

Balancing the Protection of Foreign Investors and States Responses in the Post-Pandemic World

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Edited by

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CHAPTER 15

Russia's Perspective on a Health Crisis and Its Implications for FDI

Ilia Rachkov & Andrey Saveliev

The COVID-19 pandemic entailed serious consequences for foreign investors around the world. Lawyers are examining these consequences from the perspective of both international and national law. These consequences are triggered by various measures taken by states to combat the new virus. Such measures are of particular interest to researchers. In this chapter, the authors analyse the measures taken by Russia that have affected foreign investors. For instance, these measures threatened the due performance of contractual obligations. As a result of their analysis, the authors conclude that theoretically, foreign investors could sue Russia before international arbitration, referring to the fact that the measures taken by the state do not match the legitimate expectations of the investors. However, this ground is too weak because – as a rule – the Russian authorities do not give specific obligations to foreign investors, which is an element of the concept of investors' legitimate expectations. In general, the authors note the contradictory nature of the restrictive measures imposed by the Russian authorities: with their detrimental impact on the activities of investors and the lack of compensation for many major enterprises (but some compensation for small- and mid-size ones), the overall negative impact of the pandemic on the Russian economy was rather modest. The relatively early recovery of the business activity allows analysts to make moderate optimistic forecasts about a quick rehabilitation of the Russian economy from the pandemic.

§15.01 INTRODUCTION

The coronavirus pandemic has become a serious challenge for the global economy. Foreign direct investments (FDIs) are a major contributor to the national economy in almost every country in the world. The damage caused by the pandemic to the global economy in general and to foreign investors has yet to be assessed by economists.

However, the global reach of such serious consequences must inevitably be interpreted from the perspective of law (both national and international) as well.

Lawyers already attempt to legally qualify the measures taken by states to protect their economies and populations from the coronavirus. For example, from the international law perspective, this question may arise: can a pandemic be considered as a circumstance precluding wrongfulness?¹ If so: does the pandemic constitute force majeure, distress, or necessity?² Due to the limitations on space of the chapter, we will consider only force majeure.

This chapter analyses the measures taken by Russia to combat the coronavirus pandemic from the perspective of their compliance with the legal framework for regulating foreign investors. The list of these measures is contained in Appendix A hereto. The measures have been analysed in terms of both legal and actual impact on FDIs. Particular attention is paid to the legal grounds on which foreign investors have the right to recur to investor-State dispute settlement (ISDS), as well as the arguments to which Russia as the host state may appeal (in case it faces such claims). The key question for our study is whether Russia has violated the rights of foreign investors by introducing certain measures.

§15.02 THE LEGAL BASIS FOR REGULATING THE ACTIVITIES OF FOREIGN INVESTORS IN THE RUSSIAN FEDERATION

[A] Rights of Foreign Investors in Accordance with the Domestic Legislation and International Acts of the Russian Federation

This section analyses the provisions of national and international law applicable to the activities of foreign investors in Russia. For this purpose, it is necessary to determine the scope of rights held by foreign investors. This will help understand whether their rights have been violated by anti-pandemic measures taken in Russia.

Russian domestic legislation on investments basically consists of two Federal Laws:

- (1) On the Investment Activity in the Russian Federation Pursued in the Form of Capital Investments.³

1. Chapter 5 of the Articles on Responsibility of States for Internationally Wrongful Acts, or ARSIWA, 2001.
2. Articles 23-25 of ARSIWA, respectively. See Martins Paparinskis, *COVID-19 Claims and the Law of International Responsibility*, 11 Journal of International Humanitarian Legal Studies 313 (2020); Riddhi Joshi, *Force Majeure under the ILC Draft Articles on State Responsibility: Assessing Its Viability Against COVID-19 Claims*, available at <https://www.asil.org/insights/volume/24/issue/24/force-majeure-under-ilc-draft-articles-state-responsibility-assessing> (accessed on 20 July 2021). See also Ch. 3 *supra*.
3. Federal Law No. 39-FZ of 25 February 1999 'On Investment Activity in the Russian Federation Pursued in the Form of Capital Investments', available at http://www.consultant.ru/document/cons_doc_LAW_22142/ (accessed on 20 July 2021). Hereinafter are given links to the laws and treaties of the Russian Federation in Russian.

(2) On Foreign Investment in the Russian Federation.⁴

The first Law does not distinguish domestic investors from foreign ones. Russia guarantees all investors, regardless of their form of ownership:⁵

- equal rights when carrying out investment activities;
- transparency in the approval of investment projects;
- the right to appeal in court against the decisions and actions (inaction) of public authorities, local self-government bodies and their officials; and
- protection of capital investments.

According to the Law on Foreign Investment, FDI is the acquisition by an investor of at least 10% in the share capital of a Russian commercial organization, investment in fixed assets of a branch of a foreign legal entity established in Russia, or leasing of certain equipment (machinery, equipment, mechanisms, etc.) with the customs value of at least RUB 1 million. Given this definition, the restrictive measures imposed by the Russian authorities have inevitably affected the commercial activities of most foreign direct investors carried out in Russia.

The Law on Foreign Investment provides for the national treatment from which foreign investors are entitled to benefit.⁶ (Surprisingly, this law does not contain the most-favoured-nation (MFN) clause) Exceptions to national treatment may be established by federal laws and only to the extent necessary to protect public policy. Foreign investors are also entitled to compensation for damages caused by state and municipal authorities in accordance with Russian civil legislation.⁷ The law also contains guarantees of legal protection of investment activities, compensation in case of nationalization and freedom to repatriate the capital.⁸

This law, among other things,⁹ provides both restrictions and incentives¹⁰ (i.e., benefits) for foreign investors. As one of the incentives, the law provides a stabilization clause for foreign investors with a stake in a Russian legal entity of more than 25% or implementing priority investment projects.¹¹ Priority investment projects may be approved by the Russian Government.¹² The legal content of the stabilization clause

4. Federal Law No. 160-FZ of 9 July 1999 'On Foreign Investment in the Russian Federation', available at http://www.consultant.ru/document/cons_doc_LAW_16283/ (accessed on 20 July 2021).

5. *Ibid.* Art. 15, subs. 1.

6. *Ibid.* Art. 4, para. 1.

7. *Ibid.* Art. 5, para. 1. This guarantee is also contained in the Civil Code of the Russian Federation for any persons to whom state authorities caused harm.

8. *Ibid.* Arts 4, 5, 8, 11.

9. *Ibid.* Art. 4, para. 2.

10. For example, Federal Law No. 39-FZ (Art. 15, para. 2), *supra* n. 3, contains the provision that investors implementing priority investment projects will not be subject to legislation imposing new taxes, with some exceptions.

11. *Ibid.* Art. 9, para. 1.

12. For example, such lists are contained in Resolution No. 419 of the Government of the Russian Federation of 30 June 2007 'On Priority Investment Projects in the Field of Forestry', Directive No. 1485-r of the Government of the Russian Federation of 6 September 2010 'On Approval of the Strategy of Socio-Economic Development of the North Caucasus Federal District until 2025',

boils down to reducing the tax burden on the investor, with the exception of certain types of taxes: excise taxes and a value added tax (VAT) on goods produced in the Russian Federation or imported into it.

Restrictions are set forth by the Law on the Procedure for Foreign Investments in Business Companies of Strategic Importance.¹³ The law establishes the obligation of foreign investors to obtain prior approval from the authorized Russian state body for transactions and other actions entailing the establishment of control over Russian business entities of strategic importance for national defence and state security.¹⁴ This law was adopted as a response to the criticism targeted against the Federal Antimonopoly Service of Russia (FAS).

In 2005, Total Exploration & Production Holding Russia has withdrawn its application to acquire 25% in Novatek (a Russian independent gas company) after having been waiting for many months for any definite ‘yes’ or ‘no’ answer from the FAS which was considering Total’s application.¹⁵ At that time, certain states have adopted a similar approach: in August 2005, Chinese oil company CNOOC announced that it was abandoning plans to acquire Unocal, a United States (US) oil corporation; CNOOC indicated that the reason for its decision was political pressure from the US.

However, even after the adoption of this Law, the practice of its application is neither predictable nor transparent. The most controversial case related to this law is the one initiated by the FAS, on the judicial termination of the acquisition, by Otkritie Holding, of 100% in AGD Diamonds. As the Russian antimonopoly watchdog pointed out, the government commission had not been provided with information about the fact that a couple of ultimate beneficial owners of Otkritie Holding were foreign citizens.¹⁶ To accommodate the criticism of many foreign investors of how Russia applies that law, the FAS suggested making certain amendments to the current Law to establish uniform and more plausible procedures for preliminary approval of transactions.¹⁷

Annex 1 ‘List of Priority Investment Projects and Social Projects (Activities) for 2010-2013 on the Implementation of the Strategy ...’. See Arsen Z. Ayupov, Ekaterina V. Berger and Marina G. Kholkina. *Commentary to Federal Law No. 160-FZ of 9 July 1999 ‘On Foreign Investment in the Russian Federation’ (article-by-article)*, Consultant Plus legal database (2012, in Russian). Available at <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=CMB&n=17150#ZwjWMdSq29BSkySm> (accessed on 20 July 2021).

13. Federal Law No. 57-FZ of 29 April 2008 ‘On the Procedure for Making Foreign Investments in Companies Which are of Strategic Importance for Ensuring the Country’s Defense and State Security’, available at http://www.consultant.ru/document/cons_doc_LAW_76660/ (accessed on 20 July 2021).
14. *Ibid.* Art. 2. See *Legal Guide for Foreign Investors in Russia* (4th ed., Herbert Smith Freehills CIS LLP, February 2019), available at <https://www.herbertsmithfreehills.com/file/33191/download?token=YXpPh4T3> (accessed on 20 July 2021).
15. *Total refused to buy shares of ‘NOVATEK’*, Ria-Novosti (4 August 2005, in Russian), available at <https://ria.ru/20050804/41091952.html> (accessed on 20 July 2021).
16. Ilya Usov, *The Diamond Deal has been processed*, Kommersant (26 May 2020, in Russian), available at <https://www.kommersant.ru/doc/4356489> (accessed on 20 July 2021).
17. Diana Galiyeva, *Foreign Investors will get a bit more clarity*, RBC (12 July 2021, in Russian), available at <https://www.kommersant.ru/doc/4898284> (accessed on 20 July 2021).

[B] Types of Investment Contracts

Relations between the Russian state and a foreign investor may be regulated by an agreement or state contract concluded between these parties in accordance with Russian civil law.¹⁸ In this Section [B], we analyse the following types of investment contracts (as opposed to investment treaties):¹⁹

- investments protection and promotion agreements;
- special investment contracts;
- concession agreements;
- PPP agreements; and
- other types of investment contracts.

[1] IPPA

The most recent type of investment contract in Russian law is the investments protection and promotion agreement (IPPA), introduced in 2020 by the appropriate Federal Law.²⁰ IPPA may be concluded between the State and a Russian legal entity²¹ which implements a new investment project in one of the sectors of the Russian economy, except for certain types of activities.²² Foreign investors are entitled to participate in such legal entities. If the foreign investor's share in the share capital of such a legal entity is equal to or exceeds 10%, such a legal entity will be considered as established with FDIs.

The Law on IPPAs contains a stabilization clause:²³ the Russian legal entity which implements a particular approved project is not subject to the acts and decisions of Russian state authorities that worsen the conditions for doing business or other activities. The range of 'acts of state powers that worsen the investor's position' is quite wide; acts that increase the duration of the procedures necessary for the implementation of an investment project, the number of such procedures, etc. Russian acts providing for an increase in the rates of export customs duties shall not apply. The non-application of such a wide range of acts is very relevant in the light of the plans of the Government of the Russian Federation to collect an additional RUB 400 billion by

18. Federal Law No. 39-FZ, *supra* n. 3, Art. 8, para. 1.

19. Rainer Hausmann, *Investment Contracts with Foreign Investors*, Svetlana Moroz, *Peculiarities of Investment Contracts with Participation of a State in Legal Aspects of Investment Contracts: Collection of Articles 8-28* (Azer Aliyev, Svetlana Krupko and Alexandr Trunk eds, Norma 2012, in Russian).

20. Federal Law No. 69-FZ of 1 April 2020 'On the Protection and Promotion of Investment in the Russian Federation', available at http://www.consultant.ru/document/cons_doc_LAW_349045/ (accessed on 20 July 2021).

21. *Ibid.* Art. 1, subs. 1, para. 8.

22. *Ibid.* Art. 6, subs. 1. These include gambling business; production of tobacco products, alcoholic beverages, liquid fuels; production of crude oil and natural gas (except liquefied natural gas); wholesale and retail trade; activities of financial institutions supervised by the Central Bank of the Russian Federation; construction of shopping and business centres and apartment buildings.

23. *Ibid.* Art. 9.

increasing taxes for various companies. The Russian government has already increased export duties for Russian metallurgical enterprises in 2021.²⁴

The scope and duration of the stabilization clause for a particular IPPA depend on the State body with which the organization has concluded an agreement – Russia as the federal state or one of its Member States, as well as on the volume of capital investments. In particular, the term of the stabilization clause may not exceed six years for investment projects with capital investments of up to RUB 5 billion, fifteen years – from RUB 5-RUB 10 billion and twenty years – more than RUB 10 billion.²⁵ Compared to other types of investment contracts, IPPA can regulate almost any type of business activity.²⁶

According to D. Yulov, to increase the effectiveness of IPPA it is necessary to include guarantees contained in the Russian bilateral investment treaties (BITs) with the states of origin of foreign investors.²⁷ We do not agree with that because Russian BITs apply directly, in accordance with Russia's Constitution (Article 15 paragraph 4). In the first half of 2021, thirty-six IPPAs were signed in twenty-five Russian Member States;²⁸ the planned volume of investments under these IPPAs amounts to RUB 1.2 trillion. By 2024, the authorities expect to sign more than six hundred agreements worth RUB 12.6 trillion.²⁹

In June 2021, the requirements for the investment projects to be eligible to enter into IPPAs were softened and lowered. The duration of the stabilization clause for projects in agriculture, education and healthcare has been increased from six to ten years; however, such projects are required to generate at least 70% of their turnover from core activities. Also, no construction permit is required to enter into an IPPA.³⁰ The first Russian companies which signed IPPAs (Technoleasing; R-Farm; Wildberries; Segezha Group) note that this instrument turned out to be efficient and plausible, largely due to the Russian Government's readiness to adjust it, responding to the changing situation and the companies' requests.³¹ These companies also stressed that

24. *Taxes are approaching the Pre-adjustment*, Kommersant (5 July 2021, in Russian), available at <https://www.kommersant.ru/doc/4888590> (accessed on 20 July 2021).

25. Federal Law No. 69-FZ, *supra* n. 20, Art. 10, subs. 10.

26. The Court of Transbaikal Region Case No. 3a-47/2020, Judgment (5 June 2020). This judgment states that Russian investment contracts are not public law contracts (in German: *öffentlich-rechtlicher Vertrag*).

27. Dmitriy V. Yulov. *Interaction of National and International Legal Regulation Concerning Legal Guarantees of Foreign Investors*, 4 Journal of Russian Law (2021, in Russian). Available at <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=CJI&n=135126#013036833055906705> (accessed on 20 July 2021).

28. Ministry of Finance of the Russian Federation, *Unified portal of the budget system of the Russian Federation 'Electronic budget', Register of IPPA's*, available at http://budget.gov.ru/epbs/faces/р/Бюджет/Государственные%20инвестиции/Реестр%20соглашений%20о%20защите%20и%20поощрении%20капиталовложений?adf.ctrl-state=1du92aa1gy_4®ionId=45 (accessed on 20 July 2021).

29. Diana Galiyeva, *The Agreements have been tested for Efficiency*, Kommersant (24 June 2021, in Russian), available at <https://www.kommersant.ru/doc/4869351> (accessed on 20 July 2021).

30. Diana Galiyeva, *Guarantees go to the Investment Space*, Kommersant (16 June 2021, in Russian), available at <https://www.kommersant.ru/doc/4857448> (accessed on 20 July 2021).

31. Diana Galiyeva, *supra* n. 29.

the stabilization clause was the determining factor for them to sign the IPPA. Another factor was the possibility of compensating certain expenses spent on the project.

[2] *SpIC*

Another type of investor-State investment contract is a special investment contract (SpIC) established by Federal Law on the Industrial Policy.³² Under this contract, the investor is obliged (i) to create or (ii) modernize and build up the production of industrial products in Russia.³³ Investors are the persons who have invested their own or borrowed funds (e.g., loans) in the implementation of the project.³⁴ Investors are legal entities and individual entrepreneurs or foreign persons established in accordance with the laws of a foreign state.³⁵ For its part, the Russian Federation, or its Member State, undertakes to implement measures to stimulate industrial activity.

