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ICSID CASE No. ARB/00/9

INTERNATIONAL CENTRE FOR  
SETTLEMENT OF INVESTMENT DISPUTES

BETWEEN:

**GENERATION UKRAINE, INC.**

Claimant

and

**UKRAINE**

Respondent

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**AWARD**

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Before the Arbitral Tribunal  
comprised of:

Dr Eugen Salpius  
Dr Jürgen Voss  
Mr Jan Paulsson, President

Secretaries to the Tribunal:

Ms Eloïse M. Obadia (until December  
2002)  
Ms Martina Suchankova

Assistant to the Tribunal:

Mr Zachary Douglas

Date of dispatch to the parties:

16 September 2003

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## **1. Overview**

1.1 The Claimant, a U.S. corporate vehicle wholly-owned by a U.S. national, Eugene J. Laka, seeks damages, at one time quantified in excess of USD 9.4 billion, for the spoliation of its alleged investment in commercial property in Kyiv.

1.2 The Claimant contends that it was strongly encouraged by the Government in late 1992 to invest in Ukraine; that it established a local investment vehicle in February 1993 (called Heneratsiya Ltd.); and that, after it duly identified and achieved approval of a specific project, local authorities obstructed and interfered with the realisation of that project over the course of the ensuing six years in a manner which was tantamount to expropriation and therefore proscribed under the Ukraine-U.S. Bilateral Investment Treaty. It asserts that it is therefore entitled to remedies in ICSID arbitration.

1.3 Ukraine denies that its conduct toward the Claimant was violative of the Bilateral Investment Treaty and argues that, at any rate, the Claimant has proven no damages. Even without considering those issues, however, Ukraine contends that the case must be dismissed for lack of jurisdiction.

## **2. The Parties' Representatives**

2.1 The Claimant, a company formed under the laws of New Hampshire, U.S.A., was represented by:

Mr Robert Harding, Barrister-at-Law, Dublin;

Mr Brendan Kilty, Barrister-at-Law, Dublin;

instructed by Mr Gerard H. Walsh of Mssrs McKeever Rowan, Dublin.

2.2 The Respondent, the Government of Ukraine was represented by:

Mr A. Shlapak, Minister and Mr Andriy Medvetsky, Chief of Main Legal Department, Ministry of Economy and on Issues of European Integration of Ukraine;

Mr Mykhaylo Pozhivanov, Head of Main Department for Foreign Economic Relations and Mr Olexandr Kudlay, Head of Legal Department Kyiv State City Administration;

Mr Dmitry Grischenko, Managing Partner and Dr Sergei Voitovich, Grischenko and Partners, Kyiv;

Mr Oleg Schevchuk, Managing Partner and Mr Andriy Aleksejev, Attorney, Proxen law firm, Kyiv.

### **3. Definitions**

- 3.1 *Act of Property Transfer*: Legal instrument by which the Executive Vice President of Generation Ukraine, Nellie Grigoriyevna Ageyeva, and Mr Laka, in his capacity as President of Heneratsiya, transferred alleged property rights owned by Generation Ukraine to Heneratsiya as the former's contribution to the latter's authorised capital. The date of the instrument is 21 July 1998.
- 3.2 *Act of Reservation*: Act of Reserving a Plot of Land for Fulfilment of Engineering-Prospecting Works for Object Construction, issued by the Department of Land Resources of Kyiv City State Administration and dated 3 February 1995.
- 3.3 *BIT*: the Treaty Between the United States of America and Ukraine Concerning the Encouragement and Reciprocal Protection of Investment, signed on 4 March 1994 and entered into force on 16 November 1996.
- 3.4 *Certificates of the State Agency for Authors' Rights*: Two certificates issued by the State Agency of Ukraine for Author's and Joint Rights. The first (referred to hereinafter as "Certificate A") is titled "Certificate on State Registration of the Author's Right to a Creation". The second ("Certificate B") is titled "Certificate on State Registration of the Exclusive Rights of a Person to a Creation". Both were issued on 5 June 1998.

- 3.5 *Construction Permits*: Construction Permit No.103/RU issued on 3 April 1997 for works on site preparation and extended in scope thereafter, and Construction Permit No.189/RD issued on 16 July 1998.
- 3.6 *Decision of the Kyiv City Council*: The decision of the Kyiv City Council No.358/459 dated 8 July 1999 which purportedly cancelled the Order on Land Allocation as well as the 49-year land lease rights.
- 3.7 *Foundation Agreement*: Agreement with regards to the terms for cooperation in the construction of an office building and electric transformer station in the Radyansky District, at Boulevard Taras Shevchenko 32, 32-a signed by O. Omelchenko (Acting Head of the Kyiv City State Administration), V. Padalko (Deputy Head of the Kyiv City State Administration) and Mr Laka (President of Heneratsiya Ltd) dated 26 July 1996.
- 3.8 *Generation Ukraine*: a U.S. company “Generation Ukraine Inc.” incorporated in the State of New Hampshire on 3 February 1993 and wholly owned by Mr Laka.
- 3.9 *Heneratsiya*: a Ukrainian company “Heneratsiya Ltd” incorporated in Kiev on 4 October 1993 and 99.97% owned by Generation Ukraine and 0.03% owned by Mr Laka.
- 3.10 *Lease Agreements*: Agreements for the Temporary Right of Exploitation of Land (Including Conditions on Rent Payments) signed by O. Omelchenko (Acting Head of the Kyiv City State Administration) and Mr Laka (President of Heneratsiya Ltd), both dated 27 June 1996.
- 3.11 *List of Potential Construction Sites*: Letter dated 10 December 1992 from Mr Martynenko to Mr Laka containing a List of Potential Construction Sites.
- 3.12 *Order on Land Allocation*: Order No 608 of the Kyiv City State Administration “Regarding the granting of a land parcel for the building of an office building and a transformer station at Blvd. Taras Shevchenko 32, 32-a, in the Radiyansky District to the limited partnership Heneratsiya Ltd” dated 24 April 1996.

- 3.13 *Parkview Project or Parkview Office Building*: the Claimant's "proposed premier office block development" at Boulevard Shevchenko 32 in the City of Kyiv.
- 3.14 *Protocol of Intentions*: Protocol of Intentions signed on 10 December 1992 by Ivan Sali (Representative of the President of Ukraine in the City of Kyiv), V.P. Nesterenko (Chairman of the City Council of Peoples' Deputies), A.S. Taranenko (Chief of Department of Administration for Foreign Economic Relations), A.P. Martynenko (General Director of "Kyivbudcentr" of the Kyiv City State Administration), U.F. Yurchenko (Deputy Director of "Kyivbudcentr" of the Kyiv City State Administration), John W. Milton (Project Manager, Turner Steiner International) and Mr Laka.
- 3.15 *Registration Certificates*: Registration Certificates of Investments in accordance with Article 15 of the Law of Ukraine on Foreign Investments, dated 24 May 1993.
- 3.16 *Resolution on Land Allocation*: Resolution of the Kyiv City Soviet of People's Deputies, No 12, "On allocation and withdrawal of land plots and approval of object location" dated 19 May 1994.
- 3.17 *Yalovoy Protocol*: Record of a meeting on 11 July 1997 chaired by V.B. Yalovoy (Deputy Head of the Kyiv City State Administration) with Mr Laka and, *inter alia*, a representative of the Security Service of Ukraine.

#### **4. The Procedure**

4.1 On 21 July 2000 the International Centre for the Settlement of Investment Disputes (ICSID or the Centre) received from the Claimant a Request for the Institution of Arbitration Proceedings against the Respondent. The Request invoked the provisions of the BIT.

4.2 ICSID was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), signed on 18 March 1965. The United States of America is a Contracting State to the ICSID Convention since its entry into force on 14 October 1966. Ukraine became a

Contracting State on 7 July 2000 and was thus a Contracting State to the ICSID Convention at the date of the institution of arbitration proceedings by the Claimant.

4.3 The Claimant supplemented its Request for Arbitration by letters of 28 and 31 July 2000. On 1 August 2000 the Centre, in accordance with Rule 5 of the ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules), acknowledged receipt of the Request, as supplemented, and on the same day transmitted copies thereof to Ukraine and to Ukraine's Embassy in Washington, D.C.

4.4 On 20 October 2000, the Acting Secretary-General of ICSID registered the Request pursuant to Article 36(3) of the ICSID Convention. On the same date, the Acting Secretary-General, in accordance with Institution Rule 7, notified the Parties of the registration of the Request and invited them to proceed to constitute an Arbitral Tribunal as soon as possible.

4.5 On 25 October 2000, the Claimant proposed to the Respondent that the Arbitral Tribunal consist of a sole arbitrator to be appointed by agreement of the parties from a list of three persons. By a Note Verbale dated 22 November 2000 from the Embassy of Ukraine in Washington, D.C., the Respondent rejected the Claimant's proposal and proposed instead that the Arbitral Tribunal be composed of three arbitrators, one arbitrator appointed by each Party, and the third, presiding arbitrator, appointed by agreement of the Parties.

4.6 On 27 November 2000, the Claimant accepted the Respondent's proposal of 22 November 2000 regarding the number of arbitrators and the method of constituting the Arbitral Tribunal and appointed Dr Eugen Salpius, an Austrian national, as an arbitrator. On 16 January 2001, the Respondent appointed Dr Jürgen Voss, a German national, as an arbitrator. On 6 February 2001, the Respondent accepted the Claimant's proposal to appoint Dr Ibrahim F.I. Shihata, an Egyptian national, as the President of the Arbitral Tribunal.

4.7 On 15 February 2001, the Deputy Secretary-General of ICSID, in accordance with Article 6(1) of the Arbitration Rules of the Centre, notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore



deemed to have been constituted on that date. On the same date, pursuant to ICSID Administrative and Financial Regulation 25, the parties were informed that Ms Eloïse M. Obadia, Counsel, ICSID, would serve as Secretary of the Tribunal.

4.8 On 9 March 2001, the Secretary of the Tribunal transmitted to the Parties the declarations required under Rule 6(2) of the Arbitration Rules of the Centre signed by each member of the Arbitral Tribunal, including a separate “Statement on relationships with Ukraine” dated 9 March 2001 provided by Dr Jürgen Voss. On 16 March 2001, the Acting Secretary-General of ICSID notified the Parties, in accordance with Rule 9(2)(b) of the Arbitration Rules, that the Claimant had proposed the disqualification of Dr Voss as an arbitrator pursuant to Article 57 of the ICSID Convention. As a consequence, in accordance with Rule 9(6) of the Arbitration Rules, the proceeding was suspended.

4.9 On 21 March 2001 the Secretary of the Tribunal transmitted to the other Members of the Tribunal and to the Parties Dr Voss’ observations of 20 March 2001 on the Claimant’s proposal for his disqualification as an arbitrator. On 23 March 2001 the Respondent, upon request by the President of the Tribunal, provided the Centre with its observations on the issue of the disqualification of Dr Voss, requesting the other Members of the Tribunal to reject the Claimant’s proposal. On the same date, the Claimant provided a response to Dr Voss’ observations of 20 March 2001, maintaining its proposal.

4.10 On 23 March 2001, the Respondent submitted Objections to the Jurisdiction of ICSID dated 20 March 2001 under Rule 41(1) of the Arbitration Rules of the Centre.

4.11 Further observations on the proposal for disqualification of Dr Voss were submitted on 27 March 2001 by the Claimant and by Dr Voss respectively, on 2 April 2001 by the Respondent, on 5 April 2003 by the Claimant, on 9 April 2001 by Dr Voss and on 11 April 2001 by the Claimant.

4.12 On 13 April 2001, the Respondent submitted an addendum of 12 April 2001 to its Objections to the Jurisdiction of ICSID.

4.13 On 18 April 2001, ICSID notified the Parties that, due to illness, Dr Shihata would no longer be able to serve as President of the Arbitral Tribunal.

4.14 By letter of 23 April 2001, the Respondent informed the Centre that it accepted the Claimant's proposal to appoint Mr Jan Paulsson, a French national, as the new President of the Arbitral Tribunal. On 24 April 2001, the Secretary of the Tribunal notified the Parties that Mr Paulsson had accepted his appointment.

4.15 On 21 May 2001, the Secretary of the Tribunal informed the Parties that Mr Paulsson and Dr Salpius were equally divided on the Claimant's proposal for the disqualification of Dr Voss as an arbitrator. Pursuant to Article 58 of the ICSID Convention and Rule 9(4) and (5) of the Arbitration Rules, it therefore fell to the Chairman of the ICSID Administrative Council to decide on the proposal.

4.16 On 6 June 2001, the Deputy Secretary-General of ICSID informed the Parties that, in view of Dr Voss' prior service at the World Bank and in order to ensure the impartiality of the process, the Centre had asked the Secretary-General of the Permanent Court of Arbitration at the Hague for his recommendation as to the decision on the proposal for disqualification. Upon request by the Centre, the Parties agreed to extend the time limit for the Chairman of the Administrative Council of ICSID to render his decision on the proposal for disqualification of Dr Voss by 15 days, until 5 July 2001.

4.17 On 19 June 2001, the Claimant submitted new information in support of its proposal for the disqualification of Dr Voss, accompanied by an expert report. The Claimant's submission was forwarded to the Secretary-General of the Permanent Court of Arbitration by the Secretary of the Tribunal. Observations on the Claimant's submission of 19 June 2001 were provided by Dr Voss on 20 June 2001 and by the Respondent on 21 June 2001 and were also forwarded to the Secretary-General of the Permanent Court of Arbitration.

4.18 On 5 July 2001, the Deputy Secretary-General of ICSID informed the Parties that the recommendation of the Secretary-General of the Permanent Court of Arbitration was to decline the Claimant's proposal to disqualify Dr Voss as an arbitrator, and that the Acting Chairman of the Administrative Council of ICSID had

accepted this recommendation. The Parties were consequently notified that the proceeding had resumed.

4.19 On 12 July 2001, the Claimant submitted BOOK 1(B) to its Memorial which substantially amended its pleadings.

4.20 On 13 July 2001 the Respondent requested the production of certain corporate documents by the Claimant under Article 1(2) of the BIT. Upon request by the Centre, the Respondent elaborated on its request by letter of 6 August 2001, arguing that the documents requested might be material to the question of ICSID's jurisdiction.

4.21 On 18 September 2001, the Claimant submitted its Reply of 13 September 2001 to the Respondent's Objections to the Jurisdiction of ICSID dated 20 March 2001, as supplemented.

4.22 The first session of the Tribunal was held on 26 September 2001 at the International Dispute Resolution Centre in London. On that occasion, the Parties expressed their agreement that the Tribunal had been properly constituted, in accordance with the relevant provisions of the ICSID Convention and the Arbitration Rules.

4.23 During the course of the first session, the Parties also agreed on a number of procedural matters reflected in written minutes signed by the President and the Secretary of the Tribunal. It was agreed that the language of the proceeding would be English and that the place of proceedings would be Paris.

4.24 The Respondent requested that its Objections to the Jurisdiction of ICSID be treated as a preliminary question separate from the merits of the case. The Claimant disagreed, requesting that the objections to jurisdiction be joined to the merits. The President informed the Parties that the Tribunal was disinclined to deal with the objections to jurisdiction as a preliminary matter, and that the objection would therefore be joined to the merits.

4.25 The Tribunal urged the Parties at the first session to deal reasonably with any request for production of documents directly between themselves. Upon the Tribunal's invitation, the Claimant agreed to produce copies of its organic documents.

4.26 On 8 November 2001, the Claimant produced a "Booklet of Discovery Documentation," containing, among other things, the category of documents requested by the Tribunal at the first session. On 13 November 2001 the Claimant filed a request for production of documents by the Respondent, to which the Respondent responded on 17 and 21 January 2002.

4.27 On 1 March 2002, the Centre received electronic versions of the Respondent's Counter-Memorial dated February 26, 2002. The Claimant received a hard copy thereof on 6 March 2002.

4.28 On 12 March 2002, ICSID received a "Notice of Motion" from the Claimant requesting that the Tribunal issue orders that (i) the Respondent's Counter-Memorial be dismissed; (ii) an "Award in principle" be made in favour of the Claimant; and (iii) the Claimant's damages be assessed by the Tribunal. As basis for its request, the Claimant stated that the Respondent had not complied with:

- (a) Rule 23 of the Arbitration Rules regarding the signing of the Counter-Memorial;
- (b) Regulations 24 and 30 of the ICSID Administrative and Financial Regulations regarding the filing and certification of supporting documentation; and
- (c) The Parties' agreement regarding discovery of documents (failure by the Respondent to make "full and frank discovery" pursuant to the Claimant's request of 13 November 2001 and destruction by the Respondent of documents requested).

4.29 On 14 March 2002, the Centre received the Respondent's observations on the Claimant's Motion of 12 March 2002 rejecting the Claimant's allegations. On 28 March 2002, the Centre received three further submissions from the Claimant relating to its Motion and to the Respondent's production of documents. The Respondent replied to the Claimant's further submissions by a letter of 5 April 2002.

4.30 On 12 April 2002, the Arbitral Tribunal issued Procedural Order No. 1 dismissing the Claimant's Motion of 12 March 2002 (as supplemented by the subsequent correspondence).

4.31 On 6 May 2002, ICSID received electronic versions of the Claimant's Reply Memorial. Hard copies of the Reply were received by the Respondent on 14 May 2002.

4.32 On 8 May 2002, the Claimant requested that the Tribunal instruct the Respondent not to initiate any further direct contact with a person who was stated to be a representative of the Claimant. After an exchange of correspondence by the Parties on this issue, on 26 June 2002, the Tribunal invited the Respondent to confirm that it would have no further contact with that person until such time as he might be questioned in the presence of the Arbitral Tribunal.

4.33 On 12 July 2002, ICSID received electronic copies of the Respondent's Rejoinder. Hard copies of the Respondent's Rejoinder were transmitted to the Tribunal and to the Claimant on 17 July 2002.

4.34 On 8 October 2002, the Tribunal gave instructions to the Parties regarding the further procedure and invited them simultaneously to produce, by 27 November 2002, witness statements and expert reports; by 6 January 2003 rebuttal statements and reports; by 20 January 2003, lists of witnesses and experts whom the Parties desired to be cross-examined; and, by 27 January 2003, lists of rebuttal witnesses and experts. Having consulted with the Parties, the Tribunal also confirmed that it had reserved the two weeks of 17-21 February 2003 and 17-21 March 2003 for the hearing on the jurisdictional objections and the merits of the case.

4.35 The Centre received the Parties' witness statements and expert reports on 27 November 2002. On 12 December 2002, the Respondent challenged the Claimant's submission of 27 November 2002 as inconsistent with the Tribunal's instructions.

4.36 On 21 December 2002, the Parties were informed that Ms Martina Suchankova had been appointed as new Secretary of the Tribunal replacing Ms Obadia.

4.37 On 6 January 2003, the Parties submitted their Rebuttal witness statements and expert reports. By letter of 15 January 2003, the Tribunal informed the Parties that it found that the Claimant had complied with the Tribunal's instructions of 8 October 2002. On 20 January 2003, the Parties submitted lists of witnesses and experts that they wished to examine at the hearing. The Parties did not provide any further lists of witnesses and experts to be heard and they subsequently agreed not to examine certain witnesses and experts previously listed.

4.38 The first phase of the hearing on jurisdiction and the merits took place at the World Bank Offices in Paris during the period 17-21 February 2003. The Tribunal received the testimony of Mr Eugene Laka and Mr Igor Ivanovich Marynyako, witnesses presented by the Claimant; and Mr Nick Cotton, expert presented by the Respondent. Upon the Tribunal's request, made at the hearing and articulated formally in a letter of 20 February 2003, the Parties submitted their responses to certain questions made by the Tribunal on 24 February 2003.

4.39 The second phase of the hearing, devoted to oral submissions, took place at the Hotel Baltimore in Paris during the period 17-20 March 2003. During the course of the hearing, the Parties submitted further responses to the Tribunal's questions of 20 February 2003; the Claimant in writing and the Respondent orally. On 26 March 2003, the President of the Tribunal instructed the Parties to submit to the Tribunal a statement of costs reasonably incurred or borne in the proceeding by 4 April 2003 and written comments on the reasonableness of the other Party's statement of costs by 18 April 2003. The Parties submitted their respective statements and written comments within the time limits prescribed.

4.40 On 18 July 2003 the Tribunal declared the proceedings closed pursuant to Rule 38 of the Arbitration Rules of the Centre.

## 5. Relief Sought

5.1 In Book 1 (“Memorial”) of its 8-volume introductory pleading dated 5 April 2000, the Claimant articulated eight claims under lettered headings from A to H. On 12 July 2001, the Claimant submitted a revised Book 1(B), which it explained had become necessary “because the Claimant obtained important new information.” In paragraph 2.0.a of Book 1(B), the Claimant made clear that “[t]he statement of claims in this Book supersedes and replaces all prior claims statements ....” The eight claims - of which the last two are not, properly speaking, claims at all - thus finally reworded and calculated in Part 3 of Book 1(B) are the following:

- “Claim A: Unlawful indirect and unlawful direct expropriation of anticipated revenues (US\$1,611,551,868)
- Claim B: Unlawful indirect and unlawful direct expropriation of invested funds (US\$35,346,207)
- Claim C: Unlawful indirect and unlawful direct expropriation of the Project at its appraised market value (US\$123,964,142)
- Claim D: Unlawful indirect expropriation (unlawful denial of property rights) of adjacent properties intended for construction staging purposes (US\$4,070,000, but “integrated as a non-recurring item in the calculation of Claim A”)
- Claim E: Compensation of the Company’s expenses for its legal defence (US\$2,358,768,473)
- Claim F: Moral (punitive) damages subject to compensation under Ukrainian law (US\$5,312,586,651)
- Claim G: Other forms of relief as the Court may deem appropriate in the circumstances
- Claim H: Counterclaims and offsets – none”

5.2 Within the hundreds of pages of the Claimant’s voluminous submissions, there are a myriad of allegations of misconduct attributable to the Ukrainian Government. The task of the Arbitral Tribunal, however, is not to rule on every allegation, but rather to determine whether the claims for relief are founded or not. It is, therefore, constrained only to deal with those arguments which it finds to be decisive with respect to the relief sought.

