

ICSID Case No ARB/12/2

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

Claimants

–and–

HUNGARY

Respondent

DECISION ON RESPONDENT’S OBJECTION UNDER ICSID ARBITRATION RULE 41(5)

Members of the Tribunal

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Hon. Marc Lalonde QC, Arbitrator
Mr J Christopher Thomas QC, Arbitrator

Secretary of the Tribunal

Ms.Mairée Uran Bidegain

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GLOSSARY OF DEFINED TERMS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings
Claimants' Response	Claimants' letter responding to Respondent's Arbitration Rule 41(5) Objection dated 18 September 2012.
Emmis International	Emmis International Holding, B.V., the First Claimant
Emmis Radio	Emmis Radio Operating B.V., the Second Claimant
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated March 18, 1965
ICSID/the Centre	International Centre for Settlement of Investment Disputes
MEM	Mem Magyar Electronic Media Kereskedelmi és Szolgáltató Kft, the Third Claimant
Netherlands BIT	Agreement between the Kingdom of the Netherlands and the Hungarian People's Republic for the encouragement and reciprocal protection of investments dated 2 September 1987
PO No1	Procedural Order No 1 dated 5 October 2012
Request/Request for Arbitration	Amended Request for Arbitration dated 27 December 2012
Rule 41(5) Objection	Respondent's Objection pursuant to ICSID Arbitration Rule 41(5) dated 31 August 2012
Revised Amended Request	Revised Amended Request for Arbitration filed by Claimants on 18 October 2012
Slàger Radio	Slàger Rádío Műsorszolgáltató Zrt
Switzerland BIT	Agreement between the Swiss Confederation and the Hungarian People's Republic on the Reciprocal Promotion and Protection of Investments dated 5 October 1988
Treaties	Netherlands BIT and Switzerland BIT

I. INTRODUCTION AND PARTIES

1. The present dispute is submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) on the basis of the Agreement between the Kingdom of the Netherlands and the Hungarian People’s Republic for Encouragement and Reciprocal Protection of Investments dated 2 September 1987, which entered into force on 1 June 1988 (the “Netherlands BIT”), the Agreement Between the Swiss Confederation and the Hungarian People’s Republic on the Reciprocal Promotion and Protection of Investments dated 5 October 1988, which entered into force on 16 May 1989 (the “Swiss BIT” and jointly with the Netherlands BIT, the “Treaties”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (the “ICSID Convention”). The Hungarian People’s Republic ratified the ICSID Convention on 4 February 1987 and it entered into force for Hungary on 6 March 1987.
2. The Claimants are Emmis International Holding, B.V. (“Emmis International”), Emmis Radio Operating, B.V. (“Emmis Radio”), and Mem Magyar Electronic Media Kereskedelmi és Szolgáltató Kft (“MEM”). Emmis International and Emmis Radio are both corporations organized and existing under the laws of the Netherlands with their principal place of business in Amsterdam, The Netherlands. MEM is a company organized and existing under the laws of Hungary, allegedly controlled by a Swiss national. These parties will be collectively referred to hereinafter as “Claimants.”
3. The Respondent is Hungary and is referred to as “Hungary” or “Respondent.”
4. The Claimants and the Respondent will be hereinafter collectively referred to as the “Parties.”
5. The Parties’ respective legal counsel of record in this arbitration are listed above on page (i). Claimants were represented by Covington & Burling until 17 January 2013, when, with the consent of the Claimants, that firm came off the record. On 8 February 2013, following a suspension of the proceedings ordered by the Tribunal in order to enable the Claimants to appoint new counsel, the firm of Quinn Emanuel was appointed to represent the Claimants in this arbitration.
6. The dispute relates to the alleged unlawful treatment accorded by Respondent to a national FM-radio frequency broadcasting licensee in which Claimants held their investments.

Respondent submits an objection pursuant to ICSID Arbitration Rule 41(5), alleging that certain of the disputes set forth in Claimants' request for arbitration shall be dismissed for manifest lack of legal merit because Hungary did not accord its consent to submit such disputes to ICSID arbitration. This ruling decides on Respondent's objection after careful consideration of the Parties' written submissions and oral presentations at the occasion of the First Session.

II. PROCEDURAL HISTORY

A. The Request for Arbitration

7. On 28 October 2011, ICSID received a request for arbitration on behalf of Emmis International, Emmis Radio, MEM, Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt against Hungary.¹
8. Hungary presented communications dated 16 November 2011, and 4 and 7 December 2011, objecting to the registration of the 28 October 2011 request. The Requesting Parties submitted a response to such letters on 18 and 30 November, 2011 and 6 December 2011.
9. On 9 December 2011, the Centre reminded the Requesting Parties that "the jurisdiction of the Centre shall extend to any legal dispute arising directly out of *an investment*" (emphasis added) and notified them that "[i]n the absence of consent by all disputing parties to join disputes relating to manifestly separate investments, the Secretary-General cannot proceed to register the Request for Arbitration as submitted to the Centre."²
10. Accordingly, on 27 December 2012, the Centre received two separate requests for arbitration against Hungary. One request was filed on behalf of the Claimants in this arbitration, as defined in paragraph 2 above, which allege to be investors in Slàger Rádío Műsorzolgáltató Zrt ("Slàger Radio") (the "Request" or "Request for Arbitration"). Another request for arbitration was filed on behalf of the other claimants in the request of 28 October 2011. This second

¹ See Request for Arbitration, n2.

² Letter from ICSID Secretary General to the Parties, dated 9 December 2011.

separate request for arbitration was registered under ICSID Case No. ARB/12/3, being heard by a distinct arbitral tribunal.³

11. On 18 January 2012, the Secretary-General of ICSID registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration.

