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A Glance into the Future: The Prospective Investment Law Regime between the European Union and the Russian Federation

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ABSTRACT
Since the Lisbon treaty entered into force in 2009, the European Union (EU) is vested with the exclusive competence in the field of foreign direct investment (FDI). This competence encompasses the negotiation and conclusion of bilateral investment treaties (BITs) with third countries including the negotiation of the standards of treatment applicable to foreign investors, which was so far the domain of the EU Member States. The advent of the new EU competence for FDI has also had an impact on EU-Russia relations. The European Commission identified Russia as a priority country for EU investment negotiations. Eventually, all existing BITs between the Russian Federation and EU Member States will be substituted by a new investment law regime between the EU and Russia. Drawing on the investment treaty practice of the Russian Federation and the slowly emerging contours of the EU's investment policy, this paper attempts to give a first impression of how the future EU-Russia investment regime may look like. For this purpose, the paper will take stock of the Russian BIT practice of the past and then analyze discrepancies with regard to the EU position.

KEYWORDS
Russian Federation, Bilateral Investment Treaties, New EU-Russia Agreement, EU investment policy, EU-Russia investment relations

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A） INTRODUCTION

Since the Lisbon treaty entered into force in 2009, the European Union (EU) is vested with the exclusive competence in the field of foreign direct investment (FDI) (see Article 3(1) lit. e in conjunction with Articles 206 and 207 of the Treaty on the Functioning of the European Union (TFEU)). This competence encompasses the negotiation and conclusion of bilateral investment treaties (BITs) with third countries including the negotiation of the standards of treatment applicable to foreign investors, which was so far the domain of the EU Member States. The fact that negotiations are already ongoing with Canada, Singapore, India, the United States, Morocco, Tunisia, Egypt and Jordan demonstrates that the process of putting the new competence for FDI into practice has considerably picked up pace.

The advent of the new EU competence for FDI has also had an impact on EU-Russia relations. Recently, the European Parliament passed a resolution calling for negotiations on an investment protection regime between the EU and Russia.[1] The European Commission identified Russia as a priority country for EU investment negotiations.[2] In that regard, Russia is a 'privileged partner' for the negotiation of the first EU investment agreements.[3] The future investment regime between the EU and Russia could take the form of either a comprehensive agreement including a chapter on investment or a stand-alone investment agreement (BIT). According to the European Commission, investment issues will be covered in the follow-up treaty to the outdated Partnership and Cooperation Agreement (PCA)[4] which

[1] European Parliament, Resolution of 26 October 2012 on EU-Russia trade relations following Russia's accession to the WTO, P7_TA(2012)0409, 26 October 2012, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-409> (accessed 8 July 2013).

[2] European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Towards a comprehensive European international investment policy, COM(2010)343 final, 7 July 2010, available at <http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf> (accessed 8 July 2013), 7.

[3] See European Parliament, Resolution of 6 April 2011 on the future European international investment policy (2010/2203(INI)), P7_TA(2011)0141, 6 April 2011, available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0141&language=EN> (accessed 8 July 2013), recital I. See also Christian Tietje, 'EU-Investitionsschutz und –förderung zwischen Übergangsregelungen und umfassender europäischer Auslandsinvestitionspolitik' (2010) EuZW 647, 649; Wolfgang Weiß, 'Art. 207 AEUV' in Eberhard Grabitz, Meinhard Hilf, Martin Nettesheim (eds), *Das Recht der Europäischen Union – Band II* (C. H. Beck 2012) 19, para 48.

[4] Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, 28 November 1997, Official Journal L 327, 3.

currently governs EU-Russia legal relations and which entered into force in 1997.[5] The PCA contains few tangible legal commitments and lacks an institutional mechanism to adopt legally binding decisions.[6] Against the background of these shortcomings, negotiations on a new EU-Russia Agreement had already been initiated in 2008 at the EU-Russia summit in Khanty-Mansyisk.[7] In May 2008 the corresponding negotiating directive was approved by the Council.[8] As, in the meantime, the Lisbon treaty has brought about an extension of the EU's common commercial policy to FDI, the new EU-Russia Agreement could include a fully-fledged chapter on investment. This will require an additional negotiating directive by the Council. Although negotiations on the trade and investment chapter of the new EU-Russia Agreement are underway, *de facto* negotiations so far have been exclusively on trade, not on investment.[9]

The flipside of the negotiation of a new EU-Russia Agreement is that it will eventually substitute all BITs currently in force between Russia and EU Member States.[10] In fact, in December 2012 the EU has passed a regulation establishing transitional arrangements for existing BITs concluded by EU Member States which are to be progressively replaced by EU investment treaties.[11] From the investors' perspective, EU-Russia investment relations are therefore at an important crossroads. Investors seeking to invest in the promising Russian market with its great potential for growth will judge the new agreement on the basis of its degree of protection and legal certainty. Due to the regulatory risks inherent in emerging markets, a strong investment protection regime is essential in the eyes of investors. Now that the investment relations between the EU and Russia will be updated, there is a certain concern in the business community that the new instrument's level of investment

[5] DG Trade, Overview of FTA and Other Trade Negotiations, last updated 1 August 2013, available at <http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf> (accessed 27 August 2013).
[6] Peter Van Elsuwege, 'Towards a Modernisation of EU-Russia Legal Relations?' (2012) CEURUS EU-Russia Papers, No. 5, 3-9.
[7] Joint Statement on Launch of Negotiations for a new EU-Russia Agreement, 27 June 2008, available at <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/er/101524.pdf> (accessed 11 March 2013).
[8] See Council Negotiating Directive for the Russian Federation, 2869th Council meeting General Affairs, 26 May 2008, available at <http://europa.eu/rapid/press-release_PRES-08-140_en.pdf> (accessed 21 June 2013).
[9] Currently, the negotiations on the Trade and Investment Chapter of the new EU-Russia Agreement are deadlocked, see DG Trade, Overview of FTA and Other Trade Negotiations, n5.
[10] See Section B at page 6.
[11] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries, 20 December 2012, Official Journal L 315, 40.

protection could fall below the *status quo*. On the occasion of the EU-Russia summit in Brussels on 20-21 December 2012, the EU-Russia Industrialists Roundtable (IRT) issued a press statement warning that '[under] no circumstance should an EU-Russia investment agreement weaken existing investor protection'.[12] According to the IRT, the chapter on investment 'should be based on "best practices" in existing bilateral investment treaties and, where possible, go even beyond existing provisions'.[13] Other lobby organizations like BUSINESSEUROPE and the Russian Union of Industrialists and Entrepreneurs (RSPP) have likewise stressed the importance of improving the investment climate in Russia. In joint statements, BUSINESSEUROPE and RSPP have called for the 'expeditious finalisation' of the negotiations on the new EU-Russia Agreement[14] and encouraged both sides to make 'significant progress' for a 'strong investment agreement'.[15]

Improving the conditions for EU investors is also in Russia's national interest. Roughly 75% of Russia's total foreign investments stem from the EU.[16] Now that Russia has become a member of the WTO in August 2012, less-competitive Russian manufacturing industries face stiff competition from European companies due to greater market access. Furthermore, Russia is no longer allowed to subsidize Russian companies or to treat imported goods less favorable than like domestic goods.[17] Hence, after Russia's accession to the WTO, investments are needed to modernize non-competitive Russian industries. Also, a strong

[12] EU-Russia Industrialists Round Table, 'IRT Recommendations to the EU-Russia Summit (21 December 2012, Brussels)', June 2012, available at <http://www.eu-russia-industrialists.org/documents/IRT_recommendations_Dec2012_FINAL.pdf> (accessed 11 March 2013), 2.

[13] Id, 1-2.

[14] BUSINESSEUROPE and Russian Union of Industrialists and Entrepreneurs, 'BUSINESSEUROPE-RSPP – Joint Statement on the Accession of Russia to the WTO', 14 December 2011, available at <http://www.ek.fi/ek/fi/yritysten_kv_toiminta/kuvat_liitteet/JointStatement_RussiaAccessiontotheWTO_141211.pdf> (accessed 21 May 2013).

[15] BUSINESSEUROPE and Russian Union of Industrialists and Entrepreneurs, 'BUSINESSEUROPE-RSPP Proposals for a new EU-Russia Agreement on Trade and Investment', 21 February 2008, available at <http://www.ek.fi/ek/fi/yritysten_kv_toiminta/kuvat_liitteet/RUSjs210208_Jointstatementfinalt.pdf> (accessed 21 May 2013).

[16] European Commission, DG Trade, Russia, available at <http://ec.europa.eu/trade/policy/countries-and-regions/countries/russia/> (accessed 23 May 2013).

[17] One current example is the recycling fee for vehicles which was introduced by the Russian Government in September 2012. Commentators characterized the measure as protectionist, because domestic manufacturers – in contrast to foreign car producers – can avoid paying the fee by giving a guarantee concerning the recycling of their vehicles. On 9 July 2013, the EU notified the WTO Secretariat of a request for consultations with the Russian Federation, thereby formally initiating the WTO dispute settlement procedure. See European Commission, Trade and Investment Barriers Report 2013, COM(2013) 103 final, 28 February 2013, available at <http://trade.ec.europa.eu/doclib/docs/2013/march/tradoc_150742.pdf> (accessed 26 June 2013), 13-4; WTO, Russian Federation – Recycling Fee on Motor Vehicles, WT/DS462/1, 11 July 2013.

investment protection regime would incentivize low-carbon investment which is needed to reduce Russian greenhouse gas emissions.[18]

Drawing on the investment treaty practice of the Russian Federation and the slowly emerging contours of the EU's investment policy, this paper attempts to give a first impression of how the future EU-Russia investment regime may look like. To this end, the paper will briefly sketch the current legal framework for EU-Russia investment relations and outline the transitional arrangements for existing BITs between Russia and EU Member States (Section B). Then, a tentative outline of the prospective investment architecture between the EU and Russia will be provided (Section C). For this purpose, the paper will take stock of the Russian BIT practice of the past and then analyze discrepancies with regard to the respective EU position. Section D offers some concluding remarks.

[18] See Anatole Boute, 'Combating Climate Change through Investment Arbitration' (2012) 35 Fordham International Law Journal 613.

B) THE *STATUS QUO* OF EU-RUSSIA INVESTMENT RELATIONS

1. THE CURRENT LEGAL EU-RUSSIA INVESTMENT FRAMEWORK

The first ever BIT was signed between Germany and Pakistan in 1959. Since then, countries around the world have signed such agreements leading to a dense network of over 2,850 BITs.[19] By now, the Russian Federation has signed 72 BITs, of which 54 have entered into force.[20] These include BITs signed by the Union of Soviet Socialist Republics (USSR), of which the Russian Federation is the legal successor. In addition, in 2008 Russia signed a regional investment agreement with the Member States of the Eurasian Economic Community.[21] Out of the 54 Russian BITs which are currently in force, 18 have been concluded with Member States of the European Union.[22] Eight of these BITs date back to the Soviet era and were concluded in 1991,[23] another eight were concluded between 1996 and 1997 and the remaining two were concluded in 2004 and 2005 respectively. Five out of the 28 EU Member States (Croatia, Cyprus, Poland, Portugal and Slovenia) have concluded BITs with Russia which have however not yet entered into force.[24] Russia will not pursue the ratification process regarding the BITs with Croatia, Cyprus and Poland, because they do

[19] UNCTAD, World Investment Report 2013, available at <http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf> (accessed 10 July 2013), 101.
[20] See <http://globalarbitrationreview.com/know-how/topics/66/jurisdictions/26/russia/> (accessed 9 July 2013). This article was updated the last time on 2 November 2012. For UNCTAD's list of Russian BITs see <http://www.unctad.org/Sections/dite_pcbb/docs/bits_russia.pdf> (accessed 9 July 2013). According to UNCTAD's data, Russia has signed 71 BITs of which 51 have entered into force.
[21] Agreement on the Promotion and Reciprocal Protection of Investments in the Member States of the Eurasian Economic Community, 12 December 2008, available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=107307> (accessed 8 July 2013).
[22] These countries are Austria (1990/1991), Belgium (1989/1991), Bulgaria (1993 & Protocol (2003)/2005), the Czech Republic (1994/1996), Denmark (1993/1996), Finland (1989/1991) & Protocol (1996/1999), France (1989/1991), Germany (1989/1991), Greece (1993/1997), Hungary (1995/1996), Italy (1996/1997), Lithuania (1999/2004), the Netherlands (1989/1991), Romania (1993/1996), Slovakia (1993/1996), Spain (1990/1991), Sweden (1995/1996) and the UK (1989/1991). The years in brackets denote the date of the conclusion and of the entry into force of the respective BIT. The first Russia-Italy BIT was concluded in 1989 and entered into force in 1991, but was renegotiated. A revised BIT was concluded in 1996 and entered into force in 1997.
[23] In total, eleven Russian BITs were concluded by the USSR. See Ministry of Foreign Affairs of the Russian Federation, 'Bilateral Agreements on Promotion and Reciprocal Protection of Investments', 26 February 2010, available at <http://www.mid.ru/ns-dipecon.nsf/0/41a4ca949cf9487ec32575cc002ceeab?OpenDocument> (accessed 5 June 2013).
[24] See Ministry of Foreign Affairs of the Russian Federation, 'Bilateral Agreements on Promotion and Reciprocal Protection of Investments', n23.

not 'correspond to the realities of today'.[25] The BITs with Portugal and Slovenia are still awaiting ratification. Accordingly, the Governments of Portugal and Slovenia have notified their BITs with Russia to the Commission, whereas the Governments of Croatia, Cyprus and Poland have not.[26] Russia has no BIT with Estonia, Ireland, Latvia and Malta. The legal agreement governing EU-Russia relations, the PCA, merely contains a clause encouraging cooperation regarding investment promotion and protection.[27] No hard law commitments on investment protection are contained in the PCA.

