SVEA COURT OF APPEAL	**JUDGMENT**	Case No.
Department 02	18 January 2016	T 9128-14
Division 020105	Stockholm	

APPEALED DECISION
Judgement of Stockholm District Court of 11 September 2014 in case No. T 15045-09, see appendix A

APPELANT
The Russian Federation, the "**Federation**"

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1-4 jointly referred to as the "**Funds**"

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MATTER
Motion for affirmation with respect to jurisdiction of arbitral tribunal

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Judgment, see following page.

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JUDGMENT OF THE COURT OF APPEAL

1. The Court of Appeal amends the judgment of the District Court in the following manner.
   a) The Court of Appeal affirms that the arbitral tribunal does not have jurisdiction to decide the case brought by GBI 9000 SICAV S.A., ALOS 34 S.L., Orgor de Valores SICAV S.A. and Quasar de Valors SICAV S.A. through their request for arbitration against the Russian Federation of 25 March 2007.
   b) The Court of Appeal discharges the Russian Federation from the obligation to compensate GBI 9000 SICAV S.A., ALOS 34 S.L., Orgor de Valores SICAV S.A. and Quasar de Valors SICAV S.A. for their litigation costs before the District Court.
   c) GBI 9000 SICAV S.A., ALOS 34 S.L., Orgor de Valores SICAV S.A. and Quasar de Valors SICAV S.A. are ordered, jointly and severally, to compensate the Russian Federation for its litigation costs before the District Court in the amounts of SEK 5,661,504 and USD 1,375,850, plus interest on the amounts pursuant to Section 6 of the Swedish Interest Act from the date of the District Court's judgment until the day of payment. The above amounts comprise costs for legal counsel in the amounts of SEK 5,630,173 and USD 1,216,858, respectively.

2. GBI 9000 SICAV S.A., ALOS 34 S.L., Orgor de Valores SICAV S.A. and Quasar de Valors SICAV S.A. are ordered, jointly and severally, to compensate the Russian Federation for its litigation costs before the Court of Appeal in the amounts of SEK 2,442,698, USD 402,489.91 and GBP 3,775.96, plus interest on the amounts pursuant to Section 6 of the Swedish Interest Act from the date of the District Court's judgment until the day of payment. The above amounts comprise costs for legal counsel in the amounts of SEK 2,345,367 and USD 394,778.50, respectively.

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MOTIONS BEFORE THE COURT OF APPEAL

The Federation has moved that the Court of Appeal shall grant its motion for affirmation, discharge the Federation from the obligation to compensate the Funds' litigation costs before the District Court, and order the Funds to compensate the Federation for its litigation costs before the District Court and the Court of Appeal.

The Funds have disputed any amendments to the District Court's judgment and claimed compensation for its litigation costs before the Court of Appeal.

THE PARTIES' RESPECTIVE CASES ETC.

The case has been decided following a main hearing. The parties have referenced the same circumstances and detailed their respective cases substantially in the same manner as before the District Court. They have presented the same investigation as before the District Court.

GROUNDS OF THE COURT OF APPEAL

In the present case, the parties have mainly focused on the interpretation of articles 10 and 5(2) of the bilateral investment protection agreement of 26 October 1990, entered between Spain and the Soviet Union (the "Treaty"). Therefore, the Court of Appeal will commence with these matters of interpretation, instead of, like the District Court, first deciding whether an arbitration agreement exists between the parties.

General starting points for the interpretation of the Treaty

As set forth above, the Treaty is a bilateral agreement entered into between two sovereign states. Thus, the Treaty is governed by international law. International law does not stipulate any general obligation for a state to submit to the jurisdiction of any international court or arbitral tribunal. Thus, these types of institutions for dispute resolution are, for their jurisdiction, dependent on the relevant state having given its approval in each respective case.

The Treaty contains two separate provisions on dispute resolution, both containing provisions on the jurisdiction for arbitral tribunals. One (article 9) takes aim at disputes between the contracting states and is thus not immediately relevant to the present proceedings. The other (article 10) is aimed at disputes between a contracting state and

investors from the other contracting state, a so-called diagonal dispute-resolution provision. In the present case, the parties disagree on the scope of the arbitral tribunal's jurisdiction under article 10. The Federation has maintained that the relevant arbitral tribunal does not have jurisdiction to decide whether some of the Federation's actions entail that the Funds' alleged investments have been expropriated. The Funds take the opposing view.

