Baiju Vasani
Ivanyan and Partners LLP

Location: Russia/London
Number of years in practice: 20
Number of years as an arbitrator: Eight
Admissions: District of Columbia (2008), England & Wales (Solicitor) (2004), Texas (2003, now inactive), Bar of England and Wales (Barrister) (1999, now inactive)
Geographical areas of focus: Russia & CIS, Africa, US, India, International

Baiju Vasani joined Ivanyan & Partners as head of international arbitration in November 2019. He arrived from the London and Washington, DC offices of Jones Day, where he had been a hugely respected partner and was consistently ranked among the leading arbitration lawyers in the US and UK. This slightly unconventional move has seen Vasani offered an opportunity few arbitration counsel will ever see in their lives – leading the representation of the Russian Federation in a number of high-profile investor-state cases related to Crimea.

It all began in early 2019 when Khristofor Ivanyan, a specialist in cross-border commercial disputes who has a fearsome reputation as a litigator in Russia, was looking for someone to lead the firm's representation of the Russian Federation in several investment treaty arbitrations brought by Ukrainian investors over the alleged expropriation of their assets in Crimea.

That year, the Russian Federation had decided to reverse its position and fight the bilateral investment treaty claims, even though it did not formally recognise the tribunals' jurisdiction. Vasani was appointed to help lead one of the most closely watched sagas in international arbitration and public international law today.

'I saw this as a chance to do something completely different', says Vasani. *'It was an amazing opportunity to lead the defence of the Russian Federation in a set of cases that are hugely consequential for both that country and for international arbitration and public international law as a whole. In the first few weeks I had met with the Ministry of Justice of the Russian Federation and my legal co-counsel several times to scope out how we would respond to these claims. Clearly, the opportunity was too good to turn down.'*

Moving to Ivanyan & partners also presented Vasani with the opportunity to create a firm in his own vision by handpicking an entirely new team. He has since hired associates from the London offices of Jones Day and Quinn Emanuel Urquhart & Sullivan, and hired a partner from Clifford Chance as part of a new ten-lawyer team that is set to grow further in the coming months. This multinational and multilingual team of lawyers hailing from the UK, USA, India, France, Hungary, Lebanon, and Russia all now coordinating their efforts with the Russian offices of Ivanyan & Partners. The firm's UK entity, Ivanyan & Partners LLP, is currently awaiting SRA approval before setting up in London, a move which will make it the first Russian law firm to take out a significant operational presence in the UK market. In the immediate future the team will handle work for clients in Russia and the CIS, but is set to ultimately serve international clients in disputes with no connection to those markets. *'Effectively'*, says Vasani, *'it is an elite-level team operating under alternative fee arrangements within a flexible boutique structure. We will be handling a full gamut of cases, from English litigation to investor-state and commercial arbitration and public international law.'*

Vasani is also assisting in the defence of Russia before the International Court of Justice, the European Court of Human Rights, and other pure public international law matters, as well as acting as co-lead counsel to the Russian Federation in its ISDS matters. He is also sitting as claimants-appointed arbitrator in Canadian nationals' ICSID arbitration against Serbia in relation to the country's agricultural sector, and in a number of international commercial arbitrations.

Prior to joining Ivanyan & Partners Vasani spent nearly two decades in US "Big Law" where he maintained a sizable practice in relation to Central Asia in particular. Among the many standout matters he oversaw during this period was the decision in *World Wide Minerals v. Republic of Kazakhstan*, an UNCITRAL case that saw him secure an unlikely victory for a Canadian client. *'Worldwide Minerals had invested in Kazakhstan in the 1990s and was subsequently expropriated'*, Vasani explains. *'One of my colleagues in Toronto came to me with an idea to bring a claim under the Canada/USSR BIT. This was in 2009, and no one had researched whether Kazakhstan might be a legal successor to a treaty signed by Canada with the USSR in 1989. We fought a phenomenal case and won on jurisdiction before bringing the merits claim to secure an award of over $50m. For a company that was expropriated in the 1990s to get that amount today is a real vindication for them and their decades long battle for justice.'*

Another highlight from this time is *Vladislav Kim and others v. Uzbekistan*, in which Vasani represented 12 Kazakh investors in the Uzbekistani cement industry. The opposing counsel in this matter, White & Case, ran a corruption defence that had previously proved successful in all cases it had brought on behalf of Uzbekistan. Vasani and his team not only defeated that defence but won sanctions against their opponents.

At Jones Day he maintained a solid practice in commercial arbitration, representing multinationals such as Boeing, IBM, and North American Coal. Vasani has also sat as an arbitrator in a number of high-profile cases and is currently tribunal chair in a SIAC arbitration under Indian law in relation to the healthcare sector.

He was appointed to the New York Convention Task Force for Somalia in 2016, a position which he still holds, and in the same year was elected a member of the Drafting Committee for the Somali Arbitration Bill. Since 2015 he has been Head of the Program Committee for the Somali International Arbitration Summit (SIAS) and Head of the Legal Task Force for the creation of the East African Arbitration Center, a joint effort between the Djibouti Chamber of Commerce (CCD) and the Intergovernmental Authority on Development (IGAD).

