# International Sanctions, Investment Treaty Obligations and Investor-State Dispute Settlement

**Beneficiary**

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## EXECUTIVE SUMMARY

International sanctions are coercive measures imposed by States unilaterally or by the UN globally to indicate the enforcement of international norms, withhold resources, or force behavioral change. The report focuses on measures taken pursuant to international sanctions regimes against foreign nationals who may qualify as investors with protected investments in the sanctioning State's territory. The principal categories of sanctions measure capable of directly affecting foreign investments include asset freezes, asset seizures and forfeitures, trade restrictions, financial and capital market restrictions, license revocations, border and customs measures, as well as secondary sanctions. Each measure varies in severity, ranging from temporary prohibitions on dealing with frozen property (where legal title is preserved) to the permanent elimination of ownership through confiscation and forfeiture.

### Implications for investment treaty commitments

Sanctions-related measures may implicate the following investment protection standards. In principle, the fact that a State measure is taken pursuant to a sanctions framework would not alter an arbitral tribunal's approach in scrutinizing the measure's conception and execution. That said, measures taken pursuant to UN sanctions may be accorded a higher degree of deference across investment protection standards.

Sanctions-related measures may constitute **expropriation** when their cumulative effect amounts to a permanent and substantial deprivation of the investment. Forced liquidation, asset seizure, prolonged asset freezes, license revocations, and sovereign interference with contracts have all been found capable of meeting this threshold. A State's invocation of sanctions-enforcement or other regulatory justifications does not automatically render those measures lawful: arbitral tribunals have dismissed the police powers defense in situations where measures went beyond what the stated purpose required, were disproportionate or without due process.

Sanctions-related measures may breach the **fair and equitable treatment** standard, particularly in situations where sanctions designations have been made arbitrarily, in abuse of authority, without due process (even post-designation), and possibly when they frustrate specific commitments to the contrary given to the singular affected investor or when they cause a disproportionate interference with the investment. The threshold for establishing a breach of the fair and equitable treatment standard may vary depending on the language of applicable provision: qualified provisions, which tie the standard to customary international law or the minimum standard of treatment, may demand a higher threshold for violation compared to unqualified provisions.

Sanctions-related measures may breach the host State's duty **to not discriminate** between foreign investors, as well as between foreign and domestic investors, who are in 'like circumstances'. An analysis of the likeness of circumstances is not confined to sector identity but extends to an examination of the regulatory framework and legal regimes applicable to the comparable investors. An argument could be made that differential treatment accorded to a foreign investor arising out of the latter's designation in a sanctions list would not constitute a breach of the host State's non-discrimination obligations, insofar as the designated investor and comparable investors would not be in like circumstances. But, for the argument to succeed, the host State may need to demonstrate that the sanctions in question pursue a legitimate public policy goal and that they are not being used as a pretext to discriminate against investors of a certain nationality in the circumstances of the case.

Sanctions-related measures may breach **transfer of funds** clauses, in particular through sanctions-related asset freezes and transaction prohibitions. In construing the scope of the transfers obligation, tribunals have limited the State's responsibility principally by: confining protection to transfers essentially connected to the investment; requiring the investor to first have resorted to domestic authorization procedures; and characterizing the obligation as a negative duty not to imprison funds rather than a guarantee of liquidity. Older-generation investment treaties formulate the transfer of funds guarantee in absolute terms, with no express exceptions for balance-of-payments difficulties or related regulatory matters. Whether a State nevertheless is able to justify restricting an absolute clause by reference to a sanctions regime remains an open question. Although modern investment treaties routinely incorporate exceptions to the free transfers obligation, the application of those exceptions in sanctions-related measures is unclear.

## Potential State defenses

Potential defenses that States may raise in sanctions-related claims can be based on the applicable investment treaty or on customary international law (CIL).

Treaty-based defenses include objections to the jurisdiction of the tribunal arising out of each treaty's **definition of 'investment'** (including whether certain assets qualify as investments, whether the investment has been made in the territory of the host State and whether the investment has been made in accordance with the host State's laws and regulations), the invocation of **denial of benefits** clauses (when these exist), or the invocation of **essential security exceptions** clauses (when these exist). These defenses can be effective, although much turns on the language of the investment treaty in question. For States with a varied investment treaty portfolio, therefore, treaty-based defenses may be more effective under some of their treaties as opposed to others.

With respect to defenses emanating from customary international law, the report analyses two: **force majeure** (Article 23 ARSIWA) and **necessity** (Article 25 ARSIWA). The effectiveness of these defenses in the context of sanctions-related cases would depend heavily on the facts and circumstances of the particular case and, therefore, would be difficult to predict. Nevertheless, the report finds that successful invocation of the force majeure defense would face significant difficulties in relation to measures taken pursuant to sanctions.

## Implications for the annulment, set-aside, recognition and enforcement of sanctions-related arbitral awards

The implications arising for the annulment, set-aside, recognition and enforcement of sanctions-related arbitral awards vary depending on whether an award has been rendered under the ICSID Convention or outside it.

**ICSID awards** benefit from a self-contained regime under which awards are only subject to annulment within the ICSID framework on limited procedural grounds that do not have a direct relation to the subject-matter of the dispute. Similarly, the ICSID Convention excludes any form of domestic judicial review, including on public policy grounds, on the recognition and enforcement of ICSID awards, thus leaving no formal avenue to resist enforcement.

Domestic judicial review of **non-ICSID awards** is possible with respect to set-aside, recognition and enforcement, although the grounds for that are often construed narrowly. At the set-aside stage, courts at the seat in selected jurisdictions have consistently held that sanctions do not render disputes non-arbitrable and that public policy challenges require a concrete and effective breach of the forum's fundamental values—an abstract invocation of the forum's sanctions policy is insufficient. The pending CJEU referrals in *NV Reibel* (Sweden) and *DNO v. Yemen* (France) may transform this position within the EU by clarifying whether EU sanctions constitute EU public policy for the purposes of set-aside and enforcement of ISDS arbitral awards. At the enforcement stage, domestic courts across selected jurisdictions construe the public policy ground under Article V(2)(b) of the New York Convention narrowly, distinguishing between sanctions that form part of the forum's public policy (e.g., UN sanctions) and those that do not (e.g., unilateral foreign sanctions). A recurring pattern is identified across the United States, Canada, and the United Kingdom, where courts confirm or recognize awards while deferring sanctions compliance to the execution stage (known as a 'distribution barrier' approach), which seeks to preserve the award's validity while preventing prohibited fund transfers.

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## LIST OF ABBREVIATIONS

| Abbreviation | Full Form |
|---|---|
| AJIL | American Journal of International Law |
| AfCFTA | African Continental Free Trade Area |
| Arb Int’l | Arbitration International |
| ARSIWA | Articles on Responsibility of States for Internationally Wrongful Acts |
| BIS | Bureau of Industry and Security (United States) |
| BIT | Bilateral Investment Treaty |
| CAATSA | Countering America’s Adversaries Through Sanctions Act (United States) |
| CETA | Comprehensive Economic and Trade Agreement |
| CIL | Customary International Law |
| CJEU | Court of Justice of the European Union |
| CPTPP | Comprehensive and Progressive Agreement for Trans-Pacific Partnership |
| CUFTA | Canada-Ukraine Free Trade Agreement |
| DCCP | Dutch Code of Civil Procedure |
| DoB | Denial of Benefits |
| EAR | Export Administration Regulations (United States) |
| ECT | Energy Charter Treaty |
| ESI | Essential Security Interests |
| EU | European Union |
| FAA | Federal Arbitration Act (United States) |
| FET | Fair and Equitable Treatment |

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| FIPA | Foreign Investment Promotion and Protection Agreement |
| FTA | Free Trade Agreement |
| HKIAC | Hong Kong International Arbitration Centre |
| HRC | Human Rights Council |
| IAA | International Arbitration Act 1994 (Singapore) |
| ICC | International Chamber of Commerce |
| ICLQ | International and Comparative Law Quarterly |
| ICSID | International Centre for Settlement of Investment Disputes |
| IEEPA | International Emergency Economic Powers Act (United States) |
| IIA | International Investment Agreement |
| ILC | International Law Commission |
| ILM | International Legal Materials |
| ISDS | Investor-State Dispute Settlement |
| JVCFOA | Justice for Victims of Corrupt Foreign Officials Act (Canada) |
| LCIA | London Court of International Arbitration |
| MAS | Monetary Authority of Singapore |
| MFN | Most-Favored-Nation |
| MST | Minimum Standard of Treatment |
| NAFTA | North American Free Trade Agreement |
| NT | National Treatment |
| NYIL | Netherlands Yearbook of International Law |
| OFAC | Office of Foreign Assets Control (United States) |

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| OFSI | Office of Financial Sanctions Implementation (United Kingdom) |
| Penn St L Rev | Penn State Law Review |
| PCA | Permanent Court of Arbitration |
| PILA | Federal Act on Private International Law (Switzerland) |
| RJT | Revue Juridique Thémis |
| SAMLA | Sanctions and Anti-Money Laundering Act 2018 (United Kingdom) |
| SCC | Stockholm Chamber of Commerce |
| SEMA | Special Economic Measures Act (Canada) |
| SIAC | Singapore International Arbitration Centre |
| SICC | Singapore International Commercial Court |
| SWIFT | Society for Worldwide Interbank Financial Telecommunication |
| TDM | Transnational Dispute Management |
| TEU | Treaty on European Union |
| TFEU | Treaty on the Functioning of the European Union |
| UK | United Kingdom |
| UN | United Nations |
| UN Act | United Nations Act (Canada) |
| UNCITRAL | United Nations Commission on International Trade Law |
| UNCTAD | United Nations Trade and Development |
| UNSC | United Nations Security Council |
| US | United States |
| USMCA | United States-Mexico-Canada Agreement |

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| VCLT | Vienna Convention on the Law of Treaties |

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# I. PRIMER ON INTERNATIONAL SANCTIONS REGIMES

## A. Introduction to international sanctions

1. International sanctions are coercive measures adopted by States or international organizations to bring about a change in the policy or conduct of a target State, entity, or individual.[1] They can serve diverse policy aims, including coercion (forcing behavioral change), constraint (denying resources for aggression), and signaling (enforcing international norms).[2] Different sanctions regimes may serve different policy objectives depending on the actor imposing them and the particular geopolitical issues they intend to address.

2. International sanctions can be brought under different categorizations. With respect to **type**, international sanctions comprise principally economic measures targeting distinct persons, assets or activities. Such measures can range from asset freezes and financial market restrictions,[3] to import/export bans or other sectoral prohibitions (e.g., aviation and maritime sanctions),[4] among potentially others.

3. With respect to the **source of legal authority** from which the imposition of sanctions originates, international sanctions can be divided into (i) multilateral sanctions, imposed by the UN Security Council pursuant to Article 41 of the UN Charter—and implemented by individual States, and (ii) unilateral or autonomous sanctions—imposed by regional organizations or individual states (e.g., by the EU, the United States, Canada, or the United Kingdom, among other actors) under their own authority.

4. With respect to their **effect**, international sanctions can be primary or secondary. Primary sanctions are those imposed directly against specific countries, entities or individuals prohibiting direct transactions between the nationals of the sanctioning entity and the subject that is under sanctions. Secondary sanctions are imposed on third, non-sanctioned subjects who interact with a primary sanctioned subject. The aim of secondary sanctions is usually to alter the behavior of third actors by discouraging them from interacting with the primary sanctioned subject. (**Box I**)

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[1] Andreas F Lowenfeld, *International Economic Law* (OUP 2002) 698; Gary Clyde Hufbauer and others, *Economic Sanctions Reconsidered* (3rd edn, Peterson Institute for International Economics 2007).

[2] Francesco Giumelli, *Coercing, Constraining and Signaling: Explaining UN and EU Sanctions after the Cold War* (ECPR Press 2011) 29-50.

[3] See, e.g., UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267, para 4(b); UNSC Res 2270 (2 March 2016) UN Doc S/RES/2270, para 32; Countering America's Adversaries Through Sanctions Act 2017 (CAATSA), Pub L 115-44, 131 Stat 886, ss 226-227.

[4] See, e.g., UNSC Res 2371 (5 August 2017) UN Doc S/RES/2371, para 5; Council Regulation (EU) 2022/1059 of 27 June 2022 on restrictive measures in view of the situation in Ukraine [2022] OJ L173/1, art 3c; UNSC Res 2375 (11 September 2017) UN Doc S/RES/2375, para 12.

**Box I: Secondary sanctions**

Secondary sanctions are a feature of the US sanctions framework. For instance, under the Countering America's Adversaries Through Sanctions Act (CAATSA), the President may impose sanctions on foreign persons who have had transactions for or on behalf of persons designated under US sanctions on Russia.[5] CAATSA contains several provisions with extraterritorial effect, e.g.:

- Section 226 targets foreign financial institutions who knowingly facilitate a 'significant transaction' for or on behalf of anyone designated under US Russia sanctions;
- Section 228 targets any foreign person who has knowingly facilitated a 'significant transaction' for or on behalf of persons designated under US Russia sanctions;
- Section 231 goes further to impose sanctions on persons dealing with the Russian defense or intelligence sectors;
- Section 235 sets out a list of twelve possible sanctions the President may select to impose on such persons.

In practice, secondary sanctions have been imposed against entities in China, Türkiye, and other jurisdictions for transactions with Russian-sanctioned parties.[6]

The EU does not use the term 'secondary sanctions' but has developed a framework that is functionally similar to secondary sanctions. For instance, Article 5ad of Regulation 833/2014, introduced in the 18th Sanctions Package, and expanded in the 19th Sanctions Package, prohibits transactions with third-country credit institutions, financial institutions and crypto-asset service providers that are significantly frustrating the purpose of EU sanctions, supporting Russia's war effort, or supporting non-financial entities that are frustrating prohibitions on oil and maritime transport.[7] The list has been expanding to include institutions from Central Asia, the United Arab Emirates and Hong Kong, among other jurisdictions.[8] Additionally, Article 12 of Regulation 833/2014 contains a general anti-circumvention prohibition, which makes it unlawful to

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[5] Countering America's Adversaries Through Sanctions Act (CAATSA), Pub L 115-44 (2 August 2017), s 228.

[6] See e.g., OFAC, Designation of China's Equipment Development Department and its Director under CAATSA, s 231 (September 2018); OFAC, Designation of Turkey's Presidency of Defense Industries under CAATSA, s 231 (December 2020).

[7] Council Regulation (EU) 833/2014 of 31 July 2014 Concerning Restrictive Measures in view of Russia's Actions Destabilizing the Situation in Ukraine [2014] OJ L229/1 (as introduced by Council Regulation (EU) 2025/1494 of 18 July 2025 (18th Sanctions Package) and amended by Council Regulation (EU) 2025/2033 of 23 October 2025 (19th Sanctions Package)), art 5ad and annex XLV (pt A-C).

[8] As of the 19th Sanctions Package (October 2025), annex XLV to Regulation (EU) 833/2014 includes entities from Tajikistan, Kyrgyzstan, the United Arab Emirates and Hong Kong, among others. See Council Regulation (EU) 2025/2033 of 23 October 2025 amending Regulation (EU) 833/2014.

'knowingly and intentionally participate in activities the object or effect of which is to circumvent' the prohibitions in the Regulation.[9] Furthermore, the EU has also expanded Annex IV to Regulation 833/2014, which lists the entities subject to strict export restrictions on dual-use items and advanced technology. It now includes 45 entities in third countries (including in China, India, Thailand, and Türkiye), identified as enabling circumvention by way of re-exportation of restricted goods to Russia.[10]

5. The principal focus of the present report is on measures taken by States pursuant to an international sanctions regime, either multilateral or unilateral in origin, against foreign nationals (individuals and entities) that could qualify as an investor having an investment in the territory of the State imposing sanctions.

## B. A typology of sanctions measures

6. This section offers a typology of sanctions measures that can directly affect foreign investors and their investments. The typology is not meant to be comprehensive or exhaustive. Rather, the intention is for the typology to serve as a reference framework for the analysis that follows, particularly with respect to investment treaty claims and potential State defenses.

### 1. Asset freezes

7. An asset freeze is a prohibition on dealing with, transferring, or making available any funds or economic resources belonging to, owned, held, or controlled by a designated sanctioned person. As legal title remains with the designated person, the measure does not involve a change in ownership of the frozen property.[11] Rather, this is a temporary and reversible measure, denying the designated person access to economic resources until there is a change in the circumstances that initially gave rise to the asset freeze.

8. In Canada, asset freezes are enforced through the 'dealings prohibition' applicable to persons designated under regulations made pursuant to the Special Economic Measures Act (SEMA). Sections 4(1)(a) and 4(2)(a) of SEMA empower the Governor in Council

[9] Council Regulation (EU) 833/2014 of 31 July 2014 Concerning Restrictive Measures in view of Russia's Actions Destabilizing the Situation in Ukraine [2014] OJ L229/1, art 12. See also European Commission, 'Guidance for EU Operators: Implementing Enhanced Due Diligence to Shield Against Russia Sanctions Circumvention' (December 2023) <https://finance.ec.europa.eu/system/files/2023-12/guidance-eu-operators-russia-sanctions-circumvention_en.pdf>.

[10] Council Regulation (EU) 833/2014 of 31 July 2014 Concerning Restrictive Measures in view of Russia's Actions Destabilizing the Situation in Ukraine [2014] OJ L229/1, annex IV (as expanded by the 19th Sanctions Package, October 2025), listing 45 entities, including 28 established in Russia, 12 in China (including Hong Kong), 3 in India and 2 in Thailand, subject to the export restrictions in art 2a.