B. Constitution of the Tribunal

12. By letter dated 6 April 2012, Claimants communicated to the Centre the Parties' agreement on the method of constitution of the Tribunal. In accordance with this method, the Tribunal would be composed of three arbitrators: one member of the Arbitral Tribunal appointed by each of the Parties and the third arbitrator, who would act as its President, to be appointed by agreement of the two co-arbitrators in consultation with the Parties.
13. Following this agreement, the Tribunal was constituted in accordance with Article 37(2)(a) of the ICSID Convention and is composed of Professor Campbell McLachlan QC, a national of New Zealand, President, appointed by agreement of the co-arbitrators in consultation with the Parties; the Honorable Marc Lalonde QC, a national of Canada, appointed by Claimants; and Mr J. Christopher Thomas QC, a national of Canada, appointed by Respondent.
14. On 15 August 2012, the Secretary-General notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"). Ms Mairée Uran Bidegain, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.

C. Respondent's Rule 41(5) Objection and the First Session of the Tribunal

15. On 31 August 2012, Respondent submitted Preliminary Objections pursuant to ICSID Arbitration Rule 41(5) ("Rule 41(5) Objection"). As further detailed below, Hungary objected to two categories of claims in the Amended Request in each case on the ground that it has not

³ Claimants to this arbitration and the claimants in ICSID Arbitration ARB/12/3 appointed Mr. Marc Lalonde to both proceedings (see Procedural Details of ICSID Arbitration No. ARB/12/3, publicly available on the ICSID website, at <https://icsid.worldbank.org>, last visited on 8 December 2012). The other two members of each of the arbitral tribunals differ.

consented to arbitration in respect of such claims pursuant to the instruments of consent, being the relevant provisions of the Treaties, namely:

- (1) Treaty claims other than expropriation;⁴ and,
- (2) Customary international law claims.⁵

16. On 4 September 2012, the Secretary of the Tribunal transmitted to the Parties a draft Agenda of the items to be discussed at the first session of the Tribunal (the “Draft Agenda”). The Draft Agenda included an item for Respondent’s Rule 41(5) Objection.
17. On 18 September 2012, Claimants filed their Response on Respondent’s Rule 41(5) Objection. The Claimants submitted that “Respondent’s invocation of Rule 41(5) is unnecessary, and the Tribunal need not consider the merits of the Objection.” Claimants contended that inclusion of the contested claims in the Request for Arbitration was proper, as Respondent could have chosen to consent to arbitrate these claims, but acknowledged that Respondent had refused to consent to arbitrate non-expropriation claims in this case.
18. On 19 September 2012, the Parties submitted their Joint Statement (the “Statement”) on the Draft Agenda. As to the Rule 41(5) Objection, the Statement recorded:⁶

Following Claimants’ letter of 18 September 2012, the Parties agree that a schedule of written pleadings, evidence or a hearing on the Rule 41(5) Objection filed by Respondent is unnecessary.

Respondent requests that the Tribunal issue a brief decision on the Rule 41(5) Objection confirming that the dispute before the Tribunal is limited to claims of expropriation under the Netherlands–Hungary and Switzerland–Hungary bilateral investment treaties. Claimants contend that, for the reasons stated in their letter of 18 September 2012, it was unnecessary for Respondent to submit a Rule 41(5) objection and that the Tribunal need only take note of Claimants’ position as stated in their letter of 18 September 2012.

⁴ Rule 41(5) Objection, [18] – [31].

⁵ Ibid, [32] – [36].

⁶ Statement, [13].

19. On 20 September 2012, the Respondent submitted observations on the question whether a decision from the Tribunal on the Rule 41(5) Objection was still required, to which Claimants responded by letter of 24 September 2012.
20. The First Session of the Tribunal was held via video conference on 24/25 September 2012.⁷ During this session, the Parties were given an opportunity to be heard by the Tribunal on the disposition of the Rule 41(5) Objection. The Tribunal raised with the Parties the question whether it would help in clarifying the scope of the proceedings, in the light of the measure of agreement already reached between the parties, if the Claimants were to file a revised amended request, striking through those passages that the Claimants accepted could not be pursued within the framework of the present arbitration. Both parties accepted this proposal, although the Respondent maintained its position that it was in addition entitled to a ruling on its Rule 41(5) Objection.
21. On 5 October 2012, the Tribunal issued its Procedural Order No. 1 (“PO No1”), setting out the procedural rules that Claimants and Respondent have agreed to, and that the Arbitral Tribunal has determined, should govern this arbitration. The Parties confirmed, *inter alia*, that the Tribunal had been properly constituted and agreed on a schedule of pleadings for the merits phase.
22. Section 13 of PO No1 also embodied the Tribunal’s determination with regard to the next steps to be taken in connection with the Rule 41(5) Objection. It provided:

13.1 Following Claimants’ letter of 18 September 2012, the Parties have agreed that a schedule of written pleadings, evidence or a hearing on the Rule 41(5) Objection filed by Respondent is unnecessary.

13.2 Claimants shall file by Friday 19 October 2012 an amended Request for Arbitration striking through the passages referring to any non-expropriation claims that it considers no longer pending before this Tribunal on the basis of Respondent’s lack of consent to submit those disputes to ICSID arbitration, as set forth in Claimants’ correspondence of 18 and 24 September 2012.

⁷ The Parties and the Secretary of the Tribunal meet at the offices of the World Bank in Washington D.C. to attend the first session, while the members of the Tribunal joined via video-conference, each from Montreal, London and Wellington. Given the time differences, the President of the Tribunal presided the session on 25 September 2012, while it was still 24 September 2012 for the other members of the Tribunal and the Parties.

13.3 Upon receipt of the Amended Request for Arbitration referred to in § 13.2 above, the Respondent shall have 10 business days within which to notify the Claimants and the Tribunal as to whether it maintains any objection that the Amended Request has correctly removed those claims that Claimants have agreed may not be pursued in these proceedings, following which the Tribunal will determine whether further relief, if any, is required under this paragraph.