In conversation with…

'The Russian Federation's ongoing investment treaty cases against Ukraine are subject to the vagaries of how different actors view the geopolitics of Crimea. One narrative is that Russia annexed the Crimean Peninsula, which is an integral part of the territory of Ukraine. The other view is that the Crimean people made a decision for themselves that must be respected. Indeed, the result of the public referendum, in which the overwhelming number of Crimeans voted to reunify, bears this out. Layer on to this the fact that there was a coup to overthrow a democratically elected government in Kyiv that prompted the referendum in the first place and you have a state of affairs that is far more complicated than that allowed by the conventional Western media narrative. No matter how one looks at it, there was and is overwhelming support – and independent observers confirm this – among citizens of Crimea for joining Russia that persists to this day.

As part of that reunification, there were businesses established by two categories of entities – both Ukrainian government-owned entities and those owned by, for want of a better word, Ukrainian oligarchs, that were lost. All of the claimants losing these assets had the opportunity to bring their actions in the courts, which they chose not to do. They have instead chosen to use the Ukraine-Russia bilateral investment treaty (Treaty).

But there is no jurisdiction to do so. As a threshold matter, in order for a Ukrainian claimant to bring a claim against Russia under this Treaty the tribunal has to first establish that Crimea is Russian territory for the purposes of the Treaty. Without knowing whether Crimea is Russian or Ukrainian territory under the Treaty, a tribunal cannot know which State's investors are protected there, whose legislation applies, and whether a protected investment has been made. However, no Treaty tribunal can address such a question. A tribunal only has jurisdiction over a State to the extent it has expressly consented thereto, and within the limits of that consent.

First, neither Russia nor Ukraine has consented to an investment tribunal determining their respective territorial limits or the reach of their sovereign powers, as set out in the Treaty, in respect of Crimea and in relation to which Russia and Ukraine hold divergent views. Since this question requires prior determination in order to adjudicate any claim, but is one over which investment tribunals lack jurisdiction, they cannot adjudicate these claims.

Second, a determination on Crimea's territorial status fundamentally affects Ukraine's legal interests because Ukraine fundamentally rejects both Russian sovereignty over Crimea but also Russia's ability to exercise the rights and powers contained in the Treaty in respect of Crimea. As the two are indissoluble, a determination on the territorial status of Crimea is a determination also on the sovereign powers the territorial state is able to exercise on that territory. Since Ukraine is neither a party to these claims, nor has consented to such a determination, the Monetary Gold principle precludes an investment tribunal from exercising jurisdiction.

Third, the treaty only applies to Russia and Ukraine's respective sovereignty territories, and exclusive economic zones and continental shelves. The territory of a state has a clear and well-established meaning in international law as the sovereign territory of a state. The express wording of the Treaty, its context, object and purpose, the travaux préparatoires and state practice all confirm beyond doubt that this was the meaning adopted by Russia and Ukraine in the Treaty. Therefore, since no investment tribunal can make determinations on sovereignty, and territory here can only mean sovereign territory, such tribunals have no jurisdiction to determine these claims.

Even setting aside these fundamental, and in our view insurmountable issues, there are many other challenges to the prevailing narrative which we hope to fight in these cases. For example, both states pledged to reciprocally protect the investments of the other in return for the encouragement of cross-border investment between the two states. However, since Ukraine disregards its own treaty obligations in respect of Crimea, and does not accept that Crimea is Russian sovereign territory, Russia cannot unilaterally have obligations under a bilateral treaty. It's not a one-way street. Moreover, at the time these parties invested they were Ukrainian individuals and companies investing domestically in Ukraine. None of them made a foreign investment, none of them intended to do so, and none of them expected protection under this Treaty. As such, these claimants cannot and should not now comprise protected investors with protected investments under a bilateral treaty between two states designed to protect foreign investors and investments simply due to some bizarre theory of "passive transition" of the investment across borders. Furthermore, a number of claimants in these cases are seeking investment protection for assets and infrastructure that was constructed during the Soviet era. The Treaty temporally limits investment protection to cross-border investments made after 1 January 1992.

We consider the above arguments to be unassailable. The jurisdictional decisions that were made by prior tribunals before the Russian Federation defended these arbitrations, though without precedential value, are nevertheless deeply unfortunate. The analyses in those cases are superficial and flawed, and no reliance can be placed them at all. By way of example, what the awards say about the territorial scope of the Treaty is entirely defective (and in the most negative sense of the term) teleological. I hope they will be exposed for public scrutiny in due course. Indeed, that kind of jurisprudence should not be allowed to stay immune from scrutiny. Fortunately, none of those prior tribunals heard the new arguments the Russian Federation is now raising. As a result, we don't expect the tribunals currently hearing jurisdiction to follow their example.' ■