

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

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Date of dispatch to the Parties: 16 April 2014

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GLOSSARY OF DEFINED TERMS

1997 CFT	1997 Call for Tender dated 10 June 1997, (R-10)
2009 CFT	Call for Tenders for national radio broadcasting rights dated 20 July 2009, (CA-6)
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 Sláger
Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Bifurcation Decision	The Tribunal's Decision on Respondent's Application for Bifurcation dated 13 June 2013
Brill I	First Witness Statement of Barbara Brill dated 22 April 2013
Brill III	Third Witness Statement of Barbara Brill dated 25 November 2013
Broadcasting Agreement	Agreement between Sláger and ORTT dated 18 November 1997, (C-115)
Broadcasting Right	Right granted to Sláger pursuant to section 2.1 of the Broadcasting Agreement
Contract Framework	Broadcasting Agreement, incorporating the Media Law and GTT (as alleged by Claimants in the Memorial at [43])
Counter-Memorial	Claimants' Counter-Memorial on Jurisdiction dated 19 September 2013
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, (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
Jonscher Report	Expert Report of Dr Charles Jonscher dated 9 August 2013
Körmendy-Ékes/Lengyel I	First Expert Report of Dr Judit Körmendy-Ékes and Dr Márk Lengyel dated 9 August 2013
Körmendy-Ékes/Lengyel II	Second Expert Report of Dr Judit Körmendy-Ékes and Dr Márk Lengyel dated 22 October 2013
Media Law	Act I of 1996 on Radio and Television Broadcasting, (CA-3/R-8)
MEM	MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft., the Third Claimant
Memorial	Claimants' Memorial on Jurisdiction and the Merits dated 24 April 2013
Memorial on Jurisdiction	Respondent's Memorial on Jurisdiction dated 9 August 2013
Molnár I	Expert Legal Opinion of Dr Péter Molnár dated 22 April 2013

Molnár II	Supplemental Expert Legal Opinion of Dr Péter Molnár dated 19 September 2013
Molnár III	Second Supplemental Expert Legal Opinion of Dr Péter Molnár dated 25 November 2013
Netherlands BIT	Bilateral Investment Treaty between the Netherlands and Hungary dated 2 September 1987, (CA-1)
ORTT	<i>Országos Rádió És Televízió Testület</i> , National Radio and Television Broadcasting Board of Hungary
Parties	Collectively Claimants and Respondent
Request for Arbitration	Revised Amended Request for Arbitration dated 27 December 2011, as further amended by letter from Claimants dated 25 March 2013
Reply	Respondent's Reply on Jurisdiction dated 23 October 2013
Rejoinder	Claimants' Rejoinder on Jurisdiction dated 25 November 2013
Rule 41(5) Decision	The Tribunal's Decision on Respondent's Objection under ICSID Arbitration Rule 41(5) dated 11 March 2013
Sláger/Sláger Rádió	Sláger Rádió Műsorszolgáltató Zrt.
Smulyan II	Second Witness Statement of Jeffrey H. Smulyan dated 19 September 2013
Smulyan III	Third Witness Statement of Jeffrey H. Smulyan dated 25 November 2013
Switzerland BIT	Bilateral Investment Treaty between Switzerland and Hungary dated 5 October 1988, (CA-2)
Treaties	Netherlands BIT and Switzerland BIT
T1/xx/xx	Transcript of Day 1 of Hearing on Jurisdiction/page [x]/lines [x]
T2/xx/xx	Transcript of Day 2 of Hearing on Jurisdiction/page [x]/lines [x]

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 the 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 **Switzerland 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 dated 18 March 1965, 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 organised and existing under the laws of the Netherlands. MEM is a company organised and existing under the laws of Hungary, 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 hereinafter as **Hungary** or **Respondent**.
4. The Claimants and the Respondent will be hereinafter collectively referred to as the **Parties**.
5. The dispute relates to the alleged unlawful expropriation by Respondent of Claimants' investments in a national FM-radio frequency broadcasting licensee, Sláger Rádió Műsorszolgáltató Zrt. (**Sláger** or **Sláger Rádió**).
6. After careful consideration of the Parties' written submissions and oral presentations, this Award rules on Respondent's objections to jurisdiction and request for dismissal of Claimants' claims pursuant to ICSID Convention Articles 25 and 41, and Rule 41 of the ICSID Rules of Procedure for Arbitration Proceedings (**Arbitration Rules**), on the grounds that the Tribunal lacks jurisdiction *ratione materiae* and *ratione voluntatis* to adjudicate the case.

II. PROCEDURAL HISTORY

7. 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**).
8. By paragraph 85 of the Rule 41(5) Decision (the *dispositif*), the Tribunal decided, *inter alia*, 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; and
 - (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.
9. The Tribunal included the procedural history of this matter between 10 March and 12 June 2013 in its Decision on Respondent's Application for Bifurcation dated 13 June 2013 (**Bifurcation Decision**).
10. By paragraph 57 of the Bifurcation Decision (the *dispositif*), the Tribunal decided, *inter alia*, 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 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?

11. In accordance with this Decision, the Tribunal made provision for the Parties to submit written and oral pleadings on these issues. Pursuant to paragraph 57(2) of the Bifurcation Decision, the Tribunal further decided to adopt the procedural calendar set forth under paragraph 12.8.1 of Procedural Order No. 1, as amended by Procedural Order No. 2 and the Parties' agreement of 28 April 2013, as adopted by the Tribunal on 1 May 2013.
12. On 9 August 2013 (in accordance with the Tribunal's adopted procedural calendar), Respondent filed its Memorial on Jurisdiction (**Memorial on Jurisdiction**).
13. On 19 September 2013, Claimants filed their Counter-Memorial submission on Jurisdiction (**Counter-Memorial**).
14. On 23 October 2013, Respondent filed its Reply submission on Jurisdiction (**Reply**).
15. On 25 November 2013, Claimants filed their Rejoinder submission on Jurisdiction (**Rejoinder**).
16. The Parties agreed that a two-day oral hearing on jurisdiction would suffice. Neither Party indicated a wish to examine or cross-examine witnesses or experts. Accordingly, the hearing was by agreement confined to submissions by counsel and questions from the Tribunal.
17. A hearing on jurisdiction took place at the World Bank from 16 to 17 December 2013, in Washington, DC (the **Hearing**). In addition to the Members of the Tribunal and the Secretary, present at the Hearing were:

For Respondent:

Ms Jean E. Kalicki	Arnold & Porter LLP
Mr Dmitri Evseev	Arnold & Porter (UK) LLP
Ms Mallory Silberman	
Mr Peter Nikitin	
Mr Bart Wasiak	
Mr János Katona	Kende, Molnár-Bíró, Katona

For Claimants:

Mr Scott Enright	Emmis Communications
Mr Paul Fiddick	
Mr Jeffrey Smulyan	
Ms Barbara Brill	
Dr Peter Brase	Marquard Media International
Mr Michael McNutt	

Mr Stephen Jagusch
Mr Anthony Sinclair
Mr Epaminontas Triantafilou
Mr Philip Devenish
Dr Andras Szecskay
Dr András László
Dr Gyorgy Wellmann

Quinn Emanuel Urquhart & Sullivan UK LLP

Szecskay Attorneys at Law

Other Participant:

Ms Harpreet Dhillon

Assistant to Mr J Christopher Thomas
(present with the consent of the Parties)

18. During the Hearing the Parties confirmed their prior agreement not to examine the witnesses and experts presented by each side. Counsel for Claimants summarised the basis upon which the Parties had reached such agreement as follows:

The agreement, as recorded in the communication between Counsel, is that no Report of any Expert or Statement of any Fact Witness is to be treated as withdrawn, and the agreement not to cross-examine an Expert or Fact Witness on any point or points is not to be taken by either Counsel or the Tribunal as an admission as to the accuracy or relevance of that point or points, and Counsel retain the right to make submissions to the Tribunal as to the accuracy, credibility, or probative value of any Expert or Fact Witness' evidence.¹

19. The Parties also agreed during the Hearing to introduce two new documents into the record.²
20. At the conclusion of the Hearing, the Parties confirmed their agreement with the Tribunal's proposal that post-hearing briefs were not necessary in this case.³ Accordingly, the President declared the evidentiary and submissions phase of the jurisdictional part of these proceedings closed, provided however that the Parties were ordered to provide the agreed English translations of any disputed Hungarian texts by 9am on 18 December 2013 and to submit schedules of costs by 31 January 2014.
21. The Tribunal deliberated in person, including on 17 and 18 December 2013 and by other means of communication.

¹ T1/14/17 – 15/5.

² T1/12/11 – 13.

³ T2/486/10 – 487/9.

III. FACTUAL BACKGROUND

22. In the early nineteen-nineties, Hungary began to adopt policies to attract foreign investment, modernise its infrastructure and improve competition in the provision of services. Within this context, on 21 December 1995, Hungary adopted Act I of 1996 radio and television broadcasting (the **Media Law**),⁴ seeking to attract the expertise, technology and necessary capital to modernise its broadcasting services, while providing for fair and open procedures for the allocation of radio and television airwaves and promoting freedom of the media.⁵
23. Pursuant to the Media Law, Hungary created the National Radio and Television Broadcasting Board (**ORTT**), an administrative body and independent legal entity with oversight power over the tender procedures and in charge of regulating and concluding Television and radio broadcasting agreements in accordance with the Media Law.⁶ ORTT Members are appointed by the political parties represented in the Parliament. The Chairman is jointly nominated by the President and Prime Minister of Hungary.⁷
24. On 30 August 1996 and pursuant to section 91 of the Media Law, ORTT adopted the General Terms of Tender (the **GTT**), a set of rules “relating to the contents and the evaluation of the broadcasting contracts”⁸ for the tendering of radio and television broadcasting frequencies.
25. On 10 June 1997, ORTT called a public and competitive tender process for rights to broadcast two nationwide commercial radio FM frequencies, under certain rules and specifications as to the preparation, submission and evaluation of bids, referred to as the 1997 Call for Tender (the

⁴ Act I of 1996 in Radio and Television Broadcasting, 11 February 1996, (CA-3/R-8). Hungary adopted a new Media Law in 2010. According to Act LXXXII of the 2010 Media Law, ORTT has been replaced with a new regulatory agency called the Media Council. See Claimants’ Memorial, FN 24.

⁵ T1/165/17 – 22.

⁶ T1/167/13 – 19.

⁷ T1/206/4 – 7.

⁸ Media Law, section 91(1); (CA-3/R-8); see General Tender Terms of the National Radio and Television Commission, 30 August 1996, (CA-4). The status and significance of the GTT was an issue in dispute between the Parties. The Respondent contended that the GTT is “a set of general terms and conditions [...] *not* a source of law under the Hungarian legal system, and [cannot] grant any proprietary rights.” (Memorial on Jurisdiction, [21]). Claimants relied on the evidence of its legal expert, Dr Molnár, to suggest that “the GTT is a body of mandatory rules that provides bidders with substantive rights enforceable by the Hungarian courts.” (Counter-Memorial, [42]).

- 1997 CFT**).⁹ The 1997 CFT included the text of the broadcasting agreement to be concluded with the winning bidder, and was, in turn, governed by the GTT and the Media Law.
26. Sláger Rádió, a Hungarian company 100% owned by Claimants, was the successful bidder of one of the two frequencies.¹⁰ On 18 November 1997, Sláger, and ORTT, concluded a broadcasting agreement (the **Broadcasting Agreement**),¹¹ governed by Hungary's Media Law.
27. In accordance with clause 2.3 of the Broadcasting Agreement, Sláger's licence was "issued for seven (7) years, subject to the provisions of the [...] Contract." This provision also stipulated that "[f]or the renewal of the Broadcasting License, § 107 of the Act shall be applicable."
28. Pursuant to section 107(1) of the Media Law, "[b]roadcasting rights for [radio are valid] for maximum seven years, and may be renewed once upon expiry at the broadcaster's request, without inviting a tender, for an additional five years."¹²
29. Sláger's initial seven-year broadcasting licence ending on 18 November 2004,¹³ was renewed for a five-year term ending on 18 November 2009.¹⁴ From 1997 to 2009 Claimants conducted a successful operation and became a recognised national commercial radio station in Hungary.¹⁵ Claimants submit that during that time Sláger followed a strict practice of journalist independence and operated without the influence of political partisanship.¹⁶

⁹ See 1997 Call for Tenders, 10 June 1997, (R-10).

¹⁰ Sláger's shareholding is divided as follows: Emmis International holds 59.7 percent; Emmis Radio holds 25.3 percent and MEM holds 15 percent. See Memorial, [48]. The other national FM frequency was awarded to Danubius Radio, another foreign owned Hungarian company, whose shareholders also instituted separate arbitration proceeding against Hungary before ICSID (see Bifurcation Decision, [10]).

¹¹ Radio Broadcasting Contract between the National Radio and Television Board and Radio Hungaria Broadcasting Company Limited by Shares, 18 November 1997, (C-115).

¹² Media Law, section 107, (CA-3/R-8).

¹³ See Radio Broadcasting Contract between the National Radio and Television Board and Radio Hungaria Broadcasting Company Limited by Shares, 18 November 1997, (C-115), section 2.3.

¹⁴ See Composition Agreement between the National Radio and Television Commission and Sláger Rádió, 5 December 2002, (C-117).

¹⁵ See Memorial, [68] – [72]; see also T1/175/7 – 176/21; First Witness Statement of Barbara Brill dated 22 April 2013, (**Brill I**), [7].

¹⁶ T1/176.

30. It is undisputed between the Parties that Sláger enjoyed the full twelve-year term of the 1997 Broadcasting Agreement.¹⁷ Nevertheless, the relationship between the Parties was not without incident.
31. On 5 December 2001, representatives of Emmis met with ORTT representatives on behalf of Sláger Rádió, seeking a renegotiation of the broadcasting agreement with a view to lowering fees and rescheduling payments.¹⁸
32. On 20 December 2001, citing unlawful actions and infringements of the Broadcasting Agreement for failure to pay the corresponding portion of the broadcasting fee, ORTT resolved to terminate the Sláger Broadcasting Agreement with immediate effect.¹⁹ Sláger challenged the resolution and commenced local legal proceedings. On 5 December 2002, the ORTT and Sláger entered into a settlement agreement and Sláger continued broadcasting pursuant to the 1997 Broadcasting Agreement.²⁰
33. Sláger and ORTT entered into further settlements agreements in 2005 and 2007 to resolve disputes between Sláger and ORTT relating to fines ORTT had levied against it for infringements of its broadcasting obligations.²¹
34. On 1 November 2008, a bill was introduced in Hungary's Parliament, to amend the "single renewal" rule of section 107 of the Media Law, to permit further renewals without a tender of the two national analogue broadcasting licences expiring in 2009.²² The amendment sought to extend the licences for additional five-year periods until the completion of a switchover of analog radio spectrums to digital radio broadcasting which had been provided for by Parliament in 2007.²³ Claimants had lodged submissions with the Parliamentary Media Committee in

¹⁷ See Memorial, [68] – [72].

¹⁸ See Power Point Presentation by Emmis to ORTT, 5 December 2001, (R-22).

¹⁹ See ORTT Decision No. 1787/2001 (XII.20.), 20 December 2001, (R-24).

²⁰ Memorial on Jurisdiction, [42] – [43]. In accordance with the Settlement Agreement, Sláger would comply with the original broadcasting fee terms for the remainder of the 7-year term, in exchange for the undertaking that ORTT will extend its licence otherwise set to expire in 2004 for an additional 5 years and a lower fee will be applicable in that latter period. See Composition Agreement between the National Radio and Television Commission and Sláger Rádió, 5 December 2002, (C-117). See also 2002 Sláger Annual Report and Supplementary Index, (R-26).

²¹ See 2005 Settlement Agreement, 7 December 2005, (R-36); 2007 Settlement Agreement, 15 September 2007, (R-41).

²² See Bill T/6829 On the Amendment of Act I of 1996 on Radio and television broadcasting, November 2008, (C-199).

²³ See Act LXXIV of 2007 on Digital Switchover, 1 June 2007, (R-40).

September 2008 supporting this amendment.²⁴ However, the President of Hungary refused to sign the bill into law and sent it to the Constitutional Court for review, which declared it unconstitutional.²⁵

35. Accordingly, on 20 July 2009, ORTT conducted a call for tenders to award broadcasting rights over two national FM frequencies, one of which was held by Sláger, the other one by Danubius Radio (the **2009 CFT**).²⁶ Both Sláger and Danubius submitted bids, but lost to other contenders.²⁷
36. Claimants submit that the 2009 tender process was “highly irregular” and “unlawful”.²⁸ In particular, they claim that, among other irregularities, the prevailing bidders (i) had prohibited conflicts of interest that should have disqualified their bids, including the bids submitted by FM1 Consortium and Danubius;²⁹ (ii) unfeasible business plans, offering a “patently unreasonable broadcast fee proposal,” that was lowered once the tender process ended,³⁰ and (iii) no national broadcasting experience, as the prevailing bidders, Advenio and FM1 Consortium, did not exist until just before the bids were due.³¹
37. Claimants also argue that the tender process was tainted by political partisanship. The Government at the time was led by the Socialist Party (MSZP), but its influence was waning in advance of the 2010 elections following which, Hungary’s Conservative Party (Fidesz) in coalition with the Christian Democratic People’s Party (KDNP), secured a majority in Parliament and became the Government.³² In 2009, the ORTT was composed of a Chairman (jointly nominated by the President and the Prime Minister), and 5 members: two nominated by the MSZP Socialist Party, two nominated by Fidesz Party, and its ally, KDNP, and one by the SZDSZ (the Liberal (Alliance of Free Democrats) Party).³³

²⁴ Letter dated 10 September 2008, (C-266).

²⁵ See Constitutional Court Decision No. 71/2009, AB, July 2009, (CA-102/R-50); *see also* Memorial on Jurisdiction, [54] – [55]; Counter-Memorial, [25].

²⁶ Call for Tenders for national radio broadcasting rights, 20 July 2009, (CA-6).

²⁷ Memorial, [145].

²⁸ Request for Arbitration, [45]-[53]; Memorial, [6] – [18].

²⁹ Request for Arbitration, [48]; Memorial, [14], [17] – [18].

³⁰ Request for Arbitration, [46]-[47]; Memorial, [15] – [16], [99] – [100].

³¹ Request for Arbitration, [49]; Memorial, [11], [94] – [95].

³² Memorial, [9], [74].

³³ Request for Arbitration, [44]; Memorial, [77].

38. During the period in which the tender was conducted, the Hungarian press reported that the leading MSZP and opposition Fidesz were collaborating to use their influence over ORTT to replace Sláger and Danubius, with new operators, loyal supporters of the two parties.³⁴ On this basis, among others, Claimants argue that the Members of ORTT who had been nominated by the two main parties, “acted in concert [...] to deliver the two national frequencies to new, politically-connected Hungarian bidders,”³⁵ and suggested that the MSZP and the Fidesz had reached a “secret backroom political ‘deal’ to split the national radio frequencies.”³⁶ The Hungarian press also reported that both Sláger and Danubius received warnings that they should reach accommodations with the two leading parties to have a chance of renewing their broadcasting rights.³⁷
39. On 28 October 2009, ORTT announced that Advenio and FM1 Consortium had won the tender.³⁸ ORTT executed new licence agreements with Advenio and FM1 on 4 November 2009.³⁹ The new licencees commenced broadcasting activities, thereby replacing Sláger and Danubius, on 19 November 2009.⁴⁰
40. On 2 November 2009, Sláger and Danubius requested emergency injunctions from the Hungarian courts, seeking to prevent ORTT from executing broadcasting agreements with the prevailing bidders.⁴¹ They further sought a declaration from the courts that ORTT’s broadcasting agreements with FM1 and Advenio, were unlawful.⁴² The Metropolitan Court of First Instance and Court of Appeals found that the ORTT had acted unlawfully by failing to declare both

³⁴ *Danubius and Sláger Could Disappear*, Népszabadság, 30 September 2009, (C-16); *Radio: the excluded company wants to sue*, Világgazdaság, 9 October 2009, (C-17); *Danubius and Sláger Under Siege*, Népszabadság, 17 October 2009, (C-18); Request for Arbitration, [45]; Memorial, [97] – [98].

³⁵ Memorial, [10], see also Memorial [75] – [77].

³⁶ Memorial, [78], citing to Brill I, [19]; Witness Statement of Paul W. Fiddick dated 22 April 2013, [22]; see also Robert Hodgson *Radio Station Refuses to Go Pop*, Budapest Times, 10 November 2009, (C-40).

³⁷ Strange “Reverse Lobbying” Over Radio Frequencies, Hírszerző, 2 November 2009, (C-11); Barbara Brill Notes of Meeting, 25 August 2009, (C-49); Central Investigation Public Prosecutor’s Office, Witness Hearing Minutes of Barbara Brill, 27 January 2010, (C-50); Brill I, [34]; Request for Arbitration, [45]; Memorial, [79] – [96].

³⁸ Minutes of the Meeting of the ORTT (Word for Word), 28 October 2009, (C-109).

³⁹ Agreement for Broadcasting Services between ORTT and Advenio Zrt., 4 November 2009, (C-155); Agreement for Broadcasting Services between ORTT and FM1 Kommunikációs és Kulturális Private Company Limited by Shares, 4 November 2009, (C-154).

⁴⁰ Request for Arbitration, [51] – [53].

⁴¹ See Danubius Statement of Claim, 2 November 2009, (C-158); Sláger Statement of Claim, 2 November 2009, (C-159).

