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Published PDF deposited in Coventry University repository

Original citation:

Turksen, U. (2016) The Russian Roulette? Risks in Energy Investment Disputes in the Russian Federation. *Oil, Gas and Energy Law* 4 (2016)

<https://www.ogel.org/article.asp?key=3654>

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www.ogel.org

ISSN : 1875-418X
Issue : Vol. 14 - issue 4
Published : November 2016

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The Russian Roulette? Risks in Energy Investment Disputes in the Russian Federation by U. Turksen

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The Russian Roulette? Risks in Energy Investment Disputes in the Russian Federation

Dr. Umut Turksen¹

Abstract

The Russian Federation (Russia) has not managed to improve its investment environment effectively. The impetus of easing access to strategic industries for foreign investors and improving its domestic legal regime have not reached its full potential either. The on-going geo-political and geo-economic conflicts in and around Russia as well as the uncertain investor protection regime coupled with a general lack of rule of law in Russia contribute to this trend. As a consequence there is a growing discontent about the investor-state dispute settlement involving bilateral investment treaties to which Russia is a party. Firstly, this article considers the recent developments in investor-state disputes with specific reference to the use or the lack of most favoured nation (MFN) status and other remedial avenues. Secondly, it critiques the provisional application of 'un-ratified' treaties by particular reference to the Energy Charter Treaty (ECT), 1994. Finally, it provides a critique of the enforcement of arbitration awards in Russia in light of the on-going legal reform initiatives in Russia.

It is concluded that MFN treatment is widely accepted yet its application depends on specific provision/s of the BIT thus varies widely. The paper employs case studies pertaining to disputes involving the ECT to demonstrate that there are various pitfalls inherent in the ECT. These include issues of jurisdiction, time and enforcement of awards. While there is evidence that the Russian Courts' application of international conventions on the enforcement of foreign commercial arbitration awards does appear to be improving, the Russian Government has not always heeded to such determinations nor provided an effective and/or a meaningful remedy. Moreover, the recent legislative changes may signify slow deterioration of the Russian judicial system with regards to investment disputes.

Introduction

With the surge of bilateral investment treaties (BITs),² the traditional methods of dispute resolution based on custom and/or power politics have been reduced amongst liberal democracies around the world. Most BITs provide substantive and procedural safeguards for investors thus limit sovereign interference and ensure legal redress if necessary.³ Nevertheless, national interests, domestic politics and geopolitics can still interfere with the security of the investment. Accordingly, there is a need to settle such disputes by independent and credible institutions (e.g. international arbitration, World Trade Organisation, Court of

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² There are nearly 3000 BITs worldwide. See, UNCTAD, World Investment Report 2015, p. 106, http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf.

³ Egli G., Don't get bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions, (2006-2007) *Pepperdine Law Review*, Vol. 34, 1045.

Justice for the European Union, etc). While each BIT is unique, they evidence remarkable similarities⁴ in terms of the legal redress and remedies they offer to investors.

Such provisions derive from a number of common principles found in the BITs. BITs generally stipulate a guarantee that investors will receive adequate legal remedy (i.e. compensation) if their property is expropriated. Secondly, BITs often prohibit the contracting states from hindering the free flow of capital by enacting currency controls.⁵ It is also often the case that BITs prohibit the host state from discriminating on the basis of nationality (e.g. principles of national treatment and MFN status) and require the host state to treat investors fairly and equitably in accordance with customary international law.⁶

While BITs contain numerous substantive rights for investors and investments, they would be deemed ineffective without corresponding procedural rights, which confer direct remedies for investors. Accordingly, BITs allow investors to pursue their claims through international or domestic judicial mechanisms. However, although BITs often allow investors to pursue legal redress via litigation in the host state's legal system, this option is rarely used particularly in jurisdictions which lack rule of law, legal certainty and efficiency. Hence, investors often turn to arbitration as an alternative dispute resolution method.

Undoubtedly, the effectiveness of arbitration depends largely on whether the applicant, if successful, can enforce its claims and subsequent remedies against the respondent.⁷ Robust legal systems in which such reassurances and rights can be relied on contribute to a sound investment environment and increase economic growth.⁸

⁴ Franck D. S., The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions, (2005) *Fordham Law Review*, Vol. 73, 1521.

⁵ Sullivan N. P., Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain, (2005) *Harvard International Law Journal*, Vol. 46, 67.

⁶ *Supra note*, Franck, 1530-32.

⁷ Nmehielle V., Enforcing Arbitration Awards Under the International Convention for the Settlement of Investment Disputes (ICSID Convention), (2001) *Annual Survey of International and Comparative Law*, Vol. 7, 21. Note that Article 54(1) of the International Convention for the Settlement of Investment Disputes, 1965 provides that "Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state". On the other hand, Article 55 contains the following exemption: "Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution..." Accordingly, this provision creates a loophole in favour of states party to a dispute. Egli opines that despite this loophole, execution of awards remains the rule rather than the exception. *Supra note*, Egli, at 1063.

⁸ A number of studies have found that legal certainty, democratic governance, rule of law have a positive impact on investment and economic growth. See for example, Franck S., Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law, (2006) *Pacific McGeorge Global Business and Development Law Journal*, Vol. 19, 337; Li Q. and Resnick A., Reversal of Fortunes: Democratic Institutions and Foreign Direct Investment Inflows to Developing Countries, (2003) *International Organisation*, Vol. 57, Issue 1, 175; Lerner J. and Schoar A., Does Legal Enforcement Affect Financial Transactions? The Contractual Channel in Private Equity, (2005) *The Quarterly Journal of Economics*, Vol. 120, No. 1, 223; Haggard S. *et al.*, The Rule of Law and Economic Development, (2008) *Annual Review of Political Science*, Vol. 11, 205; and Joffé G., Foreign Investment and the Rule of Law, *Euromesco*, March 1999, http://www.euromesco.net/index.php?option=com_content&view=article&id=136%3Apaper-4-foreign-investment-and-the-rule-of-law&catid=102%3Aprevious-papers&Itemid=102&lang=en.

With the collapse of the Soviet Union in 1991, the Russia Federation (Russia) sought to attract foreign investment to support its economic restructuring and development.⁹ The Russian Government swiftly adopted a new model BIT in 1992. This initial framework offered fundamental improvement in comparison to the previous Soviet model, particularly by conferring to investors the right to arbitrate their disputes and invoke the rights granted under the treaty. However, a new model BIT adopted by Russia in 2001 excised a number of fundamental legal protection provisions, including national treatment, MFN treatment and fair and equitable treatment.¹⁰ Subsequent BIT negotiations resulted in a variety of provisions; with some BITs recognising the right to legal protection whilst others do not. This inconsistency has hindered Russia's ability to enhance its investment climate despite a number of significant steps in liberalizing its economy.¹¹ Furthermore, the impetus of easing access to strategic industries for foreign investors and improving its domestic legal regime has not reached its full potential owing to the on-going socio-political conflicts in and around Russia as well as the uncertain investor protection regime, rife corruption¹² and a general lack of rule of law in Russia.¹³ It can be argued that the rule of law is not only problematic in Russia's external trade relations but also in its domestic sphere.¹⁴ For example, by utilising the military, law enforcement, and security agencies (also known as the *siloviki*), the Russian bureaucratic elite achieved the *de facto* nationalization of YUKOS (the largest oil company in Russia) while securing the imprisonment of its former owners.¹⁵ Such takeovers are a result of political rivalries and evidence of the importance of strategic nationalism in Russian government's "decision to intervene into the corporate control structures".¹⁶ It has also been reported that judges (who are financially dependent on local governments) favour local companies over foreigners.¹⁷ As a consequence there has been a growing discontent and mistrust about the investor-state dispute settlement involving bilateral investment treaties to

⁹ Aris S., Russia's Approach to Multilateral Cooperation in the Post Soviet Space: CSTO, EurAcEC, and SCO, (2010) *Russian Analytical Digest*, No. 76, 1, <http://www.css.ethz.ch/publications/pdfs/RAD-76.pdf>.

¹⁰ Luz M., New Model Bilateral Investment Treaty: A Step Backwards for Foreign Investors, *Russian/East European Business & Finance Report*, 15 October 2001.

¹¹ For example, Russia joined the World Trade Organisation (WTO) on 22 August 2012 with specific schedule of commitments that are supposed to open its market to foreign investment and businesses. http://www.org/english/thewto_e/countries_e/russia_e.htm.

¹² Russia ranks 119 out of 168 countries in Transparency International's Corruption Index, 2015, <https://www.transparency.org/country/#RUS>.

¹³ Balcer A., 'Corruption is not just endemic to the Russian system, it is the system. It is in the EU's interest to increase its engagement with Russian society', *LSE European Politics and Policy (EUROPP) Blog* (07 Jun 2012), <http://eprints.lse.ac.uk/46228/>; See, the jurisprudence of the European Court of Human Rights pertaining to the European Convention on Human Rights to which the Russian Federation is a signatory: <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/Decisions+and+judgments/HUDOC+database/>.

