

**International Centre for Settlement of Investment Disputes**

Washington, D.C.

**Tokios Tokelès (Claimant)**

v.

**Ukraine (Respondent)**

Case No. ARB/02/18

**DECISION ON JURISDICTION**

*Members of the Tribunal*

Professor Prosper Weil, President

Professor Piero Bernardini

Mr. Daniel M. Price

*Secretary of the Tribunal*

Ms. Martina Polasek

*Representing the Claimant*

Mr. Ivan Lozowy, General Counsel, Tokios Tokelès

Mr. Sergiy Danylov, Chairman of the Board of Directors, Tokios Tokelès

Ms. Ludmilla Zhyltsova, Tokios Tokelès

Mr. Oleksandr Danylov, Tokios Tokelès

*Representing the Respondent*

Mr. Vasyl Marmazov, Ministry of Justice

Mr. Kostyantyn Krasovsky, Ministry of Justice

Mr. Volodymyr Sitarchuk, Cabinet of Ministers

Mr. Volodymyr Krokmal, Ministry of Foreign Affairs

Mr. Victor Zav'yalov, State Tax Administration of Ukraine

Mr. Dmytro Gryschenko, Counsel

Mr. Oleg Schevchuk, Counsel

Mr. Andriy Alekseyev, Counsel

Mr. Sergiy Voytovych, Counsel

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## I. THE DISPUTE

1. The Claimant, Tokios Tokelès, is a business enterprise established under the laws of Lithuania. It was founded as a cooperative in 1989, and, since 1991, has been registered as a “closed joint-stock company.” The Claimant is engaged primarily in the business of advertising, publishing and printing in Lithuania and outside its borders.

2. In 1994, Tokios Tokelès created Taki spravy, a wholly owned subsidiary established under the laws of Ukraine. Taki spravy is in the business of advertising, publishing, and printing, and related activities in Ukraine and outside its borders. The Claimant made an initial investment of USD 170,000 in Taki spravy in 1994, consisting of office furniture, printing equipment, and the construction of and repairs to office facilities. Since that time, the Claimant has reinvested the profits of Taki spravy in the subsidiary, purchasing additional printing equipment, computer equipment, bank shares, and automobiles. The Claimant asserts that it has invested a total of more than USD 6.5 million in its Ukrainian subsidiary in the period 1994-2002.

3. The Claimant, Tokios Tokelès, alleges that governmental authorities in Ukraine engaged in a series of actions with respect to Taki spravy that breach the obligations of the bilateral investment treaty between Ukraine and Lithuania (“Ukraine-Lithuania BIT” or “Treaty”).<sup>1</sup> The Claimant contends that, beginning in February 2002, the Respondent engaged in a series of unreasonable and unjustified actions against Taki spravy that adversely affected the Claimant’s investment. The Claimant alleges that governmental

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<sup>1</sup> Agreement between the Government of Ukraine and the Government of the Republic of Lithuania for the Promotion and Reciprocal Protection of Investments, Feb. 8, 1994 (entered into force on Feb. 27, 1995) (“Ukraine-Lithuania BIT”). The Treaty was done in the “Ukrainian, Lithuanian and English languages, both texts being equally authentic. In case of divergency [sic] of interpretation the English text shall prevail.” *Id.* at 11.

authorities of the Respondent: (1) conducted numerous and invasive investigations under the guise of enforcing national tax laws; (2) pursued unsubstantiated actions in domestic courts, including actions to invalidate contracts entered into by Taki spravy; (3) placed the assets of Taki spravy under administrative arrest; (4) unreasonably seized financial and other documents; and (5) falsely accused Taki spravy of engaging in illegal activities. The Claimant argues that the governmental authorities took these actions in response to the Claimant's publication in January 2002 of a book that favorably portrays a leading Ukrainian opposition politician, Yulia Tymoshenko.

4. The Claimant contends that it objected to this treatment by the governmental authorities of the Respondent and made multiple unsuccessful efforts to settle the dispute. These efforts included meeting with local tax officials, sending written complaints to tax and law enforcement officials, and sending a letter of appeal to the President of Ukraine. In each case, the Claimant contends, these efforts were unsuccessful and the governmental action complained of by the Claimant continued.

## II. PROCEDURAL HISTORY

5. The Claimant initiated this proceeding on August 14, 2002, when it filed a Request for Arbitration ("RFA") with the International Centre for Settlement of Investment Disputes ("ICSID") along with its wholly owned subsidiary, Taki spravy. The RFA included letters of consent to arbitration from Tokios Tokelès and Taki spravy dated August 7 and August 9, respectively. In the RFA, the Claimants alleged that various actions by Ukrainian governmental authorities during 2002 constituted violations of the Ukraine-Lithuania BIT.

6. The requesting parties filed a supplement to their request on September 4, 2002, seeking, among other damages, just and adequate compensation for the losses sustained by Tokios Tokelès and Taki spravy for the requisitioning and destruction of their property by Ukraine's forces or authorities.

7. On October 15, 2002, ICSID notified the requesting parties that the dispute had not been subject to negotiation for a period of six months as required by Article 8 of the Ukraine-Lithuania BIT. On October 17, 2002, the requesting parties withdrew their RFA until such time as it "may be renewed and resubmitted for consideration to the Centre." The RFA was reinstated by Tokios Tokelès and Taki spravy on November 22, 2002.

8. On December 6, 2002, ICSID notified the requesting parties that Ukraine and Lithuania had not agreed that Taki spravy, an entity organized under the laws of Ukraine, should be treated as national of Lithuania under Article 25(2)(b) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention" or "Convention"<sup>2</sup>) and Article 1(2)(c) of the Ukraine-Lithuania BIT. In response, Tokios Tokelès removed Taki spravy as a requesting party on December 9, 2002, which ICSID acknowledged in a letter on the same date.

9. On December 9, 2002, Ukraine requested of ICSID the opportunity to present preliminary observations on jurisdiction prior to the registration of the RFA. In Ukraine's view, the content of the RFA might have prompted the Secretary-General not to register the same because, pursuant to Article 6(1)(b) of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, "the dispute is manifestly outside

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<sup>2</sup> Ukraine and Lithuania became parties to the ICSID Convention on July 7, 2000, and Aug. 5, 1992, respectively. See ICSID, "List of Contracting States and other Signatories of the Convention (as of

the jurisdiction of the Centre.” After receiving the views of both Ukraine and the requesting party, the Secretary-General of ICSID registered the RFA on December 20, 2002.

10. To constitute the Tribunal, the Claimant chose the option provided in Article 37(2)(b) of the Convention to constitute the Tribunal, which provides for each party to appoint one arbitrator and the two parties to agree on the third arbitrator to serve as President of the Tribunal. In March 2003, the Claimant appointed Mr. Daniel Price, a national of the United States, and Ukraine appointed Professor Piero Bernardini, a national of Italy. When the parties were unable to agree on the President of the Tribunal, the Claimant requested that the Chairman of the Administrative Council appoint the presiding arbitrator, pursuant to Article 38 of the Convention and Rule 4(1) of the Arbitration Rules. After consultation with the parties, Professor Prosper Weil, a national of France, was appointed to serve as President of the Tribunal. The Tribunal was officially constituted on April 29, 2003 and Ms. Martina Polasek was designated to serve as Secretary of the Tribunal.

11. The Tribunal held its first session on June 3, 2003, in Paris, France. At this session, the Respondent raised objections to the jurisdiction of the Tribunal and requested that the proceeding be bifurcated so that jurisdiction could be addressed first and separately from the merits of the case. The Claimant opposed this request, arguing that the merits of the case are inextricably linked to the jurisdiction of the Tribunal. In addition, the Claimant submitted a request for provisional measures, namely, the suspension of parallel court proceedings in Ukraine and investigations being conducted

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November 3, 2003)” *available at* <http://www.worldbank.org/icdis/constate/c-states-en.htm>.

by Ukrainian tax authorities, which the Claimant argued could seriously impact its rights. The Respondent opposed this request.

12. After receiving written submissions from the parties, on July 1, 2003, the Tribunal granted the Claimant's request for provisional measures and the Respondent's request to bifurcate the proceedings.

13. In accordance with the Tribunal's order, the Respondent filed its memorial on jurisdiction on July 29, 2003, and the Claimant filed its counter-memorial on August 25, 2003. The Respondent's reply and the Claimant's rejoinder were filed on September 9 and September 24, 2003, respectively. On December 10, 2003, the Tribunal held an oral hearing on jurisdiction in Paris, France.

### III. RELEVANT LEGAL PROVISIONS

14. In reaching its majority decision on jurisdiction,<sup>3</sup> this Tribunal is guided by Article 25 of the ICSID Convention as well as Articles 1 and 8 of the Ukraine-Lithuania BIT.

15. Article 25 of the ICSID Convention sets forth the objective criteria for ICSID's jurisdiction and 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...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.

(2) National of another Contracting State means:

(b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any

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<sup>3</sup> The dissenting opinion of Professor Weil is attached to this Decision.

juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

16. Article 8 of the Ukraine-Lithuania BIT sets forth the disputes that may be submitted to international arbitration:

(1) Any dispute between an investor of one Contracting Party and the other Contracting Party in connection with an investment on the territory of that other Contracting Party shall be subject to negotiations between the parties in dispute.

(2) If any dispute between an investor of one Contracting Party and the other Contracting Party can not be thus settled within a period of six months, the investor shall be entitled to submit the case to:

(a) The International Centre for Settlement of Investment Disputes (ICSID)....

17. Article 1(1) of the BIT defines “investment” as “every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter....” The definition includes a non-exhaustive list of the forms that an investment may take, such as “(a) movable and immovable property...(b) shares [and] stocks...(c) claims to money....” Article 1(1) further provides that “[a]ny alteration of the form in which assets are invested shall not affect their character as investment provided that such an alteration is made in accordance with the laws of the Contracting Party in the territory of which the investment has been made.”

