

6-15-2024

Rights in Conflict: Examining Investment Treaty Arbitration and Intellectual Property Rights in the Wake of Russia's Invasion of Ukraine

Grace Klutke

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/jbel>



Part of the [Dispute Resolution and Arbitration Commons](#), [Intellectual Property Law Commons](#), [International Law Commons](#), [International Trade Law Commons](#), and the [Military, War, and Peace Commons](#)

Recommended Citation

Grace Klutke, *Rights in Conflict: Examining Investment Treaty Arbitration and Intellectual Property Rights in the Wake of Russia's Invasion of Ukraine*, 17 J. Bus. Entrepreneurship & L. 220 (2024)
Available at: <https://digitalcommons.pepperdine.edu/jbel/vol17/iss1/7>

This Comment is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in The Journal of Business, Entrepreneurship & the Law by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

**RIGHTS IN CONFLICT:
EXAMINING INVESTMENT TREATY
ARBITRATION AND INTELLECTUAL
PROPERTY RIGHTS IN THE WAKE OF
RUSSIA’S INVASION OF UKRAINE**

Grace Klutke

I.	INTRODUCTION.....	221
II.	RUSSIA’S INVASION OF UKRAINE... ..	224
	A. <i>RUSSIA’S ANNEXATION OF CRIMEA AS A MODEL FOR BIT RECOURSE</i>	227
	B. <i>IP RIGHTS AS A CATEGORY OF DAMAGED INVESTMENTS BY RUSSIA</i>	228
III.	INTERNATIONAL ARBITRATION BACKGROUND.....	229
	A. <i>CLAIMS UNDER RUSSIA’S EXISTING BITS</i>	231
	B. <i>NINTH CIRCUIT PRECEDENT</i>	235
IV.	ALTERNATE FORUMS TO INVESTOR STATE TREATY ARBITRATION.....	238
	A. <i>PARALLEL MOTIVATIONS: HUMAN RIGHTS AND BUSINESS INCENTIVES</i>	238
	B. <i>ALTERNATIVE HUMAN RIGHTS SPECIFIC FORUMS</i>	239
	1. International Organizations	240
	2. United States Courts	241
	C. <i>ADVANTAGES AND DISADVANTAGES OF INTERNATIONAL ARBITRATION TRIBUNALS</i>	243
V.	INVESTOR STANDING IN THE UKRAINE-RUSSIA CONFLICT	244

EXAMINING INVESTMENT TREATY ARBITRATION
AND INTELLECTUAL PROPERTY RIGHTS IN THE WAKE
OF RUSSIA'S INVASION OF UKRAINE

A.	<i>INTERNATIONAL TREATY COVERAGE OF IP RIGHTS</i>	248
B.	<i>CURRENT IP INFRINGEMENT ARBITRATION CASES</i>	249
C.	<i>ENFORCEMENT OF ARBITRAL AWARDS AGAINST RUSSIA</i>	250
D.	<i>ENFORCEMENT OF ARBITRATION AWARDS</i>	252
VI.	CONCLUSION	254

I. INTRODUCTION

On February 24, 2022, the Russian Federation attacked Ukraine, targeting border units and checkpoints with artillery¹ and beginning a deadly invasion.² As of June 18, 2023, the Office of the United Nations High Commissioner for Human Rights (OHCHR) has verified 9,083 resulting civilian deaths in Ukraine since the beginning of Russia's attack.³ In addition to extensive casualties and human rights offenses, the Russian invasion of Ukraine in February 2022 called into question the status of international investments in Russia and Ukraine, which Russia damaged with its large scale attack.⁴

¹ Tim Lister & Julia Kesa, *Ukraine Says It Was Attacked Through Russian, Belarus and Crimea Borders*, CNN (Feb. 24, 2022, 12:41 AM), https://www.cnn.com/europe/live-news/ukraine-russia-news-02-23-22/h_82bf44af2f01ad57f81c0760c6cb697c.

² *Id.*

³ U.N. Off. of the High Comm'r for Hum. Rts, Ukraine: Civilian Casualty Update 19 June 2023, (June 19, 2023), <https://www.ohchr.org/en/news/2023/06/ukraine-civilian-casualty-update-19-june-2023>.

⁴ Hannah Knowles & Zina Pozen, *Russia Says Its Businesses Can Steal Patents from Anyone in 'Unfriendly' Countries*, WASH. POST (Mar. 9, 2022, 8:19 PM), <https://www.washingtonpost.com/business/2022/03/09/russia-allows-patent-theft/>; see also *Russia Puts Isle of Man on Its List of 'Unfriendly' States*, BBC (July 25, 2022), <https://www.bbc.com/news/world-europe-isle-of-man-62293137>.

Contemporaneous with the armed conflict, Russia suspended its enforcement of Intellectual Property (IP) rights for 49 states, declaring that Russian entities should not compensate the IP rights of patent holders from “unfriendly states.”⁵ Russia created the list of unfriendly countries in May of 2022.⁶ This list continues to grow as Russia includes any state which imposes sanctions in response to its invasion of Ukraine as “unfriendly.”⁷

Russia's decision to deny IP rights for firms and products of specific origin violates numerous bilateral investment treaties (BITs) under which IP rights constitute covered investments.⁸ BITs promote and protect foreign investments between contracting state parties by guaranteeing certain protected rights to foreign investors.⁹ BITs are enforceable through various neutral arbitration channels and, in many cases, the New York Convention.¹⁰

Corporations with investments in Ukraine and Russia face an uncertain path in the wake of Russia’s invasion and denial of IP rights.¹¹

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and Mutual Protection of Investments, Russ.-Ukr., Nov. 27, 1998, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2233/download> (entered into force Jan. 27, 2000). As of October of 2022, Russia has bilateral investment treaties (BITs) in effect with over sixty countries. Marney Cheek et al., *Protecting Against Russia’s Asset Seizures: Investment Treaties May Provide a Remedy for Foreign Investors*, COVINGTON (July 20, 2023), <https://www.globalpolicywatch.com/2023/07/protecting-against-russias-asset-seizures-investment-treaties-may-provide-a-remedy-for-foreign-investors/>. Companies in other countries without a BIT with Russia, such as the United States, can still have BIT protection if the entity has an investment in Russia through a company in a third country with a Russian BIT. Michelle Bradfield et al., *Companies with Investments and Businesses in Ukraine and Russia: The Importance of Investment Treaties*, JONES DAY (Mar. 2022), <https://www.jonesday.com/en/insights/2022/03/investment-treaties-in-ukraine-and-russia>. Many foreign nationals initiated bilateral investment treaty arbitration with Russia following the annexation of Crimea. *Id.* Russia’s expropriation of assets in Crimea entitled certain foreign investors with harmed investments to large arbitration awards. *Id.*

⁹ Stephan W. Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses*, 27 BERKELEY J. INT’L L. 496, 498 (2009).

¹⁰ *Id.*

¹¹ *Over 1,000 Companies Have Curtailed Operations in Russia—But Some Remain*, YALE SCH. OF MGMT. (Feb. 17, 2024),

EXAMINING INVESTMENT TREATY ARBITRATION
AND INTELLECTUAL PROPERTY RIGHTS IN THE WAKE
OF RUSSIA'S INVASION OF UKRAINE

Since February 2022, numerous corporate entities have issued statements condemning Russia's violation of international law.¹² Other businesses have taken further steps to pull their businesses and products from affected locations.¹³ Given the lack of comprehensive and compulsory international law, corporate entities with unprotected IP rights, monetary losses, or abridged business activities should consider BIT arbitration to discipline Russia for violating both investment rights and international law.¹⁴ This article examines how the armed Ukraine-Russia conflict opened a doorway for a wave of international arbitration via corporate actions against Russia for violating BIT obligations.¹⁵

To provide context for the suggested BIT arbitration against Russia, this article begins with a brief discussion of the historical background of this conflict and investor-state treaty arbitration.¹⁶ This article next pivots to analyze the applicability of investor-state treaty arbitration to compensate lost IP investments in three parts.¹⁷ Part I considers how investor-state treaty arbitration function with ongoing armed conflict and which investors may initiate investor-state treaty claims.¹⁸ Next, Part II reports on the status of Russia's existing BIT obligations and the effect of Russia's decision to suspend IP rights of "unfriendly states."¹⁹ In articulating how the suggested BIT claims would

<https://som.yale.edu/story/2022/over-1000-companies-have-curtailed-operations-russia-some-remain>.

¹² *Id.*

¹³ *Id.*

¹⁴ See Quinn Smith, *Putin's Threat to Seize U.S. Investments Could Be Costly— to Russia*, BLOOMBERG LAW (Mar. 31, 2022, 1:00 AM), <https://news.bloomberglaw.com/us-law-week/putins-threat-to-seize-u-s-investments-could-be-costly-to-russia>.

¹⁵ This Article aims to assess the impact of Russia's invasion and subsequent measures on IP investments covered by bilateral investment treaties.

¹⁶ See *infra* Part I, II.

¹⁷ Patrick Dumberry, *An Overview of State Succession Issues Arising as a Result of an Armed Conflict*, in INT'L INV. L. AND THE L. OF ARMED CONFLICT 93, 93 (Katia Fach Gómez et al. eds., 2019). See generally Odysseas G. Repousis & James Fry, *Armed Conflict and State Succession in Investor-State Arbitration*, 22 COLUM. J. EUR. L. 421, 421 (2016).

¹⁸ See *infra* Section I.A.

¹⁹ See *infra* Section I.B.; Knowles & Pozen, *supra* note 4.

lead to successful results, Part III details the enforcement routes of arbitration awards if Russia declines to pay.²⁰ This article concludes with remarks on the role of investor-state arbitration as a diplomatic tool extending beyond other legal remedies to disincentive illegal international conduct.²¹

II. RUSSIA'S INVASION OF UKRAINE

Eight years before the February 2022 attack on Ukraine, national tensions in Crimea culminated in protests between Russia separatists and the sovereign Ukrainian government.²² In November 2013, large-scale protests erupted in Crimea over Ukrainian President Yanukovich's refusal to sign a political association and free-trade agreement with the European Union (EU).²³ Yanukovich instead expressed the intention to establish closer ties with Russia.²⁴ On February 22, 2014, following a series of violent clashes between protesters and special police forces, the Ukrainian parliament decided to remove Yanukovich from office by a vote of 328-0.²⁵ As the new Ukrainian government vowed to form closer relations with the west, Russia condemned the events as a *coup*.²⁶

Russia's subsequent invasion of Crimea began on February 27, 2014, when 150,000 Russian troops moved into position at the Ukrainian

²⁰ See *infra* Part III.