¹⁴ Turksen U., 'Euro-vision of Energy Trade with Russia: Current problems and future prospects for EU solidarity in energy trade', (2014) *Oil, Gas and Energy Law*, Vol. 12, Issue 4, 34.

¹⁵ Yakovlev A., In Search for a New Social Base or Why the Russian Authorities Are Changing Their Relations with Business By, *Russian Analytical Digest*, 21 Dec. 2012, No.121, p. 10. For a list of nationalization transactions in Russia between 2004 and 2008 see, Sprenger C., Does Nationalization Work? Evidence from Russian State Takeovers, European Financial Management Association, 05 January 2012, http://www.efmaefm.org/0EFMAMEETINGS/EFMA%20ANNUAL%20MEETINGS/2012-Barcelona/papers/EFMA2012_0612_fullpaper.pdf.

¹⁶ Chernykh L., Profit or politics? Understanding renationalizations in Russia, (2011) *Journal of Corporate Finance*, Vol. 17, Issue 5, 1237.

¹⁷ See, Burger E. S., Corruption in the Russian Arbitrazh Courts: Will There Be Significant Progress in the Near Term?, (2004) *International Law*, Vol. 38, 15 and Glusker E., Arbitration Hurdles Facing Foreign Investors in Russia: Analysis of Present Issues and Implications, (2010) *Pepperdine Dispute Resolution Law Journal*, Vol. 10, No. 3, p. 602.

which Russia is a party.¹⁸ It can be seen that both foreign and native investors prefer to take their disputes outside of Russia as the adjudicators in London's High Court and the International Dispute Resolution Centre have seen a surge of disputes involving Russia.¹⁹

Firstly, this article considers the recent developments in investor-state disputes with specific reference to the use of MFN status and other remedies. In doing so, it analyses scenarios in which an MFN obligation has arisen. The article does not intend to discuss all of the MFN clauses contained in BITs. Rather, it confines itself to establishing the prospects for invoking MFN status pertaining to BITs involving Russia as the host state.

Secondly, it critiques the provisional application of 'un-ratified' treaties by particular reference to the ECT as it is currently the only major multilateral treaty in the energy field in terms of investment protection with the largest geographical and country coverage.²⁰ Finally, it provides a critique of the enforcement of arbitration awards in Russia. Given the uncertainty of the legal and political uncertainty in Russia, the paper explores whether invoking MFN treatment is feasible and if so, whether it would circumvent the risks posed to investors in Russia. It is concluded that MFN treatment is widely accepted yet its application depends on specific provision/s of the bilateral investment treaty (BIT) concerned. As a result of this inconsistency, a careful consideration must be given to the scope and nature of the MFN status in negotiations and drafting of investment agreements with Russia. The analysis also utilises disputes involving the ECT to demonstrate various pitfalls including issues of jurisdiction, time and enforcement of awards. While there is evidence that the Russian courts' application of international conventions on the enforcement of foreign commercial arbitration awards has improved in recent years, the Russian Government has not always heeded to such determinations nor provided an effective remedy. The Russian Government's strategy in curtailing proper enforcement and remedy has included exploitation of the inability of foreign creditors to enforce against state assets in Russia, making use of sovereign immunity rules in other countries and delaying payment of awards for years.²¹

It is argued that in addition to creating a more predictable energy policy and regulation regime, the future of Russia depends on whether and to what extent the Russia can agree on and comply with rules of international trade²² and decisions of independent adjudicators. Given the current crisis involving Ukraine and Russia and the subsequent geopolitical decisions and sanctions influencing trade relations between Russia and its main trading partners (e.g. the European Union), it is difficult to foresee what the immediate future holds for investors and businesses operating in Russia. Yet, there could be a degree of success in mitigating risks in Russia if due consideration is given to recent legal developments.

¹⁸ "Most Russian BITs contain a dispute resolution clause limiting jurisdiction of arbitral tribunals to hear disputes over the fact of expropriation". See, E. Gadelshina, Major Pitfalls for Foreign Investors in Russia: What Are Russian BITs Worth, 01 December 2011, Kluwer Arbitration Blog.

¹⁹ Minaeva T., The enforcement of foreign judgments and arbitral awards in Russia, *The Lawyer*, January 2014.

²⁰ Konoplyanik A. and Wälde T., Energy Charter Treaty and its Role in International Energy, (2006) *Journal of Energy and Natural Resources Law*, Vol. 24, No. 24, 526.

²¹ One of the most notorious and worst scenario cases in this regard is the Noga case, which took over two decades without success for the claimant. Noga faced intimidation by the Russian authorities and went bankrupt having spent \$40 million in legal costs. *Compagnie Noga D'importation et D'exportation S.A. v. The Russian Federation*, Docket Nos. 02-9237(L), 02-9272(CON).

²² Yakovlev A., In Search for a New Social Base or Why the Russian Authorities Are Changing Their Relations with Business, *Russian Analytical Digest*, 21 Dec. 2012, No.121, 10. Yakovlev opines that "Russia's highest officials recognize that in order to preserve the political regime, it is necessary to change the model of relations with business. However, the lack of correct stimuli for bureaucrats at the middle level continues to be a serious obstacle for development".

1. Can MFN be utilised as a remedy against expropriation?

a. Problems with the BITs involving Russia

It would be fair to say that the main objective of most BITs is the protection of investments made by investors.²³ This however – as practice demonstrates – has not always been the case in BITs with Russia.

Russia signed its first BIT with Finland in 1989 and has currently 73 BITs in place, 56 of which are in force. The remaining 17 have been signed but are not in force because they have not yet been ratified by Russia, other party or both.²⁴ Several of the major Russian BITs with countries of Western Europe and further afield are surprisingly narrow in their scope and therefore offer very little legal protection to the foreign investors, including BITs with Austria, Belgium-Luxemburg, Finland, Germany, Korea, Netherlands, Spain, Switzerland, and UK.²⁵ The common denominator in these BITs is that the investors have no redress or legal remedy in general and are not entitled to instigate arbitration proceedings in particular, in relation to the expropriation of its investment by Russia. It is important to note that Article 15(4) of the 1993 Russian Constitution provides that the principles and norms of international law and international treaties of the Russian Federation are an integral part of Russia's legal system.²⁶ This clearly creates a monist system²⁷ in regards to incorporation of international legal instruments and their effect in domestic law, and may explain why Russia has always been reluctant to include and/or limited the scope of provisions for independent adjudication of trade disputes in its various international agreements.²⁸

For instance, under the Germany-Russia BIT, the investor is limited to arbitrate issues “relating to the amount of compensation or the method of its payment [...] or to freedom of transfer [...]”.²⁹ Incidentally, Germany is the second major source of foreign direct investment flow (FDI) to Russia.³⁰ Likewise under the Netherlands-Russia BIT, an investor can only arbitrate “disputes concerning the amount or procedure of payment of compensation [...] or concerning the free transfer [...]”.³¹ The Netherlands is the third biggest contributor in terms of value of FDI flows to Russia.

²³ For further discussion see: Juillard P., *Bilateral investment treaties in the context of investment law*, OECD: (<http://www.oecd.org/investment/internationalinvestmentagreements/1894794.pdf>).

²⁴ Investment Policy Hub (UNITED NATIONS UNCTAD), *International Investment Agreements*: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/175#iiaInnerMenu>.

²⁵ Rubins N. and Rubinina E., *Global Arbitration Review - Overview of the Investment Treaty Program: Russia*, 10 September 2014; <http://globalarbitrationreview.com/know-how/topics/66/jurisdictions/26/russia/>.

²⁶ Butler W.E., “*Russian Foreign Relations and Investment Law*”, OUP 2006, p. 49; adoption of the international law without a need for its prior translation into the domestic legislation is termed “monist”, see: *Morgan and Baker v Hinton Organics (Wessex) Ltd and CAJE* [2009] EWCA Civ 107 CA.

²⁷ Jackson J., *Status of treaties in domestic legal systems: A policy analysis*, (1992) *American Journal of International Law*, Vol. 86, No. 2, 302-340.

²⁸ *Supra note*, Turksen.

²⁹ Article 10(2) of Germany-Russia BIT.

³⁰ KPMG, *Statistic from years 2007-2011; ‘Investing in Russia: An overview of the current investment climate in Russia’*, April 2013:

(<https://www.kpmg.com/NL/nl/IssuesAndInsights/ArticlesPublications/Documents/PDF/High-Growth-Markets/Investing-in-Russia1.pdf>)

³¹ Art 9(2) of Netherlands-Russia BIT.

In one of the landmark cases, *Vladimir Berschander and Moïse Berschander v Russia*,³² the tribunal held that the claim for expropriation fell outside the scope of Russia-Belgium/Luxemburg BIT allowing only for arbitration as to the amount of compensation and the method of payment.