This Law contains a stabilization clause for investors who have entered into SpICs: they are not subject to the provisions of the law establishing additional restrictions and prohibitions.³⁶ Besides, with regard to such investors, the tax legislation provides guarantees of non-increase in the aggregate tax burden on their income.³⁷ Thus, the stabilization clause protects only from the increase in direct taxes collected from the corporate income, but not from – for instance – VAT, excise taxes, import or export customs duties. The stabilization clause is valid for the period for which the SpIC was concluded, but this period may not exceed ten years.³⁸

Subsequently, both the definition of the SpIC and the terms of its conclusion were changed: according to the new version of the Law on SpIC, a SpIC shall be concluded for the implementation of an investment project (i) to introduce or (ii) to develop and to launch new technologies.³⁹ SpICs entered into prior to 2 August 2019 remain in effect. This new version of SpICs is called 'SpIC 2.0'. In December 2020, the Russian government approved a list of technologies for localization (for the purposes of SpIC 2.0) which the investors can apply following a tender to obtain long-term benefits.

A couple of foreign investors entered into SpICs. The first in line to do so at the federal level of Russia was Claas, a well-known German producer of harvesters. On 7 June 2016, Claas and Russia (acting through its federal Ministry of Industry and Trade) concluded the SpIC. This allowed Claas to officially obtain the legal status of a 'Russian

32. Federal Law No. 488-FZ of 31 December 2014 'On the Industrial Policy in the Russian Federation', available at http://www.consultant.ru/document/cons_doc_LAW_173119/ (accessed on 20 July 2021).

33. *Ibid.* Art. 16, para. 1.

34. *Ibid.* Art. 3, para. 3.

35. The question of whether the subjects of activities in the sphere of industry are investors in the meaning of Federal Law is being debated. See Tofik M. Gandilov. *Special Investment Contract: Features of Legislative Regulation*, 12 Laws of Russia: Experience, Analysis, Practice (2019, in Russian). Available at <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=CJI&n=128026#034263122575787675> (accessed on 20 July 2021).

36. Federal Law No. 488-FZ, *supra* n. 32, Art. 16, para. 5.

37. *Ibid.* Art. 16, para. 6; Art. 18.4, para. 1.

38. *Ibid.* Art. 16, para. 4; Art. 18.4, para. 1.

39. *Ibid.* Art. 18.1, para. 1.

manufacturer' of agricultural machines; in turn, this makes Claas eligible to sell its harvesters and other products (made in Russia) using financial support of the Russian state. Under its SpIC, Claas undertook to continue increasing the level of the local content of its products made in Russia (according to Regulation No. 719 of the Russian Government).

It should be noted that the World Trade Organization (WTO)⁴⁰ Agreement on Trade-Related Investment Measures (TRIMs) prohibits trade-related investment measures, such as local content requirements, that are inconsistent with basic provisions of the General Agreement on Tariffs and Trade 1994: Article III (national treatment) or Article XI (quantitative restrictions). Examples of inconsistent measures, as spelt out in the Annex's Illustrative List, include local content or trade balancing requirements. Thus, local content requirements contained in SpICs and IPPAs are contrary to Russia's obligations under the TRIMs Agreement.

At a meeting of the Committee on TRIMs on 15 September 2020, the US and the European Union (EU) raised their concerns about Russian local content measures, including those directed at procurement by state-owned enterprises.⁴¹ In particular, both the US and the EU expressed concern that Russia appeared to be expanding its local content measures. In response, Russia maintained that its measures were aimed at strengthening Russian competitiveness and were consistent with its WTO obligations, while also stressing that the COVID-19 crisis had necessitated certain actions related to critical infrastructure to mitigate negative impacts.

Other notorious examples when foreign investors entered into SpICs with Russia are Daimler AG, Volkswagen, BMW, and WILO (a German producer of pumps).⁴²

[3] *Concession Agreement*

The third type of investment contract between a private investor and Russia as the host state is the concession agreement.⁴³ It is noteworthy that Russian concession agreements have nothing to do with the exploration and production of deposits of minerals: they have to do with the construction or modernization of infrastructure.

40. The Russian Federation has been a member of WTO since 22 August 2012.

41. World Trade Organisation, *Members probe Indonesia's and Russia's local content measures in investment committee* (15 September 2020), available at https://www.wto.org/english/news_e/news20_e/trim_15sep20_e.htm (accessed on 20 July 2021). In addition, the European Union is requesting consultations with Russia within the framework of the mechanisms of the WTO because of the protectionist measures previously introduced by the Russian Federation, which limit the participation of European companies in the procurement of companies with state participation. Read more here: Diana Galiyeva, Tatyana Edovina, *Procurement rules will be challenged in the WTO*, Kommersant (20 July 2021, in Russian), available at <https://www.kommersant.ru/doc/4908939> (accessed on 20 July 2021).

42. Vladislav B. Belov, *Special Investment Contracts and Russian-German Economic Cooperation (First Part)*, 92(6) Contemporary Europe 105-116 (2019, in Russian).

43. Dr Ilja Ratschkov, Ekaterina Kalinina, *Änderungen des russischen Gesetzes über die Konzessionsvereinbarungen – Neue Hoffnungen auf PPP-Projekte*, 5 WiRO 142 (2009, in German).

Concession agreements are regulated by a special Federal Law on Concession Agreements.⁴⁴ Under a concession agreement, the concessionaire undertakes, at his own expense, to create or reconstruct certain property, which either initially belongs to the grantor (which is the Russian Federation, or one of its Member States or municipalities, represented by an appropriate public agency), or will become the property of the grantor after a certain period of time from its creation.⁴⁵ A foreign legal entity may also be a concessionaire.⁴⁶

An example of an investment project with foreign participation under a concession agreement is the construction of the M-11 expressway from Moscow to St. Petersburg. The French company Vinci Concessions participated in this project.⁴⁷ The guarantees provided by the concession agreement are essentially the same as those described above. These guarantees should ensure the concessionaire's return on investment if the aggregate tax burden increases due to the adoption of new legislation.⁴⁸ Foreign concessionaires are granted national treatment. When a concession agreement is terminated by agreement of the parties, the concessionaire has no right to demand from the grantor the result of the concessionaire's performance under the concession agreement.⁴⁹

[4] PPP Agreement

A public-private partnership (PPP) agreement may be concluded in accordance with the Law on PPP.⁵⁰ This is an agreement based on the pooling of resources and distribution of risks and on cooperation between public and private partners. PPP agreements shall be concluded in order to, among other things, attract private investments into the Russian economy. The private partner must be a Russian legal entity.⁵¹ However, this does not prohibit foreign investors from participating in such Russian legal entities – exactly as for the organizations carrying out IPPA projects.⁵²

44. Federal Law No. 115-FZ of 21 July 2005 'On Concession Agreements', available at http://www.consultant.ru/document/cons_doc_LAW_54572/ (accessed on 20 July 2021).

45. *Ibid.* Art. 3, subs. 1.

46. *Ibid.* Art. 5, subs. 1, para. 2.

47. Dariya A. Shvelidze, *Features of Foreign Participation in Russian Public-Private Partnership Projects*, 2 The Journal 'Scientific Notes of Young Scientists' 51 (2016, in Russian).

48. Federal Law No. 115-FZ, *supra* n. 44, Art. 20, subs. 1.

49. However, the parties may specify it in the contract. Vladimir S. Belykh and Tatyana M. Zvezdina, *Concession Agreement: Issues of Theory and Practice*, 24 Jurist (2017, in Russian). Available at <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&ts=51393352103368483017179478&cacheid=281C3D5412EFACAE7D7FD438C23CC68&mode=splus&base=CJI&n=111529&rnd=45FDFD368753BBFCF78369E1D9343798D#1x3b0njxbbh> (accessed on 20 July 2021).

50. Federal Law No. 224-FZ of 13 July 2015 'On Public-Private Partnership and Municipal-Private Partnership in the Russian Federation and Amending Certain Legislative Acts of the Russian Federation', Art. 3, para. 1, available at http://www.consultant.ru/document/cons_doc_LAW_182660/ (accessed on 20 July 2021).

51. *Ibid.* Art. 3, para. 5.

52. In the EAEU, Member States that have adopted legislation on PPP which allows the participation of foreign legal entities as private partners. See, e.g., Valeriy Lisitsa and Svetlana Moroz. *Legal*

The guarantees provided to private partners⁵³ are identical to those for concessionaires. As for the disadvantages of PPP agreements, researchers identify too narrow an approach to define this type of agreement, its isolation from other types of investment agreements, especially concession ones.⁵⁴ One of the largest investment projects with foreign participation carried out under the PPP agreement is the construction and operation of the Western High-Speed Diameter highway in St. Petersburg. The Italian construction company Astaldi and Turkish construction companies MegaYapi and IC took part in the project.⁵⁵

[5] *Other Types of Investment Contracts*

In addition to these types of investment contracts, the legislation of the Russian Federation also knows production sharing agreements,⁵⁶ agreements on the conduct of relevant activities within the Special Economic Zones,⁵⁷ agreements on integrated development of a territory.⁵⁸ Stabilization clauses are enshrined in these agreements to protect the rights of investors, except for compliance with instructions of the appropriate supervisory authorities.⁵⁹

* * *

The federal laws enumerated in Section [B] above form the core of Russia's domestic legislation regarding the investment law and – more specifically – the rights and obligations of investors (including foreign ones). Separate federal laws regulate the forms of investment activities, for example, injected via specially established legal entities: investment partnerships,⁶⁰ joint-stock investment funds and mutual investment funds.⁶¹

Regulation of Public-Private Partnership in Russia and Other Countries of the Eurasian Economic Union. 7(3) Russian Law Journal 63 (2019).

53. Federal Law No. 224-FZ, *supra* n. 50, Art. 15.

54. Lisitsa and Moroz, *supra* n. 52, at 71.

55. Shvelidze, *supra* n. 47, at 51.

56. Federal Law No. 225-FZ of 30 December 1995 'On Production Sharing Agreements', available at http://www.consultant.ru/document/cons_doc_LAW_8816/ (accessed on 20 July 2021). No PSA was concluded under this law.

57. Federal Law No. 116-FZ of 22 July 2005 'On Special Economic Zones in the Russian Federation', Art. 14, available at http://www.consultant.ru/document/cons_doc_LAW_54599/ (accessed on 20 July 2021). See also Ilya V. Rachkov and Sergey I. Bakhmisov, *Russian SEZs at the Crossroads of International, Integrational and Domestic Law: How to Attract Investments Without Attracting Investment Claims?*, 5 Transnational Dispute Management (2020).

58. Town-Planning Code of the Russian Federation No. 190-FZ of 29 December 2004, Art. 68, available at http://www.consultant.ru/document/cons_doc_LAW_51040/ (accessed on 20 July 2021).

59. See, e.g., Federal Law No. 225-FZ, *supra* n. 56, Arts 17-18.

60. Federal Law No. 335-FZ of 28 November 2011 'On Investment Partnership', available at http://www.consultant.ru/document/cons_doc_LAW_122222/ (accessed on 20 July 2021).

61. Federal Law No. 156-FZ of 29 November 2001 'On Investment Funds', available at http://www.consultant.ru/document/cons_doc_LAW_34237/ (accessed on 20 July 2021).

[C] International Treaties on Investment Protection

By 2021, Russia has concluded eighty-three BITs, of which sixty-two have been ratified, sixteen have been signed, but not ratified, and five have ceased to be in effect.⁶²

The Russian doctrine of public international law classifies Russian BITs into four generations:⁶³

- (1) the first generation: the BITs concluded by the USSR in 1989-1991. After the dissolution of the USSR, the latter's rights and obligations under these treaties passed to Russia as the universal legal successor of the USSR (or even the same state as the USSR – because of the principle of continuity);⁶⁴
- (2) the second generation comprises the treaties concluded by Russia in 1992-2000;
- (3) the third generation – treaties concluded in 2001-2015;
- (4) finally, the fourth generation is the post-2016 BITs.

Except for Soviet BITs, Professor Dmitry Labin and Alena Soloveva chose as the criterion for classification of Russian BIT's the appropriate Model Agreement on Encouragement and Mutual Protection of Capital Investments, enacted by the Russian Government in 1992, 2001 and 2016, respectively.⁶⁵ Virtually all the BITs to which Russia is a party contain a fair and equitable treatment (FET) clause. Most BITs contain provisions on MFN treatment and national treatment, although some first-generation

62. UNCTAD International Investment Agreements Navigator, available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/175/russian-federation> (accessed on 20 July 2021).

63. Dmitry K. Labin and Alena V. Soloveva, *Russia's Foreign Investment Policy: Recent Developments and Future Trends in Terra (In)Cognita*, in *The BRICS in the New International Legal Order on Investment. Silk Road Studies in International Economic Law*, vol. 4, Ch. 3, 28-29 (Congyan Cai, Huiping Chen and Yifei Wang ed., Brill Nijhoff, 2020).

64. This issue is controversial in Russian law and legal doctrine. The legal concept of continuity is directly enshrined in the preamble of Federal Law No. 99-FZ of 24 May 1999 'On the State Policy of the Russian Federation in Relation to Compatriots Abroad', available at http://www.consultant.ru/document/cons_doc_LAW_23178/ (accessed on 20 July 2021). At the same time, this Law also contains a contradictory provision that the Russian Federation is the legal successor *and* the continuer of the Russian state (which existed before February revolution of 1917), the Russian Republic (February-October 1917), the RSFSR (October 1917-December 1922) and the USSR (December 1922-December 1991). Similar provision is contained in the Constitution of the Russian Federation of 12 December 1993 (with the Amendments of 1 July 2020), Art. 67. 1, subs. 1, available at http://www.consultant.ru/document/cons_doc_LAW_16283/ (accessed on 20 July 2021). However, the combination of both legal statuses of the 'successor State' (i.e., a new state which inherits all or some rights and obligations of the defunct State) and of 'continuer State' (i.e., same state) is not possible, from the point of view of international law.

65. Decree No. 395 of the Government of the Russian Federation of 11 June 1992; Decree No. 456 of the Government of the Russian Federation of 9 June 2001 on Entering into International Treaties on the Encouragement and Mutual Protection of Investments between the Government of the Russian Federation and the Governments of Foreign States; The Regulation No. 992 of the Government of the Russian Federation of 30 September 2016 on Entering into International Treaties on the Encouragement and Mutual Protection of Investments.

BITs, which were not uniform, did not contain provisions on national treatment.⁶⁶ In addition, although umbrella clauses are missing from the Russian Model Agreements, such umbrella clauses are contained in twelve BITs to which Russia is a party.⁶⁷

Also, the multilateral agreements to which Russia is a party and which contain provisions regulating investment activities shall be mentioned. Thus, the Agreement on Promotion and Reciprocal Protection of Investments in the Member States of the Eurasian Economic Community of 2008 (EAEC Investment Protection Agreement)⁶⁸ and the Treaty of the Eurasian Economic Union (EAEU) of 2014 regulate the implementation of investment activities by the Member States, including the rules on the dispute settlement.⁶⁹ At the same time, the doctrine notes that the entry into force of the *lex specialis* – i.e., the EAEC Investment Protection Agreement and EAEU Treaty – did not result in the termination of the intra-EAEU BITs.⁷⁰ Surprisingly, although the economic ties between the EAEU Member States are strong enough, there are very few investment arbitration cases based on intra-EAEU BITs.⁷¹ Russian courts also very rarely refer to Russia's BITs with the other EAEU Member States when deciding cases.⁷²

* * *

The conclusion from Sections [B] and [C] above is that Russian domestic law regulating the activity of foreign investors is very extensive and detailed, although it is not without certain drawbacks. The greatest of them is that Russian domestic law did not create a clear system of investment contracts between the host state and (foreign) investors. Nevertheless, under Russian domestic law, foreign investors can choose the most advantageous investment contract that fits into their planned commercial activity. The protection offered to foreign investors by Russian domestic law mainly consists

66. Labin and Soloveva, *supra* n. 63, at 31-32. 'See, e.g., the BITs with Austria (1990), Belgium (1989), Finland (1989), Germany (1989) and the Netherlands (1989).'

67. *Ibid.*, at 33. 'USSR–France BIT (1989), Russia–China BIT (2006), USSR–Germany (1989), Russia–Greece (1993), Russia–Denmark (1993), Russia–Japan (1998), USSR–Korea (1990), Russia–Kuwait (1996), USSR–Netherlands (1989), USSR–Switzerland (1990), Russia–Turkey (1997) and USSR–UK (1989).'

68. The Agreement is still in force between the former EAEC Member States. See Georg Scherpf and Nikita Kondrashov, *Investment Protection and Arbitration in the CIS Region*. 1(18) SchiedsVZ/German Arbitration Journal 10 (2020).

69. The Agreement on Promotion and Reciprocal Protection of Investments in the Member States of the Eurasian Economic Community (12 December 2008) (EAEC Investment Protection Agreement), available at http://www.consultant.ru/document/cons_doc_LAW_107307/ (accessed on 20 July 2021). Despite the fact that the EAEC no longer exists, the Agreement is still in force between the former EAEC Member States: Russia, Belarus, Kazakhstan, Kyrgyzstan and Tajikistan. Treaty on the Eurasian Economic Union (29 May 2014), Annex 16 'Protocol on Trade in Services, Establishment, Activities and Investments', s. VII 'Investments', Art. 6 'Procedure for Settlement of Investment Disputes'. Available at https://docs.eaeunion.org/docs/ru-ru/0013611/itia_05062014_doc.pdf (accessed on 20 July 2021).

70. Ilya V. Rachkov, *Application of Bilateral Investment Treaties by Russian Courts*. 3(15) International Justice Journal 75-76 (2015, in Russian).

