**International Centre for Settlement of Investment Disputes**

**Tokios Tokelės (Claimant)**

v.

**Ukraine (Respondent)**

Case No. ARB/02/18

# AWARD

*Members of the Tribunal*
Lord Mustill, President
Professor Piero Bernardini
Mr. Daniel M. Price

*Secretary of the Tribunal*
Ms. Martina Polasek

*Representing the Claimant*
Mr. Ivan Lozowy, General Counsel,
Tokios Tokelės
Mr. Serhiy Danylov, Chairman of the
Board of Directors, Tokios Tokelės
Ms. Ludmilla Zhyltsova, Tokios Tokelės
Mr. Oleksandr Danylov, Tokios Tokelės

*Representing the Respondent*
Prime Minister of Ukraine
Cabinet of Ministers
Deputy Minister of Justice
Department on Representation of State in
Courts of Ukraine and Foreign Judicial
Institutions, Ministry of Justice of Ukraine

Mr. Dmitri Grischenko, Counsel
Mr. Sergei Voitovich, Counsel
Mr. Oleg Schevchuk, Counsel
Mr. Andriy Alekseyev, Counsel

*Date of Dispatch to the Parties: 26 July 2007*

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## A. INTRODUCTION

1. This Award is made in an arbitration between the above-captioned parties in accordance with the dispute-resolution mechanism of the International Centre for Settlement of Investment Disputes (hereafter "ICSID"). The arbitration is brought to enforce various provisions of a bilateral investment treaty, dated 8 February 1994 and entitled *Agreement Between the Government of Ukraine and the Government of the Republic of Lithuania for the Promotion and Reciprocal Protection of Investments* (hereafter "the Treaty"), between the Republic of Lithuania and Ukraine.

2. The Claimant in the arbitration is Tokios Tokelės, a corporation registered in 1989 as a co-operative enterprise under the laws of Lithuania, and subsequently reorganised as a joint-stock company. Although Tokios Tokelės is the Claimant, the companies most immediately involved in the events giving rise to this arbitration were its two wholly-owned Ukrainian subsidiaries: Subsidiary Enterprise 'Taki spravy' and II Subsidiary Enterprise 'Taki spravy' (hereafter respectively "Taki spravy" and "TSII"). By the beginning of the year 2002, Taki spravy had for some years carried on a prospering business in Ukraine in the advertising, printing, publishing and allied trades, under the control and management of two brothers, **Mr. Oleksandr V. Danylov** and **Mr. Serhiy V. Danylov**. Both are citizens of Ukraine and resident in that country, apart from a period of some years commencing in May 2002, when Mr. O. Danylov left Ukraine for Lithuania, where he sought and obtained refugee status.

3. This has proved to be a difficult case, so much so that after prolonged and intensive discussions the Tribunal with regret finds itself unable unanimously to agree on the central issue in the dispute. In addition, depending on the outcome of that issue, several major questions of principle have arisen, some of them fundamental to the developing jurisprudence on investor/state arbitrations of the present kind. The parties' legal representatives have explored these issues with the greatest diligence, in written submissions extending over hundreds of pages, reinforced by oral argument. No line of enquiry has been neglected, no assertion by one has escaped contradiction by the other. This diligence is commendable, but it has tended to submerge in a mass of detail the central feature of the case, which is whether an inference favourable to the Claimant's complaint can be drawn from a course of events which is largely undisputed. Unlike many ICSID arbitrations this

does not require the Tribunal to master and rule on complex technical matters, or to evaluate conflicting oral testimony on primary facts. The task is simple – simple to state, that is, not simple to decide – to see whether the facts speak for themselves, when placed in context, both as evidence of wrongdoing by the State and as to the outcome of that wrongdoing, so that they are sufficient to prove, with the requisite degree of conviction, the proposition of fact on which the Claimant bases its claim.

4. This proposition is that Taki spravy was the target of a long-running campaign of oppression by State agencies, instigated for political reasons by a person or persons in high authority, and taking the shape of numerous episodes of unjustified interference with Taki spravy's activities and management, largely by the Kiev tax administration but with the connivance of prosecution and judicial organs, under the guise of investigations into breaches of Ukrainian economic laws. It is alleged that the effect on Taki spravy's business, customer relations and staff welfare was so great as to constitute a wrongful "expropriation" of the investment made by the Claimant in Ukraine via Taki spravy, and was also a breach of Ukraine's obligations under the Treaty to accord fair and equitable treatment to that investment. The same conduct is asserted to be a breach of the internal laws of Ukraine which the Claimant invokes to support its Treaty claims. The Claimant seeks in this arbitration monetary compensation amounting to nearly USD 65,000,000, exclusive of interest and costs.

5. On 29 April 2004 the Panel of Arbitrators, as then constituted,[1] issued a formal document ("the Decision on Jurisdiction") which contained rulings on various procedural issues, including a challenge by Ukraine to the jurisdiction of the Tribunal, which was dismissed. Subsequently, after the re-constitution of the Tribunal,[2] the challenge was revived, partly on grounds substantially the same as those already rejected in the Decision on Jurisdiction, and partly in reliance on facts which, wrongfully, had not been disclosed by the Claimant to the former Tribunal. Justice required that the issue of jurisdiction should be reassessed in the light of this new information, and it was decided that the submissions and conclusions upon it would be incorporated, together with the issues of liability and quantum, in the present Award.

[1] Professor Prosper Weil (President), Professor Piero Bernardini and Mr Daniel M. Price.
[2] *See infra* at paragraph 26.

## B. THE SITUATION IN UKRAINE

6. It would be impossible to achieve, and hazardous to attempt, a full account of contemporary Ukrainian history, even in the respects most closely relevant to the present dispute. Something must however be said about two aspects of it, in order to place in context the dispute, and the rival interpretations of events.

### *1. The Political Situation in Brief*

7. The long history of suffering and oppression endured by Ukraine and its peoples forms an inescapable background to the dispute between Tokios Tokelės, its subsidiaries and the State. The declaration of independence in 1991 marked the formal emancipation of the country, and the adoption of a new constitution five years later, establishing a pluralistic parliamentary system and protection for human rights and liberties, promised a real break with the past, and hope for the future. In practice, the changes did not happen overnight. Many familiar faces were still to be seen in public positions, and the presence of powerful neighbours continued to be felt. The building of national unity was hampered by deep geographical, ethnic and cultural divides; and these factors also underpinned lasting controversy about the positioning of Ukraine in its political and economic relations with external powers.

8. In consequence, the events of 2001-2003 which form the substance of the present dispute were played out against a backdrop of volatility and fragmentation in Ukrainian political life. In November 2001, when so far as the evidence goes the Ukraine State authorities and the various corporate and natural persons who feature in this dispute began to intersect, a general Parliamentary Election was only a few months away. This was distinct, in principle, from the next election of a President, which was not due until 2004, when (as later events were to show) it would be the occasion of a convulsion in Ukrainian political life. Meanwhile, the position of the long-serving President, **Mr. Leonid Kuchma**, was not directly under threat. In reality, however, his personality, record, methods and policies were widely identified with the interests of the political alliance holding power in Parliament at that time. It was inevitable that efforts to unseat the existing majority would involve a challenge to Mr. Kuchma himself, and this is what duly happened. One of the most conspicuous elements campaigning for a change of government was a “Bloc”, a loose

grouping identified by the name of **Ms. Yulia Tymoshenko**,[3] a charismatic and outspoken politician, strongly opposed to Mr. Kuchma and his policies. As the Parliamentary elections drew close, this Bloc (referred to in some of the documentary evidence as "the **BYT**") set about the production and distribution of written electioneering materials in considerable quantities. Samples of these were deposited, as required by law, with the Electoral Commission. Also in widespread distribution was a volume entitled (in translation) "Unfulfilled Order", which was as hostile to Mr. Kuchma as it was laudatory of Ms. Tymoshenko. Whilst it has been asserted that this was printed by Taki spravy on the instructions of BYT, some press reports suggested that the BYT and Ms. Tymoshenko had each repudiated the volume, attributing it to a private venture. The Tribunal cannot resolve this problem, but will assume for present purposes that "Unfulfilled Order" had come to the attention of those in power in some way which associated it with Taki spravy.

9. In the event, the results of the poll held on 31 March 2002 were announced as showing that the ruling party, backed by President Kuchma, had obtained a majority of the votes cast, but insufficient to constitute an absolute majority. The adherents of the old regime thereafter continued in power, albeit in circumstances of increasing stress, throughout almost the entire duration of the events relied upon by the Claimant as instances of the hostile campaign commenced against Taki spravy in February 2002. It was not until the closing months of 2004, when Mr. Kuchma's tenure as President was due to expire, that popular upheavals and a re-run Presidential election forced the existing regime from power. We do not describe these, or their aftermath, since they are not relevant to the present dispute, beyond noting for future reference that for several months during the year 2005 Ms. Tymoshenko was Prime Minister of Ukraine.

*2. The Economic Situation in Brief*

10. It is plain that by the start of the current millennium the Government of Ukraine had become seriously concerned by two unlawful practices which were believed to be exacerbating the already serious economic situation then prevailing. First, "money-laundering", and secondly "tax-evasion". These practices, common enough world-wide, need no definition here, but there is one feature common to both which plays an important part in the present dispute, namely the use of "fictitious enterprises". We have not seen any official definition

[3] The transliteration of Ukrainian names is not consistent.

of this term[4], in its Ukrainian usage, or indeed any precise account of its meaning. But the general idea is clear enough. The "enterprise" – i.e. firm, or company or business – is not fictitious in the sense of having no existence at all, but is a sham, a falsehood, a "front", a dummy, or whatever word one may choose to describe something which is not what it purports to be, and whose real functions are not what they purport to be. Such entities can perform a variety of functions in wrongful economic dealings. In this particular context, they can be used to record spurious indebtedness to be netted-off against earnings for tax purposes, or they can be introduced into circular transactions in which money changes its exchange value; and so on. If the existence of such an entity is detected as an apparent participant in a transaction, it can be assumed that it is there for a reason; and that the reason may be nefarious. Thus, the authorities are instructed to be on the lookout for signs of fictitiousness; and "signs" are established as the criterion: not, at this first stage, concrete evidence. Then, if signs of fictitiousness are detected the authorities are entitled to investigate further, and in particular to pursue third-party investigations. So, if scrutiny of a transaction between A and B reveals signs that B may be fictitious, then the authorities may look beyond that transaction into the wider dealings of B, and perhaps move on to scrutinise its relations with C, who will then itself become a subject of investigation.

11. No doubt several agencies of the State were alert for signs of fictitiousness, but the one with which this dispute is most closely concerned was the State Tax Inspectorate, of which at the outset of the events **Mr. V.P. Furlet,** was then (before his promotion to a more senior post in the State Tax Administration ("STA")) the Senior Investigator of the Inspectorate in the Solomanskaya district of Kiev. Mr Furlet's assistant in these matters was **Mr. M.V. Vasyuk**. These two officials were in charge of the actions taken by the tax authorities which form the heart of the Claimant's case against the State under the Treaty.

## C. THE CLAIMANT'S CASE

12. The theme of the Claimant's complaint is unmistakable, even if the language used is not always exactly the same. The following extracts from its written submissions will make this clear:

[4] As distinct from "Fictitious entrepreneurship", which was defined by Art. 148-4 of the Criminal Code, as the "creation or acquisition of subjects of entrepreneurial activity (juridical persons) without intention to carry out charter activity, if it has inflicted material damage upon the State, a bank, a credit institution, other juridical persons or citizens".

"The requesting parties TT and TS allege that, in the year 2002, state bodies of Ukraine committed a series of unfounded, illegitimate and unlawful acts directed against the investments made by TT into TS".[5]

…

"Tokios Tokelės' claims in the given case concern actions committed by state agencies of Ukraine which are connected by a unity of wrongful intent and purpose on the part of government officials of interfering with the business of Tokios Tokelės' wholly-owned subsidiary in Ukraine, Taki spravy. This goal of intentionally damaging Taki spravy was realised through various measures implemented by state agencies of Ukraine in order to ultimately achieve an illegitimate political goal, namely to punish Taki spravy for supporting an opposition politician, Yulia Tymoshenko.

Similar practices of a concerted campaign against a particular company or individual have an established history in Ukraine. Such practices have received their own nomenclature – 'nayizd'".[6]

…

"The 'nayizd' practice is relevant to the given case in that it ties together the many actions, which may otherwise seem disparate, committed by the Respondent with regard to Taki spravy. The practice of 'nayizd' helps to characterise and assists in understanding the relevant facts concerning Taki spravy which form the factual basis of the given dispute".[7]

…

"The entire series of acts by state agencies of Ukraine with regard to Tokios Tokelės' investments in Ukraine, specifically in its investment vehicle Taki spravy, is rife with violations of the BIT, Ukraine's laws and international law. These acts and their attendant violations comprise a single whole, which consists of the intentional, premeditated, destruction of Taki spravy's business operations and its reputation. That this wave of repressive actions against Taki spravy began immediately after Taki spravy printed a large amount of campaign material for Yulia Tymoshenko provides convincing circumstantial evidence that the authorities vented their wrath

[5] Request for Arbitration at paragraph 12.
[6] Claimant's Memorial on the Merits at paragraphs 16 and 17.
[7] *Ibid,* paragraph 19.

> on Taki spravy precisely for its support of an opposition politician. This conclusion is supported by the focus of the state agencies' activities: companies which executed work on behalf of or supported the Block of Yulia Tymoshenko".[8]

In order to ensure that it had correctly understood the nature of the Claimant's case the Tribunal addressed the following questions to Mr. O. Danylov in the course of his oral evidence:[9]

> "PRESIDENT: And what you are asking, or your company is asking us to infer is that all the way through to the end, or nearly the end of 2004 there was a continuous nayizd persecution of the company because of its association with Madame Tymoshenko. Is that what your company is alleging?
>
> ANSWER: Yes.
>
> PRESIDENT: And that is all part of – of course, up to that point at least, all part of one continuous nayizd?
>
> ANSWER: In the extent you described at the beginning of your question in 2002 it was more often, and it was more powerful, so to say. Later, especially in view of the order by ICSID Tribunal[10] it was not that often".

13. The message is quite clear. The Claimant was the victim of a conspiracy, inspired by political rancour, put into effect through the State authorities, and carried through for years as a single course of conduct from shortly after the Claimant's activities gave offence to the regime. Whether this is proved is what the dispute is about. Equally clear is what the dispute is not about. For example, the Claimant does not contend that this is a case where a single instance of blameworthy conduct reached the level of being in itself an international wrong. This is not surprising, since although (as we shall record) there were such instances, none could on its own have caused damage to Taki spravy on a scale remotely approximating to the amount claimed. Nor is it said that this is a case where numerous individual episodes, separately arising, can be agglomerated to make an international delict.

[8] Claimant's Memorial on the Merits at paragraph 684.
[9] Hearing on the Merits, Transcript Volume III, pages 68 *et seq.*
[10] *Viz.* Order No. 1, granting interim protective measures.

Nor still is it suggested that law enforcement authorities failed to take reasonable measures to protect the Claimant from unlawful or harmful actions by third parties. Instead the Claimant has chosen (and there may well have been no other available choice) to express its complaint in the way we have summarised. It is on this that the Tribunal must focus its attention.

14. Before leaving this topic one important point must be emphasised. The Claimant has, very reasonably, made much of the personal antagonisms rife in Ukrainian politics, with a view to explaining the alleged nayizd in terms of President Kuchma's adverse reaction to the Bloc election materials. To bring the persecution home to Mr. Kuchma himself is not however an essential element in the cause of action. What does matter, for the purposes of the Treaty, is whether there was a malicious campaign, and if so whether it can be attributed to the respondent State. For this purpose the Tribunal must in practice form an idea, necessarily based on secondary and circumstantial evidence since direct evidence is out of reach, not so much about the identity of the prime mover but about whether it was a person or group of persons whose actions were, for the purposes of the Treaty, those of the State.

## D. SUMMARY OF PROCEDURAL HISTORY

15. Since the procedural history of the dispute has some bearing on the issues which remain for decision it is convenient to set it out at this stage in a compressed form, as follows.

### *1. The Request for Arbitration*

16. On 16 August 2002 Tokios Tokelės and Taki spravy filed at the Centre a Request for Arbitration dated 14 August 2002 against the Government of Ukraine. The requesting parties maintained that Tokios Tokelės was properly to be regarded as an investor for the purposes of both the ICSID Convention and the Treaty. It was claimed that, since 1994, Tokios Tokelės had invested more than USD 6.5 million in the territory of Ukraine, and that these investments were duly registered with the Ukrainian authorities. In the Request, it was further asserted that Taki spravy should be treated as a national of another Contracting State on the basis that, "it is a wholly owned subsidiary of Tokios Tokelės, it was created expressly for the purpose of realizing investments by Tokios Tokelės in the territory of Ukraine and because of the close and extensive measure of control exercised by Tokios

Tokelės over its subsidiary…"[11] The Claimants further noted that, "[i]n any event, TS lies at the heart of the dispute between the parties and should be included in the arbitration proceedings on that basis".

17. Amongst other items, the Request for Arbitration identified the complaints against the State in terms quoted above at paragraph 12. The Request was accompanied by a Letter of Consent dated 7 August 2002, signed by Mr. Serhiy Danylov as Chairman of the Board of Tokios Tokelės expressing the consent of that company to the jurisdiction of ICSID over the dispute therein identified.

*2. Withdrawal and Resubmission*

18. On 15 October 2002, however, ICSID notified the requesting parties that a condition for submitting a dispute to ICSID had not been fulfilled, namely the requirement under Article 8 of the Treaty, under which the investor is only entitled to submit a case to ICSID if a dispute between the parties cannot be settled through negotiations within a period of six months. Accordingly, on 17 October 2002, the requesting parties informed ICSID that they withdrew their Request for Arbitration until such time as it "may be renewed and resubmitted for consideration to the Centre". The Request for Arbitration was resubmitted by Tokios Tokelės and Taki spravy on 22 November 2002.

19. On 6 December 2002, the Centre alerted the requesting parties to the fact that, "the parties have not agreed that [ Taki spravy ] should be treated as a national of another Contracting State under Article 25(2)(b) of the ICSID Convention, and Article 1(2) of the bilateral investment treaty between the Government of Ukraine and the Government of the Republic of Lithuania". In response, on 9 December 2002, Tokios Tokelės informed the Centre that, in view of the absence of such an agreement, Taki spravy would be removed as a requesting party. However, Tokios Tokelės reserved "the right to introduce Taki spravy as well as other potential claimants, including legal as well as physical persons, to the cause at some future date". In the event, no subsequent attempt has been made to re-introduce Taki spravy as a party to the arbitration, or to add TSII.