Similar wording may be found in a BIT between Russia and UK, Russia's third biggest source of FDI.³³ It states that only the disputes “concerning the amount or payment of compensation [...], or concerning any other matter consequential upon an act of expropriation [...], or concerning the consequences of the non implementation of [transfer provisions]”³⁴ may be referred to arbitration. In *RosInvest*, the tribunal confirmed the position taken in *Berschander* and held that the claim for expropriation fell outside of the scope of the UK-Russia BIT.³⁵ It appears therefore that for German, Dutch, Belgian and UK investors, the only recourse for establishing the occurrence of expropriation would be to refer the dispute to the national judicial authorities in Russia, which is not often a satisfactory outcome.³⁶ Since these BITs do not allow investors to arbitrate in the event of expropriation, their object and purpose are defeated.³⁷ This is a serious flaw in Russia's approach to investment and present a great risk to investors.

b. Trick or treat – MFN as a solution or bait?

The most logical solution to overcome the shortcomings of certain Russian BITs may be to rely on an MFN clause. The MFN principles of non-discrimination, fair and equitable treatment of investors have long been considered as "the corner-stone of all modern commercial treaties," and are some of the fundamental principles of the contemporary multilateral trade systems such as the WTO regime³⁸ and other regional (e.g. North American Free Trade Agreement (NAFTA))³⁹ and international trade agreements (e.g. Energy Charter Treaty).⁴⁰ Rubins and Nazarov observe that the MFN clause found expression in a BIT in

³² (SCC Case No 080/2004, Award, 21 April 2006).

³³ Statistic from years 2007-2011; “Investing in Russia: An overview of the current investment climate in Russia”, April 2013, KPMG: (<https://www.kpmg.com/NL/nl/IssuesAndInsights/ArticlesPublications/Documents/PDF/High-Growth-Markets/Investing-in-Russia1.pdf>)

³⁴ Article 8(1) of the UK-Russia BIT.

³⁵ *RosInvest Co UK Ltd v Russia* (SCC Case No V 079/2005, Award, 12 September 2010), Stockholm Chamber of Commerce (SCC).

³⁶ For a detailed critical analysis of business disputes in Russia see, Hendley K., ‘Beyond the Tip of the Iceberg: Business Disputes in Russia’, in Murrell P (Eds), *Assessing the value of law in transition economies*, (UMP, 2001) Ch. 2.

³⁷ Gadelshina E. R., *Major Pitfalls for Foreign Investors in Russia: What Are Russian BITs Worth?*, 01 December 2011; <http://kluwerarbitrationblog.com/blog/2011/12/01/major-pitfalls-for-foreign-investors-in-russia-what-are-russian-bits-worth/>.

³⁸ Vesel S., *Clearing a Path Through Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*, (2007) *The Yale Journal of International Law*, Vol. 32, 125.

³⁹ Article 1102 of NAFTA, 1993 provides that “[e]ach Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” See for instance, *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No ARB(AF)/99/1 (awarding 10 million Mexican pesos to a US national under the North American Free Trade Agreement as compensation for Mexico's failure to provide import tax rebates similar to those offered to Mexican businesses).

⁴⁰ Article 10 (1) of the ECT stipulates that “[e]ach Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, **equitable, favourable** and transparent conditions for Investors of other

1959, “when West Germany and the Islamic Republic of Pakistan signed the very first modern treaty on the encouragement and mutual protection of investments”.⁴¹

In the ECT context, it is clear that fair and equitable treatment as well as constant security and protection are not confined to physical assets of the investor. They also encompass legal protection and procedural rights.⁴² Accordingly, any differential treatment must be reasonable and non-discriminatory. Addressing unreasonable measures, the International Court of Justice asserted that they are “not so much something opposed to a rule of law, as something opposed to the rule of law ... a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of judicial propriety”.⁴³ In determining if a measure amounts to unreasonable discrimination (e.g. in violation of the principle of national treatment under Article 10(7) of the ECT), the tribunal in *Enron Corporation and Ponderosa Assets LP v Argentina* opined that the standard question, which ought to be posed, is whether there has been “capricious, irrational or absurd differentiation”.⁴⁴

An analysis of the arbitration cases (particularly in the context of ECT)⁴⁵ indicates that there are five elements which determine whether fair and equitable treatment exist:

- transparency, stability and the protection of legitimate expectations;
- compliance with contractual obligations;
- procedural propriety and due process;⁴⁶
- good faith; and
- freedom from coercion and harassment.⁴⁷

While the principles of fair and equitable treatment are closely related to the concept of ‘treatment’ for the purposes of MFN status, they do not always overlap therefore may lose their potency.⁴⁸ For example, on its face value, the application of Article 10 of the ECT⁴⁹

Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most **constant protection and security** and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party” (emphasis added).

⁴¹ Rubin N and Nazarov A., Investment Treaties and the Russian Federation: Baiting the Bear?, (2008) *Business Law International*, Vol. 9. No. 2, 100.

⁴² *Azurix corporation v Argentina*, Award, 14 July 2006, para. 408; ICSID CASE No. ARB/01/12.

⁴³ *Case concerning Elettronica Sicula*, 20 July 1989, (1989) 15 ICJ Rep. 76.

⁴⁴ *Enron Corporation and Ponderosa Assets LP v Argentina*, Award, 22 May 2007, para. 282.

⁴⁵ For a detailed analysis of key disputes see, Kleinheisterkamp J., Investment Protection and EU Law: The Intra-and Extra-EU Dimension of the Energy Charter Treaty, (2012) *Journal of International Economic Law*, 15 (1): 85 and Roe T and Happold M., Settlement of Investment Disputes under the Energy Charter Treaty, (CUP, 2011). For a full list of investment disputes under the ECT see, Energy Charter Secretariat, <http://www.energycharter.org/what-we-do/dispute-settlement/investment-dispute-settlement-cases/>.

⁴⁶ *LG & E v Argentina*, Decision on Liability, 03 October 2006.

⁴⁷ Roe T. and Happold M., Settlement of Investment Disputes under the Energy Charter Treaty, (CUP, 2011) at 112, citing Dolzer and Schreuer, Principles of International Investment Law, (OUP, 2008).

⁴⁸ *Ibid.* pp. 120-130.

⁴⁹ Article 10(7) of the ECT stipulates the MFN status: “Each Contracting Party shall accord to Investments in its Area of Investors of other Contracting Parties, and their related activities including management, maintenance, use, enjoyment or disposal, treatment no less favourable than that which it accords to Investments of its own Investors or of the Investors of any other Contracting Party or any third state and their related activities including management, maintenance, use, enjoyment or disposal, whichever is the most favourable.”

seems to be limited by Article 26 of the ECT, which requires that any complaint be related to an investment. However, as aptly argued by Roe *et al.*, interpretation of treaty provisions must be conducted holistically, whereby “interpretation must give meaning and effect to all the terms of a treaty”.⁵⁰ Furthermore, in determining what is ‘fair and equitable’, the object and purpose of the ECT ought to be considered.⁵¹

The MFN principle also finds expression in thousands of BITs⁵² thus can be considered as a fundamental principle of modern international economic law. However, unlike the convergence on and acceptance of a single MFN clause under the multilateral trading system of the World Trade Organisation (WTO), MFN clauses within various BITs are subject to a broad range of interpretations. An examination of the case law under the auspices of the International Centre for Settlement of Investment Disputes (ICSID) and further a field indicate divergent approaches and results on the question of whether an MFN clause can be relied on by an investor in order to invoke the dispute settlement provisions of a third party's treaty with the host state.⁵³ This trend is somewhat surprising given the fact that many arbitral tribunals have referred to the WTO jurisprudence pertaining to MFN principle.⁵⁴

MFN clauses link investment agreements by ensuring that parties to one treaty provide treatment no less favorable than the treatment they provide investors under other treaties.⁵⁵ By including an MFN clause into the provisions of BITs, contracting parties seek to extend the application of benefits granted to nationals of third states to nationals of a contracting partner. MFN clauses normally contain the word “treatment” which may confer substantive and potential rights, privileges and/or concessions. These often come in the form tariff reductions and market access provisions and protections. Traditionally, national tariff schedules have generally extended MFN status beyond the BITs and/or multilateral trade agreements,⁵⁶ except on political and security grounds.⁵⁷ In determining whether MFN status

⁵⁰ *Supra note*, Roe T. and Happold M.

⁵¹ *El Paso International Energy Co v Argentina*, Decision on Jurisdiction, 27 April 2006, paras. 68-70.

⁵² Fietta S., Most Favoured Nation Treatment and Dispute Resolution Under Bilateral Investment Treaties: A Turning Point? (2005) *International Arbitration Law Review*, Vol. 8, 131. Alford asserts that “[a]lthough the national treatment tests embodied in the World Trade Organization (WTO) agreements differ from that in most bilateral investment treaties (BITs), both regimes are concerned with establishing rules to effectively regulate different forms of de facto or de jure discrimination”. Alford R., *The Convergence of International Trade and Investment Arbitration*, (2014) *Santa Clara Journal of International Law*, Vol. 12, 35.

