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

In the Proceeding Between

**TELENOR MOBILE COMMUNICATIONS A.S.**  
**(CLAIMANT)**

AND

**THE REPUBLIC OF HUNGARY**  
**(RESPONDENT)**

**(ICSID CASE NO. ARB/04/15)**

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**AWARD**  
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*MEMBERS OF THE TRIBUNAL*  
**PROFESSOR SIR ROY GOODE, CBE, QC (PRESIDENT)**  
**MR. NICHOLAS W. ALLARD**  
**MR. ARTHUR L. MARRIOTT, QC**

*ASSISTANT TO THE TRIBUNAL*  
MS. JOHANNE COX

*SECRETARY OF THE TRIBUNAL*  
MS. ELOÏSE M. OBADIA

*REPRESENTING THE CLAIMANT*  
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Mr. GERGELY SZIKLA  
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Dr. ÉVA DERZSÉNYI  
Dr. JANOS KATONA

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## I PROCEDURAL HISTORY

### The parties

1. Telenor Mobile Communications AS is represented in these proceedings by:

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2. The Republic of Hungary is represented in these proceedings by:

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and

Dr. Éva Derzsényi  
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The Respondent was also represented by Mrs. Zsuzsanna Varga, Director General at Ministry of Finance from 30<sup>th</sup> September 2004 until 3<sup>rd</sup> February 2005.

### Procedural history

3. On 16<sup>th</sup> December 2003, the International Centre for Settlement of Investment Disputes ("ICSID" or "the Centre") received from Telenor Mobile Communications AS ("Telenor" or the "Claimant"), a company established under the laws of the Kingdom of Norway, a Request for Arbitration of 11<sup>th</sup> December 2003 against the Republic of Hungary ("Hungary" or the "Respondent") pursuant to a bilateral investment treaty

("BIT") between Norway and Hungary. On 13<sup>th</sup> January 2004, upon receipt of the prescribed lodging fee, the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ("the Institution Rules") acknowledged receipt of the request and on the same day transmitted a copy to the Republic of Hungary and to its Embassy in Washington, D.C. In letters dated 1<sup>st</sup> and 17<sup>th</sup> June 2004 the Centre requested clarification by Telenor that the dispute involved matters relating to expropriation.

4. In the light of the replies received by letters of 11<sup>th</sup> June and 13<sup>th</sup> July 2004, the Centre accepted that the requested arbitration was not manifestly outside its jurisdiction. Accordingly the request, as supplemented by the Claimant's letters of 18<sup>th</sup> February, 28<sup>th</sup> May, 11<sup>th</sup> June and 13<sup>th</sup> July 2004, was registered by the Centre on 2<sup>nd</sup> August 2004, pursuant to Article 36(3) of the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"). On the same day, the Secretary-General of ICSID, in accordance with Rule 7 of the Institution Rules, notified the parties of the registration and invited them to proceed with the constitution of an Arbitral Tribunal as soon as possible. The Centre drew attention to the fact that registration of the request was without prejudice to the Tribunal's powers and functions, including those relating to jurisdiction.

5. By a joint letter of 1<sup>st</sup> October 2004, the parties informed ICSID of their agreement to extend the periods set out in the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings (the "ICSID Arbitration Rules") for the establishment of the Arbitral Tribunal. By a joint letter of 22<sup>nd</sup> November 2004, the parties agreed that the Arbitral Tribunal would be composed of three arbitrators, one appointed by each party, and the third and presiding arbitrator appointed by the two party-appointed arbitrators. By letter of 13<sup>th</sup> January 2005, the Claimant appointed Mr. Nicholas W. Allard, a U.S. national, as arbitrator. By letter of 28<sup>th</sup> February 2005, the Respondent appointed Mr. Arthur L. Marriott, QC, a British national, as arbitrator. Both Mr. Allard and Mr. Marriott accepted their appointments.

6. On 19<sup>th</sup> April 2005, the two party-appointed arbitrators appointed Professor Sir Roy Goode, CBE, QC, a British national, to serve as President of the Tribunal. Professor Sir Roy Goode accepted his appointment.

7. By letter of 22<sup>nd</sup> April 2005, the Secretary-General of ICSID informed the parties that all the arbitrators had accepted their appointments and that the Tribunal, was deemed to have been constituted and the proceeding to have begun on that date, pursuant to Rule 6(1) of the ICSID Arbitration Rules. By the same letter, the Secretary-General informed the parties that Ms. Eloïse Obadia, Counsel, ICSID, would serve as Secretary of the Tribunal. All subsequent written communications between the Arbitral Tribunal and the parties were made through the ICSID Secretariat.

8. The first session was held on 8<sup>th</sup> June 2005 in London. Present at the session were the Members of the Tribunal, Ms. Johanne Cox, Assistant to the Tribunal and the Secretary of the Tribunal; Mr. Péter Nagy for the Claimant; Mr. Whitney Debevoise, Mr. Michael Ryan, Ms. Jean Kalicki, Ms. Emma Wright and Dr. Éva Derzsényi for the Respondent.

9. During the first session, the parties expressed agreement that the Tribunal had been properly constituted (Rule 6 of the ICSID Arbitration Rules) and stated that they had no objections in this respect. During that session the number and sequence of pleadings and the time limits for their submissions were agreed. Hungary having indicated that it might be objecting to the Tribunal's jurisdiction, the Tribunal directed that any such objections should be taken in Hungary's counter-memorial, with an answer by Telenor and a reply by Hungary, with alternative directions for pleadings on the merits in the event that no objections to jurisdiction and/or admissibility were raised.

10. As agreed at the first session, the Claimant filed its Memorial on the merits on 8<sup>th</sup> August 2005. The Respondent filed its Objections to Jurisdiction on 11<sup>th</sup> October 2005 contending that all the claims were outside the Tribunal's jurisdiction. The effect was to suspend the proceeding on the merits pursuant to Rule 41(3) of the ICSID Arbitration Rules, so that there were no further pleadings on the merits. The Claimant filed its

Answer to the Respondent's Objections to Jurisdiction on 9<sup>th</sup> November 2005. Finally, the Respondent filed its Reply in Further support of Objections to Jurisdiction on 9<sup>th</sup> December 2005.

11. The filings on the objections to jurisdiction having been completed, by letter of 12<sup>th</sup> December 2005, the Tribunal consulted the parties on the length of time required for a hearing on jurisdiction. By letter of 23<sup>rd</sup> December 2005, the Tribunal informed the parties, having taken into account their comments, that it had decided to hold a one-day-hearing on jurisdiction in London and consulted the parties on their availability. By letter of 5<sup>th</sup> January 2006, the Tribunal confirmed that the hearing would take place on 15<sup>th</sup> March 2006.

12. By letter of 22<sup>nd</sup> February 2006, the Secretary of the Tribunal informed the parties that due to an unforeseen event, the hearing on jurisdiction would have to be postponed. By letter of 22<sup>nd</sup> March 2006, the parties were consulted on a new date for the hearing on jurisdiction. By letter of 29<sup>th</sup> March 2006, the Tribunal informed the parties that the hearing would be held on 28<sup>th</sup> April 2006 in London.

13. During the hearing on jurisdiction the following persons were present: the Members of the Tribunal, Ms. Johanne Cox, Assistant to the Tribunal, and the Secretary of the Tribunal; Mr. Espen Skovly, Mr Balázs Bíró, Mr. Péter Nagy, Mr. Gergely Szikla, and Mr. János Burai-Kovács for the Claimant; Mr. Whitney Debevoise, Mr. Michael Ryan, Ms. Jean Kalicki, Ms. Emma Wright, Dr. Éva Derzsényi and Dr. Janos Katona for the Respondent. Both parties fully presented their arguments and answered the Tribunal's questions. The parties also made submissions on costs.

14. As agreed upon at the hearing on jurisdiction, the Claimant and the Respondent, having made brief oral submissions on costs at the invitation of the Tribunal, furnished their written submissions on costs and statements of costs on 16<sup>th</sup> May 2006 and on 15<sup>th</sup> and 23<sup>rd</sup> May 2006, respectively.

15. The Members of the Tribunal deliberated through various means of communication, including a meeting in Oxford on 21-22 June 2006. The Tribunal has taken into account all pleadings and documents in this case.

## II THE BACKGROUND TO THE DISPUTE

### The basic issues

16. The dispute arises from a BIT between the Government of the Republic of Hungary and the Government of the Kingdom of Norway dated 8<sup>th</sup> April 1991 and a concession agreement for the provision of public mobile radiotelephone services made between the Hungarian Minister of Transport, Communications and Water Management and Pannon GSM Telecommunications RT (Pannon), dated 4<sup>th</sup> November 1993, as amended on various occasions and finally consolidated in an agreement dated 7<sup>th</sup> October 1999. Through various direct and indirect holdings Pannon is the wholly owned subsidiary of Telenor, which itself is 75% owned by the State of Norway.

17. Telenor claims damages for loss alleged to have been suffered by reason of Hungary's breaches of the BIT in respect of the years 2002 and 2003:

- (1) in expropriating Telenor's investment, or part thereof, without compensation, in breach of Article VI of the BIT; and
- (2) in failing to accord Telenor fair and equitable treatment and protection for Telenor's investment, in breach of Article III of the BIT.

18. Hungary contests the jurisdiction of the Tribunal on the grounds that:

- (1) Telenor has failed to plead facts showing a *prima facie* case of expropriation, even assuming the truth of the allegations of fact made by Telenor; and
- (2) disputes arising under Article III are outside the jurisdiction of the Tribunal, which is confined by Article XI of the BIT to issues of expropriation.

19. Hungary therefore contends that the necessary element of consent to jurisdiction is lacking. Hungary does not dispute that all the other conditions of ICSID jurisdiction, including the making of an investment by Telenor and the existence of a legal dispute arising directly out that investment, are satisfied. Telenor's investment is in its wholly owned subsidiary, Pannon, rather than directly in the rights conferred by the investment agreement, to which it is not a party, but though Hungary briefly alluded to the point in the course of the jurisdiction hearing it has not sought to contend that this is material to the present case.

20. Telenor contends, first, that it has made out a *prima facie* case for expropriation and, secondly, that the Tribunal has jurisdiction to entertain claims under Article III by virtue of the "procedural link" established by the most-favoured-nation ("MFN") clause in Article IV, which Telenor claims entitles it to invoke the widest of the dispute resolution clauses under other BITs entered into by Hungary with other States. This is contested by Hungary, which contends that the MFN clause is limited to substantive rights and cannot be invoked to extend the jurisdiction of the Tribunal beyond that conferred by Article XI of the Hungary-Norway BIT.

21. The Tribunal is not at this stage concerned with the merits of Telenor's claims, which would arise for consideration only if and to the extent that the Tribunal were to conclude it had jurisdiction. Accordingly in the rest of this Award the Tribunal has assumed the correctness of the factual allegations made by Telenor to the extent that these are *prima facie* valid and admissible on the pleadings. The description of the facts which follows reflects this assumption.



