

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

IN THE ARBITRATION PROCEEDINGS BETWEEN:

ELECTRABEL S.A.

CLAIMANT

v.

HUNGARY

RESPONDENT

(ICSID CASE NO. ARB/07/19)

AWARD

Members of the Tribunal:

Professor Gabrielle Kaufmann-Kohler, *Arbitrator*;
Professor Brigitte Stern, *Arbitrator*; and
Mr V.V. Veeder, *President*

ICSID Secretary to the Tribunal:

Ms Aurélia Antonietti

Representing the Claimant:

CLIFFORD CHANCE LLP
(until March 2012)
Mr Audley Sheppard
Mr Gareth Kenny
Ms Christina Schuetz

FRESHFIELDS BRUCKHAUS DERINGER LLP
(as of March 2012)
Mr Peter J. Turner, QC
Mr Jérôme Philippe
Ms France-Hélène Boret
Mr Baxter Roberts

ALLEN & OVERY LLP
Ms Marie Stoyanov

FALUDI WOLF THEISS
Mr Zoltán Faludi
Mr László Kenyeres

Representing the Respondent:

ARNOLD & PORTER LLP
Ms Jean Kalicki
Ms Mara V. J. Senn
Ms Mallory Silberman
Mr Csaba Rusznak

ARNOLD & PORTER (UK) LLP
Mr Dmitri Evseev
Ms Lisa Tomas
Mr Peter Nikitin
Mr Bart Wasiak

ARNOLD & PORTER (BRUSSELS) LLP
Mr Luc Gyselen

KENDE, MOLNÁR-BIRÓ, KATONA
Dr János Katona
Dr Gábor Puskás

Date of dispatch to the Parties: 25 November 2015

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PART I: THE ARBITRATION

(1) THE TRIBUNAL'S DECISION OF 30 NOVEMBER 2012

1. In its Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012 (the “Tribunal’s Decision”), the Tribunal decided (inter alia) the following principal matters:¹
 - (1) As to jurisdiction, the Tribunal declared, pursuant to Article 26 of the Energy Charter Treaty (“ECT”) and Articles 25 and 41 of the ICSID Convention, that ICSID had jurisdiction and that the Tribunal was competent to decide finally the Parties’ dispute in these arbitration proceedings;
 - (2) The Tribunal dismissed, as to liability, Electrabel’s PPA Pricing Claim, Regulated Pricing Claim and G1 Unit Claim (as defined in the Tribunal’s Decision);
 - (3) As regards Electrabel’s PPA Termination Claim, the Tribunal postponed to a subsequent phase of these arbitration proceedings its final decision (as regards both liability and quantum) in regard to “net stranded costs” forming part of Electrabel’s claim for compensation under Article 10(1) of the ECT (regarding Hungary’s obligation to accord to Electrabel’s investment fair and equitable treatment). The Tribunal otherwise dismissed as to liability all other parts of Electrabel’s PPA Termination Claim;
 - (4) As to quantum generally (including interest), the Tribunal did not decide any issue (given the Parties’ agreement on bifurcating quantum during the first phase of these arbitration proceedings); and
 - (5) As to the Parties’ respective claims for costs, the Tribunal made no order, save to reserve in full its jurisdiction and powers to make any future order as regards all legal and arbitration costs in an award subsequent to the Tribunal’s Decision.
2. Although the Tribunal’s Decision was not issued as an award under the ICSID Convention and the ICSID Arbitration Rules (nor could it be), the Tribunal declared that its several decisions and reasons were intended to be final and not to be re-visited by the Parties or the

¹ The Tribunal’s Decision, paragraphs 11.2-11.8.

Tribunal in any later phase of these arbitration proceedings.² The Tribunal notes that this approach to finality in a decision by an ICSID tribunal short of an award has subsequently been followed, inter alia, by the ICSID tribunal in *ConocoPhillips v Venezuela*.³

3. In this Award, as described below, the Tribunal addresses its postponed decision regarding “net stranded costs” forming part of Electrabel’s PPA Termination Claim.
4. This Award should be read with the Tribunal’s earlier Decision, in full, which is hereby appended and incorporated so as to form part of this Award. The Tribunal here uses the same abbreviated descriptions of names, documentation and events. Nevertheless, for good order’s sake, certain parts of the Tribunal’s Decision are repeated below.

(2) THE PARTIES AND OTHER PERSONS

5. *The Claimant:* The Claimant, Electrabel S.A., is an energy generation and sales company organised and existing under the laws of the Kingdom of Belgium, with its principal address at 8, Boulevard du Régent, 1000 Brussels, Belgium. (For ease of reference, the Claimant is hereby described as “the Claimant” or “Electrabel”).
6. The shareholding in Electrabel and Dunamenti has undergone changes since the Tribunal’s Decision. In brief, in 2014, their main shareholder (the GDF Suez Group) sold its interest to the MET Group. Those changes apparently do not affect this arbitration or Award. However, the Tribunal noted the Respondent’s reservation in this regard, as expressed during the arbitration.⁴
7. *The Claimant’s Legal Representatives:* In these arbitration proceedings, Electrabel was represented by Clifford Chance LLP of 10 Upper Bank Street, London E14 5JJ, United Kingdom until March 2012, and Faludi Wolf Theiss of Kálvin tér 12-13, Kálvin Center, 4th floor, 1085 Budapest, Hungary. Thereafter, in place of Clifford Chance LLP, Electrabel is represented by Freshfields Bruckhaus Deringer LLP of 2, rue Paul Cézanne, 75008

² The Tribunal’s Decision, paragraphs 10.1 & 11.1.

³ *ConocoPhillips Petrozuata B.V., ConocoPhillips Hamaca B.V. and ConocoPhillips Gulf of Paria B.V. v Bolivarian Republic of Venezuela* (ICSID Case No. ARB/07/30), Decision on Respondent’s Request for Reconsideration of 10 March 2014 (Keith, Fortier, Abi-Saab dissenting), paragraph 21.

⁴ H2D1.7. References to the verbatim transcript of the Second Hearing (in this arbitration’s second phase) are made to the relevant day and page: e.g. “H2D1.7” indicates page 7 of the first day (15 May 2014).

Paris, France, under a power of attorney dated 9 March 2012, and Allen & Overy LLP of 52 avenue Hoche, 75008 Paris, France.

8. *The Republic of Hungary*: The Respondent is the Republic of Hungary, acting by its Government. (For ease of reference, the Respondent is hereby described as “Hungary” or the “Respondent”).
9. *The Respondent’s Legal Representatives*: In these arbitration proceedings, the Respondent is represented by Arnold & Porter LLP of 601 Massachusetts Avenue NW, Washington, DC 20001-3743, USA, Tower 42, 25 Old Broad Street, London EC2N 1HQ, United Kingdom, and 1, Rue du Marquis – Markiesstraat, 1, B-1000 Brussels, Belgium, and by Kende, Molnár-Biró, Katona of Villányi út 47, 1118 Budapest, Hungary.
10. *Dunamenti*: Dunamenti Erőmű Rt (“Dunamenti”), a legal person organised under the laws of Hungary, is not a named or disputing party to these arbitration proceedings.
11. *The European Commission and European Union*: Neither the Commission of the European Communities nor the European Union are named or disputing parties to these arbitration proceedings. At its request and upon the invitation of the Tribunal, the European Commission made written representations to the Tribunal as a non-disputing party under Article 37(2) of the ICSID Arbitration Rules, during the first phase of these arbitration proceedings (as explained further below). These representations, particularly as to the Tribunal’s jurisdiction, were different from those of both Electrabel and Hungary. The European Commission has not taken part in this subsequent phase of the arbitration.
12. *The European Commission’s Legal Representatives*: In the first phase of these arbitration proceedings, the European Commission was represented, as agents, by Professor Dr Bernd Martenczuk, Professor Dr Frank Hoffmeister and Dr Petr Ondrusek, members of the Commission’s Legal Service, 200 Rue de la Loi, 1040 Brussels, Belgium. As mentioned, the European Commission did not take part in this arbitration’s second phase.

(3) THE ARBITRATION TRIBUNAL

13. Following the registration on 13 August 2007 of Electrabel’s Request for Arbitration by the Centre (“ICSID”) as ICSID Case No. ARB/07/19, the Tribunal was constituted on 5 December 2007, comprising of three members, as follows:

- (1) Professor Gabrielle Kaufmann-Kohler, as Co-Arbitrator, a citizen of Switzerland, appointed by Electrabel's letter dated 26 September 2007, of Lévy Kaufmann-Kohler, 3-5, rue du Conseil-Général, P.O. Box 552, 1211 Geneva 4, Switzerland;
- (2) Professor Brigitte Stern, as Co-Arbitrator, a citizen of France, appointed by Hungary's letter dated 12 November 2007, of the University Paris I, Panthéon-Sorbonne, 7 rue Pierre Nicole, 75005 Paris, France; and
- (3) V.V. Veeder, Esq., a citizen of the United Kingdom, of Essex Court Chambers, 24 Lincoln's Inn Fields, London WC2A 3EG, United Kingdom, as President, appointed by the two co-arbitrators upon their proposal to the Parties of 26 November 2007, accepted by the Claimant and the Respondent by their respective letters of 28 November 2007 and 29 November 2007.

Mr Ucheora Onwuamaegbu, Mr Marat Umerov and Ms Aurélia Antonietti, all of ICSID, served in turn as Secretary to the Tribunal.

14. *Proposal for Disqualification:* On 21 December 2007, Electrabel filed a proposal for the disqualification of Professor Stern as a member of the Tribunal. On 28 December 2007, Hungary filed observations on Electrabel's proposal. On 1 January 2008, ICSID forwarded to the Parties and the Tribunal written comments by Professor Stern made by letter dated 28 December 2007. Electrabel filed comments on Hungary's observations on 8 January 2008; and Hungary filed further observations on Electrabel's proposal on 14 January 2008. After considering these several written submissions, Electrabel's proposal was rejected by the two other members of the Tribunal on 25 February 2008 in the form of a reasoned decision sent to the Parties.
15. No further proposal was made by any Party to disqualify any member of the Tribunal.

(4) THE FIRST PHASE OF THIS ARBITRATION

16. *Written Submissions:* Electrabel submitted its Request for Arbitration (with accompanying materials) on 13 June 2007, its Memorial on 29 July 2008, with its Amendment to Part VII of its Memorial on 30 January 2009, and its Reply on 16 September 2009.

17. Hungary submitted its Preliminary Objections (with accompanying materials) on 30 October 2008, its Counter-Memorial on 15 May 2009 and its Rejoinder on 22 December 2009.
18. *Written Testimony*: Electrabel adduced signed written statements from the following factual witnesses: (i) Mr Zoltán Bodnár of 28 July 2008, 29 January 2009 and 16 September 2009; (ii) Mr Peter Csiba of 14 September 2009; (iii) Mr Alfred Hofman of 28 July 2008; and (iv) Mr Tibor Kuhl of 28 July 2008 and 16 September 2009.
19. Electrabel also adduced signed expert reports from: (i) Professor Adnan Amkhan of 28 July 2008 and 16 September 2009; (ii) Professor Sir David Edward of 24 September 2009; (iii) Dr Katalin Grósz of 28 July 2008 and 16 September 2009; and (iv) Mr Graham Shuttleworth of 16 September 2009.
20. Hungary adduced signed written statements from the following factual witnesses: (i) Mr Zoltán Barócsi of 12 May 2009 and 10 December 2009; (ii) Mr György Békés of 8 May 2009 and 15 December 2009; (iii) Mr Balázs Felsmann of 11 May 2009; (iv) Ms Zsuzsanna Filep of 5 May 2009; (v) Mr Péter Grabner of 21 December 2009; (vi) Mr Ferenc Horváth of 13 May 2009 and 10 December 2009; (vii) Mr Csaba Kovács of 13 May 2009 and 19 December 2009; (viii) Mr Imre Mártha of 11 December 2009; and (ix) Mr Péter Staviczky of 13 May 2009 and 14 December 2009.
21. Hungary also adduced signed expert reports from: (i) Dr Marianna Fazekas of 11 May 2009; (ii) Mr Wynne Jones of 13 May 2009 and 17 December 2009; (iii) Mr Brent Kaczmarek of 15 May 2009 and 17 December 2009; (iv) Professor Piet Jan Slot of 14 May 2009 and 16 December 2009; and (v) Mr Imre Vörös of 14 May 2009.
22. *Participation of a Non-Disputing Party*: On 13 August 2008, as already indicated, the European Commission applied to the Tribunal pursuant to ICSID Arbitration Rule 37(2) for permission to make a written submission as a non-disputing party. Having consulted the Parties, the Tribunal invited the European Commission to file a written submission, by letter dated 19 November 2008. This submission was filed on 12 June 2009. It is cited extensively in the Tribunal's Decision.

23. *Procedural Meetings:* The first procedural meeting with the Tribunal and the Parties took place in London on 15 May 2008 (following which the Tribunal issued written minutes of this session); the second procedural meeting took place by telephone conference-call on 17 November 2008 (following which the Tribunal issued its procedural order dated 19 November 2008); and the third procedural meeting took place by telephone conference-call on 4 December 2009 (following which the Tribunal issued its procedural order dated 10 December 2009).
24. *Procedural Rules:* The Parties and the Tribunal agreed at the first procedural meeting that these arbitration proceedings would be conducted in accordance with the ICSID Arbitration Rules in force as at 10 April 2006 (but not any amendments thereto).
25. *Procedural Orders:* In addition to the orders listed above, the Tribunal made procedural orders dated 10 March 2009 and 27 March 2009 (in regard to the procedural calendar); 28 April 2009 (in regard to the application of the European Commission to file a written submission pursuant to ICSID Arbitration Rule 37(2) as a non-disputing party); 18 August 2009, 11 November 2009 and 10 December 2009 (in regard to the production of documents); and several orders during the Hearing. These orders were recorded in writing or in the verbatim transcript of the Hearing; all are in the Parties' possession; and it serves no purpose to set them out here.
26. *Bifurcation:* Upon the initiative and agreement of the Parties, the Tribunal ordered the Parties in the first phase of these proceedings to address (as to the merits of Electrabel's claims) issues of liability only, with quantum issues to be addressed (if appropriate) in a separate second phase of these proceedings, as recorded in the Tribunal's procedural order dated 27 March 2009.
27. *First Hearing:* The Hearing on the first phase of these arbitration proceedings took place over seven days from Tuesday, 9 February to Wednesday, 17 February 2010, first (by consent of the Parties) at the offices of Arnold & Porter LLP in Washington, DC and next (following Electrabel's objection) at the Fairmont Hotel in Washington, DC. The Hearing was originally planned to be held at the offices of the World Bank in Washington, DC, but the location of the Hearing had to be changed because the offices of the World Bank remained closed for several days due to a severe winter snowstorm.

28. As already indicated above, the First Hearing was recorded by verbatim transcript.⁵
29. The First Hearing was attended, on behalf of Electrabel, by Audley Sheppard, Gareth Kenny, Christina Schuetz and Sean Peterson (all of Clifford Chance LLP), Laszlo Kenyeres (of Faludi Wolf Theiss), Jean-Marc Dethy, Eric Demuynck and Christelle Wynants (all of Electrabel).
30. It was attended, on behalf of Hungary, by Jean Kalicki, Dmitri Evseev, Mara Senn, Luc Gyselen, Suzana Medeiros Blades, Wells Bennett, Paloma Gomez, Andras Kosaras, Vanessa Mueller, Camila Valenzuela and Kelby Ballena (all of Arnold & Porter LLP), János Katona and Gábor Puskás (of Law Office of János Katona), and by Emese Szentpétery and Chistelle Wynants (of Hungary's Government).
31. Electrabel and Hungary made opening statements at the First Hearing's first day [D1.19 and D1.108, 124, 152, 187 & 208 respectively].
32. The following factual witnesses then testified orally at the First Hearing: for Electrabel, Mr Kuhl [H1D2.260x; H1D2.265 & 415xx; H1D2.395xxx], Mr Bodnár [H1D2.431x; H1D2.432xx; H1D2.530xxx] and Mr Csiba [H1D3.546x; H1D3.549xx; H1D3.585xxx]; and for Hungary, Mr Békés [H1D3.830x; H1D3.831xx ...; H1D4.863 ...xx; H1D4.932xxx], Mr Horváth [H1D4.944x; H1D4.947xx; H1D4.1048xxx], Mr Staviczky [H1D5.1066x; H1D5.1082 & 1168xx; H1D5.1153xxx], Mr Kovács [H1D5.1181x; H1D5.1185, 1257 & 1274xx; H1D5.1247 & 1281xxx], Mr Barócsi [H1D7.1728x; H1D7.1729xx; H1D7.1782xxx]; and Mr Mártha [H1D7.1788x; H1D7.1827xx].
33. The following expert witnesses testified orally at the Hearing: for Electrabel, Professor Sir David Edward [H1D3.591x; H1D3.615xx; H1D3.684 & 708xxx] and Mr Shuttleworth [H1D5.1287x; H1D5.1306 ...xx; H1D6.1403 ...xx; H1D6.1495xxx]; and for Hungary, Professor Slot [H1D3.714x; H1D3.719 ...xx; H1D3.785xxx], Mr Jones [H1D6.1504x; H1D6.1519...xx] and Mr Kaczmarek [H1D6.1581x; H1D6.1600 & 1681xx; H1D6.1663 & 1684xxx].

⁵ References below to the verbatim transcript of the First Hearing are made to the relevant day and page: e.g. "H1D1.09" indicates page 9 of the first day (9 February 2010). "x" signifies direct examination of an oral witness; "xx" signifies cross-examination; and "xxx" signifies re-examination. The documentary references to the Parties' exhibits are self-explanatory; e.g. C-184/Tab 488.

34. At the end of the First Hearing on 17 February 2010, the Tribunal informally closed the file to the Parties as regard this first phase, save for stated exceptions relating to transcript corrections, post-hearing submissions and submissions on costs to be made later in writing. The Tribunal also reserved the right to request the Parties to make new submissions at its discretion; and it advised the Parties that any Party wishing to introduce new evidence would need to make a prior application to the Tribunal for permission to do so [H1D7.1703-1705]. Several significant events subsequently took place which precluded the Tribunal from closing the file any further.
35. *Compensation Decision*: The European Commission issued, on 27 April 2010, its Decision on “State aid N 691/2009: Hungarian stranded costs compensation scheme” (the “Commission Compensation Decision”).⁶ This important document was addressed in Electrabel’s Post-Hearing Submissions of 7 May 2010 and by Hungary in its letters dated 24 May and 21 June 2010 regarding new documents.
36. *CFI Pleadings*: By letter dated 3 May 2010, at the request of the Tribunal, the European Commission transmitted copies of its Defence dated 6 October 2009 and its Rejoinder dated 16 February 2010 in the Case T-179/09, *Dunamenti Erömü v Commission of the European Communities*, before the Court of First Instance of the European Communities in Luxembourg. (The Court of First Instance (“CFI”) is now known as “the General Court”). These legal proceedings were brought by Dunamenti to annul under Article 230 EC the Commission Decision 2009/609/EC of 4 June 2008 (“the Commission’s Final Decision dated 4 June 2008”): see Dunamenti’s Claim dated 28 April 2009 and its Reply dated 4 December 2009 (appended to Electrabel’s Response dated 1 August 2011).
37. *Post-Hearing Submissions*: As already indicated, Electrabel submitted its Post-Hearing Submissions on 7 May 2010; and Hungary submitted its Post-Hearing Submissions also on 7 May 2010.
38. *New Documents*: By procedural order dated 31 May 2010, in response to Hungary’s application made by letter dated 24 May 2010 and the response from Electrabel made by letter dated 28 May 2010, the Tribunal (inter alia) admitted into evidence: (i) the European Commission’s Compensation Decision dated 27 April 2010; and (ii) the 2009 Report on

⁶ C-199.

