STOCKHOLM DISTRICT COURT Department 4	**JUDGMENT** 11 September 2014 Stockholm	Case No. T 15045-09

PARTIES

Claimant
The Russian Federation, c/o His Excellency the Minister of Justice
Ministry of Justice, 14 Zhitnaya str., Moscow 119991, Russia

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Respondents
1. GBI 9000 SICAV S.A
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2. Orgor de Valores SICAV S.A
Avda. Cantabria s/n, Ciudad Grupo Santander, Madrid, Spain

3. Quasar de Valores SICAV S.A
Avda. Cantabria s/n, Ciudad Grupo Santander, Madrid, Spain

4. ALOS 34 SL
Avda. Cantabria s/n, Ciudad Grupo Santander, Madrid, Spain

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JUDGMENT

1. The District Court rejects the motions of the Russian Federation.

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2. The District Court orders the Russian Federation to compensate GBI 9000 SICAV S.A, Orgor de Valores SICAV S.A, Quasar de Valores SICAV S.A and ALOS 34 SL for their litigation costs in the amount of USD 1,541,550, out of which USD 876,255 comprises costs for legal counsel, plus interest pursuant to Section 6 of the Swedish Interest Act on the full amount from this day until the day of payment.

BACKGROUND

On 26 October 1990, Spain and the Soviet Union entered into a bilateral investment protection agreement (the Treaty). The dispute concerns the interpretation of the Treaty. Rules for the interpretation are set out in the Vienna Convention. Below, the relevant provisions of the Treaty and the Vienna Convention are set out as published in the United Nations Treaty Series.

The Treaty

ARTICLE 1 – DEFINITIONS
1. (…)
2. The term “investments” shall apply to all types of assets, and particularly but not exclusively to:
- Shares and other forms of participation in companies;
- Rights deriving from any type of investment made to create an economic value;
- Immovable property as well as any other rights relating thereto;
- Intellectual property rights, including patents, trade marks, appellations of origin, trade names, industrial designs and models, copyrights and technology and know-how;
- Concessions, accorded by law or by virtue of a contract, for engaging in economic and commercial activity, including concessions for prospecting, tapping, mining and managing natural resources.

ARTICLE 2 – SCOPE OF AGREEMENT
This Agreement shall be applicable in the territory over which either Party exercises or may exercise jurisdiction or sovereign rights, in accordance with international law, in particular for the purposes of prospecting, tapping, mining and managing natural resources.
This Agreement shall apply to investments made by investors of one Party in the territory of the other Party, in accordance with the legislation in force there as of 1 January 1971.
…

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. (…)
4. (…)

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.
…

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, shall be communicated in writing, together with a detailed report by the investor to the Party in whose territory the investment was made. The two shall, as far as possible, endeavor to settle the dispute amicably.
2. If the dispute cannot be settled thus within six months of the date of the written notification referred to in paragraph 1 of this article, it may be referred to by either of the following, the choice being left to the investor:
- An arbitral tribunal in accordance with the Regulations of the Institute of Arbitration of the Chamber of Commerce in Stockholm;
- The ad hoc arbitral tribunal established in accordance with the Arbitration Rules of the United Nations commission on International Trade Law (UNICITRAL).
3. The decisions of the arbitral tribunal shall be based on:
- The provisions of this agreement;
- The national legislation of the Party in whose territory the investment has been made, including the rules of conflict of laws;
- The universally recognized norms and principles of international law.
4. The decisions of the arbitral tribunal shall be final and binding on the Parties involved in the dispute. Each Party shall undertake to abide by such decisions in accordance with its national legislation.

The Vienna Convention

SECTION 3. INTERPRETATION OF TREATIES
Article 31 - General rule of interpretation
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32 - Supplementary means of interpretation
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

GBI 9000 SICAV S.A, Orgor de Valores SICAV S A, Quasar de Valores SICAV S.A, and Rovime Inversiones SICAV S.A are all Spanish investment funds that have acquired so-called American Depository Receipts (ADR's), which according to them corresponds to a certain stake in Yukos Oil Company. Rovime Inversiones SICAV S.A.'s stake has now been taken over by ALOS 34 SL. The funds are collectively referred to hereinafter as SICAV *et al*.

Yukos Oil was a Russian oil company. Following tax audits of the company in Russia, the company's taxable income was increased substantially as from the year 2000 and thereafter. Yukos Oil was unable to pay the additional taxes, and as a result Yukos Oil's stake in the subsidiary Yuganskneftegaz was confiscated and sold at a public auction. Further execution measures were taken to enforce the tax decisions, whereupon Yukos Oil was eventually declared bankrupt and its remaining assets were sold.

On 25 March 2007, SICAV *et al.* opened arbitration proceedings against the Russian Federation administered by the Arbitration Institute of the Stockholm Chamber of Commerce. An arbitral tribunal comprising JP (Chairman), CNB and TTL was formed.

SICAV *et al.* maintained in the arbitration proceedings between them and the Russian Federation that an arbitration agreement had been entered between them pursuant to Article 10 of the Treaty as a result of their having requested arbitration. Further, SICAV *et al.* maintained that the arbitration agreement granted an arbitral tribunal jurisdiction to resolve a dispute concerning (i)

whether the Russian Federation had undertaken measures of expropriation against SICAV *et al.*, and (ii) the amount and method of payment of compensation to SICAV *et al.* in the event that the arbitral tribunal would conclude that expropriation had occurred. The Russian Federation maintained in the arbitration proceedings that the arbitral tribunal lacked jurisdiction to review the issue whether the taxation and enforcement measures carried out by the Russian Federation constituted an expropriation of SICAV *et al.'s* alleged investment.

On 20 March 2009, the arbitral tribunal rendered a decision to the effect that the arbitral tribunal, pursuant to Article 10 of the Treaty, had jurisdiction to review whether the Russian Federation had carried out expropriation measures against SICAV *et al.*

The Russian Federation opened the present proceedings on 25 September 2009. The arbitral award was given only on 20 July 2012. The arbitral tribunal concluded that the Russian Federation's measures against Yukos Oil amounted to expropriation and that compensation pursuant to Article 6 of the Treaty should be paid by the Russian Federation.

MOTIONS AND POSITIONS

The Russian Federation moves that the District Court shall affirm that the arbitral tribunal does not have jurisdiction to review the motions presented by SICAV *et al.* through their request for arbitration against the Russian Federation of 25 March 2007.

SICAV *et al.* dispute the motion.

The parties claim compensation for their respective litigation costs. The Russian Federation claims joint and several compensation from SICAV *et al.* in the amount of SEK 5,661,504 and USD 1,375,850. Of the amounts, SEK

5,360,173 comprises fees for Advokatfirman Lindahl, SEK 215,516 expenses incurred by Advokatfirman Lindahl, SEK 85,815 Advokatfirman Lindahl's expenses for interpreters and court reporter, USD 1,216,858 fees the law firm Baker Botts L.L.P, London, mainly for lawyers Jay L. Alexander and Alejandro A. Escobar, USD 16,373 expenses incurred by Baker Botts, USD 53,200 fees to expert witness Rein Müllerson, USD 1,520 expenses incurred by Rein Müllerson, USD 31,617 fees to expert witness Antonio Remiro Brotons, USD fees to expert witness Alain Pellet, and USD 11,065 expenses incurred by Alain Pellet. SICAV *et al.* have left it to the District Court to determine the reasonableness of the claim.