⁴² *Ibid.*

Advenio's and FM1's bids formally invalid because they violated express cross-ownership restrictions and by executing the broadcasting agreements.⁴³ However, the Hungarian Supreme Court reversed the decision pertaining to Sláger on 23 February 2011.⁴⁴ It found that ORTT was not required to disqualify FM1, since the latter could include a declaration confirming that it would remedy the conflict if declared the winner. The Supreme Court concluded, therefore, that the ORTT had not acted unlawfully.⁴⁵

41. Following the announcement of the winning bidders, ORTT's Chairman resigned in protest.⁴⁶ In his formal dissent to the Majority decision of the Board, the Chairman declared that Advenio's bid was formally invalid for failure to comply with conflicts requirements of the law and the tender and declaring its financial plan unviable.⁴⁷ Similarly, another ORTT commissioner Dr János Timár criticised ORTT's actions as a product of "a political deal" and characterised it as a disregard of the rule of law.⁴⁸
42. On 18 November 2009, the ambassadors to Hungary of nine states (including Switzerland and The Netherlands) issued a Joint Statement condemning "non-transparent behaviour affecting [foreign] investors in such areas as public utilities, broadcasting, and elements of the nation's transportation infrastructure" in Hungary.⁴⁹ The Statement further highlighted that "[t]ransparency can be a critical competitive advantage. Passing, implementing and enforcing

⁴³ Metropolitan Court Decision, 19 January 2010 (Sláger), (CA-11); Metropolitan Court decision, 5 January 2010 (Danubius), (CA-12); Metropolitan Court of Appeals decision, 14 July 2010 (Sláger), (CA-14); Metropolitan Court of Appeals decision, 14 July 2010 (Danubius), (CA-13); *see* Memorial, [115] – [117].

⁴⁴ Supreme Court of the Republic of Hungary, Judgment in Pfv.IV.21.976/2010/6, 23 February 2011, (CA-15); Supreme Court of the Republic of Hungary, Judgment in Pfv.IV.21.908/201/6, 23 February 2011, (CA-16).

⁴⁵ Supreme Court of the Republic of Hungary, Judgment in Pfv.IV.21.976/2010/6, 23 February 2011, (CA-16). The Appeal was rejected in the Danubius case. (Supreme Court of the Republic of Hungary, Judgment in Pfv.IV.21.908/201/6, 23 February 2011, (CA-15)).

⁴⁶ Memorial, [7], [105] – [107]. *See also* Peter Murphy, Politics Killed the Radio Stars, TOL, 10 December 2009, (C-19) ("Suspensions of a carve-up of the airwaves between Fidesz and the Socialists crystallized dramatically [...] when Laszlo Majtenyi the nonpartisan chairman of the ORTT, resigned his post the day after the vote in protest.").

⁴⁷ Dissent of Dr László Majtényi, Chairman of Hungary's National Radio and Television Commission with respect to the evaluation of the bids submitted for national commercial radio broadcast licenses, decisions 2066 and 2067/2009, 2 November 2009, (C-148).

⁴⁸ Dissent of Dr János Timár, in respect of the assessment of the national terrestrial radio tender bids in terms of form with respect to resolution 1903/2009, 8 October 2009, (C-150); *see also* Request for Arbitration, [50]; Memorial, [108].

⁴⁹ Joint statement on transparency, Swiss Federal Department of Foreign Affairs, 18 November 2009, (C-26).

new anti-corruption legislation could be an important factor in helping meet the aspirations of Hungary's citizens for renewed economic growth, and prosperity."⁵⁰

43. In December 2010, Hungary amended the Media Law, and subsequently enacted a new Media Law (Act CLXXXV of 2010 on Media Services and Mass Media).⁵¹ Among other elements, section 207(7) of the new law provides that unlawful agreements concluded between ORTT and licencees can only be terminated if the unlawful situation were caused exclusively by the broadcaster and not by ORTT. In addition, the Law permits the Media Council (the new regulatory agency that replaced ORTT) to reduce the broadcast fees that were unrealistically high. On this basis, according to the Claimants, neither the FM1 nor the Advenio contract could be terminated. Moreover, the Media Council has the discretion to lower the high broadcast fees that the winning bidders had included in their bids, if it wishes to do so.⁵²
44. The enactment of the Media Law raised concerns among the organs of the European Union (the European Commission⁵³ and the European Parliament⁵⁴) the Council of Europe⁵⁵ and the Organization for Security and Cooperation in Europe,⁵⁶ over the effects of the Law on the independence of the media and freedom of expression.

IV. PARTIES' SUBMISSIONS

45. In view of the Tribunal's Bifurcation Decision, the Parties structured their submissions in order to address two issues central to the scope of the jurisdiction vouchsafed to the Tribunal by the states under the Treaties, namely:⁵⁷

⁵⁰ Joint statement on transparency, Swiss Federal Department of Foreign Affairs, 18 November 2009, (C-26). The Joint Statement was issued by Ambassadors to Hungary of Belgium, France, Germany, Japan, Norway, Switzerland, the Netherlands, the United Kingdom and the United States. *See also* Memorial, [110].

⁵¹ Memorial, [118] – [121].

⁵² Request for Arbitration [58]; Memorial, [121].

⁵³ Letter from Neelie Kroes, Vice-President of the European Commission, to Tibor Navracsics, Deputy Prime Minister, 21 January 2011, (C-31).

⁵⁴ European Parliament, Resolution P7_TA-PROV (2011) 0094, Media Law in Hungary, (C-38).

⁵⁵ Council of Europe – Commissioner for Human Rights, *Opinion of the Commissioner for Human Rights on Hungary's media legislation in light of Council of Europe standards on freedom of the media*, 25 February 2011, (C-33).

⁵⁶ Organization for Security and Cooperation in Europe, Representative on Freedom of the Media, *Hungarian media legislation severely contradicts international standards of media freedom, says OSCE media freedom representative*, 7 September 2010, (C-34).

⁵⁷ Bifurcation Decision, [57(1)].

- (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 claim for expropriation within the competence of this Tribunal under the Treaties; does the present dispute arise directly out of such investment for the purpose of Article 25?

46. In summary, Respondent's case is that the Tribunal lacks jurisdiction to hear the present dispute because "only rights that are proprietary are capable of expropriation"⁵⁸ and "Claimants have failed to demonstrate the existence of proprietary rights capable of expropriation or a dispute arising directly out of an investment in relation to the 2009 tender."⁵⁹

47. In response, Claimants contend that the Tribunal has jurisdiction because:

It is undisputed that the Claimants jointly hold 100 percent of the shares in Sláger, and those shares are "assets" that qualify as a covered "investment" under both applicable BITs and the ICSID Convention. Alternatively, the Claimants' investment is their interest in Sláger as a business operation, comprising all of its value, including their indirect interest in the legal rights and assets held by Sláger under Hungarian law, the 1997 Broadcasting Agreement and 2009 Regulatory Framework. Viewed in this sense too, Sláger (and its rights) is a covered "investment" under the Treaties and the ICSID Convention.

Furthermore, the Claimants' investment was capable of giving rise to an expropriation claim under the Treaties. It is well-established as a matter of international law that indirect expropriation may affect a broad range of intangible assets with economic value, including *inter alia* shares in a company, and tangible and intangible rights held by an investment vehicle.⁶⁰

[...] Hungary's actions had a direct bearing on the value of the Claimants' shareholding investment [and in their interest in Sláger as an enterprise or business operation]. The dispute therefore arises directly out of the Claimants' investment that was impacted by Hungary's measures.⁶¹

⁵⁸ T1/25/16 – 18; *see also* T1/26/2 – 8.

⁵⁹ Reply, [9].

⁶⁰ Rejoinder, [12], [13].

⁶¹ Rejoinder, [16].

A. Claimants' rights under Hungarian Law

48. The Parties are agreed that the nature of any rights that might form the basis of Claimants' expropriation claim are to be determined under Hungarian law.⁶²
49. In its Bifurcation Decision, the Tribunal defined the material time at which it should assess this question:

[...] 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. 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 Sláger provided good radio broadcasting services, complied with the Contract Framework and offered a reasonable broadcast fee', which rights were expropriated. The Claimants seek compensation for the lost value of their investment in Sláger 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 2009.⁶³

50. The Parties exchanged extensive submissions on the question of the rights and investments held or allegedly held by Claimants, both, (a) arising generally from the 2009 Tender and (b) arising from the 1997 Broadcasting Agreement, including the right to an incumbent advantage applicable during the 2009 Tender and an entitlement to the renewal of the licence after 18 November 2009. Both questions were further elaborated in oral pleading. The Parties' submissions on each of these issues are summarised in turn.

1. General rights in the 2009 Tender

51. The Tribunal had requested that the Parties address during the jurisdictional phase the question of "[the] rights, if any, [that] Claimants ha[d] under Hungarian Law in 2009 in respect of the renewal of their broadcasting licence [...]."⁶⁴
52. According to Claimants, the 1997 Broadcasting Agreement (in effect through the 2009 Tender) incorporated by reference several legal rights held by Sláger under the Media Law (in particular Chapters II and VI) and the GTT, which rights collectively constitute the **Contract Framework**.⁶⁵

⁶² Bifurcation Decision, [38(3)(a)].

⁶³ Bifurcation Decision, [45].

⁶⁴ Bifurcation Decision, [57(1)(a)].

⁶⁵ Counter-Memorial, [79] – [80], [84].

Further, Claimants allege that the Media Law, the GTT and the 2009 Call for Tender, operated together to confer valid and enforceable rights on Sláger, which rights collectively constitute what Claimants referred to as the **Regulatory Framework**. While noting that there is a considerable overlap between Sláger's rights under the Contract and the Regulatory Frameworks, the Claimants consider that the aforementioned frameworks constitute the legal sources of:

[...] several important rights in law and contract, including the right to a fairly and transparently established tender process, the right for its bid to be evaluated properly and in accordance with applicable law, and the right not to have to compete against bidders who should have been disqualified based on the rules applicable to the tender.⁶⁶

(a) Respondent's submission

53. Respondent submits that "neither the 1997 Broadcasting Agreement nor Hungarian Law gave Sláger a proprietary right in relation to the 2009 Tender."⁶⁷ According to Respondent, "all Sláger had in the fall of 2009 was an expiring broadcasting agreement, which gave no advantages or guarantees in relation to the 2009 Tender."⁶⁸ More specifically:

[...] [C]laimants' claims to other "legal and contractual rights" under Hungarian law are either entirely spurious, or amount to simple allegations that ORTT breached general Hungarian rules and regulations governing tenders, which apply equally to all bidders and which, even if violated, cannot lead to a *losing* bidder being awarded the broadcasting right. Such "rights" are in no way linked to Sláger's status as an incumbent broadcaster, nor are they otherwise exclusive or personal to Sláger in a manner that would warrant protection as property as a matter of Hungarian law.⁶⁹

54. Hungary rejects the proposition that a particular Contract Framework applicable to Sláger exists or existed.⁷⁰ Contrary to Claimants' submission, Respondent asserts that neither the Media Law, nor the GTT can be converted into contractual obligations by virtue of being allegedly incorporated by reference through the 1997 Broadcasting Agreement.⁷¹ In particular,

⁶⁶ Counter-Memorial, [22]; *see also* [120] – [133].

⁶⁷ Memorial on Jurisdiction, [69.a]; Reply, [84] – [89].

⁶⁸ Reply, [54].

⁶⁹ Reply, [54].

⁷⁰ T1/58/5 – 9.

⁷¹ T1/32/10 – 14.

Respondent challenges Claimants' reading of section 3.2 of the Broadcasting Agreement,⁷² explaining that (a) this provision refers exclusively to obligations of the 'broadcaster,' as does the rest of section 3 of the Broadcasting Agreement and (b) in any case, such provision cannot transform the Media Law into contractual obligations.⁷³

55. Respondent argues that general provisions of law, such as the Media Law and the GTT, cannot be the source of personal obligations owed to Sláger: neither can they be converted into immutable contractual obligations that come into existence after every tender;⁷⁴ nor can they protect the beneficiary of a broadcasting agreement from later amendments of the GTT, guaranteeing its application at the time the Contract is concluded."⁷⁵
56. Relying on the Report of its experts on Hungarian law, Drs Körmendy-Ékes and Lengyel, Respondent posits that the GTT was a "set of guidelines"⁷⁶ and the primary purpose of the GTT "was to serve as a set of general terms and conditions applicable to tender participants."⁷⁷ Respondent recognises that "the GTT was binding and enforceable with respect to the tendering authority and the bidders in any particular tender."⁷⁸ The GTT, however, "was *not* a source of law under the Hungarian legal system, and could not grant any proprietary rights."⁷⁹ Respondent cites to Drs Körmendy-Ékes and Lengyel to explain that:

[T]o warrant protection under Hungarian law of property, a right must trace its origins to statutory law, have some kind of recognizable financial value, be vested in the entitled person, and be capable of entry as an asset on company

⁷² Section 3.2 of the Broadcasting Agreement reads: "The Broadcaster undertakes to observe the provisions of the Act. The parties hereby incorporate into the present Contract the provisions of the Act relating to the Broadcasting Right and its exercise in effect at the time of the conclusion of the Contract. The Broadcaster hereby expressly agrees to use the Broadcasting Right during the full term of its validity in accordance with the provisions of the Act incorporated into the Contract, whether they are repeated herein or not."

⁷³ Memorial on Jurisdiction, [76]; *see also* T2/346/3 – 7; 348/19. In response to a question from the President, Respondent further explained in oral pleading that the Broadcasting Agreement contained references to the GTT, even if the Tender terms had no real relevance at that point, for historical purposes, (T1/117/18).

⁷⁴ Reply, [68]; T1/32/17 – 21.

⁷⁵ Reply, [70]; T1/121/3 – 15.

⁷⁶ Memorial on Jurisdiction, [120].

⁷⁷ Memorial on Jurisdiction, [21].

⁷⁸ Reply, [85].

⁷⁹ Memorial on Jurisdiction, [21] [Emphasis in original].

accounts. [...] The rights Claimants assert – to the extent they even exist - fail to satisfy these minimum requirements.⁸⁰

57. In conclusion, relying on its legal and economic experts, Hungary submits that even if Hungarian law recognises both traditional property rights and “rights representing assets” capable of being owned and alienated, “none of the rights asserted by Claimants in relation to the 2009 Tender qualify as proprietary rights”⁸¹ as these rights are not “personal rights,”⁸² nor do they “distinguish Claimants from other bidders.”⁸³ It explains:

To the extent Sláger could assert enforceable rights under the GTT or generally applicable provisions of Hungarian law, these rights were merely procedural in nature. These “due process” protections extended to Sláger for the simple reason that it chose to participate in the 2009 Tender. They did *not* extend to Sláger because Sláger was the incumbent broadcaster, because Sláger had a contractual entitlement to those rights, or because Sláger had made investments in connection with its operations under the 1997 Broadcasting Agreement. In other words, none of the asserted rights arose as a result of Sláger’s broadcasting operations in Hungary or qualified as Sláger’s property under Hungarian law.⁸⁴

(b) Claimants’ submission

58. In summary, Claimants submit that as party of the 1997 Broadcasting Agreement and under the 2009 Regulatory Framework, as a duly registered bidder, Sláger enjoyed the following set of rights:

- the right to an incumbent advantage;
- the right to a properly established tender procedure;
- the right to a timely tender;
- the right to a fair and objective tender evaluation in accordance with transparent scoring criteria;
- the right not to compete against unqualified or improperly qualified bidders; and

⁸⁰ Reply, [86] – [87], citing to First Expert Report of Dr Judit Körmendy-Ékes and Dr Márk Lengyel dated 9 August 2013, (**Körmendy-Ékes/Lengyel I**), [89], [91], [98], [102], and Second Expert Report of Dr Judit Körmendy-Ékes and Dr Márk Lengyel dated 22 October 2013, (**Körmendy-Ékes/Lengyel II**), [12], [25], [80], [84], [87], [90].

⁸¹ Memorial on Jurisdiction, [83].

⁸² T1/112/21 – 22.

⁸³ T1/112/8 – 10.

⁸⁴ Reply, [89], citing **Körmendy-Ékes/Lengyel II**, [88] – [90].

- consequent upon the [appropriate] application of the preceding rights, the right to the 2009 Broadcasting Agreement.⁸⁵

59. According to Claimants, these are substantive as opposed to procedural rights, which can be the subject of evaluation by the Hungarian Courts, and which were grounded on a sound policy basis: (a) to provide adequate safeguards and benefits for a lawfully operating entity that made profitable investments in Hungary, and (b) to protect against arbitrary or underhanded behaviour on the part of ORTT.⁸⁶

60. *First*, regarding the bundle of rights arising from the *Contract Framework*, it is Claimants' position that:

[...] certain key provisions of the Media Law were incorporated as terms into the 1997 Broadcasting Agreement, including those governing the re-tendering of the broadcasting right granted in the 1997 Broadcasting Agreement, and the conclusion of a new Broadcasting Agreement at the end of such re-tendering.

By virtue of that incorporation, the duties and obligations of the ORTT under the relevant provisions of the Media Law and the GTT indeed became contractual undertakings of the ORTT vis-à-vis Sláger.⁸⁷

Claimants submit that "the legal effect of this incorporation is stabilization."⁸⁸

61. Claimants in addition state that the GTT, although not a legislative rule, is a body of mandatory rules that functions as a source of law in the Hungarian legal system.⁸⁹ It is "[binding on] the issuer and the tender and the bidders identically;"⁹⁰ and applies to all aspects of the 2009 Tender.⁹¹ Pursuant to the Broadcasting Agreement, the GTT forms part of the content of the Broadcasting Agreement.⁹² Relying on Dr Molnár's report, Claimants further allege that the GTT provides bidders with substantive rights enforceable by the Hungarian courts.⁹³

⁸⁵ Rejoinder, [8]. *See also* Rejoinder, [66] – [109].

⁸⁶ T1/233/7 – 234/7.

⁸⁷ Counter-Memorial, [86], [87]; *see also* T2/399/8 – 14, confirming that Clause 3.2. of the Broadcasting Agreement "affects an incorporation of the applicable sections of the Media Act including Chapters 2 and 6, which relates to the Broadcasting Rights and its exercise."

⁸⁸ T2/399/19 – 20.

⁸⁹ Counter-Memorial, [77].

⁹⁰ Counter-Memorial, [75].

⁹¹ Counter-Memorial, [71].

⁹² Counter-Memorial, [90] – [93].

⁹³ Counter-Memorial, [42], [44].

62. *Second*, regarding the bundle of rights arising from the *Regulatory Framework*, Claimants contend that “as a legitimate participant in the 2009 Tender having paid its tender fee and submitted a compliant bid, Sláger was entitled to benefit from the full panoply of rights conferred upon it by these instruments.”⁹⁴
63. Based on the preceding arguments, Claimants conclude that “but for Hungary’s breach of Sláger’s right during the 2009 Tender, Sláger would have been awarded the 2009 Broadcasting Agreement.”⁹⁵
64. The Tribunal will now examine the Parties’ specific submissions *first* as to an alleged incumbent advantage in the tender process; and *second* as to other bases on which Claimants’ alleged a right to award of the 2009 broadcasting licence.

2. Incumbent Advantage

65. Claimants posit that:

[A]s operator of the tendered frequency for 12 years in accordance with its 1997 Broadcasting Agreement and applicable law, Sláger held the right to an incumbent advantage, namely an added benefit in the evaluation of its bid that, combined with a reasonable broadcasting fee offer and fulfillment of the other tender requirements, offered Sláger increased chances of winning the 2009 Tender.⁹⁶

66. Claimants rely upon section 65.3 of the GTT as providing the legal basis for such a right. This provision reads:

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

65.3.2 ORTT evaluates at a disadvantage the bidder who holds the broadcasting right for the frequency forming subject of the call for tenders but its operations are not in compliance with its studio license and the Media Act.

(a) Respondent’s submission

67. According to Respondent, neither the Contract Framework nor the Regulatory Framework gave Claimants the alleged incumbent advantage.⁹⁷ On the contrary, Respondent submits that

⁹⁴ Counter-Memorial, [95].

⁹⁵ Rejoinder, [64], [112]; T1/232/4 – 7.

⁹⁶ Counter-Memorial, [23].

⁹⁷ T1/33/2 – 6.

“suggesting entitlement to an ‘incumbent advantage’ that would essentially guarantee of continued operation, would be clearly unconstitutional, contrary to the principle of competition, and contrary to the very notion of a competitive tender.”⁹⁸

68. In addition, relying on the Körmendy-Ékes/Lengyel Reports, Respondent contends that section 65.3.1 is not applicable to Sláger since this provision only applied to bidders who held indefinite “studio licenses,” a specific form of broadcasting right pre-dating the Media Law, never held by Sláger:

As explained by Drs. Körmendy-Ékes and Lengyel, Section 65.3.1 explicitly applied only to bidders who held “studio licenses”. [...] Under Section 146 of the 1996 Media Law, “studio licenses” were abolished by the new law, but prior holders of “studio licenses” issued for an indefinite term were granted a certain advantage in the tenders for broadcasting rights related to the frequencies. All local and regional tenders cited by Claimants’ expert Dr. Molnár as providing some points (usually ten) for “lawful operation” on the frequency involved frequencies on which there had been an incumbent broadcaster with a “studio license.” Since Sláger never held a “studio license,” Section 65.3.1 GTT was not applicable to it.⁹⁹

69. Moreover, according to Hungary, even under Claimants’ interpretation of section 65.3, Sláger would not have been entitled to the incumbent advantage due to its repeated and severe breaches of its 1997 Broadcasting Agreement and the Media Law.¹⁰⁰ In fact, Sláger would have fallen under section 65.3.2, which imposes a “disadvantage” on an incumbent bidder that failed to operate in accordance with its licence or the Media Law. Since Sláger’s infringement of the Media Law were both ‘repeated’ and ‘serious’, they would have been sufficient to justify an incumbent disadvantage.¹⁰¹ Respondent concedes that “ORTT did not have any dedicated discussion to determine whether or not Sláger’s breaches were serious and repeated”¹⁰² but explains that this was because ORTT did not seek to apply a preference or a dis-preference to an incumbent in the 2009 Tender.

⁹⁸ Memorial on Jurisdiction, [82], [121].

⁹⁹ Memorial on Jurisdiction,[78]; *see also* Reply [76]. According to Respondent, section 65.3.2 applied only to holders of indefinite studio licences, whereas holders of Studio licences issued for a fixed term should have transformed their studio licences into Broadcasting Contracts by March 1996, or have their right forfeit under section 146(1) of the Media Law, (T1/88/6 – 21).

¹⁰⁰ Memorial on Jurisdiction, [80]. Respondent contends that between 2002 and 2007, Sláger committed 1822 infringements of its broadcasting obligations, and many penalties were imposed in connection with these violations.

