Adjudicating While Fighting:
Political Implications of the Ukraine-Russia Bilateral Investment Treaty[1]

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Abstract

Russia's 2014 seizure of parts of Ukraine, notably the Crimean peninsula, set in motion of a flurry of legal activity. Ukraine's "lawfare" strategy, which aims to fight Russia via international legal means, has included explicit encouragement of Ukrainian investors to file disputes under the Ukraine-Russia Bilateral Investment Treaty. We consider the resulting investor-state dispute settlement (ISDS) arbitrations, the first instances of ISDS in which the state parties to the treaty are actively engaged in armed conflict. Although Ukrainian actors have consistently won at ISDS, Ukraine moved to formally withdraw from the treaty a year after the full-scale Russian invasion of 2022. Developments before and since the full-scale invasion point to hazards of non-state, commercial actors as decision-makers in wartime; the hurdles wartime adjudication generate for peace; and a reconsideration of treaty-based commitments to international investor protections, especially if interstate territorial conflict is thinkable.

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Introduction

When Russia seized the Crimean peninsula and other Ukrainian territory in 2014, Ukraine initiated a variety of international legal challenges against Russia in different fora in what it has come to call its "Lawfare Project."[2] Ukraine's terminology comes from a 21st century body of thought by scholars, military strategists, and practitioners as to whether and how international law can be used as a weapon of war.[3] The repurposing of international dispute settlement mechanisms for national security interests is not new, but the use of international investment law as an instrument of lawfare is.

Ukrainian investors in Crimea have claimed property rights protection through the Ukraine-Russia Bilateral Investment Treaty (BIT), which is one of thousands of active international investment agreements (IIAs) (Bonnitcha et al 2017, Arias et al 2018). Like most IIAs, the Ukraine-Russia BIT contains commitments to Investor-State Dispute Settlement (ISDS), the controversial system by which foreign investors alleging treaty violations have standing to sue the contracting host state for monetary compensation (Moehlecke and Wellhausen 2022). Ad hoc three-person tribunals adjudicate disputes without a substantive appeals system, and arbitrators have considerable autonomy owing to the ambiguity of treaty language and the absence of binding precedent (Pelc 2014). Under international law, investors who win an award can pursue enforcement and recovery of sovereign host-state assets in a wide variety of domestic courts worldwide. Investors can pursue arbitration and enforcement of awards on their own initiative and on timelines determined by each tribunal.

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[2] "About Lawfare Project." https://lawfare.gov.ua/about. Last accessed 5 November 2023.
[3] See Chang (2022); Ohanesian (2023); and, in general, the publication "Lawfare" (lawfaremedia.org).

Ukraine and Russia are sophisticated users of investment law, meaning that they and their investors are well-positioned to leverage the Ukraine-Russia BIT, providing observers empirical insight into how ISDS can be used for lawfare. Each state has over 60 IIAs in force. Russian and Ukrainian investors are among the most prolific users of ISDS, each ranking in the top 20 most common claimant nationalities. Both countries are in the top 15 most common respondent states as well.[4] Russia is widely viewed as the most persistent non-complier, with outstanding arbitral awards amounting to billions of dollars owed to investors and subject to scores of enforcement hearings around the world. Today, Ukraine's reputation for compliance is strong, although it was repeatedly non-compliant with awards due to US investors in the early 2000s (Wellhausen 2015, Ch. 5).

Since the onset of Russian aggression in 2014, both states have realized the potential impact that ISDS could have on their actions. In what have come to be known as the "Crimea cases," Ukrainian investors in Russian-controlled Crimea have sued the state of Russia over expropriation and other BIT violations. Russia tried unsuccessfully to prevent claims with a plan to force its passports on all residents of Crimea, and by refusing to participate in the Crimea cases altogether (Olmos Giuponni 2019). Over time, and especially since the full-scale Russian invasion of Ukraine beginning 24 February 2022, both states' attitudes towards the BIT and ISDS have changed. Russia has become an active participant in the Crimea cases, and its investors are also filing cases against Ukraine. Ukraine's attitudes towards ISDS have also changed, so much so that Ukraine moved to unilaterally withdraw from the BIT in 2023, although it has signaled its intent to abide by the 10 year sunset period. The Crimea cases and their aftermath are also pressuring other countries to reconsider their commitments to

[4] Alschner, Elsig, and Polanco (2021), and UNCTAD Investment Dispute Settlement Navigator.

ISDS. Although the legal community generally presumes that IIAs apply during wartime (Zrilič 2019), Ukraine's Western backers are reconsidering their views on the matter, evidenced by discussions about what to do with seized Russian assets.

We use this article to explain and offer initial theory-building around two aspects of the Ukraine-Russia BIT's wartime operation.[5] First, treaty-based investor protections have made commercial non-state actors into consequential wartime decision-makers. Second, symmetric treaty protections expose both the challenger and the target state to the BIT's repurposing as a tool of lawfare, in ways that prompt reevaluation of compliance with treaty commitments. Wartime adjudication of foreign investors' property rights has consequences that ultimately caused Ukraine to lose its enthusiasm for using investment law and that jeopardize the sustainability of the treaty-based international investment regime.