23. On 18 October 2012 Claimants submitted a Revised Amended Request for Arbitration striking through certain passages of the Request for Arbitration and amending others (the “Revised Amended Request”).
24. On 26 October 2012, Respondent filed its observations on the Revised Amended Request. Hungary submitted that “the Revised Request *fails to remove* allegations of breaches of various treaty provisions not relating to expropriation, and *maintains* the request that the Tribunal declare that Hungary has breached customary international law.”⁸ Respondent filed an alternative strike-through version of the Revised Amended Request in order to clarify those portions of the Request to which it maintained an objection.
25. The Parties exchanged additional letters on Respondent’s Rule 41(5) Objection, on 30 October 2012 from Claimants and on 7 November 2012 from both Parties. On 28 November 2012, the Tribunal granted Respondent a short opportunity to reply, which it did on 10 December 2012. By letter of 7 December 2012, Claimants declined a final opportunity to file additional observations on Respondent’s Rule 41(5) Objection.

III. FACTUAL BACKGROUND

26. The Tribunal summarises below, insofar as relevant for the present Decision (i) the dispute; (ii) the claims; and (iii) the relief sought, as presented by Claimants in their Revised Amended Request for Arbitration. The Tribunal adopts no position with regard to the facts as described below. The Rule 41(5) Objection in the present proceedings relates solely to the scope of the Tribunal’s jurisdiction *ratione materiae* by virtue of the instruments of consent. Accordingly, the Tribunal makes no ruling, at this stage in the proceedings, on the substantive merits of the

⁸ Respondent’s Letter dated 26 October 2012, 2, references omitted, emphasis in original.

Claimants' claims. For the purpose of such a determination, the arbitral tribunal must not prejudge the merits of the case. On the contrary, it must ordinarily presume the facts which found the claim on the merits as alleged by the claimant to be true (unless they are plainly without any foundation). In the application of those presumed facts to the legal question of its jurisdiction, the tribunal must then decide whether, as matter of law, those facts fall within or outside the scope of the consent to arbitrate. Where the objection is taken under the procedure provided in Rule 41(5), it will decide to grant the objection if one or more of the claims fall clearly outside the scope of its jurisdiction so that, for the purpose of these proceedings, the claim must be treated as being "manifestly without legal merit".

A. The Dispute

27. The Claimants' case arises out of the alleged unlawful expropriation of the Claimants' investments in and related to, Slàger Radio, a Hungarian company and holder of one of the two national radio-broadcasting FM frequencies in Hungary.
28. Hungary's National Radio and Television Broadcasting Board (ORTT) first awarded Slàger Radio a seven-year license in 1997 after a competitive tender process, which was renewed in 2004 for a five year period.⁹ In 2009, ORTT published a call for tender for the issuance of the license held by Slàger Radio.
29. Claimants contend that this last tender procedure was "highly irregular" and "unlawful."¹⁰ It "did not accord ... incumbent licensees, the preference in the tender guaranteed by Hungarian Law" and "the prevailing bidders (i) had prohibited conflicts of interest that should have disqualified their bids; (ii) no national broadcasting experience... and (iii) unfeasible business plans, among other irregularities."¹¹
30. In addition, Claimants' allege, the prevailing bidders did not comply with the requirements of the applicable Media Law and the rules governing the tender, and had close ties with the two

⁹ See Revised Amended Request, [38]-[39].

¹⁰ Ibid, [3].

¹¹ Idem; see also [43]-[50].

leading political parties in Hungary, which was an important factor in the overall result of the relevant bidding process.¹²

31. Moreover, the new bidders were awarded the frequencies “even before the Hungarian courts could investigate the irregularities making the tender illegal” and subsequently, “the Hungarian Media Law has been altered to ensure that there is no effective remedy under Hungarian Law for violations of the tender procedures...”¹³
32. Thus, according to the Request, the Government’s decision to conduct a highly irregular and unlawful tender procedures that concluded in the replacement of Slàger Radio as licensee of one of the two national radio-broadcasting frequencies after successfully operating for 12 years, resulted in the Claimant’s expropriation of its investment (including the value of the stock of Slàger Radio, its operations and related assets).

B. The Claims

33. The Claimants, by their Revised Amended Request dated 18 October 2012, have indicated those claims which they continue to contend they are entitled to pursue in the present arbitration. The Tribunal reproduces below the relevant portions, in the form submitted by the Claimants pursuant to PO No1, showing the passages that the Claimants have already accepted should be struck through as being outside the scope of the Tribunal’s jurisdiction:

65. The Respondent’s measures described in the preceding paragraphs have expropriated, or nationalized, without compensation and without complying with the other requirements imposed by applicable law, the investments of Emmis International, Emmis Radio and MEM in and related to Slàger Radio and its operating activities. ...

...

67. The Respondent’s measures described above also violate its obligations under the Netherlands Treaty and the Switzerland Treaty (including the provisions of treaties with other States that are incorporated by the most-favored-nation principle of Article 3(2) of the Netherlands Treaty and Article 4(2) of the Switzerland Treaty), and customary international law.

¹² Ibid, [51]-[53].

¹³ Ibid, [4]; *see also* [54]-[62].

68. The Respondent's additional violations of the Treaties include: (i) failure to observe obligations attendant upon a direct or indirect expropriation of an investment; (ii) failure to ensure and afford fair and equitable treatment to investments; (iii) failure to observe the duty not to impair by unreasonable or discriminatory measures the operation, management, maintenance, use, enjoyment or disposal of investments; (iv) nationality discrimination against the Claimants and in favor of Hungarian nationals in the award of radio-broadcasting licenses; and (v) failure to observe obligations entered into with regard to investments. ...

69. Respondent's violations of customary international law include ~~(i) breach of the international minimum standard of treatment of foreign investors and (ii) the~~ expropriation without compensation of Claimant's investments without observance of due process and payment of prompt, adequate and effective compensation equal to the fair market value of the investments.¹⁴

C. Relief Sought

34. The Claimants continue to seek from the Tribunal, *inter alia*, the following formal relief:

a. Declaring that the Respondent has breached the Treaties: ~~i.~~ by expropriating the Claimants' investments without complying with the requirements of the Treaties, including payment of prompt, adequate and effective compensation;

~~ii. by failing to accord fair and equitable treatment to the Claimants' investments;~~

~~iii. by taking unreasonable or discriminatory measures that impaired the operation, management, maintenance, use, enjoyment or disposal of the Claimants' investments; and~~

~~iv. by discriminating against the Claimants and in favor of Hungarian nationals in the award of the radio broadcasting licenses; and~~

~~iv. by failing to observe obligations entered into with respect to Claimants' investments;~~

b. Declaring that the Respondent has breached customary international law

~~i. by violating the minimum standard of treatment of foreign investors; and ii.~~

by expropriating the Claimants' investments without observance of due process and payment of prompt, adequate and effective compensation."¹⁵

¹⁴ Ibid, [65]-[69], references omitted.

