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The Fate of Bilateral Investment Treaties during Armed Conflict - The Russia Ukraine Conflict Perspective as Per the International Laws

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Abstract

The aim of this explorative narrative study is to review the impact of bilateral treaties during an armed conflict with a focus on the Russia-Ukraine conflict. The war between Russia and Ukraine has geopolitical consequences. The western countries and their allies particularly Japan, Australia and South Korea have started an economic warfare against Russia by implementing various sanctions. Russia has also countered the sanctions through such acts as demanding western countries pay in Rubble and seizing foreign investment assets. The exploratory study will look at the fate of the bilateral treaties during armed conflict. The findings of the study have implications on the future BITs with regards to impact of armed conflict on protection of foreign investment.

Keywords

Bilateral Investment Treaties, BITs, Russia-Ukraine war, armed conflicts

1. Introduction

The Russia-Ukraine war that started in February 2022 has impacted the world economic growth prospects with the IMF forecasting a cut in the global growth forecast by a percentage point (Al Jazeera, 2022). Scholars consider post-Soviet conflicts as 'memory politics' or 'memory wars' that narrate the current and future identities as a continuation of the WWII ideology that Ukrainians are fascists and neo-Nazis who are intent on perpetuating genocide against the Russian minorities (Fedor et al., 2017). The ideology based on the fusion of past and present

has legitimized in Russia's view the aggression in Ukraine.

The tensions between the US and Russia have regressed to cold war levels, and then some. Western nations have resorted to economic sanctions to persuade Russia to end its aggression against Ukraine (Liadze et al., 2022).

The aim of the study is to explore the impact on economic sanctions on Russia on the protection of foreign investors considering international laws and the protection clauses of the Bilateral Investment Treaties (BITs). It also offers a broad definition of investment including shares and other investment participation of the participating countries.

2. Theoretical Framework

(Ridley, 2012) defined conceptual framework as consisting of theories and concepts. A theory is a framework that offers an explanatory device often in the form of categories and relationships between phenomena. On the other hand, a concept represents a general ideal derived from a specific instance.

Defining the conceptual framework is important for a dissertation as it provides direction for the research and helps make sense of the data, according to Ridley (2012). According to Ridley (2012), we must first identify the theoretical framework of others and then propose our own framework to be used in the study.

The study will use the pragmatic paradigm to assess reality. The pragmatic approach involves determining what is practical in each situation to address an issue. The epistemological basis of the paradigm is meeting specific research goals (Morgan, 2007). A pragmatic approach will be appropriate whereby a researcher selects an appropriate method based on specific circumstances (Brierley, 2017). It helps in selecting a method that is suitable based on geographic, cost, and time constraints.

3. Methodology

Evidence based exploratory method has been selected for the study. The evidence-based study based on systematic literature review and empirical analysis of results helps in effective decision making (Buckley et al., 2020). The quality of evidence is important rather than the amount of information considered in carrying out the evidence-based study (Dotson, 2015).

The qualitative study is based on the inductive approach. Qualitative research is based on an inductive research method where we go from specific to general. We gather data and develop theories after discovering patterns in the data. In contrast, quantitative research is based on the deductive method where we go from general to specific. We test a theory using empirical methods and then describe trends and patterns related to the data.

One of the critical issues that can occur during a research study is that of researcher bias. Goldacre (2011) emphasized on the importance of carrying out extensive research to avoid partial theories resulting in bad sciences. Subjective

evaluation based on insufficient data leads to incorrect observation. A researcher needs to make sure that the evaluation is based on reliable data. Often, we tend to accept published research without gauging the quality of the research. Many times, selective observation leads to an incorrect assumption. A researcher needs to look at all the data based on the idiographic research method that involves looking at a topic from different perspectives as described by Babbie (2016). Ethical principles laid out by the American Research Association (AERA) have been followed in preparing the research study. The American Education Research Association (AERA) (2011)'s Code of Ethics has also set forward ethical principles and standards of research. The five principles include professional competence, integrity, professional responsibility, social responsibility, and respect of dignity, diversity, and rights of individuals. The ethical standards emphasize that researchers should avoid falsification, plagiarism, personal gains, harm, exploitation, harassment, and disclose any conflict of interest. Moreover, the standards state that ethical violation of others should be reported to the individual researcher and appropriate authority such as AERA solely for the integrity of the research profession and without any intention of harm. While these standards relate to research involving human subjects, some of the principles can also be applicable to other types of research work. Professional competence, social responsibility, and integrity are ethical principles that can be applied to any research work.

