

# International Investment Law and Russian Countersanctions

## Countering the Counterstrike?

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*In this third briefing on International Investment Law (IIL), we examine how IIL and investor-state arbitration may be used in response to the so-called countersanctions adopted by the Russian government in retaliation to sanctions imposed by the EU and its Western partners.*

Since its full-scale invasion of Ukraine, Russia has faced severe sanctions that have taken an enormous toll on its economy. In response, the Russian government has implemented retaliatory measures targeting companies from “unfriendly” countries such as EU Member States, the UK, the US and Japan. The measures include threats to nationalise companies from “unfriendly” countries without compensation, the possibility of suspending shareholders' rights and the introduction of “temporary management” of assets held by persons from “unfriendly” states. While stated to be “temporary”, the external management can be terminated only by decision of President Putin. In July 2023, Russia indeed temporarily placed [Danone and Carlsberg](#) under such temporary management (with Danone being released in June 2024). In addition, Russian countersanctions restrict dividend payments and fund transfers, for example by requiring “voluntary” payments of a significant portion of such payments to obtain government approval, and the sale of stakes in strategic sectors. Foreign companies wishing to exit the Russian market face additional restrictions, including government approval, forced sales at discounts and restrictions on buyers.

However, many of the “unfriendly” countries have concluded bilateral investment treaties (*BITs*) with Russia, and claims may also be made under the Energy Charter Treaty in certain circumstances. As explained in our [introductory briefing to this series](#), these treaties aim to promote and protect foreign investment by providing legal protection to investors from one country who invest in the other. This raises the question of what rights international investment treaties give international investors in Russia, and how they might enforce those rights.

## Breaches of Protection Standards by Russian Countersanctions?

Russia has concluded more than eighty BITs with various countries, including several EU Member States such as Germany or France, but also other relevant countries such as Canada, Japan, the UK, and even Ukraine. Most of Russia's BITs contain the usual standards of protection, such as fair and equitable treatment, non-discrimination, and the

prohibition of unlawful expropriation and arbitrariness. In addition, many Russian BITs provide for the free transfer of payments abroad, guaranteeing investors the ability to receive their financial returns and other investment-related funds without undue interference or restrictions by the host state. While the content of the specific provision varies from BIT to BIT, the clauses typically cover various types of payments, including dividends, profits, loan repayments, and salaries of expatriate personnel.

Russian countersanctions could violate several of these standards. For example, measures that specifically target a foreign investor on the basis of its “unfriendly” nationality could violate the non-discrimination clause, which requires the host state to treat foreign investors no less favourably than domestic investors in like circumstances.

In addition, Russia's measures could violate the fair and equitable treatment standard. This standard includes the protection of investors' legitimate expectations as well as the obligation to act in a transparent and non-arbitrary manner. The Russian countersanctions could violate this standard, in particular if they are based purely on political motivations. In addition, the countersanctions may be seen as an unexpected disruption to the investment environment, undermining investors' confidence in Russia's commitment to respect their rights. Biased court decisions that unfairly favour Russian parties and disregard contractual or statutory rights of Western companies may also be the basis of a claim under the fair and equitable treatment standard.

As another example, nationalisation or the suspension of shareholders' rights and the introduction of external management could constitute an unlawful indirect expropriation. Under international investment law, expropriation can be considered lawful under very specific conditions, including typically a public purpose, non-discrimination, and fair compensation. Expropriation envisaged by the Russian countersanctions is unlikely to meet these requirements. Finally, countersanctions could violate the free transfer obligations to the extent that they restrict dividend payments, fund transfers, and the sale of stakes. Similarly, the restrictions that foreign investors face when they want to exit the Russian market could constitute a violation of the free transfer clause as well.

In response, Russia is likely to argue that its countersanctions are justified under international law and therefore do not violate any BIT provision. Many of the Russian BITs currently in force do not contain general exceptions for measures taken in the interest of (national) security. It is therefore likely that Russia would have to rely on justifications under customary international law, in particular *force majeure* and necessity. However, the success of these defences remains doubtful, since they are subject to strict requirements and since Russia, as the aggressor, has created the cause of any perceived threats to its security or economic interests that it might invoke.

Therefore, foreign investors in Russia who are impacted by such countersanctions should consider whether these measures may breach standards of applicable investment treaties and whether they are entitled to file an arbitration claim against Russia.

## Investor-State Dispute Settlement

International investment protection through BITs is generally considered to be an effective tool because, in practice, it can be enforced without recourse to domestic courts. This may be particularly true in the case of Russia, as the Russian court system seems to be fundamentally biased against Western companies and does very likely not uphold the rule of law.

In order to initiate investor-state dispute settlement proceedings, an investor would have to demonstrate Russia's consent to arbitration, and many of the BITs that Russia has concluded do indeed contain such consent in the form of an arbitration clause, although its scope varies from treaty to treaty and is sometimes particularly narrow. Under certain circumstances, foreign investors could also obtain access to arbitration through a most-favoured-nation clause. These so-called MFN clauses typically ensure that investors are treated at least as favourably as investors from other countries with which the host state has concluded a BIT. In the context of access to arbitration, this could mean that an investor who would otherwise have to rely on a narrow arbitration clause could rely on a broader clause in another BIT.

Once jurisdiction of an arbitral tribunal is established and an award rendered in favour of the investor, one cannot expect Russia to comply with such an award voluntarily. Instead, investors will likely have to enforce their awards outside of Russia. As noted in our [previous briefing](#) in this series, locating state-owned assets against which enforcement may be sought can be a complicated issue.

Yet, foreign investors are already using international investment treaties to seek to recover their losses arising from Russian countersanctions. For instance, according to a press release, [Fortum](#) has initiated arbitration proceedings against Russia claiming compensation for the unlawful seizure of its assets.

BLOMSTEIN is highly experienced in advising on EU sanctions and monitors developments in international investment protection closely. We are at your disposal to assist you with any matter in these areas. If you have any questions or would like us to cover a specific topic, please do not hesitate to contact [Roland Stein](#), [Pia Hesse](#), [Tobias Ackermann](#), and [Sarah Beischau](#).