DISSENTING OPINION

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 set-

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

[2] *Op. cit.,* para 10.

[3] *Op. cit.,* para. 12.

[4] *Op. cit.,* para. 13.

tlement 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.*

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[5] *Op. cit.,* para. 11.

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

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

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

[8] *Decision,* para. 21.

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 Tokelės 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 Tokelės in Taki spravy and the Ukrainian nationality of Tokios Tokelės' 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,

[9] *Decision,* para. 77.

[10] *Decision,* paras. 80-81.

> 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

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[11] *Decision,* para. 80.—This is what the Claimant has argued all along in its written pleadings. For example, "[n]owhere in the relevant international treaties or national legislation is there exposed or implied the condition that the Claimant realize investments from non-Ukrainian sources.… The 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 Tokelės' *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.

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 purpose[18]—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 Tokelės 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.

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[18] *Decision*, para. 27.

[19] *Decision*, para. 25.

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

Thus, the question boils down to determining whether Tokios Tokelės, 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 Tokelės 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

[21] *Decision*, para. 24.

[22] *Decision*, para. 25.

> 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

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[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.

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 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."[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 Tokelės' 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

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[27] See *supra*, paras. 11 and 18.

[28] *Decision*, para. 56.

[29] *Decision*, para. 54.

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 Tokelės, 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

[30] *Decision*, paras. 44-45.

[31] *Decision*, para. 46.

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.…
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> The problem…is not a choice between a flexible and realistic attitude or a formalistic and rigid attitude with respect to private law

[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.

> 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 Tokelės 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

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[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.

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

[36] See *Report of the Executive Directors,* paras. 32-33.

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.

PROSPER WEIL
[President]

April 29, 2004

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[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.")