## PRELIMINARY ISSUES

### 6. The Parties' Submissions on Jurisdiction and Admissibility

6.1 An important feature of this case is that the alleged investment did not arise out of a single transaction or event, but instead evolved through the Claimant's activities in Ukraine over a number of years. This is unsurprising given the nature of the alleged investment, *viz.* a construction project for an office building, which one would expect to encompass a bundle of proprietary, contractual and administrative rights and involve capital contributions at different stages of the project's development.

6.2 The disparate elements of the Claimant's alleged investment are shrouded in intricate detail. The regulatory framework involved both international and purely local dimensions - from the regulation of inward investment to constraints upon urban land use. Moreover, it seems fair to observe that the Claimant's Ukrainian interlocutors were unfamiliar with American business methods and that this was the Claimant's first experience with Ukrainian administrative practices. The result was not only complexity, but considerable confusion. These features of the factual background are directly relevant to the analysis of the legal dispute, because the Claimant alleges a series of expropriatory acts which are said to have been carried out over a period of years even as the investment was gradually taking place. Since expropriation concerns interference in rights in property, it is important to be meticulous in identifying the rights duly held by the Claimant at the particular moment when allegedly expropriatory acts occurred.

6.3 In light of these considerations, the Tribunal elected to join issues of jurisdiction and admissibility to the merits because of the close relationship between the Respondent's primary jurisdictional objection, based on the alleged absence of any relevant investment by the Claimant, and the factual evidence pertaining to the complete history of the Claimant's activities in Ukraine.

6.4 The Parties' pleadings on jurisdiction and admissibility have been unhelpfully diffuse and hence, in order to identify the issues with adequate precision, it is indispensable to review the Parties' submissions in considerable detail. Furthermore,



the question of the Tribunal's jurisdiction *ratione materiae* and *ratione temporis*, dependent as it is on evidence of the nature and timing of the Claimant's alleged investment, is interwoven with the Claimant's cause of action founded upon expropriation. Therefore it is necessary to consider comprehensively the nature, extent and timing of the Claimant's investment, and expedient to do so from the outset - and unnecessary to repeat the exercise when dealing with the merits.

6.5 The Respondent's Objections to Jurisdiction dated 20 March 2001 may be summarised as follows:

- (a) The Claimant has not proved that the "Parkview Office Building Project" falls within the definition of an "investment" for the purposes of Article 1(1) of the BIT.
- (b) Although the Claimant's shareholding in its Ukrainian subsidiary, Heneratsiya, admittedly constitutes an investment pursuant to Article 1(1), the Claimant does not allege any grievance with respect to this investment.
- (c) The Claimant has not demonstrated that the dispute is between itself and Ukraine for the purposes of Article VI(1) of the BIT. The dispute is rather between the Claimant and Kyiv City State Administration "as a local body of executive power".
- (d) The Claimant has not provided any evidence of substantial business activities in the United States and therefore the Respondent is entitled to deny the advantages of the BIT to the Claimant pursuant to Article 1(2) of the BIT.
- (e) The ICSID Convention is a *lex specialis* in relation to the BIT and therefore Article 26 of the ICSID Convention should prevail over Article IV(4) of the BIT. Article 26 of the ICSID Convention allows a Contracting State to require the exhaustion of local administrative or judicial remedies as a condition of its consent to ICSID arbitration and the Respondent objects to the present submission to ICSID arbitration prior to the exhaustion of "Ukrainian judicial remedies".

6.6 The Respondent's "Addendum to the Respondent's Objection to Jurisdiction of ICSID", filed on 12 April 2001, alleged one further jurisdictional objection based the defective registration of Heneratsiya:

- (f) The registration was effected in breach of Ukrainian law because the foundation agreement between Generation Ukraine and Mr Laka establishing Heneratsiya was signed by Mr Laka both in his personal capacity and as the representative of Generation Ukraine. According to the Respondent, this alleged defect defeats ICSID jurisdiction because if Heneratsiya was not legally constituted in accordance with Ukrainian law, and the Claimant's shareholding in Heneratsiya is the only recognisable investment in Ukraine for the purposes of the BIT, it must follow that there can be no "investment dispute".

6.7 The Claimant's "Reply to the Respondent's Objection to the Jurisdiction of ICSID" on 13 September 2001 countered as follows:

- (a) The Claimant objects to the Respondent's submission that the Parkview Office Project Building does not fall within the definition of an investment pursuant to Article 1(1) of the BIT affirming that the "issuance of an insurance policy by the Overseas Private Investment Corporation (OPIC) to an investor is incontrovertible evidence of a valid and authentic investment into Ukraine by a US citizen or US legal entity".
- (b) In relation to the Respondent's submission that the only investment made by the Claimant is its shareholding in Heneratsiya, the Claimant states that it transferred the "entire Parkview project" on 21 July 1998 as an additional investment into Heneratsiya. Furthermore, the Claimant objects to the Respondent's statement that there is no alleged grievance in relation to the Claimant's majority share in Heneratsiya. The Claimant refers to its Request for Arbitration, and the allegation that Ukraine treated Generation Ukraine and Heneratsiya unfairly and obstructed their efforts to proceed with their investment.

- (c) In response to the Respondent's contention that the dispute is in reality between the Claimant and the Kyiv City State Administration, the Claimant states that the Kyiv City State Administration is a "political subdivision" of Ukraine and thus identified with the State by virtue of Article XI of the BIT.
- (d) In relation to the Respondent's reliance on Article 1(2) of the BIT, the Claimant notes that its "substantial business activities is a matter of public and private record and is well within the knowledge of the Respondent".
- (e) The Claimant objects to the Respondent's interpretation of Article 26 of the ICSID Convention by submitting that Article IV(4) of the BIT, which does not envisage any requirement for the exhaustion of remedies, governs the present submission to arbitration. Moreover, Ukraine did not make any reservation upon ratifying the ICSID Convention that local remedies had to be exhausted as a precondition to its consent to arbitration under the Convention.
- (f) The Claimant rejects the Respondent's contention that the registration of Heneratsiya by the Pecherska District Administration is void on the grounds that the latter scrutinised the foundation documents and found them to be in conformity with existing Ukrainian legislation. Ukraine should therefore be estopped from denying the validity of the registration. The Claimant further relies on Article 6 of the Law of Ukraine "Concerning Enterprises in Ukraine", which provides that: "An enterprise is considered created and acquires the rights of a legal entity from the day of its state registration".

6.8 The Respondent's Counter-Memorial developed its submissions on issues of jurisdiction and admissibility as follows:

- (a) The Act of Property Transfer relied upon by the Claimant as substantiating its investment in the Parkview Project relates only to the transfer of an intellectual property right in the architectural design of the Parkview building and not any other right or interest.
- (b) In relation to the Claimant's submission that the Kyiv City State Administration is a political subdivision for the purposes of Article XI of the

BIT, the latter is subject to Article 25(1) of the ICSID Convention (as the *lex specialis*) which requires that any “constituent subdivision or agency of a Contracting State” be “designated to the Centre by that State”. No designation was made in relation to the Kyiv City State Administration, which cannot be a “political subdivision” for the purposes of Article XI of the BIT. There is, therefore, no dispute between Ukraine and the Claimant.

- (c) Evidence of “third country control” (allegedly Canadian) over the Claimant for the purposes of Article 1(2) of the BIT includes the following: the Ambassador of the Embassy of Canada in Kyiv intervened on the Claimant’s behalf; a Canadian national was at one stage president of Generation Ukraine and provided architectural services to the company; Generation Ukraine established a representative office in Toronto and opened a bank account at the Royal Bank of Canada; the Generation Ukraine letterhead represents that the company is “A United States, Canada, Ukraine venture”.
- (d) In relation to Article 26 of the ICSID Convention and its relationship to the BIT, the “BIT contains a preliminary consent/declaration of the Respondent subject to (i) accession to the ICSID Convention and (ii) non-application of the rule on exhaustion of domestic remedies at latest during the first consideration of an investor’s request for an ICSID arbitration after such accession.” By this contention the Respondent appears to maintain that it had the right to insist on the exhaustion of local remedies upon the first reference to ICSID arbitration following its accession to the ICSID Convention.
- (e) The registration of Heneratsiya’s foundation documents by the Pecherska District Administration was erroneous because those documents did not comply with the requirements of the Civil Code of Ukraine. This registration cannot cure the illegality of these documents. The application of the doctrine of estoppel to this issue is refuted on the basis that Ukrainian law does not recognise such a concept. Further irregularities in the foundation documents of Heneratsiya include the absence of a provision regarding the audit commission of the company.

- (f) The Counter-Memorial raised a new point in relation to the nature of the Claimant's consent to ICSID arbitration, which, according to the Respondent, was defective because no consent was communicated to Ukraine but was contained only in the Request for Arbitration forwarded to ICSID.
- (g) Another new point was raised in relation to the "negotiation and consultation" attempts undertaken by the Claimant as required by Article VI of the BIT. The Respondent asserts that the mediation chaired by V.P. Gorbulin, the Secretary of the Council of National Security and Defence of Ukraine, does not constitute a "negotiation and consultation" between the parties to the dispute because Mr Gorbulin was not authorised to conduct such negotiations on behalf of Ukraine. A similar objection is made in relation to the mediation pursued by the Claimant before the Chamber of Independent Experts, a mediation body established by the President of Ukraine for investment disputes. This mediation body does not have the competence to mediate disputes between investors and the Ukraine, but instead "bodies of executive power and bodies of local self-government". Rather, the bodies designated by Ukraine to conduct negotiations of this nature are the Administration for Investment Corporation of the Ministry of the Foreign Economic Relations of Ukraine and Department of Foreign Investment and Credits of the Ministry of Economy of Ukraine.
- (h) Finally, the Respondent argued in relation to the same point (g) that the dispute presented to Mr Gorbulin and the Chamber of Independent Experts was formulated very differently to the dispute currently before the present Tribunal. In particular the draft protocol of the mediation before Mr Gorbulin does not mention "expropriation" which is the cause of action now alleged by the Claimant. A similar statement is made in relation to the Claimant's Notice submitted to the Independent Chamber of Experts.

6.9 In its Reply to the Counter-Memorial, the Claimant commented in detail on each of the points relating to jurisdiction and admissibility. To summarise:

- (a) The investment transferred by Generation Ukraine to Heneratsiya by the Act of Property Transfer was evidenced by the Certificate of the State Agency for

Authors' Rights and the appraisals of the value of such rights thereafter. This Certificate does not merely evidence an intellectual property right in the design of the Parkview Office Building, as alleged by the Respondent, but rights to the "entire project". Article 1(1) in its entirety "applies directly to the Claimant's investment structure and fully validates it..." and, in particular, covers the Claimant's "equity investments into its local subsidiary as a means of completing and operating the project". The Claimant's investment was comprised of two components, "which included the direct cash investment" calculated by Ukrainian and U.S. auditing firms and the "intangible component represented by the know-how, expertise, business contacts, reputation, and the quality of the work produced" which was the subject of an appraisal by a state investment agency and adjusted by a U.S. auditing firm thereafter.

- (b) A grievance does arise out of the Claimant's ownership of shares in Heneratsiya, because the investment was transferred from the former to the latter by the Act of Property Transfer.
- (c) The contention that the Chamber of Independent Experts did not have the competence to resolve an investment dispute between the Claimant and the Kyiv City State Administration "on behalf of the State" is wrong because the Chamber was established by the President of Ukraine for this very purpose.
- (d) The Kyiv City State Administration is an "organ of executive power and local self-government" and therefore a "political subdivision" for the purposes of Article XI of the BIT. By ratifying the BIT, Ukraine accepted full responsibility for its political subdivisions. Alternatively, to the extent that the Kyiv City State Administration is a "constituent element of the State of Ukraine", the provisions of Article 25 of the ICSID Convention relating to a "constituent subdivision" do not apply, and in any case Article XI of the BIT constitutes a waiver of any rights it might have to exclude "constituent subdivisions" pursuant to Article 25.
- (e) Although there was an "extensive contribution" to the Claimant's investment made by "Canadian firms and citizens," this does not constitute "third country

control” for the purposes of Article 1(2) and the Respondent has failed to evidence any proof of such. The Respondent’s assertion that the Claimant, Generation Ukraine, did not conduct “substantial business activities” in the United States is incorrect because, for instance, “a professional staff in the New York office numbering upwards of 30 people in peak periods, was responsible for a broad array of planning and co-ordination activities between the key countries, the USA, Ukraine, Canada, Austria, Turkey and others.” The Claimant’s construction, legal and tax advisors and other service providers were all U.S. firms, and such services were performed in the U.S.

- (f) Neither the BIT nor the ICSID Convention required the Claimant to exhaust local remedies prior to the submission of a dispute to arbitration pursuant to Article VI of the BIT. If the Claimant had in fact submitted its dispute to the local courts of Ukraine, it would thereafter have “forfeited” its right to refer the dispute to ICSID arbitration pursuant to Article VI(3)(a) of the BIT.
- (g) The Respondent is estopped from denying the validity of the state registration of Heneratsiya as a corporate entity in Ukraine. The Pecherska District State Administration assumed responsibility for compliance of the documents with Ukrainian law and never notified Heneratsiya that there was any error in the registration of its founding documents. Article 8 of Chapter 2 of the Law of the Ukraine “Concerning Enterprises” envisages only that the owner of the legal entity can petition the court to cancel the state registration of such a legal entity.
- (h) The contention that the Claimant’s written consent to ICSID arbitration is defective because it was communicated to the ICSID Secretariat rather than Ukraine is incorrect in light of Article VI(3)(a)(i) of the BIT, which sets out the procedure for the submission of the dispute. The Respondent’s contention that its consent to arbitration in Article VI(4) of the BIT is in some way only a “preliminary consent” is incorrect as contrary to the express wording of that provision: “Each Party hereby consents...”.
- (i) As for the assertion that the mediation attempts involving Mr Gorbulin and the Chamber of Independent Experts do not qualify as an attempt to negotiate and

consult with Ukraine, Ukraine received even earlier notice of the dispute in the form of a petition filed by numerous deputies of the Kyiv City Council and Verhovna Rada (Parliament of Ukraine) in support of the Claimant on 1 March 1996. Mr Gorbulin was, furthermore, appointed as the Executive Secretary for Ukraine to the Gore-Kuchma Commission, which was charged with resolving investment disputes between the two countries. Therefore Mr Gobulin did have the authority to act on behalf of Ukraine at the mediation. Finally, the Claimant had been diligent in seeking negotiation and consultation with the Kyiv City State Administration as a manifestation of the State “virtually on a daily basis from the start of its project in 1993 to the meeting of Dec. 4, 1998, with Mr Omelchenko and his entire entourage”. The meeting with Mr Omelchenko in and of itself satisfied the requirement for consultation and negotiation for the purposes of Article VI(2) of the BIT.

- (j) In relation to the assertion that the dispute presented to Mr Gorbulin was formulated differently than the case brought before the present Tribunal, the Claimant counters that the agenda of that mediation was designed to restart the Parkview Project; hence it necessarily differed from one that “would be appropriate in the context of litigation”. In any case, the agenda expressly mentioned the problem of executing land lease amendments, which is central to the Claimant’s expropriation claim as pleaded before this Tribunal. In relation to the formulation of the dispute submitted to mediation before the Chamber of Independent Experts, there is no requirement that the matters submitted to that forum would be replicated before this Tribunal because both petitions for relief “deal with the same goal”, *i.e.* to recover damages for the unlawful actions of Kyiv City State Administration “that blocked the completion of the Parkview Office Building Project and that ultimately led to its expropriation by the Respondent”.

6.10 The Respondent’s Rejoinder contained the following further submissions on jurisdiction and admissibility:

- (a) In relation to the nature of the Claimant’s investments, the only proven tangible investments in the Ukraine were Heneratsiya’s computer and office



equipment and the copyright to the design “Parkview (Version 3)”, whereas the intangible form of the investment was the Claimant’s majority share in Heneratsiya. None of these investments have been expropriated. The certificate issued by the State Agency for Authors’ Rights could not confer anything other than an intellectual property right, since this was the extent of the competence of the Agency. The Act of Property Transfer referred to by the Claimant could only, therefore, transfer intellectual property rights in the project to Heneratsiya and nothing more.

- (b) Even if the “entire project” was transferred by the Act of Property Transfer, as the Claimant alleges, this would simply form part of the Claimant’s majority share in Heneratsiya, which has never been expropriated.
- (c) Ukraine concedes that the BIT does apply to political subdivisions of Ukraine and the U.S.A. Nevertheless, Article XI of the BIT does not confer standing on political subdivisions for the purposes of the ICSID Convention. In particular, “[b]eing the embodiment of the state executive power at the local level, the KMDA does not act on behalf of Ukraine as a State at the international arena”. The ratification by Ukraine of the BIT does not constitute the designation or approval of consent of a political subdivision required by Article 25 of the ICSID Convention. The present dispute, which is between the Claimant and the KMDA, is therefore inadmissible.
- (d) Generation Ukraine was subject to the control of a third country (Canada) and conducted no substantial business activity in the United States.
- (e) The registration of Heneratsiya by the Pecherska District Administration was erroneous as not in compliance with the Civil Code of Ukraine. The fact of this illegal registration should be “evaluated by the Tribunal in the context of the ICSID jurisdiction”. Furthermore, the Claimant’s suggestion that Article 8 of the Law of Ukraine “On Entrepreneurial Activity” does not envisage the possibility of the State initiating legal proceedings to cancel the registration of a company is incorrect. Ukraine concedes, however, that there have been no such proceedings instituted to date.

- (d) The term “preliminary consent” is used by the Respondent to indicate that, insofar as the BIT entered into force prior to the Ukraine’s accession to the ICSID Convention, its consent to ICSID arbitration was “preliminary” and subject to “final” consent upon accession to the ICSID Convention. The form of the Claimant’s consent to ICSID was defective because it was addressed to the ICSID Centre rather than to the Respondent.
- (g) Mr Gorbulin had no authority to represent Ukraine as a State in the mediation between the Claimant and the KMDA. This mediation cannot therefore constitute “consultation and negotiation” for the purposes of the BIT. Mediation is, in any case, different from consultation and negotiation as a matter of substance. Nor did Mr Omelchenko have any authority to represent Ukraine at the meeting on 4 December 1998.
- (h) The claims in these proceedings were never raised in the various mediation attempts, nor was there any reference made to the BIT. Hence, the present dispute was never before Ukraine.
- (i) The correct interpretation of Article XII of the BIT is that the BIT applies to investments in existence at the time of its entry into force, but only to “events, facts and situations related to such investments” after the BIT enters into force. The BIT entered into force, in accordance with Article XII, thirty days after the date of the exchange of instruments of ratification, on 16 November 1996. It had no legal force as a matter of Ukrainian law before this date.

6.11 On the occasion of the hearing of witnesses in Paris on 20 February 2003, the Tribunal, by a letter to the Parties of the same date, requested that they address certain issues in their final oral submissions. Some of these issues had emerged from the Parties’ written pleadings; others were identified by the Tribunal and raised in accordance with ICSID Arbitration Rule 41.2. The relevant part of the Tribunal’s letter is reproduced below:

**“The 27.06.96 and 26.07.96 Agreements** [*i.e.* the Lease Agreements and the Foundation Agreement]

Are these agreements valid today?

Have they been breached?

May the Claimant's grievance be said to arise out of them?

What meaning is to be ascribed to the words "court" and "procedure" under Article 4.3 of the 27.06.96 agreement?

What is the effect, if any, of Article 4.3 of the 27.06.96 agreement and Article 8 of the 26.07.96 agreement in light of Article 26 (first sentence) of the ICSID Convention, or of Article VI(2)(a) and (b) of the BIT?

### **The BIT**

What investments did Generation Ukraine Inc. make as defined by Article 1 of the BIT?

What was the contractual or other proprietary foundation of such investments?

When and by whom were such contractual or proprietary rights acquired, if any; and on the basis of what legal instrument?

May the dispute concerning the Parkview Project be said to arise out of Generation Ukraine Inc.'s interest in Heneratsiya Ltd.?

What provisions of the BIT have been breached? (The Parties are invited to pay special attention to the terms of Article VI(1).)

What is the meaning and the consequences of Articles II(7) and VIII(a)?

Under Article I(2), may Ukraine deny the advantages of the BIT to U.S. companies only if they are BOTH controlled by third country nationals AND do not have substantial business activities in the US, or is EITHER condition sufficient? What is the consequence if either interpretation is plausible?

### **The ICSID Convention**

Does Ukraine's consent to ICSID jurisdiction in Article VI of the BIT extend to investment disputes arising:

- (i) before 16 November 1996;
- (ii) after 16 November 1996;
- (iii) or only after 7 July 2000."

6.12 Instead of addressing these issues in its oral submissions, the Claimant applied to the Tribunal to have written responses to these issues received into the record. The Respondent acceded to this request. The following is a summary of the main points

made in that document, which was produced on the occasion of the final oral submissions.

### **The 27.06.96 and 26.07.96 Agreements**

- (a) The Kyiv City Council issued a decree on 8 July 1999 which purported to void its earlier decision to grant the Claimant the land which was the subject of the two Lease Agreements dated 27 June 1996. The Kyiv City Council did not obtain a judgment of a Ukrainian court as required by the Land Code of Ukraine. Therefore the decree is invalid and has no legal effect. The Foundation Agreement of 26 July 1996 also remains valid.
- (b) Each of these agreements has been breached by the Ukrainian authorities and the “Claimant’s grievance arises partly from the breaches of the aforementioned Agreements”.
- (c) Article 4.3 of the Lease Agreements “convey[s] the notion that disputes relating to the agreement shall be resolved in accordance with the provisions of existing or future laws. However, in view of the existence of the US/Ukraine Bilateral Investment Treaty this would suggest that, whereas the Claimant is exempted by the BIT from adjudicating its disputes in Ukrainian courts, the Respondent is not.”
- (d) Article 26 of the ICSID Convention prescribes that once the Claimant commences an ICSID arbitration “both parties are bound to a resolution of their dispute exclusively under the rules and procedures of the Convention and no other venue”. Article VI(2)(a) and (b) of the BIT provide that the investor has the option of bring disputes to a domestic forum of the State party to the dispute or in accordance with a previously agreed dispute resolution procedure, but this is not mandatory. Indeed, if the investor makes such an election, it would thereafter lose its right to bring an ICSID claim pursuant to Article VI(3)(a) of the BIT.