The Ukraine-Russia BIT

Signed in 1998, the Ukraine-Russia BIT sought to "develop the basic provisions" established in a previous bilateral agreement signed shortly after the fall of the Soviet Union.[6] The diplomatic history around the Ukraine-Russia BIT negotiations has not been recorded, but the BIT text is quite like the hundreds of other BITs enacted around the same time. The protections afforded to investors under the agreement are typical of BITs, namely, expropriation, national treatment, most-favored nation treatment, and equal protection.[7] Its

[5] See the Appendix for a timeline of key events and key non-academic sources for news reporting and legal analysis.
[6] Ukraine-Russia BIT, Preamble, which refers to the "Agreement on Cooperation in the Sphere of Investment Activity" of December 24, 1993.
[7] The text does not mention "indirect" expropriation, an issue of increasing importance for the treaty regime as a whole as indirect expropriations claims have increased in recent years. The text regarding equal protection (Article 2) is atypical, and the BIT does not include a clause on fair and equitable treatment (FET). While Article 2 includes a reference to "legal protection of investments," it stops short of a more complete

ISDS provisions are also typical: the BIT affords aggrieved investors from one state standing to file for investment arbitration against the other state in pursuit of compensation for violations of treaty protections. The investor must notify the host state (but not its home state) in writing of its intention to file. In the subsequent six months, the parties are expected to "exert their best efforts" to negotiate a settlement.[8] Should they fail, the investor can pursue arbitration against the state at any of the forums outlined in the treaty.[9] A resulting arbitration award "shall be final and binding upon both parties."[10] Additionally, as is typical in investment treaties, investors with rights under the BIT can be natural persons or legal entities, including state-owned enterprises (SOEs).[11]

The short definition of "territory" applies the Ukraine-Russia BIT to investments "on the territory" of one of the contracting states, without more precise delineation.[12] Without any language to the contrary, the BIT does not exempt state parties from their commitments during wartime.[13] This is not unusual: the dominant scholarly view has been that investment

statement that would charge Russia or Ukraine with due diligence for the physical protection of foreign investments, as in full protection and security (FPS) clauses.

[8] Article 9(1).

[9] The World Bank's International Center for the Settlement of Investment Disputes (ICSID) is the most well-known forum for ISDS; however, Russia is not a party to the ICSID Convention. As is typical in BITs entered into by non-parties to ICSID, a tribunal using the Arbitration Regulations of the United Nations Commission for International Trade Law (UNCITRAL) is specified instead.

[10] Article 9(3).

[11] The Ukraine-Russia BIT includes provisions for direct dispute settlement between the state parties over "the interpretation and application" of the BIT (Articles 10 and 11). In principle, investors from one state could renounce standing and allow their home state to espouse all cases in direct negotiations. It took considerable effort for Alscher and Haftel (2023) to gather data on such clauses in the universe of BITs; suffice it to say, while in fact relatively common they have been essentially ignored in practice.

[12] Article 1(4).

[13] The one mention of war is in Article 6. Should investors from one state suffer damage in the other resulting from war, the treaty calls for them to be subject to "a regime no less favorable than the one" that the state grants to investors from third-party states. For example, if Ukraine were to devise measures around wartime damage to investors from the US and the European Union, the treaty requires it to offer equivalent measures to Russian investors in Ukraine that had suffered wartime damage.

treaties apply in wartime.[14] In very broad strokes, the various Crimea case tribunals' legal reasoning (to date) follows the logic that "an investment treaty is…able to be interpreted as to also apply to foreign territory under effective and relatively stable control by a State Party," but, absent international recognition, the occupying state "merely administers" BIT obligations (Ackermann 2019, p. 88, 76).

One notable characteristic of the Ukraine-Russia BIT is that it is short: in English, it runs around 2,300 words. To compare, the 2012 US Model BIT is over 14,000 words. Such short treaties are notoriously ambiguous and incomplete. By design, they depend on arbitrators to adjudicate disputes in line with the states' overall goals of protecting investment. Arbitrators with jurisdiction via the Ukraine-Russia BIT thus face a difficult task, to interpret its vague definitions and commitments in light of the peacetime intentions of the two states in an active militarized dispute. A variety of legal scholars argue that arbitral tribunals should incorporate international humanitarian law and other relevant international law in their decision-making (e.g. Ackermann and Wuschka 2023; Zrilič 2019, pp. 40-47; Schreuer 2019, ft. 6).

Ukraine-Russian BIT and the Crimea Cases

The Russian-controlled Republic of Crimea government cancelled Ukrainian-granted property rights in Crimea as of February 2014. Using the Ukraine-Russia BIT, at least 51 Ukrainian investors sued Russia for compensation over expropriation of their property in

[14] Zrilič sees this view as "hasty" and argues for a middle ground interpretation by which some aspects of IIAs could be suspended through the principle of separability (2019, p 62).

