

Tokios Tokelès v Ukraine, Decision on Jurisdiction and Dissent, ICSID Case No ARB/02/18; IIC 258 (2004); 20 ICSID Rev—FILJ 205
29 April 2004

Parties:	Tokios Tokelès (Lithuania) Ukraine
Date of Decision:	29 April 2004
Jurisdiction/Arbitral Institution/ Court:	International Centre for Settlement of Investment Dispute
Arbitrators/Judges:	Professor Prosper Weil (President); Daniel M Price (Claimant appointment); Professor Piero Bernardini (Respondent appointment)
Procedural Stage:	Decision on Jurisdiction and Dissent
OUP Reference:	IIC 258 (2004)
Arbitral Rules:	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (18 March 1965) 575 UNTS 159, entered into force 14 October 1966 ('ICSID Convention')
Governing Law:	Lithuania-Ukraine BIT (1994) ('Lithuania-Ukraine BIT') Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (18 March 1965) 575 UNTS 159, entered into force 14 October 1966 ('ICSID Convention') International law

Subject(s): International investment law

Keyword(s): Arbitral rules & institutions – Applicable law – International law, sources – Investment – Investment 'in accordance with host state law' – Investment defined in treaties – Investor – Control – Corporate veil, piercing – Denial of benefits clause – Genuine and effective link, doctrine of – Host state nationality – Nationality of investor, corporations – Nationality of investor, shareholders – Ownership – Jurisdiction of arbitral tribunals – Consent to jurisdiction through treaties – Treaties, interpretation – "Object & purpose (treaty interpretation and)" – "Ordinary meaning (treaty interpretation and)" – Rules of treaty interpretation – Vienna Convention on the Law of Treaties

Core Issue(s)

1. Whether jurisdiction existed to hear claims brought by Tokios Tokelès, a Lithuanian corporate entity, given that it had no substantial business activities in Lithuania, 99% of the shares in Tokios Tokelès were owned by nationals of Ukraine, managerial control of the company was vested in nationals of Ukraine, and the capital for the investment also originated in Ukraine.

Facts

F1 Tokios Tokelès was a publishing company established under the laws of Lithuania in 1989.

F2 In 1994, Tokios Tokelès created a wholly-owned subsidiary, Taki Spravy, established under the laws of Ukraine. Tokios Tokelès made an initial capital contribution of US\$170,000 in Taki Spravy and subsequent investments. From 1994 to 2002, Tokios Tokelès claimed to have invested a total of US\$6.5 million in Taki Spravy, funds apparently obtained from sources in Ukraine.

F3 Following publication of a book by Taki Spravy in January 2002 which favourably portrayed Ukrainian opposition politician Yulia Tymoshenko, Ukrainian authorities allegedly engaged in a series of actions against Taki Spravy, which Tokios Tokelès claimed adversely affected its investment in Taki Spravy in breach of the Lithuania-Ukraine BIT,

(1994) ('Lithuania-Ukraine BIT'). The actions allegedly included conducting invasive investigations into Taki Spravy's business under the guise of enforcing tax laws, pursuing unsubstantiated actions in the Ukrainian courts, placing the assets of Taki Spravy under administrative arrest, unreasonably seizing financial documents, and accusing Taki Spravy of illegal activities.

F4 On 14 August 2002, Tokios Tokelès and Taki Spravy submitted a joint Request for Arbitration to the International Centre for Settlement of Investment Disputes ('ICSID'), alleging multiple violations of the Lithuania-Ukraine BIT. Attached to the Request for Arbitration was an unaddressed letter dated 7 August 2002, purporting to express the requesting parties' consent to the jurisdiction of ICSID. Taki Spravy was removed as joint requesting party on 9 December 2002.

F5 Amongst other damages, Tokios Tokelès sought just and adequate compensation for losses sustained as a result of the requisitioning and destruction of its property by Ukraine's authorities

F6 At the First Session of the Tribunal on 3 June 2003, Ukraine raised objections to the jurisdiction of the ICSID Centre and the competence of the Tribunal. Ukraine requested that such objections be addressed first as preliminary issues, separately from the merits of the case. Tokios Tokelès opposed bifurcation, arguing that the objections were inextricably linked to the merits of the case. The Tribunal granted Ukraine's request to bifurcate the proceedings.

F7 At the First Session of the Tribunal, Tokios Tokelès also requested the Tribunal to grant provisional measures in the form of a recommendation that Ukraine suspend parallel court proceedings in its courts as well as investigations being conducted by Ukrainian tax authorities. The Tribunal recommended the provisional measures sought by Tokios Tokelès.

F8 On 10 December 2003, the Tribunal held a hearing to allow the parties to make oral submissions in relation to Ukraine's preliminary objections.

F9 Ukraine argued that whilst Tokios Tokelès was lawfully incorporated in Lithuania, it was not a 'genuine entity' of Lithuania for the purposes of the Lithuania-Ukraine BIT and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (18 March 1965) 575 UNTS 159, entered into force 14 October 1966 ('ICSID Convention'). Ukraine argued that the Tribunal should 'pierce the corporate veil' and determine that Tokios Tokelès was not entitled to submit a claim against it under the Lithuania-Ukraine BIT to ICSID arbitration. Instead of determining nationality on the basis of the place of incorporation, Ukraine argued that the Tribunal should adopt a 'control test', and look to the company's ultimate owners, or determine Tokios Tokelès' *siège social*, both of which, it said, pointed to Ukrainian, not Lithuanian, nationality. Ukraine emphasised that Tokios Tokelès was owned and controlled by Ukrainian nationals, who held 99% of its outstanding shares and comprised two-thirds of its management. Ukraine also argued that Tokios Tokelès conducted no substantial business activities in Lithuania, and that its administrative headquarters were based in Ukraine.

F10 Ukraine also argued that the Tribunal ought not to uphold its jurisdiction for policy reasons. It said that the object and purpose of the Lithuania-Ukraine BIT and the ICSID Convention did not permit nationals of the host state to submit claims against their own state to international arbitration, albeit through a foreign-incorporated entity. It argued that the Lithuania-Ukraine BIT and the ICSID Convention both contemplated only the settlement of international investment disputes involving a Contracting state and a foreign investor.

F11 Ukraine further argued that Tokios Tokelès had not made an investment in Ukraine as defined by the Lithuania-Ukraine BIT. Ukraine argued that both the Lithuania-Ukraine BIT and the ICSID Convention protected only international, cross-border investments and asserted that Tokios Tokelès had failed to prove that its capital investment originated from outside Ukraine.

F12 Ukraine also argued that Tokios Tokelès had failed to make an investment 'in accordance with the Laws and Regulations' of Ukraine because of errors in the relevant documentation, including absence of necessary signatures and notarization in certain asset procurement and transfer agreements. In addition, Taki Spravy was incorrectly designated as a 'subsidiary private enterprise', a legal form unknown to Ukrainian law.

F13 Ukraine observed that the alleged internationally wrongful acts were not directed against physical assets owned by Tokios Tokelès. Ukraine therefore argued that the dispute did not arise 'directly out of an investment' as required for the ICSID to have jurisdiction. Article 25(1) of the ICSID Convention provided that the ICSID should have jurisdiction only in respect of disputes arising directly out of an investment. Article 8 of the Lithuania-Ukraine BIT also required that disputes be 'in connection with' an investment in the other state.

