Russia’s Membership in the WTO: An Additional Venue for Investment Disputes?

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Inevitable growth of the investment disputes after Russian accession to WTO

It is just simple logic: since Russian accession has removed many trade barriers for foreigners and Russian businesses can now enjoy new WTO possibilities, foreign investments in Russia and Russian investments abroad will grow, as well as the number of investment disputes.
New legal realities for business.

Russia has already adjusted many years ago its internal regulations to WTO rules. Many Russian industries existed till August 2012 in situation as though Russia were already a WTO member. But before August 2012 Russia could at any time change such regulations unilaterally. Now it is not possible due to Russian commitments.
WTO rules and investments

It is a mistake to think that WTO rules deal with international trade in goods only.

WTO rules pay special attention to investments and to establishing foreign commercial presences in national markets.

WTO rules impact all economic sectors and directly or indirectly have effect for issues of corporate law.
Russian accession to WTO: immediate inflow of foreign investments in Russia?

It is a mistake to think that after Russian accession foreign businesses will immediately “occupy” Russian economy.

The changes will be very slow.

For WTO like for justice it is not speed that is important but inevitability of liberalization of markets.
WTO law: new and very important layer of regulation

WTO regulations will be a part of the Russian law system. WTO regulations will prevail over Russian domestic rules.

A challenge for Russian lawyers: WTO regulations are yet to be analyzed and understood.

Paradox: traditionally in Russia the international regulations are not well known though they prevail over Russian domestic rules.
Foreign businesses have now 2 more fora for their investment claims in the light of Russian accession to WTO

• International commercial arbitrations;
• International investment arbitrations under BITs etc. (Russia is a party to several dozens of BITs, but not to ICSID Convention or Energy Charter Treaty);
• WTO Dispute Settlement Body (through their Governments).
  WTO dispute settlement procedures are different from international investment arbitrations:
  Private investors do not directly participate in dispute resolution;
  Remedies future-oriented: ending national measures violating WTO investment regime (rather than money compensation for losses sustained by the investor).
• Russian state courts. They may directly apply WTO law, since international treaties in force form part of the Russian legal system.
Possible investments in Russian economy in the light of the Russian protection of different sectors: ratio (based on the number of text symbols for a sector in proportion to the total number of text symbols in the Russian Schedule of commitments on services)

<table>
<thead>
<tr>
<th>Sector</th>
<th>Ratio</th>
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<tbody>
<tr>
<td>1. Transport services</td>
<td>15.22 %</td>
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<tr>
<td>2. Insurance services</td>
<td>10.82 %</td>
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<tr>
<td>3. Banking and other financial services</td>
<td>9.54 %</td>
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<tr>
<td>4. Telecommunication services</td>
<td>8.25 %</td>
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<td>5. Distribution services, including retail</td>
<td>7.55 %</td>
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<tr>
<td></td>
<td><strong>51.38 %</strong></td>
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<td>6. Accounting, auditing and bookkeeping services</td>
<td>5.11 %</td>
</tr>
<tr>
<td>7. Educational services</td>
<td>3.31 %</td>
</tr>
<tr>
<td>8. Tourism and travel related services</td>
<td>1.98 %</td>
</tr>
<tr>
<td>9. Legal services</td>
<td>0.96 %</td>
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<tr>
<td>10. Services directly related to organisation and holding of negotiations, meetings and conferences</td>
<td>0.27 %</td>
</tr>
</tbody>
</table>
Circle diagram on the basis of the previous slide

- Transport: 15.22%
- Insurance: 10.82%
- Banking: 9.54%
- Telecom: 8.25%
- Distribution: 7.55%
- The rest: 10.82%
Some sectors which can be closed by Russia for foreign investments

- Subsoil exploitation.
- Distribution of television and/or radio programmes.
- Transportation: aviation, railway.
- Trade in weapon.
- Trade in alcohol.
- Investigation services.
- Security services.
- Audiovisual services.
Horizontal restrictions for all sectors

May be not allowed:

• to establish non-commercial organizations:
  “Unbound with respect to commercial presence through constitution, acquisition or maintenance of a non-commercial organisation (unless otherwise provided in the Sector-specific commitments of the Schedule)”.