Polish Stranded Costs published in March 2010 (the “2009 Polish Report”), designated as Electrabel’s Exhibits C-199 and C-200 respectively.

39. In accordance also with the Tribunal’s procedural order dated 31 May 2010, Hungary by letter dated 21 June 2010 submitted its written response to these new documents; and Electrabel responded thereto by letter dated 5 July 2010.
40. *Costs Submissions:* As ordered by the Tribunal at the First Hearing,⁷ as later modified by procedural order dated 31 May 2010, the Parties submitted written submissions regarding their respective claims for legal and arbitration costs, by their letters dated 21 July, 28 July and 9 August 2010.
41. *The Tribunal’s Three Requests:* By procedural orders dated 1 and 5 October 2010, the Tribunal requested the Parties to address three particular matters: (i) any further information then known to the Parties as to the progress, or likely progress, of the legal proceedings pending before the General Court in Luxembourg in Case T-179/09 between Dunamenti and the Commission of the European Communities; (ii) any further information then known to the Parties as to the implementation, present or future, of the draft decree on stranded costs, being the subject-matter of the European Commission’s Compensation Decision dated 27 April 2010; and (iii) whether either Party wished to make any submissions to the Tribunal, and (if so) in what form, as to the then recently published award dated 23 September 2010 in ICSID Case No. ARB/07/22 *AES Summit Generation Limited and AES-TISZA Erömü Kft v Republic of Hungary* (the “AES award”), referring to Electrabel’s reservation made in paragraph 75 of its Post-Hearing Submissions of 7 May 2010.
42. The Parties made written submissions respectively by letters dated 29 October 2010 on the Tribunal’s three requests.
43. *The AES award:* In the light of the Parties’ written submissions dated 29 October 2010, by procedural order dated 15 November 2010, the Tribunal permitted the Parties to comment substantively, in writing, on the AES award.

⁷ H1D7.1701.

44. The Parties accordingly made further written submissions respectively on 3 December 2010 on the *AES* award. In the circumstances then prevailing, the Tribunal did not consider that these submissions required any further response from either Party for the purpose of these arbitration proceedings or the Tribunal's Decision.
45. *The Tribunal's Further Requests:* By letter dated 6 June 2011, the Tribunal requested further assistance from the Parties in writing arising from certain of the Parties' Submissions dated 21 June, 5 July, 29 October and 3 December 2010 and (in particular) the earlier Submission of the European Commission dated 12 June 2009, concerning principally the related questions of applicable law and jurisdiction.
46. The Parties responded to these further requests as follows: Electrabel's Response dated 1 August 2011; Hungary's Response dated 1 August 2011; Electrabel's Reply Response dated 6 September 2011; and Hungary's Reply Response dated 6 September 2011.
47. The Tribunal considered these written submissions; and it recorded by letter dated 17 October 2011 that: as regards the Parties' responses to the third query listed in the Tribunal's letter dated 6 June 2011, the Tribunal had decided that it was not necessary for the Tribunal (or the Parties) to re-approach the European Commission for further assistance; and as regards the Parties' responses to the ninth query in the Tribunal's letter (including the European Commission's letter dated 13 September 2011 to Electrabel), the Tribunal decided that it was not necessary for the Tribunal to request any further pleadings from the European Commission in Case T-179/09.
48. *The General Court Judgment:* On 13 February 2012, the General Court issued its judgment in Luxembourg rejecting the challenge by Budapesti Erömü Zrt (another Hungarian generator) to the European Commission's Decisions dated 9 November 2005 and 4 June 2008 in Joined Cases T-80/06 and T-182/09 (the "*Budapesti* judgment"). Whilst it was possible for this complainant to appeal to the European Court of Justice, the effect of this judgment would not thereby be suspended pending such appeal under Article 278 of the TFEU. Given similar issues raised by Dunamenti as a like complainant in Case T-179/09 in regard to the Final Decision dated 4 June 2008, the Tribunal invited the Parties to comment on the *Budapesti* judgment (if so desired), by letter dated 27 February 2012.

49. Electrabel responded by letter dated 9 March 2012; and Hungary by letter also dated 9 March 2012. In summary, Electrabel submitted that the *Budapesti* judgment was irrelevant to the issues in this arbitration and, in particular, that it was not final (being subject to appeal) and also not binding or otherwise determinative of Dunamenti's separate challenge still pending before the General Court because of "different factual scenarios" distinguishing the challenges made by Dunamenti and Budapesti respectively. In summary, Hungary submitted that the *Budapesti* judgment was relevant to this arbitration on several grounds.
50. For the purpose of the Tribunal's Decision, the Tribunal took note of the *Budapesti* judgment and the Parties' different submissions. The Tribunal also took note that the disputant parties' pleadings leading to the *Budapesti* judgment were not public and therefore remained unavailable for this arbitration; that the judgment was subject to appeal; and that, in any event, the judgment did not automatically determine the final result of Dunamenti's own legal proceedings in Luxembourg in Case T-179/09. The Tribunal also noted that both Parties continued jointly to maintain that this Tribunal was not concerned with the lawfulness or unlawfulness under EU law of the Commission's Final Decision (a view not shared by the European Commission). In all these circumstances, the Tribunal decided to place no reliance on the General Court's *Budapesti* judgment of 13 February 2012. (The Tribunal returns below to Dunamenti's own legal proceedings in Luxembourg, before the General Court and the Court of Justice).

(5) THE TRIBUNAL'S DECISION

51. On 30 November 2012, the Tribunal issued its Decision on Jurisdiction, Applicable Law and Liability (as already identified, the "Tribunal's Decision"). For the reasons there earlier set out, the Tribunal decided as follows, in its operative part:

[11.2] *Jurisdiction*: The Tribunal declared, pursuant to Article 26 of the Energy Charter Treaty and Articles 25 and 41 of the ICSID Convention, that the International Centre for Settlement of Investment Disputes has jurisdiction and that this Tribunal is competent to decide finally the Parties' dispute in these arbitration proceedings;

- [11.3] *The PPA Termination Claim:* The Tribunal postponed to a subsequent phase of these arbitration proceedings its final decision (as regards both liability and quantum) in regard to net stranded costs forming part of Electrabel's claim for compensation pleaded as the PPA Termination Claim and made under Article 10(1) of the Energy Charter Treaty in regard to Hungary's obligation to accord to Electrabel's investments fair and equitable treatment. The Tribunal dismissed as to liability all other grounds advanced by Electrabel for this PPA Termination Claim and all other parts of its claim for compensation under this PPA Termination Claim;
- [11.4] *The PPA Pricing Claim:* The Tribunal dismissed as to liability Electrabel's claim for compensation pleaded as the PPA Pricing Claim;
- [11.5] *The Regulated Pricing Claim:* The Tribunal dismissed as to liability Electrabel's claim for compensation pleaded as the Regulated Pricing Claim;
- [11.6] *The G1 Unit Claim:* The Tribunal dismissed as to liability Electrabel's claim for compensation pleaded as the G1 Unit Claim;
- [11.7] *Costs Claims:* The Tribunal made no order as regards costs, save to reserve in full its jurisdiction and powers to make any order as regards all legal and arbitration costs in an award subsequent to the Tribunal's Decision; and
- [11.8] *Quantum:* The Tribunal's Decision did not decide any issue relating to quantum (including interest).

(6) THE SECOND PHASE OF THIS ARBITRATION

52. Pursuant to paragraph 10.9 of the Tribunal's Decision, these arbitration proceedings proceeded to a second phase. To that end, the Tribunal indicated that it intended to convene a procedural meeting with the Parties' legal representatives within 45 days of the Parties' receipt of the Tribunal's Decision.
53. By letter dated 30 November 2012, the Parties were requested to comment in writing on the proposed second phase of the proceedings as soon as practicable, with a view to a possible procedural meeting in January 2013 (to be held by telephone conference-call), at a date and time to be specified by the Tribunal.

54. By letter dated 22 January 2013, the Parties provided their comments with regard to the next phase of the proceedings. The Parties agreed that an in-person meeting was a preferred means over a telephone conference to discuss the scope and timing of any substantive submissions to be made by the Parties, as well as any subsequent steps in the arbitration. The Parties also listed the proposed principal issue to be addressed during the arbitration's second phase, namely: the outstanding undecided claim by the Claimant for damages in respect of net stranded costs (but not their assessment).
55. By letter dated 23 January 2013, the Tribunal noted the Parties' mutual preference for an in-person meeting, but it requested the Parties to consider whether a meeting by video-conference might suffice at this particular stage of the proceedings. The Tribunal further suggested potential dates for such a meeting in February and March 2013. By letter dated 28 January 2013, Electrabel reiterated its request that the procedural meeting be held in person.
56. Following several rounds of further correspondence, the Tribunal and the Parties attended an in-person meeting on 10 April 2013 in New York.
57. *Procedural Meeting:* Following this fourth procedural meeting on 10 April 2013 in New York, the Tribunal issued its procedural order dated 23 April 2013 whereby it established the subsequent procedural steps for the second phase of this arbitration (as more fully described below). The procedural meeting was recorded by verbatim transcript.
58. At this fourth procedural meeting, Hungary expressly reserved its position (to the extent necessary) in regard to the Tribunal's Decision.⁸ It later re-stated the same reservations during the Second Hearing.⁹ Given that Hungary's submissions during this arbitration's second phase included all Hungary's reservations in regard to the Tribunal's Decision, it is unnecessary for the Tribunal to recite here separately Hungary's reservations at the procedural meeting. In addition, as later confirmed in its written submissions, the Claimant reserved its position in regard to the Tribunal's Decision.¹⁰ Similarly, it is unnecessary to record this reservation here any further. The Tribunal duly noted both Parties' reservations.

⁸ Transcript of Procedural Meeting of 10 April 2013, pp. 35ff.

⁹ H2D2.338-339.

¹⁰ Electrabel's Post-Hearing Submissions, 7 May 2010, p. 79.

59. *PO No 12 of 23 April 2013*: By this procedural order dated 23 April 2013, the Tribunal recorded (inter alia) the Parties' agreement that their respective submissions and the proposed oral hearing for the arbitration's second phase would address "the effect of the 'Non-Payment of the Net Stranded Costs', including the standard of damages (but not their quantification)."¹¹ It also required the Parties to present interim written submissions as to costs regarding the Non-PPA Termination Claims by Electrabel.
60. *PO of 7 November 2013*: Following the procedural order dated 23 April 2013, the Tribunal issued its procedural order dated 7 November 2013 (in regard to the amended procedural calendar).
61. *Written Submissions*: Pursuant to the procedural order dated 23 April 2013, Electrabel filed its Submission on the Allocation and Amount of Fees and Costs for the Non-PPA Termination Claims on 5 July 2013. Following Electrabel's letter dated 8 July 2013 (in which it informed the Tribunal that the Parties had agreed to a modified procedural calendar to which Hungary confirmed its non-objection by email of the same date), the Tribunal approved the Parties' modified calendar on 10 July 2013; and Electrabel filed its Submission on the PPA Termination Claim on 30 July 2013. Pursuant to the procedural order dated 7 November 2013, Electrabel filed its Reply Submission on the PPA Termination Claim on 21 February 2014.
62. Pursuant to the procedural order dated 23 April 2013, Hungary filed its Submission on the Allocation and Amount of Fees and Costs for the Non-PPA Termination Claims on 24 May 2013. Pursuant to the procedural order dated 7 November 2013, Hungary filed its Counter-Submission on "net stranded costs" on 6 December 2013. Following Hungary's request dated 13 April 2014 for an extension of time for filing its Rejoinder to which Electrabel objected by letter dated 14 April 2014, the Tribunal granted Hungary's request on 14 April 2014; and Hungary filed its Rejoinder on "net stranded costs" on 22 April 2014.
63. *The Change in Dunamenti's Ownership*: Before the Second Hearing, by letter dated 18 March 2014, Electrabel notified Hungary that it was in the process of disposing of its shares in Dunamenti (whilst retaining an interest in the PPA Termination Claim in this

¹¹ Tribunal's Procedural Order No. 12, 23 April 2013, paragraph 3.

arbitration) and would provide further information later. At the Second Hearing, Hungary reserved its rights in full, including the right to ask for still further information and to raise any issues as to whether Electrabel remained a proper claimant for its claim and as to the quantum of its claim.¹² Later, Electrabel confirmed that the sale process remained incomplete; and that it would inform Hungary and the Tribunal as and when there were further developments.¹³ If and to the extent that any such developments took place subsequently, these do not appear to have been considered material to this arbitration by either Party.

64. *Second Hearing:* The Hearing on the second phase of these arbitration proceedings took place over two days from 15 May to 16 May 2014, at the World Bank headquarters in Washington, DC, USA (the “Second Hearing”). The Second Hearing was recorded by verbatim transcript.
65. The Second Hearing was attended, on behalf of Electrabel, by Peter Turner, Jérôme Philippe, Kate Parlett, France-Hélène Boret and Baxter Roberts (all of Freshfields Bruckhaus Deringer LLP), Marie Stoyanov (of Allen & Overy LLP), László Kenyeres (of Faludi Wolf Theiss), Patrick Baeten, Zoltán Bodnár and Peter Csiba (all of GDF Suez).
66. It was attended, on behalf of Hungary, by Jean Kalicki, Dmitri Evseev, Mara Senn, Peter Nikitin, Albert Teng, Kelby Ballena, Aimee Reliert and Kately Horne (all of Arnold & Porter LLP) and János Katona (of Law Office of Dr. János Katona).
67. Electrabel and Hungary made opening statements at the Second Hearing’s first day [H2D1.12, 71 & 117 and H2D1.126, 173, 195 & 242 respectively]. The Tribunal then requested the Parties to address, in particular five questions.¹⁴ Electrabel and Hungary made closing statements and responded to the Tribunal’s questions on the Second Hearing’s second day.¹⁵ There were no witnesses testifying orally at the Second Hearing.
68. *New Documents:* By communication dated 6 May 2014, before the Second Hearing, Hungary informed the Tribunal that Electrabel had agreed to Hungary’s submission of two new documents: (i) the Investment Arbitration Report article “As Romania seeks

¹² H2D1.07.

¹³ H2D2.336.

¹⁴ H2D1.254.

¹⁵ H2D2.271, 273, 281, 294 & 300 and H2D2.327, 358, 378 & 382 respectively.

annulment of \$250 million award at ICSID, enforceability questions loom”; (ii) the General Court Judgment in Case T-179/09 *Dunamenti Erőmű Zrt. v European Commission* of 30 April 2014 (the “*Dunamenti* judgment”), designated as Hungary’s Exhibits R-302 and R-303 respectively, whereby the General Court dismissed the claim by Dunamenti for (inter alia) the annulment of the Commission’s Decision 2009/609/EC dated 4 June 2008 on State Aid C 41/2005 (the “Commission’s Final Decision on State Aid”¹⁶). Electrabel confirmed its agreement to the admission of these two exhibits by communication dated 7 May 2014.

69. By communication dated 14 May 2014, on the eve of the Second Hearing, Electrabel informed the Tribunal that the Parties had agreed to Electrabel’s submission of five new documents concerning EU legal materials; namely: (i) ECJ, C-67/85 *Kwekerij Gebroeders van der Kooy BV and others v European Commission* [1988] ECR 00219; (ii) ECJ, C-303/88 *Italian Republic v European Commission* [1991] ECR I-01433; (iii) ECJ, C-305/89 *Italian Republic v European Commission* [1991] ECR I-01603; (iv) ECJ, C-482/99 *French Republic v European Commission* (“Stardust”) [2002] ECR I-04397; and (v) ECJ, C-280/00 *Altmark Trans GmbH v European Commission* [2003] ECR I-07747, designated as Electrabel’s Exhibits C-231 to C-235. Hungary provided its written response to Electrabel’s arguments put forward on the basis of these new exhibits by letter dated 23 May 2014.
70. By communication dated 15 May 2014, the first day of the Second Hearing, Hungary informed the Tribunal that the Parties had agreed to Hungary’s submission of two new documents: (i) the Country report by Beata Radzka entitled “Liberalisation, privatisation and regulation in the Polish electricity sector”; and (ii) the report by the Polish Ministry of Treasury entitled “Privatisation Lines for Treasury Assets in 2007”, designated as Hungary’s Exhibits R-304 and R-305 respectively.
71. By communication dated 16 May 2014, Hungary submitted documents which had been provided informally during the Second Hearing: (i) Case 52/84 *European Commission v Kingdom of Belgium* [1986] ECR 89; (ii) Case 94/807 *European Commission v Federal Republic of Germany* [1989] ECR-175; (iii) Case 348/93 *European Commission v Italian Republic* [1995] ECR-673; (iv) Case T-468/08 *Tisza Erőmű kft v European Commission*;

¹⁶ C-106.

- (v) Joined Cases T-115/09 and T-116/09 *Electrolux AB v French Republic*; and (vi) Case C-480/09 P *AceaElectrabel Produzione SpA v European Commission*, designated as Hungary's Exhibits R-306 to R-311.
72. By letter dated 23 May 2014, Hungary requested permission to submit the judgment of the European Court of Justice in Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA* as Hungary's Exhibit RA-150. By letter dated 27 May 2014, Electrabel provided its written response on Hungary's request, including its request to the Tribunal to ignore Hungary's unsolicited submission, to which Hungary replied by letter of 30 May 2014 with Annex A.
73. By letter dated 26 May 2014, Hungary requested permission from the Tribunal to submit the October 2014 European Commission Decision "State aid SA.38517 (2014/C) (ex 2014/NN) – Romania Implementation of Arbitral Award *Micula v Romania* of 11 December 2013" as Hungary's Exhibit RA-151. By letter dated 8 December 2014, the Claimant provided its comments on the Respondent's request. These submissions addressed the ICSID arbitration and subsequent decisions by the European Commission regarding the award of 11 December 2013 in *Micula v Romania*, ICSID Case No ARB/06/20 (the "*Micula* award").
74. By letter dated 10 December 2014, the Tribunal referred to Hungary's applications of 23 May and 26 November 2014, to Electrabel's applications of 8 December 2014 and to the Parties' earlier correspondence of 27 and 30 May 2014. The Tribunal there recorded its decision to admit Exhibits RA-150 and RA-151, subject to the right of Electrabel to respond with a short written submission.
75. By letter dated 29 December 2014, as earlier permitted by the Tribunal, Electrabel made its written submissions on Hungary's new Exhibits RA-150 and RA-151.
76. By letter dated 4 March 2015, Electrabel requested permission from the Tribunal to submit the award in *E.D.F. International v Hungary* into the record as Exhibit CA-162.
77. By letter dated 16 June 2015, the Tribunal granted Electrabel's request of 4 March 2015 to submit Exhibit CA-162 into the record, subject to the right of Hungary to respond with a short written submission.

