

Exhibit AP 4

PCA CASE NO. 2016-14

IN THE MATTER OF AN ARBITRATION BEFORE A TRIBUNAL CONSTITUTED
IN ACCORDANCE WITH THE AGREEMENT BETWEEN THE GOVERNMENT OF THE RUSSIAN
FEDERATION AND THE CABINET OF MINISTERS OF UKRAINE
ON THE ENCOURAGEMENT AND MUTUAL PROTECTION OF INVESTMENTS
DATED NOVEMBER 27, 1998

-and-

THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW,
1976

-between-

JSC OSCHADBANK
(UKRAINE)

(the "Claimant")

-and-

THE RUSSIAN FEDERATION

(the "Respondent," and together with the Claimant, the "Parties")

Decision on Claimant's Request to Dismiss the Respondent's Application for Revision of the Award

The Arbitral Tribunal

Sir David A.R. Williams KC (Presiding Arbitrator)
The Honourable Charles N. Brower
Mr. Hugo Perezcano Díaz

Registry

Permanent Court of Arbitration

11 December 2023

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I. INTRODUCTION

1. On 19 August 2019, the Respondent filed an “Application for Revision of the Award” (“**Revision Application**”) requesting that, pursuant to Article 1502 of the French Code of Civil Procedure (“**CCP**”), the Tribunal revoke its Final Award dated 26 November 2018 (the “**Award**”) and issue a new award “*declaring it has no jurisdiction over Oschadbank’s claims.*”¹
2. The Revision Application was stayed by the Tribunal while set aside proceedings were heard in the French courts.
3. Following a decision of the *Cour de cassation* on 7 December 2022, the Claimant applied to the Tribunal to have the Respondent’s Revision Application dismissed (“**Dismissal Application**”).
4. In this decision, the Tribunal determines the Claimant’s Dismissal Application.

II. PROCEDURAL HISTORY

5. On 20 January 2016, the Claimant commenced an arbitration against the Respondent pursuant to Article 9(2)(c) of the Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments dated 27 November 1998 (the “**Treaty**”), under the Arbitration Rules of the United Nations Commission on International Trade Law, 1976 (“**UNCITRAL Rules**”).
6. The unanimous Award was issued by the Tribunal on 26 November 2018. On 19 February 2019, the Respondent commenced set aside proceedings in the French courts under Article 1520 of the CCP.
7. On 19 August 2019, the Respondent submitted its Revision Application to the Tribunal. At the request of the Tribunal, the Parties filed the following submissions:
 - a. Claimant’s Response to the Revision Application dated 25 September 2019 (“**Response**”);
 - b. Respondent’s Reply dated 25 October 2019 (“**Reply**”); and
 - c. Claimant’s Rejoinder dated 25 November 2019 (“**Rejoinder**”).

¹ Revision Application, para 40.

8. Separately, on 23 September 2019, the Claimant also requested that the Respondent be required to pay its share of the costs of the arbitration, as it was now participating in the proceedings.
9. On 10 December 2019, the Respondent requested that a hearing be held on the Revision Application.
10. On 23 December 2019, the Tribunal decided to stay the Revision Application proceedings (including consideration of costs) until the *Cour d'appel de Paris* had issued its decision on the set aside application.²
11. On 7 May 2021, the Tribunal confirmed that the Revision Application proceedings remained stayed, pending appeal of the judgment to the *Cour de cassation*.
12. The *Cour de cassation* issued its decision on 7 December 2022 and the Claimant submitted its Dismissal Application on 20 December 2022. At the request of the Tribunal, the Parties filed the following additional submissions on the Dismissal Application:
 - a. Respondent's letter in response to the Dismissal Application dated 31 January 2023 ("**Response**");
 - b. Claimant's letter in Reply dated 6 March 2023 ("**Reply**"); and
 - c. Respondent's letter in rejoinder dated 3 April 2023 ("**Rejoinder**").
13. On 24 April 2023, the Claimant requested permission to file further submissions. The Tribunal does not consider any further submissions are necessary.

