

DISSENTING OPINION OF DANIEL M. PRICE

1. I join my colleagues in sections A through K and M through O of this Award. I dissent from section L and the decision of my colleagues that Respondent did not breach its obligation to accord Claimant fair and equitable treatment.
2. My colleagues find that “a deliberate campaign to punish Taki spravy for its impertinence in printing materials opposed to the regime, or to expose Taki spravy as an example to others who might be tempted to do the same,” if proved, “must surely be the clearest infringement one could find of the provision and aims of the Treaty.”¹ I agree. There could be no serious debate that the fair and equitable treatment obligation set forth in Article 3 of the Treaty is breached where a State exercises its sovereign powers – investigatorial, prosecutorial, regulatory or otherwise – to harass, intimidate, or retaliate against an investor for political purposes.
3. The majority and I are thus in apparent agreement on the content of the applicable legal standard. Where we disagree is in our assessment of the evidentiary record and on the central question of whether Claimant has established that the Respondent engaged in the type of activity that we all agree is proscribed by the Treaty. My colleagues find that Claimant has failed to meet that burden. I disagree and therefore respectfully dissent from the finding of the majority that the Respondent did not breach the obligations to accord Claimant fair and equitable treatment.
4. As the majority noted, there is relatively little disagreement between the parties over the basic facts at issue in this dispute.² The parties do dispute whether the actions of the State against Taki spravy were motivated by legitimate governmental interests or by a desire to harass or punish the company for publishing campaign materials for BYT. As the majority also noted, the evidence to support this type of claim will in most cases be circumstantial, because government actions against an investor will rarely be taken for overtly political purposes.³
5. In my view, the evidence does establish that the State engaged in a deliberate and targeted course of conduct against Taki spravy that was triggered by the company’s production of

¹ See Award at paragraph 123.

² See Award at paragraph 125.

³ See Award at paragraph 126.

campaign materials for the BYT. That the State's actions were politically motivated can be ascertained most readily by: (i) the time period in which those actions occurred, beginning shortly after Taki spravy delivered campaign materials to the BYT and six weeks before a strongly contested parliamentary election; and (ii) the lack of a convincing or, in some cases, any legal justification for the State's actions that would rebut the rather clear inference that those actions were politically motivated. I further believe that the severity and duration of the State's actions against Taki spravy, described in paragraphs 35 to 72 of the Award, lends support to Claimant's argument that the State was engaged in an effort to harass and intimidate Taki spravy.

1. Timing of the State's Actions

6. This dispute between Taki spravy and the State's tax authorities arose during the political campaign leading up to Ukraine's parliamentary elections on 31 March 2002. In November 2001, Taki spravy entered into an agreement with Produkt BVO to supply printing and publishing services.⁴ Pursuant to that agreement, in the last quarter of 2001 and the first quarter of 2002, Taki spravy printed more than two million campaign-related documents.⁵ The most controversial of these documents was "Unfulfilled Order," a brochure harshly critical of then-President Kuchma and laudatory of opposition leader Yulia Tymoshenko, delivered on 31 January 2002.⁶ Although the State has questioned whether Produkt BVO actually ordered and paid for these materials and whether Taki spravy undercharged for its services, it has not disputed that Taki spravy produced the documents and delivered them in January 2002.⁷
7. On 14 February 2002, two weeks after Taki spravy produced and delivered "Unfulfilled Order," the State's tax authorities arrived at the offices of Taki spravy to begin their investigation. Over the next six weeks leading up to the election, and for several months thereafter, the tax authorities engaged in on-site inspections of Taki spravy, made public

⁴ Claimant's Memorial on the Merits at paragraph 20.

⁵ Claimant's Memorial on the Merits at paragraph 22.

⁶ Claimant's Memorial on the Merits at paragraph 21.

⁷ Declaration from the Press Service of the State Tax Administration of Ukraine at 2 ("DP 'Taki spravy' realized the manufacture of such printed production: the brochure "Unfulfilled Order"... leaflets-calendars 'I know injustice—I want to save you from injustice'... [and] brochures 'the Team of the Block of Yulia Tymoshenko'") (submitted as Annex 25 to Claimant's Memorial on the Merits); *see also id.* at 3 ("[a]ccording to the act of transfer-acceptance by the printers DP 'Taki spravy' on 31.01.2002 there were printed and unloaded 440,000 copies of the brochure 'Unfulfilled Order'"); *id.* at 4 (on 14 February 2002 Taki spravy "concludes a contract for the already printed agitation materials... 'The Team of the Block of Yulia Tymoshenko'"); Hearing on the Merits, Transcript, Volume III, at 43:25 to 44:3 (Counsel for Respondent stated that "there is no evidence that Produkt BVO ordered either, "Unfulfilled Order", or the official campaign materials of bloc of Yulia Tymoshenko. That is the point").

allegations of criminal conduct, seized documents and computer hardware from the company, investigated its clients and suppliers, pursued criminal investigations of the company's management, froze the company's assets, issued demands for tax payments, and pursued court actions to nullify the company's contracts. I will address several of these events below but, for present purposes, will focus on the un rebutted inferences to be drawn from when they occurred.