[11] Request for Arbitration at paragraph 6.

*3. Notice of Registration*

20. After re-submission of the Request for Arbitration, the State initiated exchanges with ICSID and the Claimant on an endeavour to cause the Secretary-General of ICSID to exercise his power under Rule 6(b) of the "Institution Rules" to refuse to register the Request. The Secretary-General nevertheless proceeded to notify the parties that the Request had been registered.

*4. Constitution of the Arbitral Tribunal*

21. On 20 February 2003, sixty days having passed since the registration of the Request for Arbitration, the Claimant notified the Centre that it had chosen the formula established in Article 37(2)(b) of the Convention. Accordingly the Tribunal was to be composed of three arbitrators, one appointed by each party and the third, who would be the President of the Tribunal, to be appointed by agreement of the parties.

22. On 5 March 2003, the Claimant notified the Centre of its appointment of Mr. Daniel M. Price, a national of the United States of America, as arbitrator. On 24 March 2003, the Respondent notified the Centre of its appointment of Professor Piero Bernardini, a national of Italy, as arbitrator. The parties being unable to agree on the appointment of the President of the Tribunal, the Claimant by letter dated 25 March 2003 requested, pursuant to ICSID Arbitration Rule 4(1), that the appointment be made by the Chairman of the ICSID Administrative Council. Thereupon the Chairman of the Administrative Council, in consultation with the parties, appointed Professor Prosper Weil, a national of France, as an arbitrator and designated him as the President of the Tribunal.

23. The Tribunal held its first session in Paris on 3 June 2003, the outcomes of which were Orders No.1 and No.2 made on 1 July 2003 whereby the Tribunal granted interim protective measures and decreed that the proceedings would be bifurcated to permit certain issues of jurisdiction to be heard and determined before the remainder.

*5. Hearing on Jurisdiction: Reconstitution of the Tribunal*

24. Accordingly, after the filing of written submissions, the Tribunal held an oral hearing in Paris on 10 December 2003 to receive the objections to its jurisdiction. Thereafter the Tribunal issued its Decision on Jurisdiction. The members were divided in their opinions. Contrary to the submissions of the State, Professor Bernardini and Mr. Price concluded that the Claimant is an "investor" of Lithuania within the meaning of Article 1(2)(b) of the Treaty and a "national of another Contracting State" for the purposes of Article 25 of the ICSID Convention. These arbitrators went on to hold that the Claimant had made an "investment" in Ukraine as defined by the Treaty, and that the dispute arose from that investment. Accordingly, they held that the objections to jurisdiction should be rejected.

25. Professor Weil recorded his dissent from this conclusion in an opinion attached to the Decision on Jurisdiction. Conceiving that it would be inappropriate in the circumstances for him to play a further part in the arbitration, Professor Weil notified the Centre of his resignation as arbitrator and President of the Tribunal.

26. By letter dated 23 August 2004, the Acting Secretary-General of ICSID informed the parties of the appointment of the Rt. Hon. Lord Mustill as President of the Tribunal, in substitution for Professor Weil. The proceedings, which had been suspended pending the new appointment, then resumed.

27. There would be little point in listing the successive written submissions filed by the parties, nor with one exception attempting to reduce to a reasonable compass the numerous and extended contentions which they advanced. The substance of these can be sufficiently gathered from the account given in this Award. The exception relates to information disclosed for the first time by the Claimant in its Second Request for Provisional Measures of 14 September 2004. This was to the effect that on 6 April 2002, four months before the Claimant's first Request for Arbitration, Taki spravy had transferred to its fellow subsidiary TSII a "unitary property complex" leaving behind with Taki spravy only 10 or 11 items of assets. This disclosure formed one of the grounds on which the State submitted, on 30 June 2005 Additional Objections to Jurisdiction. The Tribunal declined to rule immediately on this objection, and postponed argument and a decision upon it until the full oral hearing and the resulting Award.

*6. The Substantive Oral Hearing*

28. The Tribunal conducted a hearing in Paris from 16 to 19 January 2006. The parties were represented by counsel who presented their respective cases to the Tribunal and also examined witnesses from their side and put questions to witnesses from the opposing side. Transcripts were made of the hearing and distributed to the parties. Present at the hearing were:

Members of the Tribunal:
Lord Mustill, President. Professor Piero Bernardini and Mr. Daniel Price

Secretary of the Tribunal:
Ms. Martina Polasek

Assistant to the President of the Tribunal:
Ms. Jessica Wells

Attending on behalf of the Claimant:
Mr. Ivan Lozowy, Mr. Oleksandr Danylov, Mr. Serhiy Danylov, Ms. Ludmilla Zhyltsova

Attending on behalf of the Respondent:
Mr. Kostyantyn Krasovsky, Mr. Dmitri Grischenko, Dr. Sergei Voitovich, Mr. Oleg Shevchuk, Mr. Andriy Alexeyev, Mr. Oleg Vysochynskyy, Ms. Yulia Konyuskenko, Ms. Larisa Lischynks and Mr. Vsevolod Chentsov

The following witnesses were called by the Claimant:
Mr. Oleksandr Danylov, Mr. Serhiy Danylov

The following witnesses were called by Ukraine:
Mr. Volodymyr Furlet, Mr. Mykola Vasyuk and Ms. Olena Volska.

29. In the course of the hearing, the Tribunal addressed a series of questions to the parties with a view to elucidating their respective submissions. These were subsequently reduced to writing, and were the subject of answers from each side in the closing written exchanges.

30. At all stages of the proceedings, the Members of the Tribunal deliberated extensively by various means of communication, taking into account all pleadings, documents and testimony adduced, whether or not specifically referred to in this Award. The proceeding was declared closed on 27 June 2007.

## E. THE CLAIMANT'S NARRATIVE

31. This is essentially a case on the facts, and although a number of important and difficult issues of principle were thoroughly explored by the parties and discussed within the Tribunal, it can be seen that, with the sole exception of the separate issue of "expropriation", the outcome of the dispute is dictated by the view taken on a single question whether the Claimant has established according to the relevant standard of proof that the events complained of were the product of a nayizd. This is a question of inference, requiring a choice between two fundamentally different narratives. One, presented by the Claimant, describes the interaction between Taki spravy, its officers and the STA. The other views the history in the context of investigations carried on by State agencies at and around the time in question, and whilst not directly challenging the Claimant's bare recital of events, treats it as incomplete and potentially misleading.

32. Apart from the question of quantum, which raises quite separate issues, the heart of the Claimant's case consists of the account which follows of the dealings between the STA and Taki spravy. There is, in addition, a quantity of written and oral evidence from the Messrs. Danylov giving personal accounts of interviews with officials, both in the year 2002 and again in 2005, in which they describe pressures allegedly applied to extort admissions, false evidence against Mr. Romanov, and the dropping of the present ICSID arbitration. For economy of space the Tribunal abstains from setting this out, since it reinforces but does not enlarge the case built upon the largely undisputed course of events. It has however been fully taken into account when at a later stage the implications of fact are discussed.

33. The way in which the Claimant has formulated its case requires the Tribunal to reach conclusions on (a) What happened as between the STA and Taki spravy, and (b) Why did it happen? The answer to the first question calls for little evidence, since the fact that the events relied upon by the Claimant both to found the inference of a political persecution and

to display the persecution in progress actually happened is scarcely in dispute. Thus, for example, where the Claimant's Memorials assert that tax officials visited its offices on a particular date, or that a demand for documents was made on another date, or that identified criminal proceedings were set in motion against Taki spravy, there is very often no contest that this is what happened, although in a number of instances the description of the incident is not accepted. The real controversy is about why these events took place. On this, the Claimant's case is ultimately very simple. One only has to look at the events, their volume, their timing, their absence of legal justification, and the political context to conclude that there could be no other reason for them but political spite thinly disguised as a tax inspection. *Res ipsa loquitur.*

34. There are problems with this approach, quite apart from the existence of materials which point the other way. One is simply a question of perspective. The Claimant presents its data in a dense mass of more than two hundred instances, undifferentiated in terms of type and significance, and simply unmanageable as it stands. To draw any reliable inference from it a perspective must be achieved, and for this purpose the episodes must be reduced to some kind of order, without descending to an over-analysis which would smother the central issue in detail. The Tribunal has approached this from two angles. First, it has prepared for the purposes of its deliberations, and now appends as Annex A, an extensive summary of the allegations, which have been divided broadly according to subject matter. Secondly, to enable a more simplified view it has compressed the complaints into a graphic in the form of a chart showing the variation with time of the numbers of events about which complaints are made (Annex B). The Tribunal draws particular attention to these Annexes, which are integral parts of this Award, and which display in perhaps a more accessible format the data on which to a large extent the Claimant's case is based, but for the moment it will simply set out a narrative account of the allegations, largely as formulated in the claims and supported by contemporaneous documents submitted by Claimant with its memorials and by testimony at the hearing on the merits.

*1. Taki Spravy Produces Campaign Materials for BYT*

35. According to Claimant, Taki spravy entered into a series of agreements in late 2001 to print campaign-related materials for the BYT in connection with the parliamentary elections

scheduled for 31 March 2002.[12] The following month and in the first quarter of 2002, Taki spravy produced approximately 2.5 million of these campaign documents, including 440,400 copies of the volume described above, "Unfulfilled Order," which were delivered on 31 January 2002.[13]

36. The tax authorities initiated their investigation of Taki spravy on 14 February 2002, which will be discussed further below. In response to the investigation, BYT issued a press statement on 6 March 2002, which stated in part: "[i]mmediately after the Electoral Bloc of Yulia Tymoshenko…had delivered to the Central Election Commission the samples of agitation materials of the Bloc printed at the publishing house 'Taki spravy', this publishing house experienced outrageous pressure, threats, and blackmail on the part of the State Tax Administration…It stands to reason that the only 'guilt' of publishing house 'Taki spravy' is its consent to print the official agitation campaign materials of the Bloc of Yulia Tymoshenko".[14]

37. On 16 March 2002, the Chairman of the Election Commission, Mr. M. M. Ryabets, received from a parliamentary candidate a letter of complaint, drawing attention to the large print runs of "Unfulfilled Order" and "The Team of the Bloc of Yu. Tymoshenko" – "printed, by the way, at the same printing house 'Taki Spravy'". The writer asked the Chairman to "charge the competent bodies with the check-up of the financial violations by Yu. Tymoshenko…and give me the answer: 1. Who, and how much money, paid for printing of 500,000 copies of the book 'Unfulfilled Order'? 2. By whom, and what amount, was the fee to the author paid? 3. How much money was spent on the distribution of the book, and from what sources?"

38. On the same day the Chairman sent what was presumably an internal memorandum to a Mr. V.V. Alsufyev, as follows: "I request that you send the complaint for an urgent examination to the State Tax Administration of Ukraine and to the Ministry of Internal Affairs of Ukraine". Mr. Alsufyev promptly forwarded the complaint to Mr. M.Ya. Azarov, the Head of the State Tax Administration, asking for information on what was stated in it, as soon as practicable but not later than 19 March 2002.

[12] Claimant's Memorial on the Merits at paragraph 20, Annex 1.
[13] Claimant's Memorial on the Merits at paragraphs 21-22.
[14] Respondent's Counter-Memorial on the Merits at Attachment 77.

### *2. The State's Press Statements*

#### *2.1 The Press Statement of 25 March 2002*

39. On 25 March 2002 the STA issued a Press Statement in which it alleged that Taki spravy was under investigation for suspected money laundering.[15] The Statement also asserted that STA was investigating alleged election law violations at the request of the Central Election Commission. During the hearing on the merits, however, witnesses for the State acknowledged that Taki spravy was not under investigation for money laundering at the time the statement was issued. In addition, witnesses for the State also acknowledged that STA has no enforcement authority with respect to election law. According to the STA Press Statement "a check of the activities of DP 'Taki spravy' was made…because of its active participation in the activities of a diversified network for the legalization of 'dirty' money". STA asks, "then why does DP 'Taki spravy' go for unjustified expenses, working for its own losses? Surely because the difference is covered at the expense of 'shadowy' sources of finances and the flows of 'dirty' money". The statement concludes, "the violations discovered during the course of the investigation of DP 'Taki spravy' have signs of crimes as foreseen by…Article 209 (the legalization (laundering) of money funds and other property, received by criminal means) of the Criminal Code of Ukraine".[16]

40. During the hearing on the merits, Mr. Furlet was asked "[b]y the end of February 2002, did the authorities of Ukraine, especially your department, reach a conclusion that there was not enough evidence to go forward against Taki spravy or its management for crimes of money laundering?"[17] Mr. Furlet responded: "[w]ith respect to myself at the end of February 2002, as far as I can recollect, the decision, criminal procedural decision about responsibility of Taki spravy management with regards to money laundering was not taken, so the decision was not taken that they were responsible for money laundering".[18] Mr. Vasyuk was asked, "[t]o your knowledge, after February 2002…was either Taki spravy or Mr. Danylov under investigation for money laundering?" Mr. Vasyuk responded, "[f]or money laundering there was none". Mr. Vasyuk was asked, "[n]one after February?" Mr. Vasyuk replied, "That's right".[19]

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[15] Claimant's Memorial on the Merits at Annex 25.
[16] Claimant's Memorial on the Merits at Annex 25.
[17] Hearing on the Merits, Transcript Volume III at 240, lines 15-20.
[18] Hearing on the Merits, Transcript Volume III at 240, lines 24-25; 241, lines 1-5.
[19] Hearing on the Merits, Transcript Volume IV at 102, lines 14-17, 21-23.

41. Mr. Vasyuk was then asked why the money laundering allegations were included in the 25 March 2002 STA Press Statement when both Mr. Vasyuk and Mr. Furlet testified that Taki spravy was not suspected of or under investigation for money laundering after February 2002. Vasyuk testified that "[p]robably, [ the Press Statement ] is not written correctly enough because Taki spravy transferred non-cash funds into cash money using the scheme which has been well known to tax police for quite a long period of time, as it is mentioned here through fictitious or dummy firms, and when, in the press, the process of transferring non-cash funds into cash money sometimes is wrongly called 'money laundering'. So I think from a legal standpoint, this material is written not correctly"[20] [sic]. However, Mr. Vasyuk's explanation that Taki spravy was under investigation for receiving income from unknown sources was not consistent with his other testimony. Mr. Vasyuk was asked, "[s]o, in your opinion, the Press Statement should have talked about tax evasion, not money laundering".[21] Mr. Vasyuk agreed, saying, "[a]bout tax evasion through- by means of moving funds through fictitious firms".[22] The Act of Investigation from the Kyiv State Tax Administration, however, does not allege that Taki spravy received moneys from unknown sources rather, it alleges that Taki spravy claimed improper expenses and VAT credits associated with those expenses.[23] The nature of the allegations of tax evasion was confirmed by Mr. Vasyuk, who was asked, "[s]o in both cases they are claiming deductions or expenses to which they are not entitled". Mr. Vasyuk responded, "[y]es, correct".[24]

42. The STA Press Statement also appears to allege that Taki spravy acted illegally or improperly by undercharging for the production of the material for the BYT. It states, "[w]ithout a doubt, the citizenry of Ukraine should turn its attention to the privileged or sponsored price of printing services. At least, their value for real should be 20 times greater".[25] However, when Mr. Vasyuk was asked whether this allegation is "at all related to the tax evasion case," Mr. Vasyuk responded, "[n]o…I didn't investigate this particular issue in the course of the case".[26] With respect to suspected election law violations, the STA Press Statement states, "[b]esides that, the Central Election Commission of Ukraine, as directed by current legislation, authorized the tax service to check information about

[20] Hearing on the Merits, Transcript Volume IV at 105, lines 9-18.
[21] Hearing on the Merits, Transcript Volume IV at 105, lines 19 to 21.
[22] Hearing on the Merits, Transcript Volume IV at 105, lines 22 to 23.
[23] Claimant's Memorial on the Merits at Annex 56, p. 7.
[24] Hearing on the Merits, Transcript Volume IV at 108, lines 3 to 6
[25] Claimant's Memorial on the Merits at Annex 25, p. 4.
[26] Hearing on the Merits, Transcript Volume IV at 111, lines 10-14.

violations of election legislation during the manufacture of printed production by the… 'Election Block of Yulia Tymoshenko".[27] When Mr. Furlet was asked, "[a]re the Tax Police responsible for enforcing elections laws," Mr. Furlet responded "[n]o. The Tax Police does not have the task of exercising control over the observance of election laws…".[28]

43. On the same date as the Press Statement of 25 March 2002, STA sent a letter to local tax authorities urging them to seek broad media coverage of the statement,[29] which was eventually reported in over 100 newspapers.[30] On 27 March 2002, Taki spravy issued a declaration and press statement denying the allegations.[31]

44. The evidence is unclear as to whether the 25 March 2002 STA letter to local authorities was consistent with STA's normal operations or an exceptional occurrence. Mr. Furlet, however, sidestepped the question from the Tribunal as to whether "any of those other companies" that Mr. Furlet had testified "were subjected to the same treatment" as Taki spravy "were the subject of a press release by the state authorities and whether the state authorities issued a directive to local authorities to publish that press release".[32] He said "there is a kind of not very official guideline from the management of the tax administration to the heads of departments to speak through the mass media from time to time," noting that in the two months prior to the hearing, he had "participated in mass media activities highlighting certain activities against economic crime".[33] In addition, Mr. Vasyuk was asked: "have you ever received a letter during your service in these terms directing the authorities to provide urgent coverage, and to report on steps taken?" He replied, "[s]uch a letter I never received because my competences covered the criminal investigation, and I am not engaged in public relations".[34] Finally, when the Tribunal asked O. Danylov for his opinion as to the purpose of the STA letter to local tax administrations, Danylov responded, "the objectives of the State Tax Administration of Ukraine sending this letter were purely political".[35]

[27] Claimant's Memorial on the Merits at Annex 25, p. 2.
[28] Hearing on the Merits, Transcript Volume III at 245, lines 4-9.
[29] Claimant's Memorial on the Merits at Annex 26.
[30] Claimant's Memorial on the Merits at Annex 25 (cont.) in Volume II.
[31] Claimant's Memorial on the Merits at Annexes 27-28.
[32] Hearing on the Merits, Transcript Volume III at 243, lines 6-12.
[33] Hearing on the Merits, Transcript Volume III at 243, lines 14-17, 21-23.
[34] Hearing on the Merits, Transcript Volume IV at 112, lines 12-18.
[35] Hearing on the Merits, Transcript Volume III at 59, lines 20-22.