Apart from those bilateral agreements there are a number of regional and multilateral instruments relating to the regulation of investment. Russia has signed the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) on 16 June 1992, but has not yet ratified it. Many Russian BITs also reference the ICSID Additional Facility Rules as one of the possible arbitral options open to the investor.[28] The Additional Facility Rules permit arbitrations to be administered by the ICSID Secretariat if either the host State or the investor's home State is a Contracting Party of the Convention. As of now, the EU cannot however become a member of the ICSID Convention due to its lack of Statehood.[29] Until a (theoretically possible) amendment of the ICSID Convention has become effective or, alternatively, the Russian Federation has ratified the Convention investors may resort to *ad hoc* arbitration based on the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). Furthermore, since 1960, Russia is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[30]

In 1994, Russia signed the Energy Charter Treaty (ECT), a multilateral agreement covering energy-related trade and investment.[31] The instrument's provisions applied provisionally in accordance with Article 45(1) pending its ratification. On 20 August 2009, Russia officially

[25] Id (translation by the author).
[26] See List of extra-EU BITs subject to Regulation 1219/2012, n51.
[27] EU-Russia Partnership and Cooperation Agreement, n5, Article 58.
[28] 2001/2002 Russian Model BIT, n37, Article 8(2).
[29] Hoffmeister and Günes Ünüvar, n47, 76-8.
[30] Russia signed the Convention on 29 December 1958. It ratified the instrument on 24 August 1960 and the Convention then entered into force on 22 November 1960. All dates are taken from <http://newyorkconvention1958.org/index.php?lvl=more_results&look_ALL=1&user_query=*&autolevel1=1&jurisdiction=20> (accessed 3 June 2013).
[31] The Energy Charter Treaty (ECT) and the Protocol on Energy Efficiency and Related Environmental Aspects (PEEREA) were both signed on 17 December 1994.

notified the ECT Depositary that it did not intend to become a Contracting Party.[32] Investments which have been made in the period of provisional application (1994-2009) continue to be protected under the ECT until October 18, 2029, according to Article 45(3)(b) ECT.[33] As Russia withdrew from the ECT, it is mainly the BITs that govern the investment relations between Russia and EU Member States.

It may also be useful to list the different Model BITs that Russia has used as a template for the negotiations with third countries. In 1987, the USSR adopted a Model BIT,[34] on the basis of which eleven BITs have been negotiated before the collapse of the USSR towards the end of 1991. Then in 1992, the Russian Federation under President Boris Yeltsin released its first Model BIT.[35] An amendment of 1995 did not modify the actual Model BIT but related solely to the intra-governmental procedures for the conclusion of investment treaties.[36] Among other things, the Russian Ministry of Economic Development, in lieu of the Ministry of Finance, was charged with conducting the negotiations with the governments of foreign States and was empowered to sign the agreement (before that, the agreement had to be presented to the Russian Government in order to be signed). In 2001, after Putin had taken office as President, a new Model BIT was drafted.[37] For unknown reasons, this model treaty

[32] As stipulated by Article 45(3) lit. a, the provisional application of the ECT by Russia terminated 'upon the expiration of 60 days from the date on which such signatory's written notification is received by the Depository', ie on the 18 October 2009. See <http://www.encharter.org/index.php?id=414#c1338> (accessed 3 June 2013).

[33] This was confirmed by the Interim Awards on Jurisdiction and Admissibility in the Yukos litigation, see *Yukos Universal Ltd. v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, PCA Case No. AA 227, 30 November 2009; *Hulley Enterprises Ltd. v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, PCA Case No. AA 226, 30 November 2009; *Veteran Petroleum Trust v. Russian Federation*, Interim Award on Jurisdiction and Admissibility, PCA Case No. AA 228, 30 November 2009. For an analysis of the interim awards on this issue, see Chiara Giorgetti, 'The Yukos Interim Awards on jurisdiction and Admissibility Confirms Provisional Application of Energy Charter Treaty' (2010) 14(23) ASIL Insights <http://www.asil.org/insights100803.cfm> (accessed 5 April 2013).

[34] Resolution of the Council of Ministers of the USSR of 27 November 1987, No 1353, 'On Conclusion between the Government of the USSR and Governments of Foreign States of Agreements on Reciprocal Protection of Investments', available at <http://jurbase.ru/2006_archive_federal_laws_of_russia/texts/sector173/tez73651.htm> (accessed 9 July 2013).

[35] Government Resolution of 11 June 1992, No 395, 'On Conclusion between the Government of the Russian Federation and Governments of Foreign States of Agreements on Promotion and Reciprocal Protection of Investments', available at <http://giod.consultant.ru/page.aspx?1;1224939> (accessed 9 July 2013). The consolidated version (with the amendments of 1995) can be found at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=10276> (accessed 9 July 2013).

[36] Government Resolution of 26 June 1995, No 625, 'On the Insertion of Changes and Additions to the Resolution of the Government of the Russian Federation of 11 June 1992, No 395', available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=6991> (accessed 9 July 2013).

[37] Government Resolution of 9 June 2001, No 456, 'On Conclusion between the Government of the Russian Federation and Governments of Foreign States of Agreements on Promotion and Reciprocal

initially lacked any provisions on NT, MFN and FET. What went unnoticed by some authors[38] was that this lacuna was swiftly closed by an amendment of 2002 which reintroduced the respective rules into the model agreement.[39] Nevertheless, Russia's investment treaty practice became much more conservative with the beginning of Putin's administration,[40] which is also reflected in the 2001/2002 Model BIT. The amendment of 2010 did not touch the substance of the 2001/2002 Model BIT but only stipulated that the investment treaty negotiations should be conducted according to a plan to be administered by the Ministry of Economic Development of the Russian Federation.[41] The plan for the year 2013 envisages negotiations with the EU on foreign investment but does not specify a time frame.[42]

2. TRANSITIONAL ARRANGEMENTS FOR EXISTING BITS BETWEEN RUSSIA AND EU MEMBER STATES

The extension of the EU's competence to FDI necessarily implicates the question if and how existing BITs between Russia and EU Member States (so-called extra-EU BITs) are affected. First, it should be mentioned that the expansion of competences on the part of the EU cannot impinge on the validity of the BITs under public international law (*pacta sunt servanda*).[43] The changes caused by the Lisbon treaty could nonetheless entail the illegality of extra-EU BITs under EU law.[44] It is the prevailing view that Article 351(1) TFEU, which states that the rights and obligations arising from extra-EU agreements concluded before 1

Protection of Investments', available at <http://www.referent.ru/1/44991> (accessed 9 July 2013). The consolidated version (with the amendments of 2002 and 2010) can be found at <http://docs.pravo.ru/document/view/6535/10477908/> (accessed 9 July 2013).

[38] David Collins, *The BRIC States and Outward Foreign Direct Investment* (OUP 2013) 61.

[39] Government Resolution of 11 April 2002, No 229, 'On the Insertion of Additions and Changes to the Model Agreement adopted by Resolution of the Government of the Russian Federation of 9 June 2001, No 456', available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=36258> (accessed 9 July 2013).

[40] Noah Rubins and Azizjon Nazarov, 'Investment Treaties and the Russian Federation: Baiting the Bear?' in Jacques Werner and Arif Hyder Ali (eds), *A Liber Amicorum: Thomas Wälde – Law Beyond Conventional Thought* (CMP Publishing Ltd 2009) 242.

[41] Government Resolution of 17 December 2010, No 1037, 'On the Insertion of Changes to the Resolution of the Government of the Russian Federation of 9 June 2001, No 456', available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=108228> (accessed 9 July 2013).

[42] Order of the Ministry of Economic Development of the Russian Federation, 31 May 2013, No 298, available at <http://merit.consultant.ru/page.aspx?60319> (accessed 16 July 2013).

[43] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 *UNTS* 331, Article 26.

[44] See Jan Ceyssens, 'Towards a Common Foreign Investment Policy? – Foreign Investment in the European Constitution' (2005) 32(3) Legal Issues of Economic Integration 259.

January 1958 shall not be affected by the provisions of the Treaties, can be applied analogously to a subsequent expansion of powers on the part of the EU.[45] This would mean that the current lack of competence on the part of the EU Member States resulting from the new allocation of competence is not enough, in and of itself, to render the existing BITs between Russia and EU Member States unlawful under EU law. The German Federal Constitutional Court, in its judgment on the Lisbon treaty, adopted this legal position by stating that the 'continued legal existence of the agreements already concluded is not in question', because the 'legal concept that a legally existing factual situation in the Member States will in principle not be adversely affected by a later step of integration' could be inferred from Article 351(1) TFEU.[46] By contrast, other authors have rejected the proposition of an analogous application of Article 351(1) TFEU and have expressed the view that it is necessary to empower EU Member States to maintain their BITs.[47]

Meanwhile, the EU has addressed these legal questions in a piece of secondary EU legislation, while at the same time avoiding taking a doctrinal position on the scholarly debate outlined above. The 'Regulation No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries'[48] provides legal certainty to investors insofar as it stipulates that existing BITs may be maintained in force until a novel BIT between the EU and the respective third country enters into force (Article 3 of the Regulation). For this purpose, all Member States are obliged to notify their BITs to the Commission.[49] Pursuant to Article 5 of the Regulation, the EU Commission has the

[45] Michael J Hahn, 'Artikel 207 AEUV' in Christian Calliess and Matthias Ruffert (eds), *EUV / AEUV – Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* (4th edn, C. H. Beck 2011) paras 81-2; Kirsten Schmalenbach, 'AEUV Art. 351' in Christian Calliess and Matthias Ruffert (eds), *EUV / AEUV – Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta* (4th edn, C. H. Beck 2011) para 8; Christoph Herrmann, 'Die Zukunft der mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon' (2010) EuZW 207, 211-2; Sven Leif Erik Johannsen, *Die Kompetenz der Europäischen Union für ausländische Direktionvestitionen nach dem Vertrag von Lissabon* (Beiträge zum Transnationalen Wirtschaftsrecht, Heft 90, Halle 2009) 23-7; Christian Tietje, *Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon* (Beiträge zum Transnationalen Wirtschaftsrecht, Heft 83, Halle 2009) 17-8; Jörg P Terhechte, 'Art. 351 TFEU, the Principle of Loyalty and the Future Role of the Member States' Bilateral Investment Treaties' in Marc Bungenberg, Joern Griebel and Steffen Hindelang (eds), *International Investment Law and EU Law* (Springer 2011).

[46] German Federal Constitutional Court (*Bundesverfassungsgericht*), 2 BvE 2/08, 30 June 2009, para 380.

[47] Frank Hoffmeister and Günes Ünüvar in Marc Bungenberg, August Reinisch and Christian Tietje (eds), *EU and Investment Agreements – Open Questions and Remaining Challenges* (Nomos 2013) 83.

[48] See note 11.

[49] Regulation establishing transitional arrangements for extra-EU BITs, n11, Article 2.

competence to assess whether one or more provisions of these BITs constitute a 'serious obstacle' to the negotiation or conclusion by the EU of BITs with third countries. If such an obstacle is identified, the Commission may 'indicate the appropriate measures to be taken by the Member State concerned' to remove the obstacle.[50] Annually, a list of all BITs notified by the EU Member States to the Commission will be published in the Official Journal of the EU.[51] All 21 EU Member States that have a BIT with the Russian Federation (either signed or already in force) have notified their respective BIT with a view to maintaining it in force.[52]

[50] Id, Article 6.
[51] Id, Article 4(1).
[52] List of the bilateral investment agreements referred to in Article 4(1) of Regulation (EU) No 1219/2012 of the European Parliament and of the Council establishing transitional arrangements for bilateral investment agreements between Member States and third countries, 8 May 2013, Official Journal C 131, 2.