III. FRENCH CODE OF CIVIL PROCEDURE

14. The Tribunal sets out the relevant provisions of the CCP relied upon by the Respondent.
15. Article 1502 of the CCP states:

"The application for revision of an arbitral award may be made in the circumstances provided in Article 595 for court judgments, and under the conditions set forth in Articles 594, 596, 597 and 601 through 603. Application shall be made to the arbitral tribunal."

² Tribunal's Decision to Stay Consideration of Respondent's Application for Revision and Claimant's Application for Security for Costs, 23 December 2019, para 6 ("**Stay Decision**").

16. Article 595 of the CCP states:

“An application for revision of a judgment may be made only where:

1. it comes to light, after the judgment is handed down, that it was obtained fraudulently by the party in whose favour it was rendered;
2. decisive evidence that had been withheld by another party is recovered after the judgment was handed down;
3. the judgment is based on documents that have since been proven or have been held by a court to be false;
4. the judgment is based on affidavits, testimonies or oaths that have been held by a court to be false.

In all four cases, an application for revision shall be admissible only where the applicant was not able, through no fault of his or her own, to raise such objection before the judgment became *res judicata*.”

17. The Revision Application was made in reliance on limbs 1 and 2 of Article 595.³

IV. RELEVANT BACKGROUND

18. On 19 February 2019, the Respondent commenced set aside proceedings before the Paris *Cour d'appel* pursuant to Article 1520 of the CCP. The Respondent relied upon several grounds in its application to set aside the award, including that the Tribunal had wrongly upheld jurisdiction as the Treaty was not applicable *ratione temporis*.⁴

19. Revision of the Award was sought in parallel to the court proceedings because, according to the Respondent, it discovered three new documents on 19 August 2019 in the Kyiv Archive demonstrating that Oschadbank's Crimean Branch pre-dated 1 January 1992. Article 12 of the Treaty states that it applies to investments created from 1 January 1992 only. The information discovered in the archive, which allegedly proved that the Claimant's investment in Crimea pre-dated 1 January 1992, was not disclosed by the Claimant to the Tribunal prior to the Award being issued. Consequently, the Respondent sought revision of the Award on the basis that,

³ Revision Application, para 7.

⁴ Response, pages 1-2.

had this information been disclosed by the Claimant, the Tribunal would have determined that it lacked jurisdiction over the Claimant's claims.

Findings of the French Courts

20. The *Cour d'appel de Paris* issued its judgment on the set aside application on 30 March 2021, setting aside the Award for lack of jurisdiction *ratione temporis*. The *Cour d'appel* agreed with the Respondent that the Claimant had made its investments in Crimea before 1 January 1992 and that Article 12 of the Treaty contained a temporal condition to the offer to arbitrate under the Treaty such that "*the jurisdiction of the arbitral tribunal is subject ... to the existence of a dispute concerning an investment which was necessarily made ... from 1 January 1992.*"⁵
21. The Court confirmed that as the conditions required by Article 12 of the Treaty pertain to jurisdiction, they can be reviewed by the Court.⁶ The Court considered that the Claimant has not satisfied that temporal condition and concluded that the Tribunal "*ha[d] wrongfully declared that it had jurisdiction to hear the dispute*"⁷ because Oschadbank's Crimean Branch has been made before 1 January 1992.⁸
22. Having found that the Tribunal lacked jurisdiction, the *Cour d'appel* did not determine the other grounds raised by Russia in its set aside application.
23. The *Cour d'appel* further held:
 - a. "It follows from these elements that the temporal condition set out in Article 12 of the Bilateral Investment Treaty containing the offer to arbitrate has not been satisfied, such that the arbitral tribunal has wrongly declared that it had jurisdiction to hear the dispute."⁹
 - b. "The Award should therefore be set aside without it being necessary to look at the other grounds."¹⁰
 - c. "On these grounds, the court

⁵ Paris Court of Appeal, No. 19/04161, 30 March 2021, para 75 (CLA-RA-45) ("**Cour d'appel Decision**").