78. By letter of 26 June 2015, Hungary made its written submission on Electrabel's Exhibit CA-162.
79. By letter of 3 July 2015, Electrabel confirmed that it did not wish to make any further submissions regarding its Exhibit CA-162 beyond those already made in its letter of 4 March 2015.
80. *The Luxembourg Proceedings*: As already noted above, Hungary submitted the *Dunamenti* judgment dated 30 April 2014 of the General Court (in *Dunamenti v European Commission*),¹⁷ whereby the General Court dismissed the claim by Dunamenti for (inter alia) the annulment of the Commission's Final Decision on State Aid dated 4 June 2008. The Tribunal subsequently noted that, on 21 July 2014, after the Second Hearing, Dunamenti (with Electrabel) lodged an appeal from that judgment to the Court of Justice (Case C-357/14 PI) and that, on 1 July 2015, Advocate General Wathelet delivered his written opinion advising the Court of Justice to set aside the General Court's judgment and to annul the Commission's Final Decision dated 4 June 2008, insofar as it concerned Dunamenti.
81. By letter dated 14 July 2015, the Tribunal raised two matters with the Parties. First, referring to the recent opinion of Advocate General Wathelet, the Tribunal informed the Parties that, unless the Tribunal heard from either Party otherwise, it was minded to assume that this opinion was not relevant to the decisions required of the Tribunal in the second phase of this arbitration and, moreover, that the pronouncement of the ECJ's appellate judgment in that case was not imminent. Second, the Tribunal indicated that it might wish to complete its decisions on legal and arbitration costs for both the first and second phases of this arbitration. It therefore requested the Parties to complete their submissions on costs for both phases, including (in particular) relevant summaries and figures for legal costs and expenses incurred to date by both Electrabel and Hungary.
82. *The ECJ*: As to the first matter, Electrabel responded by letter dated 21 July 2015; and Hungary by letter dated 28 July 2015. In summary, Electrabel submitted that the Tribunal should not ignore the Advocate General's opinion, although acknowledging that the Court of Justice was not obliged to follow the Advocate General's recommendation. In summary,

¹⁷ R-303.

Hungary submitted that the pending challenge to the Commission's Final Decision dated 4 June 2008, whatever its outcome before the ECJ, could have no impact on Hungary's liability under the ECT in this arbitration; the Advocate General's opinion might not be followed by the Court of Justice; and the content of the opinion was of no consequence for any issue before this Tribunal.

83. Subsequently, by letter dated 15 September 2015, Electrabel notified the Tribunal that the judgment of the ECJ was to be issued on 1 October 2015. In the circumstances, the Tribunal decided to delay the issuance of this Award until it had an opportunity of considering the terms of that judgment, in consultation with the Parties (if appropriate).
84. By its judgment of 1 October 2015, the ECJ dismissed (inter alia) the claims of Dunamenti and Electrabel (as appellants) that: (i) the ECJ should quash the judgment of the General Court of 30 April 2014 in Case T-179/09 (i.e. the *Dunamenti* judgment), in so far as it confirmed the Commission's Final Decision on State Aid of 4 June 2008; and (ii) the ECJ should annul the Commission's Final Decision on State Aid in so far as it found that Dunamenti's PPA constituted illegal and incompatible State aid under EU law or (in the alternative) should refer the case back to the General Court. Accordingly, the Commission's Final Decision on State Aid was finally declared valid under EU law.
85. Having received (by Hungary's letter dated 1 October 2015) and considered the terms of that judgment, the Tribunal wrote to the Parties, by its Secretary's letter dated 5 October 2015: "... Given the significance to this arbitration borne by both the Commission Decision dated 4 June 2008 and the legal proceedings in Luxembourg over such a long period, the Tribunal thinks it appropriate to permit (but not to require) each Party, if it so wishes, to submit brief but final written comments on the relevant effect, if any, to this arbitration of the judgment dated 1 October of the European Court of Justice. Such comments should be made as soon as practicable, but not later than 20 October 2015. The Tribunal has already noted the Respondent's comments in its letter dated 1 October 2015 ..."
86. By email message dated 6 October 2015 in response to the Tribunal's letter, Hungary confirmed that it did not intend to provide any further commentary on the ECJ's judgment of 1 October 2015. By letter dated 19 October 2015, Electrabel made submissions

regarding the ECJ's judgment of 1 October 2015 and the Advocate General's opinion of 1 July 2015, contending (inter alia) that the reasoning in Advocate General Wathelet's opinion should still stand insofar as it was not rejected by the ECJ.¹⁸

87. The Tribunal notes that neither Party contests the validity of the ECJ's judgment, nor the fact that this judgment has upheld the validity of the Commission's Final Decision on State Aid of 4 June 2008. Indeed, Electrabel has confirmed its position that "Hungary's conduct was in breach of the ECT and of international law, not that the Commission State Aid Decision was wrong as a matter of EU law."¹⁹ The Tribunal thus accepts the validity of the Commission's Final Decision on State Aid. As noted below, the Tribunal has taken into account the Parties' written submissions of 1 and 19 October 2015; it has also noted that the ECJ did not accept the opinion of the Advocate General that the Commission Decision be set aside; and, in the circumstances, it does not accept that the Advocate General's opinion has any legal force as a matter of EU law.
88. *Costs*: As to the second matter, the Parties made written submissions on costs by letters dated 28 August, 1 September and 7 September 2015 (with attachments). The Tribunal addresses these costs submissions separately below in Part III.

(7) THE PARTIES' CLAIMED RELIEF

89. *Electrabel*: In the first phase of the arbitration, as pleaded in paragraph 431 of its Post-Hearing Submissions, Electrabel claimed the following principal relief from the Tribunal:
- a) A declaration that the termination of the Agreement ("PPA"):
 - (i) Constitutes unlawful expropriation in breach of Article 13(1) of the Energy Charter Treaty ("ECT") and full compensation has not been paid;
 - (ii) Alternatively, constitutes lawful expropriation pursuant to Article 13(1) of the ECT but prompt, adequate and effective compensation has not been paid;

¹⁸ Electrabel contended (inter alia) that "while the Court rejected the Advocate General's opinion that the General Court's decision should be set aside as a result of the latter's mistake of law (which was expressly recognised by the Court at paragraph 107 of its judgment), it did not reject the reasoning of the Advocate General that to find that the State aid remained with the undertaking (Dunamenti) but still require it to be repaid, despite the fact that Hungary had been fully paid for that aid by the acquirer (Electrabel) on privatisation, would leave Hungary unjustly enriched." (Electrabel's letter of 19 October 2015, p. 2.)

¹⁹ Electrabel's letter of 19 October 2015, p. 1.

- b) A declaration that termination of the PPA and/or failure to pay full/adequate compensation constitutes a breach of Articles 10(1) and 10(7) of the ECT;
- c) A declaration that HEO's letter of 10 November 2005 and the instructions of the Government (in particular Minister Kóka) demanding that Dunamenti agree to a reduction in its tariffs of 34% and MVM's implementation of that instruction constitute a breach of Articles 10(1) and 10(7) of the ECT;
- d) A declaration that the Tariff Decrees imposing a reduction in the availability fee in respect of the F and G2 Units of approximately 40% constitute a breach of Articles 10(1) and 10(7) of the ECT;
- e) A declaration that the exclusion of the G1 Unit from the Mandatory Off-Take Decree and the mandatory off-take pricing regime constitute a breach of Articles 10(1) and 10(7) of the ECT;
- f) A declaration that consequent upon one or more of the breaches of the ECT, set out above, Electrabel is entitled to compensation to be determined in a further phase of these arbitral proceedings; and
- g) An order for Electrabel's costs of the arbitration.

90. As confirmed in Part IX of its Post-Hearing Submissions (page 85), Electrabel no longer advanced its so-called "Additional Claims"; namely: (i) the claim for the forced assignment of the PPA; and (ii) the CO2 allowance claim. It is appropriate to record the final status of these claims as described by Electrabel in its Post-Hearing Submissions:

"426. In its oral opening statement, Hungary suggested that Electrabel had waived its right to pursue the other claims that were raised in its Memorial [Footnote 271: T1.109 (Respondent's opening)]. Electrabel does not agree with that categorisation. However, Electrabel confirms that it no longer intends to pursue those claims for the following reasons.

427. The claim for the forced assignment of the PPA no longer has any relevance given the fact that Hungary has terminated the PPA pursuant to the PPA Termination Act.

428. The CO2 allowance claim concerned a draft allocation that was in circulation at the time of submission of Electrabel's Memorial. Hungary has since introduced a final allocation that is satisfactory to Electrabel.

429. The requirement to nominate gas requirements in advance is no longer a part of the regulation.

430. Dunamenti's category of gas limitation remains the least secure. However, there have been no restrictions on gas supply to date."

91. In these circumstances, the Tribunal did not address in its Decision these Additional Claims any further, noting that they had not been "waived" but were no longer "pursued" by Electrabel in these arbitration proceedings.
92. In the second phase of this arbitration, as pleaded in paragraph 138 of its Submission on the PPA Termination Claim and paragraph 166 of its Reply Submission on the PPA Termination Claim, Electrabel requested that the Tribunal:
 - (1) declare that:
 - (a) the Respondent has breached Article 10(1) of the ECT; and
 - (b) Electrabel is entitled to full compensation;
 - (2) reserve its decision on damages until a subsequent phase of this proceeding; and
 - (3) order such further relief as it deems appropriate.
93. *Hungary*: In the first phase of this arbitration, Hungary, as pleaded in paragraph 168 of its Post-Hearing Submissions, requested the following principal relief from the Tribunal:
 - (a) an order rejecting Electrabel's claims in their entirety; and
 - (b) an appropriate order of legal and arbitration costs in the light of such decision in favour of Hungary.
94. In the second phase of this arbitration, as pleaded in paragraph 239 of its Counter-Submission on "net stranded costs" and paragraph 249 of its Rejoinder on "net stranded costs", Hungary requested the Tribunal to:
 - (a) reject Claimant's remaining claim in its entirety;

- (b) find that Hungary did not violate ECT Article 10(1), including its fair and equitable treatment obligation;
- (c) reject any and all requests for an award of damages;
- (d) reject any and all requests for an award of interest, compound or otherwise; and
- (e) award Hungary its appropriate costs and fees in light of such decision.

(8) *ICSID ARBITRATION RULE 38(1)*

95. By letter dated 28 October 2015, the Tribunal declared the second phase of these arbitration proceedings completed as at 30 October 2015 as regards matters to be finally determined in this Award, by reference to or by analogy with ICSID Arbitration Rule 38(1).

PART II: THE PRINCIPAL ISSUES

(1) INTRODUCTION

96. Pursuant to paragraph 6.116 of the Tribunal’s Decision and paragraph 3 of the Tribunal’s procedural order of 23 April 2013, this Award addresses the remaining part of Electrabel’s PPA Termination Claim in regard to the non-payment of stranded costs by Hungary to Dunamenti.
97. This remaining part of the PPA Termination Claim originates from Hungary’s implementation of the methodology imposed by the Commission in regard to compensation made by an EU Member State for an electricity undertaking’s stranded costs in the context of incompatible State aid under EU law. Under EU law, any aid granted by a Member State or through State resources in any form whatsoever is incompatible with the internal market if it distorts (or threatens to distort) competition by favouring certain undertakings in so far as it may affect trade between EU Member States.²⁰ For a relatively simple concept, it is (for this case at least) more than complicated, extending over a significant period when Hungary was undergoing a massive political and economic transition. It is necessary to recall the principal events relevant to this Award in the form of a brief chronology.
98. In 1993, following the political changes of 1989, Hungary concluded an agreement for associate membership of the European Community (as it then existed). In 1994, Hungary applied for full membership; and in 2004, Hungary became a full member of the European Union. Also in 1994, Hungary and Belgium had signed the ECT; and it came into effect for both States in 1998. At the time when Dunamenti concluded the 1995 PPA²¹ and Electrabel made its investments in Dunamenti,²² Hungary had assumed an obligation by treaty to bring its competition rules in accord with the EC Treaty. From the outset, this obligation was well known to both Electrabel and Dunamenti. Both also knew from the outset that the long period of Dunamenti’s PPA meant that the PPA would continue well into the period

²⁰ This is so unless the aid falls within one of the exceptions under EU law (“Save as otherwise provided in the Treaties”]: Article 107(1) of the TFEU (ex Article 87(1) of the ECT).

²¹ C-1.

²² On Electrabel’s case, its investments were made between 1995 and 2001: *see* the Tribunal’s Decision, paragraph 2.9.

of Hungary's full membership of the EU, including market liberalisation and competition required under EU law.

99. Many of the following relevant events have already been described in the Tribunal's Decision, namely: (i) the Commission's Stranded Costs Methodology of 25 July 2001;²³ (ii) the Commission's Final Decision dated 4 June 2008;²⁴ (iii) Hungary's Law LXX of 10 November 2008, terminating Dunamenti's PPA with effect from 1 January 2009 and providing for the establishment of a stranded costs scheme (the "PPA Termination Act 2008");²⁵ and (iv) the Commission Compensation Decision dated 27 April 2010.²⁶
100. For present purposes, it suffices to say that an electricity undertaking may sustain costs for two reasons resulting from an adverse decision by the Commission on State aid. First, under EU law, the undertaking may be required to repay State aid; and, second, the undertaking may suffer losses resulting from the consequential termination of its PPA before the expiry of its full contractual term. These costs, amounting to payments and lost operating revenues (or profits), can therefore no longer contribute to the return on the undertaking's investment.
101. The term "stranded costs" is a term of art in EU terminology. It has been defined as "costs incurred by a company operating in a sector undergoing deregulation, prior to deregulation, that could have been recovered under a regulated market, but cannot be recovered in a liberalized market."²⁷ More specifically, it here refers to relevant losses comprising the notional difference between (i) the electricity undertaking's relevant investment costs; and (ii) the undertaking's relevant operating revenues to be generated in the future up to its PPA's contractual expiry date, i.e. post its premature termination.²⁸ The term "net stranded costs" results from a calculation of these relevant losses less repayable State aid. That end-result can be a positive or negative figure for the undertaking. Given that the calculation seeks to assess future revenues on certain hypotheses post-termination, it must necessarily use estimated and not actual figures.

²³ Commission Communication relating to the methodology for analysing State aid linked to stranded costs; R-32.

²⁴ Commission Decision on the State aid awarded by Hungary through Power Purchase Agreements; C-106.

²⁵ Act LXX of 2008 on Certain Questions related to Electricity (translated into English); CL-30.

²⁶ State aid N 691/2009 Hungarian Stranded Costs Compensation Scheme; C-199.

²⁷ Brice Allibert, *Compensations of Stranded Costs in the European Union Electricity Sector*, p. 3; RA-141.

²⁸ For the definition of the terms (net) stranded costs, see also the Tribunal's Decision, paragraph 6.96.

102. The Tribunal's Decision also addressed net stranded costs in paragraphs 6.94 to 6.118 of the Decision. The Tribunal noted that stranded costs referred to the difference between: (i) relevant investment costs; and (ii) relevant revenues generated in the past and to be generated in the future up to the notional end of the PPA's term in the future.²⁹
103. The Tribunal's Decision recorded that Hungary's compensation scheme for stranded costs was to be calculated in two stages.³⁰ At stage one, any stranded costs calculated as at the compensation date would be set off by the recovery of unlawful State aid. If the State aid exceeded the stranded costs as at that date, a payment would be made by the generator to the State, but the reverse would not occur. Accordingly, if the stranded costs exceeded the State aid, those losses would be borne by the generator. At stage two, also known as the "claw-back mechanism", each generator's revenues and costs would be finally calculated at the expiry of the relevant PPA's original term. If the balance of State aid and stranded costs had benefitted the generator at stage one, a final payment would be required by the generator to be made to the State; but, again, the reverse would not occur. Accordingly, no payment would be made by Hungary to the generator if at stage one the State had recovered a higher sum than it was in fact owed, or otherwise (e.g. if there remained net stranded costs).
104. As found by the Tribunal in its Decision, based on the evidence adduced by the Parties, the relevant figures regarding Dunamenti (as approved by the European Commission in its Compensation Decision of 27 April 2010) were as follows:³¹
- (i) Dunamenti was obliged to reimburse 125 billion HUF to Hungary as recoverable State aid;
 - (ii) Hungary fixed Dunamenti's total eligible stranded costs (up to the PPA's notional expiry date) at 147 billion HUF;
 - (iii) Hungary set-off against those 147 billion HUF in eligible stranded costs, Dunamenti's obligation to reimburse the 125 billion HUF under the first stage of Hungary's scheme, resulting in no actual repayment of State aid by Dunamenti – for the time being;

²⁹ The Tribunal's Decision, paragraph 6.96.

³⁰ The Tribunal's Decision, paragraphs 6.99-6.102.

³¹ These figures are further explained in the Tribunal's Decision, paragraph 6.106.

- (iv) As a result, under this first stage, Dunamenti's net stranded costs (being the balance of stranded costs resulting from the total of 147 billion HUF stranded costs minus the 125 billion HUF State aid) amounted to 22 billion HUF – called by Hungary “the buffer of 22 billion HUF”;
- (v) In the event that Hungary's eventual calculation of Dunamenti's stranded costs based on relevant future revenues were to be reduced by more than 22 billion HUF from the figure of 147 billion HUF (i.e. below the buffer), Dunamenti would be required to repay under the subsequent “claw-back” stage of Hungary's scheme an equivalent part of its compensation of 125 billion HUF received (by way of set-off) under the first stage;
- (vi) If the figure for stranded costs were to be increased above 147 billion HUF, Dunamenti would receive no further compensation from Hungary and would have to bear such additional net stranded costs as an uncompensated loss; and
- (vii) If the figure for stranded costs were eventually maintained at 147 billion HUF, Dunamenti would have to bear the buffer of 22 billion HUF as an uncompensated loss.

The result under Hungary's scheme is that Dunamenti has received compensation for stranded costs (in the form of a set-off) of 125 billion HUF; that no compensation for stranded costs has been or will ever be actually paid (i.e. in cash) by Hungary to Dunamenti; and that conversely, Dunamenti may have to pay (i.e. repay in cash) State aid if its stranded costs are eventually fixed at less than 125 billion HUF.

105. Hungary's scheme was necessarily based upon the Commission's established methodology for stranded costs, namely its Stranded Costs Methodology of 25 July 2001.³² The Commission there described its methodology, inter alia, materially as follows:³³ “[4] ... The State aid corresponding to the eligible stranded costs defined in this Notice is designed to facilitate the transition for electricity undertakings to a competitive market. The Commission may take a favourable view of such aid to the extent that distortion of competition is counterbalanced by the contribution made by the aid to the attainment of a Community objective which market forces could not achieve ... [4.4] The degressive

³² R-32.

³³ R-32, pp. 5, 6 & 7.

nature of aid intended to offset stranded costs will be viewed favourably by the Commission when making its assessment; it will, in fact, help the undertaking concerned to speed up its preparations for a liberalised electricity market. [4.5] The maximum amount of aid that can be paid to an undertaking to offset stranded costs must be specified in advance” For present purposes, the “undertaking” is of course Dunamenti (not Electrabel).