Every paradigm has its own ontological and epistemological foundation (Scotland, 2012). Ontology refers to the nature of existence or being (Crotty, 2003). Epistemology is concerned with a way of understanding and explaining what we know (Crotty, 2003). Research can be both critical and interpretive since both are based on subjective experiences. Critical realism helps us in developing and auguring for social phenomena by revealing the underlying causal mechanism (Danermark et al., 2002). According to Cohen et al. (2009), knowledge is determined by the positional and social power of the advocates of knowledge. In other words, we researchers can criticize and advocate for a particular cause. In my view, the ontological basis of critical realism is that there is an external reality that can be identified by the researcher. The social reality can be understood by criticizing the underlying interviewee's biases or other issues relating to the gathered research. According to Scotland (2012), researchers make value-laden judgments throughout the research process including in interpretations of the findings. The ontological position of both critical realism and interpretive paradigms is relativism that puts forward the view that reality is subjective and differs from one person to another. There are different realities that are individually constructed and there are as many realities as there are individuals (Scotland, 2012).

4. Definitions

Bilateral Investment Treaty (BIT) refers to the investment agreements between two countries that specify the terms and conditions of trade and economic cooperation between them.

Investment refers to any type of asset including shares, stocks, tangible, and intangible properties as well as rights conferred by law to carry on commercial activities including exploration, exploitation, extraction, and development of natural resources.

Russia refers to the Russian Federation that formed after the dissolution of the Union of Social Socialist Republics (USSR) on December 25, 1991.

5. Economic Sanctions Against Russia

Western governments led by the United States have imposed sanctions on Russia for instigating a war in Ukraine. The purpose of economic sanctions is to restrict the trade for non-economic reasons by governments that want to express discontent over the behavior of a country (Smeets, 2018). While political scientists and economists have expressed skepticism over the punitive measures as a political tool, the Ukraine conflict resulted in most western countries imposing economic sanctions.

The US and UK has banned all oil and gas imports from Russia (BBC News, 2022a). The oil imports from Russia made up 8 percent and 6 percent of oil imports for the US and the UK, respectively. The EU, which imports about 25 percent of oil and 40 percent of gas from Russia, had made plans to end reliance on Russian oil and gas imports by 2030 (Horton et al., 2022; McGrath, 2022).

Apart from the ban on import of Russian oil and gas, the western countries have imposed a ban on the export of luxury goods. The UK and the EU announced the ban of high-end art and fashion goods as well as luxury vehicles. The UK has banned Russian private jets in its air space. Moreover, all Russian flights are banned from Canada, the EU, the US, and the UK (BBC News, 2022a).

In addition, western countries have frozen the foreign currency reserve of the Russian central bank amounting to \$630 billion (BBC News, 2022a). The US and the UK also froze deposits of Russians in local banks, and removed the country from the international SIFT payment system (BBC News, 2022a). The assets of Russian banks were also frozen. The major Russian banks were also excluded from the financial system of the UK (BBC News, 2022a).

The EU had announced that it would target nearly 70 percent of the Russian bank market (BBC News, 2022a). Germany also announced that it will put the Nord Stream 2 gas pipeline project on hold (BBC News, 2022a). The UK stopped issuance of 'golden visas' and sanctioned thousands of wealthy Russians close to the Kremlin (BBC News, 2022a).