C) THE FUTURE INVESTMENT LAW REGIME BETWEEN THE EU AND RUSSIA

1. ISSUES OF JURISDICTION

i. The situation so far

The most palpable defect of investment protection in Russia has not been the absence of substantive protection standards but the limited investor-State arbitration clauses in the BITs between Russia and the EU Member States. Many Russian BITs concluded with economically potent EU Member States such as Austria,[53] Belgium and Luxembourg,[54] Bulgaria,[55] Finland,[56] arguably France,[57] Germany,[58] the Netherlands,[59] Spain[60] and the UK[61] contain a qualified arbitration clause limited to disputes relating to the amount or mode of payment of compensation for expropriation.[62] In statistical terms, 9 out of 18 Russian BITs with EU Member States curtail the right to access investor-State dispute settlement (ISDS). It may be fitting to note at this juncture that – with the sole exception of the Russia-Bulgaria BIT which was signed in 1993 – all BITs enumerated above originate from the Soviet-era and were signed in 1991. Outside of the EU context, there are only three further BITs that contain restrictive language regarding the access to ISDS and that is the USSR-Switzerland,[63] USSR-Korea[64] and arguably the USSR-Canada[65] BIT. These BITs also date back to the Soviet era.

[53] USSR-Austria BIT (1990), Article 7(1).
[54] USSR-Belgium/Luxembourg BIT (1989), Article 10(1).
[55] Russia-Bulgaria BIT (1993), Article 7(3).
[56] USSR-Finland BIT (1989), Article 8(1).
[57] USSR-France BIT (1989), Article 7. Compare with the almost identical formulation of the investor-state dispute settlement (ISDS) clause in the USSR-Canada BIT (1989) in Article IX(1). The tribunal in the case *RosInvestCo UK Ltd. v Russian Federation*, n78, noted that the ISDS clause in the USSR-France BIT provides 'a wider language' (para 122). The tribunal in the case *Berschader v Russian Federation*, n76, stated that the ISDS provisions in the BITs with France and Canada would be 'somewhat broader' (para 155), 'but still must be understood to exclude the fact of expropriation itself from arbitration' (para 204).
[58] USSR-Germany BIT (1989), Article 10(2).
[59] USSR-Netherlands BIT (1989), Article 9(2).
[60] USSR-Spain BIT (1990), Article 10(1).
[61] USSR-UK BIT (1989), Article 8(1).
[62] See the overview of investment treaty programs at <http://www.globalarbitrationreview.com/know-how/topics/66/jurisdictions/26/russia/> (accessed 5 April 2013).
[63] USSR-Switzerland BIT (1990), Article 8(2).
[64] USSR-Korea BIT (1990), Article 9(2).

In their restrictive approach towards ISDS, the BITs negotiated by the USSR and EU Member States were modeled heavily on the 1987 Model BIT of the Soviet Union which did not envisage ISDS at all, but only countenanced State-to-State arbitration.[66] By way of example, the USSR-Germany BIT provides in its Article 10 that (only) disputes 'relating to the amount of compensation or the method of its payment, in accordance with article 4 of this Agreement [governing expropriation]' may be submitted to an international tribunal.[67] This wording of Russian BITs suggests that (1) disputes relating to investment protection standards such as fair and equitable treatment (FET), most-favored nation (MFN) or national treatment (NT) and full protection and security cannot be submitted to investment arbitration by the investor and can only be dealt with by way of State-to-State dispute settlement and that (2) disputes over the *occurrence of expropriation* are excluded from the ambit of the arbitration clause. Following this interpretation, an arbitral tribunal's jurisdiction is lacking *ratione materiae* unless a national court has affirmed the occurrence of an expropriation measure or the host State has acknowledged that an act of expropriation has occurred.[68]

The fact that Soviet-style ISDS clauses are *prima facie* restrictive has played out extensively in the investor-State arbitrations on the basis of Russian BITs. The case-law has centered on the second issue of whether investors can claim compensation for expropriation. In the case *Sedelmayer v Russian Federation*[69] under the USSR-Germany BIT, the first investment arbitration against Russia, this issue was however not yet touched upon, simply because the Russian Government did not raise a jurisdictional challenge to this effect.[70] Speculating about the Russian Federation's failure to do so, some authors have assumed that the Protocol to the BIT gives broader access to ISDS.[71] The Protocol specifies that an investor must also be compensated 'in cases where the other Contracting Party has caused damage to the economic activity of an enterprise in which he has shares if this results in a substantial loss for his investment'.[72] Others, however, seem not to share this view by

[65] USSR-Canada BIT (1989), Article IX(1) in conjunction with Article VI on expropriation suggest that only a dispute relating to the *effects* of a measure on expropriation (ie amount of compensation or payment modalities) can be submitted by the investor to arbitration. See note 57.
[66] See 1987 USSR Model BIT, n34, Article 5.
[67] Unofficial English translation of the USSR-Germany BIT (1989), see 1707 *UNTS* 194.
[68] Elvira R Gadelshina, 'Major Pitfalls for Foreign Investors in Russia: What Are Russian BITs Worth?' (2011) Kluwer Arbitration Blog, available at <http://kluwerarbitrationblog.com/blog/2011/12/01/major-pitfalls-for-foreign-investors-in-russia-what-are-russian-bits-worth/> (accessed 9 July 2013).
[69] *Mr. Franz Sedelmayer v The Russian Federation*, ad hoc award, 7 July 1998.
[70] Jesse Heath and others, 'Russia' (2010) 44 The International Lawyer 737, 746.
[71] Noah Rubins and Azizjon Nazarov, n40, 245.
[72] Protocol to the USSR-Germany BIT (1989), paragraph 3 supplementing Article 4 of the BIT.

pointing out that Russia 'surprisingly' did not advance the argument that the BIT's ISDS clause prevented the tribunal from deciding on the occurrence of an expropriation.[73] As the Protocol stipulates that the provisions of Article 10 of the USSR-Germany BIT shall apply *mutatis mutandis* to its supplementary provision on expropriation, the scope of Russia's consent to arbitration under the BIT is arguably not expanded. Article 10 – with its reference to amount and method of payment of compensation for expropriation – remains the bottleneck for investors.[74] Against this background, it is misleading to say that there is a 'strong BIT' in force between Russia and Germany.[75]

Although of no relevance in the *Sedelmayer* arbitration, two other arbitral awards rendered on the basis of a Soviet-era BIT indeed affirmed the restrictive interpretation of the respective ISDS clause. In *Berschader v Russian Federation*, a case which was administered by the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) under the USSR-Belgium BIT, the arbitrators took the view that the ordinary meaning of the treaty's arbitration clause in Article 10 'is quite clear' in that it 'excludes … disputes concerning whether or not an act of expropriation actually occurred under Article 5 [governing expropriation]'.[76] The tribunal further noted that the clause's narrowness was the result of the 'deliberate intention of the Contracting Parties to limit the scope for arbitration under the Treaty' and reflected an 'identifiable practice' on the part of the Soviet Union.[77] The arbitration tribunal in the case *RosInvestCo UK Ltd. v Russian Federation*, which had arisen under the USSR-UK BIT and was considered by the SCC, closely followed the approach taken in *Berschader*. It was called upon to interpret the investor-State arbitration clause in Article 8 of the USSR-UK BIT which also contained limiting language similar to the one in the USSR-Belgium BIT. The arbitrators held that its subject-matter jurisdiction under the USSR-

[73] Jesse Heath and others, n70, 746.
[74] See also *Sedelmayer v Russian Federation*, n69, 72 where the tribunal noted the provision in the protocol supplementing Article 4 of the BIT in the context of its discussion of whether the investments made by Sedelmayer have been subject to expropriation. This suggests that the tribunal regarded the provision as having a substantive rather than a procedural character which would mean, in turn, that the qualified arbitration clause in Article 10 of the BIT remains intact.
[75] Arnoud Willems, Jung-ui Sul and Yohan Benizri, 'Unbundling As a Defence Mechanism Against Russia: Is the EU Missing the Point?' (2009) 7(2) Oil, Gas & Energy Law, 11.
[76] *Vladimir Berschader and Moïse Berschander v The Russian Federation*, SCC Case No. 080/2004, award, 21 April 2006, paras 152-3.
[77] *Berschader v Russian Federation*, n76, para 155.

UK BIT did not encompass the power to make a determination as to whether there was an expropriation *vel non*.[78]

In contrast, the award on preliminary objections in the case *Renta 4 S.V.S.A v Russian Federation* came to the completely opposite result than the two previous tribunals. It held that the wording of the Soviet-style ISDS clause was no impediment to the tribunal deciding on the occurrence of an expropriation. The *Renta 4 S.V.S.A* case involved a claim of a minority-shareholder of Yukos under the 1991 USSR-Spain BIT before the SCC. Although the arbitrators remarked at the outset that they 'would be hesitant to depart from a proposition followed in a series of fully-reasoned decisions reflecting a *jurisprudence constante*',[79] they nevertheless rejected to follow *Berschader* and *RosInvestCo*, for different reasons. Notwithstanding the fact that the tribunal in the *Berschader* case interpreted an arbitration clause that was virtually identical with the respective provision in the USSR-Spain BIT,[80] the arbitrators refused to regard the award as persuasive authority mainly because it purportedly contained only a short treatment of the issue at hand lacking a sufficient analysis.[81] The conclusions arrived at in the *RosInvestCo UK Ltd. v Russia* award were also not embraced, because of the slightly different formulation of the investor-State arbitration clause in the USSR-UK BIT[82] and because the tribunal had not devoted sufficient consideration to the issue of whether the formulation of the ISDS clause, relating to legal disputes concerning

[78] *RosInvestCo UK Ltd. v Russian Federation*, SCC Case No. V079/2005, award on jurisdiction, October 2007, paras 101-123.
[79] *Renta 4 S.V.S.A. et al. v Russian Federation*, SCC No. 24/2007, award on preliminary objections, 20 March 2009, para 16.
[80] *Renta 4 S.V.S.A. et al. v Russian Federation*, n79, para 22. The USSR-Belgium BIT (1989) refers to disputes 'relatif au montant ou au mode de paiement des indemnités *dues en vertu* de l'article 5' (French version) and 'касающийся размера или порядка выплаты возмещения, *подлежащего выплате* в соответствии со статьей 5' (Russian version). The unofficial English translation used in the *Berschader* award reads 'concerning the amount or mode of compensation *to be paid* under Article 5'; see *Berschader v Russian Federation*, n76, para 47.
The USSR-Spain BIT (1990) refers to disputes 'relativos a la cuantía o a la forma de pago des las indemnizaciones correspondientes *en virtud* del artículo 6' (Spanish version) and 'касающийся размера или порядка выплаты компенсации, *подлежащей выплате* в соответствии со статьей 6' (Russian version). The *Renta 4 S.V.S.A.* award, in an unofficial translation, refers to disputes 'relating to the amount or method of payment of the compensation *due* under article 6'; see *Renta 4 S.V.S.A. et al. v Russian Federation*, n79, para 5.
[81] *Renta 4 S.V.S.A. et al. v Russian Federation*, n79, paras 22-6, 47 and 53.
[82] The USSR-UK BIT (1989) refers to disputes 'concerning the amount or payment of compensation *under* Articles 4 or 5' (English version) and 'относящимся или к размеру и порядку выплаты компенсации, *предусмотренной* статьями 4 и 5настоящего Соглашения' (Russian version). For the relevant provision under the USSR-Spain BIT (1990) see note 80.

the '*payment* of compensation', could be taken to presuppose and therefore sanction a prior assessment of whether expropriation had taken place.[83]

Responding to Russia's contention that 'there is no dispute as to quantification' and that the Claimants would be impermissibly attempting to debate whether expropriation occurred, the tribunal in *Renta 4 S.V.S.A* stated that Russia's argument would be flawed, because there is 'more than one basis on which a respondent State could say "zero"'.[84] First, there could be a dispute as to quantification. Second, there could be disagreement as to whether the tribunal is empowered to decide if an obligation has arisen under Article 6 on expropriation. On the basis of this argument, it seems, the tribunal accepted that there was a dispute '*relating to the amount* (…) *of the compensation* due under article 6'. In a second step, the tribunal decided that the BIT's text does not '[allow] a curtailment of the international tribunal's authority to decide whether compensation is "due"'.[85] Consequently, the tribunal dismissed Russia's jurisdictional objection and affirmed its subject-matter jurisdiction under Article 10 of the USSR-Spain BIT.

