

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

In the arbitration proceeding between

ACCESSION MEZZANINE CAPITAL L.P.
AND
DANUBIUS KERESKEDŐHÁZ VAGYONKEZELŐ ZRT.

Claimants

and

HUNGARY

Respondent

ICSID Case No. ARB/12/3

AWARD

Members of the Tribunal
Prof. Arthur W. Rovine, President
Hon. Marc Lalonde, Arbitrator
Prof. Zachary Douglas QC, Arbitrator

Secretary of the Tribunal
Ms. Mairée Uran-Bidegain

Date of dispatch to the Parties: 17 April 2015

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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

1997 CFT	Call For Tender dated 10 June 1997 (C-50)
2009 CFT	Call For Tender dated 29 July 2009 (C-108)
Advenio	Advenio Zrt.
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Bifurcation Decision	Decision on the Respondent's Notice of Jurisdictional Objections and Request for Bifurcation dated 8 August 2013
BIT or Treaty	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hungarian People's Republic for the Promotion and Reciprocal Protection of Investments dated 9 March 1987
Broadcasting Agreement	Radio Broadcasting Contract between the National Radio and Television Board and Országos Kereskedelmi Rádió Részvénytársaság dated 18 November 1997 (C-51)
Claimants	Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt.
Cl. Mem.	Claimants' memorial on the merits dated 11 April 2013
Cl. C-Mem. Jur.	Claimants' counter-memorial on jurisdiction dated 7 November 2013
Cl. Rej. Jur.	Claimants' rejoinder on jurisdiction dated 17 December 2013
Danubius Rádió or Danubius	Danubius Rádió Műsorszolgáltató Zrt.
DHSV	Danubius Kereskedőház Vagyonkezelő Zrt.
<i>Emmis Award</i>	Award dated 16 April 2014 in <i>Emmis International Holding B.V., Emmis Radio Operating B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary</i> (ICSID Case No. ARB/12/2)

<i>Emmis</i> Decision	Decision on the Respondent’s Application for Bifurcation dated 13 June 2013 in <i>Emmis International Holding B.V., Emmis Radio Operating B.V. and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary</i> (ICSID Case No. ARB/12/2)
GTT	General Terms of Tender dated 30 August 1996 (C-48)
Hungary or Respondent	Hungary
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
Körmendy-Ékes & Lengyel First Report	First Report of Dr. Judit Körmendy-Ékes and Dr. Mark Lengyel dated 23 September 2013 (submitted with Respondent’s memorial on jurisdiction dated 23 September 2013)
Media Law	Act I of 1996 on Radio and Television Broadcasting entered into effect on 1 January 1996 (C-46)
Mezzanine	Accession Mezzanine Capital L.P.
Notice of JO	Respondent’s Notice of Jurisdictional Objections and Request for Bifurcation dated 28 June 2013
OKR	Országos Kereskedelmi Rádío Rt
OSCE	Organization for Security and Co-operation in Europe
ORTT	Hungary’s National Radio and Television Broadcasting Board
Parties	Claimants and Respondent
Requesting Parties	Emmis International Holding B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft., Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt.
Request for Arbitration	Request for Arbitration dated 27 December 2011

Resp. Mem. Jur.	Respondent's memorial on jurisdiction dated 23 September 2013
Resp. Rep. Jur.	Respondent's reply on jurisdiction dated 27 November 2013
Revised Request	Revised Amended Request for Arbitration dated 9 November 2012
Rozgonyi First Report	Expert Report of Dr. Krisztina Rozgonyi (undated; submitted with Claimants' memorial on the merits dated 11 April 2013)
Rozgonyi Second Report	Second Expert Report of Dr. Krisztina Rozgonyi dated 7 November 2013 (submitted with Claimants' counter-memorial on jurisdiction dated 7 November 2013)
Rozgonyi Third Report	Third Expert Report of Dr. Krisztina Rozgonyi dated 17 December 2013 (submitted with Claimants' rejoinder on jurisdiction dated 17 December 2013)
Ruling on Arbitration Rule 41(5)	Decision on the Respondent's Objection under Arbitration Rule 41(5) dated 16 January 2013
Sláger Rádió or Sláger	Sláger Rádió Műsorszolgáltató Zrt.
Tr. [Day 1/2], [page]	Transcript of the hearing on jurisdiction held from 26 to 27 May 2014

I. INTRODUCTION AND THE PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hungarian People’s Republic for the Promotion and Reciprocal Protection of Investments dated 9 March 1987, which entered into force on 28 August 1987 (the “**BIT**” or “**Treaty**”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965, which entered into force on 14 October 1966 (the “**ICSID Convention**”).
2. The dispute relates to the alleged unlawful expropriation or nationalization without compensation of the Claimants’ investments in and related to Danubius Rádió Műsorzolgáltató Zrt. (“**Danubius Rádió**” or “**Danubius**”), a Hungarian company, and a former licensee of one of the two nationwide FM radio-broadcasting frequencies in Hungary.
3. The Claimants are Accession Mezzanine Capital L.P. (“**Mezzanine**”) and Danubius Kereskedőház Vagyonkezelő Zrt. (“**DHSV**”).
4. Mezzanine is a partnership organized under the laws of Bermuda with its principal place of business in Hamilton, Bermuda. DHSV is a company organized and existing under the laws of Hungary, allegedly majority owned by Mezzanine. Both companies are jointly referred to as “**Claimants**”.
5. The Respondent is Hungary and is hereinafter referred to as “**Hungary**” or “**Respondent**”.
6. The Claimants and the Respondent are hereinafter collectively referred to as the “**Parties**”. The Parties’ respective representatives and their addresses are listed above on page (i).
7. This Award rules on the Respondent’s Objections to the Jurisdiction of the Centre, by which the Respondent requests that the Tribunal render an award dismissing the Claimants’ claims in their entirety for lack of jurisdiction *ratione materiae* to adjudicate this case.

II. PROCEDURAL HISTORY

A. The Initiation of the Proceedings, Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5) and the Respondent's Notice of Jurisdictional Objections and Request for Bifurcation

8. On 28 October 2011, ICSID received a request for arbitration on behalf of Emmis International Holding B.V., Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft., Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. against Hungary.
9. Further to a communication from ICSID dated 9 December 2011, refusing the registration of the 28 October 2011 request for arbitration, on 27 December 2011, the Claimants in this case submitted an amended request for arbitration against Hungary (the “**Request for Arbitration**”).
10. On 18 January 2012, the Secretary-General of ICSID registered the Request for Arbitration in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration.
11. On 10 October 2012, the Arbitral Tribunal was constituted, composed of Professor Arthur W. Rovine, a national of the United States, President, appointed by agreement of the Parties; the Honorable Marc Lalonde, a national of Canada, appointed by the Claimants; and Professor Donald M. McRae, a national of Canada, appointed by the Respondent.
12. A detailed recount of the procedural history covering the filing and registration of the Request for Arbitration, the constitution of the original Arbitral Tribunal and its First Session, and the procedures leading to the decisions on the Respondent's Preliminary Objections pursuant to ICSID Arbitration Rule 41(5) is included in Section II of the Tribunal's Decision on the Respondent's Objection under Rule 41(5) dated 16 January 2013 (the “**Ruling on Arbitration Rule 41(5)**”).
13. In its Ruling on Arbitration Rule 41(5), the Tribunal decided that:
 - a. The Parties have agreed to arbitrate, pursuant to Article 8 of the Bilateral Investment Treaty between the United Kingdom and Hungary (BIT), only expropriation rights

and obligations as set forth in Article 6 of the BIT. The Tribunal has no jurisdiction over any other substantive obligation set forth in the BIT.

- b. The BIT between the United Kingdom and Hungary, as any treaty, is to be interpreted in accordance with international law.
 - c. The UK-Hungary BIT provides no definition or guidance for determinations with respect to expropriation. Rules on expropriation constitute a portion of the rules of customary and general principles of international law, as well as other sources of international law on expropriation. In the absence of definition and guidance as to expropriation in the UK-Hungary BIT, the Tribunal will rely on customary and general principles of international law, as well as contemporary sources of law on expropriation, in determining whether or not an expropriation has occurred and if so, the compensation to be awarded. The Tribunal has jurisdiction to decide international law questions to the extent relevant and applicable to the determination of expropriation questions, as well as compensation, if necessary.
 - d. The Tribunal has jurisdiction to define the scope, extent and content of the expropriation obligations the Parties agreed to arbitrate under the BIT between the United Kingdom and Hungary. Article 42(1) is not to be interpreted or applied as an independent source of obligation.
 - e. MFN provisions may be relevant in this case and may be utilized to the extent that they apply to expropriation.
14. On 8 August 2013, the Tribunal issued its Decision on the Respondent's Notice of Jurisdictional Objections and Request for Bifurcation (the "**Bifurcation Decision**").
15. By paragraph 39 of the Bifurcation Decision, the Tribunal decided to bifurcate the proceedings, between the jurisdictional and merits phase. It indicated that the analysis of the *Emmis International Holding B.V., et al. v. Hungary* (ICSID Case No. ARB/12/2) Decision on the Respondent's Application for Bifurcation dated 13 June 2013 was to be considered as persuasive authority for this case.¹
16. A detailed account of the procedural history covering the period from the Respondent's notification of jurisdictional objections and request for bifurcation is included in Section II of the Tribunal's Bifurcation Decision.
17. The Tribunal's Ruling on Arbitration Rule 41(5) and the Bifurcation Decision constitute an integral part of this Award, and are incorporated herewith as Annexes A and B.

¹ See *infra* §56, including a summary of the conclusion of the *Emmis* tribunal, as adopted by this Tribunal.

B. The Reconstitution of the Tribunal

18. On 4 March 2014, the Secretary of the Tribunal notified the Parties of the resignation of Professor Donald M. McRae from the Arbitral Tribunal and of the vacancy resulting thereof. In accordance with ICSID Arbitration Rules 10(2) and 11(2), the proceedings were suspended on that same day and the Respondent was invited to appoint an arbitrator to fill the vacancy.
19. On 14 March 2014, the Respondent appointed Professor Zachary Douglas QC, a national of Australia, as arbitrator in replacement of Professor Donald M. McRae.
20. Professor Douglas QC accepted his appointment on 20 March 2014. On the same date, the Tribunal was reconstituted and the proceedings resumed.
21. The Tribunal is therefore composed of Professor Arthur W. Rovine, President; the Honorable Marc Lalonde; and Professor Zachary Douglas QC.

C. The Proceedings on Jurisdiction

22. Following the schedule established by the Tribunal in its Bifurcation Decision, the Respondent filed its memorial on jurisdiction (“**Resp. Mem. Jur.**”) on 23 September 2013; the Claimants filed their counter-memorial on jurisdiction (“**Cl. C-Mem. Jur.**”) on 7 November 2013; the Respondent filed its reply on jurisdiction (“**Resp. Rep. Jur.**”) on 27 November 2013; and the Claimants filed their rejoinder on jurisdiction (“**Cl. Rej. Jur.**”) on 17 December 2013.
23. A pre-hearing organizational meeting was held with the Parties by telephone conference on 14 May 2014.
24. A hearing on jurisdiction took place in Washington, D.C. from 26 to 27 May 2014 (the “**Hearing**”). In addition to the Members of the Tribunal and the Secretary of the Tribunal, present at the Hearing were:

For the Claimants:

Mr. Eugene Gulland	Covington & Burling LLP
Mr. Miguel López Forastier	Covington & Burling LLP
Mr. Alexander Berengaut	Covington & Burling LLP
Mr. Daniel Matro	Covington & Burling LLP
Ms. Ruma Mazumdar (paralegal)	Covington & Burling LLP
Dr. Rausch János	Bán, S. Szabó & Partners
Mr. Franz Hörhager	Claimants' Representative

For the Respondent:

Ms. Jean E. Kalicki	Arnold & Porter LLP
Mr. Dimitri Evseev	Arnold & Porter LLP
Ms. Mallory Silberman	Arnold & Porter LLP
Mr. Peter Nikitin	Arnold & Porter LLP
Mr. Bart Wasiak	Arnold & Porter LLP
Mr. Kelby Ballena	Arnold & Porter LLP
Mr. János Katona	Kende Molnár-Biró Katona
Mr. György Molnár-Biró	Kende Molnár-Biró Katona

25. The Parties filed their statements on costs on 15 August 2014.
26. The proceeding was closed on 17 April 2015.

III. FACTUAL BACKGROUND

27. In the early 1990s, after the fall of the Soviet Union, Hungary began transitioning to a market-oriented economy by opening certain sectors, including telecommunications and broadcast media, to private investors.²
28. On 1 January 1996, Act I of 1996 on Radio and Television Broadcasting (the “**Media Law**”) entered into effect.³ The Media Law permitted and regulated private broadcasting licences for otherwise State-owned radio frequencies.⁴
29. The Media Law created the National Radio and Television Broadcasting Board (the “**ORTT**”). In accordance with Section 32.1 of the Media Law, the ORTT was “*an independent legal entity, under the supervision of Parliament*”. It was composed of at least five members, elected by the political parties represented in Parliament, and chaired by an appointee nominated jointly by the President and the Prime Minister of Hungary.⁵ Its members could not “*be instructed within the sphere of their official capacity*”.⁶
30. The ORTT’s functions included: (i) conducting and evaluating open competitive tender processes for television and radio broadcasting rights; (ii) concluding the relevant broadcasting agreements; and, (iii) overseeing compliance with the Media Law and the resulting broadcasting agreements.⁷
31. In this context, Section 130(1) of the Media Law mandated that the ORTT issue, within three months of its entry into force, a competitive tender for broadcasting rights over two particular national radio frequencies: one for broadcasting rights held by a State-owned broadcaster under the denomination of “Danubius Rádió”; and a second one, for a new commercial national frequency to be allocated to a commercial broadcaster.

² United Nations Industrial Development Organization, Recent Experiences with Alternative Forms of Privatization, 25 March 1996 (C-47), pp. 30-31.

³ Act I of 1996 on Radio and Television Broadcasting, 1 January 1996 (“**Media Law**”) (C-46).

⁴ See Constitutional Court Decision No. 71/2009, 14 July 2009 (R-54) (C-102), p. 5.

⁵ Media Law (C-46), Section 33(1)-33(4).

⁶ *Id.*, (C-46), Section 31(2).

⁷ *Id.*, (C-46), Section 41(1) (a), (b) and (i), and 90.

32. On 30 August 1996, pursuant to Section 91 of the Media Law, the ORTT adopted the General Terms of Tender (“**GTT**”).⁸ The GTT governed the terms of tender for commercial radio broadcasting, including: (i) the evaluation and comparison criteria; (ii) the content and publication of calls for tenders; and (iii) the conclusion and execution of broadcasting agreements between the ORTT and the winning bidders.⁹
33. With regard to the tender evaluation criteria, Section 65.3.1 of the GTT established that an incumbent bidder “*shall be preferred [...] if it operates and broadcasts in accordance with its studio license and the Media Act*”. Conversely, Section 65.3.2 of the GTT provided a corollary rule pursuant to which the incumbent bidder “*shall be disadvantaged*” by the ORTT, if it “*does not operate in accordance with its studio license and the Media Act*”.
34. Against this background and pursuant to Section 130 of the Media Law,¹⁰ in June 1997 Hungary conducted a call for tender (the “**1997 CFT**”) for the broadcasting rights of two national FM radio frequencies.¹¹
35. Országos Kereskedelmi Rádió Rt (“**OKR**”), a consortium of foreign and Hungarian investors led by the Daily Mail Group Radio (U.K.), won the bid for the broadcasting rights for the existing radio frequency. Accordingly, the ORTT and the OKR concluded a Broadcasting Agreement (the “**Broadcasting Agreement**”) on 18 November 1997.¹² The broadcasting rights over the second frequency were awarded to Sláger Rádió Műsorszolgáltató Zrt (“**Sláger**”).¹³
36. In 2003, Advent and Mezzanine each invested in OKR, directly and through DSHV, the second Claimant in this case. In 2004, OKR changed its name to Danubius Rádió Műsorszolgáltató Részvénytársaság (“Danubius Rádió” as defined in Part I above). In

⁸ General Terms of Tender, 30 August 1996 (“**GTT**”) (C-48).

⁹ GTT (C-48), §74.

¹⁰ *See supra*, §31.

¹¹ 1997 Call for Tender, 10 June 1997 (C-50), §1.1.

¹² Radio Broadcasting Contract between the National Radio and Television Board and Országos Kereskedelmi Rádió Részvénytársaság, 18 November 1997 (“**Broadcasting Agreement**”) (C-51). In 2000, GWR Radio Hungary Ltd (UK) acquired OKR and its broadcasting rights.

¹³ The shareholders of Sláger Radio instituted separate arbitration proceedings against Hungary (*see Emmis International Holding B.V., Emmis Radio Operating B.V. and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary*, ICSID Case No. ARB/12/2. *See also infra*, Section IV.C(3)).

2008, Advent sold its shares in Danubius Rádió for a nominal price. DSHV and Mezzanine remained as investors in Danubius Rádió.

37. Clause 2(3) of the Broadcasting Agreement specified that the agreement was valid for an initial term of seven years, ending on 18 November 2004. The Broadcasting Agreement further stated that its “*renewal [...] shall be governed by Section 107 of the Media Law*”.¹⁴
38. Section 107(1) of the Media Law provides that broadcasting rights for radio shall be valid for a maximum of seven years and “*may be renewed once upon expiry at the broadcaster’s request, without inviting a tender, for an additional five years*”. On this basis, the ORTT renewed the Broadcasting Agreement for a period of five years, ending on 18 November 2009.¹⁵
39. In 2008, the Hungarian Parliament attempted to amend Section 107 of the Media Law, to permit the renewal, without a tender, of the Danubius and Sláger broadcasting licences, which were set to expire in 2009 (the “**Amending Act**”).¹⁶ The Amending Act was declared unconstitutional by the Constitutional Court of Hungary and the bill was not enacted into law.¹⁷ The Court also specified that the expiring rights arising out of broadcasting agreements could be renewed “*on one occasion*”.¹⁸
40. On 4 June 2009, the ORTT published a draft call for tender (“**CFT**”) for the Danubius and Sláger expiring licences. According to the Media Law, the draft was subject to comments from any interested parties.¹⁹ Danubius submitted a series of observations. On 14 July 2009, the ORTT issued its formal response to the draft questions from Danubius, and clarified, *inter alia*, that the [ORTT] “*did not wish to favour either old or new actors in the course of evaluating the bids*” and that the maximum score available for broadcasting

¹⁴ Broadcasting Agreement (C-51), §2.3 (providing that “*the Broadcasting Right shall commence on November 18, 1997 and shall be valid for a period of seven (7) years subject to the terms and conditions of this Agreement. The renewal of the Broadcasting Right shall be governed by Section 107 of the Media Law*”). Clause 3.2 of the Broadcasting Agreement further provided that “*the provisions of the Media Act relating to the Broadcasting Right and exercise thereof [...] shall be incorporated into th[e] Agreement by reference*”.

¹⁵ See Amendment to the Broadcasting Agreement, 17 December 2002 (C-52).

¹⁶ Act T/6829 on the amendment of Act I of 1996 on Radio and Television Broadcasting, November 2008 (C-91), Art. 2.

¹⁷ See Constitutional Court Decision No. 71/2009, 14 July 2009 (R-54) (C-102).

¹⁸ Constitutional Court Decision No. 71/2009, 14 July 2009 (R-54) (C-102), p. 5.

¹⁹ Media Law (C-46), Sections 93 and 95(1).

experience was 10 points, and that the ORTT “endeavoured to achieve maximum objectiveness [...] taking into consideration in particular the decision of the Constitutional Court [...]”,²⁰ regarding the renewal of expiring rights described in §39 *supra*.

41. On 29 July 2009, pursuant to Section 41(1) of the Media Law, the ORTT published a second call for tender for the national FM-radio broadcasting frequencies held by Danubius Rádió and Sláger Rádió, which were due to expire in November 2009.²¹ Danubius submitted bids for the broadcasting rights over both the frequency it originally held and the frequency awarded to Sláger in 1997. In the event, Danubius and Sláger lost to other contenders.
42. From September 2009 onwards, the Hungarian Press reported on secret backdoor negotiations between the outgoing MSZP political party and the incoming Fidesz party to split the national radio frequencies and to ensure that the frequencies would be awarded to investors of their choosing, closely linked to each of the political parties.²²
43. In line with these rumours, Danubius received overtures from Fidesz warning that it would have to reach accommodations with Fidesz-named investors or lose the tender. According to the Claimants, Sláger received similar overtures from MSZP. Danubius entertained negotiations with the potential strategic investor, which were ultimately unfruitful.²³ Advenio and the FM1 Consortium, the alleged politically-favored bidders (which ultimately took over the Sláger frequency) were created shortly before the call for tenders.

²⁰ Letter from László Majtényi to Ádám Földes, 29 July 2009, Attachment 2, §6, p. 12, and Attachment 1, §4 pp. 4-5 (C-109). It is disputed between the Parties whether those comments related to the potential priority to be given to existing broadcasters.

²¹ Call For Tender, 29 July 2009 (“**2009 CFT**”) (C-108), pp. 25, 27.

²² *Danubius and Sláger Could Disappear*, Népszabadság, 30 September 2009 (C-16); *Radio: the excluded company wants to sue*, Világgazdaság, 9 October 2009 (C-17); *Danubius and Sláger Under Seige*, Népszabadság, 17 October 2009 (C-18); Peter Murphy, *Politics Killed the Radio Stars*, TOL, 10 December 2009 (C-19).

²³ See Email from László Oláh, 15 July 2009, and attached memorandum dated 14 July 2009 (providing details of the deal proposed to Danubius Rádió shareholders) (C-103); Email from László Oláh and attachment, 24 July 2009 (C-105); Email from László Oláh, 27 July 2009 (C-106); see also Cl. C-Mem. Jur. §71.

44. On 28 October 2009, the ORTT communicated the results of the tender process and awarded the frequency previously held by Danubius to Advenio Zrt. (“**Advenio**”), a newly constituted company.²⁴
45. The ORTT Chairman and one of the ORTT Board Members resigned shortly after the winning bidders were announced and condemned the alleged irregularities affecting the tender process.²⁵ They also issued dissenting opinions on the Board’s decision to admit Advenio’s bid in disregard of the recommendations of the ORTT’s professional staff.²⁶
46. On 4 November 2009, the ORTT entered into a broadcasting agreement with Advenio.²⁷
47. The results of the tender process sparked the interest and criticism of the international community. On 18 November 2009 the ambassadors of nine nations in Hungary issued a joint statement noting “*with great concern*” that there were “*new instances of non-transparent behaviour affecting investors in such areas as public utilities, broadcasting, and elements of the nation’s infrastructure*”.²⁸ In December 2009, the U.S. House of Representatives passed a resolution in which it “*condemn[ed] the recent action by [the ORTT] that awarded the national community radio licenses*” and encouraged Hungary to “*respect the rule of law and treat investors fairly*” and “*to maintain its commitment to a free and independent press*”.²⁹

²⁴ ORTT Communication Re Tender Winner for Broadcasting Rights No. 1, 28 October 2009 (R-55), p. 2.