106. Accordingly, the Commission’s treatment of stranded costs (including net stranded costs) paid as compensation to an undertaking is viewed as a form of State aid, subject to EU law and review by the Commission. As Professor Slot testified during this arbitration’s first phase, compensation for stranded costs may not exceed the amount of eligible stranded costs, i.e. non-returned investments borne by the undertaking and revenue losses from falling profitability caused by the market’s liberalisation.³⁴ It must also be specified “in advance.”
107. Subject to EU law, there is nothing in the Commission’s methodology which expressly prohibits payment of eligible stranded costs to an undertaking. The decision is left to the Member State within the outer boundaries of the Commission’s methodology and EU law: the Member State may compensate an undertaking for eligible stranded costs in whole or in part or not at all. Whether or not the form of such compensation involves an actual payment to an undertaking, as opposed to a set-off or any other form of non-cash compensation, it remains subject to EU law on State aid given the latter’s broad definition under EU law and the Commission’s Stranded Costs Methodology.
108. According to the Commission’s methodology, the maximum amount of compensation “must be specified in advance”, i.e. *ex ante* and not *ex post*. The methodology also includes an adaptation *ex post* which could result in that amount later being reduced (but not increased). Overall, under the Commission’s methodology, the “basic principle of the methodology is that compensations should be limited in time and in extent. They should not exceed the costs actually borne by undertakings, directly caused by the liberalization, and resulting in losses.”³⁵ This was confirmed by the testimony of Hungary’s expert witness, Professor Slot,³⁶ and accepted by Electrabel.³⁷

³⁴ Professor Slot’s First Expert Report, paragraph 92.

³⁵ Brice Allibert, *A methodology for analysing State aid linked to stranded costs*, paragraph 2; RA-140.

³⁶ Professor Slot’s First Expert Report, paragraph 92.

109. In paragraph 466 of the Commission’s Final Decision on State Aid and paragraph 70 of the Commission Compensation Decision, there is at least an implication that, in the light of subsequent events, the Commission might look favourably upon upwardly revised figures for Dunamenti’s stranded costs. In the Tribunal’s Decision, this implication led the Tribunal to query whether Hungary, with the Commission’s approval, might adjust, in certain circumstances, the second “claw-back” stage of its scheme on stranded costs for Dunamenti in terms favourable to Dunamenti.³⁸
110. The Commission’s Final Decision dated 4 June 2008 refers to two judgments of the European Court of Justice: *Case 94/87 Commission v Germany* [1989] ECR-175 and *Case C-348/93 Commission v Italy* [1995] ECR-673.³⁹ As both Electrabel and Hungary explained at the Second Hearing, in materially similar terms, these paragraphs refer to a general principle of EU law expressed in Article 4 of the TEU (ex Article 5 of the ECT) which imposes a duty on Member States and Community institutions to work together in good faith with a view to overcoming difficulties, whilst fully observing the treaty provisions and, in particular, the provisions on State aid.⁴⁰
111. In these circumstances, the Commission’s implicit reference to this general principle of genuine co-operation to cover future, unforeseen or unforeseeable events, does not support Electrabel’s case. In the Tribunal’s view, the relevant figures for Dunamenti’s net stranded costs had still to be calculated and applied *ex ante* by Hungary; and there has been no unforeseen or unforeseeable event occurring to Dunamenti’s advantage (unless there was to be a successful appeal by Dunamenti to the General Court or the ECJ, which is not the case). It is therefore unnecessary to consider Hungary’s objections to the Tribunal’s query in its Decision, were the position otherwise.⁴¹
112. The Commission’s methodology was applied in the Commission’s Compensation Decision dated 27 April 2010 for Hungary’s electricity undertakings.⁴² In particular, as regards Hungary’s first and subsequent “claw-back” stages of compensation, the Commission

³⁷ Electrabel acknowledged that “[b]oth Parties also agree that Hungary could have provided compensation to Dunamenti up to the level approved by the Commission as the *ex ante* projected maximum of HUF 22 billion.” (Electrabel’s Reply Submission on the PPA Termination Claim, 21 February 2014, paragraph 14.)

³⁸ The Tribunal’s Decision, paragraphs 6.114-6.116.

³⁹ The Commission Final Decision, 4 June 2008, paragraph 466, footnote 122; C-106.

⁴⁰ H2D2.274; H2D2.382ff & H2D2.391-393.

⁴¹ H2D2.340-342.

⁴² C-199.

decided that downwards adjustments could later be made by Hungary to its *ex ante* computation of eligible stranded costs, but no upwards adjustment: “... this calculation can only result in the beneficiaries having to make a payment to the State.”⁴³

113. As addressed in the Tribunal’s Decision and also for reasons apparent below, the Tribunal does not consider the Commission’s methodology or EU law as being decisive on the principal issues addressed in this arbitration. Although both form important background materials to the decisions made by Hungary as regards its scheme for net stranded costs in regard to Dunamenti, those decisions were made within a broad discretion by Hungary, alone, consistent with EU law at that time. Those decisions must therefore stand or fall by reference to Electrabel’s claim that Hungary breached, by itself, its obligation under Article 10(1) of the ECT “to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment.”⁴⁴ That is also Electrabel’s position, as noted above.
114. In other words, as addressed in the Tribunal’s Decision in regard to this FET standard, the question before the Tribunal is: did Hungary take arbitrary measures or wrongfully frustrate Electrabel’s reasonable expectations with respect to the legal framework in Hungary, including EU law?⁴⁵ Electrabel makes no allegations regarding lack of transparency or due process by Hungary; and the Tribunal has rejected any alleged discriminatory measures in its Decision, which it here confirms.⁴⁶ In simple terms, the principal issues arise in regard only to unlawful ‘arbitrariness’ and unlawfully ‘frustrated legitimate expectations’, as alleged by Electrabel and denied by Hungary.
115. The Tribunal has already noted that the Commission’s Final Decision on State Aid has been upheld by both the General Court and the European Court of Justice in Luxembourg. By its judgment of 30 April 2014 (i.e. the *Dunamenti* judgment), the General Court confirmed the Commission’s decision that Dunamenti had received, by the PPA, incompatible State aid; and it also accepted the concept of stranded costs in the Commission’s methodology, to be applied by Member States.⁴⁷ In turn, by its judgment of

⁴³ C-199, paragraphs 48 & 23-25.

⁴⁴ The wording of Article 10(1) of the ECT is set out in the Tribunal’s Decision, paragraph 3.9.

⁴⁵ The Tribunal’s Decision, paragraph 7.74.

⁴⁶ The Tribunal’s Decision, paragraph 7.79.

⁴⁷ The Commission’s Final Decision dated 4 June 2008, paragraphs 71, 148, 158; C-106.

1 October 2015, the ECJ upheld the *Dunamenti* judgment.⁴⁸ In this arbitration, Electrabel did not seek to impugn the General Court’s judgment; and it cannot impugn the ECJ’s judgment. Accordingly, the Commission’s Final Decision on State Aid dated 4 June 2008 still stands, in full force and effect under EU law, as it has done from the time of its making.

(2) *THE ECT’S FET STANDARD*

116. As already described above, the Tribunal expressly left undecided in its Decision all relevant issues arising from the application of the ECT’s FET standard to Electrabel’s claim for stranded costs. In Article 10(1) of the ECT, as already recorded above, this FET standard required Hungary “to accord at all times Investments of Investors of the other Contracting Parties fair and equitable treatment.”

117. In paragraph 6.118 of the Tribunal’s Decision, the Tribunal concluded: “Accordingly, the Tribunal reserves in full its decision, to another decision or award in these proceedings, as to whether or not Hungary has breached or will continue to breach the FET standard in its treatment of Dunamenti’s net stranded costs. It is therefore best, in all the circumstances, for the Tribunal to say little more here, save to express the Tribunal’s current, provisional and tentative view that the non-payment of 22,171,991,[000] HUF or a lesser sum at the end of Hungary’s legislative scheme does not strike the Tribunal as necessarily amounting to a breach of the FET standard; but that non-payment (in cash or otherwise) of a significantly higher sum for Net Stranded Costs most probably could.” The Tribunal then understood liability and quantum as potentially mixed issues. Hence, the Parties’ prior agreement on bifurcating liability and quantum (confirmed by the Tribunal) precluded any final decision on liability during the arbitration’s first phase (inter alia) as a matter of procedural fairness to both Parties.⁴⁹

118. However, the Parties’ submissions in this second phase have significantly narrowed the issues requiring the further decision of the Tribunal. In particular, it is now common ground between the Parties, albeit doubtless for different reasons, that loss and damages are not relevant to the issue of liability under the ECT’s FET standard in regard to Electrabel’s claim for net stranded costs. In paragraph 151 of its Reply, Electrabel

⁴⁸ R-303; and the attachment to Hungary’s letter dated 1 October 2015.

⁴⁹ The Tribunal’s Decision, paragraph 6.117.

concluded: “the Parties both now accept that the amount of damages is irrelevant to the question of liability.” At the Second Hearing, Electrabel confirmed that: “quantum is not a relevant factor in deciding liability under the ECT.”⁵⁰ In paragraph 4 of its Rejoinder, Hungary submitted that Electrabel had “fail[ed] to present a credible explanation of how ‘stranded costs’ are relevant to liability and quantum.” At the Second Hearing, Hungary again confirmed that quantum is not relevant to the issue of stranded costs and that “liability cannot be based on the question of whether Claimant has suffered damages or on the particular amount of the loss.”⁵¹

119. The Tribunal acknowledges the Parties’ agreement that quantum is not relevant to determine liability here and accepts that damages (or loss) are generally not necessary to a finding of liability, whilst remaining necessary to the granting of compensation, unless of course loss or damage are a constituent part of the legal wrong.⁵² As Electrabel contended at paragraph 41 of its Submission on the PPA Termination Claim and confirmed at the Second Hearing: “damage is relevant to a finding of breach only if it is specifically an element of the primary obligation.” According to Electrabel (and Hungary), that is not this case.⁵³

120. The Parties were nevertheless agreed (at least initially) that, in this second phase of the arbitration, the Tribunal may consider the evidence of certain figures relevant to State aid, stranded costs and net stranded costs calculated by Hungary at the time. In the Tribunal’s view, these figures include those considered by Hungary in its compensation scheme and approved by the Commission in its Compensation Decision, as listed at paragraph 104 above. In addition, the Parties are agreed that all issues relating to assessment of damages,

⁵⁰ H2D1.15, 35 & 37.

⁵¹ H2D1.22-29, 38 & 231.

⁵² This is confirmed by the ILC’s Commentary to Article 2 of the ILC’s Articles on State Responsibility, paragraph 9: “Thus there is no exception to the principle stated in article 2 that there are two necessary conditions for an internationally wrongful act—conduct attributable to the State under international law and the breach by that conduct of an international obligation of the State. The question is whether those two necessary conditions are also sufficient. It is sometimes said that international responsibility is not engaged by conduct of a State in disregard of its obligations unless some further element exists, in particular, “damage” to another State. But whether such elements are required depends on the content of the primary obligation, and there is no general rule in this respect. For example, the obligation under a treaty to enact a uniform law is breached by the failure to enact the law, and it is not necessary for another State party to point to any specific damage it has suffered by reason of that failure. Whether a particular obligation is breached forthwith upon a failure to act on the part of the responsible State, or whether some further event must occur, depends on the content and interpretation of the primary obligation and cannot be determined in the abstract.”

⁵³ Electrabel’s Submission on the PPA Termination Claim, 30 July 2013, paragraph 41; and H2D2.292.

causation and mitigation are postponed, if relevant, to a third phase of this arbitration, as expressly re-confirmed by the Parties at the Second Hearing.⁵⁴

121. *Micula v Romania*.⁵⁵ As already noted above, based on the *Micula* award and the Commission's responses to its recognition and enforcement, the Parties made several submissions before and during the Second Hearing on the question whether or not EU law on State aid would preclude an award of damages against Hungary. Electrabel saw no bar under EU law as regards its PPA Termination Claim in this arbitration.⁵⁶ This submission was disputed by Hungary.⁵⁷ The Tribunal notes that, even now, Electrabel does not seek in this arbitration compensation beyond "the level allowed by EU law"; that its actual loss (as alleged) exceeds the maximum amount of net stranded costs permitted under the Commission's methodology; that Electrabel nonetheless limits its claim to the maximum payment allowable (as it claims) under EU law;⁵⁸ and, further, as also asserted by Electrabel at the Second Hearing: "This Arbitral Tribunal need not concern itself with whether or not its Award would fall afoul of EU State aid rules."⁵⁹ The Tribunal also notes, conversely, that Hungary maintains that the Tribunal must apply EU law on State aid, as part of the applicable law (which it was not in *Micula*) and have regard to EU public policy.⁶⁰ Following these submissions, by letter dated 15 September 2015, Hungary sent to the Tribunal the European Commission's published Decision of 30 March 2015 on State aid SA 358517 (2014)/C (ex 2014/NN). It would be possible to extend and analyse these submissions and materials at very considerable length; but it is unnecessary to do so for present purposes.

⁵⁴ H2D1.122 & 123.

⁵⁵ *Ioan Micula, Viorel Micula, S.C. European Food S.A., S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v Romania* (ICSID Case No. ARB/05/20), Award of 11 December 2013 (Lévy, Alexandrov, Abi-Saab) ("*Micula* award"); CA-161.

⁵⁶ H2D1.87ff.

⁵⁷ H2D1.147ff.

⁵⁸ Invoking the international law principle of full reparation, Electrabel submits that "Hungary is [...] required to restore Electrabel to the economic position it would have occupied had the wrongful act never occurred", specifying that "[t]he measure of damages is therefore the final figure of eligible Stranded Costs (after deduction of State aid), which will be significantly higher than the estimate of HUF 22 billion." According to Electrabel, "there is no EU law impediment to the Arbitral Tribunal's granting damages in an amount higher than HUF 22 billion, as long as these damages comply with the Methodology." (Electrabel's Reply Submission on the PPA Termination Claim, 21 February 2014, paragraph 144)

⁵⁹ H2D1.27 & 121 and H2D2.284ff, with Electrabel's Power Point Slides 4, 34 & 42.

⁶⁰ H2D1.147; Hungary's Rejoinder on "net stranded costs", 22 April 2014, paragraph 226.

122. In the circumstances, the Tribunal decides that it does not need to address in this Award, still less resolve, any of the issues arising from the *Micula* award⁶¹ or its effect under EU law. Nor does it.

(3) *THE PARTIES' RELEVANT CASES*

123. It is helpful to summarise, briefly, the Parties' respective cases on the remaining relevant issues addressed in this Award. It is not necessary, for the purposes of this Award, to refer to all submissions made by the Parties. The fact that no express reference is made to any submission by a Party should not be understood as implying by itself that it has not been considered by the Tribunal. Moreover, given the Tribunal's analyses and decisions below, much of the Parties' respective cases in this second phase do not require the Tribunal's decision.

124. *Electrabel*: In summary, in this arbitration's second phase, Electrabel contends that Hungary breached Article 10(1) of the ECT, the ECT's FET standard, by its non-payment to Dunamenti of any net stranded costs. It also alleges that net stranded costs will in any event be significantly higher than 22 billion HUF, requiring further compensation to Dunamenti. More specifically, Electrabel argues that Hungary's failure to provide compensation for Dunamenti's net stranded costs is a breach of FET because (i) it is unjust, arbitrary, abusive, inconsistent and disproportionate; and (ii) it is contrary to Electrabel's legitimate expectations.

125. Electrabel accepts the interpretation of the ECT's FET standard expressed in paragraph 7.74 of the Tribunal's Decision.⁶² It also cites to similar effect the awards in *Saluka v Czech Republic*;⁶³ *Arif v Moldova* (as to the requirement of a "balancing exercise");⁶⁴ and *Bogdanov v Moldova*.⁶⁵

126. Electrabel disagrees with the Tribunal's "current, provisional and tentative view" in paragraph 6.118 of the Tribunal's Decision, that the non-payment of 22 billion HUF might

⁶¹ *Micula* award; CA-161.

⁶² H2D1.22.

⁶³ *Saluka Investments B.V. v Czech Republic* (UNCITRAL), Partial Award of 17 March 2006 (Watts, Fortier, Behrens) ("*Saluka* partial award"), paragraph 309; CA-21.

⁶⁴ *Franck Charles Arif v Republic of Moldova* (ICSID Case No. ARB/11/23), Award of 8 April 2013 (Cremades, Hanotiau, Knieper) ("*Arif* award"), paragraphs 537 & 547(e); CA-148.

⁶⁵ *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v Republic of Moldova* (SCC), Award of 22 September 2005 (Moss), paragraph 4.2.4.8; CA-123.

not be a breach of the ECT's FET standard; and Electrabel asserts that net stranded costs under the Commission's methodology could give rise to a "very much higher amount" than 22 billion HUF.⁶⁶

127. As regards the "arbitrariness" prong of Electrabel's FET case, Electrabel argues that Hungary's failure to pay compensation is unjust, arbitrary, abusive, inconsistent and disproportionate.⁶⁷ First, Electrabel contends that EU law permitted Hungary to provide compensation exceeding the amounts of recoverable State aid, that the losses suffered by Dunamenti by far exceeded the recoverable State aid (even on Hungary's own computations), that the Commission actively encouraged Hungary to pay compensation, and that Hungary initially represented that it would do so, "apparently changing its mind only when it realised that it preferred to keep the money."⁶⁸
128. In particular, Electrabel submits that Hungary's non-payment of compensation of any net stranded costs was, admittedly and impermissibly, motivated not by any rational regulatory purpose but only "to protect the State budget."⁶⁹ Electrabel contends that Hungary cannot under the ECT justify non-payment on the ground that it would affect adversely the State's interests, as, otherwise, any claim for damages by an investor under the ECT could always be defeated by a State.
129. Electrabel also submits that it was unjust and arbitrary for Hungary to decide not to pay anything to Dunamenti before there was any reliable assessment for its actual net stranded costs. In particular, at the time of Hungary's decision (as asserted by Hungary), Electrabel contends that Hungary had no reasonable estimate of the amount of State aid repayable by Dunamenti (or even that it was a positive figure). Electrabel disputes that Hungary could perform any balancing exercise if it did not know the true actual figures. Electrabel submits that Hungary first calculated a negative figure for State aid in January 2009;⁷⁰ but that, in November 2009, it calculated a positive figure.⁷¹

⁶⁶ H2D1.15.

⁶⁷ Electrabel's Submission on PPA Termination Claim, 30 July 2013, paragraph 92.

⁶⁸ Electrabel's Submission on PPA Termination Claim, 30 July 2013, paragraph 93.

⁶⁹ H2D1.29, citing Hungary's Rejoinder on "net stranded costs", 22 April 2013, paragraph 129.

⁷⁰ C-118.

⁷¹ R-278.