18. Article 1(2) defines “investor” as:

(a) in respect of Ukraine:

- natural person [sic] who are nationals of the Ukraine according to Ukrainian laws;

- any entity established in the territory of the Ukraine in conformity with its laws and regulations;

(b) in respect of Lithuania:

- natural person [sic] who are nationals of the Republic of Lithuania according to Lithuanian laws;

- any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations;

(c) in respect of either Contracting Party – any entity or organization established under the law of any third State which is, directly or indirectly, controlled by nationals of that Contracting Party or by entities having their seat in the territory of that Contracting Party; it being understood that control requires a substantial part in the ownership.

19. The jurisdiction of the Centre depends first and foremost on the consent of the Contracting Parties, who enjoy broad discretion to choose the disputes that they will submit to ICSID.<sup>4</sup> Tribunals shall exercise jurisdiction over all disputes that fall within the scope of the Contracting Parties' consent as long as the dispute satisfies the objective requirements set forth in Article 25 of the Convention.

20. Based on Article 25 of the Convention and the BIT, this Tribunal has jurisdiction over the present dispute if the following requirements are met: (1) the Claimant is an investor of one Contracting Party; (2) the Claimant has an investment in the territory of the other Contracting Party; (3) the dispute arises directly from the investment; and (4) the parties to the dispute have consented to ICSID jurisdiction over it. We turn now to examine the Respondent's arguments that these requirements have not been met.

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<sup>4</sup> See Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1 ICSID Reports 28, at para. 23 (stating that “[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre”) (“Executive Directors’ Report”).

#### IV. ANALYSIS OF RESPONDENT’S OBJECTIONS TO JURISDICTION

##### A. First Objection: Claimant Is Not a Genuine “Investor” of Lithuania

###### 1. Arguments of the Respondent

21. The Respondent does not dispute that the Claimant is a legally established entity under the laws of Lithuania. The Respondent argues, however, that the Claimant is not a “genuine entity” of Lithuania first because it is owned and controlled predominantly by Ukrainian nationals. There is no dispute that nationals of Ukraine own ninety-nine percent of the outstanding shares of Tokios Tokelès and comprise two-thirds of its management.<sup>5</sup> The Respondent also argues, but the Claimant strongly contests, that Tokios Tokelès has no substantial business activities in Lithuania and maintains its *siège social*, or administrative headquarters, in Ukraine. The Respondent contends, therefore, that the Claimant is, in terms of economic substance, a Ukrainian investor in Lithuania, not a Lithuanian investor in Ukraine.

22. The Respondent argues that to find jurisdiction in this case would be tantamount to allowing Ukrainian nationals to pursue international arbitration against their own government, which the Respondent argues would be inconsistent with the object and purpose of the ICSID Convention.<sup>6</sup> To avoid this result, the Respondent asks the Tribunal to “pierce the corporate veil,” that is, to disregard the Claimant’s state of incorporation and determine its nationality according to the nationality of its predominant

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<sup>5</sup> Messrs. Sergiy Danylov and Oleksandr Danylov, who are nationals of Ukraine, own ninety-nine percent of the shares in Tokios Tokelès, and Ms. Ludmilla Zhyltsova, a national of Lithuania, owns the remaining one percent. *See* Request for Arbitration, at Annex 6, “Statute of the Closed Joint-Stock Company ‘Tokios Tokelès’” at para. 3.6. Messrs. Danylov and Ms. Zhyltsova serve as managers of Tokios Tokelès. *See id.* at Annex 7.

<sup>6</sup> “The Convention is designed to facilitate the settlement of investment disputes between States and nationals of other States. It is not meant for disputes between States and their own nationals.” Christoph

shareholders and managers, to what the Respondent contends is the Claimant's lack of substantial business activity in Lithuania, and to the alleged situs of its *siège social* in Ukraine.

23. In support of its request to “pierce the corporate veil,” the Respondent makes three arguments, which we encapsulate as follows:

- The context in which the ICSID Convention and the Ukraine-Lithuania BIT reference and define corporate nationality allows the Tribunal to disregard the Claimant's state of incorporation and determine its corporate nationality based on the nationality of its controlling shareholders, *i.e.*, to pierce the corporate veil;
- The Tribunal should pierce the corporate veil of the Claimant in this case because allowing an enterprise that is established in Lithuania but owned and controlled predominantly by Ukrainians to pursue ICSID arbitration against Ukraine is contrary to the object and purpose of the ICSID Convention and the Ukraine-Lithuania BIT, namely, to provide a forum for the settlement of *international* disputes; and
- The jurisprudence of ICSID arbitration supports the use of a “control-test” rather than state of incorporation to define the nationality of juridical entities and it also supports piercing the corporate veil in certain circumstances that apply in the present case.

## 2. Nationality of Juridical Entities under Article 25 of the ICSID Convention

24. Article 25 of the Convention requires that, in order for the Centre to have jurisdiction, a dispute must be between “a Contracting State...and *a national of another Contracting State...*”<sup>7</sup> Article 25(2)(b) defines “national of another Contracting State,” to include “any juridical person which had the nationality of a Contracting State other than the State party to the dispute....” The Convention does not define the method for

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H. Schreuer, THE ICSID CONVENTION: A COMMENTARY 290 (2001).

<sup>7</sup> Emphasis added.

determining the nationality of juridical entities, leaving this task to the reasonable discretion of the Contracting Parties.<sup>8</sup>

25. Thus, we begin our analysis of this jurisdictional requirement by underscoring the deference this Tribunal owes to the definition of corporate nationality contained in the agreement between the Contracting Parties, in this case, the Ukraine-Lithuania BIT. As Mr. Broches explained, the purpose of Article 25(2)(b) is not to define corporate nationality but to:

...indicate the outer limits within which disputes may be submitted to conciliation or arbitration under the auspices of the Centre with the consent of the parties thereto. Therefore *the parties should be given the widest possible latitude to agree on the meaning of 'nationality' and any stipulation of nationality made in connection with a conciliation or arbitration clause which is based on a reasonable criterion.*<sup>9</sup>

26. In the specific context of BITs, Professor Schreuer notes that the Contracting Parties enjoy broad discretion to define corporate nationality: “[d]efinitions of corporate nationality in national legislation or in treaties providing for ICSID’s jurisdiction will be controlling for the determination of whether the nationality requirements of Article 25(2)(b) have been met.”<sup>10</sup> He adds, “[a]ny reasonable determination of the nationality of juridical persons contained in national legislation or in a treaty should be accepted by an ICSID commission or tribunal.”<sup>11</sup>

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<sup>8</sup> See Aron Broches, “The Convention on the Settlement of Investment Disputes between States and Nationals of Other States,” 136 RECUEIL DES COURS 331, 359-60 (1972-II).

<sup>9</sup> *Id.* at 361 (emphasis added); see also C.F. Amerasinghe, “Interpretation of Article 25(2)(B) of the ICSID Convention,” in INTERNATIONAL ARBITRATION IN THE 21<sup>ST</sup> CENTURY: TOWARDS “JUDICIALIZATION” AND UNIFORMITY 223, 232 (R. Lillich and C. Brower eds. 1993).

<sup>10</sup> Schreuer, at 286.

<sup>11</sup> *Id.*

### 3. Definition of “Investor” in Article 1(2) of the BIT

27. As have other tribunals, we interpret the ICSID Convention and the Treaty between the Contracting Parties according to the rules set forth in the Vienna Convention on the Law of Treaties, much of which reflects customary international law.<sup>12</sup> Article 31 of the Vienna Convention provides that “[a] treaty shall 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 light of its object and purpose.”<sup>13</sup>

28. Article 1(2)(b) of the Ukraine-Lithuania BIT defines the term “investor,” with respect to Lithuania, as “any *entity established* in the territory of the Republic of Lithuania in conformity with its laws and regulations.”<sup>14</sup> The ordinary meaning of “entity” is “[a] thing that has a real existence.”<sup>15</sup> The meaning of “establish” is to “[s]et up on a permanent or secure basis; bring into being, found (a...business).”<sup>16</sup> Thus, according to the ordinary meaning of the terms of the Treaty, the Claimant is an “investor” of Lithuania if it is a thing of real legal existence that was founded on a secure basis in the territory of Lithuania in conformity with its laws and regulations. The Treaty contains no additional requirements for an entity to qualify as an “investor” of Lithuania.

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<sup>12</sup> See, e.g., *Mondev Int’l Ltd v. United States of America*, Award, Case No. ARB(AF)/99/2 (Oct. 11, 2002) 42 I.L.M. 85 (2003), at para. 43; *Emilio Agustín Maffezini v. Kingdom of Spain*, Decision on Jurisdiction, Case No. ARB/97/7 (Jan. 25, 2000), at para. 27; *Waste Management, Inc. v. United Mexican States*, Award, Case No. ARB(AF)/98/2 (June 2, 2000), 40 I.L.M. 56 (2001), at n. 2.

<sup>13</sup> Vienna Convention on the Law of Treaties, art. 31(1) (May 22, 1969).

<sup>14</sup> Emphasis added.

<sup>15</sup> THE NEW SHORTER OXFORD ENGLISH DICTIONARY 830 (Thumb Index Edition 1993).

<sup>16</sup> *Id.* at 852.

29. The Claimant was founded as a cooperative in 1989 and was registered by the municipal government of Vilnius, Lithuania on August 9 of that year.<sup>17</sup> In 1991, the founders of Tokios Tokelès agreed to reorganize the cooperative into a closed joint-stock company, which the municipal government of Vilnius, Lithuania registered on May 2, 1991.<sup>18</sup> According to the Certificate of Enterprise, the address of Tokios Tokelès is Vilnius, vul. Seskines, 13-3. On August 11, 2000, the Ministry of the Economy of the Republic of Lithuania re-registered the Claimant as an enterprise and re-registered the Claimant’s governing statute, both of which note the company’s location as Sheshkines, 13-3 (or d. 13 kv. 3), Vilnius.<sup>19</sup> The Claimant, therefore, is a thing of real legal existence that was founded on a secure basis in the territory of Lithuania. The registration of Tokios Tokelès by the Lithuanian Government indicates that it was founded in conformity with the laws and regulations of that country. According to the ordinary meaning of Article 1(2)(b), therefore, the Claimant is an investor of Lithuania.

