

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 S.H.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

[Signed]

Prof. Arthur W. Rovine
President

Date: 8 August 2013