

POSSIBLE CLAIMS AGAINST RUSSIA FOR EXPROPRIATION OF FOREIGN INVESTMENTS

On 8 April 2022, a draft law was introduced in the Russian Duma (Parliament) which would allow Russia to expropriate property of foreign nationals from “unfriendly” countries – those that have imposed sanctions on Russian entities and individuals.¹ This news came on the heels of a draft bill introduced the previous day which would impose criminal punishment for the implementation of anti-Russian sanctions in Russia,² as well as a number of other measures taken in recent weeks to retaliate against foreign companies.

This note addresses the legal recourse that foreign investors in Russia that are affected by measures harming their investment – including those tantamount to an expropriation – may have.

1 RUSSIAN RETALIATION AGAINST FOREIGN INVESTORS

In response to the sanctions imposed by the US, EU, UK, Switzerland and other States against Russia following its illegal invasion of Ukraine, Russia has enacted or is contemplating measures that will affect many foreign investments in Russia.

Hundreds of companies – including many in the consumer services, energy, and construction sectors – have decided to leave Russia or suspend or reduce their activities there, for legal/compliance, moral and/or reputational reasons. They are now potentially the target of retaliatory legislation which could harm, and potentially result in expropriation of, their remaining assets in Russia (including real estate, participations in local companies, IP rights, etc.).

On 7 March 2022, the Russian government approved an expanded list of countries and territories considered hostile or “unfriendly”, namely the US

¹ See “A bill on the nationalization of property of citizens of unfriendly countries was submitted to the Duma”, TASS, 8 April 2022, https://tass.ru/ekonomika/14326743?utm_source=google.com&utm_medium=organic&utm_campaign=google.com&utm_referrer=google.com. The draft bill itself can be found (in Russian) here: <https://sozd.duma.gov.ru/bill/103072-8>.

² See “A draft law on criminal punishment for the implementation of sanctions in Russia was submitted to the Duma”, TASS, 7 April 2022, <https://tass.ru/obschestvo/14306663>.

and Canada, most European countries – i.e., the 27 member States of the EU, plus Albania, Andorra, Iceland, Liechtenstein, Monaco, Montenegro, Norway, San Marino, Switzerland and the United Kingdom (including Jersey, Anguilla, the British Virgin Islands and Gibraltar) – as well as Australia, Japan, Micronesia, New Zealand, Singapore, South Korea and Taiwan.³

Shortly afterward, it was announced that Russia is preparing a law that would effectively permit it to nationalize certain foreign companies that have either left Russia or taken actions to terminate their business there.⁴ This proposed law “on external administration for the management of a company” would apply to companies with (1) over 25% shareholding (directly or indirectly) “connected” to “unfriendly” States (including place of registration and place of primary economic activity); and (2) a book value of over one billion rubles (around USD 12 million as of early April 2022) and/or over 100 employees. If passed, this law could have retroactive effect from 24 February 2022.

The draft bill on expropriation submitted to the Duma on 8 April 2022 is even more drastic. The target of the bill is reported to be Ukrainian oligarchs’ property in Crimea – but the scope of the draft text is much wider.⁵ As currently drafted, the bill would allow Russian State authorities to seize a broad range of assets of “unfriendly” foreign States and foreign persons (including companies) connected with “unfriendly” States. The draft expressly states that seizure is to be carried out without compensation and that the right of ownership would be terminated.

Russia has also issued several decrees placing restrictions on financial transactions, particularly with respect to “unfriendly” States and foreign

³ See “Russian government approves list of unfriendly countries and territories”, TASS, 7 March 2022, https://tass.com/politics/1418197?utm_source=google.com&utm_medium=organic&utm_campaign=google.com&utm_referrer=google.com.

⁴ See, e.g., “Government commission approved a project to nationalize the property of Western companies that left the Russian Federation”, TASS, 9 March 2022, <https://tass.ru/ekonomika/14012987>.

⁵ A bill on the nationalization of property of citizens of unfriendly countries was submitted to the Duma”, TASS, 8 April 2022, https://tass.ru/ekonomika/14326743?utm_source=google.com&utm_medium=organic&utm_campaign=google.com&utm_referrer=google.com.

currencies.⁶ These could impact foreign investors who wish to repatriate assets located in Russia.

