

VAN BAEL & BELLIS



Potential Claims for Compensation against Russia following its Invasion of Ukraine

Part III: Alternative Avenues of Redress for Foreign Investors

| 23 March 2023

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. Part II considered potential investment claims relating to measures taken against foreign investors in Russia. This Part III considers potential avenues for recourse against Russia outside of investment arbitration.

CLAIMS BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

In June 2022, Mr. Rinat Akhmetov, the owner of the Azovstal plant that was destroyed in the siege of Mariupol brought [proceedings](#) before the European Court of Human Rights ('**ECtHR**'). Mr Akhmetov's group, SCM, has also filed [over 60 claims](#) before the ECtHR in relation to assets affected by Russia's aggression. In late 2022, the State Savings Bank of Ukraine, Oschadbank, also [filed](#) an application against Russia before the ECtHR following significant losses suffered as a result of Russia's invasion of Ukraine.

A foreign investor's assets may be protected under bilateral investment treaties, which provide investors with substantive protections, such as protections from unlawful expropriation, as well as with access to international arbitration to resolve any investment disputes between an investor of one contracting State and the other contracting State.

However, foreign investors may also be entitled to rely upon the European Convention on Human Rights ('**ECHR**'), as well as investment treaties. Under the ECHR, investors may be entitled to make an application before a regional, specialised human rights court – the ECtHR. On the basis of the protections afforded to individuals under the ECHR, it is conceivable that investor claims could be brought in relation to ECHR breaches under the ECHR such as under Article 14 (Prohibition of discrimination) and Article 1 of Protocol No. 1 to the ECHR (Protection of property) particularly in cases where an investor's property has been seized by the host State.

As in investment arbitration, before the ECtHR considers any violations of substantive provisions, an investor will need to clear several admissibility thresholds and jurisdictional obstacles. The ECtHR must accept that the dispute extends to a matter concerning the interpretation and application of the ECHR, that the claim is properly admissible, and that it has jurisdiction. In addition to State parties to the ECHR being able to bring cases for alleged breaches of the ECHR or its Protocols, the ECtHR may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation of the ECHR or its Protocols by one of the State parties to the ECHR.

As of 16 September 2022, Russia's membership to the Council of Europe ceased following its 2022 invasion of Ukraine. However, in a [resolution](#) of 22 March 2022, the ECtHR clarified that it remains competent to hear applications against Russia in relation to acts or omissions which violate the ECHR provided that these occurred prior to 16 September 2022. The ECtHR confirmed this approach in the case of [Fedotova v. Russia](#) on 17 February 2023. Although Russia has [passed a bill](#) to the effect that any ruling by the ECtHR against Russia after 15 March 2022 will not be implemented by Russia, at least from the perspective of the ECtHR, despite Russia no longer being a member of the Council of Europe, it should be possible for investors to make applications before the ECtHR for damage that has occurred prior to 16 September 2022.

Furthermore, in the cases of [Ukraine v. Russia \(re Crimea\)](#) in 2020 and [Ukraine and the Netherlands v. Russia](#) in 2023 respectively, the ECtHR has ruled that it will have jurisdiction to hear claims against Russia arising out of its aggression in [Crimea](#) and [eastern Ukraine](#) where Russia had effective control over the areas in which the alleged breaches of the ECHR have taken place. These rulings provide a strong indication that, should an investor bring a claim against Russia under the ECHR for damage caused prior to Russia's withdrawal from the ECHR, the ECtHR may well accept jurisdiction to hear claims against Russia.

This is therefore a timely reminder that foreign investors may have recourse to remedies before an established judicial organ outside of the investor-State arbitration system, and that the ECtHR may be well-placed to hear aggrieved investors' claims. Foreign investors who have suffered damage in Ukrainian territories or in Russia itself following its invasion of Ukraine should therefore consider carefully whether their claims may be suitably brought under the ECHR framework.

COMPENSATION AND CLAIMS MECHANISMS

In recent months, the need to hold Russia accountable for the extensive human and property damage caused in Ukraine has resulted in a wave of discussions about potential international mechanisms to achieve reparation.