71. Scherpf and Kondrashov, *supra* n. 68: 'For the first time since its entry into force, investors have invoked in 2018, among others, the EAEC Investment Protection Agreement and the Annex XVI TEAEU. Two claims were brought against Belarus and Kyrgyzstan – *Grand Express v. Belarus* and *RusHydro v. Kyrgyzstan*. Another case against Belarus, *Manolium Processing v. Belarus*, relies exclusively on Annex XVI TEAEU. All three cases were brought by Russian investors.'

72. *Ibid.*

of a stabilization clause and a national treatment clause. The stabilization clause usually protects against changes in tax law (however, certain important taxes are not covered by the stabilization clause) and is valid for the duration of the contract or for a period to be determined (depending on the amount of the sunk investment). The civil law nature of investment contracts provides significant opportunities for the introduction of special obligations for both Russia and the foreign investor in each individual contract.

The lack of uniformity of guarantees for foreign investors is even more obvious in the case of international investment treaties to which Russia is a party. The most interesting guarantees are umbrella clauses, which elevate the violation by the host state of a civil law obligation vis-à-vis a foreign investor (arising out of an investment contract) to an internationally wrongful act of that state.

[D] Procedural Rights of Foreign Investors in Accordance with Domestic Law and Russia's International Treaties

The above brief overview of the substantive rights of foreign investors enshrined in Russian national law and Russia's international treaties should be supplemented by a short description of procedural rights available to foreign investors in connection with the resolution of their disputes with Russia as the host State. Without procedural guarantees, the substantive guarantees are only *jus nudum*.

According to the Law on Foreign Investments, foreign investors are provided with a guarantee to ensure proper resolution of a dispute arising in connection with investments made/business activities carried out in Russia.⁷³ This category of disputes may be resolved either in Russian national courts or through international investment arbitration. Depending on the details of the dispute, this dispute may fall within the exclusive competence of Russian state courts. In this case, such dispute cannot be referred to international arbitration.

Identical provisions are contained in the Law on Concession Agreements.⁷⁴ Same most broadly worded safeguards are applicable to SpICs⁷⁵ and to PPP agreements (although Federal Law on PPP does not explicitly regulate dispute resolution).

The Law on IPPA contains a kind of cooling-off period: the parties to the IPPA must negotiate within three months; if they fail to resolve the dispute through negotiation within that time, one of them may initiate a dispute either in a competent Russian court or in arbitration, subject to the arbitration clause in the IPPA.⁷⁶ The place of arbitration shall be in Russia. Arbitration shall be conducted under the rules of a

73. Federal Law No. 160-FZ, *supra* n. 4, Art. 10.

74. Federal Law No. 115-FZ, *supra* n. 44, Art. 17; Federal Law No. 225-FZ, *supra* n. 56, Art. 22.

75. Federal Law No. 488-FZ, *supra* n. 32, Art. 16, para. 9.

76. Federal Law No. 69-FZ, *supra* n. 20, Art. 13, subss 3-6.

permanent arbitration institution (PAI), including foreign arbitration institutions authorized to perform the relevant functions under the Law on Arbitration.⁷⁷

There are currently four such foreign PAIs: (1) International Court of Arbitration, (2) Vienna International Arbitral Centre, (3) Singapore International Arbitration Centre, and (4) Hong Kong International Arbitration Centre. Among Russian PAIs, disputes arising out of IPPAs can be considered in the Russian Arbitration Center, the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC at the RF CCI) and the Arbitration Center at the Russian Union of Industrialists and Entrepreneurs (acronym in Russian: RSPP).⁷⁸ The possibility of recourse to ISDS in the event of a breach by the Russian Federation of its obligations under the IPPA is not specified, but – if such a breach of the IPPA simultaneously violates the relevant BIT – such a dispute may also be resolved via ISDS – by virtue of the appropriate international treaty to which Russia is a party.

Russian BITs do not show uniformity as to the procedure for resolving disputes. The first generation of treaties limited the investor's right to apply to arbitration from the perspective of *ratione materiae*: some BITs state that only disputes on the amount and procedure of compensation payment and on the free transfer of funds from abroad to Russia can be submitted to arbitration.⁷⁹

Regarding arbitration bodies and rules of procedure, Russian BITs proposed several options. One of them was to apply to the Arbitration Institute of the Stockholm Chamber of Commerce under the relevant rules of procedure or to ad hoc arbitration in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.⁸⁰ It was also possible to apply to the International Centre for Settlement of Investment Disputes (ICSID) under the relevant Arbitration Rules, or the arbitration ad hoc with or without indication of the PCA (Permanent Court of Arbitration) Arbitration Rules.⁸¹

Foreign investors cannot file a claim against Russia to the ICSID based on the Washington Convention of 1965 on Procedures for Settlement of Investment Disputes between States and Foreign Persons because Russia has not ratified this Convention. However, a foreign investor may file a claim against Russia with the ICSID in accordance with the ICSID Additional Facility Rules of 1978. BITs involving the

77. Federal Law No. 382-FZ of 29 December 2015 'On Arbitration (Arbitration Proceedings) in the Russian Federation', available at http://www.consultant.ru/document/cons_doc_LAW_191301/ (accessed on 20 July 2021).

78. Lord Goldsmith QC, Gavin Chesney, Alyona Kucher and Evgeny Samoylov, *ICC and SIAC Granted the Status of Permanent Arbitration Institutions in Russia* (21 May 2021, in Russian), available at <https://www.debevoise.com/insights/publications/2021/05/icc-and-siac-granted-the-status-of-permanent?translationGuid=80cb412b-4aca-421f-990c-fd4f0e89c164> (accessed on 20 July 2021).

79. See, e.g., Agreement between USSR and Spain for the Protection and Promotion of the Investments (26 October 1990), Art. 10.

80. Labin and Soloveva, *supra* n. 63, at 44.

81. *Ibid.*

Russian Federation may provide for other means of dispute resolution than arbitration.⁸²

In accordance with the EAEU Treaty, the investor has the right to apply at its own discretion to:

- the competent court of the recipient state;
- the International Commercial Arbitration Court at the Chamber of Commerce of any state agreed by the parties to the dispute;
- an ad hoc arbitration, which must act on the basis of the UNCITRAL Arbitration Rules, unless the parties agree otherwise; or
- ICSID.⁸³

One of the most significant aspects for foreign investors wishing to sue Russia in the ISDS is the existing practice of investment disputes with Russia as a respondent. Russia has been a respondent in twenty-six investment disputes; out of these cases, arbitration tribunals have made eleven decisions in favour of investors and four decisions in favour of the state; nine disputes are pending, one dispute has been settled, and one has been discontinued.⁸⁴ As follows from the Yukos Foundation press release, on 23 July 2021 the PCA issued a Tribunal's Award in favour of the investor in the case of *Yukos Capital v. Russia*, the so-called second-wave Yukos case.⁸⁵ Thus, this is the twelfth decision made in favour of the investor. However, it is still not reflected on the official website of the United Nations Conference on Trade and Development (UNCTAD).⁸⁶

Whenever arbitral awards were rendered in Russia's favour, this occurred because the arbitrators concluded that they do not have jurisdiction to hear the dispute.⁸⁷ Consequently, for a foreign investor to successfully pass the stage of deciding whether the arbitral tribunal has jurisdiction means an almost guaranteed victory in the dispute on the merits.

82. *Ibid.* 'Recent examples include [...], recourse to national court in the event of a dispute relating to investments (South Africa), the use of specialised investment courts (Iraq and Kazakhstan), institutional mediation based on a national court system (Morocco and Republic of Korea), state-to-state arbitration (Australia), and the use of joint committees or ombudspersons (Brazil).'

83. Treaty on the EAEU, *supra* n. 71.

84. Hereinafter is information on disputes according to UNCTAD Investment Dispute Settlement Navigator, available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/175/russian-federation/investor> (accessed on 20 July 2021).

85. Yukos Foundation, *Russian Federation Ordered by International Court to Pay \$5 Billion to Yukos Capital* (28 July 2021), available at <https://yukosfoundation.com/russian-federation-ordered-by-international-court-to-pay-5-billion-to-yukos-capital/> (accessed on 30 July 2021). However, the text of the decision has been not published.

86. UNCTAD Investment Dispute Settlement Navigator, *supra* n. 84, The status of the dispute *Yukos Capital SARL v. The Russian Federation* specified as pending (accessed on 1 September 2021).

87. Including the confidential case *Sana Consulting & Management GmbH v. The Russian Federation*. See *Arbitration news round-up to 22 July 2015 by Practical Law Arbitration* (22 July 2015), available at [https://uk.practicallaw.thomsonreuters.com/0-617-6111?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/0-617-6111?transitionType=Default&contextData=(sc.Default)&firstPage=true) (accessed on 20 July 2021).

The analysis of the arbitral awards rendered in favour of foreign investors against Russia demonstrates that expropriation is practically the only basis for holding Russia liable as a result of violation of the provisions of the investment treaties: in seven out of the first eleven awards against our home country, Russia directly expropriated foreign investments, and in the remaining four – only indirectly. There is no information about the type of expropriation in the case of *Yukos Capital v. Russia*. However, it clearly follows from the Yukos Foundation press release that, in accordance with the Award, Russia denied the investors justice before the Russian courts. This is the first case when the arbitration tribunal came to the conclusion that Russia has committed a denial of justice.

Most often, foreign investors accused Russia of violating the FET/minimum standard, including denial of justice, as well as violating the MFN.⁸⁸ We detected the following correlation: cases where foreign investors relied on violations of investment protection standards (rather than on expropriation) were resolved in Russia's favour. For instance, in *Pugachev v. Russia*, the claimant alleged that Russia had violated customary rules of international investment law;⁸⁹ in *Berschader v. Russia*, the claimants invoked an umbrella clause in the BIT.⁹⁰ Thus, based on the analysis of existing arbitral awards on investment disputes in which Russia participated as a respondent, we draw the following conclusion: foreign investors claiming expropriation (and/or – from now on – denial of justice) have better chances to win the case. However, the fact that eight such disputes are currently pending before international investment arbitration tribunals suggests that new grounds for holding Russia liable for violations of investment agreements may appear.⁹¹

88. For example, *Renta 4 S.V.S.A and others v. The Russian Federation*, SCC case No. 24/2007, Award on Preliminary Objections (20 March 2009), paras 68-69, 103-109. It should be noted, however, that the FET and MFN were cited by the investor to substantiate the jurisdiction of the arbitral tribunal.

89. *Sergei Viktorovich Pugachev v. The Russian Federation*, UNCITRAL, Notice of Arbitration (21 September 2015), paras 119-135.

90. *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award (21 April 2006), paras 6, 117. Confirmed in UNCTAD Investment Dispute Settlement Navigator, *supra* n. 84.

91. *NJSC Naftogaz of Ukraine, PJSC State Joint Stock Company Chornomornaftogaz, PJSC UkrGasVydobuvannya and others v. The Russian Federation*, PCA Case No. 2017-16. Despite the fact that the case file is confidential and has not been completed, the UNCTAD Investment Dispute Settlement Navigator, *supra* n. 84, it is stated that the arbitration confirmed violations of the following standards, in addition to expropriation: Full protection and security and MFN. The claimant's website informs that the arbitral tribunal ruled that there was a violation of the Russia-Ukraine BIT (1998), and the proceedings are in the second phase: determining the amount of compensation. Naftogaz Group, *Permanent Court of Arbitration in The Hague finds Russia expropriated Naftogaz assets in Crimea in violation of investment treaty*, (1 March 2019), available at <https://www.naftogaz.com/www/3/nakweben.nsf/0/90E8ACADAC9BA783C22583B0005C7E88?OpenDocument&year=2019&month=03&nt=News&> (accessed on 20 July 2021).

Investment disputes involving Russia include two large groups: disputes over claims filed by former Yukos's shareholders (eight disputes) and the so-called Crimea-related disputes (ten disputes).⁹² All claims of the second group were filed by Ukrainian investors and concerned, respectively, the violation of the Russia-Ukraine BIT (1998) in connection with Crimea's takeover by Russia.⁹³ The Yukos-related disputes will be discussed below in the context of changes to Russian investment law. Thus, the specifics of the 'Crimean' disputes should be examined first.

In the beginning, Russia decided not to participate in the 'Crimean' proceedings at all. Some scholars point out the reasons for such non-participation in Russia's unwillingness to recognize the possible arguments of the opposite party and/or the arbitrators: with a high degree of probability, such arguments will concern the illegality, from the point of view of public international law, of Crimea's takeover by Russia.⁹⁴

Later on, Russia abandoned its policy of non-participation in Crimea-related investment disputes⁹⁵ and started appointing its representatives in such disputes. Given Russia's inconsistency on the issue of non-participation in investment disputes, it is difficult to forecast Russia's future attitude in other international disputes – related to restrictive measures imposed by Russia to prevent the spread of COVID-19. If Russia again decides not to participate in a hypothetical dispute, this may only strengthen the position of the foreign investor claimant. First, possible arguments of the respondent must not (but may) be considered by the arbitral tribunal, as the respondent does not raise and/or does not defend them; second, such behaviour may be regarded by arbitrators as contempt of the arbitration,⁹⁶ which would not contribute to a favourable outcome of the case for Russia either.

The issue of the possibility of recognition and enforcement of an arbitral award is also very important for investors. Russia, being the legal successor of the USSR, is the state that ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁹⁷ However, Russian legal scholars N. Doronina and N. Semilyutina note that the adoption of the convention does not warrant the enforcement

92. See Ilya V. Rachkov and Elizaveta I. Rachkova, *Crimea-Related Investment Arbitration Cases against Russia before International Investment Arbitration Tribunals*, 4 *Moscow Journal of International Law*, 119-147 (2020).

93. Of course, the authors are perfectly aware of the fact that many foreign states prefer to call it 'occupation'. However, Crimea's accession to Russia in 2014 can hardly be called 'occupation' as the vast majority of the local population appears to welcome that development (unlike, for instance, the sentiment of the population of Baltic states in late 1980s – early 1990s: that population largely wanted to depart from the Soviet Union).

94. Rachkov and Rachkova, *supra* n. 92, at 144-145.

95. *Ibid.* 'However, more recently, Russia opted for a different strategy, as it belatedly decided to participate in another Crimea-related arbitration (e.g., *Lugzor & Others v. Russia*).'

96. Peter Tzeng, *A Strategy of Non-participation Before International Courts and Tribunals*, 1(19) *The Law & Practice of International Courts and Tribunals*, 24-25 (2020).

97. The Convention was ratified by Presidium of the Supreme Soviet of the USSR on 10 August 1960. See also Letter No. OM-37 of the Supreme Arbitrazh Court of the Russian Federation of 1 March 1996 'On Enforcement of Awards of Arbitration Courts of One State in the Territory of Another State'.

of arbitral awards for foreign investors in investment claims.⁹⁸ The problems that existed during the Soviet era in *Lena Goldfields Ltd.*,⁹⁹ remain with respect to contemporary arbitration disputes involving Russia (e.g., in *Sedelmayer v. Russian Federation*).¹⁰⁰ Having failed to get the arbitral award recognized and enforced in Russia, the claimant applied to foreign courts of various countries for debt collection by levying execution on the property of the Russian Federation located abroad.¹⁰¹

[1] ECT: Special Case?

Certain provisions of Russian law regulating the recognition and enforcement of international investment arbitration awards are quite unusual. This is particularly true of arbitral awards rendered based on the Energy Charter Treaty of 1994 (ECT). Russia signed the ECT in 1994 and provisionally applied it until 2009.¹⁰² The ECT provides for provisional application to the extent not inconsistent with the Constitution, laws, or regulations of the State signatory to the ECT.¹⁰³ Russia's refusal to ratify the ECT was formalized by an appropriate Directive of the Russian Government.¹⁰⁴

In three similar cases before an international ad hoc investment arbitration tribunal brought by three groups of former shareholders of Yukos Oil Company, the Russian Federation¹⁰⁵ challenged the provisional application of the ECT to the extent it allows for international arbitration between foreign investors and host states.¹⁰⁶ In particular, Russia argued that the provisional application of the ECT is contrary to the Russian Constitution, laws and regulations to the extent of submitting disputes arising out of ECT to international investment arbitration tribunals. However, in 1994, Russia did not make any reservation or declaration to the ECT to the effect that it does not agree with provisionally also applying the arbitration mechanism.

98. Natalia G. Doronina and Natalya G. Semilyutina. *Legal Problems of Investment Dispute Resolution and the Development of Russian Legislation on Alternative Dispute Resolution Mechanisms in In Memoriam: A Collection of Memoirs, Articles, and Other Materials*, Ch. II (P.D. Savkin 2d ed., Statut, 2017, in Russian). Available at <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&ts=1955517750003061184986065002&cacheid=A2BD79F205E93B4908B39E2557664965&mode=splus&base=CJI&n=107754&rnd=F475FADB73A0CC4173E98615EAC0BD81#398rukdxn8g> (accessed on 20 July 2021).

99. See Arthur Nussbaum. *Arbitration Between the Lena Goldfields Ltd. and the Soviet Government*, 36 Cornell L. Rev. 31 (1950).

100. *Mr. Franz Sedelmayer v. The Russian Federation*, SCC case, Award (7 July 1998).