¹⁰¹ Memorial on Jurisdiction, [80]; Reply, [82].

¹⁰² T2/361/11 – 21. *See also* T2/403/8 – 12; ORTT Minutes January – December 2008, (C-197) and ORTT Minutes January – December 2009, (C-198).

70. Respondent disagrees with Claimants' argument that Hungary's renewal of the licence in 2004 and its decision to conclude a settlement agreement in 2005, according to which ORTT would agree to refrain imposing new sanctions confirms that Claimants' licence acted in accordance with the Media Law.¹⁰³ The settlement agreement merely reflected a decision not to impose further administrative sanctions for the wrongful conduct, but not that such conduct was proper.¹⁰⁴
71. Finally, Respondent posits that even if Sláger were entitled to benefit from section 65.3.1 of the GTT, the incumbent advantage would not have been sufficient to guarantee the allocation of the new licence to Sláger, since its bid was not competitive and it fell short of winning the bid by 25 points.¹⁰⁵ In any case, "the application of this provision was not sufficiently definite to constitute a right" on its own.¹⁰⁶ If, as Claimants contend, all other bidders should have been disqualified and Sláger should have won as the only qualified bidder, then the incumbent advantage would have been irrelevant for the alleged right to the 2009 Broadcasting Agreement to vest in Claimants.¹⁰⁷

(b) Claimants' submission

72. Claimants submit that section 65.3.1 of the GTT establishes the right of an incumbent to have an advantage in a new tender of the frequency that it has lawfully operated.¹⁰⁸ They further assert that the provision "gives rise to a right to be advantaged," that "cannot be assigned [...] as such, individually", but the advantage "accrues to the incumbent" and therefore it could have a "tangible economic value", that could be valued through either a "commercial assessment" (looking at market conditions, identifying comparable transactions and the percentage of points accorded at the issuance of the tender rules) or by simply looking at the points awarded.¹⁰⁹
73. Nevertheless, Claimants concede that section 65.3.1 of the GTT does not grant a "decisive" advantage to the incumbent.¹¹⁰ As explained by Dr Molnar:

¹⁰³ Reply, [83].

¹⁰⁴ T2/363/12 – 370/20.

¹⁰⁵ T1/45/5 – 10; 111/6 – 7; T2/319/18 – 22.

¹⁰⁶ Memorial on Jurisdiction, [81].

¹⁰⁷ T2/320/2 – 321/10.

¹⁰⁸ Memorial, [150].

¹⁰⁹ T2/404/2 – 405/10.

¹¹⁰ Counter-Memorial, [46]; Rejoinder, [68] – [73].

The incumbent advantage does not exclude automatically any bidder from winning a tender. If the incumbent fails to provide a competitive bid, its advantage will not save it from losing its broadcasting right.¹¹¹

Since Claimants also allege a right to have non-qualifying bidders excluded, Claimants accept the fact that "the incumbent advantage, in fact has no relevance [...] because there is no other qualifying bidder against which the incumbent needs to be advantaged."¹¹²

74. Claimants contend that the references to studio licences in section 65.3 are in fact, "a remnant from the early days of the 1996 Media Law,"¹¹³ and have in practice been applied by ORTT to all types of broadcasting agreement since "before the 1996 Media Law was enacted, Hungarian broadcasters operated on the basis of so-called studio licenses, these being precursors to the broadcasting agreements."¹¹⁴
75. Claimants agree that section 65.3.2 provides a corollary rule that handicaps an incumbent that acted unlawfully.¹¹⁵ They however disagree that Sláger had committed "serious or repeated" breaches such that ORTT would have been entitled to apply the incumbent disadvantage to Sláger.¹¹⁶ Claimants explain that "[u]nder the sanction system created by Section 112 of the 1996 Media Law, combined with well-established ORTT practice, violations would not be considered as 'serious' unless they were notified to the broadcaster pursuant to Section 112(1)(b) of the Media Law."¹¹⁷ Since Sláger never received such notices, Claimants contend that even if "it is true that Sláger was found to have committed minor infractions" considered "routine",¹¹⁸ "[t]here is no evidence that the ORTT considered Sláger as having committed 'serious and repeated' violations in evaluating Sláger's bid during the 2009 Tender."¹¹⁹ According to Claimants, both when Sláger's broadcasting right was renewed without a tender in 2004, and subsequently, after the Parties concluded settlement agreements in 2005 and 2007, ORTT

¹¹¹ Supplemental Expert Legal Opinion of Dr Péter Molnár dated 19 September 2013, (**Molnár II**), [61]; Counter-Memorial, [46].

¹¹² T2/418/2 – 10.

¹¹³ Counter-Memorial, [109]; *see also* T1/243/15 – 16.

¹¹⁴ Counter-Memorial, [107], citing Molnár II, [39] – [45]; T1/243/3 – 9.

¹¹⁵ Memorial, [151].

¹¹⁶ Counter-Memorial, [34]; Rejoinder, [86], [90].

¹¹⁷ Counter-Memorial, [33]; Rejoinder, [96]; *see also* T1/245/5 – 18.

¹¹⁸ Counter-Memorial, [39] – [40].

¹¹⁹ Counter-Memorial, [34].

“declared that all conditions for the extension had been met”¹²⁰ and agreed not to “impose unjustified sanctions on Sláger,” reflecting Sláger’s compliance with the applicable norms.¹²¹

3. Right to the award of the 2009 broadcasting licence

76. The Parties have presented diverging submissions as to the whether Sláger had a right to the award of a new broadcasting licence after 2009, and in particular, whether such right stems from section 107 of the Media Law. This provision reads:

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

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

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

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

(a) Respondent’s submission

77. Respondent submits that section 107 of the Media Law is unambiguous and provides for a strict “Term of Rights,” “limiting the holder of a commercial radio broadcasting right to a ‘maximum’ seven year term, which may be renewed ‘once’ for an additional five years.”¹²² Wherever contemplated by the Media Law, the possibility of multiple renewals was stated expressly.¹²³ In contrast with the interpretation advanced by Claimants, Respondent’s interpretation of section 107 is as follows:

Subsection (1) of Section 107 expressly says that the broadcasting right “may be renewed once,” *i.e.* not two times or twenty times, and states that the renewal shall be for “five years,” *i.e.* not for an indefinite period. Subsection (2) refers to cases where the single “renewal” allowed by subsection (1) is theoretically possible, but “cannot be awarded.” The provision clearly distinguishes between a “renewal” and a “tender” of rights, making Claimants’ asserted entitlement to “renewals of a broadcasting right by tender” a contradiction in terms.¹²⁴

¹²⁰ Rejoinder, [92].

¹²¹ See Rejoinder, [97]; see also T1/246 – 248.

¹²² Memorial on Jurisdiction, [10].

¹²³ Memorial on Jurisdiction, [120]; Körmendy-Ékes/Lengyel I, [34].

¹²⁴ Memorial on Jurisdiction, [73].

78. It further contends that neither Claimants nor ORTT ever suggested that a right to renewal or an incumbent advantage existed under the Media Law, the GTT, or the Broadcasting Agreement, in any communication leading up to the submission of bids in the 2009 Tender.¹²⁵
79. First, Sláger and its shareholders did not assert ‘a legal right’ to continue broadcasting beyond the 12-year term:¹²⁶
- None of Claimants’ documentary exhibits contain any evidence that Sláger asserted, in advance of the 2009 Tender, a *right* to an incumbent advantage or other legal entitlement arising out of the 1997 Broadcasting Agreement.¹²⁷
 - Sláger submitted a bid including a conservative business plan “based ‘only’ on the seven-year broadcasting term. It included a detailed financial model projecting profitable operations and a healthy return of investments within the term.”¹²⁸
 - According to Emmis’ accounting statements and annual reports from 1997 through 2009, “the Sláger broadcasting right was in fact depreciated as a ‘definite –lived’ intangible and was fully amortized by the end of 2009 [...]”¹²⁹ Accordingly, Emmis did not consider Sláger’s broadcasting right as having any value beyond 2009.¹³⁰
 - The Emmis parent company’s regulatory filings before the United States Securities and Exchange Commission (**U.S. SEC**) reflected the understanding that after the first renewal there could be no guarantee of renewal.¹³¹
 - Similarly, the expectations of Claimant MEM, are not based on assurances or representations by the government, but instead on its own reading of Hungarian Law or its experience in other countries.¹³²

¹²⁵ Memorial on Jurisdiction, [50].

¹²⁶ See Reply, [12] – [23]; see also T1/34/18 – 36/15.

¹²⁷ Reply, [22].

¹²⁸ Memorial on Jurisdiction, [27].

¹²⁹ Memorial on Jurisdiction, [28].

¹³⁰ Reply, [15]; Expert Report of Dr Charles Jonscher dated 9 August 2013, (**Jonscher Report**), [97] *et seq.*

¹³¹ Memorial on Jurisdiction, [121].

¹³² Memorial on Jurisdiction, [124].

80. *Second*, Hungarian authorities never transmitted to Sláger or its shareholders reason to believe or expect that they held a legal right to licence renewal:

- The 1997 Call for Tender clearly stated that what was being put up for tender was a seven year broadcasting right.¹³³
- The single renewal possibility under the Media Law was by no means a certainty for Sláger, and even Sláger lawyers approached Hungarian authorities to confirm whether a five year renewal would be forthcoming.¹³⁴
- There are no contemporaneous ORTT statements discussing a right to renewal by incumbent broadcasters.¹³⁵

81. Upon expiry of a broadcasting agreement that has been renewed, there is no provision in Hungarian law requiring ORTT to hold a tender. The ORTT enjoyed broad discretion as to the policy options they exercised in terms of managing the broadcasting frequency spectrum.¹³⁶ In fact, the “State had discretion to re-issue the broadcasting right via tender or, alternatively, to reassign the vacant frequency to another use.”¹³⁷ According to Respondent, this point is supported by the fact that the 2009 Tender was not called on the basis of section 107 of the Media Law, but rather on the basis of ORTT’s general power to call tenders under section 41(1)(a).¹³⁸ It further brings to the Tribunal’s attention that Claimants’ own regulatory filings confirm that “Hungarian Law is silent about what happens after 12 years.”¹³⁹

82. Furthermore, according to Respondent, Claimants lobbied politically for an amendment to the Media Law introducing a right of renewal to the incumbent licensee, precisely because they knew that the applicable legal framework did not give them the right to a new Broadcasting Agreement.¹⁴⁰ Such an amendment, while proposed by Congress, was never enacted into law

¹³³ Memorial on Jurisdiction, [23].

¹³⁴ Memorial on Jurisdiction, [36], [37]; *see* Letter from I. Kónya to ORTT, 21 February 2001, (R-18).

¹³⁵ Reply, [24] – [27]; *see also* T1/64/16 – 65/3.

¹³⁶ T2/340/4 – 18.

¹³⁷ Memorial on Jurisdiction, [16]; *see also* T1/60/20 – 61/4.

¹³⁸ T1/60/14 – 17; T2/335/9 – 11.

¹³⁹ *See* Emmis Communications Corporation, Annual Report, Form 10-K (fiscal year ended 29 February 2008), (R-4); Emmis Communications Corporation Annual Report, Form 10-K (fiscal year ended February 2009), 8 May 2009, (R-49).

¹⁴⁰ *See* T1/37/13 – 39/10; *see also* Letter from Sláger Rádió and Emmis to Dr György Jánosi, 10 September 2008, (C-266).

since it was declared unconstitutional. The Hungarian Constitutional Court declared that indefinite renewals of the national radio frequencies, even pending transition to digital radio were unconstitutional because they limited competition and new market entry.¹⁴¹

83. Respondent rejects Claimants' argument that Sláger's right to the 2009 Broadcasting Agreement would in any case vest upon the closure of the bidding process, since all other bidders should have been disqualified and Sláger having submitted the only qualifying bid, had to be awarded the licence agreement.¹⁴² Instead, according to Hungary, the right to the 2009 Broadcasting Agreement never vested.¹⁴³ Respondent alleges that in order to accept such a theory, the Tribunal would need to find (a) that all the other bidders should have disqualified from consideration outright; (b) that the Supreme Court of Hungary misread Hungarian Law on whether the ORTT had improperly conducted the Tender Procedure and breached the Tender Rules, since the issue of Sláger's alleged wrongful disqualification was litigated and rejected up all three levels of the Hungarian Courts, including to the Supreme Court, and, (c) that the Metropolitan Court erred on its reading of Hungarian Law by holding that when a challenger demonstrates that the winning bidder should have be disqualified, the most it can obtain is the invalidation of the awarded Contract and possibly the rerunning of the Tender.¹⁴⁴
84. Respondent also rejects Claimants' theory that the 2009 CFT constituted an offer which was accepted by Sláger when presenting the Bid, thereby constituting a contract, which would bind the ORTT to proceed to award the licence in accordance with the call for tenders. Respondent alleges instead that the investors, including Sláger, submitted a "tender offer," the bid itself, to be accepted or rejected by the ORTT. Furthermore, according to Respondent, pursuant to 2009 CFT Clause 3.44,¹⁴⁵ further supported by section 76 of the GTT, the ORTT reserved the right to declare the tender inconclusive or unsuccessful and disqualify the entire bid process, even in the event of receiving valid bids if it considers it unsuitable. The bid can however be considered an irrevocable binding offer, which may be accepted within a limited period of time.¹⁴⁶

¹⁴¹ T1/39/14 – 22; 91/16 – 21; Constitutional Court Decision No. 71/2009 (VI.30.), 14 July 2009, (R-50).

¹⁴² T1/43/12 – 46/2.

¹⁴³ T1/59/5 – 6.

¹⁴⁴ See T1/45/17 – 49/2; *see also* T1/100 – 101.

¹⁴⁵ See Clause 3.4.4. of the 2009 CFT, (CA-6), stating: "the Board reserved the right to declare the Tender unsuccessful after the closure of the evaluation if it has not found any of the bidders submitting valid bids, suitable for concluding a Broadcasting Agreement with."

¹⁴⁶ See T2/455/21 – 468/8.

85. Accordingly, since the right to a new licence never vested, Respondent submits that Claimants cannot claim expropriation of a right they did not hold.¹⁴⁷

(b) Claimants' submission

86. Claimants plead that:

[I]t has never been the Claimants' case that they were entitled to be awarded the 2009 Broadcasting Agreement. What we say is they had legal rights, which, had they been respected, would have left them as the only qualifying bidder. And in that situation, the ORTT was obligated to award the Broadcasting Agreement to them. [...] And if the Tribunal wipes away the wrongful conduct of the State, we are left with the entitlement to that Broadcasting Agreement.

The rights that we rely upon are the ones they had vested as part of the investment, as part of the 1997 Broadcasting Agreement, and to which we were entitled under Hungarian Law. The consequence of those rights, as of the closing date of the bids, was that the Claimants became entitled to the 2009 Broadcasting Agreement.¹⁴⁸

Claimants conclude that "but for the failure of ORTT to apply the rules of the Tender that they themselves determined, Sláger would have been the only valid bidder, and, therefore, the winner of the Tender and thus [...] the ORTT would have been obliged to award Sláger the 2009 Broadcasting Agreement."¹⁴⁹ According to Claimants, this right vested when the 2009 bid closed, but was extinguished as consequence of ORTTs violations: "[T]he sequence is that the right existed, and it was extinguished, not that the right would have existed but for the behavior of Hungary."¹⁵⁰

87. In this case, Hungarian law imposed obligations on ORTT as to the steps to be taken following expiry of the Licence. Claimants submit that ORTT cannot arbitrarily decide how to reallocate frequencies after a broadcasting agreement expires, since this is inconsistent with the policy purposes of the Media Law and also to ORTT's own statement as expressed in the local proceedings.¹⁵¹ Claimants agree with Respondent that the 2009 Call for Tender was called by operation of section 41 of the Media Law but assert that the "timing of the exercise of the

¹⁴⁷ See T1/59.

¹⁴⁸ T1/181/3 – 20.

¹⁴⁹ Claimants submit that the other bidders did not meet the required qualifications, because they lacked the necessary financial support for the submitted financial plans or broadcasting fees; the necessary bank certificates of first operating funds; or the requisite corporate form: T1/187, 256/14 – 258/21.

¹⁵⁰ T1/264/12 – 15.

¹⁵¹ See T1/253 – 254.

authority” is governed by section 107 of the Media Law.¹⁵² Accordingly, ORTT had an obligation to re-tender after the 12 years broadcasting licence expired.

88. In addition, the 2009 Call for Tenders constituted an offer to abide by the terms of the tender process that was later accepted unconditionally by Sláger through the bid, and simultaneously undertaking a conditional obligation to conclude the Broadcasting Agreement, with specific and binding unaltered terms. This is confirmed by the definition of “bid” included in the CFT itself.¹⁵³

89. Claimants reject Respondent’s argument that Claimants did not expect its licence to extend further than 2009. Respondent has mischaracterised Claimants’ business expectations and accounting treatment, as “the evidentiary record shows that Sláger intended to remain in Hungary for the longer term” given that:¹⁵⁴

- Claimants invested considerable funds and efforts reflecting an investment for the long term and not limited to a seven-year licence, renewed for five years;¹⁵⁵ this is confirmed with Emmis’ track record of focusing on strategic investments rather than short-term deals that turn a quick profit.¹⁵⁶
- Claimants continued investing in Sláger as late as 2008. Such a decision would be illogical if the Claimants would have to exit the market in 2009.¹⁵⁷
- The filings before the U.S. SEC reflect that the Claimants “expected – and [were] entitled – to be treated fairly in the Hungarian licence-renewal process and had a legitimate expectation of renewal, but we reported accurately to our investors that renewal was not a forgone conclusion.”¹⁵⁸
- The financial records of Sláger were prepared in light of the applicable accounting rules, which did not necessarily let the non-U.S. broadcasting licences

¹⁵² T2/399; Second Supplemental Expert Legal Opinion of Dr Péter Molnár dated 25 November 2013, (**Molnár III**), [26].

¹⁵³ T2/472/4 – 474/2, citing 2009 CFT, 20 July 2009, (CA-6).

¹⁵⁴ Rejoinder, [20]; T1/172/4 – 17.

¹⁵⁵ Counter-Memorial, [4]; Second Witness Statement of Jeffrey H. Smulyan dated 19 September 2013, (**Smulyan II**), [7].

¹⁵⁶ Rejoinder, [20].

¹⁵⁷ T1/174 – 5.

¹⁵⁸ Counter-Memorial, [17]; Smulyan II, [10].

be treated as having “indefinite lives”¹⁵⁹ but “Emmis expected to be allowed to continue to enjoy the benefits of their investment well beyond the time that initial capital for commencement of operations was returned.”¹⁶⁰

90. Respondent’s argument fails to distinguish the different times at which the Claimants’ rights under Hungarian Law vested: “[t]he right to operate beyond 2009’ did not vest until the submission of bids closed in the 2009 Tender, at which point Hungary acted in a manner that deprived the Claimants of the 2009 Broadcasting Agreement.”¹⁶¹ Therefore, Claimants would not have referred to that right before the 2009 Tender and it is unsurprising that forward looking statements from years before the Tender do not contain this right.¹⁶²

B. An investment under the Treaties and the ICSID Convention

1. An investment under the Treaties

91. The Parties agree that the Vienna Convention on the Law of Treaties is the starting point for interpretation of the Treaties.¹⁶³

(a) Respondent’s submission

92. Respondent accepts that “Claimants at one time made an investment in Hungary,” but alleges that “such investment was set to – and did – expire by its own terms in November 2009.”¹⁶⁴ It is Respondent’s position that:

To meet the definition of “investment” under both the Netherlands and the Switzerland BITs, Claimants must prove that they had rights in relation to the 2009 Tender that qualify as “assets.” Both treaties expressly tie the definition of “investment” to assets located in the host State.¹⁶⁵

¹⁵⁹ Counter-Memorial, [18]; citing Smulyan II, [13].

¹⁶⁰ Rejoinder, [29].

¹⁶¹ Rejoinder, [35].

¹⁶² T1/259.

¹⁶³ Memorial on Jurisdiction, [132] – [133]; Counter-Memorial, [156] – [159].

¹⁶⁴ Memorial on Jurisdiction, [142].

¹⁶⁵ Memorial on Jurisdiction, [130].

No definition of “asset” appears in the BITs and Respondent asserts that such word should be interpreted according to its ordinary meaning, consistent with the object and purpose of the treaty.¹⁶⁶

93. Respondent contends that:

[T]he mere existence of a right under host State law is insufficient to prove that a protected “asset” exists. Not every “right” created by domestic law constitutes an “asset.” For example, even though domestic law may create a right to free speech or to freedom of religion, because such rights are generally applicable rather than proprietary, and are not capable of being bought or sold for economic value, they cannot be considered “assets.” Furthermore, even if generally-applicable legislation provides some incidental benefit to an investor, the rights to such legislation do not *belong* to an investor in an ownership sense and such legislation therefore does not qualify as an “asset” of the investor.¹⁶⁷

94. Hungary further submits that “investment treaties do not protect pre-contract expenditures, [i.e. rights related to the process of forming or acquiring an investment] even if made with a strong expectation of winning the contract.”¹⁶⁸ According to Respondent, prior ICSID claims have failed in very similar situations, confirming that “expenditures are irrelevant, process rights are irrelevant, and even creating a local incorporated company is irrelevant if the Claimant did not, in fact, acquire the right it claims to have been denied.”¹⁶⁹

95. Endorsing the reasoning of the *Apotex*, *Joy Mining*, *F-W Oil* and *Zhinvali* tribunals, Respondent alleges that “a right does not qualify as an ‘asset’ if it is speculative or somehow contingent on future outcomes”¹⁷⁰ and concludes that “to merit the protection as an investment under an investment treaty, a right must have vested specifically in the claimant; it is not sufficient merely

¹⁶⁶ Memorial on Jurisdiction, [132] – [133].

¹⁶⁷ Memorial on Jurisdiction, [135].