SICAV *et al.* claims compensation for their litigation costs in the amount of USD 1,541,550, out of which USD 876,255 comprises costs for legal counsel, USD 456,367 fees to law firm Covington & Burling, Washington, mainly lawyers Marney Cheek, Jonathan Gimlett, Tom Johnson and John P. Rupp, USD 64,996 expenses for travel, lodging etc., USD 86,400 fees to expert witness Vladimir Gladyshev, USD 4,549 expenses incurred by Vladimir Gladyshev, USD 37,369 expenses for translations, USD 4,994 for interpretation during the main hearing, USD 7,626 expenses for court reporter, and USD 2,994 expenses for courier services. The Russian Federation has disputed the claim on the grounds that SICAV *et al.* have not incurred any litigation costs, since the costs have been guaranteed by the Russian company Menatep. The Russian Federation has attested the amounts claimed by SICAV *et al.*, with the exception of the fees in the amount of USD 86,400 to Vladimir Gladyshev, for which USD 36,000, corresponding to an hourly fee of USD 250 has been attested.

GROUNDS

The Russian Federation

SICAV *et al.*'s acquisition of ADR's does not constitute investments protected by the Treaty. In any event, the investments were not made within

the territory of the Russian Federation, which is required under Article 2 of the Treaty. The arbitration clause set out in Article 10 of the Treaty does not grant jurisdiction to the arbitral tribunal to determine whether the Russian Federation's tax and enforcement measures constituted an expropriation of SICAV *et al.'s* alleged investment, and the Russian Federation has not admitted that such an expropriation occurred. Further, the clause on most favored nation (hereinafter MFN Clause) set out in Article 5(2) of the Treaty or the Danish-Russian, Greek-Russian and Turkish-Russian investment protection agreements do not mean that the scope of Article 10 is expanded so as to cover the present dispute.

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Their investments are protected under the Treaty and took place within the territory of the Russian Federation. Whether the investments are protected by the Treaty or not is not a question of jurisdiction pursuant to the arbitration clause set out in Article 10 of the Treaty, but rather a review of the merits of the case, which are not subject to review in the present proceedings. Further, the applicability of Article 10 depends on the fact that an investment is at hand. The arbitral tribunal also had jurisdiction to determine whether the Russian Federation carried out expropriation measures against SICAV *et al.* under Article 10 of the Treaty. In the main, this interpretation of Article 10 of the Treaty follows from a correct application of Article 31 of the Vienna Convention. In the alternative, it is maintained that the contents of Article 10 of the Treaty which follow from the application of Article 31 of the Vienna Convention are ambiguous or unclear, or, in the alternative, clearly absurd or unreasonable and that it follows from Article 32 of the Vienna Convention that Article 10 shall be interpreted based on the content as maintained by SICAV *et al*. Further, the arbitral tribunal had jurisdiction to review SICAV *et al.'s* claims against the Russian Federation under Article 10 because the Russian Federation must be deemed to have admitted that right to compensation is at hand due to expropriation. Moreover, the arbitral tribunal had jurisdiction to review whether the Russian Federation had carried out

measures of expropriation against SICAV *et al.* pursuant to the MFN Clause set out in Article 5(2) of the Treaty as well as arbitration clauses set out in other Russian investment protection agreements, including Article 8 of the Danish-Russian investment protection agreement, Article 9 of the Greek-Russian investment protection agreement and Article 10 of the Turkish-Russian investment protection agreement.

The grounds of the parties can be divided into the following sub-questions.

1. Does SICAV *et al.'s* holding of ADR's constitute such investments as are protected by the Treaty? According to the arbitration clause - is this a jurisdictional issue, or does it relate to the merits of the case?

The Russian Federation

Article 2 of the Treaty provides that neither the Russian Federation nor Spain undertake any obligations with respect to investments outside their respective territories. Thus, the Treaty is not applicable to investments made by a Spanish company in USA or Western Europe. This is exactly the kind of investment made by SICAV *et al.*

SICAV *et al.'s* alleged investment comprises ADR's in Yukos Oil. A holding of ADR's does not constitute "any form of participation in a company" that forms an investment in the sense of the Treaty. These ADR's is a kind of derivative issued by Deutsche Bank trust Company Americas ("Deutsche Bank"), a legal entity registered in New York. By acquiring Yukos Oil ADR's the purchaser acquires certain contractual interests in relation to Deutsche Bank, which depend on the development of the shares in Yukos Oil held by, issued and belonging to Deutsche Bank. Holders of Yukos Oil ADR's are not shareholders in Yukos Oil – Deutsche Bank is – and the holder is not entitled to rights awarded to shareholders in Yukos Oil. For the Treaty to be applicable it is not sufficient that there is a contractual relationship between the investor and a non-Russian third party (Deutsche Bank), who

might be the shareholder in a Russian company. Moreover, the Treaty does not cover indirect investments, which renders any protection under the Treaty for SICAV *et al.* even more distant.

SICAV et al.

Article 2 of the Treaty does not form part of the arbitration agreement set out in Article 10 of the Treaty, and Article 10 does not list as a precondition to the jurisdiction of the arbitral tribunal or the applicability of the arbitration clause that the dispute should relate to an investment. Thus, it is not required that an investment is at hand for the arbitration clause to be applicable. This is clarified by the case *Swembalt* and NJA 2002 C 62. This interpretation of the arbitration clause complies with Article 31 of the Vienna Convention. There is nothing in the wording of the arbitration clause that would require the existence of an investment made by an investor or that the factual circumstances referenced by SICAV *et al.* legally must constitute an investment in the sense of the Treaty to grant jurisdiction to the arbitral tribunal. Taking the context of Article 10 of the Treaty as well as the Treaty's object and purpose into consideration leads to the same conclusion.

The Treaty's definition of investments in Article 1(2) is very broad. ADR's constitute "other forms of participations in companies". ADR's are internationally well recognized securities and are similar to shares. ADR's are, like shares, easily transferrable as securities, which lets companies easily utilize ADR's as a way of raising capital.

In any event, ADR's are investments under Article 1(2) because they, as correctly noted by the arbitral tribunal, constitute "[r]ights deriving from any type of investment made to create an economic value".

2. Are SICAV *et al.'s* holdings of ADR's investments made within the territory of the Russian Federation pursuant to Article 6 of the Treaty?

According to the arbitration clause - does this question relate to the arbitral tribunal's jurisdiction or to the merits of the case?

The Russian Federation

SICAV *et al.'s* holdings of ADR's do not constitute investments carried out in the territory of the Russian Federation. SICAV *et al.* acquired their alleged holdings of Yukos Oil ADR's at market places outside the Russian Federation. The price of the relevant ADR's did not, moreover, contribute to Yukos Oil's equity. SICAV *et al.* have only provided funds to Deutsche Bank or other third parties. Yukos Oil received funds from Deutsche Bank when shares were issued to Deutsche Bank. Thereafter, Yukos Oil, just like the Russian Federation, were financially unaffected by whether, between whom and at what price these ADR's were traded.

SICAV et al.

Their acquisitions of Yukos Oil ADR's constituted investments in the territory of the Russian Federation, because SICAV *et al.* received ownership or similar interests in Yukos Oil and because Yukos Oil was a Russian company with operations within the Russian Federation. The arbitral tribunal stated in the arbitration proceedings that the Federation's claims in this context were unconvincing and contradicted statements made by the Federation elsewhere. Whether the said ADR's constituted investments within the Russian Federation is in any event not subject to review in the present proceedings because this is not a jurisdictional issue under the arbitration clause set out in Article 10 of the Treaty, but rather a question relating to the merits.

3. Is there a genuine dispute over whether expropriation occurred? Did the Russian Federation admit right to compensation because of expropriation occurred?

SICAV et al.

