

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN

**INMARIS PERESTROIKA SAILING MARITIME SERVICES GMBH AND OTHERS**

(Claimants)

and

**UKRAINE**

(Respondent)

ICSID Case No. ARB/08/8

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**Decision on Jurisdiction**

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*Members of the Tribunal:*

Dr. Stanimir A. Alexandrov, President

Prof. Bernardo Cremades

Mr. Noah Rubins

*Secretary of the Tribunal:* Ms. Aïssatou Diop

*Representing Claimants:*

Dr. Ulrich Theune

Dr. Richard Happ

*Luther Rechtsanwalts-gesellschaft*

Hamburg, Germany

*Representing Respondent:*

Dr. Sergei Voitovich

Mr. Dmitri Grischenko

Mr. Sava Poliakov

Mr. Dmitri Shemelin

*Grischenko & Partners*

Kyiv, Ukraine

Mr. David Pawlak

*David A. Pawlak LLC*

Washington, D.C., USA

## TABLE OF CONTENTS

	<b>Page</b>
I. Procedural Background.....	1
A. Request for Arbitration .....	1
B. Constitution of the Tribunal.....	2
C. Respondent’s Objections to Jurisdiction.....	3
D. First Session of the Tribunal .....	3
E. Parties’ Submissions on Jurisdiction .....	4
F. Hearing on Jurisdiction .....	6
II. Factual Background .....	8
A. The Inmaris Companies .....	8
B. Operations in 1991-1999.....	11
C. Bareboat Charter and Related Contracts.....	12
D. Operations in 1999-2006.....	17
III. Preliminary considerations.....	19
A. Relevant Texts .....	19
B. Factual Findings at the Jurisdictional Stage.....	21
IV. Respondent’s Objections to Jurisdiction.....	22
A. Investments Premised on the Bareboat Charter Contract .....	24
1. The Bareboat Charter Contract .....	25
2. Related Inmaris Contracts.....	38
3. Payments Made, and Returns Expected, by the Inmaris Companies.....	44
4. Corporate Structure of the Inmaris Companies .....	49
B. In the Territory of Ukraine.....	50
C. Contribution to Economic Development .....	58
D. In Accordance with Law .....	61
V. Costs.....	69
VI. Decision .....	69

## **I. PROCEDURAL BACKGROUND**

### **A. Request for Arbitration**

1. On 28 May 2008, the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) received a request for arbitration dated 22 May 2008 (the “Request”) filed by Inmaris Perestroika Sailing Maritime Services GmbH, Windjammer Beteiligungsgesellschaft mbH & Co. KG, Dr. Sven-Holger Undritz as the insolvency administrator of Inmaris Windjammer Sailing GmbH i.L., and Dr. Sven-Holger Undritz as the insolvency administrator of Inmaris Windjammer Chartering GmbH i.L. (“Claimants”) against Ukraine (“Respondent”) (collectively, the “parties”).

2. The Request was made under the Agreement between the Federal Republic of Germany and Ukraine for the Promotion and Reciprocal Protection of Investments signed on 15 February 1993 and entered into force on 29 June 1996 (the “BIT” or “Treaty”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”).

3. On 29 May 2008, the Centre acknowledged receipt of the Request and transmitted a copy of the Request to Respondent.

4. On 16 June 2008, the Acting Secretary-General of ICSID sent the parties a Notice of Registration in accordance with Article 36(3) of the ICSID Convention.

5. In the Notice of Registration, the Acting Secretary-General invited the parties, in accordance with Rule 7(d) of the Centre’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings, to proceed as soon as possible to constitute an arbitral tribunal in accordance with Articles 37-40 of the ICSID Convention.

## **B. Constitution of the Tribunal**

6. In the Request, Claimants proposed that a three-member tribunal be appointed, and proposed that each party would appoint an arbitrator (Claimants in the Request, and Respondent within 20 days after registration of the Request), and that the two party-appointed arbitrators should jointly designate a third arbitrator to be President of the Tribunal within 15 days of the second arbitrator's appointment, with the Secretary-General to appoint any arbitrators remaining to be appointed within the designated time periods. In the Request, Claimants purported to appoint Mr. Noah Rubins, a national of the United States, as arbitrator.

7. By letter dated 4 July 2008, Respondent agreed that the Tribunal should consist of three arbitrators, but rejected the balance of Claimants' proposal with respect to the method of constituting the Tribunal.

8. Pursuant to Rule 2(3) of the Centre's Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"), Claimants on 16 August 2008 elected that the Tribunal be constituted pursuant to the formula specified in Article 37(2)(b) of the ICSID Convention. ICSID acknowledged that election by letter dated 18 August 2008 and invited the parties to proceed with the appointment of arbitrators.

9. Claimants on 18 August 2008 appointed Mr. Rubins as a member of the Tribunal. Respondent on 27 August 2008 appointed Mr. Bernardo M. Cremades, a national of Spain, as a member of the Tribunal. By letter of 2 September 2008, Mr. Rubins made a disclosure with respect to two ongoing engagements on behalf of Ukraine (unrelated to the present case), as to which both parties expressly waived any objection in letters dated 4 and 5 September 2008, respectively.

10. On 27 August 2008, Claimants proposed Dr. Stanimir A. Alexandrov, a national of Bulgaria, to serve as the third arbitrator and President of the Tribunal. On 10 September 2008, Respondent agreed to that proposal.

11. The Tribunal was formally constituted on 19 September 2008, in accordance with the ICSID Convention and Arbitration Rules. Ms. Aïssatou Diop, Consultant, ICSID, was designated to serve as the Secretary of the Tribunal.

### **C. Respondent's Objections to Jurisdiction**

12. Upon registration of the Request, Respondent on 18 June 2008 indicated its intention to provide by 1 July 2008 preliminary observations on the claims, which Respondent considered to be manifestly outside the jurisdiction of the Centre. Respondent did not ultimately make such a submission.

13. On 3 December 2008, however, shortly before the first session of the Tribunal with the parties, Respondent in a letter advanced objections to the Tribunal's jurisdiction. Respondent requested, pursuant to Arbitration Rule 41(3), that its objections be addressed as a preliminary matter in a separate jurisdictional phase, and asked the Tribunal to address the schedule for such a phase at the first session. Claimants by letter dated 8 December 2008 contended that the jurisdictional objections should be joined to the merits.

### **D. First Session of the Tribunal**

14. The first session of the Tribunal was held by telephone conference (with audio recording) on 9 December 2008. The parties each expressly confirmed that the Tribunal had been properly constituted, and that they had no objection to any of its members serving as arbitrator. During the session, the parties agreed on several procedural matters, having submitted a joint statement on such procedures to the Tribunal in advance of the session. The Tribunal

heard both parties on their respective views on certain issues as to which they did not agree, including the procedure to be adopted with respect to Respondent's objections to the Tribunal's jurisdiction.

15. The agreement of the parties, and the decisions of the Tribunal on matters as to which the parties were not agreed, were recorded in the Minutes of the First Session signed by the President and Secretary of the Tribunal, dated 17 December 2008. The Tribunal decided, *inter alia*, that Respondent's jurisdictional objections should be addressed in a separate, preliminary phase of the proceedings. The following schedule was set for the jurisdictional phase:

- Respondent to file its Memorial on Jurisdiction by 28 January 2009;
- Claimants to file their Counter-Memorial on Jurisdiction by 16 March 2009;
- Respondent to file its Reply on Jurisdiction by 27 April 2009;
- Claimants to file their Rejoinder on Jurisdiction by 8 June 2009;
- A hearing on jurisdiction, if determined to be necessary, to be held in The Hague on 20-21 July 2009 (following a pre-hearing conference to be held on 7 July 2009).

#### **E. Parties' Submissions on Jurisdiction**

16. Respondent filed its Memorial on Jurisdiction (dated 23 January 2009) on 27 January 2009.

17. Upon a request from Claimants, the parties agreed to extend the schedule for Claimants' Counter-Memorial by one week, with corresponding changes to subsequent filing dates (11 May 2009 for the Reply, and 22 June 2009 for the Rejoinder). Claimants' Counter-Memorial on Jurisdiction was then filed on 23 March 2009.

18. Respondent's Reply was filed on 18 May 2009 under an extension to Respondent's filing deadline, to which Claimants consented. On 22 May 2009, Respondent sought leave to file a witness statement of Mr. O.S. Kachniy, citing logistical difficulties that had impaired Respondent's efforts to file the statement together with the Reply. Claimants on 29 May 2009 advised that they did not object to the admission of the witness statement of Mr. Kachniy.

19. Respondent on 23 June 2009 asked the Tribunal to order Claimants to desist from contacting Respondent's current and former employees. The Tribunal on 25 June 2009 instructed Claimants to refrain from contact with Respondent's current employees. The Tribunal indicated that, with respect to former employees of Respondent, it would consider any applications on a case-by-case basis. The parties then exchanged further correspondence about Claimants' contacts with Respondent's employees, and Respondent's contacts with witnesses whose statements were submitted by Claimants. The Tribunal on 3 July 2009 issued an order instructing both parties to refrain from contacting each other's witnesses, and directing that any allegations of witness intimidation must be supported and documented. The Tribunal's order also dealt with certain arrangements for witness testimony at the upcoming hearing.

20. Claimants' Rejoinder was filed on 6 July 2009 under an extension to Claimants' filing deadline, to which Respondent consented.

21. A pre-hearing conference with the President of the Tribunal and the parties was held on 10 July 2009 by telephone (with audio recording). The parties agreed on a number of procedural matters for the upcoming hearing, having exchanged views by correspondence in advance of the pre-hearing conference. The Tribunal resolved other matters regarding the conduct of the hearing as to which the parties had not agreed. The parties' agreements and the

Tribunal's decisions were recorded in the Minutes of the Pre-Hearing Conference, which were circulated to the parties on 13 July 2009.

22. Respondent on 13 July 2009 requested leave to introduce a late-discovered document into the record. On 15 July 2009, Claimants sought permission to introduce two newly discovered documents into the record. All three documents were admitted to the record of the case. Respondent on 16 July 2009 advised that its witness Ms. Lyudmyla Poltavtseva, who had been called for examination at the upcoming hearing, would be unable to give testimony (in person or by video) due to a severe illness of a close family member.

#### **F. Hearing on Jurisdiction**

23. The hearing on Respondent's objections to jurisdiction was held in The Hague at the Permanent Court of Arbitration on 20 and 21 July 2009.

24. The parties were represented in The Hague as follows:

Claimants:

Dr. Ulrich Theune, Dr. Richard Happ, Mr. Georg-Maximilian von Arnim, and Ms. Yun-I Kim of Luther Rechtsanwaltsgesellschaft

Respondent:

Dr. Sergei Voitovich, Mr. Dmitri Grischenko, Mr. Sava Poliakov, and Mr. Dmitri Shemelin of Grischenko & Partners

25. Ms. Jozanneke Deelstra of Omni Bridgeway was also present at the hearing as part of Claimants' delegation.

26. In opening statements, Mr. Shemelin addressed the Tribunal on behalf of Respondent, and Dr. Happ addressed the Tribunal on behalf of Claimants. The following witnesses were then examined in person before the Tribunal:

Mr. Uwe Koch



Mr. Alexander Göhring

Mr. Geoffrey Senogles

Mr. Oleksii Rieznikov

Mr. Vasyl Chernik

In addition, the following witnesses were examined by video link from the World Bank offices in Kyiv, Ukraine, in the presence of counsel for both parties:

Mr. Oleksandr Kachniy

Mr. Yuriy Illarionov

Mr. Oleksiy Vinnov

Mr. Vitaliy Kolodyazhnyi

Mr. Mykhailo Sukhina

27. The hearing was audio recorded and a verbatim transcript was prepared. The parties subsequently proposed corrections to the transcript, a corrected version of which was circulated to the parties on 4 November 2009.

28. The parties submitted Post-Hearing Briefs simultaneously on 1 September 2009.

29. On 4 December 2009, Respondent advised the Tribunal of certain developments regarding the status of the sail training ship *Khersones*, on which Claimants commented on 29 December 2009. Respondent on 29 December 2009 advised that it would consider providing quarterly updates on the ship's status. The Tribunal took note of the parties' correspondence on the subject.

## II. FACTUAL BACKGROUND

30. We turn first to a brief synopsis of the facts of the dispute, to the limited extent that such facts are necessary to understand the context of Respondent's objections to jurisdiction and the Tribunal's decisions thereon. The Tribunal believes the following facts to be undisputed between the parties, except where indicated in context below. This recitation of the factual background of the dispute is set forth without prejudice to any further development of and findings on these same facts as may occur in later stages of the proceedings, should the Tribunal determine that it has jurisdiction and the case move forward to the merits.

### A. The Inmaris Companies

31. As noted above, claims in this proceeding are brought on behalf of multiple companies, which Claimants refer to as the Inmaris Companies. They include:

- *Inmaris Perestroika Sailing Maritime Services GmbH* ("IPS"), a limited liability company established in 1989 and registered with the commercial register of the local court in Hamburg, Germany. It is owned by individual shareholders, including Captain Uwe Koch.<sup>1</sup>
- *Windjammer Beteiligungsgesellschaft mbH & Co. KG* ("WKG"), a limited partnership (Kommanditgesellschaft) registered with the commercial register of the local court in Lübeck, Germany. It is represented by a single general partner ("GP"), and has 29 individuals as limited partners ("LPs").<sup>2</sup> Claimants explain that IPS was the general partner of WKG until 2001, and later resumed that role in 2008. In the interim period between 2001 and 2008, IWS (see below) was the

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<sup>1</sup> See Excerpt of the Commercial Register of the Hamburg Local Court, 12 February 2009 (Ex. C-7).

<sup>2</sup> See Excerpt of the Commercial Register of the Lübeck Local Court, 11 February 2009 (Ex. C-8).

general partner of WKG.<sup>3</sup> Claimants describe WKG as a typical German “ship investment fund” or a “closed end fund” for the financing of ships.<sup>4</sup>

- *Inmaris Windjammer Chartering GmbH i.L* (“IWC”), a limited liability company formed in 1999 and registered with the commercial register of the local court of Hamburg, Germany.<sup>5</sup> As of February 2009, IWC had two shareholders: WKG (49%) and IWS (51%).<sup>6</sup> IWC was put under insolvency administration and went into liquidation proceedings on 30 November 2006; Dr. Sven-Holger Undritz, the Insolvency Administrator, appears on behalf of IWC as Claimant in this proceeding.<sup>7</sup>
- *Inmaris Windjammer Sailing GmbH i.L* (“IWS”), a limited liability company formed in 2001 and registered with the commercial register of the local court of Hamburg, Germany.<sup>8</sup> It is owned by individual shareholders, including Captain

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<sup>3</sup> See Claimants’ Counter-Memorial on Jurisdiction, 23 March 2001 (“Claimant’s Counter-Memorial on Jurisdiction”) at para. 21; Excerpt of the Commercial Register of the Lübeck Local Court, 11 February 2009 (Ex. C-8) (identifying IPS as current general partner of WKG, noting that last update to registration was 8 May 2008); Letter from WKG to KMTI, 22 December 2001 (Ex. C-9) (notifying change of “Complementary shareholder” of WKG from IPS to IWS).

<sup>4</sup> See Claimants’ Counter-Memorial on Jurisdiction at para. 20.

<sup>5</sup> See Excerpt of the Commercial Register of the Hamburg Local Court, 19 February 2009 (Ex. C-10).

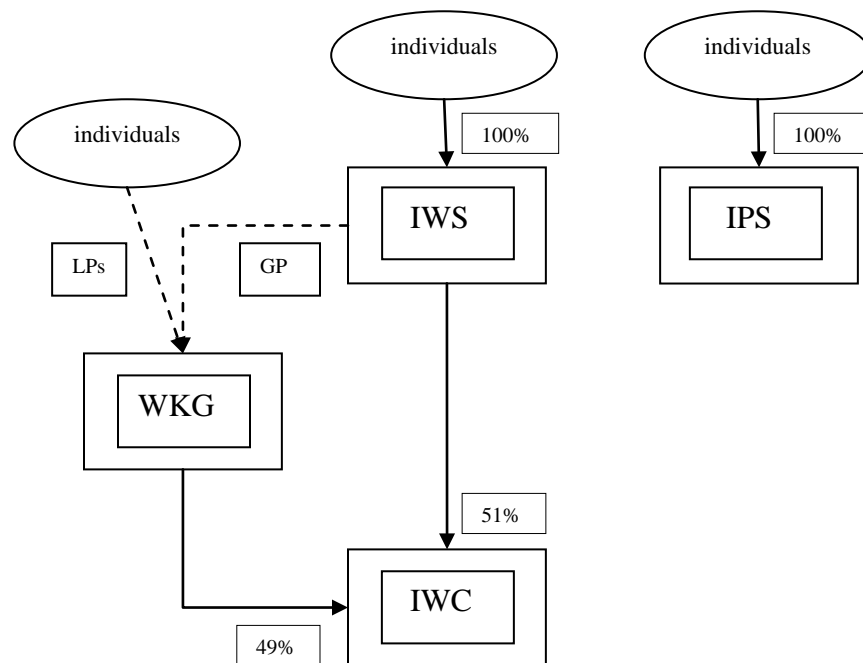
<sup>6</sup> See Excerpt of the Commercial Register of the Hamburg Local Court, 19 February 2009 (Ex. C-10). Inasmuch as IWS was not formed until August 2001, see Excerpt of the Commercial Register of the Hamburg Local Court, 12 February 2009 (Ex. C-11), the 51% share held by IWS as of February 2009 was necessarily held by another entity prior to August 2001. However, the Excerpt from the Commercial Register for IWC appears to indicate that IWS held that stake in IWC as of October 2002 (*i.e.* well in advance of April 2006). As will be seen from the Tribunal’s analysis in Section IV.A.4 below, this timing question ultimately is not determinative of the question of whether IWS is a proper Claimant in this arbitration.

