

IN THE MATTER OF AN ARBITRATION UNDER THE 1976 RULES OF THE UNITED  
NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

SERGEI VIKTOROVICH PUGACHEV

*Claimant*

v.

THE RUSSIAN FEDERATION

*Respondent*

---

DISSENTING OPINION OF PROFESSOR THOMAS CLAY

---

Tribunal

Dr. Eduardo Zuleta Jaramillo (Presiding Arbitrator)  
Prof. Thomas Clay  
Prof. Bernardo Cremades

Secretary

Mr. Rafael Rincón

Place of arbitration : Madrid, Kingdom of Spain

18 June 2020

## TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION.....</b>	<b>3</b>
<b>II.</b>	<b>THE INCONSISTENCY OF THE SOLUTION WITH THE APPLICABLE BIT .....</b>	<b>4</b>
A.	THE RULE OF INTERPRETATION OF THE VIENNA CONVENTION.....	4
a)	<i>The general rule.....</i>	4
b)	<i>The supplementary means.....</i>	6
B.	APPLICATION OF THE VIENNA CONVENTION .....	8
a)	<i>Recourse to the general rule of interpretation .....</i>	8
1.	The ordinary meaning of Article 1.2(a) of the Treaty .....	8
2.	The context of the Treaty.....	9
3.	The object and purpose of the Treaty.....	15
b)	<i>Recourse to the historical circumstances in which the Treaty was concluded.....</i>	16
<b>III.</b>	<b>THE INCONSISTENCY OF THE SOLUTION WITH WELL-ESTABLISHED CASE LAW .....</b>	<b>19</b>
<b>IV.</b>	<b>CONCLUSION .....</b>	<b>22</b>

## I. INTRODUCTION

1. This dissenting opinion does not intend to call into question the jurisdictional process that was followed during this arbitration, nor the integrity and impartiality of my co-arbitrators. It merely intends to give a divergent view on a specific point of the award on jurisdiction rendered in the arbitration between Sergei Viktorovich Pugachev and the Russian Federation (the “Award”), which has decisive consequences.
2. This dissenting opinion also does not intend to provide a general guide on the interpretation of the conditions required for the application of investment treaties, and should not be regarded as an expression of a trend or adherence to any particular school of thought. It is based on a key sentence of the Bilateral Investment Treaty between France and the Union of Soviet Socialist Republics (the “Treaty”, the “BIT” or the “France-USSR Treaty”) and should not be extrapolated to other treaties or situations. It is limited to the present case and only takes into consideration the case at hand as pleaded by both parties.
3. The major point of disagreement with my co-arbitrators is not about the French nationality of Mr. Sergei Pugachev, which is recognized by the French administration and by the arbitral Award, but about the interpretation of the *ratione temporis* criterion of the Arbitral Tribunal’s jurisdiction. More precisely, it concerns the date at which the investor’s nationality has to be assessed for the protection of their investment. The interpretation adopted by the majority of the Arbitral Tribunal seems to be, in my view, directly inconsistent both with the applicable Treaty itself and with well-established case law.
4. More precisely, the disagreement only relates to the interpretation of a part of a sentence in Article 1.2(a) of the Treaty, according to which “*The term ‘investor’ shall signify: a) Any natural person who is a national of one of the Contracting Parties and who is allowed, in accordance with the laws of that Contracting Party, to make investments on the territory or in the maritime zone of the other Contracting Party*” (emphasis added). Based on the requirement that the investment must be made “*in accordance with the laws of that Contracting Party*”, my co-arbitrators considered that this was sufficient to deviate from the constant and uniform rule that was applicable until now, according to which the status of the investor – foreign in particular – and hence their foreign nationality, required to establish the jurisdiction *ratione temporis* of the Arbitral Tribunal, must be assessed at the time of the occurrence of the alleged breaches reproached to the State, *i.e.* in this case, the alleged expropriation measures, as well as at the time of the introduction of the arbitral proceedings.
5. Indeed, according to my co-arbitrators, this part of the sentence alone allows them to go back in time in the assessment of the status of the protected investor – and hence of French nationality – to the moment the investment was made, in order to conclude that Mr. Sergei Pugachev did not have French nationality at that earlier date, and to deduce from this the lack of jurisdiction of the Arbitral Tribunal.

6. I do not agree with my co-arbitrators' position, which in my view falls foul of two major obstacles, each of which is fatal to their position: their interpretation seems incompatible with both the applicable Treaty (II) and well-established case law (III).

## II. THE INCONSISTENCY OF THE SOLUTION WITH THE APPLICABLE BIT

7. The Parties agree on the application of the Vienna Convention on the Law of Treaties of 1969 (the "Vienna Convention") for the interpretation of the Treaty.<sup>1</sup> In view of the latest version of the Award, the divergence with my co-arbitrators is now mainly due to the result achieved by the application of the method followed in interpreting the BIT. Indeed, while there is a consensus between the Parties and the Arbitral Tribunal on the recourse to the Vienna Convention, it seems to me that it is nevertheless necessary to remind the rules of interpretation of the Vienna Convention (A) before applying them to the BIT in question (B).

### A. The rule of interpretation of the Vienna Convention

8. The Vienna Convention contains two essential guidelines for the interpretation of international treaties. Article 31 refers to the general rule of interpretation (a) and Article 32 refers to the supplementary means of interpretation (b). These guidelines reflect international customary law.<sup>2</sup> They must be respected and cannot be ignored.

#### a) The general rule

9. Article 31 of the Vienna Convention provides:

*"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."*

<sup>1</sup> *Sergei Viktorovich Pugachev v. the Russian Federation*, UNCITRAL, PCA Case No. AA622, Award on Jurisdiction, ¶ 400.

<sup>2</sup> International Court of Justice, Judgment of 31 March 2004, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, I.C.J. Reports 2004, p. 48, ¶ 83: "the Court now addresses the question of the proper interpretation of the expression 'without delay' in the light of arguments put to it by the Parties. The Court begins by noting that the precise meaning of 'without delay', as it is to be understood in Article 36, paragraph 1 (b), is not defined in the Convention [on Consular Relations]. This phrase therefore requires interpretation according to the customary rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties"; International Court of Justice, Advisory Opinion of 9 July 2004, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, I.C.J. Reports 2004, p. 174, ¶ 94: "The Court would recall that, according to customary international law as expressed in Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms 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 connexion with the conclusion of the treaty;*

*(b) Any instrument which was made by one or more parties in connexion 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<sup>3</sup>. (emphasis added)*

10. This article requires various elements to be taken into account in order to determine the meaning of an international treaty provision. Among these elements, Article 31 refers to the principle of good faith, the ordinary meaning of the terms, the context, the object and purpose of the treaty, any subsequent agreement reached between the Parties and the relevant rules of international law applicable in the relations between them. All these elements must be taken into account as a whole when interpreting a treaty. As such, the Vienna Convention does not favor one particular aspect in clarifying the meaning of a norm, but rather combines all these elements. As has been indicated, *“it is the treaty which is to be interpreted; it is the terms whose ordinary meaning is to be the starting point, their context moderating selection of that meaning, and the process being further illuminated by the treaty’s object and purpose.”*<sup>3</sup>

11. Regarding the terms of the Treaty, Article 31.1 of the Vienna Convention, after referring to good faith, states that a treaty must be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty”. The “terms” of the treaty, *i.e.* the words and expressions used in the treaty, obviously refer to the text of the treaty.