### **The BIT**

- (e) The Claimant's investment was not comprised of a company, or shares or stock or other interests in a company, or interests in the assets thereof; rather, it made several investments which qualify under different categories as defined in Article 1 of the BIT:
- (1) Tangible property: "The total expenses (investment) paid in by Generation Ukraine Inc. for the period January 1<sup>st</sup> 1993 through January 31<sup>st</sup> 1999 equalled US\$4,064,388..." The Claimant also invested computer and office equipment with a value of USD 24,000.
  - (2) Intangible property: "GUI [Generation Ukraine Inc] transferred to Heneratsiya Ltd. its total rights to the Parkview Project, including its architectural design, engineering work, Kyiv technical and utility permissions, marketing work and draft tenant's lease agreements, all project related rights to contracts and agreements with third parties for the execution of work required to continue the project in a formal Akt of Property Transfer, dated July 21, 1998, valued at \$19.97 million U.S. dollars... GUI's legal rights to the transferred property was established by the State Agency of Ukraine for Author's and Joint Rights in its Certificate VP No. 190 issued to Generation Ukraine Inc..." The value of this property increased as reflected in various expert valuations, arriving at a final figure of USD 38.75 million, which was recorded in an amendment to the Charter Fund of Heneratsiya.
  - (3) A claim to money or a claim to performance having economic value, and associated with an investment: "The Claimant was entitled to maintain a claim to money or a claim to performance arising from this project. Following upon the completion of the building, the Claimant had a legitimate expectation to receive the proceeds of the investment being future rents, under a general management agreement with its Ukrainian subsidiary. The Claimant was also entitled to rely on the performance of the Respondent in co-operating with, assisting in and

assuring full compliance with her laws and regulations for the successful completion of the venture”.

- (4) Intellectual property: “The aggregate collection of the materials which comprised the entirety of the Parkview Project can properly be classified as a combination of literary and artistic works, inventions and industrial designs. It is this aggregate which the State Agency of Ukraine for Author’s and Joint Rights acknowledged in its Certificate VP No. 190...”
- (f) The contractual or proprietary foundation of such investments were not recorded in one document alone. The starting point was the Protocol of Intentions, which is, for the purposes of Article VI, an “investment agreement between that Party and such national or company” and “an investment authorization granted by that Party’s foreign investment authority to such national or company”. Even though Mr Laka in his personal capacity signed the Protocol of Intentions, Generation Ukraine and Heneratsiya became the “lawful successor organizations for the execution of the terms of the Protocol”. Thereafter, “each and every licence and permit obtained by the Claimant from the Respondent is further evidence of the contractual arrangement between the parties”. Moreover, “[t]he Agreements of 27/6/1996 and 26/7/1996 advanced the contractual arrangements further to the point where property rights were granted to the Claimant which still exist to this date”.
- (g) In response to the question concerning what provisions of the BIT have been breached, the Claimant simply listed 16 different Articles of the BIT as comprehensive justification for its claim of expropriation.
- (h) In response to the question relating to the proper interpretation of Article I(2) of the BIT, the Claimant submits that at least two of the conditions set out in Article I(2) must be present for a Party to deny the benefits of the BIT to a company or national of the other Party: first the company must be owned or controlled by nationals of a third country *and* either the company is a “mere shell” or the third country is one with which the denying Party does not

maintain normal economic relations. Insofar as the Claimant is a “U.S. chartered corporation owned 100% by a U.S. citizen”, Article I(2) cannot apply in the present case.

### **The ICSID Convention**

Although the BIT entered into force thirty days after the exchange of instruments of ratification (on 16 November 1996), Ukraine nevertheless “absorbed the Treaty into her domestic laws on 21 October 1994 under Law No.226/94/VR”. The Claimant was therefore entitled to the protection of the BIT from 21 October 1994. Furthermore, Article XII of the BIT provides that the BIT shall apply to investments existing at the time of entry into force of the BIT. The Claimant’s investment existed before this time and hence is covered by the terms of the BIT. Finally, “Ukraine did not sign the ICSID Convention until 7 July 2000 and clearly cannot benefit from her wilful delay in ensuring that the proper mechanism was available for the resolution of disputes as provided for under the Treaty”.

6.13 The Claimant made these further oral submissions relevant to jurisdiction and admissibility:

- (a) The Protocol of Intentions, the two Lease Agreements and the Foundation Agreement constitute “investment agreements” for the purposes of Article VI(1)(a).
- (b) In relation to the time at which the dispute came into existence: “all of the elements of the present complaint were first mutually and publicly acknowledged by both the company and the KMDA at the joint meeting between the company, the KMDA and representatives of the Embassy of the USA on 4 December 1998”.
- (c) The jurisdictional problem in *Tradex v. Albania*<sup>1</sup> does not arise in the present case because the “de facto forced termination and expropriation” occurred after the BIT entered into force on 16 November 1996 when the “KMDA

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<sup>1</sup> ICSID Case No. ARB/94/2, discussed in Paragraph 9.2 below.

refused to carry out its obligations under the Yalovoy Protocol” following the meeting on 11 July 1997.

- (d) It was reiterated that the Claimant’s investment consists of “two components”: “the direct cash investment from Generation Ukraine amounting to US \$4,064,338” and the “intangible components” including know-how, contracts, expertise, and the like.
- (e) A further attempt at “negotiation and consultation” was made on 8 February 1999 at a meeting involving Mr S. Tyhypko of the Ministry of the Economy of Ukraine, Mr Bowen of the United States Embassy in Kyiv, and Mr Laka. Mr Tyhypko sent a letter to the US Embassy the following day on the letterhead of the Cabinet of Ministers to explain the results of the meeting.

6.14 For its part, the Respondent addressed the issues raised in the Tribunal’s letter in its oral submissions at the second hearing, arguing as follows:

**The 27.06.96 and 26.07.96 Agreements**

- (a) The Lease Agreements and the Foundation Agreement remain valid to this day. The decision of the Kyiv City Council “had no legal impact on the validity of Land Lease Agreements [sic] for forty-nine years”.
- (b) The Lease Agreements have not been breached by either Party. The Foundation Agreement was breached by Heneratsiya because it failed to commence construction at the appropriate time and to pay the USD 150,000 infrastructure fee.
- (c) Clause 4.3 of the Lease Agreements envisages that the settlement of any disputes arising out of the agreements shall be “through the courts of Ukraine”. In this case the appropriate court would be the Economic Court of the City of Kyiv. This clause does not, however, create jurisdiction in a court that would not otherwise have jurisdiction in the absence of this clause.
- (d) Article 26 of the ICSID Convention and Article VI(2)(a) and (b) of the BIT “have no effect” in light of clause 4.3 of the Lease Agreements and clause 8 of



the Foundation Agreement. The parties to these agreements were Heneratsiya and KMDA (not Generation Ukraine and Ukraine) and hence these agreements are not “investment agreements” for the purposes of Article VI(2)(a). Furthermore, the BIT and the ICSID Convention were not in force at the time the Lease Agreements were executed and hence could have no impact on clause 4.3.

### **The BIT**

- (e) The only investments the Claimant has made in the Ukraine are the computer and office equipment and “indirect control over the design, plans and specifications concerning version three of the corrected design of the Parkview Building”. The “form of the investment” was the Claimant’s majority share in Heneratsiya. There was “no other direct investment... made by Generation Ukraine in the territory of Ukraine which might fit the broad criteria of the BIT”.
- (f) The Protocol of Intentions is not capable of being the foundation for the Claimant’s investment. It is not a binding contract (as follows from its title) because it does not meet the requirements of Ukrainian law for it to have such an effect. Furthermore, the parties to the Protocol of Intentions are not the same as the Parties to this dispute.
- (g) The dispute concerning the Parkview Project cannot be said to arise out of Generation Ukraine’s interest in Heneratsiya because there is no legally recognisable “project”.
- (h) There is no dispute within the meaning of Article VI(1)(a) or (b) of the BIT because there was no investment agreement between the Parties and nor any investment authorisations because the latter have “never been mandatory” for foreign investment in Ukraine. Ukraine has, furthermore, never breached any provision of the BIT in relation to the Claimant’s investment.
- (i) Ukraine can deny the Claimant the advantages of Article I(2) of the BIT if it can be shown that *either* there is third country control over the Claimant or no

substantial business activities of the Claimant in the United States. In the present case the Claimant “has failed to provide sufficient evidence with regard to third country control and substantial business activities”.

### **The ICSID Convention**

- (j) Ukraine asserts: “Neither the ICSID Convention nor the BIT give any ground to assume that Ukrainian consent to the ICSID jurisdiction extends to disputes arising before the date such consent was given ... [t]herefore there is no reason to allege that the Ukraine consent to ICSID jurisdiction could extend to investment disputes arising before 7 July 2000”. The BIT did not become part of Ukrainian law until it came into force in November 1996.

6.15 The Respondent made several further points in its oral submissions on 19 March 2003:

- (a) The Claimant’s legal advisors did not have proper authority to represent Generation Ukraine. The resolution of the Board of Directors of Generation Ukraine dated 1 February 2000 refers to the instruction of counsel “to represent the corporation in its complaints against the Government of Ukraine before the ICSID additional facility and other venues”. This resolution was not effective to confer authority to Mr Kilty because, on the one hand, “the word venue means only the place of proceedings rather than arbitration institution”, and, on the other hand, because the present arbitration is not before the ICSID Additional Facility. Mr Kilty therefore has no authority to represent the Claimant.
- (b) The BIT only became part of Ukrainian law when it came into force on 16 November 1996. The BIT could not be in force for the Ukraine in 1994 because “at this time it was not in force for the counterparty, for the United States of America, and how could the BIT be effective for one party without being effective for another party?”

## 7. Definition of the Preliminary Issues

7.1 Having regard to the Parties' pleadings, the Tribunal has identified the following issues in the Parties' written and oral pleadings relating to jurisdiction and admissibility that fall to be decided:

- (a) Has the Claimant made an investment in Ukraine within the definition of Article 1(1) of the BIT and Article 25 of the ICSID Convention? What are the legal rights acquired by the Claimant that evidence such an investment? What is the factual basis for the investment in terms of the consideration advanced by the Claimant to secure these legal rights? What is relevance of the Claimant's shareholding in Heneratsiya as an investment in Ukraine? These issues relate to the Tribunal's jurisdiction *ratione materiae*.
- (b) Was the registration of Heneratsiya as a legal entity in Ukraine defective in any way? How would such a defect impact on this Tribunal's jurisdiction?
- (c) Are the Claimant's grievances directed against Ukraine or the Kyiv City State Administration? Is Ukraine the proper party to this investment dispute? These issues relate to the Tribunal's jurisdiction *ratione personae*.
- (d) For the purposes of Article VI(1) of the BIT, is the investment dispute between the Parties to be characterised as a dispute arising out of or relating to: (i) an investment agreement between Ukraine and the Claimant; (ii) an investment authorisation granted by Ukraine's foreign investment authority to the Claimant; or (iii) an alleged breach of any right conferred or created by the BIT with respect to an investment made by the Claimant?
- (e) From what point in time does the Tribunal have jurisdiction (*ratione temporis*) over the investment dispute?
- (f) Was the Claimant's or the Respondent's consent to ICSID arbitration in some way defective?
- (g) Is the Claimant required to exhaust local remedies before making a submission to ICSID?

- (h) Have the parties sought a resolution of the investment dispute through consultation and negotiation pursuant to Article VI(2) of the BIT? Was Ukraine properly represented in the alleged attempts at consultation and negotiation? Was it necessary for the present investment dispute to be formulated in the same way at the alleged attempts at consultation and negotiation?
- (i) Is Ukraine is entitled to deny the Claimant the advantages of the BIT pursuant to Article I(2)?
- (j) Were the Claimant’s legal advisors properly authorised to represent the Claimant in this arbitration?

**8. The Claimant’s Investment - Jurisdiction *Ratione Materiae***

8.1 In accordance with Article 25 of the ICSID Convention, an arbitral tribunal established pursuant to the ICSID Convention has jurisdiction *ratione materiae* over “any legal dispute arising directly out of an investment”.

8.2 No definition of “investment” is to be found in the ICSID Convention. It is well settled that Contracting Parties may agree upon a more precise definition of “investment” in a separate legal instrument. The Claimant has invoked the jurisdiction of ICSID pursuant to Article VI of the BIT. Hence, the definition contained in Article I(1)(a) of the BIT (set out in full at Paragraph 18.1 below) applies in this reference to ICSID arbitration.

8.3 The Claimant’s description of its investment was first articulated in its Request for Arbitration as follows:

“Generation Ukraine Inc is a “company” within the meaning of Article I of the Treaty which undertook an “investment” (also within the meaning of Article I) in Ukraine in the form of a proposed premier office block development known as the Parkview Office Building Project at Boulevard Shevchenko 32 in the City of Kyiv.”

8.4 The same document also described a second investment for the purposes of Article I of the BIT:

“[...] Generation Ukraine Inc. caused to be registered on May 7 1993 in Ukraine a company called Heneratsiya Ltd. Heneratsiya Ltd. is a wholly owned subsidiary of Generation Ukraine Inc. and qualifies by Ukrainian law as a company with 100% foreign investment. It is an exclusively U.S. investment being owned by Generation Ukraine Inc. (99.97%) and by Mr Eugene Laka (0.03%). In accordance with Article I of the Bilateral Investment Treaty, Heneratsiya Ltd. constitutes an U.S. Investment in Ukraine made by both Generation Ukraine Inc. and Mr Laka...”

8.5 The Tribunal accepts that Generation Ukraine’s shareholding interest in Heneratsiya *prima facie* constitutes an investment within the meaning of Article I(1)(a)(ii) of the BIT which includes “shares of stock or other interests in a company”. (This is without prejudice to the Tribunal’s consideration of the Respondent’s jurisdictional challenge concerning the legality of Heneratsiya’s incorporation in the Ukraine.) Generation Ukraine’s ownership rights in the vehicle Heneratsiya (*i.e.* its title to shares in Heneratsiya) has not, however, been shown to have been affected by the conduct which has given rise to Generation Ukraine’s grievance. The Claimant’s allegations rather pertain to the difficulties encountered by Heneratsiya when it sought to make investments of its own.

8.6 Each cause of action pleaded by the Claimant in the present case relates to the “proposed premier office block development known as the Parkview Office Building Project at Boulevard Shevchenko 32 in the City of Kyiv” as described in the Request for Arbitration. Therefore, as long as there was no interference in Generation Ukraine’s ownership of Heneratsiya *per se*, there could be no “investment dispute” for the purposes of Article VI of the BIT unless and until Heneratsiya actually made an investment in the Parkview Project. A contention that Ukrainian officials made it unacceptably difficult for Heneratsiya to effect the investment could not give rise to an investment dispute unless the Claimant was in a position to invoke pre-investment protections. Such protections do exist in various international treaties (*e.g.* the right to establish a business or tender for contracts without discrimination) but no such right has been invoked here.

8.7 In response to the Claimant’s Request for Arbitration, the Respondent challenged the jurisdiction of ICSID by asserting that “[t]he Claimant has not proved that the Parkview Office Building Project fits the criteria of an ‘investment’ established in Article I(1) of the BIT”.

8.8 Since there cannot be an expropriation unless the complainant demonstrates the existence of proprietary rights in the first place, the legal materialisation of the Claimant's alleged investment is a fundamental aspect of the merits in this case and will be considered in detail in Section 18 of this Award. For present purposes, it is sufficient to record that the Tribunal is satisfied that the Claimant's efforts resulted in the materialisation of rights that qualify as "investments" under several criteria defined in Article I(1)(a). This conclusion is not, however, sufficient to create jurisdiction *ratione materiae*. It is also necessary that there be a *dispute* of a kind contemplated by the BIT.

8.9 The determination of the nature of the dispute is made difficult by the fact that the Claimant has advanced an extraordinarily broad and heterogenous swathe of claims based on Ukrainian tort law, Ukrainian constitutional and administrative law and the BIT itself. The interrelationship between domestic law claims and BIT claims is far from clear in the Claimant's pleadings. In parts of the Claimant's voluminous written submissions, it appears that the Claimant is advancing the domestic law claims in their own right, whereas in others one might deduce that the references to domestic law provisions are designed to put the various acts of Ukrainian authorities into context for the purposes of demonstrating a breach of an international standard.

8.10 This Tribunal is not endowed with general jurisdiction to hear claims based on any source of law arising at any point in time against any potential defendant. The jurisdiction of the Tribunal is limited to investment disputes, which are defined in Article VI(1) of the BIT as:

"... a dispute between a Party and a national or company of the other Party arising out of or relating to (a) an investment agreement between that Party and such national or company; (b) an investment authorization granted by that Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment."

8.11 This limited nature of the Tribunal's jurisdiction has escaped the Claimant's analysis of its claims. The formulation of "Claim A" will suffice to illustrate the point:

“This claim seeks to recover the 114 months of lost revenues, up to December 31, 1999 and which continues to grow, from the company’s Parkview Project which should have been completed and ready to accept paying tenants on, or before, June 1, 1996 ... but was not because of documented unlawful acts of officials of the Kyiv City State Administration (KMDA). The company enjoys protection from two sources for the compensation of these lost revenues: Article III of the US/Ukraine Bilateral Investment Treaty which bars unlawful expropriations and two Laws of Ukraine that expressly require the indemnification for lost revenues due to the misconduct of government entities and officials.”

8.12 This Tribunal could conceivably have jurisdiction over domestic law claims under categories (a) and (b) of the definition of investment disputes in Article VI(1). But the Claimant’s domestic law claims cannot possibly fall within these two categories. In relation to category (a), an “investment agreement” must be an agreement between the investor and one of the two State Parties to the BIT. The Claimant has never contracted directly with Ukraine as a “Party” to the BIT. In the present case, the parties to the Lease Agreements and the Foundation Agreement are the Claimant and a municipal authority of Ukraine, the Kyiv City State Administration. True enough, the acts of the Kyiv City State Administration may be imputable to Ukraine as a sovereign state for the purposes of the international law of state responsibility. For this reason, the Claimant is entitled to bring a cause of action based on alleged expropriation of its investment by acts performed by Ukrainian municipal authorities. It is an international claim and international rules of attribution apply. But such rules do not operate to join the central government of Ukraine to contractual relationships entered into by municipal authorities. The Claimant has not, moreover, ever advanced a specific claim for the breach of its agreements with the Kyiv City State Administration. In relation to category (b), it has never been suggested that the Order on Land Allocation or the Construction Permits were granted by Ukraine’s Party’s “foreign investment authority”. Nor does the Tribunal understand the Claimant to have alleged a grievance arising out of these administrative acts. The domestic law claims discernable in “Claim A” and elsewhere in the Claimant’s pleadings are therefore beyond the scope of this Tribunal’s jurisdiction.

8.13 There are additional reasons for this conclusion. The Tribunal’s jurisdiction *ratione personae* and *ratione temporis* will be examined in detail below, but to

complete the jurisdictional analysis of “Claim A” it should be noted that the proper defendant to any domestic law claims is the Kyiv City State Administration, not Ukraine. This is because the international rules of attribution obviously do not apply to causes of action grounded in domestic law, so that any such claim cannot be directed against Ukraine vicariously. Furthermore, the alleged “unlawful acts of officials” date from 1993. The BIT did not enter into force until 16 November 1996, and the earliest date at which the Claimant can be said to have a recognisable investment pursuant to Article I(1) of the BIT is 24 April 1996, upon the Kyiv City State Administration’s Order of Land Allocation. Hence, any cause of action over which this Tribunal has jurisdiction must have arisen after 16 November 1996.

8.14 The Tribunal concludes that its jurisdiction *ratione materiae* in this case is limited to category (c) of Article VI(1), viz. “any alleged breach of any right conferred or created by [the] Treaty with respect to an investment”. In its Claims A to D, the Claimant has pleaded three distinct acts of expropriation in breach of Article III of the BIT that were effected by: (i) the Kyiv City State Administration’s failure to provide Heneratsiya with corrected land lease agreements by 31 October 1997 in accordance with the terms of the Yalovoy Protocol; (ii) the Kyiv City Council’s Decision of 8 July 1998 which purported to annul Heneratsiya’s leasehold rights; and (iii) the Kyiv City State Administration’s failure to procure the use of neighbouring land for the benefit of the Claimant’s construction staging area. Subject to the resolution of the Respondent’s other jurisdictional objections below, the Tribunal rules that it has jurisdiction *ratione materiae* over these three causes of action with respect to the Claimant’s investment.

## **9. The Validity of the Registration of Heneratsiya**

9.1 The Respondent has submitted that the registration of the Claimant’s investment vehicle in Ukraine, Heneratsiya, was formally defective under Ukrainian law because the foundation agreement between its shareholders Generation Ukraine and Mr Laka was signed by Mr Laka in both his personal capacity as a shareholder and as the representative of Generation Ukraine.

9.2 In accordance with Article 6 of the Law of Ukraine “Concerning Enterprises in Ukraine”: “[a]n enterprise is considered created and acquires the rights of a legal



entity from the day of its state registration”. Further, that registration can only be annulled by a decision of a competent Ukrainian court.

9.3 The Respondent has not produced any decision of a competent Ukrainian court on the validity of the state registration of Heneratsiya. In these circumstances, the Tribunal must accept the *status quo* of Heneratsiya’s effective existence as a Ukrainian legal entity because this Tribunal has no jurisdiction to investigate and rule upon the alleged formal defect raised by the Respondent.

## **10. The Proper Parties to the Dispute - Jurisdiction *Ratione Personae***

10.1 The Respondent has asserted that the Kyiv City State Administration, rather than the State of Ukraine, is the proper party to this dispute, which relates to acts or omissions of officials of the Kyiv City State Administration allegedly causing harm to Generation Ukraine. In this connection, the Respondent has stated that “being the embodiment of the state executive power at the local level, the [Kyiv City State Administration] does not act on behalf of Ukraine as a State at the international arena”.

