

ICSID Case No ARB/12/2

**EMMIS INTERNATIONAL HOLDING, B.V.
EMMIS RADIO OPERATING, B.V.
MEM MAGYAR ELECTRONIC MEDIA KERESKEDELMI ÉS SZOLGÁLTATÓ KFT**
Claimants

–and–

HUNGARY
Respondent

DECISION ON RESPONDENT’S APPLICATION FOR BIFURCATION

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Professor Campbell McLachlan QC, President
Mr J Christopher Thomas QC, Arbitrator

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GLOSSARY OF DEFINED TERMS

2009 Regulatory Framework	Media Law, GTT and the 2009 ORTT Call for Tenders
2009 Tender	The Tender conducted by ORTT in 2009 for the FM frequency radio licence then held by Slàger
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Broadcasting Agreement	Agreement between Slàger and ORTT dated 18 November 1997, Ex. C-115
Claimants' Reply	Claimants' Reply to Respondent's Request for Bifurcation dated 5 June 2013
Contract Framework	Broadcasting Agreement, incorporating the Media Law and GTT (as alleged by Claimants in the Memorial at [43])
Emmis International	Emmis International Holding, B.V., the First Claimant
Emmis Radio	Emmis Radio Operating B.V., the Second Claimant
GTT	General Terms of Tender of ORTT dated 30 August 1996, Ex. CA-4
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March, 1965
ICSID/the Centre	International Centre for Settlement of Investment Disputes
Media Law	Act I of 1996 on Radio and Television Broadcasting, Ex. CA-3
MEM	Mem Magyar Electronic Media Kereskedelmi és Szolgáltató Kft, the Third Claimant
Memorial	Claimants' Memorial on Jurisdiction and the Merits dated 24 April 2013
Netherlands BIT	Bilateral Investment Treaty between the Netherlands and Hungary dated 2 September 1987
ORTT	<i>Országos Rádió És Televízió Testület</i> , National Radio and Television Broadcasting Board of Hungary
Parties	Collectively Claimants and Respondent
PO No1	Procedural Order No1 dated 5 October 2012
PO No2	Procedural Order No2 dated 25 March 2013
Request for Arbitration	Revised Amended Request for Arbitration dated 27 December 2012, as further amended by letter from Claimants dated 25 March 2013
Respondent's Request	Respondent's Notice of Jurisdictional Objections and Request for Bifurcation dated 28 May 2013
Rule 41(5) Decision	The Tribunal's Decision on Respondent's Objection under ICSID Arbitration Rule41(5) dated 11 March 2013
Slàger/Slàger Radio	Slàger Rádió Műsorszolgáltató Zrt
Switzerland BIT	Bilateral Investment Treaty between Switzerland and Hungary dated 5 October 1988
Treaties	Netherlands BIT and Switzerland BIT

I. INTRODUCTION

1. The present dispute is submitted to the International Centre for Settlement of Investment Disputes (**ICSID** or the **Centre**) on the basis of the Agreement between the Kingdom of the Netherlands and the Hungarian People's Republic for Encouragement and Reciprocal Protection of Investments dated 2 September 1987, which entered into force on 1 June 1988 (the **Netherlands BIT**), the Agreement Between the Swiss Confederation and the Hungarian People's Republic on the Reciprocal Promotion and Protection of Investments dated 5 October 1988, which entered into force on 16 May 1989 (the **Swiss BIT** and jointly with the Netherlands BIT, the **Treaties**), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on 14 October 1966 (the **ICSID Convention**).
2. The Claimants are Emmis International Holding, B.V. (**Emmis International**), Emmis Radio Operating, B.V. (**Emmis Radio**), and Mem Magyar Electronic Media Kereskedelmi és Szolgáltató Kft (**MEM**). Emmis International and Emmis Radio are both corporations organized and existing under the laws of the Netherlands. MEM is a company organized and existing under the laws of Hungary, allegedly controlled by Mr Jürg Marquard, a Swiss national. These parties will be collectively referred to hereinafter as **Claimants**.
3. The Respondent is Hungary and is referred to as **Hungary** or **Respondent**.
4. The dispute relates to the alleged unlawful expropriation by Respondent of Claimants' investments in a national FM-radio frequency broadcasting licensee, Slàger Rádío Műsorzolgáltató Zrt (**Slàger**).
5. This Decision concerns Respondent's request for bifurcation of these proceedings, made by Notice of Jurisdictional Objections and Request for Bifurcation dated 28 May 2013 (**Respondent's Request**). Pursuant to ICSID Convention Article 41 and Rule 41 of the Arbitration Rules, Respondent seeks a suspension of the proceedings on the merits and the resolution of Hungary's jurisdictional objections, summarised in its Request, as a preliminary matter.