---

<sup>3</sup> R. Gardiner, *Treaty Interpretation*, 2<sup>nd</sup> Ed., Oxford University Press, 2008, p. 144.

12. The ordinary meaning of a term refers to its “*natural and ordinary meaning*”,<sup>4</sup> “*common meaning*”, “*usual meaning*”, “*natural meaning*”, “*popular definition*”, “*usus loquendi*”, “*generally accepted*”, to cite some of the many varied formulas.<sup>5</sup>
13. The determination of the ordinary meaning of the terms of the treaty is the basis for all treaty interpretative work, including the interpretation of investment treaties. However, this determination constitutes only a starting point, which is then completed by an analysis of the “context”.
14. Indeed, Article 31.1 of the Vienna Convention specifies that the terms are to be read “*in their context*”. Thus, the Convention promotes a so-called “systematic” interpretation, which excludes examining a provision independently, extracting it from the whole text of the treaty of which it forms part, including its preamble and annexes.
15. Moreover, Article 31.1 of the Vienna Convention specifies that a treaty must be interpreted “*in the light of its object and purpose*”. The object refers to the subject matter of the treaty, whereas the purpose refers to what the parties intended to achieve by this treaty. This is what is sometimes referred to by legal authorities as the *ratio iuris* of a treaty.<sup>6</sup>
16. However, when the search for the ordinary meaning of the terms of a treaty compliant with Article 31 of the Vienna Convention is not sufficient, or when it is useful to confirm the ordinary meaning reached by applying Article 31 of the Vienna Convention, it allows then recourse to other means to supplement the interpretative work.

#### **b) The supplementary means**

17. Article 32 of the Vienna Convention provides:

*“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.” (emphasis added)*

---

<sup>4</sup> International Court of Justice, Judgment of 12 November 1991, Arbitral Award of 31 July 1989 (*Guinea-Bissau v. Senegal*), I.C.J. Report 1991, p. 69, ¶ 48.

<sup>5</sup> C. Rousseau, *Droit international public*, Vol. I, Introduction et sources, Recueil Sirey, 2<sup>nd</sup> Ed., 1970, No. 247, pp. 281-282.

<sup>6</sup> C. Rousseau, *Droit international public*, Vol. I, Introduction et sources, Recueil Sirey, 2<sup>nd</sup> Ed., 1970, No. 241, p. 272.

18. Article 32 gives the interpreter of a treaty the option to resort to additional means, either to “confirm” the meaning obtained by following the general rule of interpretation, or to determine the meaning when the application of the general rule has not produced a satisfactory result, *i.e.* an ambiguous or obscure meaning, or an absurd or unreasonable result.
19. These tools are said to be “*supplementary*” *i.e.* in the sense that the means referred to in Article 31 have priority and may suffice to determine the meaning of the treaty.
20. Accordingly, Article 32 of the Vienna Convention enumerates certain additional means of interpretation, such as the preparatory work and the circumstances under which the treaty was concluded. These two means are linked to the history of the conclusion of the treaty.
21. More specifically, the circumstances under which the treaty was concluded, refer to the “*historical framework formed by all the events that led the parties to conclude the treaty in order to maintain or confirm the status quo or to bring about a change, called for by new circumstances*”, as well as the “*individual circumstances of the parties*”, that is, “*ideological, political, economic and other circumstances*”, which could normally exert a certain influence on the States’ attitude in the various fields of international relations, such as, *inter alia*, membership of a given ideological group, military alliance or legal system and the fact that the State is an exporter or importer, whether industrialized or developing (free translation).<sup>7</sup>
22. As Professor Ludwik Ehrlich already pointed out in his lecture at The Hague in 1928, “*the practice requires an interpretation of treaties, which takes into account the historical circumstances; these constitute the foundations, based on which the views of the authors of the treaty were naturally formed; the treaty must therefore be read in light of the general conditions surrounding the parties at the time of its conclusion*” (free translation).<sup>8</sup> The idea is that it is not possible to interpret a treaty independently of the circumstances associated with its inception.
23. In this respect, the International Court of Justice has summarized this method of interpretation as follows :

---

<sup>7</sup> M. K. Yasseen, L’interprétation des traités d’après la Convention de Vienne, R.C.A.D.I., 1976-III, Vol. 151, p. 90: « cadre historique que forme l’ensemble des événements qui ont porté les parties à conclure le traité pour maintenir ou confirmer le statu quo ou apporter un changement qu’une nouvelle conjoncture nécessite », ainsi que les « conditions individuelles des parties », c’est-à-dire « les conditions idéologiques, politiques, économiques et autres ».

<sup>8</sup> L. Ehrlich, L’interprétation des traités, R.C.A.D.I., 1928-IV, Vol. 24, p. 130: « la pratique exige une interprétation des traités qui prenne en considération les circonstances historiques; celles-ci constituent le fond sur lequel se sont formées naturellement les conceptions des auteurs du traité; il faut donc lire le traité à la lumière des conditions générales dans lesquelles les parties se trouvaient lors de sa conclusion ».

*“An arbitration agreement (compromis d'arbitrage) is an agreement between States which must be interpreted in accordance with the general rules of international law governing the interpretation of treaties. In that respect "the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words." (Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, I.C.J. Reports 1950, P 8.) The rule of interpretation according to the natural and ordinary meaning of the words employed "is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it." (South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 336.) These principles are reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary international law on the point.”<sup>9</sup> (emphasis added)*

## **B. Application of the Vienna Convention**

24. Pursuant to the consistent and harmonious method provided by the Vienna Convention, in order to determine whether Article 1.2(a) of the France-USSR Treaty requires Mr. Pugachev to have been a French national at the beginning of the making of the investments, it is necessary to apply the general rule of interpretation (a) first, before resorting, potentially, to additional means of interpretation (b).

