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на тему:

«ОСОБЛИВОСТІ ЗАХИСТУ ПРАВ УКРАЇНСЬКИХ ФІЗИЧНИХ ТА ЮРИДИЧНИХ ОСІБ, ПОСТРАЖДАЛИХ У ЗВ'ЯЗКУ ЗІ ЗБРОЙНИМ КОНФЛІКТОМ З РОСІЄЮ, У ЄВРОПЕЙСЬКОМУ СУДІ З ПРАВ ЛЮДИНИ ТА МІЖНАРОДНОМУ ІНВЕСТИЦІЙНОМУ АРБІТРАЖІ»

(англійською мовою)

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PECULIARITIES OF PROTECTION OF THE RIGHTS OF UKRAINIAN NATURAL AND LEGAL PERSONS AFFECTED BY THE ARMED CONFLICT WITH RUSSIA IN THE EUROPEAN COURT OF HUMAN RIGHTS AND INTERNATIONAL INVESTMENT ARBITRATION

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Декларація академічної доброчесності

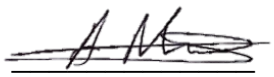
Я, Антон Олегович Махно, студент 2 року навчання магістерської програми за спеціальністю «Право» факультету правничих наук НаУКМА:

- Підтверджую, що написана мною кваліфікаційна (магістерська) робота на тему «Особливості захисту прав українських фізичних та юридичних осіб, постраждалих у зв'язку зі збройним конфліктом з Росією, у Європейському суді з прав людини та міжнародному інвестиційному арбітражі» *англійською мовою* відповідає вимогам академічної доброчесності та не містить порушень, передбачених п. 3.1. Положенням про академічну доброчесність здобувачів освіти у НаУКМА, зі змістом якого я ознайомлений;

- Підтверджую, що надана мною електронна версія роботи є остаточною та готовою до перевірки;

- Згоден на перевірку моєї роботи на відповідність критеріям академічної доброчесності, у будь-який спосіб, у тому числі порівняння змісту роботи та формування звіту подібності за допомогою електронної системи Unicheck;

- Даю згоду на архівування моєї роботи в репозитаріях та базах даних університету для порівняння цієї та майбутніх робіт.

10 травня 2024 р.  А.О. Махно

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LIST OF ABBREVIATIONS

Abbreviation	Meaning
AMCU	Antimonopoly Committee of Ukraine
ARMA	National Agency of Ukraine for finding, tracing and management of assets
BES	Bureau of Economic Security of Ukraine
BIT	Agreement between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and Mutual Protection of Investments, 27 November 1998
CAPU	Code of Administrative Procedure of Ukraine
DCF	Discounted Cash Flow
DGZK	Demurinskyi Mining and Processing Plant LLC
DPR	So-called “Donetsk People’s Republic”
ECHR	European Court of Human Rights
FET	Fair and Equitable Treatment
FIS	Foreign Intelligence Service of Ukraine
FPS	Full Protection and Security
FRG	Federal Republic of Germany
GC IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of

	War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287
GDR	German Democratic Republic
HACC	High Anti-Corruption Court
LPR	So-called “Luhansk People’s Republic”
MoJ	Ministry of Justice of Ukraine
NDA	Non-Disclosure Agreement
P1-1	Article 1 of Protocol 1 to the European Convention on Human Rights
PCA	Permanent Court of Arbitration
SCC	Arbitration Institute of the Chamber of Commerce in Stockholm
SSU	Security Service of Ukraine
UN	United Nations
UNCITRAL	United Nations Commission for International Trade Law
USR	Unified State Register of Legal Entities, Individual Entrepreneurs and Public Organisations

INTRODUCTION

The relevance of the thesis. The matter of mechanisms for securing reparations from the Russian Federation has consistently ranked among the foremost concerns for individuals, private enterprises and Ukraine as a state since the onset of the international armed conflict in 2014. Initial inquiries regarding potential reparations emerged in the wake of Russia's annexation of the Crimean Peninsula, commencing in late February 2014 ["**Annexation**"], and its consequential impact on properties, often manifesting as outright expropriation. Subsequently, a multitude of assets faced ramifications due to military operations in the Donetsk and Luhansk Regions starting in April 2014.

The urgency of this matter has intensified considering the ongoing full-scale invasion by Russia into the territory of Ukraine since 24 February 2022 ["**Russian February Invasion**"]. This invasion involves the illegal seizure of property in temporarily occupied territories and the continual destruction of civilian infrastructure. Notably, particular emphasis should be placed on the expropriation of assets in Crimea, a matter predominantly adjudicated in arbitration institutions and currently under consideration by the European Court of Human Rights ["**ECHR**"]. Despite these efforts, the overarching issue remains unresolved.

The most trustworthy ways to seek a remedy in this situation lie in: (i) lodging an application to the ECHR under the European Convention on Human Rights ["**Convention**"] and the Protocols thereto[1]; or (ii) serving the respective authorities of the Russian Federation with the notice of dispute under the Agreement between Russia and Ukraine on the Encouragement and Mutual Protection of Investments ["**BIT**"][2]. Both mechanisms were thoroughly analysed considering probable prospects of bringing such a case before each mentioned forum. In any event, the said opportunities

[1] Council of Europe, European Convention on Human Rights as amended by Protocols Nos. 11, 14 and 15 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, 4 November 1950, ETS 5

[2] Agreement between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and Mutual Protection of Investments, 27 November 1998

of redress would entail complex and demanding processes accounting for the colossal amount of factual data, which could be not straightforward.

This thesis is limited to the study of the ECHR and the BIT mechanisms among others, which are currently being formed or lack sufficient practice on the subject matter in the context of the Annexation, the armed conflict before 24 February 2022 and/or the Russian February Invasion.

Another intricate issue is the enforcement of the judgement of the ECHR or an arbitral award against the Russian Federation. Primarily, decisions of international institutions are voluntarily enforced, yet it is implausible in the current situation due to the unfavourable position of Russia.

The thesis objective is to characterise the peculiarities of the legal remedies afforded to private persons in such avenues as the ECHR and arbitral institutions.

The subject matter of the thesis is the legal framework of remedies afforded to Ukrainian private individuals and companies in ECHR and investment arbitration amidst international armed conflict with Russia.

The thesis tasks underlie in the description and analysis of (i) the legal basis of referring to the dispute settlement mechanism; (ii) jurisdiction criteria; (iii) potential violation or multiple violations; (iv) probable defences; (v) compensation mechanism; (vi) setbacks of Ukraine's conduct; (vii) specifics of the enforcement process.

To achieve the said objective, the following *general scientific methods and special juridical methods* were applied:

(i) analytical method – to divide the complex issue raised by this thesis into relatively more straightforward components and analyse the existing case law, both national and international, and specific provisions of international law and legal doctrine;

(ii) descriptive method – to provide an overview of the legal framework of proceedings before the ECHR and an investment arbitration tribunal;

(iii) statistical method – to determine the effectiveness of ECHR and arbitration proceedings by analysing statistical data on the peculiarities of proceedings, court fees, the amount of reparations and the enforcement mechanisms available;

(iv) comparative-historical – to compare the current circumstances caused by the aggression of the Russian Federation with similar situations (e.g. the 2008 Russo-Georgian War);

(v) formal legal method – to address the provisions of legal documents that grant protection to specific rights and govern the proceedings of arbitral tribunals and ECHR;

(vi) the method of comparative jurisprudence – to compare different approaches to obtaining compensation from Russia, the available legal mechanisms and their legal basis.

The basis of the thesis. This thesis is based on the Convention, the BIT, available investment arbitration awards and ECHR case law on the protection of rights guaranteed by the above instruments. As well the thesis also refers to on theoretical works of scholars and practitioners in the field of ECHR case law, international investment arbitration and international public law. The authors include Mr James Crawford, Mr Rudolf Dolzer, Ms Veronika Fikfak, Mr Christoph Schreuer, Ms Dinah Shelton, Mr Andrew Newcombe, Mr Lluis Paradell, Mr Kevin Williams and others.

The practical and theoretical importance of the study. The analysis made in this thesis may be used (i) by scholars and practitioners interested in the ECHR and investment arbitration approaches to the protection of rights amidst armed conflict; (ii) by arbitral tribunals and ECHR deciding on cases comparable to the analysed situations; (iii) by states and their representatives engaged in the assessment of the protection of private persons within armed conflict; (iv) by any other stakeholders engaged in the drafting process of new investment treaties, human rights conventions etc; and (v) by educational institutions for the purpose of research.

Structure of the thesis. The work consists of the following elements: a list of abbreviations, an introduction, four sections, conclusions, and a list of authorities. The total scope of work is 103 pages.

SECTION 1. EUROPEAN COURT OF HUMAN RIGHTS

1.1. Legal basis

The Russian Federation has been a party to the Convention and the Protocols thereto from 30 March 1998[3] until 16 September 2022. According to Article 1 of the Convention:

> the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention[4].

The ECHR was established as a body ensuring the observance of the engagements undertaken by State parties[5]. However, certain admissibility requirements were introduced in the Convention[6], among others, so as not to overwhelm the ECHR with the masses of cases. Thus, vital admissibility criteria concerning the consequences of the Annexation, the armed conflict before 24 February 2022 and/or the Russian February Invasion include:

(i) exhaustion of available effective domestic remedies;

(ii) lodging a complaint within the four-month time limit;

(iii) lying within the substantive jurisdiction of the ECHR (i.e. the right relied on by the applicant must be protected by the Convention and the Protocols thereto[7]).

It should be opined that Russian law does not provide for any effective remedy capable of redressing the Ukrainian citizens and legal persons the damages they have suffered on account of the Annexation, the armed conflict prior to 24 February 2022 and/or the Russian February Invasion. In particular, any judicial proceedings for the damage suffered would necessarily involve the investigation into the crime of

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[3] Federal Law of 30 March 1998 No 54-ФЗ "On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto"

[4] Council of Europe, European Convention on Human Rights as amended by Protocols Nos. 11, 14 and 15 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, 4 November 1950, ETS 5, Article 1

[5] *Ibid*, Article 19

[6] Convention, Article 35

[7] European Court of Human Rights, Practical Guide on Admissibility Criteria, 31 August 2022, § 279

aggression against the sovereign foreign nation committed or ordered by the Russian officials of the highest ranks. Such proceedings are unlikely to be effective and, thus, there is a probable argument of no need to exhaust them.

However, one needs to keep in mind that where it is clear from the outset that no effective remedy is available to the applicant, the four-month period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the applicant[8].

In the context of protection granted by the Convention and, hence, the ECHR, the validity of the Convention for Russia should be addressed. The aggressor state was expelled from the Council of Europe on 16 March 2022 by the decision of the Committee of Ministers[9]. Six months afterwards, on 16 September 2022, Russia ceased to be a party to the Convention[10]. Therefore, conduct attributable to the Russian Federation taking place after the said date is outside the ECHR's competence. Nevertheless, it is possible to lodge an admissible application to the said forum after 16 September 2022. The nuance lies in the occurrence of a violation, which for the purpose of the Convention, shall take place within the validity period for Russia. The said is also stipulated by the ECHR itself in the respective resolution on the consequences of the cessation of membership of the Russian Federation to the Council of Europe[11].

For instance, even if a violation was found on 15 November 2022 following the Kherson offensive, the ECHR still has jurisdiction over the conduct in question. Additionally, in such circumstances, it can be argued that a complaint can be submitted until 15 March 2023, as the four-month time limit started when a potential violation had been discovered.

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[8] Dennis and Others v. the United Kingdom (dec.), no. 76573/01, 2 July 2002

[9] Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe adopted by the Committee of Ministers on 16 March 2022 at the 1428th meeting of the Ministers' Deputies

[10] Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights, 22 March 2022

[11] *Ibid*

Nevertheless, in the context of the armed conflict prior to 24 February 2022, most of the cases would be inadmissible due to the time limit for lodging an application to the ECHR. Yet, if a violation was discovered recently, the above argumentation can be invoked.

Additionally, if one decides to recourse to Russian courts for protection, the four-month period runs from the date of the final decision rendered by such domestic courts[12].

Most straightforwardly, in the context of property rights, an applicant could complain about the breach of Article 1 of Protocol 1 to the Convention ["**P1-1**"], which ensures the peaceful enjoyment of one's possessions. This concept of "possessions" is autonomous (i.e. independent from domestic classification) and is not limited to the ownership of material goods considering certain other rights and interests also to be protected by the provision[13]. Additionally, P1-1 can be applied only to existing possessions[14] or assets, including claims with at least a "legitimate expectation" of obtaining effective enjoyment of a property right[15].

Further, a breach of Article 13 of the Convention assuring the right to an effective remedy could be argued in conjunction with P1-1 (*see* Section 1.6.).

The legal particularities of legal grounds for lodging the said claims to the ECHR are addressed below.

1.2. Jurisdiction

It is a trite law that a State's jurisdictional competence under Article 1 of the Convention is primarily territorial. Jurisdiction is presumed to be exercised normally throughout the State's territory. Conversely, acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 only in exceptional cases. These exceptions, insofar as relevant here, have been broadly joined into two groups: actions of State agents outside

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[12] Paul and Audrey Edwards v. the United Kingdom (dec.), no. 46477/99, 7 June 2001

[13] *See*, among many others, *Béláné Nagy v. Hungary* [GC], no. 53080/13, 13 December 2016, § 73

[14] *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, ECHR 2007-I, § 64

[15] *Kopecký v. Slovakia* [GC], no. 44912/98, ECHR 2004-IX, § 35 (c)

their State's territory and effective control of the Member State over the territory of another State[16].

Essentially, there are two potential types of situations, if assessed from the angle of the jurisdiction of the Russian Federation for the violations of the applicant's rights under the Convention: (a) those inflicted while within the territory, occupied by the Russian Federation (either continuously or briefly) and (b) those, suffered in the territory, controlled by the Ukrainian troops.

As to situation (a), it is to be admitted that the ECHR in *Georgia v. Russia (II)* decided that the events which occurred during the active phase of the hostilities in the 2008 Russo-Georgian War did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention and could be assessed only from the point of view of the international humanitarian law[17].

However, it is high time to invite the ECHR to reconsider the above approach. The ECHR cannot absolve itself from the obligation to monitor the protection of the Convention rights by the Member States on the sole ground of the complexity of the establishment of the factual circumstances surrounding the alleged violation.

In any case, the above approach is inapplicable in the context of the Russian February Invasion, since the situation here differs considerably from that in the 2008 Russo-Georgian War. In the latter, the hostilities continued relatively short period of time (8-12 August 2008), whilst the Russian February Invasion continues uninterrupted for over two years accompanied by very intensive warfare and the international armed conflict itself lasts for over a decade. The Russian Federation's actions cannot be screened from the Convention's body's control for such a lengthy period of time.

The situations as to formally "joined" to Russia regions of Ukraine, i.e. Donetsk, Luhansk, Kherson and Zaporizhzhia Regions, are analogous to the Crimea one. The latter was examined by the ECHR in the case of *Ukraine v. Russia (re Crimea)*[18] where the military occupation of the territory preceded its legal formalisation in the law of the

[16] *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011, §§ 130-139
[17] *Georgia v. Russia (II)* [GC], no. 38263/08, 21 January 2021, §§ 125-144
[18] *Ukraine v. Russia (re Crimea)* [GC], nos. 20958/14 and 38334/18, 16 December 2020

occupying State. In that case, the ECHR found that the state of effective control over the area began from the moment of the acquisition of the *de facto* control, i.e. 27 February 2014[19]. Further, given the lack of any grounds for the annexation of the said territory in the international law or the internal law of Ukraine, its legal formalisation did not alter the nature of the control, which remained "*effective control over an area*" rather than the territorial jurisdiction for the purpose of the Convention[20].

On 25 January 2023, the ECHR made public its assessment of the question of Russia's jurisdiction over the so-called "Donetsk People's Republic" ["**DPR**"] and "Luhansk People's Republic" ["**LPR**"]. In its striking decision on admissibility, the ECHR found that "*the vast body of evidence […] demonstrates beyond reasonable doubt that […] these areas were, from 11 May 2014 and subsequently, under the effective control of the Russian Federation*"[21]. Hence, the ECHR arrived at the conclusion that Russia exercised jurisdiction from the said date until at least the hearing on 26 January 2022[22]. It can easily be said that the level of control has not decreased since the end of January 2022, resulting in continuous effective control of Russia.

As to situation (b) Russia's jurisdiction with respect to the shelling of the Ukrainian-controlled territory is engaged on the ground of the State agent's actions outside the territory of a given State.

It should be noted that the normally applied approach is that "a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State"[23]. Yet, in *Georgia v. Russia (II)*, the ECHR opined that it must be distinguished from situations of "*armed confrontation and fighting between*

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[19] *Ibid*, § 335
[20] *Ibid*, §§ 308-349
[21] *Ukraine and the Netherlands v. Russia* [GC], nos. 8019/16, 43800/14 and 28525/20, 25 January 2023, § 695
[22] *Ibid*
[23] *Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-IV, § 91

enemy military forces seeking to establish control over an area in a context of chaos" which exclude any form of "*State agent authority and control*" over individuals[24].

The above approach should be reconsidered since the ECHR cannot absolve itself from the obligation to monitor the protection of the Convention rights by the Member States on the sole ground of the complexity of the establishment of the factual circumstances surrounding the alleged violation. Further, many instances of rocket missile strikes take place not during the chaos of a military operation, instead they are well-planned attacks without any signs of disarray within the respective military.

Additionally, in the judgment in the case of *Carter v. Russia*, the ECHR has extended the State agent's jurisdictional exception to cases of extrajudicial targeted killings by State agents acting in the territory of another Contracting State[25]. Thereby, in my opinion, the interference with the rights protected under the Convention conducted by the armed forces of the Russian Federation should engage its responsibility under the Convention for the damage thus inflicted.

1.3. Right to property

1.3.1. Interference

Depending on the case, an applicant could state that their rights, provided for in this P1-1 were interfered with by the Russian Federation via several measures. The most common forms, considering the current consequences of the Russian February Invasion, are the destruction of assets by way of direct hits by various weapons; the taking of properties and looting by the Russian soldiers; handing over of the premises and facilities to the Russian companies; blocking of access to the properties by way of active military operations or within the occupied territory.

It is to be noted that in *Esmukhambetov and Others v. Russia*, the ECHR has already opined that the destruction of the assets in the course of the military operations constitutes an interference in the property rights of the applicants[26]. The said case as

[24] *Georgia v. Russia (II)*, no. 38263/08, 21 January 2021, §§ 137-38
[25] *Carter v. Russia*, no. 20914/07, 21 September 2021, § 130
[26] *Esmukhambetov and Others v. Russia*, no. 23445/03, 29 March 2011, § 174,

well addressed the actions of the Russian military. It concerned the aerial bombing of the village of Kogi in Chechnya on 12 September 1999, allegedly carried out by two Russian warplanes and resulting in the destruction of the village and the death of several of its inhabitants.

Due to the abovementioned, potential measures listed earlier should constitute interference with the property rights within the meaning of P1-1.

1.3.2. Lawfulness of the interference

It is to be noted that an essential condition for an interference to be deemed compatible with P1-1 is that it should be lawful. As the ECHR numerously opined "*the first and most important requirement of [P1-1] is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful*"[27].

It is the settled case law of the ECHR that the expression "prescribed by law" requires firstly that the impugned measure should have a basis in domestic law[28]. The ECHR has always understood the term "law" in its "substantive" sense, not its "formal" one; it has included both "written law", encompassing enactments of lower-ranking statutes and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament, and unwritten law. "Law" must be understood to include both statutory law and judge-made "law"[29].

It is worth noting that according to Article 15(4) of the Constitution of the Russian Federation, the ratified international agreements constitute a part of Russian law[30]. In this regard, the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ["**Protocol I**"] should be specifically pointed out. It was signed by the Union of Soviet

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[27] *See*, among many others, *Beyeler v. Italy* [GC], no. 33202/96, ECHR 2000-I, § 108 with further citations

[28] *Leyla Şahin v. Turkey* [GC], no. 44774/98, ECHR 2005-XI, § 99

[29] *Ibid*, § 88 with further citations

[30] Constitution of Russian Federation dated 12 December 1993 (as amended on 6 October 2022), Art. 15(4)

Socialist Republics back in 1977 and ratified in 1989 subsequently accessed by Russia[31].

The interrelation of Protocol I, being a part of the international humanitarian law, with the Convention, as an instrument of international human rights law, could be described as the former being a *lex specialis* to the latter in times of armed conflict. This derives from the assessment of the above by the International Court of Justice, among others, in *Nuclear Weapons* and *Construction of Wall* advisory opinions, which also sets out that human rights law persists during armed conflict[32]. Moreover, this consideration was upheld in consecutive judgement in *Armed Activities in Congo* in 2005[33]. All mentioned decisions were multiply referred to by the ECHR as defining the interplay between international humanitarian law and human rights[34].

The said Protocol I, applying only to international armed conflict, provides that:

> Article 52 – General protection of civilian objects
>
> 1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.
>
> 2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
>
> 3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used[35].

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[31] 'Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977: State Parties and Signatories' (International Committee of Red Cross) <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties> accessed on 29 January 2024

[32] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, p. 226, § 25; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, p. 136, § 106

[33] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports 2005, p. 168, § 216

[34] *See*, e.g. *Georgia v. Russia (II)* [GC], no. 38263/08, 21 January 2021, §§ 89-91

[35] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection

Indeed, the instances of interference should be addressed on a case-by-case basis, as some civilian objects may become a lawful military objective in some instances. However, if we presume that the non-military nature endured, all attacks on such objects are outside the requirements of lawfulness.