10.2 The Respondent has failed to differentiate between disputes arising under domestic law and dispute arising under the BIT. Insofar as this statement relates to a cause of action based on the BIT, it discloses a confusion about the juridical nature of such a cause of action. By invoking Article III of the BIT, the Claimant is seeking to invoke the international responsibility of Ukraine on the basis that various acts or omissions of officials of the Kyiv City State Administration are attributable to Ukraine in accordance with the rules of international law and that such acts or omissions amount to an expropriation. The relevant international rule of attribution is summarised in Article 4 of the ILC’s Articles on State Responsibility:

“1. The conduct of a State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”

10.3 There is no doubt that the conduct of a municipal authority such as the Kyiv City State Administration, which is listed as an organ of State power by the Ukrainian Constitution, is capable of being recognised as an act of the State of Ukraine under international law. Judicial authority for this proposition may be found in the decision of the Permanent Court of International Justice in *Certain German Interests in Polish Upper Silesia (Merits)*:

“From the standpoint of International Law and of the Court which is its organ, municipal laws ... express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.”<sup>2</sup>

10.4 The Respondent is correct to affirm that “the [Kyiv City State Administration] does not act on behalf of Ukraine as a State at the international arena”. This is precisely the reason that Ukraine rather than the Kyiv City State Administration is the proper party to these international arbitration proceedings, where the international obligations of the former are alleged to have been breached by the conduct of the latter.

10.5 It would be an entirely different matter if this Tribunal were to be seized of a cause of action based on an alleged breach of a contract between the Claimant and the Kyiv City State Administration. In such a case, the Kyiv City State Administration itself would be the proper party to these proceedings. It is in this situation that Article 25(3) of the ICSID Convention, cited by the Respondent in the context of this jurisdictional objection *ratione personae*, has a role to play. Article 25(3) relates to the consent of the respondent State to the participation of a “constituent subdivision or agency” of that State in ICSID proceedings. This is a necessary prerequisite for investment disputes where the investor alleges a breach of an obligation owed by the “constituent subdivision or agency” in its own capacity. Only Ukraine is privy to the obligations under the BIT, not the Kyiv City State Administration.

10.6 This distinction between the basis of liability in treaty and contractual claims was examined at length by the *ad hoc* Committee in *Compañía de Aguas del Aconquija S.A. & Vivendi Universal v. Argentine Republic*:

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<sup>2</sup> 1926, P.C.I.J., Series A, No.7 at p. 19.

“... in the case of a claim based on a treaty, international law rules of attribution apply, with the result that the state of Argentina is internationally responsible for the acts of its provincial authorities. By contrast, the state of Argentina is not liable for the performance of contracts entered into by Tucumán, which possesses separate legal personality under its own law and is responsible for the performance of its own contracts.”<sup>3</sup>

10.7 There is no difficulty in applying the international rules of attribution in this case. The proper focus is instead on whether the Claimant can establish that the conduct of the Kyiv City State Administration, or other relevant Ukrainian State organs, amounts to a breach of an international obligation set out in the BIT.

## **11. Jurisdiction *Ratione Temporis***

11.1 The Tribunal finds, for reasons explained in Section 18 below, that the Claimant acquired legal rights in the Parkview Project that are susceptible to falling within the definition of an investment under Article 1(1) from the moment the Order on Land Allocation came into effect on 24 April 1996. The BIT came into force on 16 November 1996. Article XII(3) provides, *inter alia*, that the BIT “shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter”. Hence the Claimant’s investment, evidenced by the various administrative and contractual documents referred to in Section 18, is an investment recognised by the BIT notwithstanding that the BIT entered into force after the date of the Order of Land Allocation, the Lease Agreements and the Foundation Agreement.

11.2 A separate issue arises, however, relating to the jurisdiction of the Tribunal over investment *disputes* that came into existence before the BIT came into force. The Claimant’s causes of action appear to invoke the prohibition against expropriation in Article III of the BIT. Thus the disputes underlying these-causes of action fall within the third category (c) “investment disputes” under Article VI(1): “an alleged breach of any right conferred or created by this BIT with respect to an investment.” The obligations assumed by the two state parties to the BIT relating to the minimum standards of investment protection (including the prohibition against expropriation) did not become binding, and hence legally enforceable, until the BIT entered into force on 16 November 1996. It follows that a cause of action based on

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<sup>3</sup> ICSID Case No. ARB/97/3, at para. 96. (Footnote omitted.)

one of the BIT standards of protection must have arisen after 16 November 1996. Support for this conclusion may be found in *Tradex Hellas S.A. v. Republic of Albania*,<sup>4</sup> a case cited by the Claimant, where the Tribunal recognised that it could only have jurisdiction over causes of actions arising after the relevant bilateral investment treaty entered into force, notwithstanding that the treaty applied expressly to investments made before the treaty entered into force.

11.3 It is plain that several of the BIT standards, and the prohibition against expropriation in particular, are simply a conventional codification of standards that have long existed in customary international law. The Tribunal does not, however, have general jurisdiction over causes of action based on the obligations of states in customary international law.

11.4 In conclusion, the Tribunal's jurisdiction *ratione temporis* is limited to alleged expropriatory acts which occurred after 16 November 1996.

## **12. The Validity of the Parties' Consent to ICSID Arbitration**

12.1 The Respondent submits that the Claimant's consent to ICSID arbitration was defective because it was communicated directly to the ICSID Centre and not to Ukraine. The Respondent further maintains that its own consent has not been perfected because it expressed only "preliminary" consent to ICSID arbitration in the BIT before the ICSID Convention had been ratified by Ukraine. This "preliminary" consent was, according to the Respondent, subject to its "final" consent once the ICSID Convention came into force for Ukraine.

12.2 Neither of these arguments have any merit. First, it is firmly established that an investor can accept a State's offer of ICSID arbitration contained in a bilateral investment treaty by instituting ICSID proceedings. There is nothing in the BIT to suggest that the investor must communicate its consent in a different form directly to the State; to the contrary, the express language of Article VI(3)(a) dictates otherwise:

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<sup>4</sup> ICSID Case No. ARB/94/2.

“...the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by binding arbitration: (i) to the International Centre for the Settlement of Investment Disputes ...”

12.3 It follows that the Claimant validly consented to ICSID arbitration by filing its Notice of Arbitration at the ICSID Centre.

12.4 In relation to the Respondent’s second argument, there is nothing in the BIT to suggest that its consent to ICSID arbitration was in some way “preliminary” and subject to later confirmation once Ukraine had ratified the ICSID Convention. Once again, the express language of the BIT compels the opposite conclusion; Article VI(4) provides:

“Each Party hereby consents to the submission of any investment dispute for settlement by binding arbitration in accordance with the choice specified in the written consent of the national or company... Such consent, together with the written consent of the national or company... shall satisfy the requirement for: (a) written consent of the parties to the dispute for the purposes of [the ICSID Convention].”

12.5 The use of the adverb “hereby” in Article VI(4) conveys the finality of the consent to arbitration on the part of the State Parties to the BIT. There is no scope for a State Party to subsequently modify or refine its unilateral consent either generally or in relation to a particular submission to arbitration.

12.6 Ukraine’s consent to ICSID arbitration in Article VI(3) of the BIT was naturally conditional upon a future event, *viz.* Ukraine’s ratification of the ICSID Convention. This no doubt explains the proviso to the consent in Article 3(a)(i) which states: “provided that the Party is a party to [the ICSID] Convention”. But Ukraine’s free standing consent to ICSID arbitration was perfected as soon as the ICSID Convention entered into force for Ukraine on 7 July 2000. Ukraine did not make any reservation to the BIT whereby it could reassess the status of its consent once the condition precedent for its full validity had been fulfilled.

12.7 The possibility that the ratification of the ICSID Convention could be a condition precedent to the validity of an offer to arbitrate was recognised in the very first ICSID arbitration, the *Holiday Inns S.A. v. Morocco*<sup>5</sup> case, where the arbitration

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<sup>5</sup> ICSID Case No. ARB/72/1.

clause was contained in a contract between the investor and the State. The Tribunal put it as follows:

“The Tribunal is of the opinion that the Convention allows parties to subordinate the entry into force of an arbitration clause to the subsequent fulfilment of certain conditions, such as the adherence of States concerned to the Convention, or the incorporation of the company envisaged by the agreement. On this assumption, it is the date when the conditions are definitively satisfied, as regards one of the Parties involved, which constitutes in the sense of the Convention the date of consent by that Party.”<sup>6</sup>

12.8 The Claimant’s Notice of Claim was filed on 21 July 2000 after the condition precedent to the validity of Ukraine’s offer to arbitrate disputes under the auspices of the ICSID Convention had been fulfilled on 7 July 2000. This disposes of the second limb of the Respondent’s objection to jurisdiction based on the validity of the consent to ICSID arbitration.

### **13. Exhaustion of Local Remedies**

13.1 The Respondent maintains that it had the right to insist upon the exhaustion of local remedies by the Claimant as a precondition to the submission of the dispute to ICSID arbitration. The source of this right, according to the Respondent, is Article 26 of the ICSID Convention, which reads:

“Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.”

13.2 The Respondent submits that the second sentence of Article 26 of the ICSID Convention prevails over Article VI(4) of the BIT, which contains no reference to the local remedies rule, by reason of the *lex specialis* character of the ICSID Convention vis-à-vis the BIT.

13.3 It is not necessary for the Tribunal to consider the relationship between Article 26 of the ICSID Convention and Article VI(4) of the BIT because there is no conflict between these provisions. Article 26 of the ICSID Convention does not assist the

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<sup>6</sup> Quoted in P. Lalive, “The First World Bank Arbitration (Holiday Inns v. Morocco) - Some Legal Problems” (1993) 1 *ICSID Reports* 645, 668.

Respondent in its attempt to impose a procedural obstacle for the Claimant's submission to arbitration.

13.4 The first sentence of Article 26 secures the exclusivity of a reference to ICSID arbitration vis-à-vis any other remedy. A logical consequence of this exclusivity is the waiver by Contracting States to the ICSID Convention of the local remedies rule, so that the investor is not compelled to pursue remedies in the respondent State's domestic courts or tribunals before the institution of ICSID proceedings. This waiver is implicit in the second sentence of Article 26, which nevertheless allows Contracting States to reserve its right to insist upon the prior exhaustion of local remedies as a condition of its consent.

13.5 Any such reservation to the Ukraine's consent to ICSID arbitration must be contained in the instrument in which such consent is expressed, *i.e.* the BIT itself. As the Tribunal put it in *Lanco International Inc. v. Argentina*:<sup>7</sup> "A State may require the exhaustion of domestic remedies as a prior condition for its consent to ICSID arbitration. This demand may be made (i) in a bilateral investment treaty that offers submission to ICSID arbitration, (ii) in domestic legislation, or (iii) in a direct investment agreement that contains an ICSID clause."<sup>8</sup> The United States and Ukraine have elected to omit any requirement that an investor must first exhaust local remedies before submitting a dispute to ICSID arbitration in the BIT. In any case, once the investor has accepted the State's offer to arbitrate in the BIT by filing its Notice of Arbitration, no further limitations or restrictions on the reference to arbitration can be imposed unilaterally, whether by the State or by the investor.

13.6 For these reasons, the Respondent's reliance on Article 26 is unfounded. The Claimant was under no constraint to exhaust any remedies in the Ukrainian courts before filing its Notice of Arbitration to the ICSID Centre.

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<sup>7</sup> ICSID Case No. ARB/97/6.

<sup>8</sup> *Ibid.* at para. 39.

## **14. Consultation and Negotiation**

14.1 The Respondent submits that the Claimant has not complied with the requirement in Article VI(2) of the BIT to seek a resolution of the investment dispute through consultation and negotiation.

14.2 Unlike many BITs, there is no compulsory period for consultation and negotiation envisaged by Article VI(2), but rather a stipulation in Article VI(3) that six months must elapse from the date on which the dispute arose before the submission of the dispute to binding arbitration by the investor.

14.3 Some authorities consider the requirement to consult and negotiate before proceeding to arbitration as “procedural” rather than a condition precedent for the vesting of jurisdiction. This Tribunal would be hesitant to interpret a clear provision of the BIT in such a way so as to render it superfluous, as would be the case if a “procedural” characterisation of the requirement effectively empowered the investor to ignore it at its discretion.

14.4 The Tribunal need not rule upon the status of the requirement to consult and negotiation in this case because the Claimant has quite clearly discharged its obligation to do so. The Tribunal is satisfied that the attempts to mediate before V.P. Gorbulin, Secretary of the Council of National Security and Defence of Ukraine and Executive Secretary for Ukraine to the Gore-Kuchma Commission, and before the Chamber of Independent Experts, a body established by the President of Ukraine for the settlement of investment disputes are sufficient for the purposes of Article VI(2).

14.5 It is certainly true, as the Respondent maintains, that the formulation of the Claimant’s legal case before this Tribunal differs in many respects from its representations to Mr Gorbulin and the Chamber of Independent Experts. The requirement to consult and negotiate, however, does not serve to compel the investor to plead its legal case on multiple occasions. To insist upon a precise congruity in the investor’s articulation of its grievances in these different *fora* would only have a chilling effect on consultation and negotiation between the investor and the host State. There is no doubt that the subject matter of the two mediations was the Claimant’s



Parkview Project and the conduct of Ukrainian authorities in respect thereto. This is sufficient for the purposes of the requirement in Article VI(2) of the BIT.

14.6 The Tribunal is also unconvinced by the Respondent's insistence that these two mediation attempts were not "authorised" by the Ukrainian State or the specific ministry responsible for the conduct of ICSID arbitrations. The Claimant had every right to expect that the aforementioned mediators acted with the ultimate authority of the Ukrainian State.

## **15. Denying Advantages under Article I(2) of the BIT**

15.1 The Respondent has invoked Article I(2) of the BIT to prevent the Claimant from deriving benefit from the investment protection standards conferred by the BIT in the circumstances of this case. Article I(2) provides as follows:

"Each Party reserves the right to deny to any company the advantages of this Treaty if nationals of any third country control such company and, in the case of a company of the other Party, that company has no substantial business activities in the territory of the other Party or is controlled by nationals of a third country with which the denying Party does not maintain normal economic relations."

15.2 Leaving aside, for the moment, the factual predicate for the Respondent's reliance on Article I(2), the proper interpretation of this provision was a subject of controversy in the parties' written and oral pleadings. The controversy stems from an ambiguity in the text of Article I(2), insofar as it might reasonably be argued that the right of denial may extend to companies without substantial activities in the place of incorporation, whether or not they are subject to "third country control". In view of this ambiguity, the Tribunal requested the Parties' submissions on the following question:

"Under Article I(2), may Ukraine deny the advantages of the Treaty to U.S. companies only if they are BOTH controlled by third country nationals AND do not have substantial business activities in the US, or is EITHER condition sufficient?"

15.3 The Parties' responses to this question did not advance the analysis much further as both simply asserted competing semantic points without investigating the ramifications of either approach as a matter of law or policy. Nor did the Parties rely

upon any *travaux préparatoires* or other extraneous materials from which the common intention of the Contracting Parties might be better understood.

15.4 The Claimant did submit for the record various documents relating to the United States' ratification of the BIT at an early stage of the proceedings. In particular, the Tribunal has access to the "Letter of Submittal" from the United States Department of State to the President dated 7 September 1994 which provides an article-by-article commentary to the BIT. In the course of the oral submissions, the Respondent emphasised that this commentary should not be regarded as necessarily reflecting the official interpretation given to the BIT by Ukraine. This is certainly a fair and understandable reservation, but equally the Respondent did not tender any documents emanating from official Ukrainian sources.

15.5 The relevant section of the commentary in the U.S. "Letter of Submittal" reads:

"Under paragraph 2 of Article 1, either country may deny the benefits of the Treaty to investments by companies established in the other that are owned or controlled by nationals of a third country if (1) the company is a mere shell, without substantial business activities in the home country, or (2) the third country is one which the denying Party does not maintain normal economic relations."

15.6 Unlike the executed version of Article I(2), this commentary is crystal clear: one or the other of the numbered provisos must be fulfilled *in addition to* the general requirement that the company in question is owned or controlled by nationals of a third country. Hence the official and contemporaneous U.S. interpretation of Article I(2) unequivocally supports the Claimant's position in this case. A textual analysis of Article I(2) also seems to favour this approach. If the "third country control" requirement was not intended to pervade the rest of the article, one would expect the use of the disjunctive "or" rather than the conjunctive "and" before the first comma in Article I(2).

15.7 In the absence of any competing considerations advanced by the Respondent, the Tribunal is satisfied that "third country control" over Generation Ukraine is a prerequisite for any purported invocation of Article I(2) by the Respondent. Furthermore, the burden of proof to establish the factual basis of the "third country

control”, together with the other conditions, falls upon the State as the party invoking the “right to deny” conferred by Article 1(2). This is not, as the Respondent appears to have assumed, a jurisdictional hurdle for the Claimant to overcome in the presentation of its case; instead it is a potential filter on the admissibility of claims which can be invoked by the respondent State.

15.8 The Respondent’s assertion that the Claimant has “failed to provide sufficient evidence with regard to third country control and substantial business activities” is therefore inapposite, and, when coupled with the paucity of the Respondent’s own factual submissions on these issues, demonstrates the weakness of this admissibility objection. It will be recalled that, in relation to the question of “third country control”, the Respondent names Canada as the third country and relies upon the following facts: the Ambassador of the Embassy of Canada in Kyiv came to the Claimant’s assistance on one occasion; a Canadian national was at one stage president of the Generation Ukraine and provided architectural services to the company; Generation Ukraine established a representative office in Toronto and opened a bank account at the Royal Bank of Canada; and finally, it is stated on the Generation Ukraine letter head that the company is “A United States, Canada, Ukraine venture”.

15.9 Even if the Tribunal accepts these facts, the Respondent is still a long way from displacing the clear manifestation of control by a *U.S.* national (Mr Laka), who owns 100% of the share capital of the Claimant, Generation Ukraine. This admissibility objection is therefore dismissed and hence it is unnecessary to consider whether or not the Claimant conducts or conducted substantial business activities on the territory of the U.S.

## **16. Validity of the Claimant’s Legal Representation**

16.1 At the final hearing, the Respondent raised a jurisdictional objection based on an alleged deficiency in the formal appointment of the Claimant’s counsel by the Board of Directors of Generation Ukraine. Rule 41 of the ICSID Arbitration Rules describes that jurisdictional objections shall be made “no later than the expiration of the time limit fixed for the filing of the counter-memorial ... unless the facts on which the objection is based are unknown to the party at the time”. The facts in this instance taken from a document filed with the Notice of Claim. This objection must

therefore be dismissed as having been raised late. Even if this had not been so, the Tribunal would dismiss it as hypertechnical and unmeritorious since the continuous presence of the sole shareholder of Generation Ukraine, Mr Laka, at the hearings leaves no doubt that the corporation chose to be represented by the counsel who appeared on its behalf.

## **17. Conclusions on Jurisdiction and Admissibility**

17.1 The Tribunal’s jurisdiction extends to any dispute arising out of or relating to an “alleged breach of any right conferred or created by [the] Treaty” with respect to the bundle of rights the Claimant had acquired in its “Parkview Project”, to the extent that the dispute arose on or after 16 November 1996. It does not matter that such disputes may relate to rights recognised as earlier investments that have been made by the Claimant, *i.e.* as evidenced by the Order on Land Allocation (24 April 1996), Lease Agreements (27 June 1996) and Foundation Agreement (26 July 1996) (*see* Section 18 below). This follows from Article XII of the BIT which provides that “[i]t shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter”.

17.2 At paragraph 5.1 above, the Tribunal set out Claims A to H as articulated by the Claimant. For the sake of convenience, these claims are now reproduced:

- Claim A: Unlawful indirect and unlawful direct expropriation of anticipated revenues
- Claim B: Unlawful indirect and unlawful direct expropriation of invested funds
- Claim C: Unlawful indirect and unlawful direct expropriation of the Project at its appraised market value
- Claim D: Unlawful indirect expropriation (unlawful denial of property rights) of adjacent properties intended for construction staging purposes (“integrated as a non-recurring item in the calculation of Claim A”)
- Claim E: Compensation of the Company’s expenses for its legal defence
- Claim F: Moral (punitive) damages subject to compensation under Ukrainian law (treble of Claims A+B+C)

Claim G: Other forms of relief as the Court may deem appropriate in the circumstances

Claim H: Counterclaims and offsets - none

17.3 Claims A to D allege expropriatory acts attributable to Ukraine and thus fall within the Tribunal's jurisdiction *ratione materiae* as giving rise to a dispute with respect to a right created by the BIT (the prohibition against expropriation in Article III). It is therefore necessary to identify these acts with some precision in order to test the Tribunal's jurisdiction *ratione temporis* in relation to each.

17.4 In relation to Claims A, B and C, two alleged expropriatory acts are invoked in the Claimant's pleadings, namely: (i) the Kyiv City State Administration's failure to provide Heneratsiya with a pair of corrected land lease agreements by 31 October 1997 in accordance with the terms of the Yalovoy Protocol, and (ii) the Kyiv City Council's Decision of 8 July 1998 which purported to annul Heneratsiya's leasehold rights. Claim D alleges a third expropriatory act relating to the failure of the Kyiv City State Administration to provide the Claimant with use of two properties adjoining Heneratsiya's site as a construction staging area. The source of the expropriated right is claimed to be the Yalovoy Protocol, which, it is alleged, was to be performed one week after its ratification, which occurred on 17 December 1998.

17.5 Each of the alleged acts of expropriation therefore occurred after 16 November 1996.

17.6 Claim E is a request for legal costs that will be dealt with separately in Section 24 below. Claim F alleges a cause of action based on Article 56 of the Constitution of Ukraine relating to "moral damages inflicted by unlawful decisions" of state officers. As the Tribunal has found that its jurisdiction is limited to disputes arising out of an "alleged breach of any right conferred or created by [the] Treaty" for the purposes of Article VI(1), Claim F is beyond the scope of the Tribunal's jurisdiction *ratione materiae*.

