

In the Matter of an Arbitration

Under the Rules of the International Centre for the Settlement of  
Investment Disputes

Between:

TOKIOS TOKÉLES

-and-

UKRAINE

Case No. ARB/02/18

Order No. 4

4 November 2005

1. There are before the Tribunal two applications by the Respondent
  - A. "Additional Objections to the Jurisdiction of ICSID",
  - B. "Request for Discontinuance of the Arbitration Proceeding".

After deliberation, the Tribunal rules on these applications as follows.

2. The first question for consideration is whether either or both of these applications should be ruled upon at the present stage, or whether a decision should be postponed until the hearing on the merits, or alternatively to some intermediate date.
3. As regards the *Objections to Jurisdiction*, the Tribunal considers that a decision should be postponed to the merits hearing. Although the Tribunal has already received extensive written submissions the issues are not straightforward, and the Tribunal believes that a thorough exploration of them would be much assisted by an opportunity to discuss them with counsel in the course of an oral hearing. In addition, the decision of a preliminary issue on jurisdiction in favour of the Respondent would not necessarily obviate the need for a merits hearing, given that the position as regards 9 or 10 of the finance units would not necessarily be the same as for the remainder.
4. Accordingly, the question of jurisdiction will be adjourned to the main hearing. Participation by the Respondent in that hearing will not of course constitute a waiver of

any kind of their objections to jurisdiction.

5. With one exception, there is no need for the parties to submit further written arguments. The exception relates to the contention set out in paragraph 2.3 of *The Respondent's Response to the Claimant's Reply on Provisional Measures* dated October, 22, 2004, regarding the Claimant's Letter of Consent dated August 7, 2002. The Tribunal invites the Claimant to submit not later than 21 November 2005 a more extensive reply to this contention than has so far been furnished. The Respondent may answer any such reply not later than 12 December, 2005.

6. The position as regards the *Application for a Discontinuance* is different. Here, the issue is comparatively short and has already been fully ventilated. The Tribunal considered, and rejected, a similar submission by the Respondent in Order No. 3 of 18 January 2005. There is no need to postpone it further. The Respondent maintains that the actions of the Claimant in approaching consulates and embassies of certain foreign states in Ukraine was a breach of the duty implicit in Article 26 of the ICSID Convention not to act in breach of the exclusivity of remedy prescribed by that Article, and that the arbitration should therefore be brought to an end.

7. The Tribunal has no hesitation in rejecting this submission, essentially for the reasons advanced by the Claimant. In particular—

- (i) Whatever the precise meaning of the word “remedy” in Article 26 it must be confined to the intended outcome of a procedural mechanism -- administrative or judicial -- that affords some relief for the claims at issue. It cannot in the opinion of the Tribunal extend to the inviting of foreign sources to direct pressure and persuasion towards the host government.
- (ii) The Tribunal considers that correspondence with a nation other than the home state does not infringe Article 26, which is concerned only to maintain arbitration as an exclusive means of resolving a dispute between the investor and that state.
- (iii) Even if, contrary to this opinion, the Claimant were in breach of Article 26 there is no provision in the Convention which establishes as a sanction for such a breach the automatic termination of an arbitration properly commenced. Equally, the Tribunal can see no logic in the view that arbitrators have a discretionary power to terminate an arbitration in the event of a breach of Article 26, or indeed any reason why (if such a power did exist) it should be exercised in the circumstances of the present case.

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8. For these reasons **The TRIBUNAL RULES** as follows:

- A. The Respondent's Objections to the Jurisdiction of ICSID are adjourned, to be heard on the same occasion as the hearing of the merits.
- B. The Respondent's Application for a Discontinuance of the Arbitration is dismissed.

.....Signed.....

**M J MUSTILL**

(Chairman: For the Tribunal)

4 November 2005