101. See Pål Wrange. *Sedelmayer v. The Russian Federation*, 2 The American Journal of International Law 349-350 (April 2012).

102. Energy Charter Treaty (17 December 1994), part VIII, Article 45.

103. *Ibid.*

104. Directive No. 1055-r of the Government of the Russian Federation of 30 July 2009. Russia decided not to ratify the ECT for the following reasons: (1) requirement of ECT to its parties to grant transit to the countries exporting their energy resources; (2) right of energy-importing countries to re-export energy resources; (3) the clause relating to ISDS.

105. *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-04/AA227, Final Award (18 July 2014).

106. Read more about the peculiarities of the provisional application of international treaties in the Russian Federation here: Ilya V. Rachkov, *Setting Side International Investment Arbitration Awards by State Courts at the Seat of Arbitration (Inspired by the Yukos Saga): Show Must Go On?*, 1(33) International Justice Journal 111-112 (2020, in Russian).

In 2014, three arbitral tribunals (comprising the same set of arbitrators) ruled that Russia must pay former Yukos shareholders over USD 50 billion.¹⁰⁷ Concurrently, with its attempts to challenge these awards in the Netherlands (at the seat of arbitration),¹⁰⁸ Russia has decided to continue its thorny path in the application of public international law on its territory. For this purpose, the last step in this development was the amendments to the Constitution of the Russian Federation made in the summer of 2020. Article 79 of the Russian Constitution was supplemented with the second sentence: 'Decisions of international bodies, taken on the basis of provisions of international treaties of the Russian Federation in their interpretation that contradicts the Constitution of the Russian Federation shall not be enforced in the Russian Federation.'¹⁰⁹

Article 79 of the Constitution of the Russian Federation theoretically gives Russia the right not to enforce decisions – not only of international investment arbitrations but also of the main and subsidiary UN organs, WTO's Dispute Settlement Body, International Tribunal for the Law of the Sea, of the European Court of Human Rights (ECtHR), EAEU bodies, etc. To achieve that goal, it would be sufficient that the Constitutional Court of the Russian Federation (CCRF) rules that such decisions were taken on the basis of the interpretation of the applicable international treaty which is contrary to the Constitution of Russia. This provision is extremely dangerous because it makes Russia an unreliable partner in international relations.

However, this new provision of the Russian Constitution does not overrule the standpoint of public international law: Article 27 of the Vienna Convention on the law of treaties (VCLT)¹¹⁰ and Articles 3 and 32 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).¹¹¹ The ECT was signed on 17 December 1994 on behalf of Russia by Mr Oleg Davydov.¹¹² At that time (1994), there was no other option for the Russian executive power to enact the ECT but to agree with its provisional application: the federal parliament would not ratify the ECT because of the struggle for political power between the communists who dominated the parliament and the then President Yeltsin. As professor S. Belov¹¹³ put it, the government of

107. *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, *supra* n. 105, para. 1827.

108. The right to recourse to a court against an arbitral award is enshrined in Article 34 of the UNCITRAL Model Law on International Commercial Arbitration (21 June 1985), with amendments as adopted in 2006. As of July 2021, the Russian Federation is attempting to appeal the arbitral award to the Supreme Court of the Netherlands in cassation. By 23 April 2021, the Advocate General of the Supreme Court of the Netherlands had issued an advisory opinion rejecting all arguments put forward by the Russian Federation. Available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2021:425> (accessed on 20 July 2021).

109. Law on the amendment to the Constitution of the Russian Federation No. 1-FKZ of 14 March 2020 'On Improving the Regulation of Certain Matters of the Public Authority's Organisation and Functioning', Art. 1, para. 12, available at http://www.consultant.ru/document/cons_doc_LAW_346019/ (accessed on 20 July 2021).

110. Vienna Convention on the Law of Treaties (23 May 1969), available at https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed on 20 July 2021).

111. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001).

112. At the time Deputy Chairman of the Government of the Russian Federation (1994-1997) and Russian minister of external economic relations (1993-1997).

113. The dean of the law faculty of Saint Petersburg University.

Russia is empowered to sign any treaty, and even to decide on the temporary application of the treaty, but this does not mean that the government can accept any obligation on behalf of the State. Even the law cannot transfer to the government those powers that belong to the legislative branch.¹¹⁴

As Professor Belov explained, in the Yukos case, the Dutch courts only gave a literal interpretation of the Russian Federal Law on international treaties, which does not formally limit the government's powers to decide on the temporary application of an international treaty. Now the Russian Constitutional Court has indicated that the constitutional regulation, including that formulated in the earlier decisions of the Constitutional Court, does not allow this.

When the decision on Yukos becomes final and if the Supreme Court of the Netherlands recognizes that international arbitration has correctly accepted its jurisdiction over this case, only then will the question of whether it be enforced will arise. And those who called the Constitutional Court's decision a new decision on the Yukos case, which allows not to pay, were somewhat hasty.

We think that Russia can hardly rely on the caveat of Article 46 VCLT as it deals with the competence to conclude international treaties. The ECT was negotiated by a large group of States, including Russia. Russia knew very well what may be the consequences of non-compliance with the ECT, the main of which being facing claims from foreign investors and further participation in the ISDS, and consciously assumed these obligations, in exchange for potential foreign investments (also loans granted by foreign banks to Russian oil and gas companies) and the right to freely sell its hydrocarbons to foreign off-takers.

Thus, Russia would not be able to get rid of its responsibility for internationally wrongful acts by referring to its Constitution. As examples of other countries show (e.g., USSR in *Lena Goldfields*, Albania in *Corfu*, Libya in *Lockerbie*, Argentina in many international investment arbitration cases), States may refuse to comply with the decisions of international judicial bodies for decades, but sooner or later such non-obeying States have no choice but to execute such decisions – for pragmatic reasons, at least.

[2] *New Competence of the Constitutional Court of the Russian Federation*

As a development of this provision of the Constitution, the CCRF was endowed with the competence to resolve two issues:

114. *The Legal Tradition cannot just be taken and changed* in *Legal Results of the Year*, 24 Kommersant, Annex 14 (28 January 2021, in Russian), available at <https://www.kommersant.ru/doc/4661237> (accessed on 20 July 2021).

- (1) resolution of the issue of the possibility to execute the decisions of interstate bodies adopted based on the provisions of international treaties of the Russian Federation in their interpretation contradicting the Constitution;¹¹⁵ and
- (2) the decision on the possibility of enforcing the decision of a foreign or international court or arbitration tribunal, imposing obligations on the Russian Federation, if this decision is contrary to the public order provisions of the Russian Federation.¹¹⁶

Some Russian legal scholars have expressed the opinion that the new powers of the CCRF are a timely response to the existing international legal problem: whereas even such judicial bodies as the International Court of Justice, ECtHR and Court of Justice of the EU (CJEU) face problems with the execution of their decisions, such a dubious type of dispute resolution as investment arbitration should not be used (or even abused) by foreign investors without any limits.¹¹⁷ The view that the ISDS currently undergoes a systemic crisis is generally shared by researchers in the field of international investment law.¹¹⁸

[3] *Changes to Federal Laws on Investors' Rights*

Russian laws regulating the activity of foreign investors were also amended to bring them in line with the amendments to the Constitution. The provision that the decisions of interstate bodies may not be executed in/by Russia if they contradict the Constitution of the Russian Federation was added to the laws: on Foreign Investment in the Russian Federation,¹¹⁹ Concession Agreements,¹²⁰ and IPPA.¹²¹

[4] *The Newest Judicial Practice of the CCRF*

The logical continuation of the amendments made to the national legislation of the Russian Federation was the adoption of Resolution No. 2867-O-R by the CCRF on 24

115. Federal Constitutional Law No. 7-FKZ of 14 December 2015 'On Amendments to Federal Constitutional Law on the Constitutional Court of the Russian Federation', Art. 1, para. 5, available at http://www.consultant.ru/document/cons_doc_LAW_190427/ (accessed on 20 July 2021).

116. *Ibid.*

117. Alexey S. Ispolinov. *New Powers of the Russian Constitutional Court to Review the Constitutionality of Decisions of International Courts and Arbitration Tribunals*, 12 'ZAKON' Journal (2020, in Russian), available at <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&ts=1955517750003061184986065002&cacheid=D300DEFBA297D430B1F1A7AC49207A32&mode=splus&base=CJI&n=135021&rnd=F475FADB73A0CC4173E98615EAC0BD81#9vadwjdsagg> (accessed on 20 July 2021).

118. See, e.g., Malcolm Langford et al. *Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions*, 21 Journal of World Investment & Trade 168-169 (2020).

119. Federal Law No. 160-FZ, *supra* n. 4, Art. 5, para. 2.

120. Federal Law No. 115-FZ, *supra* n. 44, Art. 2, subs. 3.

121. Federal Law No. 69-FZ, *supra* n. 20, Art. 3, subs. 3.

December 2020.¹²² Formally containing no reference to the former Yukos shareholders, the said resolution is nevertheless fully devoted to the provisional application of international treaties in the Russian Federation. Explaining its own earlier decision on the provisional application of international treaties in the Russian Federation,¹²³ the CCRF ruled: the constitutional and legal meaning of the Federal Law on International Treaties of the Russian Federation does not allow the temporary application of the provisions of an international treaty of the Russian Federation, which provide for the international arbitration of disputes between Russia and foreign investors.¹²⁴

In its Resolution, the CCRF referred to the Grand Chamber decision of the CJEU in *Slovak Republic v. Achmea BV*.¹²⁵ This reference looks like a *Deus ex machina*: we do not share the CCRF's view that *Achmea* is relevant to Russia – foreign investors cases, as *Achmea* deals with the intra-EU BITs, which is a completely different context (supremacy of EU law over intra-EU BITs), as compared to *Yukos*.

The CCRF also stated in its decision¹²⁶ that investment arbitration is different from commercial arbitration; thus, as a consequence of such difference, the relevant disputes are removed from the jurisdiction of national courts.¹²⁷ Russian lawyers reasonably believe that, in fact, of greater interest to the CCRF are the principles of autonomy and the priority of EU law, as stated in the case, and their compliance with certain rules of public international law.¹²⁸ In the context of this chapter, concerning the possibility for foreign investors to resort to the ISDS, one can only assume what the consequences of this provision of Russian national law will be: Russia will pick and choose which arbitral award (rendered not only on the basis of the ECT) it will comply with.

[5] Conclusion

In the course of our analysis in this Section [D], we came to the following conclusions:

- In general, Russian domestic law regulating the activities of foreign investors gives foreign investors procedural rights to use ISDS. The Law on IPPAs also

122. Decision No. 2867-O-R of the Constitutional Court of the Russian Federation (24 December 2020).

123. Resolution No. 8-P of the Constitutional Court of the Russian Federation (27 March 2012).

124. Decision No. 2867-O-R of the Constitutional Court of the Russian Federation, *supra* n. 122, Judicial disposition, para. 1, subpara. 2.

125. *Slowakische Republik v. Achmea BV, Request for a preliminary ruling from the Bundesgerichtshof*. Court of Justice of the European (Grand Chamber) Union Case No. C-284/16, Judgment (6 March 2018).

126. Which – judging by its date – looks like a Christmas present to ‘our Western partners’, as Russian high-ranking officials say pejoratively from time to time.

127. Decision of the Constitutional Court of the Russian Federation No. 2867-O-R, *supra* n. 122, para. 5, subpara. 13.

128. Alexey S. Ispolinov. *The Achmea Case, the Autonomous Nature of EU Law and EEU Law and the Inglorious Decline of the Concept of ‘Integration Law’*. (29 March 2021, in Russian). Available at https://zakon.ru/blog/2021/03/29/delo_achmea_avtonomnyj_harakter_prava_es_i_prava_eaes_i_besslavnyj_zakat_koncepcii_integracionnogo_p (accessed on 20 July 2021).

contains explicit provisions for commercial arbitration to resolve disputes between a foreign investor and the host state.

- However, such procedural rights may not always be guaranteed. The rights of foreign investors on this issue will substantially differ from case to case.
- If ISDS is available in the given case, the practice of investment disputes with the participation of Russia shows that it would be most advantageous for investors to justify their claim with a violation, by the Russian Federation, of BIT provisions on expropriation (whether direct or indirect) of foreign investments.
- If Russia decided not to participate in a hypothetical dispute in ISDS, the foreign investor can benefit from that, even though international arbitral tribunals do not render 'default judgments'.
- However, recognition and enforcement of the international arbitral award rendered against Russia is doubtful. The right of the CCRF to declare that the enforcement of such awards would be unconstitutional greatly reduces the transparency and predictability of the protection of foreign investors' rights. Most likely, the CCRF will declare the execution of many international investment arbitration awards that Russia (represented by its official authorities) will be dissatisfied with as being contrary to the Russian Constitution. This makes our country an unreliable party to international relations and contradicts at least two basic principles of international law: good faith performance by the state of its obligations under international law and cooperation between states.

§15.03 MEASURES TAKEN BY RUSSIA TO COMBAT COVID-19 AND THEIR COMPLIANCE WITH OBLIGATIONS TO FOREIGN INVESTORS

[A] Description of the General Restrictive Measures Imposed in the Russian Federation

This paragraph focuses on the specific measures taken by Russia in connection with the spread of a new coronavirus infection, in terms of potential violations of the rights of foreign investors. The full list of measures is contained in Appendix A hereto.

Restrictions related to the pandemic were imposed in Russia on the basis of Federal Law on Protection of the Population and of the Territories from Environmental and Technological Emergencies¹²⁹ According to this law, one of two types of regimes may be introduced in Russia or its parts: high alert and emergency situation.¹³⁰ By the beginning of the pandemic (in March 2020), the power to introduce such regimes was

129. Federal Law No. 68-FZ of 21 December 1994 'On Protection of the Population and of the Territories from Environmental and Technological Emergencies', available at http://www.consultant.ru/document/cons_doc_LAW_5295/ (accessed on 20 July 2021).

130. *Ibid.* Art. 4.1, subparas 6 'a'-'b'.

vested in state authorities of Russian Member States, local self-government bodies,¹³¹ and some federal executive authorities¹³² heads of some legal entities.¹³³ As Y. Tay and S. Budylin note, within the meaning of the law, these regimes applied to state-controlled ‘bodies’ and ‘forces’, rather than to individuals and legal entities (comprising foreign investors).¹³⁴ However, the CCRF pointed out that the adoption of extraordinary measures which can be qualified as preventive legal regulation, subsequently legitimized at the federal level, is an admissible practice in emergency situations.¹³⁵

Restrictions related to the spread of the coronavirus were adopted by introducing a high-preparedness regime by the executive authorities of the Russian Member States (over eighty). Therefore, restrictions were imposed unevenly. In some Russian regions located close to the Russia-China border, the high-alert regime was introduced earlier than in some other regions.¹³⁶

[B] Certain Restrictive Measures Against the Pandemic Imposed in the Russian Federation

The legal essence of a high-alert regime can be most practically traced to the example of measures introduced in the economic centre of Russia – the city of Moscow. They were introduced by a Decree of the Mayor of Moscow.¹³⁷ In the first version of the Decree, among the measures relevant to foreign investors, the duty of employers to assist employees in complying with the self-isolation regime shall be noted. This regime – new to the Russian legal framework¹³⁸ – required a fourteen-day stay at home,

131. *Ibid.* Art. 11, para. 1, subpara. ‘m’, para. 2, subpara. ‘i’.

132. *Ibid.* Art. 13, para. 5.

133. *Ibid.* Art. 14, para. ‘i’.

134. Yuliy V. Tay and Sergey L. Budylin. *Law in Time of Plague*, 4 ‘ZAKON’ Journal (2020, in Russian). Available at https://zakon.ru/blog/2020/05/08/pravo_vo_vremya_chumy_virusnaya_hronika (accessed on 20 July 2021).

135. Resolution No. 49-P of the CCRF (25 December 2020), para. 3.2, subpara. 6. In support of its legal stance, the CCRF referred to its earlier Resolutions: No. 5-P (of 21 March 1997), No. 12-P (of 9 July 2002) and No. 7-P (of 14 April 2008). See also *COVID-19: Review of Court Practice in the Field of Trade and Consumer Law for the Year 2020*, 16 (V.A. Belov ed., M-Logos 2021, in Russian). Available at <https://m-lawbooks.ru/?download=&kcccount=> <https://m-lawbooks.ru/wp-content/uploads/2021/03/obzor-praktiki-torg-potreb-pravaobrab..pdf> (accessed on 20 July 2021).

136. For example, in the Amur Region – on 27 January 2020, in the Jewish Autonomous Region – on 5 February 2020, in the Republic of Buryatia – on 10 February 2020. Data is given in accordance with the ConsultantPlus legal database, *Coronavirus (COVID-19). Enabling of a High Alert Regime in the Regions of the Russian Federation. Recognition of Force Majeure*, (in Russian). Available at http://www.consultant.ru/document/cons_doc_LAW_349932/ (accessed on 20 July 2021). By 19 March 2020, the high alert regime was introduced in all Russian regions Vladislav Gordeev, *All Russian Regions Have Enabled High Alert Regime to Virus*, RBC (19 March 2020, in Russian), available at <https://www.rbc.ru/society/19/03/2020/5e73781c9a7947cc98c68e3c> (accessed on 20 July 2021).