<sup>7</sup> Excerpt of the Commercial Register of the Hamburg Local Court, 19 February 2009 (Ex. C-10). For convenience, the Tribunal in this Decision will refer to IWC, even though Dr. Sven-Holger Undritz is formally the Claimant on IWC’s behalf.

<sup>8</sup> Excerpt of the Commercial Register of the Hamburg Local Court, 12 February 2009 (Ex. C-11). IWS was apparently formed originally under the name Profundus Acte Vermögensverwaltungsgesellschaft mbH, but was renamed and repurposed as IWS on 21 December 2001. See *id.*

Uwe Koch.<sup>9</sup> IWS was also put under insolvency administration and went into liquidation proceedings on 30 November 2006; Dr. Sven-Holger Undritz, the Insolvency Administrator, appears on behalf of IWS as Claimant in this proceeding.<sup>10</sup>

32. While the different companies played different roles at different times in the events to be discussed below, it is useful at this point to diagram the corporate relationships of the Inmaris Companies as they are understood to have stood in April 2006, when the dispute came to a head. The diagram below sets out only the corporate structure; the various contractual arrangements among and involving these companies are discussed in the Sections that follow.



<sup>9</sup> Excerpt of the Commercial Register of the Hamburg Local Court, 12 February 2009 (Ex. C-11).

<sup>10</sup> Excerpt of the Commercial Register of the Hamburg Local Court, 12 February 2009 (Ex. C-11). For convenience, the Tribunal in this Decision will refer to IWS, even though Dr. Sven-Holger Undritz is formally the Claimant on IWS' behalf.

## B. Operations in 1991-1999

33. The *Khersones*, a windjammer sail training ship, is owned by the Kerch Maritime Technological Institute (“KMTI”), a state-owned education institution of Ukraine. KMTI is controlled by the State Committee for Fishery of Ukraine (the “Committee”), which in turn is controlled by the Minister of Agricultural Policy of Ukraine. The *Khersones*’ stated purpose is the education of cadets for Ukraine’s national fishery fleet.

34. Between early 1991 and late 1996, IPS contracted on a short term basis with the *Khersones*’ owner to operate the *Khersones* and to market sailing tours and other onboard events, while at the same time continuing to provide training to Ukrainian cadets.

35. In November 1996, IPS and KMTI concluded a longer-term contract (referred to by the parties as the “Basic Contract”) regarding the *Khersones*. Under the Basic Contract, the *Khersones* would continue to be used for the training of Ukrainian cadets, but would also be operated and marketed by IPS for, *inter alia*, “touristic and representative services” and would be used “to carry out cruises, for publicity campaigns, advertising measures and chartering to third parties.”<sup>11</sup> In exchange for this exclusive right to market the ship and receive the income from those additional activities, IPS was to cover all operational expenses for the *Khersones* (including the cadet training).

36. Pursuant to an Addendum to the Basic Contract signed in April 1998, IPS reported approximately annually to KMTI on the financial results of the *Khersones*’ operations.<sup>12</sup>

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<sup>11</sup> Contract on Cooperation over the Operation of the Sail Training Ship STS “*Khersones*”, 26 November 1996, at Section 3 (Ex. C-21) (“Basic Contract”).

<sup>12</sup> See Akte 1998 (Ex. C-54); Akte 1999 (Ex. C-55).

### C. Bareboat Charter and Related Contracts

37. For several years, the parties discussed the need to renovate the *Khersones* with amenities to make it more marketable, and to make significant repairs. It appears to be common ground that KMTI lacked the funds to finance such a reconstruction itself.

38. Claimants contend that in 1999, Captain Koch discussed with KMTI and the Committee different financing options for reconstruction of the *Khersones*. Both parties agree that the first option explored—IPS obtaining a commercial loan—was unavailing because the *Khersones*, as Ukrainian state-owned property, could not be pledged as collateral for such a loan.<sup>13</sup> A second option was then developed by IPS: the creation of a German ship investment fund to solicit funds directly from investors, carry out the reconstruction, and then recoup the funds by operating the *Khersones* under a bareboat charter (analogous to a lease) from KMTI. Claimants contend that the contractual structure associated with this option was explained to, and developed with the consent and participation of, the KMTI and the Committee. Respondent however, calls the contractual arrangements non-transparent, excessively complicated, and ultimately “fictitious.”<sup>14</sup>

39. While their legal significance is a matter of contention, it is not disputed that KMTI entered into multiple contracts with various of the Inmaris Companies in connection with this financing arrangement. They are:

- *Four-Party Agreement* among KMTI, IPS, WKG, and IWC signed on 11 October 1999.<sup>15</sup> This Agreement provided that the parties would (i) enter into various

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<sup>13</sup> See Claimants’ Counter-Memorial on Jurisdiction at paras. 60-62; Witness Statement of V.H. Chernik, 12 May 2009 (Ex. R-18).

<sup>14</sup> See, e.g., Respondent’s Reply on Jurisdiction, 18 May 2009 (“Respondent’s Reply on Jurisdiction”) at paras. 39, 41.

<sup>15</sup> Four-Party Agreement, 11 October 1999 (Ex. R-4).

contracts, including a Bareboat Charter contract between KMTI and WKG, and  
(ii) suspend the 1996 Basic Contract for the duration of the Bareboat Charter.

- *Bareboat Charter* and Addendum 1 between KMTI and WKG signed on 11 October 1999.<sup>16</sup> (An Addendum 2 to the Bareboat Charter was also submitted by both parties in their exhibits, although the date of its signature is not specified; Claimants state that it was signed “in 2001.”)<sup>17</sup> Under the Bareboat Charter, WKG was granted a 5-year charter (subject to extensions) in return for a one-time charter hire (*i.e.* payment) of DM 600,000.
- *Donation Contract* between KMTI and WKG signed on 11 October 1999, pursuant to which WKG agreed to make a further DM 500,000 “non-refundable contribution” toward the reconstruction of the *Khersones* (the total cost of which was estimated at DM 1,100,000).
- *Trustee Contract* between KMTI and IPS signed on 11 October 1999, pursuant to which IPS would act as Trustee for KMTI to receive the DM 1,100,000 (charter hire plus “donation”) from WKG and to disburse it solely for the reconstruction and renovation of the *Khersones*.<sup>18</sup>
- *Crewing Contract* between KMTI and WKG signed on 11 October 1999, pursuant to which KMTI would continue to supply the crew and cadets for the *Khersones* during its operations under the Bareboat Charter.<sup>19</sup>

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<sup>16</sup> Bareboat Charter Contract STS “*Khersones*”, 11 October 1999 (with Addenda 1 and 2) (Ex. R-5) (Ex. C-29).

<sup>17</sup> See Bareboat Charter Contract STS “*Khersones*”, 11 October 1999 (with Addenda 1 and 2) (Ex. R-5) (Ex. C-29); see Claimants’ Counter-Memorial on Jurisdiction at para. 74, n. 44.

<sup>18</sup> Trustee Contract, 11 October 1999 (Ex. C-32).

<sup>19</sup> Crewing Contract, 11 October 1999 (Ex. C-33).

40. A letter dated 17 November 1999 from Mr. Chernykh, Deputy Leader of the Committee, to Mr. Illarionov, Rector of KMTI, captioned “Concerning the approval of the conditions of the Bareboat charter of the STS KHERSONES,” states that, having “examined the project of the charter-party,” the Committee “has no objections against the scheme of the financing of the repair and the rebuilding of the STS ‘KHERSONES’, which was suggested by the institute, with the approval of the conditions of the Bareboat charter with regard to the STS ‘KHERSONES’.”<sup>20</sup>

41. In connection with the Bareboat Charter scheme, the Inmaris Companies also entered into various contracts governing relations among themselves. These intra-Inmaris contracts are:

- *Sub-Bareboat Charter Contract* between WKG and IWC, dated 28 December 1999, pursuant to which WKG subcontracted to IWC its charter rights under the Bareboat Charter Contract with KMTI, in exchange for an annual charter hire (payment) of DM 360,000 per year to WKG.<sup>21</sup>
- *General Agency Contract* between IWC and IPS, dated 3 January 2000, pursuant to which IPS was to carry out marketing, bookings, customer service, and all operational management of the vessel on IWC’s behalf.<sup>22</sup> This contract was apparently replaced by the two contracts next listed below when IWS was formed and inserted into the intra-Inmaris contractual structure in 2001/2002.
- *General Agency Contract* between IWC and IWS, which Claimants contend was first concluded “in 2001” and subsequently replaced by another version of the

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<sup>20</sup> Letter from Mr. Chernykh to Mr. Illarionov, 17 November 1999 (Exhibit C-28).

<sup>21</sup> Sub-Bareboat Charter Contract, 28 December 1999 (Ex. C-34).

<sup>22</sup> General Agency Contract, 3 January 2000 (Ex. C-83).



contract dated 20 December 2002.<sup>23</sup> Under this contract, IWS was authorized by IWC to market and collect the revenues for the travel tours on the *Khersones*, and to handle the technical and nautical management of the ship outside Ukraine, which services IWS was to perform in exchange for 35% of the sales revenues of each summer sailing season.

- *Agency Contract* between IWS and IPS, which Claimants contend was first concluded “in 2001” and subsequently replaced by another version of the contract dated 20 December 2002.<sup>24</sup> Under this contract, IPS was in turn engaged by IWS to carry out advertising, bookings and customer service for the travel tours on the *Khersones*, which services IPS was to perform in exchange for an annual license fee (23,750 euro) and 45% of IWS’s gross revenues.

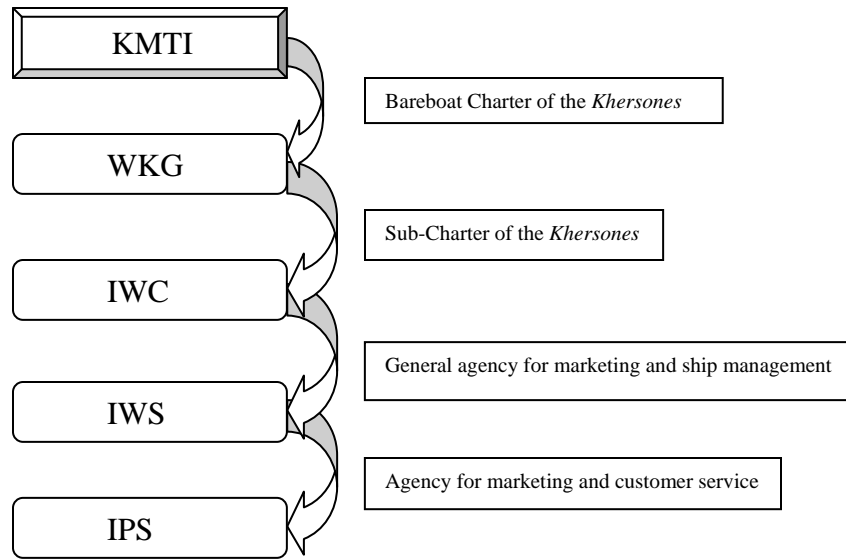
42. Claimants maintain that, in the end, this series of contracts resulted in IPS “essentially carry[ing] out the business it had carried out before the reconstruction and the setting-up of the Bareboat Charter contractual structure.”<sup>25</sup> A simplified diagram of the eventual contractual relationships is set out below:

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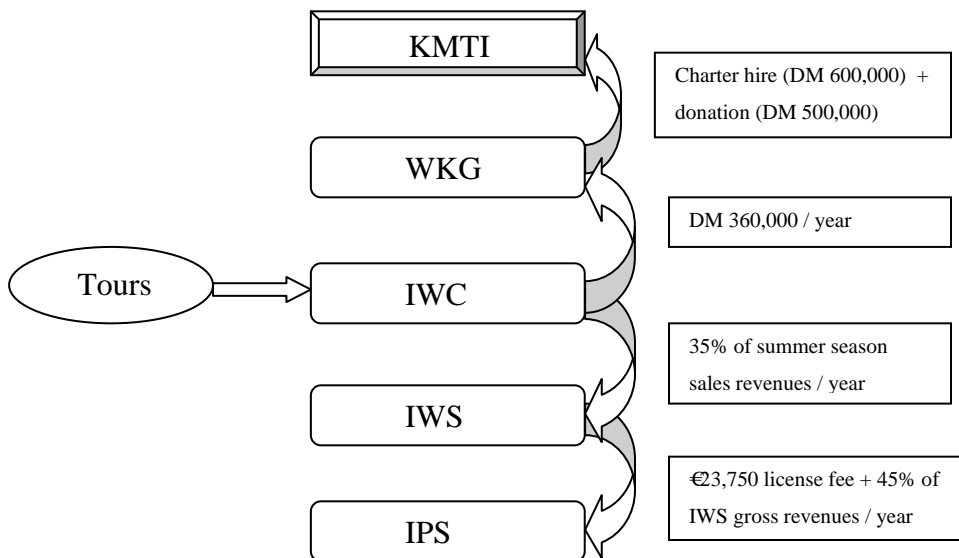
<sup>23</sup> See Claimants’ Counter-Memorial on Jurisdiction at para. 83, n. 54; General Agency Contract, 20 December 2002 (Ex. C-35). In Claimants’ Rejoinder, however, Claimants state that “[i]t is correct that new contracts between IWC and IWS and between IWS and IPS were concluded only in 2002” and that until that time, “IWS acted as general agent for IPS.” Claimants’ Rejoinder on Jurisdictional Objections, 6 July 2009 (“Claimants’ Rejoinder on Jurisdiction”) at para. 63. Ultimately, the precise date (2001 v. 2002) of IWS’s insertion into the contractual structure of the Inmaris Companies is not dispositive, as there is no question that IWS was part of that structure as of April 2006.

<sup>24</sup> See Claimants’ Counter-Memorial on Jurisdiction at para. 84, n. 55; Agency Contract, 20 December 2002 (Ex. C-36). The same ambiguity exists for the date of the IWS-IPS Agency Contract as for the IWC-IWS General Agency Contract discussed in footnote 23 above; again, however, the precise date of the Agency Contract is ultimately not relevant to the Tribunal’s analysis.

<sup>25</sup> Claimants’ Counter-Memorial on Jurisdiction at para. 86.



Meanwhile, the payment streams associated with this eventual contractual structure are understood to be as follows:



43. Claimants contend that these intra-Inmaris contracts were foreshadowed in the Four-Party Agreement, and therefore known (at least in concept) to KMTI. Section IV of the

Four-Party Agreement states that WKG and IWC “shall enter into a time charter,” and Section V states that IWC and IPS “shall enter into a new general agency agreement . . . in accordance with which [IPS] shall be obliged to arrange for tourist travels onboard sailing vessel and to sell those tours at the tourist market, and to maintain the Vessel on a fiduciary basis, and to render, in this respect, appropriate services to KMTI.”<sup>26</sup>

44. Respondent contends that it was essentially unaware of, and until this arbitration had never seen, these contracts.<sup>27</sup> In particular, Respondent notes (and Claimants do not contest) that the insertion of IWS into the intra-Inmaris contractual structure between IWC and IPS was not and could not have been foreseen in the Four-Party Agreement, as IWS did not exist at the time of that contract. Claimants contend that IWS’s role was at least tacitly accepted by KMTI in that KMTI was advised of IWS’s existence in other capacities,<sup>28</sup> and KMTI signed various financial accounts that mentioned or were signed by IWS.<sup>29</sup>

#### **D. Operations in 1999-2006**

45. The parties are divided as to whether, following the execution of the Bareboat Charter and its related contracts, the Inmaris Companies and KMTI operated pursuant to the Bareboat Charter scheme, or continued to operate under the Basic Contract. While this legal question is disputed, the facts of the operations largely are not.

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<sup>26</sup> Four-Party Agreement, 11 October 1999 (Exhibit R-4).

<sup>27</sup> *See, e.g.*, Respondent’s Reply on Jurisdiction at para. 40.

<sup>28</sup> Record documents indicate that KMTI (i) was advised that IWS had replaced IPS as the General Partner of WKG as of 21 December 2001, *see* Letter from WKG to KMTI, 22 December 2001 (Ex. C-9), and (ii) was notified, and confirmed receipt by counter-signature, that under the Basic Contract, IWS was authorized to act as the general agent of IPS, *see* Confirmation, December 2001 (Ex. R-32). Neither document, however, constitutes notice to KMTI of the conclusion of agency contracts between IWC and IWS and between IWS and IPS.

<sup>29</sup> *See, e.g.*, Akte 2002 No. 2 (Ex. C-59); Addendum to Akte 2004 (Ex. C-63); Notice of Investments, 31 December 2004 (Ex. C-64); *cf.* Akte 2003 (unsigned, referencing IWS) (Ex. C-61).