From the investors' perspective, the decision in *Renta 4 S.V.S.A.* came as a pleasant surprise. The award provides useful arguments to investors who are confronted with narrowly-worded ISDS clauses in future arbitration proceedings.[86] Still, the situation remains unsatisfactory for investors. First, Russia is still seeking to set aside the jurisdictional award in *Renta 4 S.V.S.A.*, which would nullify the utility of the award for future arbitrations.[87] Second, investors in Russia operating under a BIT that contains a qualified arbitration clause continue to be exposed to legal uncertainty as it is impossible to predict how this issue will be resolved by another arbitral tribunal. After all, two tribunals (*Berschader* and *RosInvestCo*) ruled in favor of the restrictive interpretation and only one against (*Renta 4 S.V.S.A.*).

Investors have sought to sidestep the jurisdictional hindrances posed by the restrictive arbitration clause by arguing that the MFN clause effectively expanded the tribunal's jurisdiction. This argument has been put forward in *Berschader*, *RosInvestCo* and *Renta 4 S.V.S.A.* The obligation to provide MFN treatment is found in many modern BITs. MFN

[83] *Renta 4 S.V.S.A. et al. v Russian Federation*, n79, para 48.
[84] Id, para 30.
[85] Id, para 39.
[86] See Jesse Heath and others, n70, 750 (stating that 'investors may find that the case for direct application of these BITs to the merits of expropriation claims is more easily argued in light of *Renta 4*').
[87] Luke Eric Peterson, 'Russia held liable for expropriation of Yukos shareholdings in case brought by minority Spanish shareholders (but funded by majority owner)', Investment Arbitration Reporter, 26 July 2012 <http://www.iareporter.com/articles/20120726_2> (accessed 20 June 2013).

treatment levels the playing field among investors from different countries in that it obliges the host State to accord to investments of the investor's home State treatment *no less favorable* than that accorded to the investments of any third State.

The question whether an MFN clause may be used to import more favorable dispute resolution provisions from a third-country BIT into the treaty under consideration by a given tribunal has already been addressed in a number of arbitral awards outside the Russian investment treaty context and has received ample treatment in the literature.[88] The divergent approaches towards MFN-based jurisdiction are prominently exemplified by the *Maffezini* decision[89] (allowing MFN-based jurisdiction) and the *Plama* award[90] (denying it). The arbitral jurisprudence generated in the Russian context should be seen as a subset of this broader stream of awards on the applicability of MFN treatment to procedural matters. The MFN debate prompted by the inclusion of narrow ISDS clauses in Soviet-era BITs focuses exclusively on the import of broader subject-matter jurisdiction, whereas other case-law applying the MFN standard to procedural matters relates to waiting periods, limitations *ratione temporis* or the definition of investment.[91]

In the case of the Russian BITs from the communist era, investors have attempted to circumvent the limited subject matter jurisdiction granted under those treaties' dispute resolution clauses claiming that the MFN clause would enable the investor to rely on the broader subject matter jurisdiction granted under some third-country BIT. In *Berschader*, the claimants sought to invoke the arbitration provisions contained in the Norway-Russia BIT[92] or, alternatively, in the Denmark-Russia BIT[93] by virtue of the MFN clause in Article 2 of the USSR-Belgium BIT. The tribunal resolved the issue against the investors, with one arbitrator dissenting however.[94] It applied the principle that 'an MFN provision in a BIT will only

[88] Julie A Maupin, 'MFN-Based Jurisdiction in Investor-State Arbitration: Is There Any Hope For a Consistent Approach?' (2011) 14 Journal of International Economic Law 157; Stephen W Schill, 'Multilateralizing Investment Treaties through Most-Favored-Nation Clauses' (2009) 27 Berkeley Journal of International Law 496.
[89] *Emilio Agustín Maffezini v The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000.
[90] *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005.
[91] Andreas R Ziegler, 'The Nascent International Law on Most-Favoured-Nation (MFN) Clauses in Bilateral Investment Treaties (BITs)' in Christoph Herrmann and Jörg P Terhechte (eds), *European Yearbook of International Economic Law 2010* (Springer 2010) 82-9.
[92] Russia-Norway BIT (1995), Article 8.
[93] Russia-Denmark BIT (1993), Article 8.
[94] *Berschader v Russian Federation*, n76, Separate Opinion of Todd Weiler, 15-25.

incorporate by reference an arbitration clause from another BIT where the terms of the original BIT clearly and unambiguously so provide or where it can otherwise be clearly inferred that this was the intention of the contracting parties'.[95]

In the *RosInvestCo* case, the question was whether the MFN clause in Article 3 of the USSR-UK BIT operates to the effect that the investor may invoke the broader arbitration clause contained in Article 8 of the Denmark-Russia BIT going beyond the limited subject matter jurisdiction granted in Article 8 of the USSR-UK BIT. In contrast to the *Berschader* decision, the tribunal affirmed MFN-based jurisdiction. First of all, the tribunal noted that an arbitration clause is 'of the same protective value' as any substantive protection, for the investor would otherwise have no remedy other than challenging State measures interfering with his investment before the domestic courts of the host State.[96] It then went on to state that it would be the 'normal result' of the application of an MFN clause to import protections from another treaty not consented to in the basic treaty and that this effect, 'if it applies to substantive protection, … should apply even more to "only" procedural protection'.[97] The arbitrators also placed considerable weight on the fact that Article 7 of the USSR-UK BIT contained certain exceptions to the application of the MFN clause (customs unions, agreements on taxation) but that the ISDS clause was not mentioned therein.[98] On November 9, 2011, however, the award on jurisdiction was set aside by a Swedish District Court.[99] The Court held that the arbitrators erred in affirming MFN-based jurisdiction.[100] The judgment certainly shows that the strategy of using a treaty's MFN treatment clause to access a more favorable arbitration clause contained in a different treaty is fraught with uncertainty. Furthermore, bearing in mind that other tribunals outside the Russian context have across the board rejected the widening of the scope *ratione materiae* of ISDS provisions through MFN, the *RosInvestCo UK Ltd.* decision seems to be the 'notable exception'.[101]

[95] *Berschader v Russian Federation*, n76, para 181.
[96] *RosInvestCo UK Ltd. v Russian Federation*, n78, para 132. See also id, para 130: 'the submission to arbitration forms a highly relevant part of the corresponding protection for the investor'.
[97] *RosInvestCo UK Ltd. v Russian Federation*, n78, para 132.
[98] *RosInvestCo UK Ltd. v Russian Federation*, n78, paras 134-5.
[99] Luke Eric Peterson, 'Arbitral victory in Yukos case slowly unraveling as U.S. hedge fund declines to spend more money defending arbitral award from Russian attack', Investment Arbitration Reporter, 10 April 2012 <http://www.iareporter.com/articles/20120410_5> (accessed 18 June 2013).
[100] The judgment of the Swedish District Court is available at <http://italaw.com/sites/default/files/case-documents/ita0911.pdf> (accessed 9 July 2013).
[101] Andreas R Ziegler, n91, 101.

In the *Renta 4 S.V.S.A. case*, the claimant also sought to enlarge arbitral jurisdiction by virtue of MFN-based jurisdiction. Although the arbitrators ultimately rejected this jurisdictional extension through the treaty's MFN clause, it was the particular wording of the treaty's MFN clause and not the arbitrators' general appreciation of the issue that proved to be dispositive for this outcome.[102] The MFN treatment obligation contained in Article 5(2) of the USSR-Spain BIT applies only to the 'treatment referred to in paragraph 1 above'. Article 5(1), in turn, deals with 'fair and equitable treatment'. Although several lexical inconsistencies in Article 5 of the USSR-Spain BIT also furnished arguments to the contrary,[103] the tribunal finally concluded by a majority (Charles Brower appended a separate opinion) that the BIT grants MFN treatment only in respect of FET.[104] Logically, the arbitrators then grappled with the question whether access to international arbitration is part and parcel of the FET standard. The arbitrators decided, again by a majority, that FET does not extend to the 'availability of international as opposed to national fora'.[105]

As is evident not only from the arbitral awards in the Russian context but also from other awards dealing with the issue of MFN-based jurisdiction, there is a schism in arbitral practice.[106] This absence of a *jurisprudence constante* undermines the stability and predictability of international investment law. This is not a problem peculiar to the Russian context, but as many communist-era BITs of the Russian Federation contain limited arbitration clauses (as discussed above), MFN-based jurisdiction often constitutes the last possibility for EU investors in Russia to have their claims heard.

ii. The future situation

What has become clear from the foregoing analysis of arbitral practice is that investors are faced with great uncertainty regarding the accessibility of investment arbitration. Will these precarious conditions persist under the prospective investment law regime between the EU

[102] Indeed, the tribunal seems to make a case for the general possibility of enlarging jurisdiction through an MFN clause. It stated that there is 'no authority for the proposition that MFN is limited to "primary" obligations', at *Renta 4 S.V.S.A. et al. v Russian Federation*, n79, para 100. See also id, paras 99-101.
[103] See the discussion on the 'lexical difficulties' at *Renta 4 S.V.S.A. et al. v Russian Federation*, n79, paras 111-8.
[104] *Renta 4 S.V.S.A. et al. v Russian Federation*, n79, para 119.
[105] Id.
[106] Noah Rubins and Azizjon Nazarov, n40, 247.

and Russia? All institutions of the EU that have a stake in the formulation of the EU's investment architecture concur that ISDS is a core feature of modern international investment arbitration. The European Commission,[107] the European Parliament[108] and the Council[109] have made clear that ISDS will form part of future EU investment chapters/agreements with third countries. The Council Negotiating Directive for Canada, Singapore and India[110] and the Commission's Draft Mandate for the negotiation of a transatlantic trade and investment partnership agreement with the United States of America[111] both provide for the inclusion of an effective investor-to-State dispute settlement mechanism. It is almost a matter of course that such a dispute settlement mechanism will apply to all substantive protection standards. The only exception seems to be pre-establishment rights. In the negotiations with Canada, the EU has taken the position that market access-related issues of investment should be excluded from the scope of investor-State arbitration under the Canada-EU Comprehensive Economic and Trade Agreement (CETA).[112]

The EU's demand for a state-of-the-art ISDS mechanism will most likely not elicit any major resistance from the Russian side. In contrast to old Soviet BITs, BITs concluded by the Russian Federation generally contain broad arbitration clauses.[113] To the knowledge of the author, there is only one single BIT concluded after 1991 with constraints on ISDS.[114] Even Russia's current 2001/2002 Model BIT, which cut down on substantive protections, contains

[107] European Commission, Towards a comprehensive European international investment policy, n2, 9-10.
[108] European Parliament, Resolution of 6 April 2011 on the future European international investment policy, n3, para 32.
[109] Council of the European Union, Conclusions on a comprehensive European international investment policy, 3041st Foreign Affairs Council Meeting, 25 October 2010, available at <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/117328.pdf> (accessed 9 July 2013), para 18.
[110] Council Negotiating Directives for Canada, India and Singapore, 3109th Council meeting General Affairs, 12 September 2011, available at <http://www.s2bnetwork.org/themes/eu-investment-policy/eu-documents/text-of-the-mandates.html> (accessed 3 April 2013).
[111] European Commission, Recommendation for a Council Decision authorizing the opening of negotiations on a comprehensive trade and investment agreement, called the Transatlantic Trade and Investment Partnership, between the European Union and the United States of America, COM(2013)136 final, 12 March 2013, available at <http://www.s2bnetwork.org/fileadmin/dateien/downloads/EU_Draft_Mandate_-_Inside_US_Trade.pdf> (accessed 9 July 2013).
[112] Council of the European Union, 'EU Canada Comprehensive Economic and Trade Agreement – landing zones', 6 November 2012, available at <http://www.lapresse.ca/html/1633/Document_UE_2.pdf> (accessed 9 July 2013), 8.
[113] See *Berschader v Russian Federation*, n76, para 155.
[114] This is the Russia-Bulgaria BIT (1993).

a modern ISDS clause without any restrictions.[115] For that reason, it is inaccurate to say that 'the 2001 model suggests that claims will be subject to arbitration only if all parties agree to this *after the dispute arises*'.[116] In fact, this was erroneously asserted by several authors.[117] The constraints on ISDS were however very much a relic of the investment policy of the Soviet Union and were already excised from the first Russian Model BIT of 1992.[118]