137. Decree No. 12-UM of the Mayor of Moscow of 5 March 2020 ‘On the Introduction of a High Alert Mode’.

138. Decree No. 7 of the Chief Public Health Officer of the Russian Federation of 18 March 2020, para. 2.3. It should be noted that Russian lawyers criticized the enabling of a new legal regime, the framework of which was not defined. See, e.g., Inna V. Malysheva, *Law in the Context of the*

without going to work, with minimized or no visits to public places. Self-isolation was required for persons arriving from a number of states defined in the Decree (at that time: China, South Korea, Italy, France, etc.).¹³⁹ However, during this period, employees who were technically able to organize their work remotely could do and actually did so in many cases.

[1] *High-Alert Regime in Moscow*

Since 26 March 2020, employers were obliged to transfer persons who had to comply with the self-isolation regime, upon their consent, to remote work,¹⁴⁰ or to provide such persons with annual paid leave. Compliance with the self-isolation regime became an obligation for citizens over the age of 65 and those with serious illnesses. However, this regime did not apply to managers and employees of organizations whose job function is critically important to the economy as a whole.

The next set of restrictive measures was introduced from 13 April 2020 onwards – as the pandemic progressed. The temporary suspension affected visits to places where certain activities are carried out: production of movies, real estate transactions, professional, scientific, and technical activities (except those aimed at developing treatment of coronavirus), renting and leasing, etc.¹⁴¹

At the same time, as noted in paragraph 6 of the above Decree of the Mayor of Moscow, except for these cases, organizations and sole proprietors had the right not to limit their activities if they could ensure compliance with several conditions:

- (1) at the workplaces where entrepreneurial activity was carried out, people had to comply with sanitary requirements related to checking the sickness rate of employees;
- (2) compliance with social distance; and
- (3) organization of remote work mode.

Employers had to transfer some employees to remote mode, and a separate decision had to be made regarding the employees for whom non-working days were established. In addition, employers were required to report to the authorities on each category of employees.

Coronavirus Pandemic: New Realities and Problems of Self-isolation, 8 Russian Justice 55-56 (2020, in Russian): 'However, the legal precision of the legal construction used, its forms, establishing the specifics of primarily restrictive measures, as well as the applicable sanctions for their possible non-compliance has not yet been determined.'

139. Decree No. 12-UM of the Mayor of Moscow, *supra* n. 137, para. 3.

140. Later, the Ministry of Labour and Social Protection of the Russian Federation (Mintruda) pointed out the possibility of applying several flexible work schedules. See Letter No. 14-2/10/P-3710 of the Ministry of Labour dated 23 April 2020. According to para. 1.2 of the Letter, in order to formalize the remote work regime, the employee and the employer must conclude a separate contract.

141. Decree No. 12-UM of the Mayor of Moscow, *supra* n. 137, Annex 3.

These restrictions have been removed gradually, in accordance with the Decree of the Mayor of Moscow on the Stages of Lifting Restrictions Established in Connection with the Introduction of a High-alert Mode.¹⁴² From 9 June to 4 September 2020, most of the restrictive measures were lifted. The list of types of entrepreneurial activities, the places of which were temporarily prohibited to the population, remained unchanged.¹⁴³

By the time of the second wave of COVID-19 (fall 2020), some of the restrictions in Moscow had been restored. From 28 September 2020, the obligation to work remotely was restored for persons over the age of 65, as well as for those suffering from certain serious illnesses.¹⁴⁴ As of 5 October 2020, employers were required to comply with at least 30% of employees working remotely rule (in addition to those over 65 years of age and with certain illnesses). From 13 November 2020, the ban on attendance of public events was reintroduced.

Finally, after the end of the second wave of the pandemic, most of the restrictions in Moscow were lifted again. Since 27 January 2021, the obligation of employers to transfer 30% of employees to remote work was suspended. Finally, as of 8 March 2021, it became possible for employees over the age of 65 and those with certain medical conditions to work from their offices. All in all, by May 2021, the scope of remaining restrictive measures in the RF is almost identical to that before the second wave of the pandemic. Restrictions remained in effect for places where certain business activities are carried out.

[2] *Legal Regime of ‘Non-Working Days’*

It is also necessary to mention the legal regime introduced at the federal level, which is unique in Russia. On 25 March 2020, a week after the introduction of a high-alert regime on the territories of all Russian Member States, the President of the Russian Federation issued a Decree declaring ‘non-working days’ in Russia.¹⁴⁵ In this case, the Russian President used his powers in accordance with Article 8 of the Law on Emergency. In particular, he decided to protect the population and territories from emergencies. This power details the right of the President enshrined in the Constitution of the Russian Federation¹⁴⁶ to determine the main directions of internal policy of the state.

142. Decree No. 68-UM of the Mayor of Moscow of 8 June 2020 ‘On the Stages of Lifting Restrictions Established in Connection with the Introduction of a High-alert Mode’.

143. Similar to Decree No. 12-UM of the Mayor of Moscow, *supra* n. 137, the lifting of restrictions under his Decree No. 68-UM of the Mayor of Moscow took place in stages and was formalized by the adoption of relevant decrees of the Mayor of Moscow.

144. Decree No. 12-UM of the Mayor of Moscow, *supra* n. 137, Annex 5.

145. Decree No. 206 of the President of the Russian Federation of 25 March 2020 ‘On the Announcement of Non-working Days in the Russian Federation’.

146. The Constitution of the RF, *supra* n. 64, Art. 80, subs. 3.

In total, the Russian President adopted three decrees: No. 206 of 25 March 2020, No. 239 of 2 April 2020 and No. 294 of 28 April 2020.¹⁴⁷ According to these decrees, the regime of non-working days in Russia lasted from 30 March to 8 May 2020. The main topic of discussion among Russian lawyers was the legal qualification of the 'non-working days' regime.¹⁴⁸

In the decrees of the President of the Russian Federation, 'non-working days' were not explicitly qualified as working time. Therefore, non-working days can be qualified as a time of payable vacation. However, the Labour Code of the Russian Federation contains an exhaustive list of types of rest – weekends and public holidays.¹⁴⁹ Non-working days are an 'unknown beast' as they differ from these types of rest in that they were to be paid at the same rate as working days.

Thus, 'non-working days' established by the above decrees of the President of the Russian Federation cannot be unambiguously qualified as either working time or rest time. N. Salikova and Y. Kuchina point out that non-working days can be referred to as 'additional guarantees of protection of the rights of citizens'.¹⁵⁰ However, in this case, the balance of interests of the parties was not observed: such 'guarantees' to citizens shall be paid by the other – disadvantaged – side, i.e., the employers.¹⁵¹

From the point of view of the Russian legal system, the above measures of the Russian state did not discriminate against foreign investors, neither from the point of view of national treatment nor from that of the MFN treatment. These measures were introduced for all organizations and employers, so they cannot be qualified either as restrictive exemptions for foreign investors or as a violation of national treatment. The stabilization clauses of most types of investment contracts of the Russian Federation, except for SpICs and IPPA's, cover only tax legislation,¹⁵² so they have not been violated either.

147. Decree No. 206 of the President of the Russian Federation, *supra* n. 145; Decree No. 239 of the President of the Russian Federation of 2 April 2020 'On Measures to Ensure Sanitary and Epidemiological Welfare of the Population in the Territory of the Russian Federation in Connection with the Spread of the New Coronavirus Infection (COVID-19)'; Decree No. 294 of the President of the Russian Federation of 28 April 2020 'On the Extension of Measures to Ensure the Sanitary and Epidemiological Well-being of the Population in the Russian Federation Due to the Spread of the New Coronavirus Infection (COVID-19)'.

148. Yulia V. Zhiltsova, Svetlana V. Novikova and Elena V. Kozina, *The Principle of Justice in Labor Law and Adherence to It in Conditions and Consequences of the COVID-19 Pandemic*, 4 Labor Law in Russia and Abroad (2020, in Russian). Available at <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&ts=10385772014322559332894413&cacheid=DAD8EB626067EF3C59EFBE4A1ED46E6C&mode=splus&base=CJI&n=132073&rnd=0.7325110827805432#2pbtnw9531w> (accessed on 20 July 2021). 'Has the principle of fairness in pay for different categories of employees been respected?'.

149. Labour Code of the Russian Federation of 30 December 2001, Art. 107, available at http://www.consultant.ru/document/cons_doc_LAW_34683/ (accessed on 20 July 2021).

150. Natalya M. Salikova and Yulia A. Kuchina, *Presidential Non-working Days: Payment Issues*, 4 Labor Law in Russia and Abroad (2020, in Russian), available at <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=CJI&n=133007> (accessed on 20 July 2021).

151. *Ibid.*

152. Federal Law No. 69-FZ, *supra* n. 20, Art. 9; Federal Law No. 488-FZ, *supra* n. 32, Art. 16, para. 5.

In turn, the Law on the IPPA was adopted only on 1 April 2020, which excludes *ratione temporis* the possibility of challenging the restrictive measures adopted earlier. The situation is different in relation to the SpIC: by the time restrictive measures were introduced, the practice of concluding contracts with foreign investors had developed for this type of contract.¹⁵³ The stabilization clause of the Law on SpIC determines that the legislation of the Russian Federation establishing a regime of prohibitions and restrictions shall not be applied to SpICs.¹⁵⁴

The measures imposed clearly had the potential to limit the implementation of the SpIC. However, there is no publicly available information as to whether foreign investors attempted to challenge the restrictions in Russian national courts by invoking the stabilization clause under the SpIC Law. Most likely, the foreign investors decided not to spoil their relations with the host state, which could easily retaliate against the troublemakers by ordering, for example, a tax or other types of unpleasant audits and inspections.

[3] *Subsidies to Small- and Mid-size Enterprises*

By Resolution No. 434 of 3 April 2020, the Russian Government approved a list of sectors of the Russian economy most affected by the coronavirus. It also decided to give subsidies to small- and mid-size enterprises (SMEs) from these sectors for the payment of salaries to employees. The affected sectors were indicated by reference to the all-Russian classifier by types of economic activity (acronym in Russian: OKVED). When getting incorporated in Russia, every legal entity (or sole entrepreneur) shall indicate one or more OKVED codes which are recorded in the Unified State Register of Legal Entities.

The above subsidies were a success. According to the Federal Tax Service of Russia, in April-May 2020, more than 2.6 million legal entities and individual entrepreneurs applied for such payments, of which 2.17 million received subsidies for a total of RUB 90.33 billion. Refusals were faced by 436 thousand companies and individual entrepreneurs, and some of them appealed against such refusals in the courts.¹⁵⁵ The main problem was the discrepancy between the OKVED codes in the Unified State Register of Legal Entities and the real activity carried out by the applicant. More often the courts supported the applicants:

OOO UralAvtoHaus, a Russian limited liability company, applied for, but was denied a subsidy, because the main activity of the applicant was assigned code 45.1 (trade in motor vehicles), whereas it declared, in its application for the subsidy, that it was engaged in retail trade of cars in specialized stores. The latter activity matches code 45.11.2 (contained in the list of sectors of Russian economy most affected by the

153. By July 2019, Ministry of Industry and Trade of the Russian Federation signed forty-five SpICs. See Belov, *supra* n. 42, at 106. Register of SpICs (in Russian), available at <https://gispr.gov.ru/spic2/pub/spic/search/> (accessed on 20 July 2021).

154. Federal Law No. 488-FZ, *supra* n. 32, Art. 16, para. 5.

155. Federal Tax Service of Russia, *Information on subsidies*, available at <https://www.nalog.gov.ru/rn77/business-support-2020/subsidy/> (accessed on 20 July 2021).

coronavirus, approved by the Government). Having received a refusal from the tax authorities, the company went to court, presenting a dealer agreement with OOO Mercedes-Benz Rus and data on its turnover. The *Arbitrazh* Court of the Chelyabinsk Region ultimately ordered the tax inspectorate to grant subsidy for April-May 2020 to the applicant within ten days from the entry into force of the judgment. This judgment was upheld by upper court instances.

However, sometimes courts rendered judgments in favour of the state. For instance, individual entrepreneur Ivan Ivanov applied for a subsidy, but the tax inspectorate declined his application. Mr Ivanov insisted that in 2020, he carried out activities in the field of sports (referred to in the above-mentioned list) according to the additional OKVED. However, the courts of three instances rejected Mr Ivanov's claim, stating that additional activities should not be considered, and the main OKVED of the individual entrepreneur is indicated as 'legal services' (69.10); legal services are not comprised in the above list. Thus, in this case, the form over substance approach prevailed. This situation can be eventually cured by the Supreme Court of Russia.¹⁵⁶

[4] *Changes to the Court Proceedings*

The FET standard includes procedural law aspects: the host state may not deny justice to foreign investors.¹⁵⁷ Access to justice in Russia has been hindered by the pandemic. On 18 March 2020, the Presidium of the Supreme Court of the Russian Federation issued a resolution,¹⁵⁸ which introduced serious changes to the court proceedings:¹⁵⁹

- personal reception of citizens in courts of general jurisdiction was suspended with the recommendation to submit documents through Internet offices or by mail; this restriction should have little effect on investors, i.e., they usually litigate before state *arbitrazh* courts¹⁶⁰ rather than before courts of general jurisdiction (for instance, labour disputes shall be adjudicated before a court of general jurisdiction);
- the courts were instructed to consider only urgent cases, as well as issue so-called court orders (i.e., when the debt the sum of which is below RUB 500,000 is undisputed but remains unpaid) or judgments within simplified proceedings. Commercial disputes were not qualified as urgent cases.

Given the complexity of the current situation in terms of law enforcement, the Supreme Court of the Russian Federation has issued three reviews of certain issues of

156. Ekaterina Volkova and Anna Zanina, *Between the Letter and the Spirit of State Support*, Kommersant (16 July 2021, in Russian), available at <https://www.kommersant.ru/doc/4907573> (accessed on 20 July 2021).

157. Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* Ch. 9, para. 4.2, 357 (4th ed. Cambridge University Press 2017).

158. Joint Ruling of the Presidium of the Supreme Court of the Russian Federation and the Presidium of the Council of Judges of the Russian Federation No. 808 of 18 March 2020 'On the Suspension of the Personal Reception of Citizens in the Courts'.

159. *Ibid.*, paras 1-2.

160. System of Russian state courts where commercial disputes are being handled.

judicial practice in connection with the application of measures against the spread of coronavirus.¹⁶¹ In its Review No. 1, the Supreme Court of the Russian Federation stated: in connection with the introduction of restrictive measures, the courts have the right to postpone the trial, suspend the proceedings, or extend the term of the consideration of a given dispute. In the latter case, it is necessary to consider the observance of time limits for consideration of the case by the court of the relevant instance and the reasonable term of court proceedings.

In the courts of general jurisdiction, the term for consideration of disputes for the courts of the first, appellate and cassation instances, as a general rule, is two months.¹⁶² In *arbitrazh* courts, the term of consideration of the case in the first instance is six months, and in the appellate and cassation instances is two months.¹⁶³ At the same time, courts are free not to suspend proceedings if a witness, specialist or expert, due to restrictive measures, is deprived of the opportunity to attend a court hearing. In such cases, the court, taking into account the specific circumstances of the case, has the right to postpone the trial.¹⁶⁴

Moreover, the Supreme Court pointed out that the courts have the right to consider cases that do not fall into the category of urgent, if such consideration is necessary due to the circumstances of the case, the opinions of participants in the proceedings and the conditions of the high-alert regime imposed in a region of the Russian Federation.¹⁶⁵ Also, the Supreme Court gave a broader list of cases that could be considered by the Russian courts during the period of restrictions. These included:

- cases where all the participants had petitioned to hear the case in their absence if their participation in the hearing of the case was not compulsory; and
- complaints and submissions to be considered without a court hearing.¹⁶⁶

161. Reviews of Certain Issues of Judicial Practice pertaining to Application of Legislation and Measures Aimed at Preventing the Spread of the Novel Coronavirus Infection (COVID-19) in the Russian Federation, No. 1 of 21 April 2020, No. 2 of 30 April 2020, and No. 3 of 17 February 2021.

162. Civil Procedure Code of the Russian Federation of 14 November 2002, Art. 154, subs. 1, Art. 327.2, subs. 1, Art. 379.4, subs. 1, available at http://www.consultant.ru/document/cons_doc_LAW_39570/ (accessed on 20 July 2021).

163. *Arbitrazh* Procedure Code of 24 July 2002, Art. 152, subs. 1, Art. 267, subs. 1, Art. 285, subs. 1, available at http://www.consultant.ru/document/cons_doc_LAW_37800/ (accessed on 20 July 2021).

164. For example, the right to postpone the consideration of the cases (No. A04-5290/2019 and No. A04-8320/2019) was exercised by the court in two lawsuits of the Vostochny Bank for RUB 18.6 billion against Baring Vostok and Michael Calvey. The trial, initially scheduled for 1 April 2020, was postponed to 6 May 2020. See *Court postpones consideration of Vostochny's claims against Evison and Calvey*, RIA-Novosti (2 April 2020, in Russian), available at <https://ria.ru/20200402/1569478128.html> (accessed on 20 July 2021). It is noteworthy that both cases were dismissed at the claimant's request after the defendant paid damages. Read more: *Court Terminates Vostochny Bank's Claim against Evison and Calvey*, RBC (12 November 2020, in Russian), available at <https://www.rbc.ru/rbcfreenews/5face7239a7947e246aed7f1> (accessed on 20 July 2021).