²⁵ Thomas Escritt, *Hungary broadcast regulator quits over radio bids*, Financial Times, 6 November 2009 (C-10). See also, *ORTT Chairman Claims the Radio Tender is Unclean*, Origo, 12 October 2009 (C-132).

²⁶ On 5 October 2009, the Office of the ORTT, composed of professional staff in charge of reviewing all the relevant bids, recommended to the ORTT (the Board), that the Advenio bid be rejected and concluded that “*Advenio Zrt’s Bid does not comply with the provisions of the law as in the event of its victory, Advenio would be in breach of the provisions of the Media Act (chapter VIII.) § 123 paragraph (1) and (2), moreover the ownership structure of Advenio Zrt is already in breach of GTT paragraph 25 and 25.5.*”). The recommendations of the ORTT’s office were not binding. See ORTT Office Proposal No. 1046/2009, 5 October 2009 (C-124), pp. 12-14). See Dissenting Opinion of Dr. László Majtényi, Chairman of the ORTT regarding ORTT Resolutions No. 1903, 1905 and 1911/2009 (X.7), 12 October 2009 (C-131); Dissenting Opinion of Dr. János Timár, Board Member of the ORTT regarding ORTT Resolution No. 1903/2009, 8 October 2009 (C-130).

²⁷ Agreement for Broadcasting Services between the ORTT and Advenio Zrt., 4 November 2009 (C-142).

²⁸ See Joint Statement on Transparency, Swiss Federal Department of Foreign Affairs, 18 November 2009 (C-26); (noting that it was issued with the support of the Embassies of Belgium, France, Germany, Japan, Norway, Switzerland, the Netherlands, the United Kingdom and the United States), see also *Hungary’s Investment Climate Worrying Diplomats*, Reuters, 19 November 2009 (C-27).

²⁹ H. Res. 915 (111th Cong. 2009), 8 December 2009 (C-147), p. 3.

48. Danubius challenged the results of the 2009 CFT and the ORTT's determination before the Hungarian courts, seeking: (i) interim relief in order to prevent the ORTT from signing a broadcasting agreement with Advenio; and (ii) requesting that the ORTT be ordered to sign the Broadcasting Agreement with Danubius. Danubius's interim relief application was denied.³⁰
49. On 5 January 2010, the Metropolitan Court declared that the ORTT acted unlawfully when it failed to disqualify Advenio's bid as formally invalid and executed the agreement with Advenio. The Court found that Advenio's bid violated the cross ownership and controlling interests restrictions of the Media Law. It further rejected Danubius request to declare the restoration of its broadcasting rights.³¹ This judgment was upheld by the Metropolitan Court of Appeals on 14 July 2010 and was subsequently confirmed by the Supreme Court of Hungary.³²
50. In April 2010, following elections in Hungary, a new coalition formed by the centre-right Fidesz party and the Christian Democratic People's Party KDNP took control from the MSZP Socialist Party. According to the Claimants, the political climate leading up to the elections affected the results of the tender process.³³
51. In July 2010, the Hungarian Parliament amended the Media Law, including, *inter alia*, Section 112(4)(a). This Section, in its original form, provided for the termination of an unlawful broadcasting agreement in all situations irrespective of how the unlawful situation came into existence. With the new amendment, the ORTT was required to terminate the broadcasting agreement only if the unlawful situation was caused exclusively by the

³⁰ See Metropolitan Court Decision No. 7.G.41.820/2009/6-II, 11 November 2009 (R-77), p. 1.

³¹ Metropolitan Court, Judgment No. 7.G.41.820/2009/26 of the Metropolitan Court of Budapest, 5 January 2010, (Danubius) (C-151), pp. 16, 25-6.

³² Metropolitan Court of Appeals, Judgment No. 14.Gf.40.119/2010/15, 14 July 2010, (C-159); *see also* Supreme Court of the Republic of Hungary, Judgment in Pfv.IV.21.908/201/6, 23 February 2011, (C-167) (*see* p. 10 noting that the "legal consequence" of a declaration of unlawfulness in a tender is the termination of the disputed contract pursuant to Section 112(4)(a), which it is to be requested in an administrative procedure. Section 112(4) was subsequently modified by Parliament (*see infra* §51)).

³³ *See supra* §§42-44 and *infra* 51, 54-55.

broadcaster but not where the ORTT's error or omission played any part in the unlawful situation.³⁴

52. On 28 October 2011, the Requesting Parties, as specified *supra* §8, including Claimants, submitted a request for arbitration before ICSID in respect of the alleged expropriation of the Claimants' investments in and related to Danubius Rádió.³⁵
53. The Claimants contend that the expropriation resulted from the Respondent's 2009 tender procedure when it replaced Danubius Rádió as the licensee. According to the Claimants, the Respondent's measures infringed the Media Law and the GTT by, *inter alia*: (i) not according the incumbent licensees the preferences in the tender provided by law; (ii) providing for a shorter period of time for the submission of bids than provided by law; and (iii) awarding the broadcasting rights to bidders with prohibited conflict of interest and unfeasible business plans with close ties with the two leading political parties in Hungary, which impacted the ORTT's final decision to award the licences to two competitors.
54. In December 2011, the Hungarian Parliament enacted Act CLXXXV of 2010 on Media Services and Mass Media (the "**New Media Law**").³⁶ Section 207(7) of the new law replaced Section 112(4)(a) with a measure that expressly *prohibited* the new Media Council from terminating an unlawful broadcasting agreement if the ORTT had any responsibility for the unlawful situation.
55. The New Media Law also drew the attention of international organizations. The European Commission,³⁷ the Organization for Security and Co-operation in Europe (OSCE),³⁸ and the Council of Europe urged Hungary to undertake a wholesale review of its legislation to,

³⁴ Act LXXXII (2010) (C-150), Section 24(1).

³⁵ The Claimants to this arbitration submitted an amended Request for Arbitration on 27 December 2011. (*supra* §9).

³⁶ Act CLXXXV of 2010 on Media Services and on Mass Media, 31 December 2011 (C-173).

³⁷ Letter from Neelie Kroes, Vice-President of the European Commission, to Tibor Navracsics, Deputy Prime Minister, 21 January 2011 (C-31) (noting that "*the Commission services have serious doubts as to the compatibility of the Hungarian legislation with Union law*").

³⁸ Organization for Security and Cooperation in Europe, Representative on Freedom of the Media, *Hungarian media legislation severely contradicts international standards of media freedom*, says OSCE media freedom representative, 7 September 2010 (C-34).

inter alia, reinstate legislation promoting pluralistic and independent media, and the strengthening of guarantees of immunity from political influence.³⁹

³⁹ Council of Europe – Commissioner for Human Rights, *Opinion of the Commissioner for Human Rights on Hungary's media legislation in light of Council of Europe standards on freedom of the media*, 25 February 2011 (C-33).

IV. THE TRIBUNAL'S ANALYSIS

A. THE TRIBUNAL'S DECISION ON BIFURCATION AND THE SCOPE OF THIS PHASE OF THE ARBITRATION

56. It is important at the outset to recall the scope of the present phase of the bifurcated proceedings. By its Bifurcation Decision, the Tribunal referred to the decision on bifurcation in *Emmis International Holding B.V. et al. v. Hungary* (the “**Emmis Decision**”) “*as persuasive authority here*” in view of the fact that the “*facts and jurisdictional issues in the instant case overlap very considerably with those of [Emmis]*”. The Tribunal then summarised five key points from the *Emmis Decision* directly relevant to the present case:

- a. The Tribunal is required to identify whether and which investments of Claimants may properly give rise to an expropriation claim, the only substantive cause of action within the jurisdiction of the Tribunal.
- b. The existence and nature of any such rights must be determined by reference to Hungarian and international law.
- c. The relevant time for assessment of Claimants’ rights and investments that may properly give rise to an expropriation claim is the conduct of the 2009 Tender just prior to 18 November 2009.
- d. The nature and incidents of the rights and investments held by Claimants are distinct from the question as to whether such rights were expropriated by Respondent.
- e. If Claimants are successful, it is within the Tribunal’s discretion to compensate Claimants for increased costs occasioned by Respondent’s objection to jurisdiction and consequent delay.

57. The Tribunal concluded that:

The jurisdictional issues Respondent raises are significant and deserve a focused examination in a separate phase that could either make a merits phase unnecessary or sharpen many factual issues should the Tribunal reach the merits.⁴⁰

58. The jurisdictional issues raised by the Respondent and thus capable of determination in this phase of the arbitration were set out in the Respondent’s Notice of Jurisdictional

⁴⁰ Bifurcation Decision, §39.2.

Objections and Request for Bifurcation dated 28 June 2013 (“**Notice of JO**”). Those objections are twofold:

(a) “*The absence of a qualifying foreign investment by Claimants*”; and,

(b) “*The dispute does not ‘aris[e] directly out of an investment’*”.

59. Each of these objections breaks down into a series of arguments, which the Tribunal will now summarise from the Respondent’s aforementioned pleading. The Tribunal will also designate a number to each objection and argument for convenience.

“The absence of a qualifying foreign investment by Claimants” [A]

- Accession (the first Claimant) provided financing to Advent (an unrelated private equity fund) for a leveraged buyout of Danubius and DSHV in 2003. A private contractual arrangement to finance an acquisition does not qualify as an investment under the ICSID Convention (relying principally on *Burimi v. Albania*⁴¹).⁴² [A1]
- Accession did not expend its own money in Danubius’s Hungarian radio business. A qualified investment under Article 8.1 of the BIT and Article 25 of the ICSID Convention requires an “active contribution” (relying principally on *Standard Chartered Bank v. Tanzania*⁴³).⁴⁴ [A2]
- DSHV does not meet the definition of a UK investor in the BIT because it is a Hungarian company (majority owned by a Luxembourg company) and could not itself have been the source of a foreign investment in Hungary.⁴⁵ [A3]
- Claimants’ equity shares in Danubius were worthless at the time of acquisition (Accession acquired them from Advent for 1 euro) and as such cannot be recognized as an investment.⁴⁶ [A4]

⁴¹ *Burimi SRL and Eagle Games S.H.A. v. Albania*, ICSID Case No. ARB/11/18, Award, 29 May 2013 (RA-27).

⁴² Notice of JO, §4.

⁴³ *Standard Chartered Bank v. Tanzania*, ICSID Case No. ARB/10/12, Award, 2 November 2012 (RA-33).

⁴⁴ Notice of JO, §4.

⁴⁵ Notice of JO, §4.

“The dispute does not ‘aris[e] directly out of an investment’” [B]

- Claimants did not have a right to a new licence under Hungarian law when their existing licence expired on 18 November 2009 and hence there was no cognisable investment in respect of a new licence such that the dispute does not arise directly out of an investment.⁴⁷ [B1]
- *“As there is no allegation of interference with Claimants’ shareholding of Danubius, those shares cannot, by themselves, be considered the relevant investment for purposes [sic] of this dispute”.*⁴⁸ [B2]

60. It is incumbent upon the Tribunal to resolve these jurisdictional arguments raised by the Respondent. The Tribunal must also assess the impact of its decisions on these particular arguments upon its jurisdiction over the dispute that has been submitted to it. In other words, the Tribunal must determine whether or not its jurisdiction is vitiated completely by its decisions on these jurisdictional arguments or in part only.

61. On the hypothesis that the Claimants are able to identify qualifying investments during this phase of the arbitration, it is clear from the Tribunal’s Decision on Bifurcation that the Tribunal cannot, during this phase of the arbitration, make any finding as to whether or not any such investments have actually been expropriated by the Respondent. Such a finding could not be characterised as “jurisdictional” and it was clearly recognised in the Tribunal’s Decision on Bifurcation that *“[t]he nature and incidents of the rights and investments held by the Claimants are distinct from the question as to whether such rights were expropriated by the Respondent”*. The Claimants’ two distinct claims for expropriation were summarised as follows in their Rejoinder on Jurisdiction:

First, Claimants contend that Hungary indirectly expropriated the full value of the shares of Danubius and destroyed its ability to repay loans from Claimants.

Second, Claimants contend that Hungary also expropriated the bundle of proprietary and contractual rights that Danubius enjoyed by virtue of the

⁴⁶ Notice of JO, §5.

⁴⁷ Notice of JO, §§6-13.

⁴⁸ Notice of JO, §13.

Contract Framework that Hungary created in the 1990s to encourage and protect investors in the newly-privatized broadcast industry.⁴⁹

62. As the Parties have placed a greater emphasis upon the Respondent’s objection [B] in their written pleadings and at the hearing (indeed most of the arguments for objection [A] were not dealt with at all at the hearing), the Tribunal will deal with objection [B] first. Before doing so, however, the Tribunal must address an additional argument that was raised by the Claimants at the hearing.

B. THE CLAIMANTS’ “CHOSE-IN-ACTION” ARGUMENT

63. At the hearing on jurisdiction, the Claimants introduced what appeared to be a new argument to the effect that the object of its expropriation claim “*is the right to enter into a new Broadcasting Agreement as a lawful winner, that [...] vested on October 28th, 2009*”.⁵⁰ The Respondent objected to this argument being raised for the first time at the hearing.⁵¹
64. At the hearing, the Tribunal requested clarifications from the Claimants as to the origin of their argument concerning the expropriation of a “chose-in-action”:

ARBITRATOR DOUGLAS: I just have a follow-up question relating to whether or not this is part of an existing claim or a new claim. In the summary of the two claims that you make in the first page of your Rejoinder, the first claim is that Hungary indirectly expropriated the full value of the Shares of Danubius. That’s the first. The second is that Hungary also expropriated the bundle of proprietary and contractual rights that Danubius enjoyed by virtue of the Contract Framework. So, which one of those does the chose in action—

MR. LÓPEZ FORASTIER: Neither one of those. It is not summarized there.

ARBITRATOR DOUGLAS: So, it’s a new claim?

MR. LÓPEZ FORASTIER: No, it is not a new claim. What I’m saying is that all the elements of that claim are in the papers. Now, it is the first time that we are referring to that claim as a chose in action just by reason of the Emmis Tribunal award making that reference, but you can find references, many references in there to the removal of the right, the enactment of the retroactive legislation, the inability of Claimants to enforce those rights in the courts of Hungary in addition to the right to obtain that license.

⁴⁹ Cl. Rej. Jur., §1.

⁵⁰ Tr. Day 2, p. 526 (López Forastier). This was the final formulation of the “chose-in-action” at the Hearing.

⁵¹ Tr. Day 2, pp. 293-294 (Kalicki).

ARBITRATOR DOUGLAS: So, on your case, there were three possible things that might have been expropriated. Firstly the Shares and the loans; two, a right to the license under the Contractual Framework; and, three, the chose in action created by the First Instance Decision? Is that a fair summary?

MR. LÓPEZ FORASTIER: Yes, essentially, yes.⁵²

65. It is clear from a review of the Claimants' written pleadings, and this exchange at the hearing, that the Claimants' argument in respect of the expropriation of a chose-in-action is a new claim advanced for the first time at the hearing on jurisdiction. In their written pleadings, the Claimants had asserted two distinct expropriation claims on the basis of two distinct objects (i.e. different components of their alleged investment) which they say have been expropriated. At the hearing, the Claimants introduced a third distinct object—a chose-in-action—and thus asserted a new expropriation claim.
66. Apart from the obvious procedural unfairness that would be caused to the Respondent were the Tribunal to entertain this new argument, the Tribunal simply does not have the materials before it to assess the Claimants' theory on their alleged chose-in-action. In particular, this was not an issue addressed by the Hungarian law experts in their otherwise comprehensive reports submitted to the Tribunal. Discerning the necessary elements for the existence of a chose-in-action is likely to be a complex matter in Hungarian law—assuming that the concept is even recognised under that law—just as it is in the national legal systems with which the Tribunal is more familiar. The Tribunal cannot take a stab in the dark on a complex question of national law in respect of which it has had no assistance from the Parties' legal experts.
67. The Tribunal thus concludes that the Claimants' argument on chose-in-action was raised too late to be considered in this Award.
68. The Tribunal's analysis of the Claimants' arguments in respect of their alleged rights under the "Contractual Framework" suggests that, in any event, the Claimants' chose-in-action argument would have faced insurmountable difficulties. This is because it is predicated upon the argument that Danubius either had a right or would have obtained a right as against the ORTT to enter into a new broadcasting agreement following the 2009 Tender

⁵² Tr. Day 2, pp. 415-6 (Douglas/López Forastier).

by virtue of its pursuit of litigation in the Hungarian courts. The Tribunal has concluded in section C.5 below, however, that the Hungarian courts had no power to declare a bidder in a tender conducted by the ORTT as the winner and therefore no power to make a declaration to the effect that the ORTT must enter into a new broadcasting agreement with a particular bidder. In the event that a tender procedure is declared invalid by the Hungarian courts, the ORTT could only be compelled to organise a new tender.

C. THE RESPONDENT'S OBJECTION [B1]

(1) Introduction

69. The Respondent's argument [B1] has been previously summarised by the Tribunal as follows:

Claimants did not have a right to a new licence under Hungarian law when their existing licence expired on 18 November 2009, there was therefore no cognisable investment in respect of a new licence and hence the dispute does not arise directly out of an investment.⁵³

70. The Claimants assert that they did have certain rights in connection with the tender for the broadcasting licence in 2009 and that these rights constitute a protected investment capable of expropriation. There are four steps in the Claimants' reasoning.

71. First, the Broadcasting Agreement between the ORTT and Danubius, dated 18 November 1997, incorporated the regulatory framework that governed Danubius's broadcasting rights, including the relevant provisions of the Media Law, the GTT and the 1997 Call for Tender.⁵⁴ The Claimants' expert on Hungarian law, Dr Rozgonyi, referred to this as the "Contract Framework",⁵⁵ and this term was adopted by the Claimants as well. Dr. Rozgonyi did not suggest that this was a "*formal concept under Hungarian law*"⁵⁶ but used this term for convenience to describe a complex arrangement that will be explored in detail below.

⁵³ Notice of JO, §§6-13.

⁵⁴ Cl. C-Mem. Jur., §160.

⁵⁵ Rozgonyi First Report, §4.4(a).

⁵⁶ Rozgonyi First Report, §4.4(a); Rozgonyi Second Report, §4(c).

72. Second, this “Contract Framework” imposed several obligations upon the ORTT in relation to the conduct of the tender for a broadcasting licence in 2009, including:

(i) a duty to conduct tenders in good faith, according to the law, and on a fair and transparent basis; (ii) an obligation to publish a call for tender twelve months prior to the expiration of the current license; (iii) a requirement to disqualify bidders that either violated cross-ownership restrictions or presented unsupported business plans; and (iv) a requirement to provide a preference to an incumbent bidder that had been operating in compliance with its broadcasting agreement.⁵⁷

73. Third, these obligations on the part of the ORTT correspond to rights on the part of Danubius and “*claims to ... performance under contract having a financial value*” for the purposes of Article 1(1)(a)(iii) of the BIT.⁵⁸

74. Fourth, those “*claims to ... performance*” are capable of being expropriated when there is an “*effective repudiation of the right, unredressed by any remedies available to the Claimant, which has the effect of preventing its exercise entirely or to a substantial extent*”.⁵⁹ This argument is not directed to establishing that an expropriation actually did take place—a question clearly reserved for the merits—but rather whether the Claimants’ had a right or interest that in law is capable of being expropriated.

(2) Applicable laws

75. The question of whether the Claimants had any right to broadcast over a radio frequency in Hungary at the critical point in 2009 can only be answered by reference to Hungarian law. Hence the first and second steps of the Claimants’ reasoning as summarised above must be assessed in accordance with Hungarian law. Upon the ascertainment of the existence of such rights under Hungarian law as well as their nature and scope, it then falls to consider whether they are capable of constituting a protected investment for the purposes of Article 1 of the BIT and Article 25 of the ICSID Convention. This question must be resolved by reference to those treaty provisions as interpreted against the background of general

⁵⁷ Cl. C-Mem. Jur., §161.

⁵⁸ Cl. C-Mem. Jur., §162.

⁵⁹ Cl. C-Mem. Jur., §162, quoting from *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004 (CA-33), §§175-176.

international law. This corresponds to the third step in the Claimants' reasoning. Finally, the question of whether a protected investment with the characteristics previously ascertained is capable of being expropriated must be answered by reference to Article 6 of the BIT and the general international law on expropriation.

(3) The significance of the award in *Emmis et al. v. Hungary*

76. The award in *Emmis et al. v. Hungary* (the “**Emmis Award**”) was rendered after the exchange of written pleadings in this arbitration but before the hearing on jurisdictional issues. The *Emmis* Award covers many of the same issues relevant to the Tribunal's determination of the Respondent's objection [B1]. Nonetheless, the *Emmis et al. v. Hungary* case involved claimants who are unrelated to the Claimants in this case and who, for the substantial part of the proceedings, were represented by different counsel as well. The record of the *Emmis* proceedings on the critical questions of Hungarian law was evidently different in material respects if only because the claimants in *Emmis* engaged a different expert on Hungarian law. The Claimants in this case are entitled to have this Tribunal approach these disputed issues independently and, for this reason, the Tribunal has determined the issues of Hungarian law arising from Respondent's objection [B1] without reference to the *Emmis* Award.

(4) The Claimants' first argument on the incorporation of provisions of Hungarian law relating to the tender procedure into the Broadcasting Agreement

77. The first step in the Claimants' reasoning is that the 1997 Broadcasting Agreement incorporated various provisions of Hungarian law by reference into the contractual relationship between the ORTT and Danubius and/or that various provisions of Hungarian law were incorporated in the Broadcasting Agreement by their own terms.
78. The Claimants say this incorporation is achieved by virtue of Section 3.2 of the Broadcasting Agreement and/or Section 2 of the GTT.⁶⁰

⁶⁰ Cl. C-Mem. Jur., §§171-172; Rozgonyi Second Report, §4.1; Rozgonyi Third Report, §4(a).

79. The Tribunal is bound, in its interpretation of provisions of the Broadcasting Agreement, to follow the rules of interpretation set out in Section 207(1) of the Civil Code, which reads:

In the event of a dispute, the parties shall, in light of the presumed intent of the person issuing the statement and the circumstances of the case, construe [contractual declarations] in accordance with the general accepted meaning of the words.

(i) *Section 3.2 of the Broadcasting Agreement*

80. Section 3.2 of the Broadcasting Agreement reads:

The Broadcaster undertakes to comply with the provisions of the Media Law. The Parties agree that the provisions of the Media Law relating to the Broadcasting Right and the exercise thereof, as in effect at the date of this Agreement, shall be incorporated into this Agreement by reference. By concluding this Agreement, the Broadcaster expressly undertakes the obligation to exercise the Broadcasting Right throughout the entire period thereof in accordance with the provisions of the Media Law, forming part of the Agreement in the above manner, whether or not the individual provisions are repeated herein.

81. The Tribunal accepts that the plain meaning of Section 3.2 of the Broadcasting Agreement confirms that provisions of the Media Law are incorporated by reference into the Broadcasting Agreement. The critical question, however, is which provisions of the Media Law are thereby incorporated.
82. Section 3.2 of the Broadcasting Agreement is contained in Chapter III of that Agreement entitled: “The Contents of the Broadcasting Right”. Section 3.1, the first section of that Chapter, reads:

The Broadcaster is aware of the fact that under the Media Law, the General Terms of Tender, the Call for Tender, the Bid and this Agreement, the Broadcasting Right imposes obligations on the Broadcaster.