The latest sanctions imposed by the US include a ban of new investment in Russia (BBC News, 2022b). The US and the UK have also imposed sanctions on the family members of the children and relatives of Russian President Putin and his close associates. The two countries along with the EU have imposed a ban on items that could be used by the military (BBC News, 2022b). The US announced that a license is required for the sales of sensors, computers, lasers, navigation tools, marine equipment, and telecommunication equipment to Russia and most of the

requests will be denied (Dave & Dastin, 2022).

In April 2021, the UK also targeted defense companies and Russian generals who are involved in Ukraine wars (Muvija, 2022). The country also banned Russian investors active in various industries including oil and gas, fertilizers, diamonds, and trucks and banned imports of Russian coal imports (Reuters, 2022c). Moreover, Canada had imposed sanctions on 33 defense companies that assisted the Russian military in the Ukraine conflict (Reuters, 2022d). The same month Australia targeted 14 Russian state owned companies (Reuters, 2022a). Australia also banned exports of alumina to Russia because of the war on Ukraine (Komiya, 2022).

The neutral Switzerland also imposed sanctions against Russian companies and oligarchs (Reuters, 2022b). The country froze up to \$8.03 billion (7.5 billion Swiss Francs) in assets including foreign bank accounts and properties in the country. In addition, Norway has announced that it will divest its sovereign fund from Russia (Schummer, 2022).

Japan has banned export of luxury goods to Russia (Reuters, 2022f). South Korea and Singapore also announced banking and export sanctions on Russia to assist Ukrainians (Reuters, 2022e; Shin & Kim, 2022).

The US issued warnings to actors that try to bypass sanctions against Russia (Meredith, 2022). The sanctions on Russia by the US, EU, UK, and other nations have a far-reaching impact on the bilateral treaties with Russia.

Western nations have also imposed sanctions on Russian government officials and billionaires. As of March 2022, a total of 37 Russian businessmen were sanctioned by the western countries (Tognini, 2022). The sanctions include travel ban and seizure of assets including private jets, real estate, bank accounts, and investments in western countries including Australia, Canada, the EU, Switzerland, the US, and the UK.

In addition, many Western brands have taken initiatives to end economic activities in Russia. Adidas, which has over 500 stores in Russia, announced that it will suspend sales in the country. Other notable firms that have stopped operating in the country include British American Tobacco, Nike, Unilever, American Express, Bank of America, Citigroup, JPMorgan Chase, and Goldman Sachs (New York Times, 2022). Studies cite that over one thousand companies have reduced their operations in Russia due to the Ukraine-Russia war (Yale School of Management, 2022). Corporations also have the responsibility as per the UN Guiding Principles on Businesses and Human Rights 2011 (UNGPR) to avoid doing business with privately owned businesses and government agencies that are guilty of violating human rights. While corporations won't be prosecuted for doing business in Russia, they risk serious harm to the brand image particularly in western countries.

6. The Impact of Russian Economic Sanctions on BITs with Other Countries

Russia has entered into BITs with more than 60 countries (Jones Day,

2022). In 2017, the Government of Russia adopted the Resolution on Entering into International Treaties on the Encouragement and Mutual Protection of Investments that replaced the old Russian Model BIT (Norton Rose Fulbright, 2017). The new Regulation contains guidelines for BITs that were created after a lawsuit brought about by the shareholders of Russian oil corporation Yukos. It is important to note that the new Regulation only applies to future BITs.

Existing treaties are covered under the older 2001 Russian Model BITs (Alekseenko, 2019). The Russian model BIT offers substantive protections to partner nations including fair and equitable treatment, expropriation, protection and security, and most favored nation treatment, among other factors (Rubins et al., 2021).

The International Law Commission (2010), A/65/10 (2010) stated in Draft Article 3 that armed conflict does not result in the termination or suspension of activities. According to the draft report, termination of a treaty in the event of armed conflict depends on the formal expression of a party through notification to the other party. This also implies that bilateral treaties continue to remain in force even in the event of armed conflict. Commercial arbitration and other legal rights continue to remain in force until expressed notification is announced by one of the parties of the treaty.

