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As Reuters recently reported, Russia is preparing a new law that will allow it to seize the local businesses of Western companies that have left or suspended operations in Russia due to the invasion of Ukraine. Affected companies, who may see their investments in Russia expropriated without compensation, could have a remedy under international law through investment treaties.

These investment treaties allow covered foreign investors to bring claims for compensation against Russia directly in arbitrations before impartial and independent tribunals. For many investors, international arbitration may offer a better (or the only) avenue to recover losses because of the hurdles in suing foreign sovereigns in courts, including sovereign immunity laws, service of process challenges and abstention doctrines.

What is international investment law and how could it protect foreign investors in Russia?

International investment law is a treaty-based regime that is independent of national legal systems. It protects foreign investors and their investments from unfair interference by a host government through regulation or other governmental measures that are arbitrary or unfair, discriminate in favor of local players, or take the investment without full compensation.

Bilateral or multilateral investment treaties signed between a host state (the country where the investment is made, which in this case is Russia) and a home state (the country of the investor's nationality) also grant foreign investors the right to bring claims against host states before international arbitration tribunals. This means that investors may have a direct right of action against Russia for its unlawful measures, in a neutral forum, heard by independent arbitrators appointed by the disputing parties.

The resulting awards generally are enforceable against states as local court judgments. This means awards could be enforced against Russian state assets outside of Russia, subject to questions of whether those assets are protected by sovereign immunity.

However, access to these legal protections and remedies depends on whether the foreign investor is from a home state that has concluded an investment treaty with Russia. Protection also may be available for companies within a corporate holding structure that are from a home state that has concluded an investment treaty with Russia.

What investment treaties are available to foreign investors in Russia?

Russia has 62 bilateral investment treaties (BITs) in force, including with European Union member states such as Denmark, Finland, France, Germany, Lithuania, Italy, Luxembourg, the Netherlands, Norway, Spain and Sweden. Russia also has BITs with Canada, Japan, South Korea, Switzerland, the UK and Ukraine.

The United States has signed a BIT with Russia, but it has not entered into force. Despite this, US-based companies might still avail themselves of investment treaty protections if their investments in Russia are structured via one of the countries with a BIT with Russia.

How do the investment treaties protect foreign investors?

The protections vary, depending on the treaty, but generally, most Russian BITs prohibit expropriation without

compensation, and require Russia to accord investments fair and equitable treatment (FET).

International investment law requires host states to pay prompt and adequate compensation if they seize or nationalize investors' assets. Critically, the protection also covers "indirect expropriation," which occurs when the state does not take the property directly, but rather takes measures that largely deprive the investor of the benefits or value of its investment.

This means that if Russia directly seizes a foreign investment or adopts measures that destroy its value, Russia could be liable for breaching the prohibition against expropriation in BITs.

Additionally, Russia is required to treat investors fairly and equitably. Under this standard, Russia must not treat investors arbitrarily or unreasonably, frustrate their legitimate expectations, or abruptly change its regulatory framework. Consequently, Russia's proposed law of seizing the assets of Western investors could constitute an arbitrary retaliatory measure breaching the FET protection.

How can an investor claim compensation for the violation of its rights in Russia?

Investors who are covered by an investment treaty can bring an action directly against Russia before an international arbitration tribunal and claim damages for Russia's unlawful measures. However, each treaty will have certain conditions that need to be complied with before bringing a claim – for example, notifying Russia of a dispute and a cooling-off period before commencing arbitration.

Please reach out to any of the Cooley contacts below if you have questions on investment treaty claims or how to address the Russian government's retaliatory measures.

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