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Summary of Young-OGEMID Hot Topic Discussion No. 1: "Investment Issues and Economic Sanctions Following Russian Aggression in Ukraine (March 2022)" by A. Singhal

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Summary of Young-OGEMID Hot Topic Discussion No. 1: "Investment Issues and Economic Sanctions Following Russian Aggression in Ukraine (March 2022)"

Topic: *Investment Issues and Economic Sanctions Following Russian Aggression in the Ukraine*

Discussants: Markus Wagner and J Benton Heath

Moderator: Dr. SI Strong

Hot Topic Reporter: Ayushi Singhal[1]

Introduction

Young-OGEMID (YO) is proud to launch a new series for its members: the Hot Topic Discussions. As part of this series, YO will invite experts to participate in a virtual (online) discussion/ rapid-response presentation on 'hot topics' of interest in international arbitration. The first such discussion took place from 15 March to 21 March 2022 and featured expert panelists Markus Wagner ("**Markus**") and J Benton Heath ("**Ben**").

Ben is an assistant professor of law at Temple University in Philadelphia, where his teaching and research interests include international law, global security, investment law, trade, arbitration, civil procedure, and administrative law. He previously worked on issues relating to international economic law for the U.S. Department of State and at the law firm Curtis, Mallet-Prevost, Colt & Mosle in New York. His forthcoming piece*, Making Sense of Security*, will appear in the American Journal of International Law next month.

Markus is Associate Professor at the University of Wollongong and the Director of the UOW Transnational Law and Policy Centre (TLPC). He teaches and researches in the areas of international law, international trade and investment, peace and security, dispute resolution and constitutional law. He is the Executive Vice-President of the Society of International Economic Law (SIEL) and has advised governments and international organizations on matters of international economic law and international security.

The topic for discussion was the financial and economic ramifications of Russia's aggression against Ukraine in February 2022. Amongst other issues, the panelists spoke about the current measures as a matter of international law and the likelihood of investment arbitration arising as a result of various measures.

[1] Ayushi Singhal is a disputes lawyer qualified to practice in India. She focuses on international commercial arbitration and mediation, and has represented parties in both ad-hoc and institutional arbitrations across major arbitral seats.

Pre-discussion

Dr. SI Strong introduced the inaugural hot topic event on "*Investment Issues and Economic Sanctions Following Russian Aggression in the Ukraine*".

The topic turned out to be of immediate interest to the YO community, and even before the official opening of the discussion by the panelists, members chimed in with their views.

Mark Kantor noted:

[T]he possible role of arbitration in addressing the economic consequences of the Russian invasion of Ukraine will extend far beyond international investment law.

As one perhaps exotic example, credit default swaps (CDS) covering Russian international bonds may, under the ISDA (International Swaps and Derivatives Association) standard form Master Agreement, provide for submissions to international arbitration rather than submissions to the English or New York courts.

There is no way of knowing at this stage how many of those CDS provide for arbitration. But my morning Wall Street Journal newsletter timely reminds us that CDS exposure to Russian foreign sovereign debt is quite large, apparently $40 billion[2]:

> *International sanctions are raising the possibility that Russia's government, for the first time since the Bolsheviks disavowed the Czar's debts in 1917, will default on a foreign bond. That presents another major test for the credit default swap, an insurance-like derivative that played a starring role in the 2008 financial crisis. Amid Russia's financial turmoil, some warn that C.D.S. contracts could amplify losses and disrupt markets.*
>
> *A quick primer on the C.D.S. market: Credit default swaps are like insurance but for bonds. Unlike typical insurance, there are no underwriters, and prices are set by buyers and sellers. Buyers get protection for their bonds, and sellers get money upfront but are on the hook to pay if there is default. What's more, in most C.D.S. markets the buyers don't have to own the bonds to buy the insurance. Supporters say the swaps lower borrowing costs and hedge risks, but critics say they have created a market of side bets, multiplying losses in times of distress.*
>
> *How much does Russia owe? International investors hold roughly $20 billion in Russian government bonds. As of mid-February, the latest available data from the clearing house D.T.C.C., there was $40 billion in swaps tied to Russian debt.*

Under ISDA procedures, a Credit Event Determinations Committee (DC) makes decisions on several crucial issues that are binding under the Master Agreement and public on ISDA's website, including the existence of a "Credit Event" for particular obligations[3]:

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[2] https://www.nytimes.com/2022/03/11/business/dealbook/wall-street-russia-goldman-jpmorgan.html.

[3] https://www.isda.org/a/CHDDE/agm-2012-dc-anniversary-appendix-043012.pdf&ved=2ahUKEwirl_iOkr72AhU0j3IEHZbpDqYQFnoECAsQAQ&usg=AOvVaw2KROqlKwVRMvld8zt7VcvO.

The role of the DC is to compare the facts of specific events, based on publicly available information, with the provisions of standard CDS contracts (including the Credit Derivatives Definitions) to make determinations regarding key provisions of such contracts, including:

(a) whether a Credit Event (an event that would trigger the settlement of the CDS and allow the protection buyer to obtain payment for the credit protection purchased) has occurred;

(b) whether an auction should be held to determine the final price for CDS settlement; and

(c) which obligations should be delivered or valued in the auction.