83. Each subsequent section of Chapter III, including Section 3.2, then begins with the phrase: “*The Broadcaster undertakes [...]*”
84. The plain meaning of the words in Section 3.2, as confirmed by the context in which that provision appears in Chapter III of the Broadcasting Agreement, is that Section 3.2

incorporates provisions of the Media Law relevant to the Broadcaster's exercise of the Broadcasting Right. The purpose of Section 3.2 is not to incorporate by reference obligations of the regulator, the ORTT, as set out in the Media Law, in relation to the exercise of the Broadcasting Right. Moreover, as each provision in Chapter III of the Broadcasting Agreement, including Section 3.2, is focused exclusively upon the Broadcaster's exercise of the Broadcasting Right, it is clear that Section 3.2 does not operate to incorporate provisions of the Media Law dealing with any other broadcasting right or broadcasting rights in general. Sections 2.2 and 2.3 of the Broadcasting Agreement define a specific broadcasting right for the national broadcasting of programmes specified in Annex 4 to the Broadcasting Agreement on the basis of the key data of the broadcasting services set out in Annex 5. The Broadcasting Right, defined in this way, commenced on 18 November 1997 and was valid for an initial period of seven years pursuant to Section 2.3.

85. For the sake of completeness, the Claimants' expert, Dr Rozgonyi, also appears to rely upon Section 1(a) of the Media Law as an alternative basis for the incorporation of the provisions of the Media Law into the Broadcasting Agreement⁶¹ (although it is not entirely clear whether this provision is cited merely by way of background for her analysis of Section 3.2 of the Broadcasting Agreement or as an independent basis for incorporation). Section 1(a) of the Media Law reads:

This Act shall apply to programming services if the broadcaster has its registered office (residence) in the territory of the Republic of Hungary, and carries out the respective editorial decisions on programming in the territory of the Republic of Hungary.

86. This provision defines the scope of application of the Media Act. It cannot possibly be interpreted as having the effect of incorporating all the provisions of the Media Act into broadcasting agreements with the effect that a broadcaster has a contractual right to enforce any obligation of the media regulator by means of a claim for breach of contract. If this is Dr Rozgonyi's position, then she has misunderstood the distinction between the applicable law and the obligations arising out of a contractual instrument.

⁶¹ Rozgonyi Second Report, §4.2(a).

87. Dr Rozgonyi has also placed emphasis on the fact that Section 2.3 of the Broadcasting Agreement refers to Section 107 of the Media Law that makes reference, *inter alia*, to a “tender”. According to the Claimants’ expert, “*any ambiguity as to whether Section 3.2 incorporates tender–related provisions of the Media Law is removed by Section 2.3 of the broadcasting agreement*”.⁶²

88. Section 2.3 of the Broadcasting Agreement reads:

The Broadcasting Right shall commence on November 18, 1997 and shall be valid for a period of seven (7) years subject to the terms and conditions of this Agreement. The renewal of the Broadcasting Right shall be governed by Section 107 of the Media Law.

89. Section 107 of the Media Law reads, in its entirety:

Title 7 Term of Rights

Section 107.

(1) Broadcasting rights for television shall be valid for maximum ten years and for radio for maximum seven years, and may be renewed once upon expiry at the broadcaster’s request, without inviting a tender, for an additional five years. The request for renewal shall be notified to the Board fourteen months prior to expiry.

(2) In the absence of the reporting notification referred to in Subsection (1) or if renewal cannot be awarded, the board shall publish an invitation to tender twelve months prior to the expiry of the licence.

(3) The licence cannot be renewed if the right–holder violated the contract repeatedly or seriously.

(4) The provisions relating to the award of rights shall otherwise apply to the procedure for the renewal of such rights.

90. Section 107 of the Media Law governs the term of broadcasting rights. It envisages in subsection (1) that a broadcasting right can be renewed once for an additional five years. Danubius exercised this right of renewal in anticipation of the expiry of the seven year term of its Broadcasting Right for radio in 2004 under the Broadcasting Agreement. That is why, in 2009, a tender had to be organised because Danubius had no further right to the renewal of its Broadcasting Right. Section 2.3 of the Broadcasting Agreement thus refers

⁶² Rozgonyi Second Report, §4.1(a).

to the “*renewal of the Broadcasting Right*”. It does not refer to tenders and Section 107 of the Media Act does not purport to regulate tenders. Indeed, tenders are regulated by different “Titles” of the same Chapter VI “Broadcasting Rights”: Title 3 “General Tender Conditions” and Title 4 “Invitation to Tender”. Title 7 “Term of Rights”, which includes Section 107, is self-evidently not concerned with the regulation of a tender.

91. Dr Rozgonyi nonetheless asserts that: “[t]he fact that Section 2.3 refers to Section 107 as a whole, including subsection (2) on renewal tenders, shows that the Broadcasting Agreement incorporates the Media Law’s tender-related provisions”.⁶³ This assertion is plainly wrong. Subsection (2) of Section 107 of the Media Law prescribes that if the five-year renewal of a broadcasting right is not possible, then the right will become the subject of a tender. A renewal is not possible if the broadcaster has failed to notify the Board of its request for a renewal or, for example, it has violated the broadcasting agreement repeatedly as envisaged in Subsection (3). If renewal is not possible, and the broadcasting right becomes the subject of a tender, then the tender will be regulated by the normal provisions in Titles 3 and 4 of Chapter VI of the Media Law. There is no such thing as a special category of “renewal tender” as contemplated by Dr Rozgonyi. A broadcasting right can be renewed once for five years under Section 107 of the Media Law; if it has been renewed once or cannot be renewed, then it must be the subject of a tender.
92. The reference to Section 107 of the Media Law in Section 2.3 of the Broadcasting Agreement simply confirms that Danubius had the right to renew its Broadcasting Right in accordance with the terms of Section 107. Danubius exercised that right in 2004. Section 107 had no role to play thereafter or in relation to the 2009 Tender.
93. It is important to note in this context that an amendment to the Media Law was adopted by Parliament on 8 December 2008 to allow the ORTT to renew broadcasting rights without a tender upon request of the broadcaster until the digital switchover.⁶⁴ The President refused to sign the amending act on the basis that it violated the Constitution and requested a

⁶³ Rozgonyi Third Report, §4.1(d).

⁶⁴ Constitutional Court Decision No. 71/2009, 14 July 2009 (R-54) (C-102), p. 1.

review of the amending act by the Constitutional Court.⁶⁵ The Constitutional Court's judgment of 2009 reasoned as follows:

Frequencies are currently public goods of high value and importance, the owner of which is the state.

As the number of frequencies reserved for transmission limits the entry into market, new players on the media market bidding for frequency [sic] cannot enter the market in addition to those already on the market, but may only replace those on the market. Therefore, during a tender for analogue radio broadcasting right [sic], the freedom of competition may be interpreted in a way that until the digitalization of the radio, all privately-held, profit-oriented undertakings have an equal chance to bid for the two national commercial radio frequencies if they comply with the conditions set forth in the call for tender.

[...]

The currently effective Section 107, Paragraph 1 of the Media Act makes it possible for the broadcasters complying with the Media Act and the terms of the broadcasting agreement to renew the expiring right on one occasion. Section 107 of the Media Act ensuring this possibility was known to the entities bidding during a tender for analogue broadcasting rights and also to others. The two undertakings currently possessing the national analogue ground-base radio rights were aware the following renewal of their rights, it would not be possible to again renew their rights based on the Media Act and that tendering for the frequencies would be inevitable.

The law-maker wanted to eliminate this and passed the Amending Act (because of the expiry of the rights of Slager and Danubius) to make it possible to again renew the rights.

Section 1 of the Amending Act amended Section 107 Paragraph 1 of the Media Act in a way that the expression "on one can occasion" was deleted from the text, thus, it became possible to again renew a broadcasting right which already expired after a renewal.⁶⁶

94. The Constitutional Court concluded by declaring the proposed amendment to the Media Law to be unconstitutional and thus the amendment never came into force.
95. The Claimants' interpretation of Section 107 is inconsistent with how the Constitutional Court interpreted that provision prior to the amendment introduced by Parliament. Only one renewal is possible. There is a clear distinction between the "renewal" of a broadcasting right and the calling of a "tender" for the use of frequencies.

⁶⁵ Constitutional Court Decision No. 71/2009, 14 July 2009 (R-54), (C-102) p. 1.

⁶⁶ Constitutional Court Decision No. 71/2009, 14 July 2009 (R-54), (C-102) p. 5.

96. In conclusion, neither Section 3.2 of the Broadcasting Agreement nor Section 1(a) of the Media Law incorporates by reference into the Broadcasting Agreement the provisions of the Media Law regulating the Broadcaster's exercise of the Broadcasting Right. In relation to Section 3.2 in particular, this provision cannot be interpreted to vest any contractual rights in the Broadcaster in respect of the ORTT's performance of any of its obligations or responsibilities as a regulator under the Media Law.

(ii) Section 2 of the GTT

97. The other provision relied upon by the Claimants as effecting incorporation of obligations concerning the ORTT into the Broadcasting Agreement is Section 2 of the GTT, which reads:

The GTT shall apply to the radio and television broadcasting rights of the bidders in Hungary, to the conduct of the contracting authority, to the conduct of the bidder, the relationship between the bidders among themselves and the bidders and the contracting authority, and also to the contract and the content thereof concluded on the basis of a tender.⁶⁷

98. The question is whether this provision has the effect of incorporating, by its own terms, the obligations of the ORTT as the "*contracting authority*" into the Broadcasting Agreement such that they can be contractually enforced by the Broadcaster, Danubius, against the ORTT. There is no mention of the GTT in the Broadcasting Agreement and hence if there is to be incorporation it must be by application of Section 2 of the GTT and not otherwise.

99. The Claimants' expert, Dr Rozgonyi, relies on three provisions of the Civil Code to answer this question in the affirmative.

100. First, Section 198(3) of the Civil Code provides:

An obligation or an entitlement to services may be constituted, by virtue of legal regulation or official order, without the conclusion of a contract if so ordered by a legal regulation or an authority with proper authorization, and if the obligor, the obligee, and the service are accurately specified. In such case, the provisions on contracts shall be duly applied, unless otherwise provided by the legal regulation or the authority in question.

⁶⁷ GTT (C-48), §2.

101. The Tribunal cannot accept that this provision is relevant in the present circumstances. There was a contract between Danubius and the ORTT—the Broadcasting Agreement. Section 198(1) deals with the possibility that obligations or entitlements to services may be constituted in the absence of a contract on the basis of a legal regulation or official order. It cannot be read as providing a mechanism by which obligations or entitlements can be introduced into existing contracts.

102. The second provision relied upon by Dr Rozgonyi is Section 205(2) of the Civil Code, which reads:

It is fundamental to the validity of a contract that an agreement is reached by the parties concerning all essential issues as well as those deemed essential by either of the parties. The parties need not agree on issues that are regulated by legal regulations.

103. Once again, the Tribunal finds that this provision is inapposite to the question of whether the GTT, by its terms, incorporated rights and obligations into the Broadcasting Agreement. Section 205(2) of the Civil Code deals with the validity of a contract. Neither Party has asserted that the Broadcasting Agreement was invalid because there was no agreement on essential issues. Moreover, it cannot be said that the GTT regulates matters that are essential issues for the purposes of the Broadcasting Agreement. The Broadcasting Agreement concerned a specific broadcasting licence that was valid for an initial term of seven years and then renewable for a further term of five years. The GTT regulates the competitive tender for broadcasting licences generally.

104. The third provision invoked by Dr Rozgonyi is Section 226(1) of the Civil Code, which reads:

Legal regulations can prescribe certain content elements of contracts and provide that such elements shall constitute a part of a contract even if the parties provide otherwise.

105. The GTT, by its scope of application provision in Section 2, and more generally, does not purport to lay down rules in respect of existing broadcasting agreements. The GTT applies to the bidding process during a tender for a broadcasting licence and “*also to the contract*

and the content thereof concluded on the basis of a tender". To the extent that the GTT regulated the 2009 Tender, it could not have introduced new rights or obligations into the Broadcasting Agreement between Danubius and the ORTT that had been concluded in 1997. In short, the GTT did not regulate the same subject matter as the 1997 Broadcasting Agreement. The 1997 Broadcasting Agreement governed the exercise of Danubius's Broadcasting Right, which commenced in 1997 and expired in 2009. The GTT governed the tender process that was organised to award, at that time, a new broadcasting right upon the expiry of the Broadcasting Agreement. The subject matters of the 1997 Broadcasting Agreement and the GTT as it applied to the 2009 Tender are thus completely different.

(iii) Conclusion

106. The Tribunal has concluded that only provisions of the Media Law relating to Danubius's exercise of its Broadcasting Right under the Broadcasting Agreement have been incorporated into the Broadcasting Agreement by virtue of the express terms in Section 3.2 of the Broadcasting Agreement. No other provisions of the Media Law have been incorporated into the Broadcasting Agreement. Nor have any provisions of the GTT. It follows that no legislative provision or provision of any other normative act relating to the conduct of the 2009 Tender was incorporated into the Broadcasting Agreement such that Danubius would have a contractual right to enforce any such provision against the ORTT or any other party.
107. Taking a step back, it would be surprising, if not illogical, if a broadcasting agreement governing a broadcaster's exercise of a right to broadcast on particular frequencies for a finite period of time vested that broadcaster with contractual rights against the broadcasting regulator in respect of a competitive tender for the allocation of a new right to broadcast on those frequencies after the expiry of the broadcaster's right. The rules governing the competitive tender may or may not give the incumbent broadcaster a preference of some sort in the evaluation of the bids submitted to the tender, but one would clearly expect that the source of any such preference would be the tender rules and not the original broadcasting agreement. Indeed, if the incumbent broadcaster had certain contractual rights in respect of the tender procedure that could not, by definition, be vested in any other

bidder, then it is doubtful that the tender could properly be described as “competitive”. A competitive tender implies a level playing field at least in terms of the legal relationship as between each bidder and the regulator conducting the tender.

(5) The Claimants’ second argument relating to the specific rights vested by virtue of the “Contract Framework”

108. The Tribunal has concluded that no provisions of Hungarian law relating to the 2009 Tender were incorporated into the Broadcasting Agreement such that they could be enforceable at the suit of Danubius against the ORTT or any other party as contractual obligations. On one reading of the Claimants’ submissions, this conclusion would be fatal to the Tribunal’s jurisdiction over any claim relating to a vested interest in a new broadcasting right in so far as there is no contractual basis for that interest. The Claimants appear, however, to make an alternative argument that it had vested interests capable of constituting an investment and capable of being expropriated by virtue of the applicable laws and rules governing the tender procedure, whether or not such laws and rules were incorporated into the Broadcasting Agreement.
109. The ambiguity arises to some extent because of the Claimants’ reliance on the concept of a “Contract Framework”, which is not precise in respect of whether or not the rights asserted by the Claimants are incorporated into the contractual instrument (the Broadcasting Agreement) or can exist independently of that contractual instrument. The Claimants’ expert’s conclusions on the obligations arising under the “Contract Framework” appear to be dependent upon establishing a contractual basis for those obligations. Thus, for example, in responding to the Respondent’s experts on the “*legal basis for the Contract Framework*”, Dr Rozgonyi says:

K&L err in their analysis of this point for three basic reasons. First, they incorrectly conclude that the Media Law was not incorporated by reference into the Broadcasting Agreement. Second, they do not take appropriate account of the provisions of the Media Law, GTT, and CFT that, by their terms, incorporate relevant provisions of these instruments into the Broadcasting Agreement. Third, they neglect to acknowledge that even if the Media Law, GTT, and CFT were not expressly incorporated into the Broadcasting

Agreement, they would nevertheless become binding contractual obligations by operation of the Civil Code.⁶⁸

110. In respect of each of these points, Dr Rozgonyi insists that the ORTT's obligations had a contractual basis.

111. The Claimants' counsel, however, appeared to take the view that a contractual basis for the ORTT's obligations was not necessary.⁶⁹

112. It will be recalled that the Claimants maintain that the "Contract Framework" imposed several obligations upon the ORTT in the conduct of the 2009 Tender:

(i) a duty to conduct tenders in good faith, according to the law, and on a fair and transparent basis; (ii) an obligation to publish a call for tender twelve months prior to the expiration of the current license; (iii) a requirement to disqualify bidders that either violated cross-ownership restrictions or presented unsupported business plans; and (iv) a requirement to provide a preference to an incumbent bidder that had been operating in compliance with its broadcasting agreement.⁷⁰

113. The Claimants maintain that this "*Contract Framework required the ORTT to award Danubius a broadcast agreement for continued operation*".⁷¹ More specifically, according to the Claimants:

Danubius was actually the winning bidder—the law required ORTT to disqualify Advenio's bid and award the broadcast rights to the highest-ranking bidder, Danubius, and enter into a new broadcasting agreement with Danubius.⁷²

114. The Tribunal will first analyse the alleged obligations imposed by the "Contract Framework" and then examine the consequences said to follow from these obligations under Hungarian law.

⁶⁸ Rozgonyi Second Report, §4(d).

⁶⁹ Tr. Day 1, pp. 235-6 (López Forastier).

⁷⁰ Cl. C-Mem. Jur., §161.

⁷¹ Cl. Rej. Jur., §7.

⁷² Cl. Rej. Jur., §7.

(i) The obligations upon the ORTT under the “Contract Framework”

115. Of the four alleged obligations under the Contract Framework identified by the Claimants, only the fourth received detailed consideration from the Parties’ experts on Hungarian law. The obvious difficulty with reliance on the first three obligations as rights capable of constituting an investment and capable of being the object of an expropriation is that these are procedural rules for the benefit of all bidders in the tender process. A procedural rule governing a tender process cannot constitute an “asset” for the purposes of the definition of an investment in Article 1 of the BIT. Nor is a procedural rule capable of being expropriated. This explains why, as a first step in the Claimants’ argument, the Claimants were compelled to submit that the general rules governing the procedure for tenders were contractually incorporated into the Broadcasting Agreement. This was an attempt to bridge the gap between a procedural rule and a substantive right capable of constituting an investment and capable of being expropriated. The Tribunal has rejected the Claimants’ contention that, unlike the other bidders in the 2009 Tender, Danubius was in a special position because the procedural rules governing the tender were, for Danubius and only for Danubius, incorporated into its extant Broadcasting Agreement with the ORTT or were otherwise actionable as contractual rights against the ORTT.
116. Only the fourth alleged obligation, which was referred to by both Parties as the “incumbent preference” argument, could be said to be particular to Danubius as against the other bidders. Being “particular” in this sense is, of course, not conclusive as to whether the right constitutes an investment and is capable of being expropriated, but it is manifestly clear that procedural rules that apply in equal measure to all participants in an administrative process cannot satisfy these requirements.
117. The dividing line between the Parties on the “incumbent preference” argument was principally whether GTT 65.3.1, which was the alleged source of the incumbent preference, only applied to broadcasters that held a “studio license”.
118. GTT 65.3.1 is located in Chapter III of the GTT entitled “The tender procedure” under Title 9 “Evaluation of bids”:

65.2. If the call for tenders does not set forth deviating criteria, the following criteria shall govern:

That bidder shall be preferred, who determines a more favorable proportion of information and public service programs, especially news programs, and in the case of national and regional television channels, who determines a more favorable proportion of presentation of films produced in Hungary or offers a longer or full program transmission time.

65.3.1 That bidder shall be preferred, who has held a broadcasting right awarded in tender for the frequency forming the subject-matter of the call for tenders, if it operates and broadcasts in accordance with its studio license and the Media Act.

65.3.2 That bidder shall be disadvantaged by the ORTT who has held the broadcasting right for the frequency forming subject of the call for tenders but does not operate in accordance with its studio license and the Media Act.

119. According to the Respondent's Hungarian law experts, the reference to "studio licence" is a reference to a specific instrument of Hungarian law that existed under the legal regime prior to the entry into force of the Media Law.⁷³ They were granted by the Ministry of Culture and Education in the period of 1993-1995 to local and regional broadcasters and had to be converted into "broadcasting right", which was the new form of licence, under Section 146 of the Media Law.⁷⁴ The Claimants' expert does not dispute this description of a "studio licence"⁷⁵ but disputes the assertion that an incumbent preference under GTT 65.3.1 could only be granted to the holder of a studio licence.

120. Section 146 of the Media Law reads as follows:

(1) The holders of studio licenses issued prior to the time of this Act entering into force for a fixed period may apply to the Board for the transformation of their licenses into broadcasting contracts by 31 March 1996. Failure to observe this deadline shall result in the forfeiture of the right and the license shall be considered withdrawn. The Board may not conclude a contract with the applicant if the studio does not perform broadcasting or does not perform broadcasting in compliance with the studio license. The studio license shall be withdrawn by resolution of the Board.

(2) The Board shall conclude the contract with the applicant for the term of the studio license defined in the original license and in respect of the area of

⁷³ Kőrmendy-Ékes & Lengyel First Report, §§31, 68.

⁷⁴ Kőrmendy-Ékes & Lengyel First Report, §31.

⁷⁵ Rozgonyi Second Report, §5.1(d).

reception defined therein, establishing the broadcasting fee, if the applicant operates in accordance with the provisions contained in the studio license.

(3) The Board shall invite a tender in respect of the frequency (transmission time) released through the withdrawal of a studio license, except if the broadcaster refuses to consent under Subsection (3) of Section 100.

(4) Tenders shall be invited in respect of the utilization in accordance with this Act of the frequencies used on the basis of the studio licenses issued prior to the time of this Act entering into force for an indefinite period of time or with reference to the time limit defined in this Act. The Board shall invite tenders in respect of the frequencies used on the basis of studio licenses issued with reference to the time limit defined in this Act within nine months, while in respect of the frequencies used on the basis of studio licenses issued for an indefinite period of time after one year, but within one-and-a-half years, at the most. These deadlines shall be reckoned as of the time of this Act entering into force. The studio licenses shall terminate at the date of the commencement of broadcasting services provided on the basis of the broadcasting contract concluded on the basis of the tender, at the latest.

(5) In the tenders defined in Subsections (3)-(4), the former operation of the person entitled to broadcast on the basis of the studio license on the same frequency shall be given priority in the course of the assessment process.

(6) The Board may conclude contracts with the companies existing at the time of this Act entering into force without complying with the provisions contained in Sections 85-88, Section 108 and Chapter VIII of this Act, subject to the condition to alter their activity or transform their companies by 31 December 1996.

121. According to the Respondent's experts, "studio licences" were granted to broadcasters for either a fixed term or indefinite period.⁷⁶ This is confirmed by the language of Section 146. Those with fixed term studio licences could convert them into broadcasting rights pursuant to Section 146(1) of the Media Law on the same terms as reflected in the original studio licence, as provided in Section 146(2).⁷⁷
122. In relation to studio licences for an indefinite period, Section 146(4) requires that tenders must be declared for the frequencies covered by those licences within the deadlines set out in that subsection. The holders of those studio licences for an indefinite period were, however, conferred the following benefit by virtue of subsection 5 to Section 146 of the Media Law:

⁷⁶ Körmendy-Ékes & Lengyel First Report, §31.

