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# 2022 in Review: Investment Arbitration Amidst War in Ukraine

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2022 was undoubtedly the most challenging year in the history of independent Ukraine. The international implications of Russia's war against Ukraine, including economic sanctions and global energy and food crises, have been felt even in the most remote corners of the globe. Unsurprisingly, the war also stalled the majority of investment arbitrations involving Ukraine, affecting the forecasts made in a blog post in 2021. This post will examine the progress made in investment arbitration cases and related proceedings involving Ukraine in 2022 and assess the prospects of new cases. As discussed below, all pending or contemplated cases were either impacted by Russia's war against Ukraine or relate to it.

**Pending Cases Against Ukraine**

Based on the information available in the public domain it appears that most if not all pending cases against Ukraine have been suspended as a result of the war. Notably, four out of nine cases pending before arbitral tribunals as of the end of 2021 were brought by Russian investors. The impact of sanctions on those arbitrations, including the possibility of enforcement of any awards against Ukraine, is yet to be tested in the field of investor-state dispute settlement (ISDS). (see here, here and here)

**New Cases Against Ukraine**

In early 2022, a Cypriot Ostchem Holdings Limited (Ostchem), a company associated with Ukrainian oligarch, Mr Dmytro Firtash, brought arbitral proceedings against Ukraine under the Energy Charter Treaty (ECT).

The proceedings are fuelled by the Supreme Court's decisions dated 8 June and 25 November 2021, denying enforcement of two SCC awards obtained by Ostchem against Odesa Port Plant (OPP) – one of the most powerful chemical enterprises in Ukraine (proceedings No 824/241/2018 and 824/183/19). Considering OPP's status as a strategic state enterprise and the potential consequences in case of recovery of funds – i.e., potential environmental damage and bankruptcy – the Supreme Court held that the enforcement of the awards would be contrary to Ukraine's public policy. In doing so, it also considered Ostchem's indebtedness to Gazprombank – a Russian bank sanctioned by Ukraine in 2015 – under unrelated contracts and the potential use of funds recovered

by OPP to settle those debts. These proceedings were later suspended by common agreement before the constitution of an arbitral tribunal.

Other than the proceedings brought by Ostchem, no new cases were initiated against Ukraine. Whilst some cases were threatened, such claims largely emanated from Russian or allegedly "Russian-related" investors over Ukraine's alleged expropriation of assets as a result of the war.

AMIC Energy, which claims to be an Austrian investor, threatened to bring an arbitration against Ukraine over seizure of its assets, which, among others, included gas stations, warehouses, land plots and corporate rights, in 2022. AMIC Energy acquired those assets from Lukoil Ukraine, which belonged to the Russian Lukoil Group, in 2015. Ukrainian authorities contend that AMIC Energy's beneficial owners are allegedly Russian citizens.

Likewise, two Russian banks, including Vnesheconombank (VEB), have announced that they will initiate proceedings against Ukraine over the seizure of their property following the start of the war. VEB has already initiated the first set of arbitration proceedings alleging breach of expropriation standards by Ukraine. Those proceedings have been pending before the SCC since 2019 and have passed the jurisdictional phase. It remains to be seen whether VEB will seek to expand its case by adding new claims or initiate the second set of proceedings arising from 2022 measures taken by Ukraine.

**Other Cases Involving Ukraine**

While 2022 was a slow year for pending cases against Ukraine, it was a rather robust year for cases involving Ukraine as a home state of claimants. For instance, applications to set aside the arbitral awards in three cases (*Aeroport Belbek and Kolomoisky v. Russian Federation*, *Everest and others v. Russian Federation*, *Privatbank and Finilon v. Russian Federation*) were dismissed by the Hague Court of Appeal, thereby joining the ranks of *Stabil and others v. Russian Federation* and *Ukrnafta v. Russian Federation*, in which awards on jurisdiction were upheld by the Swiss Federal Supreme Court in 2018.

