

## EXECUTIVE BRIEFING

### Recovering losses from the State of Russia – investment treaties

Russia's invasion of Ukraine has caused untold human suffering and destruction of property. Businesses are lending a hand to the humanitarian relief efforts in the face of massive displacement of people and other effects of the conflict. Businesses are also having to grapple with questions about how they might potentially recover the financial losses to their businesses arising from Russia's invasion of Ukraine, and in regard to measures that Russia may take against their business within Russia.

The situation is changing quickly, but so far, we know that likely causes of financial losses to business, and the assets affected, are as follows:

- A refusal by Russia to recognise and protect the intellectual property of goods and services that cannot be imported into Russia (because of sanctions).
- The effective expropriation by Russia of foreign owned aircraft that have been leased to airlines in Russia (in that they are prohibited from leaving Russia).
- The repayment by Russia of its US Dollar denominated bonds in Roubles.
- The expropriation by Russia of the assets of those foreign owned business that leave Russia because of the conflict in Ukraine.
- The destruction of foreign owned business in Ukraine by way of Russia's military action. It is premature to consider whether Russia will directly expropriate business in Ukraine, but when it annexed Crimea in 2014 it did do so.

This note focuses on how investment treaties can be utilised by businesses in order to recover the financial losses they suffer due to Russia's actions. Investment treaties have been utilised on over one thousand occasions to reclaim losses from states.

My colleagues and I, prior to the crisis in Ukraine arising, implemented claims against Russia under its investment treaties to recover losses flowing from the expropriation by it of foreign owned assets.

Russia has entered into over sixty investment treaties that are in force with other states. Investment treaties are agreements between states, governed by public international law, under which the state into which the business investment has been made (the host state) promises to accord the investors

of the other state certain basic protections. The common protections promised by host states in their investment treaties are to:

- take reasonable action to ensure the investor's assets are not physically damaged
- allow the free transfer by investors of their funds out of the host state
- treat the investor fairly and equitably
- provide fair market value compensation to investors in the event of expropriating their assets.

Investment treaties also invariably have a provision dealing with circumstances of war. However, such a provision does not replace or undermine the other protections.

If any of the provisions of the treaty are breached, the host state must pay damages to put the investor in the position it would have been in if the treaty had not been breached. In the event of an investment dispute with the host state, the investor has the right to submit the dispute to binding international arbitration. Investors have a right of subrogation.

The awards arising from those arbitrations are enforceable in more countries than judgments of domestic courts. Russia is a party to the international treaties that make that so.

Some of the large economies (for example, the United States) do not have an investment treaty in force with Russia. However, a foreign company investing into Russia or Ukraine often will have done so through a subsidiary or joint venture company in a jurisdiction that does have an investment treaty with Russia. This then provides a way for an international business to recover its losses. Each situation will be different and will require an analysis of the corporate structures used to make the investment into Russia and Ukraine to determine whether a claim can be made.

In regard to the claims against Russia for a failure to protect intellectual property rights in Russia, the refusal to release aircraft, the non-repayment of bonds and the outright expropriation of assets in Russia, they are classic investment treaty claims. Russia will no doubt allege that its conduct is a legitimate countermeasure to wrongful measures by other states that have been directed at it and/or a security exception should be read into its treaties so as to excuse Russia's conduct. Investors will have many answers to such arguments, including that they are not states who can be held responsible for such measures, and in any event, no such measures and exceptions can be invoked by Russia in circumstances where it has breached international law.

In so far as there are claims by investors concerning the damage to businesses in Ukraine by Russia, one legal issue to be navigated is whether damage done by Russia's military in Ukraine can be considered to be done in the "territory of the Russian Federation" and therefore engage Russia's investment treaties even though Russia has not won the military conflict in Ukraine and in circumstances where the vast majority of the international community will never accept that Ukraine is anything other than Ukrainian sovereign territory.

To be very clear, a consideration of the applicability of Russian investment treaties to measures that Russia takes against foreign owned business in Ukraine in no way assumes that Russia will win any military conflict in Ukraine. Although it is not without its differences, in this context it is

interesting to consider what happened in response to Russia invading and annexing Crimea in 2014: according to data available from UNCTAD, as at December 2020, eight claims had been brought against Russia by a mix of foreign and Ukrainian investors of which four have been successful and four remained pending. However, it is very likely that there were far more than eight claims as arbitrations are often confidential. One could hazard a guess that because Ukraine is far larger than Crimea, and the destruction we are seeing in Ukraine is far greater than in Crimea, there will be more claims against Russia.

In regard to all of the loss causing events mentioned, businesses should ensure that they keep a record of any damage that is done to their operations in Russia and Ukraine, check their insurance coverage, notify their insurers, and secure documents concerning their interests in those countries in order that they can be used in proceedings to recover their losses. This may require removing documents and records from Russia and Ukraine or at least ensuring that copies are accessible in a place outside of those jurisdictions; no easy task in the current environment.

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