Held

H1 The requesting parties' expression of consent to the jurisdiction of ICSID in their 7 August 2002 letter was strictly redundant. Any defect in that document had no effect on the admissibility of the claims. The ICSID Convention did not require requesting parties to consent to ICSID jurisdiction prior to and separately from submitting a Request for Arbitration. The necessary consent was established at the time Tokios Tokelès accepted the offer to arbitrate disputes in the Lithuania-Ukraine BIT. (paragraphs 97, 99)

H2 Turning first to jurisdiction *ratione personae*, Article 25(2)(b) of the ICSID Convention defined '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 second clause of Article 25(2)(b) applied only to extend the scope of ICSID jurisdiction to companies incorporated in the host state that were controlled by nationals of another Contracting state. It did not limit ICSID jurisdiction. (paragraph 46)

H3 The ICSID Convention left the identification of the applicable test by which to determine whether a legal person qualified as a national of a Contracting state to the 'reasonable discretion of the Contracting Parties'. (paragraph 24) The Tribunal primarily considered the wording of the Lithuania-Ukraine BIT. Article 1(2)(b) defined Lithuanian 'investors' as 'any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations'. (paragraph 28)

H4 It was not disputed that Tokios Tokelès was a legal entity duly established under the laws of Lithuania. On this basis, Tokios Tokelès was a Lithuanian 'investor' for the purposes of the Lithuania-Ukraine BIT and was held to be a 'national of another Contracting state' for the purposes of the ICSID Convention. (paragraphs 29, 38) No further or substantial connection between Tokios Tokelès and Lithuania was required in order for the Claimant to qualify for protection under the Lithuania-Ukraine BIT. (paragraph 28) Article 1(2)(b) did not require the Tribunal to look behind the corporate entity and be satisfied that the persons who owned or controlled Tokios Tokelès were themselves Lithuanian.

H5 Contracting Parties that wished to limit the scope of persons to whom they extended treaty protection were free to specify that to qualify for such protection, entities incorporated pursuant to the laws of a Contracting Party be also controlled by nationals of that state, or to reserve their right to deny protection to entities that lacked a substantial connection to the state in which they were incorporated and that were also controlled by nationals of a third state. (paragraph 39) The absence of such qualifications was regarded as 'a deliberate choice of the Contracting Parties.' (paragraph 36)

H6 The definition of corporate nationality in the Lithuania-Ukraine BIT was in accord with the ICSID Convention. ICSID tribunals had consistently applied a test of incorporation or seat, when determining the nationality of a corporate person. (paragraph 63) ICSID tribunals had not generally applied a control test to such questions. (paragraph 42)

H7 There was no evidence that Tokios Tokelès had been established for the purpose of attracting the protection of the Lithuania-Ukraine BIT. It had been founded some six years before the treaty entered into force. It would only be in extreme cases of abuse of the corporate form, fraud or malfeasance, or where it was necessary to protect the interests of third parties, or prevent the evasion of legal obligations, that the Tribunal considered that it might be appropriate to 'pierce the corporate veil' and to disregard a company's formal nationality based on the place of its incorporation. (paragraphs 53–6)

H8 Turning to jurisdiction *ratione materiae*, the term 'investment' was not defined in the ICSID Convention. As a result, and in the light of the importance the drafters gave to the party autonomy, the parties 'enjoy broad discretion to choose the disputes that they will submit to ICSID'. (paragraph 19)

H9 The specific wording of the Lithuania-Ukraine BIT Article 1(1), which defined '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', was again relied upon. That definition did not entail any requirement that capital be sourced from the other Contracting Party or, indeed, from outside of the territory of the host state. (paragraph 74) To imply 'an origin-of-capital' requirement, not present in the text itself, would be contrary to the object and purpose of the BIT (paragraph 77) and the ICSID Convention, neither of which contained any legal requirement that an investment must involve capital sourced from outside of the host state. (paragraph 82)

H10 The Tribunal dismissed Ukraine's argument that the investment was not made in compliance with the laws and regulations of Ukraine and therefore did not qualify for protection under the Lithuania-Ukraine BIT. Excluding

protection for investments because of minor, administrative or bureaucratic errors would be contrary to the Contracting Parties' intentions. In any event, Ukraine had registered Taki Spravy as a valid enterprise in 1994 and had not raised any concern as to form at that time or subsequently, until the dispute arose. This indicated that the investment in question was made in accordance with the laws and regulations of Ukraine. (paragraph 86)

H11 The dispute arose directly out of Tokios Tokelès' investment, since each of the alleged wrongful governmental actions involved the operations of its investment, namely Taki Spravy, in Ukraine. (paragraph 98)

H12 Prosper Weil, dissenting: he disagreed with the very 'philosophy of the [majority] decision'. (paragraph 1)

H13 The majority failed to respect the 'outer limits' of the ICSID's jurisdiction 'determined by the basic ICSID Convention'. (paragraph 13) The parties to a dispute could not 'dispose at will' of the objective requirements for jurisdiction to exist under the ICSID Convention. (paragraph 28) Satisfaction that there was jurisdiction under the ICSID Convention must be 'the first leg of the reasoning'. (paragraph 15) Although the Contracting Parties to an investment treaty 'are free to confer to the ICSID tribunal a jurisdiction narrower than that provided for by the Convention, it is not for them to extend the jurisdiction of the ICSID tribunal beyond its determination in the Convention'. (paragraph 13)

H14 The ICSID Convention was established as a mechanism for arbitrating 'international investment disputes, that is to say, for disputes between States and foreign investors'. ICSID arbitration was not available for 'investment disputes between states and their own nationals'. It was manifest that to be 'international', investments must involve the cross-border flow of capital; the origin of capital was therefore 'relevant, and even decisive'. (paragraphs 19–20) This interpretation was said to be consistent with the object and purpose of the ICSID Convention, properly interpreted in the light of Article 31 of the Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969), entered into force 27 January 1980 ('VCLT'). The President arrived at this conclusion also in the light of the general principle in international law that a national was not permitted to sue its own state in an international forum (paragraphs 5, 10) and the fact that the ICSID Convention was concerned with 'the need for *international co-operation* for economic development and the role of private investment therein' Paragraph 1 of the Preamble to the ICSID Convention.

H15 It was clear that in effect Tokios Tokelès was a Ukrainian entity. Thus, Tokios Tokelès was not a 'national of another Contracting state'; it was a national and investor of Ukraine. (paragraph 21) The President would have declined to uphold jurisdiction to determine the dispute.

Date of Report: 01 August 2008

Reporter(s): Anthony C Sinclair Matthew Hodgson

Counsel for Investor: Mr Ivan Lozowy; General Counsel, Tokios Tokelès; Mr Sergiy Danylov; Chairman of the Board of Directors, Tokios Tokelès; Ms Ludmilla Zhylytsova; Tokios Tokelès; Mr Oleksandr Danylov; Tokios Tokelès

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Analysis

A1 That this jurisdictional decision was a controversial one was self-evident from the dissenting opinion of the President of the Tribunal, Professor Prosper Weil, and his subsequent resignation from the Tribunal.

A2 The ICSID Convention was a unique multilateral instrument. Its creation marked a watershed in international dispute settlement. At the time of writing, August 2008, it had 155 signatories of which 143 were Contracting states. The President's Dissenting Opinion reflected a highly respectful view of that achievement and a particular appreciation of the Convention's object and purpose, not necessarily found in the precise text of its provisions. Nonetheless, the President felt moved to express his dissenting view, and subsequently resign from the case, out of concern for 'the future of the institution'. The majority decision, on the other hand, was similarly respectful of the clear terms of the parties' consent to use the ICSID facility, as expressed in the Lithuania-Ukraine BIT. In this regard, the

majority declared that they would be loathe to undermine the basic principle that the cornerstone of ICSID jurisdiction was party consent.