Another crucial instrument of international humanitarian law in this regard is the Geneva Convention relative to the Protection of Civilian Persons in Time of War ["**GC IV**"][36]. This document as well was accessed by Russia following the USSR's signing of it in 1949 and ratification in 1954[37]. This legal instrument prohibits pillage[38], and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly[39].

This thesis does not consider various potential scenarios of how exactly a certain possession was interfered with accounting for the ceaseless amount of relevant circumstances. Thereby, if presumed that the conduct in question indeed is not justified by any of the above, such acts inevitably contradict the lawfulness condition.

Accordingly, the listed above instances of interference cannot be regarded as "prescribed by law" within the meaning of P1-1 and, thus, constitute its violation.

1.3.3. Public interest

Moreover, P1-1 requires the measure, interfering in the property rights to be in the legitimate "public interest", the notion of which is necessarily extensive[40]. The publicly announced motives of the Russian February Invasion were "the

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of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, 8 June 1977, Art. 52

[36] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287

[37] 'Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949: State Parties and Signatories' (International Committee of Red Cross) <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/state-parties> accessed on 29 January 2024

[38] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, Art. 53

[39] *Ibid*, Art. 147

[40] *Béláné Nagy v. Hungary* [GC], no. 53080/13, 13 December 2016, § 113

demilitarisation and denazification of Ukraine"[41]. None of these motives constitutes a valid ground for the use of force in international law.

According to the United Nations ["**UN**"] Charter, there are only two lawful grounds for the use of force by the UN Members: a decision of the UN Security Council, permitting the use of force in view of the threat to the peace, breach of the peace, or act of aggression[42] and the self-defence[43]. As there was no decision or recommendation of the UN Security Council, permitting the Russian Federation to use force against Ukraine, it could do it only in self-defence.

Noteworthy, finding a violation under the UN Charter is evidently outside the ECHR's competence that is limited only to the Convention. Hence, this legal instrument is addressed exclusively for the purpose of defining the "legitimacy" of the use of force, as it prevails over any other international agreement concluded by a State-Member of the UN[44].

Ukraine, of course, did not commit any act of aggression against Russia and the latter in fact never claimed otherwise. The only claim that it made was that Ukraine "attacked" the so-called L/DPR. However, it should be noted that:

i. both territories constitute integral, recognised by the UN and international law, part of Ukrainian sovereign territory;
ii. until February 2022 the Russian Federation itself confirmed on many occasions that L/DPR are a part of Ukraine – it was not until 21 February

[41] 'Decision taken on denazification, demilitarization of Ukraine — Putin' (TASS, 24 February 2022) <https://tass.com/politics/1409189> accessed on 29 January 2024
[42] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Article 39-50
[43] *Ibid,* Article 51
[44] *Ibid,* Article 103

2022 when Russia "recognised the independence" of these territories, an act widely reproached by the international community; moreover;

iii. Ukraine did not, and the Russian Federation never stated otherwise, that Ukraine carried out any military activities against L/DPR after 21 February 2022.

Therefore, the Russian February Invasion in Ukraine and the subsequent military operations, including those, which brought about the loss by a potential applicant of its assets, were not in "public interest" within the meaning of P1-1 and, thus were in violation of this provision.

1.3.4. Proportionality

Finally, the interference in the peaceful enjoyment of possessions must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights[45]. The pursuit of this balance is inherent throughout the entirety of the Convention and is also mirrored in the framework of P1-1[46].

Needless to say that in the absence of any valid justification or lawful public interest that the Russian Federation could pursue by the measures complained of, the balance of interest has also been upset in the most violent and decisive manner possible, thereby violating the applicant's rights under P1-1.

1.3.5. Level of proof

Another key aspect of lodging a successful case against Russia relating to the damages of one's property is relevant substantiation. The ECHR has already addressed what could be deemed as appropriate evidence of ownership over a possession that was damaged or destroyed by armed activities in the context of both non-international and international armed conflict.

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[45] *Pressos Compania Naviera S.A. and Others v. Belgium*, Judgment of 20 November 1995, Series A no. 332, p. 23, § 38

[46] *Sporrong and Lönnroth v. Sweden*, Judgment of 23 September 1982, Series A no. 52, § 61

For instance, the case of *Damayev v. Russia* considered the conduct of Russian military aircraft that bombed a village in the Chechen Republic killing six relatives of the applicant and destroying his house. The ECHR opined that "*the complaint brought under this heading should provide at least a brief description of the property in question*" and that over four years from the incident "*it is reasonable to expect that by that time the applicant would have already taken measures to record and evaluate his pecuniary losses*"[47].

Before that, the ECHR adjudicated upon *Elasanova v. Russia* and *Kerimova and others v. Russia which* also considered the destruction of property in the Chechen Republic giving some insights on what could be deemed as relevant evidence. In *Elsanova*, the ECHR opined that the applicant had not produced any concrete evidence, and, therefore, declared the application inadmissible. Interestingly, to specify what could be documents relevant to one's claims of ownership, the Court also provided an inexhaustive list that included "*land or property titles, extracts from land or tax registers, documents from the local administration, plans, photographs or any other relevant evidence*"[48].

Later, in *Kerimova and others* the ECHR accepted certificates issued by the local administration that confirmed that some applicants lived in the properties in question and that those properties were damaged during the combat. At first, the court was sceptical as the certificates did not provide any information on the ownership, but later declared the applicants with such certificates as the owners since the domestic authorities investigating the damage never doubted the ownership of these properties by the applicants and even referred to them as the owners[49].

In the context of the international conflict initiated by Russia against Ukraine, the ECHR already considered the damaging and destruction of houses in Donetsk and Luhansk Regions in 2014. In *Lisnyy and others v. Ukraine and Russia*, the importance of evidence was underscored, as the applications lacked proper substantiation and were

[47] *Damayev v. Russia*, no. 36150/04, 29 May 2012, §§ 108-111
[48] *Elsanova v. Russia* (dec.), no. 57952/00, 15 November 2005
[49] *Kerimova and Others v. Russia*, nos. 17170/04 and 5 others, 3 May 2011, § 293

deemed inadmissible, with only a photograph of the destroyed house of one of the applicant's provided as evidence[50].

1.4. Right to an effective remedy

The provision of Article 13 of the Convention grants every natural or legal person the right to an effective remedy before a national authority against a violation of rights and freedoms enshrined in the Convention[51].

This legal norm requires the provision of a domestic remedy allowing the competent national authority both to deal with the substance of an "arguable" complaint under the Convention and to grant appropriate relief[52]. Such a remedy, however, is only required in respect of "arguable" grievances in terms of the Convention[53].

The arguability is determined on a case-by-case basis via assessment of particular facts, the nature of a raised issue, whether a claim, in conjunction with which the Article 13 complaint is brought, is arguable and the requirements of the said legal norm[54]. In my opinion, it would be implausible for the ECHR to declare that a complaint with respect to the lack of an effective remedy in current circumstances is not arguable.

As set forth above, since any judicial proceedings in Russian courts would entail the analysis of the Annexation, the Russian February Invasion, or the armed conflict up to the full-scale surge, on all of which Russian authorities have a principal position, the unavailability of an effective remedy can be brought before the ECHR. Further, the general dependence of Russian domestic courts on the policy and political will of the state leadership is tangible, collapsing potential effectiveness.

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[50] *Lisnyy and Others v. Ukraine and* Russia (dec.), nos. 5355/14 and 2 others, 5 July 2016

[51] Convention, Article 18

[52] *Maurice v. France* [GC], no. 11810/03, ECHR 2005-IX, § 106 (with subsequent citations)

[53] See *Halford v. the United Kingdom*, 25 June 1997, Reports of Judgments and Decisions 1997-III, § 64; *Camenzind v. Switzerland*, 16 December 1997, Reports of Judgments and Decisions 1997-VIII, § 53

[54] *Boyle and Rice v. the United Kingdom*, 27 April 1988, Series A no. 131, § 52

The alleged dependence may also lead to the breach of Article 6(1) of the Convention guaranteeing "[…] *a fair and public hearing* […] *by an independent and impartial tribunal*"[55]. The ECHR in this regard recently opined that judicial independence is a condition *sine qua non* for maintenance of the said provision[56].

In the context of Article 13 of the Convention, the ECHR has opined that it takes into account not only the existence of formal remedies but also the general legal and political contexts and personal circumstances of the applicant[57]. This synopsis of law only strengthens the above reasoning.

Deriving from the wording of Article 13 and the ECHR jurisprudence[58], its violation underlies a violation of another provision of the Convention. The ECHR numerously considered cases concerning Article 13 of the Convention in conjunction with P1-1. For instance, in *Chiragov and Others v. Armenia* and *Sargsyan v. Azerbaijan* (both considered by the Grand Chamber) the ECHR addressed the lack of an effective remedy for the loss of property in the context of the Nagorno-Karabakh conflict[59]. In the aforementioned decisions, violations of P1-1 and Article 13 of the Convention were established.

Nevertheless, an applicant who has failed to use the appropriate and relevant domestic remedies cannot rely on Article 13 of the Convention separately or in conjunction with another provision[60].

Hence, it is critical to raise this issue before Russian courts for this provision to apply. As discussed earlier, the admissibility criteria provide that, among others, a violation should be within the validity period of the Convention. Hereby, an applicant should have received a judicial decision of a Russian court failing to grant a remedy prior to 16 September 2022. For these limits, few, if any, applicants would be able to

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[55] Convention, Article 6(1)

[56] *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022, § 301

[57] *Akdivar and Others v. Turkey*, 16 September 1996, Reports of Judgments and Decisions 1996-IV, § 69

[58] *Zavoloka v. Latvia*, no. 58447/00, 7 July 2009, § 35 (a)

[59] *Chiragov and Others v. Armenia* [GC], no. 13216/05, ECHR 2015; *Sargsyan v. Azerbaijan* [GC], no. 40167/06, ECHR 2015

[60] *Sultan Öner and Others v. Turkey*, no. 73792/01, 17 October 2006, § 117

apply to the ECHR for the redress of this right. However, in case Russia, upon the military defeat and the subsequent structural and political changes, re-establishes as a party to the Convention, the said breach could be admissible if addressed by a national court during the validity of the Convention.

1.5. Compensation

Pursuant to Article 41 of the Convention the ECHR has the authority to afford just satisfaction to the injured party[61]. As the ECHR opined in *Iatardis v. Greece (Article 41)*:

> a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach[62].

Additionally, the ECHR is able to grant compensation for legal costs, both pecuniary and non-pecuniary damages, i.e. mental or physical suffering[63]. The amounts of all but proven pecuniary losses are assessed on an 'equitable' basis because the ECHR holds that it 'enjoys a certain discretion' in the exercise of its remedial powers[64].

Methods of the determination of the amount due employed by the ECHR for pecuniary damages include the assessment of the market value of an asset[65]. Moreover, non-pecuniary damage could be afforded due to, among other factors, serious interferences with P1-1[66].

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[61] Convention, Article 41

[62] *Iatridis v. Greece (Article 41)* [GC], no. 31107/96, ECHR 2000-XI, § 32

[63] 'Q&A on the European Court of Human Rights award of "just satisfaction" (ECHR, 26 March 2019) <https://www.echr.coe.int/Documents/Press_Q_A_Just_Satisfaction_ENG.pdf> accessed on29 January 2024

[64] D Shelton, *Remedies in International Human Rights Law* (3rd ed., Oxford University Press 2015), p. 321–322

[65] Brumarescu v. Romania (Just Satisfaction), no. 28342/95, 23 January 2001, § 24

[66] *Ibid*, § 27

Nevertheless, it is argued both in doctrine and domestic case law that as to moral damage the ECHR's compensation is "ungenerous" in comparison to English tort standards[67] or even lower than a "symbolic" amount requested by an applicant[68].

Thus, an applicant should have correct expectations that corroborated material loss is most likely to be remedied by the ECHR, while non-pecuniary damage would be afforded in a modest sum if any.

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In sum, the ECHR offers protection against the violations of the Convention perpetrated by Russia, but with certain limitations. The key aspect lies in the jurisdiction of the ECHR, as the territory where a potential violation is committed falls outside the internationally recognised borders of the Russian Federation. The recent decisions in *Ukraine v. Russia (re Crimea)* of 16 December 2020 and *Ukraine and the Netherlands v. Russia* of 25 January 2023 significantly simplify the task of proving the existence of Russia's effective control over specific territory to apply the Convention extraterritorially.

Another thing to keep in mind is the time constraints, as Russia was expelled from the Council of Europe on 16 March 2022, and, thus, ceased to have obligations under the Convention on 16 September 2022. In other words, for only the actions of Russia, which occurred before 16 September 2022, the latter can be held responsible. Additionally, the Convention allows only four months to lodge an application with the ECHR calculating from either the date of alleged violation or when an applicant becomes aware of the interference in question. Although four months have elapsed since 16 September 2022, yet an application still can be admissible if a violation occurred prior to the said date but an applicant obtained knowledge of it within the last

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[67] *Watkins v SOSHD* [2006] 2 AC 395 *as cited in* Veronika Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' [2018] 29(4) The European Journal of International Law, p. 1107

[68] *Lorsé and Others v. the Netherlands*, no. 52750/99, 4 February 2003, § 98–100 *as cited in* Veronika Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' [2018] 29(4) The European Journal of International Law, p. 1107

four months. For example, suppose in August 2022 an applicant's home was damaged by the shelling carried out by Russian troops in the territory controlled by the Russian Federation, but he learnt of this fact on 10 March 2024. In that case, he has until 10 July 2024 to file a respective application to the ECHR.

The list of violations could basically envisage almost every guarantee enshrined in the Convention, with some limitations for legal persons. For practical purposes, it is reasonable to presume that Russian troops numerously breached the protection of property outlined in P1-1. However, not every destruction or damaging of private property as such would amount to a violation. This interference could be justified by the lawfulness criteria. Russia is a party to GC IV and Protocol I – instruments of international humanitarian law, *lex specialis* applying during an international armed conflict – which allow for attacks in certain circumstances.

Apart from the "prescribed by law" criterion, the public interest and proportionality of the impugned interference should be considered. Yet, none of the motives declared by Russia could possibly be regarded as serving the public or general interest of the community, thereby failing to meet both of these criteria. In any event, even if only one of the elements of this three-part test is not met, a violation of the Convention occurs.

Further, Russia failed to fulfil its obligations under Article 13 of the Convention by not providing access to an effective remedy before its domestic courts for violations of the Convention. This failure stems from the fact that adjudicating such cases would involve addressing the conduct of the Russian army (i.e. the Annexation, the Russian February Invasion, or the armed conflict up to the full-scale escalation). It can be alleged with the utmost certainty that the Russian court system is incapable of operating without political bias and, thus, it would impair the effectiveness of this mechanism of legal protection. This conclusion as well is confirmed by the prior practice of the ECHR regarding the Nagorno-Karabakh conflict.

Thereby, it can be confidently asserted that such conduct of the Russian Federation was not in line with its obligations under the Convention, which ceased to exist 6 months after its expulsion from the Council of Europe.

Lastly, the ECHR has the capacity to grant a modest compensation for the non-pecuniary damage and fully reimburse for the legal costs incurred and material losses. However, to be eligible for such compensation, the damages shall be substantiated by the relevant evidence. The lack of such evidence may lead the ECHR to declaring one's application inadmissible.

SECTION 2. INVESTMENT ARBITRATION PROCEEDINGS

2.1. Legal basis

The BIT was concluded on 27 November 1998 and entered into force on 27 January 2000. Article 9 of the BIT provides, in the relevant part, as follows:

> 1. In case of any dispute between either Contracting Party and the investor of the other Contracting Party, which may arise in connection with the investments, […] [t]he parties to the dispute shall exert their best efforts to settle that dispute by way of negotiations.
>
> 2. In the event the dispute cannot be resolved through negotiations […] the dispute shall be passed over for consideration to:
>
> a) a competent court or an arbitration court of the Contracting Party, on whose territory the investments were carried out;
>
> b) the Arbitration Institute of the Chamber of Commerce in Stockholm ["**SCC**"],
>
> c) an "ad hoc" arbitration tribunal, in conformity with the Arbitration Regulations of the United Nations Commission for International Trade Law (UNCITRAL) ["**UNCITRAL**"].
>
> 3. The award of arbitration shall be final and binding upon both parties to the dispute. Each Contracting Party shall undertake to execute such an award in conformity with its respective legislation[69].

Accordingly, any Ukrainian "*investor*" may submit a "*dispute*" arising between it and Russia "*in connection with […] investments*" to the SCC for arbitration or for *ad hoc* arbitration under the UNCITRAL Arbitration Rules. In doing so, the investor accepts the State's standing offer to arbitrate under the BIT and thereby initiates an arbitration. The option to refer a dispute to a Russian domestic court under Article 9(2)(a) of the BIT is inadequate due to political dependence of Russia's judicial system and, thus, would not be addressed.

To date, eleven investment treaty arbitrations have been brought against Russia arising out of the international armed conflict with Russia that are known to the public[70]. Since the first of these cases was filed in 2015, these proceedings have shown

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[69] BIT, Article 9

[70] PJSC Ukrnafta v The Russian Federation, PCA Case No. 2015-34 ["**Ukrnafta**"]; Stabil LLC & Others v The Russian Federation, PCA Case No. 2-15-35 ["**Stabil**"]; PJSC CB PrivatBank and Finance Company Finilon LLC v The Russian Federation, PCA Case No. 2015-21 ["**PrivatBank**"];

a striking pattern of success. In five cases – *Everest*, *Stabil*, *Ukrnafta*, *Oschadbank* and *DTEK* – international tribunals have issued final awards against Russia, finding in favour of the investors on jurisdiction and liability, and awarding the investors substantial damages[71]. In a further three cases – *Naftogaz*, *Belbek* and *Privatbank* – tribunals have issued partial awards also upholding jurisdiction and finding Russia liable for breach of the BIT, with the quantum yet to be determined. In *Lugzor* proceedings the Permanent Court of Arbitration ["**PCA**"] rendered an award on 4 October 2022 (re-issued on 2 December 2022 due to clerical and typographical errors)[72], yet there is no information on the outcome of the case. As per publicly available information, the final two cases remain pending.

Following the Russian February Invasion numerous bilateral agreements between Ukraine and Russia were terminated, however the BIT was omitted. As the tribunal noted in the DTEK Award of 1 November 2023: "*Notwithstanding the existence of an armed conflict between Ukraine and the Russian Federation, as of the date of this Award the BIT between Ukraine and the Russian Federation remains in full force and effect*"[73]. No further developments on the issue of the validity of the BIT were voiced neither by Ukraine nor by Russia. Thus, the BIT remains valid.

Everest Estate LLC & Others v The Russian Federation, PCA Case No. 2015-36 ["**Everest**"]; Aeroport Belbek LLC and Igor Valerievich Kolomoisky v The Russian Federation, PCA Case No. 2015-07 ["**Belbek**"]; Limited Liability Company Aberon Ltd & Others v The Russian Federation, PCA Case No. 2015-29; Oschadbank v The Russian Federation, PCA Case No. 2016-14 ["**Oschadbank**"]; NJSC Naftogaz of Ukraine & Others v The Russian Federation, PCA Case No. 2017-16 ["**Naftogaz**"]; PJSC DTEK Krymenergo v The Russian Federation, PCA Case No. 2018-41 ["**DTEK**"]; LLC Lugzor, LLC Libset, LLC Ukrinterinvest, PJSC DniproAzot and LLC Aberon Ltd v. The Russian Federation, PCA Case No. 2015-29 ["**Lugzor**"]; NPC Ukrenergo v The Russian Federation (2019)

[71] *Everest*, Award on the Merits, 2 May 2018; *Stabil*, Award on Jurisdiction, 26 June 2017; *Ukrnafta*, Award on Jurisdiction, 26 June 2017; *Oschadbank*, Award, 26 November 2018

[72] 'PCA Press Release: The Tribunal renders its Award in Arbitration between Limited Liability Company Lugzor and Four Others as Claimants and the Russian Federation as Respondent" (Permanent Court of Arbitration, 30 March 2023) <https://docs.pca-cpa.org/2023/03/038c58df-press-release-dated-30-march-2023.pdf> accessed on 29 January 2024

[73] *PJSC DTEK Krymenergo v The Russian Federation*, Award of 1 November 2023, PCA Case No. 2018-41 ["**DTEK Award**"], § 212

2.2. Investor

The claimant must be a qualifying investor under the BIT to be able to bring a claim under this treaty. The claimant must show that they are a Ukrainian "*investor*". Article 1(2) of the BIT defines "*investor*" in the following broad terms:

> a) any natural person, who is a citizen of the state of a Contracting Party, and who is legally capable under its respective legislation to carry out investments on the territory of the other Contracting Party;
>
> b) any legal entity, set up or instituted in conformity with the legislation prevailing on the territory of the given Contracting Party, under the condition that the said legal entity is legally capable, under the legislation of its respective Contracting Party, to carry out investments on the territory of the other Contracting Party[74].

Accordingly, a claimant may be either "*natural persons*" who are "*citizen[s]*" of Ukraine or "*legal entit[ies], set up or instituted in conformity with the legislation prevailing*" in Ukraine. Therefore, it is evident who would be considered a Ukrainian "*investor*" within the meaning of Article 1(2) of the BIT.

2.3. Investment

In addition to showing that they are Ukrainian "*investors*" under the BIT, claimants will also have to satisfy the Tribunal that the dispute between them and Russia is "*in connection with […] investments*".