The Russian Federation must be deemed to have admitted that compensation shall be paid because of expropriation, since the Federation has taken such measures that due to their nature constitute expropriation for which compensation shall be paid. Further, Yukos Oil was granted some compensation because of and in relation to these measures. The Russian Federation's claim that no expropriation occurred is obviously unfounded. Thus, the arbitral tribunal had jurisdiction to review SICAV *et al.'s* case against the Russian Federation, since there is no genuine dispute as to whether expropriation occurred.

According to international law, e.g. the confiscation of ownership rights constitutes an expropriation measure for which compensation is due, as well as the appointment of an administrator for the winding-up or bankruptcy of a company and the sale of its assets. Through courts and other public bodies, the Russian Federation confiscated Yukos Oil and its assets in order to subsequently sell them, mainly to the state owned oil company Rosneft and other state owned companies. Thereby, Yukos Oil was wound up and ceased to exist as a legal entity. Thereafter, the Russian Federation paid out compensation by keeping some funds from the sales for the reduction of the tax debts and other debts the Russian Federation had placed on Yukos Oil. Thus, the arbitral tribunal has jurisdiction under Article 10 to review the issue whether the amount to be paid is compensation pursuant to Article 6.

The Russian Federation

The state measures referenced by SICAV *et al.* relate to a tax audit, after taxation and collection, as well as bankruptcy proceedings, which are legal under Russian law. Nothing that transpired could be held to constitute an

admission from the Russian Federation that expropriation occurred or that compensation is due. The decisions taken are merely the enforcement of Russian tax law.

4. Did the arbitral tribunal have jurisdiction under Article 10 to determine whether the Russian Federation had taken expropriation measures against SICAV *et al.*?

The Russian Federation

The Russian Federation interprets the Treaty honestly and in compliance with the ordinary meaning of its definitions seen in their respective context and in light of their aim and purpose. Article 31 of the Vienna Convention provides that the wording of a treaty is the main source for determining its contents. The phrase in the Article "relating to the amount or method of payment of the compensation due under Article 6" is clear and precise and is understandable in its exact written wording. Only disputes concerning the amount and method of payment due under Article 6 of the Treaty are eligible for arbitration between investors and the state. By explicitly limiting the type of disputes eligible for arbitration to the amount of the compensation, Article 10 excludes every dispute concerning the possible breach of Article 6 (i.e. whether any compensation is actually due). Disputes concerning whether expropriation occurred therefore fall outside the scope of the jurisdiction granted by Article 10.

In connection with the signing of the Treaty in October of 1990, the Treaty's authors provided several examples of provisions on dispute resolution between states and investors. Clearly aware of these options, the Spanish and Soviet representatives discarded the proposals for wide scopes in favor of the narrow scope limited to disputes over quantifications.

The provisions of Article 10 was a compromise accepted by the Soviet Union in connection with the negotiations of more than a dozen investment treaties

at the end of the 1980's. An expert at the Soviet ministry of finance, R. Nagapetyans, in 1990 wrote an article, which confirms that Article 10 is limited to civil law disputes over the size of the compensation. Amongst other things, he states that "In agreements for the protection of investments signed with foreign countries, the USSR accepts their review by international arbitral tribunals. In this context, the scope of the review is limited to civil law issues (mostly relating to the size of the compensation and the methods for its payment in cases of nationalization of investments and the transfer of profits and other payments due to the investor)" (Translation provided by the Russian Federation).

This general interpretation of Article 10 was accepted five years ago by the arbitral tribunal in *Vladimir Berschader and Moïse Berschader vs. the Russian Federation*. That this is the meaning of the Article is supported in several other statements by several other arbitral tribunals who interpreted similar provisions in other treaties.

<u>The arbitral tribunal incorrectly applies the Vienna Convention and fails to consider the ordinary meaning of Article 10</u>

The arbitral tribunal's decision that it has jurisdiction to review a matter involving expropriation is incorrect. The decision is based on an incorrect understanding of the word "due". Article 10 does not read "the compensation which may be due", as stated by the arbitral tribunal. Instead, it covers every dispute concerning the size of or method of payment of "compensation due" under Article 6. This conclusion is supported by the official Spanish and Russian language versions of the relevant clause. As a consequence of the arbitral tribunal's incorrect interpretation of the phrase "compensation due", the arbitral tribunal reaches the incorrect conclusion that Article 10 requires that somebody determines whether compensation is due or not and, therefore, whether expropriation occurred or not.

The conclusion is incorrect because the words “the amount of or the method for payment of” in Article 10 still limits the types of disputes governed by Article 10 to disputes concerning quantifications. The arbitral tribunal neglected these words referencing the intended general effects of the Treaty. An arbitral tribunal is not allowed to disregard the explicit meaning of a treaty and instead interpret it in the light of its own views on the treaty’s purpose. Principles on efficiency do not permit judges and arbitrators to disregard or rephrase actual provisions of a treaty. In fact, the same principles means that the phrase “the amount of or the method for payment of compensation due under Article 6” must be given effect. The purpose of Article 10 is not to establish a broad right to open arbitration proceedings between investors and states, instead SICAV *et al.* have admitted that Article 10 is limited to disputes over the legality of expropriation under Article 6. The majority of cases about expropriation involves admitted instances of expropriation of land for roads, schools, hospitals etc. Article 10 excludes the relatively uncommon instances where an investor maintains that an authority has carried out an unlawful expropriation.

Even if the words “which may be” were added to Article 10, the Article would remain silent on who is authorized to determine whether expropriation occurred or not. Arbitral tribunals are not authorized to decide on an issue merely because it has not been answered, they must base their jurisdiction on arbitration agreements.

The conclusion of the arbitral tribunal rests on the unjustified claim that issues of quantifications cannot be separated from the preceding question of liability. Division between questions of quantification and liability are not uncommon; to the contrary, separate fora for determining if expropriation occurred and determining the size of the compensation are commonplace. Second, an arbitral tribunal may not exceed its jurisdiction and is not entitled to disregard agreed limitations on what preceding legal issues that are eligible for arbitration.

SICAV *et al.'s* reference of the object and purpose of the Treaty is incorrect

A treaty's aim and purpose cannot redefine its actual wording. It is a generally accepted principle of international law that the general objects of a treaty can shed light on the contents of its provisions, but cannot place autonomous obligations upon the contracting states or modify an obligation under a specific treaty provision.

The Treaty's preamble is fully in line with the Russian Federation's interpretation of Article 10. Neither the preamble nor any other provision of the Treaty states that an object and purpose of the Treaty is to grant foreign investors broad and unlimited access to international arbitration. In fact, the preamble rather expresses the aim of stimulating investment through encouragement and mutual protection.

It is not unreasonable that sovereign states agree to arbitration only in limited cases, or that they do not agree to arbitration at all. It is not an anomaly that Article 10 excludes disputes concerning whether expropriation occurred.

SICAV et al.

The arbitral tribunal had jurisdiction pursuant to Article 10 to review whether compensation was due/should be paid under Article 6 of the Treaty as well as the amount of the compensation due/should be paid under Article 6.

SICAV *et al.* in the main maintain that this interpretation follows from the correct application of Article 31 of the Vienna Convention. A good faith interpretation, in accordance with the ordinary meaning of Article 10 in its context and in light of the Treaty's object and purpose actually provides the result given by SICAV *et al.'s* referenced interpretation. The relevant context here is the remainder of the Treaty's wording, particularly Article 6 as well as the Treaty's heading and introduction.

The view that Article 10 should be interpreted in this manner is shared by the arbitral tribunal. The analyses and conclusion of the arbitral tribunal do not rest on any misconception of the wording of Article 10. That Article 10 should have this meaning is supported by other arbitral awards.

The disputed issue of whether compensation was due/should be paid was related to the amount of the compensation that was due/should be paid. Thus, the issue of whether compensation was due/should be paid fell within the scope of the arbitral tribunal's jurisdiction pursuant to Article 10.