Crimea.[15] The Crimea cases (Table 1) are the first known instances of ISDS arbitration conducted while the contracting states to the BIT are actively engaged in armed conflict. Each ad hoc arbitral tribunal has faced the tension that establishing jurisdiction for Russia's seizure of Ukrainians' property could effectively legitimate Russia's control of the territory (Rees-Evans 2019). Moreover, given the BIT's silence on most elements of interstate conflict, each arbitral tribunal has needed to decide whether aspects of international customary and treaty law that apply in wartime, such as military necessity or humanitarian considerations, might supersede investors' treaty rights.

Table 1: Crimea cases

Case	Year filed	Claimant type	Claimant count	Investment	Award
Kolomoisky and Aeroport Belbek v. Russia	2015	Non-state (K)	2	Airport operations	Pending
Privatbank v. Russia	2015	Non-state (K)	2	Banking	Pending
Stabil and others v. Russia	2015	Non-state (K)	11	Petrol stations	USD 35 mil.
Ukrnafta v. Russia	2015	Non-state (K)	1	Petrol stations	USD 45 mil.
Everest Estate and others v. Russia	2015	Non-state (K)	19	Real estate	USD 150 mil.*
LLC Lugzor v. Russia	2015	Non-state (K)	5	Real estate	(In progress)
Naftogaz v. Russia	2016	SOE	5	Oil and gas	USD 5 bil.
Oschadbank v. Russia	2016	SOE	1	Finance	USD 1.1 bil.
DTEK Krymenergo v. Russia	2018 [revealed 2020]	Non-state (A)	1	Electric power	USD 267 mil.
Akhmetov & Investio v. Russia	2019 [revealed 2024]	Non-state (A)	2	(Unknown)	(In progress)
Ukrenergo v. Russia	2019	SOE	1	Electric power	(In progress)
Energoatom v. Russia	2021	SOE	1	Wind power plant	(In progress)

Notes: *As of March 2024. (K) = Case involving Kolomoisky. (A) = Case involving Akhmetov. * = Award enforced; all other awards unpaid. All cases at the Permanent Court of Arbitration (PCA) and brought under the Ukraine-Russia BIT. Jurisdiction upheld in all cases. See Appendix for timeline and detail on sources.*

[15] As ISDS arbitrations can be private, all publicly available data constitute a lower-bound (Moehlecke and Wellhausen 2022).

All rulings to date have favored Ukrainian investors, and the Ukrainian government has celebrated wins and encouraged more investors to file. Yet, in April 2023, Ukraine moved to unilaterally withdraw from the Ukraine-Russia BIT. We argue that Ukraine's volte face reflects not just changing war aims for Ukraine and its supporters but also the consequences that wartime adjudication has generated for Ukrainian security.

Commercial, non-state actors as wartime decision-makers

In our view, Ukraine's initial support of ISDS under the BIT gave way to concerns about some private claimants and the consequences of enforcement of awards against Russia. Claimants in all Crimea cases filed in 2015 are owned by or affiliated with Ihor Kolomoisky, a top oligarch who played a key role in Zelensky's rise. At the time of writing, Kolomoisky-linked cases have resulted in USD 280 million in arbitral awards against Russia, of which USD 150 million has been collected (see again Table 1). However, Kolomoisky has fallen out of favor since at least late 2021, has been stripped of Ukrainian citizenship (July 2022), had the bulk of his Ukrainian assets nationalized (November 2022), and has been the subject of active Ukrainian criminal investigations including a headline-grabbing raid on his home (February 2023) and detention (September 2023). Prosecutions of Kolomoisky for fraud are ongoing not only in Ukraine but also the US, Cyprus, and the UK, the last of which enabled the freezing of USD 3 billion in Kolomoisky assets (February 2023). Yet, because ISDS gives standing to investors to pursue claims without needing their home state's approval, Ukraine has no legal authority to forestall Kolomoisky's cases and enforcement efforts – regardless of the scarcity of Russian assets, or the Zelensky government's preferences over their allocation. The enormous political pressure on Kolomoisky might

encourage him to withdraw continuing cases, but completed cases with awards already have legal implications that are virtually impossible to pull back.

The drama around one of the arbitrations in which an award is pending, *PrivatBank v. Russia*, demonstrates just how far the interests of a home state and its investor pursuing ISDS can diverge. PrivatBank, founded by Kolomoisky and partners in 1992, is a household name as one of Ukraine's first commercial banks. PrivatBank went on to fail spectacularly and, to abate deep financial crisis, Ukraine nationalized it with the IMF's blessing in December 2016 – two years after its Crimean assets were expropriated. The tribunal in *PrivatBank v. Russia* found Russia liable for PrivatBank's expropriation in Crimea, and the tribunal decided to only consider the context of fraud in the quantum phase, which is ongoing at the time of writing.[16] Claimants are seeking USD 1 billion. In terms of optics, the Ukraine-Russia BIT led to a legally binding ruling in favor of the Kolomoisky-owned version of PrivatBank, so mired in fraud that it nearly collapsed the Ukrainian economy; the size and timing of the announcement of the monetary award (if any) are in the hands of the tribunal; and the Zelensky government has no authority to forestall the process.