Article 1(a) of the BIT defines the term "*investments*" broadly as encompassing "*all kinds of property and intellectual values*". It goes on to list, in a non-exclusive manner, four categories of protected investments, including (1) "*movable and immovable property and any other rights of property therein*"; (2) "*monetary funds and also securities, liabilities, deposits and other forms of participation*"; (3) "*rights to objects of intellectual property, including authors' copyrights and related rights, trade marks, the rights to inventions, industrial samples, models and also technological processes and know-how*"; (4) "*rights to perform commercial activity, including rights to prospecting, development and exploitation of natural resources*"[75]. Investments in,

[74] BIT, Article 1(2)
[75] BIT, Article 1(a)

inter alia, property (i.e., a flat, house, car, boat, specific equipment of an enterprise etc.) and shares in a legal entity evidently would satisfy these criteria.

Article 1(a) of the BIT also provides that "*Investments*" must be "*put in by the investor of one Contracting Party on the territory of the other Contracting Party in conformity with the latter's legislation*". To be considered as qualifying "*investments*", showing that property and/or shares were held in the "*territory*" of Russia, as that term is defined in the BIT, is mandatory. "*Territory*" is defined in Article 1(4) of the BIT as "*the territory of the Russian Federation or the territory of the Ukraine and also their respective exclusive economic zone and the continental shelf as defined in conformity with the international law*"[76].

In the prior arbitrations against the Russian Federation arising from the Annexation, Russia has raised a jurisdictional objection on the basis that the BIT cannot apply because investments were made prior to 2014 when Crimea was still the sovereign territory of Ukraine. Russia has argued that investments are therefore domestic investments and not in "*the territory of the other Contracting Party*" in accordance with Article 1(1) of the BIT.

In considering this matter, prior tribunals have formulated the question as follows: did investments made by Ukrainian nationals in Ukraine come under the protection of the BIT because the territory of Ukraine where the investments were made shifted under the control of Russia? All eight tribunals that have ruled on this matter have concluded that they did, and that, therefore, the BIT binds Russia in respect of investments made in Crimea prior to the Annexation[77]. This position has also been upheld by the Court of Appeals of The Hague in *Everest*[78], *Stabil* and *Belbek*[79], and in

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[76] *Ibid*, Article 1(4)

[77] The eight cases are Everest, Stabil, Ukrnafta, Oschadbank, Naftogaz, Belbek, PrivatBank and DTEK

[78] *The Russian Federation v Everest Estate LLC et al.*, The Hague Court of Appeal, Case No. 200.250.174/01, Judgment, 11 June 2019

[79] 'HHR's Crimea Team Wins Two Major Cases in Dutch Court' (Hughes Hubbard; 27 July 2022) <https://www.hugheshubbard.com/news/hhrs-crimea-team-wins-two-major-cases-in-dutch-court> accessed on 9 April 2024

Ukrnafta dispute by the Swiss Federal Supreme Court[80]. Notably, in investment arbitration initiated by *Oschadbank*, the award was set aside by the Paris Court of Appeal, which held that the tribunal did not have jurisdiction over the dispute because the bank's investments were obtained prior to 1992 with the BIT applying exclusively to investments "*carried out…as of January 1, 1992*" (i.e. outside the temporal scope of the BIT). However, this position did not impugn the tribunal's reasoning on this issue. Later on, the Supreme Court of France overturned the said decision[81].

The reasoning of the prior tribunals is as follows:[82]

First, there can be no doubt that Russia has established effective control over Crimea through a combination of physical control coupled with legal steps. This is acknowledged by both Russia and Ukraine. Russia treats Crimea as part of its sovereign territory in its national law and claims sovereignty vis-à-vis the international community. Ukraine has also reflected in long-term domestic legislation that Russia has established control over Crimea (while challenging the legality of such conduct)[83].

Second, the ordinary meaning of the term "territory" in the BIT includes areas over which the Contracting Parties exercise jurisdiction and *de facto* control, even if they hold no lawful title under international law. This is consistent with public

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[80] 'Arbitration award for expropriation of investment in the Crimea remains valid - Swiss Supreme Court rejects RF appeal for the second time' (Ukrnafta; 18 December 2019) <https://www.ukrnafta.com/en/arbitration-award-for-expropriation-of-investment-in-the-crimea-remains-valid-swiss-supreme-court-rejects-russian-federation%E2%80%99s-appeal-for-the-second-time> accessed on 9 April 2024

[81] 'French court upholds intl arbitration decision to recover $1.1 bln from Russia in favor of Oschadbank for Crimea' (Interfax-Ukraine, 7 December 2022) <https://en.interfax.com.ua/news/general/876957.html> accessed on 29 January 2024

[82] 'Uncovered: Tribunal In Previously-Unseen Award Against Russia Upheld Jurisdiction Over Crimea-Related Claims, And Awarded Over 1.3 Billion USD In Compensation' (IA Reporter, 13 April 2021) <https://www.iareporter.com/articles/uncovered-tribunal-in-previously-unseen-award-against-russia-upheld-jurisdiction-over-crimea-related-claims-and-awarded-over-1-3-billion-usd-in-compensation/> accessed on 29 January 2024

[83] Law of Ukraine no. 1207-VII "On Guaranteeing Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine" dated 15 April 2014 (as amended on 24 March 2024); Law of Ukraine no. 1636-VII "On Establishing Free Economic Zone 'Crimea' and Special Aspects of Conducting Economic Activity in the Temporarily Occupied Territory of Ukraine" dated 12 August 2014 (ceased to be in force on 21 November 2021)

international law, which recognises that situations arise where "*territorial administration [is] separated from state sovereignty*"[84]. As to the phrase "*in accordance with international law*" at the end of the definition of "territory" in Article 1(4) of the BIT, tribunals have found that this only concerns the definition of the two States' exclusive economic zones and continental shelf, not the definition of territory as a whole.

Third, the foregoing interpretation is consistent with the context, object and purpose, of the BIT and is supported by the treaty practice of the Contracting States. A number of investment treaties concluded by Ukraine specifically define "territory" with reference to "sovereignty", which the BIT does not. For example, the Lithuania-Ukraine BIT, Article 1(4) of which states that

> [t]he term "territory" shall mean in respect of each Contracting Party the territory under its sovereignty and the sea and submarine areas over which the Contracting Party exercises, in conformity with international law, sovereignty, sovereign rights or jurisdiction[85].

Further, Russian BITs with landlocked countries limit the application of the phrase "*in accordance with international law*" to Russia, as the only contracting State with maritime areas. Thus, the Russia-Hungary BIT, Article 1(4) of which states as follows:

> [t]he term "territory" shall mean the territory of the Russian Federation and the territory of the Republic of Hungary respectively and with regard to the Russian Federation also the exclusive economic zone and the continental shelf over which the Russian Federation exercises, in accordance with international law, sovereign rights and jurisdiction for the purpose of exploration, exploitation and conservation of natural resources[86].

Fourth, this conclusion is also compelled by Article 31(1) of the Vienna Convention on the Law of Treaties, which states that a treaty must be interpreted in

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[84] J Crawford, *Brownlie's Principles of Public International Law* (9th ed., Oxford University Press 2019), pp. 194-198

[85] Agreement between the Government of the Republic of Lithuania and the Government of Ukraine for the promotion and reciprocal protection of investments, 8 February 1994, Article 1(4)

[86] Agreement between the Government of the Republic of Hungary and the Government of the Russian Federation for the promotion and reciprocal protection of investments, 6 March 1995, Article 1(4)

good faith[87]. This requirement effectively bars Russia from claiming Crimea as part of its territory before the international community and yet simultaneously denying it has obligations under the BIT to Ukrainian investors in Crimea. This is also consistent with Article 29 of the Vienna Convention on the Law of Treaties, which provides that international treaties are binding upon contracting states in respect of their entire territory and will remain applicable even where a contracting state subsequently alters its territory[88].

It could be reasonably expected that an international investment tribunal hearing cases concerning investments in Crimea and Donbas would adopt similar reasoning and thus also uphold its jurisdiction. Yet, some doubts may arise considering the briefly occupied territories, like certain parts of the Kyiv Region, and property damaged by Russian shelling on the territory under Ukrainian control.

Noteworthy, that in concluding that Russia is bound by the BIT in respect of investments made in Crimea before the Annexation, prior tribunals have been at pains to stress that their mandate was limited to assessing whether they have jurisdiction under the BIT, and that they were thus not required to (and did not) express any opinion on the legality of Russia's Annexation of Crimea or on the legitimacy of the sovereign claims over the territory. For this reason, some tribunals have eschewed the language of annexation, instead referring to the "incorporation" of Crimea into Russia.

In doing so, the tribunals effectively answered a separate objection raised by Russia, namely that the disputes before them could not be resolved without determining Russia and Ukraine's respective claims to sovereignty over Crimea, a question which – Russia argued – is not within the jurisdiction of an international investment tribunal.

This is unpersuasive. Potential claims do not depend on a finding that Russia exercises *de jure* sovereignty over Crimea. Rather, it is only necessary to show that investments are in the "territory" of Russia for the purposes of the BIT, for which a showing of *de facto* control is sufficient. This is reflected in the conclusion of the Hague Court of Appeal in *Russia v Everest Estate*, which remarked that *"[t]he dispute*

[87] Vienna Convention on the Law of Treaties, 23 May 1969, UNTS, vol. 1155, p. 331, Article 31(1)
[88] *Ibid*, Article 29

between the Russian Federation and Everest et al. may be resolved without issuing a judgment on the Crimea's territorial status"[89]. An international investment tribunal adjudicating upon a dispute under the BIT would probably adopt a similar perspective on this matter.

In this respect, investment treaty claims brought against Russia arising from the Annexation contrast with the decision of a tribunal established under the United Nations Convention on the Law of the Sea in a claim brought by Ukraine against Russia. In that case, the tribunal observed that "*many*" of Ukraine's claims were "*based on the premise that Ukraine is sovereign over Crimea*" and that it had jurisdiction to hear Ukraine's claims only insofar as doing so would not involve purporting to determine the States' respective claims to sovereignty over Crimea[90].

Interestingly, in the DTEK Award, the tribunal applied a different approach to the determination of what is "territory". In doing so, the tribunal opined that:

> the proper interpretation of Article 1(4) of the BIT is that "territory of the Russian Federation" refers to the geographical area which, at the relevant date (which is the date of the impugned measures), was under the control of the Russian Federation; and there is no dispute that, at the relevant date in this case (the year 2015), Crimea was a territory under the control of the Russian Federation. There is a dispute between Ukraine and the Russian Federation regarding which of the two powers held (and still holds) sovereignty over Crimea – but this dispute does not taint the conclusion that, for purposes of the BIT, Crimea forms part of the territory which is entitled to receive protection[91].

Accordingly, the tribunal relied on who controlled the respective territory at the date of imposing measures affecting the investment. Once again, the issue of sovereignty over the Crimean Peninsula was omitted.

In the alternative, the panel of arbitrators also declared that Russia's consistent position that "Crimea forms part of its sovereign territory" bars it from arguing that Crimea is not protected territory under the BIT. In doing so the Russian Federation

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[89] *The Russian Federation v Everest Estate LLC et al.*, The Hague Court of Appeal, Case No. 200.250.174/01, Judgment, 11 June 2019, § 6.7.

[90] *See* Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (*Ukraine v. the Russian Federation*), PCA Case No. 2017-06, §§ 15, 197

[91] DTEK Award, § 292

"*has run afoul of the principle of good faith, one of the founding principles of law in general, and international law in particular*"[92]. Making this deliberation the tribunal argued:

> [Russia] is estopped from arguing that the territory it unambiguously declares to be part of its sovereign territory, should not be regarded as protected territory under the BIT, when an investor claims protection for its investments in that very territory[93].

2.4. Multiple claimants

Providing for the high costs of investment arbitration, it is likely that multiple claimants, comprising both companies and individuals, would jointly file a notice of arbitration to reduce expenses. Russia may seek to raise this issue as a jurisdictional objection.

Russia ran this argument, for example, before the Hague Court of Appeal in *Russia v. Everest*. In *Everest*, the claimants comprised 18 legal entities and one Ukrainian national, but all the claimants were "*connected to PrivatBank and Mr. Igor Valerievich Kolomoisky*"[94]. Russia argued that the arbitration agreement in the BIT did not permit the tribunal to hear multiple "*applications*" in the same proceeding[95].

However, such an argument is unlikely to be successful. As the Hague Court of Appeal observed in *Everest*, "*multiple investors collectively filing a claim*" is a "*frequently encountered phenomenon*" in investment treaty arbitration[96]. Based on the most recent jurisprudence, the question a tribunal is likely to ask is whether, notwithstanding the multiplicity of claimants, there is nevertheless a single "*dispute*"

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[92] *Ibid*, § 294

[93] *Ibid*

[94] *Everest*, Award on the Merits, 2 May 2018, §§ 47, 49

[95] *Ibid*, §§ 6.8, 6.9

[96] *Ibid*; See, for example, Noble Energy Inc and Machalapower Cia. Ltda v Ecuador and Consejo Nacional de Electricidad, ICSID Case No ARB/05/12, Decision on Jurisdiction, 5 May 2008; Bernardus Henricus Funnekotter and others v Zimbabwe, ICSID Case No ARB/05/6, Award, 22 April 2009; Abaclat and others v Argentine Republic, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011; Abaclat v Argentine Republic, Decision on Jurisdiction and Admissibility, 28 October 2011

and/or a "*substantial unity*" of claims[97]. In circumstances where all claims arise from the same measures, e.g., the Annexation, the armed conflict prior to 24 February 2022 and/or the Russian February Invasion, this test is likely to be met.

2.5. Attribution

The claims may depend on attributing to Russia the actions of the Russian Armed Forces, the Crimean/Donbas "authorities" and paramilitary forces. Issues of attribution are typically considered in accordance with the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ["**ILC Articles**"][98], which codify customary international law on this issue.

The relevant articles are likely to be (1) Article 4, which reflects the principle of the unity of the State; (2) Article 5, which concerns the acts of persons or entities who are not organs of the state but are empowered by the law of the State to exercise elements of governmental authority; and (3) Article 8, which covers the conduct of a person or group of persons who act "*on the instructions of or under the direction or control*", of the State[99]. With respect to the latter, as opined before, the effective control of Russia over paramilitary forces and authorities in Crimea and D/LPR was already established by the ECHR[100]. Thus, the proof of the existence of the said control would be unnecessary or significantly simplified before an arbitral tribunal.

As to the practical dimension, in the most recent publicly available arbitral award – DTEK Award – Russia did not dispute the attribution of the conduct of so-called authorities in the occupied Crimea (in that instance – "the State Council of the Republic of Crimea" and "the Council of Ministers of the Republic of Crimea") and the

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[97] *Giovanni Alemanni and others v Argentine Republic*, ICSID Case No ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014, §§ 288-295; *Theodoros Adamakopoulos and others v Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, 7 February 2020, §§ 205, 210

[98] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 ["**ILC Articles**"]

[99] *Ibid*, Arts. 4, 5, 8

[100] *Ukraine v. Russia (re Crimea)* [GC], nos. 20958/14 and 38334/18, 16 December 2020, § 335; *Ukraine and the Netherlands v. Russia* [GC], nos. 8019/16, 43800/14 and 28525/20, 25 January 2023, § 695

employees of State Unitary Enterprise of the Republic of Crimea "Krymenergo" owned fully by Russia[101].

2.6. Liability

2.6.1. Expropriation

Generally, investment treaties do not prohibit expropriation, provided that certain conditions are satisfied. Instead, in the event of expropriation or nationalisation of their investment, investment treaties typically entitle investors to market value compensation. In keeping with this norm, Article 5 (Expropriation) of the BIT provides:

> (1) The investments of investors of either Contracting Party, carried out on the territory of the other Contracting Party, shall not be subject to expropriation, nationalization or other measures, equated by its consequences to expropriation (hereinafter referred to as expropriation), with the exception of cases, when such measures are not of a discriminatory nature and entail prompt, adequate and effective compensation[102].

To be deemed a legal (or lawful) expropriation, an expropriation must also comply with customary international law, which is international law derived from the consistent conduct of States and *opinion juris*[103]. It is well-established that, for an expropriation to be lawful, it must:

i. not be "*of a discriminatory nature*";
ii. "*entail prompt, adequate and effective compensation*";
iii. be in the public interest; and
iv. be carried out in accordance with due process of law[104].

That being said, the first two limbs of the test for lawful expropriation are also provided for explicitly in Article 5 of the BIT.

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[101] DTEK Award, § 689

[102] BIT, Article 5

[103] *See* e.g. *Continental Shelf (Libyan Arab Jarnahiriya/Malta)*, Judgment, ICJ Reports 1985, p. 13, para. 27

[104] *See* e.g. Organisation for Economic Co-operation and Development, *Draft Convention on the Protection of Foreign Property: Text with Notes and Comments*, 12 October 1967, pp. 17-22; DTEK Award, § 622

An expropriation that satisfies the above criteria will be deemed as legal (or lawful). On the other hand, an expropriation that fails to comply with any of these criteria will be deemed an illegal (or unlawful) one.

Article 5 of the BIT explicitly protects investors against "*expropriation, nationalization or other measures, equated by its consequences to expropriation*"[105]. The BIT, therefore, protects investors against both host State conduct that deprives it of its ownership of an asset – i.e., direct expropriation – and conduct that does "*not involve actual takings of title but nonetheless result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor*" – i.e., indirect expropriation.

In cases of indirect expropriation, it is well-established that the touchstone is the "*equivalent effect*" of the relevant measure on the investor, not whether the State intended to expropriate an investment by implementing the measures at issue. Accordingly, the tribunal in *CME v Czech Republic* held that an expropriation claim properly includes measures "*that effectively neutralize the benefit of the property of the foreign owner*"[106]. Similarly, the tribunal in *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic* held that Argentina had expropriated the claimants' investment because the conduct of the Argentine province in question had "*radically deprived [the investor] of the economic use and enjoyment of their concessionary rights*" and "*had the effect of putting an end to the investment*"[107].

In practice, the question often asked by tribunals is whether the interference with the investor's rights has "*substantially […] deprive[d] the investor of the economic value, use or enjoyment of its investment*"[108]. Whether a deprivation is "substantial" is necessarily determined on a case-by-case basis. And, as one commentator has noted,

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[105] *Ibid*

[106] *CME Czech Republic B.V. (The Netherlands) v The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, § 604

[107] *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007, § 7.5.29

[108] *Telenor Mobile Communications A.S. v Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, § 65

while tribunals "*have consistently held that the deprivation must be severe and not ephemeral*", they have "*eschewed numerical thresholds*"[109].

2.6.2. National Treatment or Most Favoured Nation Treatment

Article 3(1) of the BIT obligates Russia to provide a regime for Ukrainian investments that "*shall be no less favorable than the one granted to its own investors or investors of any third state, precluding the use of discriminatory measures, which could interfere with the management and disposal of those investments*"[110] (emphasis added).

As set out above, it appears that the expropriation of investments in Crimea has been based on "*discrimination against Ukrainian-held as opposed to Russian-owned assets*"[111], including the fact that compensation has been paid to Russian investors but not to Ukrainian nationals. The same discriminatory nature could be suggested for the assets the other occupied parts of Ukraine. On this basis alone, there is a *prima facie* claim for breach of Article 3(1) of the BIT.

2.6.3. Fair and Equitable Treatment

Article 3(1) of the BIT also enables a claimant to incorporate into the BIT standards and protections from more favourable treaties entered into by Russia with other States, including notably the Fair and Equitable Treatment ["**FET**"] standard, which is included in various bilateral investment treaties between Russia and third States.

The FET standard is the most frequently invoked standard in investment disputes[112]. It is also the standard with the highest practical relevance: a major part of

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[109] A Newcombe, L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009), p. 344

[110] BIT, Article 3(1)

[111] *Everest,* Award on the Merits, 2 May 2018, § 237

[112] R Dolzer, CH Schreuer, *Principles of International Investment Law* (3rd ed. Oxford University Press 2022), p. 186

successful claims pursued in international arbitration are based on a violation of the FET standard[113].

Tribunals typically look at several non-cumulative criteria to determine whether a State's measures are in breach of the FET standard, including, among other factors: (1) whether the State acted in an arbitrary or discriminatory manner; (2) whether the States' actions were proportionate to the stated policy objective they sought to achieve; and (3) whether the State breached the investor's reasonable and legitimate expectations on which the investor relied at the time of making the investment.

Likely, Russia's expropriation or other measures equated by its consequences to the expropriation of investments would also amount to a breach of the FET standard incorporated into the BIT. In this respect, it is worth reminding that Crimean "authorities" issued the Nationalisation Decree on 30 April 2014[114]. In essence, this document declared that all state-owned and municipal properties owned by Ukraine and all properties abandoned in Crimea were to be considered property of the Republic of Crimea. This created a good *prima facie* case that the implementation of the Nationalisation Decree was conducted in a manner discriminatory to Ukrainian nationals. While no such document of general nature was issued by Russian authorities in other regions, proving the violation of the FET standard in other regions than Crimea would require more efforts.

2.6.4. Complete and Unconditional Legal Protection of Investments

Article 2(2) of the BIT provides that "*[e]ach Contracting Party shall guarantee, in conformity with its legislation, the complete and unconditional legal protection of investments of investors of the other Contracting Party*".

The concept of "complete and unconditional legal protection" has not often been considered in published investment arbitration awards. Most investment protection instruments have different wording of this standard[115], but in general, it is referred to

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[113] *Ibid*

[114] State Council of the Republic of Crimea, Decree No 2085-6/14 "On Issues of Managing Property in the Republic of Crimea", 30 April 2014 with subsequent amendments thereto

[115] Stanimir A. Alexandrov, 'The Evolution of the Full Protection and Security Standard', in Meg

as full protection and security ["**FPS**"] standard. The semantics variations do not change tribunals' interpretations of this standard[116], still, some differences take place varying from the investment treaty at hand.

