International Centre for Settlement of Investment Disputes
Washington, D.C.

Tokios Tokelės (Claimant)
v.
Ukraine (Respondent)

Case No. ARB/02/18

Order No. 3

January 18, 2005

I. SUMMARY

1. The Tribunal has pending before it several requests from the parties: a request by Claimant for provisional measures; a request by Respondent to decide whether a continuance of the proceedings is consistent with the ICSID Convention in view of what it regards as Claimant's recourse to diplomatic protection; and a request by Claimant for the production of various documents by Respondent. In addition, in response to the Tribunal's invitation, the parties have communicated their views on the appropriate number of written pleadings on the merits and the time limits within which they must submit those pleadings.

II. REQUESTS OF THE PARTIES

A. Claimant's Request for Provisional Measures

1. Submissions of the Parties

2. On September 14, 2004, Claimant filed a Request for Provisional Measures ("Claimant's Request"), requesting the Tribunal to "reaffirm" Order No. 1 of July 1, 2003, and to "issue a procedural Order" that would call on Respondent to "refrain from, suspend, and discontinue": (i) the criminal proceedings against O.V. Danylov, General Director of Claimant's subsidiaries in Ukraine; (ii) the "arrest" of assets of Claimant's subsidiaries in Ukraine; and (iii) tax investigations of Claimant's subsidiaries in Ukraine. Respondent filed observations in opposition to Claimant's Request on September 24, 2004; Claimant submitted its reply on October 7, 2004, followed by Respondent's response on October 22, 2004.

a. *Criminal Proceedings against O.V. Danylov*

3. According to information obtained by Claimant from the database of the Information Center of the Ministry of Internal Affairs of Ukraine, the Tax Police of the Solomiansky raion of Kyiv initiated criminal proceedings against O.V. Danylov on March 13, 2002.[1] The information indicates that Danylov has been "wanted" for arrest in Ukraine since June 27, 2002, and "wanted internationally" since August 6, 2003.[2] The State Tax Administration ("STA") of Ukraine, in a letter to Counsel for Claimant dated October 23, 2003, confirmed that Ukrainian authorities initiated criminal proceedings

[1] Claimant's Request for Provisional Measures, September 14, 2004, at Annex 4 ("Claimant's Request").

[2] *Id*. According to Claimant, the Republic of Lithuania granted O.V. Danylov political asylum on May 13, 2003. *Id*. at 6. It is the Tribunal's understanding that O.V. Danylov presently resides in Lithuania.

against Danylov as the head of Claimant's subsidiary.[3] Respondent does not deny that criminal proceedings against Danylov remain open.

b. *"Arrest" of Assets of Taki Spravy II*

4. According to the State Register of Collateral of Non-Real Property, Ukrainian tax authorities "registered" as "tax collateral" all assets of Claimant's subsidiary, Taki Spravy II ("TS II"), as of September 1, 2003.[4] These authorities issued a "tax demand" on October 8, 2003, indicating that TS II had an outstanding tax obligation of 400.31 hyrvnia,[5] which Claimant contends was paid in full by December 2003.[6] The parties disagree as to the legal effect of the registration of assets on Claimant's control of those assets and the date on which Claimant's subsidiary satisfied the outstanding tax obligation. According to the State Register, however, the registration of TS II's assets as tax collateral was terminated on May 5, 2004.[7]

c. *Tax Investigations of TS II*

5. According to Claimant, Ukrainian tax authorities initiated a "planned documentary investigation" of TS II on June 14, 2004.[8] STA, after considering objections raised by Claimant, notified Claimant's subsidiary on June 17, 2004, that it determined the investigation to be "unnecessary."[9] However, on August 30, 2004, STA initiated a "non-planned documentary investigation," of TS II, to begin on September 7,

[3] *Id*. at Annex 3.

[4] *Id*. at Annex 6.

[5] *Id*. at Annex 7.

[6] Claimant's Reply to Respondent's Observations, at 13, Annex 5.

[7] Claimant's Request, at Annex 6.

[8] *Id* at para. 21.