⁶ Cour d'appel Decision, para 71

⁷ Cour d'appel Decision, para 101.

⁸ Cour d'appel Decision, para 94.

⁹ Cour d'appel Decision, para 101

¹⁰ Cour d'appel Decision, para 102

1-Dismisses the claim of inadmissibility raised by the Joint Stock Company ‘State Savings Bank of Ukraine’ of [sic] the ground based on the lack of temporal jurisdiction of the Arbitral Tribunal (*ratione temporis*);

2-Sets aside the arbitral award rendered in Paris on 26 November 2018 (PCA Case No. 2016-14.”¹¹

24. The Claimant appealed the decision to the *Cour de cassation*.
25. On 7 December 2022, the *Cour de cassation* reversed the judgment of the *Cour d’appel* and reinstated the Award.¹² The *Cour de cassation* held that the *Cour d’appel de Paris* had erred in finding that Article 12 of the Treaty was jurisdictional in nature.¹³ The Court ruled that Article 12 of the Treaty “*did not set out a condition of consent to arbitration on which the jurisdiction of the Tribunal depended, but [was] a substantive rule.*”¹⁴
26. Thus, reversing the judgment of the *Cour d’appel*, the *Cour de cassation* confirmed that the temporal restriction in Article 12 was not a jurisdictional requirement and the Award could not be set aside for lack of jurisdiction. The *Cour de cassation* referred the case back to the *Cour d’appel de Paris* “otherwise composed” for a decision on the remaining grounds of the set aside application.
27. Specifically, the *Cour de cassation* held:¹⁵
- “In so ruling, when neither the offer of arbitration stipulated in Article 9 [of the BIT] nor the definition of investments provided for in [the BIT’s] Article 12 did not [sic] set out a condition of consent to arbitration on which the jurisdiction of the arbitral tribunal depended, but a substantive rule, the Court of Appeal, which was only required to verify, with regard to jurisdiction *ratione temporis*, that the dispute had arisen after the entry into force of the treaty, violated the above-mentioned text.”
28. The *Cour de cassation’s* judgment confirmed that, for the reasons stated above, the *Cour d’appel* decision was annulled, except in relation to the Claimant’s admissibility objection. The

¹¹ Cour d’appel Decision, V-OPERATIVE PART

¹² *Cour de cassation*, First Civil Section, No. 21-15.390, 7 December 2022, pages 4-6 (CLA-RA-46) (“**Cour de cassation Decision**”).

¹³ Cour de cassation Decision, para 13.

¹⁴ Cour de cassation Decision, para 13.

¹⁵ Cour de cassation Decision, para 13.

case and the parties were remitted back to the state they were in before the *Cour d'appel* judgment.

V. SUMMARY OF THE PARTIES' POSITIONS

Claimant's Request to Dismiss the Revision Application

29. The Claimant requested that the Tribunal dismiss the Respondent's Revision Application and award indemnity costs to the Claimant.
30. While the Respondent's Revision Application was made pursuant to a different article of the CCP than the proceedings in the French courts, the Claimant submitted that the Respondent relied on the same arguments and the same documents in the two proceedings, such that they both concern the same ultimate issue: whether the Tribunal has jurisdiction *ratione temporis* in the arbitration.¹⁶ This was also the conclusion of the Tribunal when it stayed the Revision Application.¹⁷
31. The Claimant averred that as the *Cour de cassation* had conclusively dismissed the Respondent's challenge of the Tribunal's jurisdiction in the set aside proceedings, upon "*a full review of the jurisdiction issue*,"¹⁸ that same challenge in the Revision Proceeding before this Tribunal must also fail.¹⁹
32. The Claimant emphasised that the Respondent sought a revision to the Award based on lack of jurisdiction *ratione temporis* and must be precluded from making further applications to revise the Award, including on the merits.²⁰

Respondent's Response

33. The Respondent submitted that the Revision Application was based on its discovery of three new documents that showed the original bylaws of the Claimant were approved on 3 September 1991 and registered by the National Bank of Ukraine on 31 December 1991. This information was not before the Arbitral Tribunal when it issued its Award. The Respondent

¹⁶ Dismissal Application, para 19.