Damien Charlotin added:

[I]t is notable that, in many respects, the existing CDS legal framework is not exactly designed to cover this type of situations; Bloomberg reported on the difficulties in assessing whether Russia is defaulting if, as appears to be an option, it decides to reimburse some bonds in rubles.[4] And then there is the fact that the mechanism of CDS is based on an auction to assess residual value, a mechanism that could break off when nobody is ready (or legally allowed, because sanctions) to bid in the auction (as is well explained in Matt Levine's Money Stuff newsletter[5]).

In other words, this shows that wars and such events are sometimes not exactly well-covered by the existing legal/financial framework (see also the impact of recent events on commodities such as nickel[6]), and should make the resulting dispute-settlement all the more interesting.

I look forward to reading the expert panelists' views! In particular, in view of Ukraine's (reported) decision to seize all Russian assets[7], and Russia's (reported) intention to nationalise assets of foreign entities that left the country[8].

Mark Kantor probed further:

[T]he EU, the US, the UK and others are today announcing their intent to withdraw "most favored nation" treatment from Russian goods and services. Would anyone care to share their views on how these actions would fit within the WTO and bilateral trade and investment agreements?

Dr. Petra Butler in response pointed to the discussion on the IELP Blog[9].

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[4] https://www.bloomberg.com/news/articles/2022-03-05/putin-seeks-to-avert-defaults-with-ruble-payments-to-creditors

[5] https://www.bloomberg.com/opinion/authors/ARbTQlRLRjE/matthew-s-levine.

[6] https://www.benchmarkminerals.com/membership/historic-nickel-rally-shuts-down-lme-and-places-tsingshan-in-the-spotlight/.

[7] https://interfax.com.ua/news/general/810896.html.

[8] https://www.reuters.com/business/russia-proposes-nationalising-foreign-owned-factories-that-shut-operations-2022-03-08/.

[9] https://worldtradelaw.typepad.com/.

Official Opening Remarks by Ben and Markus

Introduction

The military invasion of Ukraine by Russia that started in February 2022 is a humanitarian tragedy. We have seen countless people lose their lives, both civilian and military; the lives of millions of people uprooted, as evidenced by the large and growing number of refugees[10] that the military action has already caused; and infrastructure and property being destroyed.

The war will have serious consequences: the military outcome is yet to transpire, but it is safe to say that there will be tectonic shifts in the global political, economic, and security landscape with unforeseeable ramifications.

We want to briefly outline some of the most salient legal issues in the international economic law space as we currently see them. We intended our analysis to be dispassionate, leaving emotions that situations like this engender aside to the extent possible. What we want to do at this early stage of developments is to use this forum to identify issues of relevance to the Young OGEMID community in international investment law and arbitration.

Use of Force

There does not appear to be a legal justification for the military action Russia undertook against Ukraine.[11] None of the possible exceptions one could bring to bear for what to us is a violation of the prohibition on the use of force under Article 2(4) United Nations Charter is germane: self-defense, collective self-defense, or the controversial doctrine of humanitarian intervention.

How Will Economic Actors React to the War?

Many aspects of the conflict are likely to impact foreign investment and international commerce and may trigger disputes. The war itself is likely to impact ongoing arbitral proceedings[12] and frustrate compliance with treaty obligations. Sanctions and restrictions on doing business with Russia and Russian nationals have already disrupted investment and commercial relationships[13], and are likely to continue to do so. The decisions of individual firms to divest from Russia[14] likely will raise many questions of contract law, and Russia's corresponding threat to seize or nationalize those businesses[15] raises questions of legality and compensation. Finally, firms that choose to continue doing business with Russia during this period will continue to face a shifting landscape of legal requirements and practical hurdles, in addition to the public backlash that has already occurred.

[10] https://data2.unhcr.org/en/situations/ukraine.
[11] *See*, https://www.lawfareblog.com/international-law-and-russian-invasion-ukraine; https://www.ejiltalk.org/what-is-russias-legal-justification-for-using-force-against-ukraine/.
[12] https://investmentpolicy.unctad.org/investment-dispute-settlement/country/219/ukraine/respondent.
[13] https://www.npr.org/2022/03/02/1083694848/sanctions-russia-ukraine-economy-war.
[14] *See*, https://www.nytimes.com/article/russia-invasion-companies.html; https://www.wsj.com/articles/companies-divesting-from-russia-are-facing-big-write-downs-11646303400.
[15] https://www.nytimes.com/2022/03/10/world/europe/russia-economy-ukraine.html.

International Investment Law: MFN, NT and FPS

Investment treaties also often require that states afford national and most-favored-nation treatment to covered investors when affording reparation for losses owing to war or armed conflict. And a common provision in investment treaties requires that states afford "full protection and security" (FPS) to investments. This requirement has been interpreted to require that states exercise diligence to protect the physical security of investments even in times of conflict or civil disturbance.[16]

Treaty-Based Security Exceptions

Many investment treaties include provisions that anticipate war or armed conflict. A large proportion of investment treaties include security exceptions, which generally permit states to take any measures necessary to protect public order or "essential security interests." Such provisions vary in scope and standard of review[17], but as a general matter they are available to be invoked both by parties to the conflict and by third parties who credibly believe their security interests are threatened.

General International Law

Investment treaties also are not isolated from the general international law rules that apply in the event of conflict. Treaty law contemplates that an unanticipated fundamental change in circumstances[18] can, under limited circumstances, justify a withdrawal from or termination of a treaty. Principles of customary international law[19]—such as self-defense, duress, force majeure, or necessity—may justify departures from treaty norms.

