

VAN BAEEL & BELLIS



Protection of Business Assets in Russia and Ukraine under International Investment Law

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Russia's military action in Ukraine together with its announcement of retaliatory measures in response to international sanctions are likely to have significant implications for foreign investors with investments in Russia and/or Ukraine. Following the critical response of the international community to Russia's invasion and the widespread imposition of sanctions, Russia has already drawn up a list of unfriendly countries which could be targeted. As more multinationals suspend their operations in Russia, Russia has also announced various measures intended to stem the outflow of foreign capital including the possibility that the assets of any such foreign investors seeking to exit operations in Russia could be nationalised without compensation.

Russia still remains bound by the international treaties which it has signed and ratified. This Client Alert considers the protections and remedies which might be available to foreign investors affected by Russian measures under International Investment Law. After considering the measures which could potentially give rise to investment treaty claims (Section A), this Client Alert provides an overview of the treaty protections available to foreign investors as well as a summary of how those protections can be accessed (Section B). It concludes with some immediate practical guidance for foreign investors who are affected by Russia's measures (Section C).

A. Russian Measures affecting Foreign Investors

Various measures announced or imposed by Russia could affect foreign investments in Russia and potentially give rise to breaches of International Investment Law including:

- Nationalisation of the property of foreign investors who exit business operations in Russia
- Removal of any obligation on Russian users to pay compensation to patent holders associated with unfriendly countries for the unauthorised use of their patents
- Transfer and re-registration of leased foreign aircraft to Russian airlines without payment of compensation to foreign leasing companies
- Prohibition on the free transfer of cash funds outside of Russia by companies and individuals from proscribed countries

Separately, Russia's illegal military action and invasion and any consequential damage caused to foreign-owned business assets in Ukraine could potentially form the basis for an investment treaty claim. Russia may also take steps to expropriate business assets in Ukraine as it did in Crimea in 2014.

B. International Investment Law and Investor-State Arbitration

In these circumstances, International Investment Law may provide some form of asset protection and future recourse against Russia for affected foreign investors. International Investment Law includes the network of international investment agreements (IIAs) entered into by States under which one State (the Host State) guarantees a series of legal protections to investors of another State (the Home State) in respect of investments made in the Host State. As well as substantive protections in relation to treatment, those protections include a direct right for any dispute arising under an IIA to be resolved by an arbitral tribunal in international arbitration proceedings at the request of the foreign investor. That arbitral tribunal can then award monetary compensation to foreign investors who have suffered loss as a result of the Host State violating its obligations. The award of the arbitral tribunal can be widely enforced under various international conventions, most notably under the New York Convention.

Russia has entered into over 60 IIAs with a broad range of States including with Ukraine, many EU Member States and countries such as the UK, Canada and Japan. Those IIAs remain in force. Russia has also signed (but not ratified) the Energy Charter Treaty (ECT), a multilateral investment agreement relating to investments in the energy sector. Although provisional application of the ECT to Russia has ceased in 2009, Russia remains bound to the ECT in accordance with the ECT's sunset provisions until 2029.

The investment treaties which Russia has signed typically provide the following key investment guarantees:

- Prohibition against unlawful expropriation
- Requirement to treat foreign investors and their investments fairly and equitably
- Requirement to treat foreign investors no less favourably than domestic investors or investors of another State
- Requirement to allow foreign investors to transfer funds freely

To take advantage of these protections, a foreign investor will need to ensure that an applicable treaty is in place between Russia and its Home State. However, even if no such treaty is in place, an investor's investments might still be protected if a company within the corporate structure which holds its investment is incorporated in a State which has a IIA in place with Russia. For example, although no US-Russia IIA is currently in force, a US investor may still be able to obtain investment treaty protection indirectly if its investment in Russia is held through, for example, a Dutch company since there is an IIA between Russia and the Netherlands.

Although Russia might well seek to defend any investment treaty claims brought against it, the measures taken by and announced by Russia outlined above and the consequential damage caused might give rise to viable investment treaty claims against Russia which could result in arbitral decisions awarding foreign investors significant monetary compensation for the damage caused. The resulting award would likely be widely enforceable under the New York Convention. However, enforcement risks would still need to be carefully considered because Russia is unlikely to pay out any awards voluntarily. Any award creditor will therefore need to identify non-immune Russian assets outside of Russia against which an award could be enforced. The benefit of the current sanctions regime is that Russian State assets have currently been frozen and may therefore be an easier target for any future attempts at enforcement.

C. Practical Guidance

At this stage, foreign investors in Ukraine and Russia should consider several practical steps to protect their position and possible future investment treaty claims against Russia:

- Confirm the availability of investment protection under applicable IIAs whether directly or indirectly (through subsidiaries in the corporate chain)
- Collect, collate, and maintain documentary evidence in relation to key aspects of the investment, particularly in relation to (i) ownership; (ii) the decision to exit the investment; (iii) dealings with the Russian State; and (iv) the value of the investment. Copies of any such evidence should be maintained and accessible outside of Russia and Ukraine in the event that circumstances make it no longer possible to access those materials directly
- Take care in the creation of any new documents particularly in relation to valuation of the assets damaged or destroyed because these would likely be disclosable in any arbitration proceedings commenced

If any of your investments in Russia or Ukraine are affected by the measures outlined in this Alert or if you would like to discuss any other aspects of investment treaty protection of your assets in Russia and Ukraine, please contact our International Arbitration team or your usual VBB contact.

Lawyers to contact



Yuriy Rudyuk

Partner

yrudyuk@vbb.com



Nicholas A. Lawn

Partner

nlawn@vbb.com



Isabelle Van Damme

Partner

ivandamme@vbb.com



Tetyana Payosova

Senior Associate

tpayosova@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