A3 The Decision on Jurisdiction epitomized the concern of some states to limit or manage their exposure to potential investment treaty claims. At the same time, the majority acknowledged that investors too need to be able to ascertain with some certainty whether or not an investment structure would fall within the protection of a particular investment treaty.

A4 The majority decision, if followed, suggested that well-advised investors, including those having the nationality of the host state, could structure their investments through a corporate vehicle established under the laws of another Contracting state in order to attract the protection of an applicable investment protection treaty and avail themselves of ICSID jurisdiction for the resolution of potential disputes. One exception to this principle may be where the applicable treaty contains a denial of benefits provision. Such provisions may enable a host state to deny the protection of a treaty to a claimant that, whilst incorporated in the jurisdiction of another Contracting Party, conducted no substantial business activities in the jurisdiction where it was incorporated and was owned or controlled by nationals of a third state. Such companies were commonly referred to as 'brass name-plate' or 'mailbox' companies. The Tribunal noted that the Lithuania-Ukraine BIT did not contain such a provision, which it considered to be 'a deliberate choice of the Contracting Parties'.

A5 In the absence of a denial of benefits provision, following the rationale of the majority decision, investors were likely to enjoy treaty legal protection through the deployment of a corporate vehicle subject to the limited circumstances that exist in public international law in which a tribunal may be justified in looking behind the corporate veil.

Date of Analysis: 01 August 2008

Analysis by: Anthony C Sinclair Matthew Hodgson

Further Analysis

M Burgstaller, 'Nationality of Corporate Investors and International Claims against the Investor's Own State' (2006) 7 J of World Investment & Trade

AS Zanna, 'Incorporation or Control?: Contested Determinants of Corporate Nationality in Tokios Tokelès v Ukraine' (2005) 6(1) Griffin's View on Intl and Comparative L 64

HE Kjos, Tokios Tokelès v Ukraine, Decision on Jurisdiction of April 29, 2004' (2004) 1(3) TDM

Other decisions cited in the full text of this decision:

International Centre for the Settlement of Investment Disputes

Holiday Inns and Occidental Petroleum v Morocco, Decision on Jurisdiction, ICSID Case No ARB/72/1; 30 ILM 580; 1 ICSID Reports 645, 12 May 1974

Amco Asia Corporation v Indonesia, Decision on Jurisdiction, ICSID Case No ARB/81/1; 1 ICSID Rep 389, 25 September 1983

Fedax NV v Venezuela, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No ARB/96/3; IIC 101 (1997), 11 July 1997

Tradex Hellas SA v Albania, Award, ICSID Case No ARB/94/2; IIC 263 (1999), 29 April 1999

Wena Hotels Ltd v Egypt, Decision on Jurisdiction, ICSID Case No ARB/98/4; IIC 272 (1999), 25 May 1999

Salini Costruttori SpA and Italstrade SpA v Morocco, Decision on Jurisdiction, ICSID Case No ARB/00/4; IIC 206 (2001), 23 July 2001

Banro American Resources Inc and Société Aurifère du Kivu et du Maniema SARL v Congo, the Democratic Republic of the, ICSID Case No ARB/98/7, 1 September 2001

Autopista Concesionada de Venezuela, CA ('Aucoven') v Venezuela, Decision on Jurisdiction, ICSID Case No ARB/00/5; IIC 19 (2001), 27 September 2001

Loewen Group Inc and Loewen v United States, Award, ICSID Case No ARB(AF)/98/3; IIC 254 (2003), 26 June 2003

CMS Gas Transmission Company v Argentina, Decision on Objections to Jurisdiction, ICSID Case No ARB/01/8; IIC 64 (2003), 17 July 2003

SGS Société Générale de Surveillance SA v Philippines, Decision on Objections to Jurisdiction and Separate Declaration, ICSID Case No ARB/02/6; IIC 224 (2004), 29 January 2004

International Court of Justice

Barcelona Traction, Light and Power Company Ltd, Belgium v Spain, 1970 ICJ Rep 3

Permanent Court of International Justice

Mavrommatis Case, PCIJ Series A no 2, 1924

Instruments Cited in the full text of this decision:

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (18 March 1965) 575 UNTS 159, entered into force 14 October 1966, Articles 25(1), 25(2)(b)

Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969), entered into force 27 January 1980, Article 31

Lithuania-Ukraine BIT (1994), Articles 1(1), 1(2)(b)

Ukraine-United States BIT (1994)

Energy Charter Treaty (17 December 1994) 2080 UNTS 100; (1995) 10 ICSID Rev—Foreign Investment L J 258, entered into force 16 April 1998

Previous stages in these proceedings:

Order No 1; *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18; IIC 259 (2003), 1 July 2003

Subsequent stages in these proceedings:

Order No 3; *Tokios Tokelés v Ukraine*, ICSID Case No ARB/02/18; IIC 260 (2005), 18 January 2005

Decision – full text

I. The Dispute

II. Procedural History

III. Relevant Legal Provisions

IV. Analysis of Respondent's Objections to Jurisdiction

A. First Objection: Claimant Is Not a Genuine "Investor" of Lithuania

1. Arguments of the Respondent

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

3. Definition of "Investor" in Article 1(2) of the BIT

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

5. Equitable Doctrine of "Veil Piercing"

6. Other Considerations Regarding Corporate Nationality

7. Conclusion of the Tribunal

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
2. “Investment” under Article 25 of Convention
3. Definition of “Investment” in Article 1(1) of the BIT
4. Consistency of Article 1(1) of the BIT with the ICSID Convention
5. Argument of the Respondent: Investment Not Made “in Accordance with Laws and Regulations” of Ukraine

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

V. Objections to Admissibility

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

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

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

VI. Decision

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”).¹ 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 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"²) 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 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 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,³ 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 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.⁴ 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.

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.⁵ 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.⁶ 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 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*...”⁷ 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 determining the nationality of juridical entities, leaving this task to the reasonable discretion of the Contracting Parties.⁸

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.*⁹

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.”¹⁰ 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.”¹¹

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.¹² 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.”¹³

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.”¹⁴ The ordinary meaning of “entity” is “[a] thing that has a real existence.”¹⁵ The meaning of “establish” is to “[s]et up on a permanent or secure basis; bring into being, found (a...business).”¹⁶ 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.

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.¹⁷ In 1991, the founders of Tokios Tokelės agreed to reorganize the cooperative into a closed joint-stock company, which the municipal government of Vilnius, Lithuania registered on May 2, 1991.¹⁸ According to the Certificate of Enterprise, the address of Tokios Tokelės 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.¹⁹ 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 Tokelės 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* 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.²⁰ 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 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....”²¹ 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.”²²

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....”²³

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.²⁴

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 1994.²⁵ 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 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....*²⁶

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 its *siège social* or place of incorporation.²⁷ Indeed, “ICSID tribunals have uniformly adopted the test of incorporation or seat rather than control when determining the nationality of a juridical person.”²⁸ 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).”²⁹ 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.”³⁰

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),³¹ its statute of incorporation,³² and each of the Claimant's “Information Notices of Payment of Foreign Investment” (registered by Ukrainian governmental authorities),³³ all record the Claimant's address as Vilnius, Lithuania. Contrary to the assertion of the Respondent, a nationality test of *siège social* leads to the same result as one based on state of incorporation.³⁴

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....”³⁵ 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.

