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# Questions of interest in the region, in light of investment treaties and trends in newly concluded treaties, and ISDS cases

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# Cases from the Region

State	As Respondent State	as Home State of Claimant
Armenia	3	0
Azerbaijan	3	0
Belarus	3	1
Estonia	1	0
Georgia	10	0
Kazakhstan	17	5
Kyrgyzstan	13	0
Latvia	9	2
Lithuania	5	3
Moldova	11	1
Russia	24	19
Ukraine	22	11

# Legal Environment

- National Investment Protection Legislature
- Bilateral Investment Treaties
- Regional Investment Treaties (Former USSR states)
- International Investment Treaties

# Bilateral Investment Treaties (BIT)

State	BIT
Armenia	42 (35 in force)
Azerbaijan	47 (35 in force)
Belarus	64 (51 in force)
Estonia	27 (23 in force)
Georgia	31 (30 in force)
Kazakhstan	48 (43 in force)
Kyrgyzstan	36 (25 in force)
Latvia	43 (44 in force)
Lithuania	55 (53 in force)
Moldova	41 (39 in force)
Russia	79 (63 in force)
Ukraine	72 (57 in force)

# Russian Bilateral Investment Treaties

## Generation 1: USSR BITs

- Model USSR BIT (1987)
- limit jurisdiction of tribunals to disputes concerning the amount of compensation
- Russia – Spain (1989) , UK (1989), Germany (1993) , etc.

## Generation 2: Russian BITs 1990 - present

- Model Russian BIT (2001)
- wide investor-state arbitration clause
- Russia – Sweden (1995), China (2006), etc.

## Generation 3: Russian BITs from 2016

- New Russian Model BIT 2016
- Institutional arbitration
- Ad hoc arbitration with detailed procedure

# Russia – Germany BIT (28 January 1993)

## Article 10

(1) Disputes relating to investments between one Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably between the parties to the dispute.

(2) If a dispute relating to the amount of compensation or the method of its payment, in accordance with article 4 of this Agreement, or to freedom of transfer, in accordance with article 5 of this Agreement, is not settled within six months from the time when a claim is made by one of the parties to the dispute, either party to the dispute shall be entitled to refer the matter to an international arbitral tribunal.

(3) The procedure provided for in paragraph 2 of this article shall apply also to disputes relating to matters which the parties to the dispute have agreed to submit to arbitration.

(4) Unless the parties to a dispute agree otherwise, article 9, paragraphs 3 to 5, of this Agreement shall apply, *mutatis mutandis*, so that the parties to the dispute appoint the members of the arbitral tribunal and so that each party to the dispute, unless otherwise agreed, may request the Chairman of the Institute of Arbitration of the Stockholm Chamber of Commerce to make the necessary appointments, if the time limits established in article 9, paragraph 3, of this Agreement are not observed.

The decisions of the arbitral tribunal shall be recognized and implemented in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958.<sup>1</sup>

(5) A Contracting Party which is involved in the dispute shall not, in the course of the arbitration proceedings or the implementation of a decision of an arbitral tribunal, put forward the argument that an investor of the other Contracting Party, authorized under article 6, paragraph 2, of this Agreement to exercise all rights and claims, received partial or full compensation for the loss incurred on the basis of the guarantee referred to in article 6 of this Agreement.

# Russia – China BIT (9 November 2006)

## Article 9

### Settlement of disputes between one Contracting Party and an investor of the other Contracting Party

1. Any dispute between a Contracting Party and an investor of the other Contracting Party, related to an investment, shall be as far as possible settled amicably through negotiations.

2. If the dispute cannot be settled amicably through negotiations within six months from the date it has been raised by either party to the dispute, it shall be submitted:

a) to the competent court of the Contracting Party that is a party to the dispute; or

b) to the International Center Centre for Settlement of Investment Disputes (the Centre) under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington on March 18, 1965 (subject to it entered into force for both Contracting Parties) or Additional Facility Rules of International Centre for Settlement of Investment Disputes (provided that the Convention has not entered into force for either Contracting Party); or

c) to an ad hoc arbitration court in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

# Belarus – Austria BIT (1 June 2002)

## ARTICLE 9

### Settlement of Investment Disputes

(1) Any dispute arising from an investment, between a Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably between the parties to the dispute.