¹⁶⁸ Memorial on Jurisdiction, [138] [Emphasis in original], citing *McLachlan et al.*, *International Investment Arbitration* (Chapter 6) [6.50.], and also referring to *William Nagel v Czech Republic*, SCC Case No. 049/2002, Award, (Danelius, Hunter & Kronke), 9 September 2003, [326]; *see also* T1/137/16 – 19.

¹⁶⁹ T1/151/10 – 14.

¹⁷⁰ Memorial on Jurisdiction, [136]; Reply, [92], [96], citing *Apotex Inc v Government of the United States of America*, UNCITRAL, Award on Jurisdiction and Admissibility, (Smith, Davidson & Landau), 14 June 2013, (*Apotex*), (RA-47); *Joy Mining Machinery Limited v Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, (Orrego Vicuña, Craig & Weeramantry), 6 August 2004, (*Joy Mining*), (RA-55); *F-W Oil Interests, Inc v Republic of Trinidad & Tobago*, ICSID Case No. ARB/01/14, Award, (Nariman, Berman & Mustill), 3 March 2006, (*F-W Oil Interests*), (RA-32); and *Zhinvali Development Ltd. v Republic of Georgia*, ICSID Case No. ARB/00/1, Award, (Robinson, Jacovides & Rubin), 24 January 2003, (*Zhinvali*), (RA-78); *see also* T1/151/15 – 155/22.

that the claimant seems to have a prospect that the right may vest someday, *if* some future event occurs.”¹⁷¹

(b) Claimants’ submission

96. Claimants note that “the BITs each protect ‘every kind of asset’”¹⁷² and contends that “the BITs give the term ‘investment’ a broad, nonexclusive definition, recognizing that investment forms are constantly evolving.”¹⁷³ Accordingly, Claimants endorse authorities suggesting that BIT definitions of ‘investment’ should be interpreted broadly in accordance with their plain language.¹⁷⁴
97. Against this background, Claimants submit that they jointly control and are sole owner of the Hungarian project company, Sláger, which constitutes a qualifying investment under both applicable treaties:

Since 1997 the Claimants made and held investments in the form of their interests in Sláger and its business operations. [...] Sláger began broadcasting in 1997 under a Broadcasting Agreement with ORTT that, although due to expire in 2009 following the 2009 Tender, gave Sláger not only the right to broadcast, but also conferred upon it rights and protections relating to the renewal or future re-tendering of such broadcasting rights. Sláger remained a going concern, and the 1997 Broadcasting Agreement had not expired at the time of the measures giving rise to this dispute.¹⁷⁵

[The Claimants' investment] can be looked at in at least two ways. First, it suffices to note that the Claimants hold shareholdings in Sláger, and those shares are assets constituting a covered investment. Alternatively, the Claimants' investment is their interest in Sláger as a business operation, including the benefit of the bundle of rights and assets flowing from its 1997 Broadcasting Agreement in the context of the 2009 Tender. This, too, is a covered investment. Both viewpoints are correct.¹⁷⁶

¹⁷¹ Memorial on Jurisdiction, [141].

¹⁷² Counter-Memorial, [162].

¹⁷³ Counter-Memorial, [163]; T1/272 – 274.

¹⁷⁴ Counter-Memorial, [163] – [164], citing *inter alia*, *Jan Oostergetel & Theodora Laurentius v Slovak Republic*, UNCITRAL, Decision on Jurisdiction, (Kaufmann-Kohler, Wladimiroff & Trapl), 30 April 2010, (CA-124), [157]; *Tradex Hellas S.A. v Republic of Albania*, ICSID Case No. ARB/94/2, Award, (Bockstiegel, Fielding & Giardina), 29 April 1999, (CA-125), [105] – [107]; *Fedax N.V. v Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, (Orrego Vicuña, Heth & Owen), 11 July 1997, (CA-126), [34].

¹⁷⁵ Counter-Memorial, [57].

¹⁷⁶ Counter-Memorial, [59].

[...][T]he Claimants' claim is not, and never has been, that its 'investment' was an existing right to a new broadcasting agreement.¹⁷⁷

98. In particular, Claimants re-iterate that (a) their "main assets" in this arbitration are "their shares in Sláger, the existence and validity of which as investments' is undisputed"¹⁷⁸ and, (b) submit that a finding that the Claimants' shares in Sláger are covered 'investments' under the BITs and the ICSID Convention is sufficient for this Tribunal to confirm its jurisdiction *ratione materiae*.¹⁷⁹
99. Claimants also submit that their indirect interest in the rights and assets of Sláger, as a business operation constitute covered investments under each of the applicable BITs.¹⁸⁰
100. *First*, the 1997 Broadcasting Agreement remained a valuable asset and constituted a protected investment since "it contained claims to contractual performance in Hungary having economic value, and more particularly (a) comprised rights granted under public law (Netherlands-Hungary BIT, Article 1(1)(e)), and (b) constituted a concession under public law (Switzerland-Hungary BIT, Article 1(2)(e))."¹⁸¹
101. *Second*, the Contract Framework conferred rights, which included "the right to broadcast; the right of Sláger as the incumbent bidder to receive a preference or advantage in the tender process; and 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."¹⁸²
102. *Third*, the rights stemming from the Regulatory Framework and the Broadcasting Agreement, included the right to a proper and lawful evaluation of Sláger's bid during the 2009 Tender and the right to an "incumbent advantage." The latter in itself "was a valuable asset" according to Claimants, "in the sense of something to which a third party investor or buyer would assign economic value in the period leading up to the 2009 Tender."¹⁸³

¹⁷⁷ Counter-Memorial, [60].

¹⁷⁸ Counter-Memorial, [187].

¹⁷⁹ Counter-Memorial, [60]; [170]; *see also* Rejoinder, [12], T1/273/10 – 11.

¹⁸⁰ Rejoinder, [12].

¹⁸¹ Counter-Memorial, [182].

¹⁸² Counter-Memorial, [64] – [66].

¹⁸³ Counter-Memorial, [64] – [66].

103. According to Claimants, investments can also be looked at as an “indivisible”¹⁸⁴ or “integrated”¹⁸⁵ whole. In particular, investments can be considered as “as an aggregation of assets and transactions, a business operation, or an enterprise”.¹⁸⁶ They posit that Claimants’ rights arising in connection with the 2009 Tender are part of the indivisible whole of the Claimants’ investment.¹⁸⁷
104. Finally, Claimants reject Respondent’s reliance on the *Apotex* and *Joy Mining* decisions, because the Claimants do not allege their “investment” to be a future right to broadcast:

[T]he Claimants’ interest in Sláger is not ‘speculative’, ‘contingent’, a ‘pre-investment expenditure’, an ‘expectation’ or ‘a hope’. Sláger was a going concern at the time of the 2009 Tender. It held at the material time existing legal rights under Hungarian law that were violated by Hungary’s unlawful conduct during the 2009 Tender process. [...].¹⁸⁸

2. An investment under the ICSID Convention

(a) Respondent’s submission

105. By reference to the criteria adopted in *Salini*, Respondent submits that the rights relating to the 2009 Tender cannot qualify as an investment under the “ICSID Convention.”¹⁸⁹ Relying on past arbitral decisions that suggest that “for an investment to exist, a claimant must demonstrate not only that it has made a contribution” but also that “the contribution has resulted in the acquisition of rights,”¹⁹⁰ Respondent concludes that no contribution was actually made.
106. Although the shareholders’ contribution to the debt funding resulted in acquisition of certain rights in Hungary, a right to broadcast following expiration of the 1997 Broadcasting Agreement

¹⁸⁴ T1/278/17.

¹⁸⁵ T1/279/22, citing for support the *Telefónica S.A. v Argentine Republic*, Decision of the Tribunal on Objections to Jurisdiction, (Sacerdoti, Brower & Siqueiros T.), 25 May 2006, and commentators Schreuer and Kriebaum.

¹⁸⁶ T1/276/16 – 277/6.

¹⁸⁷ T1/278/8 – 15.

¹⁸⁸ Counter-Memorial, [192].

¹⁸⁹ Memorial on Jurisdiction, [143], [144] referring to *Salini Construttori S.p.A. and Italstrade S.p.A. v Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, (Briner, Cremades & Fadlallah), 16 July 2001, (RA-35).

¹⁹⁰ Memorial on Jurisdiction, [144], citing *Malicorp Limited v Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award, (Tercier, Baptista & Tschanz), 7 February 2011, (RA-56), [110]; *Apotex*, [193]; *Generation Ukraine Inc. v Ukraine*, ICSID Case No. ARB/00/9, Award, (Paulsson, Salpius & Voss), 16 September 2003, (**Generation Ukraine**), (CA-92), [18.4]; *Mr Franz Sedelmayer v Russian Federation*, SCC, Award, (Magnusson, Wachler & Zykin), 7 July 1998, (RA-52), [112].

was not among those acquired.¹⁹¹ This conclusion is, according to Respondent, consistent with Claimants' investment expectations since "Sláger presented financial plans for a business that would operate for seven years and that would, 'within those 7 years return its investors their money and earn them a substantial return, with no assumptions as to what will happen thereafter.'"¹⁹² Respondent submits that radio broadcasting is not a capital-intensive activity in Hungary.¹⁹³ It does not require an investment into radio transmission infrastructure. The broadcaster acquires the right to broadcast on a frequency and does not invest in the transmission infrastructure nor does it own or manage the frequency. It is operated on a rental model.¹⁹⁴

(b) Claimants' submission

107. There is wide controversy as to whether the *Salini* test, invoked by Respondent, should be applied as an objective test for the purpose of determining jurisdiction under Article 25 of the ICSID Convention.¹⁹⁵ Claimants submit that even addressing the elements of the test as pleaded by Hungary, Claimants' investment qualify as an investment for the purpose of the ICSID Convention as (a) Claimants' substantial contribution is reflected in the nearly HUF 856 million that Sláger's shareholders planned to invest in the equity of Sláger; (b) the investments were made in a period spanning over 12 years; (c) the activities carried the requisite degree of risk; and (d) the investment activities contributed to Hungary's economic development, since "Claimants invested nearly 30 HUF billion (about USD 135 million) in Hungary, provided employment to an all-Hungarian staff, and brought best industry practices from its experiences around the world [...] and also brought a culture of corporate responsibility and charitable giving to Hungary."¹⁹⁶

108. Claimants characterise as "artificial" Respondent's attempt to draw a line between "an old investment" (its shareholding) and "a new investment" (rights arising out of the 2009 Tender) since it ignores the concept of business operation, with a company, assets and employees and

¹⁹¹ Counter-Memorial, [145].

¹⁹² Memorial on Jurisdiction, [145].

¹⁹³ Memorial on Jurisdiction, [15].

¹⁹⁴ T1/54/11 – 18.

¹⁹⁵ Counter-Memorial, [220] – [222] referring *inter alia* to Schreuer et al. *The ICSID Convention: A Commentary* (2nd edn, 2009), (CA-162), Art. 25, [171] – [174]; *Biwater Gauff (Tanzania) Limited. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, (Hanotiau, Born & Landau), 24 July 2008, (CA-69), [317] – [318]; and *Malaysian Historical Salvors, SDN, BHD v Malaysia*, ICSID Case No. ARB/05/10, Decision on Annulment, (Schwebel, Shahabuddeen & Tomka), 16 April 2009, (CA-163), [80].

¹⁹⁶ Counter-Memorial, [223] – [229]; T1/173/4, 281/9 – 14.

overlooks that Claimants' investments in Sláger since 1997 led to the contractual and Hungarian Law rights relied upon by Claimants.¹⁹⁷

C. Rights capable of expropriation

109. The Parties are in agreement that "as a general matter of both international and Hungarian law, contractual rights are capable of being expropriated."¹⁹⁸ But they do not agree that the rights acquired by Claimants in this case were capable of expropriation.

(a) Respondent's submission

110. Respondent accepts that Claimants, as indirect shareholders in Sláger, are entitled to rely on Sláger's rights including its contractual rights.¹⁹⁹ The proposition that Hungary disputes is that Sláger had rights capable of expropriation.²⁰⁰ According to Respondent, "there cannot be an expropriation claim unless the complaint demonstrates the existence of proprietary rights.' Hungary recognises that certain 'intangible' rights are capable of being expropriated; however, such rights must be similar to property rights in the sense that they can be owned, acquired, transferred or sold."²⁰¹ Hungary rejects Claimants' contentions that the rights allegedly arising from the Contract and Regulatory Frameworks can be expropriated.

111. *First*, in Respondent's view, "even assuming, arguendo" that Claimants held an "incumbent advantage," ORTT's compliance with a GTT provision cannot be considered a proprietary right capable of giving rise to an expropriation claim, in the absence of a specific contractual undertaking such as a stabilization agreement.²⁰² In particular:

Notwithstanding Claimants' rhetorical insistence on the notion, the fact remains [...] that the 1997 Broadcasting Agreement did not create any contractual right to a dispositive "incumbent advantage." The exclusive source of the alleged right to an advantage is Section 65.3.1 of the GTT, which, (1) is an individual passage of discretionary administrative guidelines; (2) does not represent a source specified by the Hungarian Law on Legislation to govern property-related issues; (3) did not clearly apply to the broadcasting right at issue in the 2009 Tender; (4) may not have been available to Sláger in any event, given its numerous breaches

¹⁹⁷ T1/282/14 – 22.

¹⁹⁸ Counter-Memorial, [195]; Reply, [98].

¹⁹⁹ Reply, [37].

²⁰⁰ Reply, [38].

²⁰¹ Memorial on Jurisdiction, [90] – [91], citing *Generation Ukraine*, [8.8]; T1/26/1 – 8; see also T1/141/7 – 14; T2/354/2 – 9.

²⁰² Memorial on Jurisdiction, [96]; see also T2/371/10 – 372/21.

of the 1997 Broadcasting Agreement and 1996 Media Law; and (5) does not confer proprietary rights on any particular investor constituting an individual asset capable of expropriation. Moreover, [...] [g]iven that ORTT retains full discretion to define the conditions, scope, and effect of the alleged preference, it cannot be considered sufficiently concrete to constitute a proprietary right capable of expropriation. As in *Merrill & Ring*, the rights alleged herein constitute ‘only a *potential* future benefit that cannot be the subject of a taking because the Investor is not contractually entitled to them.’²⁰³

112. *Second*, Respondent emphasises that general process rights arising in connection with the conduct of the 2009 Tender, are not special to a particular investor or owned as an asset by the individual investors. Instead “every single one of [the rights] could be claimed by all participants in the 2009 Tender. They don’t belong to any one participant to the exclusion of others”²⁰⁴ and therefore cannot be expropriated:

Every bidder in a tender has the right to be treated fairly under the rules of that tender. And the right to be treated fairly in that context is like the right to free speech or free religion; you may have it, you may be able to claim violation of it through certain procedures, but it’s not a right you would hold to the exclusion of others. [...] Procedural rights in a tender can’t be expropriated, and the remedy for procedural errors can’t be the award directly to you of the very thing you were bidding on in the first place, or, as they seek to do in this case, an immediate skip to a damages phase for the full value of the thing that you were trying to bid for without even providing the services that are the quid pro quo for that tender.²⁰⁵

113. Moreover, “given the simultaneously broad and vague nature of this purported right, Claimants lack the type of ownership or control [over the right] necessary for it to be considered ‘proprietary.’”²⁰⁶

Like the alleged right to an “incumbent advantage,” the only source for Claimants’ purported right “to have th[e] tender conducted according to law in good faith and on a fair, non-discriminatory, non-partisan and transparent basis” is a passage of the GTT — a document that is subject to change and cannot, as a matter of Hungarian and international law, create proprietary rights. The alleged “right” is not set forth in any contract, and Claimants have offered no valid basis on which to distinguish it from the principle of good faith applicable to *all* aspects of Hungarian civil law, and therefore to *all* participants in the 2009 Tender.²⁰⁷

²⁰³ Memorial on Jurisdiction, [98]

²⁰⁴ T1/142/10 – 16.

²⁰⁵ T1/30/6 – 31/7.

²⁰⁶ Memorial on Jurisdiction, [105].

²⁰⁷ Memorial on Jurisdiction, [105] [Emphasis in original].

114. Likewise, Respondent considers that Claimants are, contrary to the Tribunal’s Rule 41(5) Decision, “attempt[ing] to transform Claimants’ original fair and equitable treatment claim, to remain within the boundaries of this Tribunal’s jurisdiction.”²⁰⁸ However, “if fair and equitable treatment were a legal ‘right’ whose denial is tantamount to expropriation, every alleged violation of fair and equitable treatment would also be an expropriation, and the object and purpose of treaty provisions expressly limiting consent to expropriation claims [...] would be plainly and improperly defeated.”²⁰⁹
115. Hungary further submits there can be no “expropriation claims” of legitimate expectations under international law and even if that were the case, none of Claimants’ alleged expectations would qualify “as *objectively* ‘legitimate’ - as opposed to being simply *subjective* expectations” not binding the government, because there must “be some form of representation or assurance by the government itself, upon which the investor *thereafter* relied in making its decision to invest.”²¹⁰
116. Based on these elements, Respondent concludes that “Claimants’ claim for expropriation fails at the threshold level because Claimants cannot establish the existence of a right, constituting an investment, capable of being expropriated. Claimants have failed to demonstrate that they ‘had a clear right’ to the award of a new broadcasting license.”²¹¹ “The only rights Claimants possessed were those of an ordinary losing bidder, including the right to challenge an allegedly improper tender (but not the substantive right to a new broadcasting agreement).”²¹²

(b) Claimants’ submission

117. Claimants assert that “rights in rem” are not a prerequisite to an expropriation claim and rely on several arbitral decisions to conclude that “they may also extend to contractual rights.”²¹³ They further submit that an “indirect expropriation may also be caused by a violation of non-contractual rights.”²¹⁴

²⁰⁸ Reply, [50].

²⁰⁹ Memorial on Jurisdiction, [102].

²¹⁰ Memorial on Jurisdiction, [112] – [114]; *see also* T2/382/9 – 12.

²¹¹ Reply, [99].

²¹² Reply, [99].

²¹³ Counter-Memorial, [196] – [199]; Rejoinder, [57].

²¹⁴ T1/286/12 – 14, citing *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, (Cremades, Rovine & Siqueiros T.), 21 November 2007, (RA-48).

118. Claimants contend that “direct transferability” of a right, “does not constitute a condition *sine qua non*” for a right to be categorised as proprietary.²¹⁵ They further suggest that, independently of whether they can be alienated or not, their rights are proprietary in accordance with section 2(1) of the Hungarian Civil Code, which, according to Claimants, requires all rights to be classified as proprietary if they are not inherent.²¹⁶
119. Contrary to Hungary’s contentions, the relevant provisions of the Media Law and the GTT at issue, were not generally or even broadly applicable: they either protected specific qualified persons that had invested considerable sums to qualify for such protection, in a sense “buying” access to the relevant rights; or conferred a tangible benefit solely on the incumbent broadcaster as a reward for its prior investments and lawful operation of its frequency.²¹⁷ Claimants concede that such rights (other than the incumbent advantage) would accrue to “all Bidders who would fulfil the requirements and incur the costs in accessing those right”²¹⁸ but assert that “the rights that Sláger possesses as an incumbent broadcaster and as a duly registered bidder in the 2009 Tender were not available to the general public, and had real financial value.”²¹⁹
120. Claimants add that paying a bidding fee in itself does not constitute an investment, but rather that the “fact that there is a monetary threshold for accessing specific rights and benefiting from them renders those rights proprietary.”²²⁰ The value of the fee is further confirmed by the fact that under Hungarian law courts can order the reimbursement of the bidding fee as remedy for the violation of the bidding rights.²²¹ Claimants further submit that damages may be awarded for breach of contractual rights. They accept that this would extend, in the case of the rights under the Regulatory Framework to all disappointed bidders who fulfilled the relevant legal requirements.²²²
121. Claimants submit that the incumbent advantage has a specific economic value and therefore qualifies as proprietary. They illustrate this point by submitting that if, for example, an independent third party were to consider entering in the Hungarian market, it would, all other

²¹⁵ T2/432/15 – 433/4.

²¹⁶ T2/407/7 – 16, T2/433/6 – 14.

²¹⁷ Rejoinder, [127].

²¹⁸ T2/408/2 – 16.

²¹⁹ Rejoinder, [122].

²²⁰ T1/268/21 – 269/3.

²²¹ T1/268/16 – 21.

²²² T2/409/4 – 410/9.

things being equal, pay a premium to acquire Sláger with the incumbent advantage over another competitor that did not have that advantage.²²³

122. Claimants have presented a *prima facie* case of expropriation for purposes of the jurisdictional phase,²²⁴ and their claim has been mischaracterised by Hungary as a fair and equitable treatment claim.²²⁵ Hungary's breach of rights arising out of or incorporated in the Broadcasting Agreement "was capable of amounting to an indirect expropriation of the Claimants' investment under international law."²²⁶ Claimants are not alleging a violation of the fair and equitable treatment standard under the Treaties.

D. A dispute arising directly out of the investment

(a) Respondent's submission

123. Respondent submits that the "[i]f the Tribunal agrees with Hungary that Claimants did not have a right capable of expropriation in relation to the 2009 Tender, it need not reach the last question of whether the dispute arises 'directly out of an investment.'"²²⁷

124. Should it however examine this question, the Tribunal must examine the relationship between the measures and the investment and determine whether the requisite connection exists.²²⁸ Contrary to Claimants' contention, Respondent does not allege that in doing so, the Tribunal shall follow a restrictive interpretation of the "arising directly" requirement. Rather, Hungary relies upon the plain words of the ICSID Convention, seeing no basis to depart from the standard rules of treaty interpretation in favour of either a restrictive or liberal approach.²²⁹

125. As all of the rights held by Claimants in relation to the 2009 Tender were generally-applicable rights enjoyed by all bidders — not proprietary rights granted specifically to Claimants as a result of their contributions, these rights were completely unconnected with any pre-existing

²²³ T1/278/8 – 15; *see also* T2/404/21 – 405/8.

²²⁴ Counter-Memorial, [207].

²²⁵ Counter-Memorial, [214] – [216].

²²⁶ Counter-Memorial, [216].

²²⁷ Reply, [101].

²²⁸ Memorial on Jurisdiction, [147].