17.7 Claims G and H, as previously mentioned, do not disclose claims at all.

17.8 As the Tribunal turns to address the merits, each of the three separate expropriatory acts will be tested against the standard in Article III.

## THE MERITS

### 18. The Legal Materialisation of the Claimant's Investment

18.1 The word "investment" is defined in Article I(1)(a) of the BIT as meaning:

"every kind of investment in the territory of one Party owned or controlled directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:

(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;

(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;

(iii) a claim to money or a claim to performance having economic value, and associated with an investment;

(iv) intellectual property which includes, *inter alia*, rights relating to:

literary and artistic works, including sound recordings,

inventions in all fields of human endeavour,

industrial designs,

semiconductor mask works,

trade secrets, know-how, and confidential business information, and

trademarks, service marks, and trade names; and

(v) any right conferred by law or contract, and any licenses and permits pursuant to law..."

18.2 In their written pleadings, neither Party systematically analysed the various agreements, protocols, registrations and executive orders submitted to the Tribunal for the purposes of identifying legal rights that fall within this definition of an investment. A precise identification of the investment is clearly of fundamental importance. For this reason, the Tribunal requested, by its letter dated 20 February 2003 (*see* para. 6.11 above), that the Parties address this issue with greater clarity and precision in their oral submissions. This request did not result in significant advances on either score. It is therefore necessary to analyse the various agreements, protocols, registrations and executive orders to determine whether they may have generated

rights recognisable as an investment within Article I of the BIT. The examination that follows focuses on the Parties' final submissions in response to the Tribunal's request and the Tribunal's own consideration of the documentary evidence.

18.3 It is not possible in the present case to identify a single or precise coincidence between the expenditure of funds by the investor and the acquisition of a legal right to an investment. This state of affairs arises due to two reasons. First, the Claimant is unable to supply any primary evidence of its actual expenditure for various reasons which will be considered in Section 19. As a result, *the factual* basis of Generation Ukraine's investment is a source of great controversy between the Parties. Secondly, the Claimant has put forward a multitude of documents as evidence of a legal right to its alleged investment. Their very multiplicity highlights the absence of straightforward transaction such as a deed of sale or a corporate share purchase agreement. The relevant inquiry in this case into the *legal* basis of Generation Ukraine's investment is highly complex and necessitates an analysis of the legal rights, if any, that are evidenced by each of the documents invoked.

18.4 A logical starting point would be to establish the investor's contribution of capital. One would then go on to examine the legal rights acquired by such capital expenditure. But due to the absence of reliable evidence of the timing and quantum of such contributions by Generation Ukraine, this case requires that the Tribunal first investigate the legal basis for the Claimant's investment.

#### **Protocol of Intentions and List of Potential Sites**

18.5 It is not necessary for the Tribunal to rule upon the legal significance of the Protocol of Intentions and the List of Potential Sites because at the time of their conclusion the Claimant in these proceedings, Generation Ukraine, was not in existence (Generation Ukraine was incorporated in the State of New Hampshire on 3 February 1993). Mr Laka therefore signed in his personal capacity. There is no evidence that he thereafter transferred any purported rights existing under the Protocol of Intentions or the List of Potential Sites to Generation Ukraine. Generation Ukraine cannot invoke the Protocol of Intentions as the embodiment of its investment in the Ukraine.

18.6 It is important, nevertheless, to understand the evolution of the Claimant's activities in Ukraine. The following comments on the Protocol of Intentions and List of Potential Sites are thus significant by way of background.

18.7 Neither the Claimant nor Respondent has provided a detailed explanation of the circumstances leading up to the signing of the Protocol of Intentions. The Claimant devotes one paragraph to this issue in its Memorial: the Tribunal was told that Mr Yuriy Lebedinsky, Vice Representative of the President of Ukraine in Kyiv and Chairman of the Economics, Finance and Budget Department of the Kyiv City State Administration, invited Mr Laka to travel to Kyiv to negotiate the broad terms of their future cooperation in construction projects in Kyiv. This invitation was recorded in a letter dated 31 August 1992. The Protocol of Intentions was signed on 10 December 1992, concluding a two-month visit by Mr Laka and Mr John Milton, a representative of the U.S. construction firm Turner Construction Corporation. On the same day, Mr A. Martynenko, the General Director of "Kyivbudcentr" (the investment office of the Kyiv State Administration) sent the List of Potential Sites to Mr Laka proposing four possible building sites "on which we can cooperate".

18.8 The objective of the Protocol of Intentions is stated to be "to define the basis on which the parties will endeavour to identify, research, finance and complete one or more profitable real estate projects in Kyiv, and to carry out the development of available properties as described in lists furnished by City of Kyiv authorities." The protocol, written in fluent professional American English, was drafted principally by Mr Laka. The obligations envisaged by the Protocol of Intentions are couched in the form of unilateral promises relating to future conduct of certain Ukrainian organisations represented by the signatories to the Protocol. These undertakings are not specific; they are imprecise and exhortatory. This is consistent with the very title of the document as a "Protocol of *Intentions*."

18.9 Were it necessary for the Tribunal to rule upon the legal effect of the Protocol of Intentions and the supplementary List of Potential Sites, its conclusion would be that these documents embodied an *agreement to agree* to co-operation in construction projects yet to be defined. As such, they do not purport to generate legally enforceable rights and obligations, and could not constitute an investment for the



purposes of Article I(1)(a) of the BIT, and therefore could not give rise to an expropriation claim before an ICSID Tribunal. The Claimant itself lends support to this interpretation of the legal nature of the Protocol of Intentions in its written pleadings (*see* para. 18.29 *et seq.* below).

### **Registration Certificates**

18.10 The Registration Certificates recorded the planned contributions to be made by Mr Laka and Generation Ukraine to the charter capital of Heneratsiya. The prospective status of the contributions was confirmed by Mr Laka at the hearing:

“[...] At the time these certificates were prepared they were intended not as obligatory commitments, they were intended to serve as the sort of ballpark estimates of what would be put into a particular organisation.

So that’s what we did, we put in ballpark estimates of what we thought we put into the corporation, and when the time came to make concrete investments, we put in \$30,000 instead of \$100,000...”

18.11 Mr Laka’s statement confirms the description of the Registration Certificates as concerning “planned foreign investments” in the Claimant’s written pleadings.

18.12 The investments in question related to office and computed equipment for the representative office of Heneratsiya.

18.13 It is clear that the Registration Certificates do not record actual investments made in the Ukraine. Perhaps more significantly, the USD 30,000 referred to by Mr Laka that was ultimately paid into the charter fund of Heneratsiya represented Generation Ukraine’s contribution to the initial start up costs of its investment vehicle. This investment does not give rise to any rights or interests in the Parkview Project and hence cannot properly be understood as the subject of this dispute.

### **Resolution on Land Allocation**

18.14 The Resolution on Land Allocation records the allocation of 30 land plots to various entities. The 25<sup>th</sup> entry reads:

“A land plot for construction of office building of “Heneratsiya Ltd” of company “Generation Ukraine Inc.” at 32, Tarasa Shevchenko Boulevard in Radyansky District shall be approved.

(For conditions of the approval of location refer to Annex 25).”

18.15 Annex 25 to the Resolution on Land Allocation lists five separate conditions for the approval of the “location”, including the payment of city social infrastructure fee and the resolution of all outstanding “legal and property issues”.

18.16 The Resolution on Land Allocation thus contemplates that further steps are required to consummate the allocation of the land plot to Heneratsiya upon the satisfaction of the conditions set out in Annex 25. It follows that the undertakings in favour of Heneratsiya recorded in the Resolution were not legally binding at this stage, and thus incapable of constituting an investment pursuant to Article I(1)(a) of the BIT. The Resolution instead serves as the legislative approval necessary for the subsequent alienation of the land by the relevant executive authority, in this case the Kyiv City State Administration.

#### **Act of Reservation**

18.17 The legal status of the Act of Reservation is the subject of lengthy submissions of both Parties in this case. The Claimant relies on a letter from L. Novakovsky, Head of the State Committee of Ukraine for Land Resources (Derzhcomzem) to O. Omelchenko, Head of the Kyiv City State Administration, which is titled “Observations concerning the elimination of violations of laws currently in force”. On page 3 of this letter, Mr Novakovsky concludes that: “Existing legislation does not require the compilation of an ‘Act for the Reservation of Land’ after the advance approval of the location of the land parcel.”

18.18 Thus the legality of the Act for the Reservation of Land has been contested by the Claimant, which has described the Act as “a totally artificial administrative requirement”. The Respondent did not, in the Tribunal’s opinion, present compelling arguments to counter this description. It is not necessary for the Tribunal to rule upon the compliance of this administrative requirement with Ukrainian legislation, but it is nevertheless clear that it cannot provide a legal basis for the Claimant’s investment and indeed the Claimant, unsurprisingly, has never contended otherwise.

## **Order on Land Allocation**

18.19 The Order on Land Allocation appears to be an implementation of the previous legislative consent in the Resolution on Land Allocation. It constitutes the executive act necessary for the subsequent alienation of land in the inventory of the Kyiv City Administration to private entities (by leasehold). The Order on Land Allocation records the decision to: “Grant the limited partnership Heneratsiya Ltd a parcel of land with an area of 0.206 hectares for the construction of an office building and a transformer station under a long-term lease for a period of 49 years” and to grant a short-term lease over an adjoining parcel of land with an area of 0.159 hectares for three years (the period of construction).

18.20 The Order on Land Allocation sets out various obligations upon Heneratsiya as the grantee of land:

“5. The grantee of the land is obligated as follows:

5.1. To carry out the duties of a land grantee as specified in Statute 40 of the Land Code of Ukraine.

5.2. Prior to starting construction, pay the City Administration via the Economics Department, the fee for the development of socially oriented structures and communal property in accordance with the Act dated 28.06.95 NO5/72-a-54.

5.3. Resolve all property rights in accordance with laws currently in effect.

5.4. Exploit the land parcels in accordance with the specified purposes, and to not violate the ecological states of sites on their borders.

5.5. Within one month’s time, order from the Kyiv Department of Land Resources the documents which shall affirm the right of exploitation of the land parcels.

5.6. Upon the conclusion of the temporary utilization of the site (for the construction period) restore its greenery to allow pleasant utilization.”

18.21 The Order on Land Allocation was amended by a subsequent Order of the Kyiv City State Administration “On making amendments and additions to Order of the City State Administration No. 608 dated 24.04.96”. The most significant

amendment was to shift back the construction period from 1996 to 1999 (clause 6.1 of the Decision on the Land Parcel) to 1998-2001.

18.22 The Order on Land Allocation does not establish a contractual relationship between the Kyiv City Administrator and the grantee. Furthermore, the leasehold rights contemplated in the Decision on the Land Parcel are not vested in the grantee until lease agreements are signed and registered. The rights of the grantee arising pursuant to the Decision on the Land Parcel are, however, capable of meeting the definition of an investment in Article I(l)(a)(v) of the BIT which reads: “any right conferred by law or contract, and any licences and permits pursuant to law”. The right in question is the administrative right to obtain a lease over the two land parcels contemplated by the Order on Land Allocation. The Claimant did in fact secure these lease agreements shortly after the Order on Land Allocation on 27 June 1996 (see below). Whilst, therefore, the Order on Land Allocation was of transient significance to the practical development of the Claimant’s Parkview Project, it does, nevertheless, vest the Claimant’s investment vehicle, Heneratsiya, with a right cognisable as an investment right under the BIT. This right is connected to the Parkview Project, which is the subject matter of the dispute. The Tribunal thus finds that the Order on Land Allocation establishes the first of a series of rights relating to the Parkview Project that are cognisable as part of the Claimant’s investment.

### **Lease Agreements and Foundation Agreement**

18.23 The Lease Agreements were executed using a standard form contract, the first such agreement relating to a 49-year lease over the construction site at Boulevard Taras Shevchenko No. 32-32-a and the second relating to a 3-year lease over an area surrounding the perimeter of construction site and a small construction staging area.

18.24 The Lease Agreements refer to the previous Order on Land Allocation. The rights and obligations of the parties are set out in clause 3:

“3.1. The State Administration shall:

a) have the right to, if the user exploits a land parcel for purposes other than those approved in accordance with the general plan of construction:

- terminate the present Agreement ahead of schedule;
- reset the amount of land tax or of lease payment at up to a level 5 times greater than that set herein;
- charge a penalty in accordance with existing laws if the payment defined in paragraph 2.1. has not been made on time:

3.2. The Land User shall:

a) have the right to:

- exploit the land parcel independently and in accordance with the designed purposes;
- construct buildings and facilities in accordance with the project and general plan of construction, approved according to the procedure established by law and with the building construction order already granted:
- renew the Agreement after its term has expired:

b) undertake to:

- exploit the land parcel in accordance with the designed purposes:
- protect the land parcel from arbitrary seizure and attempted constructions made by other subjects:
- follow the provisions of existing laws.”

18.25 The Lease Agreements also contain a section entitled “Payment for Land” which will be considered below.

18.26 Following an episode involving the Security Service of Ukraine, which will be examined in detail at Paragraph 18.47 *et seq.* below, several drafts of amended lease agreements were exchanged between Mr Laka and the Kyiv City Department of Land Resources in February 1999. These exchanges did not produce amended lease agreements.

18.27 As in the Lease Agreements, the Foundation Agreement also makes reference to the earlier Order on Land Allocation. The obligations of the Kyiv City State Administration are set out in clause 4.4:

“4.4. For the purpose of rendering practical assistance to the Company to carry out its Project, the City shall:

- a) agree, in accordance with established procedure, to prolong the duration of all technical agreements and other permissions, which formed the basis of design estimates, for a period of 2 years, as an issue which has been elaborated and approved;
- b) undertake to entrust the City of Kyiv Investment Agency with responsibility for resolving all problems, on behalf of the City, which may arise during the execution of the Project;
- c) undertake to revise paragraph No. 5.2. of the Head of the Kyiv City State Administration's Order No. 608, dated 24.04.96, as to the 'land parcels for construction of an office building and electric transformer station at Boulevard Taras Shevchenko 32, 32-a, Radyansky district, to "Heneratsiya Ltd.' in accordance with established procedures."

The obligations of the Claimant are as follows:

“4.5 The Company shall finance the Project, for the most part, using foreign investment sources.

4.6. The Company shall solicit a number of potential candidates and shall appoint a general contractor (hereinafter referred to as the ‘Contractor’). The Company shall seek to appoint Ukrainian sub-contractors to work the Project on normal terms and conditions.”

18.28 The Foundation Agreement was amended by written agreement of the Parties dated 3 September 1998. The amendments concern primarily the amount and manner of the payments to be effected by Heneratsiya.

18.29 The Tribunal finds that the Lease Agreements, together with the Foundation Agreement, established the contractual and proprietary foundation for the Claimant's investment in the Parkview Project (through its vehicle, Heneratsiya). The rights derived by the Claimant from these agreements collectively fall within several of the specific definitions of an investment under Article I(1)(a) of the BIT including subsections (i), (iii) and (v). This conclusion is supported by various independent Ukrainian organisations that were called upon to review the nature of the Claimant's investment in Ukraine.

18.30 Mr Laka requested a legal opinion from the Institute of State and Law, National Academy of Sciences of Ukraine on the prospect of claiming damages against Kyiv City State Administration. The legal opinion, signed by V.P. Nahrebelny and dated 21 December 1998, makes the following assessment:

“... it is logical to ask if there developed civil-legal obligatory relationships between the Kyiv City State Administration, as an organ of the executive branch of the government, and “Heneratsiya LTD,” which would convey to one or the other side the right to demand the fulfilment of obligations taken on by the other party or the indemnification for any damages... On July 25, 1996 (with a revision on September 3, 1998) the aforementioned parties concluded an agreement of cooperation for the development of an office building and transformer sub-station at Boulevard Shevchenko 32, 32a in the Radyansky District the purpose of which is clearly spelled out in the title and text of the agreement. Therefore, in the interests of completing the terms of the agreement the sides are justified in requiring the fulfilment of mutual obligations in accordance with the agreement and existing laws.”

18.31 It is curious that the Institute of State and Law did not mention the Lease Agreements in this context. At any rate, the quoted passage confirms the conclusion that the earlier “Protocol of Intentions” and other administrative acts did not give rise to a contractual relationship between the Claimant and the Respondent. The Tribunal notes that this was a legal opinion procured by the Claimant and evidently accepted by the Claimant.

18.32 In 1999, the Claimant submitted various claims against the Ukrainian authorities to mediation by the Chamber of Independent Experts, a body established by the President of Ukraine for the settlement of investment disputes. In its “Conclusions and Recommendations” issued on 31 October 1999, the Chamber made the following determination:

“The contractual relations between company ‘Heneratsiya Ltd’ and the Defendant [Kyiv City State Administration] were the following. On the 27<sup>th</sup> of June, 1996, two agreements were made between them on the right to temporary use the land on leasing conditions: for the term of forty-nine years (plot with the total area of 2079 sq. m) and with the term of three years (plot with area of 1558 sq. m)

On the 26<sup>th</sup> of July, 1996 between company ‘Heneratsiya Ltd’ and the Defendant an agreement was made; this agreement dealt with conditions of common activities in realization of the project of construction of a building of office premises in Taras Shevchenko blvd, 32, 32-a. From September of 1998 alterations in and amendments to the Agreement were made in relation to common activities.”

18.33 It is certainly true that the Claimant took issue with many of the findings made by the Chamber. To this end, the Claimant submitted a very detailed rebuttal to the Chamber’s decision which had been prepared as an attachment to a letter to the

President of Ukraine on 21 January 2000. In this rebuttal, the Claimant did not, however, challenge the specific conclusions regarding the timing of the existence of contractual relations between the Claimant and the Respondent. To the contrary, the Claimant confirmed the position in its rebuttal to the Chamber:

“Even though the company may not have had a formal contractual relationship with the KMDA at that time, that fact has no bearing, whatsoever, on the company’s rights to the protection of its assets under Ukrainian law covering extra-contractual relations”.

Finally, the Claimant cited this passage of the report of the Chamber of Experts with approval once again in its oral submissions.

18.34 This position is repeated in the Claimant’s Memorial:

“In accordance with the existing laws of Ukraine, the right to indemnification for damages, in the form of lost revenues, objectively is present in the company’s situation not only from the moment of its execution of its two civil law land lease agreements with the KMDA, having thus formed a contractual relationship, but prior to the execution of these particular agreements as well in the context of a clearly defined extra-contractual relationship starting with the Protocol of Intentions signed with both city leaders (Sali and Nestorenko) on 10 December 1992.”

18.35 The Claimant later reversed its position in the final stages of the arbitral proceedings before this Tribunal by asserting that the Protocol of Intentions was a formal contractual arrangement between the parties thereto. As the Tribunal concluded at Paragraph 18.9 above, this interpretation of the document is not persuasive.

18.36 Both the Claimant and Respondent acknowledge that the 49-year Lease Agreement and the Foundation Agreement remain in effect to this day.

18.37 The Lease Agreements and the Foundation Agreement contained provisions on the various types of payments to be made by the Claimant.

18.38 Article 2 of the Lease Agreements provided:

“2. The Payment for the Land

2.1. Payment for the land shall be made by the user in accordance with the law ‘Regarding Payments for Land’ in the form of *lease payments* in the



amount of *Five land taxes* and transferred to the account No. 010130403 p. 37 § 1, in the *Radyansky District at USB MFO 322238 department*.

2.2. The land user shall not be exempted from partial or full land payment.”

18.39 Article 4 of the Foundation Agreement regulated this issue in more detail:

“4. THE PARTIES AGREE THAT:

4.1. The Company shall give to the City \$1,650,000 U.S. for the development of the social infrastructure and municipal economy of City of Kyiv in the following forms:

- \$1,400,000 U.S. within 5 (five) years in equal annual shares, upon the Project’s completion;

- \$250,000 U.S. within a month after the Project is completed and occupancy is begun on the conditions of the City’s rendering assistance to the Company in resolving all possible administrative and technical problems which may arise during construction, so as to complete construction by a predetermined deadline. The Company shall bear responsibility in accordance with the existing laws of Ukraine if any funds due are not paid on time.

4.2. The City shall make the necessary arrangements, in accordance with established procedures, to insure the Company becomes exempt from payment for land lease charges equal to 20% of the amount specified in the lease agreement for the period of construction of the Project and with the possibility of further extensions of these kinds of exemptions.”

18.40 Mr Laka testified that Heneratsiya did not make any payments under the Lease Agreements or the Foundation Agreement. In relation to the former, he stated that clause 1.2 of the Lease Agreements exempted him from lease payments until he was granted a construction permit:

“The land parcel is granted for a temporary, long-term lease period of 49 years for the construction of an office building and electric transformer station on Boulevard Taras Shevchenko 32, 32-a, in the Radyansky District.”

18.41 Mr Laka contended that this translation, although supplied by the Claimant, was incorrect because the Ukrainian text read “under the construction ...” rather than “for the construction”. According to Mr Laka, the proper translation conveyed the intention that no lease payments should be effected until the office building had been constructed. In support of this interpretation he stated that he had never received any request for a lease payment.

18.42 The Tribunal does not find Mr Laka's interpretation of Heneratsiya's obligation to make lease payments to be persuasive in light of the wording of Article 2 of the Lease Agreements. As the Claimant's cause of action does not arise under the Lease Agreements, it is not necessary to rule upon the precise scope of the Claimant's obligations with respect to lease payments. It is, nevertheless, important to note that both the Claimant and Respondent agree that no lease payments were ever advanced by Heneratsiya in consideration for its leasehold interest.