[11] HM Treasury Office of Financial Sanctions Implementation, 'UK Financial Sanctions: General Guidance' (January 2026) para 3.1 <https://www.gov.uk/government/publications/financial-sanctions-general-guidance>.

to restrict or prohibit 'any dealing … in any property, wherever situated' that is owned or controlled by a designated person.[12] Other Canadian legislations under which similar restrictions apply are the United Nations Act (UN Act) and the Justice for Victims of Corrupt Foreign Officials Act (JVCFOA).[13]

9. In the European Union (EU), the legal basis for imposing sanctions is found in the EU Treaties, *viz.* Article 29 of the Treaty on European Union (TEU) and Article 215 of the Treaty on the Functioning of the European Union (TFEU). Taken together, these provisions empower the Council of the European Union (comprising ministers from all 27 EU Member States) to adopt restrictive economic measures against third States, non-State entities, as well as natural and legal persons. For instance, Article 2(1) of Council Regulation (EU) No 269/2014 provides that all funds and economic resources belonging to, owned, held, or controlled by listed persons 'shall be frozen', whereas Article 2(2) prohibits making funds or economic resources available to, or for the benefit of, listed persons.[14]

10. In the United Kingdom, Section 3 of the Sanctions and Anti-Money Laundering Act (SAMLA) 2018 sets out the types of financial sanctions, including asset freezes, that may be imposed through regulations pursuant to Section 1 of SAMLA.[15] These regulations create individual 'regimes', which the UK government describes as collections of sanctions measures organized by country (e.g., Russia, Iran, Myanmar) or theme (e.g., Global Human Rights, Anti-Corruption, Counterterrorism, Cyber Activity).[16] The Russia regime, for instance, is principally set out under the Russia (Sanctions) (EU Exit) Regulations 2019.[17] The Office of Financial Sanctions Implementation (OFSI), a division of HM Treasury, maintains the Consolidated List of Asset Freeze Targets.[18]

11. The United States uses a different terminology but achieves the same functional result. Under the International Emergency Economic Powers Act (IEEPA) 50 USC § 1702(a)(1)(B), the President may 'block' any property in which a foreign country or

[12] Special Economic Measures Act, SC 1992, c 17, s 4(1)(a) and (2)(a).

[13] United Nations Act, RSC 1985, c U-2, s 2; Justice for Victims of Corrupt Foreign Officials Act, SC 2017, c 21, s 2.

[14] Council Regulation (EU) 269/2014 of 17 March 2014 Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine [2014] OJ L78/6, arts 2(1) and 2(2).

[15] Sanctions and Anti-Money Laundering Act 2018, s 3.

[16] HM Government, 'Current UK Sanctions Regimes' <https://www.gov.uk/government/collections/uk-sanctions-regimes-under-the-sanctions-act>; See also Post-Legislative Scrutiny Memorandum: Sanctions and Anti-Money Laundering Act 2018 (March 2024) Annex A (listing thematic and geographic regimes separately).

[17] Russia (Sanctions) (EU Exit) Regulations 2019, SI 2019/855 (as amended).

[18] Sanctions and Anti-Money Laundering Act 2018, s 3. See also HM Treasury Office of Financial Sanctions Implementation, 'UK Financial Sanctions: General Guidance' (January 2026) <https://www.gov.uk/government/publications/financial-sanctions-general-guidance>.

national has an interest.[19] In practice, the President delegates this function to the Office of Foreign Assets Control (OFAC), which administers and enforces a Specially Designated Nationals and Blocked Persons List.[20]

12. Singapore's framework is narrower in scope, insofar as it does not have special legislation for imposing unilateral sanctions. Rather, Singapore implements UN sanctions under Section 2 of the United Nations Act, which empowers the Minister for Law to make regulations giving effect to UN Security Council resolutions.[21] Additionally, the Monetary Authority of Singapore (MAS) implements targeted financial sanctions against certain financial institutions pursuant to Section 192 of the Financial Services and Markets Act 2022.[22]

13. Despite their temporary and reversible character, the practical impact of asset freezes can be significant. The EU alone has imposed asset freezes on over 2,700 individuals and entities under Regulation 269/2014,[23] whereas Canada has reported approximately CAD 185 million in frozen property under the Special Economic Measures (Russia) Regulations as of November 2025.[24]

### 2. Asset seizure, confiscation, and forfeiture

14. Asset seizure, confiscation, and forfeiture involve permanent deprivation of ownership of property belonging to a designated person. Unlike an asset freeze, these measures extinguish the designated person's title to the property in question.

15. Canada's forfeiture regime under SEMA operates in two stages. Under Section 4(1)(b), the Governor in Council may order the seizure or restraint of property situated in Canada that is owned or controlled by a designated person.[25] Once property is seized, the Minister of Foreign Affairs can apply to a superior court for a forfeiture order under Section 5.4(1) of SEMA.[26] The proceeds of forfeited property may be used for the reconstruction of an affected foreign State, the restoration of international peace and

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[19] International Emergency Economic Powers Act, 50 USC § 1702(a)(1)(B).

[20] Code of Federal Regulations (US), 31 CFR ch V.

[21] United Nations Act (Cap 339) (Singapore), s 2(1);

[22] Financial Services and Markets Act 2022 (Singapore), s 192. See also Monetary Authority of Singapore, 'Targeted Financial Sanctions' <https://www.mas.gov.sg/regulation/anti-money-laundering/targeted-financial-sanctions>.

[23] Skadden Arps Slate Meagher & Flom LLP, 'EU Adopts 19th Russia Sanctions Package' (November 2025) <https://www.skadden.com/insights/publications/2025/11/eu-adopts-19th-sanctions-package>.

[24] Royal Canadian Mounted Police, 'Disclosure Reporting to the RCMP under the Special Economic Measures Act' (December 2025) <https://rcmp.ca/en/federal-policing/economic-and-financial-crime/reporting-frozen-assets-under-special-economic-measures-act>.

[25] SEMA, s 4(1)(b).

[26] Ibid., s 5.4(1).

security, or the compensation of victims, pursuant to Section 5.6 of SEMA.[27] By way of example, in December 2022, Canada initiated seizure and forfeiture proceedings of approximately USD 26 million in assets linked to Roman Abramovich.[28] In another example, in June 2023, Canada seized a Russian Antonov cargo aircraft at Toronto's airport, pursuant to a Governor in Council order under SEMA, Section 4(1)(b).[29] In March 2025, the Attorney General filed an application under Section 5.4(1) of SEMA seeking to permanently vest ownership of the aircraft in the Crown.[30]

16. A similar forfeiture mechanism is provided in the JVCFOA.[31]

17. In the United States, the IEEPA, 50 USC § 1702(a)(1)(C), authorizes the President to 'confiscate any property' of a foreign person, country, or national and to vest title in an agency or person as the President may designate, 'when the United States is engaged in armed hostilities'.[32] This power has been exercised with respect to Iraqi State assets during the 2003 conflict, where all right, title, and interest in the identified assets were transferred to the US Department of the Treasury and used for humanitarian relief and reconstruction in Iraq.[33]

18. In the EU, there is no equivalent EU-wide mechanism for the confiscation or forfeiture of frozen assets on the basis of sanctions designations alone.[34] For instance, the EU's response to immobilized Russian sovereign assets held in EU central securities depositories has deliberately stopped short of forfeiture.[35] Under Article 5a of Regulation 2024/1469, central securities depositories holding more than EUR 1 million of immobilized reserves of the Russian Central Bank must segregate the extraordinary cash balances and net profits accumulated on those assets since 15 February 2024, and

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[27] Ibid., s 5.6.

[28] Order Respecting the Restraint of Property Situated in Canada (Roman Arkadyevich Abramovich), SOR/2022-279.

[29] Order Respecting the Seizure of Property Situated in Canada (Volga-Dnepr Airlines or Volga-Dnepr Group), SOR/2023-120; later replaced by Order Respecting the Seizure of Property Situated in Canada (Aircraft RA-82078), SOR/2025-29.

[30] Attorney General of Canada, Application for Forfeiture under s 5.4(1) of the Special Economic Measures Act (Ontario Superior Court of Justice, 18 March 2025).

[31] See JVCFOA, as amended by Budget Implementation Act, 2022, No 1, SC 2022, c 10.

[32] IEEPA, 50 USC § 1702(a)(1)(C).

[33] Executive Order 13290 of 20 March 2003, 'Confiscating and Vesting Certain Iraqi Property', Vol 68, No 56 Fed Reg 14307.

[34] For an overview of the EU's approach, see Maruša T Veber, 'EU Sanctions and Russia's Frozen Assets' (Study, European Parliament Directorate-General for External Policies, PE 754.487, November 2025) <https://www.europarl.europa.eu/RegData/etudes/STUD/2025/754487/EXPO_STU(2025)754487_EN.pdf>.

[35] Council of the EU, 'Extraordinary Revenues Generated by Immobilized Russian Assets: Council Greenlights the Use of Net Windfall Profits to Support Ukraine's Self-Defense and Reconstruction' (Press Release, 21 May 2024) <https://www.consilium.europa.eu/en/press/press-releases/2024/05/21/extraordinary-revenues-generated-by-immobilised-russian-assets-council-greenlights-the-use-of-windfall-net-profits-to-support-ukraine-s-self-defense-and-reconstruction/>.

must transfer 99.7% of the net profits to the EU as a financial contribution,[36] to be channeled to the reconstruction of Ukraine.[37] The underlying principal, however, remains property of the Russian Central Bank.[38]

19. In the United Kingdom, SAMLA does not provide for the confiscation of frozen assets. In Singapore, the UN Act does not include forfeiture powers of this kind.

### 3. Travel bans and visa restrictions

20. Travel bans and visa restrictions aim to deny designated individuals the right of entry into, or transit through, the territory of the sanctioning State. A travel ban imposed on an investor or on the key personnel of an investing company may obstruct the investor's ability to manage, supervise, or exercise control over an investment in the sanctioning host State.

21. In Canada, all individuals designated under SEMA, JVCFOA, and UN Act regulations are deemed inadmissible to Canada under the Immigration and Refugee Protection Act.[39] In the EU, travel bans are imposed through Council decisions adopted under the Common Foreign and Security Policy (e.g., Council Decision 2014/145/CFSP, Article 1(1), concerning Ukraine), which are binding on Member States but do not require implementing regulations as such.[40] In the United Kingdom, immigration sanctions are implemented through SAMLA designations which prevent excluded persons from entering the United Kingdom under Section 8B of the Immigration Act 1971.[41] In the United States, the Immigration and Nationality Act, 8 USC § 1182, provides for the inadmissibility of foreign nationals subject to certain executive orders or designated

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[36] Council Regulation (EU) 2024/1469 of 21 May 2024 amending Regulation (EU) 833/2014 Concerning Restrictive Measures in View of Russia's Actions Destabilizing the Situation in Ukraine, art 1, inserting new paragraphs into art 5a of Regulation (EU) 833/2014 (see in particular art 5a(9)-(10)).

[37] Ibid., art 1(2) and Annex (inserting Annex XLI to Regulation 833/2014, allocating 90% of the contribution through the European Peace Facility and the remainder through the Ukraine Facility, subject to annual review).

[38] See Isabelle Van Damme, Antigoni Matthaiou and Emily Greenaway, 'EU Greenlights the Use of Extraordinary Net Profits Generated by Frozen Assets of the Central Bank of Russia to Support Ukraine' (Van Bael & Bellis, 24 May 2024) <https://www.lexology.com/library/detail.aspx?g=0b86e1a6-04d3-4054-afbe-5744cb53835e>. For the distinction between immobilization and confiscation, see Swedish Ministry for Foreign Affairs, 'EU Reaches Historic Decision to Use Revenues Generated by Russian Assets to Support Ukraine' (Press Release, 22 May 2024) ('[I]t is not the Russian Central Bank's assets that will be used to benefit Ukraine, but rather the extraordinary revenues accruing to the central securities depositories as a result of EU sanctions against Russia.')

[39] Global Affairs Canada, 'Canadian Sanctions – Essential Information' <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/sanctions/essential-informations-essentielles.aspx?lang=eng>.

[40] Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine [2014] OJ L78/16, art 1(1).

[41] Immigration Act 1971, s 8B (as inserted by the Sanctions and Anti-Money Laundering Act 2018).

under sanctions programs.[42] In Singapore, travel bans may be implemented to the extent required by the relevant UN Security Council resolutions.[43]

### 4. Trade restrictions

22. Trade restrictions include a broad category of measures such as import and export bans, prohibitions on the transfer of technology and technical data, arms embargoes, and trade restrictions imposed against specific sectors of the sanctioned State (e.g., energy, aviation, maritime transport, and defense). These measures can affect investors whose businesses in the State imposing the sanctions depend on cross-border trade or operate in the restricted sector(s).

23. In Canada, Sections 4(2)(b)-(d) of SEMA, authorize restrictions on: the exportation, sale, supply, or shipment of goods to a foreign State or designated person (paragraph (b)); the transfer or communication of technical data (paragraph (c)); and the importation or purchase of goods exported from the sanctioned State (paragraph (d)).[44]

24. The EU has a more explicit framework. Council Regulation (EU) No 833/2014 imposes multiple sector-specific restrictions on Russia, including, among other things: prohibitions on the export of dual-use goods and technology (Article 2); restrictions on goods that could contribute to Russia's military or technological enhancement (Article 2a); a crude oil import ban with associated price cap mechanisms (Articles 3m–3n); as well as aviation-related restrictions covering, both, the export of aeronautical goods and related services (Article 3c) and the use of EU airspace by Russian aircraft (Article 3d).[45] By way of example, the EU has imposed restrictions on the export to Russia of goods and technology that could contribute to Russia's military and technological enhancement, including semiconductors, quantum computing technology, and advanced electronics.[46]

25. The United Kingdom's framework is broadly similar to the EU's. The Russia (Sanctions) (EU Exit) Regulations 2019 (SI 2019/855) (as amended), restrict the export of energy-related goods, military goods, and critical industry goods and technology.[47]

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[42] Immigration and Nationality Act, 8 USC § 1182. The specific application to sanctions-designated persons depends on the terms of the relevant executive order.

[43] See, e.g., UNSC, Security Council Committee Established Pursuant to Resolution 1267 (1999), 'Note Verbale dated 17 April 2003 from the Permanent Mission of Singapore to the United Nations Addressed to the Chairman of the Committee', S/AC.37/2003/(1445)17 [17 April 2003], 13-15 (in relation to designated individuals under UNSC Res 1390 (2002) and 1455 (2003)).

[44] SEMA, s 4(2)(b)-(d).

[45] Council Regulation (EU) 833/2014 of 31 July 2014 Concerning Restrictive Measures in view of Russia's Actions Destabilizing the Situation in Ukraine [2014] OJ L229/1, arts 2, 2a, 3m, 3n, 3c, 3d (as amended).

[46] See Council Regulation (EU) 2022/328 of 25 February 2022 amending Regulation (EU) 833/2014 [2022] OJ L49/1, and subsequent amendments through the 19th sanctions package (October 2025).

[47] Russia (Sanctions) (EU Exit) Regulations 2019, SI 2019/855, ch 2 (as amended).

26. Trade restrictions in the United States operate through a different institutional channel. The Export Administration Regulations (EAR), 15 CFR Parts 730-774 are not administered by OFAC (which principally administers financial sanctions and asset blocking programs), but by the Bureau of Industry and Security (BIS). The Regulations function as export controls rather than sanctions in the strict sense. An entity placed on the BIS Entity List faces restrictions in addition to any OFAC blocking orders that may apply against it already.[48]

27. In Singapore, the Strategic Goods (Control) Act regulates the transfer and brokering of strategic goods and technology, administered by Singapore Customs.[49]

### 5. Financial and capital market restrictions

28. Financial and capital market restrictions prohibit specific categories of financial transactions, services or dealings involving sanctioned States or entities. They take various forms, such as prohibitions on correspondent banking services, restrictions on trading in securities and financial instruments, bans on new investment, or the exclusion of designated institutions from payment messaging systems like SWIFT. Targeted against foreign investors with an investment in the territory of the State imposing such financial and capital market restrictions, these measures could make it difficult or even impossible for sanctioned investors to operate their investments.

29. Canada's SEMA provisions are drafted broadly. Section 4(2)(e) of SEMA authorizes the restriction or prohibition of 'financial services or any other services' to, from, or for the benefit of a foreign State or designated person. The language is broad enough to capture any financial dealing.[50]

30. In the EU, Council Regulation (EU) No 833/2014 for its part prohibits, among other things: the purchase, sale, or provision of investment services for transferable securities and money market instruments issued by specific Russian State-owned entities (Article 5); the acceptance of deposits exceeding specified thresholds from Russian nationals or residents (Article 5b); and the provision of financial messaging services to designated Russian credit institutions (Article 5h).[51] By way of example, in March 2022, the EU excluded seven Russian banks from the SWIFT messaging system with the aim of severing their access to international payment networks.[52]

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[48] Export Administration Regulations, 15 CFR pts 730-774. See in particular the Entity List (Supplement No 4 to pt 744.16).

[49] Strategic Goods (Control) Act (Cap 300) (Singapore).

[50] SEMA, s 4(2)(e).

[51] Council Regulation (EU) 833/2014 of 31 July 2014 Concerning Restrictive Measures in view of Russia's Actions Destabilizing the Situation in Ukraine [2014] OJ L229/1, arts 5, 5b, 5g and 5h (as amended).

[52] Council Regulation (EU) 2022/345 of 1 March 2022 amending Regulation (EU) 833/2014 [2022] OJ L63/1.

31. The United Kingdom's Russia (Sanctions) (EU Exit) Regulations 2019, as amended, include similar restrictions such as prohibitions on dealing in securities and capital market instruments under regulations 16-17.[53] OFSI guidance confirms that prohibitions extend to investment bans, restricting access to capital markets, and directions to cease banking relationships.[54]

32. In the United States, financial and capital market restrictions originate in statute (principally IEEPA) authorizing the President to declare national emergencies and regulate related transactions.[55] Pursuant to this authority, the President issues executive orders (see, e.g., Executive Order 13662, signed by President Obama on 20 March 2014, in the Russia context) which, rather than specifying prohibitions, in turn authorize the Department of the Treasury to identify sectors.[56] OFAC subsequently implements the restrictions through directives that have operational force. For instance, Directives 1 to 4 under the aforementioned Executive Order 13662 progressively restricted dealings in new debt and equity of specified Russian financial institutions, energy companies and defense entities, and imposed related restrictions on deep-water, Arctic offshore and shale oil projects.[57]

33. In Singapore, MAS has the authority to issue targeted financial sanctions notices. For instance, Notice SNR-N01 prohibits Singaporean financial institutions from providing financial services to, or entering into business relationships with, designated Russian entities and banks.[58]

### 6. License revocations or denials

34. License revocations or denials target the administrative permissions necessary for a specific business activity to occur (e.g., an export license, a financial services license, or an operating permit). The withdrawal of such licenses can make an investment inoperable even in the absence of a direct asset freeze.

35. This category of measure is usually not implemented as a standalone sanction measure but as a consequence of an entity being designated under a broader sanctions framework.

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[53] Russia (Sanctions) (EU Exit) Regulations 2019, SI 2019/855, regs 16–17 (as amended).

[54] HM Treasury Office of Financial Sanctions Implementation, 'UK Financial Sanctions: General Guidance' (n 6) s 3.

[55] IEEPA, 50 USC §§ 1701–1708. Also see Congressional Research Service, 'US Sanctions on Russia: Legal Authorities and Related Actions' (CRS Report R48052, 2024) <https://www.congress.gov/crs-product/R48052>.

