

**VAN BAEL & BELLIS**



# **Potential Claims for Compensation against Russia following its invasion of Ukraine**

## **Part II : Claims Relating to Russia's Domestic Measures against Foreign Investors**

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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 examined potential investment arbitration claims against Russia for damage caused on Ukrainian territory. This 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.

## INVESTMENT CLAIMS ARISING OUT OF RUSSIA'S DOMESTIC MEASURES AFFECTING FOREIGN INVESTORS

Since the invasion, and in response to the international sanctions which Western States have introduced against it, Russia has taken [certain internal measures](#) which directly target foreign investors in Russia and are likely to lead to significant financial losses.

Examples of Russian action include the following:

- Russian airlines have been permitted to [seize](#) foreign-owned planes leased to them without compensation. The collective [value](#) of such planes is estimated at around US\$ 10 billion. Currently, over [400 foreign-owned planes](#) are still being kept in Russia as a result of this measure, with some having reportedly been [stripped of parts](#) for use by Russian airlines given that Russia is prevented from buying spare parts abroad as a result of Western sanctions.
- In June 2022, the Russian Parliament [approved amendments](#) to the 1992 subsurface law to ban foreign companies and individuals owning and operating oil and gas licences through affiliates and subsidiaries incorporated outside Russia. The amendments contemplate different treatment of foreign investors based on whether they are incorporated in "friendly" or "unfriendly" States. As a result, a Russian presidential decree [ordered](#) the transfer of all rights of the foreign investors Shell, Mitsubishi and Mitsui in the Sakhalin-2 natural gas project to a newly created Russian entity. The foreign investors were given one month to request shares in the new entity. Whilst Shell [indicated](#) that it did not intend to make this application, Mitsubishi and Mitsui [obtained approval](#) to maintain a stake in the Sakhalin-2 project, which will however now be [operated](#) by the newly incorporated Sakhalinskaya Energia.

- A similar [measure](#) was taken against the shareholders of the Sakhalin-1 oil and gas project, as Russia terminated the shareholders' interests in the project, and transferred them to a domestic operator. These shareholders included Exxon, Japan's SODECO consortium, and India's ONGC. In response to this measure, Exxon [stated](#) that it is reserving its rights under its production sharing agreement and international law. Whilst the [Japanese](#) and [Indian](#) companies wish to retain their shareholdings in Sakhalin-1, the project operator will now be a Russian entity.
- Russian law makers' [proposal](#) to adopt legislation allowing the nationalisation of assets left unused by foreign investors that have paused their Russian operations in protest at the invasion. In May 2022, Renault [handed over its Russian assets](#) to the Russian government, marking the first major nationalisation since the onset of sanctions over Russia's invasion of Ukraine.

Such measures by Russia may give rise to claims by foreign investors in Russia for unlawful expropriation and/or other breaches of international investment law, including violations of the fair and equitable treatment standard included in most international investment treaties.

An investor seeking damages for the loss of their investments caused by the actions of the Russian State could potentially bring an investment arbitration claim against Russia if they are able to identify an applicable treaty.

Russia is a party to over 60 bilateral investment treaties with States such as the UK, Singapore, France, Germany, Luxembourg and the Netherlands.

In general terms, an investor who qualifies as an 'investor' with an 'investment' under the terms of any applicable treaty may bring an investment arbitration claim and would be entitled to have their claim heard before a neutral arbitral tribunal. And, if the tribunal were to conclude that Russia had violated the terms of any applicable investment treaty and caused loss to the investor, the tribunal would be entitled to issue an arbitral award awarding damages against Russia in favour of the foreign investor.

## **ENFORCEMENT AGAINST RUSSIA**

Perhaps the greatest difficulty in pursuing claims against Russia is enforcing against Russia once an award has been rendered in favour of the investor. Russia has developed a practice of challenging awards vigorously, and has been unwilling to voluntarily comply with them, which means that the investors may need to enforce awards in a third State in which Russia has assets. Even though the Central Bank of Russia holds very significant foreign reserves (which have largely been frozen) and Russian State-owned companies hold significant assets outside of Russia, the rules on sovereign immunity (which generally permit enforcement only when State assets are used for commercial purposes) will make enforcement very difficult, particularly in a jurisdiction like England & Wales. There may, however, be other jurisdictions which take a less strict approach to sovereign immunity and it cannot be ruled out that award creditors would have more luck in enforcing against Russian sovereign assets in any such jurisdictions.

In any event, foreign investors should therefore be mindful of the potential difficulties in enforcing awards rendered in their favour and consider such enforcement risks early on in their assessment of the viability and likelihood of success of their claims.

## CONCLUSIONS

In sum, international claims under investment treaties giving rise to enforceable international arbitration awards may provide a remedy for foreign investors seeking to recover losses suffered in light of Russian counter sanctions and other discriminatory measures.

It cannot be ruled out that Russia will introduce further measures and therefore foreign investors with affected assets in Russia should be considering whether they have any rights under investment treaties and how best to preserve any available claims.

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