46. The *Khersones* was reconstructed principally at the TRAL shipyard in Kerch, Ukraine in the first quarter of 2000. That reconstruction was carried out pursuant to a contract signed by TRAL, IPS (as Trustee for KMTI), KMTI, and WKG and dated 18 December 1999.<sup>30</sup> Claimants' accounting expert Mr. Senogles states that he reviewed eight bank transaction notices documenting payments from IPS's trust account to the TRAL shipyard totaling more than DM 700,000.<sup>31</sup>

47. The reconstructed *Khersones* was operated by the Inmaris Companies, apparently without incident, between 2000 and 2004. As they had in prior years under the Basic Contract, KMTI and Inmaris representatives met approximately annually to review the prior year's financial results, which meetings resulted in the signature of annual accounts (referred to as "Akte").<sup>32</sup>

48. Claimants contend that the relationship "changed to the worse" following Ukraine's change of government after the March 2005 Orange Revolution.<sup>33</sup> Claimants' witnesses testify that in 2005, the Ministry questioned the parties' contracts and refused to permit the *Khersones* to sail until after IPS agreed to provide a EUR 50,000 non-repayable loan to KMTI, and refused to permit the signing of the 2003 and 2004 annual accounts.<sup>34</sup>

49. In early 2006, various meetings took place between representatives of Respondent and the Inmaris Companies. It is undisputed that on 5 April 2006, the Minister of Agricultural Policy of Ukraine sent a government telegram prohibiting the *Khersones* "from leaving the

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<sup>30</sup> Contract No. *Khersones* I/99, 18 December 1999 (Ex. C-37).

<sup>31</sup> Report of Geoffrey Senogles of LBC International, 20 March 2009, at paras. 56-57 (Ex. C-41).

<sup>32</sup> See Akte 1999 (Ex. C-55); Akte 2000 (Ex. C-56); Akte 2001 (Ex. C-57); Akte 2002 (Ex. C-58); Akte 2002 No. 2 (Ex. C-59); Akte 2002 No. 3 (Ex. C-60); cf. Akte 2003 (unsigned) (Ex. C-61); Akte 2004 (unsigned) (Ex. C-62).

<sup>33</sup> Claimants' Counter-Memorial on Jurisdiction at para. 100.

<sup>34</sup> See Claimants' Counter-Memorial on Jurisdiction at para. 100, citing witness statements of Messrs. Göhring, Vinnov, and Kolodiazhny (Exhibits C-WS 3, 9, 4).

borders of the territorial waters of Ukraine until clarification of the matters, as related to its joint operation.”<sup>35</sup> This prevented the *Khersones* from making a scheduled departure from Kerch on 7 April 2006 for the 2006 summer sailing season. Claimants never regained control of the *Khersones* after that date, and ultimately proceeded to file their claims in this arbitration.

### **III. PRELIMINARY CONSIDERATIONS**

50. Before proceeding to consider Respondent’s various objections to this Tribunal’s jurisdiction to hear Claimants’ claims, it will be helpful to address certain general considerations that guide the Tribunal’s analysis.

#### **A. Relevant Texts**

51. Claimants contend that Respondent’s actions violate multiple provisions of the Germany-Ukraine BIT. Accordingly, to assess its jurisdiction to hear these claims, the Tribunal must turn first of all to the BIT itself.

52. Article 11 of the BIT states (in translation) that “[d]ivergencies with regard to investments between either Contracting Party and a national or company of the other Contracting Party,” if they cannot be settled amicably within a period of six months, “shall be subjected to arbitration proceedings at the request of the national or the company of the other Contracting Party.”

53. Article 11(4) of the BIT states that if both Contracting Parties have become Parties to the ICSID Convention, then such disputes shall be subject to arbitration proceedings within the framework of the ICSID Convention (absent an agreement otherwise between the parties to the dispute). As both the Federal Republic of Germany and Ukraine are now

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<sup>35</sup> Governmental Telegram, 5 April 2006 (Exhibit R-2).

Contracting States to the ICSID Convention, and no contrary agreement has been reached by the parties, that eventuality applies here. Inasmuch as the ICSID Convention governs this dispute, the jurisdictional requirements of the ICSID Convention also delimit this Tribunal's jurisdiction.

Article 25 of the ICSID Convention provides, in pertinent part,

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre . . .

54. The BIT and Article 25(1) of the ICSID Convention constitute the applicable law for deciding questions of the Tribunal's jurisdiction. In considering such questions, rules of international law, including the Vienna Convention on the Law of Treaties of 1969 and, in particular, the principles of treaty interpretation set forth in Articles 31-33 thereof, may appropriately be invoked. Likewise, points of relevant domestic law may inform the Tribunal's jurisdictional analysis, but its conclusions must ultimately be reached under the BIT and the ICSID Convention themselves.<sup>36</sup>

55. At various points in their pleadings, the parties have drawn the Tribunal's attention to the decisions of other tribunals in other investment treaty arbitrations in support of their respective arguments. It is beyond question that that each Tribunal has its own mandate and competence, and that the decisions of prior tribunals in other cases are not binding on us in any respect. Nevertheless, this Tribunal finds it appropriate to consider the reasoning of and conclusions reached by such tribunals, and to assess whether they may be persuasive in the particular circumstances presented in the case before us. Where appropriate, with a view to the

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<sup>36</sup> The Tribunal notes, on the other hand, that Article 42(1) of the ICSID Convention will be relevant if the Tribunal finds jurisdiction and proceeds to the merits of Claimants' claims. *See* Christoph H. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* at pp. 551-52 (2<sup>nd</sup> ed. 2009).

reasoned development of investment law, we may also undertake to explain how or why we concur with or diverge from the decisions reached by other tribunals on questions that may appear similar to the ones that we face.

## **B. Factual Findings at the Jurisdictional Stage**

56. Inasmuch as this case proceeded directly to a separate proceeding on jurisdiction, the Tribunal has before it only limited pleadings and evidence as to the facts underlying the claims, to the extent that the parties have seen fit to present them at this stage. For the most part, the factual development of the case is properly deferred to the proceedings on the merits, in the event that the Tribunal finds that it has jurisdiction over any of the claims. This derives from the oft-stated proposition that, for purposes of determining whether a claimant has stated a BIT claim over which the tribunal has jurisdiction, the tribunal should consider whether the facts alleged by the claimant, if proven, could give rise to a violation of the Treaty.<sup>37</sup>

57. There are certain respects, however, in which the Tribunal must proceed to decide factual issues at this jurisdictional stage of the proceedings. That is, the Tribunal cannot in all circumstances assume the facts as alleged by Claimants to be true in order to decide on its jurisdiction. At the jurisdictional stage, the Tribunal must satisfy itself that it has jurisdiction to hear the merits of the dispute. This requires the Tribunal to make definitive findings of any facts that are directly determinative of its jurisdiction.

58. The BIT and the ICSID Convention both contain specific, threshold jurisdictional requirements that must be satisfied in order for the Tribunal to determine conclusively that it has jurisdiction. Where the Tribunal's jurisdiction with respect to threshold requirements of the

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<sup>37</sup> See, e.g., *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* (Separate Opinion of Judge Rosalyn Higgins), 1996 I.C.J. 803, 856, at para. 32.

Treaty or ICSID Convention turns on the existence (or absence) of certain disputed facts, the Tribunal cannot merely take Claimants' factual allegations as true and wait until the merits stage to ascertain whether those facts are established. Such disputed facts must be proven at the jurisdictional stage, so that the Tribunal can make a definitive determination of its own jurisdiction. If the evidence is insufficient to ascertain the facts, the Tribunal can choose to join the jurisdictional determination to the merits stage for further development of the evidence—but it cannot determine that it has jurisdiction on a *pro tempore* basis, without assuring itself that the necessary facts are proven.<sup>38</sup>

59. Accordingly, the Tribunal may well proceed to weigh the evidence and make factual findings at this stage, though it will do so solely to the extent necessary to make the conclusive jurisdictional determinations required under the BIT and the ICSID Convention.

#### **IV. RESPONDENT'S OBJECTIONS TO JURISDICTION**

60. Respondent in its Memorial on Jurisdiction articulated its objections to this Tribunal's jurisdiction under five headings: (i) Claimants' contracts do not qualify as investments under the BIT; (ii) the alleged investments have not been shown to have been made "in the territory" of Ukraine under the BIT; (iii) Claimants' contracts do not constitute investments out of which the dispute directly arises under the ICSID Convention; (iv) the alleged investments do not comprise a significant contribution to Ukraine's development under the ICSID Convention; and (v) IWS and IWC are not proper Claimants, because neither ever had any contractual relationship with any Ukrainian party that might give rise to claims to

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<sup>38</sup> See *Inceysa Vallisoletana, S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26, Award, 2 August 2006, at paras. 149, 155; *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, at para. 66; *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, at paras. 59, 61-62.



performance. In its Reply on Jurisdiction, Respondent identified under a separate heading a sixth jurisdictional objection that (vi) the alleged investments were not made in accordance with Ukrainian law either with respect to the content of the Bareboat Charter or the structure of the payment arrangements thereunder.<sup>39</sup>

61. Of these objections, the first—that Claimants’ alleged investments do not qualify as such under the BIT—has been most extensively developed in the parties’ pleadings and at the hearing before the Tribunal on jurisdiction. It is also substantially interrelated with the third, fifth, and sixth objections. Respondent’s principal contention in this respect is that the Bareboat Charter Contract, which is at the core of Claimants’ alleged investments, is a “fictitious” agreement, because the parties did not intend it actually to operate as a lease and instead proceeded in their interactions as if they were still operating under the Basic Contract of 1996. On this basis, Respondent contends that Claimants cannot have investments in the form of “claims to performance” under a fictitious—and therefore invalid—agreement, nor under any related agreements (objection (i)). Respondent in turn contends that, absent valid claims to performance that could be affected by Respondent’s actions in April 2006, this dispute cannot be said to arise directly out of an investment (objection (iii)). Moreover, because in its view the Bareboat Charter Contract is fictitious, Respondent contends that any alleged investments based on rights under the Bareboat Charter or related contracts were not made in accordance with Ukrainian law (objection (vi)). From these premises, Respondent also rejects the claimed investments of other Inmaris companies such as IWC and IWS that are ancillary to the Bareboat

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<sup>39</sup> Respondent included in its Memorial several arguments to the effect that aspects of the Inmaris contracts were inconsistent with Ukrainian legal requirements, but had not addressed them separately. *See* Respondent’s Memorial on Jurisdictional Objections, 23 January 2009 (“Respondent’s Memorial on Jurisdiction”) at paras. 31-44. Respondent in its Reply withdrew one such objection (namely, that the Bareboat Charter had not been approved by the requisite Ukrainian authorities), but added new objections based on the structure of the payments under the Bareboat Charter and the Donation Contract. *See* Respondent’s Reply on Jurisdiction at paras. 254, 249-53.

Charter Contract (objection (v)). As this issue of the validity of the Bareboat Charter Contract is at the forefront, and pervades the Respondent's jurisdictional objections, it will be addressed first, and synthetically, in Section IV.A below.

62. Respondent's remaining objections will be taken up in turn in the Sections that follow. Section IV.B will address Respondent's objection that the claimed investments were not made in the territory of Ukraine (objection (ii)). Section IV.C will take up Respondent's contention that the claimed investments do not constitute a significant contribution to its economic development (objection (iv)). In Section IV.D, the Tribunal will address Respondent's additional objections that the claimed investments were not made in accordance with the laws of Ukraine (objection (vi)) (the primary objection (vi) based on the alleged invalidity of the Bareboat Charter Contract having been addressed already in Section IV.A).

#### **A. Investments Premised on the Bareboat Charter Contract**

63. It is appropriate to turn first to the BIT's definitions. Article 2 of the BIT provides that "[i]nvestments, which have been undertaken by nationals or companies of the other Contracting Party in accordance with the legal regulations of a Contracting Party in the field of application of its legal system, shall enjoy the full protection of the Treaty."

64. Although Respondent questioned the sufficiency of Claimants' German documentation in its Memorial,<sup>40</sup> upon Claimants' production of corporate registry excerpts in

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<sup>40</sup> See Respondent's Memorial on Jurisdiction at paras. 10-11.

its Counter-Memorial,<sup>41</sup> Respondent appears to no longer question that the Claimant companies are all “companies of the other Contracting Party” for purposes of the BIT.<sup>42</sup>

65. Respondent does, however, challenge that each of those Claimant companies had undertaken “investments” within the meaning of the BIT. Article 1(1) provides, in pertinent part, that

The term ‘investment’ shall comprise all kinds of assets, in particular:

...

(b) Shares in companies and other kinds of participations in companies;

(c) Claims to money which has been used to create a material or intangible value or claims to any performance having an economic value;

....

### **1. The Bareboat Charter Contract**

66. While Claimants list multiple alleged investments on behalf of each Claimant company, the majority of the investments are interwoven around Claimants’ various direct or derivative rights under the Bareboat Charter Contract, which Claimants characterize as the source of “claims to performance” for purposes of Article 1(1) of the BIT.<sup>43</sup>

67. Respondent does not contest that a contract such as the Bareboat Charter Contract could give rise to claims to performance constituting a covered investment under the BIT. Rather, Respondent’s principal objection is that this Bareboat Charter Contract (as well as contracts derivative of it) cannot give rise to “claims to performance”—and hence cannot

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<sup>41</sup> See Claimants’ Exhibits C-7 (IPS), C-8 (WKG), C-10 (IWC), C-11 (IWS).

<sup>42</sup> Article 1(4) defines “companies” in the case of the Federal Republic of Germany as “any juridical person as well as any commercial or other company, association with or without legal character, having its seat in the territory of the Federal Republic of Germany.”

<sup>43</sup> See, e.g., Claimants’ Counter-Memorial on Jurisdiction at paras. 140-177; Claimants’ Rejoinder on Jurisdiction at paras. 126-139.

constitute the basis of an investment, whether for WKG or for others of the Inmaris Companies—because it is a fictitious contract. Respondent contends that the Bareboat Charter Contract may well have been entered into for the purpose of obtaining financing for the reconstruction of the *Khersones*, but that, at the same time, it was “entered into without the parties even intending for it to establish legal consequences”—specifically, the legal consequences of a charter or lease-type arrangement.<sup>44</sup>

68. As evidence of the contract’s fictitious nature, Respondent pointed first to the alleged absence of any documented “delivery” of the *Khersones* to WKG under the Bareboat Charter Contract, and to the absence of any payments having been made directly to KMTI under the Bareboat Charter Contract.<sup>45</sup> Respondent additionally cited the testimony of various witnesses, including testimony of Claimants’ witnesses elicited at the hearing, to the effect that, as a practical matter, the parties operated in essentially the same manner that they did under the Basic Contract of 1996.<sup>46</sup> Respondent’s fundamental contention is thus that “the Bareboat Charter did not apply to the operation of the *Khersones*” and that the *Khersones* instead “was operated on the basis of the formally suspended Basic Contract.”<sup>47</sup>

69. The Bareboat Charter Contract is governed “by English law, if it (law) does not come into contrary with Ukrainian law (material and procedural).”<sup>48</sup> Neither party has offered any briefing on English law, such as whether or how English law recognizes or applies the

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<sup>44</sup> Respondent’s Memorial on Jurisdiction at para. 24.

<sup>45</sup> See Respondent’s Memorial on Jurisdiction at paras. 26-30.

<sup>46</sup> See Respondent’s Reply on Jurisdiction at paras. 97-104 (citing witness statements of Claimants’ witnesses Mr. Illarionov, Mr. Kolodyazhnyi, and Mr. Vinnov, and Respondent’s witness Ms. Poltavseva); Respondent’s Post-Hearing Brief on Jurisdiction, 1 September 2009 (“Respondent’s Post-Hearing Brief”) at paras. 16, 19 (citing testimony of Claimants’ witnesses Mr. Kolodyazhnyi, Mr. Illarionov, and Capt. Sukhina).

<sup>47</sup> Respondent’s Post-Hearing Brief at paras. 33, 38.

<sup>48</sup> Bareboat Charter Contract STS “*Khersones*”, 11 October 1999 (with Addenda 1 and 2) at Addendum 1, clause 28 (Ex. R-5) (Ex. C-29).

concept of a fictitious contract.<sup>49</sup> Respondent does cite Article 58 of the 1963 Civil Code of Ukraine, which provides that “[a] transaction shall be void when it has been entered into for the sake of form, without intention to create any legal effect (a fictitious transaction).”<sup>50</sup> Apart from this quotation, however, Respondent has provided no further explanation as to the meaning, jurisprudence, or application of this Civil Code provision under Ukrainian law. Claimants likewise provide no guidance under English or Ukrainian law, merely asserting (without citation) that “[t]he essential characteristic of a fictitious agreement is that both parties do not intend it to have legal consequences, e.g. where the parties formally conclude contract A, but covertly agree on contract B to govern their relationship.”<sup>51</sup> Accordingly, the Tribunal is left to assess Respondent’s objection on its face.