The broader post-USSR formulation of the ISDS clause has already been tested twice in practice. In the investment arbitration *Yury Bogdanov v Republic of Moldova*[119], based on the Russia-Moldova BIT which was concluded in 1998 and hence modeled on the 1992 Russian Model BIT, the 2010 final award simply reproduces the text of Article 10 (ISDS), which covers

> *[a]ny dispute* between a Contracting Party and an investor of the other Contracting Party arising in connection with an investment, *including* disputes concerning the amount, conditions or procedure of payment of compensation pursuant to Article 6 of this Agreement [expropriation], or procedure of payment of the compensation pursuant to Article 8 of the present Agreement [transfer of payments].[120]

The Government of the Republic of Moldova did not raise any jurisdictional objection relating to Article 10, nor was access to ISDS in any way controversial. In 2005, a different sole arbitrator at the SCC had already handed down an award based on the Russia-Moldova BIT arising from a claim by the same individual investor. In that case, the arbitrator explicitly noted with respect to the jurisdiction *ratione materiae* under Article 10 of the BIT that the 'language of article 10(1) permits to extend the jurisdiction of the Arbitral Tribunal to any dispute between qualified parties (…) as long as it arises in connection with an investment

[115] Sergey Ripinsky, 'Russia' in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (OUP 2013) 614-6.
[116] Noah Rubins and Azizjon Nazarov, n71, 243 (emphasis in the original).
[117] See David Collins, n38, 61; Mark Luz, 'New Model Russian Bilateral Investment Treaty: A Step Backwards for Foreign Investors' (2001) 11(18) Executive Guide and Russia/Eastern Europe Business & Finance Report.
[118] Sergey Ripinsky, n115, 615, footnote 107; 1992 Russian Model BIT, n35, Article 6.
[119] *Yury Bogdanov v Republic of Moldova*, SCC Arbitration No. V (114/2009), final award, 30 March 2010.
[120] Russia-Moldova BIT (1998), Article 10 (emphasis added).

as defined in the BIT'.[121] In a nutshell, BITs negotiated after the breakdown of the Soviet Union will, as a rule, give full access to ISDS.[122]

Taking into account this seemingly liberal stance towards ISDS, it may seem surprising that the Russian Federation never deemed it necessary to modernize the Soviet-era BITs with EU Member States that virtually curtailed access to ISDS. The Russia-Italy BIT is indeed the only exception in this context. The scope of the ISDS clause in the old Russia-Italy BIT, which was concluded in 1989, was restricted in a manner typical for Soviet-era BITs.[123] What is of interest here is that Russia re-negotiated its BIT with Italy. The revised BIT was concluded in 1996 and contains an updated ISDS mechanism with no limitation regarding the subject-matter of the dispute.[124] In the same manner, Russia could have updated its outdated BITs with other EU Member States but chose not to do so. The BITs with Bulgaria and Finland were in fact both supplemented with a protocol in 2003 and 1996 respectively.[125] Although this would have presented a suitable opportunity to craft a modern ISDS clause, Russia in both cases failed to push for a streamlined version.

On the balance of facts it appears very likely that the new investment protection regime between the EU and Russia will feature an unlimited arbitration clause. The difficulties presented by the restrictive arbitration clauses and the volatile jurisprudence on MFN-based

[121] *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v Republic of Moldova*, SCC, arbitral award, 22 September 2005.
[122] See also the arbitral award in the case *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability, 28 April 2011. In the arbitration, which was conducted on the basis of the Russia-Mongolia BIT concluded in 1995, no jurisdictional objection relating to the scope of ISDS was raised.
[123] Russia-Italy BIT (1989), Article 9(1). The clause covered disputes 'riguardanti l'ammontare e le modalità dei risarcimenti per esproprio, nazionalizzazione, requisizione o misure aventi conseguenze analoghe'.
[124] Russia-Italy BIT (1996), Article 9. The ISDS provision of the Russia-Italy BIT has already been used in the arbitration *Cesare Galdabini S.p.A. v Russian Federation*, UNCITRAL, 2011 (award not public). It is surprising that the IA Reporter remarked that the agreement 'echoes certain other 1990s-era treaties concluded by Russia, where the investor-state arbitration clause is limited on its face to narrow categories of claims', see Luke Eric Peterson, 'Russia sued for breach of treaty by Italian company; case to rehearse debate on scope for arbitration in certain Russian BITs?', Investment Arbitration Reporter, 26 May 2010 <http://www.iareporter.com/articles/20100603_2> (accessed 19 June 2013). It may be that the IA Reporter was referring to the old BIT which has been replaced in the meantime.
[125] The USSR-Finland BIT (1989), which had entered into force in 1991, was supplemented with a protocol in 1996. See Protocol Amending the Agreement between the Government of the Republic of Finland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments, 4 May 1996, entered into force 13 May 1999, available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=INT;n=19618> (accessed 9 July 2013). The Russia-Bulgaria BIT (1993) was supplemented with a protocol in 2003 and hence before its entry into force in 2005.

jurisdiction will then belong to the past. The intelligent structuring of investments through the 'incorporation of project vehicles in appropriate jurisdictions'[126] permitting the investor to have unhampered access to ISDS, which Russian Prime Minister Dmitry Medvedev recently criticized as a manipulation of the judicial jurisdiction,[127] will also become less important with the advent of the new investment architecture between the EU and Russia.

2. NATIONAL TREATMENT

The NT obligation is virtually non-existent in Russian BITs with EU Member States. In the negotiations leading to the accession to the WTO, Russia itself admitted that its BITs guaranteed NT only 'with exemptions'.[128] In the Soviet-era BITs there is either no reference at all to NT (which is the case for the BITs with Austria, Belgium, Finland, Germany[129] and the Netherlands) or the NT obligation is watered down to a 'best effort' commitment or subjected to the domestic legal order of the respective host State (see BITs with France,[130] Spain[131] and the UK[132]). The BITs concluded by the Russian Federation with EU Member States after the breakdown of the USSR contain a provision on NT which is however always subject to a general exception clause.[133] Often, where new exceptions are introduced, a

[126] Noah Rubins and Azizjon Nazarov, n40, 251.
[127] Prime Minister of Russia, 'The 3rd St Petersburg International Legal Forum', available at <http://premier.gov.ru/en/news/item/24284/> (accessed 19 June 2013).
[128] WTO, Report of the Working Party on the Accession of the Russian Federation to the World Trade Organization, 17 November 2011, WT/ACC/RUS/70, WT/MIN(11)/2, available at <http://docsonline.wto.org/imrd/directdoc.asp?DDFDocuments/t/WT/min11/2.doc> (accessed 9 July 2013), para 45.
[129] It may be useful to point out that Article 3(4) of the USSR-Germany BIT (1989) only establishes a prohibition of 'discriminatory measures *against joint ventures* in which investors of the other Contracting Party are participants (…)' (emphasis added). David Collins seems to assume that there is a general NT obligation in the USSR-Germany BIT, see David Collins, n38, 64.
[130] USSR-France BIT (1989), Article 3(4) – 'en conformité avec sa législation nationale'.
[131] USSR-Spain BIT (1990), Article 5(4) – 'con arreglo a su legislación nacional'.
[132] USSR-UK BIT (1989), Article 3(3) – 'to the extent possible' and 'in accordance with its laws and regulations'.
[133] Russia-Bulgaria BIT (1993), Article 3(3); Russia-Czech Republic BIT, Article 3(2); Russia-Denmark BIT (1993), Article 3(3); Russia-Greece BIT (1993), Article 3(3); Russia-Hungary BIT (1995), Article 3(3); Russia-Italy BIT (1996), Article 3(2); Russia-Lithuania BIT (1999), Article 3(3); Russia-Romania BIT, Article 3(2); Russia-Slovakia BIT (1993), Article 3(2); Russia-Sweden BIT (1995), Article 3(3). Whereas the exception clauses to the NT regime of the Russia-Greece, Russia-Sweden, Russia-Denmark and the Russia-Italy BIT are straightforward, the other BITs (Russia-Bulgaria, Russia-Czech Republic, Russia-Hungary, Russia-Lithuania, Russia-Romania, Russia-Slovakia) contain rather unclearly worded exception clauses which lend themselves to diverging interpretations. To give an example, the Russia-Bulgaria BIT determines in its Article 3(3) that 'each Contracting Party reserves the right to determine sectors and spheres of activity where activities of foreign investors shall be excluded or

'grandfathering' rule applies. This means that any new exception shall not apply to investments made before the entry into force of such exception.[134] Recent investment treaty practice on the part of Russia shows no departure from its reluctant attitude towards the NT standard.[135] Also, the current Russian Model BIT states that '[each] Contracting Party reserves the right to apply and introduce exemptions from national treatment of foreign investors and their investments'.[136] In addition, the Model BIT contains a reference to Russia's commitments under the WTO regime (primarily the GATS) which constitute the upper limit of what Russia promises to undertake under the BIT.[137] Hence, in order to know

restricted' (no official translation). This wording is modeled on Article 3(3) of the Russian Model BIT of 1992. According to the plain meaning of the text, which is the starting point of any interpretative exercise under Article 31(1) of the Vienna Convention on the Law of Treaties, this sounds more like a market access provision and not like an exception to the NT regime. Assuming that Article 3(3) of the Russia-Bulgaria BIT is indeed a provision preserving the right of the host State to regulate market access (for specific market sectors), then the NT obligation contained in Article 3(2) of the BIT would fully apply to those sectors or spheres of activity which have not been blocked by the host State. This would give the host State the possibility to shut out foreign investors from certain or indeed all sectors, but once an investor is given access, the NT regime applies. This reading runs into the problem that all Russian BITs already make the admission of investments subject to each Contracting Party's legislation (in the case of the Russia-Bulgaria BIT, this is Article 2(1)). Article 3(3) would then be devoid of any effect. The formulation has also been interpreted as 1) a limitation of the MFN clause (see <http://globalarbitrationreview.com/know-how/topics/66/jurisdictions/73/romania/> (accessed 12 June 2013)), 2) a limitation of the definition of 'investment' (see <http://globalarbitrationreview.com/know-how/topics/66/jurisdictions/63/ukraine/> (accessed 12 June 2013)) and 3) as an exception to NT (<http://globalarbitrationreview.com/know-how/topics/66/jurisdictions/26/russia/> (accessed 12 June 2013)). This last interpretation seems to be the most plausible. A contextual and systematic interpretation leads to the conclusion that these exception clauses have to be interpreted as giving a right to derogate from NT. Such an interpretation would also be supported by the wording of Article 3(3) of the Russia-Hungary BIT: 'Notwithstanding the provisions of paragraphs 1 and 2 of this Article *relating to the application of the national treatment*, each Contracting Party reserves the right to determine sectors and spheres of activity …' (emphasis added).

[134] Russia-Bulgaria BIT (1993), Article 3(3); Russia-Czech Republic BIT (1994), Article 3(2); Russia-Denmark BIT (1993), Article 3(3); Russia-Greece BIT (1993), Article 3(3); Russia-Hungary BIT (1995), Article 3(3); Russia-Slovakia BIT (1993), Article 3(2); Russia-Sweden BIT (1995), Article 3(3) [with the exception that the grandfathering rule does not apply 'when the exception is necessitated for the purpose of the maintenance of defence, national security and public order, protection of the environment, morality and public health'].

[135] See Russia-Singapore BIT (2010), Article 4(3) and Russia-China BIT (2006), Article 3(2); Russia-Algeria BIT (2006), Article 4(2); Russia-Indonesia BIT (2007), Article 3(3); Russia-Jordan BIT (2007), Article 3(3); Russia-Angola BIT (2009), Article 5(5); Russia-Qatar BIT (2007), Article 4(3); Russia-Libya BIT (2008), Article 3(3); Russia-Syria BIT (2005), Article 3(3); Russia-Thailand BIT (2002), Article 3(3); Russia-Yemen BIT (2002), Article 3(3); Russia-Venezuela BIT (2008), Article 4(3); Russia-Turkmenistan BIT (2009), Article 4(3); Russia-Zimbabwe BIT (2012), Article 5(3).

[136] Sergey Ripinsky, n115, 604-9.

