

4 possible scenarios

Compensation for damage caused to national business and foreign investors at the expense of the Russian Federation assets



From the first days of armed aggression, VB PARTNERS' team of lawyers studied all «military» conventions and international legal agreements, reviewed cases in various jurisdictions on the issue of compensation for damage to national business and foreign investors at the expense of the aggressor. We have analyzed dozens of scenarios and taken into account the experience of armed conflicts over the past 50 years.

Unfortunately, there are no «direct» international acts and practices that provide such compensation. Some of the existing instruments (in particular the ECtHR), may seem appropriate, but are not in fact effective.

Based on the results of our study, we have identified **four possible scenarios for damage compensation at the expense of the property of the Russian Federation** and companies owned by Russian government. The key features of the proposed approaches are **(1)** legal validity and **(2)** the existence of practical cases.

1 Recognition of the decision of the Ukrainian court in other jurisdictions. By analogy - cases of compensation for lost property because of the events in 2014.

Under this scenario we propose to obtain a decision of the Ukrainian court on damage compensation by the Russian Federation. Such case law already exists. Ukrainian courts have satisfied claims against the Russian Federation for damages caused by its actions in the Donetsk and Luhansk regions.

In the future, the judgment will be subject to recognition and enforcement abroad, which is carried out on the basis of international agreements or the principle of reciprocity. Once such a decision is recognized in another jurisdiction, the recovery of compensation process can begin, which can be carried out at the expense of the property of the Russian Federation (seized gold and foreign exchange reserves), including the property of companies owned by Russian government.

Key issue - the principles of international law:

- ▶ «Judicial immunity of the state», which makes it impossible to file a claim against the Russian Federation in the Ukrainian court without its consent;
- ▶ «Immunity of state property», which means the inviolability of the Russian Federation property, which is located on the territory of the foreign state.

Solution - justification of the possibility of limiting the judicial immunity and immunity of state property because of abominable atrocities and violation of **(1)** international law, **(2)** fundamental norms of international coexistence (jus cogens) by the Russian Federation.

Our justification:

According to the doctrine of «living instrument», international law is not sustainable, it can be changed depending on international events and the attitude of the international community to a particular issue.

There are grounds for limiting the state's judicial immunity. In particular, this (limitation of sovereignty) is provided by Art. 12 of the UN Convention on Jurisdictional Immunities.

There are also grounds for forming an exception to the principle of «immunity of state property», which reads as follows: «A state whose actions grossly violate jus cogens - the fundamental norms of international coexistence (undermining democracy, genocide of civilians, violation of the territorial integrity of another state, etc.), cannot rely on the immunity of state property».

Nowadays, the rules of jus cogens are: **(1)** the prohibition of aggression; **(2)** the prohibition of genocide; **(3)** the prohibition of crimes against humanity; **(4)** violation of the basic principles of international humanitarian law; **(5)** the prohibition of torture, etc.

Russia's actions on Ukrainian territory grossly violate the principle of jus cogens. In particular, Russia is in violation of the UN Charter, the Universal Declaration of Human Rights, the Budapest Memorandum, the Helsinki Final Act and the Treaty on the Ukrainian-Russian State Border.

The international community may, as an exception, recover state property located on their territory (including gold and foreign exchange reserves) for the sole purpose - compensation of damages caused by the aggressor state and restoring the economy of the affected state.

The acts of a large number of countries - UK, USA, EU countries, etc. demonstrate the signs of the formation of such an exception to the immunity of the state, which is manifested in the following: **(1)** the seizure of property of the Russian Federation and its officials located on the territory of other countries; **(2)** the seizure of Russia's gold and foreign exchange reserves; **(3)** statements by senior officials about the intention to use this property for the purposes of reparation and restoration of Ukraine.

We understand the certain vulnerability of this legal position, but at the same time, we assume that a number of Western countries (their judicial systems) will be ready to deviate from the absolute principle of «state immunity».

2 Criminal proceedings in Ukraine, seizure and recovery of assets abroad. This scenario is analogous to Volga-Dnipro case.

The scenario provides the initiation of criminal proceedings in Ukraine on the fact of property destruction by Russian military personnel or at the decision of its officials that resulted in damage to the business.

