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Cutting-off Russia from ISDS: Another Tool to Consider?

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Russian full-scale invasion of Ukraine consolidated the international community in strong political condemnation and accompanying legal sanctions against vital sectors of the Russian economy. International business followed suit with more and more multinational companies ceasing their investments in Russia or pulling out their businesses entirely. As [reported by the Wall Street Journal](#), the Russian response to this unprecedented outflow of FDI included discussions of a bill to nationalize assets of leaving companies and warnings by state prosecutors that they consider arresting these companies' top-managers. These steps reconfirm the Russian government's disdain of international law, including its obligations towards foreign investors under bilateral investment treaties ("BITs"). In this post we analyse whether terminating BITs with Russia would be a reasonable response to Russia's recent transgressions.

Rationale for Termination

The economic rationale behind BITs, as usually expressed in their [preambles](#), is to create conditions for economic cooperation between two states by promoting and protecting each other's investments. To promote investments, BITs provide qualifying investors with substantive protections and access to the system of independent adjudication of disputes through international investment arbitration. However, in the wake of Russia's aggression many states seek to achieve exactly the opposite, namely, to limit Russia's economic capacities through targeted and sectoral restrictive measures. Terminating their BITs with Russia may serve as another effective tool to achieve this policy goal.

The termination of BITs will increase Russia's ostracism by the international community since any new investments made by Russian nationals abroad will not be protected by the favourable treaty regime (while remaining subject to relevant national legislation and minimum standards of treatment under customary international law). Further, without BITs, Russia's economy will become much less attractive for foreign investors, especially considering the recent actions of its government mentioned at the beginning of this post. Most importantly, termination of BITs will cut Russia from investment treaty arbitration, one of the pinnacles of the international protection of foreign investments.

Russian FDI and BIT Network

According to UNCTAD's [International Investment Agreements Navigator](#), there are 62 BITs in force between Russia and other states. The Russian Central Bank reports that Russian investments into European countries make up to 83% of all Russian foreign investments, namely USD 316 billion out of a total of USD 381 billion. The most popular destinations for Russian investments in Europe are Cyprus, Austria, the Netherlands, Switzerland, and the United Kingdom. Apart from European countries, Russia has relatively big investments in the United States, Singapore, Kazakhstan, and the United Arab Emirates. Russia has BITs in force with all these countries, except Cyprus and the United States (BITs with these countries were signed in the nineties but never entered into force).

Procedure for Termination

Under Article 54(b) of the Vienna Convention on the Law of Treaties (“VCLT”) state-parties to an international treaty may terminate it at any time by mutual consent. The termination of BITs among 23 EU Member States by signing a [multilateral treaty](#) to that effect in the aftermath of *Achmea* judgment serves as the most prominent example of this route. However, in a likely scenario that Russia disagrees with a proposed mutual termination, there are options for unilateral termination of BITs which may be considered and pursued by relevant states. As instructed by Article 54(a) of the VCLT, the guidance on unilateral termination shall be sought in BITs themselves.

Most Russian BITs have a fixed validity term (usually varying from 10 to 15 years), which is automatically renewed unless either party decides to terminate it in accordance with the respective termination clause. Taking BITs with 7 top-receivers of Russian FDI mentioned above as an example, there are two categories of termination clauses: (1) those that allow termination by prior notice at any time (“**anytime termination**”), and (2) those that only allow termination by prior notice within the short time window in advance of BIT's automatic renewal (“**end-of-term termination**”).

The ‘anytime termination’ clause is more common. It provides states with more flexibility to re-assess the desirability of a particular BIT. Nevertheless, some BITs still require states to wait until the expiration of the initial period in order to unilaterally terminate the treaty. Since most BITs were concluded in the nineties with the initial period of 10-15 years, this provision would not be an obstacle to termination ([Singapore-Russia BIT](#) being one of few exceptions, with its initial period lapsing in June 2027). Since the vast majority of Russia's BITs provide for ‘anytime termination’ clauses, there should be no issues with terminating them subject to prior notice.

The ‘end-of-term terminations’ clause is reflected, inter alia, in Russia's BITs with the [Netherlands](#), the [UAE](#), and [Ukraine](#). While the next possibility to denounce the BIT with the Netherlands will only occur in 2031, for the UAE and Ukraine BITs there is a chance to give such notice until 19 August 2022 and 27 January 2024 accordingly (*e.g.*, one-year advance notice).

Safeguards for Existing Investors

Under all BITs reviewed for this post, the effect of termination will be forward-looking and will not limit the protection of investments already covered by relevant treaties. This is due to so-called

‘sunset clauses’, which preserve BIT’s protection for existing investment. For instance, Article 14 of the [UK-Russia BIT](#) provides that “[...] *in respect of investments made at any time before the termination of the Agreement, its provisions shall continue in effect with respect to such investments for a period of fifteen years after the date of termination and without prejudice to the application thereafter of the general rules of international law*”. Depending on the termination clause of a particular BIT, such a survival period on average lasts 10 to 15 years, thereby protecting investors who have invested in Russia in reliance on the treaty guarantees which were in place. Therefore, states that once signed BITs and now wish to cut ties with Russia need not worry about their nationals already invested in it since they will have a generous transitional period to gradually leave the Russian market.

To Terminate or Not to Terminate

The authors of this post believe that terminating BITs is the right thing to do. It is only just that the state showing such abhorrent neglect of international law should not benefit from the system based on the international law and designed to foster peaceful economic cooperation.

Termination of Russian BITs would be quite a novel policy tool. There are examples of states unilaterally terminating their BITs with other countries *en masse* (see in this [blog post](#) on India) due to their disenchantment with the perceived pro-investor bias of the ISDS system. However, there have been no instances of consolidated termination of BITs with a country responsible for grave violations of international law. Yet, lack of precedent as such should not be an obstacle to considering this option, since the unprecedented crisis caused by the Russian aggression against Ukraine requires out of the box solutions.

Should Russia cease hostilities and bear responsibility for its internationally wrongful acts, the door should be open for it to negotiate new BITs in place of those terminated. This also may be an opportunity for foreign states to update terminated BITs with Russia (most of them concluded back in the nineties) to their current model BITs.

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This entry was posted on Saturday, March 26th, 2022 at 8:35 am and is filed under [Russia, Termination, Treaty, Vienna Convention on the Law of Treaties](#)

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