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.*³⁶

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.³⁷ 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.³⁸

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 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.”³⁹ 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.”⁴⁰

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*....”⁴¹ 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.

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,⁴² 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 agreement between the Contracting Parties and cause the Tribunal to deny jurisdiction in this case.⁴³

54. The seminal case, in this regard, is *Barcelona Traction*.⁴⁴ 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.”⁴⁵ 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*.”⁴⁶

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.

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:

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.⁴⁷

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.⁴⁸ 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.⁴⁹ Although the *Banro* Tribunal indicated that it “could have addressed the issue of *jus standi* of Banro American in a flexible manner,”⁵⁰ in the end, the Tribunal did not deny jurisdiction by piercing the Claimant's corporate veil. Instead, the *Banro* Tribunal denied jurisdiction to 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.⁵¹

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.”⁵² Although seemingly helpful, the text of the decision that follows the quoted passage directly undermines the Respondent's objection. In particular, the Tribunal states,

“[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*.⁵³

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.⁵⁴

64. The Respondent also cites *Loewen v. United States of America* to support its position.⁵⁵ 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.⁵⁶ 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 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.⁵⁷

65. Although the *Loewen* tribunal denied that it pierced the claimant's corporate veil,⁵⁸ 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 by Professor Schreuer.⁵⁹ 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.⁶⁰ 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.”⁶¹

69. Likewise, Mr. Broches states that the text of Article 25(2)(b) “implicitly assumes that incorporation is a criterion of nationality.”⁶² 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.⁶³ 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.

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.”⁶⁴ 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.”⁶⁵ 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.

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.”⁶⁶ 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.”⁶⁷ Parties have a “large measure of discretion to determine for themselves whether their transaction constitutes an investment for the purposes of the Convention.”⁶⁸ 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....”⁶⁹ The ordinary meaning of “by” is “indicating agency, means, [or] cause”⁷⁰ 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 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 reinvestments⁷¹ each year until 2002, for a total investment of more than USD 6.5 million.⁷² 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.⁷³

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 invested by an investor,” does not support the restriction advocated by the Respondent.⁷⁴ 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.⁷⁵ 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 underlying transaction as not being an “investment” under the Convention.⁷⁶ 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.⁷⁷ The Respondent argued that the Claimant had not made a “direct” investment in Venezuela, which the Respondent argued was required by the ICSID Convention.⁷⁸ 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.⁷⁹

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 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.”⁸⁰ 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.’”⁸¹ 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 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,”⁸² is improper because “subsidiary enterprise” but not “subsidiary *private* enterprise” is a recognized legal form under Ukrainian law.⁸³ The Respondent also alleges that it has identified errors in the documents provided by the Claimant related to asset procurement and transfer, including, in some cases, the absence of a necessary signature or notarization.⁸⁴ The Claimant disputes the Respondent's allegations.⁸⁵

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.⁸⁶ 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.”⁸⁷

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.”⁸⁸ 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 Notices of Payment of Foreign Investment.⁸⁹ 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.”⁹⁰ 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”⁹¹

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.⁹² 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.”⁹³ 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.⁹⁴

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

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.”⁹⁶ 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.”⁹⁷

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.

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.”⁹⁸ 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, 2002.⁹⁹ 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.¹⁰⁰ 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 Convention.¹⁰¹ 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.¹⁰²

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.¹⁰³

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.”¹⁰⁴ 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.¹⁰⁵

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.”¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸ Accordingly, the Respondent contends that the requirement in Article 8 of the BIT that negotiations occur between “an investor of one Contracting Party and the other Contracting Party” has not been met.¹⁰⁹ 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.¹¹⁰ 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.¹¹¹ There is, in addition, evidence of extensive negotiations between the Claimant and municipal government authorities.¹¹² While the *actions* of municipal authorities are attributable to the central government,¹¹³ 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 negotiations is irrelevant, as “[a] state cannot plead the principles of municipal law, including its constitution, in answer to an international claim.”¹¹⁴

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.¹¹⁵ 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 persons.”¹¹⁶ 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.¹¹⁷

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

Dissenting Opinion

Professor Prosper Weil

1. The chairman of an arbitral tribunal dissenting from a decision drafted by his two colleagues: this is not a frequent occurrence. If I have decided to dissent, it is because the approach taken by the Tribunal on the issue of principle raised in this case for the first time in ICSID’s history is in my view at odds with the object and purpose of the ICSID Convention and might jeopardize the future of the institution. In other words, my dissent does not relate to any particular aspect of this brilliantly drafted Decision, or to any particular assessment of the facts, but rather to what I would call the philosophy of the Decision. I would fail in my duty if I were to conceal my doubts out of friendship for my colleagues.

2. The ICSID system rests on the Convention on the Settlement of Investment Disputes between States and Nationals of other States signed on March 18, 1965 (hereafter: the Convention), which had been formulated by the Executive Directors of the World Bank and to which both Lithuania and Ukraine are parties. The object and purpose of the Convention are set out in the *Report of the Executive Directors on the Convention* as well as in the provisions of the Convention itself.

3. The *Report of the Executive Directors on the Convention* explains that the creation of ICSID was “designed to facilitate the settlement of disputes between States and foreign investors” with a view to “stimulating a larger flow of

private international capital into those countries which wish to attract it.”¹ The *Report* explains that, while “investment disputes are as a rule settled under the laws of the country in which the investment concerned is made,... both States and investors frequently consider that it is in their mutual interest to agree to resort to international methods of settlement”.² It states that “adherence to the Convention by a country would... stimulate a larger flow of private international investment into territories, which is the primary purpose of the Convention”,³ and adds that “the broad objective of the Convention is to encourage a larger flow of private international investment”.⁴ The object of the Convention, so the *Report* explains, is to “offer international methods of settlement designed to take account of the special characteristics of the disputes covered, as well as of the parties to whom it would apply.”⁵

4. The Convention, for its part, refers in its Preamble to “the possibility that from time to time disputes may arise in connection with... investment between Contracting States and nationals of other Contracting States”. “[W]hile such disputes, so the Preamble states, would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases”; that is why it has been regarded as appropriate to establish “facilities for international arbitration... to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire.” Accordingly, Article 25(1) of the Convention establishes the jurisdiction of the Centre over disputes “between a Contracting State... and a national of another Contracting State...” Over other disputes the Centre has no jurisdiction.

5. From this it appears that the ICSID arbitration mechanism is meant for *international* investment disputes, that is to say, for disputes between States and *foreign* investors. It is because of their *international* character, and with a view to stimulating private *international* investment, that these disputes may be settled, if the parties so desire, by an *international* judicial body. The ICSID mechanism is not meant for investment disputes between States and their own nationals. This is in effect not disputed by the Claimant since in its Opening Statement it declared that

... this Convention has as its express purpose the encouragement of international private investment. We can agree with the Respondent that the ICSID Convention prohibits a host State from being sued by its own nationals with the single exception of the circumstances foreseen by the second clause of Article 25(2)(b).⁶

6. The Decision rests on the assumption that the origin of the capital is not relevant and even less decisive. This assumption is flying in the face of the object and purpose of the ICSID Convention and system as explicitly defined both in the Preamble of the Convention and in the *Report of the Executive Directors*.

