



Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues

No. 164 January 4, 2016

Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)

Managing Editor: Maree Newson (mareenewson@gmail.com)

International investment law and decentralized targeted sanctions: an uneasy relationship

by

Anne van Aaken *

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 opinions¹ 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.

* Anne van Aaken (anne.vanaaken@unisg.ch) is Professor for Law and Economics, Legal Theory, Public International Law, and European Law at the University of St. Gallen, Switzerland. The author is grateful to Laurence Boisson de Chazournes, Tillmann Braun and Krista Nadakavukaren Schefer for their helpful peer reviews. **The views expressed by the author of this *Perspective* do not necessarily reflect the opinions of Columbia University or its partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

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

⁵See *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).

The material in this Perspective may be reprinted if accompanied by the following acknowledgment: "Anne van Aaken, 'International investment law and decentralized targeted sanctions: an uneasy relationship,' Columbia FDI Perspectives, No. 164, January 4, 2016. Reprinted with permission from the Columbia Center on Sustainable Investment (www.ccsi.columbia.edu)." A copy should kindly be sent to the Columbia Center on Sustainable Investment at ccsi@law.columbia.edu.

For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Maree Newson, mareenewson@gmail.com.

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading applied research center and forum dedicated to the study, practice and discussion of sustainable international investment. Our mission is to develop and disseminate practical approaches and solutions, as well as to analyze topical policy-oriented issues, in order to maximize the impact of international investment for sustainable development. The Center undertakes its mission through interdisciplinary research, advisory projects, multi-stakeholder dialogue, educational programs, and the development of resources and tools. For more information, visit us at <http://www.ccsi.columbia.edu>.

Most recent Columbia FDI Perspectives

- No. 163, Moataz Hussein, "Toward balanced Arab regional investment regulations" December 21, 2016.
- No. 162, Robert Basedow, "Preferential investment liberalization under bilateral investment treaties: How to ensure compliance with WTO law?" December 7, 2015.
- No. 161, Wenhua Shan, "The case for a multilateral or plurilateral framework on investment," November 23, 2015.
- No. 160, Mélida Hodgson, "The Trans-Pacific Partnership investment chapter sets a new worldwide standard," November 9, 2015.
- No. 159, Nicolás M. Perrone and Gustavo Rojas de Cerqueira César, "Brazil's bilateral investment treaties: More than a new investment treaty model?" October 26, 2015.

All previous *FDI Perspectives* are available at <http://ccsi.columbia.edu/publications/columbia-fdi-perspectives/>.