70. Before turning to the question of the allegedly fictitious nature of the Bareboat Charter Contract, the Tribunal notes that it is not necessarily the case, as Respondent would have it, that Claimants’ status as investors will disappear if we agree with Respondent on this issue. It may be that, even if the Bareboat Charter Contract were considered to be fictitious, the Claimants (or at least some of them) would still have standing as investors with claims against Respondent under the Treaty.

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<sup>49</sup> On the Tribunal’s own research, English law appears to comprise related concepts, such as defects in contract formation where the parties do not intend to create *bona fide* legal relations, or sham contracts intended to deceive third parties. See, e.g., *Glatzer & Warwick Shipping Co v Bradston Ltd (The Ocean Enterprise)*, [1997] 1 Lloyd’s Rep. 449, 485; *Snook v London & West Riding Investment Ltd* [1967] 2 QB 786, 802 (per Diplock LJ). Not surprisingly, it appears that the burden of establishing that an express agreement of a commercial nature was *not* intended to create legal relations lies with the party that asserts that no legal effect was intended, and the burden is a heavy one. See *Edwards v Skyways Ltd* [1964] 1 W.L.R. 349, 355 (per Scrutton LJ).

<sup>50</sup> Civil Code of the Ukrainian SSR, 1963 (excerpts) (Ex. R-8).

<sup>51</sup> Claimants’ Rejoinder on Jurisdiction at para. 47.

71. For example, if the Bareboat Charter Contract were deemed fictitious, it would presumably be treated as void *ab initio*.<sup>52</sup> Were that the case, however, then the Basic Contract would never have been suspended.<sup>53</sup> (Article III(1) of the Four-Party Agreement provides that the application of the Basic Contract “shall be suspended for the period of duration of the Bareboat Charter”;<sup>54</sup> absent a valid Bareboat Charter, Article III(1) is presumably inoperative.) In turn, the Basic Contract—the validity of which Respondent has not challenged—had a term of eight years (*i.e.* to 30 November 2004), with an automatic two-year extension (*i.e.* to 30 November 2006) absent notice from either party.<sup>55</sup> Accordingly, the Basic Contract would have been in effect—and thereby at least capable of giving rise to a “claim to performance”—at the time of the alleged arrest of the *Khersones* in April 2006. On this basis, even if the Bareboat Charter Contract were deemed fictitious and therefore void, at least IPS—the party to the Basic

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<sup>52</sup> See Civil Code of the Ukrainian SSR, 1963, at Art. 58 (Ex. R-8) (stating that a fictitious transaction “shall be void”); Respondent’s Post-Hearing Brief at para. 79, n. 177 (stating that a fictitious agreement “is void”).

<sup>53</sup> Respondent characterized the situation differently: According to Respondent, the Bareboat Charter Contract did serve to suspend the Basic Contract, notwithstanding the fact that in Respondent’s view the Bareboat Charter Contract was fictitious and therefore void. Respondent repeatedly characterized the parties as having operated on the basis of “the formally suspended 1996 Basic Contract” (*see, e.g.*, Respondent’s Post-Hearing Brief at paras. 15, 16, 98; Transcript, 20 July 2009 (Shemelin) at 8:9-13 ). Rather than explaining how a fictitious and void contract could have legal consequences (*i.e.* suspension) upon another contract, Respondent “respectfully [left] this contractual confusion to be resolved by the Tribunal.” Respondent’s Post-Hearing Brief at para. 15; *see also id.* at para. 99 (“This contractual puzzle is respectfully left for the Arbitral Tribunal to resolve.”). The Tribunal is puzzled only by the apparent internal inconsistency of Respondent’s position: it seems to overlook the basic alternatives that either the Bareboat Charter Contract had legal consequences (such as the suspension of the Basic Contract), or it was fictitious and did not have such consequences (and the Basic Contract remained operative).

<sup>54</sup> Four-Party Agreement, 11 October 1999, at Art. III(1) (Ex. R-4).

<sup>55</sup> There is no record of any such notice having been given. To the contrary, IPS and KMTI on 20 October 2004 signed Addendum No. 2 to the Basic Contract extending its term to 31 December 2010. *See* Addendum No. 2 to Basic Contract, 20 October 2004 (Ex. R-26). A Protocol was then signed on 27 March 2005 suspending the operation of Addendum No. 2 “[i]n connection with necessity of discussion of the existing arrangements on operation of STS ‘*Khersones*’.” Protocol to Addendum No. 2 to Basic Contract, 27 March 2005 (Ex. R-27). Claimants maintain that this refers to the “existing arrangements” under the Bareboat Charter Contract, pursuant to which the Basic Contract was suspended, and that the parties sought to make clear through the Protocol that the extension under Addendum No. 2 was similarly suspended (*i.e.* that Addendum No. 2 did not somehow undo the tolling of the Basic Contract’s duration during the operative period of the Bareboat Charter Contract). *See* Claimants’ Rejoinder on Jurisdiction at paras. 40-41. The Tribunal need not, and does not, make any finding at this stage on the total duration of the Basic Contract; for the point noted above, it suffices to note that, absent suspension by the Bareboat Charter Contract, the Basic Contract even on its original terms would still have been in effect in April 2006.

Contract—arguably would have the requisite investment on which to ground a claim under the Treaty.

72. Returning to the status of the Bareboat Charter Contract, the Tribunal takes it to be common ground between the parties, particularly in the wake of the testimony at the hearing, that, in practice, the day-to-day operations of the *Khersones* were not much changed following the execution of the Bareboat Charter Contract, as compared with the parties’ prior interactions under the Basic Contract. But that fact, to which Respondent attaches great significance, does not dispositively establish that the Bareboat Charter Contract was fictitious, *i.e.* entered into without any intention to create any legal consequences.

73. *First*, there is one way in which the operations were very much changed: the *Khersones* was extensively repaired and upgraded, making it more marketable and seaworthy. Respondent does not appear to contest that that development was funded by WKG,<sup>56</sup> and the Tribunal is persuaded that the Bareboat Charter was necessary to that arrangement. As Respondent itself flagged in its Reply, “the Rector of the KMTI, who signed the Bareboat Charter, definitely indicates that the purpose of entering into this Contract was to obtain financing.”<sup>57</sup>

74. Of course, Respondent went on to infer from the Rector’s statement that the purpose of the Bareboat Charter was “*i.e.* not to operate the vessel.”<sup>58</sup> But the existence of one

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<sup>56</sup> Respondent asserts that payments by “IPS/WKG” to the TRAL shipyard “may not be equated with a charter payment under the Bareboat Charter”—that is, it contends that the fact that IPS/WKG paid for the repairs is not proof that they were doing so pursuant to the Bareboat Charter, or that the Bareboat Charter payment was made into IPS’s trust account—but Respondent does not appear to contest that IPS and/or WKG actually paid for the reconstruction and repair work. *See* Respondent’s Reply on Jurisdiction at para. 121; Respondent’s Post-Hearing Brief at para. 22.

<sup>57</sup> Respondent’s Reply on Jurisdiction at para. 100 (quoting witness statement of Mr. Illarionov that “[t]he Bareboat Charter was required only in order to obtain such financing,” Ex. C-WS2, at para. 17).

<sup>58</sup> Respondent’s Reply on Jurisdiction at para. 100 (emphasis omitted).

purpose does not necessarily negate another, coexisting purpose. The Bareboat Charter Contract may well have been motivated by the need to obtain financing, but if that financing in turn required that the vessel be secured under a long-term charter to provide security for the income stream for repayment of the financing, then the Bareboat Charter Contract could have the purpose of a charter as well. Moreover, the Bareboat Charter Contract contains multiple *Khersones*-specific terms referring to the vessel's operations,<sup>59</sup> which suggest that the parties were concerned with its operational effects as well as its financing effects.

75. Respondent's position that the Bareboat Charter Contract was not intended to have legal consequences contains an inherent contradiction. On the one hand, Respondent concedes—indeed, even insists—that the Bareboat Charter was intended to make it possible to obtain financing for the *Khersones*' reconstruction, and it acknowledges that the financing was obtained and the reconstruction was performed. On the other hand, it maintains that the Bareboat Contract was not intended to have legal consequences. In effect, Respondent maintains that the financing and reconstruction of the *Khersones*, and repayment of that financing, were not “legal consequences” intended by the parties to the Bareboat Charter Contract. However, the financing and repayment objective is referenced in Addendum 1 of the Bareboat Charter Contract, in Clause 32, which provides:

After 5-year action of this Charter the Owners shall not refuse the Charterers to prolong the Charter period if [it] becomes clear that

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<sup>59</sup> Clause 29 of Addendum 1 states that “The Parties understand that management and operation of the Vessel shall not be put ahead [of] cadetts training, so the Charterers shall be limited by the s[c]hedules of cadett-exchange determined by the Parties annually in advance.” Clause 30 states that “Relations between the Parties and the Master, offices and crew of the Vessel shall be regulated by the special crewing contract, which the Parties shall sign.” See Bareboat Charter Contract STS “*Khersones*”, 11 October 1999 (with Addenda 1 and 2) (Ex. R-5) (Ex. C-29). Respondent does not appear to dispute that Addendum 1 was subject to the Committee's 17 November 1999 approval of the Bareboat Charter Contract (though it raises questions about Addendum 2). See Respondent's Reply on Jurisdiction at paras. 254-55.



Charterers obligations before their commanditists,<sup>60</sup> members and shareholders, agreed with the Owners, have not been fully executed.<sup>61</sup>

76. Moreover, the financing, reconstruction, and repayment objectives were stated explicitly in the Four-Party Agreement, which is cross-referenced as an “inalienable part” of the Bareboat Charter Contract.<sup>62</sup> The Four-Party Agreement states, *inter alia*, that:

3. Both KMTI and Inmaris realize the necessity of reequipment and capital repair of the Vessel and undertaking of actions to fund the project.

4. For the said purpose, there has been incorporated Windjammer KG, which shall actually make the funds, as required to make the repairs, available.

....

6. In order to provide for safety and repayment of the funds, as made available by Windjammer KG, the Vessel shall have to be operated and to yield a return.

7. By virtue of the aforesaid, the Vessel shall be chartered, subject to bareboat charter terms, to Windjammer KG.<sup>63</sup>

77. Accordingly, it is difficult to sustain that the financing and reconstruction of the *Khersones*, and the repayment of the financing to the WKG Kommanditists (investors), were not contemplated “legal consequences” of the Bareboat Charter Contract, intended by the parties.

78. *Second*, the fact that the day-to-day operations of the *Khersones* were largely unchanged is not necessarily inconsistent with the proposition that the parties operated under the Bareboat Charter Contract (rather than the Basic Contract). Indeed, it appears that several

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<sup>60</sup> Elsewhere Respondent argued that documentary references to the “kommandit partnership” should not be taken as evidence that KMTI’s officials were aware of or contemplated dealings with WKG. *See* Respondent’s Post-Hearing Brief at para. 35. The Tribunal finds it difficult to credit this argument, however, given the specificity of the term and the absence of any other “kommandit partnership” or “kommanditists” anywhere involved in the operation of the *Khersones*.

<sup>61</sup> Bareboat Charter Contract STS “*Khersones*”, 11 October 1999 (with Addenda 1 and 2) (Ex. R-5) (Ex. C-29).

<sup>62</sup> Bareboat Charter Contract STS “*Khersones*”, 11 October 1999 (with Addenda 1 and 2) at Addendum 1, Clause 33 (“The Parties to this Charter additionally shall conclude the Trustee contract, the Donation contract, and the Four-parties contract which are to be inalienable parts of this Charter.”) (Ex. R-5) (Ex. C-29).

<sup>63</sup> Four-Party Agreement, 11 October 1999 (Ex. R-4).

provisions of the Bareboat Charter Contract were deliberately designed to mimic the preexisting arrangements. For example, Claimants point to the Crewing Contract, which was anticipated in the Bareboat Charter Contract,<sup>64</sup> and which lists the existing crew members and states that “KMTI undertakes to further deploy the same crew, cadets and number on the ship.”<sup>65</sup> As another example, Clause 29 of Addendum 1 to the Bareboat Charter Contract, which gives primacy to the mission of cadet training, appears to replicate the Basic Contract’s provisions that “[t]he commercial activities shall not impede with the training purposes.”<sup>66</sup>

79. In this respect, the Tribunal sees the plausibility of Claimants’ proposition that the testimony of (non-lawyer) witnesses at the hearing to the effect that they continued to work “on the basis of” the Basic Contract after 1999<sup>67</sup> may be explained by the fact that they were unaware that the Bareboat Charter Contract and related agreements replicated the Basic Contract in many operational respects.<sup>68</sup> That is to say, the witnesses—who are not in a position to opine as a legal matter about which contract was effective when—confirmed the continuity of the parties’ operations, but perhaps without appreciating that the same operations could be involved under either set of contractual arrangements.

80. One respect in which the parties agree that the Bareboat Charter did not replicate the Basic Contract is with respect to the annual meetings that were held to review the prior year’s financial results and to sign annual accounts. This was required under the 1998 Addendum to

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<sup>64</sup> Bareboat Charter Contract STS “Khersones”, 11 October 1999 (with Addenda 1 and 2) at Addendum 1, Clause 30 (Ex. R-5) (Ex. C-29).

<sup>65</sup> Crewing Contract, 11 October 1999, at Clause I(2) (Ex. C-33).

<sup>66</sup> Basic Contract at Section 3 (Ex. C-21).

<sup>67</sup> *See, e.g.*, Transcript, 21 July 2009 (Kolodyazhnyi) at 110:15-111:4 .

<sup>68</sup> *See* Claimants’ Post-Hearing Brief, 1 September 2009 (“Claimants’ Post-Hearing Brief”) at para. 24; *compare* Transcript, 21 July 2009 (Kolodyazhnyi) at 120:2-12 *with id.* (Kolodyazhnyi) at 121:2-124:14.

the Basic Contract,<sup>69</sup> but was not required under the Bareboat Charter Contract. Nevertheless, even after 1999, KMTI and Captain Koch continued to hold such meetings and sign annual accounts. In many cases, Captain Koch was identified as signing the accounts for IPS; in others, he was identified as signing for IWS.<sup>70</sup> (Captain Koch was the Managing Director of both companies.) Claimants explain these meetings and the accounts as an effort on the part of the Inmaris Companies to accommodate KMTI's accounting obligations, notwithstanding the absence of any contractual obligation for them to do so under the Bareboat Charter Contract. The Tribunal finds this explanation plausible in light of the apparent overarching objective, seemingly embraced by both Inmaris and KMTI,<sup>71</sup> to change as little as possible in their working relationship while under the Bareboat Charter Contract. Again, the Tribunal does not view an effort to minimize operational change as demonstrating that legal changes in the relationship are necessarily fictitious.

81. *Third*, Respondent itself takes the position that the Bareboat Charter Contract had at least one legal consequence: according to Respondent, it did operate (via the Four-Party Agreement) to suspend the application of the Basic Contract.<sup>72</sup> If Respondent is held to that position, then it would negate the proposition that the Bareboat Charter Contract “was . . .

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<sup>69</sup> Addendum No. 1 to the Basic Contract, at Section 8A(c) (Ex. R-7).

<sup>70</sup> Compare, e.g., Akte 2002 (IPS) (Ex. C-58) with Akte 2002 No. 2 (IWS) (Ex. C-59) and Akte 2002 No. 3 (IPS) (Ex. C-60); Akte 2003 (titled as accounts of IWS, signed for IPS) (Ex. C-61); Akte 2004 (unsigned, signature block for IPS) (Ex. C-62) with Addendum to Akte 2004 (signed, IWS) (Ex. C-63).

<sup>71</sup> See Fax from IPS to KMTI, 27 September 1999 (Ex. C-25); Transcript, 21 July 2009 (Illarionov) at 57:18-25.

<sup>72</sup> Article III(1) of the Four-Party Agreement provides that the application of the Basic Contract “shall be suspended for the period of duration of the Bareboat Charter.” Four-Party Agreement, 11 October 1999, at Art. III(1) (Ex. R-4); see also Respondent's Memorial on Jurisdiction at para. 23 (“The operation of the Basic Contract was suspended by the 4-Party Agreement for the period of duration of the Bareboat Charter.”) (emphasis in original). Respondent repeatedly characterized the parties as having operated between 1999 and 2006 on the basis of “the formally suspended 1996 Basic Contract.” See, e.g., Respondent's Post-Hearing Brief at paras. 15, 16, 98; Transcript, 20 July 2009 (Shemelin) at 8:9-13.

entered into without the parties even intending for it to establish legal consequences”<sup>73</sup>— because, at a minimum, it was intended by the parties to have the legal consequence of suspending the Basic Contract.

82. *Fourth*, the Tribunal is not persuaded that the other two factual propositions upon which Respondent relies most heavily to establish that the Bareboat Charter Contract did not operate as such (namely, the alleged lack of documentary “delivery” of the *Khersones* under the Bareboat Charter Contract, and the non-receipt by KMTI of a bareboat charter payment)<sup>74</sup> have the significance that Respondent would have us attribute to them. As to the former, Claimants concede that there is no document in the record memorializing the legal delivery of the *Khersones* to WKG under the Bareboat Charter Contract. But Respondent’s insistence on the need for such a document appears to rest on an untenably strained reading of that contract’s provisions. Respondent points to Article II(2), which provides that “the Vessel shall be properly documented at time of delivery.”<sup>75</sup> However, this provision, which is part of the standard BareCon89 industry form contract language used by the parties, is more naturally read to require that the ship’s documents are in order at the time of delivery, than (as Respondent would have it) to require that the act of delivery itself be documented. That ordinary meaning of the provision is also consistent with commentary on the BareCon89 form contract, which in connection with this provision discusses the preparation of documentation such as certificates regarding the ship’s seaworthiness and “Classification and Trading certificates.”<sup>76</sup>

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<sup>73</sup> Respondent’s Memorial on Jurisdiction at para. 24.

