

**COMMENTS ON THE AWARD ON PRELIMINARY
OBJECTIONS (RENTA 4 S.V.S.A. ET. AL. v.
THE RUSSIAN FEDERATION), 20 MARCH 2009 ISSUED
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The Arbitration Institute of the Stockholm Chamber of Commerce is a frequent venue for investment-related disputes, especially those concerning the Russian Federation. This link with Russia, reflected in the wording of many bilateral investment treaties (BITs) has a long-standing tradition extending back to the Cold War, at a time Sweden was considered a neutral forum.

As a matter of fact, the authors of this review were recently able to attend a seminar on arbitration for young practitioners in Sweden in which they had the opportunity of hearing Mr. KAJ HÓBER (1) speak about the vast experience of the Stockholm Chamber of Commerce in investment arbitration.

The case discussed in this note concerns a particularly important decision on preliminary objections put forward by the Russian Federation regarding the arbitral Tribunal's alleged lack of jurisdiction.

The claimants, all Spanish, were three investment funds, Renta 4, S.V.S.A., Ahorro Corporación Emergentes F.I. and Ahorro Corporación Eurofondo F.I., and four variable stock companies («sociedades anónimas de capital variable»), Rovime Inversiones SICAV S.A., Quasar de Valores SICAV S.A., Orgor de Valores SIVAC S.A. and GBI 9000 SICAV S.A.

The claimants filed an action with the Arbitration Institute of the Stockholm Chamber of Commerce against the Russian Federation, alleging that Russian petroleum company Yukos, a company in which the claimants had invested through American depositary receipts (ADRs), had been expropriated by the Russian government as a consequence of various abuses of Executive and Judiciary powers.

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The Tribunal did not address factual details and instead focused on the jurisdictional objections raised by the Russian Federation. The objections related to five fundamental issues:

(i) the narrow scope of application of article 10 of the BIT entered into by Spain and the Russian Federation;

(ii) the validity of applying the most favoured nation (MFN) clause to the scope of the said article;

(iii) the standing of the three investment funds;

(iv) the characterisation of ADRs as a protected investment under the BIT; and

(v) the lack of demonstration of the claimants' ownership of the investment.

The Tribunal first analysed if it had jurisdiction over the claim on the basis of article 10 of the BIT. Under the heading «Disputes between one Party and investors of the other Party» (2), article 10 refers to «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». Article 6 of the BIT addresses nationalizations, expropriations and any other measures having similar effects.

Regarding article 10, the Russian Federation stated that the Tribunal's jurisdiction was limited to disputes on matters such as amounts to be paid as compensation and the methods for calculating such amounts. On that basis, the Russian Federation argued that whether or not an expropriation had taken place was a non-arbitrable matter and should be discussed in a different forum.

The arbitral Tribunal disagreed and concluded that it was indeed competent to address the matter. It held that, despite it could not decide on whether or not Russia had breached its domestic legislation as regards nationalization or expropriation, it could nevertheless assess if «compensation is due to them (the claimants) under international law by reason of the conduct of which they complain (and if so in which amount)».

This decision is a turning point in the interpretation of BITs signed by the Russian Federation. In previous decisions addressing matters involving similar drafting of BITs, arbitral Tribunals had ruled that the standard arbitration clause in the BIT applied only in cases in which the Russian Federation had admitted the existence of an expropriation.

Regarding the MFN clause, the claimants cited article 5 of the BIT entitled «Treatment of Investments», which established that such treatment «shall be no less favourable than that accorded by either Party in respect of investments made within its territory by investors of any third State». Accordingly, the clai-

(2) The present review quotes the non-official English translation of the BIT, which was used by the arbitral Tribunal and which text was uncontested by the parties. The treaty was only executed in the Spanish and Russian languages.

Comments on the award on preliminary objections...

claimants alleged that the Denmark-Russia BIT could be applied given that its scope of arbitrable disputes was significantly broader than that of the Spain-Russia BIT. In doing so, the Tribunal's jurisdiction would be affirmed even if it deemed it was not competent to decide on the matter by virtue of article 10 of the BIT.