30. Article 1(2)(c) of the Ukraine-Lithuania BIT, which defines “investor” with respect to entities not established in Ukraine or Lithuania, provides relevant context for the interpretation of Article 1(2)(a) and (b). Article 1(2)(c) extends the scope of the Treaty to entities incorporated in third countries using other criteria to determine nationality—namely, the nationality of the individuals who control the enterprise and the *siège social* of the entity controlling the enterprise. The Respondent argues that the existence of these alternative methods of defining corporate nationality to *extend* the benefits of the BIT in Article 1(2)(c) should also allow these methods to be used to *deny*

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<sup>17</sup> Claimant’s June 20, 2003 Submission of Documents, Vol. V, Annex 10.

<sup>18</sup> *Id.* at Annex 13.

<sup>19</sup> Request for Arbitration, at Annexes 5-6.

the benefits of the BIT under Article 1(2)(b). If the Contracting Parties had intended these alternative methods to apply to entities legally established in Ukraine or Lithuania, however, the parties would have included them in Article 1(2)(a) or (b) respectively as they did in Article 1(2)(c). However, the purpose of Article 1(2)(c) is only to extend the definition of “investor” to entities established under the law of a third State provided certain conditions are met. Under the well established presumption *expressio unius est exclusio alterius*, the state of incorporation, not the nationality of the controlling shareholders or *siège social*, thus defines “investors” of Lithuania under Article 1(2)(b) of the BIT.

31. The object and purpose of the Treaty likewise confirm that the control-test should not be used to restrict the scope of “investors” in Article 1(2)(b). The preamble expresses the Contracting Parties’ intent to “intensify economic cooperation to the mutual benefit of both States” and “create and maintain favourable conditions for investment of investors of one State in the territory of the other State.” The Tribunal in *SGS v. Philippines* interpreted nearly identical preambular language in the Philippines-Switzerland BIT as indicative of the treaty’s broad scope of investment protection.<sup>20</sup> We concur in that interpretation and find that the object and purpose of the Ukraine-Lithuania BIT is to provide broad protection of investors and their investments.

32. The object and purpose of the Treaty are also reflected in the Treaty text. Article 1, which sets forth the scope of the BIT, defines “investor” as “any entity” established in

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<sup>20</sup> *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, Decision on Jurisdiction, Case No. ARB/02/6 (Jan. 29, 2004), at para. 116 (“The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble it is intended ‘to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other.’ It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered

Lithuania or Ukraine as well as “*any entity*” established in third countries that is controlled by nationals of or by entities having their seat in Lithuania or Ukraine. Thus, the Respondent’s request to *restrict* the scope of covered investors through a control-test would be inconsistent with the object and purpose of the Treaty, which is to provide broad protection of investors and their investments.

33. The Respondent also argues that jurisdiction should be denied because, in its view, the Claimant does not maintain “substantial business activity” in Lithuania. The Respondent correctly notes that a number of investment treaties allow a party to deny the benefits of the treaty to entities of the other party that are controlled by foreign nationals and that do not engage in substantial business activity in the territory of the other party.

34. For example, the Ukraine-United States BIT states, “[e]ach Party reserves the right to deny to any company the advantages of this treaty if *nationals of any third country* control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party....”<sup>21</sup> Similarly, the Energy Charter Treaty, to which both Ukraine and Lithuania are parties, allows each party to deny the benefits of the agreement to “a legal entity if *citizens or nationals of a third state* own or control such entity and if that entity has no substantial business activities in the Area of the Contracting Party in which it is organized.”<sup>22</sup>

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investments.”) (“*SGS v. Philippines*”).

<sup>21</sup> Treaty between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, Mar. 4, 1994, at art. 1(2) (entered into force Nov. 16, 1996) (emphasis added).

<sup>22</sup> The Energy Charter Treaty, Annex 1 to the Final Act of the European Energy Charter Conference, at art. 17(1), Dec. 16-17, 1994, Lisbon, Portugal, available at <http://www.encharter.org/upload/1/TreatyBook-en.pdf> (emphasis added).

35. In addition, a number of investment treaties of other States enable the parties to deny the benefits of the treaty to entities of the other party that are controlled by nationals of the denying party and do not have substantial business activity in the other party. For example, the BIT between the United States and Argentina provides that “[e]ach Party reserves the right to deny to any company of the other Party the advantages of this Treaty if (a) nationals of any third country, *or nationals of such Party*, control such company and the company has no substantial business activities in the territory of the other Party....”<sup>23</sup>

36. These investment agreements confirm that state parties are capable of excluding from the scope of the agreement entities of the other party that are controlled by nationals of third countries or by nationals of the host country. The Ukraine-Lithuania BIT, by contrast, includes no such “denial of benefits” provision with respect to entities controlled by third-country nationals or by nationals of the denying party. We regard the absence of such a provision as a deliberate choice of the Contracting Parties. In our view, it is not for tribunals to impose limits on the scope of BITs not found in the text, much less limits nowhere evident from the negotiating history. An international tribunal of defined jurisdiction should not reach out to exercise a jurisdiction beyond the borders of the definition. But equally an international tribunal should exercise, and indeed is bound to exercise, the measure of jurisdiction with which it is endowed.<sup>24</sup>

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<sup>23</sup> Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, Nov. 14, 1991, at art. 1(2).

<sup>24</sup> See, e.g., *Compañía de Aguas del Aconquija S.A. and Vivendi Universal (formerly Compagnie Générale des Eaux) v. Argentine Republic*, Decision on Annulment, Case No. ARB/97/3 (July 3, 2002). “In the Committee’s view, the Tribunal, faced with such a claim and having validly held that it had jurisdiction, was obliged to consider and to decide it.” *Id.* at para. 112. “[T]he Committee concludes that the Tribunal exceeded its powers in the sense of Article 52(1)(b), in that the Tribunal, having jurisdiction

37. We note that the Claimant has provided the Tribunal with significant information regarding its activities in Lithuania, including financial statements, employment information, and a catalogue of materials produced during the period of 1991 to 1994.<sup>25</sup> While these activities would appear to constitute “substantial business activity,” we need not affirmatively decide that they do, as it is not relevant to our determination of jurisdiction.

38. Rather, under the terms of the Ukraine-Lithuania BIT, interpreted according to their ordinary meaning, in their context, and in light of the object and purpose of the Treaty, the only relevant consideration is whether the Claimant is established under the laws of Lithuania. We find that it is. Thus, the Claimant is an investor of Lithuania under Article 1(2)(b) of the BIT.

39. We reach this conclusion based on the consent of the Contracting Parties, as expressed in the Ukraine-Lithuania BIT. We emphasize here that Contracting Parties are free to define their consent to jurisdiction in terms that are broad or narrow; they may employ a control-test or reserve the right to deny treaty protection to claimants who otherwise would have recourse under the BIT. Once that consent is defined, however, tribunals should give effect to it, unless doing so would allow the Convention to be used for purposes for which it clearly was not intended.

40. This Tribunal, by respecting the definition of corporate nationality in the Ukraine-Lithuania BIT, fulfills the parties’ expectations, increases the predictability of dispute

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over the Tucumán claims, failed to decide those claims.” *Id.* at para. 115.

<sup>25</sup> Claimant’s December 30, 2003 Submission of Documents, Annexes 1-11, Catalogues of Publications of Tokios Tokelės for 1991, 1992, 1993 and 1994.

settlement procedures, and enables investors to structure their investments to enjoy the legal protections afforded under the Treaty. We decline to look beyond (or through) the Claimant to its shareholders or other juridical entities that may have an interest in the claim. As the tribunal in *Amco Asia Corp. v. Indonesia* said in rejecting the respondent's request to attribute to the claimant the nationality of its controlling shareholder, the concept of nationality in the ICSID Convention is:

...a classical one, based on the law under which the juridical person has been incorporated, the place of incorporation and the place of the social seat. An exception is brought to this concept in respect of juridical persons having the nationality, thus defined, of the Contracting state party to the dispute, where said juridical persons are under foreign control. *But no exception to the classical concept is provided for when it comes to the nationality of the foreign controller, even supposing—which is not at all clearly stated in the Convention—that the fact that the controller is the national of one or another foreign State is to be taken into account....*<sup>26</sup>

41. Thus, the decision of this Tribunal with respect to the nationality of the Claimant is consistent with *Amco Asia* and other ICSID jurisprudence, as will be discussed further below.

#### 4. Consistency of Article 1(2) of the BIT with the ICSID Convention

42. In our view, the definition of corporate nationality in the Ukraine-Lithuania BIT, on its face and as applied to the present case, is consistent with the Convention and supports our analysis under it. Although Article 25(2)(b) of the Convention does not set forth a required method for determining corporate nationality, the generally accepted (albeit implicit) rule is that the nationality of a corporation is determined on the basis of

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<sup>26</sup> *Amco Asia Corp. and Others v. Republic of Indonesia*, Decision on Jurisdiction, Case No. ARB/81/1 (Sept. 25, 1983), 1 ICSID Reports 389, 396 (emphasis added) ("*Amco*").

its *siège social* or place of incorporation.<sup>27</sup> Indeed, “ICSID tribunals have uniformly adopted the test of incorporation or seat rather than control when determining the nationality of a juridical person.”<sup>28</sup> Moreover, “[t]he overwhelming weight of the authority...points towards the traditional criteria of incorporation or seat for the determination of corporate nationality under Art. 25(2)(b).”<sup>29</sup> As Professor Schreuer notes, “[a] systematic interpretation of Article 25(2)(b) would militate against the use of the control test for a corporation’s nationality.”<sup>30</sup>

43. As discussed above, the Claimant is an “investor” of Lithuania under Article 1(2)(b) of the Ukraine-Lithuania BIT based on its state-of-incorporation. Although not required by the text of the Treaty, an assessment of the *siège social* of the Claimant leads to the same conclusion. Among the relevant evidence of *siège social*, the Claimant’s registration certificate (issued by the Ministry of the Economy of Lithuania),<sup>31</sup> its statute of incorporation,<sup>32</sup> and each of the Claimant’s “Information Notices of Payment of Foreign Investment” (registered by Ukrainian governmental authorities),<sup>33</sup> all record the Claimant’s address as Vilnius, Lithuania. Contrary to the assertion of the Respondent, a

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<sup>27</sup> Schreuer, at 278-79; *see also* G.R. Delaume, “ICSID Arbitration and the Courts,” 77 AMER. J. INT’L LAW 784, 793-94 (1983); M. Hirsch, THE ARBITRATION MECHANISM OF THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES 85 (1993).