[137] This topic is discussed separately at page 28 and following.

what the scope of the NT standard under a given Russian BIT is, one would need to consult at first Russia's Schedule of Specific Commitments under the GATS.[138]

There are, at first glance, noticeable differences with regard to the EU's position on NT. For the Commission[139], the European Parliament[140] and the Council[141] it seems to be a matter of course that NT will be one of the substantive standards in future EU BITs. One hardly needs to mention then that NT is included in the Negotiating Directives for Canada, India and Singapore and in the Draft Mandate for the Transatlantic Trade and Investment Partnership talks with the US.[142] The only textual specification regarding the NT standard instigated by the European Parliament has been that foreign and domestic investors must operate in 'like circumstances'.[143] On the other hand, in the CETA negotiations the EU has agreed to the inclusion of NT reservations for existing and future non-conforming measures.[144] This has led commentators to identify a convergence of the new EU BITs towards the NAFTA model, in contradistinction to the 'Dutch gold standard model BIT'.[145] Indeed, the renunciation of the demand for *unqualified* NT for investors may evidence a certain proximity to the Russian position.[146]

Nonetheless, the EU will most likely object to an unfettered right to cut down on the NT obligation. As a result of the diverging positions between the EU and Russia, the issue of NT will be one of the critical points in the negotiations of a new EU-Russia investment regime.

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[138] See WTO, Trade in Services, Russian Federation – Schedule of Specific Commitments, GATS/SC/149.

[139] European Commission, Towards a comprehensive European international investment policy, n2, 8 (describing NT as a 'cornerstone of the global trading system' and as a 'key ingredient of EU investment negotiations').

[140] European Parliament resolution of 6 April 2011 on the future European international investment policy, n3, para 19.

[141] Council of the European Union, Conclusions on a comprehensive European international investment policy, n109, para 14.

[142] Council Negotiating Directives for Canada, India and Singapore, n110; Commission's Draft Mandate for the negotiation of a US-EU trade and investment agreement, n111.

[143] The European Parliament has called for the inclusion of such a comparator, see European Parliament resolution of 6 April 2011 on the future European international investment policy, n3, para 19. See also August Reinisch, 'The Future Shape of EU Investment Agreements' (2013) 28 ICSID Review 179, 189-90.

[144] EU-Canada CETA – landing zones, n112, 9; Draft CETA Investment Text, 7 February 2013, available at <http://tradejustice.ca/pdfs/CETA_Investment_Rules_%20February7_2013.pdf> (accessed 9 July 2013), Article X.15.

[145] See Nikos Lavranos, 'The New EU Investment Treaties: Convergence towards the NAFTA Model as the New Plurilateral Model BIT Text?' (2013), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2241455> (accessed 8 July 2013).

[146] The negotiating directive for Canada states that the negotiations shall aim to include 'unqualified national treatment', see Council Negotiating Directives for Canada, India and Singapore, n110.

3. MOST-FAVORED-NATION TREATMENT

Another important substantive standard, which together with the NT obligation forms the principle of non-discrimination, is MFN treatment. In accordance with the USSR Model BIT of 1987,[147] Russian BITs from the Soviet-era generally contain a provision on MFN treatment which was only subject to a set of standard exceptions such as customs unions, free trade areas and regional economic integration agreements. The second wave of BITs concluded between 1996 and 1997 basically follow this approach, the only exception being that agreements in the field of economic cooperation of the Russian Federation with the States that constituted the former USSR are not covered by the MFN obligation.[148] This carve-out, which is also reflected in the later Russian Model BIT of 2001/2002[149], allows Russia to conclude more favorable investment protection agreements with former USSR countries without having to extend these benefits to other BIT partners.

Recently, Russia has adopted a more cautious stance concerning MFN. Russia's concerns have been accommodated in the 2001/2002 Model BIT. First, Russia limited the effect of the MFN clause by introducing a saving clause specifying that MFN treatment cannot create any obligations for Russia over and above existing WTO commitments.[150] Second, Russia linked the MFN principle to the FET standard. The fact that the MFN clause is FET-based[151] has an impact on its multilateralizing effect. The tribunal in *Renta 4 S.V.S.A. v Russian Federation* emphasized that such a FET-based MFN provision is different from an MFN clause 'entitling investors to avail themselves in generic terms of more favourable conditions found "in all matters covered" by other treaties'.[152] Rather, it 'establishes the right to enjoy a no less favourable level of FET'.[153] Hence, the scope of the MFN provision embodied in Russia's current Model BIT is significantly restricted vis-à-vis a MFN clause that follows the

[147] See 1987 USSR Model BIT, n34, Article 2.
[148] See Russia-Czech Republic BIT (1994), Article 3(3) lit. b; Russia-Denmark BIT (1993), Article 3(4) lit. b; Russia-Hungary BIT (1995), Article 3(4) lit. b; Russia-Italy BIT (1996), Article 3(3) lit. b; Russia-Slovakia BIT (1993), Article 3(3) lit. b; Russia-Sweden BIT (1995), Article 3(4), lit. b. Note that this additional exception is *not* based on the then valid Russian Model BIT of 1992.
[149] 2001/2002 Russian Model BIT, n37, Article 3(4).
[150] This topic is discussed separately at page 28 and following.
[151] Even before the adoption of the 2001/2002 Russian Model BIT, the MFN provisions of quite a few of Russian BITs were tied to the FET standard. See Russia-Bulgaria BIT (1993), Article 3(2); Russia-Denmark BIT (1993), Article 3(1) and (2); Russia-Italy BIT (1996), Article 3(1); Russia-Lithuania BIT (1999), Article 3(2); USSR-Netherlands BIT (1989), Article 3(2); USSR-Spain BIT (1990), Article 5(2); Russia-Sweden BIT (1995), Article 3(2).
[152] *Renta 4 S.V.S.A. et al. v Russian Federation*, n79, para 105.
[153] *Renta 4 S.V.S.A. et al. v Russian Federation*, n79, para 105.

standard wording, as its application is confined exclusively to the FET standard. Third, as the FET standard is only guaranteed with respect to 'management and disposal of investments', the MFN standard is arguably similarly limited in scope.[154] The Russia-Bulgaria BIT, which was negotiated on the basis of the 2001/2002 Model BIT, features all the restrictions mentioned above.[155] In its recent investment treaty practice with non-EU Member States, the Russian Federation has likewise successfully pushed for the FET-based version of the MFN obligation.[156]

The EU position with regard to the MFN principle differs considerably. The Commission is of the view that the principle of non-discrimination – which includes the MFN standard – should 'continue to be a key ingredient of EU investment negotiations'.[157] The Council shares this view.[158] While the European Parliament generally considers that the MFN principle should be part and parcel of future EU BITs, it demanded that its wording be adjusted with a view to 'allowing some flexibility in the MFN-clause in order not to obstruct regional integration processes in developing countries'.[159] The MFN principle is also part of the Negotiating Directives for Canada, Singapore and India and the EU Draft Mandate for the EU-US trade and investment talks.[160] Apart from the proposition of including a comparator ('in like circumstances'),[161] which does not affect the substance of MFN treatment, the three main EU institutions charged with conducting the negotiations on future EU BITs seem to be largely in agreement that the EU should press for an unfettered MFN provision. In what would be a deviation from this position, the MFN obligation in the CETA investment chapter will apparently not apply to certain existing and future non-conforming measures in different sectors or sub-sectors.[162] Apart from that, though, the MFN provision in the CETA

[154] Russian Model BIT 2001/2002, n37, Article 3(2); Sergey Ripinsky, n115, 606.
[155] See Russia-Bulgaria BIT (1993), Article 3(2) in conjunction with paragraph (1) and paragraph 5 of the Protocol.
[156] Russia-Libya BIT (2008), Article 3(2); Russia-Indonesia BIT (2007), Article 3(2); Russia-Jordan BIT (2007), Article 3(2); Russia-Venezuela BIT (2008), Article 4(2); Russia-Syria BIT (2005), Article 3(2); Russia-Turkmenistan BIT (2009), Article 4(2); Russia-Singapore BIT (2010), Article 4(2); Russia-Qatar BIT (2007), Article 4(2); Russia-Kazakhstan BIT (1998), Article 3(2). One exception is the Russia-China BIT (2006), Article 3(3).
[157] European Commission, Towards a comprehensive European international investment policy, n2, 8.
[158] Council of the European Union, Conclusions on a comprehensive European international investment policy, n109, para 14.
[159] European Parliament resolution of 6 April 2011 on the future European international investment policy, n3, para 19.
[160] Council Negotiating Directives for Canada, India and Singapore, n110; Commission's Draft Mandate for the negotiation of a US-EU trade and investment agreement, n111.
[161] See references in note 143.
[162] Draft CETA Investment Text 2013, n144, Article X.15.

investment chapter, in its current shape, does not place a limit on the possibility for investors to 'cherry pick' more favorable provisions from other investment treaties.[163] As with the NT standard, the discrepancies with regard to the Russian stance on MFN are manifest. In light of this, finding a compromise formula of the MFN provision will turn out to be tricky.

4. COMMITMENTS UNDER WTO AS A CEILING TO COMMITMENTS UNDER BITS

BITs and obligations assumed by WTO Members under the GATS overlap.[164] The GATS applies to all 'measures (…) *affecting* trade in services'[165] which has been interpreted in WTO jurisprudence as giving the GATS 'a broad scope of application'[166]. Trade in services comprises all four modes of supply listed in Article I:2 of the GATS. Defined as the 'supply of a service by a service supplier of one Member, through commercial presence in the territory of any other Member', it is first and foremost mode 3 which covers foreign investment regarding services and therefore overlaps with the scope of application of BITs. This interaction between BITs and the GATS has given rise to two main, closely inter-related concerns on the part of the Russian Federation in the run-up to its accession to the WTO:

(1) The invalidation of exceptions negotiated within the GATS framework through the multilateralization of BIT obligations *by virtue of MFN clauses in other BITs*

(2) The invalidation of exceptions negotiated within the GATS framework through the multilateralization of BIT obligations *by virtue of the MFN clause in the GATS*

A letter from the Russian Government to the State Duma, dating back to the year 2001, sheds light on the cause of Russia's first concern.[167] In that letter, the Russian Government

[163] Nathalie Bernasconi-Osterwalder, 'The Draft Investment Chapter of the Canada-EU Comprehensive Economic and Trade Agreement: A Step Backwards for the EU and Canada?' (2013) 4(3) Investment Treaty News Quarterly 10, 11.
[164] Friedl Weiss, 'Trade and Investment' in Peter Muchlinski, Frederico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 192-196.
[165] See Article I:1 of the General Agreement on Trade in Services (GATS) (emphasis added).
[166] WTO, European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC-Bananas III), Report of the Appellate Body, WT/DS27/AB/R, 9 September 1997, para 220.
[167] Government of the Russian Federation, Letter from 23 May 2001 concerning the Suspension of the Ratification Process of Agreements on the Promotion and Reciprocal Protection of Investments, available at <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=PRJ;n=35845> (accessed 9 July 2013).

requests the State Duma to stay the ratification process of BITs, because they would not correspond with the Russian position considering Russia's accession to the WTO. The letter alludes to the many exceptions to the regime of NT Russia has negotiated within the framework of the WTO and the PCA between the EU and Russia.[168] The letter cautions that the principle of NT contained in BITs could, via the vehicle of MFN treatment, nullify the exceptions to NT established in the WTO and PCA context.[169] This would disturb the 'balance of interests'. In order to prevent BITs from overriding exceptions in trade law, the Russian Government inserted a provision into the 2001/2002 Model BIT which prescribes the commitments under the WTO as a ceiling to the commitments Russia would undertake under its BITs. Article 3(5) states:

> Without prejudice to the provisions of Articles 4 [Expropriation], 5 [Compensation for losses arising out of wars, civil disturbances] and 8 [Investor-State dispute settlement] of this Agreement, the Contracting Parties shall accord the treatment no more favourable than the treatment granted by each Contracting Party in accordance with the Agreement establishing the World Trade Organization (the WTO Agreement) signed on 15 April 1994, including the obligations of the General Agreement on Trade in Services (GATS), as well as in accordance with any other multilateral arrangement that will involve both Contracting Parties and will concern the treatment of investments.[170]

By the same token, only with respect to the Russia-EU relations, the 2001/2002 Russian Model BIT further states that '[i]nsofar as matters covered by the present Agreement are covered by the [PCA], this [PCA] shall apply to such matters.'[171] The WTO exception in the current Russian Model BIT has already been included in the Russia-Bulgaria BIT[172] and also featured consistently in Russia's recent investment treaty practice with non-EU Member States[173].