*2.2 Other STA Press Statements*

45. On 27 November 2002, STA issued a press statement accusing Taki spravy (along with Rembudproekt and Produkt BVO) of conspiracy, tax evasion, dishonesty and illegal turn-over.[36] On 16 January 2003, STA issued another press statement accusing Taki spravy of conspiracy and tax evasion.[37] On 28 December 2002, an announcement appeared in "RIO" newspaper listing Taki spravy as an 'indebted enterprise' in amounts that far exceeded Taki spravy's actual debts. Claimant later asserted that STA was responsible for having this allegedly erroneous information published.[38]

*3. Investigations and Court Proceedings*

*3.1 Taki Spravy and Produkt BVO*

46. On 14 February and 18 February, and 2 July 2002, the Solomiansky tax service (hereafter "STS") sent to Taki spravy a written request for documentation of its relationship with Produkt BVO.[39] The Claimant argues that it complied with the requests even though they were overly broad and without legal foundation.[40] On 21 and 26 February 2002, Solomiansky Tax Police (hereafter "STP") rendered decisions to seize documents from Taki spravy relating to its relationship with Produkt BVO.[41] On 22 and 26 February, and 5 March 2002, STS searched and seized documents from Taki spravy.[42] Regarding the 5 March episode, Taki spravy's chief accountant stated, "when more than 10 men intruded my office…I unwillingly recalled the terrible times of Stalin's repressions. They ransacked and searched all over: turned everything upside down. I think I will remember the day when militia 'ransacked' our accounts department – 5 March 2002 – forever".[43]

47. In Case No: 21/125 of 1 April 2002, STA submitted a complaint against Produkt BVO and Taki spravy in the Economic Court, alleging that the companies were evading taxes and that

[36] Claimant's Memorial on the Merits at Annex 207.
[37] Claimant's Memorial on the Merits at Supplemental Annex 5.
[38] Claimant's Memorial on the Merits at Annex 218.
[39] Claimant's Memorial on the Merits at paragraph 366.
[40] Claimant's Memorial on the Merits at paragraphs 366 to 369.
[41] Claimant's Memorial on the Merits at Annexes 10 and 13.
[42] Claimant's Memorial on the Merits at Annexes 11, 14 to 16.
[43] Claimant's Reply on the Merits at Annex 20.

one of the companies was pursuing objectives "in conflict with the interests of state". [44] On 8 April 2002, the Court invited STA to provide "explanations and requisite proofs" which STA declined to do, instead requesting that the proceedings be suspended pending the outcome of the criminal case on the same matter. The Court rejected STA's request and on 20 May 2002, dismissed the complaint for lack of evidence.[45]

*3.2 Taki Spravy and Rembudproekt*

48. On 13 March 2002, STP authorised the inspection of Taki spravy's dealings with Rembudproekt.[46] On the same date (and again on 15 March 2002), STP authorised warrants and seized documents from Taki spravy relating to its dealings with Rembudproekt.[47] On 19 April 2002, STA requested Taki spravy to provide information regarding its dealings with Rembudproekt.[48] The Claimant argues that it complied with these requests even though they were unsubstantiated and contrary to Ukrainian law. On 7 May 2002, STA issued an "Act of Investigation" pursuant to its investigation that Taki spravy failed to make proper tax payments based on its transactions with Rembudproekt.[49] On 13 May 2002, Taki spravy submitted objections, which STA rejected on 14 May 2002.

49. On 7 May 2002, the General Procuratura (hereafter "GP") submitted a claim against Rembudproekt and Taki spravy in the Economic Court (Case No 10/399-02-2-25/5178), requesting the Court to invalidate the contract and order the companies to pay the taxes owed. On 30 May 2002, the Court returned the complaint "without review". On 17 June 2002, GP appealed the Court's decision. On 15 July 2002, the Economic Court of Appeals upheld the 30 May 2002 decision. On 16 July 2002, GP appealed to the Higher Economic Court; on 20 August 2002 the Higher Economic Court annulled the lower court's decision. On 4 September 2002, Taki spravy appealed to the Supreme Court; on 3 January 2003, and again on 6 February 2003, Ukraine's Supreme Court rejected the appeal.

[44] Claimant's Memorial on the Merits at Annex 32.
[45] Claimant's Memorial on the Merits at Annex 67.
[46] Claimant's Memorial on the Merits at Annex19.
[47] Claimant's Memorial on the Merits at Annexes 21 and 23.
[48] Claimant's Memorial on the Merits at Annex 47.
[49] Claimant's Memorial on the Merits at Annex 56.

*3.3 Investigation of Taki Spravy Clients*

50. On 8 April 2002, STA sent letters to three clients of Taki spravy, requesting documentation of their relationship with Taki spravy.[50] On 10 April 2002, STA sent letters to two additional clients of Taki spravy, informing them that their relationship with Taki spravy was being investigated.[51] The Claimant argues that the five letters do not comply with relevant legal requirements because they do not indicate the legal basis for the request and the investigation.[52] In response to questions from the Tribunal, Mr. S. Danylov testified that, of the five clients who received letters from STA, one was "one of our biggest customers", another was a "very big customer" and another was a significant supplier.[53] The Claimant submitted an unsigned witness statement of one of the clients, O.Yarosh of Palitra Druku, indicating that he was the subject of harassment and pressure from STS because of his business relationship with Taki spravy.[54]

*3.4 Other Allegedly Unfounded Investigations, Searches and Seizures*

51. On 14 February 2002, the STS issued two certificates for tax investigations of Taki spravy.[55] On 5 April 2002, STS authorised and executed seizure of documents from Taki spravy relating to LLC Agenstvo Alfo, a company that made payment on behalf of Produkt BVO for campaign materials produced by Taki spravy.[56] On 16 April 2002, STS requested Taki spravy to provide personal information regarding its employees, which Taki spravy refused on grounds that such disclosure would violate confidentiality protected by law.[57] On 22 and 23 July 2002, STS seized documents and a computer from Taki spravy.[58] On 5, 7, 9 and 12 August, 18 September, 4, 16, 22 October and 7 November 2002, STS authorised and conducted additional document seizures.[59] Each of these seizures was apparently related to the criminal case against Mr. O. Danylov. Between 30 May 2002 and 25 October 2002, the State issued eleven summonses regarding investigation of Taki spravy. The Claimant alleges that these summonses were legally defective for various reasons (for

[50] Claimant's Memorial on the Merits at Annexes 36-38.
[51] Claimant's Memorial on the Merits at Annexes 40-41.
[52] Claimant's Memorial on the Merits at paragraphs 402 and 403.
[53] Hearing on the Merits, Transcript Volume III at 60, lines 14-25; 61, lines 1-25; 62, lines 1-22.
[54] Claimant's Memorial on the Merits at Annex 252.
[55] Claimant's Memorial on the Merits at Annexes 5-6.
[56] Claimant's Memorial on the Merits at Annexes 33-34.
[57] Claimant's Memorial on the Merits at Annexes 45, 50.
[58] Claimant's Memorial on the Merits at Annexes 123-125.
[59] Claimant's Memorial on the Merits at Annexes 133, 138, 144, 146, 167, 178, 183, 186, 199.

example, for failure to state subject matter).[60] On 7 November, two agents of the State entered the home of a Taki spravy officer, I. Butuzov, without permission, threatened arrest and refused repeated requests to leave. Mr. Butuzov left Taki spravy on 3 June 2003, citing intimidation and fear for his safety.[61]

*4. Tax Notice Decisions and Related Proceedings*

52. On 13 May 2002, STS issued two Tax Notice Decisions, demanding payment of taxes allegedly owed.[62] On 21 May 2002, Taki spravy submitted a complaint to the Economic Court (Case No: 11/134), requesting that the Court invalidate the Tax Notice Decisions for lack of evidence. On 31 May 2002, Taki spravy submitted a complaint to the Economic Court seeking "preventative measures" which the Court granted. On 11 June 2002, STA requested the Court to suspend proceedings, which the Court granted. On 18 June 2002, Taki spravy appealed the decision to suspend the proceedings. On 23 July 2002, the Economic Court of Appeals rejected Taki spravy's appeal in the light of the pending criminal case against Messrs O. Danylov and Romanov.[63] The Claimant argues that the decision to suspend the case and to uphold that decision were rendered without adequate explanation and were subject to improper influence.[64]

53. On 23 July 2002, STS issued a "First Tax Demand" to Taki spravy and on 7 August 2002, STS issued a "Second Tax Demand" to Taki spravy (collectively hereafter "the Tax Demands").[65] On 19 August 2002, Taki spravy submitted a complaint to the Economic Court (Case No 29/266) requesting the Court to invalidate the Tax Demands for reasons including lack of foundation and violation of time limits.[66] On 23 August 2002, TS addressed a "Declaration" to Solomiansky District Court and the Solomiansky Procuratura with a request that a criminal case be opened against STS officials based on actions that resulted in the Tax Demands. The Court forwarded the complaint to STS. On 3 September 2002, STS informed Taki spravy that the Tax Demands were sent to Taki spravy by mistake.[67] On 11 September 2002, STS by letter informed Taki spravy that the Tax

[60] Claimant's Memorial on the Merits at paragraphs 533-542.
[61] Claimant's Memorial on the Merits at paragraphs 543-544.
[62] Claimant's Memorial on the Merits at Annexes 58-59.
[63] Claimant's Memorial on the Merits at Annex 127.
[64] Claimant's Memorial on the Merits at paragraphs 619-626, Annex 78.
[65] Claimant's Memorial on the Merits at Annexes 128, 137.
[66] Claimant's Memorial on the Merits at Annex 150.
[67] Claimant's Memorial on the Merits at Annex 158.

Demands were invalid.[68] Also on 11 September 2002, the Economic Court halted proceedings in Case No 29/266 at the request of STS.[69] On 11 November 2002, Taki spravy submitted a complaint to Solomiansky District Court requesting that the Court order STS to issue a public correction of the erroneously issued Tax Demands, which were published in the media.[70] The Court rejected the complaint on 5 December 2002.[71] On 11 March 2003, Taki spravy submitted a similar complaint and request to the same court, which once again rejected it.[72]

54. On 3 April 2003, STS issued two additional Tax Notice Demands.[73] On 11 April 2003, Taki spravy requested the Economic Court (in Case No. 25/353) to invalidate the additional Tax Notice Demands based on deficiencies in the investigation.[74] On 10 June 2003, the Court granted Taki spravy petition to suspend the proceeding in light of the pending ICSID case.[75]

*5. Tax Investigations and Arrest of Taki Spravy Assets*

55. On 6 June 2002, STA issued a notice of a complex documentary investigation of Taki spravy. On 17 June 2002, STS sent three of its officials to Taki spravy to conduct an "open-ended" investigation. Taki spravy expressed concern to STS officials, who left and returned the following day with several armed STP employees. On 20 June 2002, STA adopted a decision to place under administrative arrest all assets of Taki spravy.[76]

56. In response to the asset seizure, Taki spravy filed a complaint with the Economic Court on 21 June 2002 (Case no 11/148), seeking to overturn the decision. On 15 August 2002, the Economic Court issued a decision denying relief to Taki spravy, which Taki spravy appealed on 30 August 2002. On 20 December 2002, the Economic Court of Appeals denied the appeal. Taki spravy appealed this decision on 20 January 2003. On 11 March 2003, the Higher Economic Court accepted the appeal and on 30 May 2003, adopted a

[68] Claimant's Memorial on the Merits at Annex 164.
[69] Claimant's Memorial on the Merits at Annex 163.
[70] Claimant's Memorial on the Merits at Annex 201.
[71] Claimant's Memorial on the Merits at Annex 210.
[72] Claimant's Memorial on the Merits at Annex 231.
[73] Claimant's Memorial on the Merits at Annex 236.
[74] Claimant's Memorial on the Merits at Annex 237.
[75] Claimant's Memorial on the Merits at Annex 244.
[76] Claimant's Memorial on the Merits at Annexes 90-93.

decision to remand the case for *de novo* review. On 8 July 2003, the Economic Court dismissed the case.

57. On 25 June 2002, STA requested the Economic Court (Case No 21/246) to extend the arrest for an additional 90 days. On 27 June 2002, the Economic Court extended the arrest for 30 days, rejecting the Claimant's request to join this case with Case No 11/148. On 5 July 2002, Taki spravy appealed against this decision. On 23 July 2002 the Economic Court decided to suspend proceedings pending a decision in Case No 11/148. On 26 July 2002, STA lifted the arrest of assets.

*6. The Criminal Case Against Mr. O. Danylov: Case No. 79/00032*

58. On 13 March 2002, STS initiated a criminal tax evasion case (Case No 79-00111) against Rembudproekt; on 28 March 2002 this was expanded to include Mr. V. Romanov (Rembudproekt's Director). It appears that this case was later combined with Case No 79/00032, which had been initiated against Mr. O. Danylov on 14 May 2002, for tax evasions based on transactions said to have been entered into with Rembudproekt. During May 2002, Mr. O. Danylov left Ukraine for Lithuania. On 3 July 2002, STP issued an indictment against Mr. Romanov and Mr. O. Danylov. Whilst in custody, Mr. Romanov gave statements supporting STS's charges but later retracted those statements, alleging that he had been coerced. On 19 September 2002, Romanov filed a complaint alleging that he had been subject to physical abuse and denied access to legal counsel.[77] On 6 November 2002, Mr. O. Danylov sought refugee status in Lithuania. On the following day, Solomiansky District Court rendered guilty verdicts against him (*in absentia*) and Mr. Romanov, who was sentenced to six and a half years imprisonment. On 22 November 2002, Mr. Romanov brought an appeal to the Appellate Court, which was rejected on 21 January 2003. On 13 May 2003, the Supreme Court denied relief.

59. On the same day, 13 May 2003, Lithuania granted Mr. O. Danylov refugee status. On 3 March 2005, Mr. O. Danylov returned to Ukraine. On 25 April 2005, STA notified Mr. O. Danylov that it had decided to close the case against him for lack of evidence.[78] However, on 8 August 2005, GP notified him of its decision to reopen the case, though it declined Mr.

[77] Claimant's Memorial on the Merits at Annex 168.
[78] Claimant's Reply on the Merits at Annex 1.

O. Danylov's request for a copy of the decision.[79] On 16 November 2005, the STA decided again to close the case for lack of evidence.[80]

60. The case was reopened on 29 December 2005.[81] During the hearing on the merits, Mr. O. Danylov testified that, during a meeting with Mr. V. Schvets, a high level official in the Prosecutor General's office, Mr. Schvets told him that the criminal case against Mr. O. Danylov would be reinstated unless the Claimant withdrew its ICSID claim.[82] Mr. O. Danylov further testified that he had meetings with the Head of the State Police, Mr. Katerinchuk, and the Prosecutor General of Ukraine, Mr. S. Piskun, both of whom linked the criminal case to the ICSID claim.[83] Mr. O. Danylov testified that he met with the First Deputy Prosecutor, S. Vynokurov on 29 December 2005, who showed him a copy of a letter from the Minister of Justice, Mr. M. Holovaty, to the Prosecutor General, which described the present ICSID proceedings. Mr. Vynokurov used the letter to indicate that the Claimant was demanding too much money from Ukraine and urged Mr. O. Danylov to withdraw the ICSID claim.[84]

*7. Other Denials of Claimant's Requests for Relief*

61. The Claimant made numerous written appeals to high level tax authorities, the Presidential administration, and central and local Procuraturas, requesting them to intercede to stop the alleged mistreatment of Taki spravy. According to the Claimant, each appeal was summarily dismissed, in some case in contravention of the statutory or constitutional obligations of those offices to pursue bona fide investigations of such complaints.[85]

62. On 27 June 2002, Taki spravy filed a complaint with the Solomiansky District Court (Case No 2-2335) alleging various illegal acts by STA officials.[86] On 2 July 2002, the Court dismissed the complaint for lack of jurisdiction.[87] On 18 November 2002, Mr. S. Danylov

[79] Claimant's Reply on the Merits at paragraph 18.
[80] Letter to Martina Polasek, Secretary to the Tribunal, 3 January 2006.
[81] Hearing on the Merits, Transcript Volume I at 96, lines 1-3.
[82] Hearing on the Merits, Transcript Volume II at 15, lines 1-17; 32, lines 21-25.
[83] Hearing on the Merits, Transcript Volume II at 17, lines 1-25; 18, lines 1-5; 33, lines 15-25.
[84] Hearing on the Merits, Transcript Volume II at 42, lines 16-25; 43, lines 1-25; 44, lines 1-3.
[85] Claimant's Memorial on the Merits at paragraphs 545-572.
[86] Claimant's Memorial on the Merits at Annex 98.
[87] Claimant's Memorial on the Merits at Annex 139.

filed a complaint in Solomiansky District Court claiming that the State Tax Inspectorate engaged in improper seizures, which the Court dismissed for lack of jurisdiction.[88]

*8. The Tax Authorities' Requests for Taki Spravy to Provide Testimony Against BYT*

63. On 26 February 2002, Mr. O. Danylov met with Mr. Furlet intending to negotiate a settlement of the dispute. According to Mr. O. Danylov, Mr. Furlet questioned him "regarding companies which had placed orders with Taki spravy for the Block of Yulia Tymoshenko".[89] When Mr. Furlet was asked by counsel whether he "put questions regarding the political background of the 'Unfulfilled Order'", such as "[w]hat party stands behind the customer," Mr. Furlet replied "[a]s far as I recollect I didn't ask such questions".[90]

64. On 11 March 2002, Mr. O. Danylov met with Mr. Furlet, who, according to the Claimant, "suggested that Oleksandr Danylov attest in writing that Taki spravy had received cash payments for orders placed with Taki spravy on behalf of the Block of Yulia Tymoshenko".[91] When Mr. Furlet was asked by the State's counsel about this allegation, he responded "[n]o, I didn't make such a proposal".[92]

65. According to his written statement, Mr. S. Danylov met with Mr. Furlet on 20 May 2002, during which meeting "Furlet said that his superiors and he himself desire for me to testify that Yulia Tymoshenko gave me a 'valise' with money in it for the printing of the book".[93] In response to a question from the State's counsel, Mr. Furlet denied making this proposal.[94] On 29 July and 15 August 2002, Mr. S. Danylov again met with Mr. Furlet, who, according to Mr. S. Danylov, encouraged him to provide testimony against BYT.[95] According to Mr. S. Danylov, "Furlet in various forms repeated one and the same thing: that I and my co-workers give testimony against Kochetkov (an official representative of BYT)".[96] According to Mr. S. Danylov, Mr. Furlet said that if Mr. S. Danylov and Mr. O. Danylov "both give testimony against Kochetkov, then they will close the criminal case [ against Mr.