The Federation's narrow interpretation of Article 10 does not correspond to the ordinary meaning of its wording. The Federation's narrow interpretation of Article 10 is not required to grant the relevant wording any autonomous relevance. The verb "due" coupled with the noun "compensation" does not imply that any other party than the arbitral tribunal is authorized to determine whether expropriation occurred.

The Federation's narrow interpretation is not in line with the context, i.e. the remaining contents of the Treaty. Moreover, the Federation's narrow interpretation is not in line with the Treaty's object and purpose, i.e. to, by protecting investments, encourage investments in the host state. It is not correct that Article 31 provides that arbitration clauses shall be interpreted restrictively.

Supplementary interpretation data pursuant to Article 32 of the Vienna Convention confirms the contents, which according to the above follow from the correct interpretation Article 31 of the Convention. If the arbitration clause of the Treaty intended to exclude a material issue, such as that whether expropriation occurred, from the jurisdiction of the arbitral tribunal, it would be expected that support for this interpretation could be found in other documents of the time. No such support can be found. The documents do not state that investors would be forced to base its right to arbitration on the fact

that the Soviet Union admitted that expropriation occurred or that a Soviet court or other public authority, or an arbitral award given in arbitration proceedings between the states, determined that expropriation occurred.

SICAV *et al.* have, in the alternative, maintained that the contents of Article 10 of the Treaty, which follow from the application of Article 31 of the Vienna Convention are ambiguous and unclear, or, alternatively, clearly absurd or unreasonable and that according to Article 32 of the Vienna Convention it follows from the above stated supplementary interpretation data that Article 10 of the Treaty shall be interpreted in accordance with the contents as SICAV *et al.* has maintained.

5. Did the arbitral tribunal have jurisdiction based on the MFN Clause in Article 5(2) of the Treaty and Article 8 of the Danish-Russian investment protection treaty, Article 9 of the Greek-Russian investment protection treaty or Article 10 of the Turkish-Russian investment protection treaty?

5.1 Is the reference of these grounds precluded?

The Russian Federation

SICAV *et al.* were precluded from referencing these grounds in the arbitration proceedings. SICAV *et al.'s* request for arbitration did not reference the Danish-Russian investment protection agreement and it was not maintained that the arbitral tribunal could base its jurisdiction thereon. Only a year later, when SICAV *et al.* submitted its "Counter-Memorial" were these grounds for jurisdiction referenced. This late attempt was not permitted pursuant to the Rules for arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce, basic principles of procedural law as well as the provisions of the binding undertaking concerning arbitration to which SICAV *et al.* maintained they had committed. Article 2 of the institute's rules provides that SICAV *et al.* should have already in the request for arbitration referenced the relevant arbitration agreements upon which the claims were

based and, further, pursuant to Article 25 of the rules all amendments must be covered by the arbitration agreement upon which the request for arbitration is based. Therefore, there were no legal grounds to continue the arbitration based on a different arbitration clause. This, in turn, means that SICAV *et al.* are precluded from making the reference in these proceedings.

SICAV et al.

It is irrelevant to these proceedings whether SICAV et *al.'s* right to reference provisions of the Danish-Russian investment protection agreement or other Russian investment protection agreements had been lost in the arbitration proceedings due to preclusion. In these proceedings, the District Court must decide on the Russian Federation's motion for affirmation on the jurisdiction based on the correct interpretation of the Treaty. The Federation's objection on preclusion does not relate to the interpretation of the Treaty, but relates to the actual carrying out of the arbitration proceedings and whether it was correct of the arbitral tribunal to permit SICAV *et al.* to reference the Danish-Russian investment protection agreement. Thus, the Federation's objection on preclusion shall be disregarded.

In the event that the District Court would not disregard the objection on preclusion, SICAV *et al.'s* right to reference the objection was not precluded. The more expansive offer of arbitration made by the Federation to Danish investors did not constitute new jurisdictional grounds in the arbitration proceedings since SICAV *et al.* in the request for arbitration referenced the MFN Clause of the Treaty and thereby referenced offers of arbitration made by the Federation to other investors than Spanish investors. SICAV *et al.* maintained that they were entitled to rely on more favorable provisions of the said investment protection agreement based on the MFN Clause of the Treaty and reserved the right to reference yet more favorable provisions of the investment protection agreement between the United Kingdom and the Russian Federation as well as other investment protection agreements entered by the Russian Federation and its predecessor.

In its decision on jurisdiction, the arbitral tribunal considered the Federation's objection on preclusion of the right to reference the Danish-Russian investment protection agreement and rejected the objection.

5.2 Did the arbitral tribunal have jurisdiction based on the MFN Clause set out in Article 5(2) and Article 8 of the Danish-Russian investment protection agreement, Article 9 of the Greek-Russian investment protection agreement or Article 10 of the Turkish-Russian investment protection agreement?

SICAV et al.

In the event that jurisdiction is deemed not at hand pursuant to Article 10, then the arbitral tribunal has jurisdiction pursuant to Article 5(2) of the Treaty and arbitration clauses in other investment protection agreements, including Article 8 of the Danish-Russian investment protection agreement, Article 9 of the Greek-Russian investment protection agreement and Article 10 of the Turkish-Russian investment protection agreement to determine SICAV *et al.'s* motions based on expropriation.

The MFN Clause entails that SICAV *et al.* are entitled to rely upon the more favorable arbitration clause set out in Article 8 of the Danish-Russian investment protection agreement which covers "[a]ny dispute which may arise between an investor of one Contracting Party and the other Contracting Party in connection with an investment on the territory of that other Contracting Party". In the alternative, SICAV *et al.* are entitled to rely upon the more favorable arbitration clause set out in Article 9 of the Greek-Russian investment protection agreement which covers "[d]isputes between an investor of a Contracting Party and the other Contracting Party concerning obligations of the latter under this Agreement". In the second alternative, SICAV *et al.* are entitled to rely upon the more favorable arbitration clause set out in Article 10 of the Turkish-Russian investment protection agreement

which covers "Any dispute between a Contracting Party and an investor of the other Contracting Party arising in connection with investment activities, including disputes relating to the amount and procedure of payment of compensation to be paid in accordance with Article VI of this Agreement, or procedure of transfer to be made according to Article VIII of this Agreement". Article 10(2) of the Turkish-Russian agreement contains a reference to the Arbitration Institute of the Stockholm Chamber of Commerce.

The stated interpretation of the MFN Clause follows from Article 31 of the Vienna Convention. According to the said Article, the MFN Clause covers any disputes involving investments within the scope of the Treaty, thus also dispute resolution through arbitration. This interpretation is confirmed by such supplementary interpretation data as related in Article 32 of the Vienna Convention.

In the alternative, it is maintained that the MFN Clause is ambiguous or clearly absurd, or unreasonable and that SICAV *et al.'s* interpretation in any event follows from the supplementary interpretation data set out in Article 32 of the Vienna Convention. As Charles N. Brower noted on p. 17-18 of his Separate Opinion, evidence related to the preparatory works supports the conclusion that Spain understood the MFN Clause to have a broad scope. The Spanish "Counsil (*sic!*) of State" declared, at the time of ratification of the Treaty in the Counsil (*sic!*) of State opinion no. 55-810/RS of 14 March 1991, appendix 14, that the Treaty modified the Spanish legal system by allowing arbitration proceedings on "disputes arising from expropriation".