⁷⁷ Körmendy-Ékes & Lengyel First Report, §32.

In the tenders defined in Subsections (3)-(4), the former operation of the person entitled to broadcast on the basis of the studio licence on the same frequency shall be given priority in the course of the assessment process.

123. According to the Respondent's experts, this provision of the Media Law provides the rationale for the reference to the incumbent preference in GTT 65.3.1.⁷⁸
124. The Claimants' expert disagrees with this interpretation. Dr Rozgonyi states that all incumbent non-public broadcasters were holders of studio licences at the time the Media Law was enacted so that "*the holders of studio licences were synonymous with incumbents*".⁷⁹
125. The Tribunal cannot accept the Claimants' interpretation of GTT 65.3.1, which would necessitate ignoring the use of the express term "studio licence". The term "studio licence" is a clearly a term of art in Hungarian media law and it is used only twice in the GTT (the other occasion is in GTT 65.3.2). If the drafter of the regulations had wanted to refer to any incumbent (i.e. any broadcaster with an existing broadcasting agreement), then it could have used the term "broadcasting agreement", which appears in numerous other provisions of the GTT. In addition, and importantly, the use of the term "studio license" makes perfect sense in light of Section 146(5) of the Media Law, which is the foundational normative act for the regulation of the media in Hungary and to which the GTT must conform.
126. Dr Rozgonyi additionally cited the ORTT's practice in conducting tenders in 2004-5 when it "*did not identify compliance with former studio licenses as a relevant criteria*".⁸⁰ The provision of the "Calls for Tenders" relied upon by Dr Rozgonyi⁸¹ does not expressly refer to GTT 65.3.1. It simply says: "*Points that can be granted for lawful operation on the given frequency: 10 points*". The ORTT appears to be exercising its discretion to award points based on experience in this provision rather than following the mandatory rule in

⁷⁸ Körmendy-Ékes & Lengyel First Report, §§68-9.

⁷⁹ Rozgonyi Second Report, §5.1(e).

⁸⁰ Rozgonyi Second Report, §5.1(g).

⁸¹ Call for Tenders published in the Official Gazette No. 2005/7 for Baja 89.8 MHz, Békéscsaba 88.9, MHz, Eger 101.3 MHz, Győr 103.1 MHz, 7 March 2005 (C-68), §5.3.2.6.

GTT 65.3.1.⁸² As the Metropolitan Court hearing Danubius's claims found, whilst the preference stipulated in GTT 65.3.1 is mandatory, the ORTT nonetheless retains a discretion to award points on the basis of broadcasting experience more generally.⁸³ Finally, whatever was meant by the ORTT in this particular call for tender, it cannot override the express terms of the GTT, which are in turn linked to Section 146(5) of the Media Law.

127. The true position under Hungarian law is that the ORTT has the discretion to award points for the experience of incumbent broadcasters but it is not obliged to do so outside the scope of GTT 65.3.1. In relation to the 2009 Tender, the ORTT provided written answers to questions filed by prospective bidders in relation to the draft call for bids, which contained the following statement:

Observing the principles of neutrality of competition and equality of chances, and in line with media policy considerations, the Board did not wish to favour either old or new actors in the course of evaluating the bids.⁸⁴

128. This statement, along with the other questions and answers, was sent by the Chairman of the ORTT to Danubius under cover of a letter dated 29 July 2009.⁸⁵ After the 2009 Tender had concluded, and Advenio had been declared the winner, Danubius did not raise the "incumbent preference" point on the basis of GTT 65.3.1 before the Hungarian courts as a ground for the invalidity of the tender.⁸⁶
129. In conclusion, the Tribunal finds that Danubius was not entitled to an incumbent preference under GTT 65.3.1 in the 2009 Tender because it was not the holder of a studio licence.

⁸² See 2009 ORTT Consultation Paper, 24 September 2009 (R-76), p. 19.

⁸³ Metropolitan Court, Judgment No. 7.G.41.820/2009/26 of the Metropolitan Court of Budapest, 5 January 2010 (C-151), p. 23.

⁸⁴ Letter from ORTT to Ádám Földes, CEO of Danubius, 29 July 2009 (C-109), p. 12.

⁸⁵ Letter from ORTT to Ádám Földes, CEO of Danubius, 29 July 2009 (C-109), p. 1.

⁸⁶ Danubius's Statement of Claim, 2 November 2009 (C-139).

(ii) *The consequences that follow from the alleged breach of the obligations upon the ORTT*

130. The Tribunal has found that Danubius did not have any rights in the context of the 2009 Tender that were particular to Danubius as a party to a broadcasting agreement or as the incumbent broadcaster more generally. Notwithstanding this conclusion and for the sake of completeness, the Tribunal will now consider Danubius's position under Hungarian law as a result of the 2009 Tender being declared unlawful by the Hungarian courts.

131. By its decision of 23 February 2011, the Supreme Court upheld the decisions of the Municipal Court and Court of Appeals and concluded as follows:

Therefore it can be concluded that Defendant I [ORTT] violated Section 99(1) of the Media Act when based on the ownership structure revealed in the bid it did not reject [sic] the formerly invalid bid of Defendant II [Advenio] that was also violated the GTT [sic] prepared in accordance with the Act. Therefore the admission, evaluation and declaration of the bid as a winner was unlawful and as it interfered with the integrity and fairness of bidding, it also violated Section 7 of the Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition.⁸⁷

132. The ground for invalidity upheld by the Supreme Court thus related to the fact that Advenio violated the cross-ownership restrictions because Lanchid Rádió Kft had a controlling interest in Advenio at the critical time during the 2009 Tender.

133. Although Danubius claimed for a declaration of nullity in respect of the broadcasting agreement entered into between the ORTT and Advenio, the Metropolitan Court (and the Supreme Court did not disturb this finding) held that Section 112(4)(a) of the Media Law governed the legal consequences of an invalid tender procedure and thus displaced the general provisions of the Civil Code as a *lex specialis*.⁸⁸ Section 112(4)(a) states that: "*The contract shall be terminated with immediate effect if the contract could not have been concluded, and the unlawful status quo still exists*". Hence the remedy granted was a declaration that the ORTT was obliged to terminate the broadcasting agreement with Advenio.

⁸⁷ Supreme Court of the Republic of Hungary, Judgment in Pfv.IV.21.908/201/6, 23 February 2011 (C-167), p. 13.

⁸⁸ Metropolitan Court, Judgment No. 7.G.41.820/2009/26 of the Metropolitan Court of Budapest, 5 January 2010 (C-151), pp. 24-5.

134. Danubius was clearly successful before the Hungarian courts in establishing that the 2009 Tender was unlawful. The various court judgments, however, make it plain that Danubius, as the bidder with the second highest score after Advenio, had no legal right to be declared the winner of the (unlawful) 2009 Tender. The ORTT would have to call a new tender and Danubius would have the chance to participate and potentially submit a winning bid at that new tender.
135. The first confirmation of this came from the first court judgment rendered in relation to Danubius's application for an interim injunction. The Metropolitan Court of Budapest reasoned as follows in its judgment of 11 November 2009:

[T]he plaintiff [Danubius] itself notes in its petition that if it wins the lawsuit, the defendant [ORTT] will be forced to terminate the contract and issue a new tender, which can be enforced through administrative proceedings.⁸⁹

[...]

A decision made in this lawsuit cannot avert the loss to the plaintiff... because the claim is directed at establishing that the rules of the tender procedure were violated, and **if the plaintiff wins the lawsuit, the decision in the lawsuit will not grant it the broadcasting right; the only chance the plaintiff will gain is that if a new tender invitation is issued, it could become the winning bidder.**⁹⁰

136. The Metropolitan Court then ruled on the merits of Danubius's claim and found in its favour. In its Judgment of 5 January 2010, it had this to say about the powers of the ORTT versus the powers of the Court:

For the sake of completeness the Court notes that **it is the Defendant I's [ORTT] discretionary right to chose the winning bid from the formally valid bids, the Court cannot take over this task from the Defendant I [ORTT],** neither the Media Act, nor the provisions of civil law entitled the Court to overrule this decision of the Defendant I [ORTT] and to award a winner. Choosing the broadcaster is part of concluding the agreement. **While concluding the agreement the Defendant acts as an entity of civil law and as such he is entitled to choose with whom he wished to enter into a**

⁸⁹ Metropolitan Court Decision No. 7.G.41.820/2009/6-II (Danubius interim injunction), 11 November 2009 (R-77), p. 3 (emphasis added).

⁹⁰ Metropolitan Court Decision No. 7.G.41.820/2009/6-II (Danubius interim injunction), 11 November 2009 (R-77), p. 4 (emphasis added).

contractual relationship. Within this decision making process, the Civil Court has only competence to control legality and apply sanctions for unlawful acts if a claim requires so. That is, **the Court can only examine if the agreement that has been concluded as a result of tender procedure is unlawful either because of the person of the broadcasting entity or because of the stipulated terms and conditions of the agreement. The Defendant I [ORTT] can freely choose the broadcasting entity within the framework of the Act** and award the financial and business plans of the formerly valid bids. In this respect, the responsibility of the ORTT and its members is not based on civil law provisions; their liability is not civil law liability.⁹¹

137. Finally, the Metropolitan Court of Appeals in its Judgment of 14 July 2010 ruled:

[T]he competition with equal chances for all participants is the Plaintiff's main interest. The violation of this interest creates a need to protect rights, since (with regard to the agreement already concluded between the Defendants) **the Plaintiff may only enforce its right to participate in a lawful tender procedure by requesting declaration [sic] of the violation of the rules of the tender procedure** and of the nullity of the agreement, as it may not request obligation [sic]. **The plaintiff has such a right even if it does not require a substantive right for the conclusion of the agreement.**⁹²

138. From these passages the Tribunal concludes that in no circumstances would the Courts be permitted to award the broadcasting right that was the subject of the 2009 Tender to Danubius. The Courts' powers over the tender procedure is limited to ensuring that the process complies with the mandatory provisions of the Media Law and the other rules governing the process such as the GTT. Moreover, if a tender procedure is declared to be invalid by the Courts, as the 2009 Tender was in this case, then the ORTT is obliged to terminate the broadcasting agreement that was concluded as a result of the unlawful tender and to call a new tender.

139. The Claimants submitted that the ORTT was legally compelled to enter into a broadcasting agreement with Danubius once the 2009 Tender was declared to be unlawful. According to the Claimants: *“as of October 28, 2009, the date ORTT announced the results of the*

⁹¹ Metropolitan Court, Judgment No. 7.G.41.820/2009/26 of the Metropolitan Court of Budapest, 5 January 2010 (C-151), p. 24 (emphasis added).

⁹² Metropolitan Court of Appeals Decision No. 14.Gf.40.109/2010/12 (Sláger), 14 July 2010 (RA-79) (emphasis added).

2009 Tender, Danubius had a vested statutory right to enter into a Broadcasting Agreement with ORTT".⁹³

140. This submission contradicts the Judgment of the Metropolitan Court of 11 November 2009 in relation to Danubius's application for an injunction, which states, *inter alia*, that "*if the plaintiff wins the lawsuit, the decision in the lawsuit will not grant it the broadcasting right; the only chance the plaintiff will gain is that if a new tender invitation is issued, it could become the winning bidder*".⁹⁴
141. The Claimants nonetheless relied upon Section 74 of the GTT,⁹⁵ which reads: "*The ORTT concludes an agreement with the bidder who – taking into account the evaluation criteria – has made the most favourable bid*".⁹⁶ It would be fair to say that the Claimants' reliance on this provision was not prominent until the hearing, prior to which it was mentioned only once in their expert's first report and in a footnote at that.⁹⁷
142. The Claimants submitted that:

Section 74 was critical because once ORTT terminated the Contract with Advenio, either on its own motion or after being [compelled to do so] in an administrative proceeding, Section 74 meant that ORTT had to award the Contract or the license to Danubius.⁹⁸

143. It is clear to the Tribunal, however, that Section 74 of the GTT does not purport to regulate the consequences of a tender procedure being declared unlawful by the Hungarian courts. The ORTT entered into a broadcasting agreement with Advenio because, in its assessment, it had "*made the most favourable bid*" in accordance with Section 74 of the GTT. The procedure by which that assessment was made was then declared to be unlawful by the Hungarian courts. At that point, the ORTT must start again. It is not under an obligation pursuant to Section 74 of the GTT simply to enter into an agreement with the bidder who received the next highest score in the evaluation of the ORTT. If the procedure leading to

⁹³ Tr. Day 1, p. 235 (López Forastier).

⁹⁴ Metropolitan Court Decision No. 7.G.41.820/2009/6-II (Danubius interim injunction), 11 November 2009 (R-77), p. 4.

⁹⁵ Tr. Day 1, pp. 234-5 (López Forastier).

⁹⁶ GTT (C-48).

⁹⁷ Rozgonyi First Report, footnote 177; Tr. Day 2, p. 458 (López Forastier).

⁹⁸ Tr. Day 2, pp. 458-9 (López Forastier).

the outcome of the 2009 Tender was unlawful, then it could have no legal significance for any of the bidders in that tender.

144. The Claimants also relied upon the decision of the Metropolitan Regional Court in the case of *Klubradio*.⁹⁹ In that case, the ORTT had announced Klubradio to be the winner of the tender by adopting a formal resolution and then it communicated this to Klubradio in writing. The ORTT then refused to enter into a broadcasting agreement with Klubradio. This case is thus distinguishable from the present case because Danubius was not declared to be the winner of the 2009 Tender.
145. In conclusion, after Danubius had successfully obtained a declaration from the Hungarian courts to the effect that the 2009 Tender was unlawful, its position under Hungarian law was that it had the opportunity to bid at a new tender for the same frequencies. The ORTT, as a result of the court decisions, was obliged to terminate the existing broadcasting agreement with Advenio in respect of those frequencies. This obligation could have been enforced by Danubius in administrative proceedings against the ORTT in the event that the ORTT refused to comply. As a result of the adoption of Act LXXXII by the Hungarian Parliament on 22 July 2010, however, the ORTT was no longer obliged to terminate the broadcasting agreement with Advenio due to the retroactive amendment of Section 112(4)(a) of the Media Law. This amendment reads: “*The contract shall be terminated with immediate effect if: a) the contract could not have been concluded, and the unlawful situation – attributable to the broadcaster only – still exists*”.¹⁰⁰ As a result of this amendment, Danubius was deprived of the right to seek the annulment of the broadcasting agreement that had been concluded between the ORTT and Advenio as well as the possibility of bidding at a new tender for the frequencies that were the subject matter of this agreement. At no point, however, did Danubius have a right to a new broadcasting agreement under Hungarian law that could be enforced in the Hungarian courts.

⁹⁹ Metropolitan Regional Court, Decision No. 14.Gf.40.197/2012/8 (C-224). Tr. Day 1, pp. 212-7 (Gulland).

¹⁰⁰ Act LXXXII (2010) (C-150), Section 24(1).

(6) The Claimants' third and fourth arguments: were the Claimants' rights as against the ORTT part of their investment in Hungary and could those rights be the object of a claim for expropriation?

146. The Tribunal has concluded that the Claimants did not have a property right, contractual right or any other vested legal right in Hungarian law in relation to the exploitation of a national radio frequency in Hungary on the critical date of the alleged expropriation. The question of what precisely can be the object of an expropriation has thus been rendered moot by the Tribunal's findings in respect of the Claimants' first and second arguments as set out above. The Parties have, however, made detailed submissions on the question of what rights are capable of being expropriated and it is appropriate for the Tribunal to present a summary of its views.¹⁰¹ As will be clear, the Tribunal is in substantial agreement with the *Emmis* tribunal on this question.
147. The Respondent submits that only property rights are capable of being the object of an expropriation.¹⁰² Although the Tribunal need not decide this question in light of its previous findings, it is important to recognise that there is a profound difference between property rights and purely personal rights in the context of adjudging a claim for expropriation. The defining characteristic of a property right is that it is capable of alienation or assignment. One investor's property right might just as well be the property of another investor or of the state. It is precisely because property rights can be alienated or assigned that makes them susceptible to being appropriated or expropriated. What cannot, on the other hand, be appropriated or expropriated are personal rights because the right is not separable in law from the person who has it. A personal right cannot enter circulation in a market like a property right can. By way of example, taxi licenses in some countries are capable of alienation and hence are a property right. But it is unlikely that a licence to practise medicine is alienable in any country because it cannot be separated from the person to whom it is granted. It is not, therefore, a property right.

¹⁰¹ See in general: Z. Douglas, *Chapter 12: Property, Investment and the Scope of Investment Protection Obligations in The Foundations of International Investment Law: Bringing Theory into Practice* (OUP: 2014), pp. 363-406.

¹⁰² Resp. Mem. Jur. §§100-106.

148. This is not, of course, to suggest that personal rights cannot be interfered with by the state in a manner that violates international law. A licence to practise medicine can be annulled by a state regulatory body on an arbitrary basis. That might give rise to complaints of a lack of due process or breach of a legitimate expectation. But it makes no sense to talk about the annulment as an “expropriation”. The state has not taken the licence and used it for its own purposes or given it to someone else because that is impossible: it is not capable of alienation or assignment.
149. There are compelling reasons of justice that demand that only property rights in this sense be considered as the potential objects of an expropriation. It is widely accepted that a state can be liable for an indirect or *de facto* expropriation regardless of whether the state intended to expropriate the rights in question or whether it even had actual knowledge of the existence of the investor’s rights to property.¹⁰³ This is defensible because everyone, including the state and its organs and officials, has constructive notice of property rights. Property rights are good against the whole world. For this reason, in many national legal systems, liability for the usurpation of control over someone else’s property does not require actual notice of the rights to that property and liability for damage to someone else’s property is also imposed without the requirement of actual notice.
150. This is not defensible, however, in relation to rights that are not property rights, such as pure contractual rights.
151. A contractual right is a right to the performance of someone. The characteristics of that someone, the dutyholder, are of fundamental importance to the rightholder. Is the dutyholder good for the money? Does the dutyholder have the necessary expertise or qualifications or resources or reputation or experience to give the performance that the rightholder has bargained for? In contrast, the holder of a property right has no means of ascertaining the identity of the potential dutyholders and their personal attributes *ex ante*. For this reason, the obligations of third parties in respect of property rights are simple and straightforward: property rights always generate duties of abstention.

¹⁰³ E.g. *Tippetts, Abbott, McCartgy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, 6 Iran—U.S. C.T.R. 219, 224-6.

152. In national legal systems, liability for interferences with contractual rights can only be imposed on the basis of actual notice; whereas in relation to property rights there is no requirement for actual notice. In the contractual context, a party to a contract has actual notice of its counterparty's rights under the contract and of course can be liable for breaching its corresponding obligations. In the limited circumstances in which a third party can be liable for interferences with contractual rights, there must also be actual notice of such rights in the form of a specific intent to cause prejudice to them; this is domain of the *intentional* tort for procuring a breach of contract that exists in many national legal systems.
153. It is not possible to expropriate a pure contractual right because it is not a thing that has an independent existence from the personalized contractual relationship in which it is embedded. This is why scholars of the US constitution have maintained that pure contractual rights cannot be "taken" under the Fifth Amendment:

Contract rights are not property rights for takings purposes insofar as they reflect nothing more than a bilateral agreement; as contractual rights break free from the initial contracting parties and enter into general circulation as investments or money, they become property.¹⁰⁴

154. Pure contractual rights cannot be expropriated or taken because they are incapable of being alienated to a third party. For that reason they cannot be equated with property rights. Contracts can, however, be the source of intangible property such as debts and other choses-in-action. There is no doubt that debts and other choses-in-action are capable of being expropriated. But the object of the expropriation in such a case is the debt or chose-in-action and not the contract itself.
155. The *Emmis* tribunal made the same point in the following terms:

[T]he loss of a right conferred by contract may be capable of giving rise to a claim of expropriation but only if it gives rise to an asset owned by the claimant to which a monetary value may be ascribed [...]. It is the asset itself—the

¹⁰⁴ Merrill, 'The Landscape of Constitutional Property', 86 *VA. Law Rev.* (2000) 885, at 993-4.

property interest or chose in action—and not its contractual source that is the subject of the expropriation claim.¹⁰⁵

156. Most of the older cases now cited for the proposition that contract rights in general are capable of being expropriated actually concerned debts and other choses-in-action and therefore intangible property.¹⁰⁶
157. The distinction between a contract as a source of bilateral personal obligations and the contract as a source of property rights is critical because international law distinguishes between a state's mere non-performance of its contractual obligations to a foreign party, which cannot constitute an expropriation, and a state's taking of intangible property, which can.¹⁰⁷
158. To conclude: had the Tribunal found that the Claimants had vested rights under Hungarian law to the exploitation of radio frequencies at the critical date of the alleged expropriation, the claim for expropriation would only have been cognisable in respect of rights that had the characteristics of property rights under Hungarian law.

D. THE RESPONDENT'S OBJECTION [B2]

159. In its Notice of Jurisdictional Objections, the Respondent stated: “[a]s there is no allegation of interference with Claimants’ shareholding of Danubius, those shares cannot, by themselves, be considered the relevant investment for purposes [sic] of this dispute”.¹⁰⁸
160. Despite having raised this objection in its Notice of Jurisdictional Objections, the overwhelming focus of the Respondent’s written pleadings was to demonstrate that there is no right incorporated into the Broadcasting Agreement that is capable of expropriation (i.e. its objection [B1]). The Respondent has prevailed in respect of that objection.

¹⁰⁵ *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary* (ICSID Case No. ARB/12/2), Award, 16 April 2014, §169.

¹⁰⁶ See Z. Douglas, *International Law of Investment Claims* (2009), §§426-7.

¹⁰⁷ See, e.g. *Robert Azinian and others v. United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award, 1 November 1999, §87; *Waste Management, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/00/3), Award, 30 April 2004 (CA-33), §§174-175; *EnCana Corporation v. Ecuador* (LCIA Case No. UN3481), Award, 3 February 2006 (CA-39), §192; *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC B.V. v. Republic of Paraguay* (ICSID Case No. ARB/07/9), Decision of the Tribunal on Objections to Jurisdiction, 29 May 2009, §117.

¹⁰⁸ Notice of JO, §13.

161. The Respondent elaborated upon its objection [B2] at the hearing and, crucially, the relationship with its objection [B1]. The Respondent made three main points.
162. First, the Claimants' indirect expropriation claim in respect of the shares is wholly contingent in law upon establishing a proprietary right to a new broadcasting agreement. In other words, if the Respondent succeeds with its objection [B1], then its objection [B2] deprives the Tribunal of jurisdiction over the Claimants' expropriation claim in respect of their shares.¹⁰⁹
163. Second, the Claimants' indirect expropriation claim in respect of the shares is wholly contingent in fact upon establishing a proprietary right to a new broadcasting agreement in the sense that if the Claimants had no proprietary right to a new broadcasting agreement, then Danubius's shares were worthless on the critical date.¹¹⁰ In the words of the Respondent's counsel:

And their second argument... was that even without any such special rights, they could demonstrate expropriation simply by showing that they held shares in loan assets whose value is alleged to have been destroyed by the challenged Government conduct. For the record, that's Paragraph 33 of their Rejoinder.¹¹¹

The only way Claimants can even get to the notion that their shares were worth more before the Government act is to postulate some kind of pre-existing proprietary right to a new license term, which is theoretically inherent in their incumbent status, although apparently unrecognized by the market at the time they tried to sell their shares, but that right is exactly what they need to prove, not just postulate, to move forward with this claim. And so, we're right back where we're started.¹¹²

164. In relation to this point, the Respondent relied upon evidence at the hearing such as Danubius's balance sheet to demonstrate that Danubius's shares were worthless at the

¹⁰⁹ Tr. Day 1, p. 120 (Silberman); Day 1, pp. 134-135 (Kalicki).