<sup>28</sup> Schreuer, at 279-80 (citing *Kaiser Bauxite Company v. Jamaica*, Decision on Jurisdiction, Case No. ARB/74/3 (July 6, 1975), 1 ICSID Reports 296, 303 (1993); *SOABI v. Senegal*, Decision on Jurisdiction, Case No. ARB/82/1 (Aug. 1, 1984), 2 ICSID Reports 175, 180-81; *Amco*, at 396); *see also Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, Decision on Jurisdiction, Case No. ARB/00/5 (Sept. 27, 2001), 16 ICSID Review-FILJ 469 (2001), at para. 108 (“*Autopista*”).

<sup>29</sup> Schreuer, at 281.

<sup>30</sup> *Id.* at 278.

<sup>31</sup> Request for Arbitration, at Annex 5.

<sup>32</sup> *Id.* at Annex 6.

<sup>33</sup> *Id.* at Annex 13.

nationality test of *siège social* leads to the same result as one based on state of incorporation.<sup>34</sup>

44. The second clause of Article 25(2)(b) provides that parties can, by agreement, depart from the general rule that a corporate entity has the nationality of its state of incorporation. It extends jurisdiction to “any juridical person which had the nationality of the Contracting State party to the dispute on [the date on which the parties consented to submit the dispute to arbitration] and which, *because of foreign control*, the parties have agreed should be treated as a national of another Contracting State....”<sup>35</sup> This exception to the general rule applies only in the context of an agreement between the parties. The Respondent asks the Tribunal to apply this exception in the present case, not to give effect to an agreement between the Contracting Parties, but, rather, to create an additional exception to the general state-of-incorporation or state-of-seat rule—in the absence of an agreement to that effect between the Parties.

45. We find no support for the Respondent’s request in the text of the Convention. The second clause of Article 25(2)(b) limits the use of the control-test to the circumstances it describes, *i.e.*, when Contracting Parties agree to treat a national of the host State as a national of another Contracting Party because of foreign control. In the present case, the Claimant is not a national of the host State nor have the parties agreed to treat the Claimant as a national of a State other than its state of incorporation.

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<sup>34</sup> This is not a surprising result. See D.P. O’Connell, 2 INTERNATIONAL LAW 1041 (2d. ed. 1970) (stating, “[u]nder French law it is not possible for a corporation to have a *siège social* at a place other than that of incorporation....The corporation laws of Continental countries provide that the charter of incorporation must designate this central office, and the inference is that it must be in the country of incorporation.”).

<sup>35</sup> Emphasis added.

46. The use of a control-test to define the nationality of a corporation to *restrict* the jurisdiction of the Centre would be inconsistent with the object and purpose of Article 25(2)(b). Indeed, as explained by Mr. Broches, the purpose of the control-test in the second portion of Article 25(2)(b) is to *expand* the jurisdiction of the Centre:

[t]here was a compelling reason for this last provision. It is quite usual for host States to require that foreign investors carry on their business within their territories through a company organized under the laws of the host country. If we admit, as the Convention does implicitly, that this makes the company technically a national of the host country, it becomes readily apparent that there is need for an exception to the general principle that that the Centre will not have jurisdiction over disputes between a Contracting State and its own nationals. *If no exception were made for foreign-owned but locally incorporated companies, a large and important sector of foreign investment would be outside the scope of the Convention.*<sup>36</sup>

47. ICSID tribunals likewise have interpreted the second clause of Article 25(2)(b) to expand, not restrict, jurisdiction. In *Wena Hotels Ltd. v. Egypt*, the respondent argued that Wena, though incorporated in the United Kingdom, should be treated as an Egyptian company because it was owned by an Egyptian national.<sup>37</sup> Egypt relied on Article 8.1 of the U.K.-Egypt BIT provision, which states:

[s]uch a company of one Contracting Party in which before such dispute arises a majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25(2)(b) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party.<sup>38</sup>

48. Egypt argued that this provision could be used to deny jurisdiction over disputes involving companies of the non-disputing Contracting Party that are owned by nationals

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<sup>36</sup> Broches, at 358-59 (emphasis added).

<sup>37</sup> *Wena Hotels Ltd. v. Arab Republic of Egypt*, Summary Minutes of the Session of the Tribunal held in Paris on May 25, 1999, Case No. ARB/98/4, 41 I.L.M. 881, 886 (2002).

<sup>38</sup> *Id.* at 887.

or companies of the Contracting Party to the dispute. Wena, on the other hand, argued that this provision could be used only to extend jurisdiction over disputes involving companies of the Contracting Party to the dispute that are owned by nationals or companies of the non-disputing Contracting Party. Although the tribunal found that both interpretations of the BIT provision were plausible, it decided to adopt Wena's interpretation as the more consistent with Article 25(2)(b) of the Convention.

49. As the *Wena* tribunal stated, “[t]he literature rather convincingly demonstrates that Article 25(2)(b) of the ICSID Convention—and provisions like Article 8 of the United Kingdom’s model bilateral investment treaty—are meant to expand ICSID jurisdiction.”<sup>39</sup> The tribunal in *Autopista v. Venezuela* reached a similar result, concluding that the object and purpose of Article 25(2)(b) is not to limit jurisdiction, but to set its “outer limits.”<sup>40</sup>

50. ICSID jurisprudence also confirms that the second clause of Article 25(2)(b) should not be used to determine the nationality of juridical entities in the absence of an agreement between the parties. In *CMS v. Argentina*, the tribunal states, “[t]he reference that Article 25(2)(b) makes to foreign control in terms of treating a company of the nationality of the Contracting State party as a national of another Contracting State is precisely meant to facilitate agreement between the parties....”<sup>41</sup> In the present case, there was no agreement between the Contracting Parties to treat the Claimant as anything other than a national of its state of incorporation, *i.e.*, Lithuania.

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<sup>39</sup> *Id.* at 888.

<sup>40</sup> *Autopista*, at para. 109 (quoting Broches).

<sup>41</sup> *CMS Gas Transmission Company v. Republic of Argentina*, Decision on Jurisdiction, Case No. ARB/01/8 (July 17, 2003), 42 I.L.M. 788 (2003), at para. 51 (emphasis added) (“*CMS*”).

51. The second clause of Article 25(2)(b) does not mandatorily constrict ICSID jurisdiction for disputes arising in the inverse context from the one envisaged by this provision: a dispute between a Contracting Party and an entity of another Contracting Party that is controlled by nationals of the respondent Contracting Party.

52. In summary, the Claimant is an “investor” of Lithuania under Article 1(2)(b) of the BIT because it is an “entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations.” This method of defining corporate nationality is consistent with modern BIT practice and satisfies the objective requirements of Article 25 of the Convention. We find no basis in the BIT or the Convention to set aside the Contracting Parties’ agreed definition of corporate nationality with respect to investors of either party in favor of a test based on the nationality of the controlling shareholders. While some tribunals have taken a distinctive approach,<sup>42</sup> we do not believe that arbitrators should read in to BITs limitations not found in the text nor evident from negotiating history sources.

## 5. Equitable Doctrine of “Veil Piercing”

53. Finally, we consider whether the equitable doctrine of “veil piercing,” to the extent recognized in customary international law, should override the terms of the

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<sup>42</sup> See, e.g., *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, Decision on Jurisdiction, Case No. ARB/01/13 (Aug. 6, 2003), 42 I.L.M. 1290 (2003). In this case, a Swiss company asserted claims against the Government of Pakistan for breach of contract and for breach of the BIT between the Swiss Confederation and Pakistan. Article 9 of that BIT provides for ICSID arbitration of “disputes with respect to investments....” *Id.* at para. 149. The provision does not in any manner restrict the scope of such disputes. Although the Tribunal recognized that BIT claims and contract claims “can both be described as ‘disputes with respect to investment,’” it nonetheless decided—without support from the text or evidence of the parties’ intent—to exclude contract claims from the scope of “disputes” that could be submitted to ICSID arbitration. *Id.* at paras. 161-62.

agreement between the Contracting Parties and cause the Tribunal to deny jurisdiction in this case.<sup>43</sup>

54. The seminal case, in this regard, is *Barcelona Traction*.<sup>44</sup> In that case, the International Court of Justice (“ICJ”) stated, “the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law.”<sup>45</sup> In particular, the Court noted, “[t]he wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to *prevent the misuse of the privileges of legal personality*, as in certain cases of *fraud or malfeasance*, to *protect third persons* such as a creditor or purchaser, or to *prevent the evasion of legal requirements or of obligations*.”<sup>46</sup>

55. The Respondent has not made a prima facie case, much less demonstrated, that the Claimant has engaged in any of the types of conduct described in *Barcelona Traction* that might support a piercing of the Claimant’s corporate veil. The Respondent has not shown or even suggested that the Claimant has used its status as a juridical entity of Lithuania to perpetrate fraud or engage in malfeasance. The Respondent has made no claim that the Claimant’s veil must be pierced and jurisdiction denied in order to protect third persons, nor has the Respondent shown that the Claimant used its corporate nationality to evade applicable legal requirements or obligations.