### **Construction Permit**

18.43 On 28 March 1997, Heneratsiya submitted an application for a Construction Permit to the relevant organ of the Kiev City Council. A Construction Permit was then issued on 3 April 1997, No.103/RU, for the preparation of the site for construction. There is a disagreement between the parties as to when this limited Construction Permit actually became usable by Heneratsiya. The Tribunal will assume that this limited Construction Permit was in fact usable on the day of issue because it is clear that Heneratsiya acted upon it by installing fencing around the construction site and by removing trees and garbage. Mr Pidhirniak, the architect employed by Heneratsiya pursuant to a contract dated 15 November 1996, requested an extension of this limited Construction Permit on 25 September 1997. The Ukrainian authorities acceded to this request and granted an extension until 31 December 1997. On 16 January 1998, Mr Pidhirniak then requested a full Construction Permit from the Kiev City Council in recognition of the fact that all the preparatory works on the construction site had been completed. A full Construction Permit bearing the same index number (No.103/RU) was then issued on 19 January 1998. It was to remain valid until 31 December 1999.

18.44 On 12 July 1998, Mr Pidhirniak once again submitted an application for full Construction Permit, this time on the basis of a new architectural design version No. 3, which had been prepared to reflect amendments requested by the Security Service of Ukraine. The nature of these amendments shall be considered at Paragraph 18.47 *et seq.* below.

18.45 A new full Construction Permit was then issued on 16 July 1998, No. 189/RD, which would be valid for three years up to 31 July 2001.

18.46 The Tribunal is prepared to accept these Construction Permits as part of the Claimant's investment through Heneratsiya insofar as they evidence "licenses and permits pursuant to law" for the purposes of Article I(1)(a)(v) of the BIT.

### **Yalovoy Protocol**

18.47 Following the execution of the Land Leases and Foundation Agreement, Heneratsiya received a letter from the Head of the Administrative Department of the Security Service of Ukraine (hereinafter referred to by its Ukrainian acronym, "SBU") on 20 February 1997. The SBU cited a previous decision of the Cabinet of Ministers of Ukraine which had given the SBU control over land and buildings adjacent to Heneratsiya's property and requested that "you consent to withdraw from 522 sq.m. of the site which has been allocated for your use". The reason given for this request was that the SBU needed to install special equipment on that territory to protect the confidentiality of communication in the building. Mr Laka promptly responded on 25 February 1997 by requesting a copy of the Cabinet of Ministers decision and seven other municipal permits that the SBU had referred to in their letter. Mr Laka did not receive a reply. The SBU, however, requested the Kyiv City State Administration to instigate an investigation into Heneratsiya's financial affairs, which did not result in any serious findings against the company. Then, on 19 June 1997, the SBU wrote to the Deputy Head of the Kyiv City State Administration, V.B. Yalovoy. In this letter, the SBU stated that it did not oppose the construction of the Parkview office building, but rather insisted on compliance with several technical specifications relating to the position and height of the building and the location of fire lanes. On 25 July 1997, Mr Laka finally received a response to his original letter to the SBU; the answer was to the effect that the Cabinet of Ministers' decision is confidential and that the municipal permits are irrelevant to Mr Laka's consideration of the SBU's request.

18.48 On 11 July 1997, Mr Yalovoy sought to facilitate an agreement between all the parties affected by the SBU's demands by proposing a compromise solution. According to the Claimant, the compromise envisaged that, in return for Heneratsiya's relinquishing of 522 sq.m. at the rear of its territory, the Kyiv City State Administration would expedite the technical approval process and allow Heneratsiya to use the neighbouring land at 28 Boulevard Shevchenko, under leasehold to

International Business Centre (“IBC”), as its constructing staging area for the entire period of construction. The Claimant has estimated that the latter benefit translated to a saving of 15% on its total construction costs, or USD 3.42 million. Heneratsiya and the Kyiv City State Administration agreed to this compromise, which was recorded in the written minutes of the meeting which came to be known as the “Yalovoy Protocol”.

18.49 The Tribunal concludes that the Claimant made a genuine attempt at the meeting on 11 July 1997 to remove a host of administrative obstacles that had affected the preparatory stages of its project in addition to the problem arising from the SBU’s demands. The Yalovoy Protocol thus allocated responsibility to various state agencies and to Heneratsiya itself for a 20-point action list designed to expedite the approvals required to commence construction.

18.50 The Tribunal also appreciates that the Claimant took a serious risk in accepting this compromise. Mr Laka perceived the Yalovoy proposal as an opportunity to turn the SBU problem into a benefit in the form of a major saving on construction costs and an expedited approval process. But there was, nevertheless, a risk in acquiescing to the SBU’s demands (and thereby waiving any potential claim for damages for this interference) but then failing to secure the benefits of the compromise. Mr Laka was no doubt aware of this risk and therefore insisted on a written confirmation of the obligations undertaken by the respective parties in the form of the Yalovoy Protocol.

18.51 Several points of the Yalovoy Protocol were acted upon by the relevant Ukrainian agencies. The State Tax Administration, for instance, complied with point 16 of the Protocol by annulling a previous decision to impose fines on Heneratsiya. The Foundation Agreement was also amended to release Heneratsiya from a substantial amount of the land payments that would fall due after the Construction Permit was issued. The main prize at stake, however, proved to be illusive, as control over the neighbouring property remained out of the Claimant’s reach.

18.52 Mr Yalovoy did not endorse the Protocol until 17 December 1997. The Claimant submits that the version of the Protocol then signed by Mr Yalovoy had been altered in order to deprive the Claimant of its right to use the neighbouring

property. The Tribunal, for its part, cannot find any evidence to support this allegation. The relevant part of the “authentic” version of the Yalovoy Protocol (according to the Claimant) refers to the Claimant’s purported right to use the neighbouring property in point 10. The text of point 10 in the “authentic” Yalovoy Protocol furnished by the Claimant reads as follows:

Provide the company “Heneratsiya Ltd” with the right for the temporary utilisation of the territory of International Business Centre (Boulevard Shevchenko 28-30) to facilitate the construction of its office building and construction of a temporary right-of-way to the buildings of SB Ukraine and the Financial Directorate, (Boulevard Shevchenko 32-A and Boulevard Kotsiubinskoho 7, 7-A), in accordance with the contract between IBC and Heneratsiya Ltd.

18.53 Responsibility for this item-for-action was accorded to Heneratsiya Ltd, IBC and Kyiv City Department of Land Resources.

18.54 The “falsified” version of the Yalovoy Protocol, also provided by the Claimant, reads as follows:

Provide the company “Heneratsiya Ltd” with the right for the temporary utilisation of the territory of International Business Centre (Boulevard Shevchenko 28-30) to facilitate the construction of its office building and construction of a temporary right-of-way to the buildings of SB Ukraine and the Financial Directorate, (Boulevard Shevchenko 32-A and Boulevard Kotsiubinskoho 7, 7-A).

18.55 Thus the phrase after the final comma in the “authentic” version was deleted in the “falsified” version. Furthermore, Heneratsiya was removed from the list of entities responsible for the implementation of point 10.

18.56 The Tribunal accepts, as the Respondent has, that the version of the Protocol signed by Mr Yalovoy on 17 December 1997 is different from the version prepared on 21 July 1997 following the meeting. However, the Tribunal does not share the Claimant’s interpretation that “the permission to use these territories to facilitate the construction of the company’s building has been removed” from the “falsified” version. To the contrary, the Tribunal understands that “authentic” version to place more onerous demands on the realisation of the Claimant’s right because there is a clear reference to a “contract between IBC and Heneratsiya Ltd”, thus implying that

the consent of IBC was a necessary condition to Heneratsiya's right to use its land, as one would expect.

18.57 The IBC and Heneratsiya had crossed paths before, in the early stages of preparatory work for the Parkview Project, in fairly acrimonious circumstances. Hence it must have been clear to Mr Laka at the time the Yalovoy Protocol was negotiated that the Executive Manager of IBC, Mr Tishchanko, would not abandon control over his property as an act of good will. Mr Tishchanko was not present at the 11 July 1997 meeting and, not surprisingly, refused to add his signature to the Yalovoy Protocol thereafter. Mr Laka was simply counting on the Kyiv City State Administration, and the SBU, to deliver this benefit to him using whatever means were at their disposal, without regard to Mr Tishchanko's interests. For instance, when Mr Laka wrote to Mr Yalovoy on 25 August 1997 asking him to sign the Protocol, he requested that the Kyiv City State Administration "endow us with a legal right to use Shevchenko Boulevard, 30, without any obligations to Mr Tishchanko". Again in a letter dated 3 November 1997, Mr Laka opined that "Mr Tishchanko's consent is not required for the protocol to enter into force".

18.58 The position of the IBC was revealed in a letter of 17 February 1999, when a representative of the IBC wrote to Mr Yalovoy explaining that, insofar as his company is the lawful leaseholder of the land in question, any modification of the terms of this leasehold can only be effected by a court order or with their consent. It was affirmed that the issue of Heneratsiya's temporary use over this land must be resolved "within the framework of a special agreement" between Heneratsiya and IBC.

18.59 The question that arises in relation to the Yalovoy Protocol at this stage of the analysis is whether the Claimant acquired a right to use the neighbouring property as a construction staging area as part of the bundle of rights pertaining to the Parkview Project. The Tribunal has concluded that the Claimant has no such right. Leaving aside the validity or otherwise of the Yalovoy Protocol as a contractual document, the Tribunal cannot proceed on the assumption that the IBC's leasehold could be encumbered without the consent of the IBC or on the basis of a decision of an Ukrainian Court, as provided in the Ukrainian Land Code. The Claimant has not

presented sufficient proof that Mr Tishchanko ever agreed to Heneratsiya's utilisation of his property during the construction period. The evidence available in fact indicates that Mr Tishchanko was a long way from providing such consent.

18.60 The Tribunal will return to the Yalovoy Protocol in Section 20 when consideration is given to the claim for expropriation.

### **State Agency of Ukraine for Author's and Joint Rights Certificates**

18.61 The Claimant attaches great significance to the right it acquired under one of these certificates, which, so the claim says, embodies its definitive proprietary interest in the entire Parkview Project, which then became the subject of several valuations and registration by several Ukrainian agencies.

18.62 There are two certificates issued by the State Agency of Ukraine for Author's and Joint Rights that require analysis. They shall be referred to as "Certificate A" and "Certificate B".

18.63 Certificate A is titled "Certificate on State Registration of the Author's Right to a Creation" and recognises that Pidhirniak Volodymyr Petrovych and Pidhirniak Kvitana Yuriyivna as the "authors" have a right to "[t]he corrected project for the office premises building at Boulevard T. Shevchenko, 32, in the City of Kyiv, Variant 3 (the Parkview Project)". Certificate A was issued on 5 June 1998. Mr and Mrs Pidhirniak were commissioned by Generation Ukraine to draw up the architectural plans for the Parkview Project.

18.64 Certificate B is titled "Certificate on State Registration of the Exclusive Rights of a Person to a Creation" and recognises that Generation Ukraine Inc. as the "person having exclusive rights to a creation" has exclusive rights to "[t]he corrected project for the office premises building at Boulevard T. Shevchenko, 32, in the City of Kyiv, Variant 3 (the Parkview Project)". The names of the authors of the creation are noted as Pidhirniak Volodymyr Petrovych and Pidhirniak Kvitana Yuriyivna. Certificate B was issued on the same day as Certificate A, *viz.* 5 June 1998.

18.65 The characterisation of the rights evidenced by the two certificates appears to be quite straightforward. Certificate A recognises the architects' personal intellectual

property right in their architectural plans or design, whereas Certificate B recognises Generation Ukraine's right to the exclusive use of the same architectural plans or design. Certificate B might therefore be said to confer a licence to Generation Ukraine for the exclusive use of the design created by Mr and Mrs Pidhirniak. By the language employed in the two certificates, and the fact that the issuing authority is the State Agency of Ukraine for Author's and Joint Rights, it would appear to be quite uncontroversial that the subject matter of both certificates is nothing more and nothing less than intellectual property rights in the design of the Parkview Project (specifically "variation 3" thereof).

18.66 Contrary to this interpretation, Mr Laka testified that these certificates create entirely different rights over entirely different proprietary interests: Certificate A in relation to the "architectural design", Certificate B in relation to the "project". According to Mr Laka:

"The project is everything that went into creating a composition consisting of architectural drawings, engineering drawings, marketing plans and every conceivable thing that goes into executing the construction of a project."

18.67 Elsewhere in his oral testimony, Mr Laka opined:

"So the entire language of the two certificates is completely different, one is for the project and the other one is for the architectural design, and the certificates reflect that distinction."

18.68 The Tribunal is unable to accept Mr Laka's interpretation of the two certificates, which if given effect would uproot the plain meaning of the language used in the certificates and impermissibly extend the competence of the State Agency of Ukraine for Author's and Joint Rights. Rights in a building project in any jurisdiction inevitably arise from disparate legal sources. The ultimate owner of the project may have contractual rights vis-à-vis various entities performing different aspects of the work, proprietary rights over the land where the building is to be built, administrative rights granted by the local council to perform the work, and so on. The Claimant's attempt to channel all these aspects of the Parkview Project into a single registered interest evidenced by a single certificate is untenable.



18.69 Claimant's purpose in insisting upon its characterisation of Certificate B appears to lie in the resulting ease by which the single global right could be appraised, as will become clear in the following account of the steps taken by the Claimant to value this purported global right and register such value with Ukrainian authorities.

18.70 The Claimant foreshadowed a large investment in the Parkview Project by increasing the "authorized fund" of its Ukrainian subsidiary, Heneratsiya, before Certificate B was issued. The amendments to Heneratsiya's charter were in fact numerous.

18.71 The original version of the Heneratsiya's charter, registered by the Pechersk District State Administration on 5 May 1993, described Generation Ukraine's prospective contribution as "property rights to the construction of office and dwelling structures in Kyiv, in particular in Shevchenko blv., 32". The next version of the charter, registered on 4 October 1993, stated this contribution to be "computer and office equipment" to the value of USD 24,000. Then, on 20 April 1995, Heneratsiya's charter was amended once again, this time anticipating a contribution by Generation Ukraine to the value of contribute USD 19,994,000, without specifying the form of such contribution. Mr Laka's contribution, as the other shareholder in Heneratsiya, remained static throughout at USD 6,000 in the form of office and computer equipment. In the first two versions of the charter, the proportion of Generation Ukraine's contribution was stated to be 80%, whereas Mr Laka's was 20%. In the version registered on 20 April 1995, where the contribution of Generation Ukraine was increased dramatically, the respective percentages were not listed.

18.72 Heneratsiya's charter was amended again on 14 June 1997 and registered at the Pechersk District State Administration on 26 June 1997. The respective contributions envisaged by the two shareholders (*i.e.* Generation Ukraine and Mr Laka) remained the same (USD 19,994,000 and USD 6,000). However on this occasion the respective percentage shares in the authorised fund was 99.97% and 0.03%. This new percentage distribution does not proportionately reflect the increase in Generation Ukraine's contribution from USD 24,000 to USD 19,994,000. The

contribution by Generation Ukraine was described as “equipment, materials required for construction of premises in Kyiv at the address 32 Shevchenko Boulevard”.

18.73 Then followed yet another amendment approved by the shareholders of Generation Ukraine on 25 March 1998, and registered on 28 April 1998. It did not alter the sums of the contributions or the respective percentage interests in the authorised fund, but rather changed the description of Generation Ukraine’s contribution:

“... equipment, materials and material assets, property rights, including intellectual property rights (conceptual design documentation, architectural documentation, design plans and specification, etc) required for construction of premises in Kyiv at the address 32 Shevchenko Boulevard ...”

18.74 The Tribunal infers that this final amendment to the charter of Heneratsiya was likely to be made in anticipation of the Certificate B registered two months later on 28 May 1998 and issued to Generation Ukraine on 5 June 1998. This conclusion is supported by the next steps undertaken by the Claimant with respect to the right it acquired under Certificate B.

18.75 Heneratsiya presented an appraisal of the value of the Parkview Project to the Ukrainian State Investment Expertise on 15 June 1998 with the following calculations:

“1.	Total annual gross revenue	\$19,860,000 USD
2.	The estimated sales price of the completed and fully leased building	\$99,300,000 USD
3.	The present market value of the completed project phase of the Parkview	\$22,200,000 USD”

18.76 The Central Service of the Ukrainian State Investment Expertise concluded, in its four page report, that it “concur with the forecasts presented by the company”. The report was presented to Heneratsiya on 2 July 1998.

18.77 Shortly afterwards, on 21 July 1998, the Executive Vice President of Generation Ukraine, Nellie Grigoriyevna Ageyeva, and Mr Laka in his capacity as President of Heneratsiya, entered into the Act of Property Transfer to transfer

property rights owned by Generation Ukraine to Heneratsiya as the former's contribution to the latter's authorised fund. The contribution was described thus:

“... a contribution to the charter fund of Heneratsiya LTD in the form of property and rights, assigned to Generation Ukraine Inc in the Certificate issued by the State Agency of Ukraine for Author's and Joint Rights, VP No. 190, dated 5 June 1998, and which property and rights the Ukrainian State Investment Expertise (Central Division) valued at \$22,200,000 US dollars (in its decision dated 2 July 1998, No. 06-123).”

18.78 The Act of Property Transfer noted that there had been an agreement between the parties to this transaction that the value of the contribution would be USD 19,970,000.

18.79 Generation Ukraine submitted the Act of Property Transfer, and other supporting documents, to the Chief Tax Inspector of the Pechersk District to obtain the registration of its “foreign investment”. The Chief Tax Inspector registered the investment in the amount of USD 19,957,173 on 28 December 1999 and affirmed the “kind of investment” as:

“Author's property rights to the corrected design of the building of office premises at 32 Shevchenko Boulevard, in the City of Kyiv, version 3 (design “Parkview”), which are registered by the investor with the State Agency of Ukraine for Authors' and Joint Rights on 28.05.98 ...”

18.80 The next step in this registration process was the certification of the legitimacy of this increase to the charter fund by the State Tax Administration. For this purpose, the relevant documents were submitted to the Hard Currency Expertise Department of the Kyiv City State Administration under a covering letter from Generation Ukraine's local attorney dated 21 February 2000 (this date is probably incorrect because the response to this letter predates it). By its reply dated 10 February 2000, the Kyiv City State Administration's refused to register Generation Ukraine's foreign investment because, *inter alia*, “documents confirming the [cost] of the foreign investment were not presented”. In order to overcome this obstacle, Mr Laka wrote to the Central Service of the Ukrainian State Investment Expertise on 15 February 2000 asking them to confirm whether their previous appraisal of “the [market cost] of development of the ‘Parkview’ project” remains the same, *i.e.* USD 22,200,000”. Confirmation from the Ukrainian State Investment Expertise was forthcoming a few days later, on

21 February 2000. There then ensued a flurry of correspondence between Mr Laka and the Kyiv City State Administration that was characterised by lengthy impassioned pleas from the former (threatening to add the “offence” of non-registration to “our pending legal action”) and unhelpful brevity from the latter. Mr Laka appealed to the Ukrainian Prime Minister and Minister of the Economy, and the US Ambassador in Kyiv (his counsel in these proceedings was copied in on occasion), but the Kyiv City State Administration refused to register an increase in Heneratsiya’s charter fund for the same reason on six separate occasions.

18.81 In the meantime, Mr Laka had procured another evaluation of the projected annual revenue of the Parkview Office Building. The Ukrainian State Investment Expertise had based its previous appraisal on a report by Price Waterhouse in November 1997, which had forecasted a rental rate of USD 80 per square metre per month, resulting in a total annual figure of USD 19,860,000. Colliers provided a second report on 20 May 1999 and opined that the rental rate in 1996 (when they assume the building should have been completed) would have been USD 120 per square metre per month, or USD 29,790,000 per year. Mr Laka then requested his U.S. accountants, Marcum & Kliegman, to use the same computational model as the Ukrainian State Investment Expertise, but substituting this new projected rate of revenue. According to Marcum & Kliegman’s two page letter of 1 November 2000, which made reference to these arbitration proceedings, the new “appraised value” of the Parkview Project became USD 38,750,000. Wasting no time, the founders of Heneratsiya approved an amendment recognising the increase in value of Generation Ukraine’s contribution to Heneratsiya’s charter fund on 7 December 2000. Heneratsiya resubmitted its application for registration of this amendment on 14 November 2001 following several months of informal communications with Pechersk District State Administration. Registration was effected on 30 November 2001.

18.82 There is no basis in law or logic to conclude that the subject of Certificate B is the entire bundle of rights in the Parkview Project, whether administrative, contractual or proprietary. It follows that the whole valuation, transfer and registration process undertaken by the Claimant is flawed. The Tribunal is, moreover, singularly unimpressed by the “expert appraisal” conducted by the Ukrainian State Investment

Expertise. It is little more than a rubber stamp on Heneratsiya's own projections of the income producing potential of a completed Parkview office building. The appendices cited in the appraisal, which would expose the data underlying the calculations, have not been produced to the Tribunal. But most importantly, a linkage between the incoming producing potential of a completed office building and a registered intellectual property right to the design of such building is simply untenable. It is precisely this linkage which figures in the text of the instrument which purports to transfer the Parkview Project from Generation Ukraine to Heneratsiya:

“... a contribution to the charter fund of Heneratsiya LTD in the form of property and rights, assigned to Generation Ukraine Inc in the Certificate issued by the State Agency of Ukraine for Author's and Joint Rights, VP No. 190, dated 5 June 1998, and which property and rights the Ukrainian State Investment Expertise (Central Division) valued at \$22,200,000 US dollars (in its decision dated 2 July 1998, No. 06-123).”

18.83 In his testimony, Mr Laka attached great significance to the fact that the Pechersk District State Administration registered the corresponding amendment to Heneratsiya's charter fund on two occasions. A debate ensued as to whether the registration authorities were required to verify the substance of proposed amendment (in this case the actual value of the contribution to Heneratsiya's charter fund) or simply confirm that the formal requirements of the registration had been complied with (*i.e.* that the correct documents had been lodged in the required form).

18.84 A registration procedure cannot transform the essential qualities of the subject of the registration. If a transport vessel bearing the name “Voyager” is registered as an aircraft but it is actually a ship, the fact of the registration in compliance with all the relevant rules will not assist the Voyager in flight.

18.85 The Tribunal finds that Certificate B grants the Claimant an intellectual property right to the version 3 of the architectural design for the Parkview office building and that this right was transferred to Heneratsiya on 21 July 1998. However, the Claimant's characterisation of Certificate B and the valuations that flow from it are not accepted for the purposes of establishing the extent of the Claimant's investment.