130. Electrabel further submits that it was arbitrary for Hungary not to pay Dunamenti's net stranded costs after (according to Electrabel) Hungary had represented that it would pay such compensation. As to such representations, Electrabel cites principally the 2004 Eilmansberger opinion;⁷² the 2005 minutes of the Hungarian Parliament's Economy Committee;⁷³ the 2006 background material for this Committee's energy sub-committee;⁷⁴ the 2006 letter from the Ministry of Finance to DG Competition;⁷⁵ and the 2006 HEO Proposal on the New Operational Model of Electricity Market.⁷⁶
131. Electrabel also submits that the FET standard requires Hungary to act consistently, and that Hungary acted inconsistently by representing that it would pay stranded costs and then failing to do so.⁷⁷
132. Finally (with respect to "arbitrariness"), Electrabel argues that Hungary's conduct breaches the FET standard because it was unreasonably disproportionate. Citing *EDF v Romania*, Hungary argues that the FET standard requires "a reasonable relationship of proportionality between the means employed and the aim sought to be realized" and that such proportionality would be lacking if the investor "bears an individual and excessive burden."⁷⁸ According to Electrabel, "in the context of the extensive losses suffered by Electrabel as a consequence of Hungary's terminating the PPA, and given that Hungary could have provided some compensation to mitigate those losses, Hungary's failure to do so is completely disproportionate."⁷⁹
133. As regards Electrabel's legitimate expectations, Electrabel accepts that no expectation was founded on any specific guarantee or assurance as to Dunamenti's profitability.⁸⁰ Electrabel submits only that it had a legitimate expectation that, if Dunamenti's PPA were to be terminated prematurely by Hungary, Dunamenti would be adequately compensated

⁷² R-59, p. 114.

⁷³ R-70, p. 3, vol. 3.

⁷⁴ R-94, pp. 5-6, vol. 3.

⁷⁵ R-95, p. 5, vol. 3.

⁷⁶ R-100, p. 47, vol. 4.

⁷⁷ Electrabel's Submission on PPA Termination Claim, 30 July 2013, paragraph 97.

⁷⁸ *EDF (Services) Limited v Romania* (ICSID Case No. ARB/05/13), Award of 8 October 2009 (Bernardini, Rovine, Derains) ("*EDF award*"), paragraph 293; RA-69, citing *Azurix Corp. v Argentine Republic* (ICSID Case No. ARB/01/12), Award of 14 July 2006 (Sureda, Lalonde, Martins) ("*Azurix award*"), paragraph 311; CA-13 (quoting ECtHR, *In the Case of James and Others*, Judgment of 21 February 1986, paragraphs 50 & 63).

⁷⁹ Electrabel's Submission on PPA Termination Claim, 30 July 2013, paragraph 98.

⁸⁰ H2D1.49, with Electrabel's Power Point Slide 18.

and that, if for any reason adequate compensation were precluded, Hungary would act in such a way as to minimise the harm which Electrabel would suffer by providing the maximum allowable compensation to Dunamenti.

134. As to such expectations, Electrabel cites principally the 1995 PPA;⁸¹ the 1995 PSA;⁸² the 1998 Summary of New PPA Agreements;⁸³ the 1997 Co-operation Agreement;⁸⁴ the 1999 Government Resolution 2206/1999;⁸⁵ the 1999 minutes of Dunamenti's board;⁸⁶ the annex to the minutes of Dunamenti's board;⁸⁷ Section 70 of the draft Act 2000 on Electricity;⁸⁸ Section 3.1 of the PPA Retrofit Amendment;⁸⁹ the 1999 draft PAA between Dunamenti and MVM;⁹⁰ the 2002 Dunamenti Business Report;⁹¹ the 2007 minutes of a meeting between Hungary and the Commission;⁹² the 2007 letter from DG Comp to the Ministry of the Economy;⁹³ the 2007 letter from the Prime Minister's office to DG Comp;⁹⁴ and the 2008 letter from the Commission to Hungary.⁹⁵
135. Electrabel also refers to the different solutions adopted by Poland and Portugal as regards stranded costs following the premature termination of their PPAs required under EU law, being similar (according to Electrabel) to the PPAs of the Hungarian generators and approved, expressly or implicitly, by the Commission. In contrast to Hungary, according to Electrabel, Poland and Portugal decided, consistent with EU law, to compensate net stranded costs in full.
136. Electrabel submits that its legitimate expectations were reaffirmed in regard to the F Retrofit Agreement.⁹⁶ It contends that there was a further assurance that Dunamenti

⁸¹ C-1.

⁸² C-19.

⁸³ C-209.

⁸⁴ C-19A.

⁸⁵ R-208.

⁸⁶ C-128.

⁸⁷ R-18.

⁸⁸ R-20.

⁸⁹ C-4.

⁹⁰ R-218.

⁹¹ R-185, p. 65.

⁹² R-122, p. 2.

⁹³ R-165, p. 5.

⁹⁴ R-139, p. 14.

⁹⁵ R-174, p. 1.

⁹⁶ C-4.

would be able to recover its investment costs, resulting from the 2001 Electricity Act and derived from the PSA.⁹⁷

137. Accordingly, as to liability, Electrabel concludes that Hungary breached its obligation under the ECT's FET standard by wrongfully frustrating its legitimate expectations at the time of its several investments and by wrongfully not paying any stranded costs to Dunamenti consequent upon the termination of its PPA with effect from 1 January 2009.
138. *Hungary*: In summary, Hungary submits that it committed no breach of the FET standard in Article 10(1) of the ECT. Hungary also accepts the interpretation of the ECT's FET standard expressed in paragraph 7.74 of the Tribunal's Decision, as regards "the two core prongs of that standard as involving the question of arbitrariness and the question of reasonable expectations with respect to legal framework."⁹⁸
139. As regards the scope of its obligation under the ECT's FET standard, Hungary submits that an action cannot be arbitrary if it "bears a reasonable relationship to a rational policy", citing (inter alia) the award in *Saluka v Czech Republic*.⁹⁹ Hungary also refers to the Tribunal's Decision dismissing Electrabel's Regulated Pricing Claim; namely: "... The Tribunal's task here is not here to sit retrospectively in judgment upon Hungary's discretionary exercise of a sovereign power, not made irrationally and not exercised in bad faith towards Dunamenti at the relevant time."¹⁰⁰ In further support of its submission that neither rationality nor legitimate expectations may be judged in hindsight, Hungary refers to Electrabel's Reply, to the effect that Hungary's approach on stranded costs must be evaluated based on the facts at the time that Hungary's decision was made.¹⁰¹
140. Hungary submits that, under EU law and the Commission's Compensation Decision, Dunamenti was required to 'repay', under a first stage, 125 billion HUF to Hungary as unlawful State aid. Under a second stage, that figure could be higher. Hungary had no discretion to waive such repayment under EU law: Article 2 of the 2008 Commission's

⁹⁷ H2D2.312-313.

⁹⁸ H2D1.131. Paragraph 7.74 of the Tribunal's Decision reads, in material part: "... the obligation to provide fair and equitable treatment comprises several elements, including an obligation to act transparently and with due process, and to refrain from taking arbitrary or discriminatory measures or from frustrating the investor's reasonable expectations with respect to the legal framework adversely affecting its investment."

⁹⁹ *Saluka* partial award, *ibid*, paragraph 460; CA-21.

¹⁰⁰ The Tribunal's Decision, paragraph 8.35.

¹⁰¹ Electrabel's Reply Submission on PPA Termination Claim, 21 February 2014, paragraph 156.

Decision's dispositif directed Hungary to "recover the aid referred to in Article 1 from the beneficiaries," including Dunamenti.¹⁰² Hungary also submits that it had no discretion, under EU law, to compensate Dunamenti for anything more than the initially projected *ex ante* maximum stranded costs of 147 billion HUF. (The simplicity of these figures disguises their difficulties, to which the Tribunal necessarily returns below).

141. Under the Commission's Stranded Costs Methodology, Hungary could set off simultaneously such compensation of 147 billion HUF against the repayable State aid of 125 billion HUF under the first stage (leaving a notional initial difference of 22 billion HUF as net stranded costs). However, the Commission's methodology required Hungary to make this calculation in advance, *ex ante* and not *ex post*. In addition to the Commission's Compensation Decision, the Commission so informed Hungary's Permanent Representation with DG Comp's letter dated 10 August 2004: "... The actual amount of compensation [i.e. for stranded costs] can only be modified downwards, compared to the amount determined *ex ante*, considering that the *ex ante* amount determines the maximum of the later actual compensations."¹⁰³
142. Further, Hungary submits that the ECT's FET standard does not require Hungary effectively to insure Electrabel against the impact of Hungary's membership of the European Union, EU law or the impact of competition and market liberalisation. To the contrary, Hungary would not be acting in accordance with EU law if it did so.
143. In the Commission's Submission during this arbitration's first phase, as cited by Hungary, the Commission contended: "It follows ... that EC law governs the legal situations arising between a Belgian investor and the Hungarian government in all areas falling within the scope of the EC Treaty. All the EU Member States, including Belgium and Hungary, have agreed in 2004 *inter se* not to apply the conflict rule contained in Article 16 of the ECT, but the general supremacy rule of EC law in such situations. Accordingly, even if the Tribunal were to find a breach of the ECT by Hungary, Hungary's obligation to implement the EC State aid regime still prevails over any such award. In this context, it should be recalled that any payment obligation by the Hungarian State to the concerned generators based on those PPAs or on their termination, be it agreed in a

¹⁰² C-106, p. 85.

¹⁰³ R-51.

transaction or based on an arbitration award, is subject to EU State aid rules. The execution of such payment can thus not take place if it would contradict the rules of EU State aid policy. In that connection the European Court of Justice established in *Eco Swiss* that the competition rules of the Treaty are part of the public order which national courts must take into account when they review the legality of arbitral awards under the public policy exception recognised by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.”¹⁰⁴

144. In support of its factual case on the rationality of its conduct in regard to stranded costs within EU law, Hungary emphasises that, by 2008, it was known that Hungarian generators had achieved extraordinarily high returns under their PPAs; that Dunamenti was the most profitable of these Hungarian generators; that Dunamenti had received at least 125 billion HUF State aid from 2004 onwards; that Electrabel had recovered its own investments and was unlikely to have significant stranded costs (under contemporary analyses);¹⁰⁵ and that Dunamenti’s PPA had largely run its contractual term. Hungary also submits that its own conduct was rational in seeking to balance the interests of Hungarian taxpayers and consumers, at a time of financial crisis and Hungary’s scarce resources. Hungarian consumers had already shouldered the burden of subsidising Hungarian generators with above-market prices; and, in such circumstances, it would not have been rational for Hungary to make cash payments to Dunamenti. Hungary nonetheless shielded Dunamenti, by way of the set-off, from repayment of the 125 billion HUF as State aid, although such a payment by Dunamenti would have greatly assisted Hungary’s budget at that time.
145. Hungary also relies upon the terms of the Electricity Act 2001. Sections 3, 100 and 115 of the Act addressed stranded costs, expressly or by implication.¹⁰⁶ For present purposes, these are not directly material as regards Dunamenti. However, the 2001 Act was generally understood to advance the development of a competitive electricity market in Hungary. That necessarily meant changes for Dunamenti’s PPA. However, Dunamenti, for its own

¹⁰⁴ European Commission Submission, 12 June 2009, paragraphs 135-136 (footnotes omitted). This arbitration is, of course, an international arbitration under the ICSID Convention, which contains no similar provision on public policy.

¹⁰⁵ Hungary has asserted (and Electrabel has not contested) that “[both parties’] experts agree that as of 2008, Claimant already had recouped all its investments, including the significant F Unit retrofit and other capital expenditures, and in addition received an 8.4% average annual return above inflation in each year since 1995.” Hungary’s Counter-Submission on “net stranded costs”, 6 December 2013, paragraph 214, citing H1.D5.1324 (Shuttleworth); Mr Kaczmarek’s Second Report, paragraph 52, Table 3.

¹⁰⁶ The Electricity Act 2001; C-12; R-288.

reasons, chose to resist any changes to its PPA, deciding not to re-negotiate its PPA with MVM. As explained by Electrabel, citing Mr Bodnar's testimony: with its ICSID arbitral remedy, it "could have been construed as weakening Electrabel's stance in the arbitration to appear to be 'giving up [the] contract' by engaging in contract renegotiations with MVM."¹⁰⁷ Hungary dismisses this attempted justification as a mere tactical manoeuvre by Dunamenti.

146. As regards its own calculations, Hungary submits that these were made on a hypothetical investment in Dunamenti in 1995 (as to 100% ownership). They were not made on Electrabel's own investments in Dunamenti. These calculations showed that such a hypothetical investor fell short of a targeted rate of return on its investment, namely 7.7% (after inflation) to 2008. With only a slightly different rate, the hypothetical investor would have had no stranded costs.
147. Before the PPA Termination Act 2008, Hungary had decided upon "a nearly zero repayable aid by taking the imputable amounts into consideration."¹⁰⁸ In other words, non-re-negotiated PPAs would be terminated in line with the Commission's requirements; but the zero balance concept could avoid the recovery of State aid in the form of actual repayment from the generators to Hungary. Hungary submits that this zero balance concept was intended to shield generators from State aid payments but not to operate as a sword against Hungary, as is now attempted to be deployed by Electrabel.
148. Hungary emphasises that cash compensation for stranded costs would not have facilitated the opening up of the market to competition; that such payments would only distort competition by favouring incumbent generators at the expense of new generators and investors; and, as a result, that the Commission would have been less likely to approve a more generous scheme than the zero balance scheme proposed to it by Hungary. Further, Hungary emphasises that other regulated sectors have been liberalised within the European Union with no provision for stranded costs at all, such as air transport and the telecom

¹⁰⁷ H2D1.171 & H2D2.308, citing paragraph 271 of Electrabel's Post-Hearing Submission (first phase) and paragraph 14 of Mr Bodnar's Third Witness Statement.

¹⁰⁸ Preparatory Material regarding the PPA Termination Act, R-262, p. 3.

industries; and that, in the United Kingdom, this was also the position for the electricity sector.¹⁰⁹

149. Hungary submits that there is no uniform EU practice for compensating stranded costs, given different PPAs, durations and circumstances for termination. As regards cases where cash payments were made by EU Member States, Hungary disputes that approved “maximum” cash payments were actually made or, if made, Hungary submits that the recipients were largely State-owned. Hungary discounts the relevance of practices in Poland and Portugal in different circumstances.¹¹⁰
150. Hungary also submits that Electrabel’s actual stranded costs (past and future) are irrelevant for an alleged breach of the ECT’s FET standard. Hungary again emphasises that its calculations for stranded costs were based upon a hypothetical investor, not Electrabel (or Dunamenti). Given the use of a hypothetical investor, Hungary’s calculations did not require specific evidence from Dunamenti. Hungary therefore dismisses Electrabel’s criticisms in this regard. As Mr Kaczmarek testified (as an expert witness called by Hungary), the figures for such a hypothetical investor and Electrabel are different, with the former’s NRI as negative 22.2 billion HUF and Electrabel’s NRI a positive 13.1 billion HUF.¹¹¹ Moreover, Hungary’s calculations assume a rate-of-return that does not reflect Electrabel’s actual cost of capital, because the calculations assume a zero value for Dunamenti at the end of the PPA’s term (which is not the actual case).¹¹² These factors all work in Dunamenti’s favour. Conversely, stranded costs based on Dunamenti’s future actual costs are driven by Dunamenti’s own choices, which could significantly inflate stranded costs whilst providing increased revenues for Dunamenti.
151. Hungary rejects the relevance of Electrabel’s case based on the 2001 F Retrofit Agreement. As Dunamenti accepted at the time, by agreeing to the 2001 F Retrofit Agreement, it was waiving any rights to stranded costs from such agreement, as recorded in the proposal to Dunamenti’s board dated 28 February 2001 and the board minutes.¹¹³ Clause 3.1 of the

¹⁰⁹ Brice Allibert, *Compensations of Stranded Costs in the European Union Electricity Sector*, p. 4; RA-141.

¹¹⁰ H2D1.227ff.

¹¹¹ Mr Kaczmarek’s Second Report, paragraph 134, Table 8.

¹¹² Hungary’s Rejoinder on “net stranded costs”, 22 April 2014, paragraph 162, citing R-280 (spreadsheet).

¹¹³ R-29, p. 2; C-134, p. 9.

proposed agreement precluded expenses which could not be accepted on the electricity power market price.¹¹⁴

152. For all these reasons, Hungary rejects any liability to Electrabel under the ECT's FET standard in regard to stranded costs.

(4) THE TRIBUNAL'S ANALYSES AND DECISIONS

153. For what appears to be, essentially, a relatively straightforward case, the issues are many and complicated, as amply confirmed by the Parties' extensive written and oral submissions in this arbitration's two successive phases.

154. *Legal Burden of Proof:* The Tribunal starts with the premise that it is Electrabel which bears the burden of proving its case under the ECT's FET standard. This premise appears uncontroversial as between the Parties, for present purposes.¹¹⁵ As already noted, however, as regards certain issues relating to causation and mitigation where the Parties dispute where the burden lies, the Parties have agreed to defer these issues to a later stage of this arbitration, to the extent relevant.

155. *Legitimate Expectations:* As regards Electrabel's submissions on legitimate expectations under the ECT's FET standard, the Tribunal finds no evidence that Hungary represented to Electrabel, at the times of its investments in Dunamenti, that it would ever act differently from the way that it did act towards Dunamenti or Electrabel. In the absence of such a representation in this case, as explained below, the Tribunal considers that Electrabel's case on legitimate expectations cannot succeed.¹¹⁶ The Tribunal recognises (as it did earlier in its Decision) that a specific representation is not always indispensable to a claim advanced under the ECT's FET standard: it might simply make a difference in the assessment of the investor's knowledge and of the reasonableness and legitimacy of its expectations.¹¹⁷ Even in the absence of a specific representation, however, the investor must establish a relevant expectation based upon reasonable grounds, which Electrabel has failed to do.

¹¹⁴ Clause 3.1 of the MVN-Dunamenti PPA Amendment dated 5 March 2001; C-4.

¹¹⁵ The Tribunal's Decision, paragraph 3.4.

¹¹⁶ H2D2.310.

¹¹⁷ The Tribunal's Decision, paragraph 7.78.