II. PROCEDURAL HISTORY

6. The Tribunal set forth the procedural history of this matter from the filing of the Request for Arbitration on 28 October 2011 until 10 March 2013 in its Decision on Respondent's Objection under ICSID Rule 41(5) dated 11 March 2013 (**Rule 41(5) Decision**).
7. By paragraph 85 of that Decision (the *dispositif*), the Tribunal decided to:
 - (1) Grant Respondent's objection under Rule 41(5) of the ICSID Arbitration Rules to the extent of dismissing all Non-Expropriation Claims from these proceedings as being outside the scope of the Tribunal's jurisdiction;
 - (2) Deny Respondent's objection under Rule 41(5) in respect of the Customary International Law Expropriation Claim;
 - (3) Join any further objection to the jurisdiction of the Centre in respect of the Customary International Law Expropriation Claim, to the extent maintained, to the merits; and,
 - (4) Grant Claimants 14 days from dispatch of this Decision to the Parties within which to file a further Revised Amended Request reflecting the terms of this Decision.
8. Pursuant to paragraph 85(4), by letter dated 25 March 2013, Claimants requested the Tribunal to treat specified passages in paragraphs [24], [27], [65] and [68] of the Revised Amended Request as stricken. Accordingly, the Tribunal treats the Request for Arbitration in these proceedings as the Revised Amended Request dated 27 December 2012, as further amended by this letter (together **Request for Arbitration**).
9. Following the Rule 41(5) Decision, the Parties further applied, by letters from Claimants dated 14 March 2013 and from Respondent dated 15 March 2013, for further directions as to the procedural calendar and for an oral hearing thereon. Having received written submissions from the Parties, a teleconference hearing was convened before the full Tribunal on 21/22 March 2013. Following that hearing, the Tribunal issued Procedural Order No2 (**PO No2**) dated 25 March 2013.

10. This Order provided, by way of amendment to paragraph 12.7 of Procedural Order No1 (**PO No1**), for the Respondent to notify the Tribunal and Claimants by 22 May 2013 whether it intended to raise any jurisdictional objections under ICSID Arbitration Rule 41(1) and request a suspension of the proceedings on the merits. In the event that such an application were made, it further provided for Claimants to reply by 5 June 2013 and for the Tribunal to decide the question of bifurcation by 19 June 2013. It then set forth two alternative pleading scenarios depending upon the Tribunal's decision.
11. On 24 April 2013 (in accordance with the Tribunal's decisions of 18 April 2013 and 2 May 2013), Claimants filed their Memorial on Jurisdiction and the Merits and accompanying documents (**Memorial**).
12. On 28 April 2013, the Parties agreed certain revisions to the procedural timetable, including extending the time for the Respondent's Request to 28 May 2013. The Tribunal consented to these extensions on 2 May 2013.
13. The Respondent filed its Request on 28 May 2013.
14. The Claimants filed its Reply on 5 June 2013.
15. Each party subsequently wrote to the Tribunal: Respondent by letter dated 6 June 2013 and Claimants by letter dated 10 June 2013.
16. The Tribunal has deliberated by conference call on 10/11 June 2013 and by other means.

III. RELEVANT LEGAL TEXTS

17. The Tribunal sets forth below the relevant portions of the legal texts germane to its Decision.

A. ICSID Convention and Arbitration Rules

18. Article 25(1) of the ICSID Convention, which is found within Chapter II headed "Jurisdiction of the Centre", provides:

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.

19. Article 41 of the Convention, which is within Chapter IV Section 3 headed “Powers and Functions of the Tribunal,” provides:

(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.

20. Arbitration Rule 41 “Preliminary Objections” provides, in relevant part:

(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 objections.