## **19. The Factual Materialisation of the Claimant's Investment**

19.1 The Claimant has the burden of demonstrating the nature and quantum of its expenditure relating to the Parkview Project in accordance with internationally acceptable accounting practices.

19.2 The Claimant is severely handicapped in its efforts to discharge its burden of proof because all the primary documentation evidencing Heneratsiya's expenditure in Ukraine was, according to the testimony of Mr Laka, accidentally destroyed in Kyiv. Mr Laka described the incident, which occurred after the Claimant's decision to pull out of Ukraine in October 2000, as follows:

“We were moving or actually closing down our office facility at [Kovpaka] Street, and some of the material had to go into archives, and some of the material simply had to be thrown away.

The instructions given to the people who were throwing the stuff away were misunderstood and a number of the boxes, including the expense records and some other files were mistakenly taken by them and thrown into the dumpster.

By the time they realised what had happened, the dumpster had been removed, and that was the end of that story.”

19.3 Counsel for the Claimant was admirably forthright about the true extent of this handicap:

“... it is hugely embarrassing that we don't have the documentation here, hugely embarrassing, if one wanted to dig as big a hole I can't imagine how we could have gone about it than getting the wrong delivery man to remove the documents rather than the rubbish.”

19.4 The Claimant thus embarks on its quest to discharge its burden of proof well and truly on the back foot and must make up significant ground before the factual reality of its investment can be accepted by this Tribunal. In these circumstances, one would expect that the Claimant would have done everything in its power to furnish the Tribunal with other forms of evidence to corroborate its statements on the nature and quantum of its expenditure in Ukraine. It transpired that the Claimant both comprehensively and conclusively failed to meet this expectation, and thus by the close of these proceedings was actually further from discharging its evidential burden than at the starting point.

19.5 The Claimant relied primarily on financial reports produced by Mr Marynyako to substantiate its alleged expenditure connected with the Parkview Project in Ukraine. Mr Marynyako has an engineering and teaching degree, but never completed formal training in auditing, although he did obtain an auditing certificate on the basis of his own study and practical experience. Mr Marynyako's auditing career was rather brief, commencing in 1995 and ending on 30 October 2000, when he allowed his auditing certificate to elapse. He was employed by Mr Laka in 1999 in order to verify that the primary documents evidencing expenditure were accurately reflected in the accounting software used by Generation Ukraine. Mr Marynyako was not concerned with the compliance of his reports with accounting standards:

“If we come to the issues of accounting and accounting standards, I will tell you right away that the client didn't set me the task of making an assessment of compliance with some specific set of standards.

My task was to make an assessment of compliance of primary information with software, and I made my conclusion on that account, and wrote it down...”

19.6 In contrast to Mr Marynyako's oral admission of the limitations of the exercise that he undertook for Generation Ukraine, the Claimant has represented that his reports are certified audits of Generation Ukraine. Elsewhere in his oral evidence, Mr Marynyako made the same assertion.

19.7 Mr Marynyako testified that he spent about 200 hours on compiling his reports for Generation Ukraine, and yet he did not receive any remuneration for this work. Instead, Mr Laka confirmed that Mr Marynyako would receive a percentage of the damages awarded in these ICSID arbitration proceedings. In this context, the credibility of Mr Marynyako's evidence is highly questionable, and the conflict of interest arising from this situation is readily apparent. The following response to a question from the Tribunal is hardly satisfying:

“THE CHAIRMAN: Did anyone explain to you why this report was important to do?

MR MARYNYAKO: Well I got to know about it later, after that work was already done.

THE CHAIRMAN: So you did not understand at the time what use was going to be made of the report, is that correct?

MR MARYNYAKO: Well I had to take an objective approach to that, and at that point in time I didn't really have any knowledge about the use of that."

19.8 In Ukraine there is a distinction between an auditing certificate, which evidences the holder's personal qualifications, and an auditing licence allowing the holder to conduct auditing activity, which is a regulated activity under Ukrainian law. At the time Mr Marynyako compiled his reports, he had an auditing certificate, but not an auditing licence. Therefore, to give these reports "legal force", Mr Marynyako procured the signature of a licensed Ukrainian auditing firm, DAR, on these reports. DAR did not perform any additional verification of Mr Marynyako's methodology or calculations, nor was DAR provided with any primary documents upon which the reports were allegedly based or any financial reports of Generation Ukraine. In response dated 17 May 2002 to a request for information from Counsel to the Respondent, the Director of DAR stated that:

"Irrespective of my permit [sic: permission] to affix the seal of the AF 'DAR' upon the financial statements (documents) of 'Generation Ukraine Inc.', neither of the permanent auditors of the AF 'DAR' examined these documents and certified correctness thereof by his/her signature, and could appropriately evaluate them, since none of them (including me) knows foreign languages."

19.9 A further insight into the pretext for compiling these financial reports of Generation Ukraine is provided in the same letter:

"As an additional motive of the resort exactly to me [sic] Mr Marynyako explained that it was necessary to help a foreign entrepreneur, who had supposedly suffered from the injustice of local power."

19.10 Many questions were put to Mr Marynyako in cross examination about the methodology he employed to compile the financial reports of Generation Ukraine and the basis for certain entries in the balance sheets. Mr Marynyako's recollection failed him on almost every occasion. The problem was no doubt exacerbated because Mr Marynyako did not keep any working notes during the conduct of his "audit", despite the requirement under national standards issued by the Ukrainian Auditing Committee to do so. For example, Mr Marynyako was asked to explain the following dramatic



increases in the “equity appreciation” of Generation Ukraine’s subsidiary Heneratsiya (in US Dollars):

1993: 262,000; 1994: 1.3 million; 1995: 1.58 million; 1996: 4 million; 1997: 4 million; 1998: 20 million.

19.11 The only increase that Mr Marynyako recollected was the last, which he identified as the transfer of ownership in the Parkview Project.

19.12 In addition to these very serious reservations about the credibility of Mr Marynyako’s reports and evidence, the Tribunal is perplexed as to why the Claimant enlisted the assistance of various Ukrainian accountants to audit Generation Ukraine, which is of course an American company registered in New Hampshire. Mr Marynyako was certainly not qualified to audit U.S. companies; indeed he never had sight of the statutory documents of Generation Ukraine. Hence the lengthy debate between the parties as to the “legal force” of the audits performed by Mr Marynyako and signed by DAR is really beside the point: the Tribunal cannot possibly treat these audits, at best prepared in accordance with Ukrainian accounting standards, as in any way definitive of the true financial situation at Generation Ukraine throughout the relevant period.

19.13 Mr Laka explained that the decision to approach Ukrainian accountants to audit Generation Ukraine was based on a “suggestion” in 1999 by Generation Ukraine’s American auditor, Marcum & Kliegman, to “conduct an audit in Ukraine of our expenses and financials”. Mr Laka thus confirmed that no audit had been undertaken by Generation Ukraine before this time because corporations returning losses do not need to file income tax returns in the U.S. It was envisaged that Mr Marynyako would conduct an initial review of the primary documents against the accounts, insofar as these primary documents were mainly in Ukrainian, and then provide Marcum & Kliegman with the accounts for their review. Marcum & Kliegman were not, however, in a position to review the primary documents themselves and made a reservation to that effect in their auditing statement. When asked why Marcum & Kliegman were not furnished with these documents, Mr Laka responded:

“Well that’s very simple, because the supporting documents were no longer available for anybody to review, they were discarded by accident back in Kyiv, when we were cleaning out our office..., so we would have sent them the supporting documents if we had had them, but by that time we no longer had them.”

19.14 Thus, on this issue of the reliability of the auditing statements compiled by Mr Marynyako and Marcum & Kliegman, one comes the full circle without finding any solid corroboration.

19.15 No further reliable evidence was forthcoming from the Claimant in relation to its expenditure in Ukraine, despite the fact that several avenues appeared to be open to the Claimant to obtain such evidence.

19.16 First, Mr Laka testified that Generation Ukraine was financed by loan capital, 99% of which came from Mr Laka himself. No formal loan agreements, however, were executed between Mr Laka and Generation Ukraine. Instead Mr Laka paid over these sums directly into the bank account of Generation Ukraine in the United States, which was held at NatWest until the beginning of 1999. One would expect that NatWest would at least have records of the receipt of these sums, but Mr Laka testified that they would be impossible to retrieve because NatWest had gone “bankrupt”. In response to a question in cross examination, Mr, Laka stated:

“You’re not going to get much account detail from a bank that’s gone out of business, and I don’t know how to do that, but if you know how to do it I’ll be glad to give you a power of attorney and you can find the people, if there’s anybody still managing their affairs ...”

19.17 Mr Laka confirmed that he had not approached NatWest for this information because “there was no need”.

19.18 Second, although Mr Laka stated that his loans to Generation Ukraine could be evidenced by the bank statements relating to his own cheque account, this information was never tendered for the record in this arbitration.

19.19 Third, no attempt was made to recreate the files that were destroyed in Kyiv in October 2000 from other sources. Mr Laka gave the following reason in cross examination:

“No we didn’t try to do it for a very simple reason, because we had the affirmation of the person who had checked those records in writing, and it was confirmed by the licensed auditor.”

19.20 Fourth, several documents submitted by the Claimant referred to annexes that purportedly contained a detailed breakdown of Generation Ukraine or Heneratsiya’s expenditure relating to the Parkview Project. For instance, the Claimant relied heavily on an “Expert Appraisal” of the value of the Parkview Project conducted by the Central Service of the Ukrainian State Investment Expertise, dated 2 July 1998. The appraisal refers to “Expenses incurred by the Developer during the period 1 January 1993 to 31 May 1998 for the execution of the Parkview project, which are shown in Appendix 9”. The next line of the report states: “Total expenses which are shown in the exhibits in Appendix 9 = \$2,180,356 USD”. The Chairman of the Tribunal asked Counsel for the Claimant whether “Appendix 9” was available. Counsel later responded that the reference to “Appendix 9” was “an error”.

19.21 Fifth, although Mr Laka testified that he had a staff of 30 people at Generation Ukraine in New York, and several staff at Heneratsiya in Ukraine, he was unable to produce any records evidencing their employment because, in his evidence, they were hired on a casual basis.

19.22 Sixth, in accordance with the OPIC insurance policy maintained by the Claimant in relation to its investment in Heneratsiya, the Claimant was obliged to “maintain in the United States true and complete copies of the records, books of account and current financial statements for the foreign enterprise necessary to compute and substantiate compensation, including (1) records documenting the investment...” Either Generation Ukraine failed to keep such records in breach of its obligations under the OPIC policy, or they were withheld from the Tribunal despite their importance.

19.23 The documents that are available do not support the level of expenditure that Mr Laka contends. In an “audit certificate” prepared by the State Tax Administration of Ukraine on 30 May 1997 in relation to Heneratsiya, it is stated that there was no movement of funds in the company between 1993 and 1997 save for USD 200 placed on the current account on 9 August 1993. Mr Laka signed this “audit certificate”.

One would have expected that funds transferred from Generation Ukraine to Heneratsiya would have been detected by this audit.

19.24 Furthermore, Generation Ukraine's OPIC insurance policy, procured on 4 February 1994, states that "the Investor promises that the Investor contributed or will contribute \$150,000" towards its putative investment in the Ukraine. The maximum aggregate compensation payable under the policy was USD 405,000. Mr. Laka testified that from 1995 onwards, OPIC adjudged that the project "had moved into an area of imminent expropriation risk" and therefore the insurance coverage was frozen at this level. Despite the fact that the Claimant provided a great deal of correspondence from OPIC as purported evidence of its investment activities in Ukraine, there is nothing on the record documenting a request by the Claimant for additional coverage based on further contributions, nor a refusal from OPIC to satisfy any such request.

19.25 Counsel for the Claimant noted at the final hearing that:

"The evidence that one dollar has been spent is in the bin, that's a fact of life, so we have to rely on let's say other sources of information in relation to that."

19.26 In the circumstances just described, the Tribunal finds that the "other sources" presented by the Claimant are totally inadequate as proof of the Claimant's factual investment in the Parkview Project. Moreover, the absence of information that must surely have been available to a party making reasonable endeavours further undermines the Claimant's case.

## **20. First Alleged Expropriation**

20.1 The Claimant submits that the "indirect ('first') global expropriation of the company's rights and property" occurred on 31 October 1997 "by virtue of the [Kyiv City State Administration]'s failure to produce revised land lease agreements with valid site drawings". This is characterised by the Claimant as the beginning of the dispute.

20.2 The Claimant relies on the Yalovoy Protocol as creating a legal obligation upon Kyiv City State Administration and the Kyiv City Department of Land

Resources to issue Heneratsiya with a new set of land lease agreements that incorporated corrected site plans by 31 October 1997. The background to the Yalovoy Protocol has been explained previously at Paragraph 18.47 *et seq.* The Claimant submits that new land lease agreements were required to reflect changes in its design that were necessitated by the SBU's demands. Hence the inclusion of point 13 of the Yalovoy Protocol which reads:

“To change the boundaries of the land parcels of Heneratsiya Ltd, SB Ukraine, the Financial Directorate, and the International Business Centre by taking into account the situation which developed around these approved projects and with the consent of the landholders.”

20.3 Responsibility for implementation of point 13 was placed on the Kyiv City Department of Land Resources. The “authentic” (as the Claimant would have it) version of the Yalovoy Protocol imposed a deadline of 31 October 1997 for this amendment, whereas the “falsified” (*idem*) version extended the date to 1 February 1998.

20.4 The Claimant also submits that, even in the absence of the Yalovoy Protocol, the Kyiv City State Administration and Kyiv City Department of Land Resources “could not lawfully escape the obligation to prepare new site plans approved for the new building by the Kyiv Architectural Council that was designed especially for the SBU/KGB”.

20.5 The source of the obligation to provide amended lease agreements was therefore either the Yalovoy Protocol or Ukrainian law relating to land use.

20.6 The Claimant submits that the Kyiv City State Administration's failure to comply with this obligation effectively put an end to the Parkview Project because it created an insurmountable obstacle for any construction work to lawfully proceed. Mr Laka explained the ramifications of this omission as follows:

“The Land Code of Ukraine requires that any land lease agreement correctly and properly reflect the territory to which the land user has lawful access.

Our old land lease agreements did not correctly and properly reflect the territory to which we were now being given access, so they became unlawful.”

20.7 It is important first to identify the object of the alleged expropriation. The Claimant has persistently asserted that this omission on the part of the Kyiv City State Administration constitutes the final and irreparable destruction of the Parkview Project. Hence the issue becomes the precise nature of the “Parkview Project” on 31 October 1997.

20.8 It will be recalled that the Claimant interprets Certificate B issued by the State Agency of Ukraine for Author’s and Joint Rights on 5 June 1998 as giving effect to the Claimant’s ownership rights over the Parkview Project in its entirety. This interpretation of the scope of the rights contemplated by Certificate B has been rejected by the Tribunal. Independently of this finding, it is important to point out the contradiction in the Claimant’s pleadings, for if its interpretation were to be accepted, it would not be possible for the entire Parkview Project to be expropriated before the point in time at which the Claimant’s rights to the project were perfected. The truth of the matter is that, as of 31 October 1997, the Claimant had a very limited bundle of rights arising under the Order on Land Allocation, Lease Agreements, Foundation Agreement and Construction Permit. Thus, if the Kyiv City State Administration’s omission on 31 October 1997 did constitute an expropriation, it could only have deprived the Claimant of these legal interests and them alone.

20.9 The Claimant’s reliance on Certificate B as the penultimate and definitive source of its rights in the Parkview Project gives rise to another contradiction. The Claimant invokes the Yalovoy Protocol as the source of the legal obligation upon the Kyiv City State Administration to provide a set of amended lease agreements. The beneficiary of this obligation was Heneratsiya as the signatory to the Yalovoy Protocol and the named lessee pursuant to the Lease Agreements. According to the Claimant’s submissions, however, the “entire” Parkview Project was not transferred from Generation Ukraine to Heneratsiya until the Act of Property Transfer was signed on 21 July 1998. Thus it is difficult to see how the Kyiv City State Administration’s omission vis-à-vis Heneratsiya on 31 October 1997 could have the effect that the Claimant alleges if the Claimant’s interpretation of Certificate B were to be accepted.

20.10 It is necessary to consider some facts surrounding the Kyiv City State Administration’s failure, by 31 October 1997, to provide a set of amended lease

agreements to properly reflect changes to the boundaries of the territory to which the Claimant, through Heneratsiya, had a leasehold interest.

20.11 According to the Claimant, these changes were necessitated by reason of the SBU's demands for a buffer zone around their building on the neighbouring property. Such demands were first communicated by the SBU on 20 February 1997, by which time Heneratsiya had obtained Construction Permit No.103-Rd to commence construction at its site.

20.12 The SBU's demands necessitated corrections to the design of the Parkview Office building. These corrections were approved by the relevant Ukrainian authorities and a new Construction Permit No.189-P(d) was issued on 17 July 1998. The Yalovoy Protocol was drafted to regulate this and several other outstanding issues following the meeting on 11 July 1997.

20.13 In recognition of the additional expense incurred by the Claimant in modifying its existing architectural plans to comply with SBU's demands, amendments were made to the Foundation Agreement which, *inter alia*, exempted Heneratsiya from land payments until the date a construction permit is obtained for the revised design. The payments envisaged under clause 4.1 of the Foundation Agreement were also reduced significantly. Concomitantly, the date of the commencement of construction was postponed to December 1998. These amendments were signed by Mr Laka on behalf of Heneratsiya on 25 August 1998 and by Mr Omelchenko of Kyiv City State Administration on 4 December 1998. The latter issued a Ruling by the Kyiv City State Administration on the same day to give administrative effect to these changes.

20.14 At a meeting attended by Mr Yalovoy, Mr Omelchenko and Mr Laka on 25 December 1998, Mr Laka was informed that there was no longer any administrative obstacle to the commencement of construction. Mr Yalovoy reiterated this position in letters to Mr Laka and the U.S. Ambassador in Kyiv dated 20 January 1999 and 28 January 1999 respectively. Mr Laka wrote to the U.S. Ambassador on 4 February 1999 to challenge the Kyiv City State Administration's position that there were no further obstacles preventing construction at Heneratsiya's site and cited the following "major problems" that remained outstanding:

- the uncertainty concerning Heneratsiya's liability in the event that the roof of a neighbouring derelict building collapses during construction on Heneratsiya's site;
- Heneratsiya's unjustified prepayment of 15 months rent instead of 3 months rent, amounting to an "interest free loan" of USD 12,145.53;
- the failure of the Kyiv City State Administration to procure the temporary use of the neighbouring property (leased by IBC) for Heneratsiya as a construction staging area in accordance with point 10 of the Yalovoy Protocol;
- the failure of the Kyiv City State Administration to release a copy of the order granting a section of Heneratsiya's territory covered by its three year lease to the SBU;
- the failure of a neighbouring occupant to gain a "technical exemption approval" for a sewage line encroaching on the property of Heneratsiya;
- the fact that the same neighbouring occupant commenced construction on a portion of Heneratsiya's territory preventing the installation of hot water, electricity and water lines;
- the failure of the Kyiv City State Administration to "produce a pair of simple, two page documents" to effect amendments to Heneratsiya's two land lease agreements;
- the failure of Mr Omelchenko to reprimand Mr Karminsky for attempting to invalidate Heneratsiya's construction permit;
- the fact that Heneratsiya must have guaranteed access to Mr Omelchenko "when it needs it to resolve critical issues";
- the fact that Heneratsiya must have "Mr Omelchenko's guarantee to the company regarding his personal protection of [Heneratsiya's] project".

20.15 Mr Laka concluded this letter with the following statement, the first sentence of which appeared in bold, underlined and in capital letters:

"The Kyiv City State Administration, in the past, has repeatedly left matters unresolved resulting in persistent interruptions in the company's project. Therefore, the company is unwilling to move forward at any level of effort on its project until each and every outstanding problem is fully resolved."

20.16 This letter has been summarised in detail because it is the most comprehensive contemporaneous account of the types of grievances that, according to the Claimant, prevented the realisation of its Parkview Project following its receipt of a Construction Permit. In its pleaded case, the Claimant has attached particular significance to the Kyiv City State Administration's failure to execute amended land



lease agreements by labelling this as an expropriatory act for the purpose of Article III of the BIT.

20.17 In its defence to this alleged act of expropriation, the Respondent denies that the Kyiv City State Administration was under any obligation to issue amended land lease agreements pursuant to the Yalovoy Protocol or otherwise. Furthermore, the Respondent submits that Heneratsiya did not itself comply with its own obligations under the Yalovoy Protocol by failing to procure the requisite approvals for the relevant version of its design of the Parkview Project office building, which in turn would have prevented the Kyiv City State Administration from issuing the aforementioned amended land lease agreements. Finally, the Respondent contests the necessity of amending the leases at all in order for Heneratsiya to proceed with construction.

20.18 The Tribunal notes that there is serious disagreement between the parties about the existence of an obligation on the part of the Kyiv City State Administration, whether pursuant to the Yalovoy Protocol or arising under general Ukrainian law, to issue amended land lease agreements. There is also serious disagreement about whether or not the Claimant was in a position to proceed with the construction of its Parkview Office Building in the absence of these amended lease agreements.

20.19 In order to analyse the Respondent's international obligations under the BIT, the Tribunal will put this controversy to one side and accept the facts as pleaded by the Claimant in order to test the Respondent's conduct against the standard of investment protection encapsulated in Article III of the BIT. Article III provides:

“1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (expropriation) except: for a public purpose; in a nondiscriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in article II(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or become known, whichever is earlier; be calculated in a freely usable currency on the basis of the prevailing market rate of exchange at that time; be paid without delay; include interest at a commercially reasonable rate, such as LIBOR plus an appropriate margin, from the date of expropriation; be fully realizable; and be freely transferable.

2. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether such expropriation has occurred and, if so, whether such expropriation, and any associated compensation, conforms to the principles of international law.”

20.20 The formulation in the first sentence of Article III(1) is somewhat circular by prohibiting an expropriation by measures tantamount to expropriation. Nevertheless, it is perfectly clear that the State Parties to the BIT envisaged that both direct and indirect forms of expropriation are to be covered by Article III.