⁵³ *Ibid.*

⁵⁴ For instance, in *Pope & Talbot v. Canada*, the arbitral tribunal analysed WTO jurisprudence and rejected the respondent State's narrow definition of what constituted discriminatory treatment (*Pope & Talbot Inc. v. Canada*, NAFTA/UNICTRAL Trib., Award on Merits, 45-72 (Apr. 10, 2001), <http://naftaclaims.com/Disputes/Canada/Pope/PopeFinalMeritsAward.pdf>). In *Occidental v. Ecuador*, the arbitral tribunal compared the text of the national treatment provision in the BIT with the text of the national treatment provision in the WTO (*Occidental Exploration & Prod. Co. v. Republic of Ecuador*, LCIA Case No. UN3467, Award, 173-177 (London Ct. Int'l Arb. 2004). For detailed analysis, see, *supra note*, Alford.

⁵⁵ Acconci P., ‘Most Favoured Nation Treatment and International Law on Foreign Investment’, in Muchlinski P., *et al.*, (Eds.) *The Oxford Handbook of International Investment Law* (OUP, 2008).

⁵⁶ This principle of “national treatment” (giving others the same treatment as one's own nationals) is also found in all the three main WTO agreements (Article 3 of GATT, Article 17 of GATS and Article 3 of TRIPS) http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm and under the North American Trade Agreement (NAFTA), 1992.

⁵⁷ For instance, the former communist countries were not granted MFN status by the United States. Contention arises as to whether the term “treatment” includes dispute resolution provisions. Subramanian A and Jin Wei S., *The WTO promotes trade, strongly but unevenly*, (2007) *Journal of International Economics*, 72(1), 151.

can be invoked, arbitration decisions across the globe indicate that the *ejusdem generis*⁵⁸ principle shall be established first.⁵⁹ If the *ejusdem generis* is established,⁶⁰ then any substantive and/or procedural rights and obligations may be invoked. Consequently, in order to establish whether MFN status is available, a thorough analysis and interpretation of the relevant treaty provisions are necessary.⁶¹

The ambiguity as to whether the MFN applies to dispute resolution provisions in Russian BITs, i.e. whether the approach in *Maffezzini*⁶² or in *Plama*⁶³ (together with a strings of cases that follow them)⁶⁴ is the preferred one, has been resolved by the Svea Court of Appeal in 2013.⁶⁵ The Svea Court annulled the award of Stockholm Chambers of Commerce arbitration in the dispute between RosInvestCo and the Russian Federation. At the first instance in *RosInvest*,⁶⁶ it was held that the MFN provisions under UK-Russia BIT extended to dispute resolution; hence the RosInvest was able to bring a claim for expropriation under more favourable regime of Denmark-Russia BIT. By annulling this award, the Svea Court “confirmed” previous interpretation of non- applicability of MFN to dispute resolution preferred in the previous awards under Russian BITs.⁶⁷ The Svea Court of Appeal opined that the MFN-protection for “investors” did not exist “regarding their management, maintenance, use, enjoyment or disposal of their investments” and the arbitral tribunal did not have jurisdiction to settle whether Russia had undertaken expropriation measures against RosInvest.⁶⁸ The Svea Court reaffirmed the previous judgments on the subject matter, namely the decisions in *Vladimir Berschader and Moïse Berschader v Russia*.⁶⁹

⁵⁸ Meaning "of the same kind", the principle of *ejusdem generis* dictates where a legal provision lists specific classes of persons (i.e. investors) or things (i.e. goods) and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed.

⁵⁹ Gazzini T and Tanzi A., Handle with care: Umbrella clauses and MFN treatment in investment arbitration, (2013) *The Journal of World Investment & Trade*, Vol. 14, 978.

⁶⁰ This is often done by referring to an umbrella clause in a treaty. For example, Article II (2)(c) of the BIT between United States and Argentina provides that “[e]ach Party shall observe any obligation it may have entered into with regard to investments”. For a detailed analysis of umbrella clauses in investment treaties see, *supra note* Gaazini Tanzi and also see, Weiler T. J., *Investment Treaty Arbitration and International Law*, (Juris Publishing, 2008).

⁶¹ This is done in light of the rules contained in the Vienna Convention on the Law of the Treaties, 1969.

⁶² *Maffezini v Spain* (ICSID Case No ARB/97/7) concluding that an MFN provision permitted an investor to take advantage of a more favorable procedural right in a different treaty. See also, *Gas Natural SDG S.A. v Argentina*, Decision on Jurisdiction, ICSID No. ARB/03/10 (June 17, 2005); *Siemens A.G. v Argentina*, Decision on Jurisdiction, ICSID No. ARB/02/8 (August 03, 2004). For an overview of BITs conducted between Russia and other countries see: <http://investmentpolicyhub.unctad.org/IIA/CountryBits/175>.

⁶³ *Plama Consortium Limited v Bulgaria* (ICSID Case No ARB/03/24, Decision on Jurisdiction, 8 February 2005) finding that an MFN provision could not be utilized to invoke a more favorable procedural right.

⁶⁴ For discussion on both approaches see: Fietta S., Most favoured nation treatment and dispute resolution under bilateral investment treaties: A turning point? (2005) *International Arbitration Law Review*, Vol. 8, 131.

⁶⁵ Judgment of 05 September 2013 – Svea HovR T-10060-10:

<http://www.arbitration.sccinstitute.com/Views/Pages/GetFile.ashx?portalId=89&cat=95791&docId=1767458&ropId=1578>.

⁶⁶ *RosInvestCo UK Ltd v Russia* (SCC Case No V 079/2005, Award, 12 September 2010), Stockholm Chamber of Commerce (SCC).

⁶⁷ Malinskaya R., ‘From Russia with Love: MFN Clauses Revisited’, Berwin Leighton Paisner, 21 May 2014, <http://www.blplaw.com/expert-legal-insights/articles/russia-love-mfn-clauses-revisited/>.

⁶⁸ Judgment of 05 September 2013 – Svea HovR T-10060-10.

⁶⁹ (SCC Case No 080/2004, Award, 21 April 2006).

In *Berschader* however, the way in which the arbitrators have approached the issue of the applicability of an MFN clause to dispute resolution had different connotations. The tribunal referred to the *Maffezini*, asserting that “an MFN provision in a basic treaty does not incorporate by reference to dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.”⁷⁰ Accordingly, the *Berschader* tribunal decided that there was no evidence of the Contracting Parties’ intention to that effect. The claimant under Belgium-Russia BIT was merely entitled to arbitrate the amount and method of payment on the narrow construction of the dispute resolution clause. The attempt to import broader dispute resolution provisions from Denmark-Russia BIT – which allowed for “any dispute in connection with an investment” – was unsuccessful and the tribunal held that MFN does not extend to the dispute resolution provisions.⁷¹ Subsequently, the claimant was left without a remedy for expropriation.

This is a serious and a worrying outcome as investors are effectively denied the essence of protection that BIT sought to offer, namely protection and remedy against expropriation. The narrow interpretation of BIT provisions in both cases meant that “no claim over the amount or mode of payment may be entertained absent a national court decision on the occurrence of expropriation or an acknowledgement of the host state to that effect.”⁷² The option to apply an MFN clause to dispute resolution mechanism, which appears to have been a remedy against “faulty” construction of certain Russian BITs, was denied by both the tribunal and the Svea Court of Appeal whereby the Court accepted the Russian Federation’s appeal and set aside the SCC award.⁷³ The Svea Court of Appeal held that the award was not conferred by a valid arbitration agreement thus the award of the tribunal was annulled. Such jurisprudence indicate that relying on an MFN clause to import more favourable dispute resolution provisions from other treaties into a BIT is not straight forward and at times impossible in the Russian context.

c. Another solution – is the compensation due?

Despite the reluctance to apply MFN status to include arbitration or adjudication, an alternative remedy has been suggested in *Renta 4 SVSA et al v Russia*.⁷⁴ In rejecting the flawed restrictive construction, the Tribunal asserted that: “*The Claimants allege expropriation. Russia denies any obligation under this head. There is therefore a dispute as to whether compensation is due*”.⁷⁵ Although the tribunal concluded that the MFN status under the Spain-Russia BIT does not extend to the dispute resolution provisions in other BITs to which Russia is a party, it abstained from the narrow interpretation of dispute resolution provisions (as in cases identified above) that limited the claimant to arbitrate the amount of the compensation and the method of payment. The tribunal affirmed the respondent’s argument of non-inclusion of the occurrence of expropriation in the arbitration scope under

⁷⁰ *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7 - <http://www.italaw.com/cases/641>.

⁷¹ Salomon C. and Friedrich S., ‘How most favoured nation clauses in bilateral investment treaties affect arbitration’, Practical Law, Thomson Reuters, 2013; <http://uk.practicallaw.com/0-381-7466?source=relatedcontent>.

