

## BITS AND THE WAR: NEW ISSUES AND NEW CHALLENGES

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Russian aggression in Ukraine has cost domestic and international companies operating in Ukraine billions of dollars, which they now want to recover from Russia.

One legal avenue for recovery is to initiate an investment treaty arbitration against Russia. The interest to use this option is partially explained through the recent successful experience of several Ukrainian investors in the so-called “Crimean arbitrations.” So far, the arbitral tribunals in those cases have confirmed their jurisdiction under the Russia-Ukraine bilateral investment treaty (BIT) and have rendered awards in favor of the investors, ordering Russia to pay damages. The most interesting issue in those cases has concerned the notion of “territory” under the BIT in light of the illegal annexation of Crimea by Russia in 2014. The drafters of the BIT hardly could have imagined its application in a case where the control over some territories changed between the contracting parties. However, this has not stopped the arbitral tribunals in the Crimean arbitrations from interpreting the BIT’s provisions about “territory” extensively and concluding that Russia is liable for the expropriation it committed in Crimea since 2014. In essence, those cases have opened the door to bringing claims against a state that has occupied and exercised control, albeit illegally, over a certain territory of another state.

Unfortunately, in the first months of the war, Russia occupied certain Ukrainian territories, including in the Kyiv, Chernyiv, Symy, Kharkiv, Kherson, Zaporizhzhia, Donetsk and Luhansk regions. However, these occupations differ from the situation in Crimea in 2014 and pose even more challenging questions regarding the BIT’s application. Most of these questions await clear answers and it is important to start discussing them to find a solution.

Moscow’s purported annexation of Crimea was fast and faced little resistance, almost immediately integrating the peninsula into its own state system in all respects. In contrast, the new occupations in 2022 took place during active combat. Although Russia gained control over certain Ukrainian territories relatively fast, especially at the beginning of the war, it had to fight for weeks or months for other territories with a constantly moving front line. The battles for some cities, like Mariupol, Soledar, and Bakhmut, lasted several weeks with creeping occupations of certain districts or parts of each city.

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In some instances, even assets of the same company would not come under Russian control in one day. One may recall Russia's protracted efforts to gain control over Azovstal in Mariupol. Therefore, the important legal and factual question is when exactly the occupation of a particular territory commenced. Could the commencement time be established based on satellite or drone images? Could the various studies of the war published by various private and public entities be relied on? Should statements by the occupying state itself be relied on given it is clear that such statements are not always true?

Another important aspect is Ukraine's counteroffensive, specifically as it regained control over some of the territories. This further raises the question of when Russian occupation over particular territories ended. Here the same issue arises of how to determine the commencement of occupation with source availability and moving front lines. Russia's official statements regularly use different terms and explanations, but in essence admit that its army lost control of, or simply left, the territory it had earlier occupied. Were such statements reliable?

Difficulties also arise with regard to liberated territories that were temporarily under Russian occupation, such as Bucha and Kherson. Some cities, in the Kharkiv region for example, have been occupied and de-occupied by Russia several times during this war. This is crucially different from the situation in Crimea, where there was only one change of effective control. Needless to say, the drafters of the Russia-Ukraine BIT did not consider that one party's BIT-covered territories would switch back and forth between the contracting parties. Is it still possible, then, to solve this problem via an interpretation of the notion of territory in the BIT? And if so, could investors commence respective arbitrations well after the de-occupation of these territories? What would happen to the Crimean arbitrations when the peninsula is once again controlled by Ukraine?

Such situations lead to the question whether the mere existence of military occupation in these territories is sufficient to hold Russia liable under the BIT and whether the level of control exercised by Russia in a particular territory should somehow be measured. If so, what would be a necessary level of control for the purposes of BIT application?

The factual background of these occupations is diverse and dependent on many factors, such as: how close the occupied territory was to the Russian border, who was appointed to govern these territories during the occupation period, what kind of documents the occupation authorities issued during the occupation, and whether Russian currency, documents, or registers were used in the occupied territory. The simple questions of documenting birth, death, the obtaining of diplomas, and selling or buying of real estate property during occupation might be particularly relevant. For instance, in some Ukrainian cities, Russian occupiers issued Russian state birth certificates, stating that a particular person was born in the territory of the Russian Federation. In the same way, some people obtained documents for death, education, and transactions that were issued as made "in the Russian Federation" on official state letterheads. Russia also issued Russian passports to the inhabitants of occupied territories. To complicate matters further, the situation was not identical in all occupied territories.

Furthermore, whether the Russian declaration of the formal Russian annexation of Donetsk, Kherson, Luhansk and Zaporizhzhia in September 2022 changes the picture has also to be weighed, and if it does, whether such a change would work retrospectively. Still more questions follow: To what extent? Could it cover eight years of occupation of Donbas by Russia as well? And should the formal wording of those acts of annexation (declaring annexation of the regions within their administrative borders as established by Ukraine) be relied on or should the situation on the battlefield be considered?

Finally, how to assess expropriation during war time? Russia has simply stolen Ukrainian goods, grain, oilseeds, steel products, equipment, and vehicles, which were not always formalized or documented. Ukrainian owners, in turn, usually do not have access to their assets during war to understand what exactly has been done to their assets and even to properly collect witness testimonies or other evidence. Could the images made by satellites or vehicles' GPS tracking be used to provide that information? And how would attribution work with such kinds of evidence?

The BITs were not designed to cover these dynamic situations. The drafters did not consider a war scenario between the parties committing to protect and promote the investments of each other's nationals on their own territory. Thus, it is time to rethink and reshape some concepts. As the very aim of each BIT is to protect foreign investments, the occupying state should be held liable for damages caused to now-foreign investors on the territories it has occupied.

If satisfactory answers to all these questions are not found, Ukrainian and foreign investors will likely be left without an effective remedy for the damages caused by Russia during this war. The investors could go only to the Ukrainian courts, as the latter have found themselves competent to consider the claims against Russia. But the claimants need to prove their damages under Ukrainian local litigation rules and under Ukrainian law, which has a rather high standard of proof for damages, especially for lost profits. In addition, the enforceability of domestic court judgments outside Ukraine are not clear at the moment. As a result, investors may only be able to recover against the host state, which in this case is itself the victim of aggression. This should not be so.

The BIT system should be able to effectively protect the investments that suffered from the war and to make Russia pay respective compensation to affected investors. This would also send a strong message to any other potential aggressor state and would likely help prevent future aggression and occupations. The two following options should be considered. First, the existing BIT provisions should be interpreted more broadly than in the Crimea cases, which does not require any changes to be made to the BITs. Second, States and institutions can elaborate and adopt "war provisions" to be incorporated into the BITs. These provisions would address similar situations directly, including the difficult issue of "buffer" zones on the front line or situations of massive missile attacks on cities which have never been (and hopefully will never be) under Russian occupation.