The courts agreed with Ukrainian investors that no finding on the sovereignty of Crimea and the validity of its incorporation to Russia was required to establish jurisdiction. On territory, it was sufficient that Russia had a "settled, long-term control" of Crimea, making it responsible for the international relations of Crimea. The courts also held that given that neither Ukraine nor Russia had taken steps to terminate the 1998 Russia-Ukraine BIT (BIT), their intentions were still to encourage and mutually protect investments made in each other's territory. For the same reason, it was irrelevant whether the attempted annexation of Crimea could have been envisaged (or not) by the parties back in 1998. As regards the notions of "investment" and "investor" under the BIT, at this stage, it was sufficient that the investments in question were in the territory controlled by Russia at the time of infringement and that the investors were eligible – according to the laws of Ukraine – to make investments in Crimea.

One award – *Naftogaz and others v. Russian Federation* – was set aside by the Hague Court of Appeal. The latter sought to clarify the tribunal's findings on temporal jurisdiction, in particular, whether the tribunal had jurisdiction to adjudicate investments made before 1 January 1992 contrary to Article 12 of the BIT. Article 12 of the BIT provides that it *"shall apply to all investments made by the investors of one Contracting Party in the territory of the other*

*Contracting Party as of 1 January 1992."* Such approach echoes the decision of the French Court of Appeal in *Russian Federation v Oschadbank case*, which was later revoked by the French Supreme Court in 2022 on the basis that Article 12 of the BIT pertains to the merits of the dispute, rather than jurisdiction. Time will tell whether the Dutch courts will side with the French Supreme Court on this issue.

As of now, there are ten known cases pursued by various Ukrainian entities over the expropriation of assets following attempted annexation of Crimea by Russia in 2014. To date, Ukrainian entities have been awarded US$ 1.3 billion against Russia, excluding interest. Some entities, such as Stabil, have already moved to enforce their awards. Although little is known about the enforcement proceedings, in view of efforts taken by Russia to contest the awards, it is likely that the battle for recovery of the awarded amounts will be fierce.

**What's Next?**

Several Ukrainian individuals and companies have threatened to bring investment claims against Russia to seek compensation for damages suffered in regions other than Crimea. In light of developing case law – including, for example, the recent judgments of the District Court of The Hague and the European Court of Human Rights confirming that Russia has had overall control over the self-proclaimed Donetsk People's Republic (DPR) and Luhansk People's Republic (LPR) since mid-May 2014 and the findings in *Stabil and others v. Russian Federation* attributing paramilitary actions to Russia – the prospect of such disputes is becoming less uncertain.

Russia's recent initiative to terminate the BITs may further accelerate the process. In the end of 2022, a bill No. 255995-8 was introduced in the Russian Parliament concerning termination of the BITs with so-called "unfriendly states". In addition to the states that introduced sanctions against Russia, such list also includes Ukraine. Like other BITs, the Russia-Ukraine BIT contains a sunset clause extending its application for ten years upon the termination of the treaty. Considering the tribunals' findings in the Crimean cases, the impact of Russia's termination of the BIT, if implemented, on the prospect of new cases will need to be considered.

It is, thus, likely that in addition to new Crimean cases, 2023 will see the filing of claims involving different regions of Ukraine, i.e., DPR and LPR, over which Russia has arguably exercised long-term control from as early as 2014 and which Russia purportedly annexed on 30 September 2022. However, the prospect of those claims will depend on a number of factors, including, but not limited to, establishing a *de facto* control over those territories at the moment of infringement, attribution, correlation between investment protection and humanitarian law and most importantly recoverability of damages.

With regards to other cases that were put on hold due to the war, the tribunals will face a challenge in balancing Ukraine's right to present its case with the opposing side's right to a fair legal solution. These issues will inevitably arise should tribunals decide to resume pending proceedings and will reoccur throughout the life of these arbitrations. The same is true in relation to economic sanctions: how deeply they will cut across the international arbitration process is unknown and will depend on their continuously expanding scope. However, their impact will be felt at all stages of arbitration up to the recognition and enforcement of the award.

On the other hand, in the case of Russian investments, the dilemma might be easier to resolve as

the war between Russia and Ukraine is the cause of any impact on the rights of Russian investors. However, this may not be the case for investments from third countries.

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