¹⁵ Ibid, [72].

IV. RELEVANT LEGAL TEXTS

35. The Tribunal sets forth below the legal texts relevant to decide on Respondent's Objections under ICSID Arbitration Rule 41(5).

A. The ICSID Convention and the ICSID Arbitration Rules

36. Article 25 of the ICSID Convention, which is found within Chapter II headed "Jurisdiction of the Centre", provides, in relevant part:

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

37. Article 42(1), which is found within Chapter IV Section 3 of the Convention headed "Powers and Functions of the Tribunal" provides:

The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

38. Arbitration Rule 41 "Preliminary Objections" provides in pertinent part:

(5) Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.

(6) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect.

B. The Netherlands-Hungary Bilateral Investment Treaty

39. Article 10 of the Netherlands BIT, provides¹⁶:

- 1) Any dispute between either Contracting Party and the investor of the other Contracting Party concerning expropriation or nationalization of an investment shall as far as possible be settled by the disputing Parties in an amicable way.
- 2) If such disputes cannot be settled within six months from the date either Party requested amicable settlement, it shall upon request of either disputing party be submitted to an arbitral tribunal. In this case the provisions of paragraphs 3-9 of Article 9 shall be applied *mutatis mutandis*. ...
- 3) In case both Contracting Parties have become members of the [ICSID Convention], disputes between either Contracting Party and the investor of the other Contracting Party under the first paragraph of the present Article shall be submitted for settlement by conciliation or arbitration to [ICSID].

40. Article 9(6) provides:

The arbitral tribunal shall decide on the basis of respect for the law, including particularly the present Agreement and other relevant agreements existing between the two Contracting Parties and the universally acknowledged rules and principles of international law.

41. Article 4(1) provides:

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

- (a) the measures are taken in the public interest and under due process of law;
- (b) the measures are not discriminatory or contrary to any undertaking which the former Contracting Party may have given;
- (c) the measures are accompanied by provision for the payment of just compensation. Such compensation shall represent the genuine value of the investments affected and shall, in order to be effective for the claimants, be paid and made transferable, without undue delay, to the country designated by the claimants concerned and in the currency of

¹⁶ Agreement between the Kingdom of the Netherlands and the Hungarian People's Republic for the encouragement and reciprocal protection of investments dated 2 September 1987 (the "Netherlands BIT") (Exh. C-1).

the country of which the claimants are nationals or in any freely convertible currency adopted by the claimants.

C. The Switzerland-Hungary Bilateral Investment Treaty

42. Article 10 of the Switzerland BIT, which is headed “Settlement of disputes between a Contracting Party and an investor of the other Contracting Party”, provides in relevant part:¹⁷

- (1) For the purpose of solving disputes with respect to investments between a Contracting Party and an investor of the other Contracting Party and without prejudice to Article 9 of this Agreement (Settlement of disputes between Contracting Parties), consultations will take place between the parties concerned.
- (2) If these consultations do not result in a solution within six months, the parties to the dispute may proceed as follows:
 - a) A dispute concerning Article 6 of this Agreement shall upon request of the investor be submitted to [ICSID] instituted by the [ICSID Convention].
 - b) In the event of a dispute not referred to in paragraph (2), letter a) of this Article the dispute shall be submitted, upon agreement on such submission by both parties to the dispute, to [ICSID].

43. Article 6 of the Switzerland BIT, which is headed “Expropriation and Compensation”, provides, in relevant part:

- (1) Neither of the Contracting Parties shall take, either directly or indirectly measures of expropriation, nationalization or any other measure having the same nature or the same effect against investments belonging to investors of the other Contracting Party, unless the measures are taken in the public interest, on a non-discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation. (...)

V. THE PARTIES’ SUBMISSIONS

44. By its written submission of 31 August 2012, Respondent asserts that Claimants’ Request for Arbitration fails to allege that Hungary consented to submit to ICSID arbitration claims arising under the Netherlands and Switzerland BITs, unrelated to expropriation. It further asserts

¹⁷ Agreement between the Swiss Confederation and the Hungarian People’s Republic on the Reciprocal Promotion and Protection of Investments dated 5 October 1988 (the “Switzerland BIT”) (Exh. C-2).

that Hungary's limited consent to arbitration as provided in the dispute resolution provision of each of the Treaties does not cover any treaty claims beyond expropriation; nor does it cover claims arising independently under customary international law. On this basis, Hungary requests that the Tribunal issue a decision pursuant to ICSID Arbitration Rule 41(5) dismissing with prejudice such claims.

45. It is undisputed between the Parties that the question currently before this Tribunal can be the subject matter of a preliminary objection pursuant to ICSID Arbitration Rule 41(5).¹⁸ In addition, the applicable legal standard for the determination of such issues is also undisputed. The Respondent asserts that "to sustain an objection under Rule 41(5) a tribunal has to find that a claim is 'without legal merit' and that the lack of legal merit is 'manifest.'"¹⁹ This has not been contested by the Claimants.
46. Rather, Claimants consider that "Respondent's invocation of Rule 41(5) is unnecessary, and the Tribunal need not consider the merits of the Objection."²⁰ Respondent having made plain that it does not consent to inclusion of the non-expropriation claims within the compass of the present arbitration, the Claimants accept that those claims may not be pursued. Accordingly, a formal ruling from the Tribunal is unnecessary.
47. Following the Claimant's filing of its Revised Amended Request, and the further exchange of written pleadings upon it, the scope of matters remaining in dispute between the Parties that require a decision from the Tribunal has been significantly reduced. Accordingly, it is not now necessary to set forth in detail all of the arguments raised by the Parties on the Rule 41(5) Objection prior to the First Session. Rather, the Tribunal proposes to focus its exposition of the pleadings, and its analysis of the issues, on the two outstanding questions:
- (1) Whether, in respect of non-expropriation elements of the claim that the parties agree may not be pursued in the present arbitration, the Tribunal ought nevertheless to issue a decision under Rule 41(5);

¹⁸ See Rule 41(5) Objection, [7] (stating that "it is clear that the objection may be either merits-based or jurisdictional.") Claimants did not contest this point.