[56] Executive Order 13662 of 20 March 2014, 'Blocking Property of Additional Persons Contributing to the Situation in Ukraine', 79 Fed Reg 16169 (24 March 2014), s 1(a)(i).

[57] Executive Order 13662 of 20 March 2014, Directives 1-4 (as amended by the Countering America's Adversaries Through Sanctions Act, Pub L 115-44 (2 August 2017), s 223(d)).

[58] Monetary Authority of Singapore, Notice SNR-N01 (March 2022). See also Monetary Authority of Singapore, 'Regulations for Targeted Financial Sanctions' <https://www.mas.gov.sg/regulation/anti-money-laundering/targeted-financial-sanctions/regulations-for-targeted-financial-sanctions>.

This is evident considering that sanctions frameworks often provide for the possibility of exemptions to such license revocations or denials. For instance, in Canada, section 4(4)-(6) of SEMA, provides for the issuance, amendment, suspension, or revocation of permits authorizing transactions that would otherwise be prohibited.[59] Similarly, in the EU and the United Kingdom, the denial or revocation of licenses is the practical effect of preventing the designated person or entity from engaging in the relevant activity.[60] In the United States, OFAC administers a specific licensing system under which general and specific licenses may be issued or denied.[61]

### 7. Border and customs measures

36. Border and customs measures involve the physical interception of goods, the denial of port or airspace access, and the seizure of cargo at national borders. In February 2022, within days of Russia's invasion of Ukraine, Canada, the EU, the United Kingdom, and the United States had each closed their airspace to Russian-registered aircraft. The EU simultaneously imposed port access bans on Russian-flagged vessels.[62] The legal bases for border measures vary by actor.

37. In Canada, section 4(2)(f)-(i) of SEMA authorizes two types of transport-related prohibitions. Paragraphs (f) and (g) restrict Canadian-registered ships and aircraft from docking or landing in the sanctioned foreign State;[63] whereas paragraphs (h) and (i) prohibit ships and aircraft registered in, or operated on behalf of, the sanctioned State from docking in, passing through, or landing in Canada.[64]

38. In the EU, under Article 3ea of Council Regulation (EU) 833/2014, Russian-flagged vessels are restricted from accessing EU ports, with limited exceptions. Article 3d of the Regulation provides similarly for aircraft.[65] The United Kingdom's Russia Regulations impose similar prohibitions too.[66]

39. In the United States, port and airspace closures are not implemented through the sanctions framework. For instance, a ban on Russian-affiliated vessels entering US ports

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[59] SEMA, ss 4(4)-(6).

[60] See e.g., Council Regulation (EU) 269/2014 of 17 March 2014 Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine [2014] OJ L78/6, arts 6, 6b and 7 (derogation provisions); Sanctions and Anti-Money Laundering Act 2018, s 15 (licensing by OFSI).

[61] 31 CFR § 501.801.

[62] See e.g., Council Regulation (EU) 2022/334 of 28 February 2022 amending Regulation (EU) 833/2014 [2022] OJ L57/4, art 3d.

[63] SEMA, s 4(2)(f),(g).

[64] Ibid., s 4(2)(h),(i).

[65] Council Regulation (EU) 833/2014 of 31 July 2014 Concerning Restrictive Measures in view of Russia's Actions Destabilizing the Situation in Ukraine [2014] OJ L229/1, arts 3ea and 3d (as amended).

[66] Russia (Sanctions) (EU Exit) Regulations 2019, SI 2019/855, pt 6 (Ships) and 6A (Aircrafts) (as amended).

has been implemented through Proclamation 10371 of 21 April 2022, issued under the Magnuson Act.[67] Airspace closures have followed a similar path. For instance, the Federal Aviation Administration issued a Notice to Air Missions on 2 March 2022 under its own regulatory authority.[68]

40. In Singapore, border measures are confined to strategic goods controls under the Strategic Goods (Control) Act and are enforced by Singapore Customs.

[67] Proclamation 10371 of 21 April 2022, 'Declaration of National Emergency and Invocation of Emergency Authority Relating to the Regulation of the Anchorage and Movement of Russian-Affiliated Vessels to United States Ports', s 1 (issued under the Magnuson Act, 46 USC § 70051). Published in 87 Fed Reg 24525 (22 April 2022).

[68] FAA Notice to Air Missions (NOTAM), 2 March 2022 (revised by NOTAM 2/2415, 10 March 2022), issued under 49 USC §§ 40113(a), 44701(a)(5) and 46105(c). See also US Department of Transportation, Order 2022-3-4, suspending operations of Russian foreign air carriers (2 March 2022).

# II. INVESTMENT PROTECTION STANDARDS IMPLICATED BY SANCTIONS MEASURES

41. The present section examines the principal investment protection standards that may be implicated when a State adopts measures pursuant to an international sanctions regime. The analysis proceeds by reference to investment arbitration cases that have dealt with sanctions-related claims or cases raising issues analogous to those arising in a sanctions context. The focus is on the specific factual situations assessed by tribunals under the applicable treaty provisions. Four standards are of particular relevance to the present report.

42. Section II.A examines the **prohibition against uncompensated expropriation**, considering whether sanctions-related measures, including the seizure or confiscation of assets, asset freezes, border measures, the denial or revocation of licenses and interference with contracts, may amount to a taking of the investment within the meaning of the applicable treaty.

43. Section II.B addresses the **fair and equitable treatment (FET) standard**, which may be engaged, for instance, in cases where sanctions-related measures give rise to claims of arbitrariness, lack of due process, frustration of legitimate expectations, or abuse of authority.

44. Section II.C considers non-discrimination and the standards of **most-favored-nation (MFN) treatment and national treatment (NT)**, focusing in particular on the operation of the requirement for 'like circumstances' in cases where an investor of one nationality is subject to a sanctions regime but a comparable investor of another nationality is not.

45. Section II.D addresses the protection afforded by international investment agreements (IIAs) to the **transfer of funds**, which may be directly affected by measures such as asset freezes and transaction restrictions imposed pursuant to a sanctions regime.

## A. Prohibition against uncompensated expropriation

### 1. Overview of the standard

46. Expropriation provisions protect foreign investors against State measures that result in the taking of their investments in a manner that does not comply with the requirements of international law. While States retain the sovereign right to regulate and, where appropriate, expropriate private property,[69] international investment law subjects the exercise of that power to a set of conditions. Under most IIAs, as well as customary

[69] UNGA Res 1803 (XVII) 'Permanent Sovereignty over Natural Resources' (14 December 1962) UN Doc A/RES/1803(XVII) para 4; *Saluka Investments BV v. The Czech Republic* (Partial Award, 17 March 2006) UNCITRAL (*Saluka v. Czech Republic*), para 255; UNCTAD, *Expropriation* (UNCTAD Series on Issues in International Investment Agreements II, United Nations 2012) 6-7.

international law, an expropriation will be lawful only if it is carried out for a public purpose, in accordance with due process of law, on a non-discriminatory basis, and against the payment of compensation (commonly calculated on the basis of the fair market value of the investment). Measures that fail to meet one or more of these requirements may fall outside the scope of lawful regulation and result in the State's international responsibility.

47. Expropriations take two principal forms. A direct expropriation involves the formal transfer of title or the physical seizure of the investment.[70] Although direct expropriations have nowadays become rare, they may be of increased relevance in the context of sanctions-related measures. By contrast, an indirect expropriation occurs when, although formal title over the investor's property remains intact, the State's actions have resulted in a situation which is equivalent (or 'tantamount') to a 'total' or 'substantial' deprivation of the investment.[71] This may be the case when key attributes of property are taken, such as when the investor is deprived of its ability to manage, use or control the investment in a meaningful way.[72]

48. The vast majority of IIAs protect foreign investors against the direct and indirect expropriation of their investments. A key drafting difference between treaties, however, lies in the extent to which they provide guidance on the scope of indirect expropriation. Many (mostly older-generation) treaties rely on a traditional formulation, which prohibits direct expropriation and measures that are 'tantamount to' or have an effect 'equivalent to' expropriation, without further elaborating the concept of indirect expropriation.[73] However, other (mostly newer-generation) treaties complement this traditional provision with a separate clause or annex specifically addressing indirect expropriation. These treaties typically clarify what constitutes an indirect expropriation and identify the factors to be taken into account in making that determination. Such factors often include the economic impact of the measure on the investment, the degree to which the measure interferes with distinct, reasonable, investment-backed expectations, and the character of

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[70] UNCTAD, *Expropriation* (UNCTAD Series on Issues in International Investment Agreements II, United Nations 2012) 6.

[71] *Técnicas Medioambientales Tecmed SA v. United Mexican States* (Award, 29 May 2003) ICSID Case No ARB(AF)/00/2 (*Tecmed v. Mexico*), para 116; *Pope & Talbot Inc v. Government of Canada* (Interim Award, 26 June 2000) UNCITRAL (*Pope & Talbot v. Canada*), paras 96-102; Johanne M Cox, *Expropriation in Investment Treaty Arbitration* (OUP 2019) 56-90; Josefa Sicard-Mirabal and Yves Derains, *Introduction to Investor-State Arbitration* (Kluwer Law International 2018) 120-128.

[72] Christoph Schreuer, 'The Concept of Expropriation under the ECT and Other Investment Protection Treaties' [2005] TDM 28-29.

[73] *North American Free Trade Agreement* (signed 17 December 1992, entered into force 1 January 1994) 32 ILM 289 (NAFTA), art 1110(1) (prohibiting measures 'tantamount to nationalization or expropriation'); *Agreement between the Government of Canada and the Government of Venezuela for the Promotion and Reciprocal Protection of Investments* (signed 1 July 1996, entered into force 28 January 1998) (Canada-Venezuela BIT), art VII(1) (prohibiting 'measures having an effect equivalent to expropriation').

the governmental measure.[74] Additionally, these treaties often make an express reference to the State's police powers. The police powers doctrine provides that *bona fide*, non-discriminatory regulatory measures adopted by a State in pursuit of legitimate public welfare objectives, such as the protection of health, safety or the environment, do not constitute an indirect expropriation and therefore do not give rise to a duty to compensate foreign investors, even where such measures adversely affect the economic value of an investment.[75]

49. Canada's treaty portfolio reflects both of these approaches. Canada's earlier bilateral investment treaties (BITs), including the Canada-Russia BIT (1989), the Canada-Venezuela BIT (1996), and the Canada-Lebanon BIT (1997), adopt a traditional formulation prohibiting direct expropriation and measures 'having an effect equivalent to expropriation', without further elaboration.[76] NAFTA Article 1110, which governed a significant volume of investment disputes involving Canada prior to its replacement by the USMCA, similarly included a traditional expropriation provision.[77] Canada's approach has shifted following the adoption of its 2004 Model FIPA, which first introduced an interpretive annex setting out specific factors for the indirect expropriation analysis alongside an express clarification regarding the exercise of police powers.[78] This approach has since been carried forward and refined in Canada's newer-generation IIAs, including the Canada-China BIT (2012), CETA (2016), the CPTPP (2018), and the Canada-Ukraine Modernized FTA (2023).[79]

50. Canada's latest, 2021 Model FIPA represents the most recent expression of this approach, adding 'duration' as a fourth relevant factor in the indirect expropriation inquiry and

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[74] *Comprehensive Economic and Trade Agreement between Canada and the European Union* (signed 30 October 2016, provisionally applied 21 September 2017) (CETA), annex 8-A, para 1; *Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments* (signed 9 September 2012, entered into force 1 October 2014) (Canada-China BIT), annex B.10(b); *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (signed 8 March 2018, entered into force 30 December 2018) (CPTPP), annex 9-B, para 1.

[75] CETA, annex 8-A, para 3; Canada-China BIT, annex B.10(c); CPTPP, annex 9-B, para 3(b). See also *Methanex Corp v. United States of America* (Final Award, 3 August 2005) UNCITRAL (*Methanex v. USA*), pt IV ch D, para 7; *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v. Oriental Republic of Uruguay* (Award, 8 July 2016) ICSID Case No ARB/10/7 (*Philip Morris v. Uruguay*), paras 287-302.

[76] *Agreement Between the Government of Canada and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments* (signed 20 November 1989, entered into force 27 June 1991) (Canada-Russia BIT), art VI; *Agreement between the Government of Canada and the Government of the Republic of Lebanon for the Promotion and Protection of Investments* (signed 11 April 1997, entered into force 19 June 1999) (Canada-Lebanon BIT), art VIII(1); Canada-Venezuela BIT, art VII(1).

[77] NAFTA, art 1110(1).

[78] Government of Canada, *Canada's 2004 Model Foreign Investment Promotion and Protection Agreement* (2004), annex B.13(1); J Anthony VanDuzer, Penelope Simons and Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries* (Commonwealth Secretariat 2012) 165-167.

[79] Canada-China BIT, annex B.10(b)(i)-(iii), B.10(3); CETA, annex 8-A, paras 1, 3; CPTPP, annex 9-B, paras 1, 3(b); *Canada-Ukraine Free Trade Agreement* (signed 9 September 2023, entered into force 1 July 2024) (Modernized CUFTA), art 13.8 and annex 13-A.

introducing a 'good faith' standard—rather than the 'rare circumstances' proviso used in CETA (2016) and the CPTPP (2018)—to delineate the scope of police powers.[80]

51. In practice, sanctions-related ISDS claims have predominantly been brought under older-generation treaties which do not contain clarifications on indirect expropriation.[81] Unlike these treaties, treaties containing detailed annexes on indirect expropriation provide more guidance and articulate safeguards for non-discriminatory regulatory measures, which may strengthen a State's position in relation to sanctions-related measures.

### 2. Expropriation in the context of sanctions

52. In interpreting expropriation provisions, most arbitral tribunals have generally looked at the following principal factors. First, tribunals have looked at the effect of the challenged measure or series of measures on the investment. The central inquiry is whether, taking into account the severity and duration of the interference, the measure or series of measures have resulted in a substantial deprivation of the investment.[82] Second, depending on the circumstances of the case, tribunals may also take into account additional considerations, such as the character of the State measure,[83] or the extent to which the investor held legitimate expectations to the contrary.[84]

53. The analysis that follows examines how the above approach to construing the scope of expropriation may operate in the context of sanctions-related measures. The analysis

[80] Government of Canada, *2021 Model Foreign Investment Promotion and Protection Agreement* (13 May 2021) (2021 Model FIPA), art 9(3)(a)-(d) (adding 'duration' as factor (b)), art 8(3) (introducing 'good faith' in lieu of 'rare circumstances'); cf CETA, annex 8-A, para 3; CPTPP, annex 9-B, para 3(b). See also C Riffel, 'Indirect Expropriation and the Protection of Public Interests' [2022] 71(4) ICLQ 931, 950-951 (noting the distinction between the good faith test and the designed-and-applied test).

[81] See, e.g., *Gulnara Kerimova v. Switzerland* (UNICTRAL, pending) (*Kerimova v. Switzerland*); *Igor Viktorovich Makarov v. Canada* (ICSID Case No ARB/26/6, pending) (*Makarov v. Canada*); *Volga-Dnepr Airlines LLC v. Canada* (PCA Case No 2025-09, pending) (*Volga-Dnepr v. Canada*); *Mikhail Fridman v. Luxembourg* (PCA Case No 2025-42, pending) (*Fridman v. Luxembourg*); *Belaruskali JSC v. Lithuania* (PCA Case No 2024-03, pending) (*Belaruskali v. Lithuania*); *Mohammad Reza Dayyani and others v. Republic of Korea (I)* (Award, 5 June 2018) PCA Case No 2015-38 (*Dayyani v. Korea I*); *Bank Melli Iran and Bank Saderat Iran v. Kingdom of Bahrain* (Final Award, 9 November 2021) PCA Case No 2017-25 (*Bank Melli v. Bahrain*).

[82] *Starrett Housing Corp v. Iran* (Interlocutory Award, 19 December 1983) 4 Iran-US CTR 122 (*Starrett Housing*), paras 66-74; *Glamis Gold, Ltd v. The United States of America* (Award, 8 June 2009) UNCITRAL (*Glamis v. USA*), para 356; *Tecmed*, para 115; *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania* (Award, 24 July 2008) ICSID Case No ARB/05/22 (*Biwater v. Tanzania*), paras 452-453.

[83] *Methanex v. USA*, pt IV ch D, paras 7-9 (applying the traditional expropriation provision in NAFTA (1996) and holding that the public purpose of a measure is a material consideration when determining whether the measure constituted an indirect expropriation); *Chemtura Corporation v. Government of Canada* (Award, 2 August 2010) UNCITRAL (*Chemtura v. Canada*), para 266 (applying the traditional expropriation provision in NAFTA (1996) and finding that non-discriminatory measures adopted for the protection of public health and the environment constituted a valid exercise of police powers); *Philip Morris v. Uruguay*, paras 287-302 (applying the traditional expropriation provision in the Switzerland-Uruguay BIT (1988) and considering the public health purpose of the challenged measures as a material factor in rejecting the indirect expropriation claim).

[84] *Methanex v. USA*, pt IV ch D, paras 7-9.

distinguishes broadly between cases involving the seizure, confiscation or liquidation of investment assets, on the one hand, and cases involving other forms of interference with the investment, including the freezing of assets, border measures, the denial or revocation of licenses and interference with contracts, on the other hand. The analysis concludes with an examination of the relevance of the police powers doctrine and the investor's legitimate expectations in relation to sanctions.

### i. Seizure, confiscation or liquidation of investment assets

54. A seizure or confiscation is a measure by which a State takes physical possession of, or acquires legal control over, an investment or distinct investment assets through the exercise of governmental authority, thereby permanently transferring title or effective control over the investment or investment asset to the State or a State-designated entity and extinguishing the investor's residual ownership rights.[85] A liquidation occurs when a State, following the seizure or assumption of control over an investment or investment asset, proceeds to dispose of them through compulsory sale, public auction or court-supervised winding-up proceedings, thereby resulting in their irreversible extinction and conversion of their value into proceeds held by or distributed on behalf of the State.[86]

55. Arbitral jurisprudence indicates that seizures and confiscations may constitute an expropriation where their effect amounts to a permanent (rather than merely ephemeral) deprivation of the investment, including its use, benefit or value.[87] Where such measures additionally fail to satisfy the conditions for a lawful expropriation, namely, that the taking be carried out for a public purpose, in accordance with due process of law, on a non-discriminatory basis and against the payment of compensation, the expropriation will be unlawful.[88]

56. An illustration of the above is provided in the *Middle East Cement v. Egypt* case,[89]

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[85] UNCTAD, *Expropriation* (UNCTAD Series on Issues in International Investment Agreements II, United Nations 2012) 7-8; Johanne M Cox, *Expropriation in Investment Treaty Arbitration* (OUP 2019) 42-53.