²¹ See *infra* Part V.

²² Holly Ellyatt, *Russia Took Crimea from Ukraine in 2014. Now, Kyiv Is Fighting Back*, CNBC (Aug. 18, 2022, 9:25 AM), <https://www.cnbc.com/2022/08/18/russia-took-crimea-from-ukraine-in-2014-now-kyiv-is-fighting-back.html>.

²³ *Understanding Ukraine's Euromaidan Protests*, OPEN SOCIETY FOUNDATIONS, <https://www.opensocietyfoundations.org/explainers/understanding-ukraines-euromaidan-protests> (last updated May 2019).

²⁴ Lewis Sanders IV, *Two Years on, Crimea Still NATO Priority*, DW (Mar. 18, 2016), <https://www.dw.com/en/two-years-after-crimea-annexation-nato-chief-urges-continued-sanctions-on-russia/a-19127597>.

²⁵ *Parliament Votes 328-0 to Impeach Yanukovich on Feb. 22; Sets May 25 for New Election*, KYIV POST (Feb. 23, 2014, 10:04 AM), <https://archive.kyivpost.com/article/content/ukraine-politics/euromaidan-rallies-in-ukraine-feb-21-live-updates-337287.html> (noting about 73% of the Ukrainian parliament's 450 members took part in this vote).

²⁶ Kathy Lally & Will Englund, *Putin Says He Reserves Right to Protect Russians in Ukraine*, WASH. POST (Mar. 4, 2014), https://www.washingtonpost.com/world/putin-reserves-the-right-to-use-force-in-ukraine/2014/03/04/92d4ca70-a389-11e3-a5fa-55f0c77bf39c_story.html.

EXAMINING INVESTMENT TREATY ARBITRATION
AND INTELLECTUAL PROPERTY RIGHTS IN THE WAKE
OF RUSSIA'S INVASION OF UKRAINE

border in what the Russian government called a “military exercise.”²⁷ Russian troops quickly crossed the borders, seized Crimean airports and government buildings, and cut internet and telecommunication service between the Crimean Peninsula and Ukraine.²⁸ Russia had completed its military invasion of the peninsula by March 2014.²⁹ On March 18, Russia alleged that by referendum, ninety-seven percent of the Crimean population voted to secede from Ukraine.³⁰ International authorities regard the referendum as an “illegitimate sham,” citing that Russian authorities conducted the referendum at polls that armed guards oversaw.³¹

The status of Crimea's nationality following Russia's invasion has remained an issue.³² In the intermittent eight years, neither Ukraine nor any international agency has recovered control of Crimea, setting a dangerous precedent for the current attack on Ukraine.³³ Russia reports Crimea as its territory while Ukraine, lacking the military power to restore governmental control, continues to assert its sovereignty over the area.³⁴

²⁷ Charles Reid Jr., *Vladimir Putin's Culture of Terror: What Is to Be Done?*, 9 U. ST. THOMAS J.L. & PUB. POL'Y 275, 312 (2015).

²⁸ *Id.*

²⁹ Steven Pifer, *Crimea: Six Years After Illegal Annexation*, BROOKINGS (Mar. 17, 2020), <https://www.brookings.edu/blog/order-from-chaos/2020/03/17/crimea-six-years-after-illegal-annexation/>.

³⁰ Steven Pifer, *Five Years After Crimea's Illegal Annexation, the Issue Is No Closer to Resolution*, BROOKINGS (Mar. 31, 2011), <https://www.brookings.edu/blog/order-from-chaos/2019/03/18/five-years-after-crimeas-illegal-annexation-the-issue-is-no-closer-to-resolution/>.

³¹ *Id.* The referendum only allowed voters to join Russia or select extensive autonomy from Kyiv under Crimea's 1992 constitution. *Id.* Further, while Russia alleged that voter turnout was eighty-three percent, a member of Vladimir Putin's Human Rights Council later divulged that the turnout fell closer to thirty percent, with only half of the voters choosing to join Russia. *Id.*

³² *Id.*

³³ *Id.*

³⁴ Will Englund, *Kremlin Says Crimea Is Now Officially Part of Russia After Treaty Signing, Putin Speech*, WASH. POST (Mar. 18, 2014), http://www.washingtonpost.com/world/russias-putin-prepares-to-annex-crimea/2014/03/18/933183b2-654e-45ce-920e-4d18c0ffec73_story.html.

International law is similarly unable to resolve the issue of Crimea's nationhood.³⁵ Ukraine initiated proceedings against Russia before the International Court of Justice (ICJ), the European Court of Human Rights (ECtHR), and two tribunals constituted under Annex VII of the UN Convention on the Law of the Sea (UNCLOS).³⁶ These international proceedings have not yielded political change.³⁷ According to some legal scholars, the annexation of Crimea now shows a clear inability of international law to take action against a charter violation of the United Nations' prohibition on annexation.³⁸ Eric Posner expresses this view by stating, "1. Russia's military intervention in Ukraine violates international law. 2. No one is going to do anything about it."³⁹ The annexation of Crimea raises the question: what remedy does international law provide if Russia will not recognize the jurisdiction of the ICJ?⁴⁰

Although international law continues to face enforcement restrictions, on the individual side, the Ukrainian investors that experienced harm due to Russia's annexation of Crimea have initiated successful claims against Russia under the 1998 bilateral investment treaty (BIT).⁴¹ These BIT arbitration tribunals returned large verdicts in favor of the investors in Crimea.⁴² In light of these successes, the investors that Russia's invasion of Ukraine harmed now face the option of pursuing their own BIT claims.⁴³

³⁵ *Ukraine Institutes Proceedings Against the Russian Federation and Requests the Court to Indicate Provisional Measures*, INT'L CT. OF JUST. (Feb. 27, 2022), <https://www.icj-cij.org/public/files/case-related/182/182-20220227-PRE-01-00-EN.pdf>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ Michael Lynk, *Annexation Is a Flagrant Violation of International Law, Says UN Human Rights Expert*, UNITED NATIONS (Jun. 20, 2019), <https://www.ohchr.org/en/press-releases/2019/06/annexation-flagrant-violation-international-law-says-un-human-rights-expert>; see Juergen Bering, *The Prohibition on Annexation: Lessons from Crimea*, 49 N.Y.U. J. INT'L L. & POL. 757 (2017) (arguing that western countries and international law have confirmed the principle against armed annexation and challenged Russia on this issue).

³⁹ Bering, *supra* note 38, at 751.

⁴⁰ *Id.*

⁴¹ *Companies with Investments and Businesses in Ukraine and Russia: The Importance of Investment Treaties*, JONES DAY (Mar. 2022), <https://www.jonesday.com/en/insights/2022/03/investment-treaties-in-ukraine-and-russia>.

⁴² *Id.*

⁴³ *Id.*

EXAMINING INVESTMENT TREATY ARBITRATION
AND INTELLECTUAL PROPERTY RIGHTS IN THE WAKE
OF RUSSIA'S INVASION OF UKRAINE

A. *Russia's Annexation of Crimea as a Model for BIT Recourse*

There are striking similarities in applicable legal recourse between Russia's invasions of Crimea and Ukraine.⁴⁴ Both invasions bring forth the idea of de facto control and incurred investment obligations.⁴⁵ The de facto control theory posits that an invading country may effectively exercise control over another by physical or legal acts.⁴⁶ This control thus transposes the invaded country's investment treaty obligations onto the controlling nation.⁴⁷ Regarding Russia and Crimea, the chief issue for de facto control is whether Russia's actions are such that Crimea is fairly considered a Russian territory for the purpose of applicable BITs.⁴⁸ Proof that Crimea now forms part of Russia's 'territory' for the BIT is essential for Ukraine to bring claims against Russia for lost investments in Crimea, which was previously Ukrainian territory not subject to Russian protections.⁴⁹ As a result, Ukrainian investors in existence before the annexation became foreign investors protected by the BIT following Russia's intervention in Crimea.⁵⁰

The success of investment arbitration in response to the Crimea annexation provides a helpful template for similar success in cases involving the Ukraine invasion.⁵¹ Following the annexation of Crimea, many foreign investors, such as those from Ukraine, initiated BIT arbitration, alleging Russia's expropriation of their assets entitled them to

⁴⁴ G.J.M., *International Law—Recognition De Facto—Requisition of Ship by Both De Jure and De Facto Governments—Possession—Impleading a Foreign Sovereign State*, 7 CAMBRIDGE L.J. 270, 271 (1941).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* Russia thus accepted investment treaty obligations to existing foreign investors in Crimea when they annexed the region. For example, Ukrainian owners of Crimean airports were able to sue Russia under the investment agreement between Ukraine and Russia for damaging their investments in former Ukrainian controlled Crimea as Russia had exerted sufficient control over the area. *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *See id.*

significant arbitration awards.⁵² Since arbitration cases have already occurred based on the loss of investments in Crimea, this article will compare those findings with the potential possibilities when specifically applied to the harm to IP investments through Russia's invasion of Ukraine.⁵³

B. *IP Rights as a Category of Damaged Investments by Russia*

International IP agreements date back to the nineteenth century, as multilateral agreements covering IP rights emerged in the late 1800s, followed by bilateral agreements protecting IP investments in 1959.⁵⁴ As these agreements emerged to strengthen international protections, a pattern of IP use as political leverage during wartime also developed.⁵⁵ During World War I, the U.S. enacted the Trading with the Enemy Act in 1917 and created the Office of the Alien Property Custodian to “assume control and dispose of the enemy-owned property in the United States.”⁵⁶ Under this new office, the U.S. government seized patents of German medical company Bayer and auctioned the U.S. trademark on the drug name “[A]spirin.”⁵⁷ IP rights have similarly become critical leverage points for Russia throughout their internationally criticized attack of Ukraine.⁵⁸ In March of 2022, Russian prosecutors “issued warnings to Western companies in Russia, [including Coca-Cola, McDonald’s and IBM] threatening to arrest corporate leaders who criticize the government or to seize assets [including trademarks] of companies that withdraw from

⁵² *Id.*

⁵³ See *infra* Section II.A.

