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The Russia-Ukraine War: Establishing a Claims Compensation Process

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Russia's invasion of Ukraine has resulted in the United States, European Union, United Kingdom and numerous other jurisdictions implementing the most draconian economic sanctions ever imposed on a major economy. While those economic sanctions continue to be progressively tightened, jurisdictions opposed to the Russian invasion of Ukraine also have begun the process of assessing potential legal frameworks for how aggrieved parties may be compensated for their economic claims against Russia. At this stage, however, how those claims will be adjudicated, and where the funding to satisfy them will come from remain undecided—and subject to developments on the battlefield and political considerations among Ukraine's Western allies. There have been, however, initiatives by major institutions in the West to at least begin to establish a process for registering claims, for consideration once an adjudication process and funding mechanism have been agreed in the future.

The Council of Europe's "Register of Damage", announced on May 17, 2023, provides an initial framework for the identification and registration of claims against Russia as a result of its invasion of Ukraine. The Council of Europe's statute establishing the Register makes it clear that individuals, companies, and governments with claims for economic compensation against Russia (as opposed to those alleging criminal conduct) will need to log those claims in this public database, and that those claims' adjudication and funding will be the subject of separate international agreements to be concluded in the future.

Recent legal developments and ongoing political debate in the United States and the United Kingdom also suggest that a consensus may be emerging on the criteria that those countries may require from Russia for the removal of economic sanctions, while leaving for future resolution the controversial question of whether to use blocked and frozen assets to satisfy meritorious economic claims against Russia.

The Council of Europe's "Register of Damage": Establishing and Documenting Claims

On May 17, 2023, 44 countries and the EU signed an agreement to establish the "Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine" (the "Register").¹ The Register represents the first concrete legal step in the evolution of a formal compensation mechanism for parties that have suffered economic damage in Ukraine as a result of Russia's February 2022 invasion.

The Council of Europe Statute (the "Statute") that officially established the Register was adopted on May 12, 2023 through the Resolution of the Committee of Ministers of the Council of Europe.² The Register will have separate legal personality under Dutch and Ukrainian law, and will have its permanent

seat at The Hague, where several other adjudicatory bodies have maintained their permanent seats over the years. The Register will also maintain a formal legal presence in Ukraine.

The Register is empowered to:

- “Receive and process information on claims of damage and evidence ...”;
- “... categorise, classify and organise such claims ...”; and
- “... assess and determine the eligibility of claims for inclusion in the Register and record the eligible claims for the purposes of their future examination and adjudication.”

Importantly, the Register “shall not have any adjudication functions with respect to such claims, including determination of responsibility and allocation of any payments or compensation.”

While the Statute leaves the determination of additional criteria for the eligibility of claims to be registered to be set by the Register once operational, the Statute does establish certain baseline requirements. Under the Statute, claims may be logged that relate only to damage incurred:

- On or after 24 February 2022;
- In the territory of Ukraine within its internationally recognized borders, extending to its territorial waters; and
- By the Russian Federation’s internationally wrongful acts in or against Ukraine.

Statute Article 2.5 also specifies that the Register will transfer all claims submitted to it to an international mechanism to be agreed at a later date.

The Register’s establishment represents the first concrete step that jurisdictions opposed to Russia’s invasion of Ukraine have agreed to implement to begin the process of documenting economic claims against Russia. According to the Register’s Conference of Participants’ most recent meeting on September 11, 2023, the Register is setting an “ambitious” goal of being operational at some point in the first quarter of calendar 2024.³

Although the mechanism by which those claims will be adjudicated is yet to be determined, the claims registration process for many companies, individuals and governments appears to have essentially begun.

The Potential Mechanisms for Adjudication of Economic Claims Against Russia

Although the Register represents only a first step by governments to begin to identify and catalog relevant claims, there are several legal mechanisms that have been used over the years to adjudicate and ultimately pay out economic claims against aggressor states once an international conflict has ended.

Historically, three broad types of international mechanisms have been used to resolve economic claims:

- International commissions or tribunals under the auspices of the United Nations, such as the United Nations Compensation Commission (“UNCC”) or some other multilateral body;

- Bilateral or *ad hoc* multilateral agreements, such as the Iran-United States Claims Tribunal (“IUSCT”); and
- Single-country-administered processes under domestic law, such as in the United States under the U.S. Foreign Claims Settlement Commission (“FCSC”).