Other measures are targeting actors in specific sectors. In the **aviation industry**, where foreign lessors own more than half of Russia's commercial aircraft fleet, Russia has adopted laws allowing Russian airlines to continue using foreign planes and is considering legislation allowing airlines to keep the leased aircraft upon the termination of leasing agreements with entities from "unfriendly" States, as well as a decree that would subject the decision to return aircraft to lessors to governmental approval and allow for payment in rubles.⁷ In the **media space**, the Russian government has blocked or restricted access to certain social networks, digital platforms and tech software companies providing private communication channels,⁸ and a Moscow court has even declared US company Meta Platforms, the parent company of Facebook and Instagram, to be an extremist organization.⁹ Such measures could diminish or destroy the value of these companies' assets in Russia.

Additionally, in a significant move concerning **intellectual property**, on 6 March 2022 the government adopted Decree No. 299, providing that patentholders registered in "unfriendly" countries may no longer be protected in Russia since it would allow the use of patents without first needing to obtain the patentholder's consent and without having to pay

⁶ See, e.g., Government Decree No. 295 of 6 March 2022 "On Approval of the Rules for Issuing Permits by the Government Commission for Control over Foreign Investments in the Russian Federation for Residents to Conduct (Execute) Transactions (Operations) with Foreign Persons in order to Implement Additional Temporary Economic Measures to Ensure financial stability of the Russian Federation and amendments to the Regulations on the Government Commission for the Control of Foreign Investments in the Russian Federation", <http://publication.pravo.gov.ru/Document/View/0001202203070002>; President Decree No. 79 of 28 February 2022 "About application of special economic measures in connection with unfriendly actions of the United States of America and the foreign states and the international organizations which adjoined them" <https://cis-legislation.com/document.fwx?rgn=138018>.

⁷ See, e.g., Federal Law No. 56-FZ on Amendments to the Air Code of the Russian Federation and certain legislative acts of the Russian Federation, dated 11 March 2022.

⁸ See "Roskomnadzor will restrict access to Instagram due to calls for violence against Russians" 11 March 2022, <https://rkn.gov.ru/news/rsoc/news74176.htm>; "Response measures taken to restrict access to Russian media", 4 March 2022, <https://rkn.gov.ru/news/rsoc/news74156.htm>; "Roskomnadzor informs about the adoption of measures in relation to the Internet application Zello", 6 March 2022, <https://rkn.gov.ru/news/rsoc/news74160.htm>.

⁹ See "Russia vs Meta. Court to recognize the owner of Facebook and Instagram as an extremist organization", Mediazona, 21 March 2022, <https://zona.media/online/2022/03/21/metaonline>.

compensation.¹⁰ In addition, the Ministry of Economic Development is reportedly also considering removing restrictions on IP in goods whose supply is restricted in Russia; this could affect inventions, computer programs and trademarks.¹¹

2 RECOURSE FOR FOREIGN INVESTORS

2.1 Russia's international investment agreements

Foreign investors who suffer the loss or impairment of their investments in Russia due to Russian state actions may be able to seek relief through arbitration under an international investment agreement (“IIA”), typically a bilateral investment treaty (“BIT”) or a multilateral treaty.

Russia has concluded BITs with countries around the world. It has 62 BITs currently in force,¹² including 27 BITs with the so-called “unfriendly” States.¹³ Close to 200 companies which have suspended part of their activity in Russia are based in a country that has a BIT with Russia.¹⁴ Foreign investors may also enjoy treaty protection if they have subsidiaries in countries with BITs with Russia.

Energy companies may also consider their options under the Energy Charter Treaty (“ECT”), to which there are 53 signatories and contracting parties, including 35 of the “unfriendly” States.¹⁵ The applicability of the

¹⁰ See <http://publication.pravo.gov.ru/Document/View/0001202203070005>.

¹¹ See Hannah Knowles and Zina Pozen, “Russia says its businesses can steal patents from anyone in ‘unfriendly’ countries”, *The Washington Post*, 9 March 2022, <https://www.washingtonpost.com/business/2022/03/09/russia-allows-patent-theft/>.

¹² See UNCTAD, Investment Policy Hub, <https://investmentpolicy.unctad.org/international-investment-agreements/countries/175/russian-federation>.

¹³ Russia has BITs with the following “unfriendly” States: Albania; Austria; Belgium; Bulgaria; Canada; the Czech Republic; Denmark; Finland; France; Germany; Greece; Hungary; Italy; Japan; Lithuania; Luxembourg; the Netherlands; North Macedonia; Norway; Romania; Singapore; Slovakia; South Korea; Spain; Switzerland; Ukraine; and the United Kingdom.

