Columbia Center on Sustainable Investment
A JOINT CENTER OF COLUMBIA LAW SCHOOL AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues

No. 164 January 4, 2016

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International investment law and decentralized targeted sanctions: an uneasy relationship

by

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Since March 2014, several countries, including the United States (US), the European Union (EU), Japan, and Canada, have implemented sanctions (including travel bans and asset freezes) against Russian and Ukrainian individuals and firms due to the Ukrainian crisis. This form of decentralized smart sanctions could also be applied against other countries' nationals (e.g., due to human rights violations). Those sanctions are an important means of effectuating international law, particularly if the United Nations (UN) does not adopt centralized sanctions.

Nevertheless, those sanctions may possibly conflict with international investment law, rendering them less effective. For example, Russian citizens whose accounts are frozen pursuant to such sanctions could sue for expropriation, as well as for a breach of fair and equitable treatment (FET), under the Canadian-Russian international investment agreement (IIA). If successful, Canada would need to pay damages to the sanctioned investors, nullifying the sanctions' purpose. Russia has 59 IIAs in force, while Ukraine has 56. A key inquiry, therefore, concerns the circumstances and legal assumptions under which this scenario could occur, given the many legal grey zones in those cases.

Although in some circumstances a sole bank account may not count as an "investment" under the terms of an IIA, in most cases, especially if firms are targeted, the satisfaction of this requirement will be unproblematic. Furthermore, there is little doubt that a longer-term asset freezing, without due process, is an expropriation even if the legal title is not taken and a violation of FET. How can a sanctioning host country defend itself?

New US and Canadian BITs contain non-precluded-measures clauses, including measures for the maintenance or restoration of international peace and security that permit resorting to sanctions. Most current European IIAs do not contain this clause. Thus, the only possibility for the host country to defend itself against a claim is through reference to customary international law, namely the law of countermeasures as

promulgated by the International Law Commission in the Articles on the Responsibility of States for Intentionally Wrongful Acts (ARSIWA). Two cases have to be distinguished in this context: (1) injured states taking measures to react to the injury (Art. 42, 49 ARSIWA) and (2) non-injured states taking measures to effectuate obligations owed to the international community as a whole (Art. 48). Whereas in the former case, the measures can (within certain limits) violate international law, as e.g. targeted sanctions under an IIA, in the latter case it is heavily disputed whether non-injured states can only use lawful reprisals. Absent this restriction, any (powerful) state may have an excuse to take countermeasures outside of the UN. Following the International Law Commission, the sanctions against Russia by non-injured states would likely be violating the IIAs, and the sanctioning states would need to pay damages.

Were a tribunal to follow academic opinions[1] that countermeasures by non-injured states are allowed, certain limits would have to be respected. Any countermeasure has to respect obligations regarding the protection of fundamental human rights. Accordingly, if the legal obligations in IIAs are considered an objective human rights regime, expropriation would not be accepted; if IIAs are viewed as a reciprocal inter-state regime, probably the sanction would be excused.[2]

A further contentious issue is the nature of investors' rights. If those are merely derived by being third-party beneficiaries,[3] or they are viewed as belonging only to states, sanctioning would be possible. But if IIAs give a direct right to investors, they would be a third-party who, therefore, in principle, cannot be sanctioned.[4] Tribunals have so far overwhelmingly followed the direct rights approach and, thus, denounced sanctioning investors in order to punish the home state.[5]

In short, this legal conflict has been largely overseen by policymakers. Unless states write explicitly in their IIAs that measures for the restoration of international peace and security are permissible, they risk rendering large parts of decentralized targeted sanctions useless by being held liable for damages, endangering the effectuation of international law.

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[1] *See* Christian Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: CUP, 2010); Institute of International Law, Resolution on obligations and rights erga omnes in international law, IDI Resolution I/2005 (2005), 71(2) Ann IDI 286, Art. 5.

[2] Martins Paparinskis, "Investment arbitration and the law of countermeasures", *British Yearbook of International Law*, vol. 79, p. 264-352 (2008).

[3] See Anthea Roberts, "Triangular treaties: the nature and limits of investment treaty rights", *Harvard International Law Journal*, vol. 56 (2015).

[4] *See* Tillmann Braun, "Globalization-driven innovation", *Journal of World Investment & Trade*, vol. 15 (2014), pp. 73-116

[5]*See Archer Daniels Midland Company v. Mexico*, ICSID Case No. ARB(AF)/04/05 (NAFTA), September 26, 2007 (investor has only procedural, not substantial rights), but Separate Opinion (rights of the investor are, in all cases, fundamentally individual rights); *Corn Products v. Mexico* (Decision on Responsibility), ICSID Case No. ARB(AF)/04/01, January 15, 2008 (individual rights of the investor, possibility of the justification of the Mexican tax as a countermeasure rejected); *Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, September 18, 2009 (right to take countermeasures does not justify measures which infringe upon the rights of third parties).

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