⁵⁴ *Overview: The TRIPS Agreement*, WORLD TRADE CENTER, https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm. TRIPS is considered the most comprehensive international IP agreement in history and involves all WTO members in setting minimum standards for Intellectual Property Rights (IPR) protection. *Id.*

⁵⁵ Daniel Gross, *The U.S. Confiscated Half a Billion Dollars in Private Property During WWI*, SMITHSONIAN MAGAZINE (July 28, 2014), <https://www.smithsonianmag.com/history/us-confiscated-half-billion-dollars-private-property-during-wwi-180952144/>.

⁵⁶ *Id.*; *Records of the Office of Alien Property*, NATIONAL ARCHIVES, 131.1, 131.2.

⁵⁷ Gross, *supra* note 55.

⁵⁸ Jennifer Maloney, Emily Glazer & Heather Gaddon, *Russian Prosecutors Warn Western Companies of Arrests, Asset Seizures*, WSJ (Mar. 14, 2022), <https://www.wsj.com/articles/russian-prosecutors-warn-western-companies-of-arrests-asset-seizures-11647206193>. In the years prior to their invasion of Ukraine, the Russian Federation earned a reputation for IP rights violations. *Id.* In 2021, the U.S. government placed Russia on a nine-nation IP theft watchlist for their failure to protect patents. *Id.*

EXAMINING INVESTMENT TREATY ARBITRATION
AND INTELLECTUAL PROPERTY RIGHTS IN THE WAKE
OF RUSSIA'S INVASION OF UKRAINE

the country.”⁵⁹ Unlike the seizure of U.S. trademarks, however, Russia’s violation of IP rights constitutes broad stroke dismissal of all patent rights from a long list of nations not involved in the armed conflict.⁶⁰

In response to international trade sanctions, Russia terminated certain IP rights embedded in an extensive series of goods and trademarks.⁶¹ Russia’s recent suspension of IP rights has effectively removed all IP rights protections for countries deemed “unfriendly.”⁶² Russia continues to uphold decrees that remove protections for patent holders who are either registered in “unfriendly countries,” do business in them, or hold their nationality.⁶³ In particular, Russia delineated all unfriendly nations as “parallel import” countries whereby Russia imports goods without recognition of IP rights.⁶⁴

III. INTERNATIONAL ARBITRATION BACKGROUND

International arbitration became a global necessity after World War II as globalization and international trade grew.⁶⁵ At this time, foreign direct investment and trade skyrocketed, causing heightened international trade agreements.⁶⁶ As transnational economic ventures increased, many countries initially doubted the feasibility of international arbitration.⁶⁷

⁵⁹ *Id.*

⁶⁰ *Has Russia Legalised Intellectual-Property Theft?*, THE ECONOMIST (June 2, 2022), <https://www.economist.com/business/2022/06/02/has-russia-legalised-intellectual-property-theft>.

⁶¹ David Perry, Anthony Rapa & Fatema Ghasletwala, *What Trademark Holders Should Know About Russia’s Authorization of Parallel Imports*, BLOOMBERG LAW (Aug. 2022), https://www.bloomberglaw.com/product/health/document/XCTMT3TG000000?resource_id=88977b9d4399e7b44389f427511e5d2c.

⁶² THE ECONOMIST, *supra* note 60.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ V.V. Veeder, *The Historical Keystone to International Arbitration: The Party-Appointed Arbitrator—From Miami to Geneva*, OXFORD ACADEMIC (Nov. 2015), <https://doi.org/10.1093/acprof:oso/9780198739807.003.0008>.

⁶⁶ *Id.*

⁶⁷ *Id.*

New international agreements with clearly delineated rules of arbitration evolved to resolve international investment disputes.⁶⁸

“International investment agreements” is a broad umbrella term that defines any treaty aimed at protecting investments.⁶⁹ International trade law exists in multilateral and bilateral agreements.⁷⁰ BITs are agreements between two states designed to preserve certain rights for investors from one state operating within the jurisdiction of the other state.⁷¹ Similarly, multilateral investment treaties invoke protections for investors from multiple countries.⁷² Overall, despite the establishment of several multilateral forums through accords such as the General Agreement on Tariffs and Trade (GATT), the World Trade Organization (WTO), and the International Monetary Fund (IMF), most agreements have focused on bilateral regulation.⁷³ Over 2,500 bilateral, regional, and sectoral investment treaties govern international investment.⁷⁴

In the mid-20th century, the World Bank established a dispute settlement system to govern investment disputes between foreign companies and host countries.⁷⁵ This system became the International Centre for Settlement of International Disputes (ICSID).⁷⁶ ICSID derives

⁶⁸ *Primer on International Investment Treaties and Investor-State Dispute Settlement*, COLUMBIA CENTER ON SUSTAINABLE INVESTMENT, <https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-investor-state-dispute-settlement> (last updated Jan. 2022).

⁶⁹ Jarrod Wong, *Umbrella Clauses in Bilateral Investment Treaties: Of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes*, 14 GEO. MASON L. REV. 137, 138 (2006).

⁷⁰ *Id.* at 137, 142.

⁷¹ *Id.* at 137.

⁷² *Id.* at 142.

⁷³ *Id.* at 138.

⁷⁴ *International Investment Agreements Navigator*, UNCTAD, <https://investmentpolicy.unctad.org/international-investment-agreements> (last visited Jan. 30, 2024).

⁷⁵ *See generally* Campbell McLachlan et al., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2d ed. 2007); Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1869 U.N.T.S. 186, Annex 1B [hereinafter GATS]; Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1868 U.N.T.S. 186, Annex 1A [hereinafter TRIMs Agreement].

⁷⁶ *See generally* THE LAW OF INTERNATIONAL RESPONSIBILITY (James Crawford et al. eds., 1st ed. 2010); CHITTHARANJAN F. AMERASINGHE, DIPLOMATIC PROTECTION (2008).

EXAMINING INVESTMENT TREATY ARBITRATION
AND INTELLECTUAL PROPERTY RIGHTS IN THE WAKE
OF RUSSIA'S INVASION OF UKRAINE

its authority from BITs.⁷⁷ BIT investment pacts provide foreign investors with a range of protections when they invest in their host countries.⁷⁸

When a state violates a BIT, an investor and host nation must submit to binding arbitration, outside of their national courts.⁷⁹ Russia has negotiated more than sixty BITs with countries as of February 2023.⁸⁰ Countries without a BIT with Russia, such as the United States, can still have BIT protection if the entity has an investment in Russia and a company in a third country with a Russian BIT.⁸¹ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the “New York Convention,” governs the enforcement of international arbitral awards.⁸²

A. *Claims Under Russia's Existing BITs*

To initiate arbitration proceedings based on Russia's failure to protect IP rights, an investor will need to cite (i) an applicable BIT under which they have the standing to sue as a foreign national entity with an investment in Russia, (ii) that the provisions of the BIT cover their IP investment and that (iii) the language of the BIT allows for arbitration in the investors chosen tribunal.⁸³

⁷⁷ McLachlan et al., *supra* note 75.

⁷⁸ *Id.*

⁷⁹ International Center for Settlement of Investment Disputes (ICSID), *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, art. 25(2) (2006) [hereinafter ICSID Convention] (clarifying the “investor” jurisdictional requirement).

⁸⁰ Jennifer Younan et al., *Russian Countersanctions: New Measures Targeting Foreign Investors in Russia*, SHEARMAN & STERLING (May 2023), <https://www.shearman.com/en/perspectives/2023/05/russian-countersanctions--new-measures-targeting-foreign-investors-in-russia>.

⁸¹ ICSID Convention, *supra* note 79.

⁸² Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3 [hereinafter New York Convention].

⁸³ Peter Muchlinski, *The Framework of Investment Protection: The Content Of BITs*, in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS (Karl P. Sauvant & Lisa E. Sachs eds., 2009).

The first step in determining whether someone may initiate a BIT claim is to determine whether they are a “covered investor.”⁸⁴ Only covered investors will incur any protection under their country’s BIT.⁸⁵ Broadly, scholars explain that a foreign investor may initiate investment treaty arbitration against a respondent state to resolve the state’s alleged breaches of investment treaty protections.⁸⁶

The wording of the relevant investment treaty will determine the qualifications of a covered investor.⁸⁷ Generally, arbitration agreements define “covered investors” as nationals of a state foreign to where the relevant investment takes place.⁸⁸ Because Russia has over sixty bilateral investment treaties (BITs) in force with countries, the nationals of parties to those treaties are all provided for as covered against the other treaty country.⁸⁹ Coverage of both the investor and the investment under the relevant treaty is essential to ensuring the arbitration tribunal has jurisdiction over the parties and the dispute.⁹⁰ Scholars note that in some cases, countries without a BIT with Russia, such as the United States, can still have BIT protection if the entity has an investment in Russia and a company in a third country with a Russian BIT.⁹¹

Upon verifying that their investment is protected by the BIT, the investor must ensure that the harmed investment is also protected.⁹² Treaties will include an agreed upon definition of what investments it covers.⁹³ Typically, treaties cover any kind of tangible and intangible property, shares, bonds, IP and business concessions.⁹⁴

⁸⁴ *Id.*

⁸⁵ JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 252 (1st ed. 2010).

⁸⁶ Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and their Grand Bargain*, 46 HARV. INT’L L.J. 67, 88 (2005).

⁸⁷ *Id.*

⁸⁸ *Société Générale de Surveillance S.A. v. Republic of the Phil.*, ICSID Case No. ARB/02/6, *Objections to Jurisdictions*, ¶ 119 (Jan. 29, 2004), 8 ICSID Rep. 518 (2005).