### **a) Recourse to the general rule of interpretation**

25. Article 31.1 of the Vienna Convention calls for the ordinary meaning to be given to the terms of the treaty (1) in their context (2) and in light of the treaty's object and purpose (3).

#### *1. The ordinary meaning of Article 1.2(a) of the Treaty*

26. It is clear from the ordinary meaning of the terms of Article 1.2(a) of the Treaty that the investor must (i) be a natural person, (ii) have the nationality of one of the Contracting Parties and (iii) be authorized to make investments in the territory or maritime zone of the other Contracting Party, in accordance with the laws of the latter. These requirements are not contested by the Parties.

---

<sup>9</sup> International Court of Justice, Judgment of 12 November 1991, Arbitral Award of 31 July 1989 (*Guinea-Bissau v. Senegal*), I.C.J. Report 1991, pp. 69-70, ¶ 48.



27. However, what is disputed is at what moment the compliance of the investment with the laws of the investor State or the home State must be assessed. My co-arbitrators are of the view that this compliance is to be assessed at the date of “making” of the investment, which requires that the Claimant be a French national at that date. In my opinion, – and this is our point of contention – it is clear that such a condition does not fall within the ordinary meaning of the terms of Article 1.2(a).
28. Indeed, the wording of this article merely states that it must be possible for the investor to make investments. Nowhere does it say that this condition must be fulfilled on the day on which the investor has made their investments, if such a day can be determined. It is therefore logical that, since the Treaty is invoked on the date of the submission of the request for arbitration, and since the dispute is related to an alleged expropriation, it is at these moments, *i.e.* the moment of the introduction of the request and the moment of the alleged expropriation, and at these moments only, that the *ratione temporis* condition must be considered.
29. Confined within its ordinary meaning, Article 1.2(a) must therefore be interpreted as an invitation to assess the investment’s conformity with French law at the date of the alleged breach of the treaty, as well as at the date of the introduction of the request for arbitration, since this conformity assessment is required to determine whether an individual or entity is a protected foreign investor. This question only arises at the time of the alleged breach of the treaty and at the time of the submission of the request for arbitration, and not before.
30. The meaning of the text of the Treaty is therefore clear and already sufficient. By requiring that the ability to invest must be assessed at the moment of making the investment, the majority not only misunderstood the ordinary meaning of this article, but also added language that does not appear in the text of Article 1.2(a). My analysis is further supported by taking into account the context of the Treaty.

## 2. *The context of the Treaty*

31. The context under Article 31 of the Vienna Convention refers, on the one hand, to elements endogenous to the provision being interpreted such as the grammatical structure of the text considered (2.1.) and, on the other hand, to exogenous elements, in particular the other provisions of the Treaty (2.2.).

### 2.1. *The grammatical structure of the text*

32. From the perspective of French syntax grammar and conjugation, there is no doubt that by limiting oneself to a rigorous reading of the provision, the latter has no temporal consequence that can be linked to the verbs “is allowed”.

33. According to the French language – the undersigned’s mother tongue, one of the only two official languages of the Treaty,<sup>10</sup> and which is presumed to have the same meaning as the Russian version of the Treaty according to Article 33 of the Vienna Convention – a formula such as this one (“*peut effectuer*”) is a time-neutral formula; one can deduce nothing else than a compliance requirement at the time of the reading of the provision and not at the time of the investment itself. Other examples can be given, such as the classical expression “*il peut agir*” (for a legal action), which means that any person may bring a legal action at the moment at which the issue arises, which is neither in the past, present nor future. It is an indication of a possibility; a right, a faculty, a power (“*peut*”), without temporal consequences. In this part of the sentence, the verb “*pouvoir*” has a “*semi-auxiliaire*” function, which, when used with an “*infinitif*” (here, “*investir*”), loses its proper meaning and serves to express the features of the action to which it refers. From then on, “*pouvoir*” serves to express a probability, a simple approximation, a permitted action, or that one is in a position to accomplish, a possibility or an acceptable fact” (free translation).<sup>11</sup> This is why it is referred to as a “neutral” formula. My co-arbitrators agree with me on this point.<sup>12</sup>
34. However, I draw radically different conclusions: while my eminent colleagues agree with the temporal neutrality of such wording, they still consider that this provision also refers to the date of the investment, which is where I disagree with them. Precisely, the fact that this formula has no temporal implication is likely to reinforce the thesis that its purpose is only to ensure the legality of the investments in the State of origin, without any consequences for the jurisdiction *ratione temporis* of the Tribunal. My analysis would have been quite different if the verb “is allowed” in this phrase had been conjugated in a past form. The treaty would then have used conjugations such as “who *had been allowed* to make investments”, “who *was allowed* to make investments”. This would have then effectively referred to the past and implied prior authorization of the investment. However, this is not the case because the present tense was indeed chosen. And if this is not the case, it is because it was not intended as such. The interpretation adopted by my co-arbitrators amounts to implying that it was a conjugation in the past tense, whereas it was in fact a conjugation in the present tense. The use of French is unambiguous here, both from the point of view of the temporal consistency of the tenses in this sentence and from the grammatical point of view: when it is indicated in the “*présent de l’indicatif*” that the investor “is allowed” to make an investment, it does not refer to the past.
35. The consideration of the grammatical structure of the text as well as the other provisions of the Treaty prevents me from endorsing the reading made by my eminent colleagues of Article 1.2(a).

---

<sup>10</sup> See *infra*, n° 37.

<sup>11</sup> M. Grévisse, A. Goosse, *Le Bon Usage*, 14<sup>th</sup> Ed., Boeck Dukulot, 2007, p. 1048, ¶ 821.

<sup>12</sup> *Sergei Viktorovich Pugachev v. the Russian Federation*, UNCITRAL, PCA Case No. AA622, Award on Jurisdiction, ¶ 410.