¹⁷ Dismissal Application, para 20.

¹⁸ Stay Decision, para 24.

¹⁹ Dismissal Application, para 21.

²⁰ Dismissal Application, para 24.

said that, had the Tribunal had this information, it would have found that the conditions of Article 12 of the Treaty had not been met.²¹

34. The Respondent maintained that the set aside proceedings had not yet been terminated and the Paris *Cour d'appel*, to which the case has now been referred, will consider all the set aside grounds advanced by the Respondent, including the ground that the Claimant's investment pre-dates the temporal requirement in the Treaty. The Respondent considered this temporal requirement to be both a jurisdictional ground for set aside and a violation of international public policy.²²

35. According to the Respondent, the *Cour de cassation* had not yet decided on the Revision Application and had not reviewed the conditions of Article 12 of the Treaty. Thus, the decision of the *Cour de cassation* did not impact the issues to be determined in the Revision Proceedings.²³

36. The Respondent recalled that the Tribunal stayed the Revision Application until *Cour de cassation* ruled on the set aside application. The Respondent submitted that, as the *Cour de cassation* issued its decision on 7 December 2022, the Tribunal may now "*consider whether or not to lift the stay and to proceed to decide the Revision Application.*"²⁴

37. As the *Cour de cassation* did not decide the merits issues, including the violation of public policy, the Respondent contended that issues in the Revision Application remained live:²⁵

"... after six years of proceedings, no court or tribunal (other than the quashed set aside ruling issued on 30 March 2021 by the Paris Court of appeal in favour of the Russian Federation) has yet decided about the date of acquisition and operation of the Crimean assets, which determines the applicability of the BIT under its Article 12 and which is a provision that the Tribunal itself characterized as a "*key provision of the Treaty*" (Award, p. 22-23)."

38. The Respondent submitted that the Tribunal must not lift the stay without determining the issues. If the stay is lifted, the Tribunal must fully consider the Revision Application.²⁶

²¹ Response, page 2.

²² Response, page 3.

²³ Response, page 4.

²⁴ Response, page 4.

²⁵ Response, page 5.

²⁶ Response, page 7.

Alternatively, submitted the Respondent, the Tribunal could continue the stay until the Paris *Cour d'appel* considers the merits of the issues in the set aside application.

Claimant's Reply

39. In its Reply letter of 6 March 2023, the Claimant maintained its request that the Tribunal dismiss the Respondent's Revision Application, stating that the Respondent had mischaracterised its challenge in the French courts.²⁷ While the Respondent's set aside application included a number of grounds for challenge, the primary basis on which set aside was sought was that the Tribunal lacked jurisdiction *ratione temporis* under the Treaty, as the investment pre-dated 1 January 1992.²⁸ The *Cour de cassation* rejected this challenge.
40. The Claimant emphasised that the Respondent's sole basis for seeking revision of the Award under Article 1502 of the French Civil Code was that the Tribunal lacked jurisdiction because the investment pre-dated 1 January 1992. Relying on the new documents it allegedly discovered, the Respondent has sought revocation of the Award based on the Tribunal's lack of jurisdiction *ratione temporis* and contended that, had the Tribunal been aware of the documents, it would have influenced the Tribunal's conclusion on jurisdiction (not merits).²⁹ The Claimant submitted that an identical argument regarding jurisdiction *ratione temporis* was made before the French courts and rejected by the *Cour de cassation*.
41. According to the Claimant, the Respondent has now attempted to recharacterize the Revision Application to avoid a *res judicata* finding. In doing so, submitted the Claimant, the Respondent "*conflates the legal issue at the core of the Revision Application (i.e., whether the Tribunal had jurisdiction ratione temporis in the arbitration in line with Article 12 of the Treaty) with an evidentiary question underlying the Respondent's jurisdictional objection.*"³⁰
42. The Claimant observed that the *Cour de cassation* has now very clearly addressed the jurisdiction issue, which is precisely the issue raised in the Revision Application. The *Cour de cassation* has decided that the Tribunal's temporal jurisdiction does not depend on whether the Claimant's investments claimed in the arbitration were made before or after 1 January 1992 (i.e., the alleged discovered documents are irrelevant to the Tribunal's jurisdiction *ratione temporis*).³¹ The Claimant submitted that, as a result, the very issue that is before this