8. My colleagues find that the timing of the State's actions is inconsistent with a political motive, which, in their estimation, "could be expected to produce an immediate and intense burst of hostile activity, dying down quite rapidly once the election had terminated in favour of the existing regime."⁸ In the present case, they conclude that "the intensity of the attack seems to have grown with time, rather than diminishing."⁹ At the same time, however, they suggest that if the State officials had been politically motivated, they would have waited until after the election to act to avoid "the risk of promoting a campaign of injustice against the supporters of their political opponents, when within a very few weeks the outcome of the election might have installed those opponents in the high places themselves."¹⁰
9. First, I agree with my colleagues that the presence of a political motive would be expected to produce an immediate and intense burst of hostile activity. But in my view, such a period of activity clearly did occur. In fact, after the initial inspection of Taki spravy on 14 February 2002, the State's tax authorities entered the company's premises no less than six times over a three-week period from 22 February to 15 March to search for and seize documents.¹¹ The nature of these inspections was described in the written testimony of Taki spravy's chief accountant in which he described one episode "when more than 10 men intruded my office...I unwillingly recalled the terrible times of Stalin's repressions. They ransacked and searched all over: turned everything upside down."¹²
10. The initial "burst" of activity also included STA's 25 March Press Statement containing the allegations of money laundering and election law violations that the State acknowledged at the hearing were not being investigated at the time the release was distributed. Further, Taki spravy was subject to at least three written demands for the production of documents during

⁸ See Award at paragraph 135.

⁹ *Id.*

¹⁰ *Id.*

¹¹ The documentation of the searches and seizures of documents from Taki spravy can be found at Annexes 11, 14, 15, 16, 21, and 23 (submitted with Claimant's Memorial on the Merits).

¹² Witness Statement by Taki spravy's Chief Accountant Halyna Rozora, Annex 20 (submitted with Claimant's Reply on the Merits).

this early period of the disputes.¹³ Thus, in my view, the record shows that there was an immediate and intense burst of hostile action toward Taki spravy that supports Claimant’s argument that actions were politically motivated.

11. Second, I agree with my colleagues that the State’s actions did not die down rapidly after the election but disagree that this weakens Claimant’s argument. Once the investigation was launched, it is not at all surprising that it would continue rather than suddenly cease after the election, if only because of bureaucratic zeal and the desire to avoid the appearance of political motivation. But more importantly, the State’s political incentive to continue its actions against Taki spravy hardly diminished after the 31 March 2002 election. That is because, as we noted above, BYT’s parliamentary campaign was understood to be a challenge to President Kuchma himself and a prelude to the presidential election that would occur two years later.¹⁴ Thus, even after the pro-government coalition retained power in March 2002, the State had a continuing reason to punish the supporters and commercial suppliers of its political opponents in anticipation of the next election.
12. I also disagree that if the State’s officials were politically motivated they would have waited until after the election to act against Taki spravy in order to avoid the risk of retaliation in the event that the BYT gained power. I believe that the opposite is true. A political motive would prompt State officials to act when they did—before the election—in order to influence the outcome in their favour, maintain power, and prevent their opponents from obtaining positions of authority.

2. *Absence of Justification for the State’s Actions*

13. The State’s failure to provide justification for many of its actions against Taki spravy, either at the time the actions were taken or during these arbitral proceedings, also supports Claimant’s contention that those actions were politically motivated. The STA Press Statement of 25 March 2002 is the most glaring example. It states that “there was discovered an active participant of illegal activity, namely... ‘Taki spravy’” and accuses the company of “active participation in the activities of a diversified network for the legalization

¹³ Letter from Solomiansky Tax Service to Taki spravy from 14 February 2002, Annex 4 (submitted with Claimant’s Memorial on the Merits); List of Questions Attached to Certificate of Investigation from 14 February 2002, Annex 7 (submitted with Claimant’s Memorial on the Merits); Letter from Solomiansky Tax Service to Taki Spravy from 18 February 2002, Annex 8 (submitted with Claimant’s Memorial on the Merits).