7. This, however, is not the only key feature of the ICSID mechanism that, in my view, the Decision ignores. Another one is that once this mechanism comes into play it is exclusive of any other remedy. As the *Report of the Executive Directors* states, “[i]t may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies..., the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy.”⁷ That is why Article 26 of the Convention decides that consent to arbitration under the Convention “shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy”. In particular, as provided for by Article 27, such consent shall be exclusive of diplomatic protection.

8. It appears, therefore, that because of its specific object and purpose — namely, the protection of international investments — the ICSID Convention imposes strict obligations and limitations on both the Contracting States and the investors who are nationals of other Contracting States. It prohibits the use of diplomatic protection and excludes the jurisdiction of domestic courts, for which it substitutes the recourse to its own, specific international arbitration mechanism. It follows that ICSID arbitral tribunals have to be particularly cautious when they determine their jurisdiction. An unwarranted extension of the ICSID arbitral jurisdiction would entail an unwarranted encroachment on both the availability of diplomatic protection and the jurisdiction of domestic courts.

9. The instant case opposes a Lithuanian corporation, Tokios Tokelės, to Ukraine on measures taken by the Ukrainian authorities against its wholly owned subsidiary, the Ukrainian corporation Taki spravy, in alleged violation of the bilateral investment treaty (BIT) between Ukraine and Lithuania. As stated in the Decision, “[t]here is no dispute that nationals of Ukraine own ninety-nine percent of the outstanding shares of Tokios Tokelės and comprise two-thirds of its management”.⁸ Assuming that the dispute brought before the Tribunal meets the condition of “arising directly out of an investment” laid out in Article 25 of the ICSID Convention, a question thus arises: Does the dispute fall into the category of “disputes between States and nationals of other States”, as required by the very title of the Convention? Does it qualify as a dispute “between a Contracting State... and a national of another Contracting

State”, as required by Article 25 of the Convention? In the affirmative, the Tribunal has to affirm its jurisdiction. In the negative, it has to deny it.

10. It is, I think, the first time that an ICSID tribunal has to address the specific problem of a dispute opposing to State A (Ukraine) a corporation which has the nationality of State B (Lithuania) but which is controlled by citizens of State A (Ukraine) — so much so that the dispute, while formally meeting the condition of being between a Contracting State and a national of another Contracting State, is in actual fact between a Contracting State and a corporation controlled by nationals of that State. In some instances, there may be doubts about whether the corporation is, or is not, to be regarded as being controlled by nationals of the respondent State, and a choice will then have to be made between various possible criteria. In the present case, however, where Tokios Tokelés is indisputably and totally in the hands of, and controlled by, Ukrainian citizens and interests, there is no evading the issue of principle.

11. The Decision rests on the idea that the Ukrainian origin of the capital invested by Tokios Tokelés in Taki spravy and the Ukrainian nationality of Tokios Tokelés' shareholders and managers are irrelevant to the application of both the Convention and the BIT. What is relevant and decisive, according to the Decision, is the fact that the investment has been made by a corporation of Lithuanian nationality, whatever the origin of its capital and the nationality of its managers. The Decision dismisses any “origin-of-capital requirement”, which, so it maintains, “is plainly absent from the text” of the relevant instruments and “is inconsistent with the object and purpose of the Treaty which... is to provide broad protection to investors and their investments in the territory of either party”:⁹

The origin of the capital is not relevant to the existence of an investment... [T]he ICSID Convention does not require an ‘investment’ to be financed from capital of any particular origin... The origin of the capital used to acquire these assets is not relevant to the question of jurisdiction under the Convention.¹⁰

The Decision goes so far as to state that

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.¹¹

12. The Decision states that the Tribunal was “guided by Article 25 of the ICSID Convention as well as Articles 1 and 8 of the Ukraine-Lithuania BIT”.¹² Insofar as the relations *inter partes* under the BIT are concerned, so the Decision maintains, the Contracting Parties are “free to define their consent to jurisdiction in terms that are broad or narrow”,¹³ and “it is not for tribunals to impose limits on the scope of BITs not found in the text”.¹⁴ As to the jurisdiction of the ICSID tribunals, the provisions of the BIT are governing, so the Decision writes, “as long as the dispute satisfies the objective requirements set forth in Article 25 of the Convention”; therefore, tribunals should give effect to the consent of the Contracting Parties as expressed in the BIT “unless doing so would allow the Convention to be used for purposes for which it clearly was not intended”.¹⁵ As a consequence, so the Decision concludes, “[t]ribunals 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”.¹⁶

13. The Decision thus accepts, as a matter of principle, that the provisions of the BIT governing the jurisdiction of the ICSID tribunals can be given effect only within the limits of the jurisdiction defined in the Convention. It refers to that effect to Broches' well-known phrase that the Convention determines the “outer limits”¹⁷ of the jurisdiction of the ICSID and its tribunals. In other words, it is within the limits determined by the basic ICSID Convention that the BITs may determine the jurisdiction and powers of the ICSID tribunal, and it is not for the Contracting Parties in their BIT to extend the jurisdiction of the ICSID tribunal beyond the limits determined by the basic ICSID Convention. From this it follows that, while the Contracting Parties to the BIT are free to confer to the ICSID tribunal a jurisdiction narrower than that provided for by the Convention, it is not for them to extend the jurisdiction of the ICSID tribunal beyond its determination in the Convention.

14. To decide the jurisdictional issue the Decision should, therefore, have checked *first* whether the Tribunal has jurisdiction under Article 25 of the Convention — interpreted, as the Decision recalls, in light of its object and purpose¹⁸ — and *then*, in a second stage, whether it has jurisdiction *also* under the bilateral investment treaty. It is only if the tribunal had reached the conclusion that it has jurisdiction under the Convention that it would have had to examine whether it has jurisdiction *also* under the BIT. This, however, is not how the Decision proceeds. It states that “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.”¹⁹ And this is what it does: it begins with the “Definition of ‘investor’ in Article 1(2) of the BIT”, and then in a second stage it turns to the “Consistency of Article 1(2) of the BIT with the ICSID Convention”.²⁰

15. I now turn to what, in my view, should have been the first leg of the reasoning, namely, the question whether the basic requirements of Article 25 of the Convention are met. According to paragraph 1 of Article 25 the jurisdiction of the Centre extends to legal disputes “between a Contracting State... and a national of another Contracting State”. While Ukraine is beyond doubt a “Contracting State”, the question arises whether for the purposes of this provision Tokios Tokelés is to be regarded as “a national of another Contracting State.” Article 25(2)(b) defines this concept as

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...arbitration, and any 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.

Thus, the question boils down to determining whether Tokios Tokelés, even though undisputedly under Ukrainian control, is to be regarded as having “the nationality of a Contracting State other than the State party to the dispute”, i.e., the nationality of Lithuania, or whether, because undisputedly under Ukrainian control, it is to be regarded, for the purposes of the Convention, as having the nationality of Ukraine.

16. The Decision states that “[t]he Convention does not define the method for determining the nationality of juridical entities, leaving this task to the reasonable discretion of the Contracting Parties”²¹, and it begins its analysis, as already mentioned, “by underscoring the deference this Tribunal owes to the definition of corporate nationality contained in the agreement between the Contracting Parties.”²² While it is true that no definition of the nationality of corporations is to be found in the Convention, it cannot be the case that this definition is left to the discretion of the Parties, because it is not for the Parties to extend the jurisdiction of ICSID beyond what the Convention provides for. It is the Convention which determines the jurisdiction of ICSID, and it is within the limits of the ICSID jurisdiction as determined by the Convention that the Parties may in their BIT define the disputes they agree to submit to an ICSID arbitration.