²⁷ Reply, para 3.

²⁸ Reply, para 5.

²⁹ Reply, paras 6-9.

³⁰ Reply, para 12.

³¹ Reply, para 16.

Tribunal in the Revision Application has been conclusively determined by the French courts and that the set aside grounds that will now be determined by the *Cour d'appel* are irrelevant to the Revision Application.

43. The Claimant alleged that the Respondent is now attempting to amend its Revision Application as pertaining to either jurisdiction or the merits. The Claimant stated that this was not permissible under CCP.³²

Respondent's Rejoinder

44. The Respondent submitted that its request to revoke the Award in the Revision Application was not based on lack of jurisdiction, but on the fact that the Claimant lied and misled the Tribunal in breach of Article 595 of the French Civil Code. As the *Cour de cassation* did not rule on whether the Claimant had lied and misled the Tribunal or withheld decisive documents, these matters are not *res judicata*.³³
45. In addition, according to the Respondent, the French doctrine of *res judicata* would not apply to this case as the dispositive part of the *Cour de cassation* judgment does not address the issues raised in the Revision Application. Therefore, there is no "triple identity" because of differing subject matter, and also because the concept of jurisdiction under the CCP differs from that under the UNCITRAL Rules.³⁴
46. The Respondent suggested that the Claimant was attempting to characterize the Respondent's application as pertaining to *ratione temporis* jurisdiction to divert attention from its improper procedural behaviour.³⁵ Rather, the Revision Application involved two steps: (i) revocation based on procedural fraud; and (ii) issuing a revised award now that the Tribunal is enlightened with the new information.³⁶

VI. TRIBUNAL'S ANALYSIS

The Respondent's Revision Application

47. The Tribunal recalls the contents of the Revision Application, which is informative in determining whether the doctrine of *res judicata* applies.

³² Reply, para 26.

³³ Rejoinder, pages 1-2.

³⁴ Rejoinder, page 3.

³⁵ Rejoinder, page 2.

³⁶ Rejoinder, page 2.

48. It is evident from paragraph 3 of the Revision Application that the claim in the French courts was based on the Tribunal's alleged lack of jurisdiction.³⁷

"The Russian Federation's position is that the Tribunal had no jurisdiction to decide on Oschadbank's claims and, the Tribunal having decided otherwise, the Russian Federation has initiated set aside proceedings against the Award before the Court of appeal of Paris."

49. In addition to its application before the French courts, the Respondent requested revision of the Award under Article 1502 of the CCP. The Respondent submitted that it was entitled to seek a revision from the Tribunal on the basis that "*the winning party committed procedural fraud.*"³⁸ This alleged fraudulent behaviour was the concealment of documents that, the Respondent submitted, demonstrates the Tribunal's lack of jurisdiction under Article 12 of the Treaty.