[88] Claimant's Memorial on the Merits at Annexes 203, 209 and 211.
[89] Claimant's Memorial on the Merits at paragraph 30, Annex 159.
[90] Hearing on the Merits, Transcript Volume III at 101, lines 23-25; 102, lines 1-4.
[91] Claimant's Memorial on the Merits at paragraph 35, Annex 159.
[92] Hearing on the Merits, Transcript Volume III at 103, Line 1.
[93] Claimant's Memorial on the Merits at Annex 156, p. 5.
[94] Hearing on the Merits, Transcript Volume III at 103, lines 7-11.
[95] Claimant's Memorial on the Merits at paragraphs 130, 145.
[96] Claimant's Memorial on the Merits at Annex 156, p. 7.

O. Danylov ] and lift the siege of our enterprise".[97] In response to questions from the State's counsel, Mr. Furlet testified that it was Mr. O. Danylov and Mr. S. Danylov who proposed to offer testimony against BYT officials in exchange for the Tax Service dropping the criminal case: "they said we could, in exchange of closing down the case, make a public action to discredit this political leader. We may name the persons who acted on her behalf, and so on. I didn't agree with that proposal because that went beyond my competence and was not -- didn't meet the requirements of criminal and procedural legislation".[98]

*9. Evidence of Discrimination Against Other Publishers*

66. The Tribunal asked Mr. O. Danylov "whether other printers or publishing houses performed services [ in early 2002 ] for parties being part of the opposition, in addition to Taki spravy?[99] Mr. O. Danylov responded:

> "At that point in time in Ukraine, there was a very hard situation for the opposition [groups] in the perspective of the printing and publishing products because the government had blocked all the possibilities for producing printing products for those blocs and parties. Many directors of printing houses called me and told me that they had been instructed not to accept the orders from those parties and blocs. The State printing companies had been directly instructed not to accept such orders. The private printing houses had been warned verbally by the tax authorities not to accept such orders, otherwise they would run into big problems. I had also received such signals. I often relayed to Directors of printing houses, publishing houses, printing shops, and they often shared with me that such signals were there".[100]

67. The Claimant submitted with its Reply a letter from Mr. O. Turchynov, an official of BYT, to Mr. S. Danylov, which said that "the printers in Kyiv categorically refused to place [ orders from BYT ]. Moreover, their management believes that the very fact of such negotiations, if they are to become known, will definitely lead to problems in relations with the current government".[101] The letter continues, "during the period of the pre-election campaign of 2002 all the large printers of Ukraine were unofficially warned by local

[97] Claimant's Memorial on the Merits at Annex 156, p. 8.
[98] Hearing on the Merits, Transcript Volume III at 104, lines 6-13.
[99] Hearing on the Merits, Transcript Volume II at 123, lines 14-17.
[100] Hearing on the Merits, Transcript Volume II at 123, lines 23-25; 124, lines 1-14.
[101] Claimant's Reply on the Merits, at Annex 7.

representatives of the tax administration and other force structures, that any cooperation with the Block of Yulia Tymoshenko and the political structures which enter into it, will inevitably lead to the closure of the enterprise".[102]

68. In its post-hearing brief the Claimant responded to the Tribunal's question: "[d]uring the same period, have other publishing or printing enterprises performed services for the opposition? If so, were they made subject to interventions by the local authorities similar to those experienced by Taki spravy?" The Claimant cited numerous sources to demonstrate that newspapers, publishers, and printing companies that provided services for, or positive media coverage of, opposition politicians were subject to intervention by governmental authorities. According to these sources, the governmental actions included: (1) the detention of delivery trucks and seizures of print runs, (2) refusals to publish, (3) criminal investigations, (4) searches of offices, and (5) withholding of utility services.[103]

69. In the State's post-hearing brief it alleges that "at least five additional enterprises printed or arranged for the production of official campaign materials for the BYT in 2002," none of which was "subject to interventions by the local authorities similar to those experienced by TS1 [ Taki spravy ]".[104]

*10. Political Asylum Granted by Lithuania*

70. According to documents submitted by the Claimant, Lithuania granted Mr. O. Danylov refugee status on 13 May 2003.[105] The decision to grant asylum was based on a 18 May 2003 document issued by the Lithuanian Migration Department, which states in part that the "[p]ossibility of persecution of Olexksandr Danylov was confirmed by the information of situation in Ukraine, and the materials presented by the applicant proved the fact of such persecution".[106] Mr. O. Danylov was asked "[w]as there a process by which you applied for asylum in Lithuania?"[107] Mr. O. Danylov responded:

[102] Claimant's Reply on the Merits at Annex 7.
[103] Claimant's Post-Hearing Brief at 24-31. The sources cited by the Claimant include, (1) The Press and the Government: a Chronicle of Confrontation (published by Ukrainian partner of Reporters Without Borders), (2) annual speech to Parliament of Ukraine's Commissioner for Human Rights, and (3) 2002 Annual Report on Ukraine by Reporters Without Borders.
[104] Respondent's Post-Hearing Brief at paragraph 21.
[105] Claimant's Memorial on the Merits at Annex 239.
[106] Claimant's Memorial on the Merits at Annex 238.
[107] Hearing on the Merits, Transcript Volume II at 132, lines 13-14.

"[d]uring those interviews [ with Lithuanian Immigration officials ] I had to inform maximum possible extent about all the circumstances of persecution and provide them with the maximum possible number of documents and materials which would testify to this persecution…[T]he Immigrations Department took a decision to grant me status of a political refugee in Lithuania".[108]

71. In response to the same question, Mr. O. Danylov testified that, during his stay in Lithuania, "Lithuania refused, rejected my extradition to Ukraine, and my arrest, refused to arrest me, because the Interpol, through which Ukraine demanded my extradition and arrest according to the Interpol statute, Interpol had no rights to take any actions against…people who were granted political immigrant status".[109] Mr. O. Danylov testified that "when I took a decision to come back into Ukraine after the political situation in the country had changed I submitted the relevant application to the Immigrations Department in which I indicated that because of change to political situation in Ukraine, and because the authorities in Ukraine changed, I took a decision to return back to Ukraine".[110]

*11. Other Evidence that the State's Actions Were Politically Motivated*

72. The Claimant submitted with its Memorial a letter from Peter Byrne, a staff writer for the Kyiv Post, in which Mr. Byrne recalled a 25 June 2003 meeting with Anatoly Yakovinets, deputy head of the tax police investigative unit. According to Mr. Byrne, Yakovinets said that the case against Taki spravy "was motivated on political grounds, referring to an order 'from above' to put the printing house out of business".[111] As counsel for the Claimant noted at the hearing, the State declined to call Mr. Byrne for cross-examination. According to the Claimant, Mr. O. Danylov met with the Director of the Investigative Directorate of the Tax Police, Mr. B.Y. Valentynovych on 11 April 2002, who informed Mr. O. Danylov that "the tax service is after [ Taki spravy ] very strongly".[112]

[108] Hearing on the Merits, Transcript Volume II at 133, lines 1-5, 8-9.
[109] Hearing on the Merits, Transcript Volume II at 133, lines 12-18.
[110] Hearing on the Merits, Transcript Volume II at 135, lines 13-20.
[111] Claimant's Memorial on the Merits at Supplementary Annexes, Annex 3.
[112] Claimant's Memorial on the Merits at paragraph 55 (quoting Annex 159, at 5).

## F. THE CLAIMANT'S MAJOR ALLEGATIONS

73. The Claimant identifies within the main body of events a number of specific instances to which it attaches particular weight. The occurrence of these is not disputed, but there is radical controversy about their significance. For the moment, we do not do more than identify them.

### *1. The Press Statement of 25 March 2002*

74. First, there was an episode which we describe at a little length, because of the importance attached to it by the Claimant. This was evidently set in motion by a press statement of the BYT on 6 March 2002. The following extracts serve to set the tone:

> "Immediately after the Electoral Bloc of Yulia Tymoshenko hand [sic] delivered to the Central Election Commission the samples of agitation materials of the Bloc at the publishing house 'Taki spravy', this publishing house experienced outrageous pressure, threats and blackmail on the part of the State Tax Administration. Numerous other unplanned examinations on the part of the tax police, which are accompanied by gross violations of the laws and elementary norms of human respect, resulted in a complete blocking of the publishing house's operation. It stands to reason that the only 'guilt' of publishing house 'Taki spravy' is its consent to print the official agitation campaign materials of the Bloc of Yulia Tymoshenko".

75. It was plainly as a response to this public attack that the STA issued its own Press Statement of 25 March 2002. In particular, importance is attached to the following extracts from the Press Statement:

> "As a result of the discovery of connections, the movement of financial flows and structures related to the legalisation of 'shadow' funds there was discovered an active participant in the illegal activity, namely the Lithuanian subsidiary private enterprise 'Taki spravy' that is why a check of the activities of DP 'Taki spravy' was made not accidentally and in no way based on political considerations. Rather because of its active participation in the activities of a diversified network through legalisation of 'dirty' money for the legalisation of 'fictitious' firms, substitute

persons, falsified documents, 'fictitious' contracts. It is established that the legalisation of 'shadow funds by DP 'Taki spravy,' an active participant in the network, the 'fictitious' enterprises PP 'Produkt BVO', PP 'Rembudproekt', ZAT 'Teslo', TOV 'RIF', PP 'Lira' were used.

…

Naturally, with the legalisation of dirty money demanded from DP 'Taki spravy' a documented legalisation and masking by the realisation of business operations. It was these operations which drew the attention of the tax service. Besides that, the Central Electoral Commission, as directed by current legislation, authorised the tax service to check information about violations of election legislation during the manufacture of printed production by the election block of political parties 'The Election Block of Yulia Tymoshenko'. It is established that on 28.11.2001 there was concluded Contract No. 645 between the 'fictitious' Enterprise PP 'Product BVO' and DP 'Taki spravy' for the manufacture of printed production. On the part of the 'fictitious' enterprise PP 'Produkt BVO' the contract was signed by the supposed director Chemera S.S and on the part of 'Taki spravy' by the director Danylov O.V."

76. After deploying figures to suggest that the apparent loss on printing was in reality financed by the BYT the Press Statement turned to a brochure entitled "The team of the Block of Yulia Tymoshenko", asserting that according to the documentary orders it appeared to have been ordered twice, and commenting:

> "It should be noted that the contract was falsified already during the course of the investigation of 'Taki spravy'. Without a doubt, such a speed is connected only with the effort to hide the fact of the preparation of the agitation materials of the election block of political parties at the expense of money from the 'fictitious' enterprise PP Produkt BVO and the financing from dubious sources of origin".

77. Finally, the following must be quoted:

> "The violations discovered during the course of the investigation of DP 'Taki spravy' have signs of crime as foreseen by Article 358 section 1 (falsification of documents, seals, stamps and letterhead, their sale, the use of falsified documents) and Article 209 (the legalisation (laundering) of money funds and other property,

received by criminal means) of the Criminal Code of Ukraine. Right now these materials are being reviewed".

78. The weight to be attached to this document as part of the Claimant's allegation of a "nayizd" is discussed at a later stage. One thing is however clear, that its plain implication that Taki spravy was part of a ring of money-launderers (as distinct from tax-evaders) was not on the date of its publication established by the evidence available to the tax authorities, whatever "signs" of it they may have believed to be present. So much was conceded by the witnesses for the State during the oral hearing; the serious charge of money-laundering soon disappeared from the case; and the State has never sought to persuade the Tribunal that it was in fact well-founded.

79. In conclusion, it should be recorded that this document was circulated to numerous agencies who did in due course refer to it in the press with a request to publish it with urgency; that it has been said on behalf of the Claimant that only a few days later this Request was "withdrawn", although the State denies this; and that its unfounded allegation of money-laundering has never been put right by the tax authorities. The Press Statement, and the incorrect allegations which it contained, has never itself been "withdrawn" and indeed remains on the STA website until this day.

80. Finally, in its Response to the State's Observations, of 3 April 2006, the Claimant noted that the State had not attempted to put forward its own version of events. It noted that the State's main response to the allegations was not so much that the event alleged never occurred, but was centred on the lack of authority of the relevant officials to negotiate regarding the ICSID arbitration. In response the Claimant asserts that, if the General Procuratura wished to exert pressure on Tokios Tokelės, it could have done so, since it held the power to reopen criminal cases. The Claimant repeated its submission that the repeated opening and closing of the criminal cases constitutes a violation of due process.

*2. The Raids of 17 – 20 June 2002*

81. Next, particular importance was attached by the Claimant to events occurring on 17 and 18 June 2002. Three certificates were issued by the Solomiansky Tax Service for an open-

ended investigation of Taki spravy for the years 1 January 1999 to 1 April 2002, and officers arrived at Taki spravy's premises to perform it. The visit ended in an impasse, and officers returned the next day accompanied by a tax militia carrying side arms. There was considerable noise and confusion, in the course of which Taki spravy summoned the local police. The incident died down without violence and the documents were seized and taken away. Taki spravy was permitted to make and retain a video record of the incident which the Tribunal has viewed.

*3. The Administrative Arrest of Taki Spravy's Assets*

82. Particular complaint is made about a full administrative arrest of the assets of Taki spravy, which appears was extended by one month as the result of a court order, and which is said to have created great difficulties for the running of its business. Taki spravy instituted court proceedings to invalidate the arresting order (Case No 11/148) but this was unsuccessful at first instance and on appeal.

*4. The Electoral Commission*

83. It will have been noted that in the Press Statement of 25 March 2002, the STA justified its investigations into Taki spravy on the additional ground that "…the Central Election Commission of Ukraine, as directed by current legislation, authorized the tax service to check information about violations of election legislation during the manufacture of printed production by the… 'Election Block of Yulia Tymoshenko'" In fact, no current or other election legislation empowered the Commission to confer such an authority, and the Claimant cites this as another example of State agencies riding roughshod over the rights of individuals to further a political aim.

*5. Proceedings in the Courts of Ukraine*

84. The Claimant occupies much of its lengthy rehearsal of the numerous individual complaints with accounts of acts done or omitted by the Courts of Ukraine and by the Procuratura. The chronological relationship of these to the more direct dealings of the State authorities can readily be understood from Annex B, and we shall not explore it in detail here. For the

moment it is sufficient to say that the Claimant's allegations in relation to the various court cases falls into two categories:

> Legal actions brought by the State agencies of Ukraine which allegedly were devoid of grounds and based on insufficient evidence and which were consequently dismissed by the courts; and
>
> Cases in which the executive agencies were allegedly able to exert pressure on judges to adopt decisions which were contrary to the facts and the law.

## G. THE CLAIMANT'S FORMULATION OF BREACHES

85. The Claimant contends that the events thus summarised were infringements of the following provisions of the Treaty:

> "*ARTICLE 2. PROMOTION AND PROTECTION OF INVESTMENTS*
>
> 2. *Investments of investors of either Contracting Party shall at all times enjoy full protection and security in the territory of the other Contracting Party".*
>
> *"ARTICLE 3. MOST-FAVOURED-NATION-TREATMENT*
>
> *1. Each Contracting Party shall in its territory accord to investments and returns of investors of the other contracting Party treatment which is fair and equitable and not less favourable than that which it accords to investments and returns of investors in any third State.*
>
> *2. Each Contracting Party shall in its territory accord to investors of the other Contracting Party, as regards management, maintenance, use, enjoyment or disposal of their investment which is fair and equitable and not less favourable than that which it accords to investors of any third State".*
>
> *[…]*
>
> *"ARTICLE 5. EXPROPRIATION*
>
> *1. Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereafter referred to as 'expropriation') in the territory of the other*

*Contracting Party except for a public purpose. The expropriation shall be carried out under due process of law, on a non-discriminatory basis and shall be accompanied by provisions for the payment of prompt, adequate and effective compensation. Such compensation for the benefit of an investor shall be equivalent to the market value of the investment expropriated immediately before expropriation or the impending expropriation became public knowledge. The compensation shall include interest calculated on the LIBOR basis from the date of expropriation, shall be made without delay, shall be effectively realizable and shall be freely transferable in freely convertible currency.*

…

*2. The provision of paragraph 1 of this Article shall also apply where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which investors of the other Contracting Party own shares".*

86. The Claimant contends that during the period 2002-2003 Ukraine committed the following violations of the applicable legal norms, in that it:

Failed to encourage and provide favourable conditions for the Claimant's investments in Ukraine;

Expropriated the Claimant's propriety rights in Taki spravy and adopted measures having an equivalent effect;

Failed to provide fair and equitable treatment as well as full protection and security;

Denied justice to Taki spravy;

Acted in bad faith by deliberately pursuing a campaign of superficially legal-seeming actions motivated by political considerations that aimed to inflict damage to Taki spravy with the eventual goal of destroying this enterprise's business activities; and

Violated Ukrainian law by failing to protect the Claimant's business investments, refrain from interfering in Taki spravy's business activities and failing to compensate for resulting damages.

## H. THE CASE FOR THE STATE OF UKRAINE

87. The factual case for the State is that although much of the Claimant's narrative is correct, so far as it goes, it does not go far enough, being so incomplete that it leads in entirely the wrong direction. What it omits, so the State maintains, is any account of what was being done by the tax authorities at and around the time in question, otherwise than in the shape of the Claimant's catalogue of events. According to the State, this information is supplied through written and oral evidence of Mr. Furlet and Mr. Vasyuk, backed by some significant contemporary documents.

88. What the State's evidence amounts to is this. It is wholly untrue that the tax officials' activities vis-à-vis Taki spravy were inspired by instructions from higher authority to make the Claimant's life uncomfortable in revenge for printing election materials (especially the brochure, "Unfulfilled Order"). The tax authorities had no interest in such materials, and indeed Mr. Furlet and his subordinates knew nothing about the brochure until one of them learned about it while on escort duties on the occasion of the visit of 14 February 2002. The State contends that it was not until 26 February 2002 that the brochure appeared in the investigation, and only then because it was furnished as an example of the kind of work done by Taki spravy.

