ET.2022.216

International arbitration in the context of Danish investor protection in Russia

◆ *Russian authorities have taken and announced a series of economic measures in response to Western condemnation of Russia's invasion of Ukraine. The article analyses the legal basis for Danish investors in Russia to seek compensation through international arbitration for losses suffered from breach of the Investment Treaty between Denmark and Russia, which requires Russia to create favourable conditions for Danish investors and to provide full protection and security to Danish investments in Russian territory.*

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1. Introduction

On 24 February 2022, Russia invaded its neighbouring country Ukraine. The Russian invasion has been strongly condemned by the international community, and several countries have imposed tough economic sanctions against Russia and Belarus. The EU has adopted a number of regulations, including a ban on exports of various products and technology to Russia, as well as extensive financial restrictions, entry restrictions and requirements for freezing of the funds, assets and other financial resources of certain natural and legal persons.

In response to the international sanctions, Russia has launched and announced a series of intrusive countermeasures against investments by so-called "*unfriendly states*", including the 27 EU Member States, among these Denmark. Among the measures is a bill proposed by the ruling Russian party, United Russia, that could potentially be used by the government to nationalise assets owned by foreign investors.[1] Moreover, Russia has adopted a decree ordering Western gas customers to pay in roubles[2], prohibiting Western investors from selling assets in certain industries, and making such sale subject to permission[3].

These measures have led or may lead to significant losses for foreign companies, including as a result of forced nationalisation and expropriation of investments or misappropriation of intellectual property rights, etc. That includes both companies that have decided to continue operations in Russia and companies that have exited (or are in the process of exiting) the Russian market but still have assets in Russian territory or contracts with Russian business partners. Danish investors with activities in Russia should therefore consider their possible response to the Russian measures early in the process, including the possibility of claiming compensation from the Russian State.

Below, we analyse relevant standards of protection in the Investment Treaty between Denmark and Russia and the practice that has developed for assessing damages and enforcing arbitral awards (paragraphs 3-4) as well as the initial lessons learned from the arbitration proceedings that were initiated against Russia following the annexation of the Crimean peninsula. Finally, we analyse and summarise the possible action that may be taken by Danish investors and their challenges in recovering losses on investments in Russia, including practical and litigation strategy considerations (paragraph 6).

2. Legal protection of Danish foreign investments

Both Russian legislation and international law contain rules on investment protection in Russia, which may, in the circumstances, be a safeguard against interference by the Russian state.

First of all, general rules and principles of international law offer a certain protection of foreign investments. However, only states and international organisations are recognised in international law as having distinct legal personality with the right to bring an action to court, whereas natural and legal persons are traditionally denied access to bring an action directly against a state.[4] An investor who has suffered a loss will therefore, as a general rule, have to seek diplomatic protection and assistance from its home state.

Also, for the host state to incur liability under international law, the investor must, as a rule, have exhausted the remedies available under the national law of the host state.[5] In reality, the protection afforded by international law is therefore limited in the context of the Russian measures against Danish investors.

In addition to the general principles of international law, Russia passed an act in July 1999 which protects foreign investments (a so-called Foreign Direct Investment or FDI Act) by giving foreign investors right to compensation for infringements and forced nationalisations.[6] According to the general rules on jurisdiction, claims brought under the FDI Act must, however, be settled by the Russian courts in accordance with Russian law. The protection available to Danish investors under the FDI Act is therefore also considered as limited.

Finally, investors enjoy certain treaty-based rights under bilateral investment treaties (so-called "BITs"). At present, Russia has entered into more than 60 BITs, which set minimum standards for the protection of investments made in Russia by companies in Contracting States. The bilateral investment treaties grant foreign investors a number of rights and remedies for effective enforcement through so-called investor-state dispute settlement ("ISDS"[7]).

On 4 November 1993, Denmark concluded an investment treaty/BIT with Russia, which requires Russia to create favourable conditions for Danish investors and to provide full protection and security to Danish investments in Russian territory, including by granting Danish investments fair and equitable treatment.[8] The Investment Treaty entered into force on 25 September 1996.

1 Russia's ambassador to Denmark: Russia is forced to respond to Western sanctions. The response will be sensitive for the Western economy (politiken.dk)
2 Russia Moves Ahead With Bill on Nationalizing Assets of Foreign Companies (The Wall Street Journal)
3 Russia bans Western investors from selling banking, key energy stakes (reuters.com)
4 See, for example, Karl Strupp: Grundzüge des positiven Völkerrechts (5th ed., 1932), p. 33, and Malcolm N. Shaw: International Law (7th ed., 2014), p. 188 ff.
5 See e.g. Anders Henriksen, International Law (1st ed., 2017), p. 61-62.
6 An English translation of the Russian FDI Act is available online on WIPO's website: https://wipolex.wipo.int/en/text/188843
7 Investor-state dispute settlement.
8 The Danish version of the Investment Agreement is available online on UNCTAD's website: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5952/download

Under the Investment Treaty, Russia may not impair Danish investments by unreasonable or discriminatory measures, and the agreement further prohibits nationalisation, expropriation and measures having equivalent effect, unless prompt, adequate and effective compensation is offered. The Investment Treaty also includes an arbitration clause according to which Danish investors may initiate arbitration proceedings directly against the Russian state and claim compensation if Russia does not meet its obligations. However, there is no authority in the Investment Treaty for raising claims against individuals or privately owned Russian companies.