165. Review No. 1 of Certain Issues of Judicial Practice of the SCRF, *supra* n. 161.

166. *Ibid.*

As early as 12 May 2020 courts of the Russian Federation returned to their ordinary schedule,¹⁶⁷ albeit subject to sanitary and epidemiological requirements: visitors must wear masks and gloves indoors, many courts allow no more than one representative per party to attend their sessions, etc.¹⁶⁸ Presumably, the first case in which the court limited the number of representatives (and without references to Covid) is case No. A40-175485/2020 of the *Arbitrazh* Court of the city of Moscow on the claim of the Central Bank of the Russian Federation against three former top managers of Rost Bank.

The Court considered that there was no need for several representatives from each party to participate in the meetings. According to the court, 'taking into account the volume of documents submitted to the case materials, the degree of complexity of this dispute', one representative from each participant is sufficient.¹⁶⁹ Here, the question arises whether this rule violates the right to fair trial, including the right to be heard: what if, in a complex dispute, the claimant or the defendant distributed various aspects of the dispute between various lawyers? The right to fair trial is set forth both in the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6) and in many Russian BITs.

We think that the extraordinary mode of operation of the courts, although it caused a lot of difficulties for the litigants, in fact, lasted not very long – less than two months. After the restrictions were lifted in 2021 the Russian courts worked more intensively.¹⁷⁰ In addition, as noted in the legal doctrine, access to justice under international investment law largely means fair and impartial consideration by the courts of cases involving foreign investors.¹⁷¹ Consequently, a temporary inability to defend one's rights in court does not mean a complete denial of justice.

[5] *Assessment of Above Measures from the Point of View of Standards for Protection of Foreign Investors*

If the above measures are to be examined from the perspective of international investment law, the question is whether they can be qualified as a violation of the standard of FET. The problem is that the content of this standard is very broad and

167. *Russian courts will return to work as usual on 12 May*, Rossiyskaya Gazeta (8 May 2020, in Russian), available at <https://rg.ru/2020/05/08/rossijskie-sudy-vernutsia-k-rabote-v-obychnom-rezhime-s-12-maia.html> (accessed on 20 July 2021).

168. Letter No. SD-AG/667 of the Judicial Department at the Supreme Court of the Russian Federation of 7 May 2020, on the Activities of Courts and Bodies of the Judicial Department in Full since 12 May 2020.

169. *Mikhail Shishkhanov is arguing with the Court's Decision to limit the number of Lawyers in the Process of the Central Bank's Claim against him and Three Other Ex-top Managers of Rost Bank for 284 billion rubles*, Ria-Novosti: Dela arbitrazhnye (1 July 2021, in Russian), available at <https://t.me/zarbitrazhy/2182> (accessed on 20 July 2021).

170. Alexandr Alexandrov, *Less people are imprisoned in Russia*, Kommersant (25 May 2021, in Russian), available at https://www.kommersant.ru/doc/4827198?from=main_4 (accessed on 20 July 2021).

171. Roland Kläger, 'Fair and Equitable Treatment' in *International Investment Law*, in 81 *Cambridge Studies in International and Comparative Law*. Part II 7B 1(b)(i), 219 (Cambridge University Press, 2011).

vague.¹⁷² Thus, it makes more sense to relate the assessment of the actions of the Russian Federation to one of its central elements – the legal concept of legitimate expectations of investors.¹⁷³ One of the first cases to affirm states' obligations not to violate investors' legitimate expectations is *Tecmed v. United Mexican States*.¹⁷⁴ Legal scholars also note that this concept is based, first, on the specific obligations (or promises) assumed by the recipient state with respect to the foreign investor, and second, on the investor's belief that the stability of laws will be guaranteed.¹⁷⁵

Investment contracts between the host state and foreign investors are the most appropriate form in which Russia's specific obligations can be expressed. Only the stabilization clause under Federal Law on SpIC goes beyond the tax dimension of 'worsening' the position of SpIC holders. However, specific commitments of the Russian Federation can be contained in any investment contract. It is difficult to assess whether this is the case because Federal Law on Production Sharing Agreements does not apply in practice,¹⁷⁶ the provisions of the SpICs concluded are classified information,¹⁷⁷ and the IPPAs were concluded after the introduction of the most restrictive measures.¹⁷⁸

In view of the existing conditions, it seems that the most substantiated claims may be brought by those foreign investors to whom Russia gave specific obligations under the SpICs. As an additional argument for the violation of their rights, such investors may refer to the umbrella clause¹⁷⁹ contained in the BIT of the Russian

172. Sornarajah, *supra* n. 157, Ch. 9, para. 4,349 (4th ed. Cambridge University Press 2017). 'The content of this clearly nebulous provision has become a focal point of discussion [...].'

173. Trevor J. Zeyl, *Charting the Wrong Course: The Doctrine of Legitimate Expectations in Investment Treaty Law*, Alberta Law Review, Forthcoming 207 (3 March 2011). See also Ilya V. Rachkov, *Concept of 'Legitimate Expectations' of Foreign Investors in the International Investment Arbitration Practice*, 1 Moscow Journal of International Law 196-220 (2014, in Russian).

174. *Tecnicas Medioambientales Tecmed, SA v. United Mexican States*, ICSID Case No ARB(AF)/00/2, Award (29 May 2003), para. 154. Previously, the legitimate expectations of investors, albeit outside the context of the FET, were referred to by arbitration institution in the *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL case, Award (14 March 2003), paras 128, 151, 163.

175. Yulia Levashova, *Fair and Equitable Treatment and Investor's due Diligence under International Investment Law*, 67 Netherlands International Law Review 235 (2020).

176. Three production sharing agreements concluded by Russia and entered into force were concluded before the entry into force of Federal Law on Production Sharing Agreements. Dmitriy K. Labin, *International Law on the Protection and Promotion of Foreign Investment*, para. 2.2.7, 113 (1st ed., Justitia, 2019).

177. Vladislav B. Belov, *Special Investment Contracts and Russian-German Economic Cooperation (Second Part)*, 94(1) Contemporary Europe 149 (2020, in Russian).

178. The Ministry of Economic Development of the Russian Federation, *The first 9 IPPAs worth 135.7 billion rubles have been signed* (14 December 2020, in Russian), available at https://www.economy.gov.ru/material/news/podpisany_pervye_9_szhpk_na_1357_mlrdrubley_investitsiy.html (accessed on 20 July 2021).

179. Antony Sinclair, *Umbrella Clause in International Investment Law: A Handbook* Ch. 8, 887-958 (Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch eds C.H.Beck, Hart, Nomos, Baden-Baden, 2015); Dmitriy V. Yulov, *The Umbrella Clause as a Guarantee of the Rights and Legitimate Interests of Foreign Investors*, 11 Actual Problems of the Russian Law Journal 197-202 (2015, in Russian).

Federation with the country of origin of these investors.¹⁸⁰ Some German companies which entered into SpICs with Russia may use these arguments if SpICs contain appropriate specific promises from Russia's side.¹⁸¹ V. Belov points to the criticism of the confidential nature of the SpIC, as a result of which specific special conditions of contracts are unknown, which may include special commitments for separate investors.¹⁸²

However, the second basic attribute of legitimate investor expectations should also be considered: confidence in the stability of laws. In the context of restrictive measures imposed by states in general, the special circumstances that gave rise to such an imposition shall be considered.¹⁸³ It is unlikely that investors could reasonably have expected that no changes in national legislation will occur in response to the pandemic. It is potentially debatable whether Russia's restrictive measures were proportionate¹⁸⁴ in their impact on investments.¹⁸⁵

In this case, it seems that the most disputable was the regime of non-working days. However, it was introduced as a temporary measure. It proved to be not a very painful measure for the investors: companies adapted to this regime quickly. Thus, it can be argued that the possibility of using international arbitration for claims of the FET violation against Russia in terms of legitimate expectations of investors is very limited, also due to the relatively small number of investment contracts of various kinds.

However, in international investment arbitration disputes between foreign investors and host states, the state's reasonable healthcare measures have already been recognized as meeting the legitimate expectations of investors.¹⁸⁶ One of the notorious examples is the *Philip Morris v. Uruguay* case.¹⁸⁷ Researchers A. Garde and J. Zrilić suggest that states should not be afraid to adopt measures such as those considered in this case with respect not only to tobacco but also to alcohol and food products.¹⁸⁸ These scholars believe that such measures are also justified in order to prevent the spread of noncontagious diseases. We come to similar conclusions when analysing the validity of restrictive measures aimed at combating the pandemic.

In this paragraph, we analysed whether restrictive measures meet those investor protection standards the hypothetical violation of which is most likely to give rise to an action in international arbitration. These include the FET standard. However, the

180. *MTD Equity Sdn Bhd and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award (25 May 2004), para. 179. Notably, the tribunal in this case did not accept claimant's arguments that the umbrella clause was violated but accepted the FET violation.

181. Belov, *supra* n. 42, at 106.

182. *Ibid.*, at 149.

183. Zeyl, *supra* n. 173, at 233.

184. Grigoriy V. Vaipan, *The Principle of Proportionality in Modern International Law*, Dissertation for the degree of Candidate of Legal Sciences (2017, in Russian).

185. Elizabeth Snodgrass, *Protecting Investors' Legitimate Expectations:— Recognizing and Delimiting a General Principle*, 21 ICSID Review: Foreign Investment Law Journal, 8 (2006).

186. Ilya V. Rachkov, *Trends in Recent Developments in International Investment Arbitration: Substantive Issues*, 1(29) International Justice Journal 98 (2019, in Russian).

187. *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v. Oriental Republic of Uruguay*, ICSID Case No ARB/10/7, Award (8 July 2016), para. 295.

188. Amadine Garde and Jure Zrilić, *International Investment Law and Non-communicable Diseases Prevention*, 21(5) The Journal of World Investment & Trade 672 (2020).

conclusion to be drawn is that the prospects of a successful – for foreign investors – outcome in such suits is not that great, taking into account the arguments outlined.

Other plausible grounds, such as violation of the national regime, or MFN, and expropriation (direct or indirect) are even less applicable to the measures taken by Russia against the spread of the coronavirus. Russia has provided support to organizations in a non-discriminatory manner.¹⁸⁹ Not only Russian companies with no foreign background but also foreign-invested enterprises were included in the lists of organizations that received state support.¹⁹⁰ In particular, this applies, for example, to the list of system-forming organizations.¹⁹¹ In addition, support in the form of renewal of existing licenses has been provided to certain business sectors. This practically nullifies possible arguments of foreign investors about indirect expropriation – the second most popular ground for holding Russia liable for violating BIT norms.¹⁹² However, in light of the existing circumstances of the maximum breadth of interpretations of investment protection standards by various international arbitration tribunals,¹⁹³ the possible practice on this issue is difficult to forecast. The existing practice of international investment arbitrations on state measures relating to public health is scarce.

§15.04 FAILURE TO FULFIL CONTRACTUAL OBLIGATIONS DUE TO THE PANDEMIC: THE NATIONAL AND INTERNATIONAL LEGAL DIMENSION – CONSEQUENCES FOR THE RUSSIAN ECONOMY

Failure to perform contractual obligations may be caused by different circumstances (e.g., force majeure, frustration of contract, substantial change in circumstances) and have different consequences (release from liability, stay of performance of the obligation under the contract, termination of the contract, alteration of the contract, etc.). Some of these circumstances and consequences are analysed below. In addition, an analysis of the economic consequences of the pandemic in Russia is given.

189. For example, penalties, fines, and interest on state contracts were waived for all contracting organizations. Federal Law No. 44-FZ of 5 April 2013 ‘On the Contractual System in the Area of Procurement of Goods, Works and Services for Meeting State and Municipal Needs’, available at http://www.consultant.ru/document/cons_doc_LAW_144624/ (accessed on 20 July 2021). A list of the most affected sectors of the Russian economy was also formed. The list was based on the sign of a specific type of economic activity, without specifying the state of origin of the organizations. See also Appendix A *infra*.

190. Anastasiya Stepanova, *Tying up Loose Ends: Foreign Assets Have Become Systemically Important for Russia?*, IA-Regnum (8 May 2020, in Russian), available at <https://regnum.ru/news/economy/2942392.html> (accessed on 20 July 2021).

191. Letter No. 8952-RM/D18i of the Ministry of Economic Development of the Russian Federation of 23 March 2020 ‘On the List of System-forming Organizations’.

192. The case are the most affected sectors of the economy: construction, catering, etc. Resolution No. 440 of the Government of the Russian Federation of 3 April 2020 ‘Concerning Extension of Permits and Other Specifics Regarding Permitting Activities in 2020’.

193. Malcolm Langford and Daniel Behn, *Managing Backlash: The Evolving Investment Treaty Arbitrator?*, 29 *European Journal of International Law*, 552 (May 2018).

[A] Force Majeure

In this paragraph, we analyse the legal provisions related to the failure to perform contractual obligations due to the pandemic. At the national level, the application of these norms is of a dual nature for foreign investors: due to the private law nature of regulation of investment relations within the Russian Federation, these norms can apply both in favour of the investor and in favour of its counterparties (including the State represented by its bodies acting by adopting the *acta jure gestionis*).

The situation is different with the possibility of applying similar rules from the point of view of public international law:¹⁹⁴ the state may try to use these provisions as arguments to defend itself against potential lawsuits by foreign investors. We tried to find out what legal consequences a reference to a pandemic as a basis for non-performance or undue performance of obligations in Russian and public international law may entail.

[1] Force Majeure in Russian Law

The *pacta sunt servanda* principle is fundamental both in international law and in Russian civil law. As to Russian civil law, that principle is enshrined in Article 309 of the Civil Code of the Russian Federation (RCC). The spread of the coronavirus has clearly made it difficult (or impossible) to fulfil a large part of the obligations. Given the extraordinary nature of the pandemic, the most heated debate in the Russian legal community was whether the spread of COVID-19 should be qualified as a circumstance of irresistible force (force majeure). The RCC defines force majeure as the circumstances which are extraordinary and unavoidable under the given conditions, due to which the proper performance of contractual obligations has become impossible.¹⁹⁵ Thus, force majeure is one of the grounds for exemption from civil law liability for failure to duly perform obligations. Such an event must meet all the attributes of force majeure:

- it must be objectively unavoidable in a particular situation; and
- it must be unexpected (extraordinary).¹⁹⁶

For example, if a building burned down which was not equipped with the necessary fire extinguishing equipment and the employees who served it were not trained to act in case the fire alarm goes off, such circumstances cannot be qualified as force majeure.¹⁹⁷

194. See Chapter 3 above.

195. Civil Code of the Russian Federation of 30 November 1994, Art. 401, para. 3, available at http://www.consultant.ru/document/cons_doc_LAW_5142/ (accessed on 20 July 2021).

196. *Ibid.*

197. *Russian Civil Law: In 2 vols General Part. Property Law. Inheritance Law. Intellectual Rights. Personal Non-property Rights: Textbook (volume 1)*. Ch. 11, 466 (Evgeniy A. Sukhanov, 2nd ed., Statut 2011, in Russian).

The RCC provisions were explained in the Resolution of the Plenum of the Supreme Court of the Russian Federation on the application by courts of certain provisions of the RCC on liability for violation of obligations.¹⁹⁸ Circumstances of irresistible force have two attributes: they have to be extraordinary and unavoidable (under the given conditions). That is why the Supreme Court of the Russian Federation emphasized these features and explained that they are not of one-fits-for-all size. In other words, under some conditions, these circumstances may be qualified as an irresistible force, but under others, they cannot.

By emergency we mean exceptional nature, going beyond the ‘normal’, ordinary course of business, unusual for those or other conditions of life; such circumstances are not immanent for the normal risk of life.¹⁹⁹ Since as early as the financial crisis of August 1998, Russian courts of general jurisdiction are generally very reluctant to accept that even circumstances such as financial crises constitute force majeure.²⁰⁰ The same is true of ICAC at the RF CCI.²⁰¹ The same can be said about epidemics: Russian courts believe that, at any rate, professional entrepreneurs should factor this risk in their activities as well.²⁰²

According to the RCC and the explanations of the Supreme Court of the Russian Federation, circumstances the occurrence of which depended on the will or actions of a party to the obligation cannot be considered force majeure; examples of such circumstances are: the non-performing debtor lacks necessary funds; or his counter-parties failed to perform their duties; the malfeasance of the debtor’s representatives.²⁰³

A number of decrees and resolutions, including the Mayor of Moscow’s decree discussed above, contained the provision that the spread of coronavirus infection constituted a force majeure circumstance.²⁰⁴ However, it is very doubtful how authoritative these provisions are if they have to be tested by Russian courts.

[2] *Force Majeure Certificates*

The President of the Chamber of Commerce and Industry of the Russian Federation (CCI) has ordered the issuance of free of force majeure certificates or opinions – both for contracts between Russian business entities and for foreign trade transactions and

198. Decisions of the Plenum of the Supreme Court of the Russian Federation No. 7 of 24 March 2016 ‘On the application by courts of certain provisions of Civil Code of the Russian Federation on liability for violation of obligations’.