17. The central question before the Tribunal was thus as follows: Does Tokios Tokelés meet the requirement of having, for the purposes of the Convention, the nationality of Lithuania — in which case the Tribunal has to affirm its jurisdiction —, or is it to be regarded for the purposes of the Convention as being an Ukrainian corporation because it is indisputably under Ukrainian control — in which case the Tribunal has no jurisdiction?

18. This question is answered by the Decision in the following way:

... [I]n light of the object and purpose of the [BIT], 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... We decline to look beyond (or through) the Claimant to its shareholders or other juridical entities that may have an interest in the claim... [T]he nationality of a corporation is determined on the basis of its *siège social* or place of incorporation... [T]he Claimant is an “investor” of Lithuania under Article 1(2)(b) of the Ukraine-Lithuania BIT based on its state-of-incorporation.²³

19. This raises the single most important issue which lies at the heart of my dissent. As observed earlier, the silence of the Convention on the criterion of corporate nationality does not leave the matter to the discretion of the Parties. According to Article 31 of the Vienna Convention on the Law of Treaties, which the International Court of Justice has repeatedly described as the expression of customary international law, “[a] treaty shall be interpreted... in accordance with the ordinary meaning to be given to its terms in their context and *in the light of its object and purpose*”.²⁴ It is indisputable, and indeed undisputed, that the object and purpose of the ICSID Convention and, by the same token, of the procedures therein provided for are not the settlement of investment disputes between a State and its own nationals. It is only the *international* investment that the Convention governs, that is to say, an investment implying a transborder flux of capital. This appears from the Convention itself, in particular from its Preamble which refers to “the role of private international investment” and, of course, from its Article 25. This appears also from the passages in the *Report of the Executive Directors* quoted above.²⁵ As Professor Schreuer writes,

The basic idea of the Convention, as expressed in its title, is to provide for dispute settlement between States and foreign investors... Disputes between a State and its own nationals are settled by that State's domestic courts...

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. The latter type of dispute is to be settled by domestic procedures, notably before domestic courts.²⁶

The ICSID mechanism and remedy are not meant for investments made in a State by its own citizens with domestic capital through the channel of a foreign entity, whether preexistent or created for that purpose. To maintain, as the Decision does, that “the origin of the capital is not relevant” and that “the only relevant consideration is whether the Claimant is established under the laws of Lithuania”²⁷ runs counter to the object and purpose of the whole ICSID system.

20. Contrary to what the Decision maintains, when it comes to ascertaining the *international* character of an investment, the origin of the capital *is* relevant, and even decisive. True, the Convention does not provide a precise and clear-cut definition of the concept of *international* investment — no more than it provides a precise and clear-cut definition of the concept of *investment* —, and it is therefore for each ICSID tribunal to determine whether the specific facts of the case warrant the conclusion that it is before an international investment. Given the indisputable and undisputed Ukrainian character of the investment the Tribunal does not, in my view, give effect to the letter and spirit, as well as the object and purpose, of the ICSID institution.

21. The Decision stresses 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, so it observes, “made no attempt whatever to conceal its national identity from the Respondent” and “manifestly did not create Tokios Tokelés 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”.²⁸ I agree; but this is beside the point, as is beside the point the issue of the ‘lifting of the veil’ under the *Barcelona Traction* judgment of the International Court of Justice.²⁹ What *is* decisive in our case is the simple, straightforward, objective fact that the dispute before this ICSID Tribunal is not between the Ukrainian State and a foreign investor but between the Ukrainian State and an Ukrainian investor — and to such a relationship and to such a dispute the ICSID Convention was not meant to apply and does not apply. There is in this conclusion a merely objective, legal appreciation without any criticism of Tokios Tokelés' or Taki spravy's way of organizing and handling their relations.

22. In support of the view it takes, the Decision refers to the provision in Article 25(2)(b) of the ICSID Convention according to which the concept of a “national of a Contracting State” extends to any juridical person “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.” The Decision maintains that

This exception to the general rule [of the *siège social*] applies only in the context of an agreement between the parties... [I]t 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.³⁰

The provision in Article 25(2)(b), so the Decision states, was meant “to *expand* the jurisdiction of the Centre”; to use the control-test “to *restrict* the jurisdiction of the Centre would be inconsistent with the object and purpose of Article 25(2)(b)”.³¹

23. I am unable to concur with this reading of Article 25(2)(b). The object and purpose of this provision is, provided the parties so agree, to have the reality of foreign investment prevail for the purposes of the Convention over its legally domestic character when — because the law of the host State so requires or for whatever other reason — this investment was made through the channel of a domestic corporation, whether preexistent or created for that purpose. The object and purpose of this provision is to give effect to the genuinely international character of an apparently national investment and, therefore, as Broches' comment cited in paragraph 46 of the Decision highlights, to prevent a genuinely foreign investment from being deprived of the protection of the ICSID mechanism because of its legally domestic structure. It is this very same rationale of giving effect to the economic reality over and above the legal structure that should have led the Tribunal to decide that an investment made in Ukraine by Ukrainian citizens with Ukrainian capital — albeit through the channel of a Lithuanian corporation — cannot benefit from the protection of the ICSID mechanism and, as a consequence, to deny Tokios Tokelés, for the purposes of the Convention, the character of a ‘foreign investor’ in Ukraine. Since the object and purpose of this provision — and, for that matter, of the whole ICSID Convention and mechanism — is to protect *foreign* investment, it should not be interpreted so as to allow

domestic, national corporations to evade the application of their domestic, national law and the jurisdiction of their domestic, national tribunals.

24. This is not a question of extending the control test at the expense of the rule of the *siège social*. This is simply giving effect to a provision the rationale of which is to grant the protection of the ICSID procedures to *all* genuinely international investments but, by the same token, *only* to genuinely international investments. Insofar as business law and issues of business liability are involved, there is no reason for denying effect to the corporate structure chosen by the economic agents. When it comes to mechanisms and procedures involving States and implying, therefore, issues of public international law, economic and political reality is to prevail over legal structure, so much so that the application of the basic principles and rules of public international law should not be frustrated by legal concepts and rules prevailing in the relations between private economic and juridical players. The object and purpose of the ICSID Convention is not — and its effect, therefore, should not be — to afford domestic, national corporations the means of evading the jurisdiction of their domestic, national tribunals.

25. This is borne out by previous ICSID cases which have upheld jurisdiction where the request had been made by a company member of a group of companies while the consent to arbitration had been expressed in an instrument concluded by another company of that group.³² In the words of the award in *Banro*,

... 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 relationships 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 decision on a realistic assessment of the situation before them...

The problem... is not a choice between a flexible and realistic attitude or a formalistic and rigid attitude with respect to private law relationships between companies of the same group. The problem before the Tribunal involves considerations of international public policy and is governed by public international law.³³

As Schreuer observes, the cases

... show that the tribunals take a realistic attitude when identifying the party on the investor's side. They look for the actual foreign investor... The operation of ICSID clauses will not be frustrated through a narrow interpretation of the investor's identity.³⁴

Once again, this is not a question of alleging, or sanctioning, any misconduct or fraud of either Tokios Tokelés or its subsidiary Taki spravy, or their management. This is only and exclusively a question of giving effect to the object and purpose of the ICSID Convention and, if I may say so, of preserving its integrity.