<sup>74</sup> *See, e.g.*, Respondent’s Memorial on Jurisdiction at paras. 26-30.

<sup>75</sup> Bareboat Charter Contract STS “*Khersones*”, 11 October 1999 (with Addenda 1 and 2) (Ex. R-5) (Ex. C-29).

<sup>76</sup> *See* Mark Davis, BAREBOAT CHARTERS at 3.12 (2000) (Ex. C-81).

83. Nor do Claimants contest as a factual matter the latter allegation—that KMTI did not directly receive a charter payment from WKG. Indeed, Claimants do not allege that WKG transferred any funds directly to KMTI under the Bareboat Charter Contract.<sup>77</sup> But that does not necessarily mean (as Respondent would have it) that no charter hire payment was made under the Bareboat Charter Contract.<sup>78</sup> On its face, item 23 of the Bareboat Charter Contract specifies the “currency and method of payment” as “DM [deutschemarks], Trusty account Messrs. Inmaris Perestroika Sailing Maritime Service GmbH,”<sup>79</sup> reflecting the fact that KMTI and IPS simultaneously entered into the Trustee Contract by which IPS was to receive payments on KMTI’s behalf and disburse them for the reconstruction of the *Khersones*.<sup>80</sup> As noted above, evidence in the record (which Respondent has not contested) indicates that such an IPS trust account existed, and that funds drawn from it were used to pay for the work on the *Khersones*.<sup>81</sup> Respondent did complain of a lack of documentary evidence that WKG made the charter payments into the IPS trust account.<sup>82</sup> Based on the bank statements of the IPS account furnished by Claimants with their Rejoinder,<sup>83</sup> as well as the WKG financial statements reviewed by Mr. Senogles,<sup>84</sup> the Tribunal finds the evidence sufficient to establish that WKG did make payment into the IPS trust account in at least the amounts specified in the Bareboat Charter Contract and Donation Contract (DM 1,100,000). Particularly given that KMTI itself agreed to

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<sup>77</sup> See Claimants’ Counter-Memorial on Jurisdiction at para. 195.

<sup>78</sup> See, e.g., Respondent’s Reply on Jurisdiction at para. 116.

<sup>79</sup> Bareboat Charter Contract STS “*Khersones*”, 11 October 1999, at item 23 (Ex. R-5) (Ex. C-29).

<sup>80</sup> Trustee Contract, 11 October 1999, at Arts. I & II (Ex. C-32).

<sup>81</sup> See para. 46 above.

<sup>82</sup> See Respondent’s Reply on Jurisdiction at para. 119.

<sup>83</sup> See Dresdner Bank AG Statements for Account No. 200 9 510 096 03 of “Inmaris” Perestroika Sailing Maritime Service GmbH (with explanatory tables) (Ex. C-77).

<sup>84</sup> See Report of Geoffrey Senogles of LBC International, 20 March 2009, at paras. 35-48 (Ex. C-41) (discussing review of WKG audited financial statements showing DM 600,000 capital expense and DM 500,000 in non-capitalized repairs).

the use of this trustee and trust account structure, the Tribunal simply cannot agree with Respondent's proposition that these payments were not "actually made to the benefit of the owner of the vessel under the terms of the Bareboat Charter."<sup>85</sup> Payments to a trust account administered by IPS as trustee for KMTI did "benefit" KMTI, regardless of whether KMTI received the funds directly from WKG.<sup>86</sup> Likewise, the Tribunal does not accept Respondent's alternative contention that "[t]he fact that other contracts have been used by Inmaris companies for the alleged payments, shows that the Bareboat Charter was not an independent operative contract . . . ."<sup>87</sup> It was the Bareboat Charter itself that specified this payment mechanism.<sup>88</sup> In the Tribunal's view, the fact that a payment mechanism identified in the contract was actually used by the parties logically supports the validity or operative effect of the contract.

84. For all the foregoing reasons, the Tribunal concludes that the Bareboat Charter Contract can give rise to "claims to performance" within the meaning of Article 1(1) of the BIT's definition of "investment." At this stage, we express no view as to whether WKG was in fact entitled to performance under the Bareboat Charter Contract, whether any such right to performance was in fact breached, or whether any such breach would in fact establish a claim for breach of the BIT. These are all questions for the merits. It is sufficient at this preliminary, jurisdictional stage that the Tribunal finds that the Bareboat Charter Contract is a viable basis for a claim to performance that constitutes an investment under the BIT, and it is such claims to performance that Claimants have advanced here.

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<sup>85</sup> Respondent's Reply on Jurisdiction at para. 119.

<sup>86</sup> Respondent contends that this payment structure is also relevant to its jurisdictional objections that the investment was not made in the territory of Ukraine, and that the investment violated Ukrainian law. These aspects of the payment structure are addressed in Sections IV.B and IV.D below.

<sup>87</sup> Respondent's Reply on Jurisdiction at para. 116.

<sup>88</sup> Bareboat Charter Contract STS "*Khersones*", 11 October 1999, at item 23 (Ex. R-5) (Ex. C-29).

85. On the same basis, the Tribunal also concludes that the claims presented constitute a legal dispute arising directly out of the investment (i.e. the claim to performance under the Bareboat Charter Contract) under Article 25 of the ICSID Convention. Respondent relies principally on the logic that if the Bareboat Charter Contract is fictitious, then it cannot give rise to claims to performance out of which the dispute directly arises. Because the Tribunal does not accept the predicate, this “arising directly” objection with respect to the Bareboat Charter Contract falls away as well.<sup>89</sup>

86. We also note that Respondent framed the “arising directly” inquiry in rather specific terms: whether Claimants had a “clear, specific and enforceable right to conduct tourist cruises aboard the *Khersones* on or after the date of the alleged ‘arrest’” of the ship (i.e., 6 April 2006).<sup>90</sup> Such an inquiry as to the precise scope and import of Claimants’ legal rights and whether Respondent violated those rights would be beyond the proper jurisdictional inquiry of Article 25 and would relate to the merits of the parties’ dispute. To quote a passage from Professor Schreuer’s *Commentary* that Respondent has invoked,<sup>91</sup> Article 25 requires that “the dispute must not only be connected to an investment, but must also be reasonably closely connected.”<sup>92</sup> The Tribunal finds such a “reasonably close” connection here, and it need not approach the granular level of analysis that Respondent advocated.

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<sup>89</sup> Respondent appears to accept that if the Bareboat Charter Contract is not held to be fictitious, it could be “capable of giving rise to a dispute due to the Governmental Telegram of April 5, 2006.” Respondent’s Reply on Jurisdiction at para. 135; *see also id.* at para. 136 (“Claimants assert that the Bareboat Charter ‘gave WKG an enforceable right against KMTI’ due to the legal nature of the Bareboat Charter, which ‘is similar to a lease contract.’ This might have been so, if the Bareboat Charter had not been a fictitious agreement . . .”). The question of “arising directly” with respect to contracts other than the Bareboat Charter Contract is discussed in Section IV.A.2 below.

<sup>90</sup> Respondent’s Memorial on Jurisdiction at para. 75 (emphasis omitted); *see also id.* at para. 74 (“Any other claims to performance which could be based on the Inmaris Contracts generally . . . do not meet the requirement of directness.”).

<sup>91</sup> *See* Respondent’s Memorial on Jurisdiction at para. 73.

<sup>92</sup> Christoph H. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* at 114 (1<sup>st</sup> ed. 2001); *see also* Christoph H. Schreuer, *THE ICSID CONVENTION: A COMMENTARY* at 106 (2<sup>nd</sup> ed. 2009).

## 2. Related Inmaris Contracts

87. In connection with many of its objections, Respondent strenuously urges the Tribunal to examine the specific investments claimed by each individual would-be Claimant under each contract. The Bareboat Charter Contract was signed by only KMTI and WKG, and Respondent maintains that rights claimed derivatively by other Claimants under other contracts are insufficient to ground this Tribunal’s jurisdiction with respect to certain of the specific claims and Claimants. Accordingly, while the analysis in the preceding Section IV.A.1 identifies at least one investment sufficient to provide standing for WKG under Article 1(1) of the BIT (subject to Respondent’s other jurisdictional objections, discussed in the Sections that follow), it is also necessary to consider whether the other Claimants in this arbitration—namely, IPS, IWC, and IWS—have identified investments upon which jurisdiction can be based under the BIT and the ICSID Convention.<sup>93</sup>

88. We turn first to these Claimants’ alleged investments in the form of “claims to performance” under the various contracts related to the Bareboat Charter Contract. Some of these Claimants also lay claim to other investments by virtue of their corporate relationships, addressed in Section IV.A.4 below, and by virtue of their expenditures and expected returns, addressed in Section IV.A.3.

89. Claimants itemized the alleged investments of each of the Inmaris companies in their Counter-Memorial. IWC’s contract-based investments were identified as the Sub-Bareboat Charter and the “indirectly controlled” Bareboat Charter.<sup>94</sup> IWS’s contract-based investments were identified as the 2001 General Agency Contract between IWS and IWC, and, again, the

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<sup>93</sup> This discussion corresponds to aspects of Respondent’s first, third, and fifth objections to jurisdiction. *See supra* at para. 60.

<sup>94</sup> Claimants’ Counter-Memorial on Jurisdiction at para. 150.



“indirectly controlled” Bareboat Charter.<sup>95</sup> Finally, IPS’s contract-based investments were identified as the 1996 Basic Contract and its “indirect interest into the ship” through the 2001 Agency Contract between IPS and IWS.<sup>96</sup>

90. It is clear from the foregoing list that these purported investments are all substantially derivative of, and removed by increasing degrees from, the Bareboat Charter Contract. As depicted in the charts at paragraph 42 above, WKG in effect sub-leased the *Khersones* to IWC, which in turn made IWS its agent to operate the vessel, which in turn made IPS its agent for the marketing of the vessel. The revenue streams from this operation (*i.e.*, from the tourist bookings) flowed in to IWC, which made an annual sub-bareboat charter payment up to WKG, and paid a portion of its revenues down to IWS, which in turn paid fees down to IPS.

91. Had the claims in this arbitration been presented only on behalf of one of these companies, relying on “claims to performance” or “claims to money” under its respective contract(s) in this chain, the Tribunal might have faced difficult questions as to the requisite degree of legal and factual proximity to the underlying investment operations. It might have been necessary to consider factors such as the scope of the various entities’ legal rights (*e.g.*, the fact that IWC’s legal rights are effectively coterminous with WKG’s rights, while IWS and IPS’s rights are successively more limited), the degree of direct involvement in the *Khersones* project (*e.g.*, the fact that IWS actually operated the *Khersones* and paid for its operations, while IPS merely marketed the tours), and the degree of integration of the contractual rights (*e.g.*, the fact that the Four-Party Agreement signed by KMTI expressly contemplated a WKG sub-charter to IWC and an IWC general agency contract to another entity, but to IPS not IWS).

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<sup>95</sup> Claimants’ Counter-Memorial on Jurisdiction at para. 157.

<sup>96</sup> Claimants’ Counter-Memorial on Jurisdiction at para. 164.

92. In this case, however, the Tribunal is presented with claims on behalf of all of the Inmaris companies, proceeding jointly, arising out of all of the interrelated contracts relating to the reconstruction and operation of the *Khersones*. Accordingly, the Tribunal can step back to consider their claimed investments as component parts of a larger, integrated investment undertaking. It is not necessary to parse each component part of the overall transaction and examine whether each, standing alone, would satisfy the definitional requirements of the BIT and the ICSID Convention. For purposes of this Tribunal's jurisdiction, it is sufficient that the transaction as a whole meets those requirements. Of course, exactly what rights (if any) were held by each specific company, whether any such specific rights were breached by Respondent's actions, and whether or how such contractual breaches (if any) give rise to breaches of the Treaty, are questions that the Tribunal may need to take up on the merits. But they need not be answered at this stage, where the Tribunal need only determine the existence of a covered investment in the transaction as a whole.

93. As Claimants contended,<sup>97</sup> and Respondent acknowledged,<sup>98</sup> this approach of considering the purported investment in an integrated fashion has been followed by multiple investment treaty tribunals before us. Claimants invoked *CSOB v. Slovakia* (“[A] dispute that is brought before the Centre must be deemed to arise directly out of an investment even when it is based on a transaction which, standing alone, would not qualify as an investment under the Convention, provided that the particular transaction forms an integral part of an overall operation that qualifies as an investment.”);<sup>99</sup> *Joy Mining v. Egypt* (“[A] given element of a complex

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<sup>97</sup> See Claimants' Counter-Memorial on Jurisdiction at para. 206; Claimants' Rejoinder on Jurisdiction at para. 74.

<sup>98</sup> See Respondent's Reply on Jurisdiction at para. 83.

<sup>99</sup> *Ceskoslovenska Obchodni Banka, a.s. v. Slovak Republic*, ICSID Case No. ARB/97/4, Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999 (“*CSOB v. Slovakia*, Decision on Jurisdiction”) at para. 72.

operation should not be examined in isolation because what matters is to assess the operation globally or as a whole . . . .”);<sup>100</sup> *ADC v. Hungary* (“In considering whether the present dispute falls within those which ‘arise directly out of an investment’ under the ICSID Convention, the Tribunal is entitled to, and does, look at the totality of the transaction as encompassed by the Project Agreements.”);<sup>101</sup> and *Mytilineos v. Serbia* (“Even if one doubted whether the Agreements looked at in isolation would constitute investments by themselves, [it] seems clear that the combined effect of these agreements amounts to an investment.”).<sup>102</sup> One might also take note of the decisions of various ICSID tribunals in contract-based (rather than treaty-based) cases that relied on the overall unity or inseparability of the relevant operation in order to exercise jurisdiction over other related contracts, in addition to the contract containing the consent to ICSID arbitration.<sup>103</sup>

94. Here, in the Tribunal’s view it is clear that the various IWC, IWS, and IPS contracts were integrated with the Bareboat Charter Contract as part of the Claimants’ undertaking to renovate and operate the *Khersones*. Whether under the Basic Contract (an investment of IPS), or the Bareboat Charter Contract (an investment of WKG), that was the enterprise in which the Inmaris companies were engaged. We need not be persuaded that it was “necessary” for the various Inmaris companies to arrange their respective activities and

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<sup>100</sup> *Joy Mining Machinery Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Award on Jurisdiction, 6 August 2004 (“*Joy Mining*, Award”) at para. 54.

<sup>101</sup> *ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006 (“*ADC v. Hungary*, Award”) at para. 331 (emphasis omitted).

<sup>102</sup> *Mytilineos Holdings SA v. State Union of Serbia & Montenegro and Republic of Serbia* (UNCITRAL), Partial Award on Jurisdiction, 8 September 2006 (“*Mytilineos v. Serbia*, Partial Award”) at para. 120.

<sup>103</sup> See, e.g., *Holiday Inns v. Morocco*, as described in Pierre Lalive, *The First ‘World Bank’ Arbitration (Holiday Inns v. Morocco)—Some Legal Problems*, 51 BRIT. Y.B. INT’L L. 123 (1980), reprinted in 1 ICSID REPORTS 645, 662-63, 668-76 (1993); *Amco Asia Corp. v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983, at paras. 24, 31; *SOABI v. Republic of Senegal*, ICSID Case No. ARB/82/1, Award, 25 February 1988, at paras. 4.13, 4.16, 4.24; *Klöckner Industrie Anlagen GmbH et al. v. United Republic of Cameroon*, ICSID Case No. ARB/81/2, Award, 21 October 1983, at Part III.

responsibilities as they did in connection with the Bareboat Charter;<sup>104</sup> we need only conclude that each was an integrated part of the *Khersones* project. Even if the financing, the bareboat charter, the sailing tour operations, and the marketing all could have been performed by a single entity (as apparently was the case under the Basic Contract), the fact that Claimants allocated these responsibilities among different Inmaris entities in connection with the Bareboat Charter Contract does not change the essential nature or scope of the *Khersones* venture. Conceptually, this analysis does not allow Claimants to “create new investment[s]” through “sub-delegation,” as Respondent suggests.<sup>105</sup> Rather, it determines that the Claimants’ contractual rights, whether they flow directly from KMTI or indirectly via “sub-delegation” through another Inmaris company, are part and parcel of the same, integrated investment.

95. Moreover, most of these various arrangements were spelled out quite clearly in agreements that KMTI signed, which further attest to the integrated nature of the operations. The Four-Party Agreement expressly contemplated both that WKG would sub-charter the *Khersones* to IWC, and that IWC would appoint another entity as its general agent for the operation, maintenance, and marketing of the *Khersones*.<sup>106</sup> Consistent with this, the Bareboat Charter Contract also contemplates sub-chartering, in that it provides for the compensation of sub-charterers (among others) if the Contract is cancelled by any third party, government or state authority prior to the end of its term.<sup>107</sup>

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<sup>104</sup> Cf. Respondent’s Post-Hearing Brief at para. 69 (contending that Claimants could not “plausibly explain” why the multiple contracts were “necessary for the so-called ‘Bareboat Charter Scheme’”).