[168] Letter from the Government of the Russian Federation, n167.
[169] See also ВЕДОМОСТИ, 'У иностранцев отбирают льготы', 14 June 2001, available at <http://www.vedomosti.ru/newspaper/article/2001/06/14/29884> (accessed 25 June 2013).
[170] Translation taken from Sergey Ripinsky, n115, 605.
[171] Translation taken from Sergey Ripinsky, n115, 605.
[172] Russia-Bulgaria BIT (1993), Protocol, para 5.
[173] Russia-China BIT (2006), Article 3(5) in conjunction with the Protocol, para 2; Russia-Singapore BIT (2010), Article 4(5); Russia-Algeria BIT (2006), Article 4(4); Russia-Indonesia BIT (2007), Article 3(5); Russia-Jordan BIT (2007), Article 3(5); Russia-Angola BIT (2009), Article 5(6); Russia-Qatar BIT (2007), Article 4(5); Russia-Libya BIT (2008), Article 3(5); Russia-Syria BIT (2005), Article 3(5); Russia-Thailand

Notwithstanding a restriction of MFN clauses in BITS, the NT obligation in a BIT between Russia and a third country could likewise be multilateralized through the MFN obligation in Article II:1 of the GATS.[174] This could equally have the effect of invalidating reservations to NT contained in the GATS Schedule of Specific Commitments. The Russian Government accommodated this second concern by stipulating an indefinite exemption to the MFN obligation on the occasion of its accession to the WTO according to Article II:2 GATS. The effect of this MFN exemption relating to '[m]easures concerning investment activity and available protection'[175] is that GATS+ commitments in BITS do not have to be multilateralized on the basis of Article II:1 GATS.

To summarize, the Russian Federation has sought to establish limits to MFN and NT in order to retain the level of commitments under the GATS.[176] As a consequence, the NT standard has been deprived of its independent character and has been turned it into a simple cross reference to world trade law. It might not be utterly unrealistic to find common ground between the EU and Russia regarding the WTO exception. It is true that the EU Commission in the CETA negotiations was disinclined to include explicit references to the GATS but instead favored indicating specific reservations to NT.[177] CETA's Annex I, however, which contains all current exceptions *inter alia* to NT and MFN, 'is in substance very similarly to the list of limitations on market access and national treatment contained in the GATS schedules'.[178] Indeed, 'one finds references to the same sectors, industry classifications and types of reservations'.[179] Such a finding makes it likely that the EU and Russia will agree on the inclusion of a WTO exception.

BIT (2002), Article 3(5); Russia-Yemen BIT (2002), Article 3(5); Russia-Venezuela BIT (2008), Article 4(5); Russia-Turkmenistan BIT (2009), Article 4(5); Russia-Zimbabwe BIT (2012), Article 7(2).

[174] See Rudolf Adlung and Martín Molinuevo, 'Bilateralism in Services Trade: Is There Fire Behind the (BIT-)Smoke?' (2008) 11(2) Journal of International Economic Law 365; Frederico Ortino, 'The Principle of Non-Discrimination and its Exceptions in GATS: Selected Legal Issues' in Kern Alexander and Mads Andenas (eds), *The World Trade Organization and Trade in Services* (Martinus Nijhoff 2008) 193-204.

[175] See WTO, Trade in Services, Russian Federation – Final List of Article II (MFN) Exemptions, GATS/EL/149.

[176] Ministry of Foreign Affairs of the Russian Federation, 'Bilateral Agreements on Promotion and Reciprocal Protection of Investments', n23.

[177] EU-Canada CETA, Annex II, EU revised offer 28 February 2012, available at <http://www.bilaterals.org/IMG/pdf/CETA_EUoffers_annex_II.pdf> (accessed 9 July 2013), 11, 16-20 and 24.

[178] Céline Lévesque, 'The Challenges of "Marrying" Investment Liberalisation and Protection in the Canada-EU CETA' in Marc Bungenberg, August Reinisch and Christian Tietje (eds), *EU and Investment Agreements – Open Questions and Remaining Challenges* (Nomos 2013) 124.

[179] Id.

The open-ended formulation of the WTO exception clause in the Russian Model BIT presents a possible point of contention. The current rather vague wording of the clause could be interpreted to the effect that Russia's commitments under the WTO agreements form the limit *for every aspect of the treatment* promised under the BIT, not just for the NT standard.[180] At least one author seems to have subscribed to this view writing that 'the treatment under the BIT cannot be more favourable than that under the WTO Agreements'.[181] Such an interpretation would take a high toll on the BIT's protective effect. Substantive protection standards like FET, which are at the heart of the modern investment protection regime, would simply cease to apply as they are not part and parcel of the WTO regime. What militates in favor of such a reading is that certain Articles (expropriation, compensation for losses arising out of wars and civil disturbances and ISDS) have been explicitly excluded from the provision's ambit. This suggests, following an *e contrario* logic, that everything else – including for example FET – is covered. The EU will surely take issue with the indeterminacy of the provision and the ensuing legal uncertainty for investors. Apart from this, the EU and Russia are actually not too far apart on the perceived need for a WTO exception.

5. INVESTMENT LIBERALIZATION

An important innovation in the new EU-Russia investment architecture could be the inclusion of pre-establishment rights. This could either be achieved through the extension of the NT obligation to the pre-establishment phase or through the implementation of market access commitments.[182] BUSINESSEUROPE and RSPP have urged EU policymakers to adopt a new EU-Russia trade and investment agreement which 'must go further than the post-establishment provisions common to bilateral investment treaties and address pre-establishment issues such as foreign equity caps and restrictions on legal status'.[183] A negative list approach would be desirable.[184] In addition, the EU-Russia IRT advocated the complete abolition of investment barriers, which attests to the great importance of pre-

[180] See Rudolf Adlung and Martín Molinuevo, n174, 392 (who argue that even the obligation of 'fair and equitable treatment' in BITs is covered by the MFN obligation in Article II GATS).
[181] Sergey Ripinsky, n115, 609.
[182] See Céline Lévesque, n178, 130-1 (who differentiates market access and NT pre-establishment).
[183] BUSINESSEUROPE-RSPP Proposals for a new EU-Russia Agreement on Trade and Investment, n15, 5.
[184] Id.

establishment rights for investors.[185] Also, the European Parliament has called for the inclusion of 'extensive' pre-establishment rights in the investment chapter of the new EU-Russia agreement.[186]

In contrast to the USA[187] and Canada[188], the BITs of EU countries, apart from some exceptions like the 2004 Italy-Nicaragua BIT,[189] typically do not contain provisions on the liberalization of investment.[190] Russian BITs generally do not cover pre-establishment issues either.[191] Russian and extra-EU BITs have therefore embraced the so-called 'controlled entry' approach.[192] The USSR-Germany BIT for example provides in its Article 2 that each Contracting Party shall permit investments 'in accordance with its legislation',[193] which means that the admission of foreign investment is subject to domestic laws of the host State. There are hardly any Russian BITs which go beyond this.[194] The Russia-Turkey BIT prescribes in its Article II(1) that investments must be admitted, albeit only in accordance with each Contracting Party's legislation, on an MFN basis.[195] A similar MFN-obligation with

[185] EU-Russia Industrialists Round Table, 'IRT Recommendations to the EU-Russia Summit (21 December 2012, Brussels)', n12, 1.
[186] European Parliament, Resolution of 26 October 2012 on EU-Russia trade relations following Russia's accession to the WTO, n1, para 11. See, however, European Parliament resolution of 6 April 2011 on the future European international investment policy, n3, para 21 (stressing the 'need to exclude sensitive sectors' when negotiating market access).
[187] Article 3(1) and (2) of the 2012 US Model BIT, available at <http://www.italaw.com/sites/default/files/archive/ita1028.pdf> (accessed 9 July 2013).
[188] Article 3(1) and (2) of the 2004 Canadian Model BIT, available at <http://italaw.com/documents/Canadian2004-FIPA-model-en.pdf> (accessed 9 July 2013).
[189] Italy-Nicaragua BIT (2004), Articles I(9) and II(2).
[190] Julien Chaisse, 'Promises and Pitfalls of the European Union Policy on Foreign Investment – How Will the New EU Competence on FDI Affect the Emerging Global Regime?' (2012) 15 Journal of International Economic Law 51, 70; European Commission, Towards a comprehensive European international investment policy, n2, 5; August Reinisch, 'Protection of or Protection Against Foreign Investment? The Proposed Unbundling Rules of the EC Draft Energy Directives' in Christoph Herrmann and Jörg P Terhechte (eds), *European Yearbook of International Economic Law 2010* (Springer 2010) 68.
[191] David Collins, n38, 62.
[192] See Ignacio Gómez-Palacio and Peter Muchlinski, 'Admission and Establishment' in Peter Muchlinski, Frederico Ortino and Christoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP 2008) 240-2.
[193] See also 2008 German Model BIT, Federal Ministry for Economics and Technology, available at <http://www.italaw.com/sites/default/files/archive/ita1025.pdf> (accessed 9 July 2013), Article 2.
[194] David Collins observes that the USSR-Canada BIT provides for NT *covering both pre- and post-establishment* which must only be granted however, as he notes, 'to the extent possible and in accordance with [each Contracting Party's] laws and regulations' (Article III(4) of the BIT). See David Collins, n38, 63. It is questionable though whether the NT obligation in the USSR-Canada BIT indeed covers the *pre*-establishment stage, as this would normally require its explicit extension to establishment, acquisition and expansion like in the Canadian and US Model BIT, see notes 187 and 188.
[195] Russia-Turkey BIT (1997), Article II(1).

respect to admission of investments can be found in the USSR-Canada BIT.[196] The only BIT which contains some tangible pre-establishment commitments is the Russia-US BIT. It follows a negative-list approach by stating in its Article II(1) that each party 'shall permit and treat investment, and activities associated therewith, on a nondiscriminatory basis, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty'. The Russia-US BIT has however not yet entered into force.[197]

However, the 'right to invest' has in some cases been conferred in treaties concluded by the EU in the pre-Lisbon era which address trade matters and by the same token liberalize investment flows. Typically, FTAs concluded by the EU regulate foreign investment through a GATS-inspired approach,[198] treating it as the supply of a service through commercial presence (Mode 3 of the GATS framework).[199] This is mainly due to the fact that the EU, by reason of lacking competence to directly regulate foreign investment before the inclusion of FDI in the common commercial policy, had to negotiate provisions regarding the admission of investment through the back-door of its common commercial policy on trade in services.[200] Market access commitments undertaken by the EU were commonly based on a positive-list approach.[201] Examples are the EU-Chile Agreement[202] and the FTA between the EU and South Korea[203] which both contain commitments regarding the liberalization of investment. In comparison to these instruments, the PCA between the EU and Russia is

[196] See USSR-Canada BIT (1989), Article II(3).
[197] See UNCTAD, Bilateral Investment Treaties signed by Russia, available at <http://unctad.org/Sections/dite_pcbb/docs/bits_russia.pdf> (accessed 9 July 2013).
[198] This approach is only 'GATS-*inspired*', because the agreements concluded by the EU and third States are not within the GATS-framework by operation of Article V of the GATS. Therefore, the MFN obligation contained in Article II of the GATS – which would normally apply to specific commitments made in the GATS-context – does not extend to obligations taken on in agreements that fulfill the WTO requirements relating to economic integration in accordance with Article V of the GATS. See also European Commission, Towards a comprehensive European international investment policy, n2, 7, footnote 16.
[199] Rachel D Thrasher and Kevin P Gallagher, '21st Century Trade Agreements: Implications for Development Sovereignty' (2009) 38(2) Denver Journal of International Law and Policy 313, 339; European Commission, Towards a comprehensive European international investment policy, n2, 5, footnote 12. For a definition of 'mode 3' see Article I:2 lit. c of the GATS.
[200] See European Court of Justice, Opinion 1/94, 15 November 1994, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61994CV0001:EN:PDF> (accessed 8 July 2013).
[201] Rachel D Thrasher and Kevin P Gallagher, n199, 333.
[202] Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, 30 December 2002, Official Journal L 352, 3.
[203] Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, 14 May 2011, Official Journal L 127, 6.

more modest in its level of ambition regarding investment liberalization.[204] It defines 'establishment' as the 'right of Community or Russian companies (…) to take up economic activities by means of the setting up of subsidiaries and branches in Russia or in the Community respectively'.[205] Article 28(1) of the PCA provides for MFN treatment with regard to the conditions affecting the establishment of companies.[206] The NT obligation found in Article 28(2) and (3) applies (with exceptions) only post-establishment[207] and only with respect to the *operation* of subsidiaries of the other Party.[208] This is confirmed by the fact that in Article 33 of the PCA both sides 'recognize the importance of granting each other national treatment with regard to the establishment' and 'agree to consider the possibility of movement towards this end'. To conclude, the PCA's pre-establishment provisions are quite weak. In fact, the totality of commitments that have been made in the PCA does not, for the most part,[209] go beyond what Russia has subscribed to by virtue of its accession to the WTO in August 2012.[210]