[86] *Bank Melli v. Bahrain*, paras 669-677 (forced administration followed by compulsory winding-up held to constitute a liquidation of the investment); Johanne M Cox, *Expropriation in Investment Treaty Arbitration* (OUP 2019) 50-53.

[87] *NJSC Naftogaz of Ukraine (Ukraine) and others v. Russian Federation* (Partial Award, 22 February 2019) PCA Case No 2017-16 (*Naftogaz v. Ukaine*), para 260 (applying the traditional expropriation provision in the *Agreement between the Government of the Russian Federation and the Cabinet of Ministers of Ukraine on the Encouragement and Mutual Protection of Investments* (signed 27 November 1998, entered into force 27 January 2000) (Russia-Ukraine BIT), art 5); *Wena Hotels Ltd v. Arab Republic of Egypt* (Award, 8 December 2000) ICSID Case No ARB/98/4 (*Wena Hotels v. Egypt*), paras 96-99.

[88] UNCTAD, *Expropriation* (UNCTAD Series on Issues in International Investment Agreements II, United Nations 2012) 27-28; *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic* (Award, 20 August 2007) ICSID Case No ARB/97/3 (*Vivendi v. Argentina*), paras 7.5.21-7.5.22 (distinguishing lawful from unlawful expropriation and the consequences thereof).

[89] *Middle East Cement Shipping and Handling Co SA v. Arab Republic of Egypt* (Award, 12 April 2002) ICSID Case No ARB/99/6 (*Middle East Cement v. Egypt*), para 107.

decided under the Greece-Egypt BIT (1993).[90] The claimant had challenged before the tribunal the attachment and subsequent auctions of its vessel, M/V Poseidon, carried out by the Egyptian authorities as a result of alleged unpaid debts owed by the claimant to the port authority.[91] The tribunal observed that, while seizures and auctions ordered by national authorities would not ordinarily qualify as a taking, they may constitute measures 'the effects of which would be tantamount to expropriation' where they are not carried out in accordance with due process of law.[92] On the facts, the tribunal found that the seizure and auction of the vessel were effected without adequate notice and procedural safeguards, in breach of the due process requirements under Article 4 of the applicable BIT.[93] As a result, the forced sale led to the irreversible loss of the claimant's ownership rights and was found to constitute an expropriation.[94]

57. Within these contours, international courts and tribunals would tend to give a wider margin of discretion to acts by the host State's judiciary. In *Certain Iranian Assets*, at issue was the attachment and execution by US courts of property and property interests held by certain Iranian commercial banks. The ICJ noted that judicial decisions ordering the attachment and execution of property do not per se constitute an expropriation absent a 'specific element of illegality related to that decision', such as when the deprivation of property results from a denial of justice or when the judicial organ applies legislative or executive measures that infringe international law thereby causing a deprivation of property.as a denial of justice or a violation of international law.[95] In the circumstances of the case, the ICJ determined that the US judicial acts in question were unreasonable—for unjustifiably disregarding the Iranian companies' separate legal personality and for causing a manifestly excessive impairment of their rights—and, therefore, were in violation of the traditional expropriation provision found in the 1955 Iran-United States Treaty of Amity.[96]

58. A similar position of principle has been confirmed in sanctions-related ISDS cases. In *Bank Melli v. Bahrain*, the dispute concerned the forced administration and eventual liquidation of Future Bank by the Central Bank of Bahrain in response to, among other things, Future Bank's alleged violations of UN sanctions relating to Iran.[97] The claim

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[90] *Agreement between the Hellenic Republic and the Arab Republic of Egypt for the Promotion and Reciprocal Protection of Investments* (signed 16 July 1993, entered into force 6 April 1995) (Egypt-Greece BIT), art 4.

[91] *Middle East Cement v. Egypt*, paras 81-84, 131-151.

[92] *Middle East Cement v. Egypt*, para 139.

[93] Egypt-Greece BIT, art 4 a).

[94] *Middle East Cement v. Egypt*, paras 140-144.

[95] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Judgment [2023] ICJ Rep 51, para 184.

[96] Ibid., paras 155-56, 186. For the applicable provision, see *Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran* (signed 15 August 1955, entered into force 16 June 1957), art IV(2) (Iran-United States Treaty of Amity).

[97] *Bank Melli v. Bahrain*, paras 650, 669-677, 682-689.

was brought by Future Bank's Iranian shareholders under the Iran-Bahrain BIT (2002) which contains a traditional expropriation provision.[98] Although the measures were formally framed by Bahrain as regulatory action rather than acts of seizure or confiscation, the tribunal examined their effects on the claimant's investment, in particular whether the assumption of control through forced administration followed by the bank's compulsory winding-up, resulted in a permanent deprivation of the investors' ownership and control.[99] In this assessment, the tribunal noted that, while the claimants formally remained shareholders, they had been unable to exercise their shareholding rights for over six years, with the result that the deprivation had become permanent.[100] Having also determined that the regulatory and sanctions-related rationale of the measures was unreasonable, disproportionate and politically motivated, the tribunal concluded that the liquidation extinguished the investment in its entirety and amounted to an expropriation.[101]

59. Two additional points bear noting in relation to the permanent character of a deprivation of property.

60. First, in some cases, seizures or confiscations have been found to be expropriatory even when ownership or control over the investment assets is transferred to another entity or person rather than the State itself. This point was emphasized in *Wena Hotels v. Egypt* where the dispute arose after an entity controlled by the Egyptian government temporarily seized physical control and operations of two hotel properties owned by the investor.[102] Applying a traditional expropriation provision in the Egypt-United Kingdom BIT (1975),[103] the tribunal held that a taking can take place not only where the State itself acquires ownership, but equally where possession is transferred to another person or entity acting with the State's participation or acquiescence.[104] Although the hotels were eventually returned to the investor, the tribunal found that the deprivation was permanent since (i) the hotels had been illegally seized and possessed for nearly a year, and (ii) were returned to the investor stripped of much of their furniture and

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[98] *Agreement between the Government of the Kingdom of Bahrain and the Government of the Islamic Republic of Iran on the Promotion and Reciprocal Protection of Investments* (signed 19 October 2002, entered into force 12 October 2004) (Iran-Bahrain BIT), art 6.

[99] *Bank Melli v. Bahrain*, paras 675, 681, 690.

[100] Ibid., para 690.

[101] *Bank Melli v. Bahrain*, paras 691-697.

[102] *Wena Hotels v. Egypt*, paras 19-62.

[103] *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments* (signed 11 June 1975, entered into force 24 February 1976) (Egypt-United Kingdom BIT), art 5(1).

[104] *Wena Hotels v. Egypt*, paras 97-98, citing to *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA Consenting Engineers of Iran* (Award No 141-7-2, 22 June 1984) Iran-US Claims Tribunal (*Tippets*), 225 [Annex E-M12], and to *Amco Asia Corporation v. Republic of Indonesia* (Award on the Merits, 1984) ICSID Case No ARB/81/1 (*Amco v. Indonesia*), 62 [Annex W94]. On the specific facts of the hotel leases, the tribunal further held that interference with an investor's contractual rights was itself capable of constituting an expropriation.

fixtures.[105]

61. Second, in other instances, arbitral tribunals have found that a deprivation can be characterized as permanent when one looks at the economic effects on the investment, even when the State's measures are temporary. Applying the traditional expropriation provision of the Cyprus-Libya BIT (2004),[106] the tribunal in *Olin v. Libya* drew a distinction between the legal and the economic effects of Libya's measures. Although the Expropriation Order issued against the claimant's dairy and juice factory in November 2006 was ultimately annulled by Libyan courts in April 2010, and the land was restored in June 2011, the tribunal found that the investor had been economically dispossessed of its investment throughout the intervening period of approximately four and a half years. The tribunal concluded that this prolonged economic deprivation, which prevented the investor from operating its factory under normal conditions and created persistent uncertainty as to its legal status, was sufficient to establish an expropriation under the applicable treaty provision, notwithstanding the eventual legal reversal of the impugned measures.[107]

62. Taken together, these cases show that sanction-related measures involving forced liquidation, confiscation, or the assumption of control of an investment have been found in some instances as capable of meeting the expropriation threshold. In this context, tribunals have focused primarily on the legal and economic effects of the measures on the investment, in particular whether they resulted in a complete and irreversible deprivation of the investment's use or value. Where States have sought to justify such measures by reference to regulatory or sanctions-related objectives, tribunals have examined whether they nonetheless constituted a legitimate exercise of the State's legitimate regulatory powers, a question that is addressed separately below in Section II.A.2(iii) ("Police powers").

### ii. Other forms of interference with an investment

63. Beyond the outright seizure, confiscation or liquidation of investment assets, States may also interfere with an investment in more subtle ways that, although not transferring title or control over the investment to the State or another entity, nevertheless significantly impair or nullify key attributes of property (e.g., ability to control or reap the benefits of the investment) or result in the total destruction (but not mere diminution) of the investment's value, to an extent that may amount to a substantial deprivation of the investment.[108] Examples of measures of this kind, following the enforcement of

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[105] *Wena Hotels v. Egypt*, paras 99-101.

[106] *Agreement between the Government of the Republic of Cyprus and the Great Socialist People's Libyan Arab Jamahiriya on the Promotion and Reciprocal Protection of Investments* (signed 27 June 2004, entered into force 5 January 2007) (Cyprus-Libya BIT), art 7(1).

[107] *Olin Holdings Limited v. State of Libya* (Final Award, 25 May 2018) ICC Case No 20355/MCP (*Olin v. Libya*), paras 164-166.

[108] Cf *Starrett Housing*, para 107; *Biwater v. Tanzania*, paras 452-453.

sanctions, may include the freezing of assets, border measures, the denial or revocation of licenses, or interference with investment contracts.

### *a. Freezing of assets*

64. An asset freeze is a measure whereby a sanctioning authority prohibits the owner of designated assets from dealing with, transferring or otherwise disposing of those assets, without formally transferring legal title to the State. In other words, the original owner retains legal title throughout. Unlike confiscation or forfeiture, an asset freeze is generally intended as a temporary measure, operative for the duration of the underlying sanctions regime or legal proceedings, rather than a permanent deprivation of the investor's property rights.[109]

65. The risk that asset freezing measures can give rise to investment treaty claims is no longer theoretical. The proceedings in *Makarov v. Canada* and *Fridman v. Luxembourg* illustrate that foreign investors affected by sanctions-related asset freezes are prepared to seek recourse under IIAs.

66. Arbitral jurisprudence on whether asset freezes imposed in connection with criminal or quasi-criminal proceedings may constitute an indirect expropriation is not uniform, and different tribunals have assigned different weight to the factors they have regarded as decisive.

67. Some tribunals have held that asset freezing measures may give rise to a compensable taking where their cumulative effect amounts to a prolonged deprivation of the investor's economic use and benefit of the investment and where the measures additionally fail to satisfy the conditions for lawful expropriation, most notably proportionality. In *Bahgat v. Egypt I*, applying a traditional provision prohibiting direct and indirect expropriation or other dispossession in the Egypt-Finland BIT (1980),[110] the tribunal found that Egypt's imposition of asset freezes and travel bans in connection with criminal charges against the claimant, combined with a multi-year detention of his investment assets in an iron ore venture and a steel plant, collectively constituted an indirect expropriation. The tribunal held that even where a legitimate purpose might be said to underlie such measures, the measures nevertheless had failed to satisfy the conditions for a lawful expropriation, in particular the requirements of proportionality and adequate

[109] See e.g., SEMA, s 4(1)(b); Council Regulation (EU) No 269/2014 of 17 March 2014 Concerning Restrictive Measures in Respect of Actions Undermining or Threatening the Territorial Integrity, Sovereignty and Independence of Ukraine [2014] OJ L78/6, art 2.

[110] *Agreement between the Government of the Republic of Finland and the Government of the Arab Republic of Egypt on the Mutual Protection of Investments* (signed 5 May 1980, entered into force 21 June 1982) (Egypt-Finland BIT), art 3.

compensation.[111]

68. By contrast, other tribunals have declined to find expropriation where the deprivation was only temporary and of short duration, effectively treating permanence or near-permanence as a threshold condition. In *PACC v. Mexico*, the tribunal declined to find expropriation in relation to a Detention Order, issued by Mexican courts against ten vessels owned by the claimant's subsidiaries, in connection with criminal proceedings targeting the claimant's local joint venture partner. Applying a traditional expropriation provision in the Mexico-Singapore BIT (2009),[112] the tribunal held that the Detention Order did not have an effect equivalent to expropriation because the deprivation was of short duration and there was no evidence that Mexico intended for it to be permanent, despite also finding the detention arbitrary, grossly unfair and unjust (and thus a breach of FET).[113] In concluding so, the tribunal also affirmed as matter of principle that judicial expropriation requires the presence of 'unusual circumstances' and 'clear evidence of egregious and shocking conduct' by the courts.[114] However, a dissenting opinion by Professor Reisman took the contrary view, arguing that the Detention Order was expropriatory and that the majority had impermissibly redrafted the IIA's expropriation provision by importing a requirement of permanence not found in the treaty text.[115]

69. The divergent outcomes in *Bahgat v. Egypt I* and *PACC v. Mexico* illustrate that, while an asset freezing measure may in principle give rise to an expropriation claim, its characterization as such will depend on the duration and cumulative economic impact of the measure, rather than its formal legal classification alone, as well as on the state organ or instrumentality which takes the measure.

### *b. Border measures*

70. Border measures are a distinct category of sanctions-related State action that may interfere with an investment by restricting the cross-border movement of goods, services, aircraft, vessels, or other assets at points of entry, exit or transit. Border measures can affect foreign investments through distinct pathways.

71. One pathway is where a breach of border restrictions, such as a prohibition on aircraft landing, results in the physical detention or seizure of an investment asset at the point of

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[111] *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (I)* (Final Award, 23 December 2019) PCA Case No 2012-07 (*Bahgat v. Egypt I*), paras 227-232.

[112] *Agreement between the Government of the United Mexican States and the Government of the Republic of Singapore on the Promotion and Reciprocal Protection of Investments* (signed 12 November 2009, entered into force 3 April 2011) (Mexico-Singapore BIT), art 10(1).

[113] *PACC Offshore Services Holdings Ltd v. United Mexican States* (Award, 11 January 2022) ICSID Case No UNCT/18/5 (*PACC v. Mexico*), paras 244-246, 251-259.

[114] Ibid., para 229.

[115] Ibid. (Concurring and Dissenting Opinion of Professor W. Michael Reisman, 7 January 2022), paras 68-96.

entry or transit. This scenario is illustrated in the pending *Volga-Dnepr v. Canada* case concerning the seizure of a cargo aircraft under SEMA following the closure of Canadian airspace to Russian aircraft in February 2022. To the extent that border measures may result in the detention, seizure and confiscation, or freezing of investment assets, similar considerations as those examined in Sections II.A.2(i)-(ii)(a) may apply, provided that the affected assets relate to, or themselves constitute, a foreign investment in the host State.

72. Another pathway arises where border measures do not detain any asset but instead disrupt the cross-border movement of goods or services upon which an investment depends, thereby impairing the investor's ability to import goods necessary for its business or to access export markets.

73. In *SD Myers v. Canada*, applying the traditional expropriation provision of Article 1110 NAFTA, the tribunal considered a temporary Canadian ban on the export of hazardous waste affecting a US investment in Canada (consisting in the US company's sales office in Canada). On the facts, the tribunal determined that the closure of the border postponed the investor's entry into the Canadian market for approximately eighteen months, but did not prevent the investor from continuing its business in the longer term.[116] The tribunal accepted that the delay eliminated the investor's competitive advantage, but found that the temporary and reversible nature of the measure did not support its characterization as an expropriation within the meaning of Article 1110 NAFTA (although the tribunal did say that the loss of competitive advantage could be relevant in the assessment of damages for a breach of other treaty provisions).[117] In a similarly vein, the tribunal in *Pope & Talbot v. Canada* found that restrictions on softwood lumber exports affected profitability but did not deprive the investor of control or ownership of its enterprise, thereby not amounting to an expropriation within the meaning of Article 1110 NAFTA.[118]

74. By contrast, in *Middle East Cement v. Egypt*, the tribunal examined measures consisting of restrictions on the claimant's license and operational activities, including, in particular, the prohibition on importing cement and the denial of port access preventing the claimant from using its investment for its intended commercial purposes.[119] The tribunal considered that measures which deprive an investor, even temporarily, of the use and benefit of its investment may amount to a taking where their effects are sufficiently serious.[120] In this respect, the tribunal noted that, as a result of the prohibition decree, the claimant was deprived for a period of approximately four months of rights granted

[116] *SD Myers Inc v. Government of Canada* (First Partial Award, 13 November 2000) UNCITRAL (*SD Myers v. Canada*), paras 279-288.

[117] Ibid.

[118] *Pope & Talbot v. Canada*, paras 96-105.

[119] *Middle East Cement v. Egypt*, paras 97-107.

[120] Ibid., para 107.

under its license which were integral to the operation of the investment and resulted in a loss of part of its value.[121] On this basis, the tribunal held that such regulatory interference was capable of constituting a measure 'the effects of which were tantamount to expropriation' within the meaning of the applicable investment treaty.[122]

75. Taken together, these cases indicate that an expropriation analysis in relation to border measures is a case-by-case inquiry that may turn on the severity, duration, and reversibility of the interference with the investment's use and economic benefit. In particular, for sanctions-related border measures resulting in the detention, seizure and confiscation or freezing of assets, or for transactions prohibitions more generally, a key consideration will also be the extent to which such border measures can be said in the circumstances of the case to relate to a foreign investor or foreign investment.

### *c. Denial or revocation of licenses*

76. Measures taken pursuant to a sanctions regime may also result in the denial or revocation of licenses necessary to undertake an economic activity in the host State and, therefore, essential to the operation of an investment. To determine whether the denial or revocation of such licenses may constitute an expropriation, tribunals tend to focus on the nature of the affected right and on whether the denial or revocation at issue deprives the investor of the effective use of the investment for its intended purpose, rendering it economically valueless. A critical question that often emerges from the case law is whether the regulatory purpose invoked by the State to deny or revoke the license is genuine or pretextual. This has a direct bearing on whether the police powers doctrine may shield the State from liability.