<sup>105</sup> Respondent’s Reply on Jurisdiction at para. 206.

<sup>106</sup> Four-Party Agreement, 11 October 1999, at Preamble (8), Art. IV, Art. V (Ex. R-4).

<sup>107</sup> Bareboat Charter Contract STS “*Khersones*”, 11 October 1999 (with Addenda 1 and 2) at Addendum 1, Clause 31 (Ex. R-5) (Ex. C-29).

96. In addition to highlighting that the ancillary contracts were integrated with the Bareboat Charter, these contractual cross-references make clear that Claimants did not devise their arrangements covertly. The only aspect of the arrangements among the Inmaris companies that was not expressly contemplated in the KMTI-signed contracts in 1999 was that IWC would later divide the operation/maintenance and marketing responsibilities contemplated in Art. V of the Four-Party Agreement between IWS (a new entity in the group) and IPS, respectively. But whether or not KMTI or the State Committee was aware of the details of the Inmaris companies' arrangements *inter se*, is not dispositive. Rather, the question is whether these arrangements can properly be considered to be part of an integrated, unitary operation that comprises an investment over which this Tribunal has jurisdiction. We hold that they do.

97. In reaching this conclusion, we do not rely on Claimants' references to investment treaty decisions dealing with "indirect investments," cited in support of the proposition that the contract-related investments of IWC, IWS and IPS constitute indirect investments in WKG's own investment under the Bareboat Charter Contract.<sup>108</sup> Such cases deal with investments that are "indirect" by virtue of chains of corporate ownership.<sup>109</sup> For purposes of this analysis, where a network of contractual arrangements is in play, we find it is more appropriate to focus on the requirement of directness under Article 25 of the ICSID Convention.

98. In this vein, the Tribunal notes that examining the totality of the venture, rather than its component parts in isolation, also resolves Respondent's objections to the claims of IWC,

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<sup>108</sup> See Claimants' Rejoinder on Jurisdiction at para. 93.

<sup>109</sup> BITs that do not otherwise restrict the structure of investors' investments are regularly read to encompass investments in the host state that are owned by investors of the home state through one or more levels of subsidiaries, including subsidiaries incorporated in third countries (even when the BITs are silent on the issue). See, e.g., *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, at paras. 130, 136-37; *Gas Natural SDG, S.A. v. Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction, 17 June 2005, at paras. 10, 35.

IWS and IPS that were based on the “arising directly” requirement under Article 25 of the ICSID Convention. It is clear that the dispute placed before us is a legal one that arises directly out of the Inmaris companies’ integrated investment in the renovation and operation of the *Khersones*, as based on the Bareboat Charter Contract. We need not determine whether the dispute also arises directly out of each entity’s individual rights within that integrated investment. As did the *CSOB*, *Joy Mining*, and *ADC* tribunals,<sup>110</sup> we examine whether the dispute arises directly out of the totality of the investment—and we conclude that it does.

### **3. Payments Made, and Returns Expected, by the Inmaris Companies**

99. With respect to each of the Claimant companies, Claimants identified various payments made by them as also constituting “investments” for the purpose of grounding this Tribunal’s jurisdiction under the BIT and the ICSID Convention. For example, WKG claimed “the payments made under the Bareboat Charter and the Donation Contract for the reconstruction of the *Khersones*” as an investment;<sup>111</sup> IWC claimed “the payments it made into the ship and for the operation of the ship”;<sup>112</sup> IWS claimed “the investments made into the *Khersones*”;<sup>113</sup> and IPS claimed “the payments made for the operation of the ship, for repair and spare parts from 1996 through 1999.”<sup>114</sup> In their Rejoinder, Claimants framed these collectively as “the payments made for the renovation and operation of the ship, and . . . the claims for reimbursement of

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<sup>110</sup> See *CSOB v. Slovakia*, Decision on Jurisdiction at para. 72; *Joy Mining*, Award at para. 54; *ADC v. Hungary*, Award at para. 331.

<sup>111</sup> Claimants’ Counter-Memorial on Jurisdiction at para. 140.

<sup>112</sup> Claimants’ Counter-Memorial on Jurisdiction at para. 150.

<sup>113</sup> Claimants’ Counter-Memorial on Jurisdiction at para. 157.

<sup>114</sup> Claimants’ Counter-Memorial on Jurisdiction at para. 164.

reconstruction and operational expenses”—all of which Claimants characterized as among their “investments.”<sup>115</sup>

100. In the Tribunal’s view, Claimants’ focus on these expenditures is misguided in the context of jurisdictional objections. Claimants appear to be confusing the concept of an “investment” that is protected by the BIT (and that is subject to arbitration under the ICSID Convention) with the layman’s financial or economic notion of an “investment” as money expended in expectation of a return. This may be a function of terminology—the word “investment” is common usage in both contexts.

101. But the investment that must be identified for purposes of establishing the Tribunal’s jurisdiction is of a specific kind. Article 1(1) of the BIT provides that “[t]he term ‘investment’ shall comprise all kinds of assets . . . .” Thus, it is necessary to identify an “asset” to constitute an investment that is protected by the Treaty (provided all other jurisdictional requirements are met). The payments identified by the Claimants may reflect the contributions they made to obtain, or in furtherance of, investments; indeed, in the vernacular of quantum calculations, they might constitute Claimants’ “amounts invested” in the financial sense.<sup>116</sup> But the payment streams themselves are not necessarily “investments” covered by the Treaty. It is the asset acquired by an investor, typically as a result of such payments, that is the investment—be it tangible, such as an enterprise or real property, or intangible, such as claims to money or claims to performance (as here). Accordingly, the Tribunal does not accept Claimants’ contention that their past payments toward the operation or repair of the *Khersones*, as such,

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<sup>115</sup> Claimants’ Rejoinder on Jurisdiction at para. 79.

<sup>116</sup> See, e.g., *Autopista Concesionada de Venezuela, C.A. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, 23 September 2003, at paras. 236-306 (awarding out-of-pocket expenses); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007, at paras. 8.3.13-8.3.20 (awarding “investment damages”).

constitute investments protected under the Treaty on which this Tribunal’s jurisdiction may be founded. This is not to say that such payments will be outside the Tribunal’s consideration for other purposes. They are potentially relevant to Respondent’s jurisdictional objection that Claimants’ investment did not contribute to the economic development of Ukraine (*see* Section IV.C below). At the merits stage, in the event that the Tribunal concludes it has jurisdiction, they may form part of the factual context of Claimants’ claims under the Treaty. And they may be relevant to quantum, should the Tribunal find liability. But in the Tribunal’s estimation, those payments are not, in and of themselves, protected “investments” under the Treaty.

102. A more complicated picture emerges with respect to Claimants’ characterization of their expected returns on their various payments as “investments.” WKG claimed an “investment” in the form of its expected sub-charter hire payments and expected profits from IWC;<sup>117</sup> IWC claimed “the expected returns from the operation of the ship in 2006 and the years to come” as an investment;<sup>118</sup> and IWS claimed investments in “its share of the profits of IWC and the sub-bareboat charter, [and] IWC and its investments.”<sup>119</sup> Respondent contends that “expected or future returns” are not a “covered investment” protected by the BIT.<sup>120</sup>

103. None of the illustrative examples of investments in Article 1(1) of the BIT directly corresponds to the concept of expected returns as an asset, although as a practical matter

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<sup>117</sup> Claimants’ Counter-Memorial on Jurisdiction at para. 140. WKG owns 49% of IWC, and anticipated receiving 49% of IWC’s profits (in addition to the payments owed by IWC to WKG under the Sub-Bareboat Charter Contract). *See id.* at para. 148.

<sup>118</sup> Claimants’ Counter-Memorial on Jurisdiction at para. 150.

<sup>119</sup> Claimants’ Counter-Memorial on Jurisdiction at para. 157. As to the former claimed investment (“share of the profits of IWC and the sub-bareboat charter”), under the General Agency Contract, IWS’s remuneration was set at a percentage of the sales revenues received by IWC for sailing tours during the *Khersones*’ sailing season in each year. *See* General Agency Contract, 20 December 2002, at §3(a) (Ex. C-35). The latter claimed investment (“IWC and its investments”) is apparently a reference to the fact that IWS owns 51% of IWC, and would therefore expect to receive 51% of the profits earned by IWC.

<sup>120</sup> Respondent’s Post-Hearing Brief at para. 57; *see also* Respondent’s Reply on Jurisdiction at paras. 165, 192-94.



such returns are potentially the result of holding an asset. However, at least in the context of expected returns that are grounded in contract, one can fairly readily characterize expectations of payment as “claims to money” or “claims to performance.” On this basis, the Tribunal accepts WKG’s and IWS’s characterization of the payments expected under their respective contracts as “investments” within the meaning of Article 1(1) of the BIT.

104. Expected returns that are *not* directly premised on a contractual right to receive money, such as IWC’s claimed investment in “the expected returns from the operation of the ship in 2006 and the years to come”<sup>121</sup> or WKG and IWS’s claimed investments in the profits of IWC,<sup>122</sup> do not fit so neatly into Article 1(1)’s parameters. One typically speaks of the returns expected *from* an investment, rather than of expected returns *as* an investment as such. Here, however, the Treaty’s provisions make it unnecessary to consider the abstract question whether such returns would fit within a typical BIT definition of “investment.”

105. A Protocol to the BIT agreed upon the Treaty’s signing states that “[w]ith regard to Article 1 . . . [r]eturns from the investment, and, in the event of their reinvestment, the returns therefrom, shall enjoy the same protection as the investment.”<sup>123</sup> Several points about this provision may be noted. *First*, the state parties to the BIT evidently conceive of “returns” and “the investment” as distinct concepts. This weighs against defining returns (whether past or future) as investments *per se*. *Second*, however, by virtue of the Protocol, the BIT’s substantive protections are extended to returns. Thus, even if returns are not in fact within the definition of a

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<sup>121</sup> Claimants’ Counter-Memorial on Jurisdiction at para. 150.

<sup>122</sup> Claimants’ Counter-Memorial on Jurisdiction at paras. 148, 157.

<sup>123</sup> BIT Protocol, 15 February 1993, at Art. 1(a) (Ex. C-4).

covered “investment,” returns are nevertheless covered by the BIT, and host state conduct with respect to the returns may give rise to claims under the Treaty.<sup>124</sup>

106. *Third*, this Treaty protection for “returns from the investment” is predicated on the existence of “the” covered investment from which the returns are generated.<sup>125</sup> The Protocol could not be stretched to give BIT protection to returns from a transaction that is not an investment (such as, for example, returns on a simple contract for the sale of goods).

Accordingly, it is still necessary for the Tribunal to ground its jurisdiction over IWC’s, WKG’s and IPS’s claims on an Article 1(1) investment that is distinct from the returns which may flow from it. The Tribunal has already done so, based on their contractual rights relating to the overall Bareboat Charter investment (*see* Section IV.A.2 above).

107. In sum, the Tribunal concludes that, whether or not “expected returns” can be defined as an “investment” within the meaning of Article 1(1) of the BIT, such returns are expressly covered under the BIT by virtue of Article 1(a) of the Protocol. Accordingly they can properly be the basis of claims by IWC, WKG and IPS under the BIT.

108. The Tribunal notes, however, that the practical significance of this conclusion should not be overstated. Even if expected returns were not a subject of the BIT’s substantive protections—that is, even if one could not advance claims under the BIT for, *e.g.*, expropriation of expected returns, or lack of full protection and security for expected returns—those expected

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<sup>124</sup> On this point, the Tribunal is not persuaded by Respondent’s contention that this Treaty protection can extend only to already-earned returns and not to future returns. Respondent relied on the definition of “returns” in Article 1(2) of the BIT, which refers to “the amounts yielded by an investment for a definite period as profits, dividends, interest, royalties or other fees.” Respondent contended that the use of the past tense “yielded” necessarily excludes expected or future returns. As a linguistic matter, however, this argument is unavailing: “yielded” in this usage permits both past and future readings—*i.e.* “amounts that have been yielded,” or “amounts that are yielded,” or “amounts that will be yielded.” “Amounts yielded” is a grammatical shorthand that (perhaps deliberately) fits both timeframes. The Tribunal reads the ordinary meaning of the BIT Protocol in this manner, in the context of the Protocol’s object and purpose of extending the BIT’s coverage to returns from investments as well as investments themselves.

<sup>125</sup> BIT Protocol, 15 February 1993, at Art. 1(a) (Ex. C-4).

returns could still play a role in the rest of the case. The expected returns could be relevant to questions of liability—for example, in consideration of the claimant’s legitimate expectations. If liability were then found, they could be relevant to the calculation of the damages suffered with respect to the underlying investment.

#### **4. Corporate Structure of the Inmaris Companies**

109. In addition to their claimed investments in the form of contractual rights, payments, and expected returns, certain of the Claimants also lay claim to additional investments by virtue of their corporate relationships. For example, WKG and IWS hold equity stakes in IWC (49% and 51%, respectively), which shareholdings are claimed to be investments in their own right.<sup>126</sup>

110. The Tribunal has determined in the preceding sub-Sections that each of the Inmaris companies is properly deemed an investor with a stake in the integrated *Khersones* investment. Once that determination has been made, it follows that the owners of those “investor” companies will, in turn, also qualify as investors by virtue of that ownership. That is, the owners of IWC, for example, hold indirect investments in that same integrated operation in which IWC is an investor. Notably, however, in the circumstances of this case, such an ownership position is not an independent or distinct basis for identifying an investment; it is necessarily derivative of our prior conclusion that IWC itself qualifies as an investor holding an investment.

111. The 49% and 51% shareholdings of WKG and IWS in IWC are the type of asset that meets the definition of an “investment” within the meaning of Article 1(1) of the BIT and

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<sup>126</sup> See Claimants’ Counter-Memorial on Jurisdiction at paras. 148, 157. WKG actually states this as a claim to the “profits” of IWC—a claim discussed in Section IV.A.3 above. Because IWS claims an investment in IWC itself, apparently by virtue of its 51% stake, we discuss that claimed investment here—and our reasoning applies equally to WKG as the other 49% shareholder.

Article 25 of the ICSID Convention. Article 1(1) includes, in its “particular” examples of “all kinds of assets,” the category of “[s]hares in companies, and other kinds of participations in companies.”<sup>127</sup> Thus, the *nature* of WKG and IWS’s claimed investments in IWC presents no difficulty as a jurisdictional matter. Whether the claimed investments in IWC satisfy the other jurisdictional requirements (in particular, the territorial requirement) of the BIT will be taken up in the Sections that follow.

112. The Tribunal notes, moreover, that the question of whether such corporate holdings constitute covered investments may have little practical significance in this case, given the Tribunal’s conclusions with respect to their other claimed investments discussed above. For example, given that the Tribunal has concluded that IWC itself has covered investments (as part of the integrated contract-based investment) and can also rest claims on expected returns, any claims of WKG and IWS as the owners of IWC would be, in effect, derivative of IWC’s own claims. Likewise, were the Tribunal to find liability, any damages claims of WKG and IWS would be derivative of IWC’s own damages claims, and the Tribunal of course would not permit any double recovery with respect to the quantum awarded (if any).

## **B. In the Territory of Ukraine**

113. Both as to the whole of the Inmaris/*Khersones* operation, and to the individual investments of the individual Claimants, Respondent contends that this Tribunal lacks jurisdiction under the BIT because the alleged investments were not undertaken or invested in the territory of Ukraine.<sup>128</sup>

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<sup>127</sup> Treaty, Art. 1(1)(b).

<sup>128</sup> See Respondent’s Memorial on Jurisdiction at paras. 59-71; Respondent’s Reply on Jurisdiction at paras. 234-39. Respondent belatedly added the assertion that the ICSID Convention also imposes a jurisdictional requirement of investment “in the territory” of the Respondent state. See Respondent’s Post-Hearing Brief at para. 77.

114. The first question is whether the BIT in fact imposes such a requirement. The Germany-Ukraine BIT does not include an explicit territoriality requirement in the provision of the Treaty that most directly defines the scope of its application: Article 2(2) provides only that “[i]nvestments, which have been undertaken by nationals or companies of the other Contracting Party in accordance with the legal regulations of a Contracting Party in the field of application of its legal system, shall enjoy the full protection of the Treaty.” Likewise, “investment” is not defined in Article 1(1) by reference to the territory in which the investment is made.

115. On the other hand, the Treaty includes many other references to investments made “in the territory” of the host Contracting Party. Some of these references qualify the Contracting Party’s substantive obligations toward investors and investments:

- Article 2(1) provides that “[e]ach Contracting Party shall in its territory promote” and admit investments in accordance with its laws;
- Article 2(3) bars the Contracting Party from impeding the management, maintenance, use or enjoyment “of investments in its territory by nationals or companies of the other Contracting Party”;
- Article 3(1) promises that the Contracting Party “shall treat investments in its territory” on the basis of national treatment and MFN treatment;

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Respondent’s only support for this proposition was a passing reference in the 1965 Report of the Executive Directors describing the purpose of the ICSID Convention as “stimulat[ing] a larger flow of private international investment into [a signatory state’s] territories.” Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, at para. 12. The Tribunal does not find this to be a sufficient basis for the argument that Respondent advances. But because the Tribunal ultimately identifies an adequate territorial nexus in any event (see below), it need not make a definitive determination as to whether such a requirement exists under the ICSID Convention.