¹⁴ See Award at paragraph 8.

of ‘dirty’ money.”¹⁵ It adds that Central Election Commission of Ukraine had “authorized the tax service to check information about violations of election legislation.”¹⁶ On the same day that STA issued the release, it directed local tax authorities to obtain widespread media coverage of the release,¹⁷ which was ultimately published in at least 124 newspapers across Ukraine.¹⁸

14. During the hearing on the merits, the State’s tax officials acknowledged that STA had decided not to investigate Taki spravy for money laundering three weeks before it issued the Press Statement accusing the company of that crime.¹⁹ The officials also conceded that STA could not have investigated election law violations as it had no authority to do so.²⁰ A State tax official also conceded in his testimony that the allegations in the Press Statement were inaccurate.²¹ Despite this acknowledgement, the STA never issued a press release to correct these errors and in fact never withdrew the press release, which remains on the STA website as of the date of this Award.²² In my view, the STA Press Statement demonstrates both an absence of a legitimate justification for the State’s actions and an intent to harm the business reputation of Claimant’s enterprise.
15. Thus, I agree with the observation of my colleagues that it is “disturbing” that the State made no attempt to explain why the STA made these inaccurate statements or why they were not corrected. I agree with them that “[t]he episode casts a shadow over the entire behaviour and standards of the tax authorities.”²³ My colleagues further state that if the Press Statement had been “entirely unprompted” then “there might have been grounds” to find that it is “evidence of a conspiracy being put into effect.”²⁴ They reject such finding, however, because the Press Statement “was a response to criticisms published on the website of the Bloc some days previously.”²⁵ I fail to see how the BYT release mitigates responsibility for the unfounded allegations in the Press Statement or disproves the

¹⁵ Declaration from the Press Service of the State Tax Administration of Ukraine, Annex 25, at 1 (submitted with Claimants Memorial on the Merits) (emphasis added).

¹⁶ Declaration from the Press Service of the State Tax Administration of Ukraine, Annex 25, at 2 (submitted with Claimant’s Memorial on the Merits) (emphasis added).

¹⁷ Letter from the State Tax Administration of Ukraine to Local Tax Administrations of 25 March 2002, Annex 26 (submitted with Claimant’s Memorial on the Merits).

¹⁸ Claimant submitted a compilation of these newspaper articles as Annex Volume II of its Memorial on the Merits.

¹⁹ Hearing on the Merits, Transcript, Volume III, at 240:15 to 241:5; Hearing on the Merits, Transcript Volume IV at 102:14-23.

²⁰ Hearing on the Merits, Transcript, Volume III, at 245:4-11.

²¹ Hearing on the Merits, Transcript, Volume IV, at 105:9-18.

²² See State Tax Administration of Ukraine, Declaration of the Press Service, at <http://www.sta.gov.ua/news.php3?1439>.

²³ See Award at paragraph 128.

²⁴ *Id.*

²⁵ *Id.*

existence of a political motive. If my colleagues are suggesting that the errors were the product of a hastily written document, I cannot agree because the BYT release was issued on March 6, two-and-half weeks before the STA release. Moreover, whether or not the STA release was a response to the BYT's criticisms, why did the Release not state any accurate legal grounds for an investigation?

16. The record contains additional evidence that the State's actions lacked legal justification. For example, on 1 April 2002, STA brought a complaint against Produkt BVO and Taki spravy in Economic Court, alleging that the companies were evading taxes and that one of the companies was pursuing objectives "in conflict with the interests of the state."²⁶ The Court invited STA to provide "explanations and requisite proofs," which STA declined to do and the Court thus dismissed the complaint for lack of evidence.²⁷ This case demonstrates the State's inclination to bring even unsubstantiated actions against Taki spravy thus lending support to Claimant's contention that the intent was to harass and impede the business of the company.
17. In addition, the "tax demands" that the authorities "mistakenly" issued in July and August of 2002, like the Press Statement, demonstrate the lack of justification for the State's actions and its refusal to correct erroneous allegations that it publicly broadcast against Taki spravy.²⁸ Two weeks after the company challenged these demands in court,²⁹ the tax authorities informed Taki spravy that the demands had been "formed in an automatic regime...and were mistakenly sent to your address."³⁰ In response, Taki spravy brought an action in court requesting that the tax authorities be ordered to issue a public correction of the erroneously issued demands.³¹ That is because the demands had been published in the media, including their dire warnings that all of the assets of Taki spravy were under tax

²⁶ Claimant's Memorial on the Merits at Annex 32.

²⁷ Claimant's Memorial on the Merits at Annex 67.