89. The true background of the events in question, according to Mr. Furlet, was that from the latter part of the year 2001 the authorities were performing their allotted task of uncovering and rooting-out fiscal crimes effected through the medium of fictitious enterprises, with particular regard to a business named "Sound", and the related Case No 75-00029. This led to the discovery that the persons concerned had acquired Produkt BVO, of which Mr. V O Brodetsky (initials "BVO") was named in the registration documents as founder and manager. In the course of an interview with him on 14 February 2002 (the date of the first visit by the tax authorities to Taki spravy) Mr. Brodetsky claimed that he had formed the company at the request of an acquaintance, and soon after transferred the enterprise to the latter, and had never had anything to do with its activities. It transpired that during

November 2001 a bank account had been opened in the name of Produkt BVO with the Bank "Kyivska Rus". In order to follow up the information given by Mr. Brodetsky the investigators had seized materials and data from this Bank. These purported to show that the management of the enterprise and the right to use the account had been conferred on one S.S. Chemer, a person identified by the number of his passport – although Mr. Brodetsky had not (he said) appointed him.

90. Another item of information obtained from the Bank was that during the short lifetime of Produkt BVO's bank account, funds were credited to it from only two sources, Rembudproekt and another company ("Teslo"), and that funds had been transferred out to Taki spravy.

91. The State contends that, on this basis, the officials decided on 14 February 2002 that there were sufficient signs of fictitiousness to justify the extension of the enquiry to Rembudproekt, Teslo and Taki spravy, and accordingly signed notices to all three companies to produce documents relating to their dealings with Produkt BVO. Because of the late hour these were not sent until the following day, too late apparently to reach Taki spravy before two less senior officials arrived there to call for, and ultimately obtain, a few documents corresponding with the demand.

92. Further investigations in the course of the next few days revealed that Rembudproekt had received substantial funds from Taki spravy, ostensibly for printing services, and that funds had also flowed from Rembudproekt (as Mr. Furlet's statement expressed it) "returned through Produkt BVO to Taki spravy with the same purpose for printing services". Meanwhile, Mr. Chemer had been seeking to replace his passport, which he claimed to have lost, or had stolen from him, some time previously when he was working as a shop assistant. The tax officials now called him in for an interview and showed him the passport (or perhaps a copy of it) which had been used to open the bank account. According to a signed record of the interview he recognised the passport as the one which he had lost, except that his original photograph had been covered-up with that of someone else, whom he did not know.

93. The State argues that it was in these circumstances, and for these reasons, that the tax authorities decided that there were signs of involvement with fictitious enterprises in the

shape of Rembudproekt and Produkt BVO which justified the extension of the enquiry to Taki spravy, and the prosecution of Mr. Romanov, whom the tax authorities believed for good reason was the original owner and operator. The State argues that this decision was one of the outcomes of a long-running investigation which had begun before the election materials were published and was to continue until well after they had ceased to be of any practical interest. The impetus for the activities of the authorities was an honest perception based on reasonable grounds that there were matters which called for tenacious investigation, and this was their own perception not a cynical cover for spite.

94. As previously noted, the police and prosecuting authorities sought to eradicate and punish the kind of economic crimes which were doing so much damage to Ukraine at the time in question. The activities of the State authorities went no further than was justified, but in any event the remedy for the Claimants was to invoke the internal constitutional safeguards and remedies furnished by Ukrainian law. Complaints of the kind advanced in this arbitration are not concerned with investment protection and were never intended to be judged by the international norms, and rectified by the international remedies, of the ICSID/BIT system.

95. Not surprisingly, the Respondent did not rest content with this outright denial but sought to fall back on an alternative case, which addressed individual complaints or groups of them, by reference to the language of the Treaty. This in turn led to rebuttals by the Claimant, and ultimately to extensive written and oral evidence, examined meticulously in hundreds of pages of submissions. The outcome was complex and demanding set of issues. In its lengthy deliberations, the Tribunal has given all of these the closest attention, but takes this early opportunity to emphasise the importance of not allowing the central issue, of whether the Claimant has proved a breach of the Treaty by reason of the existence of a long-running, concerted and malicious campaign to punish Taki spravy for its association with the political opposition, to be swamped by a flood of detail. It has considered all of the multifarious arguments addressed, but will concentrate attention on those which it believes to be the most germane.

## I. JURISDICTION

96. It will be recalled that among the rulings made by the previous tribunal in the Decision on Jurisdiction was that "…the present dispute is within the jurisdiction of the Centre and the

competence of the Tribunal". It could have been thought that this would leave only the merits of the dispute to be considered at the present stage, but events have proved otherwise. The State has returned to the Tribunal with several objections to its jurisdiction. One of these was raised at the earlier stage, and rejected by the previous Tribunal. Two could have been raised on that occasion, but were not. The remainder are entirely new.

*1 Investment: Local Requirements*

97. The State relies on the requirement under Article 25 of the Convention that the dispute shall arise "directly out of an investment", and contends that the tangible assets of the two Taki spravy companies did not comply because the foreign investment notices corresponding to them were incomplete or insufficiently detailed.[113] The present Tribunal takes the same view of this argument as its predecessor. Certainly, if the assets had been touched in some way by illegality, or if their utilisation had been actively prohibited, the position might well have been different: *vide* the words—"…in accordance with the laws and regulations of the latter…" in Article 1 (1) of the Investment Treaty. But there was nothing of the sort here, and if the assets were in reality investments within the meaning of the Investment Treaty a failure to observe the bureaucratic formalities of the domestic law could not have caused their character to change.

98. The Tribunal notes that it could have dealt with the contention simply recording that by virtue of the treatment of the same point in the Decision on Jurisdiction the principles of *res judicata* and issue estoppel excluded any right to raise it again, but in the circumstances it has been thought right to reconsider the question, with the same result as before.

*2 Pre-existing Assets*

99. The Tribunal has had difficulty in understanding the next objection, advanced in Respondent's Post-Hearing Brief at paragraphs 11-19, but it seems to amount to this: There is a crucial difference between an asset which the national of the investing state already owns within the territory of the host state and the act of moving the asset into that territory. If this is what Ukraine is really saying it seems to pay no regard to the policy of the Investment Treaty read as a whole or to its structure which clearly distinguishes between the two different meanings of the word in the English language (which is the language version to which the present proceedings have been directed), namely to denote (a) a particular

[113] Respondent's Additional Objections to Jurisdiction at paragraphs 17-18.

species of asset and (b) the act of moving it into the territory of a particular state; and then, having made the distinction, goes on clearly to apply its relevant provisions to both.

100. We should add that there may be another possible aspect of this argument. Perhaps Ukraine is contending that after-acquired property cannot be an investment: i.e. that even if an asset is already an investment, money spent to modify, maintain or improve it is not. If this is indeed the argument, the Tribunal has no hesitation in rejecting it, for it has no foundation in logic, and runs entirely counter to the general policy of the Investment Treaty. Very clear words would be required to impose this limitation on the effect of the Treaty, and there are none.

*3 The Order of Events*

101. Next, there are two objections dependent on the fact that the first Request for Arbitration was made whilst the series of events in respect of which the claim is made had not yet come to an end: and indeed would not do so for three years and more.

102. The first objection turns on the six-month period prescribed by Article 8 of the Treaty for negotiations before a dispute could be referred to arbitration. This entails that when independent claims arising from independent events are referred to arbitration only those events which happened more than six months before the reference can be taken into account. For there cannot be negotiations without an existing dispute, and there cannot be a disputed claim without an existing claim; and there cannot be an existing claim without a current ground for claiming. Thus, so it is said, since arbitration was not invoked until 14 August 2002 only those events happening before 14 February 2002 could be relevant, and there are none.

103. There is a problem with this contention which might, if things had been different, have required the Tribunal to solve. Namely, whether the logic of the argument applies when the complaints relate to a single continuing course of conduct which began during the six months' moratorium, but were still in progress on and after the arbitration was invoked. In the event, however, no solution is required here, for 14 August 2002 is the wrong date from which to count back six months. The Request for Arbitration was then withdrawn, and was not put right until the second Request was filed on 22 November 2002, by which time the objection was academic.

104. The second argument on the order of events is more substantial, and raises an issue of consent. The theory of ICSID investor/state dispute resolution as a consensual process without privity is well-established, and need not be expounded at length here. Essentially, the concept is of three, progressively-narrowing fields of consent: the general consent, as between states, embodied in the Convention; the more specific consent between two or more states, created by individual investment treaties, limited to particular kinds of disputes arising from particular kinds of investor/state obligations; and the consent to refer individual disputes to arbitration, created by the choice of the investor to avail itself of the state's consent as manifested in the Convention and the investment treaty. The reference to arbitration expresses the investor's choice, and binds the investor and the state irrevocably to the resolution of the specified disputes by the ICSID dispute-resolution processes. But only those and not others, even if a wider reference would have been permitted by the investment treaty.

105. Invoking this well-established principle, Ukraine relies both on the Letter of Consent and on the Request for Arbitration. The former referred to acts by state bodies "committed in 2002", and the latter (which incorporated by reference the Letter of Consent) alleged that a series of investigations had begun in February 2002 (paragraph 3), and that in the year 2002 Ukraine had committed a series of wrongful acts (paragraph 12). Nothing could be clearer, so the State maintains. If the Claimant had intended to place before the Tribunal the whole of the episodes which might later ensue, nothing would have been simpler to say so, by using well-known expressions such as "…and continuing".

106. The Tribunal pauses to note that interesting as this argument (familiar in the context of party/party arbitration) may be from a theoretical point of view it is of little practical importance here. A glance at Annex B will show that even the proportion of events occurring after 31 December 2002 was small, and surely too small to have any significant impact on the outcome of the dispute. Nevertheless, the point is there and must be addressed, albeit briefly.

107. Two situations must be distinguished. First, if the claim had asserted a number of individual, discrete breaches of duty, each of them generating a separate cause of action, then it would seem that in principle an objection on the grounds suggested would be well-founded, for arbitration could not be invoked in respect of a claim until it had occurred and had become the subject of a dispute. On the other hand a *continuing* wrong generating a continuing cause of action would have been in existence, though not yet fully developed, at

any stage of the continuum of episodes (see, by way of analogy, Article 15 of the ILC Report on Responsibility of States for Internationally Wrongful Acts). Often, it is hard to know whether a cause of action is continuous or not, but in the present case the parties have provided a solution by the way they have shaped their propositions. As already shown, the Claimant's idea that the episodes were all part of a series lies at the heart of their case. So also for the State, whose response does not depend for its validity in principle on the establishment of a series but whose explanation of what happened necessarily rests in fact on the proposition that there was throughout an ongoing, though expanding, single investigation of linked financial misdeeds. Thus, in their different ways, the parties are at one in treating the consecutive events as a unity which can be treated as the subject of a dispute, and hence as a ground for invoking arbitration, even though it has not yet been fully consummated.

108. This conclusion accords with common sense and with the wording of the claim. Whilst the subjective intention of the party claiming arbitration cannot be relevant to the scope of the reference, for the circle of consent under the ICSID/BIT system is both closed and defined *for both parties* by the terms in which the claimant chooses to invoke the jurisdiction, a correct understanding of those terms must have regard to what the common sense of a particular intention would or would seem to have been. Here it is unlikely, whatever the words might seem to say, that the Claimant can have intended, and or could have been thought by those in charge on the side of the State to intend, that the enquiry should be terminated as at 31 December 2002, leaving the Claimant to begin, and the State to defend, a separate arbitration in respect of later events. On the contrary, since the cause of the dispute began in the year 2002, and was still in progress in that year when the Consent was given and the Request was made, the Tribunal considers it reasonable to understand the reference to the year 2002 as a means of identifying the continuing dispute, and not as a means of cutting short the dispute at the end of the year.

*4 The Transfer of Assets*

109. The Tribunal now turns to the last, and altogether most formidable, objection. This was not discussed in the Decision on Jurisdiction, and could not have been, since the relevant facts had not yet come into the open. It is now known that on 6 April 2002 Taki spravy transferred to TSII a substantial part of its assets, and indeed (the oral evidence would suggest) would have transferred them all but for inhibitions created by certain covenants as to retention of ownership. The Claimant has not given any explanation of this which the

Tribunal has been able to understand, or why it took place when it did. The fact that TSII had been incorporated some months previously, but had not so far performed any functions, suggests an element of pre-planning, but pre-planning for what is a matter of speculation. Still less has the Claimant given any explanation of why this potentially crucial fact was not disclosed when, two years later, the question of jurisdiction was before the previous Tribunal in the context of a claim for damages in which the status of the assets in the hands of TSII would obviously play a part. There was an early opportunity to do so, when the Letter of Consent and the first Request for Arbitration were submitted to the Centre. Instead, the Letter of Consent referred to ICSID jurisdiction over "the legal dispute which concerns a series of unfounded, illegitimate and unlawful acts by State bodies of Ukraine committed in 2002 against the Lithuanian subsidiary private enterprise 'Taki spravy', which is the repository of investments made in Ukraine by the CJSC 'Tokios Tokelės'": thus actively misleading the Centre and ultimately the Tribunal as first constituted. This is unacceptable conduct. For the moment, since the facts are now known, attention must be concentrated on how the transfer affects our jurisdiction over the claim.

110. For this purpose, we must distinguish between two elements of the claim as originally presented. The first was a claim by Tokios Tokelės as a claimant investor, through the medium of its local investment vehicle Taki spravy. The second was by Taki spravy in its own right as owner of the tangible and intangible assets of its business. As already stated, the latter was withdrawn as a party to the arbitration, so this second feature has disappeared, taking with it a number of issues arising from the fact that for much of the relevant period only some of the original assets belonged to Taki spravy. Although, in deference to the arguments addressed, the Tribunal has studied these questions, there would be no point in exploring them here, since a solution is not necessary to the resolution of the dispute. There are two linked reasons for this. The first is that once Taki spravy had transferred most of its assets to TSII their ownership was no longer of central importance. Thereafter, attention was focussed on the Claimant and the effect on its assets of any wrongs done to its subsidiary. Secondly, when we come to see what the injured or expropriated investment is said to have been, these questions may be recognised as immaterial. Reading once again the voluminous documents in which the Claimant sets out its case it can be seen that the heart of its complaint is that the State attacked the business of Taki spravy as a going concern, and thereby caused damage to the investor Tokios Tokelės, which had put money into that business; and that the attack took the shape of interfering with its operations, depreciating its goodwill, and putting unacceptable pressures on the company.

111. There is no word of complaint, and on the facts presented to us there could not have been, of any direct interference with the physical assets of the business. No destruction of machinery; no seizure of materials; no exclusion of staff from offices; no arrest of ships; and so on. The pressures on the printing enterprises are presented as personal, psychological and economic, not physical. This being so, the transfer of tangible assets from one subsidiary of Tokios Tokelės to another does not affect the findings in the Decision on Jurisdiction. At paragraphs 87 *et seq.* the Tribunal (as then constituted) dealt as follows with one of the State's objections to jurisdiction:

> "Third objection: The Dispute does Not Arise from the Investment.
> 87. In order for this Tribunal to have jurisdiction over a dispute, there must be an adequate nexus between the dispute and the Claimant's investment in the territory of the Contracting Party.
> 88. Article 25(1) of the ICSID Convention extends jurisdiction to any dispute 'arising directly out of an investment.' In order for the directness requirement to be satisfied, the dispute and investment must be 'reasonably closely connected.' As Professor Schreuer notes, 'disputes arising from ancillary or peripheral aspects of the investment operation are likely to give rise to the objection that they do not arise directly from the investment…'
> 89. Article 8 of the Ukraine-Lithuania BIT, in turn, provides that an investor in one Contracting Party may submit to arbitration a dispute 'in connection with' an investment in the territory of the other contracting Party. It may be held that the scope of the arbitrable disputes under the Treaty is broader than that contemplated by Article 25(1) of the Convention which refers to any 'dispute arising directly out of an investment.' Even if based only on the language of the Convention, however, the Respondent's contention is in any case bound to fail.
> 90. The Respondent argues that the present dispute does not 'arise directly out of an investment' because the allegedly wrongful acts by Ukrainian governmental authorities (including unwarranted and unreasonable investigations of the Claimant's business, unfounded judicial actions to invalidate the Claimant's contracts, and false, public accusations of illegal conduct by the Claimant) were not directed against the physical assets of the Claimant, *i.e.*, its facilities and equipment.
> 91. In this regard, the Respondent misapprehends the jurisdictional requirements of Article 25. For a dispute to arise directly out of an investment, the allegedly wrongful conduct of the government need not be directed against the physical

property of the investor. The requirement of directness is met if the dispute arises from the investment itself or the operations of its investment, as in the present case. The scope of this requirement was addressed by the first ICSID tribunal, *Holiday Inns S.A. v. Morocco*, which found jurisdiction over loan contracts that were separate but related to the investment agreement, emphasizing 'the general unity of an investment operation.'

92. Thus, the Respondent's obligations with respect to 'investment' relate not only to the physical property of Lithuanian investors but also to the business operations associated with that physical property. State's obligations with respect to 'property' and 'the use of property' are well established in international law. For example, the *Draft Convention on the International Responsibility of States for Injuries to Aliens*, defines a 'taking of property' to include 'not only an outright taking of property but also any such unreasonable interference with the use, enjoyment or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy or dispose of the property within a reasonable period of time after the inception of such interference.' Further, the Iran-U.S. Claims Tribunal found that '[a] deprivation or taking of property may occur under international law through interference by a state in the use of that property or with the enjoyment of its benefits'".

112. In the opinion of the Tribunal this pronouncement makes it a matter of issue estoppel, quite apart from its own independent conclusion, that damage to a physical asset does not form an essential ingredient of a claim under this Investment. This being so, it is hard to see why, when all the assets taken together comprise the totality of the Claimant's interests in the home State, it should make any difference precisely where the ownership of them is located: for it is the business of the Claimant which suffered the adverse consequences of whatever wrongs the State may have committed. For this reason we reject this objection, in common with the others, and will now proceed to consider the merits of the dispute.