3. The Investment Treaty between Denmark and Russia

The most effective protection of Danish companies' investments in Russia is provided by the bilateral Investment Treaty between Denmark and Russia.

The "*investments*" that are protected under the Treaty are specified in Article 1(2) as "*every kind of asset invested by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with its laws and regulations*". The Treaty covers economic assets in the broad sense, including movable property (operating equipment, etc.), immovable property, mortgages, shares and other equity interests, intellectual property rights, claims for money, and other contractual claims.

The Investment Treaty contains a number of substantive orders and prohibitions relating to the treatment of foreign investors and their investments. The most significant of these are discussed below.[9]

In addition, the Investment Treaty gives investors the opportunity to commence arbitration proceedings against Russia for settlement either by an ad hoc arbitral tribunal under the Rules of the United Nations Commission on International Trade Law (UNCITRAL) or by the Institute of Arbitration of the Chamber of Commerce in Stockholm (SCC).

Thus, the arbitration clause in the Investment Treaty offers a significant advantage to Danish investors, who do not need to initiate proceedings before the Russian courts with the associated political risks of e.g. arbitrary and unpredictable government behaviour, biased judges, and State immunity rules.

3.1 Requirement for "*full protection and security*" to Danish investments in Russia

Article 2(2) of the Investment Treaty provides that investments by Danish investors "*shall enjoy full protection and security*" in the Russian territory, as Russia may not "*in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory*". This is an absolute standard that applies regardless of the treatment accorded to investments made by Russian or third country investors.

The obligation of the host state to offer "*full protection and security*" implies a requirement for protection against physical injury and destruction, whether caused by the host state itself (officials, police or military etc., particularly in the context of an armed conflict) or by others, if it can be shown that the host state has not made reasonable efforts to secure the investment.[10] In a number of cases, the "*full protection and security*" standard has been interpreted non-restrictively by arbitral tribunals to also include other forms of protection, including "*commercial protection*" and/or "*legal protection*", in particular access to effective enforcement of the investor's rights.[11]

The "*full protection and security*" provision is not a guarantee against loss, but it imposes an obligation on the host state to ensure adequate protection and prevention measures or - where the harm has been done - to arrange for effective investigation and prosecution of the perpetrators. There seems to be consensus in legal theory that it is not a strict liability standard but rather a *due diligence* obligation or a so-called "*obligation of vigilance and care*"[12], in particular where the harm is not (directly) caused by the host state or its representatives.

3.2 Requirement for "*fair and equitable treatment*" of Danish investors

In parallel with the general standard of "*full protection and security*", Article 3(1) of the Investment Treaty provides that "*[e]ach Contracting Party shall accord investments made by investors of the other Contracting Party in its territory fair and equitable treatment no less favourable than that which it accords to investments of its own investors or to investments of investors of any third state, whichever treatment is more favourable"*.

And according to Article 3(2) the same applies to "*the management, maintenance, use, enjoyment or disposal*" of the relevant foreign investments.

The provisions imply a requirement for substantive protection of foreign investments, notably against political risks, i.e. the risk of losses as a result of political or administrative measures taken by the host state which may have an adverse effect on the investor's ownership of or return on the investment. The obligation to offer "*fair and equitable treatment*" ("FET") is on both the administrative bodies and regional and local authorities of the host state as well as on the national courts.

The standards of protection afforded under Article 3 of the Investment Treaty contain both an absolute element ("*fair and equitable treatment*") and a relative element, according to which the treatment of Danish investments must be compared with that given to national and third country investments.

The requirement for "*fair and equitable treatment*" is the standard invoked most frequently in ISDS cases and has formed the basis for compensation to investors in a number of arbitral awards.

It is a legal standard which is in practice set by the arbitral tribunal but, based on prevalent case law, the standard seems to go beyond the general minimum standard in international law, protecting also the investor's legitimate expectations.[13]

9 See also Associate Professor, PhD Lone Wandahl Moyal, "Protection of Danish companies' investments in Russia in the light of the war in Ukraine", Juristen, no. 3, 2022.

10 See e.g. Wena Hotels Limited v. Arab Republic of Egypt, ICSID case no. ARB/98/4, award of 8 December 2000, paragraph 84, with reference to American Manufacturing and Trading, Inc. v. Republic of Zaire, ICSID case no.. ARB/93/I, award of 21 February 1997.