77. In *Metalclad v. Mexico*, applying the NAFTA's traditional expropriation provision (in Article 1110), the tribunal's principal finding of expropriation rested on the denial of a municipal construction permit for the investor's hazardous waste landfill. The local municipality had acted outside its authority and without substantive justification, having regard in particular to the federal government's representations on which the investor had relied and its assurances that the project had received all necessary federal approvals.[123] Viewed in their totality, those measures deprived the investment of its reasonably-to-be-expected economic benefit within the meaning of Article 1110 NAFTA.[124]

78. In a similar vein, the tribunal in *Tecmed v. Mexico*, applying the traditional expropriation

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[121] Ibid.

[122] Ibid.

[123] *Metalclad Corporation v. United Mexican States* (Award, 30 August 2000) ICSID Case No ARB(AF)/97/1 (*Metalclad v. Mexico*), paras 104-107.

[124] Ibid., para 107.

provision in Article 5 of the Mexico-Spain BIT (1995),[125] determined that the non-renewal of a landfill operating license satisfied the quantitative threshold for expropriation: the non-renewal was formulated in imperative and irrevocable terms, permanently closing the landfill, with the result that 'economic and commercial operations in the Landfill after such denial [were] fully and irrevocably destroyed.'[126]

79. Speaking to the link between such measures and the legitimate scope of regulatory authority, the tribunal more generally held that a regulatory measure constitutes an indirect expropriation where there is no 'reasonable relationship of proportionality' between the burden imposed on the investor and the public interest invoked.[127] On the facts, the tribunal found that the true driver of the non-renewal decision was not the investor's environmental non-compliance but socio-political pressure: the relevant Mexican authority had decided to treat the renewal application as an 'exceptional case', it had consulted with the local political authorities rather than acting on the basis of its own environmental mandate, and the final decision was taken in light of 'political issues' rather than any finding that the landfill compromised public health or ecological balance.[128]

80. An additional question that will bear on the outcome of the cases is the nature of the protected investment. In *Horthel and others v. Poland*, decided under the traditional expropriation provision in Article 5 of the Netherlands-Poland BIT (1992),[129] at issue was a gambling ban which the tribunal declined to find as constituting an expropriation.[130] The protected investments in this case were the claimants' shareholding in three Polish companies, not the operational permits held by the Polish subsidiaries. Since those shares retained positive residual value while existing permits remained in force (and, therefore, could have been sold), and since the eventual expiry of the permits resulted from their natural terms elapsing rather than from any impairment of the claimants' acquired rights, the requisite substantial deprivation of the investment could not be established.[131]

81. Taken together, in the sanctions context, the denial or revocation of a license may

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[125] *Agreement between the Kingdom of Spain and the United Mexican States on the Promotion and Reciprocal Protection of Investments* (signed 23 June 1995, entered into force 18 December 1996) (Mexico-Spain BIT), art 5.

[126] *Tecmed v. Mexico*, para 117.

[127] Ibid., para 122 (citing to ECHR, *James and Others v. United Kingdom* (1986) Series A No 98; ECHR, *Mellacher and Others v. Austria* (1989) Series A No 169).

[128] *Tecmed v. Mexico*, paras 127-132.

[129] *Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Poland* (signed 7 September 1992, entered into force 1 February 1994) (Netherlands-Poland BIT), art 5.

[130] *Horthel Systems BV, Tesa Beheer BV and Poland Gaming Holding BV v. Republic of Poland* (Award, 16 February 2017) PCA Case No 2014-31 (*Horthel and others v. Poland*), paras 193-210.

[131] Ibid., paras 202-203.

constitute an expropriation if it permanently deprives the investor of the economic use and benefit of its investment, assessed in light of the nature of the protected investment and the degree to which the measure stems from a legitimate exercise of regulatory authority (e.g., taking into account the genuine or pretextual character of the regulatory purpose, or the proportionality of the measure to that purpose). This implicates directly the police powers doctrine and is analyzed further in Section II.A.2.iii below.

### *d. Interference with contracts*

82. Sanctions-related measures may also result in interference with contracts upon which an investment depends, including requiring the potential termination of such contracts with sanctioned counterparties. Several sanctions regimes prohibit the performance of contractual obligations to, or for the benefit of, designated persons or entities.[132] Where a private party terminates a contract with a sanctioned foreign investor and the factual record discloses no more than an autonomous compliance decision by the former, driven by the party's own assessment of legal risk, a tribunal may conclude that the conduct is not attributable to the State, such that no expropriation claim can be established.

83. However, while contractual non-performance or termination by a private party vis-à-vis a sanctioned counterparty will not trigger the State's international responsibility, the situation may differ when the breaching party is a State organ or a State-owned entity. Key considerations in this connection may be (i) the extent to which actions of the breaching party demonstrate the exercise of sovereign authority, going beyond what an ordinary commercial party can do;[133] as well as (ii) whether the actions of the breaching party are attributable to the State in the circumstances of the case (e.g., when taken by a State organ, or when taken by non-State organ but in the exercise of governmental authority or are otherwise directed or controlled by the State).[134]

84. An example of the scenario contemplated here is illustrated by the pending claim in *Belaruskali v. Lithuania*, where the claimant reportedly challenges the termination of a rail transit contract by Lithuania's State-owned railway operator, at the direction of the Lithuanian government, after the latter's refusal to authorize the continuation of potash transit operations through Lithuanian territory on national security grounds and following

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[132] See, e.g., SEMA, s 4(1)(a), 4(2) (prohibiting any transaction, directly or indirectly, with or for the benefit of a designated person, which may prevent performance of existing contractual obligations); Council Regulation (EU) No 833/2014 [2014] OJ L229/1 (as amended), art 11 (prohibiting satisfaction of claims arising from contracts whose performance has been affected by the Regulation).

[133] See *EnCana Corporation v. Republic of Ecuador* (Award, 3 February 2006) LCIA Case No UN3481 (*EnCana v. Ecuador*), paras 192-194; *Waste Management Inc v. United Mexican States (II)* (Award, 30 April 2004) ICSID Case No ARB(AF)/00/3 para 174 (*Waste Management v. Mexico II*), paras 175-176; ILC, 'Articles on Responsibility of States for Internationally Wrongful Acts' (2001) UN Doc A/56/10 (ARSIWA), commentary to art 4, 41 (para 6).

[134] See ARSIWA, art 5, 8.

EU sanctions restricting the import and transit of Belarusian potassium chloride.[135]

85. The analysis below highlights some of the legal issues that may arise in connection with contract terminations by the State or an entity whose actions may be attributable to the State, as well as interference with contractual rights short of termination.

86. Arbitral jurisprudence proceeds from the premise that, as a matter of general international law, the mere breach or termination of a contract by the State acting as an ordinary commercial contracting party does not constitute an expropriation, even where those acts cause significant financial loss to the investor.[136] The investor's remedy in such circumstances lies in the contractual forum or before domestic courts, not in an IIA claim. The position is different, however, where the State has acted not as a commercial party but in the exercise of its sovereign prerogative, by deploying its governmental authority to annul, repudiate or otherwise extinguish the contract, so as to deprive it of legal force independently of its contractual terms. Where such sovereign conduct results in a substantial deprivation of the investment, tribunals have held that the expropriation provision of the applicable IIA may be engaged.[137]

87. With respect to the **termination of contracts**, therefore, a critical question is whether the State terminated the contract in its capacity as an ordinary contracting party, that is, on the basis of a legitimate ground for termination, invoked in good faith, as opposed to deploying its sovereign authority to extinguish the investor's contractual rights without a valid legal basis. The contrast between two cases, *Skubenko v. North Macedonia* and *Quiborax v. Bolivia*, illustrates this distinction.

88. In *Skubenko v. North Macedonia*, decided under the traditional expropriation provision found in Article 4(1) of the North Macedonia-Ukraine BIT (1998),[138] at issue was the termination of a mining exploitation contract by the government, pursuant to North Macedonia's Law on Concessions, on the ground that the investor had failed to fulfil a contractual obligation. The tribunal adopted the three-stage test set out in *Vigotop v. Hungary*,[139] thereby asking: (i) whether the termination was driven by a hidden

135 Delfi, 'Court: Belaruskali and LTG Contract Posed Threat to National Security' [11 June 2022] https://www.delfi.lt/en/business/court-belaruskali-and-ltg-contract-posed-threat-to-national-security-90450477; IA Reporter, 'Belarusian State-owned Company Reportedly Initiates BIT Arbitration Against Lithuania' [14 November 2023] <https://www.iareporter.com/articles/belarussian-state-owned-company-reportedly-initiates-bit-arbitration-against-lithuania/>.

136 See e.g., *Waste Management Inc v. Mexico II*, para 174.

137 *SPP (Middle East) Ltd v. Arab Republic of Egypt* (Award, 20 May 1992) ICSID Case No ARB/84/3 (*SPP v. Egypt*), paras 164-165; *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka* (Award, 31 October 2012) ICSID Case No ARB/09/2 (*Deutsche Bank v. Sri Lanka*), paras 502-506, 524; *Biwater v. Tanzania*, paras 452-453.

138 *Agreement between Ukraine and the Republic of Macedonia on the Mutual Promotion and Protection of Investments* (signed 2 March 1998, entered into force 9 July 1999) (North Macedonia-Ukraine BIT), art 4(1).

139 *Vigotop Limited v. Republic of Hungary* (Award, 1 October 2014) ICSID Case No ARB/11/22 (*Vigotop v. Hungary*), paras 327-331.

sovereign agenda; (ii) whether a legitimate contractual basis for the termination existed; (iii) whether that basis was invoked in good faith rather than as a fictitious pretext for an expropriatory act. Ultimately, the *Skubenko* tribunal endorsed the North Macedonian Administrative Court's determination that the termination was legally valid under North Macedonian law, and thus concluded that there was no expropriation.[140] As the tribunal put it, where the contract has been lawfully terminated on valid contractual grounds, there is 'by definition no contract to be expropriated'.[141]

89. By contrast, in *Quiborax v. Bolivia*, decided under a traditional expropriation provision in Article VI of the Bolivia-Chile BIT (1994),[142] the tribunal found that Bolivia's issuance of a Supreme Decree revoking the investor's mining concessions did not constitute a legitimate exercise of police powers and satisfied the requirements for direct expropriation as a permanent deprivation of the investment through a transfer of title to the State. Key factual determinations leading to this conclusion were that the Supreme Decree was issued without a valid legal basis under Bolivian law, without prior notice or due process, and in circumstances suggesting that the stated grounds were a pretext.[143]

90. With respect to **other forms of interference** with an investor's contractual rights that fall short of termination, some tribunals have looked at the extent to which such interference has resulted in the investor's loss of ownership or control over the investment. In *CMS v. Argentina*, decided under the traditional expropriation provision in Article IV(1) of the Argentina-United States BIT (1991),[144] the claimant challenged Argentina's emergency measures altering the tariff regime applicable to a gas transportation concession. The tribunal examined whether the State's conduct amounted merely to breach of contract or to an exercise of sovereign authority affecting the investment.[145] It found that, although the contractual framework was significantly altered, the claimant retained ownership and operation of the investment, and the contracts continued to exist. In these circumstances, the tribunal considered that the

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[140] *Artem Skubenko and others v. Republic of North Macedonia* (Award, 21 July 2025) ICSID Case No ARB/19/9 (*Skubenko v. North Macedonia*), paras 811-822.

[141] *Skubenko v. North Macedonia*, para 818, quoting from *Robert Azinian, Kenneth Davitian and Ellen Baca v. United Mexican States* (Award, 1 November 1999) ICSID Case No ARB(AF)/97/2 (*Azinian v. Mexico*), para 100.

[142] *Agreement between the Republic of Chile and the Republic of Bolivia on the Reciprocal Promotion and Protection of Investments* (signed 22 September 1994, entered into force 21 July 1999) (Bolivia-Chile BIT), art VI.

[143] *Quiborax SA, Non Metallic Minerals SA and Allan Fosk Kaplún v. Plurinational State of Bolivia* (Award, 16 September 2015) ICSID Case No ARB/06/2 (*Quiborax v. Bolivia*), paras 200, 207-227, 229-234, applying the direct expropriation standard from *Burlington Resources Inc v. Republic of Ecuador* (Decision on Liability, 14 December 2012) ICSID Case No ARB/08/5 (*Burlington v. Ecuador*), para 506.

[144] *Treaty between the United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment* (signed 14 November 1991, entered into force 20 October 1994) (US-Argentina BIT), art IV(1).

[145] *CMS Gas Transmission Co v. Argentine Republic* (Award, 12 May 2005) ICSID Case No ARB/01/8 (*CMS v. Argentina*), paras 260-265.

measures did not amount to an expropriation.[146] Similarly, in *LG&E v. Argentina*, decided under the same IIA and examining the same package of emergency measures in relation to the investor's contract,[147] the tribunal distinguished between regulatory interference that frustrates contractual expectations and measures that neutralize the investment itself, finding that, outside the limited period of extreme crisis during which Argentina's essential security defense was operative, the investors retained ownership and control of the investment such that the measures did not amount to an expropriation.[148]

91. Notwithstanding those findings on expropriation, it bears emphasizing that both tribunals held that Argentina's same acts of contractual interference separately breached the treaty's FET standard, by destroying the stability and predictability of the legal framework upon which the investors had relied in making their investments.[149]

92. It also bears noting that other tribunals have taken a broader view with respect to contractual interference. These tribunals have looked at the extent to which the investment's value has been affected as a result of the State's sovereign conduct in relation to a contract, even if the investor's contractual rights remained formally valid and enforceable under the contract's governing law. For example, in *Deutsche Bank v. Sri Lanka*, decided under the traditional expropriation provision in Article 4(2) of the Germany-Sri Lanka BIT (2000),[150] at issue were the Sri Lankan Supreme Court's interim order prohibiting the State's petroleum corporation (CPC) from making payments due under a petroleum hedging agreement (pending investigations on alleged corruption), and the Central Bank's subsequent direction to CPC to suspend all such payments even after the Supreme Court's interim order was invoked and the case was closed.

93. Although Deutsche Bank's rights under the hedging agreement remained valid and enforceable under its governing English law, the tribunal held that the sovereign intervention of the Supreme Court and the Central Bank had deprived Deutsche Bank, as a matter of fact and as a matter of Sri Lankan law, of the practical economic value of the agreement. The tribunal found that this constituted an indirect expropriation, characterizing it as a 'financially motivated and illegitimate regulatory expropriation'.[151] This finding was criticized by one of the arbitrators who pointed to, among other things,

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[146] Ibid.

[147] *LG&E Energy v. Argentine Republic* (Decision on Liability, 3 October 2006) ICSID Case No ARB/02/1 (*LG&E v. Argentina*), paras 40-67.

[148] Ibid., paras 191-200.

[149] *CMS v. Argentina*, para 281; *LG&E v. Argentina*, paras 132-138.

[150] *Agreement between the Federal Republic of Germany and the Democratic Socialist Republic of Sri Lanka Concerning the Promotion and Reciprocal Protection of Investments* (signed 7 February 2000, entered into force 16 January 2004) (Germany-Sri Lanka BIT), art 4(2).

[151] *Deutsche Bank v. Sri Lanka*, paras 502-506, 524.

the availability of contractual remedies in the United Kingdom pursuant to the hedging agreement's governing English law.[152]

94. Beyond the above substantive law issues, difficult questions of **attribution** may arise when the conduct in question is not that of a State organ (where attribution is presumed under Article 4 ARSIWA), but that of a non-State entity in the exercise of delegated governmental authority (Article 5 ARSIWA) or under the direction or control of the government (Article 8 ARSIWA). While a full analysis of questions of attribution is beyond the scope of the present report, suffice to say that such questions have been debated in cases such as *Dayyani v. Korea I* (sanctions-related), *Elliott v. Korea*,[153] and *Mason v. Korea*,[154] among others.

### iii. 'Police powers'

95. The police powers doctrine indicates that in certain domains of state regulation (e.g., taxation, public order and morality, the protection of health and the environment) States are justified in taking measures even if doing so would result in harm to an investor's property rights.[155] That is, provided that the measures in question are in good faith, not applied disproportionately or in a disguised attempt to discriminate against the investment, and do not contradict the affected investor's reasonable and legitimate expectations to the contrary (the latter is addressed in summary in Section II.A.2.iv).

96. As confirmed by the ICJ in *Certain Iranian Assets*, the police powers doctrine stems from a State's right to regulate, which is well-recognized under international law.[156] In other words, the absence of an explicit statement of the content of police powers in IIAs (notably, older-generation ones) is immaterial.

97. There is, generally speaking, no defined or exhaustive list of the public welfare objectives capable of falling within the State's police powers. Most IIAs that codify the police powers doctrine enumerate illustrative objectives, such as the protection of public health, safety, and the environment, without expressly including international sanctions or essential security interests within their lists.[157] The AfCFTA Investment Protocol (2023) is a departure, since it expressly incorporates essential security interests within the scope

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[152] Ibid. (Dissenting Opinion of Makhdoom Ali Khan, 23 October 2012), paras 82-100.

[153] *Elliott Associates LP v. Republic of Korea* (Award, 20 June 2023) PCA Case No 2018-51.

[154] *Mason Capital LP and Mason Management LLC v. Republic of Korea* (Final Award, 11 April 2024) PCA Case No. 2018-55.

[155] *Methanex v. USA*, pt IV ch D, paras 7-18; *Chemtura v. Canada*, para 266; *Philip Morris v. Uruguay*, paras 287-307.

[156] *Certain Iranian Assets*, para 185.

[157] See e.g., CETA, annex 8-A, para 3 (identifying 'public health, safety, and the environment'); CPTPP, annex 9-B, para 3(b) (same); 2021 Canada Model FIPA, art 9(3)(d) (same).

of permissible regulatory objectives under police powers,[158] thus more clearly accommodating a broader range of measures applicable in sanctions-related disputes. In short, the question of whether sanctions-related measures constitute a legitimate regulatory objective capable of engaging the police powers doctrine is accordingly left open on the face of most treaty provisions and falls to be assessed by tribunals on a case-by-case basis.

98. There is arbitral support for the view that financial regulatory measures, including those that involve freezing assets and proceeds, may be considered an exercise of police powers where the State acts within its legitimate supervisory mandate, not disproportionately and in accordance with due process. In *Skubenko v. North Macedonia*, brought under a traditional expropriation provision,[159] North Macedonia had obtained court orders freezing the bank accounts of the claimants' mining companies following a criminal investigation into suspected money laundering, triggered in part by suspicious transaction reports and the involvement of entities subject to US and EU sanctions.[160] The tribunal found that the criminal proceedings and associated freezing measures constituted a lawful exercise of police powers in connection with the money laundering investigation, consistent with both domestic law and international public policy.[161] No expropriation was found to arise from those measures.[162]

99. *IuteCredit Europe v. Kosovo*, a case not involving sanctions, is nevertheless instructive on the degree of deference tribunals can accord to financial regulators acting within their mandate. Brought under Kosovo's Foreign Investment Law (2014), containing a traditional expropriation provision,[163] the case concerned the Central Bank of Kosovo's revocation of a microfinance institution's operating license on the ground that its interest rate practices had diverged substantially from its approved business plan.[164] The tribunal accorded deference to the Central Bank's exercise of supervisory authority, finding that it had acted within its regulatory powers, with due process, and in a reasonable and proportionate manner, thereby dismissing all claims.[165]

100. Whereas the tribunals in *Skubenko* and *IuteCredit* found that the challenged measures fell within the State's regulatory authority, other tribunals have dismissed a State's invocation of police powers owing to circumstances such as the pretextual character of

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[158] *Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area* (adopted 19 February 2023) (AfCFTA Investment Protocol), art 20.