In [May 2022](#), Columbia Law School established the [International Claims and Reparations Project](#) (the 'ICRP') to design legal frameworks for the management of international claims and reparations. The Government of Ukraine invited the ICRP to advise on legal mechanisms for securing reparations for the damage caused by Russia in Ukraine, with President Zelenskyy consistently encouraging the international community to support establishment of a [war claims commission](#).

Accordingly, in [November 2022](#), the UN General Assembly adopted a [resolution](#) which called for Russia to pay war reparations to Ukraine. The resolution also recommended the creation of an international register of damage to serve as a record of evidence, and to promote and coordinate the process of evidence-gathering. Nearly 50 States co-sponsored the resolution and 94 States [voted](#) in favour of it. The European Union also made a [statement](#) in support of the resolution. In addition, in late 2022, the European Commission President Ursula von der Leyen [stated](#) that the EU would work with the international community to get "*the broadest international support possible*" to set up a UN-backed specialised court to investigate possible war crimes committed by Russia in Ukraine.

In February 2023, the Government of Netherlands [agreed](#) in principle to Ukraine's proposal to create an international organisation in the Hague to hold the register of damage caused by Russia's aggression in Ukraine. The register is to contain information about the damage caused by the war to Ukrainians, businesses and the Ukrainian State as such. Setting up this register is the first step in the creation of a comprehensive reparations mechanism.

Support for this initiative has been unwavering, as, at the recent [17th meeting](#) of the UN General Assembly's Eleventh Emergency Special Session, the UN Secretary General underscored the urgency of resolving the conflict in Ukraine, with Malta, Australia and Iceland calling again for reparations to be made by Russia.

Questions remain about what such a compensation claims commission would look like and the sort of remedies which would be available to investors, if any. The history of such claims commissions may be informative in this respect, as the international community has a track record of successfully reducing tensions between States and aggrieved individuals by setting up compensation commissions such as the Eritrea-Ethiopia Claims Commission, which was established after the 1998-2000 Eritrea-Ethiopia conflict, or the Iran-US Claims Tribunal (the 'IUSTC'), which was established after relations between Iran and the US collapsed following the 1979 Iranian revolution. In the latter case, the IUSTC had jurisdiction to hear claims by American and Iranian nationals against the Iranian and American governments respectively. These claims related to debts, contracts, expropriations or other State measures affecting property rights. It is generally thought that the IUSTC was a success, as around 1,000 claims were filed for amounts of USD 250,000 or more, and around 2,800 claims for amounts of less than USD 250,000. To date, almost all private claims have been resolved. As such, past experiences with compensation claims commissions provide a useful illustration of the kind of access to remedies which may be available to foreign investors affected by Russia's invasion of Ukraine over the next few years.

Investors who have been affected by Russia's invasion of Ukraine should therefore carefully follow these developments. Investors in need of urgent reparation though should consider alternative fora to seek compensation because, in reality, we are likely a number of years away from the establishment of a claims commission.

CONCLUSIONS

The war between Russia and Ukraine is likely to give rise to numerous claims by investors against Russia for damage. The complexity of this conflict and the large scale of the damage resulting from it makes it more likely than not that claims by foreign investors will take place in a variety of fora, not just before investor-State arbitral tribunals under investment treaties. In particular, investors should consider carefully whether their potential claims, in particular in relation to asset seizures by Russia, should be heard by the ECtHR, or whether they should await the establishment of a specialised claims commission.

Lawyers to contact



Nick Lawn
Partner
nlawn@vbb.com



Helin Laufer
Associate
hlaufer@vbb.com

VAN BAEL & BELLIS

BRUSSELS

Glaverbel Building
Chaussée de La Hulpe 166
B-1170 Brussels, Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

GENEVA

26, Bd des Philosophes
CH-1205 Geneva
Switzerland

Phone: +41 (0)22 320 90 20
Fax: +41 (0)22 320 94 20

LONDON

5, Chancery Lane
EC4A 1BL London
United Kingdom

Phone: +44 (0)20 7406 1471