## J. THE TRIBUNAL'S FINDINGS

113. Having set forth the arguments of the parties, we return to the central question of this dispute: why did the tax authorities take these actions against Taki spravy? Did the authorities initiate and carry out these actions to punish Taki spravy for producing campaign

materials for political opponents of the government, as Claimant alleges? Or did the authorities' investigation of fictitious enterprises with which Taki spravy had business relations naturally and justifiably lead them to investigate Taki spravy, as Respondent maintains?

114. There is evidence in the record that supports the argument of each Party. For Claimant, the timing of the State's actions against Taki spravy, which began just days after the company delivered campaign materials to BYT, is consistent with political motive. In addition, the tax authorities' public allegations that Taki spravy was suspected of crimes that those authorities had already decided not to pursue, or were not empowered to pursue, cast doubt on the legitimacy of the investigation. Further, the magnitude, character, and duration of the State's investigation, as well as, in certain respects, its manifest lack of factual or legal foundation, are also consistent with Claimant's argument. Finally, even allowing for differences among national criminal justice systems, it is difficult to reconcile the criminal proceeding against O. Danylov, which the State has opened and closed a total of five times, with general principles of due process.

115. On the other hand, there is evidence in the record that supports the State's position. That evidence indicates that the actions against Taki spravy were the result of an investigation of companies with which Taki spravy did business that began before Taki spravy produced materials for BYT. That evidence further indicates that these companies showed signs of being sham enterprises and that their dealings with Taki spravy was what led the tax authorities to investigate Taki spravy.

116. With this evidence in mind, we turn now to assess Claimant's allegations that the actions of the State constituted an expropriation of Claimant's investment and denied Claimant fair and equitable treatment and full protection and security.

## K. EXPROPRIATION

117. Among the causes of action relied upon by the Claimant on the basis of the Treaty is the prohibition against expropriation and the concurrent obligation to compensate for expropriation under Article 5 of theTreaty. In its ordinary usage this term often denotes the taking of property by the state for the use of the state, and overlaps to a considerable degree

the concept of "nationalisation", but in the context of investor/state dispute resolution it has been given a considerably wider meaning, by a solid line of jurisprudence: although whether it would have been wide enough to cover a claim such as the present may perhaps be debatable. This possibility need not, however, be explored for the Claimant also relies on the words "measures having effect equivalent to …expropriation", which are interpreted in the jurisprudence (as are the words "tantamount to expropriation") more widely still. In particular, the concept has emerged of "*creeping expropriation*" (an issue dealt with in particular by the Iran-United states Claims Tribunal) or "*measures having effect equivalent to expropriation*" or "*indirect expropriation*" (UNCTAD Paper on the "Taking of Property", 2000, p.4; OECD Working Paper on "Indirect Expropriation and the Right to Regulate in International Investment Law", September 2004).

118. Since the cases are familiar there is no need to rehearse them at length but a resumé may be useful as an illustration of the problems which face the Tribunal. The jurisprudence, including under the ICSID Convention, confirms that, differently from expropriation, "*measures having effect equivalent to expropriation*" are all those measures the effect of which is to deprive the investor of the control, benefit and economic use of its investment. An ICSID award to which also the Claimant has made reference, *Middle East Cement Shipping and Handling Co. S.A.* v. *Arab Republic of Egypt* (ARB/19/6), has clearly stated that:

> "When measures are taken by a State the effect of which is to deprive the investor of the use and benefit of his investment even though he may retain nominal ownership of the respective rights being the investment, the measures are often referred to as a 'creeping' or 'indirect' expropriation or, as in the BIT, as measures 'the effect of which is tantamount to expropriation'".[114]

119. In that case, the measure consisted in the *de facto* revocation of an import licence by the Egyptian authorities, the effect of which was to deprive the foreign investor of the right and ability to import into the country and sell there cement of a certain type. The license qualifying as an "investment" under the relevant BIT, it was held that the investor had been deprived by such measures of part of the value of its investment. Similarly, in the

[114] *Middle East Cement Shipping and Handling Co. S.A.* v. *Arab Republic of Egypt* (ARB/19/6), Award of 12 April 2002, at paragraph 108.

UNCITRAL case *CME (Netherlands)* v. *Czech Republic* based on a BIT, the Partial Award of 13 September 2001 found that an expropriation had occurred because the actions and omissions of the national Media Council had "*caused the destruction of the* [joint venture] *operations, leaving the* [joint venture] *as a company with assets but without business*" (paragraph 591). Other cases in the context of NAFTA have followed the same line of thinking. Thus, in the *Metalclad Corporation* v. *United Mexican States* the Tribunal has stated:

> "expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure of formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use of reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State".[115]

120. A critical factor in the analysis of an expropriation claim is the extent of harm caused by the government's actions. For any expropriation – direct or indirect – to occur, the state must deprive the investor of a "substantial" part of the value of the investment.[116] Although neither the relevant treaty text nor existing jurisprudence have clarified the precise degree of deprivation that will qualify as "substantial", one can reasonably infer that a diminution of 5% of the investment's value will not be enough for a finding of expropriation, while a diminution of 95% would likely be sufficient. The determination in any particular case of where along that continuum an expropriation has occurred will turn on the particular facts before the tribunal.

121. Moreover, the burden of demonstrating the impact of the state action indisputably rests on the Claimant. The principle of onus *probandi actori incumbit* – that a claimant bears the burden of proving its claims – is widely recognized in practice before international tribunals. The significance of this burden was stated effectively by the tribunal in *Asian Agricultural Products, Ltd. v. Sri Lanka* (ARB/87/3), which noted that:

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[115] *Metalclad v. United Mexican States*, ICSID (Additional Facility) Case No. ARB/AF/97/1, Award of August 30, 2000, at paragraph 103.

[116] *See Pope & Talbot, Inc. v. Government of Canada*, Interim Award, June 26, 2000, at paragraphs 96, 102; *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/08, Award, 12 May 2005, at paragraph 262; *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/00/3, Award, 30 April 2004, at paragraph 155.

> [a] Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency, of proof.[117]

122. In this case, the Claimant has simply failed to satisfy this burden. For example, the Claimant has not shown that the government agencies' various press announcements damaged its reputation or customer relationships to the point that it was unable to obtain any new orders. Similarly, the Claimant has not shown that the various police raids and investigations launched against it by Ukrainian authorities have significantly impaired its ability to operate. Further, the Claimant specifically acknowledged that TSII, to which Taki spravy transferred the bulk of its assets, was not harmed by the government's actions. It is conceivable that such continuous hostile treatment as that alleged by the Claimant could in some cases deprive an investor of a substantial portion of the value of his or her business. But the record before us supports no such finding. Without more extensive proof of harm from the Claimant, we must reject the claim of expropriation under Article 5 of the Treaty.

## L. PROOF OF A BREACH

### *1. Introduction*

#### *1.1 Proof*

123. A breach of Article 5 of the Treaty being thus rejected there remain claims under Articles 2 and 3 for denial of fair and equitable treatment and full protection and security. A sharp doctrinal controversy on the standards of protection demanded by these and similar expressions in investment treaties has created two divergent streams of authority, too well-known to require citation here. We do not enter into it now, since in our opinion it does not affect the outcome of the present dispute. For if it is decided that the Claimant has succeeded in proving a deliberate campaign to punish Taki spravy for its impertinence in printing materials opposed to the regime, or to expose Taki spravy as an example to others

[117] See *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, 6 ICSID Rev.-FILJ 526, 549 (1991) at paragraph 56 (quoting Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 329-31 (1953)). See also *Tradex Hellas S.A. v. Republic of Albania*, ICSID Case No. ARB/94/2, Award, 24 December 1996, 14 ICSID Review 197, 219 (1999) (paragraph 74) ("[It] can be considered as a general principle of international procedure – and probably also of virtually all national civil procedural laws -…that it is the claimant who has the burden of proof for the conditions required in the applicable substantive rules of law to establish the claim".).

who might be tempted to do the same, this must surely be the clearest infringement one could find of the provisions and aims of the Treaty, whatever precise standards those provisions might set. Conversely, if proof is absent, so that there remain only a number of disconnected incidents that were not politically motivated, the case for the Claimant, formulated as it has been throughout exclusively in terms of a nayizd, must fall away. This being so, we shall abstain from offering a view on the meaning of "fair and equitable treatment", "full protection and security" and the associated expressions, and will concentrate on the question whether Claimant has established, according to the appropriate standard of proof, that a nayizd can properly be inferred from facts, admitted or proved.

124. Equally, we shall not propose a solution for the current uncertainty about the standard of proof to be applied in a case such as the present. We emphasise the standard of proof, not the burden of proof, for there can be no doubt that the latter rests on the Claimant. As regards the standard, three possibilities have attracted support. First, the usual standard, which requires the party making an assertion to persuade the decision-maker that it is more likely than not to be true. Second, that where the dispute concerns an allegation against a person or body in high authority the burden may be lower, simply because direct proof is likely to be hard to find. Third, that in such a situation, the standard is higher than the balance of probabilities. As to these, the logic of the second appears questionable, for its consequence is that the person who makes the allegation may be entitled to succeed even if it is less likely than not that the allegation is true. Certainly, any sensible tribunal considering an allegation of this kind will recognise that the need to rely on circumstantial or secondary evidence does not necessarily tell against it, but this does not dispense with the need for evidence of one kind or another sufficient to take the proof over the barrier. As for the third possibility, which at the other extreme requires proof of more than the balance of probabilities where an allegation of gross misconduct is made against a highly placed person, here also there are serious logical problems. It surely cannot be the case that evidentiary requirements can be heightened purely on the grounds of deference or comity or otherwise. And if it is said that this is an example of the common-sense principle that an inherently unlikely allegation requires stronger than usual supporting evidence before it is accepted, contemporary experience shows how unrealistic it can be to assume that important persons will not behave badly. We make no assumptions of this kind, one way or the other, in the present case, and shall approach the issues on the basis that in order to prove its case on the existence and causal relevance of a nayizd the Claimant must show that its assertion is more likely than not to be true.

*1.2 "Admitted or Proved"*

125. We have referred to facts "admitted or proved" and now move on to an important aspect of this expression which can easily escape notice; namely, that although it has repeatedly been emphasised that there is little controversy about whether the events relied upon to found the inference of a nayizd did in fact happen this is only half of the picture, for there is no agreement at all about the character of the events. The Claimant's submissions are pervaded by descriptions such as "wrongful", "frivolous", "unfounded", "without adequate grounds", "patently unjust", "false" and so on. The cumulative effect of the events will obviously be infinitely stronger if these descriptions are accurate than if they are not. For a continuous course of *justified* pressure would say little if anything about the existence of a nayizd, or whether the events constituted a breach of the Treaty. Yet there has been no attempt, except in a few of the more important instances, to assess the extent to which the repeated demands made on the Claimant were soundly based; and indeed there hardly could have been, given the very large numbers of events so described. This being so, the most that the Tribunal can do is to take care not to take a broad view of the events as a whole, without taking for granted the Claimant's characterisations of them.

126. This problem is well illustrated by the complaints made against the courts and the Procuratura, which form a substantial proportion of the Claimant's allegations, particularly in respect of the latter part of the period in question. The common theme of these complaints is that in addition to officials in the various departments of the tax administration and the Electoral Commission the prime movers in the conspiracy had recruited judges and prosecutors to spend time and effort in breach of their professional ethics to join in persecuting Taki spravy for its impertinence in printing opposition publicity. This is not inherently incredible, for contemporary experience shows that betrayals of trust within a judicial system can and do happen; and we do not draw any inference adverse to the Claimant simply from the absence of direct evidence in support of the allegation, for this is just what one would suspect if it were true. But there still must be evidence of some kind in favour of the assertions that the legal proceedings were "frivolous", "patently unjust" etc…, before it is possible to rely on them when contemplating an inference that they were part of a widespread and long-running campaign motivated by spite and conducted in bad faith. The prosecution, conviction and sentence of Mr. Romanov, left undisturbed after two appeals, provides a conspicuous example. We are not sure whether it is part of the Claimant's case that Mr. Romanov was innocent, but it is more than once asserted that a

statement by him implicating Mr. Danylov was made under duress. This may be true, or it may not. But the Tribunal has no evidence beyond a statement by Mr. Romanov himself which the Tribunal has no means of testing, and his culpability remains unknown.

*1.3 Documents*

127. In a case which turns on appraisal of events which happened five years ago, and where in the nature of things many of them cannot be illuminated by direct oral evidence, a decision-maker is bound to lean heavily on contemporary documents. There is no shortage of these here, and the Claimant has made use of some of those created within the tax administration to show that its actions did not conform with the law: see paragraph 131, below. But there are serious problems with others, notably those which purport to record the commercial activities of persons and corporations (whether "fictitious" or not) at the time in question: for example, those summarised in paragraphs 89-91 above, in which Mr. Chemer's name features in one capacity or another. Yet in a record of his interview with the tax investigators he is reported as denying any knowledge at all of Produkt BVO, or participating in commercial activities of any kind. It is a striking feature that the contemporary documents seem to show Taki spravy dealing with Produkt BVO through a non-existent representative, and it is no surprise that the authorities pressed hard for further documentation. The Claimant has never furnished evidence about how these apparently anomalous documents came into existence, but exist they certainly did. So wherever the truth may lie, they form an important part of the picture when deciding on the justification for the authorities' conduct as part of the general picture.

*2. Individual Items*

*2.1 The Press Statement*

128. Although we have more than once emphasised the importance of avoiding too much immersion in detail something must be said about the individual episodes to which the Claimant has given particular weight. The most conspicuous is the Press Statement. Different countries have different traditions about the relationship between the media and public authorities, but if a government body is to use the media to circulate accusations of criminal conduct when public legal proceedings have not even started it should make some effort to get the facts right. This the tax authorities manifestly failed to do when they publicly described the activities of Taki spravy as money-laundering, an alleged offence that

the authorities had already decided did not warrant further investigation. It is disturbing that in their oral evidence the witnesses for the State made no attempt to explain how this mis-statement came to be made, how it came to be recognised as false, and why it was not corrected. The episode casts a shadow over the entire behaviour and standards of the tax authorities. At the same time, we must keep in mind that the present Tribunal is not appointed to perform a disciplinary function, or to conduct a review under the local administrative law. The question is whether the serious flaw in the Press Statement is evidence of conspiracy being put into effect. If the position had been that the publication of the Press Statement was entirely unprompted there might have been grounds for an affirmative answer. In reality, however, this was not the case. The document was a response to criticisms published on the website of the Bloc some days previously. It should have been more accurate, but we find it hard to perceive as part of a pre-planned course of conduct, initiated five weeks earlier, to wear down the Claimant by unsubstantiated allegations.

129. Moreover, if the authorities did have such a plan in view they adopted a strange way of putting it into effect. Whilst money-laundering and tax evasion are not the same, they are both economic crimes and are often found in association. If the author of the document had really set out to damage Taki spravy by alleging fictional crimes it is hard to see why he or she did not go the full distance and accuse the target of the conspiracy of both offences, rather than pick the one which the authorities never afterwards tried to sustain. Beyond this, we can go no further. We give full weight to the wrongful nature of the accusation, but cannot regard it as anything approaching decisive evidence of a conspiracy.

*2.2 Entry to Premises*

130. The next major complaint relates to the repeated entries of tax personnel into the premises of Taki spravy, of which the episodes of 18 and 20 June 2002 have demanded and received special attention. We recognise that excessive disturbances of privacy are always distressing, and the progressive removal of documents, escalating as it did from a mere handful at the outset to the virtual stripping of the company's records as time went on, is bound to have had a serious effect on the orderly conduct of its business. Uncomfortable echoes of former times must have added to the disquieting effects. But too much should not be made of this. Taking the incursions of June 2002 as the worst instance, it is striking that the State personnel not only permitted the office staff to make video recordings of what went on, but even to retain them for future use. This was hardly a feature to be expected in a

brutal and cynical affront on the rights of citizens. The Tribunal has in the event been able to view the recording, which though amateurish does give an impression of the general level of confrontation. It shows a scene of confusion, with much shouting and mill-around, but no personal violence. The manager was even allowed to telephone the local police force, who arrived and left again without appearing to achieve anything substantial. The militia officers wore protective upper garments and carried side arms, nothing in itself unusual in many countries of the world, but so as far as can be seen no weapons were produced, still less used. Nobody was hurt, and no damage done to the premises. The female members of staff who can be seen waiting for the episode to die down showed few signs of apprehension. All in all, this must have been an unpleasant experience, and not the only one, but in our view its significance should not be overstated – and of course, its significance for present purposes relates not to a claim against the tax authorities for an inordinate use of their investigatory powers, but to an allegation that they were using them as a disguise for an intimidation which had nothing to do with a genuine suspicion of economic misconduct.

*2.3 Failure to Set Out Grounds for Actions*

131. Reference to the tax officials' demands for the production of documents leads to a broader topic: namely, their repeated failure, clearly demonstrated by their own internal communications, to set out the information required by law to be set out in requisitions for authority to seize and search and in the formal written authorities themselves. Having little choice, Mr. Furlet accepted that this should not have happened, and attributed the failure to the fact that his department had inherited the forms from a previous administration, and had not had the opportunity to put them right. This is unimpressive, but even if it is evidence of laxity of administration, it is hard to see how it can have caused additional damage to Taki spravy. The question is whether these deficiencies are evidence of a pre-planned campaign. Surely not. Some of the documents in question were internal to the tax services, and cannot in themselves have put Taki spravy under pressure. As to the others, if the tax authorities were willing to lend themselves to a secret, dishonest and oppressive misuse of their power they would surely have taken the trouble to cover their tracks by making their paperwork look right. In our opinion, whilst the deficiencies do not show the authorities in a good light, we must remind ourselves that we are not conducting an administrative audit but are concerned to see whether the course of events justifies the inference of a nayizd. For this

purpose, although we take it into account with all the rest of the history, the complaint does not in our opinion carry the Claimant's case any great distance further.

*2.4 The Electoral Commission*

132. The Claimant criticises the statement in the Press Statement that the Central Election Commission "…governed by current legislation authorised the tax service to check information about violation of election legislation during the manufacture of printed production by the Election Block of political parties 'the Election block of Yulia Tymoshenko"'. This was another mis-statement, but it is no evidence of wrongdoing, still less of deliberate wrongdoing. The true state of affairs emerges from a handful of contemporary documents produced in evidence. These show that a candidate for an outlying constituency was voicing suspicions about who was financing the BYT's election materials. The Chairman of the Commission obviously thought it quicker to enquire from the tax services who were already looking into payments associated with these materials, rather than have his own staff spend valuable time on them. The Chairman did not "authorise" the tax authorities to do anything that they were not already doing. Perhaps the communication was not technically in order, and certainly the unknown author of the Press Statement should have taken trouble to state the facts accurately, but we cannot accept that this episode caused the least harm, or that it points in any way to the existence of a conspiracy to damage Taki spravy.