### III THE REORGANISATION OF THE HUNGARIAN PUBLIC TELEPHONE SERVICE

22. In 1990 Hungary decided to reorganize its state-controlled telecommunications system and to invite tenders from the private sector for the provision of public mobile radiotelephone services. This was in part motivated by Hungary's prospective commitment under European Community law to abandon the grant of special and exclusive rights to State-owned entities, liberalise its telecommunications system and promote competition. One of the two winners of the tendering process was the GSM Consortium, of which Pannon was a member, and a concession agreement was then entered into between Hungary and the GSM Consortium. Subsequently the GSM Consortium transferred all its rights and obligations under the concession agreement to Pannon. The concession was limited to mobile telephone services. Fixed-line telecommunications services remained in the hands of the fixed-line operators, including Matáv, a subsidiary of Deutsche Telekom and by a considerable margin the market leader in the Hungarian fixed-line telephone service. Matáv is itself the parent company of a company formerly called Westel Mobil Távközlési ("Westel"), now T-Mobile, a mobile telephone services operator and thus a competitor of Pannon.

23. At the time of the concession agreement there was only one fixed-line operator, and the concession agreement imposed on Pannon various fixed fees. However, the regime changed with the introduction of the concept of the universal telephone service, a minimum set of telecommunication services to be available to the public at reasonable

cost. The EC Universal Service Directive<sup>1</sup> imposes on Member States of the European Union the duty to provide such a universal service. The Hungarian Government left universal service provision in the hands of the fixed-line operators, whose monopoly was preserved by the concession agreement until December 2001 or, in some cases, until May or November 2002. In 2001 the Government set up a public fund, the Universal Telecommunications Support Fund ("ETTA"), under the control of the Minister, to fund the unrecovered costs incurred by the universal service providers, calculated from data they were to supply to ETTA, the fund consisting of a levy on all telecommunications service providers, mobile as well as fixed, computed as a percentage of their revenue. As with other operators Pannon was required to contribute to the fund for the years 2002 and 2003 and the manner in which the levy on it was assessed and recovered forms part of Telenor's complaints in the present proceedings. For the years after 2003 a different system was adopted and this does not feature in Telenor's claims.

24. The Hungarian Government also introduced a regulated price regime for mobile service providers with significant market power ("SMP"), and this substituted regulated prices for free market prices in respect of interconnection (or "call termination") services.

#### **IV THE BILATERAL INVESTMENT TREATY BETWEEN HUNGARY AND NORWAY**

25. The provisions of the Hungary-Norway BIT relevant to the present proceedings are Articles III, IV, VI and XI, which provide as follows:

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<sup>1</sup> Directive 2002/22/EC of 7<sup>th</sup> March 2002.

ARTICLE III

PROMOTION AND PROTECTION OF INVESTMENTS

Each Contracting Party shall promote and encourage in its Territory investments made by investors of the other Contracting Party and accept such investments in accordance with its laws and regulations and accord them fair and equitable treatment and protection. Such investments shall be consistent with the national objectives of and be subject to the laws and regulations of the Contracting Party in the Territory of which the Investments are made.

ARTICLE IV

MOST FAVOURED NATION TREATMENT

1. Investments made by Investors of one Contracting Party in the territory of the other Contracting Party, as also the returns therefrom, shall be accorded treatment no less favourable than that accorded to investments made by Investors of any third State.
2. The treatment granted under paragraph 1 of this Article shall not apply to:
  - any advantage accorded to Investors of a third State by the other Contracting Party based on any existing or future customs or economic union, or similar international agreement, or free trade agreement to which either of the Contracting Parties is or becomes a Party.
  - any advantages accorded to Investors of a third State by the other Contracting Party by virtue of a double taxation agreement or other agreements regarding matters of taxation or any domestic legislation relating to taxation.

ARTICLE VI

EXPROPRIATION AND COMPENSATION

1. Investments made by Investors of one Contracting Party in the territory of the other Contracting Party cannot be expropriated, nationalized or subjected to other measures having a similar effect (hereinafter referred to as "Expropriation") unless the following conditions are fulfilled:
  - (I) The expropriation shall be done for public interest and under due process of law.
  - (II) It shall not be discriminatory.
  - (III) It shall be done against compensation.
2. Such compensation shall amount to the market value of the investment immediately before the date of expropriation and shall be paid without delay and shall carry an annual rate of interest equal to 12 months LIBOR quoted for the currency in which the investment was made until the time of payment. The payment of such compensation shall be effectively realizable and freely transferable.

## ARTICLE XI

### DISPUTES BETWEEN AN INVESTOR AND A CONTRACTING PARTY

1. This Article shall apply to any legal disputes between an Investor of one Contracting Party and the other Contracting Party in relation to an investment of the former either concerning the amount or payment of compensation under Article V and VI of the present Agreement, or concerning any other matter consequential upon an act of expropriation in accordance with Article VI of the present Agreement or concerning the consequences of the non-implementation or of the incorrect implementation of Article VII of the present agreement.
2. Any such disputes which have not been amicably settled within a period of three months from written notification of a claim, shall if either Party to the dispute so wishes, be submitted for conciliation or arbitration under the Convention of 18 March 1965 on the settlement of investment disputes between States and nationals of other States (the Washington Convention).

26. Of the three other Articles referred to in Article XI, two, namely Articles V and VII, dealing respectively with compensation for loss through revolution, etc., and repatriation of investments, are not relevant to the present proceedings, leaving only Article VI, which is confined to expropriation. The first question in the present case is whether the acts complained of by Telenor constitute expropriation of Telenor's investment for the purposes of Article VI.

## V THE CONCESSION AGREEMENT

27. Though claims based purely on breaches of contract are outside the Tribunal's mandate - a point discussed in more detail later - the concession agreement between Pannon and Hungary is obviously of central importance in determining the nature and extent of the investment. Strictly speaking, Telenor's investment is in Pannon, not in Pannon's rights under the agreement, but since Pannon is Telenor's wholly owned subsidiary the Tribunal considers that in practical terms this can be regarded as a distinction without a difference, and it is common ground that this is not an issue in the case.

28. Article 2 of the concession agreement granted Pannon the right to provide integrated GSM 900/DCS 1800<sup>2</sup> public mobile radiotelephone services, including services to and from foreign points, on the territory of the Republic of Hungary, together with a range of specified additional services. The concession for the GSM 900 was to be for a period of 15 years, running from 4<sup>th</sup> November 1993 (the date of the original concession agreement) to 4<sup>th</sup> November 2008 and for the DCS 1800 for a period of 15 years from the execution of the consolidated agreement, that is, from 7<sup>th</sup> October 1999 to 7<sup>th</sup> October 2014. The Minister was empowered to extend for seven years without issuing a tender invitation.

29. Under the original agreement the GSM Consortium had paid USD 50 million as the concession fee for the GSM 900 under the original agreement and under Article 3 of the consolidated agreement Pannon was required to pay HUF 11,000,000,000 (11 billion Hungarian forints) in stages. Also payable were a frequency allocation fee (originally HUF 256 million per year, later reduced to HUF 512,000 per year) and a frequency usage fee of HUF 200,000 a year for the GSM 900 and HUF 10 million per annum for each 1 MHz frequency band, as well as fees for base stations and certain other items.

30. Various obligations were imposed on Pannon by Article 6 of the concession agreement. These included the provision of the services which were the subject of the concession, the duty not to suspend services without prior consent and notification to subscribers, the establishment and operation of a digital cellular radiotelephone network,

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<sup>2</sup> GSM stands for Global System for Mobile Communications, DCS for Digital Cellular System, an upbanding from 900 to 1800 MHz.

the assurance of quality on a continuous basis and co-operation with other public telecommunications operators to ensure interconnection with their networks. For his part the Minister undertook, in Article 9, to treat the telecommunications operators equally both in the administrative proceedings and as telecommunications market players and to ensure that each and any regulatory and administrative proceedings relating to the rights obligations and activities of Pannon and other operators was impartial, transparent and controllable. He also accepted the content of the concession agreement as binding on the Hungarian State and declared that it would not invoke sovereign immunity from the jurisdiction of the court.

31. The concession agreement contained numerous other provisions, such as amendment and termination, to which it is unnecessary to refer here.

32. Under Article 19, the concession agreement was to be governed and construed under the laws of the Republic of Hungary and exclusive jurisdiction was given to the Hungarian Court to settle legal disputes.

## **VI THE CLAIMS BY TELENOR**

### **Introduction**

33. The Tribunal has not found it easy to identify with precision the claims that Telenor is making and their relationship with the BIT. This is partly because they have been put differently at different stages of the arbitral proceedings and partly because they have remained very diffuse despite the Tribunal's direction at the first session that they should be pleaded with particularity. It is therefore necessary to take each stage

separately. In the last analysis the Tribunal is, of course, concerned with Telenor's pleading in its final form, as clarified at the hearing, but to the extent that such pleading raises claims not originally set out in Telenor's Request for Arbitration this may bear on the credence to be attached to them, a point quite properly made by Hungary at the jurisdiction hearing.

34. The Tribunal is currently concerned solely with the question whether it has jurisdiction. For that purpose it is not the Tribunal's function to examine the merits of Telenor's claim. On the other hand, unless the issue of jurisdiction is joined with the merits so that both are dealt with at the same hearing (which is not the position in the present case) there is an initial threshold that has to be crossed by any claimant resisting objections to jurisdiction in that the claimant must at least adduce facts showing a *prima facie* case in favour of jurisdiction if the arbitration is to proceed to a hearing on the merits. If the claimant fails to do this the Tribunal must sustain the objection to jurisdiction and make an award accordingly, thereby bringing the arbitration proceedings to an end. The question for the Tribunal to decide in the present proceedings is whether Telenor has indeed made out a *prima facie* case. That is a matter examined in some detail later in this Award.

#### **The claims made in the Request for Arbitration**

35. In its Request for Arbitration dated 11<sup>th</sup> December 2003, and supported by 13 exhibits consisting of various documents in English and Hungarian relating to the background to the case, Telenor made a series of complaints.

(1) *Failure to designate mobile service providers as universal service providers*

The ETTA scheme limited universal service provision to fixed-line operators despite the fact that those services could reasonably be provided by mobile telephone operators at lower rates. In consequence Pannon was deprived of business opportunities that it would have enjoyed if it had been approved as a universal service provider.

(2) *The ETTA levy*

The levy imposed on Pannon as its contribution to ETTA for the benefit of the fixed-line operators took away a portion of Pannon's profits for no compensation and transferred it to Pannon's competitors, in particular Matáv. Moreover, ETTA never monitored data and the Minister never resolved to impose charges; instead ETTA forcibly collected from Pannon's bank account some HUF 1.582 billion (currently about USD 7.2 million) for the year 2002 and HUF 798,000 (currently about USD 3.6 million) for 2003.