11 See e.g. A.M.F. Aircraftleasing Meier & Fischer GmbH & Co. KG v. Czech Republic, PCA matter no. 2017-15, award of 11 May 2020, paragraph 661, and Azurix Corp. v. Argentine Republic (I), ICSID case no. ARB/01/12, award of 14 July 2006, paragraph 408.

12 Ulysseas, Inc. v. the Republic of Ecuador, PCA matter no. 2009-19, Order of 12 June 2012, paragraph 272.

13 See e.g. RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à.r.l. v. Kingdom of Spain, ICSID case no. ARB/13/30, and Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID case no. ARB(AF)/11/2.

By way of example, the tribunal expressly referred to *"legitimate expectations"* applying the "Fair and Equitable Treatment" standard ("FET")[14] in its award of 4 April 2016 in the case Crystallex v. Venezuela:

"[...] *the Tribunal is of the view that FET comprises, inter alia, protection of legitimate expectations, protection against arbitrary and discriminatory treatment, transparency and consistency. The Tribunal believes that the state's conduct need not be outrageous or amount to bad faith to breach the fair and equitable treatment standard. The Tribunal shares the observation made by the tribunal in Mondev, whereby "[t]o the modern eye, what is unfair or inequitable need not equate with the outrageous or the egregious. In particular, a state may treat foreign investment unfairly and inequitably without necessarily acting in bad faith*."

ICSID practice further suggests that the standard can be extended to also include an obligation for the host state to maintain a stable business environment consistent with the investor's legitimate expectations[15] or even a stable and predictable "*legal framework*". As for the latter, reference may be made to the tribunal's award of 1 November 2021 in the case Pawlowski v. Czech Republic, in which the tribunal took into account *"whether the State has failed to offer a stable and predictable legal framework, in breach of the investor's legitimate expectations"*[16].

3.3 Requirement for equal treatment of Danish investors with investors from Russia or third countries

The rule that foreign investments may "*in no case*" be treated less favourably than "*investments by the [host state's] own investors or investments by investors of any third state*" provides an important additional safeguard, as it prevents the host state from favouring domestic investors at the expense of foreign investors and from discriminating among foreign investors from different countries.

The national treatment and most-favoured-nations clause in the Danish-Russian Investment Treaty is worded in broad terms with very few limitations and deviations. The exceptions are set out (exhaustively) in Article 3(3), according to which the host state may only "*have in its legislation limited exceptions from national treatment*" as "*[a]ny new exception*" will apply only to investments made after the entry into force of such exception and in Article 3(4), according to which the most-favoured-nations clause will not apply to the host state's participation in free trade area, customs or economic union, or similar multilateral agreements or to the agreements relating to the economic cooperation of the Russian Federation and the states that constituted the former Soviet Union.

A claim made by an investor with reference to the national treatment and most-favoured-nations rules must be based on a comparison between the treatment of the specific investment against the treatment of other comparable investments by national or third country investors. Thus, for the host state to be held liable, unjustified discrimination must have taken place.

3.3.1 Procedural significance of the most-favoured-nations clause

The most-favoured-nations clause allows Danish investors access to rely, in certain circumstances, on favourable provisions in the bilateral investment treaties which Russia has entered into with other states and which are relevant to the assessment of the investor's claim.

It is much debated whether a most-favoured-nations clause covers only the substantive standards of protection in the host state's investment treaties, or if it also covers procedural rights under e.g. a dispute resolution clause that prescribes application of particular rules. The answer will depend on the wording of the specific provision.

RosInvest v. Russia[17] may be cited as an example of case in which an investor successfully invoked an alternative dispute resolution clause based on a most-favour-nations clause in an investment treaty with Russia. In this case, RosInvest, a UK investor, argued that it could not be treated less favourably than investors from other states, including Denmark, because of the most-favoured-nations clause in the bilateral Investment Treaty between Russia and the UK.

According to the Investment Treaty between Russia and the UK, the arbitration clause only covered the question of compensation for expropriation or "*any other matter consequential upon an act of expropriation*".[18] In contrast, the arbitration clause in Article 8 of the Danish-Russian Investment Treaty is broader, providing that "*any dispute*" between the parties "*in connection with an investment*" may be referred to arbitration. Hence, it is easier for the investor to establish jurisdiction over a potential claim under the arbitration clause in the Investment Treaty between Denmark and Russia.

The UK investor relied on the arbitration clause in the Danish-Russian Investment Treaty to commence arbitration proceedings at the Institute of Arbitration of the Chamber of Commerce in Stockholm on a matter that was outside the scope of the narrow jurisdiction clause in the Investment Treaty between Russia and the UK. For this purpose, the investor referred to the most-favoured-nations clause in the Investment Treaty between Russia and the UK, which is largely identical to the corresponding clause in the Danish-Russian Investment Treaty:

"*(1) Neither Contracting Party shall in its territory subject investments or returns of investors of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of investors of any third State.*

(2) Neither Contracting Party shall in its territory subject investors of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to investors of any third State."