[9] *Id*. at Annex 8.

2004, and "lasting 30 work days."[10] According to Claimant, two STA employees arrived at the premises of TS II on September 7, 2004, to conduct the investigation.[11]

2. Order of the Tribunal

6. Article 47 of the ICSID Convention grants the Tribunal authority to "recommend any provisional measures which should be taken to preserve the respective rights of either party" if the Tribunal "considers that the circumstances so require."[12] The corresponding Arbitration Rule 39(1) provides that either party may request that the Tribunal recommend provisional measures "for the preservation of its rights," and that such request must "specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures."

7. Among the rights that may be protected by provisional measures is the right guaranteed by Article 26 to have the ICSID arbitration be the exclusive remedy for the dispute to the exclusion of any other remedy, whether domestic or international, judicial or administrative.[13] A provisional measure may also be granted to protect a party from actions of the other party that threaten to aggravate the dispute or prejudice the rendering or implementation of an eventual decision or award.[14]

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[10] *Id*. at Annex 9.

[11] *Id*. at para. 22.

[12] As stated in Order No. 1, it is "a well-established principle laid down by jurisprudence of the ICSID tribunals" that "provisional measures 'recommended' by an ICSID tribunal are legally compulsory." Order No. 1 at para. 4. *See also Emilio Agustín Maffezini v. Kingdom of Spain*, Procedural Order No. 2, ICSID Case No. ARB/97/7 (October 28, 1999), at para. 9 ("*Maffezini v. Spain*").

[13] *See* Christoph H. Schreuer, THE ICSID CONVENTION: A COMMENTARY 368-69, 387-88, 780-81 (2001).

[14] *See Amco Asia Corporation et al. v. Indonesia*, ICSID Case No. ARB/81/1, Decision on Request of the Republic of Indonesia for Recommendation of Provisional Measures, December 9, 1983, 24 ILM 365, 368 (1985); *see also Víctor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Request for Provisional Measures, September 25, 2001, 6 ICSID REPORTS 373, 397 (2004).

8. The circumstances under which provisional measures are required under Article 47 are those in which the measures are *necessary* to preserve a party's rights and that need is *urgent*.[15] The international jurisprudence on provisional measures indicates that a provisional measure is necessary where the actions of a party "are capable of causing or of threatening irreparable prejudice to the rights invoked."[16] A measure is urgent where "action prejudicial to the rights of either party is likely to be taken before such final decision is taken."[17]

a. *Criminal Proceedings against O.V. Danylov*

9. Claimant argues that the criminal proceedings against O.V. Danylov constitute recourse to a remedy other than this ICSID proceeding, in violation of Claimant's rights under Article 26. Claimant further contends that the criminal proceedings have forced Danylov, a founder and key manager of Taki Spravy ("TS"), to leave Ukraine, which has harmed the operations of TS, reduced its profits, inhibited Claimant's ability to finance the present proceeding, and, thus, Claimant argues, jeopardized the rendering of an ultimate ICSID award.

10. Respondent contends that the criminal proceedings do not constitute part of a "legal dispute arising directly out of an investment" under Article 25; that Claimant has not cited, nor is Respondent aware of, any case in which an ICSID tribunal has imposed a provisional measure with respect to a criminal proceeding; and that Claimant has not

[15] *See* Schreuer, at 751-57.

[16] *Aegean Sea Continental Shelf Case* (Greece v. Turkey), Request for the Indication of Interim Measures of Protection, Order, September 11, 1976, 15 ILM 985, 997 (1976) (Separate Opinion of President Jiménez de Aréchaga).

[17] *Case Concerning Passage Through the Great Belt* (Finland v. Denmark), Request for the Indication of Provisional Measures, July 29, 1991, at para. 23.

shown a causal link between Danylov's absence from Ukraine and the financial difficulties of TS.