(3) *Pricing regime imposed on SMP providers*

A third complaint was that Pannon was improperly designated a provider of significant market power, which it was not, with the effect that its interconnection (or "call termination") fees to subscribers<sup>3</sup> and for interconnection services provided to other operators were subjected to an adverse pricing regime which excluded the recovery of various cost elements, whereas Matáv was not so designated, despite the fact that it was the parent company of Westel, the market leader in mobile telephony. This, Pannon alleges, reflected the fact that the fixed-line market had been steadily shrinking, while the mobile market had been solidly growing, and the Hungarian Government was determined to save Matáv from bankruptcy.

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<sup>3</sup> These are fees charged by the telecommunications operator for accepting, and later terminating, on its network a call originating from another network.



*(4) Proceedings by the Competition Office*

The fourth ground of complaint was that the Competition Office launched an investigation against mobile telephone operators in 2002 and the resulting report accused Pannon of abusing a dominant position in the call termination market and recommended that Pannon be fined HUF 1.5 billion. The Competition Council dropped the market charges and imposed a fine of HUF 150 million, enforcement of which was later suspended by the court pending court proceedings. Pannon was involved in substantial costs in defending the charge of market abuse.

36. Telenor's Request for Arbitration concluded with claims for a declaration that Hungary's ETTA regime violated Article VI of the BIT, compensation for loss suffered by Telenor and Pannon in respect of the ETTA levies, further compensation for using the ETTA regime to strengthen the position of Pannon's competitor Matáv through the ETTA subsidy, an award of interest, and costs. However, no sum was claimed in respect of the costs of defending the market abuse allegation, which had been the fourth ground of complaint. Nor was any reference made to Article III of the BIT, which featured for the first time as a separate ground for relief in Telenor's Answer to Objections on Jurisdiction.

**The Centre's request for clarification**

37. A further noteworthy aspect of Telenor's Request for Arbitration is that though it relied on breaches of Article VI the request not only failed to identify the act or acts relied on as showing expropriation but nowhere expressly alleged expropriation as such. It was necessary for the Centre to address two letters to Telenor's counsel to obtain details

which the Centre felt able to accept as showing that the request was not manifestly outside the Centre's jurisdiction for the purposes of Article 36(3) of the Washington Convention. In the first of these, dated 1<sup>st</sup> June 2004, the Centre asked to be provided with a full explanation to show that the dispute between the parties concerned "any matter consequential upon an act of expropriation in accordance with Article VI" of the BIT. In a letter in reply dated 11<sup>th</sup> June 2004 Telenor identified as acts of expropriation:

- (1) the financial burden imposed on the property of Pannon by the ET TA levy for 2002 and the prospective levy for 2003,
- (2) the loss in revenues resulting from Pannon's designation as an SMP provider, and
- (3) the consequential gains to Pannon's competitors, to the detriment of Pannon.

No mention was made of loss caused by the failure to designate Pannon as a universal service provider, though this had featured as the first of Telenor's claims in its Request for Arbitration. Nor did Telenor discuss the magnitude of its loss in relation to the total value of its investment, a central issue which was to be raised for the first time, and then very briefly, at the jurisdiction hearing itself.

38. The Centre replied by letter dated 17<sup>th</sup> June 2004 stating that Telenor's response did not appear to address any expropriation of Pannon and asking for a full explanation in that respect. By letter to the Centre dated 13<sup>th</sup> July 2004 Telenor referred to ICSID arbitration case law showing that the concept of expropriation was not confined to the seizure of the investor's property (direct expropriation) but extended to other measures depriving the investor of the reasonably expected economic benefits of its investment (indirect expropriation) and did not necessarily involve a single measure or set of measures at a particular time but was wide enough to encompass "creeping"

expropriation, that is, a series of acts over a period of time no one of which itself amounted to expropriation but all of which together produced the effect of expropriation. Telenor contended that the pay-in obligation, in subsidising Pannon's main competitor Matáv at Pannon's expense to the extent of approximately HUF 3-5 billion, "shows that this regulatory action of the Hungarian State is discriminatory, unfair and inequitable, *therefore* it should qualify as expropriation" [emphasis added]. Similarly, Telenor contended that its designation as an SMP provider and the consequent imposition of the State-regulated pricing regime for such providers resulted in a loss of revenue to Pannon of some HUF 4.5 billion (approximately USD 22 million) a year, producing the same effect as expropriation, and that the same was true of the breach of Hungary's duty to preserve competition by favouring Pannon's competitors at Pannon's expense. The latter does not appear to be an independent claim but rather an overall effect attributed to the other acts alleged to constitute expropriation. While reference was made to the fact that universal service providers, which could apply for financial subsidy from the ETTA fund, were designated from the existing fixed-line providers, thus excluding Pannon, this complaint did not feature in the details of alleged violations of Article VI of the BIT set out in section IV of the 13<sup>th</sup> July 2004 letter or in the questions for the Tribunal listed in section V of that letter. Again, there was no attempt to show the magnitude of Telenor's loss in relation to the total value of its investment.

### **Telenor's Memorial**

39. The claims set out in Telenor's Memorial departed in some respects from those advanced in its Request for Arbitration. The decision to restrict universal service provision to fixed-line operators, which had been the first ground of complaint in the

arbitration request, did not feature at all in the Memorial, which in this respect followed Telenor's above-mentioned letters to the Centre of 11<sup>th</sup> June and 13<sup>th</sup> July. On the other hand, two new grounds of complaint were added, namely the obligation imposed on Pannon, but not on Westel, to refrain from offering handset subsidies and the fact that the right to use telephone numbers was charged by the number of digits, mobile telephone numbers having nine digits as opposed to eight digits for fixed-line numbers, so that Pannon and other mobile service providers incurred charges 10% higher than those payable by fixed-line providers.

40. In support of its contention that the various measures referred to above constituted expropriation Telenor referred to:

- (1) a decision of an ICSID tribunal that violation of the "fair and equitable treatment" requirement might well amount to expropriation,<sup>4</sup>
- (2) decisions of other ICSID tribunals that substantial interference with an investor's property rights constituted expropriation even if effected through otherwise internally legitimate legislation or court rulings;
- (3) decisions to the effect that if government actions (legislative, administrative or judicial) were discriminatory or arbitrary or perhaps unfair or inequitable, they were more likely to be viewed as expropriatory.<sup>5</sup>

Telenor's Memorial concluded with the following summary:

- "• Any measure attributable to a State - should it be individual or regulatory - qualifies as expropriation if such measure interferes with one's right to property.

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<sup>4</sup> *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB (AF)/97/1, (2000), 5 ICSID Rep. 209, para. 104.

<sup>5</sup> Citing *Feldman v. United Mexican States*, ICSID Case No. ARB (AF)99/1, (2002), 7 ICSID Rep. 341 at para. 99, where the Tribunal drew this implication from a comment in the Restatement of the Law of Foreign Relations of the United States.

- In deciding whether a regulatory measure has this effect, public interest and rule of law shall both be considered.
- Regulatory measures pursuing aims other than the interest of the public (lack of legitimate aim) or that are disproportional (lack of fair balance between the aim sought and means employed) qualify as *expropriation* with no doubt.
- Also, arbitrary, unfair, inequitable, unreasonable, discriminating nature of a measure, or violation of due process of law (lack of lawfulness) shall qualify as expropriation."

41. At this stage Telenor's case was based exclusively on Article VI of the BIT dealing with expropriation; it was only at a later stage, in its Answer to Objections to Jurisdiction, that it raised for the first time claims based on Article III, dealing with fair and equitable treatment, and invoked Article IV (the MFN clause) as the "procedural link" establishing the Tribunal's jurisdiction under Article III despite the fact that Article III is not one of the provisions listed in Article XI.

42. As regards the expropriation claim it is notable that once again Telenor, while referring to cases on substantial deprivation of the investor's property rights, did not address the substantiality of its loss in relation to the total value of its investment beyond a fleeting reference in paragraph 42 of the Memorial to "preliminary indications" by Deloitte & Touche LLP (London) that the direct damage suffered as the result of the violation of Article VI of the BIT and the concession agreement was between HUF 15-30 billion (approximately USD 76-152 million), coupled with a statement in paragraph 43 that the preliminary indications "do not as yet calculate with cumulative effect of concerted actions on the part of Hungary resulting in indirect and ancillary damage." For the reasons set out later in this Award these "preliminary indications" by Deloitte's in a draft document not disclosed to the Tribunal or to Hungary are not matters which the

Tribunal feels able to take into account in deciding whether a *prima facie* case of expropriation has been made out, assuming the truth of the allegations of fact.

### **Subsequent development of Telenor's case**

43. This, then, was the manner in which Telenor's claims had been presented up to the point where Hungary challenged the Tribunal's jurisdiction. Those claims were later elaborated in Telenor's pleadings on the issue of jurisdiction by way of answer to Hungary's jurisdictional challenge and in oral argument at the jurisdiction hearing as described below.

## **VII SUBSEQUENT PLEADINGS**

### **Hungary's Objections to Jurisdiction**

44. The Objections to Jurisdiction by Hungary as Respondent were filed on 11<sup>th</sup> October 2005 and were supported by nine bundles consisting of 93 exhibits.

45. A major complaint by Hungary was that Telenor's pleadings had been consistently confusing, vague and contradictory, despite the Tribunal's directions about pleading clearly and with particularity what it is that Telenor was contending. Thus at times Telenor appeared to condemn the whole structure of Hungary's regulatory efforts, such as the funding mechanism it established to support its universal service programme and the restriction of universal service providers to fixed-line operators. If this were the case, the same charge could be brought against dozens of countries worldwide, including EU Member States, a fact hardly implying that the initiatives taken by Hungary constituted an expropriation within the meaning of Article VI of the BIT.

46. Hungary also pointed out that some of Telenor's latest complaints were entirely new, having never been mentioned either in the consultations that preceded Telenor's Request for Arbitration or in the Request itself, and that its Memorial had increased its overall damage claim more than tenfold in a single conclusory sentence, with no explanation of the difference in the figures and no attempt to allocate its claimed damages against its various claims.

47. The more specific grounds of objection may be summarised as follows:

- (1) Telenor repeatedly invoked claims under the concession contract which were outside the jurisdiction of the Tribunal and were governed by Hungarian law and subject to the exclusive jurisdiction of the Hungarian courts. ICSID jurisdiction was based on consent and Hungary had not consented to jurisdiction by the Tribunal over contract claims. Only if a breach of contract rose independently to the level of expropriation - as where it resulted in extinguishment of the investment or its removal from the investor's control - could the Tribunal's jurisdiction be engaged.
- (2) None of the claims was based on expropriation or other matters consequential upon an act of expropriation, which was the sole basis of Tribunal's jurisdiction.
- (3) Telenor misunderstood the concept of expropriation. The fundamental predicate element of the law of expropriation was that there must have been either a government taking of an investment or such substantial regulatory interference with an investment as to render it functionally equivalent to a taking by depriving the investor of control over the investment or depriving the investment of all significant economic value.