The Treaty further contains a so-called most favored nation clause ("MFN clause") set forth in article 5(2). The Funds have maintained that the clause entails that the diagonal dispute resolution clauses of other bilateral investment protection treaties ("investment protection treaties") grants the arbitral tribunal jurisdiction to decide the matter of expropriation, in the event that article 10 does not. The Federation has disputed that article 5(2) has that meaning.

Because the parties do not agree on the interpretation of articles 10 and 5(2), it is for the Court of Appeal to make its own interpretation within the frame of what the parties have maintained in the case. The interpretation shall be made pursuant to articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "Vienna Convention").

Article 31 contains a general provision on interpretation. It provides that a treaty shall be interpreted honestly and in agreement with the ordinary meaning of the expressions of the treaty, seen in their contexts and considering their respective objects and purposes. The starting point for the interpretation is always the *wording* of the treaty (cf. *Draft Articles on the Law of Treaties with commentaries*, 1966, United Nations, 2005, p. 220). If the wording is clear, it generally forms the basis for the interpretation. The objects and purposes of a treaty are not autonomous means for the interpretation, but rather form part of the interpretation to be carried out under article 31 to establish the ordinary meaning of the treaty (cf. Ian Brownlie, *Principles of Public International Law*, 6th ed., 2003, Oxford University Press, p. 602; *Draft Articles on the Law of Treaties with commentaries*, 1966, United Nations, 2005, p. 218 ff.; and *Expert Opinion of Professor Rein Müllerson*, p. 8).

Article 32 contains provisions on supplementary means of interpretation. These may be used either to confirm an interpretation under article 31 or to determine the meaning when an interpretation under article 31 does not clarify ambiguities/obscurities or lead to a manifestly absurd/unreasonable outcome.

Does article 10 of the Treaty grant the arbitral tribunal jurisdiction to decide the issue whether the Federation has taken expropriation measures against the Funds?

Prior to the Court of Appeal commencing the interpretation of article 10, there is reason to first restate its contents as set forth below. The aforementioned applies also to articles 6 and 9.

> ***Article 6***
> **NATIONALIZATION AND EXPROPRIATION**
> Any nationalization, expropriation or any other measure having similar consequences taken by the authorities of either Party against investments made within its territory by investors of the other Party, shall be taken only on the grounds of public use and in accordance with the legislation in force in the territory. Such measures should on no account be discriminatory. The Party adopting such measures shall pay the investor or his beneficiary adequate compensation, without undue delay and in freely convertible currency.
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> ***Article 9***
> **DISPUTES BETWEEN THE PARTIES**
> 1. Any dispute arising between the Parties relating to the interpretation or application of this Agreement shall, as far as possible, be settled through the diplomatic channel.
> 2. If the dispute cannot be settled by that means within six months from the start of negotiations, it may be submitted, at the request of either Party in writing, to an *ad hoc* arbitral tribunal. […]
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> ***Article 10***
> **DISPUTES BETWEEN ONE PARTY AND INVESTORS OF THE OTHER PARTY**
> 1. Any dispute between one Party and an investor of the other Party relating to the amount or method of payment of the compensation due under article 6 of this Agreement, […].
> 2. If the dispute cannot be settled […], it may be referred to […]:
> - An arbitral tribunal […].

As previously stated, the Treaty shall, pursuant to article 31 of the Vienna Convention, be interpreted in accordance with its wording. The Court of Appeal concludes that the wording of article 10 is clear to the extent that it – as opposed to article 9 – contains a limitation concerning the substantive matters eligible for arbitration. Thus, article 10 does not grant an arbitral tribunal the general jurisdiction to resolve any and all disputes that could possibly arise between investors and the host state in connection with the Treaty. The outer limits of the jurisdiction is determined by the reference therein to article 6. The reference clarifies that it covers only parts of the contents of article 6, namely the "amount or method of payment of the compensation due under article 6".

The wording of article 10 thus clarifies that the jurisdiction at least covers disputes concerning the amount and method of payment of such compensation as may be due under article 6. The question in the present case is whether it covers also other issues. The phrases

"any dispute" and "relating to" would indicate this to be the case. These phrases, considered in isolation, do not, however, clarify anything as to what else that could possibly be covered by the jurisdiction. Here, the Court of Appeal is left with the provisions of article 6.