## 2.2. The other provisions of the Treaty

36. The other provisions of the Treaty, which, *inter alia*, form the context of the BIT as defined in the Vienna Convention, support the thesis advocated herein. They indicate that the date at which the nationality of the investor is determined can only be moved back by distorting the Treaty. Thus, Articles 4, 6, 7 and 8 of the French version of the Treaty refer alternatively to “*investissements effectués*” and “*investissements réalisés*”.
37. First of all, it would be wrong to see in this formulation, that also appears in Article 1 of the Treaty, a past form that would refer to the moment of the investment. In French – one of the two only official languages of the France-USSR Treaty – this type of formulation is none other than the use of a “*participe passé*”, but used as an adjective.<sup>13</sup> The “*participe passé*” without an “*auxiliaire*” takes, in these cases, an adjectival function and adapts itself in gender and number with the noun.<sup>14</sup> In French, therefore, this “*participe passé*” should not be understood as referring to the past tense. Its meaning is therefore different from the verb.
38. There is nothing that leads one to believe, by reading the other provisions of the Treaty, that the investments had to comply with French law when they were first made. This step back in time is not justified by the terms used, either in Article 1.2(a) or in the other articles of the Treaty.
39. My co-arbitrators are interested in the use of the terms “*investissements réalisés*” and “*investissements effectués*” in the other provisions of the Treaty, rather than “investments held”, in order to conclude that the assessment of the investor status should be made at a specific moment: the moment at which the investment is made.<sup>15</sup> However, it appears that, in this Treaty, the act of investing is not understood as a single and specific operation, which would trigger the scrutiny of nationality, but rather as a continuous operation or activity, sometimes even indirect. This can be seen in a number of articles that contradict my co-arbitrators’ interpretation of Article 1.2(a).
40. Indeed, the concepts of “*effectuer*” or “*réaliser*” in Articles 4, 6 and 7 do not refer to an instantaneous transaction. An investment is, by definition, a complex transaction that is spread over time. Adopting a different position is not justified since a brief overview of the various investments in question confirms their completion over time.

- For the Red Square Project, given the nature of the investment, the Claimant cannot precisely identify the date of its “making”. However, he estimates “between 2004 and 2005” as being the moment at which the contract “deployed its full legal

<sup>13</sup> M. Grévisse, A. Goosse, *Le Bon Usage*, 14<sup>th</sup> Ed., Boeck Dukulot, 2007, p. 149, ¶ 141.

<sup>14</sup> M. Grévisse, A. Goosse, *Le Bon Usage*, 14<sup>th</sup> Ed., Boeck Dukulot, 2007, p. 187, ¶¶ 308 et seq.

<sup>15</sup> *Sergei Viktorovich Pugachev v. the Russian Federation*, UNCITRAL, PCA Case No. AA622, Award on Jurisdiction, ¶¶ 413-414.

force and effect”.<sup>16</sup> And nothing allows to infer, as the Award does, that this would correspond to the date of the “making” of the investment.

- With regard to the Shipyards, my co-arbitrators consider that the making of the investment precedes the acquisition of French nationality by Mr. Sergei Pugachev, since by 30 November 2009 (the date of the naturalization decree), Mr. Sergei Pugachev had already acquired the three shipyards (Northern, Baltic and Iceberg Shipyards).<sup>17</sup> They thus reduce the broad notion of “making” the investment to the operation of acquiring the shares of a company. It is not disputed that, on the day of entry into the share capital of “Northern Shipyard’s”, it was in a state of disrepair and had not built any ships for twenty years. And yet, the Shipyards (although it should be noted that this concerns all three shipyards, not just Northern Shipyard) were valued in 2010 at USD 2.679 billion.<sup>18</sup> This increase in value is not simply due to the entry into the shipyards as a shareholder, but is the result of successful investment strategy development over the years. It is therefore reductive, not to say incorrect, to interpret the notion of Mr. Pugachev’s “making” of the investment in the Shipyards, as referring only to the day of his entry into the capital of the various shipyards.

- As for Enisey Production Company (“EPC”), my co-arbitrators are, in my view, replicating the same misreading of what constitutes the “making” of the investment by considering that the relevant date is the date of the acquisition of EPC, in the “best case scenario” in September 2003. However, it should be recalled, and it is not disputed, that, after that date, the Claimant invested tens of millions of dollars to explore the resources of the Eleget Plateau, which demonstrated that it was one of the largest metallurgical coal hearths in the world; that the Claimant entered into contracts for the construction and design of railways to transport coal to various regions; or that the Claimant established an agreement with a foreign partner to evaluate new investments in EPC. All these key business activities and operations took place after the acquisition of EPC and yet, are still contributing to the development, valuation (EPC was valued in 2010 at USD 2.43 billion) and “making” of the investment. How then can these accomplishments be reduced to the date of the initial acquisition of shares?

- With respect to the Land Plots, my co-arbitrators, again, draw from the fact that the Claimant indirectly owned these properties prior to his naturalization, that the investment was made prior to that day. However, the value of this investment does not lie in the mere possession of the land, but in the purpose for which it is intended.

---

<sup>16</sup> *Sergei Viktorovich Pugachev v. the Russian Federation*, UNCITRAL, PCA Case No. AA622, Award on Jurisdiction, ¶ 446.

<sup>17</sup> *Sergei Viktorovich Pugachev v. the Russian Federation*, UNCITRAL, PCA Case No. AA622, Award on Jurisdiction, ¶ 457.

<sup>18</sup> Claimant’s Statement of Claim, p. 64, ¶ 177.

In the present case, the company of Mr. Sergei Pugachev obtained permission in 2010 to divide the Land Plots into 167 individual plots in view of building residences. In the case at hand, can the date of the investment really be traced back to 2004, the date at which it could be considered that, through some corporate vehicle, Mr. Sergei Pugachev actually became the owner of the Land Plots?

41. These examples are not exhaustive. Moreover, the dates of all the operations mentioned are not all subsequent to the date of Mr. Sergei Pugachev's naturalization. However, this shows that it is not possible to reduce the notion of "making" an investment to the mere act of becoming a shareholder or of acquiring or controlling an asset. Furthermore, what sum should be taken into account? That of the initial contribution, even if it was derisory, or the sum invested over time and as it was valued on the day of the deprivation measure?

The second, of course, and this is why investment protection is always analysed at the time of the expropriation measure, and not on the day of the investment, which is dynamic by nature.

42. In addition, as indicated in Article 4 of the France-USSR BIT, the purpose of the Treaty is to protect "the revenues" generated by these investments, which necessarily implies a duration in time. This Article 4 in turn makes it clear that the date of making the investment is in no way relevant. The protection provided by the Treaty is prolonged in time, and it is in this respect that the interpretation adopted by the Award violates the rules of interpretation set out in the Vienna Convention as explained above, since it limits without any reason the protection initially foreseen by the Treaty.
43. Also, Article 7 on investor-State dispute resolution specifies that protection is offered against a measure taken by the State relating to "*the management, maintenance, enjoyment or disposal of an investment made*".<sup>19</sup> This shows once again that, in the mind of the drafters of the Treaty, the notion of investment is spread over time and that taking into account only the date of the first contribution, besides the fact that it is difficult to fix such a date, distorts the Treaty and contravenes the rules of interpretation of the above-mentioned Vienna Convention.
44. Moreover, Article 7 is particularly significant in defining the moment to consider the nationality requirement. It delimits the scope of the Arbitral Tribunal's jurisdiction by referring to the dispute which relates to the effects of the "measure taken". It is therefore

---

<sup>19</sup> Article 7 of the France-USSR Treaty: "Any dispute between one of the Contracting Parties and an investor of the other Contracting Party concerning the effects of a measure taken by the first Contracting Party and relating to the management, maintenance, enjoyment or disposal of an investment made by such investor, including but not limited to the effects of a measure relating to the transportation and sales of goods, an expropriation or the transfers set forth in Article 5 of this Agreement, shall be settled if at all possible amicably by the two parties concerned. If such a dispute cannot be settled amicably within a period of six months from the time when it was raised by either one of the parties to the dispute, it may be submitted in writing to arbitration. This dispute shall then be settled definitively in accordance with the arbitration rules of the United Nations Commission for International Commercial Law as adopted by the General Assembly of the United Nations in its resolution 31/98 of December 15, 1976".

the date of the measure taken that is relevant to the determination of the Arbitral Tribunal's jurisdiction.