- (4) The allegations against Hungary of breaches of European Community law were misconceived, because they related to legislation enacted prior to the relevant Community instruments coming into force and, more fundamentally, because non-compliance with EC Directives, even if established, was not within the Tribunal's jurisdiction.
- (5) The Tribunal had no jurisdiction over claims for breach of the "fair and equitable treatment" provisions of Article III, which fell outside Article XI, nor could the rubric of expropriation be expanded to encompass minimum standards under international law, which are not a subset of expropriation but are a feature of fair and equitable treatment.
- (6) Telenor has not alleged that the actions by Hungary of which it complains deprived Telenor of control of its investment or deprived that investment of meaningful value. It was in the nature of regulation that it involved some sort of wealth deprivation and Telenor's contention that any form of interference with the investor's property or diminution of its value constitutes expropriation was completely out of line with expropriation jurisprudence. There had to be interference so substantial as to deprive the investor of all or most of the benefits of its investment, and that had not been alleged. That conclusion was reinforced by Article VI(2), which provided that compensation for expropriation "shall amount to the market value of the investment immediately before the date of expropriation", which plainly referred to either seizure of the investment or extinction of its market value, not merely diminution in the investor's profits. This is to be contrasted with the provision for compensation for losses in Article V.



48. Hungary went on to say that it would, indeed, be impossible for Telenor to establish expropriation in the sense described above because its annual reports showed that Pannon was a vigorous competitor in the Hungarian mobile telecommunications market, today controlling roughly one-third of the market and enjoying a consistent record of enviable profits. The mobile telecommunications sector in Hungary, in which Pannon has long been and remains the second largest player, has dramatically advanced on recent years, and today enjoys nearly three times the subscriber penetration as the fixed-line sector. Further, the market share of Westel (now branded as T-Mobile), the mobile telecommunication subsidiary of Matáv, the *bête noire* supposedly benefiting from Hungary's actions, has consistently fallen. Both Pannon's rising revenues for the period 1996-2004 and its description of the profitability of its business in its annual reports, in which its 2002 performance was described as "the best financial results in our history" and its 2003 performance as "another year of profitable growth," was incompatible with its assertion of expropriation.

49. Hungary contended that complaints about the regulatory structure of universal service provision were also unfounded. The funding approach adopted by Hungary was one of the most commonly accepted throughout the world. Complaints as to the failure of ETTA to assess data and ETTA's collection methods had already been brought before the Hungarian courts, where they belonged, and they were not matters for the Tribunal. The interconnection fee issues and other complaints likewise provided no basis for an expropriation claim. While the relevant measures extended to Pannon, they were not targeted at Pannon but applied equally to other mobile operators, including Pannon's

principal competitor, Westel. Three other claims (the competition authority claim, handset subsidies and dial digit fees) were insufficiently particularised and anyway related to transitory phenomena not reached by the public international law of expropriation.

### **Telenor's Answer to Hungary's Objections to Jurisdiction**

50. This was filed on 9<sup>th</sup> November 2005 and was supported by four further bundles consisting of an additional 23 exhibits. Part of Telenor's Answer seems to have been based on a misunderstanding of Hungary's arguments. For example, the first eight pages were devoted to establishing the fulfilment of various conditions of ICSID jurisdiction which Hungary had not sought to dispute in its jurisdictional objections. Again, contrary to the position taken in Telenor's Answer, Hungary had never contended that a claim otherwise falling within the Tribunal's jurisdiction under the BIT would be barred if it was a claim under a contract. Hungary's position had always been that a contract claim as such was a matter for the Hungarian courts applying Hungarian law but that if the facts on which that claim was based also constituted expropriation it fell within the Tribunal's jurisdiction. Similarly, the reference in Hungary's Objections to the fact that some of the complaints had been raised before the Hungarian courts, where they belonged, was not intended to suggest that this by itself excluded them from consideration by the Tribunal, merely that they were claims based on administrative missteps not giving rise to violations of the international law of expropriation. Telenor also said that its argument on EU law had been misunderstood, but the Tribunal remains unclear as to why the duty on Hungary to secure compatibility with EU legislation is relevant to the present case.

51. Telenor also contended that, the BIT having prescribed certain minimum standards of protection, including fair and equitable treatment, it would be unfair and inequitable and contrary to reasonable expectations and good faith to construe the BIT in such a way as to prevent a Norwegian investor from bringing a claim against the Government of Hungary for violation of that substantive standard.

52. Telenor further argued that the effect of the MFN clause in Article IV of the BIT was to entitle Telenor to the benefit not only of any wider substantive investment rights conferred by other BITs entered into by Hungary with other States but also of any wider dispute resolution clauses contained in such other BITs. Hungary had entered into BITs with numerous other States, and some of these, in contrast to the BIT between Hungary and Norway, were not confined to expropriation but extended to the resolution of all disputes relating to the investment. The effect was to extend the Tribunal's jurisdiction to encompass claims under Article III for breach of the obligation to provide fair and equitable treatment. This argument was entirely new; it had not featured either in the Request for Arbitration or in Telenor's Memorial.

53. Finally, Telenor challenged Hungary's contention that a *prima facie* breach of the BIT had not been established, pointing to a line of cases in which it had been held that at the jurisdiction stage the Tribunal should not enquire into the merits and that if the facts asserted by the Claimant were capable of being regarded as breaches of the BIT the Claimant should be entitled to have them considered on the merits. Telenor argued that a *prima facie* case had been made out in that the facts alleged showed that its investment had been harmed in such a way as to amount to expropriation and Hungary had failed to

accord fair and equitable treatment to Telenor's investment or conduct open, transparent and controllable proceedings, in both cases in breach of the concession agreement.

### **Hungary's Reply in further support of its Objections to Jurisdiction**

54. In its Reply Hungary stated that its objections to jurisdiction posed two core jurisdictional questions: whether under Article XI the Tribunal had to dismiss all claims that were not on their face framed as claims concerning an expropriation, and whether Telenor had presented any claims of expropriation as defined by Article VI. Further, Hungary's objections noted that several of Telenor's claims, which in the Request for Arbitration were pleaded in single paragraphs or in some cases were not mentioned at all, and were never amplified in Telenor's Memorial, did not satisfy the Tribunal's clear direction to plead claims with particularity.

55. Hungary contended that Telenor had refused to engage on any of these issues. Its Answer was devoid of analysis of the specific terms of Article XI and it suggested that the Tribunal's jurisdiction could be divined solely from Article 25 of the Washington Convention. Instead it devoted much of its attention to jurisdictional arguments Hungary had not raised.

56. A further point made by Hungary was that the invocation of the MFN clause to expand the scope of the Tribunal's jurisdiction was new and even if it was open to Telenor to raise it at that late juncture - which Hungary contested - the argument was one that had been rejected in a majority of ICSID awards. Article XI, which confined the Tribunal's jurisdiction to questions of expropriation, was clear, but this limitation had

been omitted entirely from Telenor's summary of the jurisdictional requirements of the BIT. "Expropriation only" clauses had been embodied in numerous other BITs entered into by Hungary, and the same approach was widely followed by other countries of Eastern Europe and former communist countries. An MFN provision did not incorporate by reference dispute settlement provisions in other treaties unless the MFN clause in the basic treaty left no doubt that such incorporation was intended. Failing this, the MFN undertaking was purely contractual in nature and disputes had to be settled in accordance with the agreed dispute resolution mechanism.

57. Telenor's contention that it would be unfair and inequitable and contrary to reasonable expectations and good faith to preclude it from presenting claims other than for expropriation was untenable. Equally untenable was the suggestion that Article 25 of the Washington Convention contained all the limitations on jurisdiction. In fact it was the first part of a two-step jurisdictional analysis, the second step involving the scope of a consent given otherwise than in the Convention itself. Such consent was to be found in the BIT but was limited to expropriation.

58. Hungary also addressed various matters on which its arguments had been mischaracterised. The Tribunal has already drawn attention to these in paragraph 50.

## **VIII THE ISSUES**

59. Three issues arise in connection with Hungary's challenge to the Tribunal's jurisdiction:

- (1) What is the investment alleged to have been expropriated?

- (2) Has Telenor asserted facts showing a *prima facie* case of expropriation within the meaning of Article VI of the BIT?
- (3) Does the Tribunal have jurisdiction over claims under Article III of the BIT?

**First issue: what is the investment alleged to have been expropriated?**

60. While Hungary has quite fairly said that the investor in this case is Telenor, not Pannon, so that strictly Telenor's investment is in Pannon itself rather than directly in the underlying concession, the distinction is not one on which either party has relied and is not an issue in this case, neither is it of any practical significance, given that Pannon is Telenor's wholly owned subsidiary, and acts which cause loss to Pannon deprive Pannon itself of equivalent value as an investment.

61. At the hearing on jurisdiction Telenor described Pannon as the vehicle for Telenor's investment, which consisted of four elements:

- (1) The radiotelephone network
- (2) Pannon's customers
- (3) The concession granted by the concession agreement, carrying with it legitimate expectations on the part of Telenor, including fair and equitable treatment and conformity with laws, including EU law
- (4) Pannon's income expectations.

Telenor contended that all these elements had to be taken together and not dealt with in isolation from each other. On this basis it would be wrong to focus on the fact that Pannon was a profitable company. The kernel of Telenor's complaint was that because of the improper actions of Hungary, Telenor had been deprived of market share and its

network was being used by others without proper payment. So Telenor's loss was not simply the money taken from it, for example through the ETTA levy, but future income of which it had legitimate expectations.

62. Hungary did not take issue with the formulation of the four elements of the investment put forward by Telenor, which are consistent with the definition of "investment" in Article I of the BIT, and the Tribunal accepts that these elements together constitute the investment made by Telenor through Pannon.

**Second issue: has Telenor asserted facts showing a *prima facie* case of expropriation within the meaning of Article VI of the BIT?**

*The concept of expropriation*

63. Expropriation can take various forms. Direct expropriation involves the seizure of the investor's property. But expropriation may also be indirect, as where, without the taking of property, the measures of which complaint is made substantially deprive the investment of economic value. Moreover, it is not necessary to show a single act or group of acts committed at one time. As stated earlier, there may be "creeping" expropriation involving a series of acts over a period of time none of which is itself of sufficient gravity to constitute an expropriatory act but all of which taken together produce the effects of expropriation. Phrases such as "equivalent to expropriation" and "tantamount to expropriation" do not expand the concept of expropriation and are usually taken to indicate that the BIT covers indirect as well as direct expropriation, thus looking at the substance of the measures in question rather than the label attached to them by

government,<sup>6</sup> and the same is true of "measures having a similar effect", which is the phrase used in Article VI of the BIT now under consideration.