Concluding Thoughts

There is so much more to discuss that we have not yet mentioned: the impact of this conflict on arbitral procedures; the legal framework for sanctions and trade controls; the implications of disputes currently unfolding at the World Trade Organization; and the effect of this conflict on contract relations and commercial arbitrations. We have chosen to focus our initial post on the substantive investment law aspects of this conflict, but we recognize that all of these issues are closely related.

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[16] http://arbitrationblog.kluwerarbitration.com/2019/10/27/same-concept-different-interpretation-the-full-protection-and-security-standard-in-practice/.

[17] https://www.yalelawjournal.org/pdf/HeathArticle_jx8mdn4b.pdf.

[18] https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/renaissance-of-the-doctrine-of-rebus-sic-stantibus/9122A30ADD637E495DCEBF99AEAB1F33.

[19] https://academic.oup.com/icsidreview/article-abstract/31/2/484/2198161.

Questions

Dr. Eva Litina - How will economic actors react to the war

As the conflict will have far-reaching implications for the energy sector, do you expect an increase of energy disputes in particular?

And as we have witnessed Big Law firms leaving Russia or quitting Russian-related work, who will take over the related work? How do you expect this development to affect ongoing or future arbitration proceedings?

Ben:

It's hard to predict the future, but I think it's reasonable to expect that you could see further disputes, both in the energy sector and beyond, as a result of the war, sanctions, and efforts to sever ties with Russia. The recent suspension of the Nordstream 2 project in Germany[20] has once again raised questions about whether the Gazprom-owned Swiss-based company, Nordstream AG, would bring investor-state dispute settlement proceedings under the Energy Charter Treaty[21].

On your second question, see this[22] (*refer footnote*) recent article in the ABA Journal on the various implications of sanctions, as well as this[23] piece (*refer footnote*) from Reuters on relevant ethics rules. There are a number of issues to keep in mind. One is the scope of US and allies' sanctions, and whether these sanctions actually prohibit the representation. Another is the availability of general or specific "licenses," which essentially allow some economic activity to take place notwithstanding the sanctions. A third is the possibility of retaliatory action by the Russian government, which could place firms in a difficult position. Finally, if firms are seeking actively to withdraw from representation of a Russian entity, ethics rules might come into play, and in some instances court approval may be required.

All this is to say that the answer to your question is complicated. Some firms might be able to continue affording representation, although perhaps on a more limited basis. There are firms that specialize in representing sanctioned entities and are experienced with navigating that legal landscape. But as to who will take the place of firms that seek to leave Russia, I think we will have to wait and see.

Victoria Barausova – default on sovereign bonds and jurisdictional issues

You have mentioned substantive standards of investment protection that may be triggered by the current events. I wanted to also mention a recent development that may raise interesting jurisdictional questions. FT reports that Russia has USD 38.5 bn of foreign-currency bonds of which half is owned by overseas investors. USD 117 mn in interest payments are due on two of its bonds tomorrow.[24] This will be followed by a 30-

[20] https://crsreports.congress.gov/product/pdf/IF/IF11138.
[21] https://www.climatechangenews.com/2022/02/24/the-energy-charter-treaty-delayed-nord-stream-2-halt/.
[22] https://www.abajournal.com/web/article/law-firms-scramble-to-keep-pace-with-unprecedented-russian-sanctions.
[23] https://www.reuters.com/legal/transactional/some-law-firms-dropping-russian-clients-us-courts-have-final-say-2022-03-15/.
[24] https://www.ft.com/content/9ed033f2-eaa4-4cce-974d-78592a3075af.

day grace period to pay up. In light of the fact that Russia's foreign exchange reserves have been frozen, the default is almost inevitable.

In such case, ISDS would become one of the potential avenues for dispute resolution. Claims based on default on sovereign bonds are likely to raise interesting jurisdictional issues. In this respect there are two decisions that came to my mind.

In the Decision on Jurisdiction and Admissibility in *Abaclat and Others v. Argentine Republic*, ICSID Case No. ARB/07/5[25], the majority held that mass claims were compatible with the ICSID framework and that bonds constituted an investment under the ICSID Convention. Of interest is also the dissenting opinion of Georges Abi-Saab who argued that sovereign bonds do not fall into the definition of investment.[26] He warned that the wide definition of investment adopted by the majority has the potential of expanding the jurisdiction of investment tribunals into a vast new field.

Another decision of interest is the Award in *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/09/2)[27] where the majority agreed that an oil price hedging agreement could be considered an investment eligible for protection under the broadly worded Germany-Sri Lanka BIT. Makhdoom Ali Khan dissented, emphasising the role of the "contribution to economic development" as a criterion for definition of investment.[28] Notably, the BIT in this case adopted a particularly broad definition of "investment". It included "every kind of asset" and mentioned "c) claims to money which have been used to create an economic value or claims to any performance having an economic value and associated with an investment" as one of the demonstrative categories (Award, para. 284).

Although Russia has signed but never ratified the ICSID Convention[29], it is possible that the reasoning of the majority in these two cases can be applied to other instruments by analogy. It remains to be seen whether ISDS is indeed the course of action that the investors would consider, but should this happen, the debate will likely be revived.

I would be keen to hear your thoughts on this.

Ben:

Sovereign debt does indeed present a range of difficult issues concerning the jurisdiction of tribunals and the possibility of entertaining mass claims. One response is to note that ICSID is not necessarily the only available forum for an investor-state dispute. The cases you mention did indeed concern ICSID's jurisdiction and raised the specialized question of whether sovereign debt is an "investment" within the meaning of Article 25 of the ICSID Convention. But this is not the only possible question.