(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 objection 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 Netherlands-Hungary Bilateral Investment Treaty

21. Article 4(1) of the Netherlands BIT provides:

Neither Contracting Party shall take any measure depriving, directly or indirectly, investors of the other Contracting Party of their investments unless the following conditions are complied with:

(a) the measures are taken in the public interest and under due process of law;

(b) the measures are not discriminatory or contrary to any undertaking which the former Contracting Party may have given;

(c) the measures are accompanied by provision for payment of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be

paid and made transferable, without undue delay, to the country designated by the claimants concerned and in the currency of the country of which the claimants are nationals or in any freely convertible currency accepted by the claimants.

22. Article 1(1) provides:

[T]he term “investments” shall comprise every kind of asset connected with the participation in companies and joint ventures, more particularly, though not exclusively:

(a) movable and immovable property as well as any other rights *in rem* in respect of every kind of asset;

(b) rights derived from shares, bonds or other kinds of interests in companies and joint ventures;

(c) title to money, goodwill and other assets and to any performance having an economic value;

(d) rights in the field of intellectual property, technical processes and know-how;

(e) rights granted under public law, including rights to prospect, explore, extract and win natural resources.

C. The Switzerland-Hungary Bilateral Investment Treaty

23. Article 6(1) of the Swiss BIT provides:

Neither of the Contracting Parties shall take, either directly or indirectly measures of expropriation, nationalization or any other measure having the same nature or the same effect against investments belonging to investors of the other Contracting Party, unless the measures are taken in the public interest, on a non-discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation. The amount of compensation, interest included, shall be settled in the currency of the country of origin of the investment and paid without delay to the person entitled thereto, without regard to its residence or domicile.

24. Article 1(2) provides:

The term “investments” shall include every kind of assets and particularly:

(a) movable and immovable property as well as any other rights *in rem*, such as servitudes, mortgages, liens and pledges;

(b) shares, parts or any other kinds of participation in companies;

- (c) claims to money or to any performance having an economic value;
- (d) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill;
- (e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law.

IV. THE PARTIES' PLEADINGS

25. The Tribunal will now summarise the pleadings of the Parties to the extent relevant and necessary to its Decision.

A. The Claim

26. By their Request for Arbitration (as amended, including as a result of the Tribunal's Rule 41(5) Decision), Claimants allege that Respondent breached the Treaties and customary international law by indirectly expropriating Claimants' investments in a national FM-radio frequency broadcasting licensee, Slàger.¹ They allege the Respondent did so by conducting a tender for the radio frequency then held by Slàger in 2009 (**the 2009 Tender**) in an unlawful manner.²
27. In setting forth the claimed basis for ICSID jurisdiction under Article 25 of the Convention, Claimants allege:³

The Claimants' investments in the stock of Slàger Radio evidenced their interests in the value of the rights conferred by their broadcasting licences. These rights included not only the right to conduct broadcast operations but also the legal protection granted by the Media Law and the regulations or other instruments adopted to implement the Media Law. Those rights and protections included, *inter alia*, the preference that was accorded to existing licensees in competitive tenders in which they sought renewal of their licenses, and a legal framework guaranteeing that tenders would be conducted lawfully and in a fair and transparent manner.

28. Claimants develop these points in their Memorial. They allege:⁴

¹ Request for Arbitration, [1], [5].

² *Ibid*, [65], [72].

³ *Ibid*, [19].

Hungary's scheme to subvert the legal norms under which Claimants were entitled to renewal of their licence indirectly expropriated Claimants' investments, including the value of their shares in Slàger Radio, related assets (including rights granted by its broadcasting agreement) and operations.

29. Relying upon the definition of investments contained in the Treaties, Claimants allege that '[p]rincipally those investments comprise their respective shares in Slàger Radio, Claimants' Hungarian subsidiary, and the rights derived from those shares.'⁵ Claimants particularise the rights derived from the shares as:⁶

- The Broadcasting Agreement between Slàger Radio and ORTT⁷, which is an asset and more particularly (i) comprises rights granted under public law (Netherlands Treaty, Article 1(1)(e)), and (ii) constitutes a concession under public law (Switzerland Treaty, Article 1(2)(e)).
- The rights, protections and guarantees conferred under the Contract Framework, which include, *inter alia*, the right to broadcast, the right of Slàger as the incumbent bidder to receive a preference or advantage in the tender for the renewal of its broadcasting right; the guarantee that all tenders for the renewal of that broadcasting right shall be conducted according to law in good faith, and on a fair, non-discriminatory, non-partisan and transparent basis. Those rights, protections and guarantees constitute investments because they are (i) rights granted under public law (Netherlands Treaty, Article 1(1)(e)), and (ii) rights given by law, by contract or by "decision of the authority in accordance with the law." (Switzerland Treaty, Article 1(2)(e)).