⁷² Gadelshina E. R., Major Pitfalls for Foreign Investors in Russia: What Are Russian BITs Worth?, 01 December 2011; (<http://kluwerarbitrationblog.com/blog/2011/12/01/major-pitfalls-for-foreign-investors-in-russia-what-are-russian-bits-worth/>).

⁷³ Judgment of 05 September 2013 – Svea HovR T-10060-10.

⁷⁴ SCC Case No V 024/2007, Award, 20 March 2009, <http://www.italaw.com/documents/Renta.pdf>.

⁷⁵ *Ibid*.

the Spain-Russia BIT by establishing that an act of taking is indeed a “predicate to any amount being due”. Thus, it held that the tribunal could assess whether any compensation is due to the claimant by the reason of respondent’s behaviour, without having to decide whether the expropriation or nationalisation has taken place.⁷⁶ The arbitrators asserted, “the flaw in Russia’s argument is that there is more than one basis on which a respondent State could say “zero”: One might be indeed a divergence as to quantification; [a]nother could be a denial of any obligation on account of alleged expropriation. Such an obligation is the evident predicate to any amount being “due” and thus the object of the type of debate allowed under Article 10.”⁷⁷

It can be contended that common sense prevailed over formalistic approach in this case.⁷⁸ It is not certain however, whether subsequent tribunals will follow this backdoor approach. These different practices illustrate that determination as to whether an MFN clause can be applied in arbitration proceedings will depend on the facts of each case and require detailed examination and interpretation of relevant legal instrument (e.g. BIT). While there is a chance that applicants may be able to invoke MFN status, the inconsistent approaches by Russia’s adjudicators do not provide legal certainty.

2. Application of the Energy Charter Treaty, 1994 (ECT)

There are generally three phases to concluding a treaty: signature, ratification, and entry into force.⁷⁹ By signing a treaty, the signatories are not under a legal duty to ultimately ratify the treaty.⁸⁰ It is a generally accepted principle of international law that treaties do not have legal effect before entry into force.⁸¹ The Vienna Convention on the Law of Treaties 1969 (VCLT) codifies the main rules of treaty interpretation and application according to customary international law. Pursuant to Article 18, the VCLT provides that signatories (in good faith) must not take actions that would undermine the aim and purpose of a treaty, prior to ratification. Subsequently, the obligations and rights arising from of a treaty do not take effect until the treaty is ratified in accordance with the signatory state’s internal legal and constitutional arrangements. However, the situation is different with respect to the ECT because the ECT contains a specific provision dealing with the treaty’s provisional effect between signature and ratification period. Article 45(1) of the ECT states that “[e]ach signatory agrees to apply this Treaty provisionally pending its entry into force ... to the extent that such provisional application is not inconsistent with its constitution, laws or regulations”. The provisional application of a treaty helps to minimise the negative impact of actual and potential defection of the parties by obliging them to bear the costs of treaty obligations immediately at the time of signing. In other words, “signatories are induced to take on these

⁷⁶ Iglesias J. *et al.*, “Comments on the award on preliminary objections (Renta 4 S.V.S.A. *et. al. v. The Russian Federation*), 20 March 2009 issued by the Arbitration Institute of the Stockholm Chamber of Commerce”.

⁷⁷ *Ibid.*

⁷⁸ *Supra note*, Gadelshina.

⁷⁹ Roucouas E., *Uncertainties Regarding the Entry into Force of Some Multilateral Treaties*, in Wellens K., (Eds.) *International Law: Theory and Practice: Essays in Honour of Eric Suy* (Kluwer,1998) cited in Niebruegge M., *Provisional Application of the Energy Charter Treaty: The Yukos Arbitration and the Future Place of Provisional Application in International Law*, (2007-2008) *Chicago Journal of International Law*, Vol. 8, 355.

⁸⁰ Rogoff M., *The International Legal Obligations of Signatories to an Unratified Treaty*, (1980) *Maine Law Review*, Vol. 32, 267.

⁸¹ Vienna Convention on the Law of Treaties (1969), Articles 26, 24(1), 24(2), and 28.

obligations by gaining the ability to capture the full benefits of the treaty regime rather than only being able to capture the indirect benefits available to parties for whom the treaty has not entered into force”.⁸²

On 20 August 2009 Russia submitted a notice to the Energy Charter Secretariat stating that it no longer wished to be a party to the ECT and that it did not apply the treaty provisionally under Article 45(1) since such provisional application would have been inconsistent with the Russian Constitution, laws and regulations.⁸³ However, according to Article 45(3), the investments made prior to the termination of the provisional application will be protected for the period of 20 years from the termination. Shortly after Russia’s “withdrawal”, three interim awards on jurisdiction have been granted in three separate arbitrations brought under the ECT against Russia.⁸⁴ In all three instances, the tribunal conferred its jurisdiction.⁸⁵ The tribunal decided that invoking the “limitation clause” under Article 45(1) does not require express declaration under Article 45(2)(c) since there is no essential linkage between the two provisions, nor any other notification to that effect, and in principle, Russia can rely on Article 45(1). The key issue however, was whether the “provisional application” under Article 45(1) of the ECT should be interpreted as application of the entire treaty (“all or nothing” approach) or application of certain parts of the treaty only (“piecemeal” approach). In other words, the question was whether Russia applied ECT as a whole or whether it applied only these provisions that were consistent with its Russian Constitution, laws and regulations. The tribunal decided that “all or nothing” approach is the preferred route for a number of reasons. Firstly, such approach is more aligned with the requirement under Article 31(1) of the VCLT to give an ordinary meaning to the treaty. Secondly, it is consistent with the existing case law on the matter, particularly *Kardassopoulos* case where the tribunal made it clear that “[w]here what is in issue is ... the provisional application of the whole treaty, then such provisional application imports the application of all its provisions as if they were already in force...”.⁸⁶ Thirdly, if the state’s intention was to apply only certain parts of the treaty this should have been made explicit from the outset. Fourthly, determining whether each and every provision of the treaty is consistent with domestic law would be against the object of the treaty and contrary to principles of international law, particularly *pacta sunt servanda* principle and Article 27 of the VCLT which prohibit states from invoking internal legislation as a justification for failure to perform the treaty obligations. Furthermore, combining international and domestic law should not be allowed, as this would cause great uncertainty and potential inconsistency. Fifthly, it is generally the practice that states are either in a position to apply the entire treaty provisionally or not at all. The Energy Charter Secretariat has kept track of the intentions of each signatory i.e. whether they wish to apply the treaty provisionally or avoid its application all together.⁸⁷

⁸² *Supra note*, Niebruegge, at 359.

⁸³ The ECT has never been ratified by Russian State Duma.

⁸⁴ *Hulley Enterprises Limited* (Cyprus) (PCA Case No. AA 226); *Yukos Universal Limited* (Isle of Man) (PCA Case No. AA 227); *Veteran Petroleum Limited* (Cyprus) (PCA Case No. 228).

⁸⁵ Roux L., The Effect of the Yukos Case and Proceedings on the EU-Russia Energy Relationship, ESCP / Research Center for Energy Management, 25 February 2013, <http://www.esceurope.eu/nc/media-news/news-newsletter/news-single/article/the-effect-of-the-yukos-case-and-proceedings-on-the-eu-russia-energy-relationship/>. Also see, Natural Gas Europe, The Impact of Yukos on the EU-Russia Energy Relationship, 01 March 2013, <http://www.stratfor.com/the-hub/impact-yukos-eu-russia-energy-relationship#axzz3KHD2cAUt>.

⁸⁶ *Ioannis Kardassopoulos v. The Republic of Georgia*, ICSID Case No. ARB/05/18, para. 219.

⁸⁷ *Supra note* 85, paras 244-329.

Once satisfied that the “all or nothing” approach is the correct one, the tribunal went on to consider the compatibility of the “provisional application” *per se* with with Russian Constitution, laws and regulations. It also addressed the compatibility of ECT’s dispute resolution provisions with the Russian Constitution, laws and regulations, which in essence goes against the “all or nothing” approach, however it expressly stated that “...*there is no need, in principle, to address Respondent’s submission that the provisions of the ECT relating to dispute resolution are themselves inconsistent with Russian law...*”.⁸⁸ Both questions were answered affirmatively. It was also noted that Russia “provisionally” applied other 45 international treaties at that time.⁸⁹

This result reassured investors that issues of provisional application would not pose any jurisdictional obstacles in bringing an arbitration claim against Russia under the ECT. However, the ECT offers no protection to any investments made after Russia’s termination of the provisional application and only the investments made prior to that termination is protected for the period of 20 years.⁹⁰ It should also be noted that the ECT’s application is limited to energy related investments. Yet, it could be argued that since its inception in 1991, the ECT remains to be a significant legal instrument in terms of its trade liberalisation nature and the legal foundation, protection and predictability it instils.⁹¹ Key provisions of the ECT should be duplicated in BITs so that a degree of legal safeguards and remedial protection can be available to all parties involved. It is unfortunate that Russia has withdrawn from this legal framework which would have paved the way for energy security and thickening of rule of law in energy trade.

