

VAN BAEL & BELLIS



Potential Claims for Compensation against Russia following its invasion of Ukraine

Part I : Claims relating to Foreign Investments in Ukraine

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Russia's illegal invasion of Ukraine and the ensuing war has had profound humanitarian consequences affecting the lives of millions of people in Ukraine and Europe. At the same time, Russia's actions are also having a profound economic effect on investors both within Ukraine and Russia. From the destruction of the Azovstal plant in the siege of Mariupol to the nationalisation of the assets of foreign businesses exiting Russia, the economic consequences of Russia's illegal war are huge and require urgent reparation.

In this three-part series on potential claims arising out of Russia's invasion of Ukraine which started on 24 February 2022, we examine and re-assess the various claims for financial compensation which investors in Ukraine and Russia may be able to bring against Russia. In Part I, we examine potential investment arbitration claims against Russia for damage caused on Ukrainian territory. Part II considers potential investment claims relating to measures taken against foreign investors in Russia. Part III considers potential avenues for recourse against Russia outside of investment arbitration.

On 25 January 2023, in the context of Russia's involvement in the activities of the separatists in eastern Ukraine, the European Court of Human Rights ("ECtHR") [ruled](#) that Russia had "effective control" over eastern Ukraine. This meant that the European Convention on Human Rights ("ECHR") was applicable, with the ECtHR having jurisdiction over events pre-dating September 2022, when Russia ceased to be a party to the ECHR.

Although this decision does not relate to a foreign investor's investment claim, the decision may well have persuasive effect before arbitral tribunals considering the all important question as to whether they have jurisdiction over investment claims against Russia relating to damage caused in the territory of Ukraine. This client alert focuses on the issue of establishing jurisdiction in potential investment claims against Russia in relation to damage caused to investments made in the territory of Ukraine.

BACKGROUND: INVESTMENT CLAIMS AGAINST RUSSIA UNDER BILATERAL INVESTMENT TREATIES ("BITS")

BITs are bilateral treaties between two contracting States which are intended to promote investment by the investors that are nationals of one contracting State into the territory of the other contracting State. BITs contain various protections for investors, including guarantees of fair and equitable treatment, protections from unlawful expropriation, and guarantees that investments can be repatriated. Most importantly, most BITs provide investors with access to international arbitration to resolve any investment disputes between an investor of one contracting State and the other contracting State.

Russia is a party to over 60 BITs. These include several European States such as the UK, France, Germany and the Netherlands. Significantly, Russia has also entered into a BIT with Ukraine, which remains in force despite the current armed conflict between Russia and Ukraine.

If Russia violates the standards of protection guaranteed to qualifying investors under these BITs, a qualifying investor will have access to international arbitration to seek redress. In general terms, to bring a claim and for the tribunal to accept jurisdiction over that claim, an investor must qualify as an 'investor' with an 'investment' as defined under an applicable BIT. This is the first threshold that an investor must cross even before the tribunal goes on to consider whether Russia has been acting in breach of the BIT.

THE JURISDICTIONAL PROBLEM IN RELATION TO DAMAGE TO FOREIGN INVESTMENTS IN UKRAINE: RUSSIA'S CONTROL OVER PARTS OF UKRAINE AS A BASIS FOR JURISDICTION

Given that Russia has invaded the territory of Ukraine and that the war is taking place on Ukrainian territory, damage to investments arising out of the invasion is largely occurring in Ukraine, rather than Russia. It is investments in Ukraine which are suffering damage. In this context, it is important to consider how foreign investors in the invaded Ukrainian territory can bring investment arbitration claims against Russia under the BITs to which Russia is a party, rather than Ukraine.

In cases of occupation, there is an argument that, if an armed conflict leads to a change of *de facto* control over a territory, the control-taking State (i.e. Russia) must apply its existing treaty obligations to foreign investors in the controlled territory.

It is in this context that the recent judgment of the ECtHR becomes potentially relevant. Since the ECtHR found that Russia had effective control over certain areas in eastern Ukraine, the ECtHR was comfortable accepting jurisdiction to hear claims against Russia for alleged breaches of the ECHR which took place *outside* of Russia as such.

This is not the only case which would support the theory that Russia must apply its treaty obligations to foreign investors in the territory which it controls beyond its own borders. In a [decision](#) of 16 December 2020, in a separate case, the ECtHR also accepted jurisdiction to hear a series of claims brought by Ukraine against Russia in relation to the 2014 annexation of Crimea on the basis that Russia had effective control over Crimea.

Similarly, there have been a number of investment arbitrations arising out of Russia's annexation of Crimea in which tribunals have needed to consider whether to accept jurisdiction. In these cases, a number of arbitral tribunals have found that they had jurisdiction to hear the claims by Ukrainian investors in Crimea against Russia on the basis that the territorial scope of the Ukraine-Russia BIT extended to the protection of foreign investments in Crimea.

For example, in the *Stabil* case, 11 companies owned by the Ukrainian businessman Igor Kolomoisky brought an investment claim against Russia based on the seizure of the companies' assets in Crimea. In its [award](#) on jurisdiction, the arbitral tribunal held that it had jurisdiction to hear the dispute given that Russia had effective control over Crimea at the time the claimants' assets were frozen.

In four other similar cases, in which investors brought claims against Russia for damage sustained in Crimea, the tribunals also upheld jurisdiction. Russia has attempted to annul the awards before the Dutch courts. However, in July 2022, the Hague Court of Appeal [upheld](#) the jurisdictional awards, and accepted the investors' arguments that Russia had assumed responsibility for Ukrainian investments in Crimea by virtue of its occupation.

CONCLUSIONS

Any decision by an investor to bring an investment arbitration against Russia would need to be considered very carefully and on many levels, particularly in light of the enforcement risk in relation to Russia.

However, as the recent ECtHR decision and other BIT jurisprudence suggests, arbitral tribunals may well accept jurisdiction in future claims against Russia under Russia's BITs brought by investors arising out of the war in Ukraine. Foreign investors (including Ukrainian investors as *de facto* foreign investors in the Ukrainian territories occupied by Russia) who have suffered damage in relation to their factories and other buildings or who have had their investments in the occupied Ukrainian territories seized should carefully consider the potential benefits of bringing an investment treaty arbitration against Russia to attempt to recover some of the financial losses which they have suffered as a result of Russia's illegal actions.

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