⁸⁹ JONES DAY, *supra* note 41.

⁹⁰ Muchlinski, *supra* note 83.

⁹¹ Martin J. Valasek & Patrick Dumberry, *Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Disputes*, 26 ICSID REV.-FOREIGN INV. L. J. 34, 35 (2011).

⁹² *Id.*

⁹³ *See supra* note 82 (“The Treaty’s definition of investment is broad, recognizing that investment can take a wide variety of forms”).

⁹⁴ *Trade Guide: Bilateral Investment Treaties*, INT’L TRADE ADMIN., <https://www.trade.gov/trade-guide-bilateral-investment-treaties>.

EXAMINING INVESTMENT TREATY ARBITRATION
AND INTELLECTUAL PROPERTY RIGHTS IN THE WAKE
OF RUSSIA'S INVASION OF UKRAINE

The final element for ensuring one's claim is provided for under the BIT is verifying that the selected tribunal of choice is allowed.⁹⁵ The BIT will specify arbitration forums whereby any disputes between investors and Russia may be resolved.⁹⁶ For example, the Russia-Ukraine BIT specifies that any disputes between Ukrainian investors and Russia may be resolved either in Russian courts; at the Arbitration Institute of the Chamber of Commerce in Stockholm (SCC); or by an ad-hoc arbitration tribunal, in conformity with the Arbitration Regulations of the United Nations Commission for International Trade Law (UNCITRAL).⁹⁷

Investors would likely choose to avoid Russian courts, and the ad hoc tribunal established under the arbitration rules of UNCITRAL

⁹⁵ Salacuse, *supra* note 85.

⁹⁶ Deborah Ruff and Trevor Tan, *Fork-in-the-Road Clauses Divergent Paths in Recent Decisions*, NORTON ROSE FULBRIGHT (Oct. 2015), <https://www.nortonrosefulbright.com/en-us/knowledge/publications/0bd10ad8/fork-in-the-road-clauses>; *see generally* Kristi How and Emily Choo, *Negotiation, Compliance, and Termination of Investment Treaties: The State's Perspective*, GLOB. ARB. REV. (Jan. 14, 2022), <https://globalarbitrationreview.com/guide/the-guide-investment-treaty-protection-and-enforcement/first-edition/article/negotiation-compliance-and-termination-of-investment-treaties-the-states-perspective>; *Cooling-Off Periods Under Bilateral Investment Treaties Provide an Opportunity to Resolve Disputes Amicably*, WITHERSWORLDWIDE (Oct. 24, 2018), <https://www.withersworldwide.com/en-gb/insight/read/cooling-off-periods-under-bilateral-investment-treaties-opportunity-to-resolve-disputes-amicably>; *see also* Compañía de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, ¶ 11 (Aug. 10, 2010). Some investment treaties will include obligations to negotiate, litigate in the courts of relevant state, or wait for a specified period before initiating proceedings. Treaties may also include a “fork in the road” provision limiting investors to either pursuing claims in domestic courts or international arbitration tribunals.

⁹⁷ Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and Mutual Protection of Investments, Russ.-Ukr., Nov. 27, 1998, United Nations UNCTAD.

provides an experienced and impartial forum for investment claims.⁹⁸ Since their initial adoption in 1976, tribunals have employed the UNCITRAL Arbitration Rules to settle a broad range of investor-State disputes.⁹⁹ The UNCITRAL Arbitration Rules provide a comprehensive set of procedural rules that parties may mutually agree upon for the conduct of arbitral proceedings arising from their commercial relationship.¹⁰⁰ These rules are widely used in ad hoc arbitrations and administered arbitrations.¹⁰¹

Two prominent examples of corporate entities initiating UNCITRAL BIT arbitration proceedings against Russia are *PJSC Ukrnafta v. The Russian Federation* and *Stabil LLC v. Russian Federation*.¹⁰² These claims related to two separate Ukrainian companies with numerous petrol stations in Crimea that were forced under Russian control after the annexation of 2014.¹⁰³ These companies initiated arbitration proceedings against Russia alleging that Russia had de facto control of Crimea and thus assumed responsibility under the 1998 Ukraine-Russia BIT for damaged Ukrainian investments there.¹⁰⁴ The companies claimed that Russia unlawfully expropriated their investments as their injury covered under the BIT.¹⁰⁵ In October 2018, despite Russia's objection, the Federal Tribunal in both cases upheld interim awards on jurisdiction under the Ukraine-Russia BIT.¹⁰⁶ Specifically, the UNCITRAL courts found that by annexing Crimea, the Russian Federation did assume responsibility for protecting Ukrainian investments in Crimea.¹⁰⁷ The courts awarded the Stabil and Ukrnafta investors a 34.50 and 44.50 million U.S. Dollars (USD) judgement respectively.¹⁰⁸

⁹⁸ See generally Pieter Sanders, *Unity and Diversity in the Adoption of the Model Law*, 11 KLUWER L. INT'L 1, 13 (1995); Pieter Sanders, *The Work of UNCITRAL on Arbitration and Conciliation*, 15 AM. REV. OF INT'L ARB. 1 (2005).

⁹⁹ See Pieter Sanders, *Unity and Diversity in the Adoption of the Model Law*, 11 KLUWER L. INT'L 1, 13 (1995).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *PJSC Ukrnafta v. The Russ. Fed'n*, PCA Case No. 2015-34 (Apr. 12, 2019); *Stabil LLC v. Russ. Fed'n*, PCA Case no. 2015-35 (Apr. 12, 2019).

¹⁰³ See *PJSC Ukrnafta*, PCA Case No. 2015-34.

¹⁰⁴ Kateryna Honcharenko, *Case Note: PJSC Ukrnafta v the Russian Federation (UNCITRAL, PCA Case No. 2015-34) & Stabil, LLC and Others v the Russian Federation (UNCITRAL, PCA Case No. 2015-35)*, THE RESOLVER (2019) at 16.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

EXAMINING INVESTMENT TREATY ARBITRATION
AND INTELLECTUAL PROPERTY RIGHTS IN THE WAKE
OF RUSSIA'S INVASION OF UKRAINE

B. *Ninth Circuit Precedent*

Investment treaty arbitration against Russia is naturally only a successful remedy for BIT violation if investors can collect on their award judgments.¹⁰⁹ As applied to Russia's invasion of Ukraine, arbitral awards are only helpful if a successful claimant can collect against Russia through other internationally secure means when Russia refuses to honor the awards.¹¹⁰ The mechanics forcing a state's compliance with international investment arbitration awards are largely treaty-based.¹¹¹ BITs may in their agreements impose a compliance obligation with arbitral awards.¹¹² There are also multilateral conventions, including the New York Convention, which necessitate compliance and provide a means for award satisfaction should a country refuse.¹¹³

Russia's BITs with other nations differ in their designation of acceptable arbitration forums and awards.¹¹⁴ Some treaties state arbitral decisions "shall be recognized and implemented" in accordance with the New York Convention¹¹⁵ while others do not mention an obligation for either party to comply with arbitral awards.¹¹⁶ Further agreements differ as some state the UNCITRAL Rules should govern while others cite the rules of the Institute of the Stockholm Chamber of Commerce (SCC).¹¹⁷ UNCITRAL and the SCC both, in differing terms, require that arbitration

¹⁰⁹ Elizabeth Edmondson & Richard Ziegler, *The Complications of Attaching Assets in the US in Aid of an Arbitral Award* 10 DISP. RESOL. INT'L 71, 71–80 (2016).

¹¹⁰ *Id.*

¹¹¹ Cody Olson, *Enforcement of International Investment Arbitration Awards Against the Russian Federation*, 22 AM. REV. INT'L ARB. 711 (2011).

¹¹² *Id.*

¹¹³ New York Convention, *supra* note 82.

¹¹⁴ UNCTAD, *supra* note 74.

¹¹⁵ The Norway-Russia BIT explicitly requires enforcement of arbitral awards in accordance with the New York Convention Agreement on Promotion and Mutual Protection of Investments, Art. 8, Nor.-Russ., Oct. 4, 1995 (entered into force May 21, 1998).

¹¹⁶ UNCTAD, *supra* note 74.

¹¹⁷ *Id.*

awards are final and binding on the parties.¹¹⁸ Despite the diversity of earlier BITs, since 1997, all BITs entered into by Russia with the exception of the Cyprus-Russia BIT, impose no compliance obligations.¹¹⁹

The New York Convention is a multilateral convention which imposes an obligation of arbitration compliance.¹²⁰ The U.S.S.R. ratified the New York Convention in August of 1960, and the treaty remains in force today.¹²¹ In practice, “[t]he New York Convention imposes an obligation to recognize and enforce arbitral awards ‘made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.’”¹²²

To enforce an arbitration tribunal award in the United States under the New York Convention, the award's winner must “supply the court with the original award or a certified copy”.¹²³ Once the court receives this document, it “shall recognize arbitral awards as binding and enforce them under the rules of procedure of the territory where the award is relied upon.”¹²⁴ Next, the winning party files a petition to recognize the award, and the court will resolve this petition without oral argument or discovery.¹²⁵

“[C]ourt[s] shall confirm the award unless [they] find[]” enforcement would go against specified defenses to recognition under the New York Convention.¹²⁶ These defenses prohibit enforcement when a party suffers from incapacity, the arbitration agreement is invalid, the award had insufficient notice, or “the award is outside the scope of the

¹¹⁸ *Id.*

¹¹⁹ *Id.* See Agreement Regarding the Promotion and Mutual Protection of Investments, Art. 7(2), Cyprus-Russ., Apr. 11, 1997 (not in force as of June 1, 2011).

¹²⁰ New York Convention, *supra* note 82.

¹²¹ Lucy Reed & Lucy Martinez, *Treaty Obligations to Honor Arbitral Awards and Diplomatic Protection*, in ENFORCEMENT OF ARBITRAL AWARDS AGAINST SOVEREIGNS 13, 17–20 (R. Doak Bishop ed., 2009).