The centrality of oligarchs to the Ukrainian (not to mention Russian) economy means that a few individuals can have an outsized impact on the compatibility of private investor-driven arbitration and the state's broader tactical approach, for worse or better. Rinat Akhmetov, Ukraine's richest oligarch, has also pursued Crimea cases against Russia (see again Table 1). In 2023, the tribunal awarded Akhmetov-linked claimants USD 270 million in an outstanding Crimea case. Since the full-scale Russian invasion, Akhmetov has

[16] Although Russia sought a set-aside of the ruling – citing the issue of fraud, among other things – their request was denied at the Hague (19 July 2022).

announced his intention to sue Russia "in all international and national courts," consistent with Ukraine's "Lawfare Project." True to his word, Akhmetov filed the first public case over damage from the full-scale Russian invasion (*SCM Group v.* Russia), listed with what we summarize as post-Crimea cases in Table 2. While Akhmetov's interests seem currently to align with Ukraine's government, the Kolomoisky-related Crimea cases serve as a cautionary tale of how little power a state has to rein in private investors if their use of a BIT should conflict with national interests.

ISDS as a "legal front" in war

In describing its "Lawfare Project," Ukraine argues that on the "legal front…Ukraine (state bodies and state-owned enterprises) is fighting quite well."[17] The parenthetical reference to state-owned enterprises connects back to Crimea cases initiated by Ukrainian SOEs that have resulted in USD billions in awards (Table 1). Although SOEs are covered investors under typical IIAs, the rise of SOEs as ISDS claimants has been controversial because one design goal of ISDS was to remove an investor's home state from disputes (Moehlecke and Wellhausen 2022).[18] Indeed, via the SOE's choice to file, settle, or waive an award, the home state may be able to achieve some other, political goal. During interstate war, we expect that SOE-claimants should rarely have conflicts of interest with their home state. At the same time, BITs are symmetric – so a BIT between an aggressor state and its

[17] See footnote 1.

[18] SOEs have long engaged in contract-based international commercial arbitration (ICA), in which SOEs litigate against respondent firms (SOEs or otherwise) over commercial disputes, rather than a respondent state (Hale 2015). The Russian SOE Gazprom and Ukrainian SOE Naftogaz have been involved in repeated commercial arbitrations against each other, for example. To date, at least ten states have been sued by SOEs in ISDS (Behn et al, 2019).

target can be used for lawfare by SOEs from both contracting parties. This is Ukraine's situation, in which Russian SOEs have filed against it, as detailed in Table 2.

Table 2: Post-Crimea cases

Case	Treaty	Year	Claimant type	Investment
VEB v. Ukraine	Ukraine-Russia BIT	2019	SOE (Ukraine)	Finance
Sberbank v. Ukraine	Ukraine-Russia BIT	2022	SOE (Ukraine)	Finance
VEB v. Ukraine (II)	Ukraine-Russia BIT	2022	SOE (Ukraine)	Finance
SCM Group v. Russia	Ukraine-Russia BIT	2023	Non-state	Various
Energoatom v. Russia (II)	Ukraine-Russia BIT	2023	SOE	Energy
Uniper v. Russia	Germany-Russia BIT	2023	SOE (Germany)*	Energy
Carlsberg v. Russia	Denmark-Russia BIT	2023	Non-state (Denmark)	Brewing
Carlsberg v. Russia	Sweden-Russia BIT	2023	Non-state (Denmark)	Brewing
Carlsberg v. Russia	Germany-Russia BIT	2023	Non-state (Denmark)	Brewing
ABH Holdings v. Ukraine	Belgium-Luxembourg-Ukraine BIT	2023	Non-state, part-owned by sanctioned Russian individuals (Luxembourg)	Finance
Fortum v. Russia	Netherlands-Russia BIT	2024	SOE (Finland)	Energy
Fortum v. Russia	Sweden-Russia BIT	2024	SOE (Finland)	Energy
Ukrenergo v. Russia (II)	Ukraine-Russia BIT	2024	SOE (Ukraine)	Energy
Ukrhydroenergo v. Russia	Ukraine-Russia BIT	2024	SOE (Ukraine)	Energy

***Notes**: As of March 2024. Criteria for inclusion are that claims have to do with Ukraine-Russia war, and that the investor has publicly stated its intent to file under the treaty referenced. See Appendix for timeline and detail on sources. *German state ownership since Dec 2022.*

The BIT's symmetry went against Ukrainian interests when, in 2019, Russia's state-owned Vnesheconombank (VEB) filed for ISDS against Ukraine. In its filing, VEB claims that, for years, Ukraine had taken "deliberate and successive steps to oust it from the country." Key to the timing of the filing, Ukrainian court rulings had just allowed VEB assets in Ukraine to be seized and turned over to Kolomoisky affiliates to enforce their USD 150 million award in the Crimea case *Everest v. Russia* (Table 1). In *VEB v. Ukraine* (Table 2), the arbitral tribunal accepted jurisdiction, returning to the text of the BIT to reject Ukraine's argument that the context of Russian aggression means that Russian SOEs are not covered as investors. The case is pending at the time of writing.