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<sup>43</sup> Article 42(1) of the ICSID Convention states, “[t]he 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.” Emphasis added.

<sup>44</sup> For the sake of clarity, the Tribunal notes that *Barcelona Traction*, which held that incorporation is the only criterion for nationality in cases of diplomatic protection, is inapplicable with respect to agreements between the parties to treat companies of the host State as a national of the other Party under the second clause of Article 25(2)(b). See Broches, at 360-361.

<sup>45</sup> *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3 (Feb. 5), at para. 58 (“*Barcelona Traction*”).

56. The ICJ did not attempt to define in *Barcelona Traction* the precise scope of conduct that might prompt a tribunal to pierce the corporate veil. We are satisfied, however, that none of the Claimant's conduct with respect to its status as an entity of Lithuania constitutes an abuse of legal personality. The Claimant made no attempt whatever to conceal its national identity from the Respondent. To the contrary, the Claimant's status as a juridical entity of Lithuania is well established under the laws of both Lithuania and Ukraine and well known by the Respondent. The Claimant manifestly did not create Tokios Tokelės for the purpose of gaining access to ICSID arbitration under the BIT against Ukraine, as the enterprise was founded six years before the BIT between Ukraine and Lithuania entered into force. Indeed, there is no evidence in the record that the Claimant used its formal legal nationality for any improper purpose.

#### 6. **Other Considerations Regarding Corporate Nationality**

57. Although not necessary elements of our Decision, the section below addresses the relevant ICSID jurisprudence and the views of ICSID scholars raised by the parties that relate to the issue of defining corporate nationality.

##### a. *ICSID Jurisprudence*

58. The arbitral awards cited by the Respondent do not support a decision by this Tribunal to set aside the definition of nationality agreed to by the Contracting Parties. Among the awards cited, the Respondent quotes the following passage from *Banro American Resources Inc. v. Congo* in support of its request to pierce the corporate veil of the Claimant:

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<sup>46</sup> *Id.* at para. 56 (emphases added).

These few examples demonstrate that in general, ICSID tribunals do not accept the view that their competence is limited by formalities, and rather they rule on their competence based on a review of the circumstances surrounding the case, and, in particular, the actual relationship among the companies involved. This jurisprudence reveals the willingness of ICSID tribunals to refrain from making decisions on their competence based on formal appearances, and to base their decisions on a realistic assessment of the situation before them.<sup>47</sup>

59. The “few examples” to which the *Banro* Tribunal refers, however, are cases in which the Claimant, as the party that requested arbitration, was not the same entity as the party that consented to arbitration.<sup>48</sup> The *Banro* Tribunal suggests that, in these cases, the tribunals have been willing to consider the nationalities of the consenting party and the Claimant when making their determinations of jurisdiction.

60. In *Banro* itself, the Claimant’s parent, Banro Resources (Canada), transferred shares in its Congolese investment to its subsidiary, Banro American (U.S.). The Tribunal stated that the Claimant, Banro American, could not avail itself of the consent expressed by its parent, Banro Resources, because Banro Resources, as a national of a non-Contracting Party, could not have validly consented to ICSID arbitration and, thus, could not transfer any valid consent to its U.S. subsidiary.<sup>49</sup> Although the *Banro* Tribunal indicated that it “could have addressed the issue of *jus standi* of Banro American in a flexible manner,”<sup>50</sup> in the end, the Tribunal did not deny jurisdiction by piercing the Claimant’s corporate veil. Instead, the *Banro* Tribunal denied jurisdiction to

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<sup>47</sup> Respondent’s Memorial, at 2.1.9 (citing *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of Congo*, Award, Case No. ARB/98/7 (Sept. 1, 2000), at para. 11 (“*Banro*”).

<sup>48</sup> *Banro*, at para. 10 (“This was the case, in particular, in two situations: when the request was made by a member company of a group of companies while the pertinent instrument expressed the consent of another company of this group; and when, following the transfer of shares, the request came from the transferee company while the consent had been given by the company making the transfer.”).

<sup>49</sup> *Id.* at para. 5.

prevent Banro Resources from availing itself of diplomatic protection while its U.S. subsidiary pursued ICSID arbitration, which, if allowed, would contravene the object and purpose of Article 27 the Convention.<sup>51</sup>

61. Thus, the issue before the Tribunal in *Banro* and in the cases discussed briefly therein was not, as it is here, the proper method of defining the nationality of the claimant. In *Banro*, there was no dispute that the claimant was a national of the United States and Banro Resources was a national of Canada, both by virtue of their incorporation in those countries. The issue in *Banro* was whether the claimant of one nationality could benefit from the consent given by its parent company of another nationality. In the present case, it is undisputed that the Claimant made the request for arbitration and expressed consent to ICSID jurisdiction. Accordingly, the decision in *Banro* provides no justification for looking beyond the nationality of the Claimant, Tokios Tokelès, to other related parties or to its controlling shareholders.

62. The decision in *Autopista v. Venezuela* is similarly unhelpful to the Respondent. The Respondent's Memorial in the case before this Tribunal cites, in isolation, the following passage: "[a]s a general matter, the arbitral Tribunal accepts that economic criteria often better reflect reality than legal ones."<sup>52</sup> Although seemingly helpful, the text of the decision that follows the quoted passage directly undermines the Respondent's objection. In particular, the Tribunal states,

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<sup>50</sup> *Id.* at para. 13.

<sup>51</sup> *Id.* at paras. 13, 24. Article 27 states, "[n]o Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute."

<sup>52</sup> Memorial, para. 2.1.9 (citing *Autopista*, para. 119).

“[h]owever, in the present case, such *arguments of an economic nature are irrelevant*. Indeed, exercising the discretion granted by the Convention, *the parties have specifically identified majority shareholding as the criterion to be applied*. *They have not chosen to subordinate their consent to ICSID arbitration to other criteria*.”

As a result, the Tribunal must respect the parties’ autonomy and may not discard the criterion of direct shareholding, *unless it proves unreasonable*.<sup>53</sup>

63. In the present case, as in *Autopista*, “arguments of an economic nature are irrelevant” where “the parties have specifically identified” the country of legal establishment “as the criterion to be applied” and “have not chosen to subordinate their consent to ICSID arbitration to any other criteria.” This Tribunal, like the tribunal in *Autopista*, is obliged to respect the parties’ agreement “unless it proves unreasonable.” Far from unreasonable, reference to the state of incorporation is the most common method of defining the nationality of business entities under modern BITs and traditional international law.<sup>54</sup>

64. The Respondent also cites *Loewen v. United States of America* to support its position.<sup>55</sup> In that case, the Canadian claimant declared bankruptcy during the arbitration proceedings and, immediately before going out of business, assigned its claim to a newly created Canadian corporation whose sole asset was the claim against the United States.<sup>56</sup> The newly created corporation was wholly owned and controlled by the U.S. enterprise that emerged from the earlier bankruptcy proceeding. Although the claim remained at all times in the possession of a Canadian enterprise, the *Loewen* tribunal held that the

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<sup>53</sup> *Autopista*, at paras. 119-120 (emphases added).

<sup>54</sup> Schreuer, at 277.

<sup>55</sup> Respondent’s Reply, at 2.1.5.

<sup>56</sup> *Loewen Group, Inc. and Raymond Loewen v. United States of America*, Award, Case No.

assignment of the claim changed the nationality of the claimant from Canadian to U.S. origin. Accordingly, the tribunal denied jurisdiction because the claimant's nationality was not continuous from the date of the events giving rise to the claim through the date of the resolution of the claim, as the tribunal believed was required by customary international law.<sup>57</sup>

65. Although the *Loewen* tribunal denied that it pierced the claimant's corporate veil,<sup>58</sup> in reality, the tribunal did exactly that. Indeed, the tribunal could not have concluded that the nationality of the claimant had changed from Canadian to U.S. origin without piercing the claimant's corporate veil. Although one may debate whether veil piercing was justified in that case, the *Loewen* decision does not clarify the jurisprudence of veil piercing because the tribunal did not admit to, much less explain its reasons for, piercing the claimant's corporate veil.

66. As *Loewen* provides no additional guidance on the doctrine of veil piercing, we refer instead to the jurisprudence of *Barcelona Traction*. As noted above, we are convinced that the equitable doctrine of veil piercing does not apply to the present case.

b. *Views of ICSID Scholars*

67. The Respondent also argues that some ICSID scholars encourage the application of the control-test to determine corporate nationality in the first clause of Article 25(2)(b) as well as the second, citing the views of Dr. Amerasinghe and Mr. Broches as discussed

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ARB(AF)/98/3 (June 26, 2003), 42 I.L.M. 811 (2003), at paras. 220, 240.

<sup>57</sup> *Id.* at para. 225.

<sup>58</sup> *Id.* at para. 237.

by Professor Schreuer.<sup>59</sup> The Respondent, however, misinterprets the views of these scholars.

68. Dr. Amerasinghe does argue that Article 25 of the Convention allows tribunals to be “extremely flexible” in using various methods to determine the nationality of juridical entities, including the control-test.<sup>60</sup> He advocates this flexible approach, however, in the context of a challenge to jurisdiction where, unlike here, the parties to the dispute have not agreed on a particular method of determining the nationality of juridical entities. In addition, the Respondent fails to mention Dr. Amerasinghe’s corollary rule of interpretation, that is, “every effort should be made to give the Centre jurisdiction by the application of the flexible approach.”<sup>61</sup>

69. Likewise, Mr. Broches states that the text of Article 25(2)(b) “implicitly assumes that incorporation is a criterion of nationality.”<sup>62</sup> He argues, however, that this provision does not preclude *an agreement between parties* to define juridical entities by methods other than state of incorporation, including ownership and control.<sup>63</sup> In other words, the Convention permits deviation from the general rule for defining the nationality of juridical entities, but only if there is an agreement between the Contracting Parties to do so. Here, there is no such agreement providing for deviation. On the contrary, the agreement under the Ukraine-Lithuania BIT confirms that the standard rule (incorporation) applies.

