

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

ORDER No 1

Claimant's Request for Provisional Measures

The Arbitral Tribunal,

Composed of: Prosper Weil, President
Piero Bernardini and Daniel Price, Members

After deliberation,

Having regard to Article 47 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) and Rule 39 of the Arbitration Rules,

Having regard to the Request for arbitration filed by Tokios Tokelés on August 14, 2002,

Having regard to the Request for provisional measures filed by Tokios Tokelés on June 3, 2003;

Having regard to Ukraine's Observations dated June 13, 2003 requesting the Tribunal to deny the Claimant's request for provisional measures;

Having regard to the letter sent by the Claimant to the Tribunal on June 24, 2003 by which the Claimant purports to convey to the Tribunal "information" about "developments which reinforce the Claimant's request for provisional measures", and to the Respondent's response of June 27, 2003;

Makes the following Order:

1. The first sentence of Article 26 of the ICSID Convention provides that

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed to consent to such arbitration to the exclusion of any other remedy.

In becoming a party to the Convention, Ukraine has committed itself to the principle of exclusivity of ICSID proceedings, and, hence, to the exclusion of domestic judicial or administrative remedies. Pursuant to this principle, which lies at the very heart of the ICSID institution and mechanism, once the parties have consented to ICSID arbitration, they must refrain from initiating or pursuing proceedings in any other forum in respect of the subject matter of the dispute before ICSID. As stated in paragraph 32 of the Report of the Executive Directors:

It 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 or require the prior exhaustion of local remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy.

2. According to this basic principle, ICSID tribunals have repeatedly ruled:
 - (a) that the parties to a dispute over which ICSID has jurisdiction must refrain from any measure capable of having a prejudicial effect on the rendering or implementation of an eventual ICSID award or decision, and in general refrain from any action of any kind which might aggravate or extend the dispute or render its resolution more difficult; and

(b) that the parties must withdraw or stay any and all judicial proceedings commenced before national jurisdictions and refrain from commencing any further such proceedings in connection with the dispute before the ICSID tribunal.

3. Article 47 of the ICSID Convention provides that

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

The Tribunal has determined that in the present instance the circumstances require that provisional measures be taken to preserve the respective rights of either party. The Ukrainian authorities – whether judicial or other – are, therefore, under the legal obligation to abstain from, and to suspend and discontinue, any proceedings before any domestic body, whether judicial or other, which might in any way jeopardize the principle of exclusivity of ICSID proceedings or aggravate the dispute before it. It is for the ICSID Tribunal, and for this Tribunal only, to determine whether there has been a breach of the 1994 Agreement for the Promotion and Reciprocal Protection of Investments between Ukraine and Lithuania.

4. It is to be recalled that, according to a well-established principle laid down by the jurisprudence of the ICSID tribunals, provisional measures “recommended” by an ICSID tribunal are legally compulsory; they are in effect “ordered” by the tribunal, and the parties are under a legal obligation to comply with them.

5. It is also to be recalled that under paragraph 3 of Rule 39 of the Arbitration Rules the Tribunal “may at any time modify or revoke its recommendations”.
6. It is finally to be recalled that, as ICSID tribunals have repeatedly stated, the “recommendation” of provisional measures does not in any way prejudice the question of jurisdiction. It is, therefore, independently of the present Order on provisional measures that this Tribunal will have to rule on the jurisdictional objections raised by the Respondent.
7. Consequently, *the Tribunal unanimously decides* that:
- (a) Pending the resolution of the dispute now before the Tribunal, both parties shall refrain from, suspend and discontinue, any domestic proceedings, judicial or other, concerning Tokios Tokelés or its investment in Ukraine, namely Taki Spravy – including those noted in the request for provisional measures and in the Claimant’s letter of June 24, 2003 – which might prejudice the rendering or implementation of an eventual decision or award of this Tribunal or aggravate the existing dispute; and
 - (b) Within 30 days hereof, each party shall notify the Tribunal about the actions taken in implementation of the present Order.

Done in Paris, on July 1, 2003

Signed

Prosper Weil, President of the Tribunal