[159] North Macedonia-Ukraine BIT, art 4(1).

[160] *Skubenko v. North Macedonia*, paras 176-182, 777.

[161] Ibid., paras 778-779, 825-826.

[162] Ibid., para 826.

[163] Law No. 04/L-220 on Foreign Investment (Kosovo, 2014), art. 7.

[164] *IuteCredit Europe AS v. Republic of Kosovo* (Final Award, 16 November 2022) ICC Case No 25135/HBH (*IuteCredit Europe v. Kosovo*).

[165] Ibid.

the measures or their disproportionate scope of the measures relative to their stated purposes.

101. In *Bahgat v. Egypt I*, the tribunal acknowledged that Egypt's arrest of the claimant and the associated asset freezes could be said to pursue a legitimate purpose.[166] It nonetheless held that the police powers doctrine is not *carte blanche* and that State measures must, among other things, be proportional to the threat to public order they purport to address.[167] On the facts, the tribunal determined that the scope of the measures (effectively bringing all commercial activities of the claimant's companies to a halt for over six years) was disproportionate to any legitimate investigative purpose, leading to the conclusion that they could not be considered as a legitimate exercise of the State's police powers.[168]

102. In *OEG v. Ukraine*, decided under the traditional expropriation provision in Article 5 of the Estonia-Ukraine BIT (1995),[169] the tribunal found that a 2009 Gambling Ban Law constituted an indirect expropriation of the claimant's investment. Although the tribunal acknowledged the potential legitimacy of a ban on gambling as a regulatory objective, the tribunal held that the measure could not be characterized as a proportionate exercise of police powers because no gambling zones—which the law had contemplated as an alternative—were actually established for eleven years following the law's entry into force, thereby transforming the purportedly temporary prohibition into one with a permanent expropriatory effect.[170] The revocation of the claimant's licenses, which were the linchpin of its entire operation, therefore amounted to an indirect taking of the investment.[171]

103. At this juncture, a question may arise as to whether the degree of a tribunal's scrutiny over the host State's regulatory actions may differ when the measure at issue relates to a sanctions framework.

104. On the one hand, the very presence of cases such as *Certain Iranian Assets* and *Bank Melli v. Bahrain* is proof that a State's invocation of unilateral or UN sanctions against investors of a certain nationality will not affect an international court's or a tribunal's power to pronounce on the international legality (including the reasonableness)[172] of the

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[166] *Bahgat v. Egypt I*, para 232.

[167] Ibid.

[168] Ibid., paras 227, 230, 232.

[169] *Agreement between the Government of the Republic of Estonia and the Government of Ukraine for the Promotion and Mutual Protection of Investments* (signed 15 February 1995, entered into force 5 August 1995) (Estonia-Ukraine BIT), art 5.

[170] *Olympic Entertainment Group AS v. Republic of Ukraine* (Award, 15 April 2021) PCA Case No 2019-18 (*OEG v. Ukraine*), paras 101, 108.

[171] Ibid., paras 107, 112.

[172] *Certain Iranian Assets*, para 186.

State's sanctions at the conception or implementation stage. On the other hand, it may be reasonable to expect that the degree of deference to be accorded to a State's decision on whether to impose sanctions may be accorded a higher degree of deference when the implementation of UN sanctions is at issue. One may infer this, for instance, from the award in *Bank Melli v. Bahrain* where the tribunal contrasted UN sanctions against Iran—which constitute mandatory international law and could qualify as norms of 'transnational or truly international public policy'—and US and EU unilateral sanctions against Iran—which lack the universality that characterizes UN sanctions and which could not qualify as part of international public policy 'insofar as they diverged from the scope of UN sanctions' (i.e., they were broader in scope than the latter).[173]

105. The above inference notwithstanding, it is also clear that it would not be beyond the purview of an arbitral tribunal to determine a State's good faith implementation of UN sanctions. Thus, in *Bank Melli v. Bahrain*, Bahrain contended that the forced administration and subsequent liquidation of Future Bank were justified under its police powers on the ground that those measures were a response to Future Bank's alleged systematic violations of anti-money laundering obligations and international sanctions, including UN sanctions.[174] The tribunal did not categorically reject Bahrain's contention that the enforcement of sanctions could come under the State's police powers in principle.[175] However, the tribunal found that the measures failed on the facts owing to their unreasonableness, disproportionate character and political motivation. The assumption of full administrative control followed by the compulsory winding-up of the institution, resulting in the complete extinguishment of the investment, went beyond what those regulatory purposes required, and, accordingly, the measures could not be characterized as a *bona fide* exercise of police powers shielding Bahrain from the duty to compensate the investors.[176]

106. In conclusion, the public welfare purpose of a measure, including its sanctions-related character, is a potential limitation on expropriation claims through the invocation of the police powers doctrine. Taken together, the cases examined above indicate that successful invocation of police powers may turn on two principal considerations: (i) the degree to which the public welfare objectives invoked are genuine and pursued in good faith (rather than a pretext to target the investment); (ii) the manner in which the measure is implemented, in particular whether the implementation is disproportionate relative to the measure's objective.

### iv. The relevance of the investor's legitimate expectations

107. Within the framework developed above, the investor's legitimate expectations do not

[173] *Bank Melli v. Bahrain*, paras 382-383.

[174] Ibid., paras 592, 603.

[175] Ibid., 632.

[176] Ibid., paras 651, 682-684, 689-691.

operate as an independent basis for finding that an expropriation has occurred, but as a contextual consideration and a contributing factor to assessing whether a State should be found liable for a particular interference with the investment reaching the expropriation threshold.

108. According to the governing principle articulated in *Methanex v. USA*, a non-discriminatory regulation enacted for a public purpose will not ordinarily constitute an expropriation, even where it significantly impairs an investment, unless the State has given specific commitments to the investor that it would refrain from taking the measure(s) in question.[177] Where such commitments relating to the imposition of restrictive measures against a particular investor exist at the time in which said investor was contemplating investing in the host State, the exact content and character of such commitments (e.g., their clear, specific or unequivocal utterance), as well as the investor's reasonable reliance upon them (e.g., whether made formally or informally; whether made by an organ vested with authority), may become important factors to consider.[178]

109. Absent such commitments given in those specific circumstances, or in instances where an investment is made after sanctions are in place, or when a violation of existing sanctions is at issue, it would be difficult for an investor to argue that the State's actions were contrary to legitimate expectations.

## B. Fair and equitable treatment

### 1. Overview of the standard

110. Nearly all IIAs contain a provision guaranteeing FET to foreign investors and their investments. The standard sets a minimum level of protection for foreign investors and investments. Its importance for States' investment treaty risk is high: by a wide margin, FET is the standard on which investors most often succeed in ISDS. Despite its significance, considerable uncertainty and unpredictability surround the application of the FET standard in IIAs. This makes it difficult for states to accurately identify the standard's exact legal content and application in specific cases.

111. Different IIAs may provide for different formulations of FET. There are two primary types of FET provisions. So-called **'qualified' FET provisions** link the FET standard to international law, be it 'principles of international law', customary international law (CIL), or the minimum standard of treatment of aliens (MST) under CIL. Examples of qualified FET provisions are found in Article III(1) of the Canada-Russia BIT (1989),

[177] *Methanex v. USA*, pt IV ch D, paras 4, 7, 9.

[178] See, e.g., *Crystallex International Corporation v. Bolivarian Republic of Venezuela* (Award, 4 April 2016) ICSID Case No ARB(AF)/11/2 (*Crystallex v. Venezuela*), paras 705-709, 711-716, 736-737; *Marvin Roy Feldman Karpa v. United Mexican States* (Award, 16 December 2002) ICSID Case No ARB(AF)/99/1 (*Feldman v. Mexico*), paras 100-114, 149.

Article II(2)(a) of the Canada-Lebanon BIT (1997), Article 6 of the Canada-Moldova BIT (2018), and Article 4 of the Canada-China BIT (2012).[179] Article 17.9 of the Modernized CUFTA (2023) goes a step further by presenting a unique formulation referencing only the CIL MST without explicitly mentioning or making a link to FET.[180] By contrast, so-called **'unqualified' FET provisions** simply state that investors must be provide with 'fair and equitable treatment'. A typical example of this approach can be found in Article III(1) of the Canada-Hungary BIT (1991).[181]

112. Unqualified FET provisions dominate the vast majority of older generation IIAs. Modern IIAs, by contrast, tend to include qualified FET provisions. At the same time, the vast majority of ISDS cases continue to be brought under those older-generation treaties which tend to include unqualified FET provisions. Older-generation IIAs account for approximately 97% of all ISDS cases to date,[182] and FET remains the most frequently litigated standard.[183]

113. Arbitral jurisprudence on the interpretation of the above variations of the FET standard is somewhat mixed. Two principal approaches can be distinguished.

114. **One approach** is to regard qualified and unqualified FET provisions as implying different violation thresholds. Tribunals applying qualified FET provisions referring to CIL or the MST may tend to emphasize the high threshold to establish a breach under CIL,[184] requiring conduct that is 'arbitrary, grossly unfair, unjust or idiosyncratic',[185] or 'sufficiently egregious [such as] manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons'.[186] (**Box II**) The extent to which the same interpretive approach applies to qualified FET provisions with a reference to 'principles of international law' is less clear.[187]

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179 *Agreement between the Government of Canada and the Government of the Republic of Moldova for the Promotion and Protection of Investments* (signed 12 June 2018, entered into force 23 August 2019) (Canada-Moldova BIT), art 6; Canada-Russia BIT, art III(1); Canada-Lebanon BIT, art II(2); Canada-China BIT, art 4.

180 Modernized CUFTA, art 17.9.

181 *Agreement between the Government of Canada and the Government of the Republic of Hungary for the Promotion and Reciprocal Protection of Investments* (signed 3 October 1991, entered into force 21 November 1993) (Canada-Hungary BIT), art III(1).

182 UNCTAD, 'International Investment Agreements Trends: The Increasing Dichotomy between New and Old Treaties', IIA Issues Note No 2 [October 2024], 7 <https://unctad.org/publication/international-investment-agreements-trends-increasing-dichotomy-between-new-and-old>.

183 UNCTAD, 'Facts and Figure on Investor-State Dispute Settlement Cases', IIA Issues Note No 3 [November 2024], 8 (fig. 8) <https://unctad.org/system/files/official-document/diaepcbinf2024d5_en.pdf>.

184 *Glamis v. USA*, para 599; see also *Mondev International Ltd v. United States of America* (Award, 11 October 2022) ICSID Case No. ARB(AF)/99/2 (*Mondev v. USA*), paras 120-122.

185 *Waste Management v. Mexico II*, para 98.

186 *Glamis v. USA*, para 616.

187 See, e.g., *Infinito Gold Ltd v. Republic of Costa Rica* (Award, 3 June 2021) ICSID Case No ARB/14/5 (*Infinito Gold v. Costa Rica*), paras 327-335; and cf with ibid. (Separate Opinion on Jurisdiction and on the Merits – Professor Brigitte Stern, 26 May 2021), paras 75-98.

**Box II: Standard of conduct under the CIL MST**

The *Waste Management v. Mexico II* case is widely considered to contain the definitive statement of the content of the CIL MST, having been cited by several subsequent tribunals. According to the *Waste Management II* tribunal, the CIL MST proscribes conduct that is:

> *... arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.*

(para 98: emphases added)

By contrast, many tribunals applying unqualified FET provisions have taken the absence of explicit CIL or MST language to mean that the standard is an autonomous one not confined to a particular body of law, but rather requiring an independent analysis of the ordinary meaning of the terms 'fair' and 'equitable' in accordance with customary law principles of treaty interpretation.[188]

115. **Another approach** to the interpretation of FET variations is convergence. Some tribunals have taken the view that qualified and unqualified FET provisions are not materially different owing to the evolution of international law,[189] while others have held that any conceptual differences that may exist between the two types of FET provisions would not produce a practical difference in the circumstances of the case.[190]

## 2. Elements related to a breach of FET

116. Notwithstanding the different types of FET provisions and the divergence one sees in

[188] See, e.g., *Gabriel Resources Ltd and Gabriel Resources (Jersey) v. Romania (I)* (Award, 8 March 2024) ICSID Case No ARB/15/31 (*Gabriel v. Romania*), paras 851-852; *Joseph Charles Lemire v. Ukraine* (Decision on Jurisdiction and Liability, 14 January 2010) ICSID Case No ARB/06/18 (*Lemire v. Ukraine*), paras 284-285; *Bahgat v. Egypt I*, paras 245-247; *Tecmed v. Mexico*, paras 154-155.

[189] See, e.g., *ELA USA, Inc. v. The Republic of Estonia* (Award of the Tribunal, 21 February 2025) PCA Case No 2018-42 (*ELA v. Estonia*), paras 742-745; *Cargill, Incorporated v. Republic of Poland* (Final Award, 29 February 2008) ICSID Case No ARB(AF)/04/2 (*Cargill v. Poland*), para 453; *Rumeli Telekom AS and Telsim Mobil Telekomunikasyon Hizmetleri AS v. Republic of Kazakhstan* (Award, 29 July 2008) ICSID Case No ARB/05/16 (*Rumeli v. Kazakhstan*), para 611; *Azurix Corp. v. The Argentine Republic* (Award, 14 July 2006) ICSID Case No. ARB/01/12 (*Azurix v. Argentina*), para 361.

[190] See, e.g., *Peteris Pildegovics and SIA North Star v. Kingdom of Norway* (Award, 22 December 2023) ICSID Case No ARB/20/11 (*Pildegovics v. Norway*), para 498; *Antonio del Valle Ruiz and others v. Kingdom of Spain* (Final Award, 13 March 2023) PCA Case No 2019-17 (*Ruiz v. Spain*), paras 710-712; *Saluka v. Czech Republic*, paras 285-295.

jurisprudence, tribunals often rely on a core set of principles and standards to determine whether a State has violated the standard. These principles and standards tend to form part of the FET analysis, regardless of whether the applicable provision is qualified or unqualified.

117. The fact that FET's common core is principle- and standards-based means that its application is often highly fact-specific and contextual, thus making generalizations difficult. Nevertheless, the following FET-related principles and standards appear to be particularly relevant in the context of sanctions.

**i. Good faith, arbitrariness and due process**

118. A failure by the State to act in **good faith** is a core component associated with the FET standard.[191] Tribunals share the view that a determination that a State has not acted in good faith in relation to a particular investor can be made on the basis of an objective assessment of the conduct or measure at issue, and does not require the investor to prove the existence of bad faith on the part of the State.[192] This is significant, as proving that the State had acted with the subjective intent to harm or deceive the investor can be particularly onerous. In practice, an absence of good faith in dealings with investors, including in sanctions-related cases, may be inferred contextually through an assessment of other components of FET, such as arbitrariness or lack of due process.

119. **Arbitrariness** has been defined by the ICJ in the *ELSI* case as action that flouts the rule of law—'a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety'.[193] Arbitral tribunals have consistently relied on this definition when reviewing State measures.[194]

120. In *Odyssey v. Mexico*, at issue was the denial of an environmental permit for the exploitation of phosphate deposits. A majority of the tribunal found that Mexico had breached its obligations under the qualified FET provision of Article 1105 NAFTA given that its conduct was 'seriously arbitrary and non-transparent, manifestly unreasonable and capricious, and … did not respect the administrative due process to which [the investor and its local subsidiary] were entitled.'[195] In particular, the tribunal's majority determined that the denial of the permit was not the result of a mere administrative error or of the mis-appreciation of the project's environmental impact. Rather, for the majority,

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[191] *Gemplus SA, SLP SA, Gemplus Industrial SA de CV v. The United Mexican States* (Award, 16 June 2010) ICSID Case No ARB(AF)/04/3 & ARB(AF)/04/4 (*Gemplus v. Mexico*), para 7-72; *Eureko BV v. Republic of Poland* (Partial Award, 19 August 2005) UNCITRAL (*Eureko v. Poland*), para 233.

[192] See, e.g., *Tecmed v. Mexico*, para 153.

[193] *Elettronica Sicula SpA (ELSI) (United States of America v. Italy)*, Judgment [1989] ICJ Rep 15, para 128.

[194] See, e.g., *Loewen Group, Inc and Raymond L Loewen v. United States of America* (Award, 26 June 2003) ICSID Case No ARB(AF)/98/3 (*Loewen v. USA*), para 131; *Philip Morris v. Uruguay*, para 390.

[195] *Odyssey Marine Exploration, Inc v. United Mexican States* (Award, 17 September 2024) ICSID Case No UNCT/20/1 (*Odyssey v. Mexico*), para 437.

the denial was not grounded in legitimate environmental concerns at all but was the result of personal motives of the person in charge of Mexico's Secretariat of Environment and Natural Resources.[196] Dissenting from this finding, arbitrator Philippe Sands noted, among other things, that as a matter of principle the assessment of arbitrariness under the FET standard should not have proceeded without taking into account Mexico's international environmental obligations, including its obligation to adhere to the precautionary principle.[197] Though made in the context of an environmental claim, States could draw parallels between the dissenter's approach and the imposition of UN sanctions.

121. An additional fundamental component of FET is **basic procedural fairness and due process** in a State's dealings with foreign investors. Tribunals have recognized that due process commitments under FET extend beyond purely judicial contexts to encompass acts of other branches of the government, including administrative decisions,[198] although the threshold of the due process standard may vary between judicial and administrative settings (it may be laxer in the latter).[199]

122. A breach of due process in administrative proceedings can been found in instances where the State has made a decision affecting the investment based on reasons that are unrelated to specific existing requirements under domestic law,[200] or on criteria that are entirely novel or unprecedented and selectively applied;[201] as well as in instances where the State has failed to give the investor a fair opportunity to present its case before local authorities,[202] or has failed to assess the investor's case in 'a reasoned, even-handed, and unbiased decision'.[203]

123. Due process concerns may be more substantively engaged in **unilateral sanctions** scenarios where a State designates a specific entity on a sanctions list and imposes restrictive measures against it without, for example, properly assessing the evidence or affording that entity a meaningful opportunity to be heard post-designation and challenge the decision. At the same time, cases like *Kadi*, although decided in a non-ISDS context, stand for the proposition that fundamental procedural guarantees such as the right to a

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196 Ibid., para 440.