Further, even if the MFN Clause would be deemed limited to "fair and equitable treatment", the contracting states' offer of arbitration to investors set out in Article 10 of the Treaty constitutes part of such treatment. Thereby, Spanish investors are entitled to arbitration of wider scopes against the Federation in accordance with the offer of arbitration set out in Article 8 of

the Danish-Russian investment protection agreement, Article 9 of the Greek-Russian investment protection agreement and Article 10 of the Turkish-Russian investment protection agreement.

Article 11(3) of the Danish-Russian investment protection agreement does not exclude the arbitral tribunal's jurisdiction over the relevant dispute

Article 11(3) of the Danish-Russian investment protection agreement does not prevent SICAV *et al.* to benefit from the Federation's broader offer on arbitration set out in Article 8 of the said agreement. First, Article 11(3) does not form part of the arbitration clause set out in Article 8 of the Danish-Russian investment protection agreement, and consequently does not provide a prerequisite to jurisdiction for the arbitral tribunal. In the event that the District Court would find that Article 11(3) provides a prerequisite for jurisdiction of the arbitral tribunal, then the Federation's claim is without merit. This is clear from what the arbitral tribunal noted in item 74 of the decision on jurisdiction, where it expresses, amongst other things, that "to think that ten words appearing in a miscellany of incidental provisions near the end of the Danish BIT would provide a loophole to escape the central undertakings of investor protection would be absurd".

In the event that the District Court would find that Article 11(3) of the Danish-Russian investment protection agreement entails that the matter is not eligible for arbitration under that treaty, then SICAV *et al.* maintain that the matter is eligible for arbitration under other Russian treaties that do not include a corresponding exclusion, such as the Greek-Russian investment protection agreement or the Turkish-Russian investment protection agreement.

The Russian Federation

The Treaty's MFN Clause does not grant the arbitral tribunal jurisdiction. The arbitral tribunal concluded correctly, in line with established case law and

jurisprudence, that the MFN Clause set out in Article 5(2) of the Treaty could not be applied to expand the jurisdiction of the arbitral tribunal.

In accordance with its explicit wording Article 5(2) cannot have any direct effect on the scope of the dispute resolution clause set out in Article 10. The Article is not at all applicable to the question of eligibility for arbitration. Article 5 is applicable to such treatment as set out in Article 5(1) of the treaty. Article 5(1) provides that "Each party shall within its territory guarantee fair and equitable treatment of investments made by investors of the other Contracting Party" (translation provided by the Russian Federation) *[TRANSLATOR'S NOTE: translated from Swedish to English by translator]*. Fair and equitable treatment does not include the obligation for sovereign states to submit to international arbitration in relation to investment disputes. Thereafter, Article 5(2) provides "The treatment referred to in paragraph 1 above shall not be less favorable than that of investments made by investors from other states" (translation provided by the Russian Federation) *[TRANSLATOR'S NOTE: translated from Swedish to English by translator]*. Article 5(2) requires that Russian and Spanish investors benefit from the same degree of fair and equitable treatment as any investor from other countries, with which Spain or the Russian Federation has entered an investment protection agreement. Article 5(2) does not provide any general rule implying that all issues relating to the Treaty are subject to MFN treatment.

Even without the limitation set out in Article 5(1) of the Treaty, Article 5(2) would not broaden the jurisdiction of the arbitral tribunal. MFN provisions cannot expand the scope of applicability of a treaty's dispute resolution clause without it being clear from the wording that MFN treatment is expanded to also cover dispute resolution.

Article 11(3) of the Danish-Russian investment protection agreement excludes jurisdiction for the arbitral tribunal in the relevant dispute

Even if SICAV *et al.* would be allowed to reference the Danish-Russian investment protection agreement, it is for SICAV *et al.* to establish that that treaty expands the jurisdiction of the arbitral tribunal in relation to the relevant dispute. From the wording of the arbitration clause of that treaty it is clear that this is not the case, since the Danish-Russian investment protection agreement excludes matters of taxation from its scope of applicability.

Article 9 of the Greek-Russian investment protection agreement excludes jurisdiction for the arbitral tribunal

Article 9 of the Greek-Russian investment protection agreement does not include a rule that investors may request arbitration pursuant to the Arbitration Institute of the Stockholm Chamber of Commerce (*sic!*). Even if SICAV *et al.* would be permitted to reference the Greek-Russian investment protection agreement, it does not grant the now relevant arbitral tribunal jurisdiction to resolve the dispute.

THE INVESTIGATION

Professors Rein Müllerson and Vladimir Gladyshev has been heard as expert witnesses. Both have submitted legal opinions. Legal opinions from Professors Alain Pellet and Antonio Remiro Brotons have also been submitted. The legal opinions refer to a large number of court cases, articles etc., which have also been submitted. The parties have also referenced and submitted other legal sources. The District Court will not describe all these sources, but will only refer to them as it finds necessary.

GROUNDS

Introduction

The investigation in the case and the arguments of the parties have in large parts concerned the jurisdiction of the arbitral tribunal under Articles 10 and 5 of the Treaty. The issues of whether relevant investments are covered by the Treaty and whether the investments, in such case, were made within the territory of the Russian Federation have been dealt with more sparingly. Moreover, the arbitral tribunal in its award chose to deal with the issues concerning Articles 10 and 5 first.

Despite this, the District Court chooses to deal with these issues in a hopefully more logical order. First, the issue whether the Treaty is at all applicable will be decided, i.e. if the investment is covered by the Treaty and, if so, whether the investment was made within the territory of the Russian Federation. These issues require that the District Court also determines whether they are jurisdictional issues, or relate only to the merits. If the arbitral tribunal lacked jurisdiction already on these grounds, the Russian Federation's motion shall be granted. If this is not the case, the District Court must determine whether there is a genuine dispute over whether expropriation occurred, i.e. if the arbitral tribunal had jurisdiction also with the interpretation proposed by the Russian Federation. If the answer is negative, then the Russian Federation's motion shall be rejected.

In the event that the Russian Federation's motion was not granted pursuant to the above, then the District Court shall determine whether the arbitral tribunal had jurisdiction pursuant to Article 10 of the Treaty to determine whether expropriation had occurred or not. If the answer is affirmative, then the Russian Federation's motion shall be rejected. If the answer is negative, then the District Court must determine whether the arbitral tribunal had jurisdiction to determine if expropriation had occurred based on the MFN Clause set out in Article 5(2) of the Treaty and Article 8 of the Danish-

Russian investment protection agreement, Article 9 of the Greek-Russian investment protection agreement and Article 10 of the Turkish-Russian investment protection agreement. If the answer is affirmative, then the Russian Federation's motion shall be rejected. If the answer is negative, then the Russian Federation's motion shall be granted. Within the scope of the review of the latter, the District Court must (i) first determine SICAV *et al.'s* right to include these grounds in the arbitration was precluded and, if so, if this entails that SICAV *et al.* were not permitted to reference Article 8 of the Danish-Russian investment protection agreement and Article 9 of the Greek-Russian investment protection agreement in these proceedings. If the District Court would find that there is nothing preventing SICAV *et al.* to reference these grounds, then the District Court must (ii) determine whether the MFN Clause of the Danish-Russian investment protection agreement means that the arbitration clause set out in Article 8 of the Danish-Russian investment protection agreement or Article 9 of the Greek-Russian investment protection agreement is applicable between the parties. If the District Court finds that Article 8 of the Danish-Russian investment protection agreement or Article 9 of the Greek-Russian investment protection agreement is applicable between the parties, then the District Court must (iii) determine if Article 8 of the Danish-Russian investment protection agreement, Article 9 of the Greek-Russian investment protection agreement or Article 10 of the Turkish-Russian investment protection agreement means that the arbitral tribunal had jurisdiction to review the issue of expropriation. Within the scope of this review, the District Court must determine whether Article 11(3) of the Danish-Russian investment protection agreement excludes the arbitral tribunal's jurisdiction for the relevant dispute. In the event that the District Court would find that Article 11(3) means that eligibility for arbitration is not at hand under the Danish-Russian investment protection agreement, the District Court must (iv) determine whether eligibility for arbitration is provided under other Russian treaties that does not contain a corresponding limiting provision, including the Greek-Russian and the Turkish-Russian investment protection agreements.