156. Electrabel cannot point to EU law for its expectations, given that Hungary was seeking at all times, necessarily, to comply with EU law, as Electrabel and Dunamenti both knew; and moreover, Electrabel does not base its case on EU law. As decided in the Tribunal's Decision, Electrabel cannot found its case on Hungary's regulated or deregulated pricing, given that it was common knowledge that long-term PPAs could not co-habit, unchanged, with deregulation. Nor can Electrabel expand its understanding that Hungary would seek to 'ameliorate harm suffered by investors' in Hungary's electrical undertakings into a form of State-funded insurance protecting future revenues and profitability during those investments' lifetimes. Electrabel knew (as did Dunamenti) that Dunamenti bore the commercial risks of its operations in Hungary under the PPA in a difficult transitional period towards market liberalisation and membership of the European Union, including the application of EU law and the role of the Commission.
157. Indeed, it is evident from the PPA that Dunamenti bore the risk of a change in the applicable law. Not only did the PPA contain no stabilization clause; Article 3 of the PPA expressly allowed MVM to terminate the PPA without compensation if any obligation became unlawful to perform due to a change in law,¹¹⁸ which the Tribunal understands to include EU law.
158. Nor did the PPA guarantee any particular return to Dunamenti or Electrabel. The Tribunal refers to the numerous contemporary and confirmatory statements by Electrabel and Dunamenti to such effect, including the former's comments to the Commission by letter dated 13 February 2006: "... The PPA itself does not contain any provision guaranteeing any return whatsoever ... the PPA does not guarantee a return on investment without risk, does not contain a guaranteed price for a guaranteed period of time and does not fix any

¹¹⁸ Article 3.2(b)(vi) of the PPA (C-1) provides: "Transmission Company may give the Generator a notice of intended termination of this Agreement upon the occurrence of any of the following events (each a "Generator Event of Default") unless resulting from an event of Force Majeure, a breach by Transmission Company of this Agreement or a Transmission Company Event of Default:[...] (vi) If, at any time it is, or will within 6 Months become, unlawful under the Laws or pursuant to a decision of a court or other decision-making council (the "Relevant Law") in respect of which an appeal has not been filed within the time limit specified under the Laws for the Generator to perform any obligation provided for in this Agreement or other documents related thereto, or, the performance of any obligation by the Generator is, or will within 6 Months become, under any Relevant Law, unenforceable by Transmission Company, and the Parties have not been able to agree on an alternate method of performing such obligation which would not be unlawful or unenforceable, as the case may be, through mutual discussions within 60 Days of Transmission Company becoming aware of the Relevant Law or decision." In turn, Article 3.3(b) provided that "[...] In the event of a Generator Event of Default for which a Termination Notice has been issued, then Transmission Company shall be relieved of all obligations hereunder, including, without limitation, any obligation to pay Availability Fee and Energy Fee."

profit items ... To the contrary, under the PPA all operational, legal, environmental, currency, fiscal, etc. risks remain with Dunamenti Neither Dunamenti nor Electrabel received any Government or any other contractual guarantee.”¹¹⁹

159. It is fair to record that Electrabel has never asserted any State guarantee (or insurance) as such. In its Reply Submission, Electrabel explained that its claim was not based on any guarantee in the PPA; nor was it founded on any specific guarantees as to return of investment, or absolute protection against harmful consequences of EU accession.¹²⁰

160. Ultimately, Electrabel’s case appeared to rest upon a simple representation from Hungary concerning pricing arrangements that Dunamenti would be entitled to a reasonable profit and Electrabel a reasonable return on its investment.¹²¹ Specifically, to that end, Electrabel relies on the following materials:¹²²

- Section 55(1) of the 1994 Electricity Act¹²³, which provides that “[t]he producer [sic], transfer, distribution and supply price (fee) of electricity shall include the recovery of reasonable investments and the costs of the efficiently operating licence holders, as well as the profit necessary for ongoing operation.”
- Paragraph 10.2.5 of the Industry Information Memorandum of 9 October 1995¹²⁴, stating that “[t]he Act provides for the introduction by 1st January 1997 of a pricing system designed to compensate investors for reasonable capital and operating costs in generation, transmission and supply of electricity as well as to provide investors with a reasonable level of profits to ensure the long-term operation of the industry.”
- Paragraph F(i) of the HEO’s Stated Position of 21 November 1995¹²⁵, which states: “The post-2000 price mechanism can only be established within the framework of the Hungarian legal system (in particular, on the basis of

¹¹⁹ R-97, paragraphs 16, 24, 25 & 29.

¹²⁰ Electrabel’s Reply Submission on the PPA Termination Claim, 21 February 2014, paragraphs 16(b) & 20.

¹²¹ Electrabel’s Reply Submission on the PPA Termination Claim, 21 February 2014, paragraph 40.

¹²² Electrabel’s Reply Submission on the PPA Termination Claim, 21 February 2014, paragraph 40, footnote 87.

¹²³ CL-3.

¹²⁴ R-5, p. 116.

¹²⁵ R-6.

Section 55 of the Electricity Act); on the basis of the regulatory experiences that will have accumulated by then both in Hungary and Europe. Based on our current knowledge and experience, the HEO does not expect radical changes, although prior to the introduction of any new pricing mechanism, another overall price and cost review would be required.”

- Section 3.8.1 of the Notice of Forthcoming Tenders for Shares of Companies within MVM of 31 July 1995¹²⁶, which stated that “[t]he PPAs will remunerate the Power Generation Companies through an availability fee for the capital costs and an energy fee for the operating costs.”

161. In the Tribunal’s view, these statements do not amount to a representation (or assurance) that Dunamenti would be entitled to a reasonable profit and Electrabel to a reasonable return on its investment. Moreover, such an alleged entitlement from Hungary would be inconsistent with the terms of the PPA itself (in particular with Article 3) and with the statements made by Electrabel and Dunamenti to the Commission (see above). In this case, the place for such an entitlement would have been in the PPA from 1995 onwards; and, in the circumstances, its omission from the PPA’s outset is fatal to Electrabel’s case.¹²⁷ It was equally absent from the F-Unit 2001 Retrofit Agreement, with the same result.¹²⁸
162. Accordingly, in the Tribunal’s view, Electrabel has failed to establish that Hungary made any express or implied representation (or assurance) to Electrabel or Dunamenti regarding State guarantees, guaranteed returns or freedom from regulatory or legal changes consequent upon Hungary’s accession to the European Union.
163. The Tribunal has also considered whether Electrabel’s case could be maintained in the absence of any specific representation or assurance by Hungary. At its most basic level, could it be decided in the circumstances of this case that Electrabel had a reasonable expectation, created by Hungary, that Electrabel or Dunamenti would be compensated by Hungary for the termination of Dunamenti’s PPA at the *maximum* level permitted by EU law under the Commission’s methodology for stranded costs?

¹²⁶ R-3, p. 23.

¹²⁷ C-1.

¹²⁸ C-4.

164. Assuming that it was in the contemplation of Electrabel, at the time of its investments in Dunamenti, that, if its PPA could constitute unlawful State aid under EU law, Hungary would be required to terminate the PPA as ordered by the European Commission, the Tribunal finds that neither Dunamenti nor Electrabel held or could reasonably have held the expectation that Hungary would provide such *maximum* compensation. Even assuming, as Electrabel claims, that “if the PPA were to be terminated, Electrabel had a legitimate expectation that it would be adequately compensated,”¹²⁹ Dunamenti has certainly received a form of partial compensation under Hungary’s scheme (by way of set off against repayable State aid). The issue in this case is whether or not, on the facts of this case, such compensation, albeit short of the maximum, is a breach of the ECT’s FET standard.
165. There is a related factor important for this case: the Tribunal considers that the application of the ECT’s FET standard allows for a balancing exercise by the host State in appropriate circumstances. The host State is not required to elevate unconditionally the interests of the foreign investor above all other considerations in every circumstance. As was decided by the tribunals in *Saluka v Czech Republic* and *Arif v Moldova*, an FET standard may legitimately involve a balancing or weighing exercise by the host State. The former tribunal decided, in regard to the FET standard in Article 3.1 of the Netherlands-Czech BIT, after citing the standard definitions of FET standards:

“[304]. This Tribunal would observe, however, that while it subscribes to the general thrust of these and similar statements, it may be that, if their terms were to be taken too literally, they would impose upon host States’ obligations which would be inappropriate and unrealistic. Moreover, the scope of the Treaty’s protection of foreign investment against unfair and inequitable treatment cannot exclusively be determined by foreign investors’ subjective motivations and considerations. Their expectations, in order for them to be protected, must rise to the level of legitimacy and reasonableness in light of the circumstances.

[305]. No investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor’s expectations was justified and reasonable, the host State’s legitimate right subsequently to regulate domestic

¹²⁹ Electrabel’s Submission on the PPA Termination Claim, 30 July 2013, paragraph 41.

matters in the public interest must be taken into consideration as well. As the *S.D. Myers* tribunal has stated, the determination of a breach of the obligation of ‘fair and equitable treatment’ by the host State must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders.

[306]. The determination of a breach of Article 3.1 by the Czech Republic therefore requires a weighing of the Claimant's legitimate and reasonable expectations on the one hand and the Respondent's legitimate regulatory interests on the other.

[307]. A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies *bona fide* by conduct that is, as far as it affects the investors’ investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and non-discrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment.

[308]. Finally, it transpires from arbitral practice that, according to the ‘fair and equitable treatment’ standard, the host State must never disregard the principles of procedural propriety and due process and must grant the investor freedom from coercion or harassment by its own regulatory authorities.”¹³⁰

166. The Tribunal does not understand that the Parties disagree about the balancing exercise permissible under the ECT’s FET standard. Indeed, Electrabel itself cites the *Saluka* and *Arif* awards: see paragraph 125 above. Below, the Tribunal returns to this balancing factor applied to the circumstances of this case. In the Tribunal’s view, it precludes Electrabel’s case for the maximum compensation permitted under EU law and the Commission’s stranded costs methodology. In other words, even assuming that Electrabel had an expectation that it would be awarded the maximum compensation for stranded costs

¹³⁰ *Saluka* partial award, paragraphs 304-308; CA-21; and *Arif* award, paragraph 537; CA-148.

permitted under EU law, once weighed against Hungary's legitimate right to regulate in the public interest, such an expectation does not appear reasonable or legitimate.

167. *Arbitrariness*: The Tribunal and the Parties have used interchangeably, references to “arbitrariness”, “irrationality”, “unreasonable”, “inequitable” and “disproportionate” treatment, as all amounting for present purposes to much the same concept under the ECT's FET standard, conveniently here collectively addressed as “arbitrariness”.
168. As regards Electrabel's case on arbitrariness, applying an objective test in the circumstances prevailing at the relevant time (to which the Tribunal returns), the Tribunal does not find that Electrabel has proven, on the materials adduced in this arbitration, that Hungary's conduct was arbitrary or that there was no legitimate purpose for Hungary's conduct or that Hungary's conduct bore no reasonable relationship to that purpose or was, in another word, disproportionate.
169. It is appropriate to recall, in summary, the five principal arguments advanced by Electrabel in support of its case that Hungary was guilty of arbitrariness in breach of the ECT's FET standard.
170. First, Electrabel argues that Hungary's sole reason for not fully compensating Dunamenti was to reduce the burden on the Hungarian national budget. According to Electrabel, preferring to keep budgetary monies instead of compensating an investor for its losses is not a legitimate regulatory interest. Hungary does not deny that a budgetary concern (or the “protection of taxpayer funds”) was one of several factors in deciding not to compensate Dunamenti for its full net stranded costs; but it argues that overall this was a legitimate regulatory interest. That said, Hungary contends that it compensated Dunamenti fairly and to the detriment of its national budget by setting up a scheme whereby Hungarian generators (including Dunamenti) had in principle to make no State aid reimbursements to the State.
171. Second, Electrabel argues that Hungary decided not to compensate Dunamenti before the extent of the actual losses resulting from its PPA's premature termination could have been known, so that Hungary never undertook any balancing of actual interests in making its decisions in regard to its scheme. By contrast, Hungary argues that it made numerous efforts before the PPA's termination to calculate Dunamenti's stranded costs.

172. In this context, it is necessary to recall that both Parties agree that the quantum of damages, i.e. Dunamenti's actual losses resulting from the PPA's termination, is legally irrelevant to the issue of liability. But for such agreement by the Parties, a question could arise as to the likely magnitude of the injury as a relevant factor in the required balancing exercise under the ECT's FET standard. However, with such agreement, the Tribunal must accept that this question does not here arise for its decision. Accordingly, Electrabel's argument that Hungary decided not to compensate Dunamenti before knowing the extent of its actual losses (as distinct from its net stranded costs) is not relevant.
173. Third, Electrabel argues that Hungary could have elected to provide compensation for Dunamenti's net stranded costs and that this would have been approved by the Commission. In this respect, Electrabel contends that compensation for stranded costs (any type of stranded costs) is not unlawful State aid. It points out that several EU Member States (in particular, Poland and Portugal) have compensated generators in similar situations with cash payments for net stranded costs with the Commission's approval. For its part, Hungary argues that the actions of third States cannot bind Hungary, and that in any event none of these cases can be compared to Hungary's case. Had Hungary decided to compensate Hungarian generators (including Dunamenti) for all of their net stranded costs, particularly involving any cash payment, Hungary submits that the evidential record does not establish that the Commission would have likely given its approval – a factual matter on which Electrabel bears the legal burden of proof. In the Tribunal's view, whether the Commission would or would not have given its approval is not decisive. The question is whether, in exercising its discretion in selecting its scheme for the compensation of stranded costs, Hungary acted in an arbitrary manner towards Electrabel.
174. Fourth, Electrabel argues that Hungary represented that it would provide Hungarian generators with compensation for net stranded costs, but then changed its mind. Hungary contends that it never made any such representation. In the Tribunal's view, Electrabel has failed to establish that Hungary made such a representation: at most, Hungary indicated that it would compensate generators in accordance with the Commission's Methodology,¹³¹

¹³¹ R-95, p. 9.

or that it would pay some stranded costs,¹³² but it did not affirmatively state that it would pay all stranded costs

175. Fifth, Electrabel argues that Hungary did provide MVM compensation for the costs of market liberalisation. Hungary argues that this decision was not arbitrary and benefited Dunamenti by perpetuating above market prices, accruing to its benefit. (It should not be forgotten that MVM was a shareholder in Dunamenti). In the Tribunal's view, a mere showing of differential treatment is not sufficient to establish unlawful discrimination or, in this context, irrationality in breach of the ECT's FET standard. For discriminatory treatment, comparators must be materially similar; and there must then be no reasonable justification for differential treatment.¹³³ Electrabel has not established that MVM's situation was materially similar to that of Dunamenti or Electrabel itself.
176. Of Electrabel's five arguments summarised above, it is necessary below to concentrate the Tribunal's analysis on the first and (as regard net stranded costs) part of the second.
177. *Stranded Costs*: As an objective test, it was publicly well known before 1995 that significant changes were coming with Hungary's approach towards membership of the European Union. Later, in its "Privatisation of the Power and Natural Gas Industries in Hungary and Kazakhstan" of 1999, the World Bank noted that new owners (following privatisation) "indicated that they accounted for, particularly in their mid and longer term marketing strategies and plans, the expected changes due to [Hungary's] EU accession."¹³⁴ As to such changes, the 1999 International Energy Report, "Energy Policies of IEA Countries: Hungary 1999 Review", recorded: "Since market participants already know that competition is likely to be introduced soon, they have an opportunity to avoid stranded costs by refraining from building above-market, expensive capacity or concluding contracts at excessive costs now."¹³⁵ In the Tribunal's view, there is no credible evidence adduced in this arbitration that Electrabel and Dunamenti held any different views.
178. Accordingly, from long before the PPA's termination on 1 January 2009, Electrabel and Dunamenti cannot reasonably have expected to escape the possible consequences of

¹³² R-19, p. 19.

¹³³ For example, see the *Saluka* partial award, paragraph 313; CA-21.

¹³⁴ R-21, p. 75.

¹³⁵ R-16, p. 120.

Hungary's membership of the European Union, including market deregulation and liberalisation and the application of EU law on State aid and stranded costs. As was decided by the tribunal in *AES v Hungary*, "... any reasonably informed business person or investor knows that laws can evolve in accordance with the perceived political or policy dictates of the times ..." and "... the fact that an issue becomes a political matter, ... does not mean that the existence of a rational policy is erased."¹³⁶

179. *Standard for "Arbitrariness"*: As already indicated above, this Tribunal agrees with the *Saluka*,¹³⁷ *AES*,¹³⁸ and *Micula*¹³⁹ tribunals in that a measure will not be arbitrary if it is reasonably related to a rational policy. As the *AES* tribunal emphasised, this requires two elements: "the existence of a rational policy; and the reasonableness of the act of the state in relation to the policy. A rational policy is taken by a state following a logical (good sense) explanation and with the aim of addressing a public interest matter. Nevertheless, a rational policy is not enough to justify all the measures taken by a state in its name. A challenged measure must also be reasonable. That is, there needs to be an appropriate correlation between the state's public policy objective and the measure adopted to achieve it. This has to do with the nature of the measure and the way it is implemented."¹⁴⁰ In the Tribunal's view, this includes the requirement that the impact of the measure on the investor be proportional to the policy objective sought. The relevance of the proportionality of the measure has been increasingly addressed by investment tribunals¹⁴¹ and other

¹³⁶ *AES Summit Generation Limited and AES-Tisza Erőmű Kft v Hungary* (ICSID Case No. ARB/07/22), Award of 23 September 2010 (von Wobeser, Stern, Rowley) ("*AES* award"), paragraphs 9.3.34 and 10.3.23; CA-99.

¹³⁷ *Saluka* partial award, paragraph 307; CA-21 (particularly, "... A foreign investor protected by the Treaty may in any case properly expect that the Czech Republic implements its policies *bona fide* by conduct that is, as far as it affects the investors' investment, reasonably justifiable by public policies and that such conduct does not manifestly violate the requirements of consistency, transparency, even-handedness and nondiscrimination. In particular, any differential treatment of a foreign investor must not be based on unreasonable distinctions and demands, and must be justified by showing that it bears a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-owned investment ...")

¹³⁸ *AES* award, paragraphs 10.3.7-10.3.9; CA-99.

¹³⁹ *Micula* award, paragraph 525; CA-161, (citing *Saluka* and *AES*).

¹⁴⁰ *AES* award, paragraphs 10.3.7-10.3.9; CA-99.

¹⁴¹ See e.g. *Técnicas Medioambientales Tecmed, S.A. v United Mexican States* (ICSID Case No. ARB (AF)/00/2), Award of 29 May 2003 (Grigera Naon, Fernandes Rozas, Bernal Vereza), paragraph 122; CA-17; *Azurix* award, paragraphs 311-312; CA-13; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic* (ICSID Case No. ARB/02/1), Decision on Liability of 3 October 2006 (de Maekelt, Rezek, van den Berg), paragraph 195; CA-130; *MTD* award, paragraph 109; CA-12; *EDF* award, paragraph 293; RA-69; *Continental Casualty Company v Argentine Republic* (ICSID Case No. ARB/03/9), Award of 5 September 2008 (Sacerdoti, Veeder, Nader), paragraph 232; RA-11. See also R. Kläger, '*Fair and Equitable Treatment*' in *International Investment Law* (2011, Cambridge), pp. 128 (footnote 434) and 236-245.

international tribunals, including the ECtHR.¹⁴² The test for proportionality has been developed from certain municipal administrative laws, and requires the measure to be suitable to achieve a legitimate policy objective, necessary for that objective, and not excessive considering the relative weight of each interest involved.¹⁴³

180. *Scope of Discretion*: Once a measure meets the test articulated above, a State has a wide scope of discretion to determine the exact contours of the measure. That requires a balancing or weighing exercise so as to ensure that the effects of the intended measure remain proportionate in regard to the affected rights and interests.¹⁴⁴ Provided that there is an appropriate correlation between the policy sought by the State and the measure, the decision by a State may be reasonable under the ECT's FET standard even if others can disagree with that decision. A State can thus be mistaken without being unreasonable. It is therefore no proof of unreasonableness, by itself, that other States have taken different decisions in regard to net stranded costs, as advocated by Electrabel, particularly in regard to Poland and Portugal. Moreover, the Tribunal is not convinced that the position of these two States was materially similar to Hungary so as to provide any useful benchmark of reasonableness in regard to Hungary in the present case.