197 Ibid. (Dissenting Opinion of Professor Philippe Sands KC, 16 December 2021), paras 12, 14-20.

198 Ibid. (Award), para 309.

199 *Glencore International AG and CI Prodeco SA v. Republic of Colombia (I)* (Award, 27 August 2019) ICSID Case No ARB/16/6 (*Glencore v. Colombia I*), paras 1319-1320.

200 *Odyssey v. Mexico*, paras 310, 332-336.

201 *William Richard Clayton, Douglas Clayton, Daniel Clayton, and Bilcon of Delaware, Inc v. Government of Canada* (Award on Jurisdiction and Liability, 17 March 2015) PCA Case No 2009-04 (*Clayton/Bilcon v. Canada*), paras 598-604.

202 Ibid.; see also *Metalclad v. Mexico*, para 88; *Glencore v. Colombia I*, paras 1318ff (finding no breach of due process in the circumstances of the case).

203 *Glencore v. Colombia I*, paras 1318ff (finding no breach of due process in the circumstances of the case).

fair hearing and to challenge evidence apply also when the direct implementation of **UN sanctions** is at issue.[204] Provided that they are severe enough, administrative lapses such as the above could result in a breach of due process for leading 'to an outcome which offends judicial propriety […] or a complete lack of transparency and candor in an administrative process.'[205]

### ii. Unreasonableness and disproportionality

124. Some tribunals have found that the FET standard also prohibits conduct that is unreasonable or disproportionate to any legitimate policy objective or that reflects 'manifest irrationality' on the part of the State.[206] Despite often presented as separate component elements of FET, the two may in practice overlap in many situations.

125. As defined by the ICJ in *Certain Iranian Assets*, in its ordinary meaning **unreasonableness** means the absence of justification based on rational grounds.[207] In this case, revolving around US sanctions against Iranian entities, the Court was interpreting Article IV(1) of the Iran-United States Treaty of Amity (1955) which recorded separate obligations of the contracting parties to 'at all times accord fair and equitable treatment' and to 'refrain from applying unreasonable or discriminatory measures' against nationals or companies of the other contracting party. Nevertheless, the Court held that there is an overlap between the two standards as 'fair and equitable treatment can encompass protection against unreasonable or discriminatory measures.'[208]

126. According to the Court, a finding of unreasonableness may rest of several factors, notably (i) if the measure does not pursue a legitimate public purpose; (ii) if there is no appropriate relationship between the purpose pursued and the measure adopted; (iii) if the measure has adverse impacts that are manifestly excessive in relation to the purpose pursued.[209] On the facts of the case, the ICJ determined that US legislation that permitted, for the purposes of satisfaction of US court judgments, the attachment of *any* assets (even if previously unblocked) of *any* company of Iranian nationality (irrespective of the Iranian government's type and degree of control over them, or the affected company's involvement in the Iranian State actions challenged by the US) was unreasonable, insofar as it caused a manifestly excessive impairment of the affected

[204] Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union*, Judgment (Grand Chamber) [3 September 2008], paras 336-353.

[205] *Waste Management v. Mexico II*, para 98.

[206] See, e.g., *Ioan Micula, Viorel Micula, SC European Food SA, SC Starmill SRL and SC Multipack SRL v. Romania (I)* (Award, 11 December 2013) ICSID Case No ARB/05/20 (*Micula v. Romania I*), paras 813-824; *Infinito Gold v. Costa Rica*, para 561; *Gemplus v. Mexico*, para 233.

[207] *Certain Iranian Assets*, para 146.

[208] Ibid., para 144.

[209] Ibid., paras 147-149.

Iranian companies' rights—effectively denying these companies their separate legal personality—when measured against the purpose invoked.[210]

127. As put forward by the ICJ, the test for unreasonableness has parallels to the test of **proportionality**. In *Philip Morris v. Uruguay*, the tribunal appears to have recognized that a State's regulatory measures, even when pursued in furtherance of a legitimate public policy objective, may nonetheless violate the FET standard if they are disproportionate to the objective sought or if they impose an excessive burden on the investor relative to the policy goal.[211] In this connection, several tribunals constituted under IIAs with qualified and unqualified FET provisions have affirmed that their role is not to second-guess the decisions of domestic authorities or to serve as courts of appeal at the international level.[212]

128. It thus follows that proportionality may be a consideration in sanctions-related ISDS cases in a manner that is not dissimilar to unreasonableness.

129. That said, it bears noting that there are competing approaches in arbitral jurisprudence on whether proportionality should better be construed as an independent ground to be assessed in an FET analysis,[213] or whether, instead, it is nothing more than a relevant consideration to be taken into account in one's appraisal of other manifestations of the FET standard, such as due process or arbitrariness.[214] Proportionality does not appear as an independent ground in the typical statements of the CIL MST, such as, the one expounded by the tribunal in *Waste Management v. Mexico II*.[215]

### iii. Abuse of authority, coercion and harassment

130. Dealings between host States and investors that are characterized aggression, confrontation, threats or unreasonable pressure put on the investor to take actions demanded by the government may amount to **coercion and harassment** and can independently establish a violation of the FET standard.[216] Similarly, using sovereign legal authority to achieve a purpose other than the one for which that authority was given

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210 Ibid., paras 150-157.

211 *Philip Morris v. Uruguay*, paras 409-410, 419-420.

212 See, e.g., *Marfin Investment Group v. The Republic of Cyprus* (Award, 26 July 2018) ICSID Case No ARB/13/27 (*Marfin v. Cyprus*), paras 868-870, 895-900; *Glamis v. USA*, paras 762, 779.

213 See, e.g., *OEG v. Ukraine*, para 132.

214 See, e.g., *Resolute Forest Products Inc v. Government of Canada* (Final Award, 25 July 2022) PCA Case No 2016-13 (*Resolute v. Canada*), para 757-758.

215 *Waste Management v. Mexico II*, para 98.

216 See e.g., *Burlington Resources Inc v. Republic of Ecuador* (Award, 7 February 2017) ICSID Case No ARB/08/5 (*Burlington v. Ecuador*), para 171; *Desert Line Projects LLC v. The Republic of Yemen* (Award, 6 February 2008) ICSID Case No ARB/05/17 (*Desert Line v. Yemen*), paras 148-194; see also *Tokios Tokelés v. Ukraine* (Dissenting Opinion of Daniel M. Price, 26 July 2007) ICSID Case No ARB/02/18 (*Tokios Tokelés v. Ukraine*), para 2.

crosses the threshold of legitimate regulation and enters the realm of **abuse of authority**, that is, the use of sovereign power to harass, intimidate or retaliate against a foreign investor for political or other improper motives.[217]

131. Transposing the above to sanctions, one could conceive that actions such as repeated designations, investigative proceedings, unwarranted criminal charges, burdensome compliance requirements, when used pretextually to hide improper motives or lacking any genuine connection to legitimate sanctions compliance objectives, may run afoul of States' FET duties not to coerce, harass or abuse their authority in their dealings with foreign investors.

### iv. The investor's legitimate expectations

132. Consideration of an investor's legitimate and reasonable expectations has figured prominently in certain arbitral awards when analyzing whether States have breached the FET standard.[218] Where the State frustrates these expectations, the threshold for establishing a FET breach is often met.[219] For expectations to be protected, they must be rooted in conditions offered by the State to the particular foreign investor, at the relevant time (often the time of investment), and upon which the investor was reasonable to rely, and actually relied, in the circumstances of the case.[220] Examples of instances where a frustration of legitimate expectations may occur include the breach of clear and specific representations made by the State towards the foreign investor, which were reasonably relied upon by the latter; or the evisceration of arrangements in reliance upon which the foreign investor was induced to invest.

133. Although most tribunals would tend to agree that legitimate expectations must be rooted in clear and specific representations or assurances given by the State, there is disagreement on whether such representations and assurances giving rise to expectations can be found in general legislation or regulation. The question has arisen and debated prominently in the context of State measures rolling back subsidies which were originally put in place to incentivize the production of renewable energy.[221] As such, the question

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[217] See, e.g., *Deutsche Bank v. Sri Lanka*, paras 481-491

[218] See, e.g., *Saluka v. Czech Republic*, para 302.

[219] *Glamis v. USA*, paras 619-622.

[220] *Enron Corporation and Ponderosa Assets, LP v. Argentine Republic* (Award, 22 May 2007) ICSID Case No ARB/01/3 (*Enron v. Argentina*), para 262; *CME Czech Republic BV v. The Czech Republic* (Partial Award, 13 September 2001) UNCITRAL (*CME v. Czech Republic*), para 611; *Saluka v. Czech Republic*, paras 302-304.

[221] For example, in *9REN v. Spain*, the tribunal held that State commitments must be 'specific as to their addressee and specific regarding their object and purpose' to generate legitimate expectations. Critically, the tribunal clarified that there is no reason in principle why such commitments of the requisite clarity and specificity cannot be made in general regulation. Given this, for the tribunal, legitimate expectations may thus arise from (i) specific commitments addressed personally to the investor (e.g., stabilization clauses); or (ii) general regulatory rules that, although not specifically addressed to a particular investor, are put in place with the specific purpose of inducing foreign investment and upon which the investor reasonably relied when making its investment decision. See *9REN*

does not appear to be immediately relevant in a sanctions setting, since there is no obvious direct link between imposing restrictive measures on a foreign investor and any representations or commitments that the State may have made in its laws and regulations in an effort to incentivize investment. Rather, an argument could be made that a specific stabilization commitment made to the specific investor would be required for legitimate expectations of regulatory stability to arise in the context of sanctions-related measures.

134. What appears to be settled from arbitral case law, however, is that, in the absence of a stabilization clause, an investor cannot reasonably expect that the regulatory framework will remain static indefinitely or that it will not change in a way that affects the investor's interests,[222] provided that such change does not go beyond an 'acceptable margin' considering the practical impact on the investment.[223] At the same time, arbitral jurisprudence indicates that temporality plays a crucial role in determining the scope of legitimate expectations. Legitimate expectations may be bounded by what a reasonably prudent and diligent investor should have foreseen at the time of investment.[224] An investor who made an investment at a time when major geopolitical tensions were evident, or when sanctions regimes were already in place or reasonably foreseeable, may therefore face difficulties claiming to have held legitimate expectations that such sanctions would not be imposed against it or expanded to include it.

### v. Interference with contracts

135. As mentioned in Section II.A.2.ii.d, sanctions-related measures may interfere with investment contracts with State organs or State-owned entities, including through the potential termination of such contracts concluded with sanctioned investors. In this regard, as in the examination of expropriation, one must distinguish between (i) a State's mere breach or termination of a contract under a valid contractual ground, which may not constitute a violation of international law in and of themselves (although they would be reviewable under the contract's governing law and before the contractually stipulated forum); and (ii) the exercise of sovereign authority in a manner that extinguishes or entirely invalidates an investor's contractual rights, which would come under the purview of IIAs. Moreover, similar considerations would also apply in relation to issues of attribution.

136. One additional remark to be made here is that, unlike a finding of expropriation, which

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*Holding Sarl v. Kingdom of Spain* (Award, 31 May 2019) ICSID Case No ARB/15/15, (*9REN v. Spain*), paras 226, 295.

For the opposite view, see *Blusun SA, Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (Award, 27 December 2016) ICSID Case No ARB/14/3 (*Blusun v. Italy*), paras 366-371 (holding that, since general legislation or regulation are addressed to a plurality or to general categories of persons, they cannot in and of themselves create an expectation of regulatory stability or immutability).

[222] *Saluka v. Czech Republic*, para 305.

[223] See *Philip Morris v. Uruguay*, paras 421-435.

[224] Ibid., paras 429-430.

typically requires a tribunal to find that the investor has suffered a substantial deprivation of its investment, a finding of FET breach generally does not depend on whether the investor has been effectively deprived of the use or enjoyment of its investment. This is important in cases of contractual interference, since an interference that does meet the threshold for expropriation may nonetheless qualify as a breach of FET. For example, in *CMS v. Argentina* and *LG&E v. Argentina*, both tribunals dismissed the investor's expropriation complaint, while at the same time finding that Argentina's same acts of contractual interference separately breached the treaty's FET standard, by destroying the stability and predictability of the legal framework upon which the investors had relied in making their investments.[225]

## C. Non-discrimination

### 1. Overview of the standard

137. Non-discrimination provisions in IIAs seek to guarantee that foreign investors and their investments receive treatment no less favorable compared to similarly situated national investors and investments, called 'national treatment' (NT), or other foreign investors and investments operating in the host State, called 'most-favored-nation treatment' (MFN). Both NT and MFN are relative standards in that the protection they afford depends on the treatment accorded *de jure* or *de facto* to other comparators, *viz.*, investors from third States in the case of MFN, and domestic investors in the case of NT.[226]

138. To establish a breach of MFN or NT, a foreign investor must demonstrate two essential elements: (i) that differential treatment has been accorded to the foreign investor or investment; and (ii) that this differential treatment is less favorable than that accorded to other national or foreign investors or investments in 'like circumstances'.[227] Failure to satisfy either element would be fatal to a claim for breach of MFN or NT.

139. The wording of NT and MFN treatment provisions can vary from IIA to IIA. A key differentiation often is whether the treaty specifies whether a comparison should be made between investors and investments 'in like circumstance'. For instance, Articles 4 (NT) and 5 (MFN) of the Canada-Moldova BIT (2018) contain such explicit references to 'like circumstances'. By contrast, Article III of the Canada-Russia BIT (1989) does not include an express mention to 'like circumstances'.[228] However, the absence of express language in the IIA does not eliminate the requirement for conducting a comparator

[225] *CMS v. Argentina*, para 281; *LG&E v. Argentina*, paras 132-138.

[226] *Parkerings-Compagniet AS v. Republic of Lithuania* (Award, 11 September 2007) ICSID Case No ARB/05/8 (*Parkerings v. Lithuania*), para 366.

[227] *Parkerings v. Lithuania*, para 371.

[228] For an additional example of this approach in Canada's IIA practice, see *Agreement Between the Government of Canada and the Government of the Republic of Argentina for the Promotion and Protection of Investment* (signed 5 November 1991, entered into force 29 April 1993) (Argentina-Canada BIT), art III-IV.

analysis. Tribunals have consistently held that the 'like circumstances' inquiry is implicit in the structure of any non-discrimination provision, even where not explicitly stated.[229]

140. Determining that investors or investments are in similar, comparable or like circumstances is often the most contentious aspect of an MFN or NT analysis. The remainder of this section accordingly focuses on this.

### 2. 'Like circumstances'

141. Tribunals have identified several factors to determine whether investors are in like circumstances. A common approach has been to focus on the identity of the industry or sector in which investors operate.[230] Under this approach, investors operating in the same economic or business sector are considered to be in like circumstances. Another frequently used approach has been to look beyond mere industry/sector identity to examine whether investors are in direct competition with one another. Such may be the case, for instance, when the investors produce substitutable products even when they do not operate in the same industry or economic sector.[231] This approach recognizes that 'likeness' may exist across different sectors where there is meaningful market competition.

142. Beyond these specific factors, tribunals have also consistently emphasized that ascertaining the likeness of circumstances requires an assessment of all relevant circumstances. As put by the tribunal in *UPS v. Canada*, analyzing 'like circumstances' requires a holistic examination of all relevant factors that affect the competitive relationship and legal position of the investors in question, as opposed to relying on a single determinative criterion.[232]

143. Given this, additional important factors, that may be of particular relevance in sanctions cases, is the extent to which investors are subject to comparable legal regimes or regulatory requirements, or the extent to which the differential treatment was plausibly connected to a legitimate policy goal which was implemented neither in a discriminatory fashion or as a disguised barrier to equal opportunity. Several cases illustrate this.

144. In *Parkerings v. Lithuania*, the tribunal examined whether a foreign investor in the parking services sector had been discriminated when compared to Lithuanian investors

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[229] See, e.g., *Parkerings v. Lithuania*, para 369 (applying an MFN provision which did not include an explicit reference to 'like circumstances').

[230] See, e.g., ibid., para 371; *SD Myers v. Canada*, paras 250-251.

[231] See, e.g., *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia* (Award on Jurisdiction and Liability) Ad hoc Arbitration (*Paushok v. Mongolia*), para 315 (finding no likeness); *Cargill, Incorporated v. United Mexican States* (Award, 18 September 2009) ICSID Case No ARB(AF)/05/2 (*Cargill v. Mexico*), paras 193-200, 211 (finding likeness).

[232] *United Parcel Service of America Inc. v. Government of Canada* (Award on the Merits, 24 May 2007) ICSID Case No UNCT/02/1 (*UPS v. Canada*), para 87.

operating in the same sector. The tribunal found that the investors were not in like circumstances considering factors such as the size of the comparators' companies and the content of the contracts to which they were subject.[233]

145. In *Apotex v. USA III* the tribunal held that ascertaining the likeness of circumstances requires an examination into whether comparators are 'subject to a comparable legal regime or regulatory requirements[.]'[234] The central dispute concerned whether foreign-owned pharmaceutical manufacturers importing generic drugs manufactured abroad to the United States were in like circumstances with domestic US manufacturers of generic drugs, in relation to the enforcement mechanisms the United States used to ensure compliance with US safety standards. The United States had argued they were not, citing that foreign manufacturers are subject to import alerts while domestic manufacturers are not,[235] whereas the claimants countered that both foreign and domestic manufacturers must comply with the same regulations.[236] The tribunal rejected the claimants' arguments, finding that the United States could not regulate foreign manufacturers in the same manner as domestic manufacturers under its domestic legal authority, and that this differential regulatory capacity justified the use of the import alert system for foreign manufacturers. Consequently, foreign and domestic comparators were not in 'like circumstances'.[237]

146. In *Windstream v. Canada I*, the tribunal examined whether the investor's freshwater lake wind project, which was subject to a moratorium, was in like circumstances with other onshore energy projects that were permitted to continue operations. The tribunal concluded that the projects were not in like circumstances since different legal frameworks were applicable to each project. Windstream had a contract under a feed-in-tariff scheme whereas the allegedly comparable investors had independent investment contracts under different schemes.[238]

147. In *GAMI v. Mexico*, the dispute concerned the expropriation of the investor's sugar mills in Mexico to ensure their solvency. Among other things, the investor's complaint before the tribunal was about discrimination, given that other insolvent sugar mills owned by Mexican nationals were not expropriated. The tribunal acknowledged that Mexican authorities may have been misguided in their conviction that this was a sound policy to pursue or that they may have made errors in deciding which sugar mills to expropriate.[239]

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[233] *Parkerings v. Lithuania*, paras 410-412, 428-430.