²²⁹ Reply, [105].

investment or the 1997 Broadcasting Agreement (which contained no additional rights and did not transform general due process rights into personal obligations owed to Claimants).²³⁰

126. This is not sufficient. To comply with the jurisdictional requirements of the ICSID Convention, the alleged investment must include the rights underlying the expropriation claim, which in turn, must be capable of expropriation.²³¹ Thus, in order to proceed any further, the 1997 Broadcasting Agreement must have included the rights underlying the claim, and “any argument based upon the rights Claimants held by virtue of the 1997 Broadcasting Agreement as Shareholders in Sláger or otherwise, must be set aside.”²³²

127. Respondent further rejects Claimants' reliance on the *Lemire* case.²³³ In contrast to the present case, the arbitration agreement in *Lemire* expressly covered non-impairment by arbitrary and discriminatory measures of the “expansion of investments.” Therefore it was possible for that tribunal to establish a causal link between Claimant’s prior investment and the dispute between the parties.²³⁴

(b) Claimants’ submission

128. According to Claimants, the dispute arising out of Hungary’s breach of Sláger’s rights is a dispute “arising directly” out of Claimants’ investment:

(a) Arbitral practice²³⁵ and commentary²³⁶ have consistently held that the term “arising directly” should be construed liberally, and what is required is that the relevant dispute “be reasonably closely connected.” In this regard, the “dispute concerning the rights enjoyed by Sláger is a dispute arising directly of the Sláger’s business operation regardless of whether individual rights under the 1997 Broadcasting Agreement and in respect of the 2009 Tender, standing alone, would qualify as an investment. The rights were “an integral part of an

²³⁰ Reply, [104].

²³¹ T1/147/10 – 12.

²³² T1/147/21 – 148/5.

²³³ *Joseph C. Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, (Fernández-Armesto, Paulsson, Voss), 14 January 2010, (*Lemire*), (CA-167).

²³⁴ T2/386/11 – 389/1.

²³⁵ Counter-Memorial, [245] – [249].

²³⁶ Schreuer et al. *The ICSID Convention: A Commentary* (2nd edn, 2009), (CA-162), 106.

overall operation that qualifies as an investment.”²³⁷ The dispute “need not arise out of physical property of the investor”²³⁸ as it can “emanate from the investment itself or the operations of the investment”²³⁹ or even “concern a transaction that does not itself constitute an investment;”²⁴⁰

- (b) Bearing in mind the natural and ordinary meaning of the word “directly”, which means “with nothing or no one in between”, and with support of arbitral practice, it is plain, as a matter of common English usage that “State’s measures [that] affect the core objectives of an investment, such as its ‘sustainability or profitability’” are clearly related to the investment;²⁴¹
- (c) A causal link must be established between the dispute and the investment; whether the governmental measure is specifically targeted at the investment in question is irrelevant and therefore Hungary’s measures at stake need not be specifically targeted at Sláger’s shareholding;²⁴²
- (d) ICSID tribunals and arbitral authority commentary have consistently held that a dispute with a foreign shareholder relating to the assets of a local company, such as its contracts or licences, is a dispute that arises directly out of an investment.²⁴³

129. In conclusion, “Sláger was directly subjected to, and legally and economically affected by, the measures [taken by Hungary in respect of the 2009 Tender.] [...] Hungary’s measures violated commitments made to, or rights enjoyed by, Sláger, and thereby violated Hungary’s treaty

²³⁷ Counter-Memorial, [249].

²³⁸ T1/288/15 – 16.

²³⁹ T1/288/16 – 18, citing *Tokios Tokelès v Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, (Weil, Bernardini & Price), 29 April 2004, (CA-154).

²⁴⁰ T1/288/19 – 22, citing *Československa obchodní banka, a.s. v Slovak Republic*, ICSID Case No. ARB/97/4, Decision on Jurisdiction, (Buergenthal, Bernardini & Bucher), 24 May 1999, (CA-94).

²⁴¹ Counter-Memorial, [241] – [244], citing *Lemire*, [95] – [96].

²⁴² T1/289/14 – 290/2, citing *CMS Gas Transmission Company v Argentine Republic*, ICSID Case No. ARB/01/8, Award, (Orrego Vicuña, Lalonde & Rezek), 12 May 2005, (CA-62), and *Total S.A. v Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, (Sacerdoti, Marcano & Alvarez), 25 August 2006, (CA-140).

²⁴³ Counter-Memorial, [250] – [257]; T1/290 – 291.

obligations towards their investment. That disagreement arises directly out of the investment impacted by Hungary's measures."²⁴⁴

V. RELEVANT LEGAL TEXTS

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

A. ICSID Convention and Arbitration Rules

131. 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.

132. 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.

133. Arbitration Rule 41 "Preliminary Objections" provides, in relevant 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) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.

[...]

²⁴⁴ Counter-Memorial, [259]; T2/443/15 – 18.

(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. Netherlands BIT

134. 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.

135. 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.

136. Article 10 of the Netherlands BIT provides:

- (1) Any dispute between either Contracting Party and the investor of the other Contracting Party concerning expropriation or nationalization of an investment shall as far as possible be settled by the disputing Parties in an amicable way.
- (2) If such disputes cannot be settled within six months from the date either Party requested amicable settlement, it shall upon request of either disputing

party be submitted to an arbitral tribunal. In this case the provisions of paragraphs 3-9 of Article 9 shall be applied *mutatis mutandis*. [...]

(3) In case both Contracting Parties have become members of the [ICSID Convention], disputes between either Contracting Party and the investor of the other Contracting Party under the first paragraph of the present Article shall be submitted for settlement by conciliation or arbitration to [ICSID].

C. Swiss BIT

137. 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.

138. 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.

139. Article 10 of the Switzerland BIT, which is headed “Settlement of disputes between a Contracting Party and an investor of the other Contracting Party”, provides in relevant part:

(1) For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party and without prejudice to Article 9 of this Agreement (Settlement of disputes between Contracting Parties), consultations will take place between the parties concerned.

(2) If these consultations do not result in a solution within six months, the parties to the dispute may proceed as follows:

(a) A dispute concerning Article 6 of this Agreement shall upon request of the investor be submitted to [ICSID] instituted by the [ICSID Convention].

(b) In the event of a dispute not referred to in paragraph (2), letter a) of this Article the dispute shall be submitted, upon agreement on such submission by both parties to the dispute, to [ICSID].

VI. THE TRIBUNAL'S ANALYSIS

A. Introduction

140. The Tribunal begins its analysis of the questions of jurisdiction placed before it by the Parties for its decision by making an elementary point that is nevertheless fundamental to the whole of its reasoning. It is this. An arbitral tribunal owes its jurisdiction solely to the consent of the parties. In the case of an arbitral tribunal constituted under the ICSID Convention, Article 25 states this requirement in terms by providing that '[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment [...] *which the parties to the dispute consent in writing to submit to the Centre*' [emphasis added]. As the Executive Directors stated in their Report on the ICSID Convention: 'Consent of the parties is the cornerstone of the jurisdiction of the Centre.'²⁴⁵
141. Where the instrument evidencing the consent in writing of the host state is a bilateral investment treaty concluded between that state and the home state of the investor, the scope of matters capable of being submitted to arbitration by an investor will be determined by reference to the arbitration agreement providing for investor-state arbitration in the treaty.
142. In the present case, it is a striking feature of the investor-state arbitration agreements in both Treaties that they limit the scope of disputes capable of submission to arbitration by an investor to expropriation claims only. Article 10 of the Netherlands BIT refers only to "[a]ny dispute between either Contracting Party and the investor of the other Contracting Party concerning expropriation or nationalization of an investment." Article 10 of the Switzerland BIT likewise permits disputes "concerning Article 6 of this Agreement" to be submitted as of right to an arbitral tribunal. Article 6 is the provision prohibiting "measures of expropriation, nationalization or any other measure having the same nature or the same effect against investments belonging

²⁴⁵ International Bank for Reconstruction and Development, "Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States" 18 March 1965, [22].

to investors of the other Contracting Party.” Disputes concerning any other provision may be submitted to arbitration only with the consent of both disputing parties. Hungary gave no such consent in the case of the present dispute.

143. The Tribunal has already decided this point in its Rule 41(5) Decision. But it is worth dwelling for a moment on the significant consequence of this point. The Treaties contain undertakings by both Hungary and, respectively, The Netherlands and Switzerland as to the protection and treatment to be accorded to investments of the other Contracting Party. Such undertakings create obligations binding on the Contracting States under international law that go well beyond the protection from expropriation. But the Contracting States decided to limit the scope of the right of an investor to invoke the jurisdiction of an international arbitral tribunal to a single cause of action.²⁴⁶
144. This decision by the Contracting States has the following important consequence for the Tribunal’s analysis. Had the Tribunal been granted a broader jurisdiction, it would have been possible to determine whether Claimants’ investments in Sláger would benefit from, for example, the Treaties’ fair and equitable treatment standard when it came to adjudging the Respondent’s conduct of the bid. It would not be so crucial for the Claimants to prove the existence of a proprietary right pertaining to the 2009 tender under Hungarian law. But if, as here, the Tribunal lacks jurisdiction over all claims except expropriation, and it is not alleged that Hungary expropriated Sláger while it held its broadcasting right under the 1997 Broadcasting Agreement, the only way that the expropriation claim can be held to be within the Tribunal’s jurisdiction is if Sláger had a proprietary right that survived the expiry of its broadcasting right under that Agreement. The Contracting States’ narrowing of the Tribunal’s jurisdiction thus necessarily requires the Tribunal to ascertain what rights Sláger held in relation to the tendering of a new licence. This would be the situation in respect of the expropriation claim even if the Tribunal had a broader jurisdiction in that, having considered a fair and equitable treatment or other claim, when it came to considering the expropriation claim, the Tribunal would still have to determine whether Sláger had a proprietary right to a new licence. It is because the applicable Treaties have such narrow grants of jurisdiction that the issue becomes so prominent at the jurisdictional stage.

²⁴⁶ The same limitation does not apply to the provision in the respective Treaties for the arbitration of disputes between the Contracting States, which extends respectively to “[a]ny dispute between the Contracting Parties concerning the interpretation or application of the present Agreement”: Art. 9 Netherlands BIT; or “[d]isputes between Contracting Parties regarding the interpretation or application of the provisions of this Agreement”: Art. 9(1) Switzerland BIT.

145. As a result, this Tribunal is only empowered by the instrument of consent concluded by the Contracting States to decide a dispute between the Parties if and to the extent that it is satisfied that the dispute concerns expropriation of the investment. Otherwise it is incompetent to proceed and must dismiss the Claimants' claim. It follows that any decision on this question cannot have any effect on any other claims that Claimants or any other person or state may have in relation to the matters that form the subject of the present dispute in any other forum.

B. Matters already decided

146. Although the written and oral pleadings of the Parties have ranged widely over numerous detailed issues, the Tribunal's decision-making task on the present challenge to its jurisdiction is focused by (1) the matters that it has already decided as a result of its Rule 41(5) Decision and its Bifurcation Decision; and (2) the matters that are common ground between the Parties. Accordingly, the Tribunal will set out the material aspects of each of these before identifying the issues still in dispute on which its present decision must rest.

1. Jurisdiction limited *ratione voluntatis* to expropriation

147. *In the first place*, the Tribunal has determined in its Rule 41(5) Decision that its jurisdiction is limited to claims of expropriation. To be sure, it considered that such claims might potentially be advanced under customary international law as well as in accordance with the Treaties. But nothing is said by the Parties to turn upon this distinction for the purpose of the present challenge to jurisdiction. The Non-Expropriation Claims that had been originally advanced by Claimants (including claims for breach of the treaty standards of fair and equitable treatment; protection against discrimination; failure to observe obligations and the claim of breach of the international minimum standard of treatment of foreign investors) fall outside the jurisdiction of this Tribunal, without prejudice to any merit that those claims may have in another forum.

2. Jurisdiction limited *ratione materiae* to an investment

148. *In the second place*, the Tribunal has held in its Bifurcation Decision that this requires it to determine:²⁴⁷

[...] 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

²⁴⁷ Bifurcation Decision, [43].

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.

3. Law applicable to jurisdictional issue

149. *In the third place*, the Tribunal has also decided that the determination of the jurisdictional issue before it requires in turn reference to each of Hungarian law and public international law:²⁴⁸

[T]he 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.²⁴⁹

150. It is for this reason that the Tribunal formulated the questions for determination as a preliminary matter as:

- (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 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?

4. Standard of proof on jurisdictional issue

151. These questions go to jurisdiction and must therefore be finally determined by the Tribunal, not decided on a *prima facie* basis. The Tribunal so held,²⁵⁰ citing Judge Higgins in her Separate Opinion in the International Court of Justice in *Oil Platforms*, when she said:²⁵¹

²⁴⁸ *Ibid*, [44].

²⁴⁹ Accord: Douglas *The International Law of Investment Claims* (2009), (RA-45), 52.

²⁵⁰ *Ibid*, [52] – [53].

²⁵¹ *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objection) [1996] ICJ Rep 803, Higgins Separate Opinion, [31].

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

152. The same point was made in the investment arbitration context by the Tribunal in *UPS v Canada* when it held:²⁵²

Any ruling about the legal meaning of the jurisdictional provision, for instance about its outer limits, is binding on the parties.

153. The Parties do not dispute the Tribunal’s holding to this effect, nor that it is empowered to make such a determination at this preliminary stage.²⁵³

C. Matters agreed between the Parties

154. The Tribunal’s task is further assisted by the common ground between the Parties. These matters have already been identified earlier in this Award and may conveniently be summarised here in the following points.
155. Significantly, both Parties accept that Claimants had an investment by way of its shares in Sláger Rádió for 12 years from 1997 until 18 November 2009, which qualified for protection under the Treaties.²⁵⁴ They also accept that that investment was not expropriated prior to expiry of broadcasting licence on 18 November 2009.
156. It follows that, unless the Claimants have rights under Hungarian law in respect of the period after 18 November 2009, they have no claim for expropriation. The question is what rights to renewal; what rights survive termination; what tangible or intangible assets investor retains. This last point was confirmed by the Claimants’ answer to the Tribunal’s hypothetical question: ‘If the

²⁵² *United Parcel Service of America Inc. v Canada*, Award on Jurisdiction, (Keith, Fortier & Cass) (2002) 7 ICSID Rep 285, 297.

²⁵³ Memorial, [1]; Rejoinder, [54].

²⁵⁴ Memorial on Jurisdiction, [69(e)] (“[...] the present dispute does not ‘aris[e] directly out of’ Claimants’ investments in Sláger, made in connection with the 1997 Broadcasting Agreement, or from any rights derived from the shares of Sláger. As Sláger’s accounts and official statements by its principal shareholder confirm, Sláger’s rights under the 1997 Broadcasting Agreement, the company’s principal asset, definitely terminated in November 2009 and had no connection with the 2009 Tender for a *new* license period, which is the subject of the present arbitration.”); Counter-Memorial, [56]-[57], [59] (“Hungary does not – and cannot – dispute that the Claimants hold lawful investments in Hungary in the form of their interests in Sláger and its business operations. The existence of an investment is in fact conceded; sweep away all the distraction and it is clear that the *only* open question Hungary raises is rather, whether the dispute before the Tribunal is a dispute arising directly out of that investment.”) *See also* Rejoinder, [138].

investor were the holder of an oil concession granted by a state for a period of 30 years where there was no right of renewal provided under the concession contract or under the general law of the host state, would the investor have any right capable of giving rise to a claim of expropriation after the expiry of the 30-year period?' Claimants' answer to this question in oral argument was:²⁵⁵

Now, this is the Tribunal's hypothetical, and as stated, and without more, the answer would be no. After the 30-year period, there would be no contractual rights capable of expropriation. But in this hypothetical, we don't know what rights might survive termination of the Contract, what rights the investor might have held in respect of any new tender or what are the tangible or intangible assets the investor might have held.

157. Finally, both Parties agree that 'as a general matter of both international and Hungarian law contractual rights are capable of being expropriated.'²⁵⁶ This last point is unexceptional in itself. But, given its significance for the issues presented for decision in the instant case, it requires some elucidation from the Tribunal.

D. Rights capable of expropriation

158. Claimants assert claims of expropriation derived from three legal sources:

(a) Article 4 of the Netherlands BIT, which provides that '[n]either Contracting Party shall take any measures depriving, directly or indirectly, investors of the other Contracting Party of their investments [...]';

(b) Article 6 of the Switzerland BIT (headed 'Expropriation and compensation'), which provides that '[n]either 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 [...]'; and,

(c) The customary international law protection against 'expropriation without compensation of Claimants' investments'.²⁵⁷

159. In view of the fact that the only cause of action within the Tribunal's jurisdiction is that of expropriation, Claimants must have held a property right of which they have been deprived. This follows from the ordinary meaning of the term.²⁵⁸ The *Oxford English Dictionary* defines 'expropriate' as '(of the state or an authority) take (property) from its owner for public use or

²⁵⁵ T2/415/6 – 14.

²⁵⁶ Reply, [98]; 'rights under state contracts may be expropriated': Counter-Memorial, [195].

²⁵⁷ Request for Arbitration, [69].

²⁵⁸ Art. 31(1) Vienna Convention on the Law of Treaties 1969 ('VCLT').

benefit'/'dispossess (someone) of property'. Its origin is from the medieval Latin *expropriat-* 'taken from the owner', from the verb *expropriare*, from *ex-* 'out, from' + *proprium* 'property', neuter singular of *proprius* 'own'.

160. The Tribunal in *Waste Management II* made the same point when it held that the object of expropriation is the property of the claimant.²⁵⁹

An indirect expropriation is still a taking of property. By contrast where a measure tantamount to an expropriation is alleged, there may have been no actual transfer, taking or loss of property by any person or entity, but rather an effect on property which makes formal distinctions of ownership irrelevant.

161. The need to identify a proprietary interest that has been taken is confirmed by the definition of 'investment' in the Treaties. In each case, the Treaty refers compendiously to 'every kind of asset[s]'.²⁶⁰ The Oxford English Dictionary definition of 'asset' is:

(usually **assets**) an item of property owned by a person or company, regarded as having value and available to meet debts, commitments or legacies.

The definitions in the Treaties go on to provide particular examples of types of property or rights that may constitute an asset for this purpose. But these examples are not exhaustive.

162. In order to determine whether an investor/claimant holds property or assets capable of constituting an investment it is necessary in the first place to refer to host State law.²⁶¹ Public international law does not create property rights. Rather, it accords certain protections to property rights created according to municipal law. As the *EnCana* Tribunal put it:²⁶²

[F]or there to have been an expropriation of an investment or return (in a situation involving legal rights or claims as distinct from the seizure of physical assets) the rights affected must exist under the law which creates them [...]

163. There is no doubt, as the Treaty definitions emphasise, that the notion of property or assets is not to be narrowly circumscribed. For this reason, tribunals have rejected a restriction to

²⁵⁹ *Waste Management, Inc. v United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, (Crawford, Civiletti & Gómez), 30 April 2004, (*Waste Management II*), (CA-48), [143].

²⁶⁰ Art. 1(a) Netherlands BIT; Art. 1(2) Swiss BIT.

²⁶¹ Douglas *The International Law of Investment Claims* (2009), (RA-45), Rule 4, 52.

²⁶² *EnCana Corporation v Republic of Ecuador*, LCIA Case No. UN3481, Award, (Crawford, Thomas & Grigera Naón), 3 February 2006, (CA-49), [184].

tangible property, emphasising that expropriation may equally protect intangible property.²⁶³ So, too, tribunals have held that the rights protected from expropriation as not limited to rights *in rem*.²⁶⁴ This is confirmed by the Treaties which include within their definition of assets qualifying as investments numerous other rights in addition to ‘movable and immovable property as well as any other rights in rem’.²⁶⁵ This is unsurprising, since the definition of investment must apply compendiously to assets created under the law of the different municipal legal systems of the Contracting States. It is not to be circumscribed by technical distinctions that may have a different import under different municipal legal systems. The test is substantive, not technical.

164. A right conferred by contract *may* therefore constitute an asset for this purpose. Article 1(2)(e) of the Swiss BIT expressly so states. The position is in any event well established in customary international law,²⁶⁶ and has been followed by investment arbitral tribunals.²⁶⁷
165. But it is important to emphasise that the protection from expropriation in relation to rights conferred under contract still requires identification of a property interest or asset held by the claimant. As the Iran-US Claims Tribunal put it in *Amoco*:²⁶⁸

Expropriation, which can be defined as a compulsory transfer of property rights, may extend to any right which can be the object of a commercial transaction, *i.e.*, freely sold and bought, and thus has a monetary value. [...] It is because Amoco's interests under the Khemco Agreement have such an economic value that the nullification of those interests by the Single Article Act can be considered as a nationalization.

166. The need to identify a property right or asset with commercial value not only equates with the basic concept of expropriation. It also aligns with the critically important distinction between rights protected by international law and contractual rights under municipal law. In its full analysis of the issue in *Waste Management II*, the Tribunal distinguished between cases in which

²⁶³ E.g. *Phillips Petroleum Company Iran v Islamic Republic of Iran* (1989) 21 Iran-US CTR 79, (Briner, Khalilian & Aldrich), 29 June 1989, (**Phillips Petroleum**), (CA-65), [106]; *White Industries Australia Limited v Republic of India*, UNCITRAL, Award, (Rowley, Brower & Lau), 30 November 2011, (CA-153), [12.3.1] – [12.3.3].

²⁶⁴ E.g. *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, (Jiménez de Aréchaga, El Mahdi & Pietrowski), 20 May 1992, (**SPP**), (CA-149), [164].

²⁶⁵ Art. (1)(a)(i) Netherlands BIT; Art. 1(2)(a) Swiss BIT.

²⁶⁶ *Certain German Interests in Polish Upper Silesia* PCIJ Ser A No 7, 1926, 44; *Amoco International Finance Corp. v Islamic Republic of Iran* (1987) 15 Iran-US CTR 89, (**Amoco**), [108]; *Phillips Petroleum*.

²⁶⁷ E.g. *SPP*, [164]; *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, (Leigh, Fadlallah & Wallace), 8 December 2000, (CA-83), [98].