45. Indeed, where the drafters of the Treaty effectively intended to aim at an instantaneous, rather than continuous element, as in Article 2, they used the expression “to permit” the investment rather than “*effectuer*” or “*réaliser*” the investment. The Treaty has thus distinguished the instantaneous nature of the date of admission of the investments by the Contracting State from the long-lasting period during which investments are made, which must of course be protected.<sup>20</sup>
46. Lastly, the solution adopted within the Award also has the effect of crystallising nationalities. By requiring that the nationality of the investor be ascertained at the time of the investment, the majority crystallises the investment at the presumed date of its realization and definitively qualifies it as French or Russian. In addition, in the analysis of the *ratione temporis* condition of nationality, the Award confuses, in my view, the investment and the investor: the nationality of the investor must be assessed in consideration of the investor, and not of the investment.
47. Finally, the BIT itself enables changes in the nature of the investment. Indeed, Article 1 provides that “*Any change in the form of investment of assets shall not affect their qualification as an investment within the meaning of this Agreement, provided that this change is not contrary to the laws of the Contracting Party on whose territory or in whose maritime zone the investment is made*”. The interpretation followed in the Award, which crystallises the investor's nationality at the moment when the investment is presumed to be made, fails to take into consideration the transformation and the evolution of the investment expressly allowed by the Treaty.
48. The only two conditions to qualify as an investor are: possession of the foreign nationality of the contracting State; and compliance of the investment with the legislation of the State of nationality. There is no additional temporal condition referring to a specific point in time at which the investment must be compliant.
49. An interpretation that requires verification of French nationality at the time of the investment also excludes the protection of investments made in Russia by third-State nationals transferred to French nationals, as well as investments made by third parties in Russia and transferred to French nationals. Thus, for example, if a Russian national acquires investments made by French nationals in France, their investments will not be protected, which is fundamentally contrary to the entire system of foreign investment protection law.

---

<sup>20</sup> Article 7 of the France-USSR Treaty: “Each Contracting Party, in accordance with its legislation and the provisions of this Agreement, shall permit and promote investments made on its territory and in its maritime zone by investors of the other Contracting Party”.



The investor's status is dynamic: an investor can lose their investment because of economic changes and then retrieve it later, and it is indeed their investment that must be protected.

50. Mr. Sergei Pugachev became French on November 30, 2009, as stated in the Award,<sup>21</sup> *i.e.* at a time when he was still the owner of his investments. It cannot be denied that, unless one wishes to reduce the notion of investment to an initial and partial contribution alone, Mr. Sergei Pugachev was indeed an investor at the time he became French. Therefore, he was French and an investor.
51. From the reading of the Treaty's other provisions, drawn from the context of Article 1.2(a), it emerges that the Tribunal cannot require Mr. Sergei Pugachev to be a French national at the date of "making" his investments and impose this requirement as a condition for its jurisdiction *ratione temporis*. This reading is all the more mistaken in my view since it also contradicts the object and purpose of the Treaty, to which Article 31 of the Vienna Convention expressly refers.

### 3. *The object and purpose of the Treaty*

52. The interpretation adopted by my co-arbitrators, according to which the Treaty requires Mr. Sergei Pugachev to have had French nationality at the time he made his first investments, amounts in reality to adding a condition to the definition of an investor, thereby distorting the general objective of the Treaty to the detriment of Mr. Sergei Pugachev, and exposing the Award to the risk of violating the Vienna Convention on the Law of Treaties. Indeed, Article 31 of the Vienna Convention prohibits any form of interpretation that would lead to a different protection from the one resulting from an interpretation 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. Yet, the interpretation adopted in the Award amounts, in my view, to rewriting the Treaty and adding conditions that were not agreed upon in the first place.
53. The purpose of the Treaty, which is the "reciprocal promotion and protection of the[se] investments", and to which the Vienna Convention expressly refers, is precisely to protect investments made into and out of Russia.
54. Moreover, the very purpose of international investment law is to establish rules for the treatment and protection of assets owned by foreigners as well as the rights they hold. This is the reason why regulations evolve as forms of investment change. By moving the nationality requirement back in time, the protection, and consequently the very purpose of investment protection law, is inevitably reduced and thus undermined.

---

<sup>21</sup> *Sergei Viktorovich Pugachev v. the Russian Federation*, UNCITRAL, PCA Case No. AA622, Award on Jurisdiction, ¶ 476.

55. The interpretation of Article 1.2(a) as set out in the Award has the effect of disregarding the foreign nationality of the investor, depriving him of the protection intended by both signatory parties to the Treaty. This over-interpretation amounts to circumventing the object and purpose of the Treaty. However, Article 31 of the Vienna Convention does not allow the interpretation of a provision in a way that is inconsistent with the object and purpose of the Treaty.
56. Thus, the *ratio iuris* of the France-USSR Treaty should rather have led to interpreting this provision in light of its original purpose, instead of suggesting that the text would require that the French investor must hold French nationality at the moment of their investment.
57. In conclusion on this point, I consider that the ordinary meaning of the terms of Article 1.2(a) of the Treaty in light of the context, object and purpose of the Treaty contradicts the interpretation provided by my distinguished colleagues.<sup>22</sup>
58. Besides the ordinary meaning of the Treaty terms, reached pursuant to Article 31 of the Vienna Convention, recourse to “supplementary means”, in accordance with Article 32 of the same Convention, leads to the same conclusion. This is an additional reason for which it is not, in my view, legally correct, according to the international rules of the interpretation of the treaty, to deduce from Article 1.2(a) a condition of nationality which goes back in time to the first dollar invested.

