

**C L I F F O R D**  
**C H A N C E**



**FOREIGN DIRECT INVESTMENTS IN TIMES OF GEOPOLITICAL UNCERTAINTY?  
DISPUTES ARISING OUT OF RUSSIA'S WAR ON UKRAINE**

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# EFILA CONFERENCE 2024

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# EFILA CONFERENCE 2024

## CRIMEA-RELATED BIT CLAIMS AGAINST RUSSIA



- 10+ BIT claims of the Ukrainian investors against Russia.
- About half of the arbitral awards are being enforced in the US (pending enforcement petitions in the US – *Stabil and others v. Russia*, *DTEK Krymenergo v. Russia*).

No.	Case	Jurisdiction	Liability	Enforcement
1.	Aeroporto Belbek and Kolomoisky v. Russia	✓	-	-
2.	Everest and others v. Russia	✓	✓	✓
3.	Privatbank and Finilon v. Russia	✓	✓	✓
4.	Naftogaz v. Russia	✓	✓	✓
5.	Oschadbank v. Russia	✓	✓	-
6.	Ukrnafta v. Russia	✓	✓	-
7.	Stabil and others v. Russia	✓	✓	-
8.	Lugzor and others v. Russia	✓	✓	-
9.	DTEK Krymenergo v. Russia	✓	✓	-
10.	Ukrenergo v. Russia	-	-	-
11.	Energoatom v. Russia	-	-	-

# EFILA CONFERENCE 2024

## CRIMEA-RELATED BIT CLAIMS AGAINST RUSSIA



### Jurisdiction – meaning of “territory”, “effective control” and their variations

#### a) exercise of “de facto control and jurisdiction”

The Tribunal construes the term “territory” for purposes of the Treaty *“to include territory over which a State exercises de facto control and jurisdiction”*.

*(Stabil and others v Russia, Final Award of 12 April 2019, para 175)*

#### b) ability to legislate and enforce the laws

Following the analysis of the meaning of term “territory” in the BIT, tribunal ruled that *“the term “territory” is used generally within the Treaty with a view toward the ability effectively to legislate and to enforce its laws”*.

*(Oschadbank v. Russia, Award of 26 November 2018, para 208 )*

#### c) exercise of “settled, long-term control”

In the Tribunal’s view, *“while physical control and political expressions of intent as regards the status of a territory may be relevant for purposes of this assessment, and will need to be weighed in the mix, the critical consideration is likely to be an appreciation of settled, long-term control over the territory in question by the State whose responsibility is invoked under the Treaty.*

*Evidence of such settled, long-term control may come, inter alia, as in this case, both from legal steps taken by the State whose responsibility is invoked to formalise, and constitutionalise, its control, and by settled, long-term physical manifestations of control.”*

*(Privatbank and Finilon v. Russia, Interim Award of 27 March 2017, para 192).*

# EFILA CONFERENCE 2024

## DONBAS-RELATED BIT CLAIMS AGAINST RUSSIA

### SCM Group v. Russia is the only reported dispute related to the investments in Donbas region

SCM Group seeks compensation for the losses incurred as a result of interference with its business or expropriation of the investment by the so-called "Donetsk People's Republic" and "Luhansk People's Republic", which have been acting under Russian direction or control. The investor seeks damages for losses starting from 2014 and up to the full-scale invasion.

### ECHR established Russia's effective control over the territories in Eastern Ukraine

On January 25, 2023, the Grand Chamber of the ECHR declared the claims in *Ukraine and the Netherlands v. Russia* (applications nos. 8019/16, 43800/14 and 28525/20) partly admissible and found Russia's effective control over the territory of eastern Ukraine from May 11, 2014.

The exercise of extraterritorial jurisdiction follows from the two main criteria:

- effective control over an area (spatial concept of jurisdiction, or jurisdiction *ratione loci*), and
- State agent authority and control over individuals (personal concept of jurisdiction, or jurisdiction *ratione personae*)" (para 559)

Applying these two criteria to the present case, the ECHR concluded:

*"As a result of Russia's military presence in eastern Ukraine and the decisive degree of influence and control it enjoyed over the areas under separatist control in eastern Ukraine as a result of its military, political and economic support to the separatist entities, these areas were, from 11 May 2014 and subsequently, under the effective control of the Russian Federation" (para 695).*

# EFILA CONFERENCE 2024

## INVESTMENT PROTECTION FOLLOWING THE FULL-SCALE INVASION

### Investment Arbitration

- Presumption of continuity of investment protection – the existence of an armed conflict does not ipso facto terminate or suspend the operation of treaties (ILC, ‘Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries’, Article 3).
- For the investment protection during the armed conflicts, Compensation for Losses Clauses and Full Protection and Security are especially relevant.
- Compensation for Losses Clauses often boil down to non-discrimination obligations in providing indemnification (e.g. Russian Federation-Ukraine BIT, Article 6).
- Full Protection and Security could be limited to legal protection and not cover physical one (e.g. Russian Federation-Ukraine BIT, Article 2).
- MFN clauses are to be used to transport more favourable treatment from other BITs (e.g. the extended war clause in Article 12 of the ECT; **extensive full protection and security clause** in Article 2 of the Lithuania - Russian Federation BIT).