Article 6 governs (i) the conditions under which expropriation or the like may be carried out by the host state and (ii) investors' rights to compensation in cases of expropriation or the like. The Court of Appeal concludes that the reference in article 10 takes aim only at (ii).

The provisions concerning (ii) assumes, according to their wording, that expropriation or the like has in fact occurred. The interpretation proposed by the Funds, that (ii) would also govern the issue whether expropriation or the like actually has occurred, does consequently not coincide with the wording of article 6.

Even if phrases such as "any dispute" and "relating to" could give the impression that an arbitral tribunal's jurisdiction would cover also other matters than the amount and method of payment, the wording of the reference to article 6 set forth in article 10 does not support the interpretation that the jurisdiction would cover also whether an expropriation actually occurred.

In their arguments, the Funds have emphasized the objects and purposes of the Treaty. In this context, they have referenced the recitals of the Treaty. The recitals clarify that, as far as is now relevant, that the goals and purposes of the Treaty are to facilitate deepened economic cooperation for the benefit of the contracting states and to establish favorable conditions for investments. Substantively similar recitals are found in all the investment protection treaties referenced in the case. Some of these include – much like the Treaty – diagonal dispute resolution clauses, whereas some do not. Already for this reason can the recitals to the Treaty not be given any importance for the interpretation of article 10.

In support of their interpretation, the Funds have further maintained the object and purpose of the diagonal dispute resolution clause. The parties have referenced a number of investment protection treaties entered by the Soviet Union. Even if there are substantial similarities between the treaties, it nevertheless remains clear that the dispute resolution clauses have been worded differently in the various investment protection agreements. In some treaties, the provisions are relatively detailed, whereas they are more general in others. Moreover, the differences in wordings between the agreements give the impression that the

clauses have to some extent been adapted to the relevant treaty. Thus, the relevant documentation does not support the conclusion that all diagonal dispute resolution clauses entered by the Soviet Union necessarily share the same object or purpose. The documentation provides even less support for the conclusion that the dispute resolution clauses of the agreements generally include jurisdiction for a review whether expropriation has occurred. The outcome of most of the referenced international arbitration awards rather indicate the opposite.

Even if it, from the perspective of a foreign investor, would be more attractive to have issues relating to expropriation resolved by an international arbitral tribunal than by a national court, an interpretation pursuant to the provisions of the Convention does not allow for the Treaty to be supplemented by substantive provisions without support in the wording of the Treaty (cf. *Draft Articles on the Law of Treaties with commentaries*, 1966, United Nations, 2005, p. 219, and *Expert Opinion of Professor Rein Müllerson*, p. 7).

By application of an interpretation pursuant to article 31 of the Vienna Convention, the Court of Appeal in sum concludes that the jurisdiction for an arbitral tribunal under article 10 of the Treaty does *not* cover a review as to whether expropriation occurred or not. The Court of Appeal concludes that this interpretation leaves no room for any remaining ambiguity/obscurity concerning the meaning of the article nor does it lead to manifestly unreasonable/absurd outcomes. The Funds, who have argued the opposite, have maintained that their interpretation is supported also by the circumstances when the Treaty was entered.

The Court of Appeal notes that no preparatory works to the Treaty have been referenced in the case. However, in support of their respective interpretations under article 32, the parties have referenced certain investigation to clarify the considerations upon which other investment protection treaties entered by the Soviet Union were based. They have also referenced investigation concerning, amongst other things, the actual political background to the Soviet Union's entering investment protection treaties. The investigation in the case has not, however, established any unified view of the considerations behind the Soviet Union's entering into investment protection treaties in general or diagonal dispute resolution clauses in particular. Thus, the investigation does not contradict the interpretation above under article 31, but rather provides some support for it.

Is there a genuine dispute concerning the question whether expropriation occurred?

By arguing that the Federation must be deemed to have admitted that expropriation or the like occurred, the Funds have maintained that there is no genuine dispute between the parties on that issue, and that the arbitral tribunal thus has jurisdiction to decide their case under article 10.

The Court of Appeal notes that the above issue is, however, indeed disputed, in the present case as well as in the arbitration. Therefore, the Court of Appeal will disregard the Funds' objection on this issue.

Does article 5(2) of the Treaty grant the arbitral tribunal jurisdiction to decide the issue whether the Federation has carried out expropriation measures against the Funds?

First, the entirety of article 5 will be restated.