¹¹⁰ Tr. Day 1, p. 134 (Kalicki).

¹¹¹ Tr. Day 1, p. 27 (Kalicki).

¹¹² Tr. Day 1, p. 28 (Kalicki).

critical date.¹¹³ It was also noted that Volksbank, and not the Claimants, would have first claim on any *de minimis* value recoverable through the liquidation of Danubius.¹¹⁴

165. Third, even if Danubius's shares did have some *de minimis* value on the critical date, there is no causal connection between any acts attributable to Hungary and the evisceration of that value.¹¹⁵
166. The Claimants reject each of these points. The Tribunal will deal with their response to the first point at length below. In relation to the second point, the Claimants maintained that Danubius did have value prior to the 2009 Tender and referred the Tribunal to evidence of an offer made in respect of Danubius's shares prior to the 2009 Tender that appeared to reflect a substantial value for those shares despite the uncertainty as to whether Danubius would win that tender.¹¹⁶ Indeed the value of Danubius was the subject of conflicting expert reports from both sides.¹¹⁷ The Claimants also maintained that the State of Hungary was the author of the destruction of this value in response to the Respondent's third point.
167. In relation to the Respondent's first point, the Tribunal asked several questions of the Claimants during the hearing to explore the relationship between the Claimants' two expropriation claims. The following was one such exchange:

ARBITRATOR DOUGLAS: [...] I just want to ask for a clarification on your expropriation claim. As I said before, there appear to be two different claims. The first is that Hungary indirectly expropriated the full value of the Shares, and the second is that Hungary expropriated the bundle of proprietary and contractual rights that Danubius enjoyed by virtue of the Contract Framework.

Now, as I understand the second one, there is no question there that you're asserting a proprietary right to the license. I've been a little bit puzzled about whether or not that is implicit in the first claim. The way I just read the formulation from Paragraph 1 of your Rejoinder appears to be neutral.

If we go into the pleading, though, and this is at Paragraph 32, you say that "the Claim based on the indirect expropriation of Claimants' equity and debt

¹¹³ DSHV Balance Sheet (as at 31 December 2009) (2009 DSHV Balance Sheet), 17 August 2010 (R-57); Tr. Day 1, pp. 57-61 (Evseev).

¹¹⁴ Tr. Day 2, p. 318 (Evseev).

¹¹⁵ Tr. Day 1, p. 102 (Silberman); Day 1, p. 118 (Silberman); Day 1, p. 139 (Kalicki).

¹¹⁶ Tr. Day 1, p. 192 (Gulland).

¹¹⁷ See First and Second Jonscher Reports submitted on behalf of Respondent and First, Second and Third Expert Report of Vienna Capital Partners submitted on behalf of Claimants

investments is an independent ground for jurisdiction, that does not hinge on Claimants' possession before the 2009 Tender of any guaranteed legal right to broadcast beyond November 2009".

So, in the first sentence you say it's not contingent upon a right to the license, but in the second you say: "Instead, it's premised on Hungary's arbitrary, corrupt, and unlawful conduct of the 2009 Tender and refusal to award renewed broadcasting rights to Danubius as the lawful winner of the 2009 tender." So, it's a claim that is based upon an assumption that you will get the license, but how is that assumption different from saying you have a proprietary right to the license, given that at the end of the day, the way you've formulated the compensation claim, for both of these Expropriation Claims, is the value of the company based upon its renewal of the license? That's what I'm slightly unclear about.

MR. GULLAND: Wholly apart from a so-called "contractual framework" claim, the claim we are making here is a Tecmed/Metalclad claim. That is to say that we have an investment in Hungary, an investment that has been built and nurtured, promoted, and improved year after year with the hope and expectation that, under the laws of Hungary, when there is a new tender, we will have a guaranteed equal chance to participate in that tender that the law provides and that Hungary agrees we have.

We participate in that tender. In doing so, we win the Tender under all the rules that exist. Our lottery ticket is the winning ticket, to use Ms. Kalicki's analogy here, and when we try to cash it in, we can't, and we can't because the official Hungarian authorities unlawfully refuse to recognize the rights that we have won and that we are trying to perfect, and we're saying that that is a clear analogy with the situation that was presented in Tecmed and Metalclad.¹¹⁸

168. Leaving to one side the *Tecmed* and *Metalclad* cases for a moment, it is clear from counsel for the Claimants' response to the Tribunal's question that the first expropriation claim is also premised upon an entitlement to a new broadcasting agreement after the original agreement expired in accordance with its terms. That alleged entitlement resulted from the Claimants' participation in the Tender. In the words of the Claimants' counsel: "*We participate in that tender. In doing so, we win the Tender under all the rules that exist. Our lottery ticket is the winning ticket [...] and when we try to cash it in, we can't, and we can't because the official Hungarian authorities unlawfully refuse to recognize the rights that we have won [...]*"¹¹⁹ This submission, however, falls into the same error as was discussed in relation to the Respondent's objection [B1]. Danubius was indeed successful

¹¹⁸ Tr. Day 2, pp. 428-430 (Douglas/Gulland).

¹¹⁹ Tr. Day 2, p. 430 (Gulland).

in demonstrating before the Hungarian courts that the Tender was unlawful. But this did not mean, as a matter of Hungarian law, that Danubius's second place in the Tender became automatically converted into the "winning ticket" in the words of the Claimants' counsel. A new tender would have to be conducted and Danubius had no special right under Hungarian law that would guarantee its success at that new tender. That was the conclusion of the Metropolitan Court of Budapest in its judgments of 11 November 2009 and 5 January 2010 and this conclusion was endorsed by the Metropolitan Court of Appeals in its Judgment of 14 July 2010. The Claimants have not sought to impeach these judgments.

169. That the Claimants' first expropriation claim is, like the second expropriation claim, contingent upon procuring a new broadcasting agreement from the ORTT, is also obvious from the Claimants' approach to compensation. The Claimants have asserted a single methodology for compensation for both expropriation claims, which is "*a discounted cash flow analysis to determine the fair market value of the Danubius Radio business as of 18 November 2009*".¹²⁰ In the determination of the project cash flows, three periods were assessed as part of this analysis:

(i) the initial seven-year broadcasting period (19 November 2009 to 18 November 2016), (ii) the five-year extension period (19 November 2016 to 18 November 2021), and (iii) the period 2022 and beyond by estimating "normalized" cash flows for 2022, which [the Claimants' valuation expert] projected would grow at a constant rate thereafter.¹²¹

170. Thus it is implicit in this assessment that Danubius was in fact granted a right to broadcast for seven years by the ORTT on or before 18 November 2009 and, moreover, that such right was extended on 19 November 2016 for a further five years. For the reasons already given, this assumption is legally unsustainable because Danubius had no right to broadcast as a matter of Hungarian law on the critical date of 18 November 2009.

171. The Claimants have, therefore, assessed their loss in respect of the first expropriation claim as the value of Danubius as a going concern as a radio operator in circumstances in which

¹²⁰ Cl. Mem., §244.

¹²¹ Cl. Mem., §248.

Danubius had no right to continue that business on the critical date. Whilst the object of the expropriation is said to be the value of the shares in and the loans to Danubius, that value has been assessed by the Claimants as reflecting the value of Danubius as a going concern. But to continue as a going concern, Danubius needed a right to broadcast.

172. The next question is whether any of these findings should be revisited in light of the Claimants' reliance on *Metalclad v. Mexico* and *Tecmed v. Mexico*. The Claimants rely specifically on these cases for the proposition that measures of the host State can be tantamount to an expropriation if the value of an investment is destroyed in whole or in part even if the object of the taking is not a property right:¹²²

[A]n indirect expropriation does not depend on the claimant's possession of a proprietary right beyond the protected investments—here the shares and loan assets—whose value is alleged to have been destroyed by the respondent's internationally wrongful conduct.¹²³

173. In the subsequent paragraph of their rejoinder on jurisdiction, the Claimants also rely on *Quasar de Valores SICAV SA v. Russian Federation*. All three cases will now be considered.
174. In *Metalclad*, the tribunal first considered a claim for a breach of the fair and equitable treatment standard in Article 1105 of NAFTA. Metalclad contended that the denial of a construction permit by the municipality at the site of Metalclad's hazardous waste landfill (its investment in Mexico) was a breach of Article 1105. The tribunal's key findings in upholding that claim were as follows: (i) Metalclad had received permits to operate the landfill from the Federal Government of Mexico and the State Government of San Luis Potosi (where the land was located); (ii) officials of the Federal Government had assured Metalclad that no further permits had to be obtained to operate the landfill prior to its investment; (iii) even if it were correct that a construction permit from the municipality at the site of the landfill was required as a matter of Mexican law, such permit could not be denied on the basis of environmental considerations because such considerations were within the controlling authority of the Federal Government; and (iv) the municipality

¹²² Tr. Day 1, p. 150, pp. 221-228 (Gulland).

¹²³ Cl. Rej. Jur., §33.

denied the construction permit once the landfill had been substantially completed for reasons that had nothing to do with the physical construction of the landfill and was thus improper.¹²⁴

175. The tribunal then upheld Metalclad's claim for expropriation under Article 1110 of NAFTA on precisely the same basis:

By permitting or tolerating the conduct of [the municipality] in relation to Metalclad which the Tribunal has already held amounts to unfair and inequitable treatment breaching Article 1105 and by thus participating or acquiescing in the denial to Metalclad of the right to operate the landfill, notwithstanding the fact that the project was fully approved and endorsed by the federal government, Mexico must be held to have taken a measure tantamount to expropriation in violation of NAFTA Article 1110(1).¹²⁵

176. There is little force in this statement as persuasive authority because it amounts to a conclusion that what is a breach of the fair and equitable standard must also be an expropriation. The Tribunal cannot accept this to be a correct statement of the law. There is no further analysis in the award as to whether the particular requirements of an expropriation have been satisfied; instead the *Metalclad* tribunal's principal findings in respect of the Article 1105 claim are simply repeated for the Article 1110 claim.

177. The Tribunal also notes that the *Metalclad* tribunal's decision on the Article 1105 claim, and its decision that its findings in respect of the fair and equitable treatment standard also resulted in an expropriation under Article 1110 (as quoted above), were annulled upon a subsequent challenge to the Supreme Court of British Columbia. The basis for that annulment was, in the estimation of the Tribunal, controversial, however, it is a factor that must at least be acknowledged in an assessment of the *Metalclad* award. The finding that was left undisturbed by the Supreme Court was the *Metalclad* tribunal's decision that there had been an expropriation on a separate and alternative basis upon the issuance by the

¹²⁴ *Metalclad Corporation v. United Mexican States* (ICSID Case No. ARB(AF)/97/1), Award, 25 August 2000 (“**Metalclad Award**”) (CA-21), §§74-101.

¹²⁵ *Metalclad Award* (CA-21), §104.

Governor of San Luis Potosi of an “ecological decree” that “*had the effect of barring forever the operation of the landfill*”.¹²⁶

178. In any event it is clear that the situation in *Metalclad* is distinguishable from the present case. In *Metalclad* the investment was the property rights associated with the landfill. The effect of the denial of the construction permit by the municipality and the issuance of the ecological decree was to deprive Metalclad of the right to use its property. The right of use is a fundamental right of ownership and its deprivation can certainly amount to an expropriation even if formal title to the property remains with the owner. This was precisely the situation in *Metalclad* and explains the *Metalclad* tribunal’s statement that “*expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property [...]*”¹²⁷ Metalclad was then awarded compensation to reflect its deprivation of the right to use the landfill by reference to the “*cost of its investment in the landfill*”.¹²⁸
179. In the present case, the property rights said to be the object of the Claimants’ first expropriation claim are the shares in and loans to Danubius. There is no allegation in these proceedings that a measure of the State of Hungary has interfered with the Claimants’ right of use in respect of these property rights.
180. The Claimants’ reliance on *Tecmed* is also inapposite. In *Tecmed*, the investment was “*real property, buildings and facilities and other assets relating to ‘Cytrar’, a controlled landfill of hazardous waste*”.¹²⁹ The *Tecmed* tribunal, before engaging with the merits of the claimant’s claims, undertook an exercise similar to one in this Award, namely, an analysis of precisely which property rights comprised the investment. It was Tecmed’s submission that, as part of the purchase price it paid to Promotora, a municipal agency, it acquired intangible property “*consisting of permits issued by municipal and federal authorities of [Mexico] which enabled and empowered [Tecmed] to operate the Las*

¹²⁶ *Metalclad* Award (CA-21), §109.

¹²⁷ *Metalclad* Award (CA-21), §103 (emphasis added).

¹²⁸ *Metalclad* Award (CA-21), §122.

¹²⁹ *Técnicas Medioambientales Tecmed v. United Mexican States* (ICSID Case No. ARB(AF)/00/2), Award, 29 May 2003 (“**Tecmed Award**”) (CA-31), §35.

Viboras site as a hazardous waste landfill".¹³⁰ After a careful analysis of the transactional documents, the *Tecmed* tribunal upheld that submission.¹³¹

181. It was only after that analysis of what rights actually comprised the investment that the *Tecmed* tribunal went on to consider whether the resolution of the Mexican authority not to renew the permit to operate the hazardous waste landfill constituted an expropriation. The claim was that "*the resolution deprived Cytrar [Tecmed's investment company] of its rights to use and enjoy the real and personal property forming the Landfill in accordance with its sole intended purpose [because] the Resolution put an end to the operation of the Landfill as an ongoing business exclusively engaged in the landfill of hazardous waste, an activity that is only feasible under a permit, the renewal of which was denied*".¹³² The Tribunal upheld this claim.¹³³
182. *Tecmed* is thus distinguishable from the situation confronting Danubius in the present case for two reasons. First, the *Tecmed* tribunal specifically found that Tecmed had acquired an intangible property right to the permits necessary to operate the landfill as part of the consideration it paid for its investment in the first place. By contrast, in considering the Respondent's objection [B1], the Tribunal has found that the Claimants had no proprietary or other right to acquire a broadcasting agreement on the critical date or thereafter. Second, and similar to *Metalclad*, the expropriation was consummated in *Tecmed* because the investor was deprived of its right to use the property associated with the landfill. Once again, there is no allegation in the present case that a measure of the State of Hungary has interfered with the Claimants' right of use in respect of its shares in and loans to Danubius.
183. Finally, the Claimants have relied upon *Quasar de Valores SICAV S.A. v. Russian Federation*. This case is different from *Metalclad* and *Tecmed* in the sense that there was a direct relationship between the state measures said to constitute an expropriation and the deprivation of the Claimants' investment in shares (in Yukos). As a result of tax assessments and bankruptcy proceedings, which the *Quasar de Valores* tribunal characterised as being directed to the seizure of Yukos's assets and their transfer to the

¹³⁰ *Tecmed* Award (CA-31), §75.

¹³¹ *Tecmed* Award (CA-31), §91.

¹³² *Tecmed* Award (CA-31), §96.

¹³³ *Tecmed* Award (CA-31), §117.

state-owned company Rosneft,¹³⁴ Yukos was struck of the register for Russian companies and the Claimants' shares were extinguished in law.¹³⁵

184. The *Quasar de Valores* case is thus an instance where the state measures said to constitute an expropriation have directly interfered with an investment in shares. For the reasons already given, this is not the situation in respect of Danubius.
185. The Tribunal thus affirms, following an analysis of the precedents relied upon by the Claimants, that their first expropriation claim is, like their second expropriation claim, contingent upon procuring a new broadcasting agreement from the ORTT. The dispute concerning the first expropriation claim does not, therefore, arise out of the Claimants' investment in shares and loans but rather out of an alleged investment right that the Claimants never had. The Tribunal thus upholds the Respondent's objection [B2] in respect of the Claimants' first expropriation claim.

E. CONCLUSION ON THE IMPACT OF THE TRIBUNAL'S FINDINGS IN RESPECT OF ITS JURISDICTION

186. It will be recalled that the Claimants have advanced two claims for expropriation in this arbitration:

First, Claimants contend that Hungary indirectly expropriated the full value of the shares of Danubius and destroyed its ability to repay loans from Claimants.

Second, Claimants contend that Hungary also expropriated the bundle of proprietary and contractual rights that Danubius enjoyed by virtue of the Contract Framework that Hungary created in the 1990s to encourage and protect investors in the newly-privatized broadcast industry.¹³⁶

187. The Tribunal has concluded in respect of the Respondent's objection [B1] that no legislative provision or provision of any other normative act relating to the conduct of the 2009 Tender was incorporated into the Broadcasting Agreement such that Danubius would have a contractual right to enforce any such provision against the ORTT or any other party. The Tribunal has also concluded that Danubius had no other right under Hungarian law

¹³⁴ *Quasar de Valores SICAV SA et al. v. Russian Federation* (SCC Case No. 24/2007), Award, 20 July 2012 (“*Quasar Award*”) (CA-86), §177.

¹³⁵ *Quasar Award* (CA-86), §§168, 189.

¹³⁶ Cl. Rej. Jur., §1.

independently of the Broadcasting Agreement to be awarded a new broadcasting agreement upon the former's expiry. It follows that the Tribunal is without jurisdiction *ratione materiae* over the second of the Claimants' claims because the Claimants never had any rights to the alleged object of the expropriation.

188. The Tribunal has also upheld the Respondent's objection [B2] in resolving that the Claimants' first expropriation claim, as pleaded, is also contingent upon establishing a right to a new broadcasting agreement under Hungarian law and thus is not a claim relating to an investment that the Claimants owned or controlled in Hungary. The Respondent has pleaded this objection as a jurisdictional one relating to the required nexus between the claim and the investment: it has submitted that the first expropriation claim does not relate, when properly analysed, to an investment in shares or loans but instead to an investment that the Claimants did not have (the right to a new broadcasting agreement). The objection might have also been pleaded as a failure to state a claim that meets the *prima facie* standard in the sense that, even if the Tribunal were to assume the correctness of the Claimants' characterisation of the Respondent's acts said to constitute an expropriation, the true object of the expropriation claim is not part of the Claimants' investment in Hungary. Whichever way the objection is formulated, the Parties have proceeded on the basis that the Respondent's objection [B2] is an issue relating to the Tribunal's jurisdiction during this phase of the arbitration. Having upheld the Respondent's objection [B2], it follows that the Tribunal is without jurisdiction *ratione materiae* over the first of the Claimants' expropriation claims as well.

189. The Tribunal's conclusions in respect of the Respondent's objections [B1] and [B2] thus result in the termination of these proceedings as the Tribunal is without jurisdiction over the merits of the dispute that has been submitted to it. No purpose would, therefore, be served in addressing the Respondent's other objections [A1] to [A4].

190. This conclusion should not be interpreted as excusing or vindicating in any way the Respondent's conduct in relation to Danubius, and in particular the illegality, as held by the Supreme Court of Hungary, of both the tender process and the choice of Advenio as the winner of the tender process. We cite as well the Hungarian Parliament's legislation

introduced in December 2010 to prohibit the ORTT from terminating an unlawful broadcasting agreement if the ORTT had any responsibility for the unlawful situation. Given that Danubius had been successful in the Hungarian courts in demonstrating that the ORTT had acted unlawfully by failing to disqualify Advenio during the tender process, it seems clear that this legislation was enacted for the very purpose of shielding Advenio's broadcasting agreement from termination by the ORTT upon an order of the court. This, and subsequent amendments to the Media Law, have attracted criticism from the international community, and for very good reason in the estimation of this Tribunal.

191. The Tribunal also recognizes that the jurisdictional issues determined in this Award were by no means straightforward. Their resolution depended, in part, upon complex and technical questions of Hungarian law. It cannot be said that either Party was advancing an extreme or untenable view of these issues during the proceedings. This was a close case in the sense of reaching or not reaching the merits. But in the end the Tribunal has determined that it does not have jurisdiction over the Claimants' claims and as a result it will not have the opportunity of adjudging the Respondent's conduct on the merits.

V. COSTS

192. The Respondent requests an award of costs in respect of all the costs incurred in connection with this proceeding, including the Tribunal's legal fees and expenses and the costs of its representation.¹³⁷ The Claimants request "*that they be permitted to address the question of costs and sanctions in the subsequent stages of this case*".¹³⁸
193. As provided in the Claimants' statement of costs dated 15 August 2014, the Claimants' paid legal fees and expenses incurred in connection with this proceeding amount to USD 2,447,929.70, including USD 249,950.00 paid to ICSID on account of the fees and expenses of the Members of the Tribunal and the ICSID administrative fees and expenses.

¹³⁷ Resp. Rep. Jur., §75.

¹³⁸ Cl. C-Mem. Jur., §199.

194. As provided in the Respondent’s statement of costs dated 15 August 2014, the Respondent’s legal fees and expenses amount to USD 1,908,335.54, including USD 249,924.50 advanced to ICSID.

195. The fees and expenses of the Tribunal and ICSID’s administrative fees and expenses amount to USD 390,688.04, divided as follows (in USD):¹³⁹

Arbitrators’ fees and expenses:

Arthur Rovine	89,886.24
Marc Lalonde	71,757.41
Zachary Douglas	86,744.39
Donald McRae (up to 30 November 2013)	19,800.00

ICSID’s administrative fees: 96,000

ICSID’s expenses (estimated):¹⁴⁰ 26,500.00

196. The Tribunal’s fees and expenses as well as ICSID’s administrative fees and expenses are paid out of the advances made by the Parties. As a result, each Party’s share of the costs of arbitration amounts to USD 195,344.02.¹⁴¹

197. Article 61(2) of the ICSID Convention provides that:

[t]he Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings and shall decide how and by whom these expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

198. Rule 47(1) of the ICSID Arbitration Rules provides that the Tribunal’s Award “*shall contain [...] (j) any decision [...] regarding the cost of the proceeding*”.

¹³⁹ The ICSID Secretariat will provide the Parties with a detailed Financial Statement of the case account as soon as all invoices are received and the account is final.

¹⁴⁰ The amount includes estimated charges (courier, printing and copying) in respect of the dispatch of this Award.

¹⁴¹ Any and all remaining balance will be reimbursed to the Parties in proportion to the payments that they advanced to ICSID.