3. Enforcement of arbitration awards in Russia

Recognition and enforcement of a foreign court decision or arbitration award in Russia have never been an easy. Nevertheless, Article 241(1) of the RF Arbitrazh Procedure Code (APC) provides that “international treaties on recognition and enforcement of foreign judgments and federal law – with the corresponding effect – serve as two complementary legal bases for both recognition and enforcement”. Russia is a party to two main multilateral international treaties on the recognition and enforcement of foreign arbitral tribunal judgments: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 and the European Convention on International Commercial Arbitration, 1961. Accordingly, arbitration awards must be recognised and enforced in Russia. Yet, the Supreme Arbitrazh Court (SAC) stated that “*the absence of an international treaty [between Russia and Israel] renders recognition of a decision of foreign court impossible.*”⁹² The same conclusion was reached in an earlier case (No. KG-A40/8581-05-P) whereby the Russian court had refused to recognise a decision of the Higher Regional Court of Berlin. Nevertheless, more recent Russian judicial decisions evidence that Article 241(1) of the APC is no longer imperative and there is a more open approach to the legal grounds for recognition and enforcement of foreign judgments in Russia. For example, in *Boegli-Gravures* (No. VAS-6580/12) the SAC

⁸⁸ *Supra note 85*, paras 330-392.

⁸⁹ Nacimienta P. *et al.*, Energy Charter Treaty Arbitration and the CIS Countries, (2014) *The European, Middle Eastern and African Arbitration Review*, 20; <http://www.nortonrosefulbright.com/files/energy-charter-treaty-arbitration-108118.pdf>.

⁹⁰ Article 45(3) of the ECT. Also see, Carlson M. F., *et al.*, Russia withdrawing from Energy Charter Treaty, 03 September 2009, <http://uk.practicallaw.com/7-422-4842?service=dispute>.

⁹¹ *Supra note*, Konoplyanik A. and Wälde T, asserting that the ECT “is aimed at strengthening the rule of law, both internationally in relation between member states and investors, but also domestically by signaling ‘good governance’ in member states”, p. 532.

⁹² The SAC Decision No. 5105/2008, 19 May 2008.

held that even if there is no international treaty in place, “recognition of an English court decision must be effected on the basis of the comity of nations and reciprocity principles.”⁹³ While the string of decisions after *Boegli-Gravures* signaled a new era in recognition and enforcement of arbitration awards in Russia, this was halted to certain degree by political developments.

On the 6th February 2014 President Vladimir Putin signed a bill amending the Constitution and several other Bills, as a result of which the SAC⁹⁴ ceased to exist on 7th August 2014.⁹⁵ Providing that the dispute could be arbitrated, the SAC was the main judicial authority for enforcing arbitration awards.⁹⁶ This judicial reform took place despite the open opposition from legal practitioners and members of judiciary⁹⁷ as well as negative reaction amongst businesses operating in Russia.⁹⁸ The Supreme Court of the Russian Federation in charge of resolving civil, criminal and administrative disputes assumed the jurisdiction over commercial disputes that previously vested in the SAC. The Judicial Board, a division of the Supreme Court, has replaced the SAC for Economic Disputes. The Judicial Board has fewer

⁹³ The following are some of the foreign judgments recognised by Russian courts: Judgments of the High Court of Justice of England and Wales, according to Decision of the Federal Arbitrazh Court of Moscow District, Number KG-A40/698-06- P, of 2 March 2006, regarding OAO Petroleum Company Yukos, according to Decision of the Arbitrazh Court of Bashkortostan, Number A07-16859/2013, of 17 March 2014, regarding VIS Trading Co Ltd. (upheld by the Ruling of the Supreme Court, Number 309-ES14-69, of 18 August 2014), as well as according to Decision of Moscow Arbitrazh Court, Number A40-153603/13, of 30 May 2014, regarding Kedart Finance Limited (upheld by the Ruling of the Supreme Court, Number 305-ES14-3869/09, of 29 October 2014); of the District Court of the City of Dordrecht, the Netherlands, according to Decision of the Arbitrazh Court of Moscow Region, Number A41-9613/09, of 8 June 2009, regarding Rentpool B.V. (upheld by the Ruling of the Supreme Arbitrazh Court, Number VAS-13688/09, of 7 December 2009); of the Patents Court of the Chancery Division of the High Court of Justice of England and Wales according to the Decision of Moscow Arbitrazh Court, Number A40-119397/11-63-950, of 10 February 2012, regarding Boegli-Gravures S.A. (upheld by the Ruling of the Supreme Arbitrazh Court, Number VAS-6580/12, of 26 July 2012); of the High Court of Justice in Northern Ireland according to the Decision of the Supreme Arbitrazh Court, Number 6004/13, of 8 October 2013, regarding Quinn Group; of the Commercial Court of Zurich according to Decision of the Federal Arbitrazh Court of North-Caucasian District, Number A15-1453/2012, of 14 March 2013, regarding Biscom AG (although the judgment was obviously mistakenly recognized and enforced with the reference to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, it was upheld by the Ruling of the Supreme Arbitrazh Court, Number VAS-4689/13, of 15 April 2013).

⁹⁴ Supreme Arbitrazh Court is now the Supreme Arbitration (Commercial) Court of the Russian Federation; <http://www.arbitr.ru/eng/sac/>.

⁹⁵ For a full overview of the reforms please see: Dolotova M., ‘Reform of the judicial system of the Russian Federation’, 15 July 2014, <http://www.lexology.com/library/detail.aspx?g=bdfc22eb-68d1-40f3-bc5f-53d63a6e8640>.

⁹⁶ Arbitrazh (commercial) courts are comprised of four instances: first instance, appeal, cassation and ‘supervision’. They are organised on the principle of territoriality, coinciding with the administrative divisions of Russia. The territorial jurisdiction of the courts of general jurisdiction in the first instance generally covers one or several districts (raion), while the jurisdiction of the commercial courts starts from the regional (oblast) level. See, Khrenov & Partners, Russia – Trends & Developments, 2015, <http://www.chambersandpartners.com/guide/practice-guides/location/241/6621/1403-199>.

⁹⁷ Novosti R., ‘Russian Lawyers Protest Putin’s Court Reform’, 20 November 2013; (<http://en.ria.ru/russia/20131120/184808408/Russian-Lawyers-Protest-Putins-Court-Reform.html>).

⁹⁸ Matthews S. and Konchits E., ‘Reform of Russian Supreme Court system – creation of an integrated Supreme Court’, (<http://www.allenoverly.com/publications/en-gb/lrrfs/continental%20europe/Pages/Reform-of-Russian-Supreme-Court-system-%E2%80%93-creation-of-an-integrated-Supreme-Court.aspx>)

judges than in the original SAC as well as in other divisions of Supreme Court.⁹⁹ This is likely to prolong commercial disputes in general.

Supporters of the reforms argue that the new structure will promote greater efficiency and help to avoid contradictory judgments.¹⁰⁰ It is argued that the changes were intended to create a “*unified approach to dispute resolutions involving both individuals and legal entities, eliminate possible jurisdiction conflicts, establish general rules of judicial proceedings, and introduce consistency to Russian court practices*”.¹⁰¹ However, others see the new regime as a weakening of the commercial court system which was more professional and less prone to political interference than any other civil and criminal court.¹⁰² In fact, the SAC developed a reputation as the most impartial court in Russia.¹⁰³ Its judges had a particular experience and expertise in commercial matters and disputes. The SAC had been issuing guidelines and clarifications, which provided more certainty for national and international investors and were binding on the lower courts.¹⁰⁴ It regularly published its important decisions in English. The SAC’s judges introduced most innovative reforms including an e-justice system that enabled parties to file documents online and increased transparency that comes with allowing anyone to review judgments and rulings in a searchable database (the Arbitration Case Directory).¹⁰⁵ This e-justice system expedited the procedure and made tracking and publicity of the case easier. The SAC’s proactive policy-making and judicial activism have reached the point when on occasions it created precedence by implementing regulations that did not have legal grounding in national legislation, an unusual feature for a civil law system.¹⁰⁶

One of the most significant improvements introduced by the SAC was made in relation to arbitration.¹⁰⁷ The NYC provides for a multiple grounds upon which the enforcement may be refused, *inter alia* invalidity of an arbitration agreement, insufficient notification of a party, non-arbitrability of a dispute, procedural defects and the most popular exemption clause – violation of public policy.¹⁰⁸ The uncertainty clouding the application of the public policy

⁹⁹ Klimov Y. and Markova N., ‘Russia: to innovate is not to reform’, April 2014, <http://www.nortonrosefulbright.com/knowledge/publications/116672/www.cdr-news.co.uk>.

¹⁰⁰ *Supra note*, Matthews and Konchits.

¹⁰¹ Specht & Partner, ‘Abolishment of the Supreme Arbitration Court of the Russian Federation: Goals and Prospects’, <http://www.spechtboehm.com/rf-supreme-court/>.