20.21 The alleged final expropriatory act or measure, as previously mentioned, is said to be the failure by the Kyiv City State Administration to issue amended lease agreements. The disputed measure cannot possibly constitute a direct expropriation of the Claimant’s investment because the Kyiv City State Administration never purported to transfer Heneratsiya’s proprietary rights in its investment to the State or to a third party. Quite properly, the Claimant has never sought to characterise the disputed measure as a direct expropriation. Instead, the Claimant has, in its written and oral pleadings, contended that this disputed measure was the culmination of a series of other prejudicial acts that ultimately deprived the Claimant of its rights to its investment, due to the level of resulting interference. The various measures of the Respondent thus, according to the Claimant, amounted to a “creeping expropriation”.

20.22 Creeping expropriation is a form of indirect expropriation with a distinctive temporal quality in the sense that it encapsulates the situation whereby a series of acts attributable to the State *over a period of time* culminate in the expropriatory taking of such property. The case of *German Interests in Polish Upper Silesia*<sup>9</sup> is one of many examples of an indirect expropriation without a “creeping” element—the seizure of a factory and its machinery by the Polish Government was held by the PCIJ to constitute an indirect taking of the patents and contracts belonging to the management company of the factory because they were so closely interrelated with the factory itself. But although international precedents on indirect expropriation are plentiful, it is difficult to find many cases that fall squarely into the more specific paradigm of creeping expropriation.

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<sup>9</sup> Judgment No.7, *P.C.I.J.*, Series A, No.7.

20.23 The *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran, et al.*<sup>10</sup> case before the Iran/US Claims Tribunal might be said to demonstrate the possibility of a taking through the combined effect of several acts. The Iranian Government appointed a temporary manager of the joint venture investment company in which the claimant had a fifty percent stakehold with the other fifty percent owned by an Iranian entity. The temporary manager commenced his duties in August 1979 and immediately breached the partnership agreement that regulated the joint venture by signing cheques on the partnership's accounts by himself and making other decisions without consulting the claimant. The claimant managed to rectify these violations of the partnership agreement. Thus, for instance, the practice of two signatures on cheques was restored. The hostage crisis at the U.S. Embassy in Tehran then intervened in November 1979 and the working relationship that had developed between the temporary manager and the claimant came to an end. The claimant's representatives left Iran in December 1979 and thereafter the management of the joint venture ceased all communication with the claimant with respect to its business operations. The Iran/US Claims Tribunal reflected upon the nature of the indirect taking in light of these facts in the following oft-cited passage:

“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, even where legal title to the property is not affected.

While assumption of control over property by a government does not automatically and immediately justify a conclusion that the property has been taken by the government, thus requiring compensation under international law, such a conclusion is warranted whenever events demonstrate that the owner was deprived of the fundamental rights of ownership and it appears that this deprivation is not merely ephemeral. The intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.”<sup>11</sup>

20.24 The Tribunal held that the taking of the claimant's property was consummated not when the temporary manager was first appointed in August 1979, but in March 1980 by which time the tentative cooperation between the claimant and the temporary manager had come to an end.

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<sup>10</sup> Award No. ITL 32-24-1 (19 Dec. 1983); reported at 4 *Iran-US. C.T.R.* 122.

<sup>11</sup> *Ibid.*, at 225-6 (footnotes omitted).

20.25 The *Tippetts* case was cited with approval in a recent ICSID arbitration in *Compañía del Desarrollo de Santa Elena, S.A. v. The Republic of Costa Rica*.<sup>12</sup> The following statement of principle provides useful guidance in the analysis of the Claimant’s plea of creeping expropriation in the circumstances of the present case:

“As is well known, there is a wide spectrum of measures that a state may take in asserting control over property, extending from limited regulation of its use to a complete and formal deprivation of the owner’s legal title. Likewise, the period of time involved in the process may vary—from an immediate and comprehensive taking to one that only gradually and by small steps reaches a condition in which it can be said that the owner has truly lost all the attributes of ownership. It is clear, however, that a measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title. . .

There is ample authority for the proposition that a property has been expropriated when the effect of the measures taken by the state has been to deprive the owner of title, possession or access to the benefit and economic use of his property. . .”<sup>13</sup>

20.26 The Claimant’s submissions on its plea of creeping expropriation have been seriously flawed due to the absence of a coherent analysis of the timing and the nature of its investments in Ukraine and how the acts and omissions of the Kyiv City State Administration have affected the Claimant’s investment in the form it existed at the time of those acts and omissions. A plea of creeping expropriation must proceed on the basis that the investment existed at a particular point in time and that subsequent acts attributable to the State have eroded the investor’s rights to its investment to an extent that is violative of the relevant international standard of protection against expropriation. It is conceptually possible to envisage a case of creeping expropriation where the investor’s interests in its investment develop in parallel with the commission of the acts complained of. But such a plea, in order to be successful, would demand a high level of analytical rigorousness and precision that is absent from the submissions before this Tribunal.

20.27 The Claimant’s pleadings assume that the Claimant had a vested right to a commercial return on a completed office building, on or before the alleged final act of

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<sup>12</sup> ICSID Case No. ARB/96/1.

<sup>13</sup> *Ibid*, at paras. 76-7.

expropriation on 31 October 1997. This cannot possibly be so. As of 31 October 1997, not a single brick had been laid, nor had the foundations for the building been excavated, nor indeed had the Claimant definitively secured financing for the construction phase of the Parkview Project. The materialisation of the Claimant's legal interests - evidenced by the Order on Land Allocation, Lease Agreements, Foundation Agreement and Construction Permit - translate not to a right to a commercial return, but simply to proceed with the construction of the Parkview Office building on land over which Heneratsiya had a 49-year leasehold interest.

20.28 The Kyiv City State Administration's omission on 31 October 1997 did not have the express intention of depriving the Claimant of the legal basis of this right to proceed to construction. The question is, therefore, whether on this date the alleged cumulative interference on the part of the Kyiv City State Administration nevertheless constituted an "indirect" expropriation for the purposes of Article III of the BIT.

20.29 Predictability is one of the most important objectives of any legal system. It would be useful if it were absolutely clear in advance whether particular events fall within the definition of an "indirect" expropriation. It would enhance the sentiment of respect for legitimate expectations if it were perfectly obvious why, in the context of a particular decision, an arbitral tribunal found that a governmental action or inaction crossed the line that defines acts amounting to an indirect expropriation. But there is no checklist, no mechanical test to achieve that purpose. The decisive considerations vary from case to case, depending not only on the specific facts of a grievance but also on the way the evidence is presented, and the legal bases pleaded. The outcome is a judgment, *i.e.* the product of discernment, and not the printout of a computer programme.

20.30 The fact that an investment has become worthless obviously does not mean that there was an act of expropriation; investment always entails risk. Nor is it sufficient for the disappointed investor to point to some governmental initiative, or inaction, which might have contributed to his ill fortune. Yet again, it is not enough for an investor to seize upon an act of maladministration, no matter how low the level of the relevant governmental authority; to abandon his investment without any effort at overturning the administrative fault; and thus to claim an international delict on the

theory that there had been an uncompensated virtual expropriation. In such instances, an international tribunal may deem that the failure to seek redress from national authorities disqualifies the international claim, not because there is a requirement of *exhaustion* of local remedies but because the very reality of conduct tantamount to expropriation is doubtful in the absence of a *reasonable* - not necessarily exhaustive - effort by the investor to obtain correction.

20.31 As stated earlier, the Claimant's pleadings do not disclose an analysis of the acts attributable to the Respondent, occurring between 16 November 1996 and 31 October 1997, that purportedly interfered with its right to proceed with the construction of the Parkview office building (leaving aside the question of whether such a right existed throughout this entire period commencing from the date of the Tribunal's jurisdiction *ratione temporis*). Nevertheless, Mr Laka's letter to the U.S. Ambassador in Kyiv dated 4 February 1999 (*see* para. 20.14) provides a detailed account of all the obstacles (mostly in the form of administrative omissions) that he alleged prevented him from proceeding with the construction of his Parkview Office Building. Although it is far from certain that all these purported obstacles existed on or before 31 October 1997, Mr Laka's list of outstanding grievances nevertheless gives a flavour of the other acts that could form the series of measures constituting a creeping expropriation. The final alleged act of expropriation that was identified was the Kyiv City State Administration's failure to issue amended lease agreements.

20.32 The Tribunal finds that the conduct of the Kyiv City State Administration in the period 16 November 1996 to 31 October 1997 does not come close to creating a persistent or irreparable obstacle to the Claimant's use, enjoyment or disposal of its investment. The Tribunal's conclusion would be no different if the relevant period were to be extended to the date when the Claimant instituted these proceedings.

20.33 No act or omission of the Kyiv City State Administration during this period, whether cumulatively or in isolation, transcends the threshold for an indirect expropriation. This Tribunal does not exercise the function of an administrative review body to ensure that municipal agencies perform their tasks diligently, conscientiously or efficiently. That function is within the proper domain of domestic courts and tribunals that are cognisant of the minutiae of the applicable regulatory

regime. In the circumstances of this case, the conduct cited by the Claimant was never challenged before the domestic courts of Ukraine. More precisely, the Claimant did not attempt to compel the Kyiv City State Administration to rectify the alleged omissions in its administrative management of the Parkview Project by instituting proceedings in the Ukrainian courts. There is, of course, no formal obligation upon the Claimant to exhaust local remedies before resorting to ICSID arbitration pursuant to the BIT. Nevertheless, in the absence of any *per se* violation of the BIT discernable from the relevant conduct of the Kyiv City State Administration, the only possibility in this case for the series of complaints relating to highly technical matters of Ukrainian planning law to be transformed into a BIT violation would have been for the Claimant to be denied justice before the Ukrainian courts in a *bona fide* attempt to resolve these technical matters.

20.34 In *Feldman v. Mexico*,<sup>14</sup> the arbitral tribunal found that although “the Claimant, through the Respondent’s actions, is no longer able to engage in his business” as a result of the elimination of a tax rebate on export resales of cigarettes,<sup>15</sup> and although “it is undeniable that the Claimant has experienced great difficulties in dealing with [Ministry] officials, and in some respects has been treated in a less than reasonable manner”,<sup>16</sup> the Mexican Government’s regulatory actions were, on balance, not equivalent to an expropriation. In declining to find that the claimant’s allegations of unlawful administrative actions constituted expropriation, the tribunal took account of the availability of court review of those administrative actions.<sup>17</sup> The claimant contended that those actions violated both Mexican judicial precedents and a specific agreement between governmental officials and the claimant. The arbitral tribunal summarised its rationale under four points<sup>18</sup> which may be paraphrased as follows: (1) “not every business problem experienced by a foreign investor in an expropriation,” (2) neither general international law nor the relevant treaty required the state to permit the kind of activity which was impeded by adverse regulation, (3)

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<sup>14</sup> ICSID Case No. ARB(AF)/99/1.

<sup>15</sup> *Ibid*, at para.109.

<sup>16</sup> *Ibid*, at para.113.

<sup>17</sup> *Ibid*, at para.140.

<sup>18</sup> *Ibid*, at para.111.

local law did not create the right to engage in such activity and (4) control of the corporate vehicle for the investment remained in the hands of the claimant, with the “apparent right” to pursue its activities in conformity with Mexican regulations. The arbitral tribunal concluded: “while none of the factors alone is necessary conclusive, in the Tribunal’s view taken together they tip the expropriation/regulation balance away from a finding of expropriation.” The parallels with the precedent case where the Claimant argues that the Kyiv authorities violated both Ukrainian law and specific agreements with the investor, are evident.

20.35 In *Feldman v. Mexico*, although the tribunal recognised that use of the power of taxation could constitute acts tantamount to expropriation, it was influenced by the victim’s failure to seek “formal, binding rulings” with respect to what he viewed as the irregular denial of certain tax benefit which had motivated his investment. The arbitrators wrote:

“It is unclear why he refrained from seeking clarification, but he did so at his peril, particularly given that he was dealing with tax laws and tax authorities, which are subject to extensive formalities in Mexico and in most other countries of the world.”<sup>19</sup>

20.36 In *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*,<sup>20</sup> the act found to be “tantamount to expropriation” was a decree, signed by the competent Minister and published in the Egyptian Gazette, and containing the following simple resolution: “To prohibit the import of all kinds of Gray Portland Cement either through the Public Governmental Sector or the Private Sector.” The decree was found to contradict the terms of an import license in reliance upon which the relevant investment had been made. Moreover, the respondent conceded that the decree had deprived the claimant of rights under the license for “at least a period of four months”. It did not agree to the 10-year duration allegation by the claimant.<sup>21</sup> The difference with the present case is palpable, both with respect to the clear and categorical effect of the governmental measure, and the level of government at which it was taken.

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<sup>19</sup> *Ibid*, at para. 114.

<sup>20</sup> ICSID Case No. ARB/99/6.

<sup>21</sup> *Ibid*, at paras. 107-111.



20.37 Finally, it is relevant to consider the vicissitudes of the economy of the state that is host to the investment in determining the investor's legitimate expectations, the protection of which is a major concern of the minimum standards of treatment contained in bilateral investment treaties. The Claimant was attracted to the Ukraine because of the possibility of earning a rate of return on its capital in significant excess to the other investment opportunities in more developed economies. The Claimant thus invested in the Ukraine on notice of both the prospects and the potential pitfalls. Its investment was speculative. Perhaps for this very reason, the Claimant was cautious about contributing substantial sums of its own money to the enterprise, preferring to seek capital from third parties to finance the construction of the building. By 31 October 1997, the Claimant had undoubtedly experienced frustration and delay caused by bureaucratic incompetence and recalcitrance in various forms. But equally, the Claimant had managed to secure a 49-year leasehold over prime commercial property in the centre of Kyiv without having participated in a competitive tender and without having made any substantial payment to the Ukrainian authorities.

20.38 For these reasons, the Tribunal rejects the Claimant's submission that an "indirect ... global expropriation of the company's rights and property" occurred on 31 October 1997 "by virtue of the [Kyiv City State Administration]'s failure to produce revised land lease agreements with valid site drawings".

## **21. Second Alleged Expropriation**

21.1 The Claimant submits that the "Direct ('Second - Repeat') global expropriation of the company's rights and property" occurred on 8 July 1999 "by virtue of the Kyiv City Council's (with the support of the Kyiv City State Administration) Decision No. 358/459 unlawfully cancel[ing] the company's 49 year land lease rights". According to the Claimant, this action "is merely a continuation and intensification of the dispute initiated on October 31, 1997 and not a 'new' dispute in its own right."

21.2 The notion of a "second" or "repeat" expropriation of the same investment poses a daunting conceptual problem. But even if the Tribunal were to consider this as a submission in the alternative (which is not the characterisation offered by the Claimant), the Decision of the Kyiv City Council cannot amount to an expropriatory

act because both Parties agree that it had no legal effect in relation to the Claimant's rights under the Order on Land Allocation or Lease Agreements. The Respondent concedes that the Decision was "legally defective" as it was beyond the competence of the Kyiv City Council to cancel a previous decision of the Kyiv City State Administration (in this case the Order on Land Allocation). The Claimant and the Respondent concur that the 49-year Lease Agreement remains valid and binding to this day (the 3-year Lease Agreement having now expired in accordance with its own terms) because any cancellation of a lease agreement relating to land can only be effected by a judgment of a Ukrainian court. This was implicit in the Decision of the Kyiv City Council itself, which called upon the Kyiv City Department of Land Resources to apply to the Supreme Arbitration Court of Ukraine for that purpose. No such application has ever been made.

21.3 Heneratsiya's legal rights to its leasehold property have, therefore, not been infringed by the Decision of the Kyiv City Council. Nor has the Decision resulted in any factual interference with Heneratsiya's enjoyment of its leasehold property as no actions have been taken by any Ukrainian authority to evict Heneratsiya from the land. Heneratsiya remains in control of its construction site.

21.4 Insofar as Heneratsiya's leasehold interests in its property were the sole target of the Decision of the Kyiv City Council and such interests remain unaffected, the Decision cannot amount to an expropriatory act for the purposes of Article III of the BIT.

## **22. Third Alleged Expropriation**

22.1 The subject of the third alleged expropriation is the Claimant's right to use the adjoining property as a construction staging area. The Claimant submits that the source of this right is the Yalovoy Protocol. The Tribunal has previously found at Paragraph 18.59 above that no such right can be recognised by the Tribunal because this was not the clear intention of the parties to the Yalovoy Protocol. In the absence of any proof that the lessee of the adjoining property consented to the Claimant's use of this land, any countenance to the Claimant's alleged right would involve a flagrant breach of Ukrainian land law. There cannot be an expropriation of something to which the Claimant never had a legitimate claim. The Tribunal concludes that the

failure of the Kyiv City State Administration to secure the Claimant's use of the adjoining property cannot amount to an expropriation.

### **23. Conclusions on Claims A to D**

23.1 The Tribunal has rejected the Claimant's submissions on each of the acts alleged to be tantamount to expropriation pursuant to Article III of the BIT. The Tribunal has not, therefore, discerned a breach of the BIT by the Respondent. It follows that Claims A to D, as predicated on a breach of Article III of the BIT, must be dismissed. As made clear in Section 17, the only other claim with respect to which the Tribunal has jurisdiction is that of costs.

### **24. Costs**

24.1 Since the claim fails in its entirety, it remains to be considered whether there are any reasons to attenuate the general rule that an unsuccessful litigant in international arbitration should bear the reasonable costs of its opponent.

24.2 Counsel for the Claimant has suggested that "there's more documentation in this particular ICSID reference than has ever been in any previous ICSID reference." The Tribunal is not certain that such an affirmation is verifiable; it is certainly true that the written evidence and submissions in this case have been voluminous. But the Claimant's written presentation of its case has also been convoluted, repetitive, and legally incoherent. It has obliged the Respondent and the Tribunal to examine a myriad of factual issues which have ultimately been revealed as irrelevant to any conceivable legal theory of jurisdiction, liability or recovery. Its characterisation of evidence has been unacceptably slanted, and has required the Respondent and the Tribunal to verify every allegation with suspicion. (For example, the Claimant's confident assertions of its mobilisation of necessary financing do not match the evidence of Crédit Lyonnais Ukraine's expression of interest, which was in the form of a draft term sheet that promised to "study applications from prospective tenants ... for the financing of their obligations under the lease". The fact that the author of that letter was announced as a witness, that a document purporting to be his written statement was produced, but that no signed version was forthcoming, and that he declined to appear before the Tribunal, has hardly helped matters.)

24.3 The Claimant's position has also been notably inconsistent. For example, it alleged that "we established Heneratsiya in anticipation of the fact that the Bilateral Investment Treaty allowed us to function in Ukraine through a local subsidiary." But Heneratsiya was formed in 1993, and Mr Laka ultimately, on the last day of his testimony, revealed that he had not become aware of the BIT until a U.S. Embassy official advised him about it at the time of preparing the Claimant's case before the Chamber of Independent Experts - which was in 1999.

24.4 Moreover, the Claimant's presentation of its damages claim has reposed on the flimsiest foundation. The Tribunal has no doubt that Mr Laka spent some money during his years pursuing the Parkview Project, but there is not one item of direct evidence of a single expenditure. Mr Laka testified that all accounting evidence was destroyed inadvertently by workmen who misunderstood their instructions when the Claimant abandoned its office in Kyiv in 2000. That may be so, but the Claimant's approach to filling that evidentiary gap has been singularly unimpressive: it presented an "audit" by Mr Marynyako, a graduate of the Department of Machinery of the Ukrainian Agricultural Academy who apparently is a self-taught accountant. He testified that he spent perhaps 200 hours verifying the Claimant's accounts in 1999 (before they were destroyed) but was not remunerated. Mr Laka explained that he had an understanding with Mr Marynyako to the effect that the latter would receive a share in the Claimant's hoped-for recovery in this arbitration. And yet there are numerous documents in the file that refer to previous examinations of the Claimant's costs; somehow the relevant annexes, notwithstanding the plethora of the Claimant's documentation, are missing. (For example, the "Expert Appraisal" of the value of the Parkview Project conducted by the Central Service of the Ukrainian State Investment Expertise made reference to an Appendix 9 showing "[e]xpenses incurred by the Developer during the period 1 January 1993 to 31 May 1998 for the execution of the Parkview project". This appendix was not produced to the Tribunal despite its request.) Similarly Mr Laka contended that the Claimant's expenditures were essentially financed by loans from himself, "paid out of his pocket" but with no formal trace.

24.5 As for the Claimant's non identified staff, with the exception of Mr Laka, they were "hourly employees" paid in local currency with "no contractual or employment status." Such is the explanation offered for the absence of payroll or similar records.

24.6 The Claimant's presentation has lacked the intellectual rigour and discipline one would expect of a party seeking to establish a cause of action before a international tribunal. This lack of discipline has needlessly complicated the examination of the claim.

24.7 Even at the stage of final oral submissions in March 2003, counsel for the Claimant relied on two ICSID awards without mentioning that they had been partially annulled. While the Tribunal was fortunately aware of that limitation on the pertinence of those awards, this was due to the happenstance of the arbitrators' personal knowledge. The Tribunal assumes in counsel's favour that he was unaware of the annulments; that is bad enough, and does no credit to the Claimant.

24.8 The Respondent has claimed costs of USD 739,309.80, representing "contract payments of lawers [sic] and experts services and expenses for business trips". The Tribunal is unsatisfied with these uncorroborated costs submissions, and considers them vastly overstated. It awards all costs the Respondent has paid into ICSID, or USD 265,000 as well as a contribution of USD 100,000 to the Respondent's legal fees.

## **25. AWARD**

25.1 Rejecting all claims and contentions to the contrary, the Tribunal decides that:

- (1) The claim is dismissed.
- (2) The Claimant is ordered to pay costs to the Respondent in the amount of USD 365,000.

Signed this 15<sup>th</sup> day of September 2003:

(signature)  
Dr Eugen Salpius

(signature)  
Dr Jürgen Voss

(signature)  
Mr Jan Paulsson  
President