199. Article 61 of the ICSID Convention gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.
200. The Tribunal's ultimate conclusion in this Award is that it is without jurisdiction in respect of the Claimants' claims. The Respondent has, therefore, prevailed. The Tribunal does not, however, consider that the Claimants acted unreasonably in pursuing their claims under the Treaty before this Tribunal. To the contrary: the Claimants had been successful before the Hungarian courts in obtaining a declaration that the tender process through which Advenio had procured its broadcasting agreement was unlawful, only for the Hungarian Parliament to scupper the possibility of a new tender. Hence there was no possibility for the Claimants to obtain justice in Hungary and it was natural for them to look to an international tribunal.
201. This Tribunal is, however, a judicial body with a limited jurisdiction that is carefully prescribed in the international instruments that are binding upon it. The Tribunal has no discretion to depart from the rules applicable to its jurisdiction, but it does have the discretion to take into account broader considerations of fairness and justice in exercising its power to award costs under Article 61 of the ICSID Convention.
202. In light of these factors and in the exercise of this discretion, the Tribunal has decided that each Party shall bear in full its own legal costs and expenses incurred in connection with the proceedings and that each Party should bear in equal shares the fees and expenses of the Tribunal and ICSID's administrative fees and expenses.

VI. AWARD

203. For the foregoing reasons, the Arbitral Tribunal, decides as follows:

- (1) The Arbitral Tribunal is without jurisdiction over the claims advanced by the Claimants; and
- (2) Each Party shall bear in full its own legal costs and the payment of the fees and expenses of the Arbitral Tribunal and the administrative fees and expenses for use of the Centre shall be paid in equal shares by each Party.

Marc Lalonde

Hon. Marc Lalonde PC OC QC
Arbitrator

Date: 01/04/15

Zachary Douglas

Prof. Zachary Douglas QC
Arbitrator

Date: 20.3.2015

Arthur Rovine

Prof. Arthur Rovine
President of the Tribunal

Date: 02/04/15

Annex A

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

In the arbitration proceeding between

ACCESSION MEZZANINE CAPITAL L.P. AND DANUBIUS KERESKEDŐHÁZ
VAGYONKEZELŐ ZRT

Claimants

and

HUNGARY

Respondent

ICSID Case No. ARB/12/3

DECISION ON RESPONDENT'S OBJECTION UNDER
ARBITRATION RULE 41(5)

Members of the Tribunal
Arthur W. Rovine, President
Hon. Marc Lalonde, Arbitrator
Donald M. McRae, Arbitrator

Secretary of the Tribunal
Mairée Uran Bidegain

Date of dispatch to the Parties: 16 January 2013

REPRESENTATION OF THE PARTIES

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FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
BIT	Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hungarian People's Republic for the Promotion and Reciprocal Protection of Investments dated 9 March 1987
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID or the Centre	The International Centre for Settlement of Investment Disputes
RA – [x]	Respondent's Legal Authorities
Request or RfA	Request for Arbitration dated 27 December 2012
Preliminary Objections	Respondent's Objections pursuant to ICSID Arbitration Rule 41(5) dated 2 November 2012
Claimants' Response	Claimants' letter responding to Respondent's Arbitration Rule 41(5) Objection dated 6 November 2012
Revised Request	Revised Amended Request for Arbitration filed by Claimants on 9 November 2012
Respondent's Reply	Respondent's letter to ICSID dated 16 November 2012
Claimants' Rejoinder	Claimants' letter to ICSID dated 29 November 2012
Respondent's Sur-Reply	Respondent's letter to ICSID dated 4 December 2012

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hungarian People’s Republic for the Promotion and Reciprocal Protection of Investments dated 9 March 1987, which entered into force on 28 August 1987 (the “BIT” or “Treaty”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the “ICSID Convention”).
2. The dispute relates to the allegedly unlawful expropriation or nationalization without compensation and without complying with other requirements imposed by the BIT and applicable law, of Claimants’ investments in and related to Danubius Rádió Műsorzolgáltató Zrt (“Danubius Radio” or “Danubius”), a Hungarian company, and a former licensee of one of the two nationwide FM radio-broadcasting frequencies in Hungary.
3. The claimants are Accession Mezzanine Capital L.P., hereinafter referred to as “Mezannine” and Danubius Kereskedőház Vagyonkezelő Zrt., hereinafter referred to as “DHSV.”
4. Mezzanine is a partnership organized under the laws of Bermuda with its principal place of business in Hamilton, Bermuda. DSHV is a company organized and existing under the laws of Hungary, allegedly controlled by Mezzanine, a national of the United Kingdom. Both companies will be jointly referred to as “Claimants.”
5. The Respondent is Hungary and is hereinafter referred to as “Hungary” or “Respondent.”
6. The Claimants and Respondent are hereinafter collectively referred to as the “Parties.” The Parties’ respective representatives and their addresses are listed above on page (i).

II. PROCEDURAL HISTORY

A. The Request for Arbitration

7. On 28 October 2011, ICSID received a request for arbitration on behalf of Emmis International Holding BV, Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kerekedemi és Szolgáltató Kft., Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt (collectively the “Requesting Parties”) against the Republic of Hungary.
8. Hungary submitted communications dated 16 and 22 November 2011, and 4 and 7 December 2011, objecting to the registration of the 28 October 2011 request. The Requesting Parties submitted a response to such letters on 18 and 30 November, 2011 and 6 December 2011.
9. On 9 December 2011, the Centre notified the parties that “[i]n the absence of consent by all disputing parties to join disputes relating to manifestly separate investments, the Secretary-General cannot proceed to register the Request for Arbitration as submitted to the Centre.”¹ The Requesting Parties then proceeded to submit two separate requests: one on behalf of investors in Danubius Radio and a second one of behalf of the investors in Slàger Rádió Műsorszolgáltató Zrt.²
10. On 27 December 2011, the Centre received an amended request for arbitration as submitted by Claimants in this case, against Hungary (the “Request” or “RfA”).
11. On 18 January 2012, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration.

¹ Letter from Ms. Meg Kinnear, Secretary-General of ICSID, to the Parties, dated 9 December 2011.

² The request for arbitration submitted by the remaining Requesting Parties is the basis of a separate ICSID arbitration proceeding registered under ICSID Case No. ARB/12/2. See *Emmis International Holding B.V., Emmis Radio Operating B.V. and MEM Magyar Electronic Media Kereskedelmi Szolgáltató Kft. v. Hungary* (ICSID Case No. ARB/12/2), Procedural Details, publicly available on the ICSID website at <https://icsid.worldbank.org>, last visited on 30 November 2012. See also, Request for Arbitration at ¶ 1, FN 2.

B. Constitution of the Tribunal

12. In accordance with Article 37(2)(a) of the ICSID Convention, the Parties agreed to constitute an Arbitral Tribunal composed of three arbitrators: one arbitrator to be appointed by each party, and the third arbitrator and President of the Tribunal to be appointed by agreement of the two co-arbitrators in consultation with the Parties.
13. The Parties further agreed that in the absence of an agreement between the co-arbitrators and the Parties regarding the constitution of the Tribunal, the Secretary-General of ICSID, rather than the Chairman of the Administrative Council, shall act as the appointing authority.
14. On 31 August 2012, Claimants requested the Secretary-General to make a default appointment. Consistent with ICSID practice, before making her appointment, the Secretary-General engaged in consultations with the Parties on potential candidates for President through a ballot procedure. At the issue of this process, both Parties agreed to the appointment of Professor Arthur W. Rovine as President of the Tribunal.
15. The Tribunal is therefore composed of Professor Arthur W. Rovine, a national of the United States, President, appointed by agreement of the Parties; the Honorable Marc Lalonde, a national of Canada, appointed by Claimants; and Professor Donald M. McRae, a national of Canada, appointed by Respondent.
16. On 10 October 2012, the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the “Arbitration Rules”). Ms. Mairée Uran Bidegain, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
17. On 18 October 2012, the Secretary of the Tribunal transmitted to the Parties a draft Agenda of the items to be discussed at the first session of the Tribunal (the “Draft Agenda”).

C. Preliminary Objections pursuant to Article 41(5)

18. On 2 November 2012, Respondent submitted Preliminary Objections pursuant to ICSID Arbitration Rule 41(5) (“Preliminary Objections”).
19. On 5 November 2012, the Parties submitted their Joint Statement on the Draft Agenda, detailing, *inter alia*, their respective positions on Respondent’s Preliminary Objections.
20. On 6 November 2012, Claimants submitted their Response on Respondent’s Preliminary Objections.
21. On 9 November 2012, Claimants submitted a Revised Amended Request for Arbitration striking through certain passages of the Request for Arbitration (the “Revised Request”).
22. On 16 November 2012, and further to a communication from the Tribunal dated 9 November 2012 granting Respondent permission to file a Reply, Respondent submitted observations, enclosing as Annex A an alternative strike-through version of the Revised Amended Request for Arbitration.
23. On 29 November 2012, Claimants submitted additional observations in a Rejoinder letter.
24. On 4 December 2012, Respondent submitted a Sur-Reply.

D. First Session of the Tribunal

25. On 30 November 2012, the Tribunal held a first session by video conference with the Parties. In accordance with their 5 November 2012 Joint Statement described in paragraph 19 above, the Parties confirmed that the Members of the Tribunal had been validly appointed. It was further agreed *inter alia* that the applicable Arbitration Rules would be those in effect from 10 April 2006, that the procedural language would be English and that the place of proceeding would be Washington D.C.
26. The agreement of the Parties was embodied in Procedural Order No. 1, signed by the President and circulated to the Parties on 17 December 2012.

III. FACTUAL BACKGROUND

27. The Tribunal will provide a brief description of the factual background that has led to the dispute as far as it needs it to examine Respondent's Rule 41(5) Objection and as currently pleaded in Claimants' Request for Arbitration, by providing a short description of (i) the dispute; (ii) the claims; and (iii) the relief sought.

A. The Dispute

28. According to the Request, Mezannine and DSHV each hold stock in Danubius Radio, a Hungarian company, and a former licensee of one of the two nationwide radio-broadcasting FM frequencies in Hungary.³

29. The dispute arises out of the alleged unlawful expropriation or nationalization without compensation and without complying with other standards of treatment set forth in the BIT, customarily international law and applicable law, of Claimants' investments in and related to, Danubius Radio and its operating activities, by Hungary.⁴

30. Claimants contend that this resulted from Respondent's decision to conduct a tender procedure through which it replaced Danubius Radio as the licensee of one of the two national FM radio-broadcasting frequencies, after Danubius had successfully operated the said radio-broadcasting frequency for twelve years.⁵

31. In particular, in 1997 after participating in an international call for tender of the licenses, Hungary's National Radio and Television Broadcasting Board (ORTT) awarded Danubius Radio one of the two licenses for a period of seven years, following which, the license was renewed for an additional period of five years, starting in 2004 through 2009.⁶ On 29 July 2009, ORTT published a call for tender for the issuance of licenses for the two FM radio

³ See Request at ¶ 9.

⁴ See Request at ¶¶ 1, 5.

⁵ See Request at ¶¶ 2-3; see generally Request at ¶¶ 34-49.

⁶ See Request at ¶ 34.

frequencies, including the one held by Danubius Radio, for a period starting in November 2009.⁷

32. Claimants contend, *inter alia*, that this tender procedure infringed the applicable 1996 Media Law and its regulations (referenced as the General Terms of Tender), among others by *inter alia* (i) not according the incumbents licensees the preferences in the tender provided by law, and (ii) providing for a shorter period of time for the submission of bids than provided by law.⁸
33. The Request for Arbitration further contends that although the prevailing bidders had (i) prohibited conflicts of interest in violation of the antimonopoly rules governing the tender, the Media Law and its regulations, (ii) no national broadcasting experience, and (iii) unfeasible business plans, they were owned by Hungarian nationals with close ties with the two leading political parties in Hungary, which impacted the ORTT's final decision to award the licenses to two competitors.⁹
34. Finally, Claimants allege that Danubius Radio attempted to challenge the results of the bid before the Hungarian judicial system without avail.¹⁰

B. The Claims

35. Claimants contend that through these and other measures, Respondent indirectly expropriated or nationalized without compensation Claimants' investment, including the value of the stock of Danubius Radio, the rights granted by the licenses and operations, and other related assets.¹¹
36. Claimants further contend that the measures summarized above constitute further violations of Hungary's obligations under the BIT (as well as the provisions of the treaties with other States that are incorporated by the most-favored-nation principle of Article 3 of

⁷ See Request at ¶ 36.

⁸ See Request at ¶¶ 3, 36.

⁹ See Request at ¶¶ 3, 44, 47-49.

¹⁰ See Request at ¶¶ 50-58.

¹¹ See Request at ¶ 61.

the BIT), including, without limitation, the obligation to (i) observe obligations attendant upon a direct or indirect expropriation of an investment; (ii) ensure and afford fair and equitable treatment to investments; (iii) avoid impairing by unreasonable or discriminatory measures the operation, management, maintenance, use, enjoyment or disposal of investments; (iv) not engage in nationality discrimination against Claimants and in favor of Hungarian nationals in the award of radio-broadcasting licenses; and (v) observe obligations entered into with regard to investments.¹²

37. In addition, Claimants contend that Respondent's measures as described above violate their obligations under customary international law, including (i) the breach of the international minimum standard of treatment of foreign investors, and (ii) expropriation without compensation of Claimant's investments without observance of due process and payment of prompt, adequate and effective compensation equal to the fair market value of the investments.¹³

C. Relief Sought

38. As pleaded in the Request for Arbitration, Claimants seek from the Tribunal the following formal relief :

“a. Declaring that the Respondent has breached the Treaty:

i. by expropriating the Claimants' investments without complying with the requirements of the Treaty, including payment of prompt, adequate and effective compensation;

ii. by failing to accord fair and equitable treatment to the Claimants' investments;

iii. by taking unreasonable or discriminatory measures that impaired the operation, management, maintenance, use, enjoyment or disposal of the Claimants' investments; and

iv. by discriminating against the Claimants and in favor of Hungarian nationals in the award of the radio-broadcasting license; and

¹² See Request at ¶¶ 63-64.

¹³ See Request at ¶¶ 63-65.

iv.[sic] by failing to observe obligations entered into with respect to Claimants' investments;

b. Declaring that the Respondent has breached customary international law

i. by violating the minimum standard of treatment of foreign investors; and

ii. by expropriating the Claimants' investments without observance of due process and payment of prompt, adequate and effective compensation.”¹⁴

39. The Claimants further request payment of full reparation in accordance with the Treaty and customary international law, the costs and expenses of the arbitration and compound interests on all compensatory damages, as well as other and additional relief that may be just and proper.¹⁵

IV. RELEVANT LEGAL TEXTS

40. The Tribunal sets forth below the the legal texts relevant to decide on Respondent's Objections under ICSID Arbitration Rule 41(5).

A. The ICSID Convention and the ICSID Arbitration Rules

41. Article 25 of the ICSID Convention, provides, in relevant part:

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(...)

42. Arbitration Rule 41 “Preliminary Objections” provides in pertinent part:

(...)

¹⁴ Request at ¶ 68.

¹⁵ See Request at ¶ 68.

(5) Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.

(6) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect.

B. The UK-Hungary Bilateral Investment Treaty

43. Article 3 of the BIT “National Treatment and Most-Favoured-Nation Provisions” provides in relevant part:

Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own investors or to investments or returns of investors of any third State.

Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own investors or to investors of any third State.

44. Article 6 of the BIT “Expropriation” provides in relevant part:

Neither Contracting Party shall nationalise, expropriate or subject to measures having effect equivalent to nationalisation or expropriation... the investments of investors of the other Contracting Party in its territory unless the following conditions are complied with:

(a) the expropriation is for a public purpose related to the internal needs of that Party and is subject to due process of law;

(b) the expropriation is non-discriminatory; and

(c) the expropriation is followed by the payment of prompt, adequate and effective compensation.

(...)

Where a Contracting Party expropriates the assets of a company which is constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares, it shall ensure that the provisions of paragraph 1 of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investments to such investors of the other Contracting Party who are owners of those shares.

45. Article 8 of the BIT “Reference to International Centre for Settlement of Investment Disputes” provides in relevant part:

1. Each Contracting Party hereby consents to submit to [ICSID]... any legal dispute arising under Article 6 of the Agreement [Expropriation] between that Contracting Party and an investor of the other Contracting Party concerning an investment of the latter in the territory of the former. A company which is constituted or incorporated under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by the investors of the other Contracting Party shall in accordance with Art. 25(2)(b) of the Convention, be treated for the purposes of the Convention as a company of the other Contracting Party.

46. Article 11 of the BIT “Application of Other Rules” provides:

If the provisions of law of either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.

V. POSITIONS OF THE PARTIES

47. In its submission dated 2 November 2012, Hungary presented an objection under Rule 41(5) of the ICSID Arbitration Rules, asserting that Claimants had failed to identify a source of consent to arbitrate the claims set forth in Claimants’ Request for Arbitration unrelated to direct or indirect expropriation of an investment described under paragraphs 38(a)(ii)–(iv), 38(b) and 39 above (hereinafter referred to as the “Non-Expropriation Claims”). Respondent alleges in particular that Hungary’s limited consent to arbitration as expressed in the BIT does not cover the Non-Expropriation Claims. As such they are “manifestly without legal merit” and should be dismissed by the Tribunal with prejudice,

together with an order that Claimants bear all costs and expenses associated with this phase of the proceedings, including attorney's fees.¹⁶

A. Respondent's Objection

48. Hungary advances three arguments in support of its contention that Claimants' claims are manifestly without legal merit.
49. *First*, it states that on the face of the BIT it is clear that Hungary consented to arbitrate only disputes concerning expropriation obligations set forth in Article 6 of the Treaty. In support of this proposition, it states *inter alia* that the "dispute resolution clause in the UK-Hungary BIT is entirely characteristic of Hungary's consistent, limited approach to consent to ICSID arbitration at the time the treaty was signed."¹⁷ It further cited to the decisions in *Telenor v. Hungary*,¹⁸ *William Nagel v. Czech Republic*¹⁹ and *Saipem S.p.A. v. Bangladesh*,²⁰ and commentary from Professor Schreuer for the proposition that "[c]ommentators and tribunals alike have recognized that the effect of Hungary's limited consent to arbitration is to limit an ICSID tribunal's jurisdiction."²¹
50. *Second*, Respondent alleges that it has not consented to arbitrate claims arising from customary international law, which Claimants have treated as a distinct base for liability, and have considered it to be applicable under Article 42(1) of the ICSID Convention. On this point, Hungary contends that "Article 42 creates no independent obligation on the part of the host State to act in accordance with customary international law, much less does it

¹⁶ Preliminary Objections at ¶ 37-39

¹⁷ Preliminary Objections at ¶ 21.

¹⁸ See Preliminary Objections at ¶ 24 (citing *Telenor Mobile Communications A.S. v. Hungary*, ICSID Case No. ARB/04/15 (holding that the claimant's fair and equitable treatment claims were "outside the Tribunal's jurisdiction, which is limited by Article XI [dispute resolution] to expropriation claims" subject to the argument that the tribunal's jurisdiction could be extended through the treaty's MFN clause), Award of 13 September 2006 at ¶ 81 (RA-20)).

¹⁹ See Preliminary Objections at ¶ 26 (citing *William Nagel v. Czech Republic*, SCC Case No. 049/2002, (concluding that Mr. Nagel's claims resulting from obligations arising out of the relevant treaty and not covered by the relevant dispute resolution provision "are not admissible and must be rejected"), Final Award of 9 September 2003 at ¶ 271 (RA-14).

²⁰ See Preliminary Objections at ¶ 28 (citing *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/07/5, (referring to the claimant's admission during the hearing that the relevant treaty "restrict[ed] the tribunal's jurisdiction to a claim for expropriation"), Award of 30 June 2009 at ¶ 121 (RA-17).

²¹ Preliminary Objections at ¶ 22.

provide a source of consent to *arbitrate* such claims before ICSID.”²² Instead, Respondent alleges, this provision of the ICSID Convention “only guides the tribunal’s task in defining the scope of the *treaty* obligations that the host State has agreed to arbitrate.”²³

51. Furthermore, Respondent rejects that stand-alone customary international law claims whether on expropriation or otherwise, would be covered by Article 8 of the BIT.²⁴ Citing the *Generation Ukraine* Tribunal, Hungary contends “[n]either the BIT, nor Article 42(1) of the ICSID Convention, entitles Claimants to assert customary international law *as an independent cause of action*.”²⁵ It further says that the Claimants’ attempt to construct consent for those claims on the basis of Article 11 of the BIT is “difficult, if not impossible, to understand” since “Article 11 does not extend the scope of the dispute resolution clause to customary international law claims any more than it extends it to arbitrate disputes under national law.”²⁶
52. *Third*, Respondent says that the Request for Arbitration does not allege the existence of advance consent to arbitrate the additional claims.²⁷ In particular, it asserts that by separating its claims in two categories under the Request, the first category relating to investment disputes arising under Article 6 of this Agreement relating to expropriation, and the second one relating to claims subject to the Parties’ mutual consent –the Non-Expropriation Claims– Claimants tacitly acknowledge that no advance consent exists to arbitrate these claims.²⁸
53. As it pertains to Claimants’ proposal to strike-through passages of the Request for Arbitration referring to the Non-Expropriation Claims, as detailed below, Respondent suggests that this constituted a tactic “to circumvent Hungary’s Objections without either contesting its substance or removing most of the offending passages in the Request for

²² Preliminary Objections at ¶ 33; *see also*, Respondent’s Reply at p. 3, Respondent’s Sur-Reply at p. 4.

²³ Preliminary Objections at ¶ 33.

²⁴ Respondent’s Sur-Reply at p. 3-4.

²⁵ *See* Respondent’s Sur-Reply at p. 4 (citing *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9 (“[t]he Tribunal does not, however, have general jurisdiction over causes of action based on the obligations of states in customary international law”), Award of 16 December 2003 at ¶ 11.3 (Annex D to Sur-Reply)).

²⁶ *See* Respondent’s Sur-Reply at p. 3-4.

²⁷ *See* Preliminary Objections at ¶ 35; *see also* Respondent’s Sur-Reply at p. 2.

²⁸ *See* Preliminary Objections at ¶ 35; *see also*, Respondent’s Reply at p. 2.

Arbitration.”²⁹ In addition, “Claimants’ Revisions fail to remove most of the key passages that are the subject of Hungary’s Objection” and they “have used their Revisions to re-write the Request for Arbitration” and they have “maintained the request that the Tribunal declare that Hungary has breached customary international law, even though Hungary’s Objection clearly asserted that the Tribunal manifestly lacks jurisdiction over such claims.”³⁰

54. Since the expropriation claims based on customary international law and the Non-Expropriation Claims against which Hungary objected continue to be pending in this proceeding, the Tribunal should issue a decision confirming that it lacks jurisdiction to consider allegations of breaches that are outside the scope of Article 6 of the BIT.³¹ In support of its position it cites to *Trans-Global Petroleum Inc. v. Jordan*, where allegedly, the claimant withdrew a claim in response to respondent’s objection that the claim was manifestly without legal merit and the tribunal proceeded to render a decision on this claim.³² It considers that the operative request for arbitration should be the one it filed identifying the “offending passages”³³ and requests that the “Tribunal’s decision...enumerate the specific allegations of Claimants’ Request for Arbitration that are no longer pending before this Tribunal.”³⁴
55. Finally, it is well established that Rule 41(5) may be jurisdictional as well as merits-based, as supported by ample authority and Respondent asserts that the Claimants lack of prior consent to submit certain claims to arbitration confirms that those are “without legal merit.”³⁵

²⁹ Respondent’s Reply at p. 1.