Ukraine's exposure to Russian ISDS claims grew significantly with the Ukrainian Parliament's unanimous decision to expropriate (only) Russian-owned assets in Ukraine, in the immediate aftermath of the full-scale Russian invasion.[19] The Cabinet of Ministers is to reassign ownership and/or liquidate assets with proceeds going to the Ukrainian state budget. Shortly thereafter, both the Russian state-owned banks Sberbank and VEB (for a second time) announced that they initiated ISDS against Ukraine over the seizure of their assets. Whatever the outcome of these arbitrations, it is costly to Ukraine – whether politically, financially, or militarily – to devote resources to defend against Russia on the "legal front" enabled by the symmetric BIT. Indeed, in the wake of these filings, the Security Service of Ukraine advocated for the termination of the BIT. Ukraine moved to do so in April 2023, but only finalized termination in August and did not make it effective until January 2025. Further, Ukraine has announced it will abide by the BIT's 10-year sunset clause, meaning protections are in place until 2035, virtually guaranteeing additional cases from the expropriation law. Whether Ukraine's formal withdrawal will have political force separate from its limited legal impact remains to be seen.

In general, Russia as respondent state has a reputation of complying with ISDS proceedings but defying arbitral awards against it, exposing it to myriad, complex enforcement proceedings in courts worldwide.[20] In the Crimea cases, however, Russia

[19] We leave for future research the question that arises about the coordination of lawfare and expropriation strategies by Ukrainian political institutions – was the legislature aware of the broader ISDS strategy and the likely consequences of the expropriation law under the Ukraine-Russia BIT?

[20] Probably the most complex case involves the Russian oil company Yukos, whose owners lost control of the company as a result of Russian actions. Russia challenged the original 2014 Yukos awards in domestic courts in the Netherlands, delaying implementation by a decade as it ground through the appeals process before finally being upheld by the Dutch Supreme Court. See M. Brauch (2014). Yukos v. Russia: Issues and legal reasoning behind US$50 billion awards. Investment Treaty News (September). https://www.iisd.org/itn/wp-content/uploads/2014/09/iisd_itn_yukos_sept_2014_1.pdf

initially sent a letter to each tribunal rejecting jurisdiction and declining to participate whatsoever. It kept to that stance until around 2019, when the first awards emerged. Russia then appointed counsel and, in each instance, sought to reopen questions of jurisdiction, submit arguments, set aside awards, and generally make up for its years of non-participation. As a result, each tribunal has had to make decisions regarding the extent to which Russia's newfound enthusiasm could reopen issues and delay proceedings. Variation in tribunals' decisions over Russian participation is one factor in why Crimea cases have been completed on such different timelines (see again Table 1).

Since the 2022 full-scale invasion of Ukraine, practitioners in the investment arbitration community have by and large declined to represent Russia; under economic sanctions, Russian state does not have access to foreign currency to pay for legal representation, either. However, in a landmark decision, a Dutch court ruled that Russia was entitled to have counsel appointed for it, if it is unable to find (or afford) representation. That Russia has both committed to economic integration and been willing to exploit commitments when it is of political interest is not new (Logvinenko 2019). What is new is that, while operating as designed, wartime adjudication through ISDS has provided Russia points of leverage in tension with the interests not just of Ukraine but of Ukraine's Western backers – the designers of the contemporary investment treaty regime (St. John 2018).

Consequences

Some elements of the Crimea and post-Crimea cases may be unique to the Ukraine-Russia conflict, such as the outsized role of wealthy individuals and powerful SOEs as investor-claimants. But the cases will resonate for years in ways that are important to and that should be studied by political scientists. The Crimea and subsequent cases pose

challenges to the broader investment treaty regime, which is already the subject of myriad reform efforts, treaty renegotiations, and withdrawals, as states chafe at the deference to foreign investors over domestic interests that it implies (Peinhardt and Wellhausen 2016, Roberts and St John 2022). The consequences of adjudicating commercial actors' claims in wartime and the possibilities ISDS offers as a "legal front" have clear implications beyond the current conflict. We highlight three: (1) the intersection of public and private interests; (2) increasing confrontation between economic and security goals; (3) and questions about the future of IIAs and ISDS.

First, the Crimea cases highlight a need to understand overlapping versus opposing interests between investors and home states. Clearly, shared interest is necessary for ISDS to work during wartime, although Maurer (2013) shows that historically US investors overseas have been surprisingly good at soliciting diplomatic help even when their interests do not align with the US government. The prevalence of oligarchs in Russia and Ukraine are an extreme case of the political consequences of (mis)alignment between investors and the home state, one that reverses the usual dynamic of diplomatic protection and allows private actors rather than the home state a choice about whether to participate in a political conflict. More work should systematically examine the divergence of home state and private interests in host countries, particularly for homes other than the United States. ISDS scholars especially should investigate if and when home states are capable of forestalling cases that they oppose.