¹⁹ Rule 41(5) Objection, [6].

²⁰ Claimants' Response, 1.

(2) Whether the Respondent is entitled to relief under Rule 41(5) in respect of the Claimants' claim for breach of the customary international law standard of expropriation.

A. The Non-Expropriation Claims

48. Hungary contends that the Request includes three categories of claims. Two of these categories relate to expropriation claims arising under the Treaties. The third category includes "claims that Hungary breached 'other standards' of the same treaties, allegedly 'by failing to accord fair and equitable treatment' 'by discriminating against the Claimants' and 'by failing to observe obligations entered with respect to Claimants.'" This category *also* includes allegations that Hungary "has breached customary international law by violating the minimum standard of treatment of foreign investors."²¹ According to Respondent, these latter claims (hereinafter the "Non-Expropriation Claims") ought to be dismissed as manifestly without legal merit.
49. First, it asserts that "...consent for arbitration by the host State must exist *prior* to the claim being submitted to arbitration. To the extent a request for arbitration fails *even to allege* the existence of such prior consent, it must be dismissed as manifestly without legal merit."²² In particular, it alleges that by referring in their Request for Arbitration to a third category of claims [the Non Expropriation Claims] which are "subject to arbitration in this proceeding with the parties' mutual consent," the Claimants have tacitly acknowledged that no advance consent exists to arbitrate those claims, while at the same time including those claims in their request for relief.²³ Given that the Request is lacking a required material element, the Non-Expropriation Claims must be dismissed.

²¹ Rule 41(5) Objection, [1] (citing the Request for Arbitration at [24], [27], [65], [70] and [72]).

²² Rule 41(5) Objection, [4]; *see also* [13]-[17]; [37] – [39]; Respondent's Letter dated 20 September 2012, 2.

²³ Rule 41(5) Objection, [37] (citing the Request for Arbitration at [24] and [27] and [70]).

50. Secondly, it alleges that on the face of each of the Treaties, Hungary consented to arbitrate only disputes concerning expropriation. It submits that this construction is supported by arbitral decisions in like cases.²⁴
51. Respondent considers that Claimants' Revised Amended Request for Arbitration, is inconsistent with the Tribunal's instruction as set forth in PO No 1 "as Claimants have chosen to treat it as a license to redraft their pleadings..."²⁵ "[I]n any event, they "fail to remedy the defect to which Hungary presented objections under ICSID Rule 41(5)..." because "the Revised Request *fails to remove* allegations of breaches of various treaty provisions not relating to expropriation."²⁶ The Respondent therefore asks the Tribunal to adopt Hungary's version of the Revised Amended Request for Arbitration.²⁷
52. Even if the principal assertions in the Objection are uncontested by Claimants, "the Tribunal cannot simply leave a Rule 41(5) Objection unresolved." Instead, and consistent with the *Trans-Global Petroleum Inc. v. Jordan* tribunal, a decision is required "particularly when the Request for Arbitration so clearly requests the Tribunal to resolve issues that are not properly before the Tribunal."²⁸
53. Claimants consider that "Respondent's contention that consent must have existed before the filing of the Request for Arbitration is overly formalistic in this context, where Respondent had

²⁴ Rule 41(5) Objection, [23] – [30], citing *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Admissibility of 19 June 2006, [216] (RA-25); *Telenor Mobile Communications A.S. v. Hungary*, ICSID Case No. ARB/04/15, Award of 13 September 2006, [81] and [83] (RA-23); *William Nagel v. Czech Republic*, SCC Case No. 049/2002, Final Award of 9 September 2003, [45] and [271] (RA-17); *Saipem S.p.A. v. Bangladesh*, ICSID Case No. ARB/07/5, Award of 30 June 2009 [121] (RA-20).

²⁵ See Respondent's Letter dated 26 October 2012, 1; Respondent's Letter dated 7 November 2012, 2; Respondent's Letter dated 10 December 2012, 1, (rejecting Claimants' allegations that their acceptance of passages stricken from the Request for Arbitration was only provisional).

²⁶ Respondent's Letter dated 26 October 2012, 1 -2; see also Respondent's Letter dated 7 November 2012, 2.

²⁷ Respondent's Letter dated 26 October 2012, 2 and Annex A; Respondent's Letter dated 7 November 2012, 3; Respondent's Letter dated 10 December 2012, 3.

²⁸ Respondent's Letter dated 20 September 2012 p. 2, citing *Trans-Global Petroleum Inc. v. Jordan*, ICSID Case No. ARB/07/25 (the tribunal rendering a decision after claimant withdrew a claim in response to respondent's objection under Rule 41(5)), Decision on Respondent's Objection under Rule 41(5) of 12 May 2008 (RA-24) ("*Trans-Global*"); Respondent's Letter dated 26 October 2012, 2.

already consented to submit to arbitration certain claims and was invited to submit to arbitration the remaining claims.”²⁹ Furthermore, Claimants notified Respondent early on that it was in violation of several non-expropriation obligations which it intended to submit to ICSID arbitration if not resolved. Respondent did not object to arbitrating those non-expropriation claims and therefore including those Non-Expropriation Claims in this proceeding was consistent with the ICSID Convention and the Treaties.³⁰