³⁰ Respondent’s Reply at p. 3.

³¹ See Respondent’s Reply at pp. 1, 5; see also Sur-Reply p. 4-5.

³² See Respondent’s Reply at p. 5 (citing *Trans-Global Petroleum Inc. v. Jordan*, ICSID Case No. ARB/07/25, Decision on Respondent’s Objection under Rule 41(5) of 12 May 2008 at ¶124, (RA-21)) (“*Trans-Global*”).

³³ See Respondent’s Reply at pp.1, 4 and 5.

³⁴ Respondent’s Sur-Reply at p. 5.

³⁵ See Respondent’s Sur-Reply at p. 2; see also Preliminary Objections at ¶¶ 8, 12, 18 (referencing Aurélia Antonietti, The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules, 21 ICSID REVIEW-F.I.L.J. 427, 439–40 (Fall 2006) (RA-1); see also *Brandes Investment Partners, LP v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/3, Decision on the Respondent’s Objection

B. Claimants' Position

56. With regard to their “Expropriation Claims,” Claimants consider that Respondent’s insistence on the Tribunal’s dismissal of Claimants’ allegation that Respondent has breached customary international law when Respondent expropriated Claimants’ investment, ignores the provisions of Articles 6 [Expropriation], and Article 8 [Dispute Resolution provision].³⁶ Claimants further consider that in accordance with Article 11 of the BIT [Application of Other Rules], “the Tribunal’s jurisdiction under Article 8.1 allows it to find that Hungary’s expropriation under Article 6 ‘breached customary international law’ to the extent that applicable rules of international law, including customary, are more favorable than those in Article 6 of the Treaty.”³⁷ In any case, “whether Respondent breached customary international law is a question that cannot be summarily dismissed as manifestly without legal merit at this early stage of the proceeding.”³⁸
57. With regard to the “Non-Expropriation Claims,” Claimants oppose the Respondent’s Preliminary Objections noting that the filing of such objections was “entirely unnecessary” because Respondent knew that the Non-Expropriation Claims were included in the Request only to the extent that Respondent consented to arbitrate those claims before ICSID, and after learning that it declined to do so, Claimants proposed to drop the claims.³⁹
58. Claimants further assert that “[n]othing prevented Respondent from agreeing to submit to arbitration the non-expropriation claims asserted in the Amended Request for Arbitration and resolve – once and for all – every single claim related to the breach of Respondent’s international obligations under the Treaty as well as customary international law.”⁴⁰ They however conclude that “Respondent has declined to consent to arbitrate the non-

under Rule 41(5) of the ICSID Arbitration Rules of 2 February 2009 (RA-4); *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, Award of 1 December 2010, (RA-8); *Rachel S. Grynberg, Stephen M. Grynberg, Miriam Z. Grynberg, and RSM Production Corporation v. Grenada*, ICSID Case No. ARB/10/6, Award of 10 December 2010) (RA-16).

³⁶ See Claimants’ Rejoinder at pp. 1-2.

³⁷ Claimants’ Rejoinder at p. 2.

³⁸ Claimants’ Rejoinder at p. 2.

³⁹ See Claimants’ Response at p.1.

⁴⁰ Claimants’ Response at p. 2.

expropriation claims in this proceeding” but that it “does not make the international wrongs it committed to go away.”⁴¹

59. As set forth in the cover letter accompanying Claimants’ Revised Request dated 9 November 2012, Claimants have allegedly stricken through passages referring to the so-called “Non-Expropriation Claims.” Claimant’s position is that such claims “are not before this Tribunal due to Respondent’s refusal to submit those disputes to arbitration” and that “both parties concur that the Tribunal lacks jurisdiction over those claims.”⁴²
60. Claimants further consider that the Revised Request should be the operative request for arbitration of these proceedings. They allege that “[t]here is no basis for Respondent’s argument that Claimants have ‘fail[ed] to remove’ certain ‘offending’ passages in their Revised Amended Request for Arbitration”⁴³ and that they are within their rights to keep passages of the Request stating that Respondent has breached other standards of Treaty besides expropriation, while at the same time acknowledging that those breaches are not subject to arbitration because Respondent refused to arbitrate those disputes and therefore striking the requests for relief related to those claims.⁴⁴
61. Respondent’s reliance on the *Trans-Global* decision is unavailing according to Claimants “since in that case, unlike here, the parties had fully briefed and argued the merits of Jordan’s Rule 41(5) objections and Claimants later withdrew one of the three claims at issue while pursuing the others making it logical for the Tribunal no issue a written award deciding the objections as to all three, [but the Tribunal] did not state that a decision resolving a Rule 41(5) objection was compelled in every situation.”⁴⁵
62. In sum, the circumstances of this case warrant the Tribunal exercising its discretion to refrain from deciding on the merits of the Objection, as Claimants’ Non-Expropriation

⁴¹ Claimants’ Response at pp. 1-2.

⁴² See Joint Statement at ¶¶ 2.1.3 and 2.1.5 and Claimants’ Letter of 9 November 2012 transmitting the Revised Request.

⁴³ Claimants’ Rejoinder at p. 4.

⁴⁴ See Claimants’ Rejoinder at p. 4.

⁴⁵ Claimants’ Rejoinder at pp. 4-5; citing *Trans-Global* at ¶¶ 19-22, 118-119.

claims have “legal merit” but the Tribunal cannot decide them because Respondent refuses to consent to their arbitration.⁴⁶

VI. THE ARBITRAL TRIBUNAL’S REASONS AND DECISION

63. Respondent in this case has submitted an Arbitration Rule 41 (5) Objection, maintaining that Claimants’ claim in respect of “non-expropriation” issues is “manifestly without legal merit.”
64. In the instant case, whatever the legal merit of the several claims initially filed, it is clear from the BIT, from the Revised Amended Request for Arbitration, the written submissions, and the oral discussion at the Tribunal’s First Session, that Claimants and Respondent are now agreed that expropriation under Article 6 of the BIT is the only substantive issue over which the Tribunal has jurisdiction.⁴⁷ The most recent communication from the Claimants on this matter, dated 29 November 2012, refers to “the so-called ‘non-expropriation’ claims, which both Parties agree are no longer before the Tribunal.”⁴⁸ The Parties also agree that the Tribunal’s jurisdiction includes the calculation of compensation, should the Tribunal find that there has been an expropriation, either direct or indirect. None of the other substantive obligations set forth in the BIT are subject to arbitration.
65. In view of this agreement of the Parties, the Tribunal sees no need to rule on the Parties’ positions with respect to striking through certain passages in the Revised Request, or failing to remove them, or keeping the passages on the ground that Respondent has breached other BIT obligations besides expropriation even though they are not subject to arbitration. The Tribunal has jurisdiction over BIT Article 6 issues, nothing more and nothing less.
66. Despite their agreement on arbitrating expropriation, however, the Parties appear to disagree, though not sharply, as to the inclusion, or not, of customary international law as

⁴⁶ See Claimants’ Rejoinder at ¶¶ 5-6.

⁴⁷ As set forth under Section IV, above, Article 8 of the BIT calls for reference to ICSID of “any legal dispute arising under Article 6 of this Agreement” for settlement by conciliation or arbitration. Article 6 addresses expropriation in the usual BIT format. There is no provision in the BIT authorizing arbitration of disputes generally or particular disputes beyond expropriation.

⁴⁸ Claimants’ Rejoinder at p.1.

being within the Tribunal's jurisdiction. As summarily explained above, Respondent has stated that, "the purpose of its Objection is not to exclude all references to customary international law. Nor is Hungary's position that the Tribunal should disregard customary international law entirely when determining the scope and content of Hungary's obligations under Article 6 of the UK-Hungary BIT. The point is that the claims themselves must remain predicated on alleged breach of Article 6. Neither the BIT, nor Article 42(1) of the ICSID Convention, entitles Claimants to assert customary international law as an independent cause of action."⁴⁹

67. There are a few essential points to be made in this context. First, the interpretation and application of the BIT is governed by international law, as is any treaty, and the expropriation clause is, obviously, a key part of the BIT. Second, it may not be possible to consider the scope and content of the term "expropriation" in the BIT without considering customary and general principles of international law, as well as any other sources of international law in this area.
68. The BIT in this case, as in almost all cases, has no definition of "expropriation" within its text, nor does it contain guidelines that would assist the Tribunal in determining whether or not there has been a compensable taking of property. Expropriation has been and is now part of international law, and the change from dispute resolution under the system of diplomatic protection to investor-state arbitration has not modified that. It is true that BITs have become the most reliable source of law in this area, as have the awards of ICSID, other investor-state tribunals acting under the UNCITRAL Arbitration Rules, and other modern-day tribunals, such as the Iran-U.S. Claims Tribunal, state practice, and writings of scholars. But that is not inconsistent with the continuing relevance of customary and general principles of international law, at least as to BIT obligations that are silent as to scope and content, as well as any other sources of international law with respect to expropriation.
69. UK BITs, including expropriation provisions, have tended to use consistent wording since the early 1970s, trying to invoke but not go beyond customary international law

⁴⁹ Respondent's Sur-Reply at p. 4.

standards.⁵⁰ Given the absence of definitions of expropriation in BITs, the normal practice for investment tribunals is to focus on expropriation within the framework of international law standards, meaning state practice, treaties and judicial interpretations of “expropriation” in the cases.⁵¹ As one example, the 2012 U.S. model BIT, at Annex B, states the “shared understanding” of the parties that expropriation (Article 6(1)) “is intended to reflect customary international law concerning the obligation of States with respect to expropriation.”

70. In the present case, “the Parties agreed that Article 42 of the ICSID Convention shall govern the issue of applicable law in the present proceeding.”⁵² Since the Parties have not agreed otherwise, the Tribunal “shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.” However, in this case, any international law rules applied by the Tribunal will be confined to expropriation. There is no basis in the consent of the Parties, in the BIT or in the Convention, to expand the Tribunal’s jurisdiction beyond expropriation and attendant rules of international law.
71. Respondent maintains, in its Preliminary Objections, as defined above, that Article 42 of the ICSID Convention “only guides the tribunal’s task in defining the scope of the treaty obligations that the host State has agreed to arbitrate.”⁵³ The Tribunal agrees, while noting that the function of international law in guiding the Tribunal’s task in defining the scope of expropriation rights and obligations under Article 6 is not insignificant. Defining the scope of treaty obligations the host State has agreed to arbitrate (in this instance expropriation) can be determinative.
72. The Tribunal also agrees with Respondent that Article 42(1) “does not authorize a tribunal to consider claims for relief that are independent of the treaty terms.”⁵⁴ But, of course, expropriation is not independent of the treaty terms, *i.e.*, in this instance the obligation to

⁵⁰ See E. Denza and S. Brooks, “Investment Protection Treaties: United Kingdom Experience” (1987), 36 ICLQ 908 at 911-912.

⁵¹ *SD Myers Inc. v. Government of Canada*, UNCITRAL, First Partial Award of 13 November 2000 at ¶ 280.

⁵² Procedural Order No. 1 of 17 December 2012, Section 11.

⁵³ Preliminary Objections at ¶ 33; *see also* ¶ 49 above.

⁵⁴ *Id.*

arbitrate Article 6 issues pursuant to Article 8 of the Treaty. At least to that extent, and applying Article 42(1) of the ICSID Convention, international law has application in this case. Given those necessarily applicable frameworks, and to that extent, international law is within the Tribunal's jurisdiction. This is not to say that customary international law is a distinct and separate basis of potential liability in this case, which it is not, but rather that customary international law is intertwined with expropriation law and cannot be treated separately.

73. Claimants maintain that the Respondent's expropriation measures permit Claimants to utilize the BIT Articles 3 and 11 to bring in most-favored-nation treatment with respect to expropriation.⁵⁵ Care has to be taken in this context. MFN clauses are not and should not be interpreted or applied to create new causes of action beyond those to which consent to arbitrate has been given by the Parties.⁵⁶ In view of the relief sought at pages 31-32 of the Revised Amended Request for Arbitration, it is the Tribunal's understanding that Claimants are not now claiming that the MFN provisions allow more than Articles 3 and 11 would properly permit, that is, the Tribunal jurisdiction over customary international law insofar as that law is relevant to the Parties' rights and obligations pursuant to Articles 6 of the BIT.
74. The Tribunal is of the view that an investor may properly rely only on rights set forth in the basic treaty, meaning the BIT to which the investor's home state and the host state of the investment are directly parties, but not more than that. The question should be whether the rights and benefits sought by virtue of the MFN clause are included within the arbitrable scope of the basic treaty. In the instant case, the arbitrable scope of the basic treaty is expropriation, including fact and law questions related thereto. In that light, Claimants are entitled to rely on the MFN provisions of the BIT, but only insofar as such provisions relate to expropriation.

⁵⁵ See Revised Amended Request for Arbitration at p. 29, ¶ 63; see also Claimants' Rejoinder at p. 2.

⁵⁶ See C. McLachlan, QC, L. Shore & M. Weiniger, *International Investment Arbitration*, Oxford University Press, 2007, at p. 254: "...it is essential when applying an MFN clause to be satisfied that the provisions relied upon as constituting more favourable treatment in the other treaty are properly applicable, and will not have the effect of fundamentally subverting the carefully negotiated balance of the BIT in question."

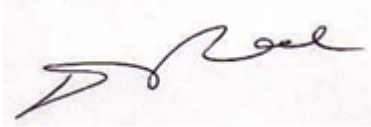
VII. COSTS

75. Under Rule 47 of the ICSID Arbitration Rules, the Tribunal has a discretionary power in its award to decide the amount and allocation of legal and arbitration costs recoverable by one Party against the other Party.
76. At this stage, the Tribunal takes due note of the Parties' positions and requests with respect to costs. It will deal with costs at a later stage, when it will be able to make an overall assessment.

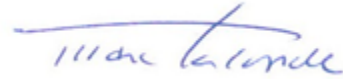
VIII. OPERATIVE PART

77. Having read the Parties' written submissions and heard their oral arguments at the Tribunal's First Session on 30 November 2012, the Tribunal's Conclusions are as follows:
- a. The Parties have agreed to arbitrate, pursuant to Article 8 of the Bilateral Investment Treaty between the United Kingdom and Hungary (BIT), only expropriation rights and obligations as set forth in Article 6 of the BIT. The Tribunal has no jurisdiction over any other substantive obligation set forth in the BIT.
 - b. The BIT between the United Kingdom and Hungary, as any treaty, is to be interpreted in accordance with international law.
 - c. The UK-Hungary BIT provides no definition or guidance for determinations with respect to expropriation. Rules on expropriation constitute a portion of the rules of customary and general principles of international law, as well as other sources of international law on expropriation. In the absence of definition and guidance as to expropriation in the UK-Hungary BIT, the Tribunal will rely on customary and general principles of international law, as well as contemporary sources of law on expropriation, in determining whether or not an expropriation has occurred and if so, the compensation to be awarded. The Tribunal has jurisdiction to decide international law questions to the extent relevant and applicable to the determination of expropriation questions, as well as compensation, if necessary.

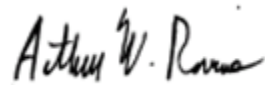
- d. The Tribunal has jurisdiction to define the scope, extent and content of the expropriation obligations the Parties agreed to arbitrate under the BIT between the United Kingdom and Hungary. Article 42(1) is not to be interpreted or applied as an independent source of obligation.
 - e. MFN provisions may be relevant in this case and may be utilized to the extent that they apply to expropriation.
78. Respondent's Article 41(5) Objection is granted in part and denied in part, in accordance with the Tribunal's Conclusions as set forth in paragraph 77 above.



Donald M. McRae
Arbitrator



Hon. Marc Lalonde
Arbitrator



Arthur W. Rovine
President

Annex B

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

In the arbitration proceeding between

**ACCESSION MEZZANINE CAPITAL L.P. AND DANUBIUS KERESKEDŐHÁZ
VAGYONKEZELŐ ZRT.**

Claimants

and

HUNGARY

Respondent

ICSID Case No. ARB/12/3

**DECISION ON RESPONDENT'S NOTICE OF
JURISDICTIONAL OBJECTIONS AND REQUEST FOR
BIFURCATION**

Members of the Tribunal

Prof. Arthur W. Rovine, President

Hon. Marc Lalonde, Arbitrator

Prof. Donald M. McRae, Arbitrator

Secretary of the Tribunal

Ms. Mairée Uran Bidegain

Date of dispatch to the Parties: 8 August 2013

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I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“**ICSID**” or the “**Centre**”) on the basis of the Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hungarian People’s Republic for the Promotion and Reciprocal Protection of Investments dated 9 March 1987, which entered into force on 28 August 1987 (the “**BIT**” or “**Treaty**”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States dated 18 March 1965, which entered into force on 14 October 1966 (the “**ICSID Convention**”).
2. The claimants are Accession Mezzanine Capital L.P. (“**Mezzanine**”) and Danubius Kereskedőház Vagyonkezelő Zrt. (“**DHSV**”). Mezzanine is a partnership organized under the laws of Bermuda with its principal place of business in Hamilton, Bermuda. DHSV is a company organized and existing under the laws of Hungary, allegedly majority owned by Mezzanine. Both companies will be jointly referred to as “**Claimants**.”
3. The Respondent is Hungary and is hereinafter referred to as “**Hungary**” or “**Respondent**.”
4. Claimants and Respondent are hereinafter collectively referred to as the “**Parties**.” The Parties’ respective representatives and their addresses are listed above on page (i).
5. The dispute relates to the allegedly unlawful expropriation or nationalization without compensation and without complying with other requirements imposed by the BIT and applicable law, of Claimants’ investments in and related to Danubius Rádió Műsorzolgáltató Zrt. (“**Danubius Radio**” or “**Danubius**”), a Hungarian company, and a former licensee of one of the two nationwide FM radio-broadcasting frequencies in Hungary.
6. This decision rules on Respondent’s 28 June 2013 notification of jurisdictional objections and request for bifurcation, seeking that the Tribunal suspend the proceedings on the merits and resolve its objections to the jurisdiction of the Centre and the competence of the Tribunal as a preliminary matter.

II. PROCEDURAL HISTORY

A. The Initiation of the Proceedings and Preliminary Objections Pursuant to ICSID Arbitration Rule 41(5)

7. On 28 October 2011, ICSID received a request for arbitration on behalf of Emmis International Holding BV, Emmis Radio Operating, B.V., MEM Magyar Electronic Media Kerekedemi és Szolagáltató Kft., Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. against Hungary.
8. Further to a communication from ICSID dated 9 December 2011 refusing the registration of the 28 October 2011 request for arbitration, on 27 December 2011, Claimants in this case submitted an amended request for arbitration against Hungary (the “**Request for Arbitration**”).
9. On 2 November 2012, following the constitution of the Arbitral Tribunal, Respondent submitted Preliminary Objections pursuant to ICSID Arbitration Rule 41(5) (“**Preliminary Objections**”).
10. On 9 November 2012, Claimants submitted a Revised Amended Request for Arbitration, striking through certain passages of the Request for Arbitration (the “**Revised Request for Arbitration**”).
11. A detailed recount of the procedural history covering the filing and registration of the Request for Arbitration, the constitution of the Arbitral Tribunal and its First Session, and Respondent’s Preliminary Objections pursuant to ICSID Arbitration Rule 41(5) is included in Section II of the Tribunal’s Decision on Respondent’s Objection under Rule 41(5) dated 16 January 2013 (the “**Ruling on Arbitration Rule 41(5)**”).
12. In its Ruling on Arbitration Rule 41(5), the Tribunal decided that :
 - a. The Parties have agreed to arbitrate, pursuant to Article 8 of the Bilateral Investment Treaty between the United Kingdom and Hungary (BIT), only expropriation rights and obligations as set forth in Article 6 of the BIT. The Tribunal has no jurisdiction over any other substantive obligation set forth in the BIT.

- b. The BIT between the United Kingdom and Hungary, as any treaty, is to be interpreted in accordance with international law.
 - c. The UK-Hungary BIT provides no definition or guidance for determinations with respect to expropriation. Rules on expropriation constitute a portion of the rules of customary and general principles of international law, as well as other sources of international law on expropriation. In the absence of definition and guidance as to expropriation in the UK-Hungary BIT, the Tribunal will rely on customary and general principles of international law, as well as contemporary sources of law on expropriation, in determining whether or not an expropriation has occurred and if so, the compensation to be awarded. The Tribunal has jurisdiction to decide international law questions to the extent relevant and applicable to the determination of expropriation questions, as well as compensation, if necessary.
 - d. The Tribunal has jurisdiction to define the scope, extent and content of the expropriation obligations the Parties agreed to arbitrate under the BIT between the United Kingdom and Hungary. Article 42(1) is not to be interpreted or applied as an independent source of obligation.
 - e. MFN provisions may be relevant in this case and may be utilized to the extent that they apply to expropriation.
13. On 20 March 2013, Claimants requested a temporary suspension of the proceedings, including a suspension of the procedural calendar fixed under paragraph 14.6. of the Tribunal's Procedural Order No. 1 dated 17 December 2012, to which Respondent objected by letter of that same date. The Parties exchanged further correspondence on this issue on 22 March 2013.
14. On 22 March 2013, the Tribunal rejected Claimants' suspension request and granted them a three-week extension to file their Memorial. The Tribunal further amended the procedural calendar for the case as follows:
- Claimants' Memorial on the Merits: 11 April 2013
 - Respondent's Counter-Memorial on the Merits: 30 August 2013
 - Claimants' Reply on the Merits: 29 October 2013
 - Respondent's Rejoinder on the Merits: 30 December 2013
15. On 11 April 2013, in accordance with the revised schedule of pleadings, Claimants submitted their Memorial on the Merits and accompanying documents.

B. Respondent's Notice of Jurisdictional Objections and Request for Bifurcation

16. On 28 June 2013, Respondent filed a Notice of Jurisdictional Objections and Request for Bifurcation (the "**Jurisdictional Notice and Bifurcation Request**"), following which the Tribunal invited Claimants to present their observations, if any.
17. On 18 July 2013, Claimants filed their Opposition to Respondent's Notice of Jurisdictional Objections and Request for Bifurcation (the "**Opposition**").
18. On 19 July 2013, Respondent wrote to the Tribunal, answering Claimants' Opposition ("**Respondent's Reply**"), to which Claimants responded on 22 July 2013 ("**Claimants' Reply**").
19. In order to examine and decide on Respondent's Jurisdictional Notice and Bifurcation Request, the Tribunal will now rely on the factual background of the case as summarized in Section (III) of the Tribunal's Ruling on Arbitration Rule 41(5). Such section, including a description of the dispute, the claims and the relief sought, is hereby incorporated by reference thereto, and constitutes an integral part of this Decision.

III. RELEVANT LEGAL TEXTS

20. The Tribunal sets forth below the legal texts relevant to decide on Respondent's Jurisdictional Notice and Bifurcation Request.

A. The ICSID Convention and the ICSID Arbitration Rules

21. Article 25 of the ICSID Convention, provides, in relevant part:

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(...)