64. It is well established that the mere exercise by government of regulatory powers that create impediments to business or entail the payment of taxes or other levies does not of itself constitute expropriation.<sup>7</sup> Any investor entering into a concession agreement must be aware that investment involves risks and that in some degree the investor's activities are likely to be regulated and payments made for which the investor will not receive compensating advantages. These are all part of the price the investor has to pay for securing the concession. Similarly, unreasonable behaviour on the part of officials and breaches of contract, even if serious, do not by themselves constitute acts of expropriation. The conduct complained of must be such as to have a major adverse impact on the economic value of the investment.

65. There has been a substantial volume of case law, both under the Washington Convention and in general public international law, as to the magnitude of the interference with the investor's property or economic rights necessary to constitute expropriation. Though different tribunals have formulated the test in different ways, they are all agreed that the interference with the investor's rights must be such as substantially to deprive the investor of the economic value, use or enjoyment of its investment.

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<sup>6</sup> See, for example, *S.D. Myers, Inc. v. Government of Canada*, (2000), Partial Award on Liability, 8 ICSID Rep. 3, para. 285; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, (2003), 19 ICSID Rev.—FILJ 158 (2004), para. 114; *Pope and Talbot, Inc. v. Canada*, Interim Award, (2000), 7 ICSID Rep. 55, para. 104.

<sup>7</sup> *Feldman v. United Mexican States*, above n 5, 7 ICSID Rep. 318.



"There is ample authority for the proposition that a property has been expropriated when the effect of measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property".<sup>8</sup>

"A plea of creeping expropriation must proceed on the basis that the investment existed at a particular point in time and that subsequent acts attributable to the State have eroded the investor's rights to its investment to an extent that is violative of the relevant international standard of protection against expropriation."<sup>9</sup>

"A deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits, even where legal title to the property is not affected [...] The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact."<sup>10</sup>

"Thus there is some textual basis for the Claimant's submission that 'the modern definition of *expropriation* must be broad enough to encompass every course of sovereign conduct that unfairly destroys a foreign investor's contractual rights as an asset.'<sup>11</sup>

"To establish whether the Resolution is a measure equivalent to an expropriation under the terms of section 5(1) of the Agreement, it must first be determined if the Claimant, due to the Resolution, was radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto - such as the income or benefits related to the Landfill or its exploitation - had ceased to exist [...] This determination is important because it is one of the main elements to distinguish, from the point of view of an international tribunal, between a regulatory measure, which is an ordinary expression of the exercise of the state's police power that entails a decrease in assets or rights, and a *de facto* expropriation that deprives those assets and rights of any real substance."<sup>12</sup>

66. There have also been arbitral awards suggesting that deprivation of a substantial or significant part of the economic value of the investment may suffice to constitute expropriation.

"Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."<sup>13</sup>

"Expropriations tend to involve the deprivation of ownership rights; regulations a lesser interference. The distinction between expropriation and regulation screens out most potential

<sup>8</sup> *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, (2000), 5 ICSID Rep. 153, para. 77.

<sup>9</sup> *Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9 (2003), 44 ILM 404 (2005), para. 20.26.

<sup>10</sup> *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, (1984), 6 Iran-US CTR 219 at 225-226. See to similar effect *Starrett Housing Corp. v. Iran*, Case No. 24 (1983), Award No. ITL 32-24-1, 4 Iran-US CTR 122, and *George E. Davidson (Homayounjah) v. Government of the Islamic Republic of Iran*, Case No. 457, (1998), 34 Iran-US CTR 3, para. 104.

<sup>11</sup> *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, (2004), 43 ILM 967 (2004), para. 145.

<sup>12</sup> *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, above n 6, para. 115.

<sup>13</sup> *Metalclad v. United Mexican States*, above n 4, para. 103.

cases of complaints concerning economic intervention by a state and reduces the risk that governments will be subject to claims as they go about their business of managing public affairs [...] An expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation; even if it were partial or temporary."<sup>14</sup>

However, these suggestions have typically been made in cases where the question of partial deprivation did not arise on the facts, and were no doubt designed to avoid excluding the possibility that partial deprivation might in an appropriate case constitute expropriation. Thus in the *Metalclad* case<sup>15</sup> there was total deprivation of the economic value of the investment by denial to the investor of access to the landfill site which was the subject of the agreement, while in *S.D. Myers*<sup>16</sup> a temporary closure of a border, which delayed the investor's venture into the Canadian market, was held not to constitute an expropriation.

67. The Tribunal considers that, in the present case at least, the investment must be viewed as a whole and that the test the Tribunal has to apply is whether, viewed as a whole, the investment has suffered substantial erosion of value.

*The onus of showing a prima facie case*

68. Telenor has quite rightly made the point that at a hearing on a challenge to jurisdiction it is not required to go into the merits of the case. Indeed, Hungary quite properly made no pleading as to the merits. Accordingly for the purpose of the jurisdictional challenge allegations of admissible fact by the Claimant are to be assumed to be true. The onus is on the Claimant to show what is alleged to constitute

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<sup>14</sup> *S.D. Myers, Inc. v. Government of Canada*, above n 6, paras. 282-283.

<sup>15</sup> Above n 4.

<sup>16</sup> Above n 6.

expropriation is at least capable of so doing.<sup>17</sup> There must, in other words, be a *prima facie* case that the BIT applies.

69. Nowadays direct expropriation is the exception rather than the rule, as States prefer to avoid opprobrium and the loss of confidence of prospective investors by more oblique means. In the present case, Telenor has asserted that Hungary was guilty of conduct amounting to indirect, creeping expropriation, that is, expropriation taking forms other than the divestment of assets and consisting of acts committed over a period of time no one of which had to be shown (though it might be capable of being shown) as in itself amounting to expropriation. In considering whether Telenor has shown a *prima facie* case of indirect expropriation it is instructive to examine the various types of conduct that have been held by tribunals in earlier cases to constitute expropriation and use these as a benchmark against which to measure Telenor's case. The following is a non-exhaustive list of acts of government or government-controlled agencies that have been held to amount to indirect expropriation:

- Repudiation of the concession agreement.<sup>18</sup>

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<sup>17</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, ICJ Reports 1996, p. 803 at p. 828 ("arguable contention"); *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, (2006), available on ICSID web site at:

[http://www.worldbank.org/icsid/cases/SalinivJordanAward\\_IncludingAnnex.pdf](http://www.worldbank.org/icsid/cases/SalinivJordanAward_IncludingAnnex.pdf), para. 151 ("the Tribunal will accordingly seek to determine whether the facts alleged by the Claimants in this case, if established, are capable of coming within those provisions of the BIT which have been invoked"), cited with approval in *Plama Consortium Ltd v. Republic of Bulgaria*, ICSID Case No ARB/03/24, (2005), 20 *ICSID Rev.—FILJ* 262 (2005), paras. 118 *et seq.*; *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, (2004), 8 *ICSID Rep.* 515, at para. 157 ("Provided the facts as alleged by the Claimant and as appearing from the initial pleadings fairly raise questions of breach of one or more provisions of the BIT").

<sup>18</sup> *In the Matter of Revere Copper and Brass, Inc. v. Overseas Private Investment Corp.*, Award 24<sup>th</sup> August 1978, 56 *ILR* 258.

- Forced amendment of a Memorandum of Association so as to require relinquishment of the exclusive right of use of a licence which had the effect of destroying the commercial value of the investment.<sup>19</sup>
- Displacement of the investor's management.<sup>20</sup>
- The imposition of taxes which would substantially erode profits.<sup>21</sup>
- Denial of permits necessary to operate the concession, and associated measures.<sup>22</sup>
- Freezing of the investor's bank account and harassment of its staff.<sup>23</sup>
- Detention and deportation of key personnel necessary to run the business comprising the investment.<sup>24</sup>
- Acquisition of a majority shareholding in the concession company where subsequent measures adopted by the majority which destroy the economic value of the investment go beyond the legitimate exercise of a majority shareholder's right to manage the company.<sup>25</sup>

70. In considering whether measures taken by government constitute expropriation the determinative factors are the intensity and duration of the economic deprivation suffered by the investor as the result of them.<sup>26</sup> There is a divergence of views as to whether the intention or objectives of the government in introducing the measures may

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<sup>19</sup> *CME Czech Republic BV (The Netherlands) v. Czech Republic*, (2001), 9 ICSID Rep. 113.

<sup>20</sup> *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, above n 10; *Starrett Housing Corp v. Iran*, above n 10.

<sup>21</sup> *In the Matter of Revere Copper and Brass, Inc. v. Overseas Private Investment Corp.*, above n 18.

<sup>22</sup> *Metalclad Corp. v. United Mexican States*, above n 4; *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, above n 6.

<sup>23</sup> *Starrett Housing Corp. v. Islamic Republic of Iran*, above n 10.

<sup>24</sup> *Biloune and Marine Drive Complex Ltd v. Ghana Investments Centre and Government of Ghana*, Award on Jurisdiction and Liability (1989), 95 ILR 183.

<sup>25</sup> *Foremost Teheran, Inc. v. Islamic Republic of Iran*, Award No. 222-37/231-1 (1986), 10 Iran-US CTR 228, 248.

<sup>26</sup> Christoph Schreuer, "The Concept of Expropriation under the ETC and other Investment Protection Treaties", (2005), 2 Transnational Dispute Management, November 2005, para. 82.

also be taken into account or whether the sole criterion is the effect of the government measures,<sup>27</sup> but on the view this Tribunal takes of the effects of Hungary's actions on Telenor in the present case that is not an issue that needs to be explored.

71. In the present case Telenor complains of a series of governmental and administrative acts by Hungary which it says have reduced the value of its investment. However, the inconsistencies and lack of particularity in Telenor's various pleadings have made it difficult for the Tribunal, even at the conclusion of the hearing on jurisdiction, to have a clear idea either of the claims it is making or of the magnitude of the erosion of its investment it is seeking to assert. Hungary repeatedly stressed the difficulties it faced on these counts in dealing with the claims made by Telenor, and the Tribunal considers that Hungary's objections on this score were fully justified.

72. As regards the claims themselves, the Tribunal has already drawn attention to the following facts:

- (1) The Request for Arbitration made no mention of expropriation at all.
- (2) Though the first head of claim in the Request for Arbitration was the exclusion of Pannon from universal service provision, no mention was made of this in Telenor's letter to the Centre of 11<sup>th</sup> June 2004 in response to the Centre's request for an explanation of the acts of expropriation relied upon, nor did this head of claim feature at all in Telenor's Memorial.