30. The **Broadcasting Agreement** is defined by Claimants as the Agreement between Slàger and **ORTT** dated 18 November 1997.⁸ The **Contract Framework** is defined by Claimants as the Broadcasting Agreement incorporating the Media Law and the ORTT's General Terms of Tender (**GTT**).⁹

31. In elaborating their claim of expropriation, Claimants allege:¹⁰

⁴ Memorial, [22].

⁵ *Ibid*, [291].

⁶ *Ibid*, [292] footnotes omitted.

⁷ ORTT, Hungarian acronym for *Országos Rádió És Televízió Testület*, is the National Radio and Television Broadcasting Board of Hungary.

⁸ *Ibid*, [43], Ex. C-115.

⁹ *Idem*, Ex. CA-4.

¹⁰ *Ibid*, [346] footnotes omitted.

The unlawful measures described above rendered Claimants shares in Slàger worthless. The value of Slàger was intrinsically tied to Respondent's observance of the rights and guarantees provided to Slàger in the Contract Framework and the expectation that Slàger's broadcasting right would be renewed indefinitely as long as Slàger provided good radio broadcasting services, complied with the Contract Framework and offered a reasonable broadcast fee. Respondent's wilful failure to observe these obligations coupled with its effective plot to foreclose any meaningful relief from Hungarian courts annihilated the value of Slàger's shares.

B. Respondent's Notice of Jurisdictional Objections

32. By its Request, Respondent gives notice of its jurisdictional objections and requests bifurcation of the proceedings so that they may be further pleaded and determined by the Tribunal.

33. In summary, Respondent submits that Claimants' claim:¹¹

... does not "aris[e] directly out of" an investment as required by Article 25 of the ICSID Convention. Furthermore, it largely concerns non-existent rights that fail to meet the definition of "investment" under the Treaties and the ICSID Convention. Finally, the asserted rights are not cognizable as vested property rights under Hungarian law and therefore cannot, at the threshold level, be the subject of an expropriation claim, the only claim for which Hungary has consented to arbitration. The dispute is therefore beyond the Tribunal's jurisdiction due to the failure to meet the requisite conditions *ratione materiae* and *ratione voluntatis*.

34. Specifically, Respondent submits that:

- The alleged right of incumbent preference does not exist under Hungarian law. There being no legal right, there can be no investment capable of being expropriated;¹² and,
- The alleged rights of fair treatment or legitimate expectation regarding the 2009 Tender do not constitute an asset or investment capable of being expropriated.¹³

¹¹ Respondent's Request, [3].

¹² Ibid, [6]-[8].

¹³ Ibid, [9] – [10].

C. Claimants' Reply

35. Claimants allege in Reply that Respondent has mischaracterised the nature of the claim, including Claimants' investments. It emphasises that these investments include:

- Their shares in Slàger;
- Their contractual rights under the Broadcasting Agreement and its Contractual Framework; and,
- Their direct rights under the Media Law, the GTT and the 2009 Call for Tenders (together the **2009 Regulatory Framework**).

They allege that these rights, taken together, would have entitled them to renewal of their licence in 2009, with or without an incumbent advantage.¹⁴ Thus, Claimants allege, Respondent's actions in failing to renew their licence, have deprived them of the entire value of their investment.

V. ISSUES ON BIFURCATION

A. Common Ground

36. The Parties advance opposing submissions on the question of bifurcation. Nevertheless, there is a measure of agreement between them as to (a) the approach to be taken to bifurcation; and (b) the law applicable to the determination of Claimants' investments. The Tribunal adopts these points as the starting-point for its analysis.

37. In approaching the question of bifurcation, the Parties are agreed that:

- (1) The Tribunal has, by virtue of Article 41 of the ICSID Convention and Arbitration Rule 41, discretion as to whether to suspend the proceedings on the merits and determine a jurisdictional objection as a preliminary issue or whether to join it to the merits.¹⁵

¹⁴ Reply, [23].

¹⁵ Respondent's Request, [13]; Reply, [10].

