

# Will Russia's bilateral investment treaties provide paths to compensation in Ukraine?

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Russian troops and authorities have held on to territory in the east and south of Ukraine since the full-scale invasion in 2022 and have maintained full control of Crimea since its annexation in 2014. While the outlook for Ukraine remains uncertain, both Ukrainian and foreign investors who hold property, assets or interests ('investments') in Ukraine are looking to their countries' Bilateral Investment Treaties (BITs) with Russia as a potential means of obtaining redress for violation of their rights and associated losses, as a result of Russia's actions in Ukraine.

Although varying from treaty to treaty, in general BITs afford foreign investors with protections and mechanisms for obtaining effective compensation in the event that one country to the BIT expropriates, harms or treats unfairly the investments of an investor from the other country.

## This article addresses three important questions:

1. Ukrainian investors with interests in Crimea have already taken arbitral action successfully against Russia under Ukraine's BIT. Is the same approach likely to work with regard to investments in other Ukrainian regions currently under Russian control?
2. Might other foreign investors with investments in Russian-controlled parts of Ukraine be able to rely upon their home countries' BITs with Russia in the same way?
3. Even if investors – either Ukrainian or from other countries – are successful at arbitration, what are the prospects for enforcement against the Russian state?

## How military control of Ukraine has changed

Feb 2022: Before the invasion

Mar 2022: Russia's rapid advance



Nov 2022: Ukraine regains ground

May 2024: Russia edges forward



■ Russian military control  
▨ Limited Russian military control  
■ Held or regained by Ukraine  
□ Russia annexed Crimea in 2014  
■ Russian-backed separatist-held areas

Note: Areas held or regained by Ukraine were reset by the Institute for the Study of War (ISW) on 12 May 2023

Source: [BBC and Institute for the Study of War](#), May 2024

## UKRAINIAN INVESTORS' ARBITRATION EFFORTS UNDER THE RUSSIA-UKRAINE BIT

Ukraine's BIT with Russia will terminate on 27 January 2025. However, a sunset provision means that investments made prior to that date remain under the protections provided by the treaty until 27 January 2035. If the Russia occupied regions of Ukraine can be defined as de facto Russian, then claims can be brought against the Russian state under Ukraine's BIT with Russia for breaches of investment protection guarantees in the treaty.

### A precedent in Crimea?

A precedent may have been set by claims relating to investments in Crimea. In those cases, investors (including Ukrainian owners of petrol stations, airport terminals and power distribution networks) took their cases to arbitration tribunals in Paris, Geneva, the Hague, and Stockholm and at least 7 companies publicly reported favourable decisions (at least 3 more arbitration proceedings are pending). In those cases, the tribunal was satisfied that Russia had de facto control of Crimea, thus allowing for the application of the treaty's investment protection terms.

### Will this extend to southern and eastern regions?

It may be harder for the tribunals to accept that Russia has de facto control of the eastern and southern areas. When Russia took control of Crimea in 2014, the move met little resistance and Russian control has been total and consistent. By contrast, in the eastern and southern regions, active conflict continues, with lines constantly being redrawn as Russian troops advance or are pushed back. While this leaves hope for Ukraine that these territories might eventually be regained, it also means that it may be harder to establish the legal argument that Russia has de facto control, for investment protection purposes.

That being said, Russia's moves in southern and eastern regions replicate the Crimean experience. In September 2022 Russia unlawfully annexed four regions in eastern and southern Ukraine – Luhansk, Donetsk, Zaporizhzhia and Kherson – held sham referenda and began the formal process of incorporating them into the Russian state. Moscow sees them as subject to Russian law, which should logically extend to international treaty obligations.

Some Ukrainian investors who have made claims against the Russian state in Crimea, are already seeking to apply the same approach to assets in these regions.

For example, SCM Group – whose assets include Azovstal Iron and Steel Works in Mariupol – has commenced arbitration proceedings, and national nuclear energy firm Energoatom has announced its intention to do the same.

The Russian state's defences to these claims might include questions around causes of loss. For example, according to Ukraine's BIT with Russia, investors will need to prove that any losses were incurred as a direct result of actions by the Russian state, its military forces, or others connected with the state. Further, Moscow may argue that investors have voluntarily chosen not to continue to operate in these regions under the occupying authorities, suggesting that preference or choice have played a role.

