

Tokios Tokelès v. Ukraine (ICSID Case No. ARB/02/18)

Introductory Note

In its Decision on Jurisdiction of April 29, 2004, the Tribunal composed of Professor Prosper Weil (President), Professor Piero Bernardini and Mr. Daniel M. Price, rejected by a majority decision the objections to jurisdiction raised by the Respondent.

The Claimant, a publishing enterprise established under the laws of Lithuania, submitted its dispute with Ukraine to ICSID under the 1994 Agreement between the Government of Ukraine and the Government of the Republic of Lithuania for the Promotion and Reciprocal Protection of Investments, which entered into force in 1995 (the Treaty). It alleged that certain governmental authorities in Ukraine had taken a series of measures violating the Treaty in respect of its wholly owned subsidiary in Ukraine, Taki spravy, in which the Claimant had made investments. The Claimant contended that these measures, mainly pertaining to tax investigations, were in fact retaliation for a publication issued by Taki spravy concerning a Ukrainian opposition politician.

ICSID registered the Claimant's request for arbitration on December 20, 2002. Subsequently, the Respondent raised objections to the jurisdiction of the Tribunal, which the Tribunal decided to deal with as a preliminary matter. The parties thus submitted pleadings on jurisdiction and a hearing was held in Paris on December 10, 2003.

The Respondent's main objections pertained to the Claimant's nationality and its investment. The Respondent first observed that the Claimant was owned and controlled to 99% by Ukrainian nationals and further argued that it did not have any substantial business activities or its *siège social* in Lithuania. The Respondent thus stated that the real claimants were in fact Ukrainian nationals pursuing an international arbitration against their own government, which would be inconsistent with the object and purpose of the ICSID Convention. It therefore requested that the Tribunal "pierce the corporate veil" to determine the nationality of the Claimant based on that of its predominant shareholders and managers.

Second, the Respondent contended that, even if the Claimant were a Lithuanian investor, it did not make an "investment" in Ukraine because it did not show that the source of capital originated outside Ukraine and that, in any

event, an investment was not made in accordance with the laws and regulations of Ukraine as required by the Treaty.

In regard to Ukraine's first objection, the majority of the Tribunal held that Contracting Parties to the ICSID Convention may agree under its Article 25(2)(b) on how to determine the nationality of a juridical person. In this respect, the Tribunal noted that the Treaty contained such an agreement providing that an "investor" is "any entity established in the territory of the Republic of Lithuania in conformity with its laws and regulations" (Article 1(2)(b) of the Treaty). Accordingly, the Tribunal found that the only relevant consideration in this respect was whether the Claimant was established under the laws of Lithuania, which it found that it was. The Tribunal indicated that the piercing of the corporate veil might be done in exceptional circumstances, but found that there was no evidence of the alleged abuse of legal personality in this case because, among other things, Tokios Tokelės was founded before the Treaty entered into force and could thus not have been created for the purpose of establishing ICSID jurisdiction.

As regards the Respondent's second objection, the majority of the Tribunal found that the Claimant had made an "investment" in the territory of Ukraine under the Treaty and that, because the Treaty contained no condition as to the origin of the capital used to make such investment, the Claimant did not have to demonstrate that the capital originated from non-Ukrainian sources. The Tribunal added that "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 [Treaty]" (para. 82 of the Decision).

The dissenting presiding arbitrator opposed the majority's interpretation of the ICSID Convention as he found that it appeared from its Preamble and from the accompanying *Report of the Executive Directors on the Convention* that ICSID arbitration was meant for *international* investment disputes, which in itself implied a cross-border flow of capital. Therefore, the Dissenting Opinion concluded that it would be against the object and purpose of the ICSID Convention to cover "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" (para. 19 of the Dissenting Opinion). According to the Dissenting Opinion, Contracting States did not have the discretion under the Convention to agree on a definition of corporate nationality which would allow such situation. The dissenting arbitrator added that tribunals in ICSID cases should not, as a matter of principle, seek to identify the "real"

investor in each case (which he noted could sometimes be difficult), but that this particular situation was crystal clear and undisputed, to which the ICSID Convention was not meant to apply.

The question of how to determine the nationality of juridical persons acting as claimants in ICSID arbitrations has been debated in several cases. It has been suggested that tribunals should take into account the economic reality of the corporate structure and determine nationality based on the test of ownership and control. Many ICSID tribunals have nevertheless determined nationality based on a juridical person's place of incorporation or seat and, where applicable, upheld an agreement that defined the nationality of a corporate investor.

The text of the Decision on Jurisdiction in *Tokios Tokelès v. Ukraine*, with the Dissenting Opinion, both issued in English, is reproduced with the parties' consent and is also posted in PDF format on ICSID's website at <www.worldbank.org/icsid>. The case on the merits is still pending before the Centre.

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