Second, what do the Crimea cases suggest about the behavior of states when economic and security goals collide? States can choose to ignore ISDS awards or to participate selectively in proceedings, but the possibility of third-party jurisdictions

enforcing awards means ISDS can prove costly even for noncompliant states. In such cases, states backpedal on their commitments, as Russia has been doing for years by ignoring cases or foot-dragging when it does participate. Still, Russia has certainly paid a cost for the Crimea cases, and those costs seem likely to rise. For its part, Ukraine initially thought that ISDS could help in its legal maneuvering against Russia. Ukraine's volte face to pursue BIT termination is consistent with the strategy of reasserting control given a collision between security interests and investment treaty commitments. Clearly, decisions by autonomous arbitral tribunals can fly in the face of the national interest of the states that gave them authority; those states are unlikely to tolerate such behavior. At the extreme, the dominance of security goals means the de facto eradication of investment treaty protections during wartime.

Our third point builds on scholars who explore the considerable backlash against ISDS, and on states' attempts to reclaim control that they previously delegated in IIAs to arbitrators. Many suggested reforms highlight the need to prevent claims that challenge legitimate public policy interests (Moehlecke 2020), and a significant literature has arisen on reclaiming state regulatory space in treaties (Thompson, et al. 2019). Empirically, investment treaty negotiators in recent decades have carved out more and more precise exemptions, inspired especially by tensions between investor protections and environmental, health, and fiscal policy (Manger and Peinhardt 2017, Haftel and Thompson 2018, Polanco 2019). When it comes to war and violence, a common interpretation of IIAs is that they generally "require the government of the host state not only not to attack the facilities or personnel of the investor, but to defend the investor or investment against others, including, for instance, rebel forces" (Lowenfeld 2008, p. 558). Still, there is no strict

liability to provide absolute protection against physical infringement; instead, it is understood to require host states' due diligence regarding the physical safety of the investment.[21]

Perhaps better treaties, with more consideration of the protection of property rights in wartime are the way forward? We are pessimistic that contracting parties can wordsmith themselves out of wartime complications ex ante. Alschner (2022) argues that even when thoughtful revisions have been included in IIAs, arbitrators often ignore them in favor of more established standards. What if ISDS were simply suspended during war? If that were the case, treaty protections would be fragile exactly for private investments involving rivalrous home and host states, on which the greatest hopes of a commercial peace dividend might rest (McDonald 2007). In short, the status quo of adjudicating investment disputes during war severely strains an investment regime that is largely unprepared for armed conflict over territory.

The contents of this article are, unfortunately, of broader interest to political science, as investment arbitration during armed conflict could easily occur between other states. International relations scholars keep track of militarized interstate disputes (MIDs), which are active militarized conflicts between states that have not risen to full-scale war (Maoz et

[21] Some IIAs do include explicit provisions that require compensation for property damaged during war or civil unrest. One clause in particular, granting "full protection and security," has traditionally been understood to mean protection of investors against "various types of political violence including the invasion of the premises of the investment" (Dolzer & Schreuer 2008, p. 149). But sometimes, depending on the presence of fair and equitable treatment (FET) or umbrella clauses, the wording tends to be applied even more broadly (149).

al., 2019).[22] Since 2014, Russia has a MID and a BIT with thirteen states other than Ukraine.[23] Additionally, China has a MID and a BIT with five states;[24] Iran has a MID and a BIT with three states;[25] and there are six other dyads with a MID and BIT.[26] We hope that the treaty-based investment arbitrations between Ukrainian and Russian actors are the only ones ever between warring states, but others may very well follow.

[22] MIDs involve "the threat, display or use of military force short of war by one member state…explicitly directed towards the government, official representatives, official forces, property, or territory of another state." (Jones et al. 1996: 163)
[23] Canada, Denmark, Finland, France, Germany, Japan, Lithuania, Netherlands, Norway, South Korea, Sweden, Turkey, United Kingdom.
[24] India, South Korea, Taiwan, Vietnam, Philippines.
[25] Afghanistan, Pakistan, Turkey.
[26] Greece-Turkey, Turkey-Syria, Lebanon-Syria, Tajikistan-Kyrgyzstan, Thailand-Cambodia, Malaysia-Indonesia.

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Adjudicating While Fighting:
Political Implications of the Ukraine-Russia Bilateral Investment Treaty

Appendix

Contents:

1. **Timeline of key events**
2. **Sources: News reporting and legal analysis**

1. Timeline of key events

Notes on dates: News of ISDS arbitrations associated with earliest available date, so that dates in this timeline reflect public knowledge of these events rather than the actual date on which tribunals were appointed, awards issued, or other legal activities officially documented. For legal records, see especially IAReporter.