The treaties regarding protection of investor's assets remain in force even after the outbreak of war but only if the two countries have signed a BIT. Investors from countries who have not signed treaties have to rely on customary law for the protection of their foreign investment. A claims commission is generally established for processing of claims in case there are no investment treaties. An example of a claims commission includes the Eritrea-Ethiopia Claims Commission that was set up to deal with claims after the armed conflict in Ethiopia. Another example of the claim's commission is the setup of the Iran-US Claims Commission that was set up to process claims by investors in the two countries.

The International Law Commission (ILC) was created by the UN General Assembly in 1947. The aim of ILC was to promote the progressive development of international law. The commission has carried out various studies in this regard that has led to the development of international protection of investor rights among other topics.

An important distinction that must be considered when it comes to protection of claims by investors is between internal and international armed conflict. Internal conflict is covered under Article 3 of the Geneva Conventions and the Protocol Additional to the Geneva Convention in 1949 as well as Article 19 of the 1954 Hague Convention on Cultural Property (United Nations, 1994). The protection clauses are applicable for all investors that are not parties of hostilities in the event of an armed conflict.

Property damage is inevitable in armed conflicts such as the Russia-Ukraine conflict. The Article 46 and 47 of the Hague Regulations prohibit confiscation of private property in a country. The same protection is afforded in Article 53 of the

Geneva Convention that prohibits the pillaging and destruction of private property unless justified as necessary by the military. Failing to comply with the provisions of the articles is considered a war crime. The Hague Convention also specifically states that an occupying party shall respect the legal obligations of the country prior to the war. Private and government investors whose properties are seized or destroyed through a military necessity need not be compensated, as per the international laws.

Protection of property rights is applicable also in the case of non-international conflict such as a civil war. The host country is responsible for damages if the destruction goes beyond objective necessity. The country is also responsible for actions by any of its supporters. The attack should not be excessive and precautionary measures should be adopted to minimize collateral damage in the event of a military attack.

Under the ILC, a host country is responsible in the event of losses sustained by a non-resident alien due to a civil unrest in a country leading to government action. The primary obligation as per the ILC is on the host party and the secondary responsibility is on the international community. In the case of the Russia-Ukraine conflict, the host country that is Russia and Ukraine are responsible for losses sustained by foreign investors. However, the responsibility for protection of foreign investors becomes an international obligation in case the host-country violates the terms of the treaty.

The obligation of the host state to provide protection of foreign investment does not result in the creation of an absolute liability. The host country with the signing of the BITs does not give any promise to foreign investors about safety of investment. Instead, it creates an obligation of practicing due diligence in protecting the assets of foreign investors.

Most BITs between Russia and other countries contain the war clauses. The war clauses of the BIT assure investors that they will be compensated by the host party for their losses. For instance, Article 5 Compensation for losses of the Bahrain-Russian Federation BIT for 2014 states that the host party will offer compensation, restitution, indemnification, and other settlements without any discrimination and of equal degree to the restitution provided to the local investors in the event of war. In addition, the Russian Federation - Uzbekistan BIT that came into force in 2013 contains provisions for protection of foreign investment in the Article Damages section. This provision is contained in all the BITs entered by Russia and other countries. The bilateral treaties like ILC do not contain any provisions that imply that the provisions do not apply or end in the event of armed conflicts.

The clauses of the BITs between Russia and other countries imply that the host party will be responsible to compensate foreign investors in a similar capacity to compensating local investors. The BITs state that the investors will be provided compensation in the event of war or other types of armed conflict such as revolt, state of national emergency, revolution, riot, insurrection, and other similar events.

The BITs guarantee that both the contracting parties will guarantee full security and protection to investors. The clauses ensure non-discriminatory compensation to foreign investors in case they suffer loss due to any type of armed conflicts. Unlike the ILC, BITs between Russia and other countries don't differentiate between destruction due to military necessity and otherwise. The treaties require that the host party with an ongoing armed conflict must compensate investors in case of destruction during civil strife and war irrespective of the fact that the destruction of the target asset was a military necessity.