> ***Article 5***
> **TREATMENT OF INVESTMENTS**
> 1. Each Party shall guarantee fair and equitable treatment within its territory for the investments made by investors of the other Party.
> 2. The treatment referred to in paragraph 1 above shall be no less favourable than that accorded by either Party in respect of investments made within its territory by investors of a third State.
> 3. Such treatment shall not, however, include privileges which may be granted by either Party to investors of a third State, by virtue of its participation in:
> - A free trade area;
> - A customs union;
> - A common market;
> - An organization of mutual economic assistance or other agreement concluded prior to the signing of this Agreement and containing conditions comparable to those accorded by the Party to the participants in said organization.
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> The treatment granted under this article shall not include tax exemptions or other comparable privileges granted by either Party to the investors of a third State by virtue of a double taxation agreement or any other agreement concerning matters of taxation.
> 4. In addition to the provisions of paragraph 2 above, each Party shall, in accordance with its national legislation, accord investments made by investors of the other Party treatment no less favourable than that granted to its own investors.

The general question for the Court of Appeal to decide is whether the MFN clause set forth in article 5(2) means that the arbitral tribunal in the relevant arbitration can base its jurisdiction on another, more favorable diagonal dispute resolution clause of another investment protection treaty, which is binding on the Federation. The Federation, which has

disputed this, has in the main maintained that it is not at all possible to "import" dispute resolution clauses from one investment protection treaty to another.

The main issue whether an arbitral tribunal, under reference to a MFN clause, may base its jurisdiction on the provisions of another investment protection treaty, has been decided in a number of arbitrations. Different arbitral tribunals have reached different conclusions.[1] The Court of Appeal concludes that there is nothing that would prevent this type of imports as such. Instead, the determining factor is the wording of the MFN clause in the relevant case. Consequently, article 5(2) of the Treaty shall be interpreted – just as the remaining provisions of the Treaty – in accordance with the interpretation rules of the Vienna Convention.

The wording of article 5(2) provides that the "treatment" set forth in article 5(1) must not be less favorable than that awarded by any of the contracting states to other investors from third countries. Article 5(1) further provides that each contracting state guarantees the counter party's investors "fair and equitable treatment". The word "treatment" in article 5(2) shall thus be understood as "fair and equitable treatment". The wording is clear and unambiguous. Thus, there is no room to interpret any additional contents into this wording. The Funds' arguments, particularly the reference to the wording of the heading of the article as well as article 5(3), does not persuade the Court of Appeal to draw any other conclusion.

Hereafter, what remains to be decided is whether the relevant arbitral tribunal may base its jurisdiction on diagonal dispute resolution clauses of other investment protection treaties under reference to the phrase "fair and equitable treatment" set forth in article 5(2). The relevant phrase generally means the absolute standard that forms a cornerstone of current international investment law. There is no exact definition of this standard. Moreover, the generally accepted contents of the standard have been altered with the passing of time. Nevertheless, it is clear that it entails protection for investors against flagrant cases of arbitrariness, discrimination and abuse by the host state. At the very least, the standard must

[1] For an example of a decision where an MFN clause has been deemed to grant jurisdiction for an arbitral tribunal, see *RosInvestCo v. Russian Federation* [Award on Jurisdiction October 2007], which concerned an investment protection treaty between the United Kingdom and the Soviet Union. The Court of Appeal concludes that the wording of article 5(2) of the Treaty materially deviates from the MFN clause of the aforementioned investment protection treaty.
For an example of a decision where an MFN clause has been deemed to not grant jurisdiction for an arbitral tribunal, see *Berschader v. Russian Federation* [Award on Jurisdiction April 2006], which concerned an investment protection treaty between, amongst others, Belgium and the Soviet Union.

currently be deemed to include the right to court review and a fair trial (cf. *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreement II, United Nations, New York and Geneva, 2012, p. 1 and 80).

The Funds, who have not maintained that they have no access to court review, have, however, maintained that they would not have access to a fair trial before a national court. However, no investigation that would support this has been referenced. The standard "fair and equitable treatment" cannot be deemed to include an unconditional right for investors to have their cases decided by an international arbitral tribunal. Against this background, and because the MFN clause of the Treaty is limited to the said standard, the relevant arbitral tribunal is not entitled to base its jurisdiction on diagonal dispute resolution clauses of other investment protection treaties. Consequently, the arbitral tribunal does not pursuant to article 5(2) have jurisdiction to decide the question whether the Federation has carried out expropriation measures against the Funds.