11. Respondent is incorrect when it argues that the criminal proceedings against Danylov cannot be subject to a provisional measure because the proceedings are not part of a "legal dispute arising directly out of" Claimant's investment.[18] It is not necessary for a tribunal to establish that the actions complained of in a request for provisional measures meet the jurisdictional requirements of Article 25. A tribunal may order a provisional measure if the actions of the opposing party "relate to the subject matter of the case before the tribunal and not to separate, unrelated issues or extraneous matters."[19] Respondent is also incorrect when it argues that a request for provisional measures must be supported by precedent in ICSID jurisprudence.[20]

12. In the present case, however, provisional measures are unwarranted with respect to the proceedings against O.V. Danylov. Assuming *arguendo* that the criminal proceedings implicate Claimant's rights in this proceeding, Claimant has failed to show that a provisional measure is either necessary or urgent to protect those rights. We agree with Respondent that Claimant has not demonstrated that O.V. Danylov's absence from Ukraine caused TS's decline in profits, or, certainly, that it has caused a decline in profits of such magnitude as to impair Claimant's ability to finance the present ICSID proceeding. The provisional measure requested by Claimant, therefore, is not necessary

[18] Respondent's Observations to Claimant's Request for Provisional Measures, September 24, 2004, at para. 3.1.3 (quoting Article 25 of the Convention).

[19] *Maffezini v. Spain*, at para. 23. The *Maffezini* Tribunal held that Respondent's request for a provisional measure requiring Claimant to post "a guarantee or bond to ensure payment of additional costs" of the proceeding was a separate issue from the dispute over the Claimant's investment. *Id*. at paras. 24-25.

[20] *See, e.g., Maffezini v. Spain*, at para. 5 (stating that "the lack of precedent is not necessarily determinative of our competence to order provisional measures in a case where such measures fall within the purview of

to preserve its right to have this proceeding be the exclusive remedy for the dispute or, under the facts adduced, to be free from action by Respondent that aggravates the dispute.

13. Moreover, the circumstances underlying the provisional measure requested do not appear urgent. Although the criminal proceedings against O.V. Danylov were initiated in March 2002—nine months before ICSID registered Claimant's Request for Arbitration—Claimant did not include these proceedings in its first Request for Provisional Measures dated June 3, 2003, or its letter of June 24, 2003, to which Order No. 1 refers. Claimant cannot credibly claim that circumstances it did not consider urgent 18 months ago are urgent now. Accordingly, we deny Claimant's request for a provisional measure that would effectively enjoin the criminal proceedings against O.V. Danylov.

b. *"Arrest" of Assets of TS II*

14. The parties do not dispute that Ukrainian tax authorities took action in September 2003 to encumber the assets of TS II for the purpose of securing payment of an outstanding tax obligation. Nor do the parties disagree that this action ended in May 2004. As such, even if the encumbrance of assets infringed Claimant's rights in the present dispute, such infringement ceased once the encumbrance was removed. Thus, Claimant presently has no right in need of preservation by a provisional measure. Accordingly, the Tribunal denies Claimant's request for a provisional measure with respect to the "arrest" of assets of TS II.

c. *Tax Investigation of TS II*

15. Claimant argues that the tax investigation of TS II infringes Claimant's right to have this ICSID proceeding exclude all other remedies and the right to have Respondent

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the Arbitration Rules and are required under the circumstances").

refrain from actions that aggravate the dispute. Respondent argues the investigation does not implicate those rights, and that, even if it did, Claimant has not shown that a provisional measure is necessary or urgent. Although the Tribunal agrees that provisional measures may be recommended by a tribunal to ensure exclusivity under Article 26 and to prevent the parties from aggravating the dispute, the Tribunal finds that (1) the requested relief is not, as asserted by Claimant, within the scope of the Tribunal's prior Order, and (2) Claimant has, quite apart from its argument in respect of Order No. 1, failed to establish the necessity or urgency of such measures with respect to the tax investigation of TS II.

16. Order No. 1, which directs the parties to "refrain from, suspend and discontinue, any domestic *proceedings*, judicial or other" does not apply to the tax *investigation* of TS II.[21] We reach this conclusion based on the ordinary meaning of "proceedings," which is "[t]he fact or manner of taking legal action,"[22] whereas "investigation" is defined as "[t]he action or process of investigating; systematic examination."[23] An investigation typically precedes the institution of proceedings. As the two words have distinct meanings that do not overlap, we conclude that "investigations" are not covered by Order No. 1, and Respondent, therefore, is not presently in violation of that Order.