To give rise to an investment treaty dispute, a debt instrument must also constitute an "investment" as that term is used in the relevant treaty. This question is conceptually distinct from whether the instrument is an investment for the specific purposes of ICSID. At least one

[25] http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C95/DS10925_En.pdf.
[26] http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C95/DC5313_En.pdf.
[27] https://www.italaw.com/sites/default/files/case-documents/italaw1272.pdf.
[28] https://www.italaw.com/sites/default/files/case-documents/italaw1273.pdf.
[29] https://icsid.worldbank.org/about/member-states/database-of-member-states.

of your cases, *Deutsche Bank*, deals with this issue as well and may be worth looking at. In addition, you might want to take a look at this[30] (*refer footnote*) excellent piece in the American Journal of International Law by Stratos Pahis on the difficulties of treating sovereign debt under a BIT.

Naimeh Masumy– the protection of foreign investments in times of armed conflict

I. The Applicable Legal framework for the Protection of Foreign Investment in Times of Armed Conflict

Both Ukraine and Russia are party to numerous important multilateral and bilateral investment treaties, notably the Energy Charter Treaty[31]; and thus, the current armed conflict is likely to lead to multiple disputes with foreign investors.

Exploring how foreign investments may be protected in times of armed conflicts gives rise to numerous questions, most importantly: what legal framework(s) govern(s) the application of investment treaties and their standards of protection in situations of armed conflict?

A great deal of uncertainty surrounds the legal regimes that govern the dispossession and destruction of foreign investments, and the obligation to protect foreign investment (precautionary obligation) from the effects of armed conflict.

To date, the extent to which the interests of foreign investors are protected in times of armed conflict has been shaped by the interaction of international investment law with international humanitarian law (IHL).

Historically, the relationship between the investment law regime and IHL norms gave rise to a 'norm conflict'[32], where the application of both IHL and investment law norms led to two different results, as they may regulate the same conduct, albeit with different objectives and standards of review.

I.I The Seemingly Incompatible Nature of International Investment Law and International Humanitarian Law Norms

Scholars such as Vranes[33] and Kelsen[34] maintain that fundamental incompatibilities in the text, object, and purpose of these two legal regimes will lead to normative tension: what one norm prohibits or restricts; a different norm permits.

A cogent example in this regard is when investment tribunals are typically required to award claimants the Fair Market Value (FMV) of their investment in the case of dispossession of investment. However, dispossession of investment might be construed as

[30] https://www.cambridge.org/core/journals/american-journal-of-international-law/article/bits-bonds-the-international-law-and-economics-of-sovereign-debt/165C41E267DE4568FF39BF6804B01889.
[31] https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/signatories-contracting-parties/.
[32] https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780191001604.001.0001/acprof-9780191001604-chapter-4.
[33] https://academic.oup.com/ejil/article/17/2/395/2756254.
[34] https://hal.archives-ouvertes.fr/hal-03156125/document.

a lawful act during armed conflict, when determined based on the IHL standard of review.[35]

Further, IHL is designed to regulate and limit hostilities[36] by placing restrictions on the use of lethal measures, while permitting (but not obliging or mandating) States to take certain lethal actions against persons or properties. These norms are anchored in core humanitarian notions, safeguarding the fundamental rights of individuals from which no derogation is permitted.

In contrast, international investment law mostly serves to afford protections to foreign direct investment and foreign investors. The presumption of the continuity of treaties during armed conflicts has been confirmed by the efforts of the International Law Commission of the United Nations, in which the Special Rapporteur, Ian Brownlie, opined that the rights and obligations of States under investment treaties remain applicable despite the existence of armed conflict[37], confirming that the outbreak of hostilities, does not, ipso facto, abrogate the operation of investment treaties.

The varying nature and functions of these normative systems, when applied simultaneously, begs the question: Can these divergent norms be reasonably reconciled, particularly in the investment treaty arbitration context? The more important question is: do investment tribunals have the tools to resolve such conflicts?

II. The potential challenges of Investment Tribunals to clarify the Interaction between Investment Law and IHL Norms

Considering the specific and limited jurisdiction of investment tribunals, the extent to which defenses based on IHL can be invoked by either States or investment tribunals as part of the applicable law gives rise to complex and rather controversial questions, which are beyond the scope of this note. Nevertheless, it is worth noting that when investment tribunals face IHL-based arguments, three potential (and conceivable) scenarios may arise:

1. **The first scenario: an investment tribunal is presented with a dispute concerning the breach of obligations under peremptory norms, or obligations which protect essential humanitarian values. As cited by the International Court of Justice in the *Genocide Case*[38], under this scenario, investment tribunals lack jurisdiction to adjudicate such cases.**
2. **The second scenario: a dispute arises under an investment treaty. The applicable treaty confers a wide adjudicative powers to investment tribunals, over a broad range of dispute ranging from the alleged breach of substantive standards, and interpretation and application of the treaty, to investment authorization more generally. Additionally, if the relevant investment treaty contains a choice of law clause expressly stipulating that public international law will apply, such as the rule on attribution, state responsibility, and IHL**

[35] https://www.corteidh.or.cr/tablas/R23029.pdf.
[36] https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf.
[37] https://www.cambridge.org/core/books/investment-law-within-international-law/international-investment-and-armed-conflict/FF34BCCF8EBE53614C9BDA74CBAA5507.
[38] https://www.icj-cij.org/en/case/91/judgments.

norms, thus IHL norms will form part of the applicable law[39] and might be invoked by States as a defense in arbitration.