50. The Respondent submitted that the concealment of information regarding the date of the investment "*is sufficient to demonstrate that the conditions under French law for the revision of an arbitral award are fulfilled.*"³⁹ The Respondent emphasised that fraud had occurred because the Claimant had the burden of proving jurisdiction, citing past cases in support of this contention.⁴⁰ The Respondent said that the Claimant was required to "*submit evidence that the Tribunal had jurisdiction over the alleged violation of the BIT.*"⁴¹

51. Based on the new documents, the Respondent submitted that "*the Crimean Branch is ... an alleged investment that is not protected racione temporis by the BIT*"⁴² and that the facts and "*the documents recently found would have conducted the Tribunal to decide that it does not have jurisdiction over Oschadbank's claims.*"⁴³

52. Paragraph 40 sets out the Respondent's "Request for Relief" and is particularly important to the analysis that follows:

"For all the reasons set out above the Russian Federation respectfully requests the Tribunal to:

³⁷ Revision Application, para 3.

³⁸ Revision Application, para 5.

³⁹ Revision Application, para 23.

⁴⁰ Revision Application, para 33.

⁴¹ Revision Application, para 36.

⁴² Revision Application, para 17.

⁴³ Revision Application, para 39.

- (a) revoke (“rétracter”) the Award rendered on 26 November 2018;
- (b) issue a new award declaring that it has no jurisdiction over Oschadbank’s claims . . .”

Tribunal’s conclusions on the nature of the Revision Application

53. Having reviewed the Revision Application, it is clear to the Tribunal that it is focused on two primary elements:
- a. The first element is that the conditions for revision of the Award under French law have been fulfilled (paras 24-39 and 40(a) of the Application). This element must be satisfied for the Tribunal to be permitted to revise the Award; and
 - b. The second element is the revision sought by the Respondent to the Award, being that the Tribunal issue a new award declaring it has no jurisdiction over the Claimant’s claims (paras 10-23 and 40(b) of the Application).
54. In the Tribunal’s view, once the Respondent has satisfied the conditions for revision under Article 595 of the CCP, the Respondent’s sole remaining contention is that the new documents demonstrate lack of temporal jurisdiction. In the Revision Application, the Respondent states that Article 1502 is invoked because “*since the judgement, decisive documents that have been withheld by the act of [the Claimant]*” have been discovered that “*indisputably show that the Tribunal lacked jurisdiction.*”⁴⁴ The Respondent’s position is that, had the documents been before the Tribunal during the proceedings, the Tribunal “*would have inevitably decided that it lacked jurisdiction*” because the investment was made prior to 1 January 1992.⁴⁵
55. There is no other basis advanced by the Respondent for a revised finding in the Award as result of the information in the new documents. The Revision Application does not, contrary to the Respondent’s assertions, characterise the temporal restrictions of Article 12 as pertaining to either jurisdiction or the merits.⁴⁶ There is no mention of revising the Award based on the merits or that the Claimant’s claims fail on substantive issues. The sole relief requested is a finding that the Tribunal lacks jurisdiction.
56. The Tribunal agrees with the Claimant that the Respondent cannot now recharacterize the issue as a broader concept pertaining to either jurisdiction or the merits. That was simply not

⁴⁴ Revision Application, paras 6 and 10 (heading).

⁴⁵ Revision Application, para 11.

⁴⁶ Response, page 6.

how the original Revision Application was framed by the Respondent. This is clear from the submissions contained in the Application, as well as the specific relief requested in paragraph 40 of the Application.

57. The Respondent's decision to characterize the Application (and the documents) as pertaining to jurisdiction is relevant when considering the findings of the *Cour de cassation*.