22. Article 41 of the ICSID Convention, headed “Powers and Functions of the Tribunal,” provides in relevant part:

(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

23. Arbitration Rule 41, headed “Preliminary Objections,” provides in pertinent part:

(1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.

(2) (...).

(3) Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.

(4) The Tribunal shall decide whether or not the further procedures relating to the objection made pursuant to paragraph (1) shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.

B. The UK-Hungary Bilateral Investment Treaty

24. Article 1 of the BIT, which is headed “Definitions” provides in relevant part:

1. (a) the term “investment” means every kind of asset connected with economic activities which has been acquired since 31 December 1972 and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares, stocks, bonds and debentures and any other form of participation in a company;

- (iii) claims to money and other assets or to any performance under contract having a financial value;
- (iv) intellectual property rights and goodwill;
- (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources;

(b) (...)

(c) the form in which assets are invested does not affect their character as investments.

2. (...)

3. The term “investors” means:

- (a) in respect of the United Kingdom: physical persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom, and corporations, firms and associations constituted or incorporated under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 12;

(b) (...)

4. The term “territory” means:

- (a) in respect of the United Kingdom; Great Britain and Northern Ireland and any territory to which this agreement is extended in accordance with the provision of Article 12.

25. Article 8 of the BIT, which is headed, “Reference to International Centre for Settlement of Investment Disputes” provides in relevant part:

1. Each Contracting Party hereby consents to submit to [ICSID]... any legal dispute arising under Article 6 of the Agreement [Expropriation] between that Contracting Party and an investor of the other Contracting Party concerning an investment of the latter in the territory of the former. A company which is constituted or incorporated under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by the investors of the other Contracting Party shall in accordance with Art. 25(2)(b) of the Convention, be treated for the purposes of the Convention as a company of the other Contracting Party.

26. Article 12 of the BIT, which is headed “Territorial Extension” provides in relevant part:

At the time of entry into force of this Agreement, or at any time thereafter, the provisions of this Agreement may be extended to such territories for whose international relations the Government of the United Kingdom are responsible as may be agreed between the Contracting Parties in an Exchange of Notes.

IV. PARTIES' POSITIONS

A. Respondent's Position

a. Summary of Respondent's Jurisdictional Objections

27. In its Jurisdictional Notice and Bifurcation Request, Respondent summarized as follows its jurisdictional objections:

[T]he dispute Claimants attempt to bring before this Tribunal does not “aris[e] directly out of an investment” as required by Article 25 of the ICSID Convention and does not concern either an “asset” within the meaning of BIT Article 1 or “an investment of” a U.K. national in Hungary within the meaning of BIT Article 8.1. Furthermore, the dispute largely concerns non-existent rights that are not cognizable as vested property rights under Hungarian law and therefore cannot, at the threshold level, be the subject of an expropriation claim under the BIT — the only claim for which Hungary has consented to arbitration. The dispute therefore is beyond the Tribunal’s jurisdiction due to the failure to meet the requisite conditions *ratione materiae*, *ratione personae*, and *ratione voluntatis*.¹

28. In particular, Hungary advances the following arguments in support of its contention.

29. *First*, Respondent submits that neither Mezzanine nor DSHV made “investments” for purposes of Article 25 of the ICSID Convention and Article 8(1) of the BIT because “not a penny of Accession’s money was actually invested in building Danubius’ Hungarian radio business. This is inconsistent with Article 8(1) of the BIT and Article 25 of the ICSID Convention, both of which require an active contribution for jurisdiction to exist.”² Furthermore, Danubius was insolvent even before the allegedly improper actions, and therefore “Claimants apparently worthless equity shares in Danubius [...] cannot be recognized as an ‘investment’ of a U.K. national in Hungary.”³ In its view, Tribunals such

¹ Jurisdictional Notice and Bifurcation Request at ¶ 3.

² *Id.* at ¶ 4.

³ *Id.* at ¶ 5.

as the ones in *Burimi* and *Standard Chartered* have found an absence of investment on materially similar facts.⁴

30. *Second*, Respondent alleges that DSHV “does not independently meet the definition of a U.K. ‘investor’ in the BIT because it is a Hungarian company (majority owned by a Luxembourg company) and could not itself be considered a source of foreign investment in Hungary.”⁵

31. *Third*, Respondent alleges that the dispute does not “arise directly out of an investment.” It asserts that “the dispute concerning the 2009 Tender is based on an assertion of rights that do not exist under Hungarian law, do not constitute an ‘asset’ or an ‘investment of’ a U.K. national in Hungary within the meaning of the BIT, and do not meet the conditions of ICSID Convention Article 25(1).”⁶ Specifically, Respondent explains that:

It is true that Danubius held a broadcasting license covering virtually the same frequencies under a 1997 broadcasting agreement (“1997 Broadcasting Agreement”). That license was granted for the maximum seven-year term, and Hungarian law allowed exactly *one* renewal for an additional five-year term. Danubius received the full benefit of that extended twelve year term, which expired on 18 November 2009 in accordance with the relevant agreements and the applicable provisions of Hungarian law.

Notably, Claimants do not claim in these proceedings that Hungary interfered in any way with the twelve-year term of the 1997 Broadcasting Agreement. Instead, they assert an entitlement to a *new* license (and, indeed, to further new licenses and renewals) based on an alleged “right” to a supposedly almost dispositive incumbent preference. This “right” is conspicuously absent from any agreement between the parties and, as Hungary is prepared to demonstrate, simply does not exist under Hungarian law and cannot be used as the basis of an expropriation claim under the BIT. Without this alleged right to parlay their prior license into a new license, Claimants cannot rely on the 1997 Broadcasting Agreement or any investments associated therewith.⁷

⁴ See *Id.* at ¶¶ 1, 4; Respondent’s Reply at p.3 (citing to *Burimi SRL and Eagle Games SH.A v. Albania*, ICSID Case No. ARB/11/18, Award of 29 May 2013, ¶ 144 (Exh. RA-27), and *Standard Chartered Bank v. Tanzania*, ICSID Case No. ARB/10/12, Award of 2 November 2012, ¶¶ 198-201, 257 (Exh. RA-33).

⁵ Jurisdictional Notice and Bifurcation Request at ¶ 4.

⁶ *Id.* at ¶ 14.

⁷ *Id.* at ¶¶ 8-9 (citations omitted).

b. Respondent's Bifurcation Request

32. Respondent asserts that Article 41 of the ICSID Convention and ICSID Arbitration Rule 41 grants tribunals discretion to determine whether to bifurcate the proceedings.⁸ Hungary further asserts that in accordance with Arbitration Rule 41, Respondent's Jurisdictional Notice and Bifurcation Request was timely, made "a full two months before the due date"⁹ fixed by Arbitration Rule 41(1) and "neither the Tribunal nor Claimants have made any request for an earlier notification."¹⁰ In addition, Claimants' references to prior ICSID cases are unavailing for the proposition that Hungary's request was not filed "as early as possible", since none featured jurisdictional objections that were raised before the deadline for the filing of the Counter-Memorial.¹¹
33. Respondent further posits that in deciding on bifurcation arbitral tribunals mainly focus on the question of "procedural efficiency" by considering different criteria. Those criteria favour bifurcation in the present case for the following reasons:¹²
- a. Respondent's intended jurisdictional objections as described above are not frivolous, but instead they raise substantial and serious questions, as confirmed by the *Emmis* tribunal.¹³
 - b. Such objections would effectively dispose of the entire case, save the parties a lengthy and costly merits proceeding and thereby enhance procedural efficiency. According to Respondent, Hungary's objection, even if rejected, would "inevitably

⁸ *Id.* at ¶ 15.

⁹ Respondent's Reply at p.1.

¹⁰ *Id.*

¹¹ *Id.*, n.1, referring to Claimants' Opposition at ¶¶ 7-10 (citing *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award of 6 February 2008, ¶¶ 57, 59 (Exh. CA-65); *Waguih Elie George Siag and Clorinda Vecchi v. Egypt*, ICSID Case No. ARB/05/15, Award of 1 June 2009, ¶¶ 108, 207 (Exh. CA-55); *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award of 16 September 2003, ¶ 16.1 (Exh. CA-66)).

¹² *Id.* at ¶¶ 16-17, citing the criteria identified by the Tribunal in *Glamis Gold Ltd v. United States of America*, Procedural Order No. 2 (revised) of 31 May 2005 (Exh. RA-30).

¹³ Jurisdictional Notice and Bifurcation Request at ¶ 18, citing *Emmis International Holding, B.V. et al v. Hungary* (ICSID Case No. ARB/12/2), Decision on Respondent's Application for Bifurcation of 13 June 2013 (the "***Emmis Bifurcation Decision***"), ¶ 47 (the tribunal finding that the similar objection Hungary raised in the *Emmis* case "raise[d] a substantial question which requires clarification in the interests of both the parties and the Tribunal."). See also, Respondent's Reply at p.4.

... serve to clarify the exact nature of [Claimants'] investment or rights, in relation to which aspects of Hungary's challenged conduct would need to be assessed in the merits phase."¹⁴ Respondent further proposes a detailed procedural calendar to deal with the jurisdictional phase.¹⁵

- c. Hungary's jurisdictional objections are not inextricably intertwined with the merits. In particular, "[a]t the jurisdictional phase, the focus would be on whether Claimants had legally cognizable investments and rights capable of expropriation, and whether this dispute 'aris[es] directly out of' any such investments within the meaning of Article 25 of the ICSID Convention. At the merits phase, by contrast, the focus would be on whether Hungary's conduct surrounding the 2009 Tender did, in fact, amount to an expropriation and, if so, what damage was caused to Claimants as result."¹⁶
- d. Bifurcation would not result in any irreparable harm or prejudice to Claimants. In fact "[a]ny delay could be fully compensated by the Tribunal through an award of pre-judgment interest" or through the allocation of costs of the proceedings.¹⁷ The Claimants have failed to demonstrate how any of the prejudice they claim to have suffered, could not be made whole through these means.¹⁸

B. Claimants' Position

a. Claimants' Reply to Respondent's Jurisdictional Objections

- 34. In their pleadings, Claimants allege the following with respect to the jurisdictional arguments advanced by Respondent:
 - a. Claimants actively contributed to Hungary by, *inter alia*, owning all of the equity shares in Danubius radio and actively controlling the broadcasting company. In any event, this is irrelevant, because the term "investment" does not require 'active

¹⁴ Jurisdictional Notice and Bifurcation Request at ¶¶ 19-20 (citations omitted); *see also* Respondent's Reply at p. 3.

¹⁵ Jurisdictional Notice and Bifurcation Request at ¶ 24.

¹⁶ *Id.* at ¶ 22 (citing the *Emmis Bifurcation Decision* at ¶¶ 44-46).

¹⁷ *Id.* at ¶ 23.

¹⁸ Jurisdictional Notice and Bifurcation Request at 23; Respondent's Reply at p. 3.

contribution’ for jurisdiction to exist pursuant to the Treaty.¹⁹ Furthermore, Claimants Memorial and the expert testimony of Dr. Krisztina Rozgonyi, extensively showed that Claimants had legal rights entitling them to renew their broadcasting agreement in 2009. In particular, in her legal opinion, Dr. Krisztina Rozgonyi, an expert on Hungarian law governing broadcast media concluded that:

(1) Claimants possessed recognized rights under the Hungarian Media Law and regulations issued thereunder that were incorporated into Danubius’s 1997 Broadcasting Agreement under which Danubius’s broadcasting rights should have been renewed, (2) Hungary (acting through ORTT) violated those rights in the 2009 tender, (3) Hungarian law required ORTT to award Danubius a renewal of its broadcasting rights in the 2009 tender, even without regard to its incumbent preference and (4) after Danubius successfully challenged the lawfulness of the tender in Hungarian courts and sought revocation of the broadcast rights awarded to its rival Advenio, the Hungarian Parliament overruled the courts, prevented the cancellation of Advenio’s broadcast contract, and foreclosed Claimants from obtaining any effective remedy in Hungary.

Without submitting any remotely comparable analysis of Hungarian law and Claimants’ rights thereunder, Hungary’s “notice of objections” simply denies that those rights exist under Hungarian law and asserts that Respondent’s future objections will support its position. But if Claimants only had “imaginary rights or hopes” in connection with the 2009 tender, why did Hungary’s Supreme Court declare in Danubius’s lawsuit that ORTT’s call for tender and awarding of the broadcast rights to Advenio, was unlawful? And why did Parliament, days after Danubius prevailed in the Metropolitan Court of Appeals, amend the Media Law to prevent Danubius from regaining its rights by forbidding ORTT from terminating its illegal agreement with Advenio?

Hungary’s ‘Notice’ asserts, without supporting authority, that ‘there is no provision in Hungarian law requiring ORTT to hold any tender’ upon expiry of a broadcasting agreement that has been renewed once. This misstates Hungarian law.²⁰

- b. “[M]ultiple authorities confirm that companies like DSHV qualify as an investor under BITs that, like the UK Treaty, contain an exception to the ‘negative nationality requirements’ of the ICSID Convention that confer treaty protection to

¹⁹ Opposition at ¶ 13.

²⁰ *Id.* at ¶¶ 15-17 (citations omitted).

companies organized under the laws of the host country that are controlled by investors who are nationals of the other contracting party.”²¹

- c. Respondent’s reliance in the *Burimi* and *Standard Chartered* awards is unavailing according to Claimants because “neither case bears any relevant resemblance to this one.” In particular:

In 2003, Claimant Accession Mezzanine Capital, L.P. (“AMC”), acting through subsidiaries under its control, provided senior and mezzanine loans to finance Advent’s acquisition of Danubius Radio for the *express purpose* of investing in Danubius, a well-established radio station operating in Hungary. That same year, Claimant Danubius Kereskedőház Vagyonkezelő Zrt. (DSHV) became an equity investor in Danubius Radio, acquiring all of its equity. DSHV also sold advertisements for Danubius, organized radio promotions, and marketed the Danubius brand in Hungary. In January 2008, AMC through subsidiaries acquired all of the equity in Danubius and took over control of its management and operations, and this ownership structure and active management continued throughout the relevant period in 2009 during which Hungary carried out its unlawful expropriatory tender of the radio frequencies (citations omitted).²²

b. Claimants’ Opposition to Respondent’s Bifurcation Request

35. With regard to the applicable standard, Claimants are in agreement with Respondent that the Tribunal shall consider as an overarching question whether fairness and procedural efficiency would be preserved or improved. They allege that past tribunals, including those relied upon by Respondent, “have recognized that joinder of jurisdictional questions to the merits is preferred where there is an overlap between them.”²³
36. The Claimants further agree that ICSID Arbitration Rule 41 provides Tribunal with broad discretion to suspend the proceedings on the merits. Claimants assert, however, that “in exercising that discretion, the Tribunal should accord special weight to a Respondent’s timeliness in asserting such objections in light of the ‘as early as possible’ requirement.”²⁴

²¹ Opposition at ¶ 13.

²² Claimants’ Reply at pp. 2-3.

²³ Opposition at ¶ 14 (citing to *Burimi SRL and Eagle Games SHA v. Albania*, ICSID Case No. ARB/11/18, Award of 29 May 2013, ¶ 63 (Exh. RA-28), and *Glamis Gold Ltd v. United States of America*, UNCITRAL (Procedural Order No. 2 (Revised) of 31 May 2005, ¶ 25 (Exh. RA-30)).

²⁴ Opposition at ¶ 6.

In particular, they contend that under Arbitration Rule 41(1) respondents shall make their jurisdictional objections as early in the proceedings as they can do so.²⁵

37. Considering these elements, Claimants request that Respondent’s Notice and Bifurcation Request be denied for the following reasons:

- a. Hungary’s Request is untimely under ICSID Arbitration Rule 41(1). According to Claimants “while Rule 41(1) permits a party to raise preliminary objections as late as the filing of the counter-memorial, it does not entitle it to postpone objections that it was able to assert earlier.”²⁶ Respondent has been on notice of Claimants’ legal position since December 2011, when Claimants filed a detailed Request for Arbitration, and it received Claimants’ Memorial on the merits in April 2013.²⁷ Furthermore, Hungary raised similar objections in the *Emmis* case on 28 May 2013, and yet it did not reveal its jurisdictional argument in this case until 28 June 2013, when it filed a mere notice of future objections.²⁸
- b. Fairness and procedural efficiency weigh strongly in favour of preserving the existing procedural schedule, instead of introducing a new “jurisdictional phase.”²⁹
- c. Respondent’s objections arguing the lack of qualifying “investment” or “investor” are insubstantial (based on the arguments described in paragraph 34 above), and can be readily addressed at the merits stage.
- d. Bifurcating the proceedings would “ordain that a decision on jurisdictional issues alone would take longer than a full decision on the merits under the existing

²⁵ *Id.*

²⁶ Opposition at ¶ 7 (citing *Dessert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17, Award of 6 February 2008 ¶ 97).

²⁷ Opposition at ¶¶ 1-5.

²⁸ *Id.* at ¶¶ 2, 5.

²⁹ *Id.* at ¶ 12.

schedule.”³⁰ Therefore, Hungary’s proposed schedule would not ‘shorten or streamline’ these proceedings.³¹

- e. “Hungary’s further objection that the dispute does not ‘arise out of an investment’ turns on questions that are inextricably intertwined with the merits.”³² According to Claimants “[t]he central question Hungary raises – whether Claimants had legal rights entitling them to renew their broadcasting agreement in 2009 – is extensively addressed in Claimants’ Memorial and the expert testimony of Dr. Krisztina Ruzgony,”³³ and the case on jurisdiction substantially overlaps with the Hungarian Law and treaty violations described in Claimants’ Memorial.³⁴ Claimants further explain that “the body of evidence and legal opinion relevant to providing the existence and nature of an incumbent preference and other legal rights for jurisdictional purposes is the same body of evidence and legal opinion against which the lawfulness of ORTT’s conduct must be measured.”³⁵
- f. If granted, bifurcation would signify “financial, procedural and tactical forms of prejudice”³⁶ which cannot be compensated “through an award of interest covering the additional duration of the proceeding.”³⁷ Claimants do not have other continuing operations to sustain their activities since they were expropriated nearly four years ago, and “they require support on a month to month basis from their investors.”³⁸ Furthermore, bifurcation “would also give Respondent far more time to present its case than Claimants enjoyed [...] in violation of the principal of equality of arms.”³⁹

³⁰ Opposition at ¶ 20.

³¹ Opposition at ¶ 20, referring to the Jurisdictional Notice and Bifurcation Request at ¶ 23.

³² *Id.* at ¶ 14.

³³ *Id.* at ¶ 15.

³⁴ *Id.* at ¶ 19.

³⁵ *Id.* at ¶ 18.

³⁶ *Id.* at ¶ 21.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

V. THE ARBITRAL TRIBUNAL'S REASONS AND DECISION

38. With regard to the applicable standard, Claimants are in agreement with Respondent that the Tribunal shall consider as an overarching question whether fairness and procedural efficiency would be preserved or improved. The Tribunal agrees.

39. HAVING READ THE PARTIES' WRITTEN SUBMISSIONS, THE TRIBUNAL DECIDES AS FOLLOWS:

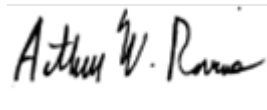
1. The case shall be bifurcated, using the schedule for briefing and hearing, as follows:
 - a. Respondent's Memorial on Jurisdiction 45 days from the Tribunal's decision on bifurcation (*i.e.* by no later than Monday, 23 September 2013)
 - b. Claimants' Counter-Memorial on Jurisdiction 45 days from the Memorial (*i.e.* by no later than 7 November 2013)
 - c. Reply on Jurisdiction 20 days from Counter-Memorial (*i.e.* by no later than 27 November 2013)
 - d. Rejoinder on Jurisdiction 20 days from Reply (*i.e.* by no later than 17 December 2013)
 - e. Hearing on Jurisdiction at least 40 days from Rejoinder (*i.e.* starting on Monday, 27 January 2014).
2. The facts and jurisdictional issues in the instant case overlap very considerably with those of *Emmis International Holding B.V., et. al, v. Hungary*. The Tribunal believes that the analysis of the bifurcation issue in *Emmis* is sound and should serve as persuasive authority here. The jurisdictional issues Respondent raises are significant and deserve a focused examination in a separate phase that could either make a merits phase unnecessary or sharpen many factual issues should the Tribunal reach the merits. There is no need to repeat the *Emmis* analysis in the instant case. Its bifurcation decision can be found on the ICSID website. In brief summary of a few key points from *Emmis*:
 - a. The Tribunal is required to identify whether and which investments of Claimants may properly give rise to an expropriation claim, the only substantive cause of action within the jurisdiction of the Tribunal.

- b. The existence and nature of any such rights must be determined by reference to Hungarian and international law.
 - c. The relevant time for assessment of Claimants' rights and investments that may properly give rise to an expropriation claim is the conduct of the 2009 Tender just prior to 18 November 2009.
 - d. The nature and incidents of the rights and investments held by Claimants are distinct from the question as to whether such rights were expropriated by Respondent.
 - e. If Claimants are successful, it is within the Tribunal's discretion to compensate Claimants for increased costs occasioned by Respondent's objection to jurisdiction and consequent delay.
3. Notwithstanding its decision in favor of bifurcation in the instant case, the Tribunal has concerns as to the timeliness under Arbitration Rule 41(1) of Respondent's Jurisdictional Notice and Bifurcation Request. There is an important and undecided question in investment arbitration law as to the proper interpretation and application of the "as early as possible" requirement in Rule 41(1). Respondent's Notice and Request was submitted on 28 June 2013. The virtually identical Objection and Request by Respondent in *Emmis* was submitted on 28 May 2013. The Revised Request for Arbitration, submitted by Claimants on 9 November 2012, is a detailed 31-page Request that appears to contain virtually all of the issues argued by Respondent in its 28 June 2013 Jurisdictional Notice and Bifurcation Request. In light of this, the Tribunal feels obliged to consider whether the Respondent's request for bifurcation was filed "as early as possible" within the meaning of Rule 41(1).
4. The Tribunal invites Claimants and Respondent to file, with their submissions on jurisdiction pursuant to the schedule indicated above, written submissions stating why they believe that there has or has not been compliance with Rule 41(1)'s "as early as possible" requirement, and the meaning of that requirement. What jurisdictional issues were missing from Claimants' Amended Request for Arbitration, submitted on 9 November 2012, that justified Respondent's waiting until 28 June 2013 to submit a notice of objections to the Tribunal's jurisdiction? Could Respondent's Rule 41(1) request have been submitted at the same time as its

Rule 41(5) request? What is the relationship between the two? Should “as early as possible” mean as early as possible after the submission of Claimant(s)’ Memorial? Can it mean by 30 August 2013 in this case, i.e. the deadline for Respondent’s Counter-Memorial, in accordance with Respondent’s argument in its Notice of Objection?

5. Since the Tribunal has decided to bifurcate without deciding the timeliness issue, a consequence of lack of timeliness does not affect the decision to bifurcate, but can be dealt with in costs, which shall be addressed at a later stage of this proceeding.

ON BEHALF OF THE TRIBUNAL

A handwritten signature in black ink, reading "Arthur W. Rovine", enclosed in a thin black rectangular border.

Prof. Arthur W. Rovine
President

Date: 8 August 2013