*2.5 The Events of 2005*

133. The twice-repeated discontinuance and revival of the criminal charges, which, as of December 2005, remain pending, create a poor impression and must have imposed a quite unnecessary strain on Mr. Danylov. More than three years after the event, the tax and prosecuting authorities ought to have made up their minds whether or not to pursue the criminal charges. Whether in truth this was the outcome of a difference of opinion between officials about the sufficiency of the evidence against Mr. Danylov, or whether it was part of an attempt to put pressure on Tokios Tokelės to settle an expensive ICSID arbitration, we are unable to say. The way in which the complaint was introduced into the arbitration coupled with the refusal of the State to respond to questions from the Tribunal[118] as to the legal justification of the criminal proceeding much less give access to its files has made it impracticable to explore the matter in any depth. We accept that a manifest and gross

[118] Hearing on the Merits, Transcript, Volume I, at 265:24 to 266:12, 171:20 to 172:1.

failure to comply with the elementary principles of justice in the conduct of criminal proceedings, when directed towards an investor in the operation of his investment, may be a breach, or an element in a breach, of an investment treaty, but we are unable to find that the events of 2005 were part of the alleged conspiracy, or evidence that one ever existed. The most we can say is that they are part of the general picture which must be looked at in its entirety when we come to decide what if any inferences can properly be made.

*3. The Complaints as a Whole*

134. Although we have warned against becoming lost in detail we have had no alternative but to treat these complaints individually, because of the special weight attached to them by the Claimant. We recognise however that this does less than justice to the Claimant's case, for it is the combined effect of all the complaints which is said to make the inference of a nayizd irresistible, and to elevate what might otherwise disparate items of maladministration into a single continuous breach of international law. Surely, the Claimant urges, this massive deployment of the machinery of State must have been aimed at more than the investigation of whether a single company was engaged in a middle-rank tax fraud. We learn from figures produced by the State itself how very many enterprises were being investigated and brought to justice for just such abuse of fictitious vehicles, and there seems no reason why such a striking amount of time and resources should have been devoted to only one of them. It cannot, so it is urged, have been a simple coincidence that the bureaucratic bombardment of Taki spravy began so soon after the lodging of documents hostile to the current regime. And at the end of the story, it must be something more than obstinacy on the part of officials which explains why a criminal prosecution, which bears all the marks of going nowhere, should still so long after the event be repeatedly brought to life. The whole picture is one of abnormal behaviour which cannot be explained except by the type of plan described in the passages quoted at the beginning of this Award (paragraphs 12-13).

135. We are fully alive to the strength of this case, but even when viewed in isolation it leaves important matters unexplained. Perhaps most strikingly, it is clear, once the hundreds of allegations are viewed, not as an undifferentiated bulk but in their chronological development, that their profile is not at all what would be expected if the Claimant's theory is valid. The latter could be expected to produce an immediate and intense burst of hostile activity, dying down quite rapidly once the election had terminated in favour of the existing regime, making pique and deterrence things of the past. But this is the opposite of what happened, as a glance at the Annexes to this Award will show. In fact the intensity of the

attack seems to have grown with time, rather than diminishing as past resentments were overtaken by current preoccupations. The likelihoods are also against the nayizd theory. Would the guilty persons in high places have taken the risk of promoting a campaign of injustice against the supporters of their political opponents, when within a very few weeks the outcome of the election might have installed those opponents in the high places themselves? And when Ms Tymoshenko came later to occupy an important position would it not have been natural for her to put a stop to the persecution of those who had performed services on behalf of her electoral campaign? Yet, according to the Claimant, it continued unabated. And why was only Taki spravy made the target, leaving both TSII and the other publishers of the Bloc's materials unmolested? These are among the unanswered questions.

*4. Conclusions*

136. Notwithstanding these grounds for scepticism, we might have regarded the issues as very finely balanced, if the existence of a nayizd had been the only feasible explanation of what took place. But this is not so. We have already summarized the account given by the State of the investigations which had begun at the end of the year 2001, and which by mid-February 2002 had already uncovered some highly suspicious circumstances. (supra, paragraphs 89 to 91). This account is corroborated by the contemporary documents, which are not alleged to have been fabricated, whatever the truth of their contents. On the basis of them there was every reason for the authorities to begin, and continue to press, an enquiry into the connection of Taki spravy with these dubious events. There is thus an entirely plausible alternative to the hypothesis of a nayizd. It is not for the State to prove that Taki spravy was guilty of economic offences, and the relevance of this material is simply to show that the Claimant is in error in asserting that the events have no credible alternative explanation other than a concerted, malicious and politically inspired campaign. Once this alternative is on the table it is in our opinion impossible to treat the existence of a nayizd as the most plausible explanation of the events which found the Claimant's case.

137. Ultimately, this long and costly dispute turns on a short question of inference. Having reflected with great care, giving full weight to the contrary opinion of our colleague, each of us has come to the firm conclusion that the case for the Claimant on this decisive issue is not made out, and we therefore join in dismissing all the causes of action asserted under the Treaty.

## M. APPLICABILITY OF UKRAINIAN LAW

138. In addition to the Treaty and international law, the Claimant relies on the provisions of Ukrainian legislation.

139. The issue of the law applicable to the present dispute has been dealt with by the parties in their written and oral submissions. The Claimant has contended that according to Article 42(1) of the ICSID Convention, the law of the state party to the dispute and the rules of international law are to be applied failing a choice by the parties. The Claimant further cites Article 8 of the Treaty, which provides that an investor may submit "any dispute" to ICSID arbitration, whether it is based on an alleged breach of the Treaty, the domestic law of the host state, or other applicable legal norm. The Respondent has replied that only the Treaty and international law are applicable to settle a dispute arising under the Treaty, the provisions of Ukrainian law serving only the purpose of elucidating the factual background of the case and the Claimant's claims.

140. The Tribunal shares the view expressed by the Annulment Committee in *Wena Hotels Ltd. v. Arab Republic of Egypt* that under Article 42(1), second sentence, "both legal orders… have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit".[119]

141. The Claimant relies on various provisions of Ukrainian law, specifically:

(1) those protecting foreign investments and investment activity (including provisions to be found in the Constitution), ensuring stable conditions for foreign investments and compensation to investors in case of expropriation or expropriation–like measures;

(2) those prescribing the observance by State's authorities of procedures, formalities and conditions for the validity of their acts (as in case of searches, seizures of documents or summons of witnesses); and

(3) those providing for items of damage additional to compensation which is due for expropriatory measures (such as moral damages, under Article 23 of the New Civil Code).

[119] *Wena Hotels Ltd. v. Arab Republic of Egypt,* Decision of February 5, 2002, 41 ILM 933 (2002), at 941.

142. Regarding Ukrainian provisions concerning protection of foreign investments, the Claimant itself recognizes the primacy of international agreements over domestic legislation in this field.[120]

143. Accordingly, the system of protection, guarantees and remedies provided by Ukrainian law with regard to foreign investments is in effect replaced *ratione materiae* by the substantive provisions of the Treaty and international law, to the extent the latter govern the same subject-matter.

144. The Claimant invoked the provisions referred to in paragraph 141(2) above in order to establish that the State's actions have had expropriatory effects or have resulted in the failure to provide fair and equitable treatment and full protection and security to the Claimant's investment in Ukraine.[121] According to the Claimant, those were the effects of the actions by the Ukraine's government and it is on this basis that it has claimed compensation in these proceedings. We thus have taken into consideration the provisions in paragraph 141(2) when examining whether the State's actions breached the Treaty.

145. Finally, a majority of the Tribunal having found that no treaty breach was committed by the State, Ukrainian law provisions regarding damages referred to in paragraph 141(3) above are of no avail.

## N. COSTS

146. The Tribunal reviewed the entire conduct of the parties in this matter in order to consider whether it should make any special order as to the allocation between them of a) the legal costs and expenses of each party and b) the "Cost of Proceedings" referred to in Chapter VI of the Convention, and has determined that it should not. Accordingly, each side must bear its own legal costs and expenses. The costs of the proceedings shall be borne as to one-half by each party.

[120] Claimant's Memorial on the Merits at paragraph 322.
[121] *See, e.g.*, Claimant's Memorial on the Merits at paragraph 324.

## O. ORDERS OF THE TRIBUNAL

147. The Tribunal orders as follows:-

(1) The objections by the Respondent to the jurisdiction of the Tribunal are dismissed.

(2) The claim of the Claimant for breach of Article 5 of the Treaty is dismissed.

(3) (By a majority). The claims of the Claimant for breach of Articles 2 and 3 of the Treaty are dismissed.

(4) (a) Each party shall bear its own legal costs and expenses; and

(b) Each party shall contribute one half of the Costs of Proceedings.

* * *

148. In conclusion all members of the Tribunal wish to express their earnest thanks to the Staff of the Secretariat for their sustained endeavours throughout these lengthy proceedings.

_____/signed/_____
Lord Mustill
President of the Tribunal
Date: 29 June 2007

_____/signed/_____
Professor Piero Bernardini
Arbitrator
Date: June 29, 2007

_____/signed/_____
Mr. Daniel M. Price
Arbitrator
Date: 29 June 2007
Dissenting

**TOKIOS TOKELĖS v. UKRAINE**

**ANNEX A**

**ANALYSIS OF CLAIMANT'S FACTUAL ALLEGATIONS**

## 1. Actions by Solomiansky Tax Police

| Date | Allegation |
|---|---|
| 14/02/02 | Director of Solomiansky Tax Police (Wolodomyr Furlet) requested that Taki spravy ("TS1") provide "verified copies of documents which reflect the financial-economic interrelations with the enterprise 'Produkt BVO' for the entire period of activity." |
| 18/02/02 | Furlet sent letter to Oleksandr Danylov ("OD") stating that Produkt BVO has "signs of fictitiousness" and requesting that TS1 speed up the production of documents previously requested. TS1 responded to this request on 19/02/02. |
| 21/02/02 | Deputy Chief of Investigative Department (Yu. O. Zayets) signed "Warrant of Seizure" from TS1 of documents reflecting the financial-economic relationship with Produkt BVO as well as other documents. |
| 26/02/02 | Negotiations between OD and Furlet. Furlet authorised an additional investigation of TS1 as to reports, accounting ledgers and other documents relating to Produkt BVO. |
| 11/03/02 | Negotiations between OD and Furlet. Furlet suggested that OD attest in writing that TS1 had received cash payments for orders placed with TS1 on behalf of Bloc of Yulia Tymoshenko. |
| 12/03/02 | Furlet forwarded letter to OD explaining that investigations of TS1 were being conducted in connection with criminal case initiated against the management of Produkt BVO. |
| 13/03/02 | Furlet authorised inspection of TS1 regarding its "mutual settlements" with Rembudproekt. |
| 28/03/02 | Zayets initiated criminal case against Valentyn Romanov, Director of Rembudproekt, for evasion of taxes and falsification and use of documents. Joined to Criminal Case No. 79-00011. |
| 30/05/02 | Negotiations between Serhiy Danylov ("SD") and Furlet. Furlet indicated "the desire by his superiors and himself to show that Yulia Tymoshenko exceeded the amount of expenses established for the elections and to annul the results of the elections." |
| 18/06/02 | At least four members of tax police, armed and in bullet proof vests, accompanied STS in its attempted investigation of the premises of TS1. |
| 29/07/02 | Further negotiations between SD and Furlet. Furlet proposed that SD provide false testimony against an official representative of the Bloc of Yulia Tymoshenko. |
| 15/08/02 | Third set of negotiations between SD and Furlet. Furlet again proposed that SD should provide false testimony. |

## 2. Actions by Solomiansky Tax Service

| Date | Allegation |
|---|---|
| 14/02/02 | Dispatched two workers to offices of TS1 as part of "non-planned investigation of money documents, accounting books…and other documents connected with the calculation and payment of taxes…" |
| 14/02/02 | Director of Department of Document Investigations of Revenue Tax from Salaries signed a "list of questions which are to be investigated" at TS1. |
| 22/02/02 | Representatives of STS conducted search of premises of TS1 and seized a number of documents. |
| 26/02/02 | Representatives of STS authorized and carried out a warrant of seizure of documents from TS1. Also conducted search of premises of TS1. |
| 05/03/02 | Representatives of STS conducted a search of premises of TS1 and seized a number of documents. |
| 13/03/02 | STS initiated Criminal Case No. 79-00011, alleging large scale evasion of taxes in by managers of Rembudproekt. Issued warrant of seizure of documents reflecting the financial-economic relations with Rembudproekt. Conducted seizure of documents. |
| 15/03/02 | STS authorised further seizure of documents relating to Rembudproekt. Seizure conducted. |
| 05/04/02 | STS adopted Decision authorizing seizure from TS of documents relating to "Agenstvo Alfa" which had rendered payment for an order placed with TS1 by Produkt BVO. |
| 16/04/02 | STS requested that TS1 provide information regarding its employees, including home addresses and home telephone numbers. Also inquired of TS1 whether a certain number and type of printing operations could have been performed on equipment operated by TS1 during the period 01/01/01 to 01/04/02. |
| 13/05/02 | STS issued two "Tax Notices-Decisions", on the basis of the 7 May 2002 Act of Investigation, demanding payment from TS1 and threatening the sale of TS1's assets in the event of non-compliance. |

| Date | Allegation |
|---|---|
| 14/05/02 | STS initiated Criminal Case No. 79-00032 against OD for tax evasion. |
| 30/05/02 | Summons issued to SD requiring him to give evidence in Criminal Case No. 7900032. |
| 31/05/02 | Summons issued to Halyna Rozora, to give evidence in Criminal Case No. 7900032. |
| 12/06/02 | STS issued Summons to OD. He was not in Ukraine at the time and consequently did not appear. |
| 17/06/02 | STS issued 3 certificates to tax officials for the conducting of an open-ended investigation of TS1 for the period from 1999 to April 2002. These officials visited TS1 to conduct the tax investigation. After attempts by TS1's management to ascertain the grounds for the investigation, the investigation was postponed until the following day. |
| 18/06/02 | STS arrived at TS1's premises. Incident video-taped. |
| 20/06/02 | STS compiled a "Protocol of a description of the assets of the tax payer which have been placed under administrative arrest". |
| 02/07/02 | STS replied to TS's appeal against the decision suspending the proceedings in Case No. 11/134. |
| 03/07/02 | STS adopted "Decree on the Indictment of the Accused" in relation to Romanov and OD. |
| 10/07/02 | STS responded to TS1's complaint by claiming that it had not violated established procedures during the investigations of TS. |
| 22/07/02 | STS seized a large number of documents and a computer from TS1. |
| 23/07/02 | STS returned to TS1 and seized additional documents. |
| 23/07/02 | STS issued a "First Tax Demand" for the payment of 1,375,208.29 UAH as allegedly unpaid taxes, penalties and financial sanctions. |
| 05/08/02 | STS conducted an additional seizure of documents from TS1. |
| 07/08/02 | STS issued "Second Tax Demand" and continued its seizure of documents from TS1. |
| 08/08/02 | STS issued Summonses to various officers of TS1 to appear as witnesses. |
| 09/08/02 | STS continued its seizure of documents from TS1. |
| 12/08/02 | STS conducted an additional seizure of documents from TS1. |
| 03/09/02 | STS informed TS1 that First and Second Tax Demands had been sent mistakenly. |
| 11/09/02 | STS repeated that the two Tax Demands should be considered invalid. |
| 18/09/02 | STS conducted seizure of documents from TS1. |
| 20/09/02 | STS adopted decision to conduct another seizure of documents from TS1. |
| 04/10/02 | STS conducted a seizure of documents from TS1, comprising employee travel documents. |
| 11/10/02 | STS responded to TS1's claim for damages from publications which mentioned an alleged tax debt by TS1. |
| 16/10/02 | STS conducted another seizure of documents from TS1. |
| 18/10/02 | STS sent enquiry to TS1 for detailed information regarding the company's internal policies of accounting and other record keeping. |
| 21/10/02 | STS requested from TS1 "copies of documents of invalids who work at the enterprise", average lists of the numbers of workers and a list of debtors and creditors on certain dates. |
| 22/10/02 | STS seized additional documents from TS1. |
| 23/10/02 | STS issued Summonses to Halyna Rozora, and another, to appear as witnesses in Criminal Case No. 79-00032. |
| 24/10/02 | STS issued another Summons to Rozora to appear in Criminal Case No. 79-00032. |
| 25/10/02 | STS issued Summons to a former founder of TS1 to appear as a witness in Criminal Case No. 79-00032. |
| 29/10/02 | STS adopted decision to seize additional documents from TS1. |
| 05/11/02 | STS refused to return documentation submitted by TS1 as attachments to TS1's request for certification of a notice of foreign investment. |
| 07/11/02 | STS conducted a seizure of documents from the premises of TS1. |
| 04/02/03 | STS demanded that TS1 provide documents concerning its business relations with "The Publisher Palitra Druku". |
| 14/03/03 | STS demanded that TS1 provide documents concerning business relations with Palitra Druku. |
| 28/03/02 | STS submitted to TS1 a copy of an "Act on the Results of a Documentary Investigation of Adherence to the Requirements of Tax and Currency Legislation." |
| 03/04/03 | STS submitted to TS1 four Tax Notices-Decisions, requiring payment of 7,696,335.44 UAH in allegedly unpaid taxes. |
| 09/06/03 | STS filed its response to TS1's complaint in Case No. 23/353. |
| 22/10/03 | STS submitted to TS1 a Notice claiming unpaid taxes in the amount of 596,538.18 UAH. |
| 15/12/03 | STS submitted to TS1 a Notice claiming unpaid taxes in the amount of 604,492.93 UAH. |
| 28/01/04 | STS submitted to TS1 a Notice claiming unpaid taxes in the amount of 553,809.99 UAH. |
| 28/01/04 | STS submitted to TS1 a Notice claiming unpaid taxes in the amount of 556,787.81 UAH. |
| 03/02/04 | STS requested information regarding the annual income of Halyna Rozora. |