¹⁰² Hille K., ‘Putin tightens grip on legal system’, Financial Times, 27 November 2013; <http://www.ft.com/intl/cms/s/0/a4209a42-5777-11e3-b615-00144feabdc0.html#axzz3Dhl9JDrS>.

¹⁰³ Balmforth T., Putin’s Legal Vertical: Kremlin Seeks To Consolidate Court System, 09 October 2013, <http://www.rferl.mobi/a/russia-judicial-reform-arbitration-court/25131950.html>.

¹⁰⁴ Matthews S. and Konchits E., “Reform of Russian Supreme Court system – creation of an integrated Supreme Court”, <http://www.allenoverly.com/publications/en-gb/lrrfs/continental%20europe/Pages/Reform-of-Russian-Supreme-Court-system-%E2%80%93-creation-of-an-integrated-Supreme-Court.aspx>.

¹⁰⁵ Klimov Y. and Markova N., “Russia: to innovate is not to reform, April 2014, <http://www.nortonrosefulbright.com/knowledge/publications/116672/www.cdr-news.co.uk>.

¹⁰⁶ “B2B: The Russian Judicial System: Reforms Continue”, Roman Zaitsev, The Moscow Times, 21 April 2014, <http://www.themoscowtimes.com/news/article/b2b-the-russian-judicial-system-reforms-continue/498551.html>.

¹⁰⁷ Stankewitsch P., ‘Russia’s application of the NY Convention will only determine the theoretical enforceability; For a discussion on seizing of the assets of Russian Companies see: “Enforcement of Arbitral Awards against Russian Companies outside Russia, (2005), *Transnational Dispute Management*, No 3.

¹⁰⁸ Nacimiento P. and Barnashov A., Recognition and enforcement of arbitral awards in Russia, White & Case, September 2010; http://www.whitecase.com/files/Publication/4969faac-7c89-44ad-91bb-1e47a5eca02d/Presentation/PublicationAttachment/27de1b0a-6034-4425-98e7-24be2921dc5e/Article_Recognition_and_Enforcement_of_Arbitral_Awards_in_Russia_v2.pdf.

grounds¹⁰⁹ has been finally addressed in February 2013 by the SAC, which published the guidelines on the application of the power to refuse recognition and enforcement of the award on public policy grounds, suggesting a narrow interpretation. This change was expected to result in a greater number of awards being enforced in Russia.¹¹⁰ However, it is unclear whether this will materialise. The decision of the Plenum of the Supreme Court has a power to amend every decision made by the SAC. Time will tell whether the progress made by the SAC will be reversed or further developed by the new Judicial Board.¹¹¹

As illustrated by the *Fujitsu Technology*¹¹² and *Bouygues Batiment* cases¹¹³ – the Russian courts were becoming keener to enforce the awards, which were being opposed on some other grounds than public policy. In *Fujitsu Technology* the two objections were dismissed: a) the consent to arbitrate the dispute and b) the lack of signature. The court held that it is for the tribunal to decide on the scope of its own jurisdiction and that the lack of signature, since it had not been raised at the beginning of the proceedings, cannot be raised at the enforcement stage. In *Bouygues Batiment* the court confirmed that Russian courts were not prepared to interfere with the merits of the awards and that the application to set aside the award did not preclude its enforcement.¹¹⁴ These decisions are in line with international practice however, the Russian legal system does not operate on the principle of precedent and the recent legal reforms have not yielded any positive results hence the problem of legal certainty remains.

The recognition and enforcement of the awards containing “forum selection clause”¹¹⁵ have also become uncertain as a result of the SAC’s judgement in *RTC v Sony Ericsson Mobile Communications*.¹¹⁶ The SAC ruled on invalidity of such clauses and held that both lenders and borrowers have right to apply to their domestic courts to adjudicate the matter, effectively including Russian courts in the party’s choice. Nevertheless, this is balanced by the general Russian courts’ inclination to refer the dispute to arbitration even if the arbitration clause is somewhat ambiguous or does not expressly name the arbitration institution.¹¹⁷ These are sound examples of the Russian efforts to integrate into the international trade and investment regime. Yet, political interference either directly on investment projects¹¹⁸ and

¹⁰⁹ *Ibid. Diana V. Tapola*, 22 Arb. J.151 (No. 1, 2006)

¹¹⁰ Minaeva T., “Enforcement of foreign judgments and arbitral awards in Russia” – Recent trends, *The Law Society International Division*, 20 February 2014.

¹¹¹ Given the smaller number of judges in the Judicial Board and their lack of experience in commercial and investment disputes compared to the SAC, the recent reforms may result in increased timelines and greater uncertainty.

¹¹² *Fujitsu Technology Solutions GmbH v. LLC RRSi* (case no. A40-121292/12-29-1204).

¹¹³ *Bouygues Batiment International S.A. v. CJSC Potok 0458* (case no. A40-100678/12-52-931).

¹¹⁴ Usoskin S., “Enforcement of Arbitral Awards in Russia: Effect of Foreign Court Proceedings”, 19 April 2013, <http://www.cisarbitration.com/2013/04/19/enforcement-of-arbitral-awards-in-russia-effect-of-foreign-court-proceedings/>.

¹¹⁵ i.e. clause that gives one party an option to litigate or arbitrate while the other party can only arbitrate.

¹¹⁶ Case A40-49223/11-112-401.

¹¹⁷ Minaeva T., The enforcement of foreign judgments and arbitral awards in Russia, *The Lawyer*, January 2014.

¹¹⁸ For example, after spending \$4.7 billion on the \$40 billion project, President Putin announced that Russia would abandon the South Stream Pipeline Project. See, Vihma A. and Turksen U., The Geoeconomics of the South Stream Pipeline Project, (2015 – Fall/Winter) *Journal of International Affairs*, Vol. 69, No. 1, 34 and Stern J *et al.*, Does the cancellation of South Stream signal a fundamental reorientation of Russian gas export policy?, The Oxford Institute for Energy Studies, January 2015, <http://www.oxfordenergy.org/wpcms/wp-content/uploads/2015/01/Does-cancellation-of-South-Stream-signal-a-fundamental-reorientation-of-Russian-gas-export-policy-GPC-5.pdf>. Also recall that “in September 2006, the Russian government revoked the Royal Dutch Shell (Shell) company license to manage the world’s biggest liquefied gas development in Sakhalin. Shell was accused of environmental violations and forced to hand control of the US \$22 billion project to state-owned

arbitration awards, or indirectly by curtailing the power or jurisdiction of specialised courts, the rule of law and remedies in investment disputes and energy trade remain problematic in Russia.

4. Conclusion and current developments

It is clear that the business and legal environment in Russia can present some serious risks for investors. In order to minimise any future legal uncertainty emerging from the lack of MFN status or other substantive procedural rights and remedies, parties to a BIT could adopt a mutual understanding protocol annexed to the BIT. After all, under public international law, it is accepted that protocols and annexes of a treaty form an integral part thereof.¹¹⁹ Furthermore, an agreement to amend BIT provisions or clarification as to the interpretation of its terms by a joint declaration can inform any future dispute settlement procedure including arbitration.¹²⁰

Adequate protection of investments is an essential building block of investor's confidence. As discussed above, there are serious concerns that such protection may not meet the standards required by investors interested in investing in Russia. Non-arbitrability of the issue of expropriation in certain BITs, non-applicability of the MFN clause to dispute resolution provisions, limited applicability of the ECT, ineffective judicial reforms and uncertainty of the recognition and enforcement of awards in Russia, added together; do not present an inviting investment protection package to a potential investor nor ensure remedies for existing investors should a dispute arises. With the legal reforms in Russia still in a state of flux as well as the constant changes introduced by the government, numerous judicial organs are struggling to adjust and produce consistent decisions. For example, on 29 December 2015, President Putin signed the Federal Law "On Arbitration in the Russian Federation" (FLA) and the Federal Law "On Changes to Certain Laws of the Russian Federation". The FLA will come into force on 01 September 2016.¹²¹ These efforts are perhaps a sign that the government has acknowledged the need to improve the credibility of the dispute resolution mechanism in Russia. This should not, however, lead us to the conclusion that these changes are beyond criticism. For example, the new FLA requires that Russia shall be the mandatory seat of arbitrations related to disputes between shareholders of Russian legal entities irrespective of whether such parties are domiciled in Russia or not.¹²² Subsequently, foreign arbitral institutions will only qualify for administering Russian corporate disputes after they have acquired the necessary certification. It is not clear yet what this certification process

gas and oil entity Gazprom. In June 2007, the Russian government went after international oil company British Petroleum (BP) and threatened to revoke its development license. BP was forced to sell its 62.9% stake in the world's largest natural gas field in Kovykta to Gazprom for pennies on the dollar". See, *supra note*, Glusker, p. 613.

¹¹⁹ See for instance, Article 2(2) - Vienna Convention of 23 May 1969 on the Law of the Treaties; Article 51 Treaty of the European Union 2009. Binding force of these have been confirmed by the Court of Justice of the European Union in numerous cases, *inter alia* (Case 149/85 *Wybot* [1986] ECR 2391; Case 314/85 *Foto-Frost* [1987] ECR 4199).