3. **The third – and most controversial – scenario: a dispute arises under an investment treaty that does not include a choice of law clause. In the absence of a specific mention or incorporation of IHL in a treaty, the determination of the law applicable to the arbitration rules usually rests on the arbitral rules of the institutions. In this instance, questions arise as to: 1) whether the tribunal itself can raise IHL-based arguments to support a decision with respect to the investment claim through the use of VCLT article 31 (1) (4), or the evolutionary interpretation[40] of investment treaty terms; 2) to what extent and by who and whom IHL-considerations can be invoked as a ground to exempt, justify, or carve-out investment arbitration during armed conflict.**

I look forward to hearing your thoughts.

Markus:

1. The overlap between different regimes is thorny indeed and one that is increasingly of concern in practice. Fragmentation was initially more an issue of academic interest but eventuated in the real world. As you rightly point out, the question of the interaction between human rights and IHL is one of perennial interest (though appears unfortunately unresolved, at least in the eyes of some).
2. Closer to the discussion here, the interaction between international economic law regimes and other areas has been the subject of intense debate for a couple of decades. The discussion on how the then-newly created WTO dispute settlement system was to deal with conflicting norms and find a way to reconcile them sparked considerable debate (see only the panel decision in EC – Biotech[41] and the debate that followed[42]).
3. Moving to our topic under discussion, you rightly raise the question of whether conflicting demands under IHL and IIL can be reconciled. I would shy away from positing a blanket rule here as much will depend on the facts of a case (including whether the facts can be established). But I would draw your attention to Articles 46 and 53 of the Hague Regulations which permit the seizure of private property under certain circumstances, but not the transfer of ownership.
4. As to the question of whether IIL tribunals are well-equipped to deal with such questions (and here I only want to comment on your third point), I am generally hesitant but would also say that we may not have much of a choice. Investors will make use of the ISDS system and the system - such as it is - will somehow cope. There are some tribunals with some will agree and some with others will disagree. I don't know that amicus curiae briefs will play much of a role, as investors will likely bring arguments that favor them and respondent states will do likewise.

[39] https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2601234_code1160356.pdf?abstractid=1611207.

[40] https://www.bloomsburycollections.com/book/evolutionary-interpretation-and-international-law/ch23-evolutionary-interpretation-in-investment-arbitration-about-a-judicial-taboo.

[41] https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm.

[42] https://www.cambridge.org/core/books/conflict-of-norms-in-public-international-law/D2AB790E1082AF2F3E5C4A1174D4A19B.

Ben:

I generally agree with Markus's points. For those who are following along the discussion and would like to know more, you could follow three more threads that emerge from this discussion.

1. In case you missed it, late Sir Ian Brownlie was the special rapporteur of the ILC's Draft Articles on the Effects of Armed Conflict on Treaties. The ILC's work on that topic was completed in 2011 and is worth perusing in these times.[43]
2. Second, it is worth dusting off the first BIT case, *AAPL v. Sri Lanka*, which concerned damage to an investment as the result of military force in the context of an armed insurgency. The state and the dissenting arbitrator had argued that the provision requiring non-discrimination in compensation as the result of war damage was the only provision that applied in the scenario faced by Sri Lanka. If that argument had been accepted, it would have created a kind of accommodation between investment law and IHL, as investment law would have a limited (but still real) role to play in armed conflict. The majority's opinion, instead, finds that the government, under the BIT, should have taken appropriate precautionary measures to protect the property of an investor in this period of insurgency, and that this "due diligence" standard was breached by the military operation in question. The majority derived the due diligence obligation from the terms of the BIT itself, and not (if I recall correctly) from human rights or IHL requirements, nor did it determine whether IHL would have applied to the state's actions. This leads to the "overlap" that the YO member and Markus both describe, and which we continue to live with. A useful discussion of *AAPL* and similar cases is James Thuo Gathii, *War's Legacy in International Investment Law*[44].
3. Third, and only by way of analogy, folks might be interested in how states are currently raising issues of *jus ad bellum* and aggression in the WTO. This is another example of the overlap that the YO member and Markus discuss, but in a different forum and with different implications. Mona Pinchis-Paulsen has a post at Opinio Juris where she describes how this practice seems to differ from the earlier disputes relating to Russia's invasion of the Crimea, where WTO fora were careful to avoid reaching conclusions about jus ad bellum or jus in bello.[45]

"Hot Topic" Follow-up Post by Ben and Markus: Investment Issues and Economic Sanctions Following Russian Aggression in Ukraine

Following on from our initial post a few days ago which focused on some of the substantive issues that the Ukraine conflict will inevitably bring forth, we now want to turn to procedural questions and adjacent topics.

International Investment Law Procedure

We first want to address the effect of this conflict on the proceedings in ongoing or future ISDS disputes. According to the UNCTAD database, there are currently at least nine pending investment disputes against Russia[46], six of which involve Ukrainian investors. There are at

[43] https://legal.un.org/ilc/guide/1_10.shtml.
[44] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1356860.
[45] https://opiniojuris.org/2022/03/10/characterizing-war-in-a-trade-context/.
[46] https://investmentpolicy.unctad.org/investment-dispute-settlement/country/175/russian-federation/respondent.

least eight such disputes pending against Ukraine[47], three of which involve Russian investors. Potential cases will not be limited to investors from either country. In a globalized economy we should expect that the effects of this conflict ripple outward to cases in which neither the investor's home state or the respondent state is a party to the conflict.