The UK investor succeeded in its claim and was thus allowed to commence arbitration proceedings based (indirectly) on the Danish arbitration clause.

14 Crystallex International Corporation v. Bolivarian Republic of Venezuela, ICSID case no. ARB(AF)/11/2, award of 4 April 2016, paragraphs 543-544.

15 See e.g. Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID case no. ARB(AF)/00/2, and LG&E Energy Corp., LG&E Capital Corp. and LG&E International, Inc. v. Argentina, ICSID case no. ARB/02/1.

16 Pawlowski AG and Project Sever s.r.o. v. Czech Republic, ICSID case no. ARB/17/11, award of 1 November 2021, paragraph 292.

17 RosInvestCo UK Ltd. v. the Russian Federation, SCC case no. 079/2005, award of 5 October 2007, paragraphs 135-139.

18 Russian Federation – United Kingdom BIT (1989), Article 8(1).

ICSID practice further shows a tendency towards an extensive interpretation of most-favoured nations clauses to also include procedural matters. Reference may i.a. be made to the case Le Chèque Déjeuner v. Hungary[19], in which the tribunal agreed with the investor that the investor could "import" a more favourable arbitration clause from Hungary's investment treaty with Lithuania into the bilateral investment treaty between France and Hungary.

Reference may also be made to the case White Industries v. India[20], in which White Industries, an Australian investor, successfully argued, based on a most-favoured-nations clause in the investment treaty between Australia and India, that the host state had an obligation to ensure "*effective means of asserting claims and enforcing rights with respect to investments ...*", notwithstanding that such provision did not appear in India's investment treaty with Australia but instead in India's investment treaty with Kuwait.

At that point, the Australian investor had been seeking for 8 years to enforce an award from 2002 against State-owned Indian mining company Coal India before the Indian courts, without success. In 2010, the investor commenced arbitration proceedings against India, claiming that the Indian courts' delay constituted a breach of the investment treaty, which - by virtue of the most-favoured-nations clause - required India to ensure access to effective enforcement of the investor's rights (see above). The tribunal agreed and awarded the investor AUD 4 million in compensation.

3.3.2 Possible use of the most-favoured-nations clause to derogate from "cooling off" requirement

In the case of the Investment Treaty between Denmark and Russia, the question of the scope of the most-favoured-nations clause is mainly of procedural significance for the agreed 6-month cooling-off period (see Article 8(2)). In the cooling-off period, the parties must seek to reach a negotiated settlement before commencing arbitration proceedings.

Russia's bilateral investment treaty with Japan does not provide for a cooling-off period[21]. Thus, a non-restrictive interpretation of the most-favoured-nations clause in the Danish-Russian Investment Treaty may have as a result that Danish investors - if strategically expedient (e.g. where negotiations seem unlikely to resolve the matter) - are entitled to circumvent the 6-month cooling-off period provided for in the Treaty.

This was the case in Maffezini v. Spain[22], where the tribunal allowed the investor to "replace" the arbitration clause in Spain's investment treaty with Argentina, prescribing an 18-month cooling-off period, with the corresponding clause in Spain's investment treaty with Chile, which did not provide for a cooling-off period.

3.4 Requirement for compliance with contractual obligations

According to Article 2(4) of the Investment Agreement, Russia must "*observe any obligation it may have entered into with regard to investments"* made by Danish investors (a so-called "umbrella clause").

Umbrella clauses appear in approx. 40% of all BITs[23], but with quite different wordings. The scope and effect of such provisions is a matter of debate. The most commonly held view seems to be that umbrella clauses are in fact an enforcement mechanism that "elevates" contractual breach by the host state to a treaty infringement. Accordingly, the investor will have a right to pursue the breach by commencing international arbitration proceedings according to the terms of the investment treaty.

This is illustrated by the tribunal's award of 11 December 2013 in the case Micula v. Romania[24]:

"*The purpose of the umbrella clause is to cover or "elevate" to the protection of the BIT an obligation of the state that is separate from, and additional to, the treaty obligations that it has assumed under the BIT.* […]

Thus, whether an obligation has arisen depends on the law governing that obligation, and so the interpretation of the term "obligation" for purposes of the umbrella clause would rely primarily on that law rather than on international law. In other words, to be afforded the protection of the BIT, the obligation must qualify as such under its governing law."

Based on this interpretation, the question whether there is a breach of contract must, in the first place, be assessed and determined under the governing law and venue stipulated in the contract. Only when this has been established can the dispute be referred to arbitration under the investment treaty. However, nothing prevents an investor from commencing concurrent or parallel arbitration proceedings and claim compensation for breach of the investment treaty, including for time limitation reasons.

3.5 Prohibition of nationalisation and expropriation

Article 4 of the Investment Treaty also contains a key provision on expropriation. It is stated in Article 4(1) that investments by Danish investors may not be "*nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation*" in the Russian territory, "*except for measures taken in the public interest on a basis of non-discrimination and against prompt, adequate and effective compensation".*

It is further stated that the compensation "*shall amount to the value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge*", and that the compensation "*shall be paid without delay, be freely transferable and shall include interest at the normal commercial rate established on a market basis from the date of expropriation until the date of payment".*

Thus, the Investment Treaty does not contain an absolute prohibition of expropriation, if it is justified by public interest and is non-discriminatory, i.e. proportionate and based on reasonable grounds. Instead, the investment protection is afforded through a qualification of the conditions for permissible expropriation and a requirement for "*prompt, adequate and effective compensation".*

The provision does not define the term "expropriation". In practice, however, expropriation typically means the taking by the State of ownership of assets belonging to private (natural or legal) persons for the benefit of the State itself or a third party.[25]

19 UP (formerly Le Chèque Déjeuner) and C.D. Holding Internationale v.{j}Hungary, ICSID case no. ARB/13/35, award of 3 March 2016, paragraph 216 ff.
20 White Industries Australia Limited v. the Republic of India, ad hoc arbitration, award of 30 November 2011.
21 Also, Russia's Investment Treaties with Austria, Finland, South Korea, and the UK only provide for a 3-month cooling-off period.
22 Emilio Agustín Maffezini v. the Kingdom of Spain, ICSID case no. ARB/97/7, award of 25 January 2000, paragraph 64.
23 Yannaca-Small, K. (2006), "Interpretation of the Umbrella Clause in Investment Agreements", OECD Working Papers on International Investment, 2006/03, OECD Publishing.
24 Ioan Micula, Viorel Micula and others v. Romania (I), ICSID case no. ARB/05/20.
25 See e.g. Saint-Gobain Performance Plastics Europe v. Bolivarian Republic of Venezuela, ICSID case no. ARB/12/13, award of 30 December 2016, paragraph 443.

The provision also covers "*measures having effect equivalent to nationalisation or expropriation*", which may therefore be characterised as indirect expropriation. It probably also covers so-called "creeping" expropriation, i.e. cases where a series of successive measures over time deprives the investor of the right of disposal of the investment, being de facto equivalent to nationalisation or expropriation.

The scope of the provision is therefore broader than physical seizure of assets, as it probably also covers indirect measures such as forced sale, excessive taxation, confiscation of proceeds, interference with the operation of the investment, and legislative and political changes that significantly reduce the value of the investment.

In principle, it is irrelevant for the assessment whether the expropriation is lawful under Russian national law.

3.6 Assessment of damages in investment arbitration

3.6.1 General observations

Existing case law shows that the damages awarded in ISDS cases tend to be far more generous than in Danish civil lawsuits, in particular because arbitration tribunals usually give considerable weight to the investor's legitimate expectations (as noted above).

The following is stated in Article 5 of the Investment Treaty in relation to assessment of damages for breach of the Treaty: *"Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war, other armed conflicts, a state of national emergency or other similar circumstances shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation. or other settlement, no less favourable than that which it accords to its own investors or to investors of any third State. Resulting payments shall be made without delay and be freely transferable".*

The Investment Treaty does not provide any guidance as to the principles for assessment of damages, and case law shows that different methods can be used.

The most prevalent standard used for calculation of losses is the "*fair market value*" method. The concept is typically defined in accordance with the International Glossary of Business Valuation Terms prepared by the US National Association of Certified Valuators and Analysts[26]:

"*Fair Market Value – the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.*"

In a going concern business with an established profitability track record, the "discounted cash flow" model may be used for calculating the fair market value. Discounted cash flow is an income-based valuation method, where the value of an investment is determined on the basis of the discounted "present value" of expected future cash flows. Where damages are assessed using the discounted cash flow model, the business will probably have to produce evidence of its historical return on the investment.

If a business has not demonstrated its profitability as a going concern or is operating at a loss, the fair market value may be calculated on the basis of its liquidation value. The liquidation value of a business is typically calculated as total assets less intangible assets (patents, goodwill, etc.) and liabilities.

For other assets, the fair market value can be determined on the basis of their replacement cost. If the asset has been acquired recently or has been valued immediately before to the expropriation, the book value may also be used.[27]

In line with general tort law principles, the compensation is generally limited to the loss incurred by the investor.

3.6.2 Assessment of damages for expropriation

Existing case law shows that even very large amounts can be awarded in damages for expropriation of investments in breach of an investment treaty.

In the wake of the Gaddafi regime's assumption of power in Libya in 1969 and the resulting nationalisations of foreign oil concessions, foreign investors such as LIAMCO[28] and Texaco[29] were awarded substantial amounts of compensation.

As noted above, it is stated in Article 4(1) that the compensation for expropriation "*shall amount to the value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge*", and that the compensation "*shall be paid without delay, be freely transferable and shall include interest at the normal commercial rate established on a market basis from the date of expropriation until the date of payment".*

The general tort law principles according to which the tortfeasor must (as far as possible) make good the damage or loss caused by the tortious act also apply to the liability of States.

Thus, the tribunal held as follows in the ICSID case AES v. Kazakhstan[30]:

"*It is a general principle of law that whoever causes damage as a result of a wrongful act should be liable for such damage. This principle applies to all legal subjects including States and private actors.*"

However, in a situation where expropriation has taken place in breach of the investment treaty (according to which the expropriation must be carried out "*in the public interest on the basis of non-discrimination*"), it cannot be ruled out that investors can claim compensation also for their indirect losses, i.e. not only for the "*value of the investment*" as provided in Article 4(2).

26 See e.g. Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic, ICSID case no. ARB/04/16, award of 25 February 2016, paragraph 123, El Paso Energy International Company v. Argentine Republic, ICSID case no. ARB/03/15, award of 31 October 2011, paragraph 70, and Enron Creditors Recovery Corporation and Ponderosa Assets, L.P. v. Argentine Republic, ICSID case no. ARB/01/3, award of 22 May 2007, paragraph 361.

27 See i.a. World Bank Guidelines on the Treatment of Foreign Direct Investments, paragraph 6.

28 Libyan American Oil Company v. the Government of the Libyan Arab Republic, ad hoc arbitration, award of 12 April 1977.

29 Texaco Overseas Petroleum Co. and California Asiatic Oil Company v. Libya, ad hoc arbitration, award of 19 January 1977 (made in French).

30 AES Corporation and Tau Power B.V. v.{j}Republic of Kazakhstan, ICSID case no. ARB/10/16, award of 1 November 2013, paragraph 463.

Reference may be made to a landmark ruling made by the Permanent Court of International Justice [31]on 13 September 1928[32] in the Chorzów Factory case, which lays down some key principles for assessment of damages:

"*It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated* […]

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law."

In ICSID cases, arbitration tribunals tend to lean against the standard applied in the Chorzów Factory case[33], and it has also been used in a number of ad hoc arbitration cases.[34]

Finally, Article 4(2) of the Investment Treaty provides that "*[t]he investor affected shall have the right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Contracting Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this Article."*

Based on a literal interpretation, the provision can hardly be considered as limiting the investor's rights, meaning that it is for the Russian courts to rule on the lawfulness of the expropriation and/or assessment of damages. Instead, the provision is deemed to confer a *right* (but hardly an obligation) for the investor to effective ("*prompt*") review by a Russian court or another independent authority if so requested.

3.7 Enforcement

An arbitral award against Russia is enforceable under the New York Convention, which ensures mutual recognition and enforcement of arbitral awards in more than 160 states.[35] The New York Convention provides for enforcement against assets owned by the Russian State in most parts of the world, but not against assets owned by Russian natural or legal persons. Enforcement against sanctioned (frozen) funds may also give rise to particular challenges.

Sedelmayer v. Russia[36] may be cited as an example of a case in which an investor succeeded in a claim for enforcement against the Russian State. On 10 October 1995, Franz J. Sedelmayer, a German investor, initiated arbitration proceedings against Russia at the Institute of Arbitration of the Chamber of Commerce in Stockholm, claiming breach of a bilateral investment treaty between Germany and the Soviet Union from 1989. On 7 July 1998, the tribunal awarded Sedelmayer USD 2.35 million in damages.

Sedelmayer's efforts to enforce the award resulted in lengthy legal proceedings with extensive litigation in both Germany and Sweden, as Russia initially claimed setting aside of the award and later relied on the State immunity rules in an attempt to prevent enforcement.

However, by decisions of 11 October 2010 and 1 July 2011, both the High Court of Stockholm and the Swedish Supreme Court established that execution could be levied against properties owned by the Russian State and the related rental income as security for Sedelmayer's claim.

For more recent arbitration case law, reference may be made to the case Everest and others v. Russia[37] which was brought by Ukrainian investors. On 2 May 2018, the tribunal awarded USD 159 million in damages to the investors, who sought to enforce the award at the courts in both Ukraine and the Netherlands.

By judgment of 25 September 2018, the Ukrainian Kyiv Court of Appeal held that execution could be levied against assets owned by Russian state-owned banks as security for the investors' claims. By judgment of 25 January 2019, the Ukrainian Supreme Court found that it was for the Ukrainian enforcement court to decide whether Russian-owned companies' assets could be deemed to belong to the Russian State under Ukrainian law. The Dutch cases are still pending at the courts in The Hague.