• to establish representation offices for commercial activities.
Restrictions on foreign participation in equity

- Insurance companies.
- Banking and other financial companies.
- Tourist operators and tourist agencies.
- Telecommunications companies (voting shares in “incumbent operators”).
Commercial presence that may be allowed only in the form of a legal person of the Russian Federation: some sectors

- Auditing.
- Medical and dental services.
- Insurance (9 years from the date of Russia’s accession to the WTO).
- Real estate services.
- International maritime transport services.
Some Russian restrictions for investments of additional interest

- Founders of mass media agencies must be Russian citizens. The commitments make it possible to prohibit for a foreign entity to be a founder of mass media.
- Special regime of shipping in Caspian sea.
- Foreign ownership is prohibited for agricultural land and border territories and may be limited for other types of land. Rent of land plots is permitted for the period of 49 years (with possible prolongation).
- Production sharing agreement for the exploration, development and production of mineral raw materials:
  - Russian legal persons have the priority right to take part in the conduct of the operations as contractors, suppliers or in any other capacity under production sharing agreement with investors.
  - Not less than 80% of all employed personnel engaged in realization of a production sharing agreement should be Russian citizens.
1. 249 mentions of “investment”.
   80 mentions of “investments”.
2. The subsection “Trade-related investment measures (TRIMs)” in section 3 “Internal policies affecting foreign trade in goods” with many clarifications on Russian investment law and policy, e.g.:
   the same charter capital requirements to be applied to all banks in the Russian Federation (except the Central Bank), including state-owned banks (para. 1392);
   investments in charter capital of companies licensed as pension funds would not be subject to the foreign charter capital ratio for insurance (para. 1379).
3. The subsection “Investment regime” in section “Economy, economic policies and foreign trade“.
## Russian Federation – List of Article II (MFN) Exemptions

<table>
<thead>
<tr>
<th>Sectors or sub-sectors</th>
<th>Description of measure indicating its inconsistency with Article II</th>
<th>Country or countries to which the measure applies</th>
<th>Intended duration</th>
<th>Conditions creating the need for the MFN exemption</th>
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<tbody>
<tr>
<td>All sectors.</td>
<td>Measures concerning investment activity and available protection.</td>
<td>All parties to existing and future respective agreements which may be concluded.</td>
<td>Indefinite.</td>
<td>The measures are aimed at forming a legal framework for mutual protection and investment promotion.</td>
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<td>Sectors or sub-sectors</td>
<td>Limitations on Market Access</td>
<td>Limitations on National Treatment</td>
<td>Additional commitments</td>
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<td>Legal services, except for notary services (CPC 861*) only on private international law, international public law, and the law of the country in which jurisdiction the personnel of the services supplier is qualified</td>
<td>(1) None.</td>
<td>(1) None.</td>
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<td>(2) None.</td>
<td>(2) None.</td>
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<td>(3) None, except the following: with respect to advocates’ activity only: advocates can exercise advocates’ activity only through Advocates’ cabinet, Advocates’ bureau, Advocates’ collegiums or a legal advice office.</td>
<td>(3) None, except as indicated in the column &quot;Limitations on market access&quot;.</td>
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<td>(4) Unbound, except as indicated in Part I &quot;Horizontal commitments&quot;. An advocate is a natural person, obtaining advocate’s status in accordance with the Russian legislation. Only advocates are allowed to: - carry out representation in criminal courts and Russian arbitration tribunals; - act as representatives of organisations, governmental bodies, local government bodies in civil and administrative court proceedings and court proceedings relating to administrative offence cases.</td>
<td>(4) Unbound, except as indicated in Part I &quot;Horizontal commitments&quot;.</td>
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Commitments on legal services: an indication and confirmation of the fact that the Russian accession to WTO was not strongly motivated by legal reasoning.

Mistakes and inconsistencies in other commitments.

Therefore many WTO disputes with Russia may follow.
Exposure of the Russian accession mostly to the political situations, not to legal / economic considerations

- Establishing of WTO as the political consequence of the USSR collapse.
- Atmosphere of complete and undue silence.
- Influence on final decision to accede of the US presidential elections in 2012: undesirability of further possible delay for 8 year more in situation when actually the Russian legislation was in full compliance with WTO regulations and Russian concessions to very large degree were unilateral, not reciprocal.
- Political nature of ratification of the Protocol on Russian accession in the Russian Parliament: too many breaches of the constitutional procedures.
- Political nature of the Decree of the Russian Constitutional Court dated July 9, 2012, № 17-П, on the constitutional control over the Protocol on Russian accession to WTO: too much avoidance of responses to the breaches of the constitutional procedures.
Russia in general has lost the legal battle negotiating the accession to WTO

- Russian WTO commitments have quite many omissions and awkward wordings in Russian translation.
- This creates basis to believe that many investment claims against Russian in WTO might be likely to succeed.
- To win investment disputes Russia would often need foreign legal representatives.
- This is good news for foreign lawyers.
- Russian lawyer will get more work as well.
- **So if someone wins from Russia’s accession to WTO and future investment disputes, it will be lawyers, both Russian and foreign.**
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Thank you for your attention!