Russia	Year	Ukraine (West)	Cases (Treaty)
Mar: Russia occupies Crimea *Begins "passportization," forcing Russian passports on residents of Crimea*	**2014**	Mar: Kolomoisky personally funds Ukrainian militias and feuds with Putin; Putin accuses of defrauding Russian oligarch Abramovich Jul-Oct: 35 Kolomoisky affiliates put Russia on notice of Crimea case filings	
Jan-onward: After each Crimea case filing, Russia sends letter to tribunal rejecting jurisdiction and declining to participate	**2015**	Jan-Jun: ISDS: Kolomoisky-affiliated Crimea cases Mar: Kolomoisky fired as regional governor by Ukrainian Pres. Poroshenko	*Kolomoisky and Aeroport Belbek v. Russia; Privatbank and Finilon v. Russia; Stabil and others v. Russia; Ukrnafta v. Russia; Everest Estate and others v. Russia*
Dec: Crimean law back-dating elimination of Ukrainian property rights to Feb 2014; establishing no compensation due to SOEs or individuals against whom a Russian case regarding an "extremist crime" had been brought (i.e., Kolomoisky)[28]	**2016**	Jan: ISDS filing: Ukrainian SOE Oschadbank Crimea case Mar: ISDS filing: Kolomoisky-affiliated Crimea case Oct: ISDS filing: Ukrainian SOE Naftogaz Crimea case Dec: Ukraine nationalizes Kolomoisky-owned PrivatBank, lauded by IMF	*Oschadbank v. Russia* *Lugzor v. Russia*[27] *Naftogaz v. Russia*
	2017	*Around this time, tribunals begin upholding jurisdiction in Crimea cases*	

[27] The connections between Kolomoisky and claimants in *Lugzor v. Russia* are less clear than the other cases; *Luzgor* was also not immediately publicly disclosed. We categorize this as a Kolomoisky-affiliated case as Kolomoisky-controlled Ukrnafta is reported to have leased the DniproAzot chemical plant from at least 2011 to 2019; DniproAzot is one of the claimants. "Privat Empire: What Does Oligarch Ihor Kolomoisky Own in Ukraine?" 21 May 2019. Hromadske.ua, https://hromadske.ua/en/posts/privat-empire-what-does-oligarch-ihor-kolomoisky-own-in-ukraine.

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	2018	May: First Crimea case award: USD 150 million	*Everest v. Russia*
		Sept: Ukrainian courts uphold seizure of Russian state-owned bank assets in Ukraine to enforce USD 150 mil award	*Everest v. Russia*
Sept: Russian state-owned bank VEB puts Ukraine on notice of ISDS			*VEB v. Ukraine*
		Nov: ISDS: Akhmetov-affiliated Crimea case [Note: public in 2020]	*DTEK Krymenergo v. Russia*
		Nov: Award in Ukrainian SOE Crimea case: USD 1.1 bil	*Oschadbank v. Russia*
Around this time, Russia begins to participate in Crimea cases	**2019**	Feb: ISDS filing: Akhmetov-affiliated Crimea case [Note: public in 2024]	*Akhmetov & Investio v. Russia*
		Apr: Awards in 2 Kolomoisky-affiliated Crimea cases: USD 35 mil *(Stabil)* and USD 45 mil *(Ukrnafta)*	*Stabil v. Russia, Ukrnafta v. Russia*
		Apr: Zelensky elected president	
Jun: ISDS: Russian state-owned bank VEB lodges official case			*VEB v. Ukraine*
		Sept: ISDS: Ukrainian SOE Ukrenergo Crimea case	*Ukrenergo v. Russia*
	2020	Dec: Ukrainian SOE Energoatom threatens to file Crimea case (actual filing in May 2021)	*Energoatom v. Russia (I)*
	2021	Feb: ISDS filings: Kolomoisky affiliates v. United States re: actions borne of PrivatBank financial crimes investigations	*Optima (I) and (II) v. United States (Ukraine-US BIT)*
		Mar: US State Dept makes Kolomoisky ineligible to enter US	
Mar: Russia successful in getting award to Ukrainian SOE set aside [later reinstated Dec 2022]			*Oschadbank v. Russia*
		Oct: Pandora Papers reveal Zelensky and affiliates offshore holdings, trigger accusations of PrivatBank money laundering involvement Nov: "Anti-oligarch" legislation signals Zelensky's full split from Kolomoisky	
24 Feb: Russia begins full-scale invasion of Ukraine[29]	**2022**		

[29] At the time of the invasion, the Russian Tatneft was pursuing enforcement of an outstanding arbitral award against Ukraine in US courts. In the days after the invasion, Ukraine accused Russia of using discovery to gather national security intelligence. Helpfully for the US courts, the parties filed a joint motion for a moratorium on discovery and the court suspended further discovery-related proceedings quickly, in March 2022.