#### **b) Recourse to the historical circumstances in which the Treaty was concluded**

59. The assessment of the historical circumstances raised by the parties and expressly referred to by my co-arbitrators by way of “supplementary means of interpretation” of Article 32 of the Vienna Convention<sup>23</sup>, in my view, reinforces, confirms and even supports the position that Article 1.2(a) must not affect the jurisdiction *ratione temporis* of the Arbitral Tribunal.
60. The condition in Article 1.2(a) that refers to the authorization to invest by the legislation of the Contracting Party was originally inserted from a Soviet perspective only, for outward foreign investments made by Soviet investors, which had to comply with the requirements of the home State, *i.e.* the law of the Soviet Union. Without pretending that this obligation

---

<sup>22</sup> It would also be questionable in the light of the dynamic or evolutive method of interpretation, that could be allowed under the Vienna Convention, to interpret Article 1.2(a) as requiring verification of the capacity to invest at the time of making the investment, when this requirement does not exist in France and has been abandoned by Russia. According to the French dictionary of public international law, the evolutive interpretation is a “*method of interpretation which takes into account the evolution, since the conclusion of the treaty in question, of the legal system in which the provision to be interpreted is inserted, and that of the legal situations to be addressed by the implementation of the norm laid down by that provision or by a norm held to derive implicitly from it*” (free translation), J. Salmon, Dictionnaire de droit international public, Ed. Bruylant, 2001, p. 605; See *infra*, No. 60 et seq.

<sup>23</sup> *Sergei Viktorovich Pugachev v. the Russian Federation*, UNCITRAL, PCA Case No. AA622, Award on Jurisdiction, ¶¶ 429-431.



would apply only to Russians, since neither the provision nor the Parties claim that it does<sup>24</sup>, it must be understood that this provision induces that it should have no impact *ratione temporis* on the jurisdiction of the Tribunal. In any event, should this requirement admittedly be bilateral, one may consider that it could be neutralised since French investors are automatically authorised to invest abroad. This requirement is therefore totally overridden for French investors. It is therefore contrary to the historical understanding of the Treaty to attempt, at the cost of an extensive interpretation of this provision, to create a new condition and apply it to a case for which it was not originally intended.

61. A good way to find out for whom this provision was intended is to compare whether a similar provision is found in other treaties concluded at the time by France and the USSR with third parties. It turns out that it is found in very few treaties concluded by France, like the BIT between France and Bulgaria, a State sharing the same economic views as the Soviet Union, whereas, on the contrary, it is found in almost all the treaties concluded by the USSR. Thus, for example, similar provisions are found in the USSR-Belgium,<sup>25</sup> USSR-Netherlands<sup>26</sup> and USSR-Germany<sup>27</sup> treaties.<sup>28</sup> Furthermore, to my knowledge, no French legislation prohibits French investors from investing abroad. This compliance requirement therefore has no real meaning for French investors. It is proof that the national legislation referred to in Article 1.2(a), in its original sense, was aimed at Russians, or rather, the Soviets at the time.
62. This provision dates back to a time when the economy administered by the central Soviet State was not to be contradicted in the international market over which the State wished to keep control. It was necessary to prevent Soviet entities from investing abroad without being in conformity with the law, *i.e. de facto* without having been authorised by the Soviet regime. None of this had any connection with French law in the minds of the signatories of the Treaty.
63. At that time, in the midst of Perestroïka and despite remarkable loosening of the markets, the Soviet economy had inherited the Marxist-Leninist principles of central planning and

---

<sup>24</sup> *Sergei Viktorovich Pugachev v. the Russian Federation*, UNCITRAL, PCA Case No. AA622, Award on Jurisdiction, ¶ 431.

<sup>25</sup> Article 1 of the USSR-Belgium Treaty, dated 13 October 1991 : “[...] Le terme « investisseur » désigne : 1.1.1. Toute personne physique [...] qui peut, conformément à la législation de son pays, réaliser des investissements sur le territoire de l’autre Partie contractante”.

<sup>26</sup> Article 1 of the USSR-Netherlands Treaty, dated 20 July 1991 : “[...] The term ‘investor’ shall comprise with regard to either Contracting Party: i. natural persons having the nationality of that Contracting Party in accordance with its laws and having the right to effect in accordance with the laws of their country investments on the territory of the other Contracting Party [...]”.

<sup>27</sup> Article 1 of the USSR-Germany, dated 5 August 1991 : “[...] The term ‘investor’ means an individual having a permanent place of residence in the area covered by this Agreement, or a body corporate having its registered office therein, authorized to make investments”.

<sup>28</sup> The Soviet BITs with Argentina, the Czech Republic, Egypt, Spain, Switzerland, Ukraine and Lithuania also contain this particularity.

State ownership, where private property was limited to personal assets, and commercial enterprises could only exist in the form of State-owned companies.

64. Prior to the 1980s, foreign direct investments were a prerogative limited to a few dozen State organizations under the control of the Ministry of Foreign Trade.<sup>29</sup> Since then, Russia has considerably modified its legal framework, showing once again the obsolescence of such a provision.
65. Thus, a decree of December 2, 1988, together with a decree of March 8, 1989, authorized “*all enterprises, associations and co-operatives that are competitive on the foreign market*” to access foreign markets, after registering with the competent authorities.<sup>30</sup>
66. On December 10, 1990, President Gorbachev promulgated the Fundamental Principles of Investment Legislation, which took effect on January 1, 1991. Among these principles, the utilization by investors of their property interests was considered “*an inalienable right*”.<sup>31</sup>
67. According to Law No. 1545-I of the Russian Soviet Federative Socialist Republic dated July 5, 1991, called the “*Investment Activity Act*”, Soviet citizens and entities had the right to make investments abroad in accordance with this Act, the legislation of the foreign countries concerned and international agreements.<sup>32</sup> Article 4, paragraph 1, of this Act provides:

*“Citizens and legal entities of RSFSR have the right to perform investing activities abroad according to this Law, the legislation of foreign states and international agreements”.*

68. Thus, it was not until the 1990s that Russia adopted a new legislation allowing investments. This liberalization manifested itself both at the national level and in terms of foreign investments.
69. These historical circumstances help explain the specificity of the condition in Article 1.2(a) relating to the legality of the investment found in Soviet treaties. In fact, the Award expressly refers to it by quoting the Respondent:

*“During the Hearing on Jurisdiction, Respondent explained that the unusual wording of Article 1(2)(a) could be explained by the historical context in which the Treaty was redacted:*

*“[...] in the Soviet Union there were very strict restrictions as to who could carry out foreign trade. So you need to be allowed by Soviet law to do foreign transactions, to invest outside of Soviet Union. That's why this treaty -- this provision is here,*

---

<sup>29</sup> C. H. McMillan, *Foreign Investment in Russia and the Other Soviet Successor States*, Eds. Y. Adjubei, P. Artisien-Maksimenko, Springer 2016, p. 49.