Moreover, due to its 'like' formulation with the FET standard, the consideration of their relationship creates confusion among arbitrators[117]. Thus, in *Frontier Petroleum v Czech Republic* the tribunal delineated these standards as follows:

> full protection and security obliges the host state to provide a legal framework that grants security and protects the investment against adverse action by private persons as well as state organs, whereas fair and equitable treatment consists mainly of an obligation on the host state's part to desist from behaviour that is unfair and inequitable[118].

However, in the context of the BIT, in *OAO Tatneft v. Ukraine*, the UNCITRAL tribunal considered that the analysis of such a standard was inseparable from its assessment of FET under Article 3(1) of the BIT. The tribunal went on to note that *"[w]hile the individuality of Article 2(2) might be justified in the context of certain disputes, in the instant case all of its relevant elements are indistinguishable from the BIT's principal standards*", being the legal protections against expropriation and the guarantee of FET[119].

2.7. Compensation

2.7.1. Standard of compensation for internationally wrongful acts

Like most investment treaties, the BIT does not offer guidance as to the appropriate measure of damages or compensation payable for a breach of its substantive investment protections, save in the case of a lawful expropriation (i.e., one conducted in accordance with Article 5 of the BIT and customary international law). In the absence of any guide in the BIT, international tribunals typically grant relief

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Kinnear et al. (eds.), *Building International Investment Law: The First 50 Years of ICSID* (2015), p. 319

[116] *Ibid*

[117] R Dolzer, CH Schreuer, *Principles of International Investment Law* (3rd ed. Oxford University Press 2022), p. 196

[118] *Frontier Petroleum v Czech Republic*, Final Award, 12 November 2010, § 296

[119] *Tatneft v. Ukraine*, PCA Case No. 2008-8, 29 July 2014, § 361

based on the principles of customary international law, as set out by the Permanent Court of International Justice (afterwards renamed into the International Court of Justice) in *Chorzów Factory*,[120] and subsequently reflected in the ILC Articles[121].

These principles require the State to compensate the investor for "*any financially assessable damage including loss of profits insofar as it is established*"[122]. A claimant will bear the burden of proving a causal link, both factual and legal, between the alleged breach of the BIT and the harm it has suffered. Under the factual test of causation, the issue is whether the wrongful conduct played some part in causing the harm of injury. In contrast, under the legal test of causation, the key issue is whether the wrongful conduct was a sufficiently proximate or direct cause of harm or injury. The factual causal link alone is insufficient to hold the host State liable to make reparation[123].

2.7.2. Valuation methods

The four most common valuation methods deployed in international investment arbitration to assess damages are income-based, market-based, asset-based and sunk investment costs. Each of these is examined in turn below in this section.

First, the income-based approach calculates the present value of a business's anticipated future cash flows[124]. One common way of calculating such value (in arbitrations, as elsewhere) is the Discounted Cash Flow ["**DCF**"] method, which is widely used for calculating the fair market value of a going concern with a proven track-record and/or future profit-making potential. It requires an ability to forecast future earnings. Thus, tribunals have accepted the DCF method as a sound method of valuing companies, while noting that it should be used with caution to avoid compensating for speculative losses.

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[120] *Case concerning the Factory at Chorzów (Germany v Poland)*, Claim for Indemnity, Merits, PCIJ, Series A, No. 17, 1928, pp. 47 and 48

[121] ILC Articles

[122] *Ibid*, Article 36

[123] *See* S Ripinsky, K Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law 2008), p. 135

[124] *Ibid*, p. 245

Second, the market-based approach determines the value of a business by comparing it to similar businesses, business ownership interests or securities that are traded on the open market. It is of particular value if the market is demonstrably liquid and/or data can be obtained from a significant number of transactions involving identical or comparable assets. It may also be used as a 'sense-check' to support a DCF calculation.

Third, the asset-based approach values tangible and intangible assets comprising a business and aggregates these separate values to arrive at the value of the business. There are several asset-based methods (such as replacement value, book value or liquidation value) and the only difference between them lies in the indicators used to value the individual assets. As these methods fail to factor in the value of a going-concern outside of its assets (for example, goodwill and know-how), asset-based approaches are typically pursued in circumstances where the whole value of the business resides in its assets, or alternatively as a sense-check of income or market-based methods.

Fourth, some tribunals have determined the amount of compensation by reference to the investor's sunk investment costs and have allowed a claimant to recover its investment capital, less what it has already recovered but plus a return on the capital invested from the date of injury to the date of recovery. Investment tribunals tend to reject a DCF approach and instead rely on the historic sunk costs of an investment where the evidence necessary to apply an income-based approach – evidence of its prospects – is considered insufficient. This is often because the business does not have a long track record of profitable operation[125].

2.8. Procedural considerations

2.8.1. "Cooling-off" period

Like many investment treaties, the BIT provides that a dispute may only be referred to international arbitration after a fixed period – in the case of the BIT, six

[125] *See*, e.g., *Compania de Aguas del Aconquija SA and Vivendi Universal SA v Argentina*, ICSID Case No ARB/97/3, 20 August 2007, §§ 8.3.5 and 8.3.12-8.3.13,

months – from written notification of the claim by the investor to the host State[126]. This is often referred to as the "cooling-off" period and the written notification of dispute is commonly known as a "trigger letter". Arbitral tribunals have treated such provisions in different ways, with several tribunals holding that they are "compulsory", and at least as many considering them merely "procedural and directory" in nature. A tribunal that takes the view that the "cooling-off" period is mandatory will consider the claim inadmissible or decline to exercise jurisdiction if the State has not been notified of the claims in accordance with the prescribed "cooling-off" period.

The trigger letter, which is addressed to appropriate senior representatives of the Russian Government, should contain the following:

i. identify the relevant factual circumstances giving rise to its claims;
ii. invoke its rights under the BIT;
iii. propose negotiations to seek an amicable resolution of the dispute within the six-month timeframe specified in the BIT; and
iv. reserve its right to refer the dispute to international arbitration in accordance with Article 9(2) of the BIT should no settlement be reached.

2.8.2. Selection of seat

In keeping with most investment treaties, the BIT does not specify a seat – or legal place – for arbitrations brought under Article 9. Instead, the default provisions of the applicable procedural rules will apply.

In the case of arbitration under both the SCC and the UNCITRAL Rules, the place of arbitration will be determined by the tribunal[127]. In the ordinary course, the tribunal will solicit proposals from the parties[128], and determine the seat of arbitration by reference to a range of considerations, including:

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[126] See BIT, Article 9: "*In the event the dispute cannot be resolved through negotiations within six months as of the date of the written notification as mentioned in Item 1 hereof above, then the dispute shall be passed over for consideration to [arbitration]*"

[127] Swedish Chamber of Commerce Arbitration Institute, Arbitration Rules of the SCC Arbitration Institute, 1 January 2023 ["**SCC Rules**"], Article 25; United Nations Commission on International Trade Law, UNICTRAL Arbitration Rules, 2021 ["**UNCITRAL Rules**"], Article 18

[128] Article 25(2) of the SCC Rules provides that "*[t]he Arbitral Tribunal may, after consulting the*

i. the suitability of the law on arbitration at the seat;
ii. the convenience of the seat to the parties and the arbitrators;
iii. the neutrality of the seat (i.e., its independence from the parties to the dispute); and
iv. whether there is a multilateral or bilateral treaty on the enforcement of arbitral awards between the State where the arbitration is seated and the States where the award is likely to be enforced[129].

2.8.3. Costs of arbitration

Costs of arbitration is another procedural issue that basically sets "limits" for individuals or companies to initiate investment arbitration under the BIT. Thus, from available public information, the average cost of investment arbitration proceedings already carried out under the BIT is roughly around USD 12.36 mln[130].

As noted above, the dispute resolution under the BIT offers two sets of procedural rules to govern potential investment arbitration – the UNCTIRAL Rules and the SCC Rules[131]. Both rules provide for what should be deemed as the costs of arbitration, yet there are some differences.

Under the UNCTIRAL rules, the costs of arbitration include: (1) the fees of the arbitral tribunal; (2) the travel and other expenses of arbitrators; (3) costs of expert advice and other assistance required by the arbitral tribunal; (4) the travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

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parties, conduct hearings at any place it considers appropriate". Under Article 3(3)(g) of the UNCITRAL Rules, a claimant's notice of arbitration shall include a "*proposal as to the ... place of arbitration, if the parties have not previously agreed thereon*"

[129] *Ethyl Corporation v Government of Canada*, Ad Hoc Arbitration under the 1976 UNCITRAL Rules, Decision Regarding the Place of Arbitration, 28 November 1997, pp. 4, 9; *Philip Morris v Australia*, Procedural Order No. 3 Regarding the Place of Arbitration, 26 October 2012, §§ 36-40

[130] This calculation is made by obtaining simple average of costs set out in available to the author awards in cases: (1) USD 5,333,120.96 and EUR 705,000 in *Stabil*, Final Award, 12 April 2019, §§ 417, 426; (2) USD 8,583,110.02 and EUR 650,000 in *Everest*, Award on the Merits, 2 May 2018, §§ 401, 408; (3) USD 3,635,734.33 in *Oschadbank*, Award, 26 November 2018, §§ 400, 406; (4) USD 29,857,274.91 and EUR 896,794.87 in *Naftogaz*, Final Award, 12 April 2023, § 706; (5) USD 11,739,067.64 in *DTEK*, Award, 1 November 2023, §§ 1013, 1016

[131] BIT, Article 9(2)

(5) the costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable; (6) any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration[132].

The SCC Rules in its turn encompass (1) the fees of the arbitral tribunal; (2) the administrative fee; (3) the expenses of the Arbitral Tribunal and the SCC and separately mention (4) any reasonable costs incurred by another party[133]. Moreover, only the Board, which is a part of the SCC administration, has the power to finally determine the costs of arbitration (points 1-3 from the previous sentence)[134], while costs 'reasonable costs' may be ordered by the arbitral tribunal[135].

Therefore, given the above, UNCTIRAL Rules give a more comprehensive list of costs exclusively referring this question to the arbitral tribunal. At the same time, while the SCC Rules mainly refer the issue of "reasonable costs" to the discretion of a sole arbitrator or a panel of arbitrators, the administrative expenses on the services of the SCC arbitration are fixed by its Board.

In all instances, the biggest portion of costs derives from legal services[136]. While highly dependent on the nature of damages and their amount, the costs are a significant "investment" in the procedure. Up to the time of writing this thesis, the total amount of costs varies from the minimum of USD 3,635,734.33 in *Oschadbank*[137] to the maximum of USD 30,823,109 in *Naftogaz*[138], even though both arbitrations consider

[132] UNCITRAL Rules, Article 38
[133] SCC Rules, Articles 49, 50
[134] SCC Rules, Article 49(2)
[135] SCC Rules, Article 50
[136] *Stabil*, Final Award, 12 April 2019, §§ 417, 426; *Everest*, Award on the Merits, 2 May 2018, §§ 401, 408; *Oschadbank*, Award, 26 November 2018, §§ 400, 406; *Naftogaz*, Final Award, 12 April 2023, § 706; *DTEK*, Award, 1 November 2023, §§ 1013, 1016
[137] *Oschadbank*, Award, 26 November 2018, §§ 400, 406
[138] *Naftogaz*, Final Award, 12 April 2023, § 706

the largest volume of awarded damages – USD 1,111,300,729 in *Oschadbank*[139] and USD 4,222,875,858.81 in *Naftogaz*[140].

As noted in the above paragraph, the costs of arbitration can be regarded as a so-called 'investment' since the costs, finally fixed in arbitration award[141], shall in principle be borne by the unsuccessful party[142]. However, the arbitral tribunal remains free to allocate the costs at its consideration depending on the circumstances of each case[143]. Thereby, a party can expect to receive back the sums paid as the costs of arbitration.

Nevertheless, some claimants resort to third-party funding of investment arbitration proceedings. Third-party funding is not yet uniformly defined, but the UNCITRAL Working Group III shaped their approach and interpretation as follows:

> any provision of direct or indirect funding or equivalent support to a party to the international investment dispute proceeding (funded party) by a natural or legal person who is not a party to the proceeding (third-party funder) in return for remuneration dependent on the outcome of the proceeding[144].

The process of obtaining third-party funding may be divided into the following key steps in respect of the claims against the Russian Federation under the BIT.

Initially, a written analysis of the strength of the claimant's claims should be prepared for the purposes of presentation to potential third-party funders based on the documents and other information provided by the claimant. This document shall focus on the merits and quantum of the claimant's claims, as well as any jurisdictional issues and the prospects for enforcement. Such aspects as securing input from expert witnesses in the disciplines of forensic accounting and/or enforcement intelligence, as

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139 *Oschadbank*, Award, 26 November 2018, §§ 410(3)

140 *Naftogaz*, Final Award, 12 April 2023, § 716

141 UNCITRAL Rules, Article 38; SCC Rules, Article 49(5)

142 UNCITRAL Rules, Article 40(1); SCC Rules, Article 50. Please note that the SCC Rules do not directly refer to an 'unsuccessful party', but addresses the distribution of costs "having regard to the outcome of the case"

143 UNCITRAL Rules, Article 40(1-2); SCC Rules, Article 49(6)

144 UNCITRAL Working Group III, 'Possible reform of investor-State dispute settlement (ISDS): Draft provisions on procedural reform', 11 July 2022, A/CN.9/WG.III/WP.219., p. 12

required, and inclusion of an overall case budget for the prosecution of the arbitration and any subsequent enforcement proceedings can be decisive in this regard.

Once the case assessment is substantially complete, an appropriate shortlist of third-party funders to approach shall be discussed. This step is mostly justified by the competition between funders and various non-competition clauses that might be present between funders. As part of this process, a non-disclosure agreement ["**NDA**"] shall be entered with each funder. An NDA ensures that the confidentiality of the case and the funding terms that may be agreed with the funder is maintained and that, as far as possible, privilege is preserved over any documents that are shared with the funder.

Further, each of the funders will review the case assessment, together with any supporting documents provided therewith. That review will focus on the key aspects of the claims addressed in the case assessments, namely the strength of the claims as a matter of merits, quantum and jurisdiction, as well as the prospects for enforcement of any award against the Russian Federation.

In addition, each funder will evaluate whether the claims meet their investment criteria. For example, most funders will only fund claims above a minimum quantum threshold and will only meet budgeted costs up to a fixed percentage of that quantum (e.g., 10% of the claim value). The funders will therefore also scrutinize the case budget included with the case assessment.

Based on its review of the case assessments, any funder prepared to fund the claims will offer terms to the claimant in the form of a term sheet. The terms offered are likely to be presented based on either (1) a percentage of the damages return received by the claimants, or (2) a multiple of the money invested by the funder (whichever is the greater).

The term sheet will also include a period of exclusivity during which, once the terms are agreed, the claimant is prohibited from approaching or speaking to any other funder. During the exclusivity period set out in the term sheet, the funder will complete its analysis of the claim. Often this would involve the funder obtaining a third-party legal opinion verifying its own analysis of the claims (which can cause substantial delay); however, the case assessment prepared by the counsel of the claimant could

also be sufficient. The funder may request additional documents and is also likely to want to meet or speak with appropriate representatives of the claimants and their arbitration counsel.

Based on the term sheet provided by the funder, the claimant and its preferred funder will negotiate a formal funding agreement. Once the terms of the funding agreement are finalised, the funder will present the claims to its investment committee for approval, following which the first draw-down of funds will be made available.

The whole process of obtaining third-party funding is a lengthy operation that could take up to 4-6 months depending on the interest from the funder, which is mostly conditional upon the amount in dispute, and the efficiency of any other involved party.

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In conclusion, the BIT offers substantial protection for the "investments" of Ukrainian "investors" in the "territory" of the Russian Federation, with arbitral tribunals consistently finding breaches of such provisions as the prohibition of expropriation, fair and equitable treatment and most favoured nation treatment. The issue of whether the conduct in question is attributable to Russia, is typically in favour of the investor establishing the attribution. Notably, in the most recent case of *DTEK*, the Russian Federation did not contest the actions attributed to the state.

Despite the absence of a statute of limitations, the number of publicly known cases under the BIT remains relatively low, indicating the exclusivity of this mechanism due to associated costs. As of now, the public information points out eleven cases that were brought by Ukrainian investors against Russia under the BIT.

The issue of costs is pivotal, as it strikes an average of USD 12 mln within the already considered cases. Reducing the costs may be achieved by joining other claimants and commencing a multi-claimant arbitration or by a mechanism of third-party funding. The selection of a seat in a "pro-arbitration state" and adhering to the "cooling-off" period (six months for attempting an amicable settlement of the dispute) are also essential aspects to be considered before lodging a claim. Lastly, the BIT offers

two sets of procedural rules – UNCITRAL or SCC Rules, both of which are suitable to conduct the arbitration and offer compensation of arbitration costs.

SECTION 3. APPROPRIATION OF ASSETS IN UKRAINE

3.1. Legal framework

On 12 May 2022, the Ukrainian Parliament adopted Draft Bill No. 2257-IX "On Amendments to Certain Legislative Acts of Ukraine to Improve the Effectiveness of Sanctions Related to Assets of Individuals" ["**Bill 2257**"][145]. This bill, among others, introduced changed to the Law of Ukraine "On Sanctions" No. 1644 of 14 August 2014 ["**Law 1644**"]. The most significant adjustment is the introduction of a new type of sanction resembled in Article 4(1)(1[1]) of the Law 1644 as follows:

> appropriation of assets to the benefit of the state belonging to an individual or legal entity, as well as assets in respect of which such a person may directly or indirectly (through other individuals or legal entities) perform actions tantamount in content to the exercise of the right to dispose of them[146].

In general, a resolution to apply a sanction to private persons is adopted by the National Security and Defence Council of Ukraine ["**NSDC**"] and is enacted by a Decree of the President of Ukraine[147]. However, the one mentioned in Article 4(1)(1[1]) of the Law 1644 provides for a different enforcement mechanism.

Thus, by the virtue of the adoption of the Bill 2257, the Ministry of Justice ["**MoJ**"] of Ukraine, as the central executive body that ensures the implementation of the state policy in the field of appropriation of assets of persons subject to sanctions[148], received exclusive powers to lodge lawsuits on the application of the provision of Article 4(1)(1[1]) of the Law 1644 to those already under the sanction of blocking assets (i.e. temporary deprivation of the right to use and dispose of assets, belonging to an individual or legal entity, as well as assets in respect of which such a person may

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[145] Law of Ukraine no. 2257-IX "On Amendments to Certain Legislative Acts of Ukraine to Improve the Effectiveness of Sanctions Related to Assets of Individuals" dated 12 May 2022

[146] Law of Ukraine no. 1644-VII "On Sanctions" dated 14 August 2014 (as amended on 29 January 2024) ["**Law 1644**"], Article 4(1)(1[1])

[147] Law 1644, Article 5(2)

[148] Resolution of the Cabinet of Ministers of Ukraine no. 228 "On Approval of the Regulation on the Ministry of Justice of Ukraine" dated 2 July 2014, § 1(2)

directly or indirectly (through other individuals or legal entities) perform actions tantamount in content to the exercise of the right to dispose of them)[149].

The foundation for applying this sanction is the creation of a significant threat to the national security, sovereignty or territorial integrity of Ukraine (including through armed aggression or terrorist activity) or a significant contribution (including through financing) to the commission of such actions by other persons[150]. As well there is a set of other more detailed criteria to be met to apply the said sanction. In the end, it is a national court that applies the sanction at hand and appropriates the assets to the benefit of Ukraine[151].

The respective changes were also introduced to the Code of Administrative Procedure of Ukraine ["**CAPU**"], referring cases on imposition of sanctions for consideration to the High Anti-Corruption Court ["**HACC**"] under the rules of administrative procedure[152]. The administrative nature of these disputes is clear: the state obtains new assets and prior decisions enabling this procedure are adopted by the public authority – MoJ. However, why the HACC is designated as the only competent national court to decide upon these situations remains dubious. Firstly, the HACC, as evident from its naming, deals with corruption cases lying *prima facie* in the field of criminal jurisdiction and criminal procedure. This is said without any prejudice to the expertise of the HACC judges in the domain of administrative procedure or administrative substantial law. While this issue falls outside the scope of this thesis, it is also surprising that likewise without any obvious reasons the HACC jurisdiction encompasses cases on the recognition of unjustified assets and their recovery to the state revenue under civil litigation rules[153].

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[149] Law 1644, Articles 4(1)(1), 5(1)(2)

[150] Law 1644, Article 5^1(1)

[151] Law 1644, Article 5(3)(2)

[152] Law of Ukraine no. 2747-IV "Code of Administrative Procedure of Ukraine" dated 6 July 2005 (as amended on 31 December 2023) ["**CAPU**"], Article 20(3)

[153] Law of Ukraine no. 1618-IV "Code of Civil Procedure of Ukraine" dated 18 March 2004 (as amended on 31 December 2023), Article 23(4)

Nevertheless, in my opinion, judges dealing with decisions of public authorities and their consequences daily would be a more convenient choice in these circumstances. Additionally, if decided in administrative courts, these disputes could be within the exclusive jurisdiction of the district administrative court with territorial jurisdiction over the city of Kyiv as the decisions at hand concern a public authority whose powers extend over the entire territory of Ukraine. Similarly, appeals against decisions of such public authorities are already within the exclusive jurisdiction of the said court under Article 27(1) of the CAPU[154].