The relevant investments shall be deemed covered by the Treaty and shall be deemed to have been made within the territory of the Russian Federation

The Russian Federation has maintained that SICAV *et al.'s* acquisition of ADR's does not constitute investments protected by the Treaty. In any event, the investments were not made within the territory of the Russian Federation, which is required under Article 2 of the Treaty. SICAV *et al.* have maintained that their investments are protected by the Treaty and were made within the territory of the Russian Federation. Whether the investments are protected by the Treaty and were made within the territory of the Russian Federation is, according to SICAV *et al.*, not related to the jurisdiction under the arbitration clause set out in Article 10 of the Treaty, but relate to the merits of the case, something that is not subject to review in the present proceedings. Further, the applicability of Article 10 does not require that an investment is at hand.

The District Court chooses to first determine how the Russian Federation's objections in this respect should be considered, i.e. through a *prima facie* review based on the so-called doctrine of assertion or through a so-called *full review*.

An arbitral tribunal is authorized to determine its own jurisdiction. In the review hereof, one and the same circumstance may have importance both to the court's jurisdiction and the merits (so-called doubly relevant circumstances). The core of the doctrine of assertion means, in short, that the arbitral tribunal, when determining its jurisdiction, should not decide on the alleged existence of those circumstances, which the requesting party asserts are covered by a legal relationship within the scope of the arbitration clause, see e.g. NJA 2008 p. 406 (*Petrobart*). Instead, the arbitral tribunal shall assume that these circumstances are at hand, provided that a binding arbitration clause is at hand. A cornerstone of the purpose of the doctrine of assertion is that issues relating to the scope of the arbitration agreement should be left to the arbitral tribunal to determine and should not be reviewed

by public courts. In NJA 2005 p. 586 the Supreme Court deviated from the doctrine of assertion when it was obvious that the claim was unfounded. In jurisprudence it is a common opinion that there is an "exception for the obvious".

In the present proceedings, it is clear that there is an arbitration agreement based on Article 10, which entails an offer to open arbitration proceedings. The relevant assertion, i.e. that the investments in ADR's are covered by the Treaty and that the investments were made within the territory of the Russian Federation, are matters that are relevant to the jurisdiction as well as the merits. It is not obvious that these assertions are unfounded. Thus, the District Court must determine whether the doctrine of assertion is applicable in this case.

The questions of the existence and scope of the doctrine of assertion have been called into question, see Finn Madsen, Påståendedoktrin eller anknytningdoktrin, SvJT 2013 p. 731 and therein referenced court cases and noted literature. The review of case law and literature establishes according to Finn Madsen "that case law has failed to establish a clear view of how the determination of jurisdiction should be done. It also shows clear differences of opinion amongst leading Swedish experts on the subject of review of jurisdiction according to applicable Swedish law." The review to be done by the District Court is, however, more limited, namely how the doctrine of assertion affects the review of this case.

In the above mentioned Petrobart case, the Supreme Court stated that it is an established general principle of Swedish law that arbitrators when reviewing their jurisdiction shall apply the doctrine of assertion, irrespective of whether the arbitration is based on law or agreement. Thus, in the Petrobart case, it was incorrect of the arbitral tribunal in the challenged arbitral award to dismiss Petrobart's case due the fact that the asserted facts in issue (rättsfakta) were not at hand.

In the Petrobart case, the court review took place within challenge proceedings, whereas the review in this case is made pursuant to Section 2 of the Swedish Arbitration Act. However, the District Court finds that the doctrine of assertion shall be applied also in this case.

In sum, the District Court concludes that in this respect so-call doubly relevant circumstances are at hand, and they are not obviously unfounded. Such circumstances shall, when an arbitration agreement is at hand, be fully reviewed only by the arbitral tribunal, and so the District Court shall accept the circumstances referenced by SICAV *et al*. This means that the arbitral tribunal did not lack jurisdiction because of the Russian Federation's objections that the investments were not covered by the Treaty and that the investments were not made in the territory of the Russian Federation. Thus, the objections of the Russian Federation cannot be accepted.

There is a genuine dispute on the issue of whether expropriation occurred
SICAV *et al.* have maintained that there is no genuine dispute between the parties as to whether expropriation occurred and have further maintained that the Russian Federation has admitted that expropriation occurred. There is, however, no such explicit admission. To the contrary, the parties have had long lasting disputes on these matters and the Russian Federation has persistently maintained the opinion that no expropriation occurred. Therefore, the District Court finds that there is a genuine dispute between the parties and that the arbitral tribunal thus must establish its jurisdiction in Articles 10 or 5.

The arbitral tribunal had jurisdiction to review the expropriation issue pursuant to Article 10 of the Treaty
The parties agree that the Treaty shall be interpreted in accordance with Articles 31 and 32 of the Vienna Convention. Article 31 provides general rules for interpretation, whereas Article 32 contains supplementary aids for interpretation. The parties further agree that all four elements of Article 31,

i.e. good faith, ordinary meaning, context, and object and purpose are of equal importance, something that has also been confirmed by Rein Müllerson and Vladimir Gladyshev. As stated by Rein Müllerson, the natural first step of the review is to determine the ordinary meaning of a provision.

Expert witnesses Rein Müllerson, Alain Pellet and Antonio Remiro Brotons have all stated that the ordinary meaning of Article 10 is that the arbitral tribunal does not have jurisdiction to review the issue of expropriation. Rein Müllerson further stated that the wording of Article 10 is so clear and unambiguous that there is no reason to proceed with supplementary interpretation data. Vladimir Gladyshev has criticized Rein Müllerson's statement, but not provided any concrete statements as to the ordinary meaning of the arbitration clause.

With respect to the ordinary meaning the parties have also referenced several court cases. The dispute *Berschader vs. the Russian Federation* (of 2006) concerned an investment protection agreement between the Soviet Union on the one side and Belgium and Luxembourg on the other. Article 10 of that treaty provides that the arbitration clause covers: "Any dispute between one Contracting Party and an investor of the other Contracting Party concerning the amount or mode of compensation to be paid under Article 5 of the present Treaty…" Article 5 of that treaty deals with, amongst other things, expropriation. The arbitral tribunal noted that the meaning of the clause excluded 1. disputes concerning other articles than Articles 5, and 2. disputes concerning whether expropriation occurred or not. In its grounds, the arbitral tribunal stated: "The Tribunal is of the view that the ordinary meaning of Article 10.1 is quite clear. Only disputes concerning the amount or mode of compensation (au montant ou au mode de paiement des indemnités) to be paid under Article 5 may be subject to arbitration. The wording expressly limits the type of dispute, which may be subject to arbitration under the Treaty, to a dispute concerning the amount or mode of compensation to be paid in the event of an expropriatory act occurring under the terms of Article

5. – The Tribunal is satisfied that the ordinary meaning of the provision excludes from the scope of the arbitration clause: (i) disputes concerning any of the provisions of the Treaty other than Article 5, and (ii) disputes concerning whether or not an act of expropriation actually occurred under Article 5."