(2) If a dispute according to paragraph (1) of this Article cannot be settled within three months of a written notification of sufficiently detailed claims, the dispute shall upon the request of the Contracting Party or of the investor of the other Contracting Party be subject to the following procedures:

- a) to conciliation or arbitration by the International Centre for Settlement of Investment Disputes, established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on March 18<sup>th</sup>, 1965. In case of arbitration, each Contracting Party, by this Agreement irrevocably consents in advance, even in the absence of an individual arbitral agreement between the Contracting Party and the investor, to submit any such disputes to this Centre and to accept the award as binding. This consent implies the renunciation of the requirement that the internal administrative or juridical remedies should be exhausted; or
- b) to arbitration by three arbitrators in accordance with the UNCITRAL arbitration rules, as amended by the last amendment accepted by both Contracting Parties at the time of the request for initiation of the arbitration procedure. The Contracting Party submits itself to the arbitral tribunal mentioned also in the case that no such agreement for arbitration exists.

(3) The award shall be final and binding; it shall be executed according to national law; each Contracting Party shall ensure the recognition and enforcement of the arbitral award in accordance with its relevant laws and regulations.

(4) A Contracting Party which is a party to a dispute shall not, at any stage of conciliation or arbitration proceedings or enforcement of an award, raise the objection that the investor who is the other party to the dispute has received by virtue of a guarantee indemnity in respect of all or some of its losses.



# Regional Investment Treaties (CIS)

- **Convention for the Protection of Investors' Rights (1997, Moscow)**
  - National courts, CIS Economic Court, international arbitration
- **EurAsEc Convention for the Promotion and Mutual Protection of Investments (2008)**
  - National courts, National Chamber of Commerce arbitration, ad hoc UNCITRAL, ICSID or ICSID Additional Facility
- **Treaty on the Eurasian Economic Union (2014)**
  - National courts, National Chamber of Commerce arbitration, ad hoc UNCITRAL, ICSID or ICSID Additional Facility

# Regional Treaties

State	Moscow Convention 1997	EurAsEc Convention 2008	Eurasian Economic Union Treaty 2014
Armenia	yes		yes
Azerbaijan			
Belarus	yes	yes	yes
Estonia			
Georgia			
Kazakhstan	yes	yes	yes
Kyrgyzstan	yes	yes	yes
Moldova	yes		
Russia	yes	yes	yes
Ukraine			
Tajikistan	yes	yes	

# Treaty on the Eurasian Economic Union (2014)

## Protocol No.16

### 6. Procedure for Settlement of Investment Disputes

84. All disputes between a recipient state and an investor of another Member State arising from or in connection with an investment of that investor on the territory of the recipient state, including disputes regarding the size, terms or order of payment of the amounts received as compensation of damages pursuant to paragraph 77 of this Protocol and the compensation provided for in paragraphs 79-81 of this Protocol, or the order of payment and transfer of funds provided for in paragraph 8 of this Protocol, shall be, where possible, resolved through negotiations.

85. If a dispute may not be resolved through negotiations within 6 months from the date of a written notification of any of the parties to the dispute on negotiations, it may be referred to the following, at investor's option:

- 1) a court of the recipient state duly competent to consider relevant disputes;
- 2) international commercial arbitration court at the Chamber of Commerce of any state as may be agreed by the parties to the dispute;
- 3) ad hoc arbitration court, which, unless the parties to the dispute agree otherwise, shall be established and act in accordance with the Rules of Arbitration of the United Nations Commission on International Trade Law (UNCITRAL);
- 4) the International Centre for Settlement of Investment Disputes established pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1965, in order to resolve the dispute under the provisions of the Convention (provided that it has entered into force for both Member States that are parties to the dispute) or under the Additional Facility Rules of the International Centre for Settlement of Investment Disputes (if the Convention has not entered into force for one or both the Member States that are parties to the dispute).

# International Investment Treaties

- **ICSID Convention (1965)**
  - Russia, Tajikistan and Kyrgyzstan are not parties
- **ICSID Additional Facility Rules**
  - Non-signatories may bring claims
- **Energy Charter Treaty (1994)**
  - Russia is not a party
- **New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)**
  - Turkmenistan is not a party

# Russian Federation

- **As a home state of investors**
  - Natural resources, Energy, Construction, Space
  - Fair & Equitable Treatment ground
  - Most cases are under UNCITRAL + 1 ICSID
  
- **As a host state**
  - International Center for Legal Protection
  - New BITs (SIAC/HKIAC?)
  - Crimea related disputes