17. We do not rule out that investigations may give rise to a need for provisional measures. Here, however, the Tribunal sees no grounds on which to order a new provisional measure with respect to the tax investigation, as requested by Claimant. In its

[21] We reach the conclusion that Order No. 1 by its terms does not apply to the tax investigation of TS II without deciding the question of whether TS II is properly part of the present dispute. *See infra* Part IV.

[22] THE NEW SHORTER OXFORD ENGLISH DICTIONARY 2364 (1993).

[23] *Id*. at 1410.

written submission, Claimant indicates that the "non-planned" tax investigation of TS II began on September 7, 2004, and was scheduled to be completed within thirty business days. Thus, although the investigation was ongoing at the time Claimant filed its Request for Provisional Measures, the investigation apparently has now concluded. Even if we assume that the investigation infringed Claimant's right of non-aggravation or exclusivity, the infringement ceased when the investigation ended.

18. Moreover, even if the tax investigation of TS II were ongoing, a provisional measure to halt the investigation would not be necessary and urgent, based on Claimant's description of the investigation. Claimant did not show, for example, that the investigation threatened or caused irreparable harm or that Respondent's action had to be addressed prior to the resolution of this ICSID dispute on the merits. Accordingly, the Tribunal denies Claimant's request for a provisional measure with respect to the tax investigation of TS II.

B. Respondent's Objection Regarding Diplomatic Protection

1. Submissions of the Parties

19. Respondent informed the Tribunal in a letter dated September 1, 2004, of the existence of written correspondence between Claimant and its home government, the Republic of Lithuania, and between Lithuania and Respondent regarding the STA's June 2004 planned documentary investigation of TS II discussed above. Respondent submitted to the Tribunal a copy of Claimant's letter to the Lithuanian Minister of Foreign Affairs dated June 10, 2004, which urged the Minister to protect "Lithuanian investments in Ukraine" by calling on the Ukrainian tax authorities to justify their

planned investigation of Claimant's subsidiary.[24] Respondent also submitted a copy of a letter from the Lithuanian Embassy in Ukraine to the Ukrainian Ministry of Foreign Affairs dated June 26, 2004, asserting that the tax investigation violated the rights of Claimant's subsidiary under Ukrainian law and Claimant's rights under Order No. 1 of this Tribunal, and requesting the Ministry to explain the competence of the tax authorities to take such action. Based on the foregoing, Respondent requested the Tribunal "to decide whether a continuation of the given arbitration proceeding is in line with the object and purpose of the ICSID Convention (especially Articles 26 and 27 of Chapter II 'Jurisdiction of the Centre')."

20. Claimant filed observations in response to Respondent's letter on September 7, 2004, arguing that its request to the Government of Lithuania did not violate Articles 26 and 27 of Convention because the Tribunal's proceeding was suspended at the time of the request.[25] Claimant also argued that the request of the Government of Lithuania did not violate the Convention because the subject of the request was the provisional measures order and not the underlying dispute before this Tribunal. Finally, Claimant argued that even if the request violated the Convention, such violation would not affect the continuation of these proceedings. Respondent replied to Claimant's observations on September 13, 2004, which was followed by a response from Claimant on October 8, 2004, and a reply from Respondent on October 21, 2004.

[24] Although the letter from Claimant to the Lithuanian Minister refers only to "Taki Spravy," not "Taki Spravy II," the target of the investigation is the latter, as the investigation is the same as the one contained in Claimant's Request for Provisional Measures.