181. The Tribunal also notes that Hungary's scheme was not devised by the Hungarian Parliament for Dunamenti alone, but for an industrial sector comprising other Hungarian generators. These were also turbulent economic times, with Hungary's economy facing severe financial and fiscal constraints. Hungary's negotiations with the Commission were difficult and protracted. It is all too easy, many years later with hindsight, to second-guess a State's decision and its effect on one economic actor, when the State was required at the time to consider much wider interests in awkward circumstances, balancing different and competing factors. Further, even as regards a single actor such as Dunamenti, Hungary

¹⁴² See ECtHR, *In the Case of James and Others*, Judgment of 21 February 1986, paragraphs 50 and 63.

¹⁴³ See Benedict Kingsbury and Stephan W. Schill, *Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality*, in *International Investment Law and Comparative Public Law*, Stephan W. Schill, ed. (OUP, 2010), pp. 75-104.

¹⁴⁴ See *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile* (ICSID Case No. ARB/01/7), Award of 25 May 2004 (Sureda, Lalonde, Blanco) ("*MTD award*"), paragraph 109, CA-12; *EDF award*, paragraph 293, RA-69; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador* (ICSID Case No. ARB/06/11), Award of 5 October 2012 (Fortier, Williams, Stern dissenting) ("*Occidental award*"), paragraphs 404-409 & 427; CA-160. This part of the *Occidental award* is unaffected by the decision of the ICSID annulment committee of 2 November 2015, partially annulling the award; see also R. Kläger, '*Fair and Equitable Treatment*' in *International Investment Law* (2011, Cambridge), pp. 128 (footnote 434) and 236-245.

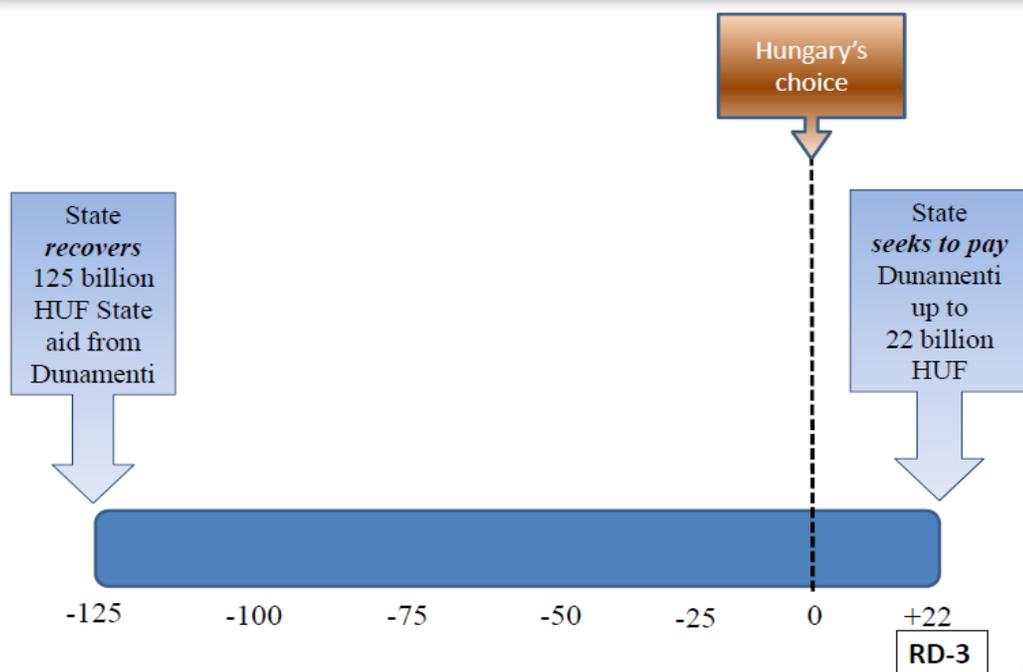
sought to balance several factors, such as its legal duty to recover unlawful State aid from Dunamenti and its willingness to accommodate Dunamenti for its stranded costs.

182. In the Tribunal’s view, this balancing exercise is aptly illustrated by the figures referred to in paragraph 104 above, as displayed by Hungary’s demonstrative exhibit RD3 submitted at the beginning of the Second Hearing. In its earlier Decision, the Tribunal had noted an apparent lack of symmetry in Hungary’s scheme as regards its effect on calculating compensation for Dunamenti’s net stranded costs. The Tribunal there noted: “The scheme’s first stage is now complete; whilst the second stage lies in the future ... On Hungary’s own calculations, however, it is clearly possible that Dunamenti will not recover compensation in the sum of HUF 22,171,991[000] for its net stranded costs under the second stage of Hungary’s scheme. As finally calculated by Hungary, this figure could of course be lower, non-existent or even negative; but it could also be significantly higher ...”¹⁴⁵ If higher, there would be no payment (or other compensation) by Hungary, leaving Dunamenti with eligible stranded costs.
183. During the Second Hearing, Hungary explained its scheme further, using its demonstrative exhibit RD3 during its oral opening and later submissions (shown below).¹⁴⁶ Hungary asserted that there was no asymmetry but, rather, that its discretionary exercise was generous to Dunamenti. The table’s base-line showed a range of “-125” to “0” and ending in “+22”, signifying respectively the 125 billion HUF which Hungary could recover from Dunamenti as unlawful State aid, zero “as Hungary’s choice”, and the 22 billion HUF as the balance of Dunamenti’s stranded costs (the “buffer”). By adding the 125 billion to the 22 billion, the resulting figure of 147 billion HUF represented the total maximum amount of eligible stranded costs for Dunamenti. Accordingly, so Hungary submitted, any asymmetry should take into account the fact that Hungary’s choice of zero was much closer to the maximum positive 22 billion (i.e. 147-125 billion) than to the negative maximum 125 billion. It is necessary to emphasise that all these figures were already in evidence and that exhibit RD3 only illustrated them in a more dramatic form.

¹⁴⁵ The Tribunal’s Decision, paragraph 6.109.

¹⁴⁶ H2D.140ff & 204ff; H2D2.342ff.

Issue #1: The Scope of Hungary's Discretion



184. As Hungary concluded at the Second Hearing: “So, in understanding the scope of Hungary’s discretion, it’s important to dispose of some strawmen that Claimant has repeated. The first is that where Hungary actually drew its line [zero] didn’t involve any compensation to Generators, and that’s simply wrong. Anything other than the left-hand pole of the chart [i.e. 0 to -125], anything other than recovery of the full 125 billion HUF of State aid previously paid to Dunamenti does constitute compensation already to Dunamenti on account of Stranded costs ...”¹⁴⁷ To the extent that there was any asymmetry at all, Hungary submitted that its origins lay with the outer boundaries imposed by the Commission and EU law, not with Hungary.

185. In the Tribunal’s view, to assess whether there is a lack of symmetry in Hungary’s compensation scheme, it is necessary to compare the impact of the compensation scheme on Dunamenti with the impact it had on Hungary. The Commission required Dunamenti to repay the State aid received during the life of the PPA, and this State aid was quantified at 125 billion HUF. In turn, Dunamenti’s total eligible stranded costs (as calculated by Hungary and confirmed by the Commission) amounted to 147 billion HUF. The

¹⁴⁷ H2D1.143.

Commission's methodology allowed Hungary to compensate these stranded costs in whole or in part, or not at all. In other words, Hungary had a choice, at one end of the spectrum, to compensate nothing and receive a cash payment from Dunamenti in the amount of 125 billion HUF, and at the other end of the spectrum, to receive repayment of State aid in the amount 125 billion HUF (in the form of a set off) *and* a cash payment to Dunamenti for its net stranded costs of 22 billion HUF.

186. Hungary's choice was closer to the latter than the former: it chose to compensate 125 billion HUF (i.e. 85% of Dunamenti's eligible stranded costs as approved by the Commission), by setting them off against the 125 billion HUF it was entitled to receive as State aid. As a result, although Hungary had the possibility of receiving 125 billion HUF in cash, it forewent this possibility in order to compensate Dunamenti for 85% of its eligible stranded costs (subject to the claw-back). Although Dunamenti did not receive compensation for 100% of its eligible stranded costs, the Tribunal finds that Hungary's exercise of its discretion was reasonable and proportionate.
187. It is however here necessary to address a procedural quirk whereby, curiously, Hungary later objected to the Tribunal referring to its own demonstrative exhibit RD3. Unfortunately, it was not entirely clear to the Tribunal on what basis this objection was made by Hungary; and it remained unclear at the end of the Second Hearing whether Hungary still maintained its full objection to the Tribunal considering exhibit RD3, as a demonstrative of no evidential value in and of itself (given that it only recorded figures already in the evidential record). In brief, it appeared that Hungary submitted that the figures illustrated in RD3 did not yet exist in 2008, which was therefore too late (on that part of its case) for the relevant time under any test of irrationality.¹⁴⁸ Hungary appeared to submit that the relevant time stopped at its implementation of the Commission's Final Decision dated 4 June 2008, namely not later than the PPA Termination Act 1998.¹⁴⁹ Hungary also expressed its submission as both a jurisdictional objection (for the first time) and a point on the merits as to liability.¹⁵⁰

¹⁴⁸ H2D2.273.

¹⁴⁹ H2D2.378-382.

¹⁵⁰ H2D2.346-351 & 378ff.

188. Given that (i) exhibit RD3 merely illustrated figures which had long been introduced by the Parties into this case's evidential record; and (ii) exhibit RD3 had been voluntarily introduced as a demonstrative by Hungary itself and then much discussed by both Parties earlier in the Second Hearing (without any reservation by Hungary at that time), it is not appropriate for the Tribunal to treat Hungary's submission as a timely jurisdictional objection. That belated objection, if it was eventually maintained by Hungary, is therefore rejected. The Tribunal must nonetheless here address Hungary's submission as a point on the merits, given the significance which the Tribunal attaches to the figures demonstrated in exhibit RD3 for the purpose of this Award.
189. The Tribunal has rejected, for several reasons, Hungary's submission that the test for irrationality should be frozen in 2008, without any regard for Hungary's subsequent calculations of Dunamenti's State aid, stranded costs and net stranded costs (as recorded in exhibit RD3) or other relevant events subsequent to 2008, including the Commission's Compensation Decision dated 27 April 2010.¹⁵¹
190. First, the Tribunal rejects Electrabel's allegation that Hungary breached the ECT's FET standard in not preparing and successfully submitting to the European Commission a more generous scheme for Dunamenti. This was a scheme proposed in the PPA Termination Act 2008 for an industrial sector in Hungary; it could not be tailored to meet only Dunamenti's particular demands; and there is no cogent evidence that the Commission would have approved a more generous (or less ungenerous) scheme. In any event, as decided in paragraph 173 above, that is not the decisive issue. Hence, in the Tribunal's view, the relevant time for the correct test for irrationality must include the Commission's Compensation Decision dated 27 April 2010 and Hungary's subsequent responses.
191. Second, as pleaded by Electrabel, its claim is made in regard to Hungary's failure to compensate it for the premature termination of Dunamenti's PPA, with only the measure of such loss constrained (by EU law) to the amount of net stranded costs. Electrabel does not plead, as such, any breach by Hungary of its obligation to pay net stranded costs.¹⁵² Hence,

¹⁵¹ C-199.

¹⁵² H2D2.292 (Counsel for Electrabel]: "... We say that the obligation is not the payment of Net Stranded Costs. It is the obligation to compensate Electrabel for the loss of the PPA, and we are now restricted to the question of non-payment of Net Stranded Costs because of the Tribunal's findings about the applicable law and the applicability in particular of the European law.").

also in the Tribunal's view, the relevant time for any test for irrationality must include the time when Hungary implemented the Commission's Compensation Decision dated 27 April 2010, i.e. its attempt to compensate Dunamenti for the premature termination of its PPA.

192. This is not a conclusion adverse to Hungary's case, given the Tribunal's decisions below as to the rational basis for the scheme's application to Dunamenti, assessed at the relevant time (without hindsight). To the contrary, in the Tribunal's view, Hungary's case would be significantly weaker if the clock were stopped in 2008. Moreover, as Hungary rightly accepted elsewhere: "To the extent later events shed light on things that are relevant to the alleged wrongful act, of course, you can always look at them ..."¹⁵³ The Tribunal has decided that it is here legitimate to do so, even if (contrary to its view), the time for assessing a possible breach of the ECT's FET standard occurred in 2008. It is only necessary to add that Electrabel did not object to the introduction of exhibit RD3 as a demonstrative exhibit.
193. *Relevant Time to Assess "Arbitrariness"*: In its Decision, as regards the PPA Pricing Claim, the Tribunal decided upon the issue of the relevant timing to determine when a legitimate expectation had arisen, as follows: "As regards the relevant point in time for the assessment of legitimate and reasonable expectations, it is common ground in 'investment jurisprudence' and between the Parties that the assessment must refer to the time at which the investment is made ..."¹⁵⁴ The question remains, however, as what is that relevant time for assessing the alleged wrong under the FET standard on the facts of this case.
194. In the Tribunal's view, as already indicated, it could not pre-date the Commission's Compensation Decision dated 27 April 2010 which approved (or, rather "decided not to raise any objections" to) Hungary's scheme for stranded costs as regards (inter alia) Dunamenti.¹⁵⁵ Accordingly, the Tribunal considers that it is appropriate for the Tribunal to take into account events subsequent to the PPA Termination Act 2008 and the Commission Compensation Decision 2010, even where both events post-date the commencement of this

¹⁵³ H2D2.357.

¹⁵⁴ The Tribunal's Decision, paragraph 7.76. To the legal materials there cited, Electrabel added the awards in *Arif v Moldova*, paragraphs 537 & 547(e); CA-148; and *Bogdanov v Moldova*, paragraph 4.2.4.8; CA-123. See Electrabel's Reply Memorial, 16 September 2009, paragraph 116; see also Hungary's Counter-Memorial, 15 May 2009, paragraphs 427-428.

¹⁵⁵ C-199, paragraph 71.

arbitration. In order to explain the Tribunal's approach, given the controversy raised by this issue, it is next necessary to re-examine the Parties' respective submissions made during this arbitration's first phase, read together with the Tribunal's Decision, even if it means going over several matters which have already been considered above.

195. Electrabel's submissions were summarised by the Tribunal at paragraphs 6.24 and 6.35 of the Tribunal's Decision. The Tribunal noted that Electrabel submitted that since Dunamenti had considerable stranded costs in excess of any recoverable State aid, this factor contradicted Hungary's assertion that Dunamenti's PPA had to be terminated under the 2008 Act (as of 1 January 2009), and thus supported Electrabel's case on Hungary's breach of the FET standard and its case on unlawful expropriation without compensation. Hungary's submissions were summarised by the Tribunal at paragraph 6.42 of the Tribunal's Decision. The Tribunal noted that Hungary submitted that it did not deny Electrabel the opportunity to comment on the calculations of State aid and stranded costs.
196. The Tribunal's Decision also addressed net stranded costs in paragraphs 6.94 to 6.118 of the Decision. The Tribunal noted that stranded costs referred to the difference between: (i) relevant investment costs; and (ii) relevant revenues generated in the past and to be generated in the future up to the notional end of the PPA's term in the future.¹⁵⁶
197. The Tribunal's Decision recorded that Hungary's compensation scheme for stranded costs was to be calculated in two stages.¹⁵⁷ At stage one, any stranded costs calculated as at the compensation date would be set off by the recovery of unlawful State aid. If the State aid exceeded the stranded costs as at that date, a payment would be made by the generator to the State, but the reverse would not occur. Accordingly, if the stranded costs exceeded the State aid, those losses would be borne by the generator. At stage two, also known as the "claw-back mechanism", each generator's revenues and costs would be finally calculated at the expiry of the relevant PPA's original term. If the balance of State aid and stranded costs had benefitted the generator at stage one, a final payment would be required by the generator to be made to the State; but, again, the reverse would not occur. Accordingly, no payment would be made by Hungary to the generator if at stage one the State had

¹⁵⁶ The Tribunal's Decision, paragraph 6.96.

¹⁵⁷ The Tribunal's Decision, paragraphs 6.99-6.102.

recovered a higher sum than it was in fact owed, or otherwise (e.g. if there remained net stranded costs).

198. At stage one, as explained above, Dunamenti's net stranded costs were calculated to be approximately 22 billion HUF,¹⁵⁸ with no payment to Dunamenti. At paragraph 6.109 of the Tribunal's Decision, the Tribunal noted that at the conclusion of stage two, the amount of 22 billion HUF might not be paid to Dunamenti. The Tribunal noted that the eventual amount might be lower, non-existent, negative or indeed significantly higher than this figure. It was then impossible to quantify Dunamenti's actual net stranded costs. The Tribunal determined that because that final figure lay in the uncertain future, it was not possible for the Tribunal to predict what the final figure for net stranded costs would be.
199. The Tribunal's conclusion, reached in the Tribunal's Decision, raised the question whether as a matter of legal principle it is possible for a breach of the FET standard to be dependent upon the quantum of loss as it continues to accrue into the future, or whether the question of breach, however difficult, must be assessed as at the date of the alleged breach without any regard to the quantum of any subsequent loss. In this second phase of the arbitration, as already recorded above, Electrabel submitted that quantum was not a relevant factor for any breach of the ECT's FET standard; and that non-payment of compensation short of any net stranded costs to Dunamenti was in and of itself a breach of the FET standard.¹⁵⁹ Electrabel contended, correctly, that both Parties agreed upon this approach to quantum as an irrelevant factor.¹⁶⁰ Electrabel also argued that, if quantum was relevant, then Dunamenti's net stranded costs were significantly higher than 22 billion HUF.¹⁶¹
200. If any stranded costs were awarded to Dunamenti by Hungary, Electrabel also accepted that, in order to obtain approval from the Commission, those costs would have to have been calculated on an *ex ante* basis, not an *ex post* basis.¹⁶² Thus, according to the methodology adopted by Hungary, 22 billion HUF was the maximum that Hungary could have paid to Dunamenti with authorisation from the Commission.¹⁶³ However, according to Electrabel, Hungary presented the relevant figures inaccurately and the correct figures

¹⁵⁸ The Tribunal's Decision, paragraph 6.106.

¹⁵⁹ H2D1.14-15.

¹⁶⁰ H2D1.35.

¹⁶¹ H2D1.37.

¹⁶² H2D1.106-9.

¹⁶³ H2D1.110.

were much higher.¹⁶⁴ Therefore, according to Electrabel, in order to give *effet utile* to the Commission's Decision, Electrabel's loss ought to be calculated by reference to "the maximum Stranded Costs that could have been asked for under the Commission's Methodology."¹⁶⁵

201. Electrabel also argued that the Commission's ability to amend its Decision in the event that this Decision was overturned in Dunamenti's (then) pending legal proceedings in Luxembourg, as recorded in paragraph 4.70 of the Decision, was reflective of the general principle of cooperation under EU law, being now derived from Article 4 of the TEU.¹⁶⁶ Accordingly, so Electrabel argued, any relevant changes ought to be reassessed by Hungary with the Commission; and such reassessments would take precedence over any *ex ante* calculation, it being a principle derived from the TEU.
202. Electrabel further argued that the Tribunal could take into account the existing figures for the purpose of determining liability.¹⁶⁷ If the eventual result on net stranded costs turned out to be lower than these figures, there would be no claw-back.¹⁶⁸ Conversely, Electrabel appeared to argue that there would be no further payment of stranded costs if the eventual result were higher.
203. During the Second Hearing, the Tribunal invited Electrabel to clarify its primary case, namely whether quantum of damage could ever be relevant to a finding of breach of the FET standard under the ECT.¹⁶⁹ Electrabel acknowledged, as summarised above, that it could be relevant in principle, but not in this case because Electrabel's claim was made in respect of non-payment of any compensation, rather than a claim that the compensation was unfair.¹⁷⁰
204. In response, Hungary submitted that a breach of the ECT's FET standard could not be evaluated with hindsight in the light of subsequent events.¹⁷¹ Hungary contended that the relevant time for assessing rationality is the time at which the State acted with the

¹⁶⁴ H2D1.118-123.