# Russian cases

## **Early cases (SCC administered)**

- Compagnie Noga v. Russia (1993) - food-for-oil contract
- Franz Sedelmayer v. Russia (1998) – real estate investment
- Cesare Galdabini SpA v Russia – supply of equipment to VAZ in 1980s

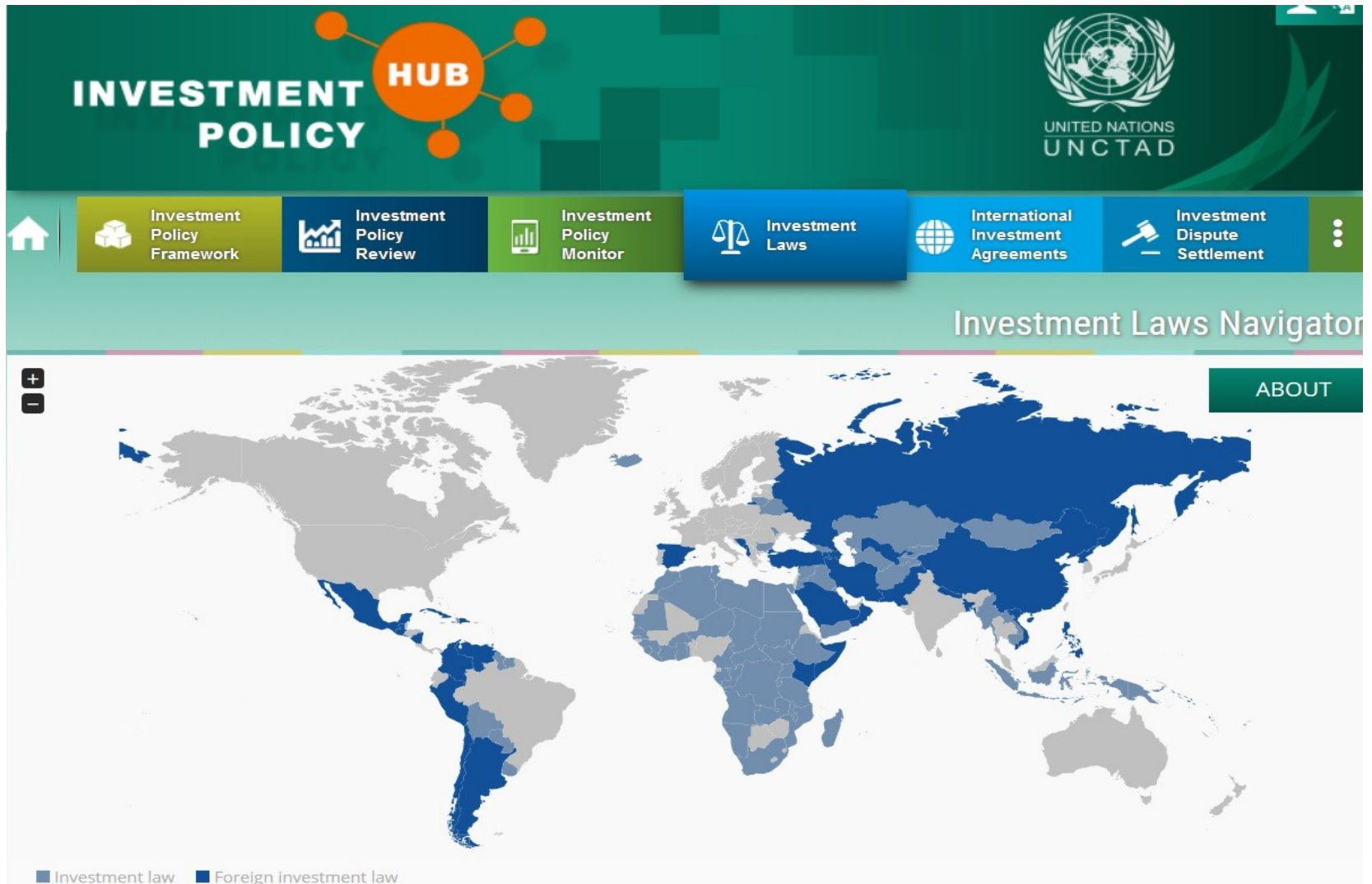
## **The Yukos cases (PCA administered UNCITRAL)**

- Energy Charter Treaty
- Alleged expropriation v Tax evasion penalties
- Annulment proceedings in Dutch courts (lack of jurisdiction / provisional application of ECT)

## **Crimea cases (PCA administered UNCITRAL)**

- Russia/Ukraine BIT
- 6 cases

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