The Court's Ruling

58. The Revision Application was stayed because the French courts were addressing the same issues that were before the Arbitral Tribunal. While other issues may also have been before the French courts, it is clear from paragraph 3 of the Revision Application that the jurisdiction issue was squarely before the French courts.
59. As the Tribunal stated when it initially stayed the Revision Application, "both this Tribunal and the Parisian Court will issue rulings on the same underlying point, based on the same evidence ... the Paris Court of Appeal is certain to address the same ultimate issue as has been presented to this Tribunal."⁴⁷ This is now what has transpired.
60. The *Cour d'appel* considered jurisdiction and found that the information in the new documents demonstrated that the Tribunal lacked jurisdiction *ratione temporis*, as the investment pre-dated January 1992. This is precisely the finding that the Respondent has sought from this Tribunal.
61. As set out in paragraphs 25-28 above, the *Cour de cassation* reversed the *Cour d'appel* decision, finding that the *Cour d'appel* had erred in its ruling that the Tribunal lacked temporal jurisdiction. This is because, according to the *Cour de cassation*, Article 12 of the Treaty did not impose a jurisdictional requirement on consent to arbitration and any breach of Article 12 did not deprive the Tribunal of jurisdiction in this matter. The Court found that Article 12 of the Treaty was "substantive" in nature and did not go to jurisdiction.
62. As the *Cour d'appel* did not decide upon the other grounds of the Respondent's application, nor on Article 12 as a substantive issue, these matters have been remitted to it for its consideration.

⁴⁷ Stay Decision, paras 24-25.

Res Judicata

63. In the Tribunal's view, while the *Cour d'appel* is still to determine the remaining issues raised by the Respondent in its set aside application, the issue of jurisdiction *ratione temporis* has now been conclusively determined by the French courts.
64. The Claimant submitted that the Revision Application must be dismissed as a result of the findings of the *Cour de cassation*. The Respondent contested this on the basis that its Revision Application involved different issues and required two steps to be determined, being revocation of the original Award and replacement of it with a new award finding that the Tribunal has no jurisdiction over Oschadbank's claims.⁴⁸
65. The issue for the Tribunal is whether the *Cour de cassation* decision prevents the Tribunal from granting the remedy requested by the Respondent in its Revision Application – that is, revision of the Award to find that the Tribunal lacks jurisdiction over the Claimant's claims. The lack of jurisdiction must be temporal in nature (based on Article 12 of the Treaty), as this is the only issue raised by the new documentation and referenced by the Respondent in its Application.
66. In its Rejoinder submission the Respondent stated:⁴⁹
- “The authority of *res judicata* only applies to what was the subject of the judgment. The thing sought must be the same; the claim must be based on the same cause of action; the claim must be between the same parties, and made by them and against them in the same capacity.”
67. It is beyond cavil that these elements are satisfied in the present case. The parties in the *Cour de cassation* action are the same and they are acting in the same capacity. The issue to be determined is also the same. This is clear from the Respondent's summary of the claim in paragraph 3 of the Revision Application where it states that set aside proceedings in the Court have been initiated on the basis that “the Tribunal had no jurisdiction to decide on Oschadbank's claims” – precisely the same relief sought from this Tribunal. The Respondent's position before the French courts was identical: the Tribunal lacks jurisdiction *ratione temporis* due to breach of Article 12 of the Treaty, based on the information contained in the newly discovered documents. This is the very issue that the *Cour de cassation* decided.

⁴⁸ Rejoinder, page 2.

⁴⁹ Rejoinder, footnote 4.

68. The Tribunal agrees with the Claimant that:⁵⁰

“Thus, the French Supreme Court conclusively established the Tribunal’s temporal jurisdiction does not depend on whether the Claimant’s investments claimed in the arbitration were made before or after 1 January 1992; in other words, the French Supreme Court ruled that the alleged Newly Discovered Documents are irrelevant to the Tribunal’s jurisdiction *ratione temporis*.”

69. The Tribunal does not accept the Respondent’s contention that the subject matter was different just because the *Cour de cassation* was considering whether to uphold the judgment of the *Cour d’appel*. The decision to overturn the lower Court’s judgment was based on the finding by the *Cour de cassation* that Article 12 does not raise a jurisdictional issue. The *Cour de cassation* has conclusively determined the Respondent’s claims on jurisdiction *ratione temporis*. The claims that remain live in the French courts (and will now be considered by the *Cour d’appel*) concern the substantive merits, not jurisdiction. Those remaining issues are not before this Tribunal in the Revision Application.