Further, some amendments were introduced by the Law of Ukraine no. 3223-IX "On Amendments to Certain Legislative Acts of Ukraine Concerning the Application of Sanctions" dated 13 July 2023. By its virtue, the stringent statute of limitations introduced by the Bill 2257 was extended. Even though the current legislation also sets unnecessary strict deadlines, the limitation period was changed as follows:

(i) time for the reply to the claim changed from 2 days to 5 days;

(ii) time for the consideration in the first instance – from 10 days to 30 days;

(iii) time for the consideration in the appeal – from 5 days to 15 days[155].

Apart from the aforementioned, there are a number of issues arising from the practice of the HACC, which could lead to the breach of: (1) the right to property under P1-1, (2) the right to a fair trial under Article 6(1) of the Convention; (3) prohibition of expropriation or measures with similar effect under Article 5 of the BIT or mainly any other investment treaty to which Ukraine is a party; (4) the FET standard; (5) national treatment of most favoured nation treatment. All the above violations could occur only subject to specific requirements of each international instrument, including the Convention and the BIT addressed in the previous chapters.

The mechanism of appropriation of assets of sanctioned persons and assets ultimately controlled by them became operational in 2023. During this year the HACC issued 26 judgements imposing the said sanction on various Russian oligarchs and

[154] See CAPU, Article 27(1)

[155] Law of Ukraine no. 3223-IX "On Amendments to Certain Legislative Acts of Ukraine Concerning the Application of Sanctions" dated 13 July 2023

some state bodies, such as the Ministry of Defence of the Republic of Belarus[156]. In 23 of 26 cases (~ 88%), the MoJ's claims were satisfied in full. Only in cases against Mr Oleg Deripaska[157], Mr Dmytro Vorona[158] and Mr Oleksii Cherniak[159] the HACC failed to establish control over assets and dismissed the claim in the respective part.

To provide concrete example and avoid abstraction in arguments, the controversial application of Article 4(1)(1^1) of the Law 1644 will be presented below in the case of Russian tycoon Mikhail Evgenievich Shelkov ["**Shelkov**"], marking the first instance of the application of this provision by the HACC ["**Shelkov Case**"].

3.2. Background of Shelkov Case

Shelkov was sanctioned (including the blocking of assets) multiple times by the NSDC decisions, with the latest enacted on 19 October 2022 by the President of Ukraine[160], as Shelkov's major business PJSC "VSMPO-AVISMA Corporation" ["**Avisma**"] serves the needs of the Russian defence industry by executing government contracts in Russia. Together with him, on the same date a Cyprus-registered legal entity – Limpieza Limited ["**Limpieza**"] was also subject to similar sanctions as at that time 75 % of the latter was owned by Avisma[161].

Until June 2019 Limpieza was in ownership of Avisma (75 %) and a Cyprus company – Romtex Co. Limited (25 %). On 24 June 2019, Bolatico Limited ["**Bolatico**"], fully owned by Ukrainian national Ms Svitlana Ilto ["**Ilto**"][162], bought

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156 'Sanctions Digest 2023' (Arzinger; 23 February 2024) <https://arzinger.ua/files/2024/Sanctions_Digest_ENG.pdf> accessed on 27 February 2024

157 Decision of the Appeals Chamber of High Anti-Corruption Court of 16 June 2023, case no. 991/265/23 <https://reyestr.court.gov.ua/Review/111734983> accessed on 25 February 2024

158 Judgement of the High Anti-Corruption Court of 31 July 2023, case no. 991/6040/23 <https://reyestr.court.gov.ua/Review/112597143> accessed on 25 February 2024

159 Judgement of the High Anti-Corruption Court of 27 February 2023, case no. 991/1396/23 <https://reyestr.court.gov.ua/Review/109228819> accessed on 25 February 2024

160 Decree of the President of Ukraine no. 726/2022 "On the Decision of the National Security and Defence Council of Ukraine of 19 October 2022 'On the Application and Amendments to Personal Special Economic and Other Restrictive Measures (Sanctions)'" dated 19 October 2022

161 Decree of the President of Ukraine no. 727/2022 "On the Decision of the National Security and Defence Council of Ukraine of 19 October 2022 'On the Application and Amendments to Personal Special Economic and Other Restrictive Measures (Sanctions)'" dated 19 October 2022

162 'Purification* of Mr Shelkov. Has the Russian billionaire left the Ukrainian titanium business?'

the share of Romtex Co. Limited in Limpieza for USD 4,181,776 ["**2019 Agreement**"]. Afterwards, in 2020-2021 a corporate conflict emerged between Bolatico and Avisma related to the management of the Ukrainian companies. In the course of the settlement of the said conflict, Ilto offered to buy-out the shares of Avisma. Further, on 20 February 2022, Bolatico became the sole owner of Limpieza ["**2022 Agreement**"] buying 75 % for EUR 3,750 (the nominal value of shares).

Prior to 3 February 2023, Limpieza owned Demurinskyi Mining and Processing Plant LLC ["**DGZK**"] and Ti-Minerals LLC. DGZK, in its turn, owned 100% of Investagro LLC ["**Investagro**", jointly the three Ukrainian companies are referred to as "**Ukrainian companies**"]. The Ukrainian companies are engaged in the extraction, processing and export of ilmenite and rutile ore, developing the Vovchanske alluvial titanium-zircon ore deposit in the Dnipropetrovsk Region.

In parallel to the imposition of sanctions on Shelkov and Limpieza, on 18 March 2022, the Shevchenkivskyi District Court of Kyiv ("**Shevchenkivskyi Court**") attached the corporate rights of DGZK as part of the investigation by the Bureau of Economic Security of Ukraine ["**BES**"] into alleged tax evasion. However, on 2 June 2022, following DGZK's director appeal, the attachment was lifted due to "*an incomplete and one-sided trial*"[163]. Along with the appeal, the director of DGZK filed a motion with the Shevchenkivskyi Court to lift the said attachment, which the court denied on 15 June 2022[164].

Concurrently, on 15 June 2022, the Shevchenkivskyi Court granted a new motion of the prosecutor to attach the property of DGZK and transfer it to the National Agency of Ukraine for finding, tracing and management of assets ["**ARMA**"] for storage or preservation. The management of property transferred to ARMA involves

(Nadra.info; 10 January 2023) <https://nadra.info/2023/01/purification-of-mr-shelkov-has-the-russian-billionaire-left-the-ukrainian-titanium-business/> accessed on 16 February 2024

[163] Order of the Kyiv Court of Appeal of 2 June 2022, case no. 761/6538/22 <https://reyestr.court.gov.ua/Review/104715738> accessed on 29 February 2024

[164] Order of the Shevchenkivskyi District Court of Kyiv of 15 June 2022, case no. 761/7847/22 <https://reyestr.court.gov.ua/Review/104832271> accessed on 29 February 2024

the ownership, use and disposal of assets, namely, by appointing a manager[165]. After the transfer to management, ARMA monitors the actions of the managers through on-site inspections and desk audits. Disagreeing with this decision, DGZK filed an appeal, arguing that the attachment was not justified. Upon considering the appeal, on 18 October 2022, the Kyiv Court of Appeal removed the attachment of the property due to its illegality[166].

In the meantime, in the same proceedings, on 8 June 2022 at the BES's motion, the Shevchenkivskyi Court attached the corporate rights of DGZK to preserve them as material evidence. DGZK filed a motion, which on 13 October 2022 the Shevchenkivskyi Court, having assessed the validity of the re-attachment, granted and revoked the attachment[167].

In parallel, on 2 June 2022, the Shevchenkivskyi Court attached the real estate and corporate rights of the DGZK due to the pre-trial investigation by the Security Service of Ukraine ["**SSU**"] into subversion or planning, preparation or unleashing of an aggressive war. On 29 July 2022, the motion against this attachment was dismissed[168].

On 7 October 2022, by the Resolution of the investigator of the SSU, DGZK as an integral property complex was recognised as material evidence in the case as a tool for committing the crime. On 2 November 2022, at the request of the SSU investigator, the Shevchenkivskyi Court decided to transfer 100% of shares in DGZK and its property to the ARMA to ensure its preservation[169].

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[165] Law of Ukraine no. 772-VIII "On the National Agency of Ukraine for finding, tracing and management of assets derived from corruption and other crimes" dated 10 November 2015 ["**ARMA Law**"], Article 21(3)

[166] Order of the Kyiv Court of Appeal of 18 October 2022, case no. 761/15799/22 <https://reyestr.court.gov.ua/Review/106964243> accessed on 28 February 2024

[167] Order of the Shevchenkivskyi District Court of Kyiv of 13 October 2022, case no. 761/20931/22 <https://reyestr.court.gov.ua/Review/107187876> accessed on 28 February 2024

[168] Order of the Shevchenkivskyi District Court of Kyiv of 29 July 2022, case no. 761/11539/22 <https://reyestr.court.gov.ua/Review/105514605> accessed on 28 February 2024

[169] Order of the Shevchenkivskyi District Court of Kyiv of 2 November 2022, case no. 761/22992/22 <https://reyestr.court.gov.ua/Review/107134962> accessed on 28 February 2024

3.3. Appropriation of assets by the HACC

On 21 December 2022 the MoJ lodged a lawsuit seeking to impose sanctions and appropriate assets owned by Shelkov and assets in respect of which he directly or indirectly performs actions tantamount to the exercise of the right of disposal. It was alleged that Shelkov owns the Ukrainian companies through Limpieza as he continues to exercise control over the company.

In the opinion of the MoJ, this "control" was confirmed by the following:

(i) the entry in the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Organisations ["**USR**"] regarding the ultimate beneficiary of DGZK was not changed;

(ii) Ilto is a nominee shareholder of Limpieza in favour of Shelkov since a letter from the Foreign Intelligence Service of Ukraine ["**FIS**"] established that she and a person nominated as co-director of Limpieza by Avisma in 2019 are close friends;

(iii) Ilto is a nominal owner of the Limpieza in favour of Shelkov since she was a subject of the National Anti-Corruption Bureau of Ukraine ["**NABU**"] investigation;

(iv) previous orders on the attachment of DGZK's property stipulated that Shelkov is the ultimate beneficiary owner of DGZK;

(v) titanium raw materials from DGZK were factually shipped to Russian recipients although the buyer of the goods was an Austrian company;

(vi) in 2016-2018 DGZK supplied raw materials to Avisma;

(vii) the 2022 Agreement was fictitious due to the undervaluation of the sale price of 75% of Limpieza and doubts about the date of its signing;

(viii) the 2022 Agreement was invalid as it was not approved by the Antimonopoly Committee of Ukraine ["**AMCU**"];

(ix) Shelkov controls DGZK through its USD 8.3 million loan to Avisma and USD 9.5 mln loan to Limpieza.

On 21 January 2023, the HACC issued the Judgement ["**Shelkov Judgement**"] partially satisfying the claim of the MoJ, appropriating in favour of the state the

property owned in Ukraine by Avisma and Shelkov personally[170]. This outcome of the decision is validly substantiated, in particular, by the major public interest of the people of Ukraine to weaken the Russian military industrial complex. Thereby, it is not disputed by the author.

Thus, on 21 January 2023, the court dismissed the part of the claim related to assets "under Shelkov's control" since:

(i) according to the 2019 and 2022 Agreements, Bolatico owns 100% of Limpieza and Ilto owns 100% of Bolatico;

(ii) although the purchase price of 75% of Limpieza is questionable, no other materials in the case-file that would confirm the fictitiousness of this transaction;

(iii) the failure to obtain the AMCU's approval for the acquisition of 75% of Limpieza is not a ground for invalidating the 2022 Agreement;

(iv) a corporate conflict in 2021, proven by documents produced within the judicial proceedings regarding this conflict, confirms that Ilto was a self-sufficient participant of Limpieza, independent of Shelkov;

(v) the FIS materials on Shelkov's influence on Ilto are of a general nature;

(vi) no evidence of direct sales of goods by DGZK to Avisma was provided;

(vii) the conclusion of the 2022 Agreement during the sanctions in the form of blocking Shelkov's assets does not indicate the invalidity of the transaction, as the MoJ did not provide evidence of the extension of Ukrainian sanctions to Cyprus;

(viii) a loan debt does not create a relationship of control between Shelkov and DGZK[171].

Afterwards, disagreeing with the Shelkov Judgement, the MoJ filed an appeal against it with the HACC Appeals Chamber, reiterating the position that it had taken during the proceedings in the first instance court.

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[170] Judgement of the High Anti-Corruption Court of 23 January 2023, case no. 991/6606/22 ["**Shelkov Judgement**"] <https://reyestr.court.gov.ua/Review/108532262> accessed on 25 February 2024

[171] *Ibid*

During the hearing, the presiding judge invited the parties to provide their positions on the applicability of Article 36(13)(2) of the Law of Ukraine "On Capital Markets and Organised Commodity Markets" dated 23 February 2006 No. 3480-IV ["**Law 3480**"], according to which:

> transactions with financial instruments made with the participation, on behalf of and/or in favour of persons subject to sanctions in accordance with the Law of Ukraine "On Sanctions", as well as transactions with securities issued by such persons, are void[172].

The representatives of Limpieza and the Ukrainian companies provided explanations according to which Law 3480 does not apply to the 2022 Agreement due to the need to register the issue of shares with the National Securities and Stock Market Commission ["**NSSMC**"], which was not done for the Limpieza's shares and these shares were not admitted to circulation in Ukraine, and the absence of extraterritorial effect of this Law, in particular, in respect of a transaction between non-residents regarding the sale and purchase of shares in a Cyprus company under English and Cypriot law.

Having heard the parties, on 3 February 2023, the HACC Appellate Chamber issued a Decision cancelling the Shelkov Judgement and satisfying the claim of the MoJ in full ["**Shelkov Decision**"]. Thereby, the court ruled, among others, "to recover the following assets for the benefit of the state: (1) 100% of the share in the charter capital of [DGZK]; (2) 100% of the share in the charter capital of [Ti-Minerals LLC]; (3) 100% of the share in the charter capital of [Investagro]"[173].

As the main basis for this decision, the HACC Appeals Chamber resorted to Article 36(13)(2) of Law 3480. The court decided that it applies to transactions with any securities, including those issued abroad. Given that at the time of the conclusion of the 2022 Agreement, the issuer of the shares, Limpieza, and the seller, Avisma, were subject to sanctions, the court held that the Agreement was null and void as contrary to

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[172] Law of Ukraine no. 3480-IV "On Capital Markets and Organised Commodity Markets" dated 23 February 2006, Article 36(13)(2)

[173] Judgement of the High Anti-Corruption Court of 3 February 2023, case no. 991/6606/22 ["**Shelkov Decision**"] <https://reyestr.court.gov.ua/Review/108772467> accessed on 25 February 2024

law. Accordingly, there is no need to declare it separately invalid, but rather to apply the consequences of nullity, namely, to consider that the change of ownership of 75% of Limpieza did not take place and Shelkov remains the beneficial owner of the Ukrainian companies and, thus, the corporate rights held by Limpieza are subject to unpaid nationalisation in accordance with Article 4(1)(11) of Law 1644[174].

At the same time, the HACC Appeals Chamber explicitly acknowledged in para 84 of the Shelkov Decision that the claimant, the MoJ, did not refer to Law 3480 as a basis for applying expropriation under Law 1644, but considered itself entitled to do so on its own initiative, based on the principle that "the court knows the law" and the court's obligation to apply the consequences of a null and void transaction on its initiative[175].

Moreover, the HACC Appeals Chamber considered that Shelkov was able to control the Ukrainian companies "de facto" due to the "clear signs of fictitiousness" of the 2022 Agreement and the retention of control through management, contractual mechanisms and other instruments.

As the "clear signs of fictitiousness" of the 2022 Agreement the HACC Appeals Chamber listed:

(i) the allegedly low price;
(ii) insufficient evidence of the existence of a corporate conflict (although the court did not establish its absence);
(iii) the alleged motive of avoiding sanctions and preserving DGZK as a source of titanium raw materials to Russia; and
(iv) doubts about the date of its conclusion[176].

As to "maintaining control through management, contractual mechanisms and other instruments", the HACC Appeals Chamber referred to:

(i) an affiliated with Avisma person was dismissed from the position of Limpieza's director only on 22 August 2022;

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[174] *Ibid*
[175] Shelkov Decision, § 84
[176] *Ibid*, §§ 96-118

(ii) the director of DGZK remains the same, although he was appointed in 2021;

(iii) a former director of Ti-Minerals LLC had a power of attorney to represent one of Avisma's subsidiaries;

(iv) the court considered that it was not proved that the requirement of the 2019 Agreement to pay USD 1,181,776 in share capital had been fulfilled, that the guarantors under this agreement allegedly prohibited Limpieza from selling its assets, creating encumbrances on them, amending its charter documents, paying dividends, repaying loans.

In para 64 of the Shelkov Decision, the HACC Appeals Chamber noted that the legitimate purpose of the sanction as follows:

> to ensure control over the assets of a person who poses or may pose a potential threat to the national interests of Ukraine, its sovereignty and territorial integrity; to stop the aggressive actions of the Russian Federation; to stop supporting its current political regime by striking at the financial capabilities of the 'supporters' of such a policy; to ensure prompt and effective compensation for damages caused to victims of aggression at the expense of funds received from the confiscation of property[177].

In para 65 of the Shelkov Decision, the HACC Appeals Chamber further explained that "the sanction of appropriation is not a type (form, means, mechanism) of liability and does not require the establishment of signs of an offence"[178].

Further, applying the above "legitimate aim" to the circumstances of the case, in para 67 of the Shelkov Decision, the court stated that:

> (1) titanium and other ores produced by Demurinsky GZK have been used or may be used in the future for the manufacture of means and instruments of military aggression of the Russian Federation; (2) property assets controlled directly or indirectly by Shelkov have been used or may be used in the future to strengthen the military capabilities of the Russian Federation; (3) the seizure of these assets may strengthen Ukraine's defence capabilities – in this case, the legitimate purpose of the recovery sanction is to reduce Russia's ability to continue its military aggression against Ukraine by recovering assets in favour of Ukraine that are ultimately related to the armed aggression against Ukraine[179].

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[177] *Ibid*, § 64

[178] *Ibid*, § 65

[179] *Ibid*, § 67

3.4. Violations of the Convention

3.4.1. Right to property

As described in detail in Section 1.1.-1.5. above, P1-1 grants protection to a natural or legal person's possession from unjustified interference and deprivation as one of the latter's forms subject to some exceptions. Following the above facts, it is possible to argue a violation of the rights of the Ukrainian companies granted under P1-1.

3.4.1.1. Possession and interference

The corporate rights held by Limpieza in the Ukrainian companies (namely, the 100% share in DGZK and Ti-Minerals LLC and the 100% share in Investagro held by DGZK) undoubtedly had economic value and constituted "possession" within the meaning of P1-1[180].

The ECHR considers that P1-1 "comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph"[181].

The HACC Appeals Chamber by its Shelkov Decision appropriated to the State the shares in the Ukrainian companies owned by Limpieza. Moreover, it clearly stated in para 64 of the Shelkov Decision that:

> the legitimate purpose of the asset appropriation sanction is to ensure control over the assets of a person who poses or may pose a potential threat to the national interests of Ukraine, its sovereignty and territorial integrity; to stop the aggressive actions of the Russian Federation; to stop supporting its current political regime by striking at the financial capabilities of the 'supporters' of such a policy; to ensure prompt and

[180] *Sovtransavto Holding v. Ukraine*, no. 48553/99, ECHR 2002-VII, § 91

[181] *Sporrong and Lönnroth v. Sweden*, Judgment of 23 September 1982, Series A no. 52, § 61

> effective compensation for damages caused to victims of aggression at the expense of the funds received from confiscation.

The HACC Appeals Chamber further explained that "the sanction of appropriation is not a type (form, means, mechanism) of liability and does not require the establishment of signs of an offence"[182].

Thus, Limpieza, and subsequently the Ukrainian companies, were clearly "deprived of its property" within the meaning of the second sentence of P1-1[183].

3.4.1.2. Lawfulness and public interest

Any interference by a public authority with the peaceful enjoyment of possessions must be lawful. In particular, the second paragraph of P1-1, while recognising that States have the right to control the use of property, subjects their right to the condition that it be exercised by enforcing "laws". Moreover, the principle of lawfulness presupposes that the applicable provisions of domestic law are sufficiently accessible, precise and foreseeable in their application[184].

3.4.1.2.1. Unlawfulness of the measure

The main reason for the imposition of the measure, i.e. the appropriation of the assets for the benefit of the state without payment of any compensation, is the failure of the HACC Appeals Chamber to recognise the transfer of ownership of 75% of the Limpieza's shares from Avisma to Bolatico under the 2022 Agreement. The court justified such non-recognition by applying the provisions of Article 36(13)(2) of Law 3480, according to which transactions on the alienation of financial instruments between persons subject to sanctions imposed under Law 1644 are void.

In other words, the Ukrainian court, referring to the provisions of Ukrainian law, refused to recognise the transfer of ownership of the shares of Limpieza, a company registered in the Republic of Cyprus, based on the application of Ukrainian law to the share purchase agreement concluded between the Cypriot and Russian companies and

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[182] Shelkov Decision, § 64-65

[183] See for comparison *Lithgow and Others v. the United Kingdom*, Judgment of 8 July 1986, Series A no. 102, p. 46, § 107

[184] *Konstantin Stefanov v. Bulgaria*, no. 35399/05, 27 October 2015, § 54

governed by English law. That being said, such a transaction was duly carried out in accordance with Cypriot law and was formalised by entering the relevant information into the Cyprus State Register of Legal Entities[185]. The MoJ did not claim any violations of the law of the Republic of Cyprus in the course of concluding or executing the 2022 Agreement in its submissions to the court.