Each mechanism has particular features, making them more or less likely to be employed to resolve claims against Russia for economic losses in Ukraine. We highlight a few of those particular features here.

I. United Nations-Administered Processes

The prime example of processes that existing international bodies administer is that undertaken by the UNCC, which a UN Security Council resolution created in 1991 in the wake of Iraq’s invasion of Kuwait.

Only recently concluded after paying the final claim against Iraq in 2022, the UNCC afforded both individuals and corporations the right to bring economic claims before adjudicatory panels. Those panels were originally staffed with three “Commissioners”, each of whom was an expert in technical fields such as law, accountancy, and/or engineering. A Secretariat assisted the panels in making technical determinations, valuations, and verifications. Upon reaching a decision regarding the validity and amount of a certain claim, a panel would submit its findings to the “Governing Council” for approval and ultimate payment, with claims payments funded from Iraqi oil sales.

A UN-administered mechanism can be attractive in some instances because it would likely enjoy the broadest level of support among the international community. However, it is also the most unlikely mechanism in the Russia-Ukraine case, due to the fact that the Russian Federation retains a permanent seat—and its accompanying veto power—on the UN Security Council. As such, the Russian Federation possesses the right to veto the establishment of any UN-established tribunal, which, barring some broader agreement to run a compensation process for the Russia-Ukraine War through the UN, the Russian Federation would almost certainly do.

II. Ad Hoc Bilateral or Multilateral Processes

A more likely scenario is the establishment of a bilateral or multilateral *ad hoc* adjudicative mechanism, by international agreement among Russia, Ukraine and other jurisdictions whose individuals or companies will be seeking compensation. Such a mechanism could possibly be led or convened by a neutral third country with little or no claims exposure itself.

Perhaps the best-known example of such a mechanism, although bilateral and not multi-party (as the Russia-Ukraine mechanism is likely to be) is the IUSCT. Following a mediation process by the Algerian government, the IUSCT was formed to resolve the crisis between the United States and the Islamic Republic of Iran following the 1979 hostage crisis and the United States’ subsequent freezing of Iranian assets.

The IUSCT, which remains operational to this day, possesses jurisdiction over private and government claims, expropriations, debts and contracts brought by nationals (natural and legal) of the United States and Iran against the government or nationals of the other country. Claims are confined to those arising after the Iran-U.S. hostage crisis but before January 19, 1982. Under the IUSCT, both the United States and Iran are barred from bringing private claims in other fora, although they may also pursue counterclaims in the IUSCT process.

The IUSCT was initially composed of nine members, with three each appointed by Iran and the United States, and the remaining three then appointed by the first six members. Cases may be heard either by one of three chambers or by the full Tribunal. The rules of the IUSCT's procedure are adapted from the United Nations Commission in International Trade Law (UNCITRAL) arbitration rules.

The agreement to establish the IUSCT required concessions on each side. Iran was required to release the hostages; the United States was required to restore Iran's frozen assets not subject to successful claims. To meet its obligations, the United States agreed to terminate other legal proceedings against Iran and to nullify attachments and judgments previously obtained against those frozen assets and resolve those claims instead through arbitration. Now that all private claims have been resolved (with some state-to-state claims still pending), the IUSCT has awarded over US\$2.5 billion to U.S. companies and nationals.

The process of establishing the IUSCT could resemble the adjudicatory process by which claims against Russia could be resolved. Both sides would be required to make concessions which they otherwise would be reluctant to make: In the Russia-Ukraine case, in particular in light of ongoing political debate in the United States, United Kingdom and elsewhere, the Russian Federation's agreement to participate in a claims resolution process, and to satisfy all outstanding claims, is likely to be a condition for the ultimate lifting of the sanctions in place since February 2022.

III. Unilateral Country-Administered Regimes

The United States and/or other jurisdictions may also set up a claims process under their own domestic law. For example, U.S. nationals have been able to bring claims under U.S. federal law for certain property losses incurred in various jurisdictions under the FCSC since its formation in 1954.