¹²² *Id.* (“An obligation to honor a treaty-based arbitration award may be implied if the respondent state has ratified the New York Convention.”).

¹²³ Jef Klazen, Marcus J Green & Clinton J Dockery, *Enforcement in the United States*, GLOB. ARB. REV. (July 24, 2018), <https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2019/article/enforcement-in-the-united-states#endnote-007>.

¹²⁴ *Id.* (citing New York Convention article III–IV).

¹²⁵ *Id.*

¹²⁶ *Id.* (citing New York Convention article V).

EXAMINING INVESTMENT TREATY ARBITRATION
AND INTELLECTUAL PROPERTY RIGHTS IN THE WAKE
OF RUSSIA'S INVASION OF UKRAINE

arbitration agreement.”¹²⁷ Further, under the New York Convention, courts may not enforce awards if

the composition of the arbitral tribunal or procedure was not compliant with the parties' agreement or, absent such an agreement, the laws of the jurisdiction where the arbitration took place; the award has not yet become binding on the parties; the dispute was not arbitrable; or recognition of the award would be against public policy.¹²⁸

Different civil procedure rules govern whether courts can recognize awards under the New York Convention.¹²⁹ For example, generally in the United States, award creditors usually need to file their “petition in a state or federal judicial district where the defendant has a presence” or in some instances, property that may satisfy a judgment.¹³⁰

In addition to other member states such as the United States, the New York Convention obligates Russian courts to recognize and enforce international investment arbitration awards, including those issued against the Russian State.¹³¹ Scholars note, however, that various political pressures would likely prevent a nation's courts from imposing awards against their state.¹³² Claimants may thus instead seek to enforce arbitration awards in New York Convention states where Russia is likely to have attachable assets “reachable under the law of the country where

¹²⁷ *Id.* (quoting New York Convention article V).

¹²⁸ *Id.* (quoting New York Convention article V).

¹²⁹ *Id.* (citing *Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic*, 582 F.3d 393, 398 (2d Cir. 2009) (“holding that the ‘district court did not err by treating jurisdiction over either [debtor] or [debtor’s] property as a prerequisite to the enforcement of [creditor’s] petition”)).

¹³⁰ *Id.*

¹³¹ George K. Foster, *Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals for Its Reform*, 25 ARIZ. J. INT’L & COMPAR. L. 665, 691 (Fall 2008), <http://arizonajournal.org/wp-content/uploads/2015/11/Foster.pdf>.

¹³² *Id.* at 668.

they are located.”¹³³ Assets are more likely to be reachable when they are not protected under the doctrine of sovereign immunity and may be viewed as the sovereign’s property.¹³⁴ For example, commercial property without a governmental purpose, which Russia keeps in a New York Convention state, may be an attachable asset.¹³⁵

IV. ALTERNATE FORUMS TO INVESTOR STATE TREATY ARBITRATION

While lawsuits are often best suited for the forum where the underlying incident occurred, in many cases, the home country is unwilling or unable to fairly adjudicate these claims.¹³⁶ Given the ongoing and highly political nature of the Russian conflict, finding a suitable, neutral forum with the ability to enforce binding awards is critical.¹³⁷ This section responds to critiques to investment dispute forums as a means to adjudicate human rights related claims, while also considering the strengths and limitations of other forum alternatives.

A. *Parallel Motivations: Human Rights and Business Incentives*

Scholars critique the intermingled use of international tribunal judgements on issues involving the violation of human rights.¹³⁸ Broadly, there is a perception that private dispute resolution “is [significantly] biased in favor of business interests,” and thus investment arbitration is not an appropriate or adequate human rights tool as these claims consider harm to investors and not citizens as a whole.¹³⁹ The Russian armed

¹³³ *Id.* at 671.

¹³⁴ *Id.* at 671.

¹³⁵ *Id.* at 672–73.

¹³⁶ Aleksey Shtivelman, *Russian Law Says “No” to Foreign Arbitration Proceedings Against Sanctioned Russian Individuals and Companies*, JD SUPRA (July 20, 2022), <https://www.jdsupra.com/legalnews/russian-law-says-no-to-foreign-7215317/>.

¹³⁷ *Id.*

¹³⁸ James D. Fry, *International Human Rights Law in Investment Arbitration: Evidence of International Law’s Unity*, 18 DUKE J. COMPAR. & INT’L L. 77, 77, 80 (2007), <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1077&context=djci> l.

¹³⁹ Gregory R. Day, *Private Solutions to Global Crises*, 89 ST. JOHN’S L. REV. 1079, 1082–83 (2015), https://web.archive.org/web/20190429023148id_/https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=6734&context=lawreview; *see generally* Raymond Yang Gao, *Bridging Separate Worlds— Application of Human Rights*

EXAMINING INVESTMENT TREATY ARBITRATION
AND INTELLECTUAL PROPERTY RIGHTS IN THE WAKE
OF RUSSIA'S INVASION OF UKRAINE

conflict in Ukraine naturally involves human rights offenses and investment breaches; thus, it is subject to these critiques.¹⁴⁰

In many ways, potential BIT arbitration in light of Russia's illegal invasion of Ukraine shows how business interests can work in favor of human rights.¹⁴¹ When human rights and investment violations are mutually present, punitive legal action against the aggressor nation under either cause of action may have a deterring effect.¹⁴² Further, investment disputes frequently interact directly with human rights as they may cover investor "[r]ights to health, to water, to a healthy and safe environment, and to be free from torture, forced labor and arbitrary detention."¹⁴³ Courts may hold states liable for failing to protect individuals' human rights from foreign investors or find that a host state adopted measures that it claims defended human rights, which adversely impact an investor.¹⁴⁴ Tribunals have frequently referred to international human rights conventions and laws when interpreting standards of treatment or applying norms invoked by states.¹⁴⁵ Further, recent BITs have increased their use of direct references to human rights instruments and state parties' commitments to universal human rights.¹⁴⁶

B. *Alternative Human Rights Specific Forums*

Currently, there is also a lack of proper forum to uphold international human rights, as international agencies often lack the

Law in Investment Treaty Arbitration, 42 NW. J. INT'L L. & BUS. 1 (2021), <https://scholarlycommons.law.northwestern.edu/njilb/vol42/iss1/1> (asserting that international investment law faces difficulty in balancing investment protection and public interests).

¹⁴⁰ Smith, *supra* note 14; Reid, *supra* note 27, at 9.

¹⁴¹ Jo Feldman, *Human Rights and International Investment Arbitration: A Snapshot*, NORTON ROSE FULBRIGHT (May 2022), <https://www.nortonrosefulbright.com/en/knowledge/publications/11a8c614/human-rights-and-international-investment-arbitration-a-snapshot>.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 21.

¹⁴⁶ *Id.*

jurisdiction to investigate and issue binding judgments.¹⁴⁷ Additionally, as branches of government, rulings from national courts may undermine international independence when they legislate over other countries' governance and customs.¹⁴⁸ In contrast, arbitral tribunals are private actors, mitigating most of the practical and political dangers associated with courts of law.¹⁴⁹

I. International Organizations

The ongoing conflict between Russia and Ukraine constitutes an international armed conflict governed by international humanitarian treaty law.¹⁵⁰ The primary humanitarian treaties that control are the “Geneva Conventions of 1949 and its first additional protocol of 1977 (Protocol I), and the Hague Conventions of 1907 regulating the means and methods of warfare), as well as the rules of customary international humanitarian law.”¹⁵¹ Intentional or reckless violations of international humanitarian law constitute war crimes under these treaties.¹⁵²

While Russia faces widespread condemnation and isolation in international bodies, uniform international response faces an uphill battle.¹⁵³ Although international authorities, including international governmental organizations and tribunals, have condemned Russia's actions, these forums are limited in their ability to enforce penalties.¹⁵⁴ For example, the International Criminal Court (ICC) is a permanent international court mandated to adjudicate suspected genocide, crimes against humanity, and war crimes, but it can only rule on crimes occurring

¹⁴⁷ See generally Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 TEX. L. REV. 279 (2017) <https://scholarship.law.vanderbilt.edu/faculty-publications/36> (stating “international law now includes as ‘law’ many norms, especially human rights norms, that are routinely violated [...] more fundamental transformations of international law through human rights have not fully taken hold and have proven costly to international law as a whole”).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Russia, Ukraine & International Law: On Occupation, Armed Conflict and Human Rights*, HUM. RTS. WATCH (Feb. 23, 2022, 5:25 PM), <https://www.hrw.org/news/2022/02/23/russia-ukraine-international-law-occupation-armed-conflict-and-human-rights>.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ John B. Bellinger III, *How Russia's Invasion of Ukraine Violates International Law*, COUNCIL ON FOREIGN RELS. (Feb. 28, 2022, 2:25PM), <https://www.cfr.org/article/how-russias-invasion-ukraine-violates-international-law>.

¹⁵⁴ *See id.*

EXAMINING INVESTMENT TREATY ARBITRATION
AND INTELLECTUAL PROPERTY RIGHTS IN THE WAKE
OF RUSSIA'S INVASION OF UKRAINE

within countries party to the ICC treaty.¹⁵⁵ Ukraine and Russia are not members of the ICC, and while Ukraine granted the ICC jurisdiction over alleged crimes committed on its territory in November 2013, Russia never complied with or acknowledged the ICC's investigation.¹⁵⁶

The UN Security Council has faced similar issues.¹⁵⁷ In February of 2022, the Security Council voted in favor of a binding resolution which condemned the invasion and required Russia to cease its military actions and withdraw from Ukraine, which Russia, as a permanent member of the Security Council, vetoed.¹⁵⁸ A veto from any of the five permanent members of the Council immediately stops action on the measure.¹⁵⁹

2. United States Courts

While some legal scholars note that the American legal system, in practice, is most receptive to foreign lawsuits,¹⁶⁰ several doctrines and principles prevent U.S. courts from exercising jurisdiction in cases involving Russia's invasion.¹⁶¹ Broadly, the presumption is that a law of the United States has a territorial scope extending only to its sovereign borders (unless Congress has used express language to legislate otherwise).¹⁶² Several American statutes specifically provide a cause of action over foreign acts, but these are limited and usually unenforceable.¹⁶³

¹⁵⁵ HUM. RTS. WATCH, *supra* note 150.