26. This is, in substance, the approach I think the Tribunal should have adopted and the conclusion it should have reached. To quote again from *Banro*, “[t]he ICSID mechanisms will be all the more efficient and effective if the conditions to their application provided by the relevant texts are better respected.”³⁵

27. Needless to say, this does not mean that, in my view, ICSID tribunals should in each and every case, and as a matter of principle, look behind the legal structure chosen by the parties with a view to discovering some hidden ‘reality’. This does not mean that, in my view, ICSID tribunals should in each and every case, and as a matter of principle, set out to identify the ‘real’ investor in a situation involving multiple players. This does not mean that I would be inclined to ignore or put into question the flexible approach adopted in previous ICSID cases — in particular the *Holiday Inns v. Morocco* and *Fedax v. Venezuela* cases — to the overall issue of the extent and limits of the jurisdiction of ICSID tribunals under Article 25 of the ICSID Convention, and more particularly to the key concepts of ‘investment’ or ‘dispute arising directly out of an investment’. No more is at issue in the instant case the sometimes difficult identification of the corporation within a group of corporations which has specifically to be taken into account for the purposes of determining the jurisdiction of ICSID. The situation in the instant case is crystal clear and in effect undisputed: it is a situation where there is simply no question of any foreign — whether Lithuanian or other — investment in Ukraine, and where there is a question only, and indisputably, of an Ukrainian investment in Ukraine. And to such a situation the ICSID Convention and the ICSID procedures are not meant to apply.

28. Paragraph 82 the Decision states that

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 would be loathe to undermine it.

While it may be for private parties within the framework of a private, purely commercial, contractual relationship “to chose their methods of defining corporate nationality”, this does not hold true to the same extent when the application of the ICSID Convention is involved. The restrictions imposed on, and the rights accorded to, the parties by the Convention are based on the nationality of the party other than the ‘Contracting State’, and it cannot be assumed that the parties are free to dispose at will of these restrictions and rights by playing with the definition of corporate nationality. In particular, Article 26 provides that, unless otherwise stated, consent of the parties to arbitration under the Convention is exclusive of any other remedy, and Article 27 prohibits a Contracting State from giving diplomatic protection, or bringing an international claim, in respect of a dispute which one of its nationals and another Contracting State have consented to submit, or have submitted, to arbitration under the Convention, unless the State party to the dispute fails to honor the award rendered in that dispute.³⁶ Chapter II of the Convention (“Jurisdiction of the Centre”), which, in the words of the *Report of the Executive Directors*, defines “the limits within which the provisions of the Convention will apply and the facilities of the Centre will be available”,³⁷ is the cornerstone of the system. Even assuming that the definition of these “limits” — in particular, the definition of the key term “national of another Contracting Party” — is left to the discretion of the Parties, this, as the Decision recognizes, holds true only insofar as this discretion is “reasonable”.³⁸ There can be no question of leaving unconditionally to the parties the task of determining the scope of application of the Convention along with the rights and duties it places upon both parties. This would frustrate the system by putting its extent in the hands of the parties and at their discretion, thus making the provisions of its Chapter II, and more particularly of its central and crucial Article 25, a purely optional clause. This, in my view, is unacceptable. This, however, is what the Decision does.

29. As mentioned above, the provisions of the BIT have to be applied and interpreted within the limits of the Convention. The BIT cannot bestow jurisdiction on an ICSID tribunal beyond the jurisdiction bestowed on it by the ICSID Convention. As a consequence, once the conclusion is reached — as in my view it should have been — that the Tribunal has no jurisdiction under Article 25(2)(b) of the Convention, the question whether Article 1(2) of the BIT is to be read as giving it jurisdiction becomes moot. I can, therefore, dispense with discussing paragraphs 27 to 41 of the Decision.

30. To sum up: The ICSID mechanism and remedy are not meant for, and are not to be construed as, allowing — and even less encouraging — nationals of a State party to the ICSID Convention to use a foreign corporation, whether preexistent or created for that purpose, as a means of evading the jurisdiction of their domestic courts and the application of their national law. It is meant to protect — and thus encourage — *international* investment. It is regrettable, so it seems to me, to put the extraordinary success met by ICSID at risk by extending its scope and application beyond the limits so carefully assigned to it by the Convention. This might dissuade Governments either from adhering to the Convention or, if they have already adhered, from providing for ICSID arbitration in their future BITs or investment contracts.

signed

Prosper Weil

April 29, 2004

Footnotes

¹ 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.

² 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 November 3, 2003)” *available at* <http://www.worldbank.org/icdis/constate/c-states-en.htm>.

³ The dissenting opinion of Professor Weil is attached to this Decision.

⁴ 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”).

⁵ Messrs. Sergiy Danylov and Oleksandr Danylov, who are nationals of Ukraine, own ninety-nine percent of the shares in Tokios Tokelès, and Ms. Ludmilla Zhylytsova, 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. Zhylytsova serve as managers of Tokios Tokelès. See *id.* at Annex 7.

⁶ “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 H. Schreuer, *The ICSID Convention: A Commentary* 290 (2001).

⁷ Emphasis added.

⁸ 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).

⁹ *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 21st Century: Towards “Judicialization” and Uniformity* 223, 232 (R. Lillich and C. Brower eds. 1993).

¹⁰ Schreuer, at 286.

¹¹ *Id.*

¹² 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.

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

¹⁴ Emphasis added.

¹⁵ The New Shorter Oxford English Dictionary 830 (Thumb Index Edition 1993).

¹⁶ *Id.* at 852.

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

¹⁸ *Id.* at Annex 13.

¹⁹ Request for Arbitration, at Annexes 5–6.

²⁰ *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 investments.”) (“*SGS v. Philippines*”).

²¹ 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).

- ²² 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).
- ²³ 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).
- ²⁴ 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 over the Tucumán claims, failed to decide those claims.” *Id.* at para. 115.
- ²⁵ Claimant’s December 30, 2003 Submission of Documents, Annexes 1–11, Catalogues of Publications of Tokios Tokelès for 1991, 1992, 1993 and 1994.
- ²⁶ *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*”).
- ²⁷ 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).
- ²⁸ 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*”).
- ²⁹ Schreuer, at 281.
- ³⁰ *Id.* at 278.
- ³¹ Request for Arbitration, at Annex 5.
- ³² *Id.* at Annex 6.
- ³³ *Id.* at Annex 13.
- ³⁴ 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.”).
- ³⁵ Emphasis added.
- ³⁶ Broches, at 358–59 (emphasis added).
- ³⁷ *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).
- ³⁸ *Id.* at 887.
- ³⁹ *Id.* at 888.
- ⁴⁰ *Autopista*, at para. 109 (quoting Broches).

⁴¹ *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”).

⁴² 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.

⁴³ 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.

⁴⁴ 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.

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

⁴⁶ *Id.* at para. 56 (emphases added).

⁴⁷ 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*”).

⁴⁸ *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.”).

⁴⁹ *Id.* at para. 5.

⁵⁰ *Id.* at para. 13.

⁵¹ *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.”

⁵² Memorial, para. 2.1.9 (citing *Autopista*, para. 119).

⁵³ *Autopista*, at paras. 119–120 (emphases added).

⁵⁴ Schreuer, at 277.

⁵⁵ Respondent’s Reply, at 2.1.5.

⁵⁶ *Loewen Group, Inc. and Raymond Loewen v. United States of America*, Award, Case No. ARB(AF)/98/3 (June 26, 2003), 42 I.L.M. 811 (2003), at paras. 220, 240.