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<sup>59</sup> Respondent’s Reply, at 2.1.10 (citing Schreuer, at 278-79).

<sup>60</sup> C.F. Amerasinghe, “The Jurisdiction of the International Centre for the Settlement of Investment Disputes,” 19 INDIAN J. INT’L LAW 166, 214 (Apr.-June 1979).

<sup>61</sup> *Id.* at 214-215.

<sup>62</sup> Broches, at 360.

<sup>63</sup> *Id.* at 360-61.

c. *Traditional Approach under International Law*

70. As with the Convention, the definition of corporate nationality in the Ukraine-Lithuania BIT is also consistent with the predominant approach in international law. As the International Court of Justice has explained, “[t]he traditional rule attributes the right of diplomatic protection of a corporate entity to the States under the laws of which it is incorporated and in whose territory it has its registered office. The two criteria have been confirmed by long practice and by numerous international instruments.”<sup>64</sup> According to *Oppenheim’s International Law*, “[i]t is usual to attribute a corporation to the state under the laws of which it has been incorporated and to which it owes its legal existence; to this initial condition is often added the need for the corporation’s head office, registered office, or its *siège social* to be in the same state.”<sup>65</sup> Thus, the Ukraine-Lithuania BIT uses the same well established method for determining corporate nationality as does customary international law.

7. **Conclusion of the Tribunal**

71. The Tribunal concludes that the Claimant is an “investor” of Lithuania under Article 1(2)(b) of the BIT and a “national of another Contracting State,” under Article 25 of the Convention.

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<sup>64</sup> *Barcelona Traction*, at para. 70.

<sup>65</sup> 1 OPPENHEIM’S INTERNATIONAL LAW 859-60 (Sir Robert Jennings and Sir Arthur Watts eds., 9<sup>th</sup> ed. 1996) (footnotes omitted).

**B. Second Objection: The Claimant Did Not Make an “Investment” “in Accordance with the Laws and Regulations” of Ukraine**

**1. Argument of the Respondent: Claimant Has Not Shown that the Source of Capital Is Non-Ukrainian**

72. The Respondent argues that, even if the Tribunal determines that the Claimant is an investor of Lithuania, the Claimant did not make an “investment” in Ukraine as defined by the Treaty. More specifically, the Respondent argues that the Claimant has not proved that it had sufficient capital to make the initial investment in its subsidiary, Taki spravy, nor that the capital otherwise originated outside Ukraine. According to the Respondent, the investment in Taki spravy therefore falls outside the scope of the Ukraine-Lithuania BIT and the ICSID Convention, as the purpose of both agreements is to protect international, *i.e.*, cross-border, investment. The Respondent also argues that, even if the Claimant is judged to have made investments in Ukraine, those investments were not made in accordance with Ukrainian law and thus are not covered by the Ukraine-Lithuania BIT.

**2. “Investment” under Article 25 of Convention**

73. Article 25 of the Convention requires that, in order for the Centre to have jurisdiction, a dispute must arise from “an investment.” As with corporate nationality, the parties have broad discretion to decide the “kinds of investment they wish to bring to ICSID.”<sup>66</sup> Indeed, “[p]recisely because the Convention does not define ‘investment’, it does not purport to define the requirements that an investment should meet to qualify for ICSID jurisdiction.”<sup>67</sup> Parties have a “large measure of discretion to determine for

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<sup>66</sup> Schreuer, at 124.

<sup>67</sup> *CMS*, at para. 51.

themselves whether their transaction constitutes an investment for the purposes of the Convention.”<sup>68</sup> Here, that discretion is exercised in the BIT.

### 3. Definition of “Investment” in Article 1(1) of the BIT

74. As mentioned above, Article 1(1) of the BIT defines “investment” as “every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter....” In addition, Article 1(1) provides that “[a]ny alteration of the form in which assets are invested shall not affect their character as an investment....” The Treaty contains no requirement that the capital used by the investor to make the investment originate in Lithuania, or, indeed, that such capital not have originated in Ukraine.

75. To phrase the Respondent’s objection in the terms of the Treaty, it maintains that the assets of Taki spravy in the territory of Ukraine were not “invested by” the Claimant because the Claimant has not shown that it used non-Ukrainian capital to finance the investment. To assess the Respondent’s objection, we follow the standard rule of interpretation: we apply to the terms of the Treaty their ordinary meaning, in their context, in light of the object and purpose of the Treaty. The ordinary meaning of “invest” is to “expend (money, effort) in something from which a return or profit is expected....”<sup>69</sup> The ordinary meaning of “by” is “indicating agency, means, [or] cause ....”<sup>70</sup> Thus, an investment under the BIT is read in ordinary meaning as “every kind of asset” for which “an investor of one Contracting Party” caused money or effort to be

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<sup>68</sup> See *Fedax N.V. v. Republic of Venezuela*, Decision on Jurisdiction, Case No. ARB/96/3 (July 11, 1997), 37 I.L.M. 1378 (1998), at para. 22 (quoting Carolyn B. Lamm and Abby Cohen Smutny, “The Implementation of ICSID Arbitration Agreements,” 11 ICSID Review-FILJ 64, 80 (1996)) (“*Fedax*”).

<sup>69</sup> THE NEW SHORTER OXFORD ENGLISH DICTIONARY, at 1410.

expended and from which a return or profit is expected in the territory of the other Contracting Party. In other words, the Claimant must show that it caused an investment to be made in the territory of the Respondent.

76. The Claimant has provided substantial evidence of its investment in Ukraine, beginning with its initial investment of USD 170,000 in 1994, and continuing reinvestments<sup>71</sup> each year until 2002, for a total investment of more than USD 6.5 million.<sup>72</sup> Moreover, although the Treaty does not require the Contracting Parties to acknowledge the investments of entities of the other Contracting Party in order for such investments to fall within the scope of the Treaty, in this case, the Respondent has done so. In particular, the Claimant has produced copies of twenty-three “Informational Notice(s) of Payment of Foreign Investment,” in which the Claimant’s investments were registered by Ukrainian governmental authorities.<sup>73</sup>

77. The Respondent requests the Tribunal to infer, without textual foundation, that the Ukraine-Lithuania BIT requires the Claimant to demonstrate further that the capital used to make an investment in Ukraine originated from non-Ukrainian sources. In our view, however, neither the text of the definition of “investment,” nor the context in which the term is defined, nor the object and purpose of the Treaty allow such an origin-of-capital requirement to be implied. The requirement is plainly absent from the text. In addition, the context in which the term “investment” is defined, namely, “*every* kind of asset

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<sup>70</sup> *Id.* at 310.

<sup>71</sup> The definition “investment” in Article 1(1), “every kind of asset invested by an investor” certainly includes reinvestments of the profits generated by the initial investments.

<sup>72</sup> *See, e.g.*, Claimant’s June 20, 2003 Submission of Documents, Vols. II-IV.

<sup>73</sup> Request for Arbitration, at Annex 13.

invested by an investor,” does not support the restriction advocated by the Respondent.<sup>74</sup> Finally, the origin-of-capital requirement is inconsistent with the object and purpose of the Treaty, which, as discussed above, is to provide broad protection to investors and their investments in the territory of either party. Accordingly, the Tribunal finds no basis on which to impose the restriction proposed by the Respondent on the scope of covered investments.

78. We conclude that, under the terms of the BIT, both the enterprise Taki spravy and the rights in the property described in the above-referred “Informational Notices,” are assets invested by the Claimant in the territory of Ukraine. The investment would not have occurred but for the decision by the Claimant to establish an enterprise in Ukraine and to dedicate to this enterprise financial resources under the Claimant’s control. In doing so, the Claimant caused the expenditure of money and effort from which it expected a return or profit in Ukraine.

#### **4. Consistency of Article 1(1) of the BIT with the ICSID Convention**

79. The Tribunal’s finding under the BIT is also consistent with the ICSID Convention. The broad definition of “investment” in the Lithuania-Ukraine BIT is typical of the definition used in most contemporary BITs.<sup>75</sup> Because the Convention leaves the definition of the term to the Contracting Parties, which in general have defined it broadly, there have been few cases in which the Respondent has challenged the

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<sup>74</sup> Emphasis added.

<sup>75</sup> See *Fedax*, at para. 34 (citing Antonio Parra, “The Scope of New Investment Laws and International Instruments,” in *ECONOMIC DEVELOPMENT, FOREIGN INVESTMENT AND THE LAW* 27, 35-36 (Robert Pritchard ed. 1996)); see also Rudolph Dolzer and Margaret Stevens, *BILATERAL INVESTMENT TREATIES*, 26-31 (1995).

underlying transaction as not being an “investment” under the Convention.<sup>76</sup> One such case was *Fedax N.V. v. Republic of Venezuela*. The treaty under which that dispute was arbitrated, the Netherlands-Venezuela BIT, defines “investment,” like the Ukraine-Lithuania BIT, as “every kind of asset.” In that case, the Respondent argued that the government-issued promissory notes held by the Claimant were not “investment(s)” because the Claimant had acquired the notes by way of endorsement from a Venezuelan company.<sup>77</sup> The Respondent argued that the Claimant had not made a “direct” investment in Venezuela, which the Respondent argued was required by the ICSID Convention.<sup>78</sup> In the following passage, the *Fedax* tribunal rejected the Respondent’s argument and also underscored the broad definition of investment contemplated by the Convention:

[T]he text of Article 25(1) establishes that the “jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment.” It is apparent that the term “directly” relates in this Article to the “dispute” and not the “investment.” It follows that jurisdiction can exist even in respect of investments that are not direct, so long as the dispute arises directly from such transaction. This interpretation is also consistent with the broad reach that the term “investment” must be given in light of the negotiating history of the Convention.<sup>79</sup>

80. The Respondent in the present case also asks the Tribunal to narrow the scope of covered investments by adding a condition—in this case, an origin-of-capital requirement—not found in the instrument of consent or the Convention. The Respondent alleges that the Claimant has not proved that the capital used to invest in Ukraine originated from non-Ukrainian sources, and, thus, the Claimant has not made a direct, or

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<sup>76</sup> *Fedax*, at para. 25.