In the course of its accession to the WTO, Russia has made certain commitments with regard to the liberalization of the services sector which are annexed to the 'Report of the Working Party on the Accession of the Russian Federation'. Some salient examples from this schedule will be given here to illustrate what Russia has subscribed to in terms of investment liberalization.[211] For small and medium-sized enterprises it could be especially significant that engineering services, the maintenance and repair of equipment and general construction work for buildings have been completely liberalized (no limitations on market access for mode 3), with the exception of mode 4 where only the horizontal commitments have to be observed. As regards services incidental to manufacturing as well as the

[204] See primarily EU-Russia Partnership and Cooperation Agreement, n5, Title IV, Chapter II.
[205] EU-Russia Partnership and Cooperation Agreement, n5, Article 30 lit. a.
[206] The Joint Declaration in relation to Article 28 specifies that the words 'in conformity with the legislation and regulations' in Article 28(1) may not be interpreted as giving the right to create 'reservations resulting in a less favourable treatment than that accorded to companies or branches of any third country respectively'.
[207] See EU-Russia Partnership and Cooperation Agreement, n5, Article 28(5).
[208] August Reinisch, n190, 66.
[209] Regarding international maritime transport services (Article 35 PCA and paragraphs 1 and 2 of Article 39 PCA) and the temporary movement of natural persons for business purposes (points (a) and (b) of paragraph 2 of Article 32 PCA), the PCA contains WTO+ commitments. These commitments will be preserved through the 'Agreement in the form of an Exchange of Letters between the European Union and the Government of the Russian Federation relating to the preservation of commitments on trade in services contained in the current EU-Russia Partnership and Cooperation Agreement', 29 February 2012, Official Journal L 57, 44. Russia has included these commitments in its list of exemptions to the MFN principle; see Russian Federation MFN Exemptions, n175.
[210] Peter Van Elsuwege, n6, 4-5.
[211] See Russia's GATS Schedule of Specific Commitments, n138.

wholesale, retail and franchise sectors, there are almost no limitations with regard to mode 3 with the main exception that a commercial presence is allowed only in the form of a juridical person of the Russian Federation. Mode 4 is again unbound except as indicated in the horizontal commitments.[212] Furthermore, Russia has committed itself to liberalizing the banking, insurance and telecommunications sectors. With regard to the presence of natural persons on the territory of the Russian Federation (mode 4), the intra-corporate transfer and business visitors are admissible under certain circumstances.[213]

It seems that the EU will continue to push for liberalization in the post-Lisbon era.[214] The Commission stated that 'a comprehensive common international investment policy needs to better address investor needs from the planning to the profit stage or from the pre- to the post-admission stage. Thus, our trade policy will seek to integrate investment liberalisation and investment protection'.[215] The EU and Canada for instance in their negotiations on a Comprehensive Economic and Trade Agreement have agreed on both market access commitments and NT pre- and post-establishment.[216] It seems however that matters are different in the case of the new EU-Russia Agreement. First, the Russian Government has made clear that it opposes WTO+ provisions on market access as it 'takes time for Russian economy to "digest" new operating conditions in the WTO area'.[217] Second, the EU has apparently consented not to cover market access issues in the new agreement by reason of it being non-preferential.[218] Hence, the new EU-Russia Agreement will most likely only confer post-establishment protections, while the scope of market access rights will be determined by Russia's commitments under the GATS.

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[212] Unbound means that Russia remains free to introduce or maintain measures inconsistent with market access.
[213] Note the WTO+ commitments in the services sector in force between the EU and Russia, see note 209.
[214] August Reinisch, n143, 187-8.
[215] European Commission, Towards a comprehensive European international investment policy, n2, 5. See also Council of the European Union, Conclusions on a comprehensive European international investment policy, n109, para 16.
[216] Céline Lévesque, n178, 121-3.
[217] The Ministry of Foreign Affairs of the Russian Federation, 'Speech by Foreign Minister Lavrov during a meeting with representatives of the Association of European Businesses in Russia', 8 October 2012, available at <http://www.mid.ru/brp_4.nsf/0/52A9A0EC716E909344257A94002EBF18> (accessed 23 May 2013). See also The Ministry of Foreign Affairs of the Russian Federation, 'The interview of Russian Foreign Minister Sergey Lavrov to Euronews TV channel', 19 December 2012, available at <http://www.mid.ru/bdomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/77d60aea517ff8fd44257ae200215761!OpenDocument> (accessed 23 May 2013).
[218] See DG Trade, Overview of FTA and Other Trade Negotiations, n5.

6. OTHER ISSUES

Other issues which will supposedly play a role in the negotiations are briefly discussed here. The FET standard, which has, among investors, become one of the most prominent tools against potentially harmful State conduct, features in all BITs between Russia and EU Member States. With the exception of the USSR-France BIT, which provides for FET 'in accordance with principles of international law',[219] the FET obligation in the Russia-EU Member States BITs is formulated as an autonomous, free-standing standard.[220] However, the official position of the Russian Federation seems to have shifted away from granting unqualified FET. In the 2001/2002 Russian Model BIT, FET is only conceded in relation to 'management' and 'disposal' of investments.[221] In its actual BIT practice, however, Russia often diverges from this pre-set negotiating position. The Government has either agreed to extending the FET obligation to the 'management, maintenance, enjoyment, use or disposal' of investments[222] (which is wider than the formulation in the Model BIT) or has even consented to the insertion of the full FET obligation.[223] This flexible position on the part of the Russian Federation will certainly facilitate the negotiations with the EU. In the CETA negotiations, the EU had originally favored an open-textured formulation of FET but has meanwhile agreed to incorporate a catalogue of situations that amount to a breach of FET.[224]

Russian (Model) BITs have always contained a standard formulation of the protection against unlawful expropriation. Also, the interpretation and application of the expropriation provisions

[219] USSR-France BIT (1989), Article 3(1).
[220] Sometimes, like in the 2012 US Model BIT, n187, the FET standard is tied to the international minimum standard. Although the customary international law minimum standard of treatment of aliens is perhaps less open to expansive interpretation by arbitrators and may, therefore, leave a wider room for manoeuver to States, the dynamic interpretation of the international minimum standard, recently affirmed by the first arbitral award handed down under the Dominican Republic – Central American Free Trade Agreement (CAFTA) in *Railroad Development Corporation (RDC) v Republic of Guatemala*, attenuates the gap in terms of substantive protection towards the free-standing FET standard.
[221] See 2001/2002 Russian Model BIT, n37, Article 3(1).
[222] See Russia-Indonesia BIT (2007), Article 3(1); Russia-Jordan BIT (2007), Article 3(1); Russia-Libya BIT (2008), Article 3(1); Russia-Qatar BIT (2007), Article 4(1); Russia-Venezuela BIT (2008), Article 4(1) and Russia-Turkmenistan BIT (2009), Article 4(1).
[223] Russia-Singapore BIT (2010), Article 4(1); Russia-China BIT (2006), Article 3(1); Russia-Angola BIT (2009), Article 5(1) and Eurasian Economic Community investment agreement (2008), Article 4(1).
[224] Draft CETA Investment Text 2013, n144, Article X.9; Nathalie Bernasconi-Osterwalder, n163, 11.

in Russian BITs by arbitral tribunals has not unearthed any specific characteristics in comparison to the interpretation of such clauses in other BITs.[225]

Although there was some initial ambiguity regarding the EU's position,[226] it seems that the EU is now pushing for an umbrella clause to be included in the new EU-Canada CETA.[227] On the other hand, the Council took a rather nuanced position when it said that an umbrella clause could be included 'where appropriate'.[228] The Russian attitude regarding umbrella clauses is not definite either. Although Russia has concluded BITs with some EU Member[229] and other States[230] containing an umbrella clause, the Model BITs of 1992 and 2001/2002 make no mention of it at all. Whereas the question of the inclusion of an umbrella clause might be used as a bargaining chip by the Russian Government, it will not seriously impede the negotiations.

It transpired from the Negotiating Directives for Canada, India and Singapore and from the Commission's Draft Negotiating Mandate for the Transatlantic Trade and Investment Partnership with the United States that the future EU BITs shall also cover investments made *before* the entry into force of the agreement.[231] Such a broad temporal scope would certainly be in the interest of EU investors in Russia as the protection of the new EU-Russia investment regime – notably the state-of-the-art ISDS mechanism guaranteeing unhampered access to investment arbitration – would apply to investments made in the past. Article 11 of the 2001/2002 Russian Model BIT however excludes any retroactive effect.[232] It remains to be seen what the EU and Russia will agree upon regarding the new agreement's temporal scope.

[225] Sergey Ripinsky, n115, 610-1.
[226] August Reinisch, n143, 188-9.
[227] See EU-Canada CETA – landing zones, n112, 10.
[228] Council of the European Union, Conclusions on a comprehensive European international investment policy, n109, para 14.
[229] See USSR-Germany BIT (1989), Article 7(2); USSR-Netherlands BIT (1989), Article 3(4); USSR-France BIT (1989), Article 8; Russia-Greece BIT (1993), Article 10(2); Russia-Denmark BIT (1993), Article 2(4); USSR-UK BIT (1989), Article 2(2).
[230] Russia-China BIT (2006), Article 11(2); Russia-Japan (1998), Article 3(3).
[231] Council Negotiating Directives for Canada, India and Singapore, n110; Commission's Draft Mandate for the negotiation of a US-EU trade and investment agreement, n111.
[232] According to Article 9 of the 1992 Russian Model Treaty, n35, the BIT may, by agreement between the Parties, also apply to investments made before its entry into force.

D) CONCLUDING REMARKS

The Commission has announced to 'go for the "gold standard" of investment protection provisions'.[233] Regarding Russia, the Commission will certainly have a hard time negotiating the 'gold standard' given the discrepancies relating to investment liberalization and protection identified in this paper. The concerns that investment protection could be diluted under the prospective investment regime between the EU and Russia are however only partly warranted. The prime weakness of the current investment protection regime is that many of the Soviet-era BITs between Russia and EU Member States suffer from a lack of reliable access to ISDS. As we have seen, it may be expected, for good reasons, that the new EU-Russia investment regime will put an end to the erratic jurisprudence on the scope of ISDS under the Soviet-era BITs and on MFN-based jurisdiction, which will enhance reliability and predictability and encourage investors to vindicate their rights through international investment arbitration. Another major benefit is the creation of a level-playing field between EU investors, thereby eliminating asymmetries that resulted from the different extra-EU BITs with Russia.

On the other hand, in what may be described as a contrary trend, the 2001/2002 Russian Model BIT has scaled back the level of substantive investment protection. The limitations placed on MFN, NT and FET can hardly be reconciled with the aspiration of the EU to base its BITs on the 'best practices'[234] of EU Member States regarding their BITs. There is indeed an underlying difference in the appreciation of the international investment regime. This is evidenced by a recent statement of the Russian Prime Minister Dmitry Medvedev at the 3rd Saint Petersburg International Legal Forum in May 2013. Talking about the 'shortcomings of modern international law in the field of investment', Medvedev criticized the privileged treatment of foreign investors over domestic ones.[235] After attacking the 'grandfather clause' which would allow foreign investors to avoid the effect of new laws on taxation and other matters, the Prime Minister called for 'new legal mechanisms for countries that receive investments'.[236] Against the backdrop of Medvedev's critical statements and the State-

[233] Frank Hoffmeister and Günes Ünüvar, n47, 70.
[234] European Parliament resolution of 6 April 2011 on the future European international investment policy, n3, para 19; Council Negotiating Directives for Canada, India and Singapore, n110; Council of the European Union, Conclusions on a comprehensive European international investment policy, n109, para 15; European Commission, Towards a comprehensive European international investment policy, n2, 11.
[235] Prime Minister of Russia, 'The 3rd St Petersburg International Legal Forum', n127.
[236] Id.

friendly 2001/2002 Russian Model BIT, one could think that the stage is set for a divergence between Russia and the EU regarding international investment law. On the other hand, the suggested 'NAFTArisation' of the EU investment policy[237] – evidenced by leaked documents of the CETA negotiations – could lead to a rapprochement of both sides in investment matters.

Lastly, an important extra-legal factor which will impinge on the success of the new EU-Russia investment regime is enforcement. In the past, Russia has often failed to honor investment arbitration awards rendered against it.[238] Voluntary compliance with arbitral awards on the part of the Russian Federation will present one of the key (political) challenges in the future EU-Russia investment architecture.

[237] See Nikos Lavranos, n145.
[238] See for example Cody Olson, 'Enforcement of International Investment Arbitration Awards against the Russian Federation' (2011) 22 American Review of International Arbitration 711.