199. *Ibid.*, para. 8.

200. The Fourth Cassation Court of General Jurisdiction Case No. 88a-20633/2020, Cassation Decision (10 September 2020); The Arbitrazh Court of Moscow District Case No. A40-124783/2018, Resolution (3 April 2019).

201. ICAC at the RF CCI Case No. 198/2000, Award (30 July 2001). See Ilya Kokorin and Jeroen van der Weide, *Force Majeure and Unforeseen Change of Circumstances. The Case of Embargoes and Currency Fluctuations (Russian, German and French Approaches)*, 3 Russian Law Journal 46-82 (2015).

202. The Fifth Arbitrazh Court of Appeal Case No. A51-15143/2019, Resolution (15 October 2020).

203. *Ibid.*

204. This norm was originally enshrined in Article 8(1) of the Decree No. 12-UM of the Mayor of Moscow, *supra* n. 137, as amended on 14 March 2020.

international contracts.²⁰⁵ The procedure for issuing such opinions and certificates is stipulated by a Letter from the CCI of the Russian Federation of March 2020.²⁰⁶ This document states that the concept of force majeure does not include: financial and economic crisis, changes in exchange rates, devaluation of the national currency, criminal actions of unidentified persons, unless otherwise expressly provided in the contract, as well as other circumstances that the parties to the contractual relationship excluded from the concept of force majeure.²⁰⁷

According to V. Platonov, president of the Moscow city CCI, within less than a month since the above letter was released (including the delegation of the authority to issue such certificates from the CCI of Russia to the CCI of Russian regions), the CCI of Moscow received 1,787 applications from entrepreneurs asking for issuance of such certificates or opinions.²⁰⁸ Of these, 65% in their content, in principle, do not relate to force majeure. Only in respect of 10%-15% of the applications, the Moscow CCI has the competence to accept and review them. The remaining 20% of applications do not fall within the competence of the authority. As V. Platonov noted, many entrepreneurs thought that a force majeure certificate is an indulgence issued by the CCI and that it protects them from the duty to make any payments.²⁰⁹

The question arises: what is the legal status of opinions issued by the CCI? The CCI of the RF Letter No. 04v/0088 of 17 April 2020²¹⁰ states the following: the legal nature of the opinion of the CCI of Russian regions on force majeure circumstances under contracts between Russian business entities is that this is the opinion of an independent specialized expert organization. The conclusion of a CCI to the effect that, in a particular case, force majeure features are (or are not) established, is a legal issue; in case of a dispute, such issue shall be eventually decided by the competent court.

[3] Case Law

Guided by the above reviews of the Supreme Court of Russia, the courts continued to run their activity during the difficult period of the pandemic. In its Review No. 1, the Supreme Court of Russia indicated that the spread of a new coronavirus infection cannot be qualified as a force majeure circumstance for all categories of debtors.²¹¹ In each case, the competent court shall consider the type of activity of the given debtor, the conditions under which such activity is being carried out, as well as the region in

205. Letter No. PR/0315 of the Chamber of Commerce and Industry of the Russian Federation of 26 March 2020.

206. Letter No. 02v/0241 of the Chamber of Commerce and Industry of the Russian Federation of 27 March 2020.

207. *Ibid.*, para. 1.3.

208. Vladimir Platonov, Andrey Gabov, Vadim Belov and Roman Bevenko et al., *COVID-19 and Law of Contracts*, 4 'ZAKON' Journal (2020, in Russian), available at <http://www.consultant.ru/cons/cgi/online.cgi?req=doc;base=CJI;n=130239> (accessed on 20 July 2021).

209. *Ibid.*

210. Letter No. 04v/0088 of the Chamber of Commerce and Industry of the Russian Federation of 17 April 2020.

211. Review No. 1 of Certain Issues of Judicial Practice of the SCRF, *supra* n. 161.

which the debtor operates. Because of this, the existence of force majeure circumstances must be established on a case-by-case basis, taking into account the circumstances of the specific case (including the term of performance of the obligation, the nature of the unperformed or underperformed obligation, etc.).

The CCI of Russia gave an approximate list of circumstances that can be qualified as force majeure, provided that the above requirements are met. These include circumstances caused by the threat of the spread of coronavirus and restrictive measures taken by state bodies and local self-government authorities.²¹² Among other things, the Supreme Court has listed: the establishment of mandatory rules of conduct during the introduction of a high-alert regime or an emergency, a ban on the movement of vehicles, restrictions on the movement of individuals, and the introduction of compulsory self-isolation of citizens, and so on.

Summarizing its conclusions, the Supreme Court determined that to be released from liability for non-performance or improper performance of contractual obligations, the counterparty must prove the following circumstances:

- force majeure circumstances actually exist and last for a certain time;
- there is a causal link between force majeure and the debtor's inability (or delay) in performing his obligations;
- the debtor did not contribute to the emergence of force majeure circumstances;
- the debtor took bona fide measures to prevent or minimize possible risks.

Finally, the Supreme Court of Russia stated this: when considering the issue of declaring circumstances as force majeure, courts may (but are not obliged to!) take into account the opinions/certificates issued by a CCI or other documents. However, 'to be taken into account' does not mean that the court will definitely agree with the CCI in assessing a circumstance as force majeure.

Judicial practice on this issue lacks uniformity. We should cite examples in which the spread of coronavirus infection has been qualified as a circumstance of irresistible force. Case No. A78-8171/2020 (State Autonomous Healthcare Institution 'Regional Hospital No. 4' v. OOO Bimk-Cardio-Volga), the claimant stated that the obligation set forth in a supply contract also included assembly, installation and commissioning of certain medical equipment; the supplier (defendant) did not properly perform this part of the contract. The claimant requested to collect liquidated damages from the defendant.

The court of the first instance, as well as the Court of Appeal, ruled against the claimant. Among other things, the courts pointed out that the equipment was delivered ahead of schedule and that the delay was due to force majeure: access to the site was hampered by restrictions imposed by state authorities. The defendant, however, performed its obligation to deliver the equipment as soon as possible and notified the claimant on numerous occasions of the reasons for the restrictions preventing the further performance of the contract. The court noted that the defendant took all

212. Hereinafter are the arguments of the Supreme Court of the Russian Federation cited in its Review No. 1 of Certain Issues of Judicial Practice, *supra* n. 161.

possible measures to fulfil the obligation as soon as possible and to minimize the risks.²¹³

In another case, a cassation court denied recovery of liquidated damages, moral damages and fines for the air carrier's failure to duly perform its obligations. The court noted that the carrier – Pobeda Airlines (defendant) – had cancelled a flight from Yekaterinburg to Krasnodar to ensure compliance with flight safety conditions and to eliminate the risk of endangering the lives and health of passengers (one of whom filed the lawsuit) due to the spread of the coronavirus. The flight did not take place due to force majeure.²¹⁴ Similar judgments on exemption from liability in connection with measures taken against the spread of the coronavirus were also rendered by Russian courts in favour of tourist operators.²¹⁵

Nevertheless, in many other cases, Russian courts have often found that there were no force majeure circumstances because they did not establish a causal link between the pandemic and the debtor's failure to duly perform its obligation.²¹⁶ It is noteworthy that after hard restrictions were lifted, many Russian entrepreneurs, due to the lack of uniformity in judicial practice on force majeure, began to add to their lease agreements a clause regulating the parties' action plan in case of new COVID-19 prevention measures.²¹⁷

Thus, after analysing Russian law and the practice of its application by Russian courts, we came to the following conclusions regarding the qualification of the spread of coronavirus infection as force majeure:

- (1) In a number of Russian regions, the executive power has unambiguously determined that a pandemic constitutes a force majeure circumstance; nevertheless, Russian courts will not necessarily agree with this when considering a particular case.
- (2) The same applies to opinions and certificates issued by the CCI of Russia or one of its regions. As A. Ivanov²¹⁸ rightly noted, neither the legislative nor the

213. The Fourth *Arbitrazh* Court of Appeal Case No. A78-8171/2020, Resolution (22 January 2021).

214. The Seventh Cassation Court of General Jurisdiction Case No. 88-17193/2020, Decision (16 November 2020).

215. The Seventh Cassation Court of General Jurisdiction Case No. 88-945/2021, Decision (21 January 2021). See also The Eight Cassation Court of General Jurisdiction Case No. 88-1555/2021, Decision (27 January 2021).

216. See, e.g., The First *Arbitrazh* Court of Appeal Case No. A43-11624/2020, Resolution (12 October 2020); The *Arbitrazh* Court of St. Petersburg District and Leningrad Region Case No. A56-65237/2020, Judgment (12 October 2020); The *Arbitrazh* Court of Chuvash Republic Case No. A79-3793/2020, Judgment (16 July 2020); The *Arbitrazh* Court of Republic of Mari El Case No. A38-2822/2020, Judgment (24 July 2020); The *Arbitrazh* Court of Republic of Tatarstan Case No. A65-8854/2020, Judgment (2 June 2020).

217. Nikita Shchurenkov, *Force Majeure Was Taken from food service*, Kommersant (25 June 2021, in Russian), available at <https://www.kommersant.ru/doc/4869835> (accessed on 20 July 2021).

218. The research supervisor at the Law Department of the National Research University Higher School of Economics.

executive power can establish in advance which circumstance constitutes force majeure.²¹⁹

- (3) For foreign investors, this means the following: if the investor previously performed its contractual obligations in good faith, but – despite his due diligence – failed to prevent the occurrence of external circumstances related to the introduction of restrictive measures and preventing the performance of the contract, it is highly likely that such investor can expect a Russian court to qualify the spread of coronavirus as force majeure.
- (4) In this regard, we advise companies to explicitly provide in their contracts that epidemics do constitute force majeure and that the contract shall be adapted or – if adaptation is not possible – terminated in the event of force majeure. For example:
 - (i) the contract shall be automatically terminated if force majeure circumstances arise;
 - (ii) the contract shall be automatically terminated if such circumstances have not ceased within a certain period of time after their occurrence (e.g., one month).

The above sketch of the application of force majeure rules by Russian courts demonstrates that the reference to circumstances of irresistible force is far from being a panacea for foreign investors. Force majeure may be invoked by Russian counterparties of foreign investors; thus, to save time and money, foreign investors may be recommended, among other things, to try to negotiate an amicable settlement. On the other hand, if the foreign investor can rely on a solid basis to explain his own non-performance (or undue performance) of a contractual obligation by force majeure, Russian courts may agree with that if they qualify these circumstances as extraordinary and irresistible.

[4] *International Law: Public Order and Force Majeure*

The Russian Federation, as a potential respondent state in international investment arbitration, has relatively scarce tools to defend its position, if a violation of a standard of treatment of foreign investments or investors actually occurred.²²⁰ One of the tools

219. Anton A. Ivanov, *COVID-19 and Force Majeure in Russia in Discussion Session of the ICLRC ‘Is It the Epidemic Itself or Its Outcomes That Make a Force Majeure?’*. *The Materials of St. Petersburg International Legal Forum 9 ½: Rule of Corona* (11 April 2020), available at https://iclr.ru/files/events/74/Is-it-the-Epidemic-Itself-or-its-Outcomes-that-Make-a-Force-Majeure_ICLRC-Panel_April-11%2C2020.pdf (accessed on 20 July 2021).

220. We are talking about the absence of the so-called non-precluded measures clauses in the BITs of Russia. These include *inter alia* clauses on public order and on public health. See Mark McLaughlin, *Non-precluded Measures Clauses: Regime, Trends, and Practice in Handbook of International Investment Law and Policy* 1-23 (Julien Chaisse, Leïla Choukroune and Sufian Jusoh ed., Springer, 2020).

is an invocation of public policy.²²¹ However, the public order clause in Russian BITs deals only with expropriation.²²² Only in one BIT – between the USSR and Belgium–Luxembourg Economic Union, public order is a permissible exception to the full protection and security standard.²²³ The public health clause is contained in the Russian Model BIT (2016)²²⁴ but is missing from Russian BITs concluded after 2016.²²⁵

The third generation of Russia's BITs contains provisions on exemptions from the national treatment in accordance with the laws of the host state.²²⁶ A controversial question is whether this provision refers to non-precluded measures clauses (npm-clauses). On the one hand, these provisions do not exactly meet the characteristics of npm-clauses: the scope, the permissible objectives and the 'nexus requirement';²²⁷ on the other hand, some authors are of the opinion that these provisions constitute npm-clauses.²²⁸ Due to the absence of references to these provisions in the practice of Russian investment disputes, as well as the lack of research on this issue in the context of Russian BITs, this question cannot be answered unequivocally. We think that at least the complicated procedure for the acquisition by a foreign investor of a share in a strategic Russian enterprise constitutes an exemption from the national treatment.²²⁹

Hypothetically, the Russian Federation can follow an appropriate line of defence when accused of violating the national treatment: in those cases where provisions on exemption from national treatment are contained in BITs, Russia can say that this provision is an npm-clause and was introduced in order to protect public order and public health. However, Russia's ability to refer to this provision is rather narrow: such provisions are contained in BITs concluded mainly with developing countries, while

221. Martin Gebauer and Felix Berner, *Ordre Public (Public Policy)* in *Max Planck Encyclopedia of Public International Law [MPEPIL]* (Rüdiger Wolfrum and Anne Peters ed., Oxford University Press, online edition, last updated in August 2019). Available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1448?prd=MPIL> (accessed on 20 July 2021).

222. For example, Agreement between the Government of the Russian Federation and the Government of the Kingdom of Denmark Concerning the Promotion and Reciprocal Protection of Investments (4 November 1993), Art. 4.

223. Belgium, Luxembourg and USSR. Agreement concerning the Promotion and the Reciprocal Protection of Investments (9 February 1989), Art. 4. *See also* Labin and Soloveva, *supra* n. 63, at 31.

224. Russian Model BIT (2016), *supra* n. 65, part. 6, para. 59.

225. For comparison, twenty out of eighty BITs concluded by India contain provisions on the protection of public health. *See* Ranjan Prabhash and Anand Pushkar, *COVID-19, India, and Investor-State Dispute Settlement (ISDS): Will India Be Able to Defend Its Public Health*, 28(1) Asia Pacific Law Review 6 (2020). *See also* Ch. 13 *supra*.

226. For example, Agreement between the Government of the Russian Federation and the Government of the United Arab Emirates on the Promotion and Reciprocal Protection of Investments (28 June 2010), Art. 3, para. 3.

227. McLaughlin, *supra* n. 220, at 11.

228. Andrew Newcombe, *General Exceptions in International Investment Agreements*, Draft Discussion Paper prepared for BIICL Eighth Annual WTO Conference, 3-4 (13 and 14 May 2008), available at https://www.biicl.org/files/3866_andrew_newcombe.pdf (accessed on 20 July 2021).

229. Federal Law No. 57-FZ, *supra* n. 13.

Russia's BITs with economically developed states belong mainly to the first and second generation of BITs.²³⁰

In this situation, general international law may be invoked. This includes the customary rules of international law on state responsibility. According to the ARSIWA, force majeure²³¹ is one of the circumstances precluding wrongfulness.²³² At the same time, given the rigidity of the requirements for the recognition of circumstances as force majeure in Russian domestic law, both concepts of force majeure (that of international and that of domestic law) can be qualified as identical in their essence, unlike the approach taken by the arbitration tribunal in *Autopista Concesionada de Venezuela*.²³³

The legal doctrine agrees that the provisions of ARSIWA reflect the international custom and thus are applicable in international investment arbitrations.²³⁴ In practice, however, as noted in scientific articles, in addition to force majeure, respondent states have invoked the state of necessity.²³⁵ Necessity is another ground precluding wrongfulness. A textbook example is the series of cases initiated against Argentina after the country's financial crisis.²³⁶ In most cases, arbitral tribunals declined such arguments advanced by the respondent states.²³⁷ The only case in which Russia could have invoked the financial crisis (1998) as force majeure or a state of necessity is the claim of Nomura Bank (London branch) against Russia, but that dispute was settled out of arbitration proceedings.²³⁸

Thus, we conclude that the existing international investment arbitration case law concerning the state of necessity in extraordinary situations can be extrapolated to the actions of states in the event of a pandemic. For example, with a high degree of probability, it can be stated that the Russian Federation as a potential respondent state

230. Labin and Soloveva, *supra* n. 63, at 31.

231. Simon Hentrei and Ximena Soley, *Force Majeure* in *Max Planck Encyclopedia of Public International Law [MPEPIL]* (Rüdiger Wolfrum and Anne Peters ed., Oxford University Press, online edn., last updated in April 2011). Available at <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1042?prd=OPIIL> (accessed on 20 July 2021).

232. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (2001), *supra* n. 111, Ch. 5.

233. *Autopista Concesionada de Venezuela v. Bolivarian Republic of Venezuela*, ICSID Case No ARB/00/5, Award (23 September 2003), para. 107. See Federica I. Paddeu, *A Genealogy of Force Majeure in International Law*, 82 *British Yearbook of International Law*, 486 (2012). 'Venezuela argued that the standard of impossibility required by the Venezuelan law on administrative contracts did not require "that the force majeure event be irresistible; it suffices that by all reasonable judgment the event impedes the normal performance of the contract".'