The inclusion of 'war clauses' in BITs is the outcome of economic necessity. Foreign investment benefits the local economy leading to improved tax revenues and increased employment. That is why most countries guarantee the other party the protection of investment assets irrespective of whether the destruction was caused due to a necessary military activity.

An important aspect of BITs between Russia and other countries is that the treaties contain clauses that imply that the protection clauses are applicable to both unarmed and armed conflict. It does so by using the terms war, riot, and national emergency. This means that the protection mechanisms apply to non-armed conflicts and even national emergencies such as COVID pandemic.

Tribunals that are formed to settle compensation claims by foreign investors will first look at provisions of the BIT. International tribunals even go on to declare that provisions of BITs take precedence over national or international (ICSID, 2006).

In addition, the treaties afford full protection for each contracting party to the contracting parties. As an example, Article 2 Promotion and Protection of Investments of the Russian Federation - Uzbekistan BIT (2013) states that, "Each Contracting Party shall ensure...full protection on its territory of investments of investors of the other Contracting Party". Similar provisions are included in BITs between Russia and other countries. These provisions are generally included in the early sections of the treaties that signify an expression of importance to the compensation of foreign investment. The full protection term implies that the host country does not impose a particular restrictions or discrimination in offering compensation for losses during armed conflicts. Moreover, the treaties do not imply strict liability on the host nation as this would require the host country to compensate the other even in case of destruction due to actions of entities whose actions are not attributed to the State. This implies that the host countries must take due diligence in protecting the properties of foreign investors. The host country must provide reasonable protection to the assets of foreign investors with no discrimination and in a similar capacity to protection provided to local investors.

Under the clauses of the BITs, host countries have the responsibility to protect foreign investments in the case of conduct by the government, its agent or implicit approval of the action of a third country. Moreover, the implied responsibility is not applicable in case the damages are caused by a third party. This means that Russia will not be obligated to compensate investors if Ukraine or

other parties cause damage to the assets of the foreign investors. In contrast, if a third party or rebels gains control of the Russian government, they will be liable to compensate foreign investors. The responsibility arises through the attribution of conduct of the opposition faction to the host country. However, the host country must afford protection or at least warn the foreign investors about the threat posed by the opposing party during an armed conflict. Failure to provide protection and acting according to due diligence in providing protection will make the host country responsible for damages by the opposing party. The responsibility will also remain on the host country if it does not punish the opposing party and order it to provide reparation for the damages.

An important point to note about full protection liability in the context of BITs is that the host country cannot claim that it has met its responsibility and acted in a similar manner to both local and foreign investors by not providing protection to either party. The host country is responsible to provide protection to foreign investors irrespective of compensation to local investors.

The foreign investors whose properties have been damaged due to armed conflict must provide evidence. The responsibility of the host country will be absolved in case the claimant fails to produce evidence that the damage was due to actual or implied actions of the country.

7. An Assessment of the Western Economic Sanctions on Russian Foreign Investors

The Western economic sanctions on Russia are a type of economic warfare (Naylor, 2001). The intent of the sanctions was to put economic pressure on the target company (Fishman, 2017). The western nations sanctions against foreign Russian investors is valid according to the doctrine of universal jurisdiction that reflect the jurisdiction of states to prescribe their criminal laws for international criminal actions (O'keefe, 2004). The concept of universal jurisdiction represents a mixture of local judicial processes and international politics. The international criminal actions that are subject to local judicial procedures include war crimes, human rights violations, torture and genocide (Kissenger, 2001). The aim of the economic sanctions is to increase pressure on the aggressive party to end its criminal actions. Under this doctrine, people who are associated with the aggressive party can be tried and sanctions can be imposed on them by local courts.

The economic sanctions against the aggressive party under the universal jurisdiction have been criticized by some experts. Some experts consider it a 'tyranny of judges' that violates international laws (Kissenger, 2001). But others consider the action of local courts acting under universal declaration to be valid as the aggressor will think twice before committing criminal acts (Roth, 2001).