(2) The overarching question is one of procedural efficiency. Factors that may be relevant in this regard include:

- (a) Whether the request is substantial or frivolous;
- (b) Whether the request, if granted, would lead to a material reduction in the proceedings at the next stage;
- (c) Whether bifurcation is impractical in the sense that the issues are too intertwined with the merits.¹⁶

38. As to the determination of the Claimants' investments, the Parties both proceed on the basis that:

- (3) (a) The existence and incidents of the rights acquired by Claimants are to be determined by reference to Hungarian law; and,
- (b) The questions whether those rights constitute investments and are of a kind that are capable of giving rise to a claim of compensation for expropriation are governed by international law, including the Treaties and Article 25(1) of the ICSID Convention.¹⁷
- (4) In pleading as to the existence and incidents of the rights acquired by Claimants, the Parties would both wish to adduce evidence, including expert evidence.¹⁸

B. Respondent's Request for Bifurcation

39. Against this background, Respondent submits that the Tribunal ought to order bifurcation on the following grounds:

- Respondent's jurisdictional objections are substantial not frivolous.

¹⁶ Respondent's Request, [14]; Reply, [11], in each case citing *Glamis Gold Ltd v United States of America* (UNCITRAL, Procedural Order No2 (revised), 31 May 2005), Ex. RA-33, [12].

¹⁷ Claimants' Request for Arbitration, [19], cited *supra* [27]; Memorial, [291] – [292], cited *supra* [29]; Reply, [21], [29]; Respondent's Request, [8].

¹⁸ Reply, [31]; Respondent's letter dated 6 June 2013, 3rd para.

- If successful, they would dispose of the whole case. If not, they would significantly ‘clarify the exact nature of the investment or rights against which Hungary’s conduct would need to be assessed in the merits phase.’¹⁹
- There are numerous issues on the merits, the determination of which would be lengthy and costly. These costs could be saved if Hungary were successful on its jurisdictional challenge.
- The issues are distinct. The jurisdictional phase would focus on whether Claimants had legally cognizable investments and rights capable of expropriation and whether this dispute arises directly out of same. The merits phase would focus on whether Hungary’s conduct of the 2009 Tender did amount to expropriation and, if so, what damage was caused to Claimants as a result.
- There would be no prejudice to Claimants other than delay that could be compensated in costs if Claimants were successful.

C. Claimants’ Reply on Bifurcation

40. Claimants oppose bifurcation as causing delay and not procedural efficiency. They submit that:

- Respondent’s proposed jurisdictional objections are ‘so unfounded in fact and law as to be frivolous’;²⁰ Claimants’ contractual and legal rights are indisputably investments as are their shares in Slàger; and,

Determination of the legal issues identified by Respondent would require extensive evidence ‘regarding the existence of the legal rights at issue and the manner in which they should have been implemented in the context of the 2009 Tender’,²¹ which questions are inextricably intertwined with the merits.

¹⁹ Respondent’s Request, [17].

²⁰ Reply, [30].

²¹ Ibid, [31].

VI. TRIBUNAL'S ANALYSIS

41. In the light of the foregoing, the Tribunal can now proceed to its analysis of the issue of bifurcation, considering the merits of the Request, including its impact on the fair and efficient conduct of these proceedings as a whole.
42. *In the first place*, it observes that this case is, following its Rule 41(5) Decision, solely concerned with a claim for compensation for expropriation. To be sure, the *source* of the legal right to claim for expropriation is found in two different bilateral treaties, and the Claimants have also asserted a claim under the customary international law of expropriation (which claim, and any jurisdictional objections thereto, the Tribunal has joined to the merits). These differences notwithstanding, there are no other substantive causes of action over which this Tribunal has jurisdiction.
43. *In the second place*, the essential consequence of this point is that it is of fundamental importance that the Tribunal identify precisely whether, and if so which investments of Claimants are capable of giving rise to their expropriation claim. This is so because, if Respondent's jurisdiction objection were to be upheld, the consequence would be that the Tribunal would have no jurisdiction over the present case as a whole. Both Article 25(1) of the ICSID Convention and the scope of the protection from expropriation found in each of the Treaties are limited to 'investments' (in the latter case as therein defined). But the same point is equally valid were the Tribunal to deny Respondent's objection. In that event, the Tribunal would need to determine the nature and incidents of the rights held by Claimants that may be considered as investments capable of enjoying the protection of international law against expropriation before deciding whether Respondent's conduct had in fact caused any such expropriation. This would be so whether the proceedings were bifurcated or joined.
44. *In the third place*, the existence and nature of any such rights must be determined in the first instance by reference to Hungarian law, before the Tribunal proceeds to decide whether any such rights can constitute investments capable of giving rise to a claim for expropriation for the purpose of its jurisdiction under the Treaties and the