Summary

In light of the conclusions drawn by the Court of Appeal, the arbitral tribunal does not have jurisdiction to decide the Funds' case, whether under article 10 or article 5(2) of the Treaty. Therefore, the motions of the Federation shall be granted and the judgment of the District Court shall be amended.

Upon this outcome, the Court of Appeal has no reason to investigate the issue whether there is an arbitration agreement between the parties.

Litigation costs

Upon this outcome, the Funds shall be ordered to compensate the Federation for its litigation costs, in the District Court as well as in the Court of Appeal. The amounts claimed by the Federation are substantial and by far exceed the costs of the Funds. However, the Federation has held the position as claimant in the District Court as well as in the Court of Appeal. Further, the outcome of this case can be assumed to have consequences for the Federation also outside the scope of the present case. Against this background, the claimed amounts appear motivated to protect the interests of the Federation in the present case. Therefore, the Funds shall be ordered to compensate the Federation in the claimed amounts.

HOW TO APPEAL, see appendix B

Appeals to be submitted by 15 February 2016

The decision has been made by: Judges of Appeal CS and PS, reporting (dissenting grounds) and Deputy Associate Judges CJ and JC.

Dissenting grounds, see following page.

Dissenting grounds

Appeals Judge PS dissents with respect to the grounds as follows.

The jurisdiction of the relevant arbitral tribunal may be based only on an arbitration agreement between the disputing parties, which are not the same as the contracting parties to the Treaty. In the present case, an arbitration agreement has arisen between the disputing parties through the Funds' acceptance of the Federation's offer to accept arbitration set out in the Treaty, in the form of the Funds' requesting arbitration against the Federation.

In the Treaty, the Federation has not offered arbitration for any forms of disputes that Spanish investors might want resolved. In article 10, the Federation has offered arbitration only for such disputes that relate to the amount and method of payment for compensation under article 6 ("relating to the amount or method of payment of the compensation due under article 6").

Thus, the Funds' request for arbitration must – in order for an arbitration agreement to arise between them and the Federation, which in its turn would grant the arbitral tribunal jurisdiction to decide the relevant dispute – correspond to the Federation's offer, i.e. relate to a dispute of such nature as the Federation has agreed to offer arbitration, in short disputes under article 6.

Article 6 governs expropriation and the like. It stipulates when expropriation is allowed, and the compensation that is due. It also provides that this relates to investments within the territory of the contracting party ("investments made within its territory").

The Federation maintains that the Funds' acquisition of Yukos ADR's was not an investment under article 1(2) of the Treaty, nor was it an investment within its territory. The Funds maintain the opposite.

The Funds' acquisition of Yukos ADR's is characterized by the following, which is undisputed in the present case. The Funds acquired Yukos ADR's from the issuer of the securities, namely Deutsche Bank Trust Company Americas ("Deutsche Bank"), registered in New York. Deutsche Bank, in its turn, held shares in the company Yukos. The Funds' acquisition of Yukos ADR's established a relationship between the Funds and Deutsche

Bank. The acquisition did not establish or entail any rights or obligations between the Funds and the Yukos company.

Compared to an acquisition of shares in Yukos, the Funds' acquisition of Yukos ADR's meant that the Funds put another party – Deutsche Bank – between themselves and the Yukos company. If the Funds alternative was to acquire shares in the Yukos company, it can be established that the Funds must have concluded that the advantages of acquiring Yukos ADR's outweighed the disadvantages.

The above leads to two conclusions. First, the rights that the Funds' acquisition of Yukos ADR's established for them in relation to Deutsche Bank is not an "asset" for the Funds in the sense set forth in article 1(2) of the Treaty, particularly not – due to the absence of rights and obligations between the Funds and the Yukos company – any kind of "participation" in the said company. Second, the Funds' acquisition of Yukos ADR's, due to the same absence, are not investments made within the Federation's territory in the sense set forth in article 6 of the Treaty.

The conclusion to be drawn from this is that the Federation's offer of arbitration does not cover investments of the kind the Funds' made by acquiring Yukos ADR's. Thus, the Funds' request for arbitration does not correspond to the Federation's offer of arbitration. The consequence is that the Funds' request for arbitration did not give rise to any arbitration agreement granting the arbitral tribunal jurisdiction to decide the dispute covered by the request.

Therefore, the claimant's motions shall be granted.

Concerning the question of litigation costs, I agree with the majority.