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<sup>27</sup> The so-called "sole effects" doctrine. See Rudolf Dolzer, "Indirect Expropriations: New Developments?" 11 NYU Env LJ 64, 79 (2002).

- (3) Similarly the letter of 11<sup>th</sup> June made no mention of the costs incurred in defending the allegation of market abuse, despite the fact that a claim for such costs had been included in the Request for Arbitration.
- (4) Likewise, Telenor's Memorial omitted all reference to a claim for reimbursement of the above costs.
- (5) On the other hand, Telenor's Memorial included two claims, relating respectively to handset subsidies and dial digit fees, which had not been mentioned anywhere in its Request for Arbitration.
- (6) Neither the Request for Arbitration nor the Memorial made any reference to Article III of the BIT as the basis for any claims. Both documents relied exclusively on Article VI. It was only in Telenor's Answer to Objections that Article III was invoked for the first time, together with Article IV as establishing the procedural link to the Tribunal's jurisdiction. Had Hungary maintained at the hearing the objection it had made in its Reply to the Tribunal's consideration of the claim under Article III and the invocation of Article IV, it is highly unlikely that the Tribunal would have entertained argument by Telenor in respect of Articles III and IV.

73. As regards the magnitude of Telenor's loss in relation to the value of its investment, the Tribunal is still little wiser now than it was at the commencement of the proceedings. Indeed, Telenor's Request for Arbitration and subsequent pleadings seem to regard this question as of no great significance and to assume that any improper interference with its investment and any unfair, unlawful or inequitable treatment sufficed

to establish a *prima facie* case of expropriation. Thus claims of the kind falling within Article III of the BIT became elided with those under Article VI.

74. At the hearing the Tribunal sought to establish the total amount Telenor was contending it had lost because of the alleged breaches of duty by Hungary. In answer to questions from the Tribunal counsel for Telenor referred to the draft of a report prepared by Deloitte's which had given a preliminary indication of loss up to HUF 30 billion, as briefly mentioned in Telenor's Memorial (see paragraph 42 above). Neither the Tribunal nor Hungary had been supplied with a copy of the draft, which counsel for Telenor said he was not authorised to release. Counsel explained that the draft was incomplete and anyway only provided figures within a certain range, and that once objection had been made to the jurisdiction the case was suspended as to the merits and therefore he had not allowed further work on the report to proceed. At this point counsel for Hungary understandably objected that no further document based on the draft report should be put in. In the first place, the figure given was not credible, being 10 times the amount of damages claimed in the Request for Arbitration. Moreover, the case was three years old and the pleadings on jurisdiction were closed. Telenor had chosen not to present the report.

75. The Tribunal accepted these objections. The maximum loss referred to in the report, namely HUF 30 billion, is a large sum, and the issue of the magnitude of Telenor's loss in relation to its investment is plainly a central issue which could and should have been addressed in detail in the Request for Arbitration and subsequent pleadings, not merely adverted to in two brief paragraphs in the Request for Arbitration. The Tribunal

has not seen the report, Hungary has not seen it, and Telenor is not authorised by Deloitte's to release it. The report is an incomplete draft on which considerable further work has to be done, neither the Tribunal nor Hungary have been supplied with even minimal information showing how the figures referred to have been computed or how they have been allocated to the different heads of claim, the figures range from HUF 15 billion at one end to HUF 30 billion at the other, which is an enormous range, and they bear no relation to the amount of the claims made in the Request for Arbitration. Finally, in answer to a question from the Tribunal, Telenor confirmed that the draft report went to the merits, which of course the Tribunal would not reach unless first satisfied that it had jurisdiction. Given all these facts, the Tribunal confirms its ruling at the hearing that it can take no account of the information supplied relating to the figures in the draft.

76. The result is that, in the absence of any other figures in Telenor's Memorial, the Tribunal is left with two amounts only, namely the ETTA levies on Pannon of HUF 1,585,259,454 for the year 2002 and HUF 797,625,024 for the year 2003 (see Memorial, paragraphs 18 and 21). Table 1 shows the comparison between Telenor's contributions to ETTA and the amount of its gross and net profits. Table 2 compares the same contributions with the value of Pannon's assets. Table 3 shows the amount of Pannon's gross and net profits and the value of its assets for the three years prior to the levy as well as for 2002 and 2003. All the tables are based on Pannon's annual reports and accounts which were included as exhibits to the pleadings.



Table 1

ETTA LEVY AS PERCENTAGE OF PROFITS AND OF ASSETS  
(Exhibit R-71, pp 18, 20)

<b>2002</b>	<i>HUF billion</i>
Gross profit	96.4
Net after-tax income	22.5
Levy	1.6
Levy as % of gross profit	1.7%
Levy as % of net income	7.1%

<b>2003</b>	
Gross profit	102.2
Net after-tax income	25.8
Levy	0.8
Levy as % of gross profit	0.8%
Levy as % of net income	3.1%

**For two years combined**

Gross profit	198.6
Net after-tax income	48.3
Levy	2.4
Levy as % of gross profits	1.2%

*HUF billion*

Levy as % of net income	5.0%
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Table 2

ETTA LEVY AS PERCENTAGE OF ASSETS

*HUF billion*

<b>2002</b>	
Assets	149.7 [= increase of HUF 11 billion over 2001]
Levy	1.6
Levy as % of assets	1.1%
<b>2003</b>	
Assets	164.4 [= increase of HUF 15 billion over 2002]
Levy	0.8
Levy as % of assets	0.5%

**For two years combined**

Assets	314.1
Levy	2.4
Levy as % of assets	0.8%

Table 3

Pannon's gross and net profits and assets for the years 1999-2003  
(Exhibits R-68, R-70)

	1999	2000	2001 (levy)	2002 (levy)	2003
(in HUF billions)					
Gross profits	53.1	58.5	79.6	96.4	102.2
Net profits	12.9	9.7	17.2	22.5	25.8
Assets	111.9	117.4	138.5	149.7	164.4

77. The following conclusions can be drawn from these figures. First, Pannon is a very successful and profitable company and regularly describes itself as such in its annual reports. Its gross and net profits rose every year, nearly doubling between 1999 and 2003. The 2002 levy amounted to 1.7% of its gross profit and 7.1% of its net income, while the 2003 levy, the last to be imposed under the ETTA system, reduced these percentages by over a half, to 0.8% and 3.1% respectively. Secondly, the value of Pannon's assets also rose steadily year by year, from HUF 111.9 billion in 1999 to HUF 164.4 billion in 2003, and the amount of the levy in relation to asset value was 1.1% for 2002 and 0.8% for 2003. There were no further levies after 2003, and in 2004 Pannon's assets rose in value by a further HUF 86 billion to HUF 249.5 billion, well over double what they had been in 1999. The Chief Executive Officer's Annual Report 2002 contained the following passage:

"The demanding challenges of the market were successfully met: besides stabilising our market share around 38%, expanding the network coverage and maintaining our development of our customer-oriented services, we managed to achieve the best financial results in our history."

In his Annual Report 2003, describing the achievements of that year, the Chief Executive Officer said:

"I am proud to announce that 2003 was another year of profitable growth for Pannon GSM [...] Our business was stable and balanced throughout the whole year."

78. These figures, which speak for themselves, are not the only difficulty confronting Telenor in its assertion of expropriation. The evidence submitted to the Tribunal indicates that the type of arrangement set up by the Hungarian Government for universal service provision was not dissimilar to those established in a number of other jurisdictions, both within and outside Europe. The exclusion of mobile operators from the provision of universal service applied not only to Pannon but to all other mobile service providers. The ETTA levy of which Telenor has made such fierce complaints was not imposed on Pannon alone but was a levy on all providers of telecommunications services, whether fixed-line or mobile, including Pannon's competitors in the mobile telephony market. Similarly, the restrictions on hand-set subsidies and the disadvantageous fee structure for digit dialling on mobile networks applied to Pannon's competitors as it did to Pannon itself.

79. In the light of all the above facts and figures, coupled with absence of any admissible pleadings as to the magnitude of Telenor's total losses, whether in relation to the value of its investment or otherwise, and the fact that expropriation was not even mentioned in the Request for Arbitration and came into play only in response to letters from the Centre raising the question of expropriation, it is evident that the effect of the measures by Hungary of which Telenor complains fall far short of the substantial economic deprivation of its investment required to constitute expropriation as indicated in the examples given in paragraph 65 above. Beyond the compulsory collection of the 2002 and 2003 ETTA levies from Pannon's bank account, none of Pannon's assets has been seized. Pannon's management has been left in the hands of its Board without governmental interference, the concession agreement remains in full force, and Pannon

has not been denied access to its assets, its revenues or any of its other resources. Moreover, Pannon is, and in its annual reports proclaims itself to be, a highly profitable company whose net income and asset value has increased steadily year by year.

There is no evidence before the Tribunal to suggest any activity on the part of the Hungarian Government that remotely approaches the effect of expropriation. There has been no suggestion of government interference with Telenor's network or its relations with its customers. Telenor's position is thus not dissimilar to that of the Claimant in *Pope & Talbot, Inc. v. Canada*,<sup>28</sup> where the Tribunal likewise rejected the contention that the acts of Canada had amounted to expropriation.

"The Investor's (and the Investment's) Operations Controller testified at the hearing that the Investor remains in control of the Investment, it directs the day-to-day operations of the Investment, and no officers or employees of the Investment have been detained by virtue of the Regime. Canada does not supervise the work of the officers or employees of the Investment, does not take any of the proceeds of company sales (apart from taxation), does not interfere with management or shareholders' activities, does not prevent the Investment from paying dividends to its shareholders, does not interfere with the appointment of directors or management and does not take any other actions ousting the Investor from full ownership and control of the Investment."<sup>29</sup>

Except for the ETTA levies, exactly the same is true of the acts of Hungary in relation to Telenor.

80. The Tribunal therefore concludes that Telenor has failed to make out a *prima facie* case of expropriation. It follows that the Tribunal has no jurisdiction over claims for expropriation made under Article VI of the BIT.

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<sup>28</sup> Above n 6.

<sup>29</sup> *Ibid.*, para. 100.

**Third issue: does the Tribunal have jurisdiction over claims under Article III of the BIT?**

*(1) The pleading aspects*

81. Telenor's approach to pleading caused the Tribunal similar difficulties in relation to its claims for breach of the obligation of fair and equitable treatment imposed on Hungary by Article III of the BIT. Telenor appears to have assumed, at least initially, that any claim it might have under the BIT would fall within the Tribunal's jurisdiction. That is not the case. Subject to the argument analysed below that the Tribunal's jurisdiction is extended by the MFN clause in Article IV to cover claims under Article III, such claims are outside the Tribunal's jurisdiction, which is limited by Article XI to expropriation claims. That does not mean that Telenor is without remedy if Hungary has failed to fulfil its obligations of fair and equitable treatment. On the contrary, Telenor has two avenues of recourse. One is to invoke diplomatic protection and request Norway to seek a remedy on its behalf under Article III; the other is to bring proceedings before the Hungarian courts under Hungarian law for breach of the same obligations under the concession agreement.