We expect that these effects will raise a host of procedural issues. These include requests for continuance and stays of proceedings, questions about the admissibility of "leaked" or highly contested evidence, requests for the production of confidential or classified documents, and questions about who bears the responsibility for a state's inability to produce documents, witnesses, and other evidence.

Effects of Sanctions on Legal Representation

As we have already discussed in this symposium, the imposition of sanctions and the broader outcry over Russia's actions has led some firms to withdraw from Russia or limit their representation of Russian clients. This could affect the ability of Russian entities or the Russian government to obtain representation in international arbitral proceedings. Similar actions might be taken with respect to Belarus.

Lawyers and law firms that continue to work with parties involved in this conflict will want to closely scrutinize[48] the relevant sanctions law and be sure to comply with relevant rules and procedures.

Not all decisions to withdraw will be based solely on legal or economic questions, however. In addition to the legal and financial risks law firms or other service providers face, many will also be concerned with the reputational repercussions they face if they continue to operate on behalf of the Russian public or private entities or individuals.

Earlier this month, Alain Pellet published a widely read piece[49] concerning his decision to withdraw as Russia's counsel in ongoing cases connected to Russia's takeover of the Crimea. Pellet distinguished the present invasion from the incursion in the Crimea, saying "enough is enough." His letter has already generated a great deal of discussion on the role of external counsel in matters of extreme international import.

Enforcement of Arbitral Awards

The conflict may have future effects on the potential of enforcing arbitral awards, both against Russia and against third countries. As to the former, sanctions can in some cases prevent or delay execution on "blocked" assets[50], potentially frustrating enforcement efforts.

But there may be broader effects ahead. The system of international arbitral enforcement is premised on the fact that most states and state-owned enterprises have assets abroad, which may be subject to execution if an award is not paid voluntarily. Thus, the arbitration system

[47] https://investmentpolicy.unctad.org/investment-dispute-settlement/country/219/ukraine/respondent.
[48] https://globalinvestigationsreview.com/guide/the-guide-sanctions/first-edition/article/key-sanctions-issues-in-civil-litigation-and-arbitration.
[49] https://www.ejiltalk.org/open-letter-to-my-russian-friends-ukraine-is-not-crimea/.
[50] https://scholar.google.com/scholar?scidkt=6885216369793064927&as_sdt=2&hl=en.

may be impacted if the unprecedented level of Western sanctions ultimately furthers a "corrosion of globalization," as some have suggested[51].

Jurisdictional Questions

Our discussion has already raised some jurisdictional questions, and here we want to add just one more. Investment treaties, as a general matter, do not expressly contemplate who is responsible for harm to investment in territories under belligerent occupation, raising questions about whether Russia or Ukraine (or either) is responsible in these areas. This has already been the subject of several arbitral proceedings relating to investments in the Crimea[52], and we could anticipate seeing similar issues in newly occupied Ukrainian territory.

Mark Kantor and Dr. SI Strong – Claims arising out of Russia's seizure of leased aircraft

Mark Kantor:

The prospect of Russia taking control of about 500 leased aircraft[53] raises an additional question about the interplay between the rights of the aircraft lessor in ISDS and the rights in ISDS of insurers as subrogees under war risks or confiscation, expropriation, nationalization or deprivation (CEND) coverage for an estimated $12-15 billion in aircraft assets.[54]

Dr. SI Strong:

Russia's seizure of aircraft seems to bring us more into alignment with the type of situation the Iran-US Claims Tribunal is/was seeking to address. What are your thoughts about a claims tribunal as a way forward?

Markus:

1. Aircraft leasing: in the current circumstances, the lessor/owner is in a difficult situation. Flying the aircraft out is not a viable option nor is receiving payments (due to sanctions) should they somehow be able to sell the plane to a Russian buyer. The manufacturers have stopped supplying parts so there will be a shrinking number of planes that will be airworthy leading to cannibalization (I vividly remember seeing Soviet era planes at Sheremetyevo airport that underwent that fate in the early 2000s en route for various projects in Central Asia). Much of these issues are coming to light already as the FT article cited by Mark suggests[55] - despite the fog of war still being thick. ISDS may well be one avenue that some investors will take although I wonder (as we hinted at in our initial post) if and how quickly investors will be able to move.
2. A Russia / Many Claims Tribunal: I think the idea of creating a separate tribunal is one possibility. Others with a better knowledge of the events that led to the conclusion of the Algiers Accords may have a different opinion, but I am sceptical

[51] https://www.foreignaffairs.com/articles/world/2022-03-17/end-globalization.
[52] https://www.jonesday.com/en/insights/2014/04/crisis-in-crimea-is-your-foreign-investment-there-protected-by-a-treaty.
[53] https://www.amp.cnn.com/cnn/2022/03/16/business/russia-aircraft-seizure/index.html.
[54] See, https://www.ft.com/content/44ec694b-7c03-41e1-8489-9babfb643d7a.
[55] https://www.ft.com/content/44ec694b-7c03-41e1-8489-9babfb643d7a.

that we will see something akin to the Iran US Claims Tribunal. The historical circumstances, the power differentials, the larger number of potential nationalities involved as claimants and other issues strike me as making it difficult to reach agreement on such an institution. I think it more likely that we will see a more haphazard approach in which there may be some countries that may be able to strike an agreement with Russia while others won't want to go down that route or are being pressured not to do so.