4. Arbitration cases after Russia's annexation of the Crimean Peninsula in 2014

Russia's invasion of Ukraine on 24 February 2022 is seen by many in the international community as an escalation of a war that had already begun with Russia's annexation of the Crimean Peninsula in 2014.

The conflict in 2014, which led to widespread political unrest and changes on the Crimean Peninsula, gave rise to a range of international arbitration proceedings with foreign investors claiming compensation for breach of their rights under bilateral investment treaties with Russia. These arbitration proceedings, mainly commenced by Ukrainian investors, have in most cases been heard by the Permanent Court of Arbitration in The Hague.

To start with, Russia put up the same defence in these cases. In letters to the Permanent Court of Arbitration, Russia argued that the bilateral investment treaty between Russia and Ukraine did not provide a basis for setting up of a tribunal to hear the investors' alleged claims, and further that Russia did not recognise the

31 The Permanent Court of International Justice was the predecessor of the International Court of Justice in The Hague.

32 Factory at Chorzów, the Government of Germany v. the Government of the Polish Republic, PCIJ Series A. no. 17, order of 13 September 1928, page 47.

33 See e.g. Gemplus, S.A., SLP, S.A. and Gemplus Industrial S.A. de C.V. v. United Mexican States, ICSID case no. ARB(AF)/04/3, paragraph 13.81, LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, ICSID case no. ARB/02/1, award of 25 July 2007, paragraph 31, and Siemens A.G. v. Argentine Republic, ICSID case no. ARB/02/8, award of 6 February 2007, paragraph 353.

34 See e.g. BG Group Plc v. Republic of Argentina, award of 24 December 2007, paragraphs 423-429 and S.D. Myers, Inc. v. Government of Canada, award of 13 November 2000, paragraphs 311-313.

35 The New York Convention has been implemented in Danish law by Executive Order 1973-03-07 no. 117 on Recognition and Enforcement of Foreign Arbitral Awards and on International Commercial Arbitration. Sections 38-39 of the Danish Arbitration Act also contain rules on enforcement of arbitral awards in Denmark, which - subject to a number of exceptions in section 39(1) - may take place under the provisions on enforcement in the Danish Administration of Justice Act.

36 Franz Sedelmayer v. the Russian Federation, award of 7 July 1998.

37 Everest Estate LLC, Edelveis-2000 PE, Fortuna CJSC and others v. the Russian Federation, PCA case no. 2015-36.

Court's jurisdiction[38]. Russia did not participate in the proceedings and, accordingly, did not file any pleadings.

However, the tribunals continued hearing the claims and ruled in several case in favour of the investors. Russia has subsequently instituted legal proceedings before national courts, in particular in the Netherlands, claiming that the awards should be set aside.

According to news media, Russian Minister of Justice Aleksandr Konovalov announced in May 2019 that Russia would change its defence strategy and handle future claims for compensation at an early stage, i.e. before issuance of a final award. Subsequent cases have shown that Russia, following the change of strategy, has fought the claims on several fronts, including in relation to jurisdiction, basis of liability, assessment of damages, and enforcement.

As a result of the new strategy, Russia has in some cases been allowed to present new views after issuance of the final awards, i.a. in relation to jurisdiction. Reference may be made to the cases PrivatBank and Finilon v. Russia[39] and to Lugzor and others v. Russia[40]. In the latter case, Russia's arguments caused the tribunal to reject a request by the investors for security for costs.

In the cases that have been decided after Russia's annexation of the Crimean peninsula, investors have been awarded sizeable damages and substantial legal costs. As an example, damages of USD 44 million were awarded in the case Ukrnafta v. Russia[41], and in Stabil and others v. Russia[42] the damages awarded amounted to USD 34 million. Both cases involved expropriation of petrol stations. In the case Everest and others v. Russia[43] involving expropriation of real property, damages of USD 130 million were awarded, and in the case Oschadbank v. Russia[44] involving expropriation of a bank branch, the amount of damages was USD 1.11 billion.

Russia has claimed that all of the awards should be set aside by national courts.

Based on the experience from the arbitration proceedings after Russia's annexation of the Crimean peninsula in 2014, Russia may, if Russia adheres to its new litigation strategy in actions for damages after the invasion of Ukraine, be expected to play an active role in the process. The cases also show that the amounts of damages may be significant.

5. Danish investors' opportunities and challenges

The Russian measures against investors from "*unfriendly states*" have caused and may continue to cause very significant losses for Danish companies with activities in Russia and for their owners. Danish investors in Russia should therefore carefully consider the possibilities of claiming, or reserving the right to claim, compensation from the Russian State to mitigate any losses.

This includes an analysis of the legal basis for a potential claim, including the significance of the investor's participation in (excessive) sanctions against Russia, and the investor's possibility of demonstrating that the general requirements for claiming compensation are met.

