

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

Representing Accession Mezzanine Capital L.P. and Danubius Kereskedőház
Vagyonkezelő: Representing Hungary:

COVINGTON & BURLING LLP
Mr. Eugene D. Gulland
Mr. Miguel López Forastier
Mr. Alexander O. Canizares
1201 Pennsylvania Avenue, NW
Washington, D.C. 20004-2401
United States of America

ARNOLD & PORTER LLP
Ms. Jean E. Kalicki
555 12th Street, NW
Washington, D.C. 20004
United States of America

ARNOLD & PORTER (UK) LLP
Mr. Dmitri Evseev
Tower 42
25 Old Broad St.
London EC2N 1HQ United Kingdom

and

KENDE, MOLNÁR-BÍRÓ, KATONA
Dr. János Katona
Dr. György Molár-Bíró
Dr. Gábor Puskás
Villányi út 47
1118 Budapest,
Hungary

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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 Műsorzolgáltató 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.

[Signed]
Donald M. McRae

[Signed]
Hon. Marc Lalonde

[Signed]
Arthur W. Rovine