Panel ready for Ukrainian bank's second treaty claim against Russia

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Dyalá Jiménez

Costa Rican arbitrator **Dyalá Jiménez** is presiding over the tribunal that will hear a new investment treaty arbitration brought by Ukrainian state-owned bank Oschadbank against Russia over its actions in Ukraine, as Russia continues its effort to revise a US$1 billion award won by the bank in an earlier case.

Oschadbank announced in April that it had filed the new arbitration in respect of "substantial assets and operations in the Donetsk, Luhansk, Kherson, and Zaporizhzhia regions" of south-eastern Ukraine that it says it has lost since the annexation of Crimea in 2014 and especially since

Russia's full-scale invasion of the country in 2022.

The four regions of Ukraine, which represent roughly 15% of its territory, have been declared Russian territory after referendums that Ukraine and its Western allies have denounced as sham.

Oschadbank has brought its claim – understood to be worth hundreds of millions of dollars – under the 1998 Ukraine-Russia bilateral investment treaty after a notice of dispute served on Russia in July last year allegedly went unanswered. It previously won US$1.1 billion (US$1.3 billion with interest) from Russia in 2018 over losses in Crimea in another case under the Ukraine-Russia BIT.

In the new case, Oschadbank is represented by the same lead counsel from Quinn Emanuel Urquhart & Sullivan that secured its last win, led by partners **Epaminontas Triantafilou** and **Alex Gerbi** in London, and by the same co-counsel from Asters in Kyiv.

Russia did not participate in the first arbitration and was unrepresented for the hearing. For the new case, it has instructed counsel from Pinna Goldberg in Paris, who are currently representing the state in cases brought by German energy group Wintershall Dea and Ukrainian energy company Ukrenergo in relation to the invasion of Ukraine and in French court proceedings relating to the first Oschadbank arbitration and award. The team is composed of partner **Andrea Pinna**, counsel **Pratyush Panjwani** and senior associate **Dimitrios Papageorgiou**.

Oschadbank has appointed as its arbitrator **Stavros Brekoulakis**, a Greek arbitrator and professor at the National University of Singapore. Russia has picked **DY Chandrachud**, a retired Indian Supreme Court judge who was chief justice of India from 2022 to last year.

Jiménez was picked as tribunal president by both sides. She is a Costa Rican former trade minister and the granddaughter and niece of former presidents of Costa Rica.

As reported by GAR, Chandrachud was previously approached by Russia last year to act as arbitrator in the Wintershall and Ukrenergo cases following the resignation from both tribunals of Russia's previous appointee, **Hamid Gharavi**. The French-Iranian arbitrator had stepped down after Russia started anti-arbitration proceedings in Moscow seeking to restrain the Wintershall arbitrators from continuing to hear the case, with a €7.5 billion penalty if they disobeyed.

Chandrachud declined to act as Russia's arbitrator in either case as, on the very day he was approached, the Permanent Court of Arbitration made him appointing authority in the Wintershall arbitration, responsible for picking Gharavi's successor on the tribunal among other tasks. Chandrachud later stepped down from this role, having disclosed all his communications with Russia.

In the Wintershall case, Gharavi was replaced by Singaporean arbitrator **Geoffrey Ma** and, in the Ukrenergo case, by Hong Kong arbitrator **Teresa Cheng SC**.

The previous arbitration between Oshadbank and Russia was heard by a Paris-seated UNCITRAL tribunal consisting of New Zealand arbitrator **David AR Williams KC** as chair, with US arbitrator **Charles Brower** appointed by Oschadbank and Mexican arbitrator **Hugo Perezcano Diaz** chosen by the appointing authority on Russia's behalf, given the state's non-participation in proceedings.

After the award in 2018, the tribunal issued two further decisions, in 2023 and 2024, rejecting a request by Russia for revision of the award based on new evidence and ordering it to bear the costs of the revision proceeding.

Since the arbitration, there have been prolonged proceedings in the French courts over the award. It was set aside in 2021, after a court accepted Russia's arguments that the BIT's offer to arbitrate only applied to investments made after Oschadbank's Crimean branch opened, but reinstated by the French cassation court a year later on the basis that the relevant provision could not be subject to court review.