As the European Court of Justice has noted

> it should be borne in mind that, unlike natural persons, companies are creatures of the law and, in the present state of Community law, creatures of national law. They exist only by virtue of the varying national legislation which determines their incorporation and functioning[186].

The national legal system determines the capacity of the corporation and all matters commonly regarded as falling within the ambit of corporate law, in particular issues relating to the corporation's internal management[187], which include, among others, the determination of the composition of its members/shareholders. According to the "Study on the Law Applicable to Companies" commissioned by the European Commission, "most national approaches to private international company law are categorised as belonging to one of two basic doctrines, the so-called real seat theory and the incorporation theory"[188].

Whichever of these two theories is applied, Limpieza, which is incorporated as a company under the law of Cyprus and has its registered office and its governing bodies in Cyprus, will be governed by the law of the Republic of Cyprus. It is this law that will determine the Limpieza's internal organisation and management, including the composition of its shareholders.

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[185] See Shelkov Judgement, § 5.8.3.

[186] Case 81/87 *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*., Judgment of the Court of 27 September 1988, § 19 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61987CJ0081> accessed on 5 March 2024

[187] European Commission, Directorate-General for Justice and Consumers, Schuster, E., Gerner-Beuerle, C., Siems, M. et al., *Study on the law applicable to companies – Final report* (Publications Office; 2016), p. 117 <https://data.europa.eu/doi/10.2838/527231> accessed on 5 March 2024

[188] *Ibid*

Thus, the application of Ukrainian law to the 2022 Agreement and the subsequent non-recognition by the Ukrainian court of the transfer of ownership of 75% of the Limpieza's shares to Bolatico, although the relevant changes to the Cyprus Companies Register were made and not challenged, violates the law of the Republic of Cyprus that should have been applied to the transfer of ownership of the shares in Limpieza. Consequently, the measure applied to Limpieza, and thus to the Ukrainian companies, is not "lawful" under the applicable Cypriot law and is therefore "unlawful" in terms of P1-1.

3.4.1.2.2. Unforeseeability of the measure

The scope of the concept of foreseeability depends to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed. The mere fact that a legal provision is capable of more than one construction does not mean that it fails to meet the requirement of "foreseeability" for the purposes of the Convention. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, considering the changes in everyday practice. The task of the supreme courts in securing a uniform and coherent application of the law cannot be underestimated in this regard. A failure by a supreme court to cope with that task may produce consequences incompatible, inter alia, with the requirements of P1-1. It is primarily for the national authorities to interpret and apply domestic law. However, the ECHR is required to verify whether the way in which the domestic law is interpreted and applied produces consequences that are consistent with the principles of the Convention, as interpreted in the light of the ECHR's case-law[189].

The extended interpretation given by the HACC Appeals Chamber to the term "financial instrument" used in Article 36(13)(2) of Law 3480 to include instruments issued abroad is not foreseeable. The term "financial instrument" in Law 3480 refers,

[189] *Serkov v. Ukraine*, no. 39766/05, 7 July 2011, §§ 35 and 36 with further citations

in particular, to shares, the issue of which is registered with the NSSMC. In other words, shares as securities that are traded in Ukraine.

As the HACC noted in Shelkov Judgement, Ukrainian sanctions legislation applies exclusively to the territory of Ukraine. The extended interpretation provided to Article 36(13)(2) of Law 3480 by the HACC Appeals Chamber may lead to absurd consequences when Ukraine does not recognise, for example, transactions with shares of sanctioned foreign companies that are mandatory in the country of origin (nationalisation of such shares or their alienation in bankruptcy proceedings).

Thus, the interpretation provided to Article 36(13)(2) of Law 3480 by the HACC Appeals Chamber is unforeseeable, therefore, the relevant law does not meet the criteria of law quality, and, accordingly, the measure applied to Limpieza's possessions (i.e. Ukrainian companies) was not "provided for by law", as required by P1-1.

3.4.1.2.3. Lack of public interest

Interpretation of Article 36(13)(2) of Law 3480, according to which the HACC Appeals Chamber appropriated Limpieza's property in favour of the state, creates a legal fiction when the Ukrainian authorities do not recognise the transfer of ownership of 75 % of Limpieza's shares from Avisma to Bolatico and, on this basis, treat Ukrainian companies as remaining "owned by a natural or legal person, as well as assets in respect of which such person may directly or indirectly (through other individuals or legal entities) perform actions tantamount in content to the exercise of the right to dispose of them" within the meaning of Law 1644.

It is evident, from the point of Cypriot law, the ownership of these shares has been transferred to Bolatico, and the Ukrainian authorities cannot and do not plan to challenge this transfer in a Cypriot court. Thus, the interpretation created by the HACCU Appeals Chamber allows for the deprivation of property not from Avisma, which no longer has control over the Ukrainian companies, but from a Ukrainian national – Ilto. Furthermore, Ilto is not a citizen of the aggressor state and is not under any sanctions. The MoJ's attempts to argue that Ilto, who owns 100 % of Bolatico, was a nominee shareholder for Shelkov were in vain: the Shelkov Judgement directly refutes this position, and the Shelkov Decision does not mention it.

Although the Shelkov Decision does question the reality of the 2021 corporate conflict between Ilto and Avisma, it rejects it as a basis for the conclusion of the 2022 Agreement, but not as a fact[190]. The existence of a corporate conflict is obvious considering numerous contemporaneous documents produced within judicial proceedings regarding the conflict in Cyprus and Ukraine. This, in turn, once again underlines Ilto's independence from Avisma and Shelkov.

In other words, this legal fiction created by the HACC Appeals Chamber *de facto* allows for the deprivation of property of persons not covered by Law 1644. Thus, the public interest specified in para 64 of the Shelkov Decision as the legitimate purpose of the appropriation of Limpieza's assets pursued by the application of this Law is not relevant to Bolatico and Ilto. Hence, the measure applied to Limpieza in the form of deprivation of property does not pursue the declared public interest and, accordingly, violates P1-1.

Alternatively, as established in the Shelkov Judgement and the Shelkov Decision, pursuant to the 2019 Agreement, Bolatico acquired 25 % of Limpieza's shares in 2019. The validity of this transaction was not questioned in either the Shelkov Judgement or the Shelkov Decision. As noted above, Ilto has not been subject to any sanctions and is not a nominee shareholder for Shelkov. Thus, the appropriation of the 25 % indirectly (through Bolatico and Limpieza) owned by Ilto did not serve any public interest that could be pursued under Article 36(13)(2) of Law 3480 or Law 1644.

3.4.1.3. Proportionality

As regards the proportionality of the measure, P1-1 requires any interference to be reasonably proportionate to the means employed and the aim pursued[191]. The requisite fair balance will not be struck where the person concerned bears an individual and excessive burden[192].

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[190] See, e.g., para. 110(3) of the Shelkov Decision, in which the HACC Appeals Chamber attempts to explain that the conflict was not relevant to the 2022 Agreement, as it was exhausted long before the conclusion of this transaction.

[191] *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, ECHR 2005-VI, §§ 83-95

[192] *Maggio and Others v. Italy*, nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, 31 May

3.4.1.3.1. Procedural guarantees

(i) Application of Law 3480

The importance of the procedural obligations under P1-1 must not be overlooked. Thus the ECHR has, on many occasions, noted that, although P1-1 contains no explicit procedural requirements, judicial proceedings concerning the right to the peaceful enjoyment of one's possessions must also afford the individual a reasonable opportunity of putting his or her case to the competent authorities for the purpose of effectively challenging the measures interfering with the rights guaranteed by this provision. An interference with the rights provided for by P1-1 cannot therefore have any legitimacy in the absence of adversarial proceedings that comply with the principle of equality of arms, allowing discussion of aspects that are important for the outcome of the case. In order to ensure that this condition is satisfied, the applicable procedures should be considered from a general standpoint[193].

In the case at hand, the central ground for applying to Limpieza the measure provided for in Article 4(1)(11) of Law 1644 was the extension of Article 36(13)(2) of the Law 3480 to transactions with foreign shares that are not traded in Ukraine. Moreover, the claimant, the MoJ, did not state this position in court either in the statement of claim, or in addenda to it, or in the appeal.

The possibility of applying Law 3480 in this case was first raised by the Chairman of the panel of judges of the HACC Appeals Chamber at the end of the first day of the hearing, on 1 February 2023. Limpieza and the Ukrainian companies were given the opportunity to prepare its position on this issue overnight and to express it the next day, on 2 February 2023. The Decision was announced on 3 February 2023, and it explicitly acknowledged that the court is applying the said rule on its own initiative. The law does not provide for regular appeals against the decision of the HACC Appeals Chamber in this category of cases.

2011, § 57

[193] *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, 28 June 2018, § 302 with further citations

In this regard, a situation where a judge takes the side of the prosecution constitutes a violation of Article 6 of the Convention, as it calls into question the independence of the court[194]. Given that the court in the present case had in fact itself formed the legal basis for the expropriation of Limpieza's possession (the Ukrainian companies) without compensation, the very short time limit for preparing a response which was given to Limpieza and the Ukrainian companies and the lack of possibility to appeal against the decision of the HACC Appeals Chamber to a higher court, the procedural guarantees for the protection of property rights were not provided to him by the State in violation of the requirements of P1-1.

(ii) Conclusion on the existence of Shelkov's control

Alternatively to the main ground for the expropriation of Limpieza's property – the nullity of the 2022 Agreement due to the application of Article 36(13)(2) of Law 3480 – the HACC Appeals Chamber argued that it had established the existence of Shelkov's de facto control over the Ukrainian assets. The court made this conclusion based on the following:

(a) the allegedly undervalued purchase price for 75 % of Limpieza's shares under the 2022 Agreement and the uncertainty of the date of its conclusion;
(b) a person nominated as co-director of Limpieza by Avisma in 2019 was dismissed on 24 August 2022;
(c) the director of DGZK remains the same, although he was appointed in 2021;
(d) a director of Ti-Minerals LLC had a power of attorney dated 21 January 2022 to represent Avisma as a participant of VSMPO Titan Ukraine LLC;
(e) the alleged restrictions under the 2019 Agreement on Limpieza's right to sell its shares in the Ukrainian companies and amend their charter documents, pay dividends, create encumbrances on assets and make payments to creditors without Avisma's consent;
(f) Limpieza's debt to Avisma in the amount of USD 9 mln.

[194] *Ozerov v. Russia*, no. 64962/01, 18 May 2010, §§ 53-58

Each of the facts listed in para 70 above raises serious doubts as to whether it confirms Shelkov's de facto control over the Ukrainian companies. In particular, points (a) and (f) contradict each other – the low price of the asset can be explained by the significant debt to the former shareholder. In addition, the price of the 2022 Agreement may be explained by Avisma's fears that it could lose the Ukrainian companies for no consideration at all.

The argument about the dismissal in August 2022 of the co-director of Limpieza appointed by Avisma is unclear – this was long before the MoJ filed the claim (December 2022) and obviously long before the Shelkov Decision. As for the director of DGZK, his only connection to Avisma is that he was appointed in 2021, when Avisma was Limpieza's majority shareholder. However, Avisma itself tried to dismiss him from this position, which resulted in the corporate conflict. Finally, the only connection between a former director of Ti-Minerals LLC and Avisma is a power of attorney to represent its interests in another Ukrainian company. Thus, the Avisma's "control" over the Ukrainian companies was substantiated by the HACC Appeals Chamber based on only indirect and extremely unconvincing facts.

As to Avisma's alleged control over Limpieza under the 2019 Agreement, even if true, that Bolatico did not pay the amount of the charter capital set out in the Agreement, the level of control provided for in the Agreement is clearly far below the ability to "perform acts tantamount to the exercise of a right of disposal". As for Limpieza's debt to Avisma, it is not clear why the HACC Appeals Chamber considers that this allows Avisma to control Limpieza or the Ukrainian companies.

In general, all these grounds do not explain how Avisma can control the Ukrainian companies when 100 % of them are indirectly owned by Ilto, which is not a nominee shareholder of Limpieza for Shelkov or Avisma as discussed above. The Shelkov Decision does not even attempt to explain how exactly Shelkov or Avisma can influence Ilto and what exactly is the "fictitiousness" of the 2022 Agreement if, as a result of its signing, Bolatico acquired 100% of Limpieza and 100% of Bolatico is owned by Ilto.

It is important to note here that the fictitiousness (fraudulence) of a transaction is a category of private law that was developed by the Supreme Court primarily in bankruptcy cases. As noted by the Supreme Court in its Decision dated 7 October 2020 in case no. 755/17944/18:

> [t]he application of the 'fraudulent' construction in a paid civil law contract has certain specifics, which are manifested in circumstances that allow qualifying a paid contract as one made to the detriment of the creditor. Such circumstances include, among others, the moment of entering into the agreement; the counterparty with whom the debtor enters into the disputed agreement (for example, a relative of the debtor, stepson of the debtor, related or affiliated legal entity); price (market/non-market), presence/absence of payment of the price by the debtor's counterparty[195].

This legal construction (fraudulent transaction) cannot be applied to public law relations concerning the application of sanctions, especially when they relate to such a measure as the unpaid appropriation of property for the benefit of the state. In these relations, the State is not a creditor of the sanctioned person and has no inherent right to appropriate the property of such person in its favour.

The declared public interest of such a measure is to prevent sanctioned persons who cooperate with the aggressor state, among others, in the military sphere, from owning assets in Ukraine that may increase the military power of the aggressor. Therefore, in the event of a transfer of indirect ownership of the Ukrainian companies to a person who is not under sanctions and who is not a nominee holder of these shares in favour of Avisma, the State should have explained why there is still a public interest in the appropriation of these assets without any compensation.

The Shelkov Decision does not even attempt to explain how Avisma planned to achieve the retention of control over the assets after the execution of the 2022 Agreement and why the relatively low price paid for Limpieza's 75% stake is related to such retention of control. It is obvious that the relatively loose restrictions on the right to dispose of the assets set out in the 2019 Agreement and the existence of Limpieza's debt to Avisma do not establish substantial control over the assets.

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[195] Decision of the Supreme Court dated 7 October 2020, case no. 755/17944/18 <https://reyestr.court.gov.ua/Review/92315178> accessed on 10 March 2024

The fact that Avisma appointed director was retained as a director of Limpieza for six months after the execution of the 2022 Agreement, but dismissed before the MoJ filed its lawsuit; the retention of the director of DGZK, whom Avisma attempted to dismiss, as a director of DGZK; and the appointment of a former director of Ti-Minerals LLC, who had a power of attorney to represent Avisma as a participant in an unrelated legal entity, also do not in themselves create a dependence of the Ukrainian companies on Avisma. The lack of substantiated explanations from the MoJ as to how, after Bolatico's registration as a 100% owner of Limpieza in the Cyprus register, Avisma continued to "perform actions tantamount to the exercise of the right of disposal" apparently became the basis for the HACC to dismiss the claim in the Shelkov Judgement.

Therefore, the arguments used in the Shelkov Decision in favour of Avisma's alleged de facto control over the Ukrainian companies are clearly not convincing to apply such a draconian measure as the appropriation of Limpieza's assets in favour of the State without any compensation. Thus, this measure was applied in a disproportionate manner and violates P1-1.

3.4.1.3.2. Choice of applicable measure

Additionally, when interfering with the right to property, the ECHR considers that it is relevant whether the same objective (to satisfy the public interest) could be achieved by less invasive interference with the applicant's rights and whether the authorities examined the possibility of applying these less intrusive solutions[196].

The Shelkov Decision indicates that the appropriation of the Limpieza's property was justified by the following objectives:

> to ensure control over the assets of a person who poses or may pose a potential threat to the national interests of Ukraine, its sovereignty and territorial integrity; to stop the aggressive actions of the Russian Federation; to stop supporting its current political regime by striking at the financial capabilities of the 'supporters' of such a policy; to ensure

[196] *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, 20 September 2011, §§ 651-654; *Vaskrsić v. Slovenia*, no. 31371/12, 25 April 2017, § 83

> prompt and effective compensation for damages caused to victims of aggression at the expense of the funds received from confiscation[197].

It is worth noting here that the last goal ("to ensure prompt and effective compensation for damages caused to victims of aggression") is completely declarative. Neither Law 1644 nor any other regulatory act of Ukraine provides for any payments to victims of aggression from the assets confiscated under Law 1644.

The Shelkov Decision states that the sole reason for applying the measure in the form of asset appropriation directly against Limpieza is the need to prevent the supply of goods produced by the DGZK (titanium ores) to the enterprises of the military-industrial complex of the Russian Federation.

Considering the weakness of the argument that Avisma could "perform actions tantamount to the exercise of the right of disposal" against Limpieza, the imposition of a measure in the form of appropriation of property without compensation was unjustified and had less severe alternatives. For example, such alternative measures may include:

(a) imposing restrictions on the sale and control of titanium sales by DGZK;

(b) introducing administrative control over the activities of the DGZK, namely, transferring the management to ARMA, which would allow the State to fully control the enterprise as since 2 November 2022, the State has the right to exercise control over DGZK through ARMA under the Order of Shevchenkivskyi Court;

(c) expropriation of property for military purposes in accordance with the Law of Ukraine no. 4765-VI "On the Transfer, Expropriation or Seizure of Property under the Legal Regime of Martial Law or a State of Emergency" dated 17 May 2012[198].

It is important to emphasise that the Shelkov Decision contains the need to ensure that the products of the Ukrainian companies do not enter the military-industrial complex of the Russia as the only reason relating directly to this property for the uncompensated appropriation of the Limpieza's assets. Neither the MoJ nor the HACC

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[197] Shelkov Decision, para 64

[198] *See* Law of Ukraine no. 4765-VI "On the Transfer, Expropriation or Seizure of Property under the Legal Regime of Martial Law or a State of Emergency" dated 17 May 2012, Article 3

Appellate Chamber explained what the public interest in nationalising the Ukrainian companies is (e.g. that their products are needed by the Ukrainian military-industrial complex, or that some of their property is needed for the military needs of Ukraine). Obviously, if the Ukrainian companies were managed by a manager appointed by ARMA, such a manager would prevent the sale of goods to Russia.

Furthermore, the general principles of international law referred to in the second sentence of the first paragraph of P1-1 are applicable only in cases where the State interferes with the property of non-citizens[199]. Limpieza is a company not registered in Ukraine, and therefore these principles are applicable in the present case[200].

Many states (including the EU and the US) have imposed sanctions on individuals originating from Russia and Belarus in connection with the aggression against Ukraine. However, none of these sanction regimes provide for the nationalisation of assets. For example, Article 2 of Council Regulation (EU) no. 269/2014 provides for restrictive measures in the form of freezing the assets of the persons concerned and restricting their access to financial resources[201].

Thus, the State could have achieved the asserted public interest by applying a less invasive interference with Limpieza's rights and, subsequently, with rights of the Ukrainian companies. The application of such an exceptional and severe measure as the appropriation of property without compensation in the presence of effective alternatives and considering the applicability of general principles of international law, which do not provide for the nationalisation of assets as a form of sanctions restrictions at all, entails a violation of the requirements of P1-1.

3.4.1.3.3. Compensation as an element of a fair balance

According to the ECHR's settled case-law, the taking of property without payment of an amount reasonably related to its value will normally constitute a

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[199] *James and Others v. the United Kingdom*, Judgment of 21 February 1986, Series A no. 98, § 66

[200] *Poznanski and Others v. Germany* (dec.), no 25101/05, 3 July 2007

[201] Council Regulation (EU) No. 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine

disproportionate interference, and a total lack of compensation can be considered justifiable under [P1-1] only in exceptional circumstances[202].

The only case to date when the ECHR has recognised the existence of exceptional circumstances under which the state, that deprived the applicants of their property under the second rule P1-1, was allowed not to pay compensation is the judgment of the Grand Chamber in *Jahn and Others v. Germany*[203]. The case concerned a situation where, immediately after the unification of the two Germanys, the law of the Federal Republic of Germany ("**FRG**") provided for the free-of-charge seizure of land plots from former East German citizens if they had obtained (equipped) them in violation of the German Democratic Republic ("**GDR**") legislation, even though before its dissolution, the latter had unknowingly granted ownership of the plots to such persons.

The Grand Chamber, overturning the Chamber's decision in the applicants' favour, found by 11 votes to 6 that there had been no violation of P1-1, based on the exceptional circumstances of the case, namely:

(i) the 1991 GDR law (which granted the applicants ownership of the plots) was adopted by a parliament that was not democratically elected during a period of transition that was necessarily fraught with uncertainty, and the applicants understood that they had received the plots in violation of the law;

(ii) the 1992 FRG law (which deprived the applicants of the right to ownership of the plots) was adopted without undue delay;

(iii) the purpose of the seizure was to bring the situation under the GDR law in line with social justice, so that the acquisition of land as a result of the reforms that took place during the GDR did not depend on the actions or inactions of the Soviet authorities.

The present case is clearly distinguishable from *Jahn*. First, Limpieza, when acquiring ownership of the shares in the Ukrainian companies, acted in accordance

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[202] *The Holy Monasteries v. Greece*, 9 December 1994, Series A no. 301-A, § 71

[203] *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, ECHR 2005-VI, §§ 83-95

with Ukrainian law. Prior to the adoption of the amendments to Law 1644 on 12 May 2022, Limpieza had no reason to question the reliability of its title to this property.