<sup>30</sup> F. J. M. Feldbrugge, *Russian Law: The End of the Soviet System and the Role of Law*, Ed. Nijhoff, 1993, p. 272.

<sup>31</sup> F. Joseph, M. Feldbrugge, *The Emancipation of Soviet Law*, Vol. I, Ed. Nijhoff, 1992, p. 122.

<sup>32</sup> Law of the RSFSR on Investment Activity in the RSFSR, dated 5 July 1991.

*which suggests that if you are Soviet or Russian and you are making an investment in France, you should -- this should be legal from the Soviet or Russian point of view”.*<sup>33</sup>

70. Therefore, the Award gives effect, for the assessment of French nationality, to a provision drafted for the Soviets, which they themselves have abandoned in most of their treaties, almost thirty years before the assessment of nationality in the present case. I cannot follow the approach of my co-arbitrators on this point, because it amounts to turning a condition – politically justified at a specific point in time, into a justification for the lack of jurisdiction of the Arbitral Tribunal, at a much later and entirely different period of time.
71. From an anachronistic provision originally intended for the Soviets, my co-arbitrators have deduced that the investor in this case cannot benefit from his French nationality, which is nonetheless admitted by the French administration and by the arbitral Award. This is, in my view, contrary to the historical background of the Treaty, in addition to violating its ordinary meaning. Furthermore, it also violates well-established case law.

### III. THE INCONSISTENCY OF THE SOLUTION WITH WELL-ESTABLISHED CASE LAW

72. Traditionally, arbitral case law has identified two relevant dates for examining the nationality of the investor: the date of the alleged violations, here the alleged expropriation measures, and the date of the initiation of the arbitral proceedings.
73. According to the International Court of Justice, the moment when jurisdictional conditions must be assessed is the date of the submission or the date of the institution of the proceedings:

*“The Court recalls that, according to its settled jurisprudence, its jurisdiction must be determined at the time that the act instituting proceedings was filed. Thus, if the Court has jurisdiction on the date the case is referred to it, it continues to do so regardless of subsequent events.”*<sup>34</sup>

74. No arbitral tribunal, to my knowledge, has taken the condition of nationality back to the time of “making” the investment.
75. Thus, for example, in the *Pac Rim Cayman* case, the arbitral tribunal decided:

*“[...] what CAFTA requires is not that the investor should bear the nationality of one of the Parties before its investment was made, but that such nationality should*

<sup>33</sup> *Sergei Viktorovich Pugachev v. the Russian Federation*, UNCITRAL, PCA Case No. AA622, Award on Jurisdiction, ¶ 429.

<sup>34</sup> International Court of Justice, Judgment of 14 February 2002, Arrest Warrant of 11 April 2000 (*Democratic Republic of Congo v. Belgium*), I.C.J. Report 2002, p. 13, ¶ 26 ; ICSID Case No. ARB/94/2, *Tradex Hellas S.A. v. Albanian Republic*, Award on Jurisdiction, dated 24 December 1996, p. 179 : “[...] both in national and international procedural law jurisdiction must mostly be established at the time of filing the claim”.

*exist prior to the alleged breach of CAFTA by the other Party. Therefore, as regards this issue in the present case, the Tribunal is required to determine when the Parties' dispute arose in order to establish if the Claimant's required nationality under CAFTA nationality was present at the relevant time.*"<sup>35</sup>

76. In the *Pey Casado* case, the arbitral tribunal also inferred from the absence of an express provision in the Treaty that there was no nationality requirement at the time of "making" the investment:

*"The condition of nationality within the meaning of the BIT differs from that of nationality within the meaning of Article 25 of the ICSID Convention in two fundamental aspects. First, contrary to Article 25 of the ICSID Convention, **the BIT does not specify the time of assessment of the applicant's nationality. In the Tribunal's view, the nationality requirement under the BIT must be established on the date of the investor's consent to arbitration. [...]** Moreover, the requirements for the application of the treaty, including the nationality requirement, also have to be satisfied, absent any contrary provision, at the date of the alleged violation, otherwise, the investor cannot invoke before the tribunal constituted under the treaty, the violation of said treaty."*<sup>36</sup> (emphasis added)

77. Similarly, the arbitral tribunal in the *Vladislav Kim v. Republic of Uzbekistan* case applied the nationality requirements of the Treaty by considering the crucial dates defined as: "(a) 'the date of the alleged breach of the treaty', (b) 'the date on which the claim was submitted to ICSID' and (c) 'the date on which the claim was registered by ICSID'."<sup>37</sup>
78. The well-known *Serafín García* case also illustrates this consistent case law, where the majority of the arbitral tribunal decided that the nationality of the investor at the date of his investment was not decisive for determining whether he fulfilled the requirements of the treaty:

*"The majority of the Tribunal does not consider it relevant, for the purposes of this Decision on Jurisdiction, to inquire what was the nationality of the Claimants on the dates in which they made their investments in Venezuela, since those dates do not constitute a determining factor in **deciding on the application of the APPRI**. Indeed, the relevant moments to be able to invoke the protection of the BIT are : (a) the date on which the alleged violation occurred (in this case, the Measures); and (b) the date on which the arbitration proceedings begin, aimed at resolving the dispute between the investor and the State receiving the investment resulting from the alleged violation."*<sup>38</sup> (emphasis added)

<sup>35</sup> *Pac Rim v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdiction Objections, dated 1 June 2012, ¶ 3.34.

<sup>36</sup> *Victor Pey Casado v. Republic of Chile*, ICSID Case No. ARB/98/2, Final Award, dated 8 May 2008, ¶ 414.

<sup>37</sup> *Vladislav Kim v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Award on Jurisdiction, dated 9 March 2017, ¶¶ 190-191.

<sup>38</sup> Paris Court of Appeal, No. 15/01040, dated 25 April 2017, *Serafín García v. Bolivarian Republic of Venezuela*.