The arbitration clause set out in Article 11 of an investment protection agreement between Norway and Hungary was reviewed by the arbitral tribunal in the dispute *Telenor Mobile Communications vs. Hungary* (of 2006). According to the arbitration clause, the arbitral tribunal had jurisdiction to review "any legal disputes … in relation to an investment … concerning the amount of payment of compensation under Article V and VI of the present Agreement". The arbitral tribunal found that did not have jurisdiction to review the motions of Telenor Mobile Communications, but the case does not, in the District Court's opinion, provide any detailed guidance for the review of the dispute in the present proceedings.

In the arbitration *RosInvest vs. the Russian Federation* (of 2007) the arbitral tribunal had to decide on the diagonal arbitration clause set out in Article 8 of the investment protection agreement between the United Kingdom and the Soviet Union. That clause provided that the arbitral tribunal had jurisdiction to review "any legal disputes … in relation to an investment … concerning the amount or payment of compensation under Articles 4 or 5 of this Agreement or concerning any other matter consequential upon an act expropriation in accordance with Article 5 of this Agreement". The arbitral tribunal noted: "To start with the first jurisdictional clause, rather than referring generally to Articles 4 and 5, it expressly contains a qualification by the words 'concerning the amount or payment of compensation under'. In order to give an ordinary meaning to that qualification, it can only be understood as a limitation of the jurisdiction conferred by that clause." The arbitral tribunal concluded that it did not have jurisdiction to review the

expropriation issue based on that clause, but thereafter held that it had jurisdiction under the second arbitration clause.

The dispute *The Czech Republic vs. European Media Ventures SA* (of 2007) concerned, amongst other things, the interpretation of the diagonal dispute resolution clause set out in Article 8 of the investment protection agreement between Belgium-Luxembourg and Czechoslovakia. The Article provided: "Disputes … concerning compensation due by virtue of Article 3 Paragraph (1) and (3) …" The High Court of Justice in England stated with respect to the condition "due by virtue of" the following: "In other words, in determining any claim 'concerning compensation', the tribunal must necessarily consider whether the events in Articles 3(1) and (3) have occurred, and their precise nature." Thus, the court appears to have interpreted the word "due" so as to include also the review of whether any amount is "due" at all. However, it should be noted that the clause did not include the word "amount", which is noted explicitly in the judgment.

The dispute *Australian Airlines vs. Slovakia* (of 2009) concerned the diagonal arbitration clause set out in Article 8 of the investment protection agreement between Austria on the hand, and the Czech and Slovak Federation on the other. The arbitration clause provided: "Any dispute arising out of an investment … concerning the amount or the conditions of payment of a compensation pursuant to Article 4 of this Agreement …" The arbitral tribunal stated: "The ordinary meaning of Article 8(1) arises from the words used in that provision which are clear by themselves. They mean that only disputes 'concerning the amount or the conditions of payment of a compensation' can be submitted to arbitration. The scope is therefore limited to disputes about the amount of the compensation and does not extend to the review of the principle of expropriation." Therefore, the arbitral tribunal held that it did not have jurisdiction to review the issue of expropriation under the arbitration clause.

The review of the court cases referenced by the parties establishes, in the opinion of the District Court, that there is no simple and unambiguous case law on the interpretation of arbitration clauses. The wording of the interpreted arbitration clause has been the determining factor.

The relevant Article 10 of the Treaty means, in short, that the arbitral tribunal has jurisdiction to review "Any dispute … relating to the amount or method of payment of the compensation due under article 6". The phrase "method of payment" is intended to establish a way for the investor to receive the payment, which the other state is obliged to make, e.g. in a currency that can be exchanged. Therefore, this part of the Article is, according to the District Court, irrelevant in these proceedings.

That the arbitration clause explicitly states amount does not mean that there is a limitation in the arbitral tribunal's jurisdiction. The word amount of the Treaty must be understood so that the arbitral tribunal is authorized to determine the size of the amount due to the investor. This means, according to the District Court, that the arbitral tribunal also has jurisdiction to review all circumstances affecting the size of the amount. The word amount is by itself so devoid of autonomous meaning, that in order to reach an ordinary meaning one must establish how the amount is to be determined. This is set out already in Article 10, where it is provided that the amount concerns "compensation due under article 6".

The amount to be awarded by the arbitral tribunal is thus governed by Article 6 of the Treaty and is stated to be "adequate compensation". The Article does not provide what is to be considered "adequate compensation"; moreover, it is not provided which circumstances that shall be considered by the arbitral tribunal when determining the amount.

It is for the parties to reference the circumstances upon which the review of "adequate compensation" shall be made. The District Court assumes that

these circumstances are relevant not only to this issue, but also to the issue of whether expropriation occurred. At least in theory, it is entirely possible that the circumstances referenced for "adequate compensation" are exactly the same as those referenced by the parties to establish that expropriation occurred or did not occur, respectively. As the District Court understands the Russian Federation's arguments, the Federation maintains that the arbitral tribunal has jurisdiction to consider these circumstances, but only to determine "adequate compensation" and not for the review of whether expropriation occurred.

The ordinary meaning of the words "amount" and "adequate compensation" does not entail, according to the District Court, that the arbitral tribunal would have jurisdiction to determine the expropriation issue. However, Article 10 also provides "Any dispute" "relating to" and "compensation due under article 6". The words "relating to" entail that an arbitral tribunal has jurisdiction to review not only such matters as are explicitly stated in the provision. The expropriation issue could thus be included in the words "relating to".

That the amount shall be "due under article 6" means that the arbitral tribunal does not have jurisdiction to review matters concerning compensation due under other articles of the Treaty. SICAV *et al.* have argued that the word "due" (it is difficult to find an accurate Swedish translation of this word) is of pivotal importance for the understanding of Article 10, which also the arbitral tribunal concluded, whereas the Russian Federation has maintained that the arbitral tribunal misinterpreted the word "due". SICAV *et al.* maintain that "due" means that something is to be paid under the provisions of Article 6 and that the review thereof falls within the jurisdiction of the arbitral tribunal. It should however be noted that the division proposed by the Russian Federation between "entitlement" to compensation and the size of the compensation ("quantification") is commonplace in Sweden as well as in other countries.

Against the above background, the District Court concludes that the arbitration clause is not entirely clear, but that the ordinary meaning of the arbitration clause supports the view that the arbitral tribunal did have jurisdiction to review the expropriation issue. The main support for this conclusion is that the clause provides that the amount shall be "due under article 6". It should be particularly noted that the referenced judgments are not binding case law for the District Court.

The arbitration clause set out in Article 10 shall further, pursuant to Article 31 of the Vienna Convention, be interpreted in its context and in line with its object and purpose. According to Article 31(2) and 31(3) of the Vienna Convention, this includes, amongst other things, the preamble and the appendices. As noted above, Article 6 is important already to the interpretation of the ordinary meaning.

According to the preamble, the object of the Treaty is to protect investments. The preamble provides, amongst other things: "Agreement between Spain and the Union of Soviet Socialist Republics concerning the encouragement and reciprocal protection of investments … Desiring to intensify economic cooperation for the benefit of both States, Intending to create favourable conditions for investments by investors of either State in the territory of the other State, and Recognizing that encouragement and the mutual protection of investments in accordance with this Agreement will stimulate the development of business initiatives in the area of investments, …" In the opinion of the District Court, this preamble implies that the Treaty should be interpreted favorably to investors. With respect to the relevant arbitration clause set out in Article 10, it should be stressed that arbitration clauses in other investment protection agreements have entirely different wordings and limitations, or are even missing entirely, despite the fact that the preamble of these agreements have similar wordings to that of the Treaty. Thus, one

should not place too much emphasis on the importance of the preamble for the interpretation of the relevant arbitration clause.