¹⁵⁶ *Id.*

¹⁵⁷ *Russia Blocks Security Council Action on Ukraine*, UNITED NATIONS (Feb. 26, 2022), <https://news.un.org/en/story/2022/02/1112802>.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Christopher A. Whytock, *Transactional Litigation in U.S. Courts: A Theoretical and Empirical Reassessment*, 19 J. EMPIRICAL LEGAL STUD. 4, 5 (2022).

¹⁶¹ Illan Fuchs, *Prosecuting Russia for Human Rights Violations in Ukraine*, AMERICAN MILITARY UNIVERSITY, (May 17, 2022) <https://amuedge.com/prosecuting-russia-for-human-rights-violations-in-ukraine/>.

¹⁶² William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 85–86 (1998).

¹⁶³ *See id.* at 91–97.

The United States has litigated several human rights lawsuits since the early 1980s under the Alien Tort Statute (ATS).¹⁶⁴ This statute grants federal courts jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁶⁵ The ATS was first applied in 1980 to hear claims in the United States Court of Appeals for the Second Circuit for the case of *Filártiga v. Peña-Irala*.¹⁶⁶ This case involved torture in Paraguay by the junta in violation of public international law, including the United Nations Charter, the Universal Declaration of Human Rights, and the American Declaration of the Rights and Duties of Man.¹⁶⁷ Both parties were within the United States when the claim was asserted.¹⁶⁸ Presently, the Supreme Court permits ATS claims for violations of a small set of clearly defined, international human rights norms.¹⁶⁹

Scholars note that any prosecution of Russia for war crimes in the United States would “take considerable time and necessitate the presence of a perpetrator on U.S. soil.”¹⁷⁰ For example, in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 133 (2013), involving Dutch, British, and Nigerian corporations, the United States Supreme Court found they lacked jurisdiction.¹⁷¹ Despite the U.S. international human rights treaty obligations, the Supreme Court held unanimously that the alleged parties were not liable in the United States for aiding and abetting the Nigerian government’s campaign of human rights offenses when such acts were perpetrated outside of the United States.¹⁷² Critics of this decision argued that by requiring offenses to take place on state territory, an important avenue of relief for victims of human rights violations is shut down entirely.¹⁷³

¹⁶⁴ *The Alien Tort Statute: Protecting the Law that Protects Human Rights*, CTR. FOR CONST. RTS. (Apr. 17, 2013), <https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/alien-tort-statute-protecting-law-protects>.

¹⁶⁵ 28 U.S.C. § 1350.

¹⁶⁶ Fuchs, *supra* note 161.

¹⁶⁷ *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

¹⁶⁸ *Id.*

¹⁶⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004).

¹⁷⁰ Fuchs, *supra* note 161.

¹⁷¹ *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108, 133 (2013).

¹⁷² *Id.* at 113.

¹⁷³ Kali Borkoski, *Kiobel v. Royal Dutch Petroleum: What’s at Stake, and for Whom?*, SCOTUSBLOG (Sept. 30, 2012, 9:36 PM), <https://www.scotusblog.com/2012/09/kiobel-v-royal-dutch-petroleum-whats-at-stake-and-for-whom/>.

EXAMINING INVESTMENT TREATY ARBITRATION
AND INTELLECTUAL PROPERTY RIGHTS IN THE WAKE
OF RUSSIA'S INVASION OF UKRAINE

C. *Advantages and Disadvantages of International Arbitration*

Tribunals

As jurisdictional and sovereignty restraints typically prevent many courts of law from litigating many cases of human rights violations, international treaty arbitration presents a desirable solution.¹⁷⁴ International tribunals operate independently from national governments and can arbitrate many conflicts without violating a state's sovereignty.¹⁷⁵ Further, these tribunals provide freedom from practical issues associated with public entities claiming jurisdiction over international corporate torts.¹⁷⁶

International tribunals have practical limitations in terms of the scale of investors considered.¹⁷⁷ Without significant resource backing, the arbitration process rarely grants private citizens the right to assert human rights claims.¹⁷⁸ This may lead to prioritizing corporations and other large investors above private citizens.¹⁷⁹

One critique of the use of BITs to protect foreign investments is the inherent ambiguity and versatility of these agreements and their provisions.¹⁸⁰ Stakeholders and scholars argue that some older investment

¹⁷⁴ Gregory R. Day, *Private Solutions to Global Crises*, 89 ST. JOHN'S L. REV. 1079, 1082–83 (2015).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ Boon, K. E., *Investment Treaty Arbitration: Making a Place for Small Claims*, 19 J. WORLD INV. & TRADE, 667–692 (2018).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Tom Wilson, *International Investment Agreements: Is An Overhaul Necessary?*, FORDHAM J. CORP. & FIN. L. (Mar. 20, 2020), https://news.law.fordham.edu/jcfl/2020/03/20/international-investment-agreements-is-an-overhaul-necessary/#_edn42, see also Tarald Laudal Berge & Wolfgang Alschner, *Reforming Investment Treaties: Does Treaty Design Matter?*, INT'L INST. FOR SUSTAINABLE DEV. (Oct. 17, 2018), <https://www.iisd.org/itn/2018/10/17/reforming-investment-treaties-does-treaty-design-matter-tarald-lauald-berge-wolfgang-alschner/>.

agreements need to be narrower and more specific to indicate a comprehensive and modern trade agreement.¹⁸¹ The United Nations Conference on Trade and Development (UNCTAD) reported in 2017 that 95% of international investment agreements in force as of 2020 were finalized before 2010.¹⁸² This equates to approximately 2,500 agreements at the basis of investor-state dispute claims.¹⁸³ The static nature of these older agreements, and the lack of uniformity in the dispute resolution methods they prescribe, cause legitimacy concerns.¹⁸⁴

Further, some scholars voice concerns regarding whether investor-state treaty arbitration stacks the deck in favor of investors at the expense of host nations.¹⁸⁵ In 2018, the U.N. Conference on Trade and Development (UNCTAD) stated that publicly available arbitration results report that tribunals granted nearly two-thirds of arbitral awards in favor of the investor against the host country.¹⁸⁶ As a result, host nations suffer a financial loss in about two out of three cases, with the average award being \$120 million.¹⁸⁷ In light of these ongoing trends, some nations have withdrawn from their international investment agreements.¹⁸⁸ In 2017, India terminated 58 of its BITs with other countries, while Ecuador withdrew from all of its remaining 16 BITs.¹⁸⁹

V. INVESTOR STANDING IN THE UKRAINE-RUSSIA CONFLICT

Russia currently has 62 BITs signed and enforced with other countries that impose investment protection obligations.¹⁹⁰ These active

¹⁸¹ Berge & Alschner, *supra* note 180.

¹⁸² U.N. CONF. ON TRADE AND DEV., PHASE 2 OF IIA REFORM: MODERNIZING THE EXISTING STOCK OF OLD-GENERATION TREATIES 1 (2017).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Wilson, *supra* note 180.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Nicholas Peacock & Nihal Joseph, *Mixed Messages to Investors as India Quietly Terminates Bilateral Investment Treaties with 58 Countries*, HERBERT SMITH FREEHILLS (Mar. 16, 2017), <https://hsfnotes.com/arbitration/2017/03/16/mixed-messages-to-investors-as-india-quietly-terminates-bilateral-investment-treaties-with-58-countries/>; *Ecuador Denounces Its Remaining 16 BITs and Publishes CAITISA Audit Report*, INV. TREATY NEWS (Jun. 12, 2017), <https://www.iisd.org/itn/2017/06/12/ecuador-denounces-its-remaining-16-bits-and-publishes-caitisa-audit-report/>.

¹⁹⁰ James Maton, Rachel Thorn & Juan Nascimbene, *International Law May Protect Foreign Investors in Russia*, LAW 360 (Jul. 18, 2022),

EXAMINING INVESTMENT TREATY ARBITRATION
AND INTELLECTUAL PROPERTY RIGHTS IN THE WAKE
OF RUSSIA'S INVASION OF UKRAINE

BITs include agreements in force signed by the Union of Soviet Socialist Republics, the Russian Federation between 1992 and 1996, and the Russian Federation since 1997.¹⁹¹

Although textually different, each of Russia's BITs references and codifies the guaranteed standard of treatment for investments.¹⁹² Common standards guaranteed in these agreements are: national treatment, most-favored-nation treatment, fair and equitable treatment and full protection and security, the prohibition of direct and indirect expropriations without compensation, the protection of investor-State contracts, and the free transfer of capital.¹⁹³ Mutual consent underpins investor-state arbitration and most BITs explicitly state the host states' consent to submit to investor-State arbitration if an investment dispute arises.¹⁹⁴ This consent of both parties allows covered investors from one signatory nation to directly initiate arbitration proceedings against the host State, alleging a violation of the governing investment treaty.¹⁹⁵

Russia has effectively suspended recognition of all IP rights for patent holders who are registered in "unfriendly countries," do business in them, or hold their nationality.¹⁹⁶ In addition to general dismissal of IP rights recognition for "unfriendly countries," on March 29, 2021, the Russian government adopted a parallel import policy into law through Decree No. 506.¹⁹⁷ This legislation permits the Ministry of Industry and

<https://www.law360.com/articles/1510814/international-law-may-protect-foreign-investors-in-russia>.

¹⁹¹ *Id.*

¹⁹² See Cody Olson, *Enforcement of International Investment Arbitration Awards Against the Russian Federation*, 22 AM. REV. INT'L ARB. 711 (2011).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Russia Introduces New Legislation to Suspend Protections of Foreign IP-Rights*, BUGGE VALENTIN (Jan. 26, 2024),

<https://www.buggevalentin.com/russia-introduces-new-legislation-to-suspend-protection-of-foreign-ip-rights>.