## CAN FOREIGN INVESTORS IN UKRAINE ALSO RELY ON BITS?

Foreign investors in Ukraine will need to scrutinise the terms of their home countries' BITs with Russia, including the status of the bilateral treaty, any sunset clauses where relevant, the types of investments covered and the extent of protection. In most cases, a foreign investor will need to rely on the BIT between its home country and Russia, even if it operates as a Ukrainian entity in Ukraine. Sometimes, foreign investors deliberately include an intermediate jurisdiction in its ownership structure so that claims can be filed by the intermediate state against the host state. Each case will depend on specific circumstances, including details of the business management centre of the foreign investor.

Russia has about 60 BITs with other countries. Some contain dispute resolution clauses that are notably narrower than others. For example, Russian BITs with Austria and Germany limit the jurisdiction of arbitral tribunals in expropriation cases to disputes relating to the amount of compensation or the method of its payment. Switzerland's BIT with Russia also limits jurisdiction in relation to expropriation cases to disputes concerning procedural issues and the amount of compensation. These clauses tend to apply to direct expropriation of foreign investments by host states. In those types of cases, disputes between states and investors tend to revolve around level of compensation, and the fact of expropriation is not disputed. Depending on the details of specific BITs with Russia, Moscow may attempt to argue that forced sales, excessive taxation, deprivation of profits or interference with management do not amount to expropriation.



## NO REAL VICTORY WITHOUT SUCCESSFUL ENFORCEMENT

The main obstacle, however, will be enforcement, given that the Kremlin is almost certain to resist demands to comply with any arbitral awards. In relation to the arbitral awards issued in favour of Ukrainian investors (we have seen no information of similar awards made in favour of foreign investors so far) some enforcement efforts have begun but there is no publicly available information as to their outcome.

- **On 5 December 2023**, Naftogaz, together with five companies of the Naftogaz Group, secured an order from the High Court of Justice of England & Wales recognizing its USD 5 billion final award for damages (including interest) against Russia, as well as the underlying partial award on jurisdiction and liability.
- **On 7 November 2023**, DTEK Krymenergo filed a petition to confirm a foreign arbitral award (for damages in the amount of USD 207.8 million, plus interest, as well as USD 9.4 million in legal fees and USD 1.3 million in administrative costs) in the US District Court for the District of Columbia.

- **On 9 April 2022**, a petition to confirm an arbitral award against Russia was filed by Stabil LLC and other investors with the US District Court for the District of Columbia (for damages in the amount of around USD 42.6 million plus interest, legal and administrative costs of the arbitration).
- **On 4 December 2018**, in Everest v Russia, Russia filed a request to suspend the enforcement of the arbitral award for USD 130 million or, in the alternative, to order Everest to provide security. The request was dismissed by the Court of Appeal in the Hague, and the enforcement of the award continues.

Russia is effectively in financial exile from the west and is perpetrating an expensive war. In these circumstances Moscow is extremely unlikely to prioritise compliance with arbitral awards or to give in easily to enforcement pressure. While assets of prominent Russians have been frozen around the world, possible avenues include identifying assets owned by unsanctioned Russian individuals, where it is possible to establish connections to the Russian state or to initiate enforcement actions in countries where Russian state-owned assets are not currently frozen and are not subject to sovereign immunity. It will be essential that foreign investors have a strong legal strategy, focused on enforcement and recovery, without which paper judgments will offer little compensation.

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**Astraea Group** is a special situations legal and professional services firm with extensive experience leading and managing complex cross-border enforcement, deploying a multi-disciplinary team of international disputes professionals, with tested CIS experience, supported by forensic investigators and intelligence experts.

**Hillmont Partners'** International Dispute Resolution ("IDR") practice specializes in investor-state dispute resolution and complex multijurisdictional enforcement against judgment debtors that have attempted to place assets outside the reach of creditors. Hillmont's White-Collar Crime and Strategic Communication practices contribute their expertise to develop robust, multi-pronged asset recovery strategies.



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