Secondly, for the purposes of the measure listed in para 64 of the Shelkov Decision, only ensuring the payment of compensation to victims of aggression can be considered as aimed at achieving social justice. However, as mentioned above, Ukrainian legislation does not provide for any scheme of compensation to such victims from the appropriated assets. Furthermore, it is unclear why compensation to such victims should be paid from property beneficially owned by a Ukrainian citizen who has no connection to the aggressor state. Thus, there are no exceptional circumstances in the present case that would justify Limpieza's deprivation of property (including the Ukrainian companies) without compensation.

Thirdly, as noted above, the deprivation of Limpieza of its property must comply with general principles of international law, which, among others, provide for "prompt, adequate and effective" compensation for nationalised assets of foreign investors[204]. Therefore, if any exceptions would allow for the non-payment of compensation for nationalised property in this case, they cannot be applied under general principles of international law.

Limpieza and the Ukrainian companies, therefore, bear an undue burden due to the application of Article 4(1)(11) of Law 1644. Thereby, this measure is disproportionate and in breach of P1-1.

3.4.2. Violation of Article 6(1) of the Convention

Article 6(1) of the Convention, insofar as it is relevant to the present case, provides as follows: "In the determination of his civil rights and obligations or of any

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[204] *Lithgow and Others v. the United Kingdom*, Judgment of 8 July 1986, Series A no. 102, § 111; OECD, *International Investment Law: A Changing Landscape* (OECD; 6 September), p. 44 *noting* "Two decades ago, the disputes before the courts and the discussions in academic literature focused mainly on the standard of compensation and measuring of expropriated value. The divergent views of the developed and developing countries raised issues regarding the formation and evolution of customary law. Today, the more positive attitude of countries around the world toward foreign investment and the proliferation of bilateral treaties and other investment agreements requiring prompt, adequate and effective compensation for expropriation of foreign investments have largely deprived that debate of practical significance for foreign investors".

criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"[205].

The situation when a judge takes the side of the prosecution constitutes a violation of Article 6 of the Convention, as it calls into question the independence of the court[206]. The right to adversarial proceedings means the opportunity for the parties to have knowledge of and comment on all evidence adduced or observations filed and submit comments with a view to influencing the court's decision. In any event, the lack of ability possibility of replying to conclusions submitted to a judicial authority causes an infringement of the right to a fair hearing[207].

Further, according to the ECHR's established case-law, judgments of courts and tribunals should adequately state the reasons on which they are based[208]. Nevertheless, when an issue arises as to the lack of any factual and/or legal basis of the lower court's decision, it is important that the higher court gives proper reasons of its own[209].

It could be implied that the court in this case, on its own initiative, created a legal basis for the uncompensated appropriation of Limpieza's property, gave the Ukrainian companies a short time limit to prepare a response to a crucial aspect of the case and favoured the prosecution. Given the apparent inapplicability of Ukrainian law to the 2022 Agreement, the Shelkov Decision lacks proper justification. Accordingly, this resulted in a violation of the right to a fair trial guaranteed by Article 6(1) of the Convention.

Moreover, the right of access to a court guaranteed by Article 6(1) of the Convention must be "practical and effective"[210]. The rules on the procedure and time-limits for appeals are designed to ensure the proper administration of justice and, in

[205] Convention, Article 6(1)
[206] *Ozerov v. Russia*, no. 64962/01, 18 May 2010, §§ 53-58
[207] *Ruiz-Mateos v. Spain*, 23 June 1993, Series A no. 262, § 65-67
[208] *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, 11 July 2017, § 84
[209] *Tatishvili v. Russia*, no. 1509/02, ECHR 2007-I, § 62
[210] *Zubac v. Croatia* [GC], no. 40160/12, 5 April 2018, §§ 76-79

particular, legal certainty. This principle of legal certainty requires, among others, that all litigants should have an effective judicial remedy[211].

The CAPU, which is applicable to this case, established the following timelimits when the case was under consideration:

(a) for filing a response to the statement of claim – 2 days from the date of receipt of the claim;

(b) for consideration of the case by the first instance – 10 days from the date of receipt of the claim by the court;

(c) an appeal may be filed within 5 days from the announcement of the decision;

(d) consideration of the appeal within 5 days from the receipt of the appeal by the court[212].

Even though, the Ukrainian authorities noted the extreme timeframe for such proceedings and amended it, the respective statute of limitations is still harsh. Thus, on 13 July 2023 the Ukrainian parliament adopted the Law of Ukraine no. 3223-IX "On Amendments to Certain Legislative Acts of Ukraine Concerning the Application of Sanctions". The said Law amended the procedural time limits in (a) to 5 days from receiving the claim; (b) to 30 days from the receipt of the claim; (d) to 15 days from the receipt of the appeal[213].

Therefore, the insufficient timeframe for filing a response, appealing the decision, preparing both the first instance decision and the appeal one, and the inability to challenge the decision of the HACC Appeals Chamber, together, cause impracticality and inefficiency. Similarly, the "alleviated" limitations does not give the parties and the court enough time to effectively deal with such complex cases. Accordingly, this as well violates Article 6(1) of the Convention.

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[211] *Brumarescu v. Romania* [GC], no. 28342/95, ECHR 1999-VII, § 61

[212] Law of Ukraine no. 2747-IV "Code of Administrative Procedure of Ukraine" dated 6 July 2005 (as amended on 6 November 2022), Article 283-1(2,4,8)

[213] Law of Ukraine no. 3223-IX "On Amendments to Certain Legislative Acts of Ukraine Concerning the Application of Sanctions" dated 13 July 2023

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In summary, the appropriation of assets to the benefit of Ukraine, introduced by the Bill 2256, notwithstanding its aim of deprivation of the economic base for waging an aggressive war against Ukraine and compensation for the consequences, Ukraine has a set of downfalls. This mechanism allows Ukrainian court to appropriate the assets of a person, that is already under sanctions imposed by the President of Ukraine, and pose a substantial threat to the national security, sovereignty, or territorial integrity of Ukraine, or who have materially contributed to the perpetration of such actions by others.

First and foremost, the limitation period initially introduced by the Bill 2256 for such judicial proceedings was too harsh. Notwithstanding the following alleviating of the statute of limitations of 13 July 2023, the deadlines remain needlessly strict.

Further, as illustrated in detailed analysis of the Shelkov Case, numerous violations of the Convention may occur during the imposition of the said sanction. Most notably, the right to property, under P1-1, was disregarded by HACC in this proceeding in terms of all components of the three-part test (i.e. lawfulness; public interest and proportionality).

In my opinion, the most critical issue arises from the Appeals Chamber of the HACC's disregard of the following fact that remain undisputed during the proceedings: 25 % of Limpieza since 2019 has been owned by a Ukrainian national without any ties with Russia – Ilto. Despite the absence of arguments contesting the legitimacy of the 2019 Agreement, the court appropriated the entire 100 % of Limpieza along with the Ukrainian companies. This action clearly overlooks the ownership of 25 % of Limpieza and fails to provide any justification for its appropriation.

As well, the potential bias of the Appeals Chamber of the HACC and the tight deadlines of the CAPU unique to such cases create another violation of the Convention – right to a fair trial under Article 6(1) of the Convention.

SECTION 4. ENFORCEMENT

4.1. European Court of Human Rights

The execution of the ECHR decisions is mainly codified in Article 46 of the Convention, which *inter alia* provides that a State-Party abides by "*the final judgment of the Court in any case to which they are parties*"[214]. The case law also addresses the said provision noting that establishing a breach imposes on the State a legal obligation to put an end to the breach and make reparation for its consequences[215].

Despite this, the Russian Federation has repeatedly refused to execute judgments rendered against it. For instance, in the well-known *Yukos* case, Russia denied the enforcement via a decision of the Russian Constitutional Court[216]. With the Russian Federation being expelled from the Council of Europe it is hard to see the exact pathway to enforcement, yet specific instruments definitely would be developed.

Therefore, in its 16th Annual Report published in March 2023, the Committee of Ministers observed that enforcement of judgments and decisions was pending in 6,112 cases[217]. At that juncture, Russia had not enforced 2,352 cases[218], representing approximately 38,4 % of all pending cases.

Lastly, on 11 June 2022, Russian authorities passed a law that essentially codifies the non-enforcement of the ECHR decisions rendered after 15 March 2022, the date of Russia's expulsion from the Council of Europe. This law also restricts the payment of monetary compensations pursuant to the ECHR judgments rendered before 15th March 2022 to be made solely in Russian currency (rubles) and to accounts in Russian banks. Furthermore, according to the said law, ECHR rulings no longer serve as a basis for reviewing decisions rendered by Russian courts[219].

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[214] Convention, Article 46

[215] *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, Series A no. 330-B, § 34

[216] 'Russian Constitutional court denies enforcement of ECHR decision on Yukos' (CIS Arbitration, 25 January 2017) <http://www.cisarbitration.com/2017/01/25/russian-constitutional-court-denies-enforcement-of-echr-decision-on-yukos/> accessed on 29 January 2024

[217] Council of Europe, Supervision of the Execution of Judgements and Decisions of the European Court of Human Rights 2022: 16th Annual Report of the Committee of Ministers, March 2023, p. 98

[218] *Ibid*

[219] Federal Law no. 183-ФЗ "On Amending Certain Legislative Acts of the Russian Federation and

4.2. Investment arbitration proceedings

While many States often comply voluntarily with treaty awards or are willing to negotiate reasonable post-award settlements with investors[220], recent awards against Russia have been a notable exception. Russia has been or is a party to at least 28 investor-State arbitrations. Of these, Russia has settled one and lost fifteen[221], all of which resulted in an award of damages against the State. In many cases, Russia has applied to set aside an unfavourable award at the courts of the seat. This is a not uncommon tactic by States since it affords the possibility of avoiding having to satisfy the award at least until such time as the challenge has been determined. No instance is known in the public domain where Russia has voluntarily honoured an award rendered against it.

Unless voluntarily complied with, an SCC or UNCITRAL award must be recognised and enforced by local courts, pursuant to the national law of the place of enforcement and the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 ["**New York Convention**"]. The New York Convention also sets out several grounds on which a court can refuse to recognise or enforce a foreign arbitral award[222].

Further, while awards made under the SCC Rules or UNCITRAL Rules are final and binding and can therefore be enforced in the courts of the jurisdictions where Russia's assets are located, such awards are also subject to set-aside proceedings before the courts of the seat of arbitration. The initiation of set-aside proceedings is a common

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Repealing Certain Provisions of Legislative Acts of the Russian Federation" dated 11 June 2022

[220] While there are no comprehensive publicly available statistics in relation to cases in which States have voluntarily complied with treaty awards and/or in which investors have been required to seek forcible execution, a 2008 survey indicated that, based on interviews, States complied with treaty awards 90% of the time: 'International Arbitration: Corporate Attitudes and Practices' (Queen Mary University of London & PriceWaterhouseCoopers, 2008), p. 7 <www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf> accessed on 30 January 2023

[221] *See* Investment Dispute Settlement Navigator: Russia Federation (Cases as Respondent State), *Investment Policy Hub* <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/175/russian-federation> accessed on 29 January 2024

[222] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, 330 UNTS 38, Article 5

tactic employed by States since it affords the possibility of avoiding having to satisfy the award at least until such time as the challenge has been determined. Russia has pursued set aside proceedings in respect of all four of the final awards against it arising from the Annexation ordering Russia to pay damages, and evidently, this practice would take place in any subsequent cases.

In light of the foregoing, it is imperative to put in place a viable enforcement strategy to enable the efficient monetization of any award obtained against Russia. Such a strategy will have two key components:

First, the selection of an appropriate seat, in which the courts will address an application for set aside by Russia expeditiously and construe the criteria for set aside under the New York Convention narrowly and predictably.

Second, the identification of attachable assets in enforcement-friendly jurisdictions is not subject to sovereign immunity.

In relation to the former, all ten of the prior claims against Russia arising from the Annexation have been brought under the UNCITRAL Rules and are seated in France, the Netherlands or Switzerland, while SCC arbitrations tend to be seated in Sweden[223]. It is very likely that, following input from the parties, an investment tribunal hearing a similar claim would also choose one of these seats (or a comparable "pro-arbitration" jurisdiction, such as England and Wales). Three of these seats – France[224], the Netherlands[225] and Sweden – provide for only one round of appeal against a first-instance decision on set aside, while in Switzerland there is no right of appeal (an application for set aside is headed directly by the Swiss Federal Supreme Court).

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[223] In 2020, the SCC registered 213 cases and 208 had their arbitral seat in Sweden. Two cases were seated in London, two cases were seated in Helsinki and one case was seated in Copenhagen.

[224] The Paris Court of Appeal set aside set aside the award in *Oschadbank*. However, it did so on the basis that the tribunal did not have jurisdiction over the dispute because the bank's investments were outside the temporal scope of the BIT, which would not be an issue in this case.

[225] Notably, the set aside proceedings in Yukos were initiated prior to the introduction of the New Dutch Arbitration Act (which came into force on 1 January 2015). Prior to the Act, set aside applications in the Netherlands were initiated with the District Court and could be appealed to the Court of Appeal and the Supreme Court. This is one of the reasons why the *Yukos* set aside proceedings have been so protracted.

Furthermore, these jurisdictions have "pro-arbitration" courts that are likely to uphold a well-reasoned award by an international investment tribunal. Based on the selection of one of these jurisdictions as the seat of arbitration, it is therefore very likely that any application by Russia to set aside an award would be unsuccessful. In the intervening period, it is vital to progress enforcement of the award, as it is by no means certain that enforcement would be stayed in all jurisdictions during the pendency of the set-aside proceedings.

As to the latter, there are at least three promising avenues for enforcement. The first is to identify and enforce against the property of Russian State-owned companies, several of which own extensive assets in both Europe and the United States of America. These so-called "State corporations" are owned by the Russian State and undertake commercial activities but also act at the behest of the State. Such a strategy was pursued successfully in *Everest* and *Oschadbank*. The claimants in those cases were able to convince the Ukrainian courts to allow them to enforce their awards against Prominvestbank, a bank based in Ukraine, on the basis that over 95 % of Prominvestbank is owned by VEB.RF, a Russian State development corporation[226]. Therefore, it is worth discovering the international exposure of VEB.RF and other State corporations, such as Rostec, Rosnano, Rosatom and Roskosmos.

The second tactic, which can be pursued in parallel, is to target property previously owned by the USSR, which after the collapse of the USSR became Russian property but remains located in post-Soviet States such as Ukraine, Moldova and Georgia.

Thirdly, it is possible to apply for the attached assets of Russia around the globe. For instance, around USD 630 billion of the Russian central bank was frozen in G7 countries following respective sanctions[227]. Even though Russia's authorities bragged

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[226] Decision of Supreme Court, case no. 796/165/18, 25 January 2019 <https://reyestr.court.gov.ua/Review/79573187> accessed on 21 March 2024

[227] 'Moscow braces for rouble to crash at least 25% as new sanctions hit' (The Guardian, 28 February 2022) <https://www.theguardian.com/business/2022/feb/27/ukraine-moscow-braces-for-market-meltdown-monday-as-new-sanctions-hit > accessed on 29 January 2024

about lodging lawsuits challenging the attachments abroad[228], no viable consequences could be seen. For instance, this approach was implemented by investors in *Stabil* seeking recognition and enforcement in the US[229]. Notwithstanding the fact that the US courts did not render a decision in *Stabil* enforcement up to the date of completion of this paper, this novel concept is believed to be effective.

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In conclusion, the mechanisms for enforcing decisions of the ECHR and investment arbitration awards against Russia pose significant challenges in holding this state accountable for its breaches of the Convention and the BIT.

The enforcement framework outlined in Article 46 of the Convention requires State Parties to abide by final judgments of the ECHR, but Russia has repeatedly refused to comply, creating a substantial backlog of pending cases. Despite efforts by the Committee of Ministers to address this issue, many cases remain unresolved, reflecting systemic challenges in Russia's cooperation with international legal institutions. Moreover, the legislation passed by Russian authorities further complicates enforcement efforts by codifying non-compliance with ECHR judgements rendered after its expulsion from the Council of Europe in March 2022.

In investment arbitration proceedings, Russia has been resistant to honouring awards, often challenging unfavourable decisions in court. While the New York Convention provides a framework for the recognition and enforcement of foreign arbitral awards, Russia's engagement in set-aside proceedings has delayed enforcement and undermined investor confidence.

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[228] 'Russia Working on Lawsuits to Unlock Foreign Reserves, Central-Bank Chief Says' (the Wall Street Journal, 19 April 2022) <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-04-19/card/russia-working-on-lawsuits-to-unlock-foreign-reserves-central-bank-chief-says-O5Z1chgXFKXwYdRpR46C> accessed on 29 January 2024

[229] 'Ukrainian petrol companies seek to enforce against Russia' (Global Arbitration Review, 11 April 2022) <https://globalarbitrationreview.com/kolomoisky-companies-take-crimea-award-us-court> accessed on 29 January 2024

To overcome these challenges, effective enforcement strategies are essential. This includes identifying attachable assets and selecting arbitration seats conducive to enforcement. Jurisdictions such as France, the Netherlands, Sweden, and Switzerland offer favourable conditions for enforcement, with courts likely to uphold well-reasoned arbitral awards. Additionally, targeting state-owned assets and property previously owned by the USSR presents viable avenues for enforcement, albeit with potential jurisdictional complexities.

Overall, addressing the enforcement gap requires innovative and resourceful approaches to navigate Russia's resistance and uphold international legal standards. By implementing strategic enforcement strategies, stakeholders can promote accountability, uphold the rule of law, and safeguard human rights in the face of persistent challenges from Russia.

CONCLUSIONS

The issue of protection in Ukraine has been put into the limelight by the conduct of the Russia Federation. While surviving amidst the Russian aggression is initial concern for the affected Ukrainian natural and legal persons (in respect to their assets and business activity), the second phase is thinking of legal redress available for the occurred violations. Even though, only a portion of available remedies is addressed in this thesis, it nevertheless gives a valuable understanding of specific processes pertaining to the restoration of justice.

The provision of P1-1 and the caselaw of the ECHR on the former *prima facie* fully cover the loss of possessions or measures that result in such a loss inflicted during the Annexation, the armed conflict prior to 24 February 2022 and/or the Russian February Invasion. Nonetheless, the commencement of armed conflict in Donetsk and Luhansk Regions lies outside Russia's liability with the ECHR's jurisdiction, which starts only on 11 May 2014. Obviously, consideration of the ECHR on the merits would differ from case to case, yet, from my perspective, very few if any argumentation could lead to not establishing the breach of P1-1 if a possession was interfered with by Russian troops or Russian authorities in the occupied territories. Moreover, while with certain limitations, the unavailability of effective remedy against violations of the rights protected by the Convention could also lead to the breach of Article 13 of the Convention by Russia.

Prospects of getting a favourable ECHR judgement, accounting for its previous jurisprudence, are feasible. Of utmost importance are decisions on admissibility in *Ukraine v. Russia (re Crimea)* and *Ukraine and the Netherlands v. Russia* establishing effective control over Crimea and D/LPR commencing in the beginning of 2014. As well the expulsion of Russia from the Council of Europe on 16 September 2022 and thus the Convention should be considered as it affects the admissibility of an application regarding Russia's violation.

In its turn, the BIT offers a costly path via international arbitration for Ukrainian investors having their investments in the territories under the effective control of

Russia. First and foremost, as per the jurisdiction of an arbitral tribunal, consistent case law in Crimean arbitrations stipulates that a tribunal under the BIT is competent to deal with cases arising from the Annexation. The same approach apparently is to be maintained in disputes involving the territory under D/LPR's control following the outcome of *Ukraine v. Russia (re Crimea)* and *Ukraine and the Netherlands v. Russia* admissibility assessment. However, it's improbable that an arbitral tribunal would extend its jurisdiction to damages in the territory under Ukrainian control.

When the jurisdiction was established Russia's liability derives from Article 5 of the BIT prohibiting expropriation or implementing measures equated by consequences to expropriation. Indeed, some justifications are present in the said provision, but they unlikely would appear in such disputes. Additionally, the breach of the non-discrimination (Article 3(1) of the BIT) and the FET principles could be argued.

As described in detail in section 2.8.3., the main concern with this mechanism is its cost averaging at approximately USD 12 mln. Inevitably, this causes the unavailability of international arbitration under the BIT for some individuals and companies at the first glance. However, there are ways of reducing the expenses on international arbitration, including the cost-sharing with other co-claimants and attracting third-party funders. The latter is a popular solution in this regard, yet the funder would typically receive 30 % of the factual compensation as its interest and not every claimant is able to pass the funder's due diligence. Given the above, the sensitive issue of high costs cannot be omitted.

Apart from the heavy pricing, the dispute resolution under the BIT offers to choose procedural rules – either UNCITRAL Rules or SCC Rules – under which the arbitration would be carried out. Investment arbitration proceedings under the BIT also underly the procedure of a "cooling-off period" of 6 months devoted to negotiations on a potential settlement. Most likely, no acceptable amicable solution can be reached with Russia on this matter opening a recourse to an arbitral tribunal.

Primarily, one would think of what could be done to bring the Russian Federation to the responsibility for the damages caused by the latter's conduct. However, the rights of Ukrainian natural and legal persons were also violated by the actions of Ukrainian authorities, including the Ukrainian judiciary and the MoJ. The Shelkov case could serve as an example of such unlawful decision in the aspect of the property rights of Ms Svitlana Ilto, a Ukrainian national, and of several Ukrainian legal entities beneficially owned by her. In pursuit of a good cause – the deprivation of property of Russian tycoons in the territory Ukraine to help the state in times of war – the rights of other co-investors appear to be neglected. The proper redress could be achieved through lodging an application with the ECHR, but instead of waiting for an international judicial body to point out the wrongdoing Ukraine should have reviewed its approach to this procedure.