		7 Mar: Ukraine adopts law expropriating Russian-owned property without compensation[30]	
		Apr: Crimea case claimants petitioned US courts in April 2022 for confirmation of award to aid in enforcement	*Stabil v. Russia*
May: Russian SOEs Sberbank and VEB each announce intent to initiate arbitration against Ukraine			*Sberbank v. Ukraine, VEB v. Ukraine (II)*
		May: Kolomoisky affiliates threaten third ISDS filing v. United States re: actions borne of PrivatBank financial crimes investigations	[follow-through to formal case unclear]
		Jul: Kolomoisky stripped of Ukrainian citizenship	
Aug: Russian-linked gas station chain AMIC Energy chain threatens to file under Austria-Ukraine BIT			[follow-through to formal case unclear]
		Aug: Ukraine triggers denial of benefits clause under Energy Charter Treaty with regard to Russia[31]	*(Energy Charter Treaty)*
Sept: Hague ruling that counsel must be appointed for Russia			*(Hof von Discipline case)*
		Nov: Ukraine uses martial law to nationalize 5 defense-related firms, 2 with Kolomoisky assets, including Ukrnafta	
Dec: Set-aside decision of March 2021 overturned and award to Ukrainian SOE reaffirmed			*Oschadbank v. Russia*
Dec: Russian Duma deputies suggest denouncing BITs with "unfriendly" states[32]; Ukraine's security service suggests withdrawing from BIT			
	2023	Feb: UK proceedings enable freezing of USD 3 billion Kolomoisky assets re: PrivatBank litigation enforcement	
		Mar: ISDS filing: Energoatom (Ukraine SOE), regarding Zaporizhia nuclear plant violations since Mar 2022	*Energoatom v. Russia* (II)

[30] "On the Basic Principles of the Forcible Seizure of Objects of Property Rights of the Russian Federation and its Residents in Ukraine." 7 March 2022. (https://zakon.rada.gov.ua/laws/show/2116-IX#n21)

[31] Ukraine argued that it could do this, and no sunset clause applies, because Russia is a non-contracting (third party) state to the ECT. However, although Russia withdrew from the ECT in 2009, its sunset clause means that Russia's commitments as a contracting state apply through 2029, muddying the situation.

[32] No further action taken on BITs as of the time of writing (November 2023). However, Russia suspended Double Taxation Treaties (DTTs) with "unfriendly" states in August 2023. (Decree of the President of the Russian Federation, 08.08.2023 No. 585 "On Suspension by the Russian Federation of Certain Provisions of International Tax Treaties of the Russian Federation.")

25 Apr: Russian decree No. 302 expropriates Fortum (Finland SOE) and Uniper SE (Germany SOE)		***19 Apr: Ukraine moves to withdraw from the Ukraine-Russia BIT; confirms adherence to 10-year sunset clause[33]***	*(Ukraine-Russia BIT)*
		Apr: Award in Ukrainian SOE Crimea case: USD 5 billion	*Naftogaz v. Russia*
June: ISDS: Bank (Luxembourg; part-owned by sanctioned Russian individuals), re: poor treatment + forced sale			*ABH Holdings v. Ukraine (Belgium-Luxembourg-Ukraine BIT)*
		10 Aug: Ukraine finalizes withdrawal from Ukraine-Russia BIT effective Jan 2025, with 10-year sunset clause in place through 2035[34]	*(Ukraine-Russia BIT)*
		Sept: Ukraine moves to withdraw from BIT with Syria	*(Ukraine-Syria BIT)*
June: LSR group, Russian parent of firm sanctioned by Ukraine, threatens filing under Germany-Ukraine BIT			*(Germany-Ukraine BIT)*
		Nov: Award in Akhmetov-linked Crimea case: USD 267 million	*DTEK Krymenergo v. Russia*
		Dec: Ukraine moves to withdraw from BIT with Belarus	*(Ukraine-Belarus BIT)*
Jan: Russia successfully disqualifies two Crimea case arbiters due to views on full-scale Russian invasion	**2024**		*Akhmetov & Investio v. Russia*
Jan: Belgian reveals threats of Russian claims re: sanctioned assets			*(Belgium-Luxembourg-Russia BIT)*
		Feb: ISDS filings: Several filings by foreign investors under treaties other than Ukraine-Russia BIT	*Fortum v. Russia (Netherlands-Russia BIT)* *Fortum v. Russia (Sweden-Russia BIT)* *Uniper v. Russia (Germany-Russia BIT)*
		Feb-Mar: ISDS filings: Filings in progress by various Ukrainian SOEs	*Ukrenergo v. Russia (II)* *Ukrhydroenergo v. Russia*

[33] Explanatory note to the draft Law of Ukraine "On Termination of the Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on Encouragement and Mutual Protection of Investments," Section 2. 19 April 2023.
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For news reporting and legal analysis, we are especially indebted to Investment Arbitration Reporter (IAReporter).[35] We have also benefitted from discussions at Washington Arbitration Week,[36] on the Young-OGEMID/Transnational Dispute Management listserv,[37] and on the platform Lawfare.[38] Below are specific sources on which we draw in telling narratives in the text (in chronological order):

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