234. James Crawford and Simon Olleson, *The Application of the Rules of State Responsibility in International Investment Law: A Handbook* Ch. 5, III, F, 441 (Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch eds, C.H.Beck, Hart, Nomos, Baden-Baden, 2015).

235. Mark Augenblick and Alison B. Rousseau, *Force Majeure in Tumultuous Times: Impracticability as the New Impossibility: It's Not as Easy to Prove as You Might Believe*, 13 *Journal of World Investment and Trade* 63 (2012).

236. For example, *LG&E Energy Corp. LG&E Capital Corp and LG&E International Inv v. Argentine Republic*, ICSID Case No. ARB/02/1, Liability (3 October 2006).

237. Federica I. Paddeu, *supra* n. 233, at 459.

238. UNCTAD. Investment Dispute Settlement Navigator, *supra* n. 84, available at <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/47/uk-bank-v-russia> (accessed on 20 July 2021). 'Summary of the dispute: Claims arising out of the default on sovereign bonds during the Russian financial crisis'.

which introduced objectively necessary measures; in some cases, these measures could lead not to difficulty, but the true impossibility of the Russian state to perform all or certain obligations towards a foreign investor.

[B] **Clausula Rebus Sic Stantibus**

Foreign investors may need to adapt their contracts to the changed situation or terminate them. This is stipulated in Article 451 RCC. Russian Supreme Court pointed out that under certain types of civil law contracts additional rights to repudiate or to amend the contract are available. As an example, in its Review No. 1 of 21 April 2020, the Supreme Court gave an example of a real estate lease contract.²³⁹

R. Bevzenko drew attention to the fact that the spread of coronavirus infection caused a drop in traffic and oil prices.²⁴⁰ This also had an impact on the exchange rate of the ruble. In such a case, the courts of the Russian Federation could take these circumstances into account in order to rule on the amendment or termination of contracts on the basis of the *clausula rebus sic stantibus*.²⁴¹ At the same time, this author notes that the financial crisis, an unfavourable economic situation and a high rate of inflation are not qualified, as a rule, as essential changes in the circumstances that trigger the adaptation or termination of the contract.²⁴²

Russian courts explained this approach as follows: the parties must proceed from the possibility that such events can occur since inflationary processes themselves are not among the circumstances the occurrence of which cannot be foreseen.²⁴³ It is quite interesting that with the noticeable influence of German civil law, Russian courts apply this concept differently than German courts. In contrast to the BGB (*Bürgerliches Gesetzbuch*), the RCC by default provides for the termination (rather than adaptation) of a contract in the event of an essential change in circumstances.²⁴⁴

In case No. A40-70812/20-50-513 (*Graduate School of Information Technology and Security v. OOO Yug Development*), the claimant, providing educational services, asked the court to terminate a lease agreement with the landlord because, with the outbreak of coronavirus, the entire education had been converted into an online format. The lease agreement stipulated that it can be early terminated by the court if force majeure lasted more than three months. Thus, alternatively, the claimant referred to force majeure as a ground to rescind the lease agreement. The court refused to terminate the contract on this latter ground because the circumstances had lasted less

239. Review No. 1 of Certain Issues of Judicial Practice of the SCRF, *supra* n. 161. See also Kirill Ponasyuk, *The rent shall be counted in the fall*, Kommersant (28 September 2021, in Russian), available at <https://www.kommersant.ru/doc/4994612> (accessed on 29 September 2021).

240. Platonov, Gabov, Belov and Bevzenko et al., *supra* n. 208.

241. *Ibid.*

242. The Presidium of the Supreme Arbitrazh Court of the Russian Federation Case No. A40-90259/08-28-767, Resolution (13 April 2010).

243. Roman S. Bevzenko and Andrey V. Egorov, *Adjustment of Contract to Change of Circumstances and Good Faith Behaviour Principle in On Contracts: a Collection of Papers in Honor of V.V. Vitryanskiy* 51-52 (S.V. Sarbash ed., Statut, 2017, in Russian).

244. *Ibid.*, at 40.

than three months. Nevertheless, the court qualified the impossibility for the lessee to use the leased premises due to the imposition of restrictive measures as an essential change of circumstances and terminated the contract on this basis.²⁴⁵

However, in case No. A40-9823/2021 (*Cinema Park v. Bank Trust*), the *Arbitrazh* Court of the City of Moscow concluded that it was necessary to amend (rather than terminate) the loan agreement between the contracting parties in order to give the claimant (a cinema chain) a grace period to repay the loan.²⁴⁶ The court substantiated its finding as follows: 'it is fair to demand that the defendant take the same measures to support organizations from the most affected industries as the state does through other institutions'.²⁴⁷

At the international law level, the provisions on the fundamental change of circumstances are enshrined in the VCLT. Similar to the national norms of the Russian Federation, a fundamental change of circumstances with respect to international obligations entails the termination of the treaty.²⁴⁸ Legal scholar J. Kulaga pointed out the measures taken by Ecuador after the adoption of the new Constitution.²⁴⁹ The Constitutional Court of Ecuador ruled that the Ecuador–Chile BIT with respect to ISDS was inconsistent with Ecuador's new Constitution. After that the Ecuadorian National Assembly affirmed this conclusion, stating that the adoption of the new Constitution constituted a fundamental change in the circumstances under the VCLT.²⁵⁰

There is a possibility that the Russian Federation, in a hypothetical dispute in the ISDS, may refer to similar practices, given the similarity of the practices of the constitutional courts of the two states. In addition, according to J. Kulaga, the reference to the *rebus sic stantibus* clause in investment arbitrations is very probable in the context of the increasing criticism of the ISDS system.²⁵¹ However, we think that no reasonable arbitrator may agree with the argument of a respondent State to the effect that the willful amendments to the Constitution can be qualified as a fundamental change of circumstances because this is the state itself which gave birth to these amendments.

With this consideration in mind, we draw the following conclusion: proving the facts which can be qualified by an independent judge or arbitrator as the impossibility of performance of a contractual or treaty obligation requires serious efforts from foreign investors – at the national level, and from the Russian Federation – at the international level. There is no uniformity in this issue among Russian courts and Russian legal scholars, nor in the practice of international arbitration tribunals. Russian BITs contain

245. The *Arbitrazh* Court of the City of Moscow Case No. A40-70812/20-50-513, Judgment (11 September 2020).

246. Pavel Kazarnovskiy, *Court Upholds Mamut's Cinema Chain in Dispute with Trust over State Bank Status*, RBC (30 June 2021, in Russian), available at <https://www.rbc.ru/finances/30/06/2021/60dae4169a7947687e70c100> (accessed on 20 July 2021).

247. The *Arbitrazh* Court of the City of Moscow Case No. A40-9823/21-156-67, Judgment (24 June 2021).

248. Vienna Convention on the Law of Treaties (1969), *supra* n. 110, Art. 62, para. 1.

249. Julian Kulaga, *A Renaissance of the Doctrine of Rebus Sic Stantibus?*, 69(2) *International & Comparative Law Quarterly* 483-484 (2020).

250. *Ibid.*

251. *Ibid.*, at 496.

the following significant disadvantage: they almost completely lack exceptions from the duty to protect foreign investors' rights for the reasons of public order and public health protection. Even worse: similar provisions are absent even from Russia's most recent BITs.

[C] **Economical Consequences**

First of all, the actual consequences of the pandemic for the Russian economy must be noted as a whole and for foreign investors in particular. In late 2020, Russia's GDP fell by 3.1 %, as compared to 2019. This is the largest drop since the 2008 global financial crisis. At the same time, this indicator is better in Russia than in many other countries, including the most economically developed ones. For example, in 2020, the GDP of the USA fell by 3.5 %, the GDP of Germany by 5 %, and the GDP of France by 8.3 %.²⁵²

However, in addition to economic indicators, the results of efforts to preserve the lives and health of the population are no less important. Russia's measures were mainly aimed at slowing down the spread of the virus, including preparing the necessary infrastructure. Russia became the fourth country in the world with more than one million cases of infection by 1 September 2020. The first to reach this figure were the US (28 April 2020), Brazil (19 June 2020), and India (16 July 2020).²⁵³ By April 2021, the Russian Federation ranked fifth in the world in the number of cases and seventh in the number of deaths from COVID-19. At the same time, the proportion of confirmed coronavirus related deaths in the Russian Federation was 5 % of the total number of cases. In fact, even officially published statistics show that there were 358,000 excess deaths in our country between 1 April and 31 December 2020, although the authorities officially reported only one-sixth of that number as 'COVID-caused deaths'.²⁵⁴

The statistics of FDI investments in the Russian economy do not look very encouraging either. The total volume of new FDI in Russian non-financial companies in 2020 was USD 1.4 billion. This is more than twenty times less than in 2019, according to the balance of payments data of the Bank of Russia.²⁵⁵ FDI in the Russian economy was lower only in 1994. Some difficulties for the Russian economy are related to exports to China: since the main flow of Russian export goes through China, the measures taken in China to test truck drivers and quota truck units at border points

252. Yulia Starostina, *Russia's Economic Decline due to Pandemic Becomes Maximum in 11 Years*, RBC (1 February 2021, in Russian), <https://www.rbc.ru/economics/01/02/2021/6017e1819a7947cb98f23f95> (accessed on 20 July 2021).

253. *The Latest Data on Coronavirus in Russia and the World*, Kommersant (8 April 2020, in Russian), available at <https://www.kommersant.ru/doc/4314405> (accessed on 20 July 2021).

254. Dmitriy Kuznets, *Now it's almost official: Russia is in first place in the number of coronavirus victims per capita. This is the result of the actions of the authorities in the summer of 2020*, Meduza (10 February 2021, in Russian), available at <https://meduza.io/feature/2021/02/10/teper-pochti-ofitsialno-rossiya-na-pervom-meste-po-chislu-zhertv-koronavirusa-na-dushu-nas-eleniya-eto-rezultat-deystviy-vlastey-letom-2020-goda> (accessed on 20 July 2021).

255. Evgeniy Kalyukov and Tatyana Bochkareva, *Foreign investments in Russian companies fell by more than 20 times*, RBC (19 January 2021, in Russian), available at <https://www.rbc.ru/economics/19/01/2021/6006e0609a79472ba73d18f2> (accessed on 20 July 2021).

slow down the exchange of goods.²⁵⁶ Nevertheless, economists expect FDI to improve in 2021.

Over the past three years, the number of companies with foreign participation in Russia has significantly decreased – by 40%. The decline in the share of foreign presence in Russian business is explained by the outflow of capital from the country, the authorities' deoffshorization campaign, sanctions imposed by the US and the EU on trading with certain Russian persons, and the reduction of investment programmes by large international companies during the pandemic.²⁵⁷ It follows from this that the decline in indicators is not related to the pandemic only.

Also, a National Research University Higher School of Economics report 'Macroeconomic Effects of COVID-19 Pandemic and Prospects for Economic Recovery' indicates that the investment crisis was short-lived, related only to some extent to the pandemic, and less damaging than the 2008 and 2014-2015 financial and global economic crises.²⁵⁸ At the global level, FDI indicators for 2020 decreased by 42% – from USD 1.5 trillion to USD 859 billion. As noted on the UNCTAD website, these figures are close to the level of the 1990s.²⁵⁹

§15.05 CONCLUSION

In terms of the legal consequences of the pandemic, we came to a number of conclusions. From the content of the previous three paragraphs, the following dichotomy resulting from the application of international investment law in Russia can be drawn:

- (1) First, it is the disproportion of substantive and procedural rights of foreign investors. On the one hand, foreign investors are provided with a relatively broad scope of investment protection standards. It is true that the scope of rights under Russia's various BITs is heterogeneous and includes the most basic standards. On the other hand, in the light of high-profile investment arbitration awards, under which the Russian Federation is obliged to pay considerable²⁶⁰ amounts to foreign investors, Russian legislation is moving towards more and more restrictions on the recognition and enforcement of foreign court judgments and arbitral awards (at least, those rendered in favour of foreign investors). In practice, this means that even if the outcome

256. Natalya Skorlygina, *Economy of the trans-border period*, Kommersant (11 August 2021, in Russian), available at <https://www.kommersant.ru/doc/4937404> (accessed on 20 September 2021).

257. Tatyana Edovina and Maxim Visloguzov, *Strangers are quieter here*, Kommersant (17 September 2021, in Russian), available at <https://www.kommersant.ru/doc/4988133> (accessed on 20 September 2021).

258. Dmitriy Butrin, *Recession in brief*, Kommersant (12 April 2021, in Russian), available at <https://www.kommersant.ru/doc/4770522> (accessed on 20 July 2021).

259. UNCTAD, *Global foreign direct investment fell by 42% in 2020, outlook remains weak* (24 January 2021), available at <https://unctad.org/news/global-foreign-direct-investment-fell-42-2020-outlook-remains-weak> (accessed on 20 July 2021).

260. Or sometimes – as in the Yukos case – enormous.

of the case is positive for the investor, he will have to apply to national courts of the states where Russia's property that can be foreclosed is located. We are sure that not all foreign investors have enough reserves to wage a legal war in many states, attempting to get hold of Russia's assets. In this sense, the Russian Federation has successfully created a number of security valves against possible recourse of foreign investors to international arbitration.

- (2) Second, despite the existence of restrictive measures, foreign investors can use only relatively few legal grounds to sue Russia in international arbitration. This is due to two factors: first, only the basic standards of protection are enshrined in Russian BITs. Second, it follows from the very content of the restrictive measures: Russian authorities did not introduce a state of emergency, the introduced measures were non-discriminatory in nature, and the State provided support measures regardless of the state of origin of the Russian businesses.
- (3) Together with this conclusion, there is a third disproportion: just as foreign investors, who make their investments in the Russian economy, have not the most impressive number of rights under BITs, Russia itself, in fact, practically did not properly protect its interests in its treaty practice. The absence of basic carve-outs (unlike in the BITs of other states), for example, on public policy has led to a situation where Russia, as a hypothetical respondent state, can only refer to the provisions of general international law to defend its position; these general provisions may not be sufficient to successfully rebut the claimant's arguments.

Thus, paradoxically, this situation permits to keep certain balance of interests between the two parties – foreign investors and the host state – if the former decides to recur to the international ISDS to protect their rights, allegedly violated by the latter.

**APPENDIX A SELECTED MEASURES TAKEN BY RUSSIA TO COMBAT
THE CORONAVIRUS PANDEMIC²⁶¹**

<i>Group of Measures</i>	<i>Description of Measures</i>	<i>Status</i>
1. General measures	Restrictions on international flights, border closures	Partly valid
	Automatic renewal of licenses and permits expiring between 15 March 2020 and 31 December 2021.	Valid
	Introduction of a high-alert regime by Russian regions.	Partly valid
	Administrative fines for legal entities: – for violation of quarantine: RUB 200,000-500,000); – for unintentional harm to health: RUB 500,000-1 million.	Valid
2. Measures to support public health	Russia-wide vaccination against COVID-19 since 18 January 2021.	Valid
	Customs duty exemption for drugs and medical devices to combat coronavirus.	Valid
	Simplification of EAEU customs procedures for the importation of goods intended to combat COVID-19	Valid
3. Social support measures	Extension of the period of validity of documents for foreigners (residence permit, temporary residence permit, etc.) on the territory of the Russian Federation.	Not valid from 15 June 2021

261. Government of the RF, *Measures of the Russian Government to combat Coronavirus Infection and Support the Economy*, available at http://government.ru/support_measures/ (accessed on 20 July 2021).

<i>Group of Measures</i>	<i>Description of Measures</i>	<i>Status</i>
4. Taxation measures	For organizations operating in the most affected industries: extension of tax payment deadlines (up to 6 months), deferrals (up to 1 year), instalment payments (up to 3 years).	Valid
	Insurance premium payments on the portion of wages exceeding the minimum wage are reduced to 15% for small and SMEs.	Valid
	Tax deferrals, state guarantees on loans, subsidies and other measures for system-forming organizations.	Valid
	Calculation of tax deadlines taking into account non-working days.	Valid
	Extension of the deadline for payment of all taxes, except VAT, to 9 months for SMEs from the most affected industries.	Not valid
	SMEs from the affected industries are exempt from taxes for the second quarter of 2020.	Not valid
5. Financial measures	Deferral of rent payments for state and commercial real estate for the most affected industries.	Valid until 1 January 2023
	Expansion of preferential lending programmes at the rate of 8.5% and microcredit for SMEs.	Valid
	Wage Fund Programme: 3 programmes of subsidized loans to SMEs from the most affected industries to keep people employed.	Not valid from 1 July 2021
	A moratorium on the institution of bankruptcy proceedings on applications filed by creditors for the most affected industries, system-forming organizations and business entities of strategic importance.	Not valid from 8 January 2021
6. Measures to support tourism	Payment of RUB 2.5 billion in support of tourism operators using domestic charter flights.	Valid until 31 December 2021
	Payment of RUB 23.4 billion to Russian air carriers for compensation of losses from restrictions on international flights.	Not valid from 1 January 2021

<i>Group of Measures</i>	<i>Description of Measures</i>	<i>Status</i>
7. Measures in the field of transportation	Renewal of certificates for drivers transporting dangerous goods.	Not valid from 1 December 2020
	Abolition of weight control for transportation of goods of prime necessity.	Not valid from 26 May 2020