<sup>77</sup> *Id.* at para. 18.

<sup>78</sup> *Id.* at para. 24.

<sup>79</sup> *Id.*

cross-border, investment. Even assuming, *arguendo*, that all of the capital used by the Claimant to invest in Ukraine had its ultimate origin in Ukraine, the resulting investment would not be outside the scope of the Convention. The Claimant made an investment for the purposes of the Convention when it decided to deploy capital under its control in the territory of Ukraine instead of investing it elsewhere. The origin of the capital is not relevant to the existence of an investment.

81. That the ICSID Convention does not require an “investment” to be financed from capital of any particular origin was confirmed by the tribunal in *Tradex Hellas S.A. v. Republic of Albania*. In that case, the tribunal considered a definition of “foreign investment” under Albanian law that is substantially similar to the definition of “investment” in the Ukraine-Lithuania BIT: “every kind of investment in the territory of the Republic of Albania owned directly or indirectly by a foreign investor.”<sup>80</sup> The tribunal found that the definition, “nowhere requires that the foreign investor has to finance the investment from his own resources...the law provides for a broad interpretation of ‘investment.’”<sup>81</sup> As in *Tradex*, the Claimant in the present case owns and controls the assets in Ukraine that have given rise to this dispute. The origin of the capital used to acquire these assets is not relevant to the question of jurisdiction under the Convention.

82. In our view, the ICSID Convention contains no inchoate requirement that the investment at issue in a dispute have an international character in which the origin of the capital is decisive. Although the Convention contemplates disputes of an international

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<sup>80</sup> *Tradex Hellas S.A. v. Republic of Albania*, Award, Case No. ARB/94/2 (Apr. 29, 1999) 14 ICSID Review-FILJ 161, at para. 105 (citing Albanian law).

<sup>81</sup> *Id.* at para. 109.

character, we believe that such character is defined by the terms of the Convention, and in turn, the terms of the BIT. Were we to accept the origin of capital as transcending the textual definition of the nationality of the Claimant and the scope of covered investment in the Ukraine-Lithuania BIT, we would override the explicit choice of the Contracting Parties as to how to define these terms. Ukraine, Lithuania and other Contracting Parties chose their methods of defining corporate nationality and the scope of covered investment in BITs with confidence that ICSID arbitrators would give effect to those definitions. That confidence is premised on the ICSID Convention itself, which leaves to the reasonable discretion of the parties the task of defining key terms. We should be loathe to undermine it.

**5. Argument of the Respondent: Investment Not Made “in Accordance with Laws and Regulations” of Ukraine**

83. According to the Respondent, even if the Claimant were found to have made investments, those investments were not made in accordance with Ukrainian law as required by Article 1(1) of the Ukraine-Lithuania BIT. For example, the Respondent argues that the full name under which the Claimant registered its subsidiary, “The Lithuanian subsidiary private enterprise The Publishing, Informational and Advertising Agency Taki Spravy,”<sup>82</sup> is improper because “subsidiary enterprise” but not “subsidiary *private* enterprise” is a recognized legal form under Ukrainian law.<sup>83</sup> The Respondent also alleges that it has identified errors in the documents provided by the Claimant related

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<sup>82</sup> Request for Arbitration, at Annex 8.

<sup>83</sup> Respondent’s Memorial, at 2.2.2. Although the Certificate Regarding the State Registration of a Subject of Entrepreneurial Activity includes the phrase “The Lithuanian subsidiary private enterprise,” as part of the name of the Claimant’s subsidiary, the “organizational form” is recorded as “subsidiary enterprise.” Request for Arbitration, at Annex 8.

to asset procurement and transfer, including, in some cases, the absence of a necessary signature or notarization.<sup>84</sup> The Claimant disputes the Respondent’s allegations.<sup>85</sup>

84. The requirement in Article 1(1) of the Ukraine-Lithuania BIT that investments be made in compliance with the laws and regulations of the host state is a common requirement in modern BITs.<sup>86</sup> The purpose of such provisions, as explained by the Tribunal in *Salini Costruttori S.p.A and Italstrade S.p.A v. Morocco*, is “to prevent the Bilateral Treaty from protecting investments that should not be protected, particularly because they would be illegal.”<sup>87</sup>

85. Thus, the question before the Tribunal is whether the alleged violations establish that the assets invested by the Claimant were invested not “in accordance with the laws and regulations of” Ukraine. Under the Vienna Convention, the ordinary meaning of these terms “must emerge in the context of the treaty as a whole and in the light of its objects and purposes.”<sup>88</sup> As discussed above, the object and purpose of the BIT is to provide broad protection for investors and their investments.

86. In the present case, the Respondent does not allege that the Claimant’s investment and business activity—advertising, printing, and publishing—are illegal *per se*. In fact, as discussed above, governmental authorities of the Respondent registered the Claimant’s subsidiary as a valid enterprise in 1994, and, over the next eight years, registered each of the Claimant’s investments in Ukraine, as documented in twenty-three Informational

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<sup>84</sup> Respondent’s Reply, at Section 4.

<sup>85</sup> Claimant’s Rejoinder, at 48, 86-134.

<sup>86</sup> Schreuer, at 130.

<sup>87</sup> *Salini Costruttori S.p.A and Italstrade S.p.A v. Kingdom of Morocco*, Decision on Jurisdiction, Case No. ARB/00/4 (July 23, 2001), 42 I.L.M. 609 (2003), at para. 46.

<sup>88</sup> Ian Brownlie, PRINCIPLES OF INTERNATIONAL LAW 634 (5<sup>th</sup> ed. 1998) (footnotes omitted).

Notices of Payment of Foreign Investment.<sup>89</sup> The Respondent now alleges that some of the documents underlying these registered investments contain defects of various types, some of which relate to matters of Ukrainian law. Even if we were able to confirm the Respondent’s allegations, which would require a searching examination of minute details of administrative procedures in Ukrainian law, to exclude an investment on the basis of such minor errors would be inconsistent with the object and purpose of the Treaty. In our view, the Respondent’s registration of each of the Claimant’s investments indicates that the “investment” in question was made in accordance with the laws and regulations of Ukraine.

**C. Third Objection: The Dispute Does Not Arise from the Investment**

87. In order for this Tribunal to have jurisdiction over a dispute, there must be an adequate nexus between the dispute and the Claimant’s investment in the territory of the Contracting Party.

88. Article 25(1) of the ICSID Convention extends jurisdiction to any dispute “arising directly out of an investment.” In order for the directness requirement to be satisfied, the dispute and investment must be “reasonably closely connected.”<sup>90</sup> As Professor Schreuer notes, “[d]isputes arising from ancillary or peripheral aspects of the investment operation are likely to give rise to the objection that they do not arise directly from the investment  
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<sup>89</sup> Request for Arbitration, Annex 13.

<sup>90</sup> Schreuer, at 114.

<sup>91</sup> *Id.*

89. Article 8 of the Ukraine-Lithuania BIT, in turn, provides that an investor of one Contracting Party may submit to arbitration a dispute “*in connection with*” an investment in the territory of the other Contracting Party.<sup>92</sup> It may be held that the scope of arbitrable disputes under the Treaty is broader than that contemplated by Article 25(1) of the Convention which refers to any “dispute arising directly out of an investment.”<sup>93</sup> Even if based only on the language of the Convention, however, the Respondent’s contention is in any case bound to fail.

90. The Respondent argues that the present dispute does not “arise directly out of an investment” because the allegedly wrongful acts by Ukrainian governmental authorities (including unwarranted and unreasonable investigations of the Claimant’s business, unfounded judicial actions to invalidate the Claimant’s contracts, and false, public accusations of illegal conduct by the Claimant) were not directed against the physical assets owned by the Claimant, *i.e.*, its facilities and equipment.<sup>94</sup>

91. In this regard, the Respondent misapprehends the jurisdictional requirements of Article 25. For a dispute to arise directly out of an investment, the allegedly wrongful conduct of the government need not be directed against the physical property of the investor. The requirement of directness is met if the dispute arises from the investment itself or the operations of its investment, as in the present case. The scope of this requirement was addressed by the first ICSID tribunal, *Holiday Inns S.A. v. Morocco*,

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<sup>92</sup> Emphasis added.

<sup>93</sup> Emphasis added.

<sup>94</sup> Respondent’s Memorial on Jurisdiction, at 12-16.

which found jurisdiction over loan contracts that were separate but related to the investment agreement, emphasizing “the general unity of an investment operation.”<sup>95</sup>

92. Thus, the Respondent’s obligations with respect to “investment” relate not only to the physical property of Lithuanian investors but also to the business operations associated with that physical property. States’ obligations with respect to “property” and “the use of property” are well established in international law. For example, the *Draft Convention on the International Responsibility of States for Injuries to Aliens*, defines a “taking of property” to include “not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference.”<sup>96</sup> Further, the Iran-U.S. Claims Tribunal found that “[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.”<sup>97</sup>

93. In the present case, each of the allegedly wrongful government actions—investigations, document seizures, public accusations of illegal conduct, and judicial actions to invalidate contracts and seize assets—involved the operations of the Claimant’s subsidiary enterprise in Ukraine. Accordingly, we are satisfied that the present dispute arises directly from the Claimant’s investment.

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<sup>95</sup> Schreuer, at 116 (citing P. Lalive, “The First World Bank Arbitration (*Holiday Inns v. Morocco*)—Some Legal Problems,” 1 ICSID Reports 645).

<sup>96</sup> L. Sohn and R. Baxter, “Responsibility of States for Injuries to the Economic Interests of Aliens, 55 AM J. INT’L L. 545, 553 (1961) (Article 10.3 of *Draft Convention on the International Responsibility of States for Injuries to Aliens*).