The victim has the right to file a civil lawsuit for compensation of damages. In order to secure such compensation a seizure of assets may be imposed by the Criminal Court of Ukraine. Such seizure is subject to recognition and enforcement by foreign law enforcement agencies (we have significant experience in this matter). In the future, after the satisfaction of the civil lawsuit, it is possible to compensate damages at the expense of the seized property. The decision to satisfy the claim is recognized and enforced abroad.

The similar scenario was implemented in the criminal proceedings initiated at the request of the Antonov State Enterprise against officials of the Federal Air Transport Agency and a company that is part of the Volga-Dnipro Group. Ukrainian court has seized 12 aircraft of the Russian airline Volga-Dnipro based abroad. Some of the aircraft have actually been seized at airports in European countries.

Key issues:

- ▶ Identification of specific officials of the Russian Federation who committed the crime (whose actions led to losses) and the collection of sufficient evidence base;
- ▶ Search for companies, 51% owned by Russia, their assets abroad for the seizure. The existence of a link between a company and the committed crime is desirable;
- ▶ The state's political will in which the assets are located to recognize and enforce the decision of the Ukrainian court.

3 Criminal proceedings in other jurisdictions, based on the place of origin of the investment. We draw analogy to the MH17 case.

The scenario provides for the initiation of criminal proceedings in a foreign state whose citizens lost their property and investments in Ukraine as a result of the military actions of the Russian Federation. The criminal legislation of many countries prescribes the possibility of investigation and criminal punishment for actions against citizens / their property of these countries and their property in other territories, committed by citizens of other states.

Specific persons (from among the Russian military personnel) guilty of crimes, including the destruction of property, shall be identified and brought to justice. The victim has the opportunity to receive compensation for the damage caused by filing a civil claim in criminal proceedings.

We make analogy to the criminal proceedings in the Netherlands on the fact of the destruction of the MH17 plane over the territory of the occupied Donetsk region in 2014.

Four suspects were identified as a result of investigative actions. The District Court of the Hague is now considering the case on the merits. The victims, the next of kin, filed a civil claim for moral damages of 40,000 to 50,000 euros each .

Key issues:

- ▶ The legislation of the state of origin of investments should allow for bringing to justice persons who are not its citizens and who have committed a crime outside its territory;
- ▶ The political will of the State of origin of the investment to bring Russian servicemen or officials to criminal responsibility is necessary. The Netherlands is active in the process because the downing of the plane killed 192 citizens. At the same time, the destruction of a person's property may not be considered as sufficient grounds for criminal prosecution of the perpetrators;
- ▶ Identification of specific persons who committed the crime and collecting sufficient evidence to bring them to justice are needed. We believe that it will be enough to identify the military unit/ ship commander that carried out the bombing or rocket attack.

4 Obtaining the status of a victim in the case of Ukraine against the Russian Federation in the International Criminal Court. We draw analogy to the case of the “President of Sudan”.

The scenario involves obtaining the victim status in a case pending at the International Criminal Court. The said proceedings were initiated by a special prosecutor and 40 states. Evidence is being collected now.

The result of this process should be charging the guilty parties of crimes (genocide, crimes against humanity, war crimes) and compensation for damages. The victim is entitled to compensation for the damage caused by the perpetrators.

The victim can be:

- ▶ An individual who has suffered damages as a result of a crime under the jurisdiction of the International Criminal Court;
- ▶ Organizations or institutions, if their property, intended for specific purposes (religious, educational, cultural, scientific or charitable and humanitarian, social infrastructure, historical sites, hospitals, etc.), was damaged as a result of one of these crimes.

Key issues:

- ▶ Damage to business facilities is not subject to compensation;
- ▶ Damage to social infrastructure facilities can be compensated.

CONTACTS

Want to know more about the issue of compensation for damage caused to national business and foreign investors at the expense of the aggressor? Contact one of our experts:



Denys Bugay
Attorney-at-law, partner
d.bugay@vbpartners.ua



Denys Shkarovsky
Attorney-at-law, partner
d.shkarovsky@vbpartners.ua