### Compensation Commission

- The Register of Damage launched its operation on April 02, 2024, and currently accepts only the claims for damage or destruction of residential immovable property.
- Subsequent category of claims to be accepted by the Register is the claims for damage or destruction caused to Ukraine’s critical infrastructure.
- Temporal, territorial and subjective scope of claims to be accepted by the Register is limited to the damages:
- occurred **on or after 24 February 2022**;
- in the territory of Ukraine within its internationally recognised borders, including its territorial waters; and
- by internationally wrongful acts of the Russian Federation in or against Ukraine.

# EFILA CONFERENCE 2024

## INVESTMENT PROTECTION FOLLOWING THE FULL-SCALE INVASION



### ● > **Energoatom v. Russia**

In April 2023, Ukrainian state-owned nuclear company Energoatom initiated legal proceedings against Russia caused by Russia's expropriation of its investments in the Zaporizhzhia region, including the temporarily occupied Zaporizhzhia Nuclear Power Plant.

### ● > **Ukrhydroenergo is developing strategy to bring claims against Russia**

Ukrhydroenergo is preparing to bring claims against Russia for attacking infrastructure during its full-scale invasion of the country, including destruction of the hydroelectric dam.

### ● > **Ukrenergo**

Ukraine's electricity transmission system operator Ukrenergo had instructed legal counsels to develop a litigation and arbitration strategy to pursue Russia for losses caused by the war.



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## BIT CLAIMS OF SANTIONED PERSONS AGAINST UKRAINE



### BIT claims of sanctioned persons against Ukraine

- **ABH Holdings v. Ukraine**  
In June 2023, Luxembourg-registered ABH Holdings filed a notice of dispute against Ukraine under BLEU (Belgium-Luxembourg Economic Union) - Ukraine BIT (1996). The dispute concerns Sense Bank – formerly known as Alfa Bank Ukraine – which was majority owned by ABH prior to its nationalization in July 2023. The bank was nationalised under martial law as a bank owned by sanctioned individuals Mikhail Fridman, Petr Aven and Andrei Kosogov.
- **Shell threatens Ukraine with a potential investment arbitration claim**  
The potential claim relates to the nationalization of the share of the sanctioned Russian oligarch Eduard Khudainatov in Alliance Holding Ukraine. At present, Shell indirectly owns 97,44% of the corporate rights of Alliance Holding, and, thus, the nationalization of Khudainatov's share allegedly violates Shell's rights.
- **At least two other cases related to sanctioned persons are reported to threaten Ukraine with a BIT claim**



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## BIT CLAIMS RELATED TO EXITS FROM RUSSIA



### Businesses operating in Russia after the full-scale invasion

As follows from the Kyiv School of Economics' website (as of April 22, 2024):

- **378+** companies **completed their exit** (company sold its business/assets or its part of the business to a local partner and leaved the market).
- **508+** companies **withdrew** from Russian market (company completely halting Russian engagements or exiting Russia).
- **701+** companies **suspended** their operation in Russia (company temporarily curtailing operations while keeping return options open).
- **389+** companies **reduced activities** (company scaling back some business operations while continuing others).
- **143+** companies **hold off investments** (company postponing future planned investment/development/marketing while continuing substantive business).
- **1662+** companies **continue operations**.

# EFILA CONFERENCE 2024

## BIT CLAIMS FOLLOWING EXITS FROM RUSSIA



### BIT claims against Russia following exits from Russia

#### Uniper prepares treaty claim against Russia

German state-owned energy group Uniper has put Russia on notice of a potential investment treaty claim over a decree that placed its Russian assets under temporary state control (temporary administration) that violates the Russia-Germany BIT and the Energy Charter Treaty.

#### Finnish energy company launches billion-euro claim against Russia

Finland's majority state-owned energy company "Fortum Oyj" has launched an investment treaty claim against Russia, seeking several billion euros in damages over the seizure of its operations in the country.

#### Carlsberg dispute with Russia brewing

On 13 October, 2023, the Copenhagen-headquartered group served notices of dispute with several Russian ministries under the state's bilateral investment treaties with Denmark, Sweden and Germany.

### RUSSIA'S RESPONSE TO ASSET FREEZING

#### Belgium risks treaty claims over Russian asset freezes

Belgium has been threatened with treaty claims over the billions of dollars in Russian assets that have been frozen in the country since Russia's invasion of Ukraine.

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