The FCSC, which was created from the reorganization of two predecessor agencies, is a quasi-judicial independent agency within the United States Department of Justice that adjudicates claims pursuant to international claims settlement agreements at the request of the U.S. Secretary of State or under specific jurisdiction conferred by Congress.

In total, the FCSC and its predecessor agencies have processed 660,000 claims as part of 47 different claims programs against countries including Iran, the Soviet Union, Italy, Cuba, China, and Egypt. Past awards from the FCSC total in the billions of dollars. Payouts for successful claims are normally funded by congressional appropriations, international claims settlements, or, perhaps more likely in the Russia-Ukraine scenario, the liquidation of foreign assets that the U.S. government has seized or frozen.

When Sanctions Against Russia Will Be Lifted and How Compensation to Ukraine Will Be Funded

The questions of when sanctions on Russia will be lifted and how compensation of any claims settlement process against Russia will be funded are likely to be directly related.

While the Register has set up the first formal mechanism for parties to file claims with an independent body, there appears to be an emerging consensus (between the United States and the United Kingdom at least) that sanctions on Russia will only be lifted once Russia has agreed to and is participating in an international claims resolution mechanism. The United States and the United Kingdom have legislation pending in Congress and Parliament, respectively, that tie the lifting of sanctions to such agreement (in the United States' case, a "bona fide international mechanism that, by agreement, will discharge the

obligations of the Russian Federation to compensate Ukraine for all amounts determined to be owed to Ukraine.”).⁴

Importantly, the pending U.S. legislation also specifies that only if Russia does not agree to such a mechanism may the United States confiscate frozen Russian sovereign assets to fund Ukraine-related claims.⁵ These provisions suggest one compromise position among interested parties in the United States as to whether frozen Russian sovereign assets will be used to fund that compensation, given the controversial nature of doing so under international law and the countervailing domestic political pressure to use those assets regardless of that controversy. Consequently, the question of how and when sanctions against Russia will be lifted has become more complicated as time has passed, particularly given the steady addition of restrictive measures that the United States, the United Kingdom, the European Union, and other jurisdictions continue to implement against Russia.

Takeaways

The takeaways for companies, individuals, governments and others from these developments are several-fold:

- Any party that has suffered economic damages in Ukraine as a result of Russia’s invasion should be developing a strategy for documenting and valuing those claims so that those claims can be promptly and effectively pursued once an adjudication mechanism is fully agreed upon and becomes operative. Establishment of the Register provides the first vehicle through which those claims can be documented and registered with a governmental authority; whether it is in a potential claimant’s interest to register a claim when the Register goes “live” (perhaps in the first quarter of 2024) will depend on a number of factors.
- The situation on the ground in Ukraine is likely to continually change over the coming months and possibly years, with events on the battlefield affecting how the conflict will end and the bargaining position of the parties, including over compensation mechanisms and funding. In addition to assessing their own strategy now, potential claimants also need to routinely monitor developments in the conflict, including the changing landscape of sanctions being applied to Russia. Companies and financial institutions operating in Russia and with respect to the Russian economy continue to face risks, and the details of the sanctions being imposed now will impact the ability of potential claimants to register and successfully prosecute their claims later.

Paul Hastings LLP has decades of experience with successfully advising clients on sanctions issues as well as planning, proving, and pursuing claims for compensation against sovereign states in all types of fora.



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- ¹ <https://www.coe.int/en/web/kyiv/-/council-of-europe-summit-creates-register-of-damage-for-ukraine-as-first-step-towards-an-international-compensation-mechanism-for-victims-of-russian-aggression>; https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680ab2596.
 - ² Council of Europe Committee of Ministers, “Resolution CM/Res(2023)3, establishing the Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine”, May 12, 2023 (https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680ab2595).
 - ³ Council of Europe Conference of Participants in the Ukrainian Damage Register, “The Conference of Participants in the Ukrainian Damage Register has held its second meeting”, September 12, 2023 (<https://www.coe.int/en/web/human-rights-rule-of-law/-/the-conference-of-participants-in-the-ukrainian-damage-register-has-held-its-second-meeting>).
 - ⁴ REPO For Ukrainians Act, H.R. 4175, 118th Cong. § 103(a)(2)(B) (2023).
 - ⁵ *Id.* at § 104(g)(2)(B).

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