82. As with the expropriation claim, no reference was made to Article III in Telenor's Request for Arbitration. Indeed, Article III was not mentioned even in Telenor's Memorial, only in its Answer to Hungary's Objections to Jurisdiction. In its Reply Hungary rightly objected to claims under Article III being pursued, and as stated earlier if that objection had been maintained at the hearing the Tribunal would have found it difficult to avoid dismissing the claims under Article III on the spot. However, the

objection was not pursued and the Tribunal will therefore deal with the claims under Article III in this Award.

(2) *Telenor's reliance on Article IV to invoke dispute resolution clauses in other BITs*

83. Article III is not one of the Articles referred to in Article XI of the BIT and therefore *prima facie* is outside the Tribunal's jurisdiction. However, at a late stage in the proceedings, Telenor advanced the argument that the most favoured nation clause embodied in Article IV provided what it called a procedural bridge to Article III in that it entitled Telenor to take advantage of any wider dispute resolution clause in any other BIT entered into by Hungary with other States. It is unfortunate that Telenor did not consider it necessary to identify the wider clauses in question, nor indeed was it able to do so when asked about this by the Tribunal at the jurisdiction hearing. Telenor's position was that the investigation into the circumstances in which the Norway-Hungary treaty was negotiated was a matter to be dealt with only at the merits stage of the case. The Tribunal then indicated that it could, of course, look at the MFN clauses in other BITs itself. Such assistance as has been provided to the Tribunal on this point came from Hungary in its Reply in which it examined the types of dispute resolution clause found in the various BITs entered into by Hungary and Norway (see paragraph 96).

84. Article IV has already been set out in paragraph 25 but for convenience is reproduced again here:

#### ARTICLE IV

##### MOST FAVOURED NATION TREATMENT

1. Investments made by Investors of one Contracting Party in the territory of the other Contracting Party, as also the returns therefrom, shall be accorded treatment no less favourable than that accorded to investments made by Investors of any third State.

2. The treatment granted under paragraph 1 of this Article shall not apply to:
  - any advantage accorded to Investors of a third State by the other Contracting Party based on any existing or future customs or economic union, or similar international agreement, or free trade agreement to which either of the Contracting Parties is or becomes a Party.
  - any advantages accorded to Investors of a third State by the other Contracting Party by virtue of a double taxation agreement or other agreements regarding matters of taxation or any domestic legislation relating to taxation.

(3) *Two cases cited in support of Telenor's position*

85. Of the various cases cited by Telenor two in particular were relied on to support its invocation of Article IV as a procedural bridge, namely *Maffezini*<sup>30</sup> and *Siemens*.<sup>31</sup> In *Maffezini* the parties to the BIT were Argentina and Spain and the claim was brought against Spain by an Argentinean national. The dispute resolution clause, contained in Article X of the BIT, was not only very wide but also complex and productive of potential inconvenience. The relevant part of Article X read as follows:

- "1. Disputes which arise within the terms of this Agreement concerning an investment between an investor of one Contracting Party and the other Contracting Party shall, if possible, be settled amicably by the parties to the dispute.
2. If the dispute cannot thus be settled within six months following the date on which the dispute has been raised by either party, it shall be submitted to the competent tribunal of the Contracting Party in whose territory the investment was made.
3. The dispute may be submitted to international arbitration in any of the following circumstances:
  - a) at the request of one of the parties to the dispute, if no decision has been rendered on the merits of the claim after the expiration of a period of eighteen months from the date on which the proceedings referred to in paragraph 2 of this Article have been initiated, or if such decision has been rendered, but the dispute between the parties continues;
  - b) if both parties to the dispute agree thereto.
4. In the cases foreseen in paragraph 3, the disputes between the parties shall be submitted, unless the parties otherwise agree, either to international arbitration under the March 18, 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States or to an ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

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<sup>30</sup> *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, (2000), 5 ICSID Rep. 387.

<sup>31</sup> *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, (2004), available on ICSID web site at: <http://www.worldbank.org/icsid/cases/siemens-decision-en.pdf>.

If after a period of three months following the submission of the dispute to arbitration by either party, there is no agreement to one of the above alternative procedures, the dispute shall be submitted to arbitration under the March 18, 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, provided that both Contracting Parties have become parties to the said Convention. Otherwise, the dispute shall be submitted to the above mentioned ad hoc tribunal."

86. Article IV of the BIT in *Maffezini* also embodied an MFN clause in the following terms:

"In all matters subject to this Agreement, this treatment shall not be less favourable than that extended by each Party to the investments made in its territory by investors of a third country."

The claimant contended that Article IV embraced not only substantive investment rights but also dispute resolution procedures, so that it was entitled to invoke a dispute resolution clause in Article 10(2) of the Chile-Spain BIT, which provided merely that the investor could opt for arbitration after the six-month period for negotiations had expired, with no other pre-conditions. The respondent, Spain, argued that Article IV was confined to material economic treatment and did not extend to procedural matters. The tribunal upheld the claimant's submission and ruled that international arbitration and other dispute resolution provisions were essential to the protection of the rights envisaged under the pertinent BITs and that Article IV was therefore to be interpreted as giving the claimant the benefit of any wider dispute resolution clause contained in any other BIT between Spain and a third State, in the instant case the Chile-Spain BIT.

87. In reaching its decision the *Maffezini* tribunal examined in detail the practice followed by Spain in respect of BITs with other countries. It noted that of all the Spanish treaties it had been able to examine the only MFN provision that spoke of "all matters subject to this Agreement" was the provision in the BIT with Argentina. All other treaties omitted this reference and confined the MFN clause to "this treatment" (i.e.,



treatment accorded to the investments), which as the tribunal noted was a narrower formulation, and is that used in the BIT between Hungary and Norway. The tribunal, aware of the danger of disruptive treaty-shopping that could, it thought, play havoc with the policy objectives of underlying specific treaty provisions, incorporated in its ruling some important qualifications based on public policy, though the source of these is unclear.

88. The *Siemens* Decision is more supportive of Telenor's case in that the MFN clause was there confined to the treatment of the investments, yet despite this important difference the tribunal, which concurring with *Maffezini* that this formulation was narrower, considered it sufficiently wide to cover the settlement of disputes concluded that the investor, a German national, was entitled to invoke against Argentina the wider dispute resolution clause contained in the Chile-Argentina BIT. A similar approach was adopted in the *Gas Natural* case,<sup>32</sup> where the tribunal focused on the importance to be attached to the assurance of independent international arbitration and concluded that MFN provisions in a BIT should be understood to apply to dispute settlement unless it clearly appeared otherwise. More recently *Maffezini* was followed in *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. The Argentine Republic*.<sup>33</sup>

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<sup>32</sup> *Gas Natural SDG, S.A. v. Argentine Republic*, Case No. ARB/03/10, Decision on Jurisdiction, 17<sup>th</sup> June 2005, available on the web site of *International Law in Brief* at:

<http://www.asil.org/pdfs/GasNat.v.Argentina.pdf>.

<sup>33</sup> ICSID Case No. ARB/03/17, Decision on Jurisdiction, 16<sup>th</sup> May 2006, available on the web site of Investment Treaty Arbitration at: <http://ita.law.uvic.ca/documents/Suez-Jurisdiction.pdf>.

(4) *Cases adopting a narrower construction of the MFN clause*

89. Though *Maffezini* and *Siemens* do not stand on their own and have been followed in some later decisions, it is clear that in other cases they occasioned considerable disquiet and indeed fairly vigorous criticism and dissent. Thus in *Plama Consortium Ltd v. Republic of Bulgaria*<sup>34</sup> the tribunal robustly rejected the expansive interpretation accorded to the MFN clauses in *Maffezini*, and thus found it unnecessary to deal with *Siemens*.

"The tribunal in *Maffezini* further referred to 'the fact that the application of the most favoured nation clause to dispute settlement arrangements in the context of investment treaties might result in the harmonization and enlargement of the scope of such arrangements' (Decision at paragraph 62). The present Tribunal fails to see how harmonization of dispute settlement provisions can be achieved by reliance on the MFN provision. Rather, the 'basket of treatment' and 'self-adaptation of an MFN provision' in relation to dispute settlement provisions (as alleged by the Claimant) has as effect that an investor has the option to pick and choose provisions from the various BITs. If that were true, a host state which has not specifically agreed thereto can be confronted with a large number of permutations of dispute settlement provisions from the various BITs which it has concluded. Such a chaotic situation - actually counterproductive to harmonization - cannot be the presumed intent of Contracting Parties. [...]

[...] the principle with multiple exceptions as stated by the tribunal in the *Maffezini* case should instead be a different principle with one, single exception: an MFN provision in a basic treaty does not incorporate by reference dispute resolution provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them."

Similarly in *Salini v Jordan*<sup>35</sup> the tribunal, after stating that it "shares the concerns that have been expressed in numerous quarters with regard to the solution adopted in the *Maffezini* case", declined to treat the MFN clause as extending the scope of application of the BIT in relation to dispute settlement and held that its jurisdiction was limited by the dispute resolution clause in the BIT itself. The tribunal noted that the claimants had not cited any practice in the States parties to the BIT in support of their claim.

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<sup>34</sup> ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8<sup>th</sup> February 2005, above n 17, paras. 219 and 223.

<sup>35</sup> *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/02/13, Decision on Jurisdiction, 29<sup>th</sup> November 2004, 20 *ICSID Rev.—FILJ* 148 (2005), para. 115.

(5) *Conclusions on the MFN clause*

90. This Tribunal wholeheartedly endorses the analysis and statement of principle furnished by the *Plama* tribunal.

91. There are at least four compelling reasons why an MFN clause in a BIT providing for most favoured nation treatment of investment should not be construed as extending the jurisdiction of the arbitral tribunal to categories of dispute beyond those set out in the BIT itself in the absence of clear language that this is the intention of the parties.

92. In the first place, Article 31 of the 1969 Vienna Convention on Treaties requires a treaty to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purposes." In the absence of language or context to suggest the contrary, the ordinary meaning of "investments shall be accorded treatment no less favourable than that accorded to investments made by investors of any third State" is that the investor's *substantive* rights in respect of the investments are to be treated no less favourably than under a BIT between the host State and a third State, and there is no warrant for construing the above phrase as importing *procedural* rights as well. It is one thing to stipulate that the investor is to have the benefit of MFN investment treatment but quite another to use an MFN clause in a BIT to bypass a limitation in the very same BIT when the parties have not chosen language in the MFN clause showing an intention to do this, as has been done in some BITs.