⁵⁷ *Id.* at para. 225.

⁵⁸ *Id.* at para. 237.

⁵⁹ Respondent's Reply, at 2.1.10 (citing Schreuer, at 278–79).

⁶⁰ 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).

⁶¹ *Id.* at 214–215.

⁶² Broches, at 360.

⁶³ *Id.* at 360–61.

⁶⁴ *Barcelona Traction*, at para. 70.

⁶⁵ 1 Oppenheim's *International Law* 859–60 (Sir Robert Jennings and Sir Arthur Watts eds., 9th ed. 1996) (footnotes omitted).

⁶⁶ Schreuer, at 124.

⁶⁷ *CMS*, at para. 51.

⁶⁸ 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*").

⁶⁹ *The New Shorter Oxford English Dictionary*, at 1410.

⁷⁰ *Id.* at 310.

⁷¹ 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.

⁷² See, e.g., Claimant's June 20, 2003 Submission of Documents, Vols. II–IV.

⁷³ Request for Arbitration, at Annex 13.

⁷⁴ Emphasis added.

⁷⁵ 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).

⁷⁶ *Fedax*, at para. 25.

⁷⁷ *Id.* at para. 18.

⁷⁸ *Id.* at para. 24.

⁷⁹ *Id.*

⁸⁰ *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).

⁸¹ *Id.* at para. 109.

- ⁸² Request for Arbitration, at Annex 8.
- ⁸³ 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.
- ⁸⁴ Respondent's Reply, at Section 4.
- ⁸⁵ Claimant's Rejoinder, at 48, 86–134.
- ⁸⁶ Schreuer, at 130.
- ⁸⁷ *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.
- ⁸⁸ Ian Brownlie, *Principles of International Law* 634 (5th ed. 1998) (footnotes omitted).
- ⁸⁹ Request for Arbitration, Annex 13.
- ⁹⁰ Schreuer, at 114.
- ⁹¹ *Id.*
- ⁹² Emphasis added.
- ⁹³ Emphasis added.
- ⁹⁴ Respondent's Memorial on Jurisdiction, at 12–16.
- ⁹⁵ Schreuer, at 116 (citing P. Lalive, "The First World Bank Arbitration (*Holiday Inns v. Morocco*)—Some Legal Problems," 1 ICSID Reports 645).
- ⁹⁶ 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*).
- ⁹⁷ *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA*, Award No. 141-7-2, 6 Iran-U.S. C.T.R. 219, 225 (June 22, 1984).
- ⁹⁸ Schreuer, at 213.
- ⁹⁹ Request for Arbitration, at Annex 1.
- ¹⁰⁰ Respondent's Memorial on Jurisdiction, at 3.1.3.
- ¹⁰¹ *Id.* at 3.1.4.
- ¹⁰² *Id.*
- ¹⁰³ C.F. Amerasinghe, "The Jurisdiction of the International Centre for the Settlement of Investment Disputes," at 224 (emphases added).
- ¹⁰⁴ 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.

¹⁰⁵ Amerasinghe, “The Jurisdiction of the International Centre for the Settlement of Investment Disputes,” at 224.

¹⁰⁶ Executive Directors' Report, at para. 24.

¹⁰⁷ Schreuer, at 225.

¹⁰⁸ Respondent's Memorial, at 3.2.5–3.2.6; Transcript of Oral Hearing on Jurisdiction, at 57–59.

¹⁰⁹ Ukraine-Lithuania BIT, at art. 8.1 – 8.2.

¹¹⁰ Request for Arbitration, at Annex 20.

¹¹¹ *Id.* at Annexes, 16, 17, 18, 19, and 21.

¹¹² See Supplement to the Request for Arbitration, at 3–8.

¹¹³ See Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission, Fifty-third session, U.N. GAOR, 56th 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”).

¹¹⁴ Brownlie, at 451.

¹¹⁵ Respondent's Memorial, at 3.3.2.

¹¹⁶ *Mavrommatis Case* 1924 P.C.I.J. Ser. A, No. 2, at 11–12.

¹¹⁷ Schreuer, at 102.

¹ *Report of the Executive Directors*, para. 9.

² *Op. cit.*, para 10.

³ *Op. cit.*, para. 12.

⁴ *Op. cit.*, para. 13.

⁵ *Op. cit.*, para. 11.

⁶ *Opening Statement of Tokios Tokelés*, p. 5.

⁷ *Report of the Executive Directors*, para. 32.

⁸ *Decision*, para. 21.

⁹ *Decision*, para. 77.

¹⁰ *Decision*, paras. 80–81.

¹¹ *Decision*, para. 80. – This is what the Claimant has argued all along in its written pleadings. For example: “... Nowhere in the relevant international treaties or national legislation is there exposed or implied the condition that

the Claimant realize investments from non-Ukrainian sources...[T]he Respondent incorrectly attempts to impose the *sui generis* condition that the investment sources not originate from Ukraine...For an investment to be foreign it is sufficient to be made by a foreign juridical person, regardless of the funds used to realize the investment” (Tokios Tokelés’ *Rejoinder*, p. 136, paras. 248–249; p. 139, para. 253.)

¹² *Decision*, para. 14.

¹³ *Decision*, para. 39.

¹⁴ *Decision*, para. 36.

¹⁵ *Decision*, paras. 19 and 39.

¹⁶ *Decision*, para. 19.

¹⁷ A. Broches, as quoted in para. 25 of the *Decision*.

¹⁸ *Decision*, para. 27.

¹⁹ *Decision*, para. 25.

²⁰ *Decision*, paras. 27 ff. and 42 ff.

²¹ *Decision*, para. 24.

²² *Decision*, para. 25.

²³ *Decision*, paras. 38, 40, 42, 43.

²⁴ Italics supplied.

²⁵ *Supra*, para. 3.

²⁶ Christoph H. Schreuer, *The ICSID Convention: A Commentary*, Cambridge University Press, 2001, p. 158, para. 165, and p. 290, para. 496.

²⁷ See *supra*, paras. 11 and 18.

²⁸ *Decision*, para. 56.

²⁹ *Decision*, para. 54.

³⁰ *Decision*, paras. 44–45.

³¹ *Decision*, para. 46.

³² See for example *Holiday Inns v. Morocco*, in P. Lalive, “The first World Bank Arbitration (*Holiday Inns v. Morocco*) — Some Legal Problems”, *British Year Book of International Law* (1980), p. 151; *Amco v. Indonesia*, 1 *ICSID Reports*, pp. 400 ff.

³³ *Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema, SARL v. Democratic Republic of the Congo* (2000), Excerpts in *Foreign Investment Law Journal*, vol. 17 (2002), No. 2, pp. 380 ff., at p. 385, para. 11 and p. 391, para. 24. (Because of lack of consent of the parties only excerpts of the Award have been published: see p. 381.)

³⁴ Schreuer, *op. cit. supra* fn. 27, p. 178, para. 216.

³⁵ *Op. cit. supra* fn. 34, p. 391, para. 25.

³⁶ See *Report of the Executive Directors*, paras. 32–33.

³⁷ *Ibid.*, para. 22.

³⁸ *Decision*, paras. 24, 25, 26, 82. — Cf. *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 465 (2001), at para. 99 (“...[T]o determine whether these objective requirements are met in a given case, one needs to refer to the parties' own understanding or definition. As long as the criteria chosen by the parties to define those requirements are reasonable, i.e. as long as the requirements are not deprived of their objective significance, there is no reason to discard the parties' choice.”)