54. They further assert that “[n]othing prevented Respondent from agreeing to submit to arbitration the non-expropriation claims asserted in the Amended Request for Arbitration and resolve – once and for all – every single claim related to the breach of Respondent’s international obligations under the Netherlands Treaty, the Switzerland Treaty as well as customary international law.”³¹
55. According to Claimants, Hungary’s argument that the lack of consent to arbitration of the Non-Expropriation Claims compels the Tribunal to dismiss them pursuant to ICSID Arbitration Rule 41(5) is without merit.³² They reject Respondent’s interpretation of the *Trans-Global* decision and consider it inapposite, since in that case the parties had fully briefed and argued the merits of the Rule 41(5) Objection and it was only later that the claimant decided to withdraw one of the three claims, while pursuing the other, “making it logical for the Tribunal to issue a written award deciding the objections as to all three.”³³
56. With regard to the Revised Amended Request for Arbitration, Claimants consider that the amendments are “proper and consistent with the Tribunal’s instructions” and that the Revised Request should be acknowledged as the operative Request for Arbitration in these proceedings.³⁴ In particular, in the Revised Request, Claimants “struck the request for

²⁹ Claimants’ Letter dated 24 September 2012, 2.

³⁰ Claimants’ Letter dated 24 September 2012, 3.

³¹ Claimants’ Response, 2.

³² Claimants’ Response, 1.

³³ Claimants’ Letter dated 24 September 2012, 3.

³⁴ Claimants’ Letter dated 30 October 2012, 1, 3; Claimants’ Letter dated 7 November 2012.

declaratory relief related to Respondent's violation of the minimum standard of treatment under customary international law."³⁵

57. Claimants conclude that while "Claimants' [N]on-[E]xpropriation claims are meritorious...the Tribunal cannot decide them because Respondent has refused to consent to their arbitration"³⁶ and "the Tribunal need not enter an unnecessary order of dismissal of claims under Rule 41(5)."³⁷

B. The Customary International Law Expropriation Claim

58. Respondent alleges that it has not consented to arbitration of claims arising from stand-alone obligations under customary international law, and therefore the customary international law expropriation claim must be dismissed.³⁸ Article 42 of the ICSID Convention does not "create [an] independent obligation on the part of the host State to act in accordance with customary international law, much less does it provide a source of consent to *arbitrate* such claims before ICSID."³⁹ Nor does it "authorize a tribunal to consider claims for relief that are independent of the treaty terms."⁴⁰
59. Accordingly, "neither the treaties at issue nor Article 42(1) of the ICSID Convention entitles Claimants to assert customary international law *as an independent cause of action*, as Claimants purport to do in their Request for Arbitration."⁴¹ Respondent further rejects Claimants' alleged assertions that the dispute resolution provision of the Netherlands BIT, should be read as a reference to Article 4 of the Treaty [Expropriation and Nationalization] as

³⁵ Claimants' Letter dated 7 November 2012, 2.

³⁶ Claimants' Letter dated 24 September 2012, 4; *see also* Claimants' Response, 3.

³⁷ Claimants' Letter dated 30 October 2012, 3.

³⁸ Rule 41(5) Objection, [32]-[36].

³⁹ *Ibid*, [35].

⁴⁰ *Ibid*, [35].

⁴¹ Respondent's Letter dated 10 December 2012, 2 (referring to *Generation Ukraine Inv. v. Ukraine*, ICSID Case No. ARB/00/9, Award of 16 December 2003, [11.3]).

well as to disputes under customary international law on expropriation.⁴² The wording of the Switzerland BIT is even more clear, as it limits the consent to arbitration only to disputes ‘concerning Article 6’ of that Treaty.⁴³

60. Further, Respondent contends that Claimants conceded at the First Session that the request for relief based on customary international law should be deleted and should not be allowed to resile from this concession by failing to make such a deletion.⁴⁴
61. Claimants submit that they “should not be forced to delete their existing reference to ‘principles of international law’” or “abandon their request in paragraph 72(c) that the Tribunal declare that Respondent has ‘breached customary international law by expropriating the Claimants’ investment.’ These are plainly expropriation claims, and the Tribunal has jurisdiction to apply principles of international law and provide the requested relief under the Netherlands-Hungary [BIT] and Article 42(1) of the ICSID Convention.”⁴⁵
62. Claimants contend that they made no concession on this point at the First Session, always making clear that they would need an opportunity to check and confirm the position in writing.⁴⁶ In any event, they submit that this issue may not be resolved under the Rule 41(5) procedure as “manifestly without legal merit”. Rather, it requires consideration at the hearing on the merits, after full argument.⁴⁷

VI. THE TRIBUNAL’S ANALYSIS

63. In view of the narrowing of the issues that has been achieved as a result of the discussions and exchanges of pleadings between the Parties, the Tribunal is in a position to limit its

⁴² Respondent’s Letter dated 10 December 2012, 2 (referring to Claimants’ Letter dated 7 November 2012).

⁴³ Respondent’s Letter dated 10 December 2012, 2; Hungary-Switzerland BIT, Art. 10 (Exh. C-2).

⁴⁴ Respondent’s Letter dated 7 November 2012, 2 (referring to audio recording of First Session).

⁴⁵ Claimants’ Letter dated 30 October 2012, 2; *see also* Claimants’ Letter dated 7 November 2012, 1.

⁴⁶ Claimants’ Letter dated 7 November 2012, 2.

⁴⁷ Claimants’ Letter dated 13 December 2012, 2.

consideration to the remaining unresolved questions left for its decision. Accordingly, it proposes to address:

- (1) Whether, in the light of the Revised Amended Request, the Respondent is still entitled to a decision on its Rule 41(5) in respect of the Non-Expropriation Claims; and,
- (2) Whether the Customary International Law Expropriation Claim is “manifestly without legal merit” within the terms of Rule 41(5) and should therefore be dismissed.

A. The Non-Expropriation Claims

64. Both Parties are agreed that, in the absence of consent to the arbitration of additional claims by both parties, the jurisdiction of the Tribunal in the present proceedings is limited to claims of expropriation. The Treaties, as the operative instruments of consent so state in express terms:

(1) The dispute settlement provision in the Netherlands BIT is limited to disputes “concerning expropriation or nationalization of an investment”;⁴⁸

(2) The dispute settlement provision in the Switzerland BIT is, save where both parties consent, limited to a “dispute concerning Article 6 of this Agreement”. Article 6 is headed “Expropriation and Compensation” and proscribes “measures of expropriation, nationalization or any other measure having the same nature or the same effect against investments.”