Nevertheless, upon the receipt of a favourable ECHR judgement or arbitral award against the Russian Federation, the enforcement should be dealt with. As Russia overwhelmingly does not honour judicial decisions rendered against it, that would cause extra complications. While there are no viable chances to enforce ECHR's judgement as of now, an award of arbitral tribunal based in a "pro-arbitration" state could be enforced against Russia's assets in the respective territory.

In any event, getting a document establishing one's right to compensation either in the form of an ECHR judgement or an arbitral award is essential. At best, the said would only strengthen a claim to a portion of potential *ex gratia* reparations received by Ukraine following the fall of Russia. In a different scenario, e.g. if Ukraine's sole choice would be to commence lengthy judicial proceedings to recover losses, having such a document as a judgement of the ECHR in one's favour or an award of an arbitral tribunal under the BIT opens viable perspectives of getting compensated in a more efficient way.

LIST OF AUTHORITIES

International Treaties

1. Agreement between the Government of the Republic of Hungary and the Government of the Russian Federation for the promotion and reciprocal protection of investments, 6 March 1995
2. Agreement between the Government of the Republic of Lithuania and the Government of Ukraine for the promotion and reciprocal protection of investments, 8 February 1994
3. Agreement between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and Mutual Protection of Investments, 27 November 1998
4. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, 330 UNTS 38
5. Council of Europe, European Convention on Human Rights as amended by Protocols Nos. 11, 14 and 15 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, 4 November 1950, ETS 5
6. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287
7. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, 8 June 1977
8. United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI
9. Vienna Convention on the Law of Treaties, 23 May 1969, UNTS, vol. 1155, p. 331

European Court of Human Rights

1. 'Q&A on the European Court of Human Rights award of "just satisfaction" (ECHR, 26 March 2019) <https://www.echr.coe.int/Documents/Press_Q_A_Just_Satisfaction_ENG.pdf>

2. *Akdivar and Others v. Turkey*, 16 September 1996, Reports of Judgments and Decisions 1996-IV
3. *Al-Skeini and Others v. the United Kingdom* [GC], no. 55721/07, ECHR 2011
4. *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, ECHR 2007-I
5. *Béláné Nagy v. Hungary* [GC], no. 53080/13, 13 December 2016
6. *Beyeler v. Italy* [GC], no. 33202/96, ECHR 2000-I
7. *Boyle and Rice v. the United Kingdom*, 27 April 1988, Series A no. 131
8. *Brumarescu v. Romania* (Just Satisfaction), no. 28342/95, 23 January 2001
9. *Brumarescu v. Romania* [GC], no. 28342/95, ECHR 1999-VII
10. *Camenzind v. Switzerland*, 16 December 1997, Reports of Judgments and Decisions 1997-VIII
11. *Carter v. Russia*, no. 20914/07, 21 September 2021
12. *Chiragov and Others v. Armenia* [GC], no. 13216/05, ECHR 2015
13. *Damayev v. Russia*, no. 36150/04, 29 May 2012
14. *Dennis and Others v. the United Kingdom* (dec.), no. 76573/01, 2 July 2002
15. *Elsanova v. Russia* (dec.), no. 57952/00, 15 November 2005
16. *Esmukhambetov and Others v. Russia*, no. 23445/03, 29 March 2011
17. European Court of Human Rights, Practical Guide on Admissibility Criteria, 31 August 2022
18. *G.I.E.M. S.R.L. and Others v. Italy* [GC], nos. 1828/06 and 2 others, 28 June 2018
19. *Georgia v. Russia (II)* [GC], no. 38263/08, 21 January 2021
20. *Grzęda v. Poland* [GC], no. 43572/18, 15 March 2022
21. *Halford v. the United Kingdom*, 25 June 1997, Reports of Judgments and Decisions 1997-III
22. *Iatridis v. Greece (Article 41)* [GC], no. 31107/96, ECHR 2000-XI
23. *Jahn and Others v. Germany* [GC], nos. 46720/99, 72203/01 and 72552/01, ECHR 2005-VI
24. *James and Others v. the United Kingdom*, Judgment of 21 February 1986, Series A no. 98

25. *Kerimova and Others v. Russia*, nos. 17170/04 and 5 others, 3 May 2011
26. *Konstantin Stefanov v. Bulgaria*, no. 35399/05, 27 October 2015
27. *Kopecký v. Slovakia* [GC], no. 44912/98, ECHR 2004-IX
28. *Leyla Şahin v. Turkey* [GC], no. 44774/98, ECHR 2005-XI
29. *Lisnyy and Others v. Ukraine and Russia* (dec.), nos. 5355/14 and 2 others, 5 July 2016
30. *Lithgow and Others v. the United Kingdom*, Judgment of 8 July 1986, Series A no. 102
31. *Lorsé and Others v. the Netherlands*, no. 52750/99, 4 February 2003
32. *Maggio and Others v. Italy*, nos. 46286/09, 52851/08, 53727/08, 54486/08 and 56001/08, 31 May 2011
33. *Maurice v. France* [GC], no. 11810/03, ECHR 2005-IX
34. *Moreira Ferreira v. Portugal* (no. 2) [GC], no. 19867/12, 11 July 2017
35. *OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, 20 September 2011
36. *Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-IV
37. *Ozerov v. Russia*, no. 64962/01, 18 May 2010
38. *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, Series A no. 330-B
39. *Paul and Audrey Edwards v. the United Kingdom* (dec.), no. 46477/99, 7 June 2001
40. *Poznanski and Others v. Germany* (dec.), no 25101/05, 3 July 2007
41. *Pressos Compania Naviera S.A. and Others v. Belgium*, Judgment of 20 November 1995, Series A no. 332, p. 23
42. Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights, 22 March 2022
43. *Ruiz-Mateos v. Spain*, 23 June 1993, Series A no. 262
44. *Sargsyan v. Azerbaijan* [GC], no. 40167/06, ECHR 2015

45. *Serkov v. Ukraine*, no. 39766/05, 7 July 2011
46. *Sovtransavto Holding v. Ukraine*, no. 48553/99, ECHR 2002-VII
47. *Sporrong and Lönnroth v. Sweden*, Judgment of 23 September 1982, Series A no. 52
48. *Sultan Öner and Others* v. Turkey, no. 73792/01, 17 October 2006
49. *Tatishvili v. Russia*, no. 1509/02, ECHR 2007-I
50. *The Holy Monasteries v. Greece*, 9 December 1994, Series A no. 301-A
51. *Ukraine and the Netherlands v. Russia* [GC], nos. 8019/16, 43800/14 and 28525/20, 25 January 2023
52. *Ukraine v. Russia (re Crimea)* [GC], nos. 20958/14 and 38334/18, 16 December 2020
53. *Vaskrsić v. Slovenia*, no. 31371/12, 25 April 2017
54. *Zavoloka v. Latvia*, no. 58447/00, 7 July 2009
55. *Zubac v. Croatia* [GC], no. 40160/12, 5 April 2018

Council of Europe

1. Council of Europe, Supervision of the Execution of Judgements and Decisions of the European Court of Human Rights 2022: 16th Annual Report of the Committee of Ministers, March 2023
2. Council Regulation (EU) No. 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine
3. Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe adopted by the Committee of Ministers on 16 March 2022 at the 1428th meeting of the Ministers' Deputies

Arbitral Awards & Decisions

1. *Abaclat and others v Argentine Republic*, ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011
2. *Abaclat v Argentine Republic*, Decision on Jurisdiction and Admissibility, 28 October 2011

3. *Aeroport Belbek LLC and Igor Valerievich Kolomoisky v The Russian Federation*, PCA Case No. 2015-07
4. *Bernardus Henricus Funnekotter and others v Zimbabwe*, ICSID Case No ARB/05/6, Award, 22 April 2009
5. *CME Czech Republic B.V. (The Netherlands) v The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001
6. *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007
7. Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (*Ukraine v. the Russian Federation*), PCA Case No. 2017-06
8. *Ethyl Corporation v Government of Canada*, Ad Hoc Arbitration under the 1976 UNCITRAL Rules, Decision Regarding the Place of Arbitration, 28 November 1997
9. *Everest Estate LLC & Others v The Russian Federation*, PCA Case No. 2015-36
10. *Frontier Petroleum v Czech Republic*, Final Award, 12 November 2010
11. *Giovanni Alemanni and others v Argentine Republic*, ICSID Case No ARB/07/8, Decision on Jurisdiction and Admissibility, 17 November 2014
12. *Limited Liability Company Aberon Ltd & Others v The Russian Federation*, PCA Case No. 2015-29
13. *NJSC Naftogaz of Ukraine & Others v The Russian Federation*, PCA Case No. 2017-16
14. *Noble Energy Inc and Machalapower Cia. Ltda v Ecuador and Consejo Nacional de Electricidad*, ICSID Case No ARB/05/12, Decision on Jurisdiction, 5 May 2008
15. *Oschadbank v The Russian Federation*, PCA Case No. 2016-14
16. *Philip Morris v Australia*, Procedural Order No. 3 Regarding the Place of Arbitration, 26 October 2012
17. *PJSC CB PrivatBank and Finance Company Finilon LLC v The Russian Federation*, PCA Case No. 2015-21

18. *PJSC DTEK Krymenergo v The Russian Federation*, Award of 1 November 2023, PCA Case No. 2018-41
19. *PJSC Ukrnafta v The Russian Federation*, PCA Case No. 2015-34
20. *Stabil LLC & Others v The Russian Federation*, PCA Case No. 2-15-35
21. *Tatneft v. Ukraine*, PCA Case No. 2008-8, 29 July 2014
22. *Telenor Mobile Communications A.S. v Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006
23. *Theodoros Adamakopoulos and others v Republic of Cyprus*, ICSID Case No. ARB/15/49, Decision on Jurisdiction, 7 February 2020

Ukrainian Courts Jurisprudence

1. Decision of the Appeals Chamber of High Anti-Corruption Court of 16 June 2023, case no. 991/265/23 <https://reyestr.court.gov.ua/Review/111734983>
2. Decision of Supreme Court, case no. 796/165/18, 25 January 2019 <https://reyestr.court.gov.ua/Review/79573187>
3. Order of the Shevchenkivskyi District Court of Kyiv of 15 June 2022, case no. 761/7847/22 <https://reyestr.court.gov.ua/Review/104832271>
4. Order of the Shevchenkivskyi District Court of Kyiv of 29 July 2022, case no. 761/11539/22 <https://reyestr.court.gov.ua/Review/105514605>
5. Decision of the Supreme Court dated 7 October 2020, case no. 755/17944/18 <https://reyestr.court.gov.ua/Review/92315178>
6. Order of the Kyiv Court of Appeal of 2 June 2022, case no. 761/6538/22 <https://reyestr.court.gov.ua/Review/104715738>
7. Order of the Kyiv Court of Appeal of 18 October 2022, case no. 761/15799/22 <https://reyestr.court.gov.ua/Review/106964243>
8. Judgement of the High Anti-Corruption Court of 23 January 2023, case no. 991/6606/22 <https://reyestr.court.gov.ua/Review/108532262>
9. Judgement of the High Anti-Corruption Court of 3 February 2023, case no. 991/6606/22 <https://reyestr.court.gov.ua/Review/108772467>
10. Judgement of the High Anti-Corruption Court of 27 February 2023, case no. 991/1396/23 <https://reyestr.court.gov.ua/Review/109228819>

11. Judgement of the High Anti-Corruption Court of 31 July 2023, case no. 991/6040/23 <https://reyestr.court.gov.ua/Review/112597143>
12. Order of the Shevchenkivskyi District Court of Kyiv of 13 October 2022, case no. 761/20931/22 <https://reyestr.court.gov.ua/Review/107187876>
13. Order of the Shevchenkivskyi District Court of Kyiv of 2 November 2022, case no. 761/22992/22 <https://reyestr.court.gov.ua/Review/107134962>

Other Courts and Dispute Settlement Bodies

1. *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, p. 168
2. Case 81/87 *The Queen v H. M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust plc*., Judgment of the Court of 27 September 1988, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61987CJ0081>
3. *Case concerning the Factory at Chorzów (Germany v Poland)*, Claim for Indemnity, Merits, PCIJ, Series A, No. 17, 1928
4. *Continental Shelf (Libyan Arab Jarnahiriya/Malta)*, Judgment, ICJ Reports 1985, p. 13
5. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136
6. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226
7. *The Russian Federation v Everest Estate LLC et al.*, The Hague Court of Appeal, Case No. 200.250.174/01, Judgment, 11 June 2019
8. *Watkins v SOSHD* [2006] 2 AC 395

Domestic Law

1. Decree of the President of Ukraine no. 726/2022 “On the Decision of the National Security and Defence Council of Ukraine of 19 October 2022 ‘On the Application and Amendments to Personal Special Economic and Other Restrictive Measures (Sanctions)’” dated 19 October 2022

2. Decree of the President of Ukraine no. 727/2022 “On the Decision of the National Security and Defence Council of Ukraine of 19 October 2022 ‘On the Application and Amendments to Personal Special Economic and Other Restrictive Measures (Sanctions)’” dated 19 October 2022
3. Federal Law no. 183-ФЗ “On Amending Certain Legislative Acts of the Russian Federation and Repealing Certain Provisions of Legislative Acts of the Russian Federation” dated 11 June 2022
4. Federal Law of 30 March 1998 No 54-ФЗ “On Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto”
5. Law of Ukraine no. 1207-VII “On Guaranteeing Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine” dated 15 April 2014 (as amended on 24 March 2024)
6. Law of Ukraine no. 1618-IV “Code of Civil Procedure of Ukraine” dated 18 March 2004 (as amended on 31 December 2023)
7. Law of Ukraine no. 1636-VII “On Establishing Free Economic Zone ‘Crimea’ and Special Aspects of Conducting Economic Activity in the Temporarily Occupied Territory of Ukraine” dated 12 August 2014 (ceased to be in force on 21 November 2021)
8. Law of Ukraine no. 1644-VII “On Sanctions” dated 14 August 2014 (as amended on 29 January 2024)
9. Law of Ukraine no. 2257-IX “On Amendments to Certain Legislative Acts of Ukraine to Improve the Effectiveness of Sanctions Related to Assets of Individuals” dated 12 May 2022
10. Law of Ukraine no. 2747-IV “Code of Administrative Procedure of Ukraine” dated 6 July 2005 (as amended on 31 December 2023)
11. Law of Ukraine no. 2747-IV “Code of Administrative Procedure of Ukraine” dated 6 July 2005 (as amended on 6 November 2022)
12. Law of Ukraine no. 3223-IX “On Amendments to Certain Legislative Acts of Ukraine Concerning the Application of Sanctions” dated 13 July 2023

13. Law of Ukraine no. 3480-IV "On Capital Markets and Organised Commodity Markets" dated 23 February 2006 (as amended on 8 March 2024)
14. Law of Ukraine no. 4765-VI "On the Transfer, Expropriation or Seizure of Property under the Legal Regime of Martial Law or a State of Emergency" dated 17 May 2012 (as amended on 29 September 2022)
15. Law of Ukraine no. 772-VIII "On the National Agency of Ukraine for finding, tracing and management of assets derived from corruption and other crimes" dated 10 November 2015
16. Resolution of the Cabinet of Ministers of Ukraine no. 228 "On Approval of the Regulation on the Ministry of Justice of Ukraine" dated 2 July 2014
17. The Constitution of the Russian Federation dated 12 December 1993 (as amended on 6 October 2022)

Miscellaneous

1. 'Arbitration award for expropriation of investment in the Crimea remains valid - Swiss Supreme Court rejects RF appeal for the second time' (Ukrnafta; 18 December 2019) <https://www.ukrnafta.com/en/arbitration-award-for-expropriation-of-investment-in-the-crimea-remains-valid-swiss-supreme-court-rejects-russian-federation%E2%80%99s-appeal-for-the-second-time> accessed on 9 April 2024
2. 'Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949: State Parties and Signatories' (International Committee of Red Cross) <https://ihl-databases.icrc.org/en/ihl-treaties/gciv-1949/state-parties>
3. 'Decision taken on denazification, demilitarization of Ukraine — Putin' (TASS, 24 February 2022) <https://tass.com/politics/1409189>
4. 'French court upholds intl arbitration decision to recover $1.1 bln from Russia in favor of Oschadbank for Crimea' (Interfax-Ukraine, 7 December 2022) <https://en.interfax.com.ua/news/general/876957.html>

5. ‘HHR’s Crimea Team Wins Two Major Cases in Dutch Court’ (Hughes Hubbard; 27 July 2022) <https://www.hugheshubbard.com/news/hhrs-crimea-team-wins-two-major-cases-in-dutch-court> accessed on 9 April 2024
6. ‘International Arbitration: Corporate Attitudes and Practices’ (Queen Mary University of London & PriceWaterhouseCoopers, 2008) <www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf>
7. International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1
8. Investment Dispute Settlement Navigator: Russia Federation (Cases as Respondent State), *Investment Policy Hub* <https://investmentpolicy.unctad.org/investment-dispute-settlement/country/175/russian-federation>
9. ‘Moscow braces for rouble to crash at least 25% as new sanctions hit’ (The Guardian, 28 February 2022) <https://www.theguardian.com/business/2022/feb/27/ukraine-moscow-braces-for-market-meltdown-monday-as-new-sanctions-hit>
10. Organisation for Economic Co-operation and Development, *Draft Convention on the Protection of Foreign Property: Text with Notes and Comments*, 12 October 1967
11. ‘PCA Press Release: The Tribunal renders its Award in Arbitration between Limited Liability Company Lugzor and Four Others as Claimants and the Russian Federation as Respondent’ (Permanent Court of Arbitration, 30 March 2023) <https://docs.pca-cpa.org/2023/03/038c58df-press-release-dated-30-march-2023.pdf>
12. ‘Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977: State Parties and Signatories’ (International Committee of Red Cross) <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties>

13. ‘Purification* of Mr Shelkov. Has the Russian billionaire left the Ukrainian titanium business?’ (Nadra.info; 10 January 2023) <https://nadra.info/2023/01/purification-of-mr-shelkov-has-the-russian-billionaire-left-the-ukrainian-titanium-business/>
14. ‘Russia Working on Lawsuits to Unlock Foreign Reserves, Central-Bank Chief Says’ (the Wall Street Journal, 19 April 2022) <https://www.wsj.com/livecoverage/russia-ukraine-latest-news-2022-04-19/card/russia-working-on-lawsuits-to-unlock-foreign-reserves-central-bank-chief-says-O5Z1chgXFKXwYdRpR46C>
15. ‘Russian Constitutional court denies enforcement of ECHR decision on Yukos’ (CIS Arbitration, 25 January 2017) <http://www.cisarbitration.com/2017/01/25/russian-constitutional-court-denies-enforcement-of-echr-decision-on-yukos/>
16. ‘Sanctions Digest 2023’ (Arzinger; 23 February 2024) <https://arzinger.ua/files/2024/Sanctions_Digest_ENG.pdf>
17. State Council of the Republic of Crimea, Decree No 2085-6/14 “On Issues of Managing Property in the Republic of Crimea”, 30 April 2014 with subsequent amendments thereto
18. Swedish Chamber of Commerce Arbitration Institute, Arbitration Rules of the SCC Arbitration Institute, 1 January 2023
19. ‘Ukrainian petrol companies seek to enforce against Russia’ (Global Arbitration Review, 11 April 2022) <https://globalarbitrationreview.com/kolomoisky-companies-take-crimea-award-us-court>
20. UNCITRAL Working Group III, ‘Possible reform of investor-State dispute settlement (ISDS): Draft provisions on procedural reform’, 11 July 2022, A/CN.9/WG.III/WP.219.
21. ‘Uncovered: Tribunal In Previously-Unseen Award Against Russia Upheld Jurisdiction Over Crimea-Related Claims, And Awarded Over 1.3 Billion USD In Compensation’ (IA Reporter, 13 April 2021)

<https://www.iareporter.com/articles/uncovered-tribunal-in-previously-unseen-award-against-russia-upheld-jurisdiction-over-crimea-related-claims-and-awarded-over-1-3-billion-usd-in-compensation/>

22. United Nations Commission on International Trade Law, UNICTRAL Arbitration Rules, 2021

Books and Treatises

1. A Newcombe, L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009)
2. D Shelton, *Remedies in International Human Rights Law* (3rd ed., Oxford University Press 2015)
3. European Commission, Directorate-General for Justice and Consumers, Schuster, E., Gerner-Beuerle, C., Siems, M. et al., Study on the law applicable to companies – Final report (Publications Office; 2016) <https://data.europa.eu/doi/10.2838/527231>
4. J Crawford, *Brownlie's Principles of Public International Law* (9th ed., Oxford University Press 2019)
5. OECD, *International Investment Law: A Changing Landscape* (OECD; 6 September)
6. R Dolzer, CH Schreuer, *Principles of International Investment Law* (3rd ed. Oxford University Press 2022)
7. S Ripinsky, K Williams, *Damages in International Investment Law* (British Institute of International and Comparative Law 2008)

Articles and Book Chapters

1. Stanimir A. Alexandrov, 'The Evolution of the Full Protection and Security Standard', in Meg Kinnear et al. (eds.), *Building International Investment Law: The First 50 Years of ICSID* (2015)
2. Veronika Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' [2018] 29(4) The European Journal of International Law 1091-1125