- Article 3(2) extends national and MFN treatment to the activity of nationals and companies of the other Contracting Party “in connection with investments in its [*i.e.*, the host Contracting Party’s] territory”;
- Article 4(1) promises that investments shall enjoy full protection and security “in the territory” of the host Contracting Party;
- Article 4(2) states that investments shall not be expropriated, nationalized, or subjected to measures tantamount to expropriation or nationalization “in the territory of the other [*i.e.*, the host] Contracting Party” except for the public benefit and against compensation;
- Article 4(3) promises national treatment in connection with any restitution when “[i]nvestments suffer losses in the territory of the other [*i.e.*, the host] Contracting Party” due to war or other armed conflict;
- Article 4(4) promises MFN treatment “in the territory of the other [*i.e.*, the host] Contracting Party” to nationals or companies of a Contracting Party with respect to matters covered in Article 4 (*e.g.*, full protection and security, expropriation, restitution for losses in the event of war);
- Article 6 provides for the recognition of subrogation arrangements with respect to “an investment in the territory of the other [*i.e.*, the host] Contracting Party”;
- Article 8(2) states the Contracting Party’s obligation to “observe any other obligation it may have entered into with regard to investments in its territory” by nationals or companies of the other Contracting Party.

116. Other provisions of the Treaty also mention investment “in the territory” of the Contracting Party. For example, while Article 2(2) on the application of the Treaty does not

include such a requirement, Article 9 extending the Treaty's application to investments predating the BIT does so specify: "This Treaty shall also apply to investments that nationals or companies of either Contracting Party made in the territory of the other Contracting Party" prior to the BIT's entry into force. In addition, the Treaty's Preamble describes the Contracting Parties as "intending to create favorable conditions for investments by the citizens or companies of one state in the territory of the other state."

117. Within this framework, Claimants contend that the Treaty does not include a territorial requirement as a predicate for *jurisdiction*.<sup>129</sup> Claimants see the territorial references in the Treaty as specifying conditions under which various of the substantive BIT obligations will or will not apply, but not as limiting the Tribunal's jurisdiction over the investments as such.<sup>130</sup>

118. The Tribunal is not persuaded by this line of argument. First, while one could imagine a Treaty that established a territorial requirement for the treaty as a whole in either its definitions or its scope provisions, and could argue that this would be more efficient than repeating the requirement in each of the Treaty's provisions, that is by no means the only way to do so.

119. Second, Article 9, which does define the BIT's scope on a temporal basis, includes such a requirement. Article 9 states that the Treaty shall "also" apply to investments in the territory made prior to the BIT coming into effect; it would not in any way stretch the Treaty's ordinary meaning then to infer that the Treaty otherwise applies to the same kind of investments (*i.e.* investments in the territory) that are made after the BIT came into effect.

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<sup>129</sup> See Claimants' Counter-Memorial on Jurisdiction at para. 180.

<sup>130</sup> See Claimants' Counter-Memorial on Jurisdiction at para. 180 n. 132.

120. Third, even if an “in the territory” requirement did not delimit the Treaty’s scope as a whole (and we are inclined to conclude that it does), there *is* such a requirement in several of the substantive BIT protections that Claimants have invoked. In their Request for Arbitration, Claimants charged Respondent with violations of Article 2(1) (fair and equitable treatment), Article 2(3) (arbitrary impairment), Article 4(2) (uncompensated expropriation of an investment, and returns from an investment), and Article 4 as modified by the BIT Protocol, item 4 (intervention by state measures in a business that is the object of an investment).<sup>131</sup> At least two of these provisions contain explicit territorial limits: The protection of Article 2(3) is limited to “investments in [the] territory” of the host Contracting Party, and Article 4(2) applies only to expropriations, etc. “in the territory” of the host Contracting Party.<sup>132</sup> The Tribunal needs to determine whether the investment was made in the territory of Ukraine in order to ensure that Claimants’ claims as stated are within these provisions’ scope. Otherwise, the Tribunal would lack jurisdiction to resolve claims for breaches of these provisions.

121. Thus, whether we treat the BIT as including a territoriality requirement as an overarching jurisdictional limit, or as including territorial limits among the elements of the substantive protections that underlie Claimants’ claims, the Tribunal must inquire into the territorial nexus of Claimants’ investments at this stage. The only difference will be the standard

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<sup>131</sup> Claimants’ Request for Arbitration at para. 48.

<sup>132</sup> It is arguable, but not explicit on the face of the provision, that Article 2(1)’s fair and equitable treatment provision is also covered by an “in the territory” requirement. Article 2(1) contains two sentences—the first promises that each Contracting Party “in its territory” shall promote and admit investments in accordance with its laws; the second states that the Contracting Party shall “in any case” accord investments fair and equitable treatment. The second sentence (under which Claimants’ claim is advanced) does not mention a territorial limit. However, its linkage to the first sentence (*i.e.*, the phrase “in any case” apparently drawing a contrast with the first sentence) permits an argument that the territorial limit of the first sentence should be read into the second sentence as well. Given our conclusion with respect to the territorial nexus of Claimants’ investments below, we need not definitively resolve this question. Even if the fair and equitable treatment provision were read as incorporating a territorial requirement, the analysis by which we identify a territorial nexus for purposes of Articles 2(3) and 4(2) would be equally applicable to Article 2(1).



of review that we apply to the relevant facts, as discussed in Section III.B above. If a territorial nexus is a requirement for the Treaty's application as a whole, we must determine definitively that the requisite nexus exists. If the territorial nexus is merely an element of one or more substantive claims, we need only determine that the Claimants have alleged sufficient facts that, if proven, could establish the requisite nexus. As we will discuss next, Claimants' investments meet the former, more exacting standard; the undisputed facts (and our factual findings to the extent the facts are disputed) establish that the requisite territorial link is present here.

Accordingly, we need not decide the exact nature of the BIT's territorial requirement, because either standard of review would be satisfied.

122. Respondent contended that Claimants' investments, whether viewed collectively or individually, were not undertaken in the territory of Ukraine. Respondent contended that, with respect to investments in the form of "claims to performance," funds must be injected into Ukraine for works or services provided in Ukraine, out of which would arise an entitlement to performance, also in Ukraine.<sup>133</sup> In Respondent's view, none of these requirements has been met. As support, Respondent alleges, *inter alia*, that Claimants did not perform services in Ukraine, their expenditures on the *Khersones* have not been shown to have been made in Ukraine, the various intra-Inmaris contracts did not involve any Ukrainian parties or any injection of funds into Ukraine, IWC and IWS have never carried out any activity in Ukraine, and WKG's charter hire and donation payments were transferred to IPS in Germany not to KMTI in Ukraine.<sup>134</sup>

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<sup>133</sup> Respondent's Memorial on Jurisdiction at para. 60.

<sup>134</sup> See, e.g., Respondent's Memorial on Jurisdiction at paras. 64-71; Respondent's Reply on Jurisdiction at paras. 150-51, 156-57, 166, 176, 220, 230.

123. The Tribunal is of the view that Respondent’s characterization of the territorial requirement is unduly narrow and formalistic. Of course, an injection of funds into the territory of the host State in connection with an investment will typically satisfy the requirement. The Tribunal notes that at least some such injections apparently did occur here: IPS made payment (with funds received from WKG) to the TRAL shipyards, in Kerch, Ukraine, for the repair and renovation of the *Khersones*. But an injection of funds is by no means the only way that an investment may be made in the territory of a host State. The tribunals in *Fedax v. Venezuela* and *CSOB v. Slovakia*, for example, each found qualifying investments in circumstances where the investor was not shown to have transferred funds into the host State in question.<sup>135</sup> As the *Fedax* tribunal noted, “[i]t is a standard feature of many international financial transactions that the funds involved are not physically transferred to the territory of the beneficiary, but put at its disposal elsewhere.”<sup>136</sup> We agree with that proposition, and accordingly do not accept Respondent’s attempt to impose a stricter interpretation here. Thus, for example, the fact that payments for the reconstruction of the *Khersones* were made by WKG (in Germany) via IPS (in Germany) under the Trustee Contract rather than transferred to KMTI (in Ukraine) does not foreclose the possibility that WKG’s investment in the contract rights associated with the reconstructed *Khersones* is nevertheless an investment in the territory of Ukraine.

124. In the Tribunal’s view, an investment may be made in the territory of a host State without a direct transfer of funds there, particularly if the transaction accrues to the benefit of the State itself. Here, the benefits of Claimants’ investments, considered as an integrated whole,

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<sup>135</sup> See *Fedax N.V. v. Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997 (“*Fedax*, Decision on Jurisdiction”) at para. 41; *CSOB v. Slovakia*, Decision on Jurisdiction, at para. 78 (“[A] transaction can qualify as an investment even in the absence of a physical transfer of funds.”)

<sup>136</sup> *Fedax*, Decision on Jurisdiction at para. 41.

were received by Respondent. It is undisputed that KMTI, a Ukrainian state entity, now owns a substantially renovated sailing vessel for the training of its cadets, which also offers the prospect of revenues from tourist operations. Respondent does not dispute that the funds for such a renovation would otherwise have had to come from the State's coffers, or that the State lacked the financial resources to undertake the renovation. Claimants' expenditures in connection with the *Khersones* created value in Ukraine, on the basis of contractual relationships with a Ukrainian state entity. Accordingly, the Tribunal has little difficulty in concluding that the Claimants' investments are investments in the territory of Ukraine.<sup>137</sup>

125. In reaching this conclusion, the Tribunal is mindful of, but not persuaded by, Respondent's contention that each individual claimed investment of each Claimant company must be separately examined to determine whether it was undertaken in the territory of Ukraine. As already discussed, the Tribunal views the various inter-Inmaris relationships as merely the means by which Claimants implemented their collective investment in the rights to operate and market the renovated *Khersones* under the Bareboat Charter Contract. The division of labor among the Claimants does not affect the nature of the integrated investment in which they participated. Likewise, it does not affect the fact that the investment as a whole was ultimately undertaken in relation to property belonging to the Ukrainian state, and thus sufficiently in the territory of Ukraine. It is not necessary to parse the territorial nexus of each and every component of the Claimants' investment; it is the investment as a whole that has that nexus.

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<sup>137</sup> The Tribunal thus does not rely on Claimants' alternative argument that their investments in the *Khersones*' renovation and operation were made "in the territory of Ukraine" because the vessel was Ukrainian-flagged and thus was itself part of "the territory of Ukraine" even when sailing in foreign or international waters. See Claimants' Counter-Memorial on Jurisdiction at paras. 182-84. This strikes the Tribunal as a potentially quite far-reaching proposition, and it is not a basis for the Tribunal's finding of a sufficient territorial nexus in this case.

### C. Contribution to Economic Development

126. Respondent also contends that the Tribunal lacks jurisdiction because the Claimants' alleged investments did not contribute significantly to the economic development of Ukraine. In Respondent's Memorial, this objection was premised on the notion that the Bareboat Charter and its associated contracts, while potentially significant for KMTI's operations, "were not more than ordinary commercial transactions" and did not significantly contribute to the economic development of Ukraine.<sup>138</sup> In its Reply, Respondent challenged the significance for Ukraine's economic development of seven specific claimed investments of specific investors (such as, for example, WKG's alleged investment in 49% of IWC), apparently on the theory that each individual claimed investment must separately meet a threshold of a "significant" contribution.<sup>139</sup>

127. Respondent's objection relies on a premise that the Tribunal does not fully embrace. Respondent maintains that there exists an "objective requirement" that, to constitute a qualified investment within the jurisdictional scope of Article 25 of the ICSID Convention, the proposed investment must be shown to make a "significant contribution to the host State's economic development."<sup>140</sup> Absent such a showing, Respondent contends, jurisdiction under the ICSID Convention must be denied.

128. Respondent does acknowledge, as it must, that the term "investment" is not so defined in Article 25 of the ICSID Convention—indeed, "investment" is not defined at all in the Convention.<sup>141</sup> The Report of the Executive Directors on the ICSID Convention specifically

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<sup>138</sup> Respondent's Memorial on Jurisdiction at para. 102.

<sup>139</sup> Respondent's Reply on Jurisdiction at para. 262.

<sup>140</sup> Respondent's Memorial on Jurisdiction at para. 76.

<sup>141</sup> Respondent's Memorial on Jurisdiction at para. 77.

explains that “[n]o attempt was made to define the term ‘investment’ given the essential requirement of consent by the parties, and the mechanism through which Contracting States can make known in advance, if they so desire, the classes of disputes which they would or would not consider submitting to the Centre . . . .”<sup>142</sup> As the tribunal in *Mihaly v. Sri Lanka* elaborated, “the definition was left to be worked out in the subsequent practice of States, thereby preserving its integrity and flexibility and allowing for future progressive development of international law on the topic of investment.”<sup>143</sup>

129. Respondent relies instead on a definition “established in the ICSID case law”<sup>144</sup> that is sometimes referred to as the “*Salini* test.” Various tribunals have adopted some or all of the typical characteristics of an investment identified by the tribunal in *Salini v. Morocco*,<sup>145</sup> and have applied them as a compulsory, limiting definition of investment under the ICSID Convention.<sup>146</sup> However, this Tribunal is not persuaded that it is appropriate to impose such a mandatory definition through case law where the Contracting States to the ICSID Convention chose not to specify one.

130. Rather, in most cases—including, in the Tribunal’s view, this one—it will be appropriate to defer to the State parties’ articulation in the instrument of consent (*e.g.* the BIT) of what constitutes an investment. The State parties to a BIT agree to protect certain kinds of

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<sup>142</sup> Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, at para. 27.

<sup>143</sup> *Mihaly International Corp. v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/00/2, Award, 15 March 2002, at para. 33.

<sup>144</sup> Respondent’s Memorial on Jurisdiction at para. 76.

<sup>145</sup> *Salini Construttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, at para. 52.

<sup>146</sup> See, *e.g.*, *Joy Mining*, Award at para. 53; *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Award, 8 May 2008, at para. 232; *Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, at paras. 29, 33.

economic activity, and when they provide that disputes between investors and States relating to that activity may be resolved through, *inter alia*, ICSID arbitration, that means that they believe that that activity constitutes an “investment” within the meaning of the ICSID Convention as well. That judgment, by States that are both Parties to the BIT and Contracting States to the ICSID Convention, should be given considerable weight and deference. A tribunal would have to have compelling reasons to disregard such a mutually agreed definition of investment.

131. The *Salini* test may be useful in the event that a tribunal were concerned that a BIT or contract definition of investment was so broad that it might appear to capture a transaction that would not normally be characterized as an investment under any reasonable definition. These elements could be useful in identifying such aberrations. Indeed, of late a number of tribunals and *ad hoc* committees have expressed the view that these elements should be viewed as non-binding, non-exclusive means of identifying (rather than defining) investments that are consistent with the ICSID Convention.<sup>147</sup>

132. In any event, to the extent that showing a “contribution to the economic development of the host state” were required in this case, the Tribunal is satisfied that the requirement is met by the alleged investments here. The Inmaris Companies’ renovation and operation of the *Khersones* through the Bareboat Charter and related contracts provided benefits

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<sup>147</sup> See, e.g., *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, at paras. 312-18; *MHS v. Malaysia*, Annulment at paras. 75-79; cf., *MCI Power Group, LC and New Turbine, Inc. v. Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, at para. 165; *RSM Production Corp. v. Grenada*, ICSID Case No. ARB/05/14, Award, 13 March 2009, at paras. 236-38. The first tribunals to confront directly an objection that claimant lacked an “investment” under the ICSID Convention did not search for or apply definitions. In *Fedax*, the tribunal merely surveyed prior cases involving investments under the Convention before concluding that the promissory notes before it also qualified, see *Fedax*, Decision on Jurisdiction at paras. 25-29; in *CJOB v. Slovakia*, the tribunal resisted respondent’s call to apply a definition, stating that while the “elements of the suggested definition...tend as a rule to be present in most investments, [they] are not a formal prerequisite for the finding that a transaction constitutes an investment as that concept is understood under the Convention,” *CJOB v. Slovakia*, Decision on Jurisdiction at para. 90.

directly to the Ukrainian state that it could not otherwise afford—namely, a rehabilitated state asset (the *Khersones* itself)—and provided valuable training for thousands of Ukrainian cadets.

133. While Respondent disparages the importance of both for Ukraine’s economic development,<sup>148</sup> in the Tribunal’s view it is relevant evidence that a state entity (KMTI) willingly participated in and directly benefited from the arrangements, and that Respondent acknowledges that “the Contracts with Claimants could be significant for the KMTI.”<sup>149</sup> The Inmaris Companies’ contributions were financially meaningful as well: without taking any definitive view on the Claimants’ calculations, the evidence suggests that WKG alone dedicated more than DM 1,100,000 (approx. EUR 550,000) to the *Khersones*’ renovation and repair,<sup>150</sup> even before taking into account IWC’s outlays for the routine operation of the ship.