¹⁹⁷ Perry et al., *supra* note 61. The expressed objective of the Russian law is to avoid supply chain issues and economic bottlenecks arising from economic sanctions. *See id.*

Trade to exempt specific goods, by proposals of the federal executive bodies, from regional exhaustion of IP rights of Articles 1359(6) and 1487 of the Russian Civil Code.¹⁹⁸ On a broad scale, this means that national/regional exhaustion of IP rights will not uniformly protect foreign IP holders.¹⁹⁹

Under the limit of exhaustion of IP rights, after an IP right owner consents to sell an IP-protected product, they exhaust their IP right.²⁰⁰ While IP rights holders can still prevent other companies from making counterfeit goods, the exhaustion doctrine does not prevent consumers from reselling the protected goods.²⁰¹ Generally, on an international scale, the exhaustion principle prescribes that once a trademark owner distributes their goods for sale in a designated territory, the trademark cannot stop the resale of the product in that specified territory.²⁰² The trademark owner exhausted their IP rights through the first sale.²⁰³ The Eurasian Economic Union (EEU) stipulates that member countries, including Russia, fall under the specific “national exhaustion regime” whereby trademark owners exhaust their IP rights by placing their goods for first sale in particular countries or regions.²⁰⁴ The IP rights holder still maintains their rights against countries and regions outside of their directed sales.²⁰⁵

Contrary to the national exhaustion regime, Resolution 506 permits Russia to designate which goods are controlled by an international exhaustion principle.²⁰⁶ The international exhaustion regime is far less protective, such that a trademark owner exhausts its rights in every market once the good is placed for first sale anywhere in the world with the trademark owner’s consent.²⁰⁷ Thus, Russia now imports and resells

¹⁹⁸ Ksenia Andreeva & Valentina Semenikhina, *Update: Russia Legalizes Parallel Import of Certain Goods*, MORGAN LEWIS (Apr. 25, 2022), <https://www.morganlewis.com/pubs/2022/04/update-russia-legalizes-parallel-import-of-certain-goods>.

¹⁹⁹ *Id.*

²⁰⁰ Perry et al., *supra* note 61.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Mary L. Grieco, *Intellectual Property in Russia: Protect Your Rights*, N.Y. L. J., (Sept. 29, 2022, 10:00 AM), <https://www.law.com/newyorklawjournal/2022/09/29/intellectual-property-in-russia/>.

²⁰⁷ Perry et al., *supra* note 61.

EXAMINING INVESTMENT TREATY ARBITRATION
AND INTELLECTUAL PROPERTY RIGHTS IN THE WAKE
OF RUSSIA'S INVASION OF UKRAINE

specified goods from other nations not placed in the Russian market without honoring their IP protections.²⁰⁸

Russia gave further indication of what goods would not have full IP protections on April 19, 2022, when the Ministry of Industry and Trade adopted Order No. 1532, providing a comprehensive list of goods to be covered by Decree No. 506.²⁰⁹ This list consisted of a published 25-page document enumerating a broad range of parallel import goods that may be imported without permission from the owner.²¹⁰ These categories ranged from engineering patents, industrial materials and cosmetics to phones and virtual games.²¹¹ Using an international exhaustion regime, this list identifies a series of goods for parallel import to Russia without recognition of IP rights.²¹²

In addition to IP violations in the form of parallel imports, news outlets report that Russian persons and companies are filing applications for well-known trademarks at the Russian Trademark Office (Rospatent).²¹³ Rospatent received more than 50 trademark applications since mid-March, which appear to conflict with well-known Western

²⁰⁸ *Id.*

²⁰⁹ Andreeva & Semenikhina, *supra* note 198.

²¹⁰ Alisa Pestryakova, *The Complete List of Goods Covered by the New Parallel Imports Regime Approved by the Russian Administration*, LEXOLOGY (May 30, 2022), <https://www.lexology.com/library/detail.aspx?g=8e1c1467-6a32-4c91-9c52-c65c4847dee0>. Parallel imports are branded goods that are imported and sold in a market without the trademark owner's consent to sell in that market. Perry et al., *supra* note 61. These goods were made with the trademark owner's permission for sale in one territory but were then imported into an unauthorized territory for sale. *Id.*

²¹¹ Pestryakova, *supra* note 210.

²¹² *Id.*; see also Sharon Urias, *What to Know about the Importation of Gray Market Goods into the United States*, PHX. BUS. J. (Jan. 21, 2020), <https://www.bizjournals.com/phoenix/news/2020/01/21/what-to-know-about-the-importation-of-gray-market.html>.

²¹³ Popple, Kamps & Krukov, *Russia and Ukraine: Important Developments for Brand Owners*, TAYLORWESSING (May 3, 2022), <https://www.taylorwessing.com/en/insights-and-events/insights/2022/04/bu-russia-and-ukraine-important-developments-for-brand-owners>.

trademarks.²¹⁴ Apple, Coca-Cola, McDonald's, and IKEA are among the companies affected.²¹⁵

A. *International Treaty Coverage of IP Rights*

In order to understand how investment treaties consider Russia's infringement of IP rights, it is useful to start with the World Trade Organization (WTO) Agreement on Trade-Related Aspects of IP Rights (the TRIPS Agreement).²¹⁶ This agreement sets minimum standards of protection for "trademarks, patents, copyrights, industrial designs, trade secrets, geographical indicators, and integrated circuit industrial designs."²¹⁷ The Russian Federation has been a member of WTO since August 22nd, 2012.²¹⁸ As a minimum floor for protection, TRIPS allows members to adopt more stringent levels of protection or eliminate an optional provision.²¹⁹ Members of the WTO must apply the general principles of National Treatment and Most-Favored-Nation (MFN) Treatment dictating that "[e]ach Member shall accord to the nationals of other Members treatment no less favorable than that it accords to its own nationals with regard to the protection of IP."²²⁰

The creation of designated parallel imports violates IP protection and claimants may cite the no less favorable clause present in their respective BIT.²²¹ The no less favorable clause states that the country hosting the foreign investment may not use discretion to purposefully treat other investments more favorably.²²² In effect, this means the host country cannot treat covered foreign investments less favorably than those of its own investors.²²³

²¹⁴ *Id.*

²¹⁵ *Id.* (noting it is not clear how the Russian Trademark Office will handle these applications and any opposition).

²¹⁶ Lahra Liberti, *Intellectual Property Rights in International Investment Agreements: An Overview* 3–39 (OECD Working Papers on International Investment, Working Paper No. 2010/01), <http://dx.doi.org/10.1787/5kmfq1njz135-en>.

²¹⁷ *Id.* at 4.

²¹⁸ World Trade Organization, *Russian Federation and the WTO*, https://www.wto.org/english/thewto_e/countries_e/russia_e.htm (last accessed Feb. 19, 2023).

²¹⁹ Liberti, *supra* note 216, at 4.

²²⁰ *Id.*

²²¹ *Id.* at 8.

²²² *Id.* at 4.

²²³ *Id.*

EXAMINING INVESTMENT TREATY ARBITRATION
AND INTELLECTUAL PROPERTY RIGHTS IN THE WAKE
OF RUSSIA'S INVASION OF UKRAINE

“The most frequent formulation of the MFN clause requires the host state to accord treatment ‘no less favorable’ than that accorded to investors from” another state.²²⁴ Textual differences may change what exactly constitutes “treatment” as covered by the BIT, and an arbitration tribunal may consider the treaty's language and evidenced intent when applying an MFN clause.²²⁵

B. *Current IP Infringement Arbitration Cases*

An example of import IP infringement is Russia's reproduction of a trademarked cartoon character, Peppa Pig.²²⁶ In September 2021, Entertainment One—the owners of Peppa Pig, a popular British cartoon—sued a Russian entrepreneur in a Russian national court alleging duplicated versions of the copywritten character.²²⁷ The National Arbitration Court dismissed Entertainment One's earlier trademark case, stating Britain fell under the “unfriendly” country classification, meaning Russia would not enforce any trademark responsibilities.²²⁸ The judge specifically grounded the holding on Article 10.1 of the Russian Civil Code, prohibiting “(1) the exercise of rights with the aim of causing harm to another (legal) person, (2) circumvention of the law with an unlawful aim, and (3) other abuse of rights.”²²⁹ Since the UK directed sanctions against Russia, the Russian court held Entertainment One's actions in defending its IP rights were an “abuse of rights.”²³⁰ The judge noted that since western countries maintained economic restrictions in the form of sanctions against Russia,

²²⁴ Scott Vesel, *Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties*, 32 YALE J. INT'L L. 125, 144–45 (2007).

²²⁵ *Id.* at 146.

²²⁶ Dani Kass, *Russia OKs Use of Peppa Pig TM As Sanctions Retaliation*, LAW360 (Mar. 11, 2022), <https://www.law360.com/articles/1473286/russia-oks-use-of-peppa-pig-tm-as-sanctions-retaliation>.

²²⁷ Lamiat Sabin, *Russia Rejects Peppa Pig Trademark Infringement Claim to Retaliate Against Sanctions for Ukraine War*, INDEP. (Mar. 14, 2022), <https://www.independent.co.uk/news/world/europe/peppa-pig-russia-trademark-ukraine-b2034842.html>.

²²⁸ *Id.*

²²⁹ Popple et al., *supra* note 213.

²³⁰ *Id.*

their actions were precedential to Russia's decree.²³¹ The dismissal of Entertainment One's suit from a Russian Arbitration court showcases the importance of actions under investor state treaty arbitration taking place in a neutral UNCITRAL or ICSID forum.²³² As noted in prior sections, Russian courts are unlikely to find in favor of foreign investors.²³³

C. *Enforcement of Arbitral Awards Against Russia*

Claimants seeking to file a claim for a harmed investment from invasion must determine what BIT applies.²³⁴ Foreign investors may seek compensation from damaged investments in Ukraine and Russia under the approaches of de facto control of territories in Ukraine or directly through investments in Russia.²³⁵ According to the theory of de facto control, Russia's invasion and occupation of territories in Ukraine may entitle foreign investors with BITs with Ukraine to compensation from Russia as the controlling nation responsible for damaged investments.²³⁶ When a court finds de facto control over an area resulting from armed conflict, the new state holding control inherits the treaty obligations to investors in that domain.²³⁷ This means that the harm to foreign investors stemming from expropriation or unfavorable treatment of their assets in Ukraine, resulting from Russia's conflict, necessitate proper compensation from Russia as the controlling nation.²³⁸

After the Russian invasion of Crimea, Ukrainian investors initiated their claims under the Russia-Ukraine BIT, even though the UN General Assembly still recognizes Crimea as Ukrainian territory.²³⁹ "Article 9 of the Russia-Ukraine BIT grants Ukrainian investors the right to institute arbitral proceedings against Russia for compensation if Russia expropriates any of the investors' investments on Russian territory (and

²³¹ *Id.*

²³² Shtivelman, *supra* note 136.