The object and purpose of the Treaty is that which is stated in the preamble. Thus, the parties' intention was to improve, amongst other things, the conditions for Spanish investors making investments in the Russian Federation. In order to improve the procedural status of an investor who maintains that his property has been expropriated, the expropriation issue must be dealt with in sensible manner. It is not obvious that a review of the expropriation issue before Russian courts that also decided on the measures that constituted the alleged expropriation, would be considered meaningful to an investor. The object and purpose of the arbitration clause thus also indicate that the arbitral tribunal had jurisdiction to review the expropriation issue.

SICAV *et al.* have argued that the Russian Federation in the arbitration Sedelmayer vs. the Russian Federation did not object on the jurisdiction and that there has consequently not been any thought through Russian policy on the arbitration clauses of the investment protection agreements. However, the Russian Federation has maintained that the Federation's counsel did not carry out its assignment particularly well. The District Court concludes that the obligation to interpret the Treaty in good faith does not produce any other conclusions than those noted above.

In sum, the District Court concludes that the interpretation according to Article 31 of the Vienna Convention of the arbitration clause set out in Article 10 of the Treaty means that the arbitral tribunal had jurisdiction to review the expropriation issue. The District Court also concludes, however, that the interpretation is not entirely unambiguous, necessitating a supplementary interpretation under Article 32 of the Vienna Convention.

The Russian Federation has referenced a policy within the Soviet Union on arbitration clauses in investment protection agreements, documented in the

form of a model agreement. In the District Court's opinion, the model agreement's imprints in the signed agreements are not, however, particularly clear. On the alleged policy, it should be noted that the arbitration clauses of the 14 different investment protection agreements entered by the Soviet Union were worded differently, and in some cases there is no arbitration clause at all. That the arbitration clauses are not mentioned in the Explanatory Note referenced by SICAV *et al.* indicates, in the District Court's opinion, that no policy existed. The article of R. Nagapetyant from 1991 does not establish a clear policy; the "civil disputes" for which he maintained the Soviet Union accepted could relate to expropriation issues in arbitration. If there was a policy, it was not followed or has not been successfully negotiated with other countries. The conclusion must be that the Soviet Union was willing to enter investment protection agreements with varying wordings of arbitration clauses. The District Court finds that this supports the interpretation related above.

Thus, the District Court concludes that the interpretation in accordance with Article 31 of the Vienna Convention means that the arbitral tribunal had jurisdiction to review the expropriation issue and that this interpretation is supported by an interpretation in accordance with Article 32 of the said convention. Therefore, the District Court concludes that the arbitral tribunal had jurisdiction under Article 10 of the Treaty to review the now relevant issue.

Summary

The District Court shall only make a *prima facie* review with respect to the Russian Federation's objections that the Treaty is not applicable to the relevant investments and that the investments were not made within the territory of the Russian Federation. Following this review, the District Court concludes that the Treaty is applicable to the investments and that the arbitral tribunal did not lack jurisdiction on those grounds. Further, the District Court concludes that there is a genuine dispute as to whether expropriation

occurred, which means that the arbitral tribunal must have jurisdiction to review this issue. Finally, the District Court concludes that the arbitral tribunal had this jurisdiction based on Article 10 of the Treaty. As the motion of the Russian Federation shall be rejected already on these grounds, the District Court refrains from reviewing whether the arbitral tribunal also had jurisdiction under Article 5 of the Treaty.

Litigation costs

Because the Russian Federation is the losing party, the Federation shall under the main rule of Section 1 of Chapter 18 of the Swedish Code of Judicial Procedure compensate SICAV *et al.* for their litigation costs. It follows that the Russian Federation shall cover its own litigation costs.

The Russian Federation has maintained that SICAV *et al.'s* litigation costs in the present case, as well as in the arbitration, have been borne by the Russian company Menatep, without any obligation for SICAV *et al.* to compensate it for these costs. Therefore, SICAV *et al.* were not awarded any compensation for litigation costs in the final arbitral award. SICAV *et al.* have maintained that they are entitled to compensation although a third party is covering their costs, or in the alternative, that SICAV *et al.* are obliged to forward the compensation they receive from the Russian Federation to Menatep under Spanish legal provisions on unlawful profits.

The arbitral tribunal determined the cost issue under Section 42 of the Swedish Arbitration Act, which authorizes the arbitral tribunal to determine such issues, and under Section 44 of the Rules for Arbitration of the Arbitration Institute of the Stockholm Chamber of Commerce, which provides that the arbitral tribunal may upon a party's request in the final arbitral award order a party to pay reasonable litigation costs incurred by another party, including costs for legal counsel, having regard to the outcome of the arbitration and other relevant circumstances. Thus, the arbitral tribunal was relatively free to determine the cost allocation issue, whereas the District

Court in the present proceedings is bound by the provisions of Chapter 18 of the Swedish Code of Judicial Procedure.

As noted above, the losing party shall compensate the other party for its litigation costs. Section 8 of Chapter 18 of the Swedish Code of Judicial Procedure provides that the compensation shall fully cover the costs for the preparations for the litigation and the carrying out thereof, plus costs for legal counsel, to the extent the costs were reasonably incurred to protect the party's interests. These provisions do not govern the issue of whether a party shall be deemed to have incurred costs when a third party has offered to cover them.

That a third party covers the litigation costs is not, however, uncommon. If legal aid has been granted to a party, the counterparty's obligation to compensate for litigation costs is set out in Section 30 of the Swedish Legal Aid Act so that the counterparty is ordered to compensate both the winning party and the state. Another situation is when a party has insurance covering a part of the party's litigation costs. In that situation, the insurance policy usually requires the insured in court proceedings and in mediations to claim compensation from the counterparty for his costs for legal counsel and other litigation costs. If the insured, without due grounds, fails to claim compensation for his costs from the counterparty, the insurance compensation can be reduced wholly or partially. Swedish courts have applied the provisions of the Swedish Code of Judicial Procedure so that the party in these situations shall be deemed to have incurred the costs and that the counterparty can be ordered to compensate the costs, if the counterparty is the losing party.

There are other possible situations where a third party agrees to cover a party's litigation costs, e.g. a person with interest in the estate of a deceased agreeing to cover the estate's litigation costs or a creditor of a bankruptcy agreeing to cover the bankruptcy estate's litigation costs. As far as is known, there is no case in which a party has been denied compensation because the

party has been deemed not to have incurred costs in such situations. Thus, the District Court concludes that in these situations applicable law provides a presumption that the party in the main shall claim compensation from the counterparty and that the guaranteeing party's liability is merely subsidiary. The District Court finds that the Russian Federation has not presented any evidence indicating that Menatep's agreeing to cover the litigation costs shall be interpreted in any other manner. Therefore, the Russian Federation shall be ordered to compensate SICAV *et al.* for their litigation costs.

The Russian Federation has attested the amounts claimed by SICAV *et al.*, with the exception of the fee of USD 86,400 to Vladimir Gladyshev, for which USD 36,000 has been attested, corresponding to USD 250 per hour. Vladimir Gladyshev stated in his witness statement that he previously charged USD 250 per hour, which had been considered as cheap in previous proceedings. Therefore, he has now charged an hourly rate of USD 600 to SICAV *et al.*

Section 8 of Chapter 18 of the Swedish Code of Judicial Procedure provides that SICAV *et al.* are entitled to compensation to the compensation that can be deemed reasonable for Vladimir Gladyshev in the present proceedings, irrespective of what he has charged in previous proceedings. The District Court holds that the claimed amount of USD 86,400 is reasonable. The Russian Federation shall therefore be ordered to compensate SICAV *et al.* with the entire claimed amount.

HOW TO APPEAL, see appendix (Dv 401)

Appeals, addressed to Svea Court of Appeal, must be received by the District Court 2 October 2014

Thore Brolin Tomas Zander Manne Heimer