ICSID Convention. That is the basis upon which Claimants plead their case. Respondent submits the same. The Tribunal agrees.²²

45. *In the fourth place*, the nature of the claim pleaded by Claimants is that Respondent's conduct of the 2009 Tender resulted in the expropriation of its investment. Respondent does not dispute that Claimants originally made an investment in connection with the 1997 Broadcasting Agreement.²³ But Claimants advance no claim about Respondent's conduct prior to 2009. Equally, neither party disputes that Claimants retained their rights under the Broadcasting Agreement including the broadcasting licence until 18 November 2009.²⁴ The Claimants' claim turns upon an allegation that they held valuable rights, which in the circumstances entitled them to renewal of their licence after 18 November 2009 'as long as Slàger provided good radio broadcasting services, complied with the Contract Framework and offered a reasonable broadcast fee', which rights were expropriated.²⁵ The Claimants seek compensation for the lost value of their investment in Slàger consequent upon their loss of the licence following the 2009 Tender. It follows that the material time at which the Tribunal must assess the question of the rights and investments held by Claimants is at the conduct of the 2009 Tender immediately prior to 18 November 2009.
46. *In the fifth place*, the precise nature and incidents of the rights and investments then held by Claimants is distinct from the question as to whether such rights were expropriated by Respondent. The first question is primarily a question of law: both Hungarian law and international law. The second question would involve a close consideration of the factual evidence—both documentary and witness testimony—as to Respondent's conduct of the 2009 Tender. In addition to the merits of the expropriation claim, the Tribunal would also have to determine the quantum of any compensation, if it were to decide that a right to compensation was engaged. These aspects of the matter already occupy a substantial portion of the Memorial and its voluminous supporting documentation, and would have to be the subject of pleading

²² Accord: Douglas *International Law of Investment Claims* (2009), Ex. RA-45, 52.

²³ Respondent's Request, [11].

²⁴ *Ibid*, [5]; Reply, [19].

²⁵ Memorial [346], cited *supra* [31].

by way of Counter-Memorial and subsequent pleadings, with the possibility also of requests for document production.

47. It will be apparent from the foregoing analysis that the Tribunal does not regard the Respondent's objection as frivolous. Rather, it raises a substantial question which requires clarification in the interests of both the parties and the Tribunal.
48. The Tribunal has anxiously considered the issue of procedural efficiency. It is not unmindful of the fact that the parties have already agreed to an alternative pleading schedule that would enable determination of both jurisdiction and the merits in February 2014 in the event that all issues were to be joined. An order for bifurcation, with a hearing on jurisdiction in December 2013 will, in the event that Respondent is unsuccessful in its jurisdictional challenge, inevitably lead to a significant delay in any merits hearing.
49. On the other hand, the Tribunal must balance that factor against the consideration that, if the Respondent were successful in its jurisdictional challenge, it would dispose of the entire case. The Tribunal does not accept the Claimants' submission that the case must, on any scenario, proceed to the merits on the basis of the indirect expropriation of Claimants' shareholding in Slàger.²⁶ For the reasons developed in paragraph 45 above, the Tribunal regards the issue before it on the case as presented by Claimants as concerned with the nature of the rights held by Claimants in respect of the award of a new broadcasting licence. In evaluating that question, the Tribunal must consider the whole bundle of the Claimants' rights. This includes, but is not limited to, the shareholding. On the basis of this examination, it may then determine whether these rights constitute an investment capable of protection from expropriation.
50. The Tribunal considers that to defer the determination of that question to the merits phase might lead to confusion and lack of clarity on a fundamental question. Indeed, this very point is made in the Award of the Tribunal in *Generation Ukraine Inc v Ukraine*, a decision cited by Claimants in their submissions.²⁷ In that case, the Tribunal denied Respondent's request to bifurcate.²⁸ At the conjoined hearing, the Tribunal

²⁶ Reply, [7].