²³³ *Id.*

²³⁴ *See generally id.*

²³⁵ *Stabil LLC and Others v. Russian Federation*, UNCITRAL, PCA Case No. 2015-35 (concluding that Russia's physical control coupled with legal steps equated to de facto control of Crimea).

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ Peter Tzeng, *Sovereignty over Crimea: A Case for State-to-State Investment Arbitration*, 41 *YALE J. INT'L L.* 459, 461–63 (2016). Secretary of State John Kerry acknowledged in March 2014 that Russia had "complete operational control of the Crimean Peninsula." *Id.*

EXAMINING INVESTMENT TREATY ARBITRATION
AND INTELLECTUAL PROPERTY RIGHTS IN THE WAKE
OF RUSSIA'S INVASION OF UKRAINE

vice versa with respect to the investments of Russian investors on Ukrainian territory).²⁴⁰

Article 9 does not expressly give the investor-state tribunals jurisdiction to determine who has sovereignty over Crimea. Nevertheless, as a general matter, international courts and tribunals may sometimes make a determination of international law as a matter of ancillary jurisdiction, that is, if such a determination is necessary to resolve a dispute over which they have jurisdiction.²⁴¹

Cases related to Russia's invasion of Crimea are still ongoing, but recent court decisions signify a promising trend towards accountability for foreign invasion under the theory of de facto control.²⁴² In 2017, the Permanent Court of Arbitration held for the first time in the case *Aeroport Belbek LLC v. Russian Federation* that bilateral investment treaties protected investments in territory illegally occupied by the respondent state.²⁴³ The facts of this monumental decision related to Russia's expropriation of an airport terminal in Crimea during the 2014 invasion.²⁴⁴ Accepting the theory of de facto control, the court found Russia liable for the damage to Ukrainian investors who lost their investments in the now Russian controlled territory.²⁴⁵ Arbitral awards against Russia in these cases range from millions to over a billion dollars.²⁴⁶ In the case *Oschadbank v. Russian Federation*, involving the alleged seizure of a branch of a bank in Crimea following the annexation of this territory, the Permanent Court of Arbitration awarded the Crimean bank a total sum of damages amounting to \$1.1 billion.²⁴⁷ The arbitrators determined this award by finding a loss of assets amounting to \$600 million, loss of future profits amounting to \$485 million, other "heads of loss," including

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Aeroport Belbek LLC v. Russian Fed'n*, No. 2015-07 (PCA 2015).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ See Honcharenko, *supra* note 104; *Oschadbank v. Russian Fed'n*, No. 2016-14 (PCA 2016).

²⁴⁷ *Oschadbank v. Russian Fed'n*, No. 2016-14 (PCA 2016).

unrecoverable stolen gold and cash-in-transit amounting to \$29 million, and the costs of the proceedings and legal fees.²⁴⁸ This case is now in the process of judicial review by national courts, and the claimants will likely go through the process of seeking award acceptance from Russian assets in a New York Convention state.²⁴⁹

In addition to destruction of investments in Ukraine, Russia's invasion caused disruption to a large number of corporate entities with operations in Russia.²⁵⁰ To mitigate risk and avoid expropriation, many entities have taken preventative measures—such as withdrawing their investments, ceasing operations in affected areas, and halting transportation through the county.²⁵¹ Apart from the singular finding of the Russian tribunal in the case *Entertainment One UK Ltd. v. Kozhevnikov*, the fact that certain investors are party to “unfriendly nations” or chose to curtail operations in Russia does not necessarily bar future recovery from damaged investments in Russia.²⁵²

D. *Enforcement of Arbitration Awards*

In the past, fulfilling an arbitration award required seeking enforcement where the loser held assets.²⁵³ Consequently, foreign entities looking to claim assets had difficulty enforcing their claims in local courts.²⁵⁴ It was common for governments and courts to refuse to honor awards against their own or their allies' property.²⁵⁵ Because the Russian Federation is a successor of the USSR, which ratified the New York Convention in 1960, the Russian Federation continues to be a contracting state under the former USSR BITs.²⁵⁶

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ YALE SCH. OF MGMT., *supra* note 11. Corporations can play an active role in this process and thus the overall effect lends value to the security of investment rights and international law. *Id.* Further similarly situated corporations could pursue mass claims for their joint loss in investment. *Id.*

²⁵¹ *Id.*

²⁵² *Ent. One UK Ltd. v. Kozhevnikov*, No. A28-11930/2021 (Arb. Court of Kirov 2022).

²⁵³ Day, *supra* note 174.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN RUSSIA AND FORMER USSR STATES (Roman Zykov ed., 2021) (citing Peter J. Pettibone, *The Scope of the Public Policy Exception to the Recognition and Enforcement of Foreign Arbitral Awards in Russia*, 25 AM. REV. INT'L ARB. 105 (2014)). While this case presents the issue of enforcement against Russia, Russia has a history of recognizing and enforcing (R&E) awards against foreign countries under the

EXAMINING INVESTMENT TREATY ARBITRATION
AND INTELLECTUAL PROPERTY RIGHTS IN THE WAKE
OF RUSSIA'S INVASION OF UKRAINE

The New York Convention provides a viable remedy for the enforcement of arbitration awards when Russia declines to honor the judgments outright.²⁵⁷ As a multilateral treaty, violating the New York Convention is equivalent to a treaty violation.²⁵⁸ The binding force of the New York Convention dictates that arbitral awards are generally enforceable without disruption.²⁵⁹ Even if Russian courts refuse to enforce the arbitral award, Russia will face burdens in parking its assets in New York Convention states that have agreed to enforce such foreign awards.²⁶⁰ Since the beginning of Russia's invasion, over "\$280 billion in assets of the Russian Central Bank have reportedly been frozen in the territory of seven Member States of the New York Convention (i.e., Austria, Canada, France, Germany, Japan, the United Kingdom, and the United States)."²⁶¹ "Frozen Russian assets may prove to be a point of interest in the future enforcement of arbitral awards, especially if such assets may come to be characterized as commercial in nature or otherwise not subject to

New York Convention as a contracting state. *Id.* One study posits that Russia granted 80% to 97% of all R&E applications. *Id.* Overall, the total value of the claims was over "€8.2 billion, out of which claims for nearly €4.8 billion (58%) were enforced. The most popular objections to enforcement related to violation of public policy (in 42 cases); lack of proper notice (34 cases) and excess of mandate by arbitrators (in 13 cases)." *Id.*

²⁵⁷ George K. Foster, *Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals for Its Reform*, 25 ARIZ. J. INT'L & COMPAR. L. 665, 668–69 (2008).

²⁵⁸ Emmanuel Gaillard & Benjamin Siino, *Enforcement Under the New York Convention*, GLOB. ARB. REV. (June 8, 2021), <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/2nd-edition/article/enforcement-under-the-new-york-convention>.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ Raja Bose, Ian Meredith, Robert L. Houston & Hena Sial, *Between a Rock and a Hard Place: Claims Against Russia in Investment Treaty Arbitration—Part II of II*, K&L GATES (Apr. 20, 2022), <https://www.klgates.com/Between-a-Rock-and-a-Hard-Place-Claims-Against-Russia-in-Investment-Treaty-Arbitration-Part-II-of-II-4-20-2022>.

protection under the applicable domestic law on sovereign immunity in the jurisdiction of enforcement.”²⁶²

A court may decline to enforce an arbitration award if the award deals with a “difference not contemplated by or not falling within the terms of the submission to arbitration,” if the parties’ arbitration agreement did not accord with the award, or if enforcement is contrary to the forum country’s public policy.²⁶³ Enforcement violates public policy when it “would violate the forum state’s most basic notions of morality and justice.”²⁶⁴

VI. CONCLUSION

BITs provide an integral path to recourse for covered investors who faced harm to their IP rights as a result of Russia’s actions in this ongoing conflict.²⁶⁵ Unlike other domestic and international law forums, investor state treaty arbitration provides a practiced form of enforcement whereby investors can have their arbitration awards enforced under the New York Convention.²⁶⁶ This means even in the likely event that Russia does not comply with the proceedings or accept a tribunal’s decision, awards can be honored through Russian assets parked in New York Convention states.²⁶⁷

As events unfold in the Russian-Ukrainian conflict and Investment Treaty Arbitration dimensions, the characteristics of potential BIT claims will change.²⁶⁸ Further, the results of future arbitration awards will depend on the ongoing outcomes of the invasion and the enforcement of previous arbitration awards against Russia for the annexation of Crimea.²⁶⁹ Given the uncertainty of outcomes and international law, investor state treaty arbitration provides a tested and valuable channel to disincentivize future invasion.

²⁶² *Id.*

²⁶³ *Tatneft v. Ukraine*, 21 F.4th 829, 835 (D.C. Cir. 2021) (citing New York Convention art. V(1)(c), June 10, 1958, 21 U.S.T. 2517).

²⁶⁴ *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974).

²⁶⁵ *See supra* Part II.A.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *See* Tobias Ackermann & Sebastian Wuschka, *The Applicability of Investment Treaties in the Context of Russia’s Aggression Against Ukraine*, INT’L CTR. FOR SETTLEMENT INV. DISPS. (July 5, 2023), <https://icsid.worldbank.org/news-and-events/speeches-articles/applicability-investment-treaties-context-russias-aggression>.

²⁶⁹ *Id.*