93. Secondly, as the *Plama* tribunal pointed out, the effect of the wide interpretation of the MFN clause is to expose the host State to treaty-shopping by the investor among an indeterminate number of treaties to find a dispute resolution clause wide enough to cover a dispute that would fall outside the dispute resolution clause in the base treaty, and even then there would be questions as to whether the investor could select those elements of the wider dispute resolution that were apt for its purpose and discard those that were not.

94. Thirdly, the wide interpretation also generates both uncertainty and instability in that at one moment the limitation in the basic BIT is operative and at the next moment it is overridden by a wider dispute resolution clause in a new BIT entered into by the host State.

95. Fourthly, of particular relevance is the practice of the States parties to the BIT in the formulation of their dispute resolution clauses in BITs with other States. Those who advocate a wide interpretation of the MFN clause have almost always examined the issue from the perspective of the investor. But what has to be applied is not some abstract principle of investment protection in favour of a putative investor who is not a party to the BIT and who at the time of its conclusion is not even known, but the intention of the States who are the contracting parties. The importance to investors of independent international arbitration cannot be denied, but in the view of this Tribunal its task is to interpret the BIT and for that purpose to apply ordinary canons of interpretation, not to displace, by reference to general policy considerations concerning investor protection, the dispute resolution mechanism specifically negotiated by the parties. There are BITs entered into by a State which provide for reference to arbitration of *all* disputes, and

others entered into *by the same State* that limit consent to arbitration to specified categories of dispute, such as expropriation. It must be obvious that such a State, when reaching agreement on the latter form of dispute resolution clause, intends that the jurisdiction of the arbitral tribunal is to be limited to the specified categories and is not to be inferentially extended by an MFN clause. Where, as in the present case, *both* parties to a BIT which restricts the reference to arbitration to specified categories have entered into other BITs which refer all disputes to arbitration or where they have concluded other BITs some of which refer all disputes to arbitration while others limit such a reference to specified categories of dispute, then it can fairly be assumed that in the BIT in question the two parties share a common intention to limit the jurisdiction of the arbitral tribunal to the categories so specified. In these circumstances, to invoke the MFN clause to embrace the method of dispute resolution is to subvert the intention of the parties to the basic treaty, who have made it clear that this is not what they wish.

96. In the present case Hungary made the telling point that, of the 15 Norwegian BITs publicly available, the BIT with Hungary is the *only* one that specifies the categories of dispute referable to ICSID arbitration; the 14 others all specify "all" or "any" disputes. All those treaties were included in the exhibits in support of Hungary's objections to jurisdiction, though not all were in the English language. By contrast about half of the BITs entered into by Hungary with States other than Norway restrict consent to ICSID arbitration to expropriation claims. Hungary also included in its exhibits copies of various BITs entered into by Hungary with States other than Norway, though again some of these were not in English. The Tribunal's own research shows that of the 22 Hungarian BITs available in English on the UNCTAD web site, only seven limit

submission to arbitration to cases involving expropriation or nationalisation,<sup>36</sup> while 13 allow for any legal dispute to be referred to arbitration and two, including the BIT under consideration in this case, specify categories additional to expropriation or nationalisation, such as compensation for losses due to war, but do not extend to other disputes.

97. It therefore seems clear that in Article XI of their BIT Hungary and Norway have made a deliberate choice to limit arbitration to the categories specified in that Article and have eschewed the wide form of dispute resolution clause adopted in many of their other BITs.

98. In the recent *Aguas*<sup>37</sup> case, which as stated above followed *Maffezini*, the tribunal distinguished *Plama* on three grounds. First, the MFN clause in *Plama* was narrower than in *Aguas*, which used the phrase "In all matters governed by this Agreement," followed by a set of exceptions. Secondly, *Plama* was guided by evidence that the contracting States did not intend the MFN clause to cover dispute resolution, whereas in *Aguas* no evidence of intent was adduced by the parties. Thirdly, in *Plama* the Claimant attempted to replace the dispute resolution clause in the base treaty *in toto* by a dispute resolution mechanism incorporated from another treaty, a "radical effect" compared with the much more limited one in *Aguas*, which consisted merely of waiving a preliminary step in accessing the dispute resolution mechanism. All three of the features in *Aguas* which were held to distinguish it from *Plama* also distinguish it from the present case. The MFN clause in the Hungary-Norway BIT is more limited than in *Aguas*, the present

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<sup>36</sup> Those concluded with Cyprus, China, The Netherlands, Spain, the United Kingdom, Finland and Greece.

<sup>37</sup> Above n 33.

Tribunal had before it evidence of a kind not before the *Aguas* tribunal - namely the practice of both Hungary and Norway in entering into BITs with other States - that the parties intended to limit dispute resolution to the matters specified in the dispute resolution clause in the Hungary-Norway BIT, and what Telenor seeks to do is not simply remove a preliminary condition of invoking the dispute resolution mechanism but to extend the scope of the Tribunal's jurisdiction to questions entirely outside Article XI of the Hungary-Norway BIT.

99. In *Aguas*, the tribunal expressed no opinion as to whether an MFN clause of the more radical kind contained in *Plama* could have the effect of replacing the dispute resolution clause but dissented from the general principle formulated by the *Plama* tribunal. By contrast the present Tribunal fully supports the *Plama* formulation.

100. The Tribunal therefore concludes that in the present case the MFN clause cannot be used to extend the Tribunal's jurisdiction to categories of claim other than expropriation, for this would subvert the common intention of Hungary and Norway in entering into the BIT in question.

101. Towards the end of the hearing on jurisdiction the Tribunal asked Telenor whether, if the Tribunal were to rule against its contention on the application of Article IV, Telenor would still contend that claims under Article III fell within the Tribunal's jurisdiction. Counsel for Telenor very fairly and properly conceded that if Article IV could not be invoked, claims under Article III would be inadmissible and Telenor would be restricted to a claim for expropriation. Since the Tribunal has concluded, for the reasons set out above, that Article IV does not operate to extend the Tribunal's

jurisdiction beyond that conferred by Article XI, it follows that Telenor's claims under Article III must also be dismissed for want of jurisdiction.

## IX CONCLUSIONS

### Jurisdiction

102. For the reasons set out above the Tribunal concludes:

- (1) that Telenor has failed to adduce a *prima facie* case of expropriation;
- (2) that the scope of the Tribunal's jurisdiction is limited by Article XI to claims involving expropriation and that the MFN clause embodied in Article IV cannot be invoked to extend the Tribunal's jurisdiction to claims under Article III;
- (3) that the Tribunal therefore has no jurisdiction over any of the claims brought by Telenor.

### Costs

103. At the invitation of the Tribunal the parties made brief oral submissions on costs and later filed more detailed written submissions.

104. In its oral and written submissions Hungary argued that if the Tribunal were to decide it had no jurisdiction over any part of the claim Hungary should be awarded costs, partly because of the widely accepted "loser pays" principle and partly because of what it called "behavioural components", that is, the fact that in the view of Hungary, Telenor's claims were misconceived from the outset, it initiated the arbitral proceedings without any examination of the jurisdictional basis of its claims, and its pleadings were lackadaisical and failed entirely to address the question how its investment was expropriated.



105. Telenor, having at the oral hearing indicated its acceptance of the principle that "the winner takes all" (a concession made at the end of a day's hearing and one to which the Tribunal would not wish to hold Telenor), did not directly address the issue in its written submission, but (1) attacked Hungary for failing to file any pleadings on the merits, contrary, said Telenor, to the Tribunal's directions, and for Hungary's "notorious attempts to divert attention from" this failure and (2) said that "as the Tribunal will apparently hold it does have *prima facie* jurisdiction over Claimant's claims" its jurisdiction costs were separated out "from the costs related to the merits in order to enable the tribunal to resolve on the forum costs separately."

106. As stated earlier, the allegation that Hungary ignored a direction from the Tribunal to file pleadings on the merits is a misconception. The directions given for pleadings on the merits were conditional on there being at least some aspects of Telenor's claim in respect of which there was no challenge to the jurisdiction. In the event, jurisdiction was challenged across the board, so that the question of filing pleadings on the merits did not arise, all proceedings on the merits being suspended pending the Tribunal's ruling on jurisdiction. It is therefore quite unfair of Telenor to criticise Hungary for failing to plead to the merits and to assert that this was in breach of the Tribunal's direction, and even more unfair to suggest that Hungary had deliberately sought to deflect attention from the want of such pleading. It is not clear on what basis Telenor assumed the Tribunal would rule in its favour on the question of jurisdiction and the assumption has proved to be unfounded. Telenor has made no submission on what order should be made as to costs in that event.

107. The Tribunal has concluded that on both of the grounds advanced by Hungary Telenor should be ordered to pay Hungary's costs. Though aware of a common practice in ICSID arbitrations for the parties to bear their own costs and bear the costs of ICSID and the tribunal equally regardless of the outcome of the case, this Tribunal is among those who favour the general principle that costs should follow the event. In any event, the Tribunal agrees with Hungary's criticisms of Telenor's approach to this case, which has undoubtedly caused difficulties both for Hungary and for the Tribunal and has added substantially to the costs incurred. The Tribunal does not propose to say more about this other than to refer to what has been said in paragraphs 33, 36-39, 41 and 71-75.

#### **The Award**

108. Accordingly:

- (1) Telenor's claims are dismissed on the ground that the Tribunal has no jurisdiction over them;
- (2) Telenor is ordered to reimburse to Hungary its contributions to the fees and expenses of ICSID, including the fees and expenses of the Tribunal, and the costs incurred by Hungary as set out in the annexed Schedule of Costs. Telenor is ordered to pay these costs within 30 days from the notification by ICSID to the parties of its fees and expenses.

*R. J. Goode*

PROFESSOR SIR ROY GOODE, CBE, QC

PRESIDENT

*22<sup>nd</sup> June 2006*

*Nicholas W. Allard*

MR. NICHOLAS W. ALLARD

*6/22/06*

*Arthur Marriott*

MR. ARTHUR MARRIOTT, QC

*22<sup>nd</sup> June 2006*

## SCHEDULE OF COSTS

1.	Counsel for Hungary: fees and expenses	US\$
	(i) Arnold & Porter LLP (15 <sup>th</sup> May 2006):	979,785.61
	(ii) Arnold & Porter LLP (23 <sup>rd</sup> May 2006):	31,615.72
	(ii) Law offices of Tamas Kende, Budapest	237,938.96
		<hr/> 1,249,340.29
2.	Hungary's travel costs for attending hearings	3,552.48
		<hr/> 1,252,892.77
3.	ICSID costs, including the fees and expenses of this Tribunal: Amount to be advised to the parties	
	(i) paid by Hungary:	150,000.00
	(ii) paid by Telenor:	150,000.00
	(iii) to be reimbursed by Telenor to Hungary:	Half of ICSID costs