¹²⁰ Authentication of treaty and interpretation of its provisions can be reached after the signature of the treaty. Aust A., *Modern Treaty Law and Practice*, (CUP, 2007) at 239 – referring to the United Nations, International Law Commission, 844th Meeting, 24 February 1966, ILC 18 Yearbook of the International Law Commission, Vol. 1, Part II. [http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes\(e\)/ILC_1966_v1_p2_e.pdf](http://legal.un.org/ilc/publications/yearbooks/Ybkvolumes(e)/ILC_1966_v1_p2_e.pdf).

¹²¹ Grishchenkova A., 'New Russian Arbitration Laws', KIAP, 09 February 2016, <http://www.kiap.com/press-centr/public/606.html>.

¹²² Vishnevskaya O. and Radnaev V., 'The Russian Arbitration Reform Reached Its New Development', Kluwer Arbitration Blog, 07 January 2016, <http://kluwerarbitrationblog.com/2016/01/07/the-russian-arbitration-reform-reached-its-new-development/>.

entails in detail but for a foreign arbitral institution, the main criterion is the evidence of a widely recognised international reputation (FLA, Article 44, para. 8). A failure by a foreign arbitration institution to obtain a certificate would have great consequences for cases where Russia is the seat of arbitration. Such cases would be considered as ad hoc arbitration, not institutional arbitration (FLA, Article 44, para. 3) therefore foreign arbitral institutions without certification would not have jurisdiction in relation to corporate disputes regarding Russian companies.

FLA also states that an arbitration agreement shall be part of a charter of a Russian company and shall be applicable to all shareholders. However, public corporations and corporations with more than 1000 shareholders are not allowed to enter into arbitration agreements.¹²³ As these examples illustrate, Russia has a long way to go for ensuring investment disputes are settled effectively and in free market environment subject to the rule of law. In the mean time, any investor engaging with Russia would be advised to include an arbitration clause and arbitrate disputes in a foreign jurisdiction whenever possible.

The concerns articulated above however are dwarfed by the risk posed by the ongoing crisis on Ukraine, and the trade war that Russia is engaged in with countries imposing countermeasures.¹²⁴ The new wave of sanctions by the EU against Russia have gone into force, blocking loans for five big state banks and curbing EU business with oil and defense firms. These sanctions target not only individuals and companies but also particular sectors of the Russian economy.¹²⁵ Three major Russian state oil firms are targeted: Rosneft, Transneft and Gazprom Neft, the oil unit of gas giant Gazprom. Their access to financial markets is restricted - a serious matter for Rosneft, which last August asked the Russian government for a \$42bn (£25.2bn) loan.¹²⁶ Big Russian state-owned banks are barred from getting loans with a maturity longer than one month, and from getting other financial services in the EU.¹²⁷ Following the sanctions imposed on Russia and nearly 40% fall in petrol prices since July 2014, the Russian currency, ruble, fell to a new low against the US dollar and the euro.¹²⁸

With the early Russian initiatives of integration to international trade, not only the Russian export revenues have increased,¹²⁹ but also Russia was becoming a major host for foreign direct investment (FDI). The Global Investment Trend Monitor published by UNCTAD,

¹²³ *Supra note*, Grishchenkova, (providing an overview of the new arbitration laws).

¹²⁴ Hansson L. *et al.*, Overview of The U.S. And EU Sanctions On Russia, 06 October 2014; <http://www.mondaq.com/unitedstates/x/344530/Export+controls+Trade+Investment+Sanctions/Overview+Of+The+US+And+EU+Sanctions+On+Russia>; Sonne P. and Troianovski A., Russia Bans Food Imports in Retaliation for Western Sanctions, 07 August 2014, <http://online.wsj.com/articles/russia-bans-food-imports-in-retaliation-to-western-sanctions-1407403035>.

¹²⁵ Jones E. and Whitworth A., Unintended consequences of European Sanctions on Russia, (2014) *Survival: Global Politics and Strategy*, Vol. 56, No. 5, 21-30.

¹²⁶ BBC News, Rosneft requests \$42bn loan from Russian government, 15 August 2014, <http://www.bbc.co.uk/news/business-28801185>.

¹²⁷ Council of the European Union, EU restrictive measures in view of the situation in Eastern Ukraine and the illegal annexation of Crimea, 29 July 2014; http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/144159.pdf.; Europa Newsroom, EU sanctions against Russia over Ukraine crisis, http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions/index_en.htm; BBC News, How far do EU-US sanctions on Russia go?, 15 September 2014, <http://www.bbc.co.uk/news/world-europe-28400218>.

¹²⁸ Farchy J., 'Russia's rouble falls to record low amid oil price plunge', Financial Times, 20 January 2016, <http://www.ft.com/cms/s/0/a4c1b838-bf6b-11e5-846f-79b0e3d20eaf.html#axzz40VRJYfIQ>.

¹²⁹ In 2014 Russia witnessed a 250-percent increase in capital outflow as compared to 2013. Kuchma A., 'Russia is facing record capital and investment outflow', Russia Beyond the Headlines, January 29, 2015. http://rbth.co.uk/business/2015/01/29/russia_is_facing_record_capital_and_investment_outflow_43261.html.

indicated that for the first time in history Russia has become the third largest recipient of FDI. In 2013, FDI in Russia was at a record level, with an 83% increase since 2012. It was indicated that this unprecedented increase was caused by the British company BP acquiring a large stake in the Russian Rosneft, as part of the acquisition of TNK-BP by Rosneft.¹³⁰ After stepping up 20 places in the 2014 Doing Business Report of the World Bank,¹³¹ Russia went up two more places in the 2015 Report, ranking as 62nd out of 189 economies.¹³² However, the new geopolitical tensions between Russia, Ukraine and the Western countries have reversed this positive trend and gave rise to numerous economic sanctions. As a consequence, FDI fell to a record low in 2014 and 2015. It is evident that the EU sanctions have been drafted carefully, in light of number of vulnerabilities the EU faces, including the dependence on Russian gas supply and nuclear technology. Accordingly, Russian gas exports, the space industry and nuclear energy have been given exemptions. In response, Russia banned EU food exports. While this ban hurts a number of EU Member States; it will also lead to increase in the cost of living in Russia.¹³³

These unfortunate events dent the prospect of building a successful investment regime in Russia. Once one adds the mixture of inherent shortcomings such as the uncertainty of interpretation and application of MFN status, calculation and enforcement of arbitration awards, and the limited protection and safeguards conferred by the ECT, it becomes more evident that the energy trade and investment with Russia are complex, full of risks and surprises. Hence, this can be called the Russian Roulette!

Put in a perspective, issues discussed in this article are subtle nuisances when compared with the fears of an armed intervention, loss of lives, trade sanctions and embargoes all of which are taking shape within geo-politics and subject of contest of wills. It is therefore difficult to predict what the near future will bring in terms of investment security, legal certainty and normalisation of trade relations with Russia. It is clear however that drop in oil and gas prices, lack of investment and economic sanctions have already taken their toll on the Russian FDI as it is expected to fall by nearly 50% from last year's 59.7 billion euros to the expected 30 billion euros in 2014.¹³⁴ The recent IMF Report (2016) indicates that overall Russian economic growth was in the negative¹³⁵ and the projections for the coming years are not promising either,¹³⁶ a fact which Russia had confirmed earlier.¹³⁷

¹³⁰ Santander Trade Portal, Russia – Foreign Investment; https://en.santandertrade.com/establish-overseas/russia/foreign-investment?&actualiser_id_banque=oui&id_banque=44&memoriser_choix=memoriser.

¹³¹ The World Bank and International Finance Corporation, Doing Business 2014 – Comparing Business Regulations for Domestic Firms in 189 Economies, <https://openknowledge.worldbank.org/bitstream/handle/10986/16204/19984.pdf?sequence=1>.

¹³² The World Bank, Doing Business 2015 – Comparing Business Regulations for Domestic Firms in 189 Economies <https://openknowledge.worldbank.org/bitstream/handle/10986/20483/DB15-Full-Report.pdf?sequence=1>.

¹³³ *Supra note*, Jones and Whitworth, p. 25.

¹³⁴ Weber A., Russian FDI to Fall 50% in 2014 on Risk, Institute Says, 05 June 2014; <http://www.bloomberg.com/news/2014-06-05/russian-fdi-to-fall-50-in-2014-on-risk-institute-says.html>.

¹³⁵ IMF, World Economic Outlook, 'Subdued Demand, Diminished Prospects', 16 January 2016, <http://www.imf.org/external/pubs/ft/weo/2016/update/01/pdf/0116.pdf>.

¹³⁶ *Ibid.* p. 6.

¹³⁷ BBC News, Russia warns of recession in 2015, 02 December 2014, <http://www.bbc.co.uk/news/business-30288739>.