For this purpose, it may be taken into account that the Investment Treaty between Denmark and Russia offers a broad standard of protection with very few limitations and exceptions (Article 3(1) and (2)). Danish investors may therefore be well positioned to prove that Russia is breaching its obligations under the Investment Treaty.

Many of the measures taken, or threatened, by the Russian government in response to the international sanctions could further conflict with the safeguards afforded in Articles 2 and 3 of the Investment Treaty. This includes the Russian decree of 8 September 2022, requiring investors from "*unfriendly states*" to obtain approval from the Russian authorities in order to divest business activities in Russia. The decree may be seen as a breach of Article 2(2) of the Investment Treaty, according to which Russia may not "*in any way impair by unreasonable or discriminatory measures [...] the disposal of investments in its territory*".

When assessing Danish investors' response to losses in Russia, commercial and strategic considerations in relation to timing should also be taken into account, not least because of the need for continued cooperation with the Russian authorities. Hence, a claim for compensation will hardly be conducive to any continued or future presence on the Russian market or make any current exit talks with the authorities easier. Concerns about time, economy, and litigation risks are also important aspects in determining whether an investor may benefit from making a claim.

Danish businesses that have exited or are in the process of exiting the Russian market should also consider the risk of adverse reaction from shareholders, who may disagree with the decision to leave Russia, including claims for active loss mitigation.

Management liability concerns is another element to be taken into consideration, including the question whether the management must claim compensation in order to discharge its duty to act "*in the company's interests*", inter alia by handling any financial difficulties properly. This may, in the circumstances, involve a duty for the management to take steps to prevent or mitigate losses likely to be incurred by the company and its business partners, creditors and - not least - shareholders.

In Danish law, management liability is assessed according to the so-called "Business Judgment Rule", which grants corporate executives substantial discretion in making such business decisions as they reasonably believe will be in the best interests of the company and its owners - even if the decision later turns out to result in a loss. The management must make the business decision on an informed and prudent basis and may not pursue interest that are not in line with the company's interests nor act contrary to its duty

38 See e.g. Aeroport Belbek LLC and Igor Valerievich Kolomoisky v. the Russian Federation, PCA case no. 2015-07, PJSC Ukrnafta v. the Russian Federation, PCA case no. 2015-34, Stabil, Crimea-Petrol LLC, Elefteria LLC, Novel-Estate LLC and others v. the Russian Federation, PCA case no. 2015-35, and Everest Estate LLC, Edelveis-2000 PE, Fortuna CJSC and others v. the Russian Federation, PCA case no. 2015-36.

39 PJSC CB PrivatBank and Finance Company Finilon LLC v. the Russian Federation, PCA case no. 2015-21, Procedural Order No. 7 of 12 September 2019.

40 Limited Liability Company Lugzor and others v. the Russian Federation, PCA case no. 2015-29, Procedural Order No. 7 (Security for Costs) of 30 August 2019.

41 PJSC Ukrnafta v. the Russian Federation, PCA case no. 2015-34, award of 12 April 2019.

42 Stabil, Crimea-Petrol LLC, Elefteria LLC, Novel-Estate LLC and others v. the Russian Federation, PCA case no. 2015-35, award of 12 April 2019.

43 Everest Estate LLC, Edelveis-2000 PE, Fortuna CJSC and others v. the Russian Federation, PCA case no. 2015-36, award of 2 May 2018.'

44 Oschadbank v. Russian Federation, PCS case no. 2016-14, award of 26 November 2018

of loyalty.[45] In practice, the management is allowed substantial leeway in case of any misjudgement, as long as the above criteria are met[46].

In modern management, corporate governance, CSR and ESG concerns also play an important role for companies that are reconsidering their presence in Russia.

As a first step, investors who have suffered specific losses as a result of Russia's actions against "*unfriendly states*" may reserve the right to make a potential claim for compensation by submitting a formal letter, a Notice of Claim, to the Russian State. In this way, the investor will be protected against any acquiescence or time-barring objections, reserve the right to made a claim, and "buy time" to collect information and documentation for calculation of the loss and preparation of a cost-benefit analysis to serve as a basis for the final decision. Submission of a formal notice will also trigger the agreed 6-month cooling-off period under Article 8(2) of the Investment Treaty.

It is crucial according to the Business Judgment Rule that the management provides ongoing documentation of all decisions and deliberations in relation to its obligations and possible responses to the war in Ukraine and the Russian measures, and that the management makes a full risk assessment for that purpose.

45 Doctor of Laws Jan Schans Christensen: Kapitalselskaber – aktie- og anpartsselskabsret (6th ed., 2021), pages 689-700, and Paul Krüger Andersen: Aktie- og anpartsselskabsret (14th ed., 2019), page 515.
46 See e.g. UfR 1977.274 H (Havemann), UfR 1981.973 H (Røde Vejrmølle), UfR 2013.1312 H (Skodsborg Grundejerforening) and UfR 2019.1907 H (Capinordic).