¹⁶⁵ H2D1.123.

¹⁶⁶ H2D2.274-276.

¹⁶⁷ H2D2.281.

¹⁶⁸ H2D2.285.

¹⁶⁹ H2D2.291-293.

¹⁷⁰ H2D2.292-293.

¹⁷¹ H2D1.131-132.

knowledge that it had at the time: “a State can’t be penalized for acting rationally based on the information that it had just because events subsequently unfolded in a different way.”¹⁷² However, the Tribunal notes that such is not the issue here, where a State’s conduct at the relevant time can be understood better by a subsequent event, namely the Commission’s Compensation Decision dated 27 April 2010.

205. Hungary also submitted that stranded costs were awarded by Hungary to the level of the State aid, which was an exercise of discretion;¹⁷³ that this figure had to be calculated on an *ex ante* basis because that was the applicable methodology, and that the *ex ante* figure could only be revised down later, which Hungary stated (correctly) was an uncontested point as between the Parties.¹⁷⁴ Hungary further submitted that if the Tribunal took the view that the non-payment of net stranded costs was asymmetrical, then the complaint must lie against the Commission, since Hungary had no discretion to go beyond the *ex ante* maximum. Hungary contended that a finding of liability could not turn upon the question whether Electrabel had suffered damages or upon the quantum of any loss; and thus a finding of liability could not be reverse-engineered, particularly if the figure cannot be known for years into the future.¹⁷⁵
206. Hungary addressed the possibility that the European Commission might be willing to accept an adjustment to compensation for net stranded costs.¹⁷⁶ It argued that this would require Hungary’s notification to the Commission for approval; and that it would be limited to the *ex ante* maximum. Hungary further argued that the European Commission could not change its position on compensation unless the Commission’s Final Decision on State Aid dated 4 June 2008 were annulled by the General Court or the European Court of Justice in Luxembourg.¹⁷⁷
207. Hungary argued that the questions posed by the Tribunal as to timing of the payments reflected broad questions about whether it would be fair for Hungary to pay cash to Dunamenti if, after 2015, Dunamenti struggled more in the free market than was

¹⁷² H2D1.131-132.

¹⁷³ H2D1.143.

¹⁷⁴ H2D1.145-6.

¹⁷⁵ H2D1.218-9.

¹⁷⁶ H2D1.240-241.

¹⁷⁷ H2D1.251.

anticipated in 2008 or 2009.¹⁷⁸ Hungary argued this was not permitted in principle. The threshold question is what did Hungary do wrong under the ECT at the relevant time.¹⁷⁹ A second question was whether the Tribunal could have any jurisdiction in respect of future acts or omissions by Hungary that might breach the ECT. In other words, if the final calculation were to require higher figures in favour of Dunamenti, then a decision at that time by Hungary not to pay might give rise to a separate and new claim under the ECT – but, as Hungary emphasised, that was not a claim before this Tribunal.¹⁸⁰

208. As to Electrabel’s submission on the principle of sincere cooperation under Article 4(3) of the TEU, Hungary argued that such a principle was not relevant, as indicated above.¹⁸¹ Hungary submitted that compensation was bound to the *ex ante* approach so as to ward off perverse incentives influencing Dunamenti, e.g. (as an extreme case) Dunamenti’s management might otherwise buy Lamborghinis and seek to charge them to Hungary.¹⁸²
209. *Summary and Conclusion:* The Tribunal has set out the Parties’ submissions on timing at some length because ultimately, perhaps somewhat surprisingly, they amount to a material consensus for the purpose of this Award. Taking that approach into account, the Tribunal here summarises its principal conclusions:
210. First, in this particular case, the issue of liability under the ECT’s FET standard, as now disputed between the Parties, does not raise any issue of quantum as such; and it can thus be decided by the Tribunal without any further evidence of loss by Dunamenti or Electrabel, still less the eventual calculations of Dunamenti’s final net stranded costs (actual or hypothetical). The Parties are clearly agreed on this; and, in the circumstances, for the purpose of this particular case, the Tribunal must accept their joint approach.
211. Second, the calculation of net stranded costs by Hungary could only be made upon an *ex ante* basis at the outset and not subsequently upon any *ex post* basis. This results from EU law, the Commission’s Stranded Costs Methodology and the Commission’s Compensation Decision. It was not open to Hungary to adopt an *ex post* approach to Dunamenti’s net stranded costs into the future; but, even if it were, the Tribunal would not find in this case

¹⁷⁸ H2D2.328-329.

¹⁷⁹ H2D2.333.

¹⁸⁰ H2D2.335-342.

¹⁸¹ H2D2.393.

¹⁸² H2D2.407.

that a mere failure to adopt an *ex post* scheme could by itself amount to a breach of the ECT's FET standard. Nor was it irrational for Hungary to calculate Dunamenti's stranded costs upon a hypothetical basis: it would have been difficult to do otherwise; and, moreover, Dunamenti was afforded sufficient opportunity by Hungary (especially HEO) to comment on Hungary's methodology.¹⁸³

212. Third, in these circumstances, the relevant time for addressing the issue of whether or not Hungary violated the ECT's FET standard is the date when Hungary implemented its scheme towards Dunamenti, namely following its receipt of the Commission's Compensation Decision dated 27 April 2010 approving that scheme. It was not 2008. Until the Commission had approved that scheme, it was effectively writ in water notwithstanding the termination of Dunamenti's PPA, with effect from 1 January 2009 under the PPA Termination Act 2008.
213. Fourth, Hungary was necessarily required to perform a difficult balancing exercise in implementing the Commission's Decision and Compensation Decision. It had of course to apply EU law; it had to consider the position of affected Hungarian generators (including Dunamenti); and it had also to consider the position of Hungarian electricity consumers who had subsidised those generators for many years with above-market prices.
214. In such circumstances, the Tribunal finds that Hungary's decision to compensate Dunamenti for 85% of its total eligible stranded costs through a set off of those costs against the State aid that Dunamenti was required to repay was reasonably related to a legitimate policy objective. The legitimate policy objective here is not, as Electrabel claims it is, Hungary's goal to protect the State budget and "keep the money." As Electrabel itself has argued, the measure in question is the termination of the PPA without payment of compensation, not Hungary's failure to pay net stranded costs as such.¹⁸⁴
215. The legitimate government policy sought by Hungary was the alignment of its electricity sector with the EU market and the elimination of distortions to competition within and without Hungary. As set out by the Commission's Final Decision on State Aid, which has now been confirmed by the General Court and the ECJ, this required the termination of the PPAs. Under the Commission's Methodology, Hungary was also allowed to compensate

¹⁸³ R-168; *see also* the Commission's Decision of 4 June 2008, paragraphs 21-23.

¹⁸⁴ *See* footnote 156 above.

generators for stranded costs, but it was not required to do so. The choice fell squarely on Hungary. In deciding how much of those stranded costs it would compensate, Hungary carried out a balancing exercise between the interests of generators and those of tax-payers; and it decided to pay 85% of Dunamenti's stranded costs through a set off of those costs against the State aid that Dunamenti was required to repay. In doing so, Hungary forewent a cash payment of 125 billion HUF in State aid that it was entitled to request from Dunamenti.

216. In the Tribunal's view, this is hardly evidence of an intention to "keep the money", as Electrabel claims. It is also significant that Hungary took this decision at a time in which it was emerging from massive political and economic changes, exacerbated by budgetary constraints caused by the global economic and financial crisis.
217. Fifth, on the evidence, the Tribunal does not accept Electrabel's submission that Hungary, with the Commission's approval, could have procured under EU law at any time an upwards adjustment favouring Dunamenti as regards future events in regard to stranded costs (other than a relevant judgment from Luxembourg invalidating the Commission's Final Decision on State Aid dated 4 June 2008 – which did not occur). Moreover, under Article 4(3) of the TEU, the principle of co-operation could not be deployed to modify Hungary's scheme; and, in effect, the figure of 22 billion HUF could not be revised upwards whatever the future held for Dunamenti in Hungary.
218. Accordingly, as regards Electrabel's claim in respect of net stranded costs under the ECT's FET standard, the figures emanating from Hungary's scheme are the relevant figures applied *ex ante* in 2010, both as a matter of EU law and the ECT.
219. The Tribunal decides that the figures set out in paragraph 104 above in respect of Dunamenti (as there demonstrated from the factual evidence) have not been proven by Electrabel to be wrongfully unreasonable, irrational, arbitrary, unfair, inequitable or disproportionate in violation of the ECT's FET standard. Given the balancing exercise required of Hungary, it would be unduly simplistic to assert that Hungary should have paid the sum of 22 billion HUF in cash to Dunamenti and that a failure to do so necessarily amounted to a violation of the ECT's FET standard. The Tribunal rejects that proposition. There is no balancing exercise if the scale is pre-determined to tip completely towards the

investor. Whether the Tribunal, acting in Hungary's shoes, would have come to a different figure from Hungary is not the right question under the ECT's FET standard. The Tribunal is not a court of appeal. Rather, the question is whether Hungary, at the relevant time, acting in good faith, could have arrived at that figure in a rational manner under the ECT's FET standard, as set out in paragraph 179 above. The Tribunal answers that question in favour of Hungary.

220. In the Tribunal's view, there is a broad symmetry in the relevant figures reflecting Hungary's rational balancing exercise. Further, if there were any asymmetry, it favoured not Hungary but Dunamenti and (indirectly) Electrabel. As Hungary submitted, Hungary's choice of zero lies much closer to the positive figure of 22 billion HUF than to the negative figure of 125 billion HUF for recoverable State aid, thereby directly and immediately benefiting Dunamenti by 125 billion HUF (i.e. 147 billion – 22 billion HUF). As a balancing exercise, in the Tribunal's view, the balance was therefore tilted in Dunamenti's favour; it was certainly not tilted in favour of Hungary; and, overall, it was a rational exercise of Hungary's discretion.
221. The Tribunal rejects any bad faith and any unfair or improper motive for Hungary's scheme, as asserted by Electrabel, for want of any cogent evidence to such effect. Moreover, the direct and immediate benefit of 125 billion HUF granted by Hungary to Dunamenti (by way of set off) also contradicts Electrabel's submission: it was not, on any view, an insignificant sum.
222. Finally, as decided above, the Tribunal has dismissed Electrabel's claim based on legitimate expectations at the times of its investments.
223. For all these reasons, the Tribunal dismisses Electrabel's remaining case as to liability under the ECT's FET standard in respect of its PPA Termination Claim. As regards the Parties' respective prayers for relief set out above, the Tribunal therefore declares that Hungary has not breached Article 10(1) of the ECT; and that Electrabel's PPA Termination Claim is therefore dismissed.
224. The Tribunal notes that its decision in regard to the PPA Termination Claim might be considered to be at variance with the recent award in *E.D.F. v Hungary* ("*E.D.F.*

UNCITRAL award”).¹⁸⁵ The Tribunal has considered the Parties’ written submissions to different effects of 4 March 2015 (Electrabel) and 26 June 2015 (Hungary). By letter of 3 July 2015, Electrabel waived its right of reply to Hungary’s written submissions. It would of course be inappropriate for this Tribunal to dissect the *E.D.F.* UNCITRAL award in search of the evidence and arguments addressed to that tribunal. This Tribunal is required to decide the arguments advanced by the Parties in this arbitration based on the evidence adduced by the Parties in these proceedings. It cannot be influenced therefore by the result of a different arbitration, where an investor’s claim appears to have been formulated differently and decided on different arguments and evidence: the Tribunal refers, for example, to paragraphs 465-467 and 637 of the *E.D.F.* UNCITRAL award, with paragraphs A1-7 of Hungary’s submission of 26 June 2015.

225. The Tribunal also notes, in particular, that the *E.D.F.* UNCITRAL award did not compensate the claimant investor for the maximum amount of net stranded costs attributed to its subsidiary (Budapesti Erömü Zrt). The *E.D.F.* tribunal awarded €107 million as compensation calculated on a different basis, whereas the total figure for net stranded costs was apparently €300 million, leaving uncompensated net stranded costs far in excess of such compensation: see paragraph 681 of the *E.D.F.* UNCITRAL award.¹⁸⁶ The Tribunal understood from the Parties that the *E.D.F.* UNCITRAL award was the subject of legal proceedings in Switzerland. It now understands, from public sources, that an application to annul the award was rejected by the Swiss Federal Tribunal by its judgment of 6 October 2015.

226. For all these reasons, despite its distinguished tribunal, the Tribunal could derive no material assistance from the *E.D.F.* UNCITRAL award for the purpose of its decisions in this Award.

227. It follows from this Award, read with the Tribunal’s earlier Decision, that all the substantive claims made by Electrabel in this arbitration are dismissed by the Tribunal.

¹⁸⁵ *E.D.F. International v Hungary* (UNCITRAL), Award of 3 December 2014 (Böckstiegel, Dupuy, van den Berg) (“*E.D.F.* UNCITRAL award”); CA-162. (The Tribunal understands that this award, made in Zurich, currently remains confidential and unpublished.)

¹⁸⁶ Paragraph 681 of the *E.D.F.* UNCITRAL award (CA-162) reads: “The above amount of €107 million is below the maximum amount of eligible stranded costs as determined by the EC for the amount of compensation of stranded costs (i.e. HUF 89 billion, which is equivalent to €300 million.)” The footnote (omitted here) makes plain that the figure of €300 million is for net stranded costs, i.e. “after deduction of recoverable amounts of State Aid pursuant to the PPA Decision, which Hungary had forgiven to BERT.”

PART III: COSTS

228. *Introduction:* In its Decision (at paragraph 11.7), the Tribunal made no order as regards costs, save to reserve in full its jurisdiction and powers to make any order as regards all legal and arbitration costs in an award subsequent to that decision. By order of 14 July 2015, the Tribunal invited the Parties to bring up to date their several claims for costs. For the purpose of deciding costs in this Award, the Tribunal has taken into account the Parties' submissions as regards the allocation and assessment of costs made in regard to both the first and second phases of this arbitration.
229. The Parties made several written submissions on such costs, principally following the Hearing in July-August 2010, the New York Hearing in 2013 (both as to interim costs arising from this arbitration's first phase) and in August-September 2015 (as to all costs, including this arbitration's second phase). In the circumstances, it is unnecessary here to record these submissions in full.
230. As to amount, by letters dated 28 August and 1 September 2015, Electrabel claimed costs totalling for the first phase of these arbitration proceedings: US\$ 5,583,47; and for the second phase: EUR€ 1,764,732.78, UK£ 117,737.26 and US\$ 433,744.85. By letter dated 28 August 2015, Hungary claimed costs totalling US\$ 10,055,733.
231. As to allocation between the Parties, the Tribunal considers that Hungary is to be considered as the prevailing party in this arbitration overall, in both phases of these arbitration proceedings. By the Tribunal's earlier Decision and under this Award, Electrabel has not succeeded in any of its substantive claims against Hungary.
232. The ECT, the ICSID Convention and the ICSID Arbitration Rules do not mandate that the prevailing party should recover its costs from the non-prevailing party. The Tribunal considers that it has a broad discretion as to the award of costs under Article 61(2) of the ICSID Convention and ICSID Arbitration Rules 28 and 47(1)(j).
233. In the Tribunal's view, there are three particular factors in this case relevant to the exercise of such discretion. First, this arbitration was commenced, in 2007, before the Commission's Final Decision on State Aid dated 4 June 2008, the termination of

Dunamenti's PPA by Hungary on 1 January 2009 and the Commission's Compensation Decision dated 27 April 2010. Accordingly, the most important (monetarily) and complicated factual and legal issues arose one after the other during these arbitration proceedings, much akin to a Russian *matryoshka* doll. This was a major factor causing difficulties for both Parties, as to which Electrabel can bear no special responsibility.

234. Second, the Commission's submissions to the Tribunal (as a "non-disputing party") raised important and extensive issues of jurisdiction and applicable law. These were not issues, particularly as to jurisdiction, raised by Hungary. However, Electrabel had to expend much time and cost to deal with the Commission's submissions. In effect, far from exercising the traditional role of an "amicus curiae", the Commission became a second respondent more hostile to Electrabel than Hungary itself. If accepted by the Tribunal, the Commission's submissions would have been fatal to Electrabel's case. The Tribunal was required to decide these issues at length in its Decision and there reject a material part of the Commission's submissions. Overall, the Commission's participation in this arbitration was a hugely complicating factor, as were to a lesser extent the pending legal proceedings in Luxembourg (being only concluded on 1 October 2015). For all these, Electrabel bore by far the greatest burden.
235. Third, with hindsight, it was at least unfortunate that the Parties agreed, albeit with the Tribunal's subsequent consent, to bifurcate all issues of quantum from all issues of liability. This was also a major factor which caused difficulties for both Parties and the Tribunal. However, any responsibility should be shared by all. As between the Parties, however, Electrabel should not bear any special responsibility.
236. *Decision:* Taking all the circumstances of this case into account, pursuant to its discretion under Article 61(2) of the ICSID Convention and ICSID Arbitration Rules 28 and 47(1)(j), the Tribunal decides that the Parties shall each bear their own legal costs and expenses, save that Electrabel shall bear and pay for all the other costs of these arbitration proceedings (without recourse to Hungary). Accordingly, Electrabel must bear in full the administrative costs of the ICSID Secretariat, together with the fees and expenses of the

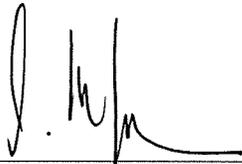
Tribunal, the exact amount of which shall be subsequently notified in writing to the Parties by the Centre.¹⁸⁷

¹⁸⁷ The ICSID Secretariat will provide the Parties with a detailed financial statement of the case account as soon as the account is finalised.

PART IV: THE OPERATIVE PART

237. For the reasons set out above, the Tribunal decides and awards, as follows:

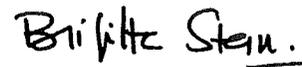
- (1) Save as expressly otherwise set out below, the Tribunal's Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012 is here repeated and confirmed, as if that Decision were here expressly set out and formed part of this Award;
- (2) All the Claimant's substantive claims are hereby dismissed in their entirety, together with all the Claimant's claims for interest and costs;
- (3) The Parties shall each bear their own legal costs and expenses, subject to paragraph 4 below;
- (4) As to other arbitration costs (i.e. the administrative costs of the ICSID Secretariat and the fees and expenses of the Tribunal), the Claimant shall bear (as between the Claimant and the Respondent) all such costs in full, the exact amount of which shall be subsequently notified in writing to the Parties by the Centre, and shall accordingly reimburse the Respondent its share of these costs; and
- (5) All other claims by any Party are hereby dismissed.



Gabrielle Kaufmann-Kohler
Arbitrator

Date:

20 November 2015



Brigitte Stern
Arbitrator

Date: 12 November 2015



V.V. Veeder
President

Date: 11.11.2015