[25] *See* Letter from Martina Polasek, Secretary to the Tribunal, to Tokios Tokelės (Claimant) and the Government of Ukraine (Respondent), (May 4, 2004) (notifying the parties of the resignation of Tribunal President Prosper Weil and the suspension of the proceeding); Letter from Antonio R. Parra, Acting-Secretary-General, to Tokios Tokelės (Claimant) and the Government of Ukraine (Respondent), (Aug. 23,

2. **Decision of the Tribunal**

21. Article 27 of the ICSID Convention prohibits Contracting States from giving diplomatic protection in respect of a dispute involving one of its nationals if the dispute has been submitted to arbitration. Although Article 27 is directed to Contracting States, investors have a corresponding obligation under Article 26 not to pursue diplomatic protection.[26] The term "diplomatic protection" includes not only espousing the claim of a national, but also a variety of other actions—such as formal diplomatic interventions of the type at issue here—that may be undertaken by a State to protect its national's interests in respect of a matter in dispute.

22. We find that Claimant's request to the Government of Lithuania was a request for diplomatic protection inconsistent with Claimant's obligation under Article 26. Claimant's explanation for its request is unpersuasive. The suspension of an arbitral proceeding does not suspend the obligations of the parties under the Convention, including the obligation to respect ICSID arbitration as the sole and exclusive remedy for the dispute. Once parties consent to arbitration, they are bound by the obligations of the Convention until an award is rendered or the case is terminated. Claimant's recourse to diplomatic protection was inconsistent with its obligations under Article 26 even though at the time of such recourse this proceeding was suspended pending the appointment of a replacement arbitrator. That recourse, however, appears to have ceased and there is no record of further diplomatic interventions and requests.

2004) (notifying the parties of the appointment of Lord Mustill as Tribunal President and the resumption of the proceeding).

[26] *See Banro American Resources, Inc. and Société Aurifère du Kivu et du Maniema S.A.R.L. v. Democratic Republic of the Congo*, Award, ICSID Case No. ARB/98/7 (September 1, 2000) (excerpts), at paras. 15-20;

23. Thus, although Claimant's actions were inconsistent with Article 26, the appropriate response is not to discontinue the proceedings as suggested by Respondent. Abstention from diplomatic protection is not, in fact, a condition for the Centre's jurisdiction or the Tribunal's competence.[27] Should Claimant hereafter transgress its obligations under Article 26, the Tribunal would entertain appropriate requests from Respondent.

C. Claimant's Request for Production of Documents

24. In a letter dated September 8, 2004, Claimant requested the Tribunal to call upon Respondent to produce documents related to six different subject areas. Respondent delivered its response on September 13, 2004, which was followed by correspondence from Claimant on September 27, 2004, and October 8, 2004, and from Respondent on October 21, 2004.

25. Under Article 43 of the Convention and Arbitration Rule 34(2)(a), the Tribunal may "call upon the parties to produce documents" if the Tribunal "deems it necessary" to do so.

1. Documents Related to January 2002 Announcement of Chairman of State Tax Administration

26. Claimant requests copies of "[t]he order and any and all other written or verbal instructions, normative acts or other documents" on which the Chairman of the State Tax Administration based his January 2002 announcement that STA would not conduct tax examinations of the mass media until after the elections on March 31, 2002. Claimant

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see also Schreuer, at 387-88.

[27] *See* Schreuer, at 399, para. 6.

argues that it would use such documents, if they exist, to show that Respondent acted against government policy when it undertook examinations of Claimant's subsidiary during this period. Respondent argues that the temporary suspension of tax examinations did not apply to Claimant's subsidiary because it is not a member of "printed mass media," and, therefore, Respondent should not be required to produce such documents.

27. Respondent's assertion that Claimant's subsidiary is not a member of the mass media – an assertion on which we take no view – does not justify withholding the requested documents. Claimant's request for the production of verbal as well as written instructions, however, is overbroad. Accordingly, the Tribunal calls upon Respondent to produce within 30 days all written documents prepared by Respondent, if any, on the basis of which then Chairman of the State Tax Administration Mykola Azarov announced in January 2002 that there would be no tax investigations of the mass media in the first quarter of 2002.