The Tribunal did not share the claimants' view and rejected the application of article 5 of the BIT. The majority of the Tribunal understood that article 5 of the BIT could not be read to enlarge the competence of the Tribunal. Moreover, it considered that the MFN treatment should be restricted to «the realm of FET (fair and equitable treatment) as understood in international law», i.e. as related to normative standards and «does not extend to the availability of international as opposed to national fora».

The Tribunal then analyzed the standing of the three Spanish investment funds (Ahorro Corporación Emergentes F.I., Ahorro Corporación Eurofondo F.I and Renta 4 S.V.S.A.) and ruled that they did not have standing to bring an action in the arbitral proceedings. The Tribunal concluded that investment funds cannot be considered investors under article 1 of the BIT, which defines the term «investor» as «any corporate body established in accordance with the legislation of either party, and allowed under the legislation in force there to make investments in the territory of the other party». Having examined this definition, the Tribunal held that the investment funds could not be considered corporate bodies.

Regarding the lack of standing of Ahorro Corporación Emergentes F.I. and Ahorro Corporación Eurofondo F.I., the Tribunal based its decision on the fact that they had no legal personality and thus could not be considered a corporate entity. Concerning Renta 4 S.V.S.A., the Tribunal rejected its right of action in the proceedings considering that it was not a corporate entity and, furthermore, that it did not own the ADRs, which were being held in custody for Renta 4 Europa Este FIM.

Regarding the characterisation of the ADRs, the Tribunal ruled that the ADRs owned by the claimants were indeed an investment protected by the BIT, on the basis that article 1 states that the term investment «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», thus permitting any kind of investment vehicle.

In the Tribunal's view, the extensive interpretation of the term investment was supported by article 6 of the BIT referring to the right of compensation for the investor or its «beneficiary».

In relation to the ownership of the investment of the variable stock companies (i.e. those claimants that the Tribunal determined to have standing), the Tribunal declared itself satisfied with the submitted statements detailing the transactions carried out by the claimants.

Having addressed the majority opinion of the Tribunal, we briefly turn to the reasoning contained in Mr. Charles N. Brower's separate opinion.

Regarding the MFN clause, Mr. Brower argued that, even if Article 5 of the BIT were to refer exclusively to fair and equitable treatment, Russia's consent to the Danish BIT should nevertheless be extended to the claimants «as part of the 'more favourable' fair and equitable treatment» available under the Denmark-Russia BIT. He concluded that «the mere existence of differences in the available dispute settlement mechanisms is sufficient to trigger an MFN clause and thereby extend the treatment afforded by the Danish treaty to those benefiting from the MFN clause in the Spanish treaty».

With respect to the standing of Ahorro Corporación Emergentes F.I. and Ahorro Corporación Eurofondo F.I., Mr. Brower stated that the Tribunal unjustifiably departed international law by basing its decision on domestic Spanish regulations. The Tribunal declined jurisdiction over the investment funds after studying article 3 of Law 35/2003 of 4 November on collective investment schemes and an opinion letter provided by the claimants. Mr. Brower criticised the decision stating that an investment fund —such as Ahorro Corporación Emergentes F.I. and Ahorro Corporación Eurofondo F.I.— which was created in accordance with Spanish legislation and designed to engage in investment activities, both domestic and foreign, does not qualify as a corporate body falling under the scope of article 1 of the BIT, regardless of its legal personality (or lack of) under domestic law.

Moreover, Mr. Brower stated that the arbitral Tribunal's decision violates two main principles of international law: its primacy over domestic legislation and the rule that international treaties are to be interpreted independently. Mr. Brower argued that the term corporate body should be interpreted under an international light, i.e. «any legal entity (other than a physical person) provided that it has been established».

Regarding the standing of Renta 4 S.V.S.A., Mr. Brower claims that, although it was not the entity owning the Yukos ADRs, it was clear that it was bringing the action for the real party in interest (Renta 4 Europa Este FIM). Therefore, it should have either been allowed to appear as a party «acting for the funds owning the ADRs» or the Tribunal should have permitted whatever amendments necessary to remedy the lack of standing on behalf of the real party in interest.

Finally, we would like to point out that this arbitral proceeding may be significant both for the decision on its preliminary objections and the future award on the merits. It will undoubtedly be followed with interest by other Yukos ADRs holders in countries that have BITs with Russia, such as Denmark or the United Kingdom.