²⁷ ICSID Case No.ARB/00/9, Award dated 16 September 2003; cited in Reply, [15] n11.

²⁸ Ibid, [4.24].

adverted to the fundamental need to identify the existence of proprietary rights giving rise to a claim of expropriation, and the difficulties that it encountered, both as to jurisdiction and the merits, in identifying the legal basis for the claims advanced.²⁹

51. The Tribunal has also considered the practicality of determining the nature of Claimants' rights or investments at a preliminary stage and the risk of overlap or duplication with any subsequent merits phase were Respondent to be unsuccessful. Of course, in one sense, as the treatment of the issues in *Generation Ukraine* illustrates, the question of the nature of the investment can go both to jurisdiction and to the merits. It follows that, in the present case, any determination by the Tribunal as to the question would have to be dispositive on either basis. That is to say:

(a) In the event that the Tribunal were to decide that the Claimants had, at the material time, no rights constituting an investment which could be expropriated (or that the dispute did not arise directly out of such investment), then the Tribunal would be obliged to render an award deciding that the dispute is not within the jurisdiction of the Centre or within its own competence, as required by Arbitration Rule 41(6).

(b) In the event that the Tribunal were to decide that the Claimants had, at the material time, rights which did constitute an investment (and that the present dispute arises directly out of such investment), it would overrule the Respondent's objection and hold that the Centre and the Tribunal do have jurisdiction over the present dispute. In that event, the Tribunal's decision as to the nature and incidents of Claimants' investment would also be final for the purpose of the merits phase of the case.

52. This point was well elucidated by Judge Higgins in her Separate Opinion in the International Court of Justice in *Oil Platforms*, when she said:³⁰

Where the Court has to decide, on the basis of a treaty whose application and interpretation is contested, whether it has jurisdiction, that decision must be definitive....It does not suffice, in the making of this definitive decision, for the Court to decide that it has heard claims relating to the

²⁹ *ibid*, [8.8]-[8.14], [18.1]-[18.2].

³⁰ *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objection) [1996] ICJ Rep 803, Higgins Separate Opinion, [31].

various articles that are “arguable questions” or that are “bona fide questions of interpretation”....

53. The same point was made in the investment arbitration context by the Tribunal in *UPS v Canada* when it held:³¹

[A]ny ruling about the legal meaning of the jurisdictional provision, for instance about its outer limits, is binding on the parties.

54. The Tribunal will be assisted in reaching such a final determination by the expert evidence as to Hungarian law that both parties propose to adduce.
55. But the Tribunal does consider that this issue can and should be separated from the questions of whether Respondent’s acts constituted expropriation, and, if so, the consequences of that in terms of compensation.
56. The Claimants will not be prejudiced by bifurcation, other than in the increased costs occasioned by the jurisdiction application and consequent delay in the event that they are successful in opposing it. It is within the discretion of the Tribunal, as Respondent accepts, to compensate Claimants for these costs.

VII. DECISION

57. **Accordingly, for these reasons, the Tribunal hereby decides that:**

- (1) There shall be a preliminary hearing on Respondent’s jurisdictional objection, namely as to the questions:**
- (a) What rights, if any, did Claimants have under Hungarian law in 2009 in respect of the renewal of their broadcasting licence for any period after 18 November 2009;**
- (b) To what extent, if at all, did those rights constitute an investment for the purpose of the jurisdiction of the Centre under Article 25 of the ICSID Convention and an investment capable of giving rise to a**

³¹ *United Parcel Service of America Inc v Canada* (Award on Jurisdiction) (2002) 7 ICSID Rep 285, 297.

**claim for expropriation within the competence of this Tribunal
under the Treaties; and,**

- (c) **Does the present dispute arise directly out of such investment for
the purpose of Article 25?**
- (2) **For this purpose, the pleading and hearing schedule set forth in scenario A
provided in paragraph 8.12.1 of PO No1 as inserted by PO No2 (and as
varied by agreement between the Parties on 28 April 2013) shall apply.**
- (3) **All proceedings on the merits shall be suspended pending the hearing and
decision on this objection.**
- (4) **The costs of and occasioned by this application shall be reserved.**

ON BEHALF OF THE TRIBUNAL

[Signed]

Professor C A McLachlan QC

(President)

Date: 13 June 2013