

Client Alert

Russia and Ukraine: The Next Wave of International Disputes

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With the geopolitical and economic crisis in Russia and Ukraine growing rapidly from recent events, international commercial operations in the region will be severely impacted in some manner, and many such impacts will result in disputes. The events surrounding the peso crisis in Argentina in early 2000s, as well as those in Venezuela from the actions of Hugo Chavez, and others arising out of the Arab spring, all resulted in dozens of international disputes. We may see the same from current events, and there will be dispute options available to numerous companies with operations in either country who are experiencing severe disruptions of operations, loss of profit, or destruction of property, including, potentially: investor-State arbitration, domestic litigation, or claims tribunal recovery.

From an immediate and practical perspective, as the situation is developing, companies should begin compiling and preserving all materials relating to communications with Russian government officials, documents relating to the ownership and corporate structure of their foreign investment, to operations and profitability, and to insurance carriers and other coverage. Companies should also compile and preserve inventories of all assets currently in Russian and/or Ukrainian territories, and record and preserve contemporaneous notes of all developments. To the extent possible, such information should be stored in or at least accessible from a location outside of the territories of Russia and Ukraine.

Perhaps most importantly, because Russia has over 60 operating treaties that provide foreign investors with certain protections, Investor-State dispute settlement (ISDS) mechanisms may be available for parties eligible to bring claims under those treaties. Specifically, the treaties provide a process to seek compensation for expropriation and nationalization, such as may occur if the proposed legislation currently before the Russian Parliament is approved and implemented.

Impacted parties may also consider pursuing recovery of their commercial damages through other avenues, including domestic litigation in the United States or elsewhere, international commercial arbitration, and potential future mass claims tribunals. Each avenue of recovery will present unique challenges. And if none of these options offer a viable avenue for recovery against Russia or Russian entities, impacted parties should consider if their agreements or applicable treaties allow for actions against third parties.

Investor-State Arbitration

Foreign investors in Russia may consider pursuing investor-State arbitration if (a) the investor is a national of a State that is a party to an in force international investment agreement (IIA) with Russia, such as defined by a bilateral investment treaty (BIT), a free-trade agreement (FTA), or other similar instrument; or (b) the investor is

itself a signatory to a contract or some form of investment agreement with Russia, its municipalities, and/or agencies or instrumentalities that includes an international dispute resolution clause.

There are currently more than 60 in-force investment treaties to which Russia is a signatory, and they all provide for procedures to seek compensation arising from direct and indirect expropriation. The signatories to these treaties include all of the major members of the European Union, Canada, Japan, and others. Although there is not currently an in-force BIT or other investment agreement between the United States and Russia, American investors may consider whether their investment structure would permit bringing an investor-State claim through an affiliate or subsidiary under the auspices of another BIT or IIA, such as those to which the United Kingdom, Italy, Germany, France, or the Netherlands are a signatory.

Such treaties may also include protections against arbitrary and discriminatory treatment, assurances for monetary transfers, and obligations of general compensation for losses caused by war and armed conflict on a most-favored nation basis. For example, Article 4 of the UK-Russia BIT provides that:

Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to any armed conflict, a state of national emergency or civil disturbances in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favorable than that which the latter Contracting Party accords to investors of any third State. Resulting payments shall be made without delay and be freely transferable.

Parties should carefully review the relevant IIA for a full understanding of what claims may be brought and what damages they may be entitled to. In the event that a party is a signatory to an investment contract with the State, its municipalities, and/or the agencies or instrumentalities of the State or municipality, the party should also carefully review their contract to determine what dispute resolution mechanism, if any, is identified, and what claims may be available outside or beyond the scope of the IIA, to the extent that any are applicable.

A State party to an IIA may also consider directly engaging in State-to-State investment arbitration against Russia on behalf of its investors, likely depending on the breadth of claims and the investors impacted in that particular State.

Litigation

Depending again on the individual circumstances and factors present, parties may consider initiating litigation proceedings under the relevant and applicable domestic law. Companies should pay particular attention to questions of jurisdiction and which parties it can or should bring claims against. Companies should also review their underlying contracts and the applicable domestic law to address these questions. In the United States, for example, the Foreign Sovereign Immunities Act (FSIA) provides broad jurisdictional immunity for sovereigns, subject to a few key exceptions that may be applicable in a given context.

Claims Tribunal

Although most mass claims tribunals and commissions that are organized following acts of war, invasion, and occupation are largely designed to address the critical issues pertaining to humanitarian needs, such tribunals have also been used to compensate individuals and businesses whose commercial activities were disrupted as a direct result of war. One of the best-known examples of a claims tribunal is the Iran-U.S. Claims Tribunal which arose after the 1979 Iranian Revolution and the widespread expropriation of U.S. investments. Approximately 4,700 private U.S. claims were filed against the Government of Iran at the Tribunal, resulting in more than \$2.5 billion in awards to U.S. nationals and companies.

Such tribunals and commissions have been created in a myriad of ways, including through United Nations resolutions and domestic legislation. However, the creation of a commercial claims tribunal in this instance is likely to face significant obstacles. For example, the U.N. Security Council has been previously responsible for passing the resolution which created the United Nations Compensation Commission (UNCC), which was designed to compensate individuals and businesses for claims arising out of the 1990 Iraqi invasion and occupation of Kuwait. Russia's position on the U.N. Security Council makes a similar process unlikely, as Russia could be expected to veto any attempt. Similarly, the international community justifiably has little optimism that Russia would pass domestic legislation creating a commission itself.

Realistically, the only way that parties could expect a tribunal to address these claims would be if the affected States included some framework as a condition in any future diplomatic resolution with Russia. Alternatively, States could establish their own claims' tribunals (independently or in collaboration with the broader international community) to compensate their investors and pursue their own recovery, independently, in any actions they take against Russia. Parties should not rely exclusively on this avenue, however, as all control and determination will be subject to individual governments, and recovery—if any—is likely to be relatively far off.

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