79. Professor Rodrigo Oreamuno, one of the members of the arbitral tribunal in this case, expressed his disagreement with his co-arbitrators on this point by issuing a dissenting opinion. His position was confirmed by the Paris Court of Appeal, deciding on an application to set aside the award.<sup>39</sup>
80. More specifically, the Paris Court of Appeal examined the wording of the Spain-Venezuela Treaty, which referred to the terms “*invested*” or “*made*”, rather than “*held*”. In the Court’s view, these terms implied that the investment would not be an asset simply “*held*” by an investor of the other contracting party, excluding any reference to the date of acquisition; but rather an “*invested*” asset, which would inevitably refer to a condition of nationality of the investor prior to the date of the investment. This conjugation in the past tense is the opposite of the one in the France-USSR Treaty, as already noted. A cursory reading of this decision could lead to think that the issue of the date of the nationality of the investor in the *Serafin García* case arose in the same way as in the present case. However, such a reading would be erroneous for three reasons: first, because the Treaty at hand is not worded in the same way as the Spain-Venezuela treaty, which distinguishes the starting point of the analysis; second, the Paris Court of Appeal controlled jurisdiction of the arbitral tribunal exclusively from the point of view of French law, applying French standards, which do not necessarily reflect arbitral tribunals or other jurisdictions’ standards; finally and above all, this decision is based on the provision related to the investment and not, as in the present case, on the provision related to the definition of investor. Venezuela was in fact seeking annulment on the grounds of the arbitral tribunal’s lack of jurisdiction *ratione materiae*. In any event, the wording of the France-USSR BIT has nothing to do with the Spain-Venezuela BIT, and the Paris Court of Appeal has ruled only through a French Law perspective, which prevents any transposition, especially since the seat of the present Tribunal is Madrid, Spain that will therefore be the competent jurisdiction should the award be challenged.
81. Especially since, moreover, the first decision of the Paris Court of Appeal in this case has been overruled by the French *Cour de cassation*.<sup>40</sup> Admittedly, the *Cour de cassation* did not, in fact, refute the findings of the Paris Court of Appeal regarding nationality issues,<sup>41</sup> on which the *Cour de cassation* has not yet expressed its opinion. After *cassation*, the case was sent back before the judges in charge of the merits, who confirmed their first analysis and quashed the award on the grounds that the arbitral tribunal had wrongly declared itself competent by disregarding the nationality requirement at the date of the investment<sup>42</sup>. A further application to challenge this judgement of the Paris Court of Appeal is likely to be filed with the *Cour de cassation*. The case is therefore not over yet, and given the merits of

---

<sup>39</sup> Paris Court of Appeal, No. 15/01040, dated 25 April 2017, *Serafin García v. Bolivarian Republic of Venezuela*.

<sup>40</sup> French *Cour de cassation*, 1<sup>st</sup> Civil Chamber, No. 17-25.851, dated 13 February 2019.

<sup>41</sup> *Sergei Viktorovich Pugachev v. the Russian Federation*, UNCITRAL, PCA Case No. AA622, Award on Jurisdiction, ¶ 424.

<sup>42</sup> Paris Court of Appeal, No. 19/03588, dated 3 June 2020, *Serafin García v. Bolivarian Republic of Venezuela*.

the case and the proceedings not being over, it is not possible to rely on this French lower court's decision to resolve the present issue of jurisdiction.

82. But, to come back to the award itself, the fact remains that the arbitral tribunal in *Serafin García* clearly decided, albeit by a majority, that the nationality of the investors at the time of the investment was not relevant in determining whether an investor had standing under the treaty. This argument is all the more important since, in his dissenting opinion, Professor Rodrigo Oreamuno agreed with the conclusion of the decision on the jurisdiction of the arbitral tribunal, but only considered it necessary to record the above-mentioned dissent.<sup>43</sup>
83. Thus, faced with this uniform and consistent arbitral case law, the main question is whether the excerpt from Article 1.2(a), which mentions conformity with the laws of the Contracting State, is sufficient to deviate from this undisputed case law. The point of dissent with my co-arbitrators is precisely here: while they consider that this part of the sentence is sufficient to take the nationality requirement back to the moment of the first investment, it seems to me that this is not sufficient to deviate from a homogeneous case law, which has never held that nationality should be assessed at the time of the investment, but rather at the time of the breach of the Treaty and at the time of the request for arbitration.
84. This part of the sentence is obsolete, of secondary importance and intended for Soviet investors. It does not, in and of itself, justify making an exception to go back in time for the assessment of the investor's nationality - especially as these investments were properly made in conformity with French laws. Worst of all, following this approach, the Award conflicts with the *raison d'être* of investment treaty law, which is to protect investments.

#### IV. CONCLUSION

85. I reiterate that my disagreement with the decision of the majority of the Tribunal is based exclusively on a divergent legal analysis, without any other consideration. I consider that the correct application of the instruments of international law, in this case the Vienna Convention, leads to a result which is not the one reached by my co-arbitrators. Moreover, this divergence in substance inevitably has financial consequences with regard to the allocation of the costs of the arbitration.

---

<sup>43</sup> PCA Case No. 2013-3, *Serafin García v. Bolivarian Republic of Venezuela*, Dissenting Opinion of Professor Rodrigo Oreamuno, ¶¶ 14-15 : “[...] 14. Ajuicio del firmante, basta con que una parte de sus inversiones fueran realizadas por los Demandantes cuando ya eran españoles, para que ellos gocen de la protección del APPRI y, consecuentemente, para que este Tribunal sea competente para conocer de sus reclamos. 15. Por lo expuesto en los párrafos anteriores, el suscrito coincide con la conclusión de la Decisión sobre Jurisdicción, pero consideró necesario consignar la disidencia anterior”.



86. I believe that the majority has disregarded Articles 31 and 32 of the Vienna Convention, with the effect of reaching a conclusion which there's nothing to suggest that it would have been the same had the text been applied rigorously.
87. In essence, my co-arbitrators are of the view that, by referring to the requirement of compliance with the laws of the investor's State, Article 1.2(a) of the France-USSR Treaty has the effect of requiring Mr. Pugachev to have been French at the moment he began to "make" each of his investments – if such a moment can be defined – and thus artificially takes back in time a requirement which only applies later in precedent case law, *i.e.* at the time of the alleged violations, here the expropriation, and at the time of the request for arbitration; which had not been designed in 1989 for French nationals; and which has, moreover, been complied with in the present case since the investments made by Mr. Pugachev were in full conformity with French law.
88. The correct analysis of the France-USSR Treaty should therefore have led the Arbitral Tribunal not to exclude its jurisdiction on this ground. This is the reason why I cannot agree with the solution adopted by my two eminent colleagues and why I am issuing the present dissenting opinion.



**Professor Thomas Clay**

18 June 2020

## APPENDIX NO. 2

### ACCEPTED CORRECTIONS TO THE DISSENTING OPINION

Reference	Original Text	Accepted Correction
Paragraph 63	Perestroïka	Perestroika
Paragraph 67	According to Law No. 1545-I of the Russian Soviet Federative Socialist Republic dated July 5, 1991 [...]	According to Law No. 1545-I of the Russian Soviet Federative Socialist Republic dated July 4, 1991 [...]