Ben:

As someone who has some (limited) experience with the Iran-US Claims Tribunal, I tend to agree with Markus's preliminary conclusion that the possibility of standing up such a tribunal as part of an end to this conflict today seems remote. This may change as circumstances change on the ground and in international fora.

Daniel Pakpahan – Duty of non-aggravation and international investment and trade law; customary defences and jurisdiction

I'd like to draw your attention to the Order handed down by the International Court of Justice[56], where the third provisional measure (adopted unanimously by the Court) obliges Ukraine and Russia to refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve. Do you envisage a situation where the duty of non-aggravation spills over to international investment and trade law, restricting Russia and Ukraine from conducting certain trade or investment related activities or sanctions beyond the context of *jus ad bellum*?

With regard to questions of Jurisdiction, we have seen several coverage of Russia's expropriation threat[57] against foreign companies in its territory to prevent them from leaving, and the expropriation of Russian property in Ukraine[58] (which could trigger responsibility for harm to investment in territories under belligerent occupation). It appears to me that, in the event of a treaty dispute, justification of both States would not easily come from treaty-based defences (except for security exceptions clause[59] that models Art. XXI GATT, which was not incorporated in the Russia-Ukraine BIT[60]). Rather, customary defences of countermeasures[61] (for Ukraine) or state of necessity (for Russia) remain open to preclude wrongfulness.

Would invocation of customary defences successfully force a tribunal to stretch its jurisdiction and adjudicate questions of general international law (e.g., legality of the use of force justifying countermeasures)? Perhaps you could also weigh in on the feasibility of these defences, as both are notoriously hard to prove. There has been conflicting

[56] https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf.
[57] https://www.bloomberg.com/news/articles/2022-03-11/mercedes-flags-billions-at-risk-as-russia-weighs-expropriation.
[58] https://interfax.com.ua/news/general/810896.html.
[59] https://www.oecd.org/daf/inv/investment-policy/40243411.pdf.
[60] https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2859/russian-federation---ukraine-bit-1998-.
[61] https://thelawreviews.co.uk/title/the-investment-treaty-arbitration-review/legal-defences-to-claims#:~:text=Legal%20defences%20to%20investment%20treaty%20claims%20can%20be%20based%20on,force%20majeure%2C%20distress%20and%20necessity.

interpretation of the necessity defence in the 2001 Argentina crisis saga[62]. My preliminary thought is that Russia cannot rely on the exception as it substantially contributed to the (alleged) state of necessity. I have not seen countermeasures being successfully invoked in any investment treaty dispute (I might be wrong).

I look forward to the engaging discussion.

P.S.

For those of you interested in learning more about the international law consequences of Russia's invasion, a recent BIICL Blog post[63] also offers a snapshot of the relevant rules implicated by the current situation.

Ben:

I have a few reactions, though many of these questions are complex and would require further thought.

1. As to treaties, while the Russia-Ukraine BIT does not have an essential security exception, this is not the only treaty that could be implicated. For instance, actions of the U.S., EU and their allies could easily affect the property interests of entities protected by an investment treaty, including, for example, of entities owned by Russian nationals but incorporated through another state. So it is important here to think broadly about the world of possible claims and not focus only on what is or is not in the Ukraine-Russia BIT.
2. It is also correct that customary international law defenses play a role, whether in the place of or in addition to treaty exceptions. The focus in past cases has mostly been on the doctrine of necessity, and, as pointed out in the discussion, this doctrine has been troublesome for tribunals. One of my favorite recent pieces on this is Michael Waibel and Federica Paddeu's piece[64], which serves as a potential corrective to some of the arbitral jurisprudence on this topic. Again, however, we should not limit ourselves to the arguments that were made in the past. Virtually the full panoply of circumstances precluding wrongfulness, including self-defense, countermeasures, force majeure, distress, and necessity, all might be available depending on the circumstances of a case.
3. The invocation of any such circumstance will also raise the question of whether and how to apply Article 27 of the ILC's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, and in particular Art. 27(b), which provides that the invocation of necessity or other such circumstances is "without prejudice to ... the question of compensation for any material loss caused by the act in question." The phrase "without prejudice to ... the question" suggests that it is not clear whether compensation would be owed, and it may not be. And the phrase "compensation for ... material loss" differs from the usual standard of reparation in international law, though the extent of this deviation is unclear. These are hard and often undecided questions.

[62] https://jusmundi.com/en/document/wiki/en-necessity-as-a-defence.
[63] https://www.biicl.org/blog/34/russias-invasion-of-ukraine-and-international-law-questions-and-answers?cookiesset=1&ts=1647522149.
[64] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3858530.

4. One question concerned countermeasures specifically. I am also unaware of any ISDS case where a state successfully invoked a countermeasures defense. Martins Paparinskis has a good article on the state of play of countermeasures (or at least the state of play as of the last time I looked).[65] A threshold question, in this space, is whether investment treaties simply create rights between the states parties (disclosure—this is my own view), or whether they afford substantive legal rights under international law to investors, in a manner similar to human rights treaties. If one takes the latter view, as the majority of arbitrators to address the issue have done to date, then it is hard to argue that a state should be able to take countermeasures *against the investor's rights* in retaliation for the wrongs done by the investor's home state. This would allow an investment tribunal to sidestep the inconvenient questions of general international law. If one takes my view of the reciprocal nature of investment treaties, however, then countermeasures should be available provided all legal conditions are met. This then would force some of the questions that were alluded to int he discussion.