65. The question remaining for the Tribunal is whether the filing of the Revised Amended Request is sufficient acknowledgement of the point, as Claimants contend, or whether a ruling under Order 41(5) is needed, as Respondent continues to assert.

66. The Tribunal has reviewed the Revised Amended Request. Paragraph 13.2 of PO No1 requires Claimants, as they had agreed to do at the First Session, to “strik[e] through the passages referring to any non-expropriation claims” that they consider no longer pending before this Tribunal. In a number of paragraphs, this is precisely what Claimants have done. Notably, the

⁴⁸ Art. 10.

revised Request for Relief (reproduced above at [34]) does strike through the non-expropriation claims.

67. However, in other paragraphs, Claimants have gone beyond the terms of the Tribunal's order in PO No1, by maintaining previous text relating to the non-expropriation claims and supplementing it. For example, the revised text of paragraph 24 as filed by Claimants now reads:

~~This dispute~~ The Respondent has also results from committed breaches of other standards of the Netherlands treaty described above, which but those breaches are not subject to arbitration in this proceeding with the parties' mutual consent because Respondent has refused to arbitrate those breaches.

There are further examples of a similar approach taken in paragraphs 27, 65 and 68.

68. Respondent submits that this does not comply with PO No1 and that, in the circumstances, it is entitled to a Decision under Rule 41(5) dismissing the Non-expropriation Claims. Further, it requests the Tribunal to adopt Hungary's rival proposal as to the passages to be stricken from the text of the Request for Arbitration.⁴⁹ Claimants, for their part, contend that "[t]here is nothing inappropriate or prejudicial in Claimants' ... making reference to Respondent's refusal to consent to arbitrate the non-expropriation claims, where such consent was the express premise on which the claims had initially been made".⁵⁰
69. The Tribunal does not consider that it is part of its function, as arbitrator appointed by the Parties to adjudge their respective claims and defences, to draft either Party's pleadings for them. For this reason, it does not enter upon a reformulation of the Revised Amended Request whether in the terms proposed by Respondent or otherwise.
70. Nevertheless, it does consider that the plain text of the Treaties makes it manifest that, in the absence of other consent, the Non-Expropriation Claims fall outside the jurisdiction of this Tribunal. Accordingly (and without prejudice to any merit that those claims may have in

⁴⁹ Respondent's Letter dated 26 October 2012.

⁵⁰ Claimants' Letter dated 30 October 2012, 1.

another forum) they must be treated as “without legal merit” for the purpose of these proceedings.

71. The Tribunal’s overriding duty is to ensure that those claims that are properly within its jurisdiction are determined in accordance with the applicable law and fairly as between the Parties. It considers that the approach presently adopted by Claimants in those paragraphs of its Revised Amended Request referred to in paragraph 67 above falls outside the scope of its jurisdiction and do not contribute to the fair disposition of these proceedings. Such passages go beyond recording Respondent’s refusal to arbitrate the non-expropriation claims and contain a positive averment that Respondent has committed other treaty breaches. For the reasons already stated, it is outside the jurisdiction of this Tribunal to determine whether or not this is so. It follows that Respondent is neither obliged nor entitled to plead to these averments in its Counter-Memorial, and that they cannot be the subject of evidence or submission. They fall outside the scope of these proceedings and cannot therefore form any part of them.
72. Accordingly, the Tribunal considers that it is necessary for it to enter a formal dismissal of the non-expropriation claims from these proceedings, pursuant to its powers under Rule 41(5).

B. The Customary International Law Expropriation Claim

73. The position is different as regards the Customary International Law Expropriation Claim. In its present form, this is found in paragraph 72(b) of the Revised Amended Request, which seeks an award “[d]eclaring that the Respondent has breached customary international law by expropriating the Claimants’ investments without observance of due process and payment of prompt, adequate and effective compensation.” Paragraph 69 adds that: “[c]ustomary international law is applicable in this case under Article 42(1) of the ICSID Convention.”
74. In its Rule 41(5) Objection, Respondent seeks separately a dismissal of this claim on the ground that it falls outside the instruments of consent, being the arbitration provisions of the Treaties. Respondent also submits that the exclusion of this claim was conceded by Claimants at the First Session.

75. Claimants contend that such a claim is within the Tribunal's jurisdiction, as the Parties consented to its inclusion in particular by Article 10 of the Netherlands Treaty, which refers simply to disputes "concerning expropriation or nationalization of an investment".⁵¹
76. The Tribunal does not consider that, by their statements in the First Session, the Claimants have conceded the excision of this claim. The discussion between the Tribunal and counsel as to the passages in the Request for Arbitration that may be covered by the agreement between the Parties on the Rule 41(5) Objection proceeded expressly on the basis that neither Party would be bound without a further opportunity to review the matter after the hearing and to confirm their position in writing. Moreover, the Tribunal confined the relevant paragraph in PO No1 to a requirement that Claimants file "an amended Request for Arbitration striking through the passages referring to any non-expropriation claims" (emphasis added). It made at that stage no specific provision in relation to the Customary International Law Expropriation Claim. It simply permitted the Respondent to renew its Rule 41(5) Objection in the event that "it maintains any objection that the Amended Request has correctly removed those claims that Claimants have agreed may not be pursued in these proceedings."⁵²
77. Thus, the Tribunal regards the question of whether the Customary International Law Expropriation Claim falls within or without its jurisdiction as still being at large in these proceedings. If and only if the Tribunal is satisfied that the invocation of its jurisdiction on this basis is "manifestly without legal merit" is it empowered to dismiss it under Rule 41(5).
78. The question at this stage is not one of the law applicable to the merits of the proceedings. True it is that the choice of law rule in Article 42(1) of the ICSID Convention includes reference to "such rules of international law as may be applicable." This means that the Tribunal has to apply international law *as a whole* to the claim, and not the provisions of the BIT in isolation.⁵³ It must in any event construe the applicable primary rules in the Treaties by reference to

⁵¹ Claimants' letter dated 30 October 2012, 2 n3; Claimants' letter dated 7 November 2012, 3 n5.