Recent court proceedings have focused on a brief requesting the participation of *amicus curiae* that was co-signed by Brower two years ago on behalf of the former majority shareholders of Yukos Oil Company as they fight to enforce their US$50 billion Energy Charter Treaty award against Russia in the US. Pinna Goldberg is advising Russia in post-award litigation in relation to that case too.

The brief, which Brower co-signed with **Harold Hongju Yoh** of Yale Law School and **Diane Desierto** of Notre Dame Law School, criticised Russia's conduct in systematically challenging decisions that were unfavourable to the state and accused it of "endless *do overs*" of arguments that had already been rejected by the Dutch courts in set-aside proceedings.

An attempt by Russia to set aside the 2018 award in favour of Oschadbank because of the brief signed by Brower failed last year, with a court ruling that it did not address the subject matter of the dispute and was submitted more than five years after the award. However, the Paris Court of Appeal recently annulled the tribunal's decision on revision of the award and a related costs decision after finding that the brief created reasonable doubts about Brower's impartiality.

In a ruling in June, the Paris Court of Appeal said the brief was "extremely critical" of Russia and its strategy of challenging unfavourable awards, including through the request to revise the Oschadbank award. It noted the tribunal including Brower had refused to revise the award just five months before the brief, while the decision on costs came after.

As a result of the June ruling, Russia's request to revise the 2018 award remains undecided and must be adjudicated afresh by an arbitral tribunal. Through Pinna Goldberg, Russia has applied to the PCA to resume the revision proceeding and appointed as its arbitrator **Georges Affaki**, founding partner of Affaki in Paris and a professor of law at the University of Paris. Oschadbank has yet to appoint an arbitrator.

Meanwhile, Oshadbank continues to seek the enforcement of the award in multiple jurisdictions, with Russia opposing, and last year said it had secured the attachment of Russian assets worth around €87 million in France.

Other enforcement proceedings are taking place in the US District of Columbia, the UK, Finland and the Czech Republic, while discovery proceedings have started in New York.

Offering an insight into possible quantum in the new arbitration, Oschadbank's CEO Sergii Naumov said last year that the bank's losses at the hands of Russia in the wake of the 2022 invasion included loan amendment expenses, changes in the fair value of loans, additional payments for staff support, lost interest and the devaluation of the Ukrainian hryvnia. He said an internal estimate of the “total negative impact” of Russia’s invasion on the bank was around US$460 million and that “distinguishable direct losses” amounted to around US$379 million.

Yurii Katsion, chairman of the Oschadbank management board, said when the new arbitration was filed against Russia that it is the “next step towards bringing the aggressor state to financial accountability" and deputy CEO Arsen Miliutin has said it is working "systemically" to enforce its existing award in multiple jurisdictions since Russia “will not voluntarily comply with decisions”.

Oschadbank has also said that, as the first Ukrainian company to obtain and enforce a final award against Russia, it is an "example" for thousands of other Ukrainian private and state-owned companies.

In the new BIT claim – Oschadbank v Russia

Tribunal

- **Dyalá Jiménez** (president) (Costa Rica)
- **Stavros Brekoulakis** (Greece) (appointed by Oshadbank)
- **DY Chandrachud** (India) (appointed by Russia)

Counsel to Oschadbank

- Quinn Emanuel Urquhart & Sullivan

Partners **Epaminontas Triantafilou** and **Alex Gerbi** in London

- Asters

Partners **Oleksiy Didkovskiy**, **Andrii Pozhidayev** and **Oksana Legka** in Kyiv

Counsel to Russia

- Pinna Goldberg

Partner **Andrea Pinna**, counsel **Pratyush Panjwani** and senior associate **Dimitrios Papageorgiou in Paris**

In the first BIT arbitration – Oschadbank v Russia (Paris-seated under UNCITRAL rules)

Tribunal

- **David AR Williams KC** (New Zealand) (President)
- **Charles N Brower** (US)
- **Hugo Perezcano Diaz** (Mexico)*

* *appointed on Russia's behalf by* ***Michael Hwang SC*** *as appointing authority designated by the PCA*

<u>Counsel to JSC Oschadbank</u>

- Quinn Emanuel Urquhart & Sullivan

Partners **Stephen Jagusch KC, Alex Gerbi** and **Epaminontas Triantafilou** and associates **Anna Tkachova*, Philip Devenish*, Manthi Wickramasooriya, Sonal Pandya** and **Tina Kang*** in London

* *No longer with the firm*

- Asters