### 3. Actions by the State Tax Administration of Ukraine (STA)

| Date | Allegation |
|---|---|
| 25/03/02 | Press Service issued "Declaration" which accused TS1 of money laundering, fraud and other illegal activity. Accused of receiving money from "fictitious enterprise" Produkt BVO. STA ordered local tax services to provide urgent coverage of this statement in regional mass media. |
| 19/07/02 | STA responded to complaint by TS1, claiming that investigations of TS1 were in conformity with the legislation. |
| 22/07/02 | STA responded to the open letter by employees of TS1 of 21 June 2002, supporting the legality of the administrative arrest of the assets of TS1. Also responded to complaint by TS1 by asserting that tax officials had not committed any violations in their investigation of an unspecified criminal case. |
| 24/07/02 | In response to TS1's complaint, STA asserted that the tax service had committed no violations in its actions against TS1. |
| 27/11/02 | Press Service of STA published press release entitled "Taki spravy – Criminal Affairs" which accused TS1 of conspiracy, tax evasion, dishonesty and illegal turn-over. |
| 16/01/03 | Press Service of STA issued a press release accusing TS1 of conspiracy and tax evasion in large amounts. |

### 4. Actions by Kiev State Tax Administration (KSTA)

| Date | Allegation |
|---|---|
| 04/04/02 | KSTA submitted complaint against Produkt BVO and TS1 to Economic Court of Kiev, alleging evasion of taxes and concluding a contract with the goal of conflicting with the interests of the state. |
| 08/04/02 | KSTA addressed separate letters to three clients of TS1 requesting them to provide all financial-economic documents which confirm mutual payments with TS1 from 31/01/01. |
| 19/04/02 | KSTA requested that TS1 provide documents confirming mutual payments with Rembudproekt for the period from 01/01/01 to the present day. Also authorized an investigation of documents belonging to TS1. |
| 07/05/02 | KSTA issued "Act on the results of an investigation of [TS1] on questions of adherence to the demands of tax legislation as to the interrelations with Rembudproekt…" Concluded that TS1 had unfoundedly included a sum in its gross expenses and had failed to pay the full amount of taxes. |
| 14/05/02 | KSTA rejected objections submitted by TS1 to the 7 May 2002 Act of Investigation. |
| 06/06/02 | KSTA issued "Notice for the conducting of a documentary investigation" of TS1 on the question of adherence to tax and currency legislation for the period from 1999 to 01/04/02. KSTA issued 3 certifications to tax service officials for the conducting of an open-ended investigation of TS1 for the period from 1999 to April 2002. |
| 11//06/02 | KSTA requested the court in Case No. 11/134 to halt the proceedings based on criminal cases against Romanov and OD. |
| 20/06/02 | KSTA adopted a "Decision on the implementation of the administrative arrest of the assets of a tax payer", thereby imposing the "full administrative arrest of the assets of [TS1]". |
| 25/06/02 | KSTA submitted its request to the Kiev Economic Court that the arrest of assets be extended for an additional 90 days. |
| 02/07/02 | KSTA wrote to TS1 requesting the submission of documents for use in an investigation in Criminal Case No. 79-00032. |
| 12/07/02 | KSTA responded to TS1's complaint by claiming that no violations had been permitted during investigations of TS1. |
| 26/07/02 | KSTA lifted the arrest of TS1's bank accounts. |
| 06/08/02 | KSTA submitted its reply in Case No. 11/148, in which TS1 sought the invalidation of the tax service's arrest of its assets. |
| 06/08/02 | STA in Kiev claimed that the tax service had taken into account appeals by TS1 as to the administrative arrest of its assets and did not violate any laws as to a newspaper publication. |

### 5. Actions by State Tax Administration in the Dnipropetrovsk Oblast (DOSTA)

| Date | Allegation |
|---|---|
| 10/04/02 | DOSTA wrote to two companies, "Media Brief" and "Color Hand", informing them that an investigation of their business relations with TS1 would be conducted. Issued authorization for an investigation of "Color Hand". |

### 6. Actions by Kiev Economic Court

| Date | Allegation |
|---|---|
| 09/04/02 | KSTA directed by the Court to provide the Court with documents in support of its complaint brought on 04/04/02. |
| 29/04/02 | Court adopted decision in Case No. 21/125 in which it was claimed that TS1 had not appeared at the hearing. |
| 17/05/02 | Court rejected TS1's submission for recusal of judge in Case No. 21/125. |
| 20/05/02 | Court delivered decision in Case No. 21/125, rejecting all the demands of the KSTA on the basis of lack of evidence. |
| 31/05/02 | Court acceded to TS1's request for preventative measures in Case No. 11/134 (in which TS1 suing to recognise as invalid the Tax Notices-Decisions issued by the STS on 13 May 2002.) |
| 11/06/02 | Court halted the proceedings in Case No. 11/134, following the petition from KSTA. |
| 27/06/02 | Court issued decision in Case No. 21/246, extending the arrest of assets of TS1 for an additional 720 hours. |
| 15/08/02 | Court issued its Decision in Case No 11/148, in which it denied relief for TS1. |
| 11/09/02 | Court halted proceedings in Case No 29/266, as requested by the STS. |
| 15/01/03 | Court renewed the proceedings in Case No. 10/399. |
| 08/07/03 | Court rejected Tokios Tokelės ("TT")'s demand that Case No. 11/148 be halted on the basis of ICSID's exclusive jurisdiction. |

### 7. Actions by Kiev Appellate Economic Court

| Date | Allegation |
|---|---|
| 23/07/02 | Adopted decision in Case No. 11/134 rejecting an appeal of the lower court's decision to halt the proceedings due to the proceedings in Criminal Cases No. 79-00032 and 79-00011. |
| 20/12/02 | Court denied an appeal filed by TS1 in Case No. 11/148. |

### 8. Actions by Higher Economic Court of Ukraine

| Date | Allegation |
|---|---|
| 20/08/02 | Decision in Case No. 02-2-25/5178 annulling a lower court decision refusing to review the complaint. |
| 17/12/02 | Court satisfied cassation appeal from the General Procuratura. |
| 11/03/02 | Court accepted for review an appeal by TS1 in Case No. 11/148. |
| 30/05/03 | Court adopted decision to remand Case No 11/148 for review *de novo* |

### 9. Actions by Kiev Appellate Court

| Date | Allegation |
|---|---|
| 21/01/03 | Adopted decision amending lower court's decision which sentenced Romanov and found OD guilty by excluding references to a prior conspiracy between Romanov and OD. |

### 10. Actions by Solomiansky District Court

| Date | Allegation |
|---|---|
| 02/07/02 | Court rejected complaint by SD as to the illegal actions of state officials due to lack of jurisdiction. |
| 29/08/02 | Court forwarded the complaint by TS1 of 23 August 2002 to Solomiansky Tax Police for review on the merits. |
| 25/10/02 | Court rejected request that material evidence be accepted for review in the criminal court case against Romanov. |
| 07/11/02 | Court issued guilty verdict against Romanov in Criminal Case No. 79-00011, sentencing him to 6 years and 6 months in prison. |
| 02/12/02 | Court returned the complaint filed by SD as lacking in jurisdiction. |
| 09/12/02 | Court returned complaint filed by SD as lacking in jurisdiction. |

**11. Actions by Supreme Court of Ukraine**

| Date | Allegation |
|---|---|
| 03/01/03 | Court rejected TS1's cassation appeal in Case No. 02-20-25/5178. |
| 02/06/03 | Court rejected in its entirety the appeal filed in the Romanov case. |

**12. Actions by General Procuratura of Ukraine**

| Date | Allegation |
|---|---|
| 07/05/02 | General Procuratura passed on TS1's complaint to Procuratora of City of Kiev. |
| 07/05/02 | Submitted a claim to Kiev Economic Court against Rembudproekt and TS1 asking the court to recognise as invalid the contracts concluded between them, and to "draw down to the revenue of the State" all the monies received under these contracts. |
| 17/06/02 | General Procuratura appealed decision from Kiev Economic Court of 30 May 2002, which returned, without review, the above complaint. |
| 09/07/02 | General Procuratura passed on a complaint by TT for review by the Kiev City Procuratura. |
| 16/07/02 | General Procuratura issued a cassation appeal to the Higher Economic Court of Ukraine regarding the Kiev Appellate Economic Court's Decision of 15/07/02. |
| 17/07/03 | General Procuratura passed on complaint by TS1 to Kiev City Procuratura. |
| 21/08/02 | General Procuratura responded to complaints by TS1, stating that no infringements of the law of criminal procedure have been discovered in the actions of the Tax Police officials. |
| 04/11/02 | General Procuratura submitted a cassation appeal in Case No. 10/399. |

**13. Actions by Procuratura of City of Kiev**

| Date | Allegation |
|---|---|
| 14/05/02 | Procuratura of City of Kiev passed on TS1's complaint to the Procurator in the Solomiansky district of Kiev. |
| 06/06/02 | Responded to TS1's complaint by denying any violations by the tax service in the repeated investigations of TS1 and in the publications regarding TS1. |
| 02/08/02 | Responded to complaint addressed by TS1 to members of Parliament, stating that "Violations…were not uncovered by the Procuratura of the city". |
| 15/08/02 | Kiev City Procuratura responded to complaint made by TT to General Procuratura, denying any wrongdoing by state officials during investigations, searches and seizures at TS1. |
| 07/10/02 | Kiev City Procuratura responded to TS1's complaints referred through members of Parliament, stating that it had uncovered no violations by tax officials. |

**14. Actions by Solomiansky District Procuratura**

| Date | Allegation |
|---|---|
| 24/05/02 | Solomiansky Procurator passed on TS1's complaint to the Investigative Section of the District Department of Tax Police. |
| 20/08/02 | Responded to complaint by TS1 by stating that the grounds for the Procuratura's reaction were not established. |

**15. Actions by Administration of President of Ukraine**

| Date | Allegation |
|---|---|
| 16/07/02 | Passed on for review by the STA, a complaint submitted by TS1 as to actions by the tax service. |
| 19/07/02 | Notified TS1 that its complaint against the tax service was being forwarded for review to the STA. |
| 20/11/02 | Responded to complaint by TS1 from 8 November 2002 by listing the hours of the Administration's personal reception. |

### 16. Actions by Ukraine's Ministry of Justice

| Date | Allegation |
|---|---|
| 30/07/02 | Forwarded letter to the Lithuanian Embassy in Ukraine, setting out its assessment of Ukraine's investment protection regime, indemnification provisions and investment dispute resolution provisions. |

### 17. Miscellaneous

| Date | Allegation |
|---|---|
| 11/04/02 | OD told by a "highly placed tax official", Yosyp Buchynsky, that "the tax service is after [TS1] very strongly." |
| 19/09/02 | Romanov signed "Complaint" in which he claimed that he had been physically abused while held in detention and coerced into making accusations against OD. |
| 23/09/02 | TS1 received phone call from Solomiansky Administration inquiring about salary arrears at the company. |
| 06/11/02 | OD submitted a request for the granting of the status of refugee in the Lithuanian Republic. |
| 22/11/02 | Romanov's lawyers submitted an appeal of the verdict and sentence passed on Romanov. |
| 25/11/02 | The car being driven by SD was hit by a car belonging to the State Treasury. |
| 10/01/03 | TS1 informed that STS responsible for information published regarding TS1 on 28 December 2002 in the "RIO" newspaper. |
| 25/01/03 | Newspaper article describing Romanov's conviction and making reference to OD. |
| 13/05/03 | Migration Dept. of Ministry of Internal Affairs of Lithuania issued a Decision on Granting Refugee Status to OD. |
| 04/10/04 | The Director of Palita Druku explained that his company had been investigated by the tax service in October 2002, because of its business relations with TS1. The tax service had alleged a tax debt by Palitra Druku and the Director was threatened by local tax officials, summoned and detained by the local Procurator. A fine of 1,700 UAH was imposed on Palitra Druku. |

### 18. Actions by TS1

| Date | Allegation |
|---|---|
| 22/04/02 | TS1 submitted complaint to General Procuratura of Ukraine, the Administration of the President of Ukraine and the Parliament, alleging violations of Ukrainian law during the multiple investigations, searches and seizures and the publications by the tax authorities. |
| 26/04/02 | TS1 responded to request for information about employees by pointing out that this would violate the confidentiality of its employees. |
| 29/04/02 | TS1 issued response to KSTA's claim before the Kiev Economic Court. |
| 13/05/02 | TS1 submitted its Objections to the Act of 7 May 2002, denying the allegations against TS1. |
| 20/05/02 | TS1 appealed to President Leonid Kuchma to intercede in the disputes between TS1 and the state agencies of Ukraine. |
| 21/05/02 | TS1 submitted complaint (Case No. 11/134) to Kiev Economic Court requesting that the two Tax Notices Decisions of 13/05/02 be recognised as invalid on the basis of lack of evidence. |
| 10/06/02 | TS1 requested clarifications from the tax service regarding the investigation initiated by the certificates issued by KSTA on 06/06/02. |
| 12/06/02 | Ludmilla Zhyltsova, a shareholder of TT, addressed request to the STA and the General Procuratura for an explanation of the "concrete and specific evidence (if such exist) of violations of law on the part of our subsidiary". |
| 18/06/02 | TS1 appealed the decision to suspend Case No. 11/134. |
| 18/06/02 | TS1 addressed letters to clients asking for their understanding in the circumstances. |
| 19/06/02 | TS1 notified city government that employees and their families would picket the building of the Kiev city tax service on 28 June 2002. The demonstration was held as planned. |
| 21/06/02 | TS submitted complaint to Kiev Economic Court requesting that the tax service's decision to place its assets under administrative arrest be recognized as invalid. Also filed complaint with Kiev Economic Court seeking to overturn the tax service's decision. TS asserted that the decision was taken without proper grounds. |
| 21/06/02 | Employees of TS and their families adopted an open letter addressed to the President of Ukraine, the mayor of Kiev, the heads of the Economic Court of Kiev and the State Tax Administration. |

| Date | Allegation |
|---|---|
| 25/06/02 | TS1 submitted its reply to request by KSTA to the Kiev Economic Court, that the arrest of assets be extended. |
| 27/06/02 | SD submitted complaint to Solomiansky District Court in relation to allegedly illegal actions by tax officials. |
| 05/07/02 | TS1 appealed to the Appellate Economic Court against the lower court's decision to extend the administrative arrest of assets in Case No. 21/246. |
| 10/07/02 | TS1 appealed to the Chairman of the State Tax Administration, complaining of illegal actions by tax officials and the administrative arrest imposed on TS1's assets. |
| 15/07/02 | TS1 submitted its reply to General Procuratura's appeal against decision of 30 May 2002, refusing review of suit brought against TS1. TS1 also submitted its response to request for documentation from KSTA of 02/07/02. |
| 19/07/02 | TS1 submitted complaint to the Solomiansky Procurator alleging illegal actions by state officials. |
| 22/07/02 | TS1 submitted a "Declaration" to the Solomiansky Procurator asking for the latter's personal intervention, in particular as regards the decision by STS to seize all documentation from TS1 in its entirety, for the period 2000-2001. |
| 06/08/02 | TS1 submitted amendments to its claim in Case No. 11/148. |
| 12/08/02 | TS1 submitted an "Addendum to the Claim" in Case No. 11/148. |
| 19/08/02 | TS1 submitted complaint to the Kiev City Economic Court requesting that the Tax Notices-Decisions from 23 July 2002 and 7 August 2002 against TS1 should be invalidated. |
| 20/08/02 | TS1 responded to the General Procuratura's cassation appeal in Case No. 02-2-25/5178. |
| 23/08/02 | TS1 addressed a "Declaration" to the Solomiansky District Court and the Solomiansky Procuratura with a request that a criminal case be opened against STS officials for abuse of power. |
| 30/08/02 | TS1 appealed the Kiev Economic Court's refusal to review its complaint against the arrest of its assets. |
| 04/09/02 | TS1 submitted a cassation appeal to the Supreme Court of Ukraine in Case No. 02-2-25/5178. |
| 09/09/02 | TS1 addressed letter to Romanov's lawyers, attaching samples of production sub-contracted to Rembudproekt by TS1, for use in Romanov's trial. |
| 11/09/02 | TS1 submitted "Additions" to its complaint regarding the Tax Notices-Decisions. |
| 18/09/02 | TS1 submitted claim to STS for damages resulting from the two Tax Demands. |
| 30/09/02 | TS1 submitted a Reply to the claim by STS in Case No. 10/399. |
| 01/10/02 | TS1 petitioned the Court in Case No. 10/399 to suspend the proceedings in favour of criminal cases regarding the same subject matter. Court subsequently suspended the proceedings. |
| 03/10/02 | TS1 submitted its response in Case No. 10/399. |
| 09/10/02 | TS1 provided additional documents to STS, relating to pollution, emissions and funds advances at TS1. |
| 07/11/02 | Igor Butuzov, Deputy Director of TS1, submitted complaint to General Procuratura regarding the unauthorized entry into his home by police from the Ministry of Internal Affairs of Ukraine. |
| 08/11/02 | TS1 appealed to the President of Ukraine for a meeting. |
| 11/11/02 | TS1 submitted complaint to Solomiansky District Court regarding the correction of untrue information regarding the Tax Notices-Decisions. |
| 18/11/02 | SD submitted complaint to the Solomiansky District Court regarding seizures from TS1 conducted by the STS. |
| 10/12/02 | SD submitted on behalf of TS a complaint to the Shevchenko District Court requesting that the tax service refute accusations made against TS1 and issue an apology. |
| 17/12/02 | TS1 submitted its reply to a cassation appeal by the General Procuratura in Case No. 10/399. |
| 26/12/02 | SD submitted complaint to the Kiev Appeals Court, requesting that the decision by a lower court from 9 December 2002, denying review of his complaint as to the actions of tax officials towards TS, be annulled and the complaint heard. |
| 20/01/03 | TS1 filed cassation appeal in Case No. 11/148. |
| 06/02/03 | TS1 requested its clients to submit evidence of state agencies interference in their business activities because of their relations with TS1. |
| 11/03/03 | TS1 submitted complaint to Solomiansky District Court claiming that the Tax Notices-Decisions were invalid and requesting relief in the form of a right of response. This right was not granted. |
| 20/05/03 | TS1 demanded that the STS return seized documents because of the completion of investigations of TS1. |

# Tokios Tokelės v. Ukraine

## Annex B

**Note: The activities of the various State agencies are depicted quarter by quarter; and the position of the entries within a quarter does not reflect the actual dates of the activities.**