While western nations have acted in accordance with international laws in freezing assets of foreign Russian investors in the light of the doctrine of universal jurisdiction, the same cannot be said for Russia. Russia has violated the BITs clauses of protection of foreign investor's assets by limiting individuals and

companies from 'unfriendly' countries to transfer funds in excess of \$10,000 outside Russia. In addition, the actions taken by the Russian government to seize the assets of firms that close operations in the country is in direct violation of BIT treaties. The Russian government will seize shares of foreign companies belonging to 'unfriendly states' that have more 25 percent share ownership will be taken by the Russian government. Russia has also blocked foreign investors from selling their positions in Russia and receiving dividends.

The retaliatory actions taken by Russia against foreign investors breaches the BIT's protection clauses regarding fair and equitable treatment of foreign investors. The measures result in significant deprivation of assets that represent unlawful expropriation of foreign investors.

8. Future Credibility of BITs through the Armed Conflict between Russia and Ukraine

The Russian government's actions after the armed conflict in Ukraine-Russia have greatly undermined the integrity of the BITs with other countries. In an unprecedented move, Russia announced that it will seize assets of foreign firms and nationalize the companies that close operations in the country (Tan, 2022; Thompson & Cotovio, 2022). This move is in violation of the war clauses of the BITs whereby Russia had committed to provide protection to foreign investment in the event of an armed conflict.

Capital controls initiated by Russia to protect national interest at the expense of the interest of the foreign investors is a clear violation of the war clauses of BITs. The actions also violate the ILC clauses regarding protection of foreign investment. Companies have the right to enter and exit the country without any kind of legal repercussions. Capital controls initiated by Russia has greatly undermined the future of BITs.

The war clauses of BITs regarding protection of foreign company assets have been ignored by Russia. The action has been taken to protect the national interest of the country. It can be argued that countries in times of armed conflicts generally look at their own interest. The aim of the policy makers at the time was survival instead of considering the interest of partner nations. Russia was indeed forced to violate the clauses of the BIT and international investment treaties regarding protection of foreign investment during the Russia-Ukraine war to protect its interest. This has put the credibility of BITs during armed conflict at risk since countries don't necessarily take measures during armed conflicts to protect the assets of a partner country. The responsibility of protection of foreign investment during armed conflict should not be solely on signatories of the BITs. Foreign investors should not rely on BITs for the protection of investment. It is important to set up an international tribunal that focuses on matters relating to reparation of losses suffered by foreign investors during armed conflict. The country violating the BIT should be pressured to compensate foreign investors and barred from World Trade Organization (WTO) membership until it offers the required compensation

for violating the war clauses of the BITs and ILC.

9. Conclusion

Economic sanctions are largely ineffective since the alternative market diminishes the impact (Kaempfer & Lowenberg, 1988). The study conclusion is that the obligation of protection of foreign and local investor's properties falls on the host country. Russia and Ukraine are responsible for the protection of private properties in their respective countries.

Russia has the obligation under international conventions to protect properties of foreign investors in the country. Noncompliance of the laws will make the host country a war criminal with associated repercussions. The duty of care for private properties is necessary for the host country and must be complied with otherwise it will be deemed a war criminal. The standard set by the international laws regarding duty of care is of due diligence that requires the host country to protect foreign investors' properties from potential and actual harm. Not taking due diligence in protection of the property is considered a breach as per the international laws concerning armed conflict.

As per the ILC, the duty to protect is applicable to the host country irrespective of the international or domestic armed conflict. This means Russia is bound to the international laws for the protection foreign investors' assets in both its own country and 'occupied' regions in Ukraine. The Articles of the ILC regarding the rules related to the Effects on Armed Conflict on Treaties the terms of the BITs remain in effect in armed conflicts. The ILC rules regarding compensation will apply to the BITs if there is no express provision regarding the matter in the treaty.

International and local civil wars generally exclude the application of the contracts of the parties of the bilateral treaties. The ILC is applicable in almost all treaties of Russia and other countries since they don't contain a war clause. Under the international laws, the host country as expressed earlier must compensate the foreign investor who suffers a loss due to military action. Investors must seek compensation under the rules of the international laws.

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