134. Accordingly, the Tribunal rejects Respondent’s objection to jurisdiction on grounds of a lack of contribution to the economic development of Ukraine under Article 25 of the ICSID Convention.

#### **D. In Accordance with Law**

135. Article 2(2) of the BIT defining the scope of its application states: “Investments, which have been undertaken by nationals or companies of the other Contracting Party in accordance with the legal regulations of a Contracting Party in the field of application of its legal

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<sup>148</sup> See Respondent’s Reply on Jurisdiction at paras. 263-64.

<sup>149</sup> Respondent’s Memorial on Jurisdiction at para. 102.

<sup>150</sup> See Report of Geoffrey Senogles of LBC International, 20 March 2009, at paras. 35-48 (Ex. C-41) (discussing review of WKG audited financial statements showing DM 600,000 capital expense and DM 500,000 in non-capitalized repairs).

system, shall enjoy the full protection of the Treaty.”<sup>151</sup> Respondent presented a variety of objections to jurisdiction based on alleged inconsistencies with Ukrainian law.

136. First and foremost among these was Respondent’s contention that the Bareboat Charter Contract is a fictitious contract. Respondent maintained that because fictitious contracts are void as a matter of Ukrainian law, the Bareboat Charter Contract and the related Inmaris contracts derivative of it were not investments made in accordance with the laws and regulations of Ukraine.<sup>152</sup> This objection has been addressed, and rejected, in Section IV.A.1 above.

137. A second objection was not advanced by Respondent until its Reply submission. There, Respondent argued the payment scheme under “the Inmaris Contracts” was not in compliance with Ukrainian laws on currency controls in effect at that time.<sup>153</sup> More specifically, Respondent contended that the arrangement contemplated in the Four-Party Agreement (and implemented in the Bareboat Charter Contract, Donation Contract, and Trustee Contract), by which WKG’s charter and donation payments were channeled to IPS as trustee and not to KMTI in Ukraine, was contrary to law. Respondent maintained that the proceeds of services exported from Ukraine (such as, Respondent contends, chartering) had to be deposited in a Ukrainian bank; that any bank accounts held outside Ukraine by a Ukrainian resident (such as, apparently in Respondent’s view, the IPS trust account held on KMTI’s behalf) had to be licensed by the

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<sup>151</sup> Article 9, which extends the BIT’s protections to investments that pre-date the BIT’s entry into force, also specifies that the extension is available to such “investments . . . made in the territory of the other Contracting Party in accordance with the legislation of the latter.” Some of the BIT’s substantive protections repeat the phrasing as well. *See* Treaty, Art. 2(1) (promotion and admission of investments), Art. 3(1) (national and MFN treatment for investments).

<sup>152</sup> *See* Respondent’s Memorial on Jurisdiction at paras. 37-38; Respondent’s Reply on Jurisdiction at para. 248; Respondent’s Post-Hearing Brief at paras. 79-85.

<sup>153</sup> *See* Respondent’s Reply on Jurisdiction at paras. 250-53.



National Bank of Ukraine; and that proceeds outside Ukraine belonging to Ukrainian residents (such as KMTI) must be declared to the National Bank of Ukraine.<sup>154</sup>

138. As a threshold matter, the Tribunal notes that the Ukrainian foreign currency regulations identified by Respondent do not appear to impose a flat prohibition on the receipt or use of foreign currency by Ukrainian residents outside Ukraine. Rather, they provide that Ukrainian entities—such as, we take it, KMTI—must obtain licenses from, or declare assets located outside Ukraine to, the National Bank of Ukraine. This is clearly the case with respect to the second and third alleged illegality: the 14 July 1999 Decree on Currency Regulation System and Currency Control cited by Respondent provides that “[a]n individual license shall be required for the operations such as: . . . placement of currency valuables on accounts and in deposits outside Ukraine,” and that “[c]urrency valuables and other property of residents, which is outside Ukraine, shall be obligatorily declared at the National Bank of Ukraine.”<sup>155</sup> It also appears to be the case with respect to the first alleged illegality. Respondent contended that the proceeds of services exported from Ukraine were, at the time, required to be deposited with a bank in Ukraine within 90 days. However, that requirement too appears to be subject to exceptions with an appropriate license from the Ukrainian authorities. The 4 October 1994 Law on the Procedure for Settlement in Foreign Currency cited by Respondent does provide that “[p]roceeds of residents in foreign currency shall be credited to their currency accounts with authorised banks within the terms of debt repayment, as specified in contracts, but not later than 90 calendar days . . . .” But it also states that “[e]xcess of the specified term shall require an

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<sup>154</sup> See Respondent’s Reply on Jurisdiction at paras. 252-53.

<sup>155</sup> See Decree of the Cabinet Ministers of Ukraine on Currency Regulation System and Currency Control, 14 July 1999 (excerpts) (Ex. R-39). Although the Decree states as a general matter that individual licenses are to be issued to “residents and nonresidents,” Respondent has not explained how this particular requirement relating to deposits outside Ukraine could be applicable to non-Ukrainian entities (as opposed to Ukrainian entities such as KMTI).

individual license of the National Bank of Ukraine”<sup>156</sup>—a proviso that the Tribunal understands to indicate that the requirement may be waived if such a license is obtained.

139. To be clear, the record before the Tribunal does not indicate that any such licenses were obtained. But the Tribunal also reads these provisions of Ukrainian law as placing the burden to obtain any required license, or to make any required declaration, on the Ukrainian resident in question—here, KMTI—rather than on its foreign counterparty. The Tribunal concurs with Claimants’ argument that it would be incongruous to declare Claimants’ investments to be inconsistent with Ukrainian law based not on defaults by the foreign investors, but by a Ukrainian counterparty that was not under their control.

140. This approach is further confirmed by the fact that KMTI was not just an ordinary Ukrainian commercial counterparty, but was itself a state institution, and its participation in the Bareboat Charter Contract was also approved by other representatives of the state.<sup>157</sup> First, it is reasonable to expect state organs and officials to be cognizant of, and comply as necessary with, the state’s own legal requirements. Second, this is not a case such as *Fraport v. Philippines* (cited by Respondent), in which the facts that rendered the investment illegal under the host state’s law were hidden from the state.<sup>158</sup> Whatever Respondent might say about its lack of knowledge of the intra-Inmaris contracts, it cannot say that its representatives were unaware of the other contracts that established the payment scheme (*i.e.*, the Bareboat Charter Contract, the Trustee Contract, and the Donation Contract), because KMTI was a signatory to all of them. Third, the Tribunal takes note that during the course of the parties’ negotiations prior to the

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<sup>156</sup> Law of Ukraine on the Procedure for Settlement in Foreign Currency, 4 October 1994 (excerpts), at Art. 1 (Ex. R-38).

<sup>157</sup> See Letter from Mr. Chernykh to Mr. Illarionov, 17 November 1999 (Exhibit C-28).

<sup>158</sup> See *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007, at para. 347.

commencement of this arbitration, Ukraine’s representatives signed Minutes of a meeting memorializing that Mr. Soschnev, Head of the State Fisheries Committee of Ukraine, stated that “the existing contracts, i.e. the bareboat charter contract dated 9/10/1999 (including the modifying contracts and addenda) . . . are valid.”<sup>159</sup> While the Tribunal need not go so far as to rely on this statement under the formal rubric of estoppel, we do view it as indicating that Respondent did not at that time consider those contracts (or the payment scheme contained in them) to be illegal under Ukrainian law.

141. A third, and little developed, objection to the consistency of the investments with Ukrainian law relates to Addendum 2 to the Bareboat Charter Contract. Respondent initially, in its Memorial, contended that the Bareboat Charter Contract in its entirety was not made in accordance with Ukrainian law because governmental approval had not been obtained, as was claimed to be required in connection with the disposition of State property such as the *Khersones*.<sup>160</sup> After Claimants furnished the State Committee’s 17 November 1999 approval,<sup>161</sup> Respondent in its Reply graciously withdrew this objection—at least as to the 11 October 1999 Bareboat Charter and Addendum No. 1 (which were signed together).<sup>162</sup> However, Respondent “noted” that Addendum No. 2 was not covered by the 17 November 1999 State Committee approval and also that it “has signs of being backdated” because it bears the typewritten date 11

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<sup>159</sup> Minutes of the [27 January 2007] Workshop To Resolve the Problems Concerning the Ukrainian Sail Training Ship STS “*Khersones*,” 28 January 2007 (Ex. C-50).

<sup>160</sup> See Respondent’s Memorial on Jurisdiction at paras. 37, 39-44.

<sup>161</sup> See Letter from Mr. Chernykh to Mr. Illarionov, 17 November 1999 (Exhibit C-28).

<sup>162</sup> See Respondent’s Reply on Jurisdiction at para. 254. Respondent elsewhere in its Reply contended that the Bareboat Charter Contract did not comply “with the requirement to the form established for foreign economic contracts by the then effective law” because two signatures were required on KMTI’s side. See Respondent’s Reply on Jurisdiction at para. 140 (citing Law of Ukraine on Foreign Economical Activity, 16 April 1991 as amended (excerpts) at Art. 6 (Ex. R-45)). The Tribunal understands this objection to be covered by Respondent’s withdrawal of its objection regarding the requisite approval for the Bareboat Charter Contract. Even if that were not the case, however, the Tribunal would be persuaded by Claimants’ argument that the two-signature requirement was repealed prior to the State Committee approval ratifying the Bareboat Charter Contract, apparently rendering that requirement inapplicable to the Contract. See Claimants’ Rejoinder on Jurisdiction at para. 107.

October 1999.<sup>163</sup> Whether this “note” was in fact meant as a jurisdictional objection is not clear, but the Tribunal will address it briefly here.

142. First, the Tribunal sees no signs of “backdating” on the face of Addendum No. 2 to the Bareboat Charter Contract. The document is titled “Addendum 2 To the ‘BareCon 89’ STS ‘*Khersones*’”, and the next line of typed text, before the text of the Addendum, reads “dd. 11/10/99.”<sup>164</sup> In the Tribunal’s view, this need not be read as a claim that Addendum No. 2 itself was signed on that date, but rather it appears to be a reference to the date on which the Contract being amended by the Addendum (*i.e.*, the “BareCon 89” STS “*Khersones*”) was signed. Claimants have never suggested that Addendum No. 2 was signed on 11 October 1999; to the contrary, Claimants stated in their Counter-Memorial that Addendum No. 2 was signed in 2001.<sup>165</sup>

143. Respondent’s observation that Addendum No. 2 is not covered by the State Committee’s 17 November 1999 approval has more merit. Chronologically, at least, the 17 November 1999 approval could not have reflected direct approval of an Addendum that was not signed until more than a year later. Ultimately, however, the validity of Addendum No. 2 does not affect this Tribunal’s jurisdiction, given that the Bareboat Charter Contract itself has been determined to be a covered investment under the Treaty out of which this dispute directly arises. The validity or invalidity of Addendum No. 2 might affect questions for the merits, such as the duration of Claimants’ claims to performance under the Bareboat Charter Contract, or quantum issues related to the amount payable for the charter hire. But it would not affect this Tribunal’s

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<sup>163</sup> Respondent’s Reply on Jurisdiction at para. 255.

<sup>164</sup> Bareboat Charter Contract STS “*Khersones*”, 11 October 1999 (with Addenda 1 and 2) at Addendum No. 2 (Ex. R-5) (Ex. C-29).

<sup>165</sup> See Claimants’ Counter-Memorial on Jurisdiction at para. 74 n. 44.

jurisdiction to hear Claimants' claims arising out of the Bareboat Charter Contract investment, none of which appear to turn on Addendum No. 2. The Tribunal therefore leaves to the merits, to the extent (if at all) that they may be relevant there, questions such as, for example, whether or not State Committee approval was required for Addendum No. 2, whether or not such approval (if needed) was implicit or anticipated in the 17 November 1999 approval, or whether or not such approval (if needed) was afforded retroactively by the statements of Ukraine's representatives on 27 January 2007.

144. A final possible objection by Respondent under the heading of "in accordance with the legal regulations of Ukraine" is that neither the Bareboat Charter Contract nor any of the related contracts was registered as an investment or investment contract in Ukraine.<sup>166</sup> The Tribunal uses the term "possible" because it is not entirely clear whether Respondent alleged that the claimed investments violated Ukrainian law in this respect. In Respondent's Memorial, the lack of registration of the Contract as a foreign investment was noted as merely "[a] supplementary argument that Claimants did not have a legitimate claim to performance"; Respondent reasoned that because the contracts were not registered, "Claimants did not consider their contract rights as 'investments' which needed legal protection."<sup>167</sup> Likewise, in Respondent's Post-Hearing Brief, the lack of registration was raised principally as evidence that Claimants did not consider the contracts to be investments in Ukraine. However, Respondent at the same time insisted that such registration "is mandatory,"<sup>168</sup> leaving open the question whether this is in fact an "in accordance with law" objection to jurisdiction. In an abundance of caution, the Tribunal addresses it as such here.

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<sup>166</sup> See Respondent's Memorial on Jurisdiction at para. 57; Respondent's Post-Hearing Brief at para. 76

<sup>167</sup> Respondent's Memorial on Jurisdiction at para. 57.

<sup>168</sup> Respondent's Post-Hearing Brief at para. 76.

145. Having reviewed carefully Ukraine’s Law on Foreign Investments Regime<sup>169</sup> and the Regulation on the Procedure for State Registration of Agreements (Contracts) of Joint Investment Activity with Participation of a Foreign Investor<sup>170</sup> cited by Respondent, the Tribunal understands registration of such contracts to be “mandatory” primarily in the sense that such registration is required if the parties to the contract wish to take advantage of legal protections for foreign investors, as well as certain tax and customs benefits that are conferred on foreign investments, under the laws of Ukraine. While the Law stipulates that contracts with foreign investors for “joint investment activity” should be registered,<sup>171</sup> it also states the consequences of a failure to do so: “[u]nregistered foreign investments shall not provide privileges and guarantees stipulated by this Law.”<sup>172</sup> Neither the Law nor the Regulations governing registration suggest that unregistered investments are illegal as such. It is illegality that is the touchstone of our analysis under provisions such as Article 2(2) of the BIT. Accordingly, the Tribunal is not prepared to deem the Claimants’ investments to be contrary to Ukrainian law, and thus outside the Treaty’s protection, by virtue of the fact that Claimants did not afford themselves of the benefits of Ukraine’s foreign investment law through registration of their contracts.

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<sup>169</sup> See Law of Ukraine on Foreign Investments Regime, 16 July 1999 (Ex. R-37).

<sup>170</sup> See Cabinet Ministers of Ukraine Resolution on Approval of the Regulation of the Procedure for State Registration of Agreements (Contracts) of Joint Investment Activity with Participation of a Foreign Investor, 30 January 1997, as amended (Ex. R-40).

<sup>171</sup> Law of Ukraine on Foreign Investments Regime, 16 July 1999, at Art. 24 (Ex. R-37) (“The agreements (contracts) should be registered within the terms and according to the procedure determined by the Cabinet of Ministers of Ukraine.”).

<sup>172</sup> Law of Ukraine on Foreign Investments Regime, 16 July 1999, at Art. 13 (Ex. R-37). The Tribunal understands this text to mean that the privileges and guarantees of the Law shall not be provided to such unregistered foreign investments. See also Regulation of the Procedure for State Registration of Agreements (Contracts) of Joint Investment Activity with Participation of a Foreign Investor, 30 January 1997, as amended, at Art. 4 (Ex. R-40) (“State registration of agreements (contracts) is the ground for realization of the foreign investment under the respective agreements (contracts) pursuant to Articles 23 and 24 of the Law of Ukraine ‘On Foreign Investment Regime’.”).

## V. COSTS

146. Although neither party requested costs in the first round of written submissions, Respondent in its Reply and Claimants in their Rejoinder each requested the Tribunal to award all costs of the jurisdictional proceedings.<sup>173</sup> Both parties repeated these requests in their Post-Hearing Briefs.<sup>174</sup>

147. However, the Tribunal has decided to reserve its determination on costs until the conclusion of the proceedings, consistent with Article 61 of the ICSID Convention and Arbitration Rule 28.

## VI. DECISION

148. The Tribunal has carefully considered the parties' arguments advanced in their written submissions and at the hearing before it. For all of the reasons set out above, the Tribunal decides as follows:

- Respondent's objections to jurisdiction are dismissed.
- The Tribunal's determination with respect to costs is reserved until the conclusion of the proceedings.

149. The parties are instructed to confer and seek to reach agreement on a schedule for the merits proceedings, and to report to the Tribunal thereon within 30 days following the issuance of this Decision.

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<sup>173</sup> See Respondent's Reply on Jurisdiction at para. 274; Claimants' Rejoinder on Jurisdiction at para. 149(2). Respondent made clear that its request included "the Respondent's costs for legal representation and assistance"; Claimants were less specific, simply requesting that Respondent be made to bear "all costs." *Id.*

<sup>174</sup> See Respondent's Post-Hearing Brief at para. 103; Claimants' Post-Hearing Brief at para. 41(2).

*[signed]*

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Prof. Bernardo Cremades

*Arbitrator*

*[signed]*

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Mr. Noah Rubins

*Arbitrator*

*[signed]*

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Dr. Stanimir A. Alexandrov

*President*

*[March 8, 2010]*

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Date