²⁶⁸ *Amoco*, [108].

the claim of expropriation of contractual rights was ancillary to a claim of expropriation of other property and ‘the much smaller group of cases where the only right affected is incorporeal’. As to the latter, it said:²⁶⁹

[...] these come closest to the present claim of contractual non-performance. [...] In such cases, simply to assert that “property rights are created under and by virtue of a contract” is not sufficient.²⁷⁰ The mere non-performance of a contractual obligation is not to be equated with a taking of property, nor (unless accompanied by other elements) is it tantamount to expropriation. [...]

The Tribunal concludes that it is one thing to expropriate a right under a contract and another to fail to comply with the contract. Non-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation.

167. Moreover, such an interpretation also accords with the separate and distinct function of the protection against expropriation as compared to the other protections included within the framework of the wider investment treaty. Thus:

(a) Both Treaties provide for the ‘fair and equitable treatment’ of investments.²⁷¹

This protection is designed to ensure that investments receive due process from the host State’s administrative authorities and courts. That provision would not serve a useful and distinct function if procedural rights were treated as assets of the investor protected by the expropriation clause;

(b) The Netherlands BIT specifically provides that ‘[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.’²⁷² Such a requirement to observe undertakings generally would be unnecessary if all undertakings, whether contractual, unilateral or under the general municipal law, were treated as assets subject to protection under the expropriation clause;

(c) The Switzerland BIT specifically protects from impairment ‘by unreasonable or discriminatory measures the management, maintenance, use, enjoyment,

²⁶⁹ *Waste Management II*, [174] – [175]; accord *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, (Lévy, Lalonde & Lew), 11 September 2007, [248].

²⁷⁰ Citing *Shufeldt Claim* (1930) 2 RIAA 1083, 1097.

²⁷¹ Art. 3(1) Netherlands BIT; Art. 4(2) Swiss BIT.

²⁷² Art. 3(5) Netherlands BIT.

extension, sale and, should it so happen, liquidation of such investments'.²⁷³ A similar provision afforded the claimant a good cause of action in *Lemire v Ukraine* in relation to the award of radio broadcasting licences.²⁷⁴ But the Tribunal in that case emphasised the importance to its decision of the fact that the claim was brought for breach of the fair and equitable treatment standard, and *not* for expropriation.²⁷⁵

168. It also follows from the basic notion that an expropriation clause seeks to protect an investor from deprivation of his property that the property right or asset must have vested (directly or indirectly) in the claimant for him to seek redress. This has been recognised by many tribunals, for example:

(a) In *Marvin Roy Feldman Karpa v United Mexican States*,²⁷⁶ the Tribunal rejected an expropriation claim because 'the Claimant never really possessed a "right" [under Mexican law] to obtain tax rebates upon exportation of cigarettes.'

(b) In *Generation Ukraine v Ukraine*,²⁷⁷ the Tribunal noted that since 'expropriation concerns interference with in rights in property, it is important to be meticulous in identifying the rights duly held by the Claimant at the particular moment when the alleged expropriation occurred.' The Tribunal went on to hold that in respect of a claimed right to use land, there 'cannot be an expropriation of something to which the Claimant never had a legitimate claim.'²⁷⁸

(c) In *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*²⁷⁹, the Tribunal noted that the 'first step in assessing the existence of an expropriation is to identify the assets allegedly expropriated.'

(d) In *Merrill & Ring v Canada*,²⁸⁰ the Tribunal rejected a claim that Canada had expropriated the claimant's interest in realizing fair market value for its logs on

²⁷³ Art. 4(1) Swiss BIT.

²⁷⁴ See *Lemire*.

²⁷⁵ *Ibid*, [280].

²⁷⁶ *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, (Kerameus, Covarrubiaz Bravo & Gantz), 16 December 2002, [118].

²⁷⁷ *Generation Ukraine*, [6.2].

²⁷⁸ *Ibid*, [22.1].

²⁷⁹ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, (Kaufmann-Kohler, Berman and Böckstiegel), 27 August 2009, (CA-151), [442].

the international market because this was “only a potential interest that may or may not materialize” and was not therefore covered by the treaty protection from expropriation.

- (e) In *Crompton (Chemtura) Corporation v Canada*,²⁸¹ the Tribunal held that, when analysing an expropriation claim, the first step was to determine ‘whether there was an investment capable of being expropriated.’
- (f) In *Apotex v United States of America*,²⁸² the Tribunal rejected claimant’s argument that it had made an investment in the United States by applying for regulatory approval for a drug that it claimed it would have been granted but for Respondent’s alleged breaches. The Tribunal held “the critical enquiry must be as to the nature of the alleged ‘property’ as at the date of the alleged breach - not at some future point.”²⁸³
- (g) In *Swisslion DOO Skopje v Macedonia*,²⁸⁴ the Tribunal found that the ‘Claimant has not proven the juridical fact on which the second limb of its expropriation claim is based, i.e., that it had a clear right to recover the purchase price [of a share purchase and sale agreement that had been terminated] in that proceeding such that the court’s failure to so order constituted an expropriation.’

169. Pausing at this point in the analysis, the Tribunal summarises the legal position under international law in the following way: the loss of a right conferred by contract may be capable of giving rise to a claim of expropriation but only if it gives rise to an asset owned by the claimant to which a monetary value may be ascribed. The claimant must own the asset at the date of the alleged breach. It is the asset itself - the property interest or chose in action - and not its contractual source that is the subject of the expropriation claim. Contractual or other rights

²⁸⁰ *Merrill & Ring Forestry L.P. v Government of Canada*, UNCITRAL, Award, (Orrego Vicuña, Dam & Rowley), 31 March 2010, (RA-58), [140].

²⁸¹ *Chemtura Corporation v Government of Canada* (formerly *Crompton Corporation v Government of Canada*), UNCITRAL Arbitration under Chapter Eleven of the NAFTA, Award, (Kaufmann-Koehler, Brower & Crawford), 2 August 2010, [242].

²⁸² *Apotex*, [215].

²⁸³ *Ibid*, [215].

²⁸⁴ *Swisslion DOO Skopje v former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, (Guillaume, Price & Thomas), 6 July 2012, (RA-66), [320].

accorded to the investor under host state law that do not meet this test will not give rise to a claim of expropriation.

170. Thus, when applied to the facts of this case, the legal test for an investment capable of giving rise to a claim for expropriation within the competence of the Tribunal (the question posed as issue (b) in its list of issues for preliminary determination²⁸⁵) enables the Tribunal to undertake a more focused enquiry under issue (a) into the rights of Claimants, through their wholly-owned subsidiary Sláger under Hungarian law in 2009 in respect of the renewal (or fresh grant) of their broadcasting licence.²⁸⁶ The only question that the Tribunal must decide is whether Claimants held, prior to expiry of Sláger's broadcasting licence on 18 November 2009, contractual rights capable of constituting property or assets under Hungarian law *relating to the grant of a new broadcasting licence*.²⁸⁷
171. The Tribunal must decide this question finally at the jurisdictional stage on the balance of probabilities. The Claimants bear the burden of proof. If the Claimants' burden of proving ownership of the claim is not met, the Respondent has no burden to establish the validity of its jurisdictional defences. As the tribunal held in *Saipem v Bangladesh*.²⁸⁸

In accordance with accepted international practice (and generally also with national practice), a party bears the burden of proving the facts it asserts. For instance, an ICSID tribunal held that the Claimant had to satisfy the burden of proof required at the jurisdictional phase and make a *prima facie* showing of Treaty breaches.

172. This passage touches upon two types of jurisdictional proof. The first relates to questions of fact that must be definitively determined at the jurisdictional stage. The second involves questions of fact that go to the merits, which the Tribunal must ordinarily not prejudge, unless they are plainly without foundation. This latter question necessarily involves assessing whether the alleged conduct of the Respondent is capable of constituting a breach of the substantive protections of the investment treaty so as to fall within the jurisdiction of the Tribunal *ratione materiae* but this has to be determined on a *prima facie* basis only.

²⁸⁵ Bifurcation Decision, [57(b)], reproduced *supra* [150].

²⁸⁶ *Ibid*, [57(a)].

²⁸⁷ Emphasis added.

²⁸⁸ *Saipem S.p.A. v People's Republic of Bangladesh*, ICSID Case No. ARB/05/7, Decision on Jurisdiction and Recommendation on Provisional Measures, (Kaufmann-Kohler, Schreuer & Otton), 21 March 2007, (RA-63), [83], referring to *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, (Guillaume, Cremades & Landau), 22 April 2005, (*Impregilo*), (CA-110), [79].

173. In the context of the present case, the Claimants bear the burden of proving that they owned an investment capable of expropriation. This task lies fully within the ambit of the jurisdictional phase. This burden is to be contrasted with the need to establish on a *prima facie* basis at the jurisdictional phase that the Respondent breached the treaty. This question is based on whether the alleged unlawful conduct giving rise to the treaty breach—if it can be established in the merits phase—is capable of falling within the treaty provisions invoked.²⁸⁹

174. Issues that are essential to establish jurisdiction, such as the existence or ownership of a covered investment, must be dealt with decisively in the jurisdictional phase. The Tribunal in *Phoenix Action Ltd v Czech Republic* articulated accepted practice when it observed:²⁹⁰

[W]hen a particular circumstance constitutes a critical element for the establishment of jurisdiction itself, such fact must be proven, and the Tribunal must take a decision thereon when ruling on its jurisdiction. In our case, this means that the Tribunal must ascertain that the prerequisites for its jurisdiction are fulfilled, and that the facts on which its jurisdiction can be based are proven.

175. Where the Tribunal is presented with a question of municipal law essential to the issues raised by the Parties for its decision, the Tribunal, whilst retaining its independent powers of assessment and decision, must seek to determine the content of the applicable law in accordance with evidence presented to it as to the content of the law and the manner in which the law would be understood and applied by the municipal courts.²⁹¹

176. This is not to say that decisions of municipal courts arising directly out of the same set of facts will be necessarily dispositive of the question before an international tribunal. The tribunal retains its independent power to judge the probative value of evidence placed before it, including evidence of municipal law.²⁹² But nevertheless, as Claimants accepted,²⁹³ determinations of municipal courts as to the content of the municipal laws that they are mandated to apply are likely to be of great help to an international tribunal.

²⁸⁹ *Impregilo*, [254].

²⁹⁰ *Phoenix Action Ltd v Czech Republic*, ICSID Case No. ARB/06/5, Award, (Stern, Bucher & Fernández-Armesto), 15 April 2009, (RA-61), [64].

²⁹¹ *Serbian Loans Case (France v Serb-Croat-Slovene State)* (1929) PCIJ Ser A, No. 20, 46; *Brazilian Loans Case (France v Brazil)* (1929) PCIJ Ser A, No. 21, 124; Recommendations 8 & 10-11, ILA Committee on International Commercial Arbitration Final Report —Ascertaining the Contents of the Applicable Law in International Commercial Arbitration (2008) 73 ILA Conf. Rep. pp. 850, 881-2; *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Annulment, (Tomka, Hascher & McLachlan), 23 December 2010, (**Fraport**), [236].

²⁹² *Fraport*, [242].

²⁹³ T2/414/9 – 17.

177. With these considerations in mind, it is now possible to proceed to an analysis of the proprietary rights under Hungarian law alleged by Claimants to give rise to their claim of expropriation in respect of the 2009 tender.

E. Legal characteristics of proprietary rights under Hungarian law

178. The evidence presented to the Tribunal supports the proposition that Hungarian law recognises a broad category of rights as proprietary, which are not limited to rights *in rem*. Respondent's Hungarian law experts accepted as much in opining that:²⁹⁴

85. Hungarian law creates a wide array of rights and obligations set forth in different sources of laws, with the Hungarian Constitution reigning supreme. However, not all these rights are “proprietary”, in the sense that they are capable of being owned and alienated by the entitled person (for instance, through sale, transfer, inheritance, etc.).

86. Hungarian law recognises two categories of rights as having this “proprietary” character. The first one includes rights *in rem*, exercisable over tangible moveable and immovable objects and regulated in Part III of the Hungarian Civil Code. The second is known as “rights representing assets” (“*vagyoni értékű jogok*”).

87. The concept of “rights representing assets” is used to distinguish such rights from other rights and freedoms that cannot be owned or alienated and cannot form part of an estate. These can include claims under contracts, licenses, etc. The Constitutional Court has confirmed that “rights representing assets” enjoy the same constitutional protection as rights *in rem*.

88. The concept of “rights representing assets” is also used by Act C of 2000 on accounting (the “Accounting Law”) which regulates their accounting treatment as a form of asset: “under intangible assets, [rights representing assets] shall include those acquired rights which are not related to real property. This includes, in particular, leases, rights of use, trusteeship, rights of utilization of intellectual products, brand names, licenses, furthermore, concessions, gaming rights, and other rights which are not related to immovables.”

179. This view is supported by the decision of the Hungarian Constitutional Court which confirmed:²⁹⁵

Article 13(1) of the Constitution sets forth the principle of protection of the right to property. *a)* Under the Constitutional Court’s case law, the right to property is protected by the Constitution as a fundamental right [Constitutional Court decision no. 7/1991. (II. 28.), ABH 1991, 22, 25.]. Constitutional Court decision no. 17/1992. (III. 30.) provided that the constitutional protection of property rights covers not only things, as determined by civil law, but also rights representing assets (ABH 1992, 104, 108.). Under Article 2(3) of the [*the Act under constitutional review*] an operating license is a right representing assets

²⁹⁴ Körmendy-Ékes/Lengyel I, [85] – [87], references omitted.

²⁹⁵ Constitutional Court Decision 28/2006 (VI.21) AB, (R-38).

which is attached to a person and which, under certain conditions determined by law, can be transferred and continue. Accordingly, the constitutional protection of right to property also protects an operating license.

180. The Tribunal sought clarification from the Parties as to whether it is necessary under Hungarian law for a right to be proprietary for it to be capable of being sold or alienated, and, if so, on what authority on the record.²⁹⁶ Respondent maintained that the essential characteristic of a proprietary right is that it is capable of being sold or alienated, whilst accepting that the right did not lose this characteristic if the owner were under contractual or other restriction that prevented its actual sale.²⁹⁷
181. Claimants pointed out in oral pleading that rights did not need to be capable of being sold or alienated independently to be capable of being proprietary, giving the example of the statutory right of pre-emption of the co-owner of property or the goodwill of a company.²⁹⁸
182. Thus far the propositions advanced by the Parties are consistent with each other and with the formulation of the Constitutional Court. That is to say: a property right is one capable of being owned and transferred to another. It does not lose that characteristic because it cannot be transferred independently or because contractual or other legal conditions limit its transferability.
183. But counsel for Claimants went further and submitted that, as a matter of Hungarian law, all rights to be vindicated in a civil lawsuit must be either proprietary or inherent. Since the category of inherent rights was limited to those that attach to the person by reason of his existence as such (such as the right to privacy), it followed, he submitted, that all other rights are proprietary, including contractual or non-contractual obligations relating to goods.²⁹⁹ He cited as authority for this proposition section 2(1) of the Civil Code and the decisions of the Hungarian courts in the Sláger litigation.
184. The Tribunal notes that this proposition is not advanced in any of the three reports submitted by Dr Molnár, Claimant's expert on Hungarian law, whether in response to the passage cited above from Respondent's experts or otherwise.

²⁹⁶ T1/295/9 – 12.

²⁹⁷ T2/353/11; 360/2 – 11.

²⁹⁸ T2/431/22 – 432/19, citing, as to the right of pre-emption, section 145(2) Civil Code, (R-6).

²⁹⁹ T2/432/20 – 435/2.

185. The Tribunal has reviewed the authorities relied upon by Claimants itself and is satisfied that they do not stand for so broad a concept of proprietary rights. Section 2(1) of the Civil Code (in the English translation agreed between the Parties³⁰⁰) provides:

‘This Act shall protect the property rights, inherent rights, and lawful interests of all persons.’

It will be immediately observed that this over-arching statement extends not just to property rights and inherent rights, but also to the *‘lawful interests of all persons’*.

186. The Code does not offer a definition of ‘property rights’. It is divided into five Parts: (One) Introduction; (Two) Persons; (Three) Ownership; (Four) Obligations; and (Five) Succession. Part Three on Ownership opens with a provision (section 94) on the objects of ownership, which provides:

(1) There may be ownership of all things which are *capable of appropriation*.³⁰¹

(2) Unless otherwise provided by law, the provisions pertaining to ownership shall duly apply to money and securities as well as to natural resources that can be utilized in the same way as things.

A separate Part (Four) deals with Obligations. It is that Part which includes in its Title I the provisions on Contracts. This Title includes a number of references to contractual rights.³⁰² The Tribunal's preliminary conclusion from this reference to the Code is that Hungarian law recognises substantive civil rights, enforceable in the courts, other than proprietary rights. Included in this category of other civil rights are those enforceable by contract.

187. This view is confirmed by the approach of the Hungarian courts in the *Sláger* proceedings relied upon by Claimants.³⁰³ In these proceedings, *Sláger* sought to challenge the 2009 Tender conducted by ORTT. A preliminary question for the Metropolitan Court was the legal basis for the claim. The Court held:³⁰⁴

Pursuant to the Act, Defendant I [ORTT] acts in the tender proceedings and the legal relationship [...] created by the broadcasting agreement in part as an administrative authority and in part as a subject of civil law. The Act expressly

³⁰⁰ Email communication of counsel to the Tribunal Secretary dated 18 December 2013.

³⁰¹ Emphasis added.

³⁰² E.g. section 207(4) (waiver of rights); section 233(2) (third party rights); sub-section 315-6 (breach).

³⁰³ *Sláger v ORTT* Metropolitan Court, 19 January 2010, (CA-11); Metropolitan Court of Appeals, 14 July 2010, (CA-14).

³⁰⁴ *Sláger v ORTT* Metropolitan Court, 19 January 2010, (CA-11), 20 – 21.

defines in which cases Defendant I acts as an administrative authority and it only regulates within the confines of this proceeding the opportunities of the bidder to obtain remedies. The Act does not contain any provisions on the protection measures available to the bidder out of these confines, therefore legal protection of the bidder can be enforced in the courts of law, in part pursuant to Section 2(1) and 7 (1) of the Civil Code, and in part pursuant to Section 87 of the General Terms of Tender (applicable in the tender proceeding by the authorization of Act I of 1996) and Section 1.3.2. of the Call For Tender, and the general rules of the Code of Civil Procedure apply.

188. Section 7(1) of the Code provides:³⁰⁵

Each and every government agency shall be obliged to protect the rights provided by law. Unless otherwise stipulated by law, those rights shall be enforced in the court of law.

189. The Court's finding that Sláger's rights in the tender could be enforced under the Civil Code did not, however, entail a finding that such rights were proprietary. On the contrary, the Court proceeded on the basis that the plaintiff was entitled to declaratory relief that the terms of the GTT had not been complied with.³⁰⁶ It held:³⁰⁷

The right of the Plaintiff to be protected is that in a compulsory tender proceeding prescribed by law for the selection of the person of the broadcaster, the person of the broadcaster be selected in compliance with the provisions of law, from among those who submitted a valid bid.

[...]

[T]he declaration that Defendant I should not have concluded the agreement with Defendant II is appropriate for the protection of the rights of the Plaintiff, as based on this, Defendant I shall conduct the administrative proceeding and select the winner by applying tendering terms in correspondence with the legal provisions [...]

190. The Court of Appeals took the same view, holding that the plaintiff had a 'direct interest' which was the 'competition with equal chances for all participants' constituted by the Media Law and the GTT. Such a right was limited to a declaration of the violation of the rules of the tender procedure and the nullity of any agreement concluded in breach of those rules. The plaintiff was held to have no 'substantive right for the conclusion of the agreement.'³⁰⁸

³⁰⁵ Civil Code, (R-6).

³⁰⁶ *Sláger v ORTT* Metropolitan Court, 19 January 2010, (CA-11), 21, 33.

³⁰⁷ *Sláger v ORTT* Metropolitan Court, 19 January 2010, (CA-11), 22.

³⁰⁸ Metropolitan Court of Appeals, 14 July 2010, (CA-14), 25.

191. There is no trace in the judgments of either the Metropolitan Court or the Court of Appeals of a finding that Hungarian law treats all rights other than inherent rights as proprietary, nor of any reference to the provisions of the Civil Code dealing with ownership of property. Rather, the Courts proceed on the basis that the participant in a public tender has a lawful interest in securing compliance with the provisions of the law and the terms of the tender. This is actionable by way of declaratory relief through the Civil Courts by virtue of the general provision of Article 2(1) (which refers to ‘the lawful interests of all persons’) and the confirmation in Article 7(1) that the right to vindicate such an interest applies equally to the obligations of government agencies ‘to protect the rights provided by law.’ These findings are consistent with the view already arrived at by the Tribunal in construction of the Civil Code, namely that it protects a broad range of legal rights, including contractual rights, but that not all of these constitute property rights.
192. Thus, the Tribunal concludes that the category of proprietary rights under Hungarian law is undoubtedly broad enough to include intangible assets as well as movable and immovable property *stricto sensu*, it is nevertheless an essential attribute of a proprietary right that it be an asset capable of ownership, valuation and alienation.

F. Alleged sources of Claimants’ proprietary rights

193. Claimants allege two sources of proprietary rights:
- (a) Rights in respect of the 2009 tender acquired by them in or under the 1997 Broadcasting Agreement³⁰⁹; and
 - (b) Rights acquired by them by virtue of their participation as a bidder in the 2009 Tender Bid.

It is necessary to analyse each of these sources of rights separately.

1. 1997 Broadcasting Agreement

194. It is common ground between the Parties that the Broadcasting Right created by the Broadcasting Agreement was a ‘right representing assets’ and therefore protected by the Hungarian law of property.³¹⁰ In this connection, and as noted above, both Parties accept that Claimants had an investment by way of its shares in Sláger Rádió for 12 years from 1997 until

³⁰⁹ Dated 18 November 1997, (C-115).

³¹⁰ Körmendy-Ékes/Lengyel II, [17].

18 November 2009, which qualified for protection under the Treaties.³¹¹ The issue in the present case is a more specific one: what proprietary rights, if any, did Claimants acquire thereby in respect of any period after 18 November 2009?

195. Claimants put their case in this regard in two ways:

First, they say generally that the Broadcasting Agreement contained or incorporated valuable provisions for Claimants' benefit in relation to the subsequent period, notably the right to a subsequent tender in accordance with the provisions of the GTT; and,

Second, they claim that, by virtue of the incorporation of the GTT into the Broadcasting Agreement, they obtained in particular the right to an 'incumbent advantage' on any subsequent tender, which was a valuable asset of a proprietary character, which was taken from them by the manner in which the ORTT, as a Hungarian state agency, operated the 2009 Tender.

196. In order to assess this claim, it is necessary for the Tribunal to construe first the duration of the Broadcasting Agreement. Section 2.3 provides:

The Broadcasting License shall commence from the 18th day of November, 1997 and is issued for seven (7) years, subject to the provisions of the present Contract. For the renewal of the Broadcasting License, §107 of the Act shall be applicable.

There are no other express provisions in 1997 Agreement as to renewal or the grant of further broadcasting licences thereafter.

197. Section 107 of the Media Law, to which reference is made in section 2.3, provides:

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

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

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

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

³¹¹ See above, [155].

198. Taken together the provisions of the Broadcasting Agreement and of section 107 of the Media Law provide a clear structure as to the term of the radio broadcasting right granted by the Broadcasting Agreement:

(a) The licensee obtains an initial term of seven years (in the present case from 18 November 1997 to 18 November 2004); and,

(b) Provided it has not violated the licence repeatedly or seriously, the licensee may request a further five year extension, which ORTT may grant without inviting a tender, provided that the request is made within the time specified, i.e. fourteen months prior to expiry. In the present case, it is common ground that this request for an extension was made and granted, thus extending the licence to 18 November 2009.³¹²

199. Thus far, there is no dispute between the Parties. But the experts on Hungarian law whose reports were filed on behalf of each Party disagree as to the precise effect of section 107 of the Media Law within the Broadcasting Agreement upon any subsequent tender for the period after 18 November 2009.³¹³ There are two sub-issues on which this disagreement centres:

(a) Whether the Broadcasting Agreement confers rights upon Claimants binding in contract upon ORTT derived from the Media Law (and, in turn, from the GTT promulgated thereunder); and,

(b) Whether section 107(2) in particular confers a right to renewal or re-tender 12 months prior to the expiry of the maximum twelve-year period under section 107(1) in respect of any subsequent period.

(a) Contractual incorporation of the Media Law

200. Dr Molnár, the expert called on behalf of Claimants, maintains that “[t]he 1997 Broadcasting Agreement incorporated the regulatory framework governing Sláger’s broadcasting right, including the Media Law and the GTT and the 1997 Call for Tender.”³¹⁴ He relies for this purpose in particular on section 3.2 of the Broadcasting Agreement, which (in the agreed translation of the Parties) provides:

The Broadcaster undertakes to observe the provisions of the Act. The parties hereby incorporate into the present Contract the provisions of the Act relating to

³¹² See Composition Agreement between ORTT and Sláger, 5 December 2002, (C-117).

³¹³ Expert Legal Opinion of Dr Péter Molnár dated 22 April 2013, (**Molnár I**), [27]; Körmendy-Ékes/Lengyel I, [32] – [41]; Molnár II, [20]; Körmendy-Ékes/Lengyel II, [21] – [23]; Molnár III, [23] – [28].

³¹⁴ Molnár I, [24]; Molnár II, [20] – [22]; Molnár III, [29] – [38].

the Broadcasting Right and its exercise in effect at the time of the conclusion of the Contract. The Broadcaster hereby expressly agrees to use the Broadcasting Right during the full term of its validity in accordance with the provisions of the Act incorporated into the Contract, whether they are repeated herein or not.

201. Dr Molnár opines that the reference in this provision to ‘the provisions of the Act relating to the Broadcasting Right and its exercise’ are a reference to the provisions of Chapters II and VI of the Media Law, which deal respectively with ‘Principles and rules of broadcasting’ and ‘Broadcasting Rights’.
202. Drs Körmendy-Ékes and Lengyel, Respondent’s experts, disagree. They maintain that section 3.2 ‘does not incorporate the provisions of the 1996 Media Law except to impose obligations of compliance *upon the broadcaster*.’³¹⁵ Further, they opine that ORTT was not competent to give a commitment to leave the Media Law unchanged during the term of the Agreement.³¹⁶ That was a question for Parliament and not the regulatory agency.
203. The Tribunal finds that the effect of section 3.2 was, as its terms provide, to ‘incorporate into the present Contract the provisions of the Act relating to the Broadcasting Right and its exercise in effect at the time of the conclusion of the Contract.’ The effect of incorporation is that the provisions referred to become terms of the Contract between the Parties, just as if they had been written out in full. No doubt one consequence of such incorporation was to impose obligations upon the broadcaster. Yet it is too narrow a reading of the section to limit its effect in this way. That is not what the plain words of the quoted sentence provide. Moreover, such a limited unilateral effect would have been unnecessary. Hungarian law bound Sláger in any event in its performance of the Broadcasting Right. Rather, the effect of section 3.2 was to give bilateral *contractual* effect to the incorporated statutory provisions.
204. The Tribunal does not consider that this was beyond ORTT’s competence. The provision did not bind the Hungarian Parliament in a manner that precluded subsequent amendments to the Media Law during the pendency of the Licence. Rather, it merely ensured that, as between Sláger and ORTT, the contractual framework was stabilised as at the time of the conclusion of the Contract. Hungarian law makes specific provision for the effect of any subsequent changes in the law upon parties’ contractual rights and duties. Section 226(2) of the Civil Code provides (in a manner that is unexceptional in the Civil Law):

³¹⁵ Körmendy-Ékes/Lengyel I, [52(a)].

³¹⁶ *Ibid*, [52(c)]; Körmendy-Ékes/Lengyel II, [26].

Legal regulations can amend the content of contracts that have been concluded prior to the date on which the legal regulations enter into force only under special circumstances. If the amended content of a contract injures any substantial and rightful interest of any of the parties, the party so affected shall be entitled to request the court to amend the contract, or, unless otherwise provided by legal regulation, the party shall be entitled to rescind from the contract.

205. The effect, then, of such incorporation in the present case is that the provisions of Chapter VI of the Media Law, which relate to the Broadcasting Right and its exercise, form contractual terms of the Broadcasting Agreement. Chapter VI includes provisions relating to the publication by ORTT of both General Tender Conditions³¹⁷ and Invitations to Tender,³¹⁸ as well as the term of rights provision (section 107).
206. But the fact that these provisions form part of the Broadcasting Agreement during its term does not in itself address the second question, which is whether the Agreement contains obligations assumed by ORTT in respect of any period after 18 November 2009.

(b) Application of Broadcasting Agreement to period after 18 November 2009

207. The dispute between the Parties on the application of the Agreement to the period after 18 November 2009 hinges on the proper construction of section 107(2) of the Media Law. The question is whether this section imposes upon the ORTT an obligation to issue a further call for tenders twelve months before the end of the maximum period of twelve years of the Broadcasting Licence granted and renewed under section 107(1). If it does, Claimants submit that they were, by virtue of the incorporation of that section into the Broadcasting Agreement, *contractually* entitled to the conduct of a further tender in 2009 upon the same terms as applied in 1997. If it does not, then Claimants' contractual rights under the 1997 Broadcasting Agreement would cease on 18 November 2009. Any rights Claimants might then have in respect of the 2009 Tender would have to be derived from another source.
208. Dr Molnár states in his first report that section 107 contemplates two types of renewals: (a) that provided under section 107(1) (a renewal without re-tender for an additional five years) and (b) "where the first type of renewal was already awarded, or 'cannot be awarded' a renewal conducted through a tender published by ORTT 12 months before the expiration of the broadcasting agreement (Section 107(2))."³¹⁹ Thus, he considers that section 107 applies not only

³¹⁷ Title 3, sub-section 91 – 94.

³¹⁸ Title 4, sub-section 95 – 102.

³¹⁹ Molnár I, [27].

to the “singular permitted renewal of broadcasting rights without tender”³²⁰ but also “to the re-tendering of the existing broadcasting right by holding a competitive tender, and signing a new contract with the winner.”³²¹

209. Drs Körmendy-Ékes and Lengyel disagree. They opine that section 107(2) only applies to circumstances in which the first renewal is not sought or granted. At the end of maximum twelve-year period, they argue that the ORTT had a complete discretion as to whether to call a tender at all.³²² If it did so, then the applicable provision of the Media Law would be section 41 (the general power of the Board to call for tenders for radio frequencies) and not section 107(2). Dr Molnár accepts in reply that section 41 serves as the legal basis for the call for tenders, but maintains that section 107(2) complements section 41 because it ‘regulates the timing but does not affect the statutory basis for calling the tender itself.’³²³
210. The experts called by both Parties referred to discussions within the ORTT Board and to ORTT practice in support of their respective positions, drawing opposing conclusions from this practice. But, in the end, the Tribunal finds that this question is simply a question of construction of the statutory provision. That is to say: it is a question of law that the Tribunal must decide.
211. In the Tribunal’s view, section 107(2) does not apply in respect of a period beyond the maximum licence period of twelve years provided under section 107(1). It does not in particular impose an obligation upon the ORTT Board to issue a call for tenders twelve months prior to the expiry of the twelve-year period. Rather, section 107(2) makes provision only for the position in the event that there is to be no renewal after the first seven years of a broadcasting licence. This may be so, *either* because the licensee has failed to notify the Board fourteen months prior to the expiry of the first seven year period that it seeks a renewal under sub-section (1); *or* because it has failed to meet the conditions for renewal by repeated or serious violations of the contract under sub-section (3). In either or those events, the Board is under an obligation under sub-section (2) to publish an invitation to tender twelve months before the expiry of the first licence period. Such a call for tenders would have to be issued at the outset of Year 7 in respect of the period from the beginning of Year 8.
212. The Tribunal is unable to read section 107(2) as having any application to a situation in which the renewal provided under section 107(1) has been already granted without tender and the period

³²⁰ Molnár II, [26].

³²¹ *Ibid*, [27].

³²² Körmendy-Ékes/Lengyel I, [42] – [45]

³²³ Molnár III, [26].

under contemplation is therefore beyond the maximum twelve-years there provided. Section 107 is the only section in Title 7 of the Media Law which is entitled 'Term of Rights'. The section is by its express terms concerned with specifying maximum periods for which Broadcasting Rights are valid. Section 107(1) provides for only one renewal beyond the first maximum period of seven years. That renewal is to be for a period of five years. In its express terms, the Broadcasting Agreement is consistent with the law.

213. Dr Molnár had originally maintained that a new call for tenders in respect of a period beyond twelve years is nevertheless a 'type of renewal'. But this is not consistent with the language of section 107(2), which speaks rather of 'an invitation to tender' which must be published 'if renewal cannot be awarded'.³²⁴ Section 107(2) does not create a different type of renewal to that provided under section 107(1). In his Third Report, Dr Molnár retreated somewhat from his original formulation, maintaining simply that section 107(2) continued to impose an obligation upon the Board to issue a new call for tenders in respect of the period after twelve years.³²⁵ The Tribunal considers that this gives a construction to the words 'if a renewal cannot be awarded' which is inconsistent with the function of sub-section (2) within the structure of section 107. As it has already explained, this function is to provide for the situation at the end of the first seven-year period in the event that the single renewal right is not applicable.
214. The Tribunal is fortified in this view by a consideration of the consequences that would apply in the event that Claimants' construction of the section were to be applied. Claimants maintain that the obligation to issue a call for tenders in 2009 must be exercised on the basis of the Contractual Framework applicable to the 1997 Broadcasting Agreement, including by incorporation the Media Law, GTT and CFT in force in 1997. The Tribunal sought clarification of this point in the course of oral argument. The President asked counsel for Claimants the following question:³²⁶

As I understand the submission of the Claimant, the submission is that if the ORTT were to have amended the General Terms for Tender such that different terms applied in 2009 to those originally published in [199]7, Claimants' position is that Claimant would be entitled to relief contractually if those changes had any material effect on their position vis-à-vis the original GTT in 1997?

MR. TRIANTAFILOU: Yes.

PRESIDENT McLACHLAN: What would be the position then, again, in seven years thereafter? Would it still be the 1997 GTT that would apply to the Claimant?

³²⁴ Molnár II, [27].

³²⁵ Molnár III, [26].

³²⁶ T2/401/9 – 402/20.

MR. TRIANTAFILOU: As we noted yesterday, I think this is, of course, a matter of fact. The question would be whether the new Broadcasting Agreement would effect a similar incorporation of the GTT in effect at the time of the 2009 Tender. So the '97 Broadcasting Agreement incorporated the GTT in effect at that time, but, of course, the new Broadcasting Agreement would have to effect a similar incorporation for the same GTT to apply in future tenders, and, in particular, most likely a re-tendering because after the seven years, there is a renewal pursuant to Section 107 of the Media Law.

We have observed that the draft Broadcasting Agreement annexed to the 2009 CFT contains an incorporation clause functionally identical to Section 3.2 of the '97 Agreement. So I guess this by a long way of saying that, in this case, the same GTT would remain in effect for purposes of the winning bidder of the 2009 Tender until 2021 when presumably its Broadcasting Agreement plus renewal would come to an end.

215. Although Claimants submitted in answer to the President's second question that the ORTT could promulgate a new GTT for the 2009 Tender, their answer to the first question necessarily entails that, in their view, the ORTT was contractually bound vis-à-vis Sláger by virtue of the 1997 Broadcasting Agreement to issue the Call for Tenders for the 2009 Tender on the same terms (including the same terms as to renewal) as that provided in 1997. Any failure to do so would expose ORTT to a claim for contractual remedies from Sláger. The result would be that due compliance by ORTT with its contractual obligations would result in a potentially perpetual obligation to renew on 1997 terms. The Tribunal does not consider that this is at all consistent with the limited term of the Broadcasting Right conferred by the Broadcasting Agreement and the Media Law.
216. The Tribunal's view that the 1997 Broadcasting Agreement did not generally impose upon ORTT obligations in respect of the period after 18 November 2009 is corroborated by the Claimants' own contemporaneous views as expressed to the regulatory authorities both in the United States and in Hungary.
217. Thus, in filing disclosure forms with the United States Securities and Exchange Commission on 12 May 2008, 8 May 2009 and 9 October 2009 (ten days after the deadline for submitting bids in the 2009 Tender), Emmis Corporation (the ultimate US holding company of two of the Claimants) stated:³²⁷

Broadcast licenses in many foreign countries do not generally confer the same renewal expectancy as U.S. radio stations broadcast licenses. For instance, Hungarian broadcast law is silent as to the treatment of broadcast licenses after the expiration of the first license renewal period. While we believe we have

³²⁷ 2008 Emmis Form 10-K, 12 May 2008, 17, (R-4); 2009 Emmis Form 10-K, 8 May 2009, 15, (R-49); 2009 Emmis Form 10-K/A, 9 October 2009, 15, (R-53).

reasonable prospects for securing additional extensions of our Hungarian broadcast licenses after the expiration of our first license renewal period in November 2009, we cannot assure that such extensions will be granted or that the terms and conditions of such extensions will not have a material adverse effect on our Hungarian operations.

218. Further, for accounting purposes Claimants did not attach a value to Sláger's broadcast licence after November 2009. On the contrary, Emmis Corporation confirmed in the same US SEC filings that:³²⁸

The Company has *definite-lived intangible assets* recorded that continue to be amortized in accordance with SFAS No. 142. These assets consist primarily of foreign broadcast licenses, trademarks, customer lists and non-compete agreements, all of which are amortized over the period of time the assets are expected to contribute directly or indirectly to the Company's future cash flows. *The cost of the broadcast license for Sláger Radio is being amortized over the five-year term of the license, which expires in November 2009.*

219. Claimants submit that these statements of prudent accounting policy should not be taken as any indication of Emmis' lack of commitment to long-term investment in the Hungarian radio market or lack of expectation of a long-term benefit from that investment.³²⁹ But the question for the Tribunal is a different one. It is whether the 1997 Broadcasting Agreement conferred rights that might constitute valuable intangible assets, capable of expropriation in respect of any period after 18 November 2009. Claimants' contemporaneous accounting treatment of the Broadcasting Right confirms that it was indeed a valuable asset during the period of the licence and its first renewal. But at the same time, both Emmis Corporation and Sláger attributed a nil value to that asset in respect of the period after 18 November 2009. This confirms the view that the Tribunal has arrived at as a result of its own analysis of the rights conferred by the 1997 Broadcasting Agreement, interpreted in the light of the relevant provisions of Hungarian law.

220. Moreover Sláger took the same position when it urged the Hungarian Parliament in 2008 to amend the Media Law so as to provide for further renewal of its licence. It stated:³³⁰

As it is known, the broadcasting licenses of the two national commercial radio licenses will expire in the second half of 2009 based on the broadcasting

³²⁸ 2008 Emmis Form 10-K, 12 May 2008, 70, (R-4); 2009 Emmis Form 10-K, 8 May 2009, 66, (R-49); 2009 Emmis Form 10-K/A, 9 October 2009, 66, (R-53), both emphases added by the Tribunal. This approach is confirmed in the accounts of Sláger: Jonscher Report, [89].

³²⁹ Counter-Memorial, [17] – [19] citing Smulyan II [10] – [13]; Rejoinder, [24] – [30], citing Third Witness Statement of Jeffrey H. Smulyan dated 25 November 2013, (**Smulyan III**); Third Witness Statement of Barbara Brill dated 25 November 2013, (**Brill III**), [14].

³³⁰ Letter from Sláger to Chair of Parliamentary Media Committee, 10 September 2008, 1, (C-266).

agreements concluded with the [ORTT] in a manner that their extension is currently not possible based on the currently effective provisions of Act I of 1996 (“Media Act”).

221. Thus, the Tribunal concludes that the 2007 Broadcasting Agreement conferred in general no rights in respect of the period after 18 November 2009 constituting valuable assets capable of expropriation. However, it remains to consider one specific right that Claimants submit they acquired by virtue of being awarded the Broadcasting Right under the 1997 Broadcasting Agreement and which they submit constituted a valuable asset in the 2009 Tender Bid. That is the alleged right to an incumbent advantage. The question whether Claimants acquired this right must be considered in the next section of this Award.

2. *Alleged right to an incumbent advantage*

222. Claimants’ right to an incumbent advantage is alleged to derive from section 65.3 of the GTT which provides:

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

65.3.2 ORTT evaluates at a disadvantage the bidder who holds the broadcasting right for the frequency forming subject of the call for tenders but its operations are not in compliance with its studio license and the Media Act.

223. Although much argument was devoted to the question whether the GTT was, or was not, incorporated into the 1997 Broadcasting Agreement, the Tribunal considers that this issue is not in the end dispositive of the issue before it. It has already found that the provisions of Chapter VI of the Media Law that relate to the Broadcasting Right and its exercise were incorporated into the Broadcasting Agreement. These provisions include the requirement upon the Board to publish general terms of tender.³³¹

224. There is no dispute that section 65.3 of the GTT did form part of the tender for the 1997 Broadcasting Right. Moreover the same provision was also included in the GTT for the 2009 Tender, since the GTT continued to apply to all tenders of broadcasting rights until the Media Law was replaced in 2010 and was specifically incorporated into the Call for Tenders for the 2009 Tender.³³² Sláger did submit a bid in the 2009 Tender. It was undoubtedly the bidder ‘who has held a broadcasting right awarded in tender for the frequency forming the subject-matter of the

³³¹ Section 91.

³³² 2009 CFT, 20 July 2009, 1, (CA-6); Molnár I, [23];

call for tender'.³³³ If, therefore, section 65.3 were applicable to the 2009 Tender, then Sláger would be the only bidder holding the advantage recognised under the section.

225. Thus, Claimants' claim under this head does not depend solely upon their more general submissions about the continuance of the rights under the 1997 Broadcasting Agreement. Indeed the language of section 65.3.1 contemplates two distinct elements:

- (a) The participation of the bidder in a current bid; and,
- (b) The fact that this bidder had previously held a broadcasting right for the same frequency, which right had been awarded in tender.

The advantage contemplated by section 65.3.1 therefore derives from current participation and the prior holding of the right, not from a continuation of that right.

226. Respondent devotes some effort towards submitting that, even if section 65.3 applied, ORTT would have been entitled to evaluate Sláger at a disadvantage under section 65.3.2. It submits that Sláger conducted its operations in ways that were not in compliance with the Media Law, and cites instances that it claims constituted repeated and serious breaches of the Law.³³⁴ But the Tribunal finds no evidence that such infringements of the Media Law as were committed by Sláger rose to a level of repeated or serious violations, such that it could be said to be conducting its operations generally in a manner that was not compliant with the Law. On the contrary, it accepts the evidence advanced by Claimants showing that ORTT as regulator had granted the renewal of Sláger's licence in 2004; had settled its subsequent differences with Sláger in 2007 and that it was not regarded as a delinquent operator in 2009.³³⁵

227. But this leaves the question whether Sláger was in fact entitled *ratione personae* to the incumbent advantage provided in section 65.3.1. The language of the section refers to a bidder who 'operates and broadcasts in accordance with its studio license and the Media Act.'³³⁶ It is undisputed that Sláger's Broadcasting Right was not a 'studio licence'. The question of construction of section 65.3.1 is therefore whether that provision applies:

³³³ Section 65.3.1 GTT.

³³⁴ Memorial on Jurisdiction, [80]; Reply, [82], citing Körmendy-Ékes/Lengyel II, [70].

³³⁵ Settlement Agreements dated: 5 December 2002, (C-117), & 15 September 2007, (R-41); ORTT Board Minutes, 23 September 2009, (C-42).

³³⁶ Emphasis added.

- (a) only to tenders for the award of frequencies previously held by holders of studio licences; or,
- (b) generally to incumbent bidders on all frequencies, all of whom must comply with the Media Law. In that event the reference to studio licences would have to be regarded as ‘a mere anachronism’.³³⁷

228. Neither the GTT nor the Media Law defines ‘studio licence’. But the experts on Hungarian law called by both Parties were agreed that this type of licence had been issued at a local or regional level during the period prior to the entry into force of the Media Law, either for a fixed term or with an indefinite duration.³³⁸

229. Specific provision is made for the treatment of such pre-existing studio licences in section 146 of the Media Law, which provides:

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

(2) The Board shall conclude the contract with the applicant for the term of the studio license defined in the original license and in respect of the area of reception defined therein, establishing the broadcasting fee, if the applicant operates in accordance with the provisions contained in the studio license.

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

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

³³⁷ T1/243/16.

³³⁸ Molnár II, [35] – [40]; Körmendy-Ékes/Lengyel I, [29] – [31].

broadcasting services provided on the basis of the broadcasting contract concluded on the basis of the tender, at the latest.

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

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

230. The transitional regime set out in section 146 makes provision for two different types of studio licence:

(a) *Fixed Period*: The holders of fixed term studio licences could apply to the Board within the stipulated window for the transformation of their studio licence into a broadcasting contract of the same duration, provided that they were broadcasting in compliance with their existing licence: section 146(1) – (2);

(b) *Indefinite Period*: The holders of indefinite term licences had to submit to a re-tender within a stipulated period, but would ‘be given priority in the course of the assessment process’: section 146(4) – (5).

231. In the Tribunal’s view, section 65.3 of the GTT can only be read as the ORTT’s implementation of the requirements of section 146 of the Media Law. The ‘advantage’ accorded to a bidder under section 65.3.1 of the GTT implements the requirement in section 146(5) of the Law to give that bidder ‘priority’. Claimants’ expert opines that there is no necessary link between the two provisions, pointing out that there is no equivalent in the Media Law of section 65.3.2 in the case of the holders of studio licences of indefinite duration.³³⁹ But, in the Tribunal’s view, this observation in no way affects the close relationship between the two provisions. The right to transform fixed-term studio licences into broadcasting contracts without tender under section 146(1) had to be subject to an express qualification in cases where the incumbent had not complied with the terms of the studio licence. Otherwise a delinquent incumbent could unjustly benefit from rights under the new Law. But, in the case of a tender for an indefinite-term licence, section 146(3) makes it clear that the incumbent must submit to a tender process under the Board’s tender conditions, which had yet to be promulgated. The requirement to accord the incumbent ‘priority’ could not preclude the Board from promulgating tender conditions that

³³⁹ Molnár II, [44].

enabled it to take into account the question whether the incumbent had in fact operated in accordance with its studio licence and the Law.

232. Claimants further submit that in practice the ORTT did accord an incumbent advantage in new tenders of local or regional frequencies,³⁴⁰ although the experts disagreed as to the significance of this practice.³⁴¹ The Tribunal derives little assistance from this evidence, since its function is to construe and apply the applicable legal provisions, a task that is not determined by the practice of the regulator.
233. The Board was empowered under section 91 of the Media Law to publish the GTT, defining, under sub-section (2)(b) criteria for evaluation of the material conditions of the bid. Although by section 92 the Board could have promulgated a different GTT for each of local, regional and national broadcasting, in fact it did not. The GTT, as adopted, applied across these different categories of broadcasting. But this does not mean that every provision in the GTT must be applied in the case of every bid if the particular provision is, by its terms, inapplicable to the bid in question.
234. Section 65.1 of the GTT permits the contracting authority to evaluate the bids according to the criteria published in the Call for Tenders. The ORTT published the Call for Tenders in respect of the 2009 Tender on 29 July 2009.³⁴² That Call accorded 10 points for Broadcasting Experience, but stated expressly that “[i]n evaluating the Broadcasting Service Experience, it can not be regarded as a disadvantage if the Bidder has non-national broadcasting service experience.”³⁴³
235. The Tribunal’s view, as a matter of law, that ORTT was not obliged to accord an incumbent advantage to bidders outside the specific context of holders of studio licence is reinforced by the conduct of Sláger and the conclusions of the Hungarian courts at the time.
236. In its comments on the draft Call for Tenders, Sláger made no reference to an incumbent advantage under section 65.3.1. It confined itself to a general observation that the draft made no distinction based on whether the broadcaster had demonstrated a long-term commitment in the Hungarian market. In reply, ORTT had stated that:³⁴⁴

³⁴⁰ Relying on Molnár I, [45]; Molnár III, [56] – [57].

³⁴¹ Cf. Körmendy-Ékes/Lengyel I, [59]; Körmendy-Ékes/Lengyel II, [64].

³⁴² 2009 CFT, 20 July 2009, (CA-6).

³⁴³ *Ibid*, [3.4.3.1.3].

³⁴⁴ ORTT Proposal 799/2009, 14 July 2009, (C-204), 34.

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

237. Sláger had previously sought to secure an extension to its licence by promoting an amendment to the Media Law in Parliament. On 30 July 2009, the Hungarian Constitutional Court delivered its judgment declaring unconstitutional the amending legislation of the Hungarian Parliament that would have extended Sláger's licence without re-tender.³⁴⁵ The Court held:³⁴⁶

Frequencies are, at present, public goods of high value and importance, the owner of which is the state. [...] Because the number of frequencies reserved for transmission limits the entry into the market, new players on the media market bidding for frequencies are unable to enter the market in addition to those already on the market. They can only replace those on the market. Therefore, in a tender for analogue radio broadcasting right, the freedom of competition can be interpreted such that until radio digitalization takes place, all privately-held, profit-oriented undertakings must have an equal chance to bid for the two national commercial radio frequencies if they comply with the conditions set forth in the call for tender.

238. After the outcome of the bid had been announced, Sláger challenged the decision before the Hungarian Metropolitan Court *inter alia* on the basis of section 65.3. It argued that the ORTT should have excluded non-national broadcasting experience. But the Court rejected that argument, holding that, whilst section 65.3 was a mandatory part of the GTT, the ORTT was entitled under section 65.2 to formulate other criteria and thus the extension to non-national broadcasting experience was not a breach of the Media Law or the GTT.³⁴⁷

239. In the Tribunal's view, Claimants' disclosures in the United States and their conduct in Hungary prior to the Tender are consistent with the view that they knew that they did not have an incumbent advantage in the 2009 Tender. On the contrary, an extension of their licence without re-tendering by amendment to the Media Law had failed in the Constitutional Court on the basis that it would undercut the basic objective of ensuring equality of treatment as between incumbents and new bidders.³⁴⁸

240. As a result, the Tribunal finds that the provisions of section 65.3.1 of the GTT did not apply to Sláger in its bid in the 2009 Tender for a national radio frequency. The Tribunal therefore does

³⁴⁵ *Supra* [34]; Constitutional Court Decision No. 71/2009, AB, July 2009, (CA-102/R-50).

³⁴⁶ *Ibid*, 5.

³⁴⁷ *Sláger v ORTT* Metropolitan Court, 19 January 2010, (CA-11), 30; Metropolitan Court of Appeals, 14 July 2010, (CA-14), 30.

³⁴⁸ Claimants do not seek to challenge the Constitutional Court decision in their pleadings.

not need to decide whether the advantage set forth in that section is capable of being treated as an asset of the incumbent constituting property capable of expropriation.

241. Nevertheless, Claimants do not put their claim of expropriation solely on the basis of the alleged failure to apply the incumbent advantage. They also allege that, by participating in the 2009 Tender Bid, Claimants acquired other rights of a kind capable of expropriation. It is to this alternative basis for the claim that the Tribunal must finally turn.

3. 2009 Tender Bid

242. Claimants submit that, by virtue of its participation in the 2009 Tender, Sláger acquired the following four additional rights:³⁴⁹

- (a) The right to a properly established tender procedure;
- (b) The right to a timely tender;
- (c) The right to a fair and objective tender evaluation in accordance with transparent scoring criteria; and,
- (d) The right not to compete against unqualified or improperly qualified bidders.

243. Claimants submit that these rights vested in Sláger by virtue of its participation in the Tender. They constituted a contract between Sláger and the ORTT.³⁵⁰ Had these rights been respected, Sláger would have been entitled to be declared the winning bidder (because, on the facts of the case, in Claimants' view it would have been the only qualifying bidder) and thus would have been entitled to the award of the 2009 Broadcasting Agreement.³⁵¹ These rights were violated by ORTT in their evaluation of the bids in a manner that extinguished the rights, and accordingly these rights were expropriated.³⁵²

244. At this jurisdictional stage of its enquiry, the Tribunal is not of course concerned to determine whether Respondent's conduct breached the applicable standards. In respect of breach, it is sufficient for Claimants to allege a *prima facie* case on the merits. Rather, the Tribunal is concerned with a prior question, which must be decided as a question of jurisdiction. That is

³⁴⁹ Counter-Memorial, [120] – [134]; Molnár II, [64] – [87]; Rejoinder, [100] – [109].

³⁵⁰ T2/473/11 – 17.

³⁵¹ Rejoinder, [8].

³⁵² T1/261/17 – 164/17.

whether the rights alleged constitute assets or property of the Claimants that are capable of being expropriated.³⁵³

245. The Tribunal finds as a matter of Hungarian law, that, in issuing the Call for Tenders, ORTT was obliged vis-à-vis all bidders to observe the conditions of the GTT as regards the tender procedure. The Call for Tenders provided that:³⁵⁴

The rules of the Media Act and the GTT must be applied to the tender procedure carried out on the basis of the Call for Tenders. The definitions and requirements used in the Call for Tenders must be interpreted in accordance with the Media Act and the GTT.

The Metropolitan Court held, in its decision of 19 January 2010 in the *Sláger* case, that:³⁵⁵

This means that the General Terms of Tender is part of the calls for tender for the individual broadcasting rights by virtue of the Act, its rules are mandatory and can only be deviated from if the Act or the GTT expressly permit.

246. The GTT therefore contained obligations that were binding on the ORTT as well as on the bidders. The Hungarian Court of Appeal so held in the *Klubradio* case on 12 July 2012, rejecting the submission of the ORTT that the GTT only constituted administrative directions:³⁵⁶

The statement made by the Defendant in the Appeal according to which the Call for Tenders and GTT represented procedures adopted only on the basis of a statutory authorization and formed a set of execution rules which, contrary to the provisions of the law containing the contracting option, could not create any imperative, cannot be accepted. The Defendant did not state either that the cited provisions of the Call for Tenders and GTT were in breach of the law and violated the Broadcasting Act, yet the rules of GTT and the Call for Tenders must be equally binding for the Caller of the Tender and the Bidders. Otherwise the principle stressed in the Defendant's Appeal with reference to the interest of the national economy would be violated, according to which frequencies managed by the State must be utilized in a fair and open competition.

247. The *Klubradio* case concerned a claimant who had been declared the winning bidder of a radio frequency following a tender procedure, who sought, successfully, to compel ORTT to enter into a broadcasting agreement. The claimant in that case had, therefore, already acquired the right to a valuable asset and sought to compel ORTT to deliver that asset to it.

³⁵³ *Supra* [148].

³⁵⁴ 2009 CFT, 20 July 2009, (CA-6), section 1.3.1.

³⁵⁵ *Sláger v ORTT* Metropolitan Court, 19 January 2010, (CA-11), 24.

³⁵⁶ Metropolitan Court of Appeals Decision, 12 July 2012, (*Klubradio* Case), (CA-86).

248. However, the present case is different, since here Sláger was not declared the winning bidder. Claimants contend rather that, had ORTT followed the proper procedures, it ought to have been declared to be the winning bidder. Thus Claimants' case requires the Tribunal to analyse the nature of the rights held by Sláger in the tender process prior to the declaration of the winning bid. Can such rights constitute proprietary assets of Sláger?
249. In view of the analysis as to applicable law already undertaken by the Tribunal above, it is necessary first to determine the character of those rights under Hungarian law. Some indication of the character of the rights is provided by the decisions of the Hungarian courts in the *Sláger* proceedings. The claim that Sláger advanced before the Metropolitan Court was that the ORTT had breached the fairness of the competition and the provisions of the Media Act, the GTT and the Call for Tenders. Accordingly Sláger was entitled to a declaration of unlawfulness, and injunctive relief.³⁵⁷ The Metropolitan Court accepted that a bidder could vindicate its rights to a proper tender before the civil courts.³⁵⁸
250. Nevertheless, the fact that civil relief may be afforded to a bidder against the ORTT if the latter does not observe the tender conditions does not suffice to determine whether the bidder's rights are proprietary in character. In answer to a question from the Tribunal, Claimants confirmed that:³⁵⁹

The review of the civil courts of the conduct of the ORTT in question was and is limited in important respects. The Courts have held that they cannot second-guess the ORTT's decision-making process, such as the scoring of individual criteria, but they can and will review the formal compliance of the ORTT with the bid criteria.

251. The overall purpose of the tender was, as the Supreme Court confirmed in its decision in the *Sláger* proceedings, 'to enable a competition *with equal chances* between the media-providers, also in respect of the frequency-tender.'³⁶⁰ Such a right is undoubtedly a very important one. It is of the essence of fair decision-making in a state governed according to law that individuals should be entitled to expect that a regulatory authority will comply with the legal framework applicable to it in exercising the regulatory powers conferred upon it. This is the essence of the

³⁵⁷ Statement of Claim, 2 November 2009, (C-159), [69] – [81].

³⁵⁸ *Sláger v ORTT* Metropolitan Court, 19 January 2010, (CA-11), 21 – 22.

³⁵⁹ T2/479/8 – 14.

³⁶⁰ Supreme Court of the Republic of Hungary, Judgment in Pfv.IV.21.976/2010/6, 23 February 2011 (*Sláger*), (CA-16), 12, emphasis added.

complaint that Claimants raise in the present proceedings and in particular of the rights they allege under this head of their claim.

252. But the existence of such rights is not sufficient to answer the question whether this Tribunal had jurisdiction to vindicate such rights on the international plane. For that purpose, it is necessary to determine whether the rights constitute valuable proprietary assets of the Claimants. In line with the analysis already undertaken in Part VI E above the Tribunal is in no doubt that they do not.
253. *In the first place*, the rights accorded to Sláger by virtue of its participation in the tender were also accorded to every other bidder. That follows necessarily from the fundamental purpose of the tender, confirmed by the Hungarian Constitutional Court, as enabling a competition with equal chances. It is perfectly possible to construe such a right as held by all if it is a right to due process, or, in the language of the Treaties, to ‘fair and equitable treatment’.³⁶¹ Such rights are, of their nature, designed to ensure that all persons affected by a governmental decision receive the equal protection of the law. But a property right is something quite different. It constitutes a right held by its owner to the exclusion of others. It is no answer to say that the rights acquired by bidders in the 2009 Tender were acquired for valuable consideration. That may have created a contractual relationship between each bidder and the ORTT. But each bidder did not thereby acquire a valuable asset, capable of being alienated. If that were so, it would mean that each bidder had, by virtue of its participation in the bid, acquired the same asset. But this makes no sense in the context of a tender, the very purpose of which is to determine which of a number of bidders is to acquire the asset in question, namely the 2009 Broadcasting Right.
254. *In the second place*, none of the rights alleged to arise directly from participation in the 2009 Tender could be said to be assets or property owned or controlled by Claimants. On the contrary, Sláger’s rights in the 2009 Tender were rights concerning participation in a process that would determine whether it could acquire ownership of an asset. Such rights could not, in the words of the Iran-US Claims Tribunal, be ‘freely sold and bought, and thus ha[ve] a monetary value’.³⁶² In the absence of this character, it is no answer to say that Sláger’s rights arising from its participation in the 2009 Tender had a contractual as well as a regulatory basis. As the Tribunal in *Waste Management II* held: ‘[n]on-compliance by a government with contractual obligations is not the same thing as, or equivalent or tantamount to, an expropriation.’³⁶³ The Tribunal has

³⁶¹ Art. 3(1) Netherlands BIT; Art. 4(2) Swiss BIT.

³⁶² *Amoco*, [108].

³⁶³ *Waste Management II*, [175].

already considered, and rejected for the reasons set out in Part VI E above, Claimants' argument that all rights under the Civil Code other than inherent rights are to be regarded as proprietary. This accords neither with the structure and language of the Civil Code; nor with the expert evidence as to the nature of property under Hungarian law; nor with the fundamental notions of property embodied in the concept of expropriation at international law.

255. In the final analysis, the Tribunal is satisfied that the only proprietary right that Claimants had, capable of protection from expropriation, was the Broadcasting Right it acquired in 1997. That right was a right of limited duration. It expired on 18 November 2009. None of the ways in which Claimants have sought to plead their case on the injustices that they allege were perpetrated upon them in the 2009 Tender meet the basic requirement of a property right. This being so, the Contracting States to the instruments of consent, namely the Netherlands and Switzerland BITs, have not conferred upon this Tribunal jurisdiction to determine Claimants' claims on the merits. Accordingly this Tribunal has no option but to dismiss Claimants' claims of expropriation as presently maintained in this arbitration for lack of jurisdiction.

G. Costs

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

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

257. In accordance with the directions of the Tribunal at the Hearing, both Parties submitted written observations and schedules of costs on 31 January 2014. Respondent submits that, in the event that it were to succeed at the jurisdictional stage, it ought to receive its costs, particularly in view of what it characterises as its "rational and good faith responses to the highly aggressive and inappropriate litigation tactics adopted by Claimants."³⁶⁴ Claimants, on the other hand, submit that, in the event that the Tribunal finds it does not have jurisdiction over all or part of the claim, it ought to order that each Party bear its own costs and contribute equally to the fees and expenses of the Tribunal and the Centre. It submits that "[t]his is consistent with the prevailing practice of investment treaty arbitration tribunals when a legitimate claim has been alleged but

³⁶⁴ Respondent's Costs Submission, [3].

dismissed, absent evidence of bad faith or misconduct on the part of the claimant or its counsel.”³⁶⁵

258. It is clear from the *travaux* of the Convention that its framers intended to leave an arbitral tribunal with broad discretion as to how to apportion costs.³⁶⁶ Schreuer comments that:³⁶⁷

In the absence of reasons to decide otherwise, each party should bear half of the costs of the arbitration including the charges for the Centre’s services and the fees and expenses of the arbitrators and should pay for its own expenses in preparing and presenting its case.

259. In the present case, the Tribunal considers that this is the proper order for costs. It does not accept Respondent’s submission that Claimants adopted highly aggressive and dilatory litigation tactics. On the contrary, it finds that Claimants acted in good faith in bringing and prosecuting their claim for alleged breaches of the Treaties. Respondent could have consented to submit the wider dispute encompassing Claimants’ non-expropriation claims to ICSID arbitration, a possibility specifically envisaged by Article 10 (2)(b) of the Switzerland BIT. Respondent however decided not to give its consent, as it was entitled to do. Respondent also insisted at the First Procedural Hearing that Claimants submit a full Memorial on Jurisdiction and the Merits before Respondent was required to indicate whether it intended to challenge the jurisdiction of the Centre and the Tribunal. This, too, was Respondent’s right under the ICSID Rules. But it had the effect that Claimants were put to substantial cost in pleading to the merits, costs that are effectively thrown away.

260. The Tribunal does not consider that Claimants’ subsequent prosecution of the action can be considered either aggressive or inappropriate. The withdrawal of Claimants’ counsel from the record, and the need to appoint new counsel is not a step that can be laid at the door of Claimants. Both Parties approached their pleadings on Respondent’s successive applications – its Rule 41(5) Objection, its application for bifurcation and its challenge to jurisdiction – in a manner that greatly assisted the Tribunal in its task.

261. Finally, the present Award is in no sense a vindication of Respondent’s position on the merits. On the contrary, the Tribunal’s decision makes no finding, *prima facie* or otherwise, on the merits. Rather, the decision turns solely on the proper construction of the narrow basis for jurisdiction afforded to it by the Contracting Parties under the Treaties. The fact that the Tribunal has not

³⁶⁵ Claimants’ Costs Submission, [10].

³⁶⁶ *Documents concerning the Origin and Formulation of the ICSID Convention* (1968), II, 873, 898, 939, 993.

³⁶⁷ Schreuer et al. *The ICSID Convention: A Commentary* (2nd edn, 2009), (CA-162), 1236.

been invested with jurisdiction to determine Claimants' claims beyond the claim for expropriation does not mean that those other claims are unfounded.

262. For all of the above reasons, the Tribunal has decided that the appropriate order for costs is that each Party should bear in equal shares the fees and expenses of the Tribunal and the charges of the Centre for the proceedings and that each Party shall bear its own expenses incurred in connection with the proceedings.

263. The costs incurred by the Tribunal, the Centre and the Parties are set out below.

	US\$
Centre's administrative fees and expenses³⁶⁸	87,846.13
Tribunal's fees and expenses	243,421.19
Claimants' fees and expenses	2,594,404.00
Respondent's fees and expenses	1,866,421.00

264. Each Party has in addition to date contributed US\$250,000 by way of advances on costs to ICSID. This sum excluded from the table above.

VII. DECISION

265. **For the above reasons, the Tribunal hereby renders this Award pursuant to which it:**

- (1) Dismisses Claimants' claims of expropriation, which constitute their claims in these arbitral proceedings, for lack of jurisdiction;**
- (2) Pursuant to its discretion under Article 61 of the ICSID Convention:**
 - (a) Orders each Party to bear in equal shares the fees and expenses of the Tribunal and the charges of the Centre for the proceedings; and**
 - (b) Orders that each Party shall bear its own expenses incurred in connection with the proceedings.**

³⁶⁸ The total costs of the proceeding as provided herein are actual as of the day of dispatch of the Award. It does not include the courier services expenses to be incurred for printing, binding and sending the certified copies of the Award as well as other related costs. Upon the financial closure of the case, ICSID will provide a detailed financial statement reflecting the final costs. Such statement will be notified to the Parties within 90 days from the date of dispatch of the Award.

[Signed]

[Signed]

**Hon Marc Lalonde QC
Arbitrator**

**J Christopher Thomas QC
Arbitrator**

Date: 10 April 2014

Date: 4 April 2014

[Signed]

**Professor Campbell McLachlan QC
President**

Date: 1 April 2014