⁵² PO No 1, [13.3].

⁵³ *MTD Equity Sdn Bhd ('MTD') v Chile* (Decision on Annulment) (2007) 13 ICSID Rep 500, [61].

other relevant rules of international law applicable in the relations between the parties.⁵⁴ In the case of the Netherlands BIT, this point is made expressly in Article 9(6), which provides:

The arbitral tribunal shall decide on the basis of respect for the law, including particularly the present Agreement and other relevant agreements existing between the two Contracting Parties and the universally acknowledged rules and principles of international law.

79. But what is at issue here is not the determination of the content of the applicable treaty norms in the context of international law as a whole, including customary international law. Rather, the Claimants advance an additional separate cause of action for expropriation under customary international law. This therefore raises a question not of applicable law, but of the scope of the Tribunal's jurisdiction *ratione materiae*. Such a question is not determined by reference to Article 42 of the ICSID Convention, which is solely concerned with the law applicable to the merits of a dispute already properly within the jurisdiction of the Centre.⁵⁵
80. The jurisdiction of the Centre is determined by Article 25 of the Convention, which requires "consent in writing to submit to the Centre." In the present case, the only instruments of consent relied upon by Claimants are the dispute settlement provisions in the Treaties, namely Article 10 of the Netherlands BIT and Article 10 of the Switzerland BIT. Each of these constitutes a "convention to arbitrate"⁵⁶ whose existence, scope and construction as an instrument of consent for the purpose of Article 25 of the ICSID Convention is separate from the other obligations in the Treaty in which it is found. Each such instrument of consent is to be construed by the Tribunal in accordance with the general principles of *pacta sunt servanda* and good faith in order to "find out and to respect the common will of the parties."⁵⁷
81. Article 10 of the Switzerland BIT is, by its terms, limited in the absence of other consent, to "[a] dispute concerning Article 6 of this Agreement". Article 6 contains the Treaty stipulation

⁵⁴ Art31(3)(c) Vienna Convention on the Law of Treaties, 1969.

⁵⁵ *CMS Gas Transmission Co v Argentina* (Decision on Annulment) ICSID Case No ARB/01/8 (September 25,2007), [68]; *Southern Pacific Properties (Middle East) Ltd v Egypt* (Decision on Jurisdiction No 2) (1988) 3 ICSID Rep 131; Schreuer *The ICSID Convention: A Commentary* (2nd edn, 2009), 550-2.

⁵⁶ *Amco Asia Corp v Indonesia* (Decision on Jurisdiction) (1983) 1 ICSID Rep 394, [14].

⁵⁷ *Idem*.

in relation to expropriation. This instrument of consent is therefore not wide enough to encompass a separate claim of breach of the customary international law standard of expropriation, but is limited to the treaty standard (construed in accordance with international law as the applicable law). It follows that the Tribunal's jurisdiction *ratione materiae* has been defined by the Contracting Parties.

82. However, Article 10 of the Netherlands BIT, on which Claimants have specifically relied in their recent submissions, refers generally to “[a]ny dispute between either Contracting Party and the investor of the other Contracting Party concerning expropriation or nationalization of an investment.” Article 10 is not expressly linked to Article 4(1), which sets forth the treaty standard relating to expropriation. Indeed, Article 4(1) does not use the expression “expropriation or nationalization” at all. Instead, it refers functionally to “measures depriving, directly or indirectly, investors of the other Contracting Party of their investments”. At this point, the Tribunal does not decide whether the consent to arbitrate “[a]ny dispute ... concerning expropriation or nationalization of an investment” in Article 10 of the Netherlands BIT is necessarily limited to disputes founded upon Article 4(1). Expropriation and nationalization are terms that may also properly refer to the standards of customary international law, where such concepts have been widely considered and applied.
83. At this stage in the proceedings, the Tribunal need reach no conclusion as to whether there is any difference in the applicable content of the customary international law standard to that set out in Article 4(1) of the Netherlands BIT. Nor indeed need it take a final decision as to whether Article 10 does, as a matter of construction, embrace both the customary international rules on expropriation and the treaty standard. Despite the opportunities afforded to both Parties to develop their written submissions on the Rule 41(5) Objection, the Tribunal does not consider that this question has as yet been sufficiently briefed to enable it to reach a conclusive determination on the point.
84. It is sufficient for present purposes to decide that the Customary International Law Expropriation claim is not “manifestly without legal merit” for the purpose of Rule 41(5). It must therefore be allowed to go forward to the hearing on the merits. This finding does not preclude Respondent from maintaining, should it be so advised, an objection to jurisdiction in relation to this claim. But the Tribunal considers that, in view of fact that the Parties are

agreed that the treaty expropriation claims are within its jurisdiction, and the close overlap between such claims and the customary international law expropriation claim, any such objection, if made, should be joined to the merits.

VII. DECISION

85. **For the above reasons, the Tribunal hereby decides to:**

- (1) Grant Respondent's objection under Rule 41(5) of the ICSID Arbitration Rules to the extent of dismissing all Non-Expropriation Claims from these proceedings as being outside the scope of the Tribunal's jurisdiction;**
- (2) Deny Respondent's objection under Rule 41(5) in respect of the Customary International Law Expropriation Claim;**
- (3) Join any further objection to the jurisdiction of the Centre in respect of the Customary International Law Expropriation Claim, to the extent maintained, to the merits;**
- (3) Grant Claimants 14 days from dispatch of this Decision to the Parties within which to file a further Revised Amended Request reflecting the terms of this Decision;**
- (4) Reserve all questions as to the costs of the Rule 41(5) Objection.**

[Signed]

**Hon Marc Lalonde QC
Arbitrator**

[Signed]

**J Christopher Thomas QC
Arbitrator**

[Signed]

**Professor Campbell McLachlan QC
President**