¹⁴ See Yale CELI List of Companies, <https://som.yale.edu/story/2022/over-600-companies-have-withdrawn-russia-some-remain>.

¹⁵ Albania; Austria; Belgium; Bulgaria; Croatia; Cyprus; the Czech Republic; Denmark; Estonia; Finland; France; Germany; Greece; Hungary; Iceland; Ireland; Japan; Latvia; Liechtenstein; Lithuania; Luxembourg; Malta; Montenegro; the Netherlands; North Macedonia; Norway; Poland; Portugal; Romania; Slovakia; Slovenia; Spain; Switzerland; Ukraine; and the United Kingdom.

ECT to Russia is somewhat controversial, as Russia signed the ECT in 1994 but did not ratify it; however, the ECT applied provisionally pursuant to its Article 45. In 2009, Russia notified its intention of not becoming a Contracting Party to the treaty, triggering a 20-year sunset clause. Russia denies having consented to arbitration under the ECT, but, famously in the Yukos cases, an arbitral tribunal (as well as the Dutch Supreme Court) dismissed Russia's objection on this point.¹⁶

2.2 Protection of Investments in Russia

Russia's BITs protect qualifying investors/investments against State acts such as expropriation and unfair or discriminatory treatment, including by imposing the obligation to provide fair and equitable treatment. Another frequent provision is the protection of repatriation of investments and returns (i.e., the transfer of funds) from Russia to the investor's state (see, e.g., Article 6 of the Russia-UK BIT). Some BITs, like the Russia-Ukraine BIT, also provide for "complete and unconditional legal protection".¹⁷ In case of violation, the State is obliged to "wipe out all the consequences of the illegal act", which most often will be done by paying fair compensation to "reestablish the situation which would, in all probability, have existed if that act had not been committed".¹⁸

Thus, for instance, a foreign company whose assets in Russia are nationalized under the contemplated "external administration" law might have (among other potential causes of action) a claim for compensation for expropriation. Meanwhile, a foreign investor who was prevented from repatriating assets under the new measures prohibiting transfer by Russian residents of foreign currency to foreign bank accounts might have a claim under a transfer of funds provision.

¹⁶ See *Yukos Universal Limited (Isle of Man) v. Russia*, PCA Case No. 2005-04/AA227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, paras. 106-174 (setting out Russia's position) and paras. 289-294 (Tribunal's decision); Stan Putter, "What the Dutch Supreme Court decided in the Yukos case", *Global Arbitration Review*, 17 December 2021, <https://globalarbitrationreview.com/what-the-dutch-supreme-court-decided-in-the-yukos-case>.

¹⁷ Russia-Ukraine BIT, Art. 2(2). See also, e.g., the BITs entered into with Slovakia, Romania, and the Czech Republic.

2.3 Arbitration procedure

BITs typically provide that investors may submit their grievances to an international arbitral tribunal. Aggrieved investors must typically first notify Russia of their claim, and this notification marks the start of a “cooling off” period of three to six months, following which a request for arbitration can be filed. The parties then have the opportunity to appoint a three-member tribunal; importantly, even if Russia declined to participate, the tribunal could nevertheless be constituted (with the support of a court or arbitral institution) such that the proceeding could go forward.

2.4 Enforcement of arbitral awards

Any arbitral award secured against the Russian State (or State-owned entities) would be binding and enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which Russia ratified on 24 August 1960. Although, by virtue of the principle of sovereign immunity, many State assets cannot be seized to execute an award, there are many exceptions to this principle; in Switzerland, for instance, assets may be attached if they are used for commercial purposes and the underlying transaction out of which the claim against the Russian State (or State-owned entities) arises has a sufficient connection to Switzerland. Additionally, there is a secondary market for arbitral awards, and a successful claimant may be able to sell its interest in an award to a funder or other entity which will then take on the enforcement effort.

2.5 Conclusion

International arbitration may offer a path forward for foreign investors that suffer losses at the hand of the Russian State and wish to claim compensation.

For further questions or comments about this topic, please contact:



Matthias Scherer
Partner
mscherer@lalive.law



Joachim Knoll
Partner
jknoll@lalive.law



Lorraine de Germiny
Partner
ldegerminy@lalive.law



Emilie McConaughy
Associate
emcconaughey@lalive.law