70. To grant the relief requested by the Respondent in the Revision Application, this Tribunal must make a finding on jurisdiction *ratione temporis* that is directly contradictory to the finding of the *Cour de cassation* on the same issue, between the same parties, acting in the same capacity. Such an outcome is precluded by the doctrine of *res judicata*.

71. The fact that the Respondent considers the position of the *Cour de cassation* to be incorrect or at odds with the findings of other courts,⁵¹ does not allow it to circumvent the *res judicata* doctrine. It is not a doctrine that can be ignored simply because a party disagrees with a court’s findings on a matter.

72. For the reasons above, the Tribunal finds that it is precluded from revising the Award to find that it lacks jurisdiction *ratione temporis* on the basis that this issue has already been conclusively and finally determined by the *Cour de cassation*.

The remainder of the Revision Application

73. The Respondent has emphasised that this Tribunal has been asked to grant two separate orders – revocation of the Award for procedural fraud and issuance of a new award finding lack of jurisdiction. Both requested reliefs rely on the new documents.

⁵⁰ Reply, para 16.

⁵¹ Response, page 4; Rejoinder, page 3.

74. As the Respondent states, the *Cour de cassation* did not determine whether the Claimant “*lied to the Tribunal and misled it*”⁵² – albeit this is also not a finding requested of this Tribunal. The Tribunal agrees, nonetheless, that the *Cour de cassation* did not address the Respondent’s requested relief that the Award be revoked (or revised) under Article 595 of the CCP.
75. However, in the Tribunal’s view, this does not affect the ultimate outcome. If the Tribunal is to find that the Award should be revised under Article 595 of the CCP, the sole revision requested is a new award declaring the Tribunal lacks jurisdiction.
76. The Tribunal considers that it is not open to it to revise the Award on any other basis than that requested by the Respondent. There was no broad “catch-all” relief that the Tribunal revise the Award in any manner it considers appropriate. The Tribunal recalls that revision of an award under Article 1502 is an exceptional remedy. Due to the exceptional nature of the remedy, it would be improper for the Tribunal to stray from the specific relief requested and revise the award in any manner it chooses. This is not a course of action open to the Tribunal.
77. Based on the requested relief, the only revision that the Tribunal is entitled to make is to find, based on the new documents, that the Tribunal lacks jurisdiction *ratione temporis* over the Claimant’s claims. This finding has been precluded by the decision of the *Cour de cassation*.
78. Therefore, even if the Tribunal were to find that the Award could be revised under Article 1502 (and Article 595) based on the concealment of documents, the revision requested could not be granted and there is no alternative revision available to the Tribunal, based on the relief requested by the Respondent. The Tribunal agrees with the Claimant that resuming the revision proceeding in circumstances where there is no prospect of the relief being granted would simply waste time and cost.⁵³
79. On this basis, the Tribunal finds that the Revision Application must be dismissed. Of course, the Respondent may continue to pursue its remedies in the French courts. However, the door to the exceptional remedy of revision in Article 1502 has now been closed by the findings of the *Cour de cassation*.

⁵² Rejoinder, page 1.

⁵³ Reply, para 25.

VII. DECISION

80. For all of the foregoing reasons, the Tribunal decides:

- a. The Claimant's request to dismiss the Respondent's Application for Revision of the Award dated 19 August 2019 is granted;
- b. The Respondent's Application for Revision of the Award dated 19 August 2019 is dismissed; and
- c. Costs are reserved for further consideration following submissions from the parties (to be directed).

Place of Arbitration: Paris, France

Date: 11 December 2023



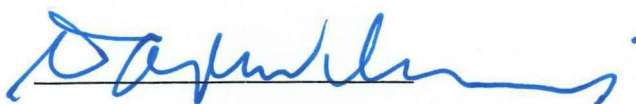
The Honorable Charles N. Brower

Arbitrator



Mr. Hugo Perezcano Díaz

Arbitrator



Sir David A.R. Williams KNZM KC

Presiding Arbitrator