2. Documents Related to Alleged Violations of Election Law

28. Claimant requests copies of any documents related to an authorization issued by the Central Election Commission of Ukraine to the tax authorities regarding alleged violations of election law during the production of printed materials by opposition political parties. Claimant apparently wishes to establish that the tax investigations initiated by Respondent were without proper legal justification. Respondent indicates that it has tried but thus far has been unable to find responsive documents.

29. The Tribunal notes the efforts of Respondent to find the requested documents and calls on Respondent to continue searching for the documents and to produce them within

30 days from the date of this Order or to report by the same time limit about the result of its search.

3. Documents Related to Violations of Tax Laws

30. The Tribunal notes that Claimant withdrew this request in a letter to the Tribunal dated October 8, 2004.

4. Documents Related to Criminal Proceedings against O.V. Danylov

31. In its letter dated October 8, 2004, Claimant requests that Respondent produce "key pieces of specific evidence based on which Ukraine initiated the criminal case" against O.V. Danylov. Respondent argues that Ukrainian law does not permit the materials underlying a criminal case to be disclosed. Claimant states that Respondent has mistranslated the relevant provision of Ukrainian law, which Claimant contends merely prohibits such materials from being announced or published. Respondent also argues that the criminal proceedings are unrelated to the dispute over Claimant's investment in Ukraine. Respondent notes that Claimant has not provided the Tribunal with any examples of a dispute arbitrated under the ICSID Convention that involved a criminal proceeding in the host State.

32. The Tribunal encourages Claimant to prepare its submission on the merits with the materials at its disposal with respect to the proceedings against Danylov on this subject. The Tribunal recommends Respondent to produce all documents that it is required by Ukrainian law to disclose to a defendant in this type of criminal proceeding, if it has not done so already.

5. Documents Related to Surveillance of Claimant's Employees

33. Claimant initially requested "all documents, audio-recordings, video-recordings or other evidence of eavesdropping, listening into telephone or other conversations as well as other forms of surveillance of employees" of Claimant and its subsidiary. In its letter to the Tribunal dated October 8, 2004, however, Claimant modified its initial request and now asks the Respondent simply to "affirm or deny" whether it has conducted any surveillance of Claimant's employees since February 2002.

34. As modified, Claimant's request is not a request for documents within the scope of Article 43 but an interrogatory addressed to Respondent. There is thus no action requested of this Tribunal.

6. Respondent's Internal Documents Related to the Dispute

35. Claimant initially requested "all communications … which mention or are in any way related to Tokios Tokelės, Taki spravy, their employees or the given ICSID arbitration case which the Respondent does not have specific and reliable grounds to know are in fact already in the Claimant's possession." In response to Respondent's contention that the request must be more specific, Claimant modified its initial submission to request only "internal memoranda regarding the dispute" and "the results of any internal investigations regarding complaints submitted by Claimant to the Ukrainian authorities."

36. Even as modified, Claimant's request remains overbroad. The Tribunal notes that Respondent has expressed its willingness to respond to a more narrowly tailored request, and the Tribunal invites Claimant to submit such a request.

III. SUBMISSIONS ON THE MERITS

37. In a letter dated October 1, 2004, the Tribunal invited the parties to communicate their views as to the number of and time limits for the submission of written pleadings on the merits. The parties agreed to two rounds of written pleadings but did not agree on time limits for their submissions. Accordingly, the Tribunal orders the parties to adhere to the following schedule: (1) Claimant's memorial is due on March 21, 2005; (2) Respondent's counter-memorial is due on May 20, 2005; (3) Claimant's reply is due on June 20, 2005; and (4) Respondent's rejoinder is due on July 20, 2005.

IV. STATUS OF CLAIMANT'S INVESTMENT IN TS II

38. In this Order, the Tribunal finds that it is able to dispose of the pending requests without deciding the question raised by Respondent of whether Claimant's investment in TS II is within the scope of the present dispute. This question must be decided, however, if Claimant seeks to recover damages for alleged injury to TS II in the merits phase of this proceeding. In that event, we invite the parties to include in their opening written pleadings their views on whether TS II is within the scope of the present dispute.

signed

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President of the Tribunal
The Rt. Hon. The Lord Mustill