²⁸ First Tax Demand from the Solomiansky Tax Service to Taki spravy from 22 July 2002, Annex 128 (submitted with Claimant's Memorial on the Merits); Second Tax Demand from the Solomiansky Tax Service to Taki spravy from 7 August 2002, Annex 137 (submitted with Claimant's Memorial on the Merits).

²⁹ Claim from Taki spravy to the Economic Court of Ukraine from 19 August 2002, Annex 150 (submitted with Claimant's Memorial on the Merits).

³⁰ Letter from the Solomiansky Tax Service to Taki spravy from 3 September 2002, Annex 158 (submitted with Claimant's Memorial on the Merits).

³¹ Claimant Statement from Taki spravy to the Solomiansky District Court in Kyiv from 11 November 2001, Annex 201 (submitted with Claimant's Memorial on the Merits).

mortgage and would be sold at auction in the event of non-payment. Notwithstanding the tax authorities' acknowledgment of its error, the Court dismissed Taki spravy's complaint.³²

18. My colleagues note that the warrants for the searches of Taki spravy's premises and seizures of the company's documents failed clearly to identify the legal grounds on which they were issued, as acknowledged by the State's witness.³³ They find, however, that "it is hard to see" how the absence of legal justification "can have caused additional damage to Taki spravy."³⁴ I respectfully submit that this is not the point. Claimant does not argue that the lack of legal justification adds to its damages but rather that it provides evidence that the State lacked a valid motive and its actions could not be characterized as *bona fide* exercises of investigatory authority. My colleagues, however, conclude that the lack of justification actually argues against political motive because "if the tax authorities were willing to lend themselves to a secret, dishonest and oppressive misuse of their power they would surely have taken the trouble to cover their tracks by making their paperwork look right."³⁵ A more plausible explanation, in my view, is that the searches and seizures in fact lacked legal justification.
19. Finally, with respect to the criminal proceedings against Mr. Danylov, Claimant presented evidence that the proceeding was first initiated to punish Taki spravy for assisting BYT and later reopened to coerce Claimant into withdrawing its treaty claim.³⁶ In my view, this evidence shifted the burden to Respondent to demonstrate the existence of a legal justification consistent with applicable treaty norms. It refused to do so. Indeed, when the Tribunal posed the question to counsel for Respondent,³⁷ counsel referred the Tribunal to its earlier statement that "Respondent sees no justifying reason to conduct, in an international investment arbitration proceeding a detailed discussion regarding closure of a criminal case and cancellation of such closure, whatever the motives and/or reasons for them..."³⁸
20. My colleagues "accept that a manifest and gross failure to comply with the elementary principles of justice in the conduct of criminal proceedings, when directed towards an investor in the operation of his investment, may be a breach, or an element in a breach, of an

³² Decision from the Solomiansky District Court in Kyiv to Danylov S.V. from 5 December 2002, Annex 210 (submitted with Claimant's Memorial on the Merits).

³³ See Award at paragraph 131.

³⁴ *Id.*

³⁵ *Id.*

³⁶ See Direct Examination of O. Danylov, Hearing on the Merits, Transcript, Volume II, at 15:1-17; 17:1 to 18:6; 29:24 to 30:23; 32:21 to 33:25.

³⁷ Hearing on the Merits, Transcript, Volume I, at 265:24 to 266:12.

³⁸ Hearing on the Merits, Transcript, Volume I, at 171:20 to 172:1.

investment treaty.”³⁹ They are unable to conclude, however, that the State’s repeated openings and closings of the case against Mr. Danylov transgress that standard. Even assuming that a departure from elementary principles of justice must be manifest and gross in order to give rise to a breach of Article 3 – a standard I believe to set the bar too high⁴⁰ – that standard is surely met where the State refuses to provide any justification for acts which, on the evidence, appear arbitrary or to raise serious questions about their motivation. If an ICSID tribunal may consider whether the conduct of criminal proceedings has breached the provisions of a treaty – a competence which all members of this Tribunal maintain exists in this case – then a respondent state must offer an explanation or justification for the acts called into question. If it fails to do so, a tribunal must decide the issue based on the credible evidence submitted by the claimant.

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21. For the foregoing reasons, I find that Respondent has breached Article 3 of the Treaty and must therefore, respectfully, dissent from the majority’s decision that Claimant has failed to establish such a breach.

_____/signed/_____
Mr. Daniel M. Price
Arbitrator
Date: 29 June 2007

³⁹ See Award at paragraph 133.

⁴⁰ If there is in fact a “failure to comply with elementary principles of justice,” it is unclear why such failure must be manifest *and* gross.