Shreya Jain – Possible suspension of investment treaty obligations in light of armed conflict; compliance with pre-arbitral steps during this period

1. **Can Russia and Ukraine decide to suspend their investment treaty obligations during this period, citing armed conflict? I understand that there's no automatic suspension of investment treaties during armed conflict, but could they perhaps rely on a specific provision (e.g. a broad security exception) in their treaties or on other general doctrines under VCLT or ILC Articles (e.g. impossibility or fundamental change in circumstances) and claim suspension?**
2. **Do you anticipate difficulties in compliance with mandatory pre-arbitral steps in certain treaties (e.g. negotiations, mediation, recourse to local course) during this period and how can investors/States look to tackle that hurdle?**

Ben:

1. Regarding the question concerning the doctrine of fundamental change of circumstances. Under the Vienna Convention on the Law of Treaties, art. 62, a party may invoke a fundamental change of circumstances to terminate, withdraw from, or suspend a treaty, provided some (relatively strict) conditions are met. One of them is that the fundamental change may not be the result of a breach by the invoking party of any "international obligation owed to any other party to the treaty." This would seem on my initial read to preclude invocation by an aggressor state, but not necessarily by a state acting in self-defense. Moreover, the fundamental change must have been unforeseen, the existence of such circumstances must be an "essential basis" of the treaty bargain, and the effect of the change must be to "radically transform" the extent of obligations to be performed. These, I think, are fact-specific questions that would have to be addressed in the context of a given case.
2. On the question about pre-arbitration hurdles in time of conflict. I am afraid I do not have much to add other than to affirm that this could be a difficult problem. In my limited experience, tribunals are frequently quite lax (perhaps too lax) in demanding genuine attempts to reach conciliation prior to submission to arbitration,

[65] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2789597.

> absent strong language in the treaty to the contrary. Where recourse to local courts is required, sometimes treaties will recognize the futility of doing so as an exception, or tribunals might read that exception into the requirement. I have some reservations about doing so absent clear treaty language. But surely there is at least a background requirement that states perform their treaty obligations in good faith (VCLT art. 26). If a state is actively frustrating access to its courts, it arguably cannot rely on those same actions to block a proceeding from moving forward. This in my view should be a doctrine of limited scope, but I could imagine it applying here.

Christian Campbell:

I do not think that fundamental change in circumstances would be a promising argument to suspend treaty obligations where (at least) one of the treaty parties is the "author" of those changed circumstances. Art 62 provides:

> (2)A fundamental change of circumstances may not be invoked …
>
> …
>
> (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty **or of any other international obligation owed to any other party to the treaty**.

Alexander Stonyer-Dubinovsky – Russian justification and defence of its military action

Of course, this is a very important discussion with a very real impact on the oil and gas sector. Russia already claims Crimea and its EEZ as its sovereign territory as of 2014. There are now reports that Russia intends on dividing Ukraine on ethnic grounds and essentially occupying the remaining Ukrainian coastal areas in the Black Sea and Sea of Azov. If this situation occurs, Russia's claimed EEZ will include an estimated reserve of 495.7 bcm of natural gas and 50.4 million tons of oil and condensate[66], potentially worth trillions of dollars[67].

I would like to hear your thoughts concerning the Russian justification and defence of its military action. In this respect, I would like to highlight two points: first, it seems that the official line from Russia is that the invasion is at least partly motivated by the liberation of persecuted ethnic-Russian minorities in Ukraine. Second, Russia may soon affirm its sovereignty over these areas through a referendum, as in Crimea. Do you see either of these two points as a viable defence against potential claims?

For example, Ben mentioned the doctrine of fundamental change of circumstances. Here he made a distinction between aggressor states and those acting in self-defence. There is

[66] https://www.forbes.com/sites/arielcohen/2019/02/28/as-russia-closes-in-on-crimeas-energy-resources-what-is-next-for-ukraine/?sh=6c39bb2729cd.
[67] https://www.nytimes.com/2014/05/18/world/europe/in-taking-crimea-putin-gains-a-sea-of-fuel-reserves.html.

evidence of human rights abuses by Ukrainian law enforcers against ethnic Russians in eastern Ukraine[68]. Could these types of arguments be used to any avail?

Ben:

I think that your questions take us a bit far from the realm of international economic law that was the initial subject of our symposium, and in that respect I think your very well-put questions emphasize the complex nature of the legal problems that are likely to arise out of this conflict.

Some aspects of your questions range outside my core areas of expertise. But I would expand on an observation in our initial post to this symposium, to the effect that Russia's acts in Ukraine do not seem to be justified by any recognized exception to the prohibition on the use of force. These include the consent of the host state, individual or collective self-defense, Security Council authorization, and the controversial doctrine of humanitarian intervention.

I am aware that Russia, through its statements and actions, has gestured toward some of these justifications. I can only say that I share in the exceptionally broad consensus among the international legal community that these justifications are not especially convincing.

I think the same would go for arguments that Ukraine, rather than Russia, bore the legal responsibility for a change in circumstances or a state of necessity in the region. This is arguably supported by the ICJ's recent statement[69] that Ukraine "has a plausible right not to be subjected to military operations by the Russian Federation, "even where the stated purpose of the intervention is supposedly to prevent or punish 'genocide'."

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By way of closing remarks, Dr. Strong thanked Ben and Markus for sharing their expertise on this extremely complex subject.

[68] https://news.un.org/en/story/2015/06/500292-persistent-and-grave-human-rights-violations-eastern-ukraine-un-report.

[69] https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf.