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

Rachel L. Wellhausen
Associate Professor, University of Texas at Austin

Clint Peinhardt
Professor, University of Texas at Dallas

1 August 2023

Abstract

When Russia seized parts of Ukraine in 2014, previously domestic companies that were owned by Ukrainians gained access to international adjudication over violations of their property rights via the 1998 Ukraine-Russia Bilateral Investment Treaty. As a result, international arbitrators have considered at least a dozen Investor-State Dispute Settlement (ISDS) cases resulting from Crimea, the first investment disputes between actively warring parties. What are the implications of the return of interstate war for the investment treaty regime? In addition to complicating any peace negotiations for Ukraine and Russia, the Crimea cases highlight the difficulties of wartime adjudication for the broader investment treaty regime and reinforce a trend towards states reclaiming authority in such disputes and weakening the power of international arbitrators.

[1] *Acknowledgements:* For comments, sincere thanks to Wolfgang Alschner, Yoram Haftel, and participants at the 2022 International Studies Association conference. We are indebted to IAReporter for its real-time coverage and analysis of investment arbitration news. We have benefitted from discussions at Washington Arbitration Week, on the Young-OGEMID/Transnational Dispute Management listserv, and in other forums since the Russian invasion of 24 February 2022. We highly recommend Jure Zrilič, *The Protection of Foreign Investment in Times of Armed Conflict* (Oxford University Press 2019). For research assistance, we thank Artem Kvartalnov, AJ Torok, and student researchers at Innovations for Peace and Development at the University of Texas at Austin. Data and other factual information is accurate as of the time of writing (July 2023).

Introduction

The contemporary international investment treaty regime is comprised of around 2,600 active bilateral and multilateral international investment agreements (IIAs), in which states commit to protect the property rights of foreign investors in their territories. The vast majority of IIAs include Investor-State Dispute Settlement (ISDS), the controversial system by which foreign investors alleging treaty violations have standing to sue the host state for monetary compensation. Ad hoc three-person tribunals adjudicate these disputes, there is no substantive appeals system, and arbitrators have considerable autonomy as there is no formal *stare decisis*. 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.[2] Investors can pursue arbitration and enforcement of awards on their own initiative and on timelines determined by each tribunal. These design elements were meant to depoliticize foreign investment protection and provide investors assurance that either their property rights or prompt compensation for treaty violations would be ensured even if political risks were realized.[3]

This investment regime, which flourished after the Cold War, has been predicated on an unspoken but crucial assumption: the era of territorial conquest is over. If sovereigns and their territorial jurisdictions are known and unchanging, it is straightforward to match the location of a foreign investment to a sovereign's treaty commitment to that foreign investor's property rights. But what happens when interstate war breaks out? How does the investment treaty regime accommodate wartime harm to foreign investors in contested

[2] As of 2023, 172 states are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (signed in 1958).
[3] For more information, see Bonnitcha, Poulsen, and Waibel (2017) and Moehlecke and Wellhausen (2022).

territory? How robust are sovereigns' commitments to foreign investors' property rights in times of peace to times of war?

Russian aggression against Ukraine since 2014 and the full-scale invasion since 2022 are putting the contemporary investment treaty regime to a severe test. Both states have been active participants in the investment treaty regime, each with over 60 treaties in force.[4] 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.[5] Russia's reputation is of 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).

What is unprecedented is that Ukraine and Russia have an active military conflict and IIA treaty commitments to each other, via the Ukraine-Russia Bilateral Investment Treaty (BIT) signed in 1998. In the BIT, both Ukraine and Russia commit to protecting the property rights of foreign investors from the other state in their own territory. So, under the BIT, Ukrainian investors in Russian territory can sue the state of Russia over expropriation without compensation and other treaty violations, and pursue enforcement of arbitral awards – and vice versa. Because investment arbitration and enforcement proceedings are initiated by investor-claimants, that need not even inform their home state of invoking the

[4] Russia has 68 investment treaties in force, 64 with ISDS. Ukraine has 61 treaties in force, all with ISDS. Alschner, Elsig, and Polanco (2021), https://edit.wti.org/.
[5] Ukrainian (Russian) investors have been claimants in at least 16 (26) treaty-based ISDS cases. Ukraine (Russia) has been the respondent in at least 31 (27) cases. UNCTAD Investment Dispute Settlement Navigator https://investmentpolicy.unctad.org/investment-dispute-settlement.

BIT, the reality is that arbitral tribunals are adjudicating Ukrainian and Russian investors' commercial property claims while the parties to the treaty are fighting.

Dozens of Ukrainian investors have brought claims against Russia for expropriation of their property in Crimea in 2014, tribunals have upheld jurisdiction, and outstanding awards against Russia are in the billions. Ukraine initially encouraged and celebrated these ISDS claims, seeing them as a tool by which to establish that "the illegal occupation has its price."[6] Yet Russian investors have also turned to the BIT to make claims against Ukraine for expropriation and other treaty violations. Since the 2022 invasion, private investors and state-owned enterprises (SOEs) on either side have made threats of new filings as well as pursued outstanding arbitrations, putting ad hoc tribunals in the position of making choices over how the war does or does not affect the proceedings. Ukraine eventually soured on investment arbitration, and resolved to unilaterally terminate the Ukraine-Russia BIT in April 2023. Still, the BIT has a sunset period of 10 years that holds for all investments made prior to the announcement, leaving the door open for more claims over wartime damages, in either direction.

Wartime adjudication is a far cry from negotiating compensation in a peace agreement, deferring settlement to post-war claims commissions, or the outdated notion that to the victor go the spoils. It is inevitable that adjudicating-while-fighting generates legally binding outcomes that clash with the interests of one or both of the belligerents-cum-contracting parties to the BIT. Unfortunately, current ISDS arbitrations under the Ukraine-Russia BIT may also have consequences for the journey to post-war peace.

[6] Interfax: Ukraine Business Weekly, 21 May 2018. "Economic Policy; Ukrainian Diplomat Calls on Companies That Lost Property in Crimea to File Lawsuits Against Russia."

The fallout of the Ukraine-Russia BIT operating in times of war also suggests a severe shortcoming in the contemporary investment treaty regime. Ukraine, its geopolitical backers, and the international legal community (if not Russia) could very well find justifiable ways to prioritize obligations under the laws of war and humanitarian law over those of the Ukraine-Russia BIT. In general, from a political rather than legal point of view, states will not abide by prior commitments that compel them to prioritize foreign commercial investors' wartime adjudication outcomes over their own security interests. When property rights protections for foreign investors are at odds with state security, ISDS wartime adjudication forces states to choose between costly compliance, potentially costly noncompliance, or outright abrogation of their treaty commitments. Including investment treaty provisions for armed conflict may eventually solve the problem, but only if they pause treaty obligations during conflict. Such reforms would take time, and in the short-term, violent conflict between IIA signatories will only serve to heighten the already pronounced dissatisfaction with ISDS (Peinhardt and Wellhausen 2016).

We substantiate these arguments by examining the Ukraine-Russia BIT, focusing on its relevance to the war. We then provide a short overview of the Crimea cases and highlight the divergent interests of state and nonstate actors, as well as each state's attempt to use ISDS as a legal front in the war. In addition to complicating any peace negotiations for Ukraine and Russia, the Crimea cases highlight the difficulties of wartime adjudication for the broader investment treaty regime and reinforce a trend towards states reclaiming authority in such disputes and weakening the power of international arbitrators.

The Ukraine-Russia BIT

In context

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.[7] The diplomatic history around the Ukraine-Russia BIT negotiations has not been recorded, but the BIT 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.[8] Its 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.[9] Should they fail, the investor can pursue arbitration against the state at any of the forums outlined in the treaty.[10] A resulting arbitration award "shall be final and binding upon both parties."[11] 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).

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[7] Ukraine-Russia BIT, Preamble, which refers to the "Agreement on Cooperation in the Sphere of Investment Activity" of December 24, 1993.

[8] 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 (Pelc 2017). The text regarding equal protection (Article 2) is atypical, and the BIT does not include a clause on fair and equitable treatment (FET).

[9] Article 9(1).

[10] 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.

[11] Article 9(3).

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.

Territory

In adjudication over wartime harm, the most salient jurisdictional issue has been what the Ukraine-Russia BIT means by "territory." How can Russia be responsible for wartime property rights violations in Crimea (or elsewhere in Ukraine) if no international body has recognized Russian sovereignty there? Any arbitral tribunal that accepts its own jurisdiction under the Ukraine-Russia BIT on the grounds that Russia controls the Ukrainian territory where the investment is located risks violating another element of international law, the duty of nonrecognition, which forbids states from recognizing illegal annexed territory as a part of the occupying state.[12] Still, tribunals have upheld jurisdiction in all publicly known rulings regarding wartime harms by Russia to Ukrainian investors in Ukrainian sovereign territory. The short definition of "territory" in the Ukraine-Russia BIT aides jurisdictional justifications, as it applies to investments "on the territory" of one of the contracting states, without more precise delineation.[13] In very broad strokes, the various

[12] Wuschka (2019) argues that nonrecognition of illegally acquired territory "serves as a sanction" against the occupying state, and as a "manifestation of the principle *ex injuria non oritor jus*" (p. 132).
[13] Article 1(4).

tribunals' legal reasoning 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).

To be clear, it was not obvious that tribunals would accept jurisdiction, and because tribunals operate independently, future tribunals might deny jurisdiction despite similar circumstances.[14] The upshot is that contracting states engaged in interstate war are exposed to unpredictability, as the application of a specific investment treaty to investments on a given piece of territory contested in interstate war is a matter subject to the ruling of each arbitral tribunal.[15]

War

In motivating his book-length treatment of international law on the protection of foreign investment during armed conflict, Zrilič (2019) writes that there is a "great deal of uncertainty" over the applicability of investment treaties in war, and as a result "investment law has been imbued with an unpredictability as to how effective the legal frameworks for protecting foreign investors against violence are" (pp. 4-6). The Ukraine-Russia BIT is an exemplar of these issues. It only mentions war once, concerning equity should there be post-war compensation.[16] Without any language to the contrary, it does not exempt state parties

[14] ISDS does not have *stare decisis*, although in practice arbitrators are attentive to other cases.
[15] For a treatment of whether the jurisdictional logic of the Crimea rulings will apply in other Ukrainian territories, see Ackermann and Wuschka (2023).
[16] 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.

from their commitments during wartime. This is not unusual: the dominant scholarly view is that investment treaties apply in wartime,[17] and BITs have typically included few-to-no explicit exemptions to BIT protections. As a consequence, it is up to each arbitral tribunal to decide whether military necessity, humanitarian considerations, or other aspects of international customary and treaty law applicable in wartime might supersede investor rights under the Ukraine-Russia BIT.[18]

Most importantly, the key innovation in the contemporary investment treaty regime is that foreign investors have standing to pursue what they see as treaty violations on their own initiative. In peacetime, investor standing means that IIAs expose respondent states to costs if and when investors file frivolous claims (Pelc 2017; Johns, Wellhausen, and Thrall 2020). In wartime, the costs of responding to investor claims – frivolous or otherwise – are myriad and magnified. The reality is that, since Russian aggression against Ukraine began in 2014, Ukrainian and Russian investors have filed for ISDS under an imprecise treaty, and each ad hoc, three-person arbitral tribunal has been put in the position of interpreting the treaty and adjudicating disputes during the war itself. It is inevitable that adjudicating-while-fighting generates legally binding outcomes that clash with the interests of one or both of the belligerents, not to mention the international community. We see wartime adjudication as the primary incompatibility between the investment treaty regime and interstate war, as made clear by cases emanating from the 2014 Russian seizure of Crimea.

[17] 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).
[18] A variety of legal scholars argue that arbitral tribunals should incorporate international humanitarian law and other relevant international law in their decision-making. See Ackermann and Wuschka (2023); Zrilič 2019, pp. 40-47; Schreuer 2019, ft. 6.

Wartime Adjudication: The Crimea Cases

After the Russian occupation of Crimea, the Russian-controlled Republic of Crimea government officially cancelled Ukrainian-granted property rights in Crimea on 21 February 2014.[19] Since that time, Ukrainian investors that had been domestic investors in Ukrainian Crimea have been treated by the local government as foreign investors in Russian Crimea.[20] At least 44 Ukrainian investors have sued for compensation over expropriation of their property in Crimea. What have become known as the "Crimea cases" are the first publicly known instances of ISDS arbitration conducted while the contracting parties to the BIT are actively engaged in armed conflict (Table 1).

Table 1: "Crimea cases"

Case	Year filed	Claimant type	Claimant count	Investment	Status
Kolomoisky and Aeroport Belbek v. Russia	2015	Non-state	2	Airport operations	Award pending
Privatbank v. Russia	2015	Non-state	2	Banking	Award pending
Stabil and others v. Russia	2015	Non-state	11	Petrol stations	USD 35 mil.
Ukrnafta v. Russia	2015	Non-state	1	Petrol stations	USD 45 mil.
Everest Estate and others v. Russia	2015	Non-state	19	Real estate	USD 150 mil.*
LLC Lugzor v. Russia	2015	Non-state	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.
Ukrenergo v. Russia	2019	SOE	1	Electric power	In progress
DTEK Krymenergo v. Russia	2020	Non-state	1	Electric power	In progress

Notes: * = Award enforced. All other awards unpaid. Energoatom put Russia on notice in December 2020; unclear whether it subsequently filed (SOE, regarding wind farm). All cases filed at the Permanent Court of Arbitration (PCA) and brought under the Ukraine-Russia BIT. Jurisdiction upheld in all cases. Information as of July 2023.

[19] "On the peculiarities of regulation in the Republic of Crimea regarding individual property relations." Law of the Republic of Crimea (No. 345-ZRK/2016). Promulgated 28 December 2016.

[20] Russia conferred Russian passports and nationality on all residents of Crimea, but the BIT does not exclude "previously held nationality" from being relevant in defining covered investors (Olmos Giuponni 2019, p. 169).

Tribunals have upheld jurisdiction under the Ukraine-Russia BIT in all of the Crimea cases. All rulings have favored the Ukrainian investor, and publicly known awards against Russia amount to USD 6.3 billion, with the most recent being the largest yet – USD 5 billion awarded in *Naftogaz v. Russia* in 2023. Ukraine initially celebrated wins in the Crimea cases as victories on the "legal front" and encouraged more investors to file under the BIT.[21] But the country recently reevaluated its stance on the BIT. The Ukrainian parliament voted to withdraw from the BIT in April 2023 (and trigger its 10-year sunset clause), justifying that it was "prompted by the ongoing large-scale armed aggression by the Russian Federation against Ukraine."[22] We see the volte face as reflecting the consequences the Crimea cases have generated for Ukrainian security and the war aims of it and its backers. We discuss cases and consequences in two parts: the role of non-state actors as wartime decision-makers, and how state participation in ISDS has contributed to a "legal front" in the war. See the Appendix for a timeline of key events.

Non-state claimants as wartime decision-makers

Ukraine cheered the initial series of Crimea cases filed in 2015, calling the first award a means of ensuring "the burden of aggression will be heavier for Russia."[23] But the Ukrainian state's interest in these particular private claimants' decisions to trigger the Ukraine-Russia BIT and pursue enforcement of awards against Russia has changed dramatically in the ensuing years. Claimants in all the cases filed in 2015 are owned by or affiliated with Ihor

[21] See footnote 6.
[22] Ukraine has confirmed its adherence to the BIT's sunset clause. 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.
[23] USD 150 million, in *Everest v. Russia* (2018). Discussed in next section. See footnote 6.

Kolomoisky, a top oligarch who played a key role in Zelensky's rise.[24] Kolomoisky has become *persona non grata* in Ukraine but has been persistent in pursuing claims and enforcing awards, both before and after the February 2022 invasion.

At the time of the 2014 Russian occupation of Crimea, Kolomoisky was a regional governor with wealth and reputation that spread beyond Ukraine. Ukrainians celebrated Kolomoisky when he personally funded Ukrainian militias, and when he feuded with Putin.[25] Kolomoisky had a falling out with Ukrainian President Poroshenko a year later and was fired from his governorship. He then began cultivating a challenger to Poroshenko – Volodymyr Zelensky, the star of a show on Kolomoisky-owned TV.[26] Although Zelensky won the 2019 election, Zelensky's relationship with Kolomoisky dogged his campaign and his image. For example, in 2021 the Pandora Papers revealed offshore holdings by Zelensky and affiliates, which triggered accusations of Zelensky's involvement in Kolomoisky-linked money laundering. Nonetheless, anti-oligarch legislation in late 2021 signaled a convincing Zelensky split from Kolomoisky.[27] Since the Russian invasion, Kolomoisky 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

[24] 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.

[25] Counsel cited the feud with Putin in ISDS proceedings to explain why Kolomoisky-affiliated claimants were singled out for especially harsh treatment and swift expropriation. A Crimean law retroactively excluded compensation to individuals against whom a Russian criminal case regarding an "extremist crime" had been brought, namely, Kolomoisky. "On the peculiarities of regulation in the Republic of Crimea regarding individual property relations." Law of the Republic of Crimea (No. 345-ZRK/2016).

[26] See for example: Maheshwari, Vijai. 17 April 2019. "The Comedian and the Oligarch." Politico.

[27] "Ukrainian President Signs 'Anti-Oligarch Law'." 5 November 2021. RadioFreeEurope/RadioLiberty. https://www.rferl.org/a/ukraine-zelenskiy-anti-oligarch-law/31548053.html

including a headline-grabbing raid on his home (February 2023). In June 2023, a Zelensky associate was quoted as saying, "Kolomoisky is our pet. Our domesticated oligarch."[28]

Kolomoisky and the companies affiliated with him have, as of the time of writing, won USD 280 million in arbitral awards against Russia and collected USD 150 million. Since the Russian invasion, Kolomoisky-linked claimants have petitioned US courts to aid in its enforcement of an outstanding award.[29] Additionally, proceedings in the three outstanding Kolomoisky-affiliated Crimea cases have continued, with awards pending at the time of writing. Because ISDS gives standing to investors to pursue arbitration, without needing their home state's approval, Ukraine has no authority to forestall Kolomoisky's efforts to win and enforce arbitral awards against Russian assets – regardless of the scarcity of Russian assets or the Zelensky government's preferences over their allocation. Additionally, Kolomoisky and affiliates are continuing to pursue multiple investment arbitrations against the United States under the Ukraine-United States BIT, over claims arising from US law enforcement actions around Kolomoisky's alleged financial crimes.[30] These actions are surely unaligned with the Zelensky government's wartime interests, but the design of the investment treaty regime allows Kolomoisky to pursue them.

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 in an

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[28] "How Volodymyr Zelenskyy hopes to send Ihor Kolomoisky into retirement." The New Voice of Ukraine. 29 June 2023. https://www.yahoo.com/entertainment/volodymyr-zelenskyy-hopes-send-ihor-223600310.html?guccounter=1

[29] In *Stabil v. Russia.* Charlotin, Damien. 11 April 2022. "Ukrainian investors file…" IAReporter . https://www.iareporter.com/articles/ukrainian-investors-file-for-enforcement-of-35-million-usd-award-against-russia/ The other outstanding arbitral award on which Kolomoisky has claims is in *Ukrnafta v. Russia*, though Ukraine has nationalized Kolomoisky's assets in Ukrnafta.

[30] *Optima v. United States (I), ICSID Case No. ARB/21/11; Optima v. United States (II) ICSID Case No. ARB/21/12.* Cases were later merged. US notified of potential third case in May 2022.

investment arbitration can diverge. PrivatBank, founded by Kolomoisky and partners in 1992, is a household name and was one of Ukraine's first commercial banks. In brief, PrivatBank failed spectacularly and, with the IMF's blessing, Ukraine nationalized it in December 2016 to abate deep financial crisis. Considerable evidence of financial crimes at PrivatBank under Kolomoisky's ownership has come to light, and 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 as of February 2023.[31]

The tribunal in *PrivatBank v. Russia* ruled on the merits in 2021, finding Russia liable for expropriating PrivatBank's assets in Crimea. The tribunal's interpretation of the Ukraine-Russia BIT was to separate judgement of Russia's treaty violation from the context of financial crime. The tribunal acknowledged the evidence of fraud at PrivatBank, but it decided to only consider the fraud in the context of the monetary award. Although Russia sought a set-aside of the ruling – citing the issue of fraud, among other things – it was upheld at the Hague shortly after the Russian invasion. Claimants are seeking USD 1 billion. The size as well as the timing of the announcement of the award are in the hands of the tribunal. 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. If a monetary award follows, Kolomoisky will have an additional,

[31] In March 2021, the US State Department made Kolomoisky and family ineligible to enter the US.

binding claim on Russian state coffers, and the Zelensky government does not have the authority to preclude Kolomoisky from pursuing that claim, either.[32]

The centrality of oligarchs to the Ukrainian (as well as Russian) economy means that a few individuals can have an outsized effect on the compatibility of private investor-driven ISDS arbitration and the state's broader tactical approach, for worse or for better. Rinat Akhmetov, Ukraine's richest oligarch, also filed a Crimea case in 2018 (*DTEK Krymenergo v. Russia*), although the case did not become public knowledge until 2020. Moreover, in 2023 Akhmetov filed the first publicly known case over damage to properties in Russian-controlled Donetsk and Luhansk (*SCM Group v. Russia*). Indeed, Akhmetov has announced his intention to sue Russia "in all international and national courts."[33] His intentions align with Ukraine's effort to pursue legal cases against Russia in multiple venues to ensure that "Russia's aggression will be the subject of legal proceedings."[34] Still, Kolomoisky serves as a cautionary tale of how little power the Ukrainian state has to rein in a non-state, private investor exercising their rights to sue Russia under the Ukraine-Russia BIT.

ISDS as a "legal front" for warring states

Ukraine's "Lawfare Project" involves litigation against Russia in a variety of international venues, and it argues that on the "legal front…Ukraine (state bodies and state-

[32] Since its nationalization, Kolomoisky has repeatedly attempted to regain ownership of or compensation for PrivatBank from the Ukrainian state. For example: Sorokin, Oleksiy. 22 November 2019. "Kolomoisky boasts: 'PrivatBank will be returned to me soon.'" Kyiv Post. https://www.kyivpost.com/post/9007

[33] Akhmetov has also begun proceedings at the European Court of Human Rights. Djanic, Vladislav. 11 April 2023. "Ukraine's Richest Man Initiates BIT Arbitration…" IAReporter. https://www.iareporter.com/articles/ukraines-richest-man-initiates-bit-arbitration-against-russia-over-interference-with-donbass-assets/

[34] See footnote 6.

owned enterprises) is fighting quite well."[35] The parenthetical reference to state-owned enterprises connects back to Crimea cases initiated by Ukrainian SOEs, which have won billions in awards over Crimean expropriation, with additional arbitrations still in progress (Table 1).[36] In contrast to private Ukrainian investors, Ukraine controls SOEs and their choice to file, settle, or waive an award in return for some other goal in the conduct of interstate war. The rise of SOEs as ISDS claimants has been controversial because one design goal of ISDS was to depoliticize disputes (Moehlecke and Wellhausen 2022).[37] During interstate war, SOEs as claimants should rarely produce conflicts of interest with their home state. At the same time, BITs are symmetric – so a BIT between an aggressor state and its target can be used for "lawfare" by both contracting parties.

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."[38] As a key point of context for 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.* Whether or not Russian state-

[35] "About Lawfare Project." https://lawfare.gov.ua/about. Last accessed 11 July 2023. See also Chang 2022.
[36] The Republic of Crimea passed legislation precluding compensation for property rights terminations to Ukrainian SOEs; regardless, tribunals have consistently ruled that Ukrainian SOEs in Crimea are covered investors under the BIT. See footnote 25.
[37] Typically, SOEs have 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. 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. Source: PITAD.beta https://pitad.org/index#detailed/claimant_type/11/edit.
[38] VEB claims that Ukraine violated the BIT by revoking licenses for financial and investment activities in Ukraine, prohibiting business with Ukrainian SOEs, and harassing via criminal investigations. Braun, Johanna. 22 September 2021. "Revealed: Tribunal in VEB v. Ukraine…" IAReporter. https://www.iareporter.com/articles/revealed-tribunal-in-veb-v-ukraine-upholds-jurisdiction-over-russian-state-owned-claimant-but-declines-to-import-more-favourable-standards-of-treatment-through-the-underlying-treatys-mfn-c/

owned banks' assets abroad are subject to seizure or are protected under sovereign immunity has been in question since Russian aggression against Ukraine began, especially as VEB and other banks have been under various sanctions for years. Legal issues aside, Russian SOEs have standing under the Ukraine-Russia BIT to file for ISDS against Ukraine over what they consider BIT violations. In the VEB case, the arbitral tribunal accepted jurisdiction in in 2021, returning to the text of the BIT to reject Ukraine's argument that Russian SOEs are not covered as investors. The case remains pending.

Further, Ukraine is exposed to more Russian investors' claims under the BIT especially as, days after the Russian invasion, the Ukrainian Parliament voted unanimously to expropriate (only) Russian-owned assets in Ukraine and gave the Cabinet of Ministers power to reassign ownership and/or liquidate assets with proceeds going to the Ukrainian state budget.[39] To date, both the Russian state-owned banks Sberbank and VEB (for a second time) have announced that they are pursuing ISDS under the BIT over the seizure of their assets.[40] Irrespective of the outcome of arbitrations initiated by Russian investors, it is costly to Ukraine – whether politically, financially, or militarily – to have to devote resources to defend against Russia on the "legal front" enabled by the symmetric BIT. For their part, Ukraine's Western backers that were integral to the design and spread of ISDS and IIAs are caught between supporting ISDS when it helps Ukraine (the Crimea cases) and ignoring it when it hurts (Ukraine's expropriation of Russian assets).[41]

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[39] "On the Basic Principles of the Forcible Seizure of Objects of Property Rights of the Russian Federation and its Residents in Ukraine." Adopted 3 March 2022.

[40] Djanic, Vladislav. 12 May 2022. "Two Russian Banks…" IAReporter. https://www.iareporter.com/articles/two-russian-banks-threaten-treaty-arbitration-against-ukraine-following-seizure-of-their-assets-in-the-context-of-the-ongoing-russia-ukraine-war/

[41] At the time of the invasion, the Russian Tatneft was pursuing enforcement of a (pre-war) arbitral award against Ukraine in US courts. 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

Lastly, states can act strategically on the respondent side of the "legal front." While, like other states, Ukraine has been non-compliant in paying arbitral awards (Wellhausen 2015), Russia's reputation is as the most persistent non-complier with arbitral awards worldwide.[42] What has been novel about the Crimea cases is that Russia disavowed them in their entirety. Russia sent a letter to each tribunal rejecting it *prima face* and declined to participate whatsoever. Russia kept to that stance until around 2019, when the first Crimea case awards began being issued. At that point, Russia 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. The upshot is that each tribunal has had to make decisions regarding the extent to which Russia's newfound enthusiasm can 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, with several still pending at the time of writing (Table 1). Since the 2022 invasion, practitioners in the investment arbitration community have by and large declined to represent Russia in its efforts; the Russian state does not have access to foreign currency to pay for legal representation, either. However, in a landmark case, a Dutch court ruled that Russia was entitled to have counsel appointed for it, if it is unable to find (or afford) representation.[43]

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discovery and the court suspended further discovery-related proceedings. Bohmer, Lisa. 2 March 2022. "Ukraine Accuses Russia of…" IAReporter. https://www.iareporter.com/articles/analysis-the-impact-of-ukraine-related-sanctions-on-arbitral-proceedings-lodged-by-russia-affiliated-claimants-including-nord-stream-2-v-eu-and-frances-first-bit-case/

[42] See, for example: Gulyaeva, Natalia. 29 March 2022. "Challenging and Enforcing Arbitration Awards: Russia." Global Arbitration Review. https://globalarbitrationreview.com/insight/know-how/challenging-and-enforcing-arbitration-awards/report/russia.

[43] Bohmer, Lisa. 21 September 2022. "Analysis: Dutch Court Rules…" IAReporter. https://www.iareporter.com/articles/analysis-dutch-court-rules-that-bar-association-dean-must-appoint-counsel-for-russia-if-the-state-is-unable-to-find-representation/

While operating as designed, wartime adjudication in ISDS generated a ruling that undermines the intent of Western sanctions.

Consequences

For Peace

The Crimea cases, as well as any subsequent ISDS proceedings, could complicate a future peace agreement between Ukraine and Russia. To prioritize national interests, each party may need to persuade or coerce their investors to forego rights afforded them under the Ukraine-Russia BIT. However, investors who already hold legally binding rulings and awards will likely have more leverage over their home states than investors that did not, a possibility that suggests a counterproductive future rush to ISDS filings exactly when peace nears. SOE-initiated arbitral proceedings and awards could potentially constrain the parties' ability to bargain, if for example Ukraine finds it politically difficult to accept a haircut on the (at least) USD 6.1 billion Russia owes to its SOEs in Crimea case awards. Moreover, binding wartime arbitral awards to commercial investors will coexist with obligations under international humanitarian law, setting up an issue of prioritizing claims on scarce state assets.

Wartime adjudication under the Ukraine-Russia BIT is not problematic enough to delay the war's end, but the historical precedent is that warring states settle commercial property rights claims after wars end. Although foreign-owned property once belonged to the conqueror, by the nineteenth century, states accepted more obligations to compensate aliens for wartime actions, although obligations arose from the rights of individuals and not firms (Zrilič 2019, pp 18-29). Over 200 peace agreements have included settlements of

property claims, typically in the form of lump sums to be distributed by the home state as it wishes (Westin, Bederman, and Lillich 1999). The closest precursor to today's IIAs are Treaties of Friendship, Navigation, and Commerce (FCN), prevalent prior to World War I. FCNs left property rights compensation to be negotiated by states; if awarded at all, compensation was understood to be voluntary and without any admission of wrongdoing (Alschner 2013, Vandevelde 2017). Rather than rely on diplomatic negotiation, around forty mixed claims commissions have been formed to provide a consistent, legalized basis compensation; the first was between the US and Mexico in 1839, and notable recent examples include the UN Claims Commission after the Iraq-Kuwait conflict and the Ethiopia-Eritrea Claims Commission (Zrilič 2019 p. 19 fn 11; Parlett 2013). Again, such claims commissions have come into operation after the end of armed conflict.

The West's commitment both to treaty-based investment arbitration and to international legal precedents are being put to the test as a result of the conflict. Augmenting this tension, Zelensky has called for an international commission to confiscate Russian assets and compensate victims of its aggression even as the fighting continues.[44] Additionally, the European Union and others have actively discussed using seized Russian assets to pay for Ukrainian needs.[45] Although efforts to initiate these plans appear to have stopped for now, doing so during the war would break significantly from precedent in issues of sovereign immunity around state assets, in or out of wartime.

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[44] "We urge the partner states…" 20 May 2022. Statement by the President of Ukraine. https://www.president.gov.ua/en/news/proponuyemo-derzhavam-partneram-viznati-sho-rosiya-povinna-p-75221. The International Claims and Reparations Project at Columbia Law School is advising Ukraine on these issues https://icrp.law.columbia.edu/

[45] See Martin Sandbu (2023) "What to do with Russia's blocked reserves." *Financial Times*, 2 March.

For the Investment Treaty Regime

Can states avoid these problems by writing better treaties? In the decades since the Ukraine-Russia BIT was signed in 1998, treaty negotiators have carved out more and more precise exemptions, inspired especially by tensions between environmental, health, and fiscal policy and investor protections (Manger and Peinhardt 2017, Haftel and Thompson 2018, Polanco 2019). Many newer IIAs contain more language on conflict-related harm than in the Ukraine-Russia BIT, for example.[46] Alschner (2022) finds that such next-generation treaty language have not yet had meaningful effects on arbitration outcomes, which casts doubt on the ability of contracting parties to wordsmith themselves out of wartime complications ex ante.[47]

Ultimately, if sovereign states cannot amend treaties to allow them to override investors' preferences when they conflict with state interests, then states will backpedal on their commitments. We see this as what Russia has been doing for years as it has been ignoring cases filed under the BIT, foot-dragging when it does participate, and not complying with awards. While a different tactic, we see Ukraine's choice to terminate the BIT as consistent with the strategy of reasserting control.[48]

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[46] For example, a Full Protection and Security (FPS) clause (Zrilič 2019, Ch. 4). While Article 2 includes a reference to "legal protection of investments," it stops short of a more complete statement that would charge Russia or Ukraine with due diligence for the physical protection of foreign investments, as in FPS clauses.
[47] 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.
[48] In another effort to reassert control, Ukraine triggered the "denial of benefits" provision to deny protections to Russian investors under the Energy Charter Treaty (ECT), a multilateral investment to which Ukraine is a party. Ukraine argues that it can do so, 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. See Charlotin, Damien. 22 August 2022. "Ukraine triggers ECT's denial of benefits…" IAReporter.

For Foreign Investment

From the point of view of foreign investors, ISDS promotes effective dispute resolution should they have property rights claims against sovereign states. In this sense, the Ukraine-Russia BIT is working as designed: investors from the contracting states are filing against the contracting states over property rights violations, and those cases are being heard in ad hoc tribunals, on a timeline controlled by the arbitrators and outside of the realm of interstate politics. However, if states suspend or ignore the legal framework designed to protect foreign investor property rights during armed conflict, then investors would reasonably discount the credibility of peacetime commitments. Treaty protections may be fragile exactly for the riskiest investments involving rivalrous home and host states.[49] If and when doubts over the investment rules extend to third-party states whose interests are also at stake, investors may begin to question the very foundations of the regime.[50]

If investment treaty protections prove to be unreliable in the context of interstate war, and investors' home states have security priorities that trump investors' need for prompt compensation for wartime damages, then investors must look further afield for solutions to mitigating wartime political risk. Already, foreign investors with exposure to

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Danojevič (2023) "Investment Protection in the Times of War under the Energy Charter Treaty." Lexology. 10 March 2023.

[49] Given the complexities of investor nationality, such fragility could spill over to investors covered by other treaties (Thrall 2020). For example, an Austrian investor has threatened BIT to file under the Austria-Ukraine BIT over Ukraine's wartime actions, whereas Ukraine has claimed that the investor and assets in question are "connected to the Russian Federation." Bohmer, Lisa. 20 August 2022. "Seizure of Gas Stations…" https://www.iareporter.com/articles/seizure-of-gas-stations-allegedly-linked-to-russian-interests-prompts-threat-of-investment-arbitration-against-ukraine/

[50] Russia has BITs in place with 27 states which it has labelled "unfriendly," and foreign investors from "unfriendly" states have experienced targeted harm since the Russian invasion of Ukraine. In remarks to legal practitioners, one expert saw "a moral argument about funding cases regarding access to justice" under these BITs (Washington Arbitration Week, December 2022). Whether or not a moral case would fully align with potential investor-claimant preferences is not obvious. At the time of writing, there are no publicly known ISDS filings against Russia for wartime harm under BITs other than the Ukraine-Russia BIT.

violence spend resources on political risk management strategies such as employing private security forces and buying political risk insurance (Jamison 2020, Arel-Bundock et al 2020).[51] The return of interstate war would likely mean more demand for these kinds of services by the large multinational corporations that can afford them, and a decline in foreign investment by the small- and medium-sized firms that cannot.

Conclusions

Even in times of peace, the status quo investment treaty regime is imperfect, and ongoing reform efforts suggest it is fragile (Roberts and St John 2022). The regime seems unlikely to survive in its current form if it relies on states adhering to binding wartime adjudication that conflicts with their national interests, much less the interests of the international community.

It remains to be seen whether the confluence of Russian aggression and the Ukraine-Russia BIT is enough to fracture the regime. Unfortunately, while this situation is unprecedented, it could be reproduced. 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 al., 2019).[52] Since 2014, Russia has a MID and a BIT with thirteen states other than Ukraine.[53] Additionally, China has a MID and a BIT with

[51] Possibly, publicly-provided (if not private market) political risk insurance could be subject to geopolitical tensions around payouts and enforcement in the context of territory contested in interstate war.
[52] In an active MID, "the threat, display or use of military force short of war by one member state is explicitly directed towards the government, official representatives, official forces, property, or territory of another state. Disputes are composed of incidents that range in intensity from threats to use force to actual combat short of war." (Jones et al. 1996: 163)
[53] Canada, Denmark, Finland, France, Germany, Japan, Lithuania, Netherlands, Norway, South Korea, Sweden, Turkey, United Kingdom.

five states;[54] Iran has a MID and a BIT with three states;[55] and there are six other dyads with a MID and BIT.[56] We hope that the Crimea cases are the only ones between warring states, but others may very well follow.

[54] India, South Korea, Taiwan, Vietnam, Philippines.
[55] Afghanistan, Pakistan, Turkey.
[56] Greece-Turkey, Turkey-Syria, Lebanon-Syria, Tajikistan-Kyrgyzstan, Thailand-Cambodia, Malaysia-Indonesia.

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Appendix: Timeline of Key Dates

Russia	Date	Ukraine	Cases
Mar: Russia occupies 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	
	2015	Jan-Jun: ISDS filings: Kolomoisky-affiliated Crimea cases	*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*
Jan-onward: After each Crimea case filing, Russia sends letter to tribunal rejecting jurisdiction and declining to participate			
		Mar: Kolomoisky fired as regional governor by Ukranian Pres. Poroshenko	
		May: 5 Kolomoisky affiliates put Russia on notice of Crimea case filing	
	2016	Jan: ISDS filing: Ukrainian SOE Oschadbank Crimea case	*Oschadbank v. Russia*
		Mar: ISDS filing: Kolomoisky-affiliated Crimea case	*Lugzor v. Russia*
		Oct: ISDS filing: Ukrainian SOE Naftogaz Crimea case	*Naftogaz v. Russia*
		Dec: Ukraine nationalizes Kolomoisky-owned PrivatBank, lauded by IMF	
	2017	*Around this time, tribunals begin upholding jurisdiction in Crimea cases*	
Jan: Crimean law bans compensation to Ukrainian SOEs + Kolomoisky			
	2018	May: First Crimea case award: USD 150 million	*Everest v. Russia*
Sept: Russian state-owned bank VEB puts Ukraine on notice of ISDS			
		Nov: ISDS filing: Akhmetov-affiliated Crimea case [Note: not public until 2020]	*DTEK Krymenergo v. Russia*
		Nov: Award in Ukrainian SOE Crimea case: USD 1.1 billion award	*Oschadbank v. Russia*
Around this time, Russia begins to participate in Crimea cases	**2019**		

		Jan: Ukraine courts uphold seizure of Russian state-owned bank assets to enforce USD 150 mil award *(Everest)*	*Everest 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 filng: Russian state-owned bank VEB			*VEB v. Ukraine*
		Sept: ISDS filing: Ukrainian SOE Ukrenergo Crimea case	*Ukrenergo v. Russia*
	2020	Dec: Ukrainian SOE Energoatom threatens to file Crimea case	[follow-through to formal case unclear]
	2021	Feb: ISDS filings: Kolomoisky affiliates v. United States re: actions borne of PrivatBank financial crimes investigations	*Optima (I) and (II) v. United States*
		Mar: US State Dept makes Kolomoisky ineligible to enter US	
Mar: Russia successful in getting award to Ukrainian SOE set aside			*Oschadbank v. Russia*
		Oct: Pandora Papers reveal Zelensky and affiliates offshore holdings, trigger accusations of PrivatBank money laundering	
		Nov: "Anti-oligarch" Legislation signals Zelensky's full split from Kolomoisky	
24 Feb: Russia begins full-scale invasion of Ukraine	**2022**		
		3 Mar: Ukraine passes law expropriating Russian-owned property without compensation	
		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			[follow-through to formal case unclear]
		May: Kolomoisky and 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	
Sept: Hague ruling that counsel must be appointed for Russia			

		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*
	2023	Feb: UK proceedings enable freezing of USD 3 billion Kolomoisky assets re: PrivatBank litigation enforcement; Ukrainian police raid Kolomoisky's home	
		19 Apr: Ukraine withdraws from the Ukraine-Russia BIT, triggers 10-year sunset clause	
		Apr: Award in Ukrainian SOE Crimea case: USD 5 billion	*Naftogaz v. Russia*