<sup>97</sup> *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA*, Award No. 141-7-2, 6 Iran-U.S. C.T.R. 219, 225 (June 22, 1984).

## V. OBJECTIONS TO ADMISSIBILITY

### A. First Objection: Claimant's Written Consent Was Improper and Untimely

94. Article 25(1) states, “jurisdiction of the Centre shall extend to any legal dispute... which the parties to the dispute consent in writing to submit to the Centre.” The consent of the Ukraine is found in Article 8(2) of the Treaty, which provides that “the investor shall be entitled to submit the case to [arbitration]...” It is well established that, “formulations [in a BIT] to the effect that a dispute ‘shall be submitted’ to the Centre’... leave no doubt as to the binding character of these clauses.”<sup>98</sup> The Respondent does not contest that it has consented to ICSID arbitration.

95. The Respondent does argue, however, that the Claimant's consent was improper and untimely, and, thus, its claim should be inadmissible. As discussed above, the Claimant attached an unaddressed document entitled, “Letter of Consent to Arbitration,” dated August 7, 2002, to its Request for Arbitration, which was received by ICSID on August 14, 2002.<sup>99</sup> The Claimant withdrew its request on October 17, 2002, and resubmitted it on November 22, 2002.

96. The Respondent argues that the Claimant's consent was improper because its Letter of Consent was not addressed and sent directly to the Respondent.<sup>100</sup> In addition, the Respondent argues that the consent was untimely because it was not given before the initiation of ICSID proceedings, which, according to the Respondent, is required by the

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<sup>98</sup> Schreuer, at 213.

<sup>99</sup> Request for Arbitration, at Annex 1.

<sup>100</sup> Respondent's Memorial on Jurisdiction, at 3.1.3.

Convention.<sup>101</sup> Finally, the Respondent argues that the Claimant's consent was untimely because it was expressed before the expiration of the six-month negotiating period required by Article 8 of the BIT.<sup>102</sup>

97. Each of the Respondent's arguments fails. First, the Convention does not stipulate the form that written consent must take, much less to whom it must be addressed and sent. As Dr. Amerasinghe explains,

[t]he Convention requires *only* that the consent be in writing. Thus, it is not necessary that the consent of both parties be included in a single instrument. The consents may, indeed, be expressed in instruments of completely diverse character, and *not necessarily addressed to the other party* or made with particular reference to any dispute of arrangement with it.<sup>103</sup>

98. In fact, the Claimant need not have expressed its consent in a document separate from the RFA itself. As Professor Schreuer notes, “[i]t is established practice that an investor may accept an offer of consent contained in a BIT by instituting ICSID proceedings.”<sup>104</sup> Thus, not only the Claimant's letter but also the RFA itself satisfy the requirement to “consent in writing” to the jurisdiction of the Centre. As the Convention contemplates “no requirement that the consent[] either precede or follow the incidence of a particular dispute,” neither does it require consent to precede or follow negotiations concerning a dispute.<sup>105</sup>

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<sup>101</sup> *Id.* at 3.1.4.

<sup>102</sup> *Id.*

<sup>103</sup> C.F. Amerasinghe, “The Jurisdiction of the International Centre for the Settlement of Investment Disputes,” at 224 (emphases added).

<sup>104</sup> Schreuer, at 218. As stated by the Tribunal in *SGS v. Philippines*, “the Claimant relies upon the consent to ICSID arbitration given by the Philippines in the BIT, combined with its own written consent contained in the Request for Arbitration. It is well established that the combination of these forms of consent can constitute ‘consent in writing’ within the meaning of Article 25(1), provided that the dispute falls within the scope of the BIT.” *SGS v. Philippines*, at para. 31.

<sup>105</sup> Amerasinghe, “The Jurisdiction of the International Centre for the Settlement of Investment

99. Further, the Claimant was not required to submit its consent prior to initiating ICSID proceedings. The Executive Directors' Report addresses the timing of parties' consent in paragraph 24: "[c]onsent of the parties must exist when the Centre is seized (Articles 28(3) and 36(3)) but the Convention does not otherwise specify the time at which consent should be given."<sup>106</sup> When an investor accepts a State's general offer of consent in a BIT, as in the present case, the timing of such an acceptance is proper as long as it occurs not later than the time at which the Claimant submits its request for arbitration.<sup>107</sup> There is no requirement that the Claimant's consent precede the request. Similarly, neither the BIT nor the Convention requires the Claimant to wait until after the requisite six-month negotiating period has ended before expressing its consent to ICSID jurisdiction. Article 8 of the BIT merely requires that there be a negotiating period of six months after a dispute arises before a claim may be submitted to arbitration. We are confident that this requirement has been fulfilled.

100. For the foregoing reasons, the Claimant's written consent satisfies the requirements of the ICSID Convention.

**B. Second Objection: Claimant and Respondent Were Not "Parties" to the Negotiation Required by Article 8 of the BIT**

101. The Respondent argues that, to the extent that negotiations occurred, they involved Taki spravy and local governmental authorities in Kyiv, not the Claimant and Respondent themselves.<sup>108</sup> Accordingly, the Respondent contends that the requirement in

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Disputes," at 224.

<sup>106</sup> Executive Directors' Report, at para. 24.

<sup>107</sup> Schreuer, at 225.

<sup>108</sup> Respondent's Memorial, at 3.2.5-3.2.6; Transcript of Oral Hearing on Jurisdiction, at 57-59.

Article 8 of the BIT that negotiations occur between “an investor of one Contracting Party and the other Contracting Party” has not been met.<sup>109</sup> The Respondent further argues that the governmental authorities in Kyiv were not duly authorized to negotiate on behalf of Ukraine. In addition, the Respondent argues that officials acting on behalf of Taki spravy, not Tokios Tokelès, engaged governmental officials in negotiation.

102. We are satisfied that the Claimant and the Respondent participated to the extent necessary in the negotiations concerning this dispute. The Claimant did bring this dispute to the attention of the central government authorities, including the President of Ukraine.<sup>110</sup> In addition, the Claimant has provided evidence of its negotiations with federal officials in the form of letters that the Claimant exchanged with the General Procurator of Ukraine and the Chairman of the State Tax Administration of Ukraine.<sup>111</sup> There is, in addition, evidence of extensive negotiations between the Claimant and municipal government authorities.<sup>112</sup> While the *actions* of municipal authorities are attributable to the central government,<sup>113</sup> we need not decide whether the *negotiations* by those authorities may count toward the six-month “cooling off” period prescribed by the Treaty, as the direct negotiations with central government authorities satisfy the jurisdictional requirement. Moreover, whether the President authorized any of these

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<sup>109</sup> Ukraine-Lithuania BIT, at art. 8.1 - 8.2.

<sup>110</sup> Request for Arbitration, at Annex 20.

<sup>111</sup> *Id.* at Annexes, 16, 17, 18, 19, and 21.

<sup>112</sup> *See* Supplement to the Request for Arbitration, at 3-8.

<sup>113</sup> *See* Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission, Fifty-third session, U.N. GAOR, 56<sup>th</sup> Sess., Supp. No. 10, at 47, U.N. Doc. A.56/10 (2001) (Article 17, “Conduct of organs of a State,” provides that [t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State”).

negotiations is irrelevant, as “[a] state cannot plead the principles of municipal law, including its constitution, in answer to an international claim.”<sup>114</sup>

103. With respect to the Claimant’s participation in the negotiation, it is immaterial whether the Claimant’s representatives negotiated as agents of the parent enterprise, Tokios Tokelès, or its wholly owned subsidiary, Taki spravy. In either case, the Claimant was a party to the negotiation.

104. Thus, the present dispute was the subject of negotiation between “an investor of one Contracting Party and the other Contracting Party” in accordance with Article 8 of the BIT.

**C. Third Objection: The “Dispute” Was Not the Subject of Negotiation as Required by Article 8 of the BIT**

105. The Respondent further argues that the claim is inadmissible even if the Claimant and Respondent did negotiate because the “dispute” was not the subject of their negotiations.<sup>115</sup> In particular, the Respondent argues that the governmental actions complained of by the Claimant did not crystallize into a dispute until August 16, 2002, the date on which the Respondent received the Request for Arbitration. Accordingly, the Respondent argues that the parties did not negotiate “the dispute” for the requisite six months before the case was registered on December 20, 2002.

106. In the *Mavrommatis Case*, the International Court defined dispute “as a disagreement on a point of law or fact, a conflict of legal views or interests between two

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<sup>114</sup> Brownlie, at 451.

<sup>115</sup> Respondent’s Memorial, at 3.3.2.

persons.”<sup>116</sup> Professor Schreuer described the requirements of a “dispute” in the following passage:

The dispute must relate to clearly identified issues between the parties and must not be merely academic. This is not to say that a specific action must have been taken by one side or that the dispute must have escalated to a certain level of confrontation, but merely that it must be of immediate interest to the parties. The dispute must go beyond general grievances and must be susceptible of being stated in terms of a concrete claim.<sup>117</sup>

107. We are convinced that the dispute was sufficiently defined for negotiations to occur at least six months prior to the date upon which the Centre registered the claim. The Claimant notified governmental authorities of the Respondent of specific grievances, including allegedly unwarranted investigations, unreasonable seizures of documents, unfounded judicial actions, and publicly stated accusations by governmental authorities of the Respondent that the Claimant had engaged in illegal conduct. Although we reserve judgment as to merits of the Claimant’s allegations, we find at this point that the claims constitute a “dispute” for the purpose of satisfying jurisdictional requirements.

## VI. DECISION

108. For the foregoing reasons, and after taking notice of the President’s Dissenting Opinion, the Tribunal decides by a majority of its members that the present dispute is within the jurisdiction of the Centre and the competence of the Tribunal.

signed  
Daniel M. Price

signed  
Piero Bernardini

April 29, 2004

<sup>116</sup> *Mavrommatis Case* 1924 P.C.I.J. Ser. A, No. 2, at 11-12.

<sup>117</sup> Schreuer, at 102.