[234] *Apotex Holdings Inc. and Apotex Inc v. United States of America III* (Award, 25 August 2014) ICSID Case No ARB(AF)/12/1 (*Apotex v. USA III*), para 8.15.

[235] Ibid., paras 8.16-8.32.

[236] Ibid., para 8.34-8.35.

[237] Ibid., para 8.40.

[238] *Windstream Energy LLC v. Government of Canada (I)* (Award, 27 September 2016) PCA Case No 2013-22 (*Windstream v. Canada I*), paras 413-414.

[239] *GAMI Investments Inc v. Mexico* (Final Award, 15 November 2004) UNCITRAL (*GAMI v. Mexico*), para 114.

Nevertheless, the tribunal determined that the claim should fail insofar as Mexico's measure 'was plausibly connected with a legitimate goal of policy … and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity.'[240]

148. Some modern IIAs include clarifications in the treaty text or interpretive notes recording the contracting parties' understanding that a determination of 'like circumstances' is a fact-specific exercise involving the consideration of the totality of the circumstances prevailing, along similar lines as the cases identified above.[241]

149. Transposing the above to sanctions-related measures, an argument could be made therefore that differential treatment accorded to a foreign investor arising out of the latter's designation in a sanctions list would not constitute a breach of NT or MFN treatment, insofar as the designated investor and comparable investors would not be in like circumstances. At the same time, for the argument to succeed, the host State may need to demonstrate that the sanctions in question pursue a legitimate public policy goal and that they are not being used as a pretext to discriminate against investors of a certain nationality in the circumstances of the case.

## D. Transfer of funds

### 1. Overview of the standard

150. IIAs routinely guarantee investors the right to freely transfer funds into and out of the host State. Payments protected under these provisions include returns on investment (such as profits, dividends and interest), proceeds from the full or partial sale or liquidation of the investment, loan repayments, and other remittances of a similar character.[242] Asset freezes, blocking orders and transaction prohibitions imposed pursuant to sanctions legislation directly implicate the cross-border movement of capital and thus engage transfer of funds (or transfers) provisions.

151. Transfers provisions found in the network of IIAs reflect a discernible drafting evolution from absolute guarantees to qualified, exception-laden clauses.[243] Older-generation IIAs typically include transfers provisions written in sweeping and unqualified terms. They guarantee that all payments in connection with an investment may be made freely, without delay, and in a freely convertible currency, without at the same time carving out any exceptions within the transfers provision itself (e.g., for balance of payments

[240] Ibid.

[241] See, e.g., CPTPP, Drafters' Note on Interpretation of 'In Like Circumstances' Under Article 9.4 (National Treatment) and Article 9.5 (Most-Favoured-Nation Treatment) <https://www.mfat.govt.nz/assets/Trade-agreements/CPTPP/Interpretation-of-In-Like-Circumstances.pdf>.

[242] UNCTAD, *Transfer of Funds* (UNCTAD Series on Issues in International Investment Agreements II, United Nations 2000) 15-20; Kenneth J Vandevelde, *US International Investment Agreements* (OUP 2009) 402-405.

[243] UNCTAD, *Transfer of Funds* (UNCTAD Series on Issues in International Investment Agreements II, United Nations 2000) 15-20; Stephan Schill, *The Multilateralization of International Investment Law* (CUP 2009) 78-82.

difficulties, emergency measures or other regulatory exigencies).[244] Article 5 of the Argentina-Germany BIT (1991) is paradigmatic of this approach,[245] which may be interpreted as effectively shifting the risk of macroeconomic and geopolitical instability entirely onto the host State.

152. By contrast, newer-generation IIAs tend to complement the core transfers guarantee with express exceptions—most commonly including balance of payments difficulties, and the good faith and non-discriminatory application of domestic laws relating to bankruptcy, insolvency, securities regulation, and criminal offences, among other grounds.[246]

### 2. Scope limitations to free transfers in arbitral jurisprudence

153. Arbitral jurisprudence points to a series of limitations to the scope of application of free transfers provisions. These would apply to all transfers of funds in principle, including, therefore, transfers restricted following the imposition of sanctions.

154. First, a transfer is protected under an IIA's guarantees if it concerns a movements of capital that are **genuinely connected to an investment**. It is a common drafting feature of transfers provisions, appearing across older- and newer-generation IIAs,[247] that they apply to transfers relating to a covered investment. Employing such a reading of Article V of the Argentina-United States BIT (1991), the tribunal in *Continental Casualty v. Argentina* held that the treaty protected only those transfers that were 'essential for, or typical to the making, controlling, maintenance, disposition of investments.': short-term dollar deposits held by the investor's subsidiary did not meet this threshold, whereas remitting them abroad constituted 'merely a change of type, location and currency' of the assets rather than a transfer inherently connected to the operation or liquidation of the underlying investment.[248]

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[244] See e.g., R Dolzer and C Schreuer, *Principles of International Investment Law* (2nd edn, OUP 2012) 212-214; Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009) 403-407.

[245] *Tratado entre la Republica Federal de Alemania y la Republica Argentina sobre Promoción y Protección Reciproca de Inversiones* (signed 9 April 1991, entered into force 8 November 1993) (Argentina-Germany BIT), art 5.

[246] See e.g., *Canada-Colombia Free Trade Agreement* (signed 21 November 2008, entered into force 15 August 2011) (Canada-Colombia FTA), art 2203; CETA, art 8.13(3); CPTPP, art 9.9(4); 2021 Model FIPA, art 10(5).

Other modern IIAs, particularly those containing financial services chapters or general exceptions, additionally permit States to adopt or maintain restrictions to transfers that are consistent with their obligations under the IMF Articles of Agreement, including restrictions on capital transfers imposed pursuant to those obligations. See, e.g., CETA, art 28.5; *2012 US Model Bilateral Investment Treaty* (2012 US Model BIT), art 7(4).

[247] See e.g., Argentina-United States BIT, art V(1) ('transfers related to an investment'); Canada-Russia BIT, art VII(1) (using phrases such as 'accruing from any investment', 'of any investment', 'related to an investment' and 'in connection with an investment'); CETA, art 8.13(1) ('transfers relating to a covered investment'); CPTPP, art 9.9(1) ('transfers relating to a covered investment'); UNCTAD, *Transfer of Funds* 20-25.

[248] *Continental Casualty Company v. Argentine Republic* (Award, 5 September 2008) ICSID Case No ARB/03/9 (*Continental Casualty v. Argentina*), paras 238-242.

155. Second, tribunals have held that **domestic administrative formalities or prerequisites must be complied with** as a condition of treaty protection. In *Metalpar v. Argentina*, brought under Argentina-Chile BIT (1991),[249] the tribunal dismissed the claim on the ground that the claimants had failed to submit the requisite authorization request to the Central Bank before attempting to execute the transfer.[250] The same was reaffirmed in *Rusoro Mining v. Venezuela*, brought under the Canada-Venezuela BIT (1996),[251] where the tribunal held that a breach of the free transfers obligation materializes only if the investor has complied with the established procedure and the State subsequently denied or unreasonably delayed the authorization.[252]

156. Third, tribunals have clarified that a free transfers guarantee is **a negative obligation, that is, a duty not to restrict rather than a positive assurance of financial liquidity**. In *Biwater v. Tanzania*, brought under the Tanzania-United Kingdom BIT (1994),[253] the tribunal rejected the investor's attempt to invoke the transfers provision as an alternative ground to claim compensation for the commercial destruction of its investment. The tribunal held that the provision is not a guarantee that investors will have funds to transfer, but, rather, aims to guarantee that, if investors have funds, they will be able to transfer them.[254] The tribunal added that the free transfers provision targets specifically those State measures which 'effectively imprison the investors' funds' through mechanisms such as explicit currency controls or capital embargoes.[255]

### 3. Explicit transfers exceptions

157. As mentioned, modern IIAs tend to include exceptions to their free transfers provisions, notably encompassing balance of payments difficulties and the good faith and non-discriminatory application of domestic laws relating to bankruptcy, insolvency, securities regulation, and criminal offences, among other grounds. Of these, application of criminal laws is the ground that appears to be most closely related to sanctions enforcement measures.

158. However, the applicability of the exception for criminal laws to the imposition of sanctions would depend on the characterization of the sanctions framework according to

[249] *Agreement between Argentina and Chile for the Promotion and the Protection of Investments* (signed 2 August 1991, entered into force 1 January 1995) (Argentina-Chile BIT), art 5.

[250] *Metalpar SA and Buen Aire SA v. Argentina Republic* (Award, 6 June 2008) ICSID Case No ARB/03/5 (*Metalpar v Argentina*), para 179.

[251] Canada-Venezuela BIT, art VIII.

[252] *Rusoro Mining Ltd v. Bolivarian Republic of Venezuela* (Award, 22 August 2016) ICSID Case No ARB(AF)/12/5 (*Rusoro Mining v. Venezuela*), paras 581-583.

[253] *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Republic of Tanzania for the Promotion and Protection of Investments* (signed 7 January 1994, entered into force 2 August 1996) (Tanzania-United Kingdom BIT), art 7.

[254] *Biwater v. Tanzania*, para 735.

[255] Ibid.

the host State's own domestic law as forming part of its criminal law. In cases where the sanctions framework is regarded as a foreign policy tool, therefore, the exception may not be available. The situation could differ when the violations of the host State's sanctions framework is at issue. Some countries characterize such violations as criminal offences, and to the extent that the penalties for evading sanctions under the law of the sanctioning State involve restrictions of capital movements, an argument could be made that those may be brought under the exception.

#### 4. Restrictions to transfers in the absence of explicit exceptions

159. Existing arbitral case law does not resolve the question whether a State may be able to justify restrictions to the free transfer of funds in the exercise of its general regulatory authority, that is, even in the absence of explicit exceptions in the free transfers provision of the applicable IIA.

160. On the one hand, the argument could be made that the systematic inclusion of express exceptions for criminal offences and related regulatory grounds in the free transfers provisions found in newer-generation IIAs suggests that such exceptions should not be read into older, absolute transfers provisions.

161. On the other hand, the ICJ's judgment in *Certain Iranian Assets* could be taken as authority for the opposite conclusion. In that case, among the complaints brought by Iran against US restrictive measures targeting Iranian commercial entities was an alleged breach of the free transfers provision in Article VII(1) of the 1955 Iran-United States Treaty of Amity. The provision mandated that neither contracting party could impose restrictions of the transfer of funds 'except (a) to the extent necessary to assure the availability of foreign exchange for payments for goods and services essential to the health and welfare of its people, or (b) in the case of a member of the International Monetary Fund, restrictions specifically approved by the Fund.' Iran argued that the clause should be read as prohibiting any restrictions on transfers save for the two instances listed as exceptions. The Court disagreed. Siding with the US' interpretation, the ICJ held that the provision's prohibition should not be interpreted in isolation but in its relevant context, that is, in light of the two exceptions and the article's subsequent paragraphs—all of which referred to exchange restrictions.[256] Construed in this manner, the Court concluded that the prohibition on restrictions to transfers was a prohibition on exchange restrictions rather than restrictions of any kinds.[257]

162. While the ICJ's decision was heavily reliant on the particular wording of the applicable provision, what may make the decision relevant in the context of sanctions-related measures is the Court's subsequent observation on the consequences of following Iran's suggested interpretation. In that respect, the Court said:

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[256] *Certain Iranian Assets*, para 206.

[257] Ibid.

*[T]he interpretation suggested by Iran would give the provision the character of a prohibition of any restriction on the movement of capital. Given the treaty practice of States regarding movement of capital more generally, it is difficult to conceive that the Parties intended to impose such a general prohibition, especially in the absence of any words making clear an intention to do so[.]*[258]

[258] Ibid., para 207.

# III. POSSIBLE STATE DEFENSES

163. This section analyses potential defenses that a State may raise against claims brought in connection with sanctions-related measures affecting foreign investors and investments in its territory. Defenses are grouped under two categories:

- **Defenses that may available under the applicable IIA**, depending on that IIA's exact text. These may include defensive arguments arising out of the IIA's definition of investment (e.g., the scope of a protected investment or investor, legality); arguments arising out of the application of denial of benefits clauses; and arguments arising out of the application of exceptions for essential security interests (Section III.A).

- **Defenses that are available to States under CIL**, for instance, necessity and force majeure (Section III.B).

164. Since the exact scope of application of each of the potential defenses above would be heavily reliant on the IIA text and the facts of each case, the analysis presented here inevitably cannot be fully comprehensive with respect to all the legal issues that could arise and every permutation of the arguments that could be raised in response.

## A. Defenses under the applicable investment treaty

### 1. Defenses arising out of the definition of 'investment'

165. An essential jurisdictional requirement under all IIAs is that the claimant must have an 'investment' according to the terms of the applicable IIA. While definitions of investment are not uniform across IIAs, most tend to include similar characteristics, notably, a list of assets that could qualify as investments, a territoriality condition, and a legality requirement. All three of these could be relevant in the context of sanctions-related measures, insofar as (i) the host State's restrictions may involve assets that may not qualify as protected investments, (ii) the claimant's investment may actually be located outside the territory of the host State, or (iii) the assets comprising the investment in the host State may have been procured in contravention of the host State's sanctions framework, that is, illegally.

#### i. Assets qualifying as 'investments'

166. Treaty practice shows two types of definitions of investment. According to the **asset-based** type (the most common), IIA-protected investments are defined in terms of a non-exhaustive list of assets which is introduced by a chapeau with the phrases 'every kind of asset' or 'any kind of asset'. Listed assets often include movable and immovable property, tangible or intangible property, shares, intellectual property rights, rights under licenses or permits, and rights under contract having an economic value, among other

types.[259] According to the **enterprise-based** type, IIA-protected investments are defined in terms of an enterprise and assets associated with an enterprise, such as equity and debt securities issued by the enterprise and assets owned or controlled by the enterprise.[260]

167. Canadian IIA practice includes both kinds of definitions, although the newer-generation of Canadian IIAs show a clear preference for enterprise-based definitions. For instance, the Canada-China BIT (2012) and Canada-Moldova BIT (2018) contain an almost identical enterprise-based definition of investment, whereas the Canada-Russia BIT (1989) contains a traditional asset-based definition.[261] It is also noteworthy that the enterprise-based definitions of the IIAs with China and Moldova contain a closed list which limits the scope of a protected investment only to the listed items.[262] This can be contrasted to the definition in Article 8.1 of CETA (2016) which combines the 'every kind of asset' conceptual chapeau one finds in asset-based definitions with a non-exhaustive list of enterprise-linked assets that could qualify as investment.[263]

168. Another feature of both asset-based and enterprise-based definitions of investment found in newer-generation IIAs is the inclusion of characteristics that an investment must exhibit in order to qualify as such: the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and sometimes a certain duration, being the ones most often used.[264] This feature is present in a number of Canadian IIAs.

169. The exact scope of the definition of investment found in the IIA text is of relevance in sanctions-related disputes, where the investor may seek to raise a claim on the basis of an asset which does not satisfy the requirements of a protected investment. That may be, for instance, because the asset does not fall under a definition's closed list, or because the asset is not linked to an investment in the sense of an economic project involving the commitment of capital, an expectation of profit or the assumption of risk.

170. In the absence of clarifications and safeguards put in place in the IIA text, traditional asset-based definitions of investment may be construed as protecting so-called free-standing assets, such as, for instance, a passive holding of funds in a bank account held

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[259] See, e.g., *Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area* (signed 27 February 2009, entered into force 10 January 2010) (AANZFTA), ch 11, art 2(c). Generally, see Huan Qi, 'The Definition of Investment and its Development: For the Reference of the Future BIT between China and Canada' [2011] 45 RJT 545, 552-553.

[260] See, e.g., 2021 Canada Model FIPA, art 1. Generally, see see Huan Qi, 'The Definition of Investment and its Development: For the Reference of the Future BIT between China and Canada' [2011] 45 RJT 545, 553-554.

[261] Canada-China BIT, art 1(1); Canada-Moldova BIT, art 1; Canada-Russia BIT, art I.

[262] Cf UNCTAD, *Scope and Definition* (UNCTAD Series on Issues in International Investment Agreement II, United Nations 2011) 34.

[263] CETA, art 8.1.

[264] See, e.g., Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China (signed 17 June 2015, entered into force 20 December 2015) (Australia-China FTA), art 9.1(d); CETA, art 8.1; 2021 Canada Model FIPA, art 1;

in the host State.[265] In such a scenario, the choice of arbitration rules can play a crucial role. In **ICSID arbitrations**, the application of the double-barrelled jurisdictional test will mean that the claimant would have to demonstrate the existence of an investment under, both, the IIA's definition as well as Article 25 of the ICSID Convention. In determining the latter, arbitral tribunals would often apply a variation of the *Salini* test, thus considering the presence of elements such as the contribution of capital or other resources, the expectation of profit, the assumption of risk, and at times also elements like a certain duration or the contribution to the host State's economic development.[266] No such requirement is present in other arbitration rules, including the UNCITRAL arbitration rules which are the second most popular after the ICSID rules. The issue of whether such inherent characteristics must be considered also in **non-ICSID arbitrations** remains contentious with arbitral tribunals having taken divergent opinions.[267]

### ii. Investments in the host State's 'territory'

171. IIAs would typically mandate that an investment must be made in the territory of the host State.[268] This is an important condition as it could exclude assets which may be located in the host State in the normal course of business, but are otherwise linked to a home State investment.

172. That said, there may be limitations to the exclusion. For instance, the exclusion may not always apply in cases where at least part of the claimant's work is in the territory of the host State. In *SGS v. Philippines*, the dispute concerned a contract for pre-shipment inspections for goods intended for the Philippines, which the investor had to conduct at the country of export. Despite this, the tribunal considered that SGS had made an investment in the territory of the Philippines since a 'substantial and non-severable part of the contractual arrangement' involved setting up a liaison office in the Philippines in

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[265] The problem does not appear as acute in enterprise-based definitions, since the assets in question must be linked to an enterprise with a presence in the host State.

[266] *Salini Costruttori SpA and Italstrade Spa v. Kingdom of Morocco (I)* (Decision on Jurisdiction, 23 July 2001) ICSID Case No ARB/00/4 (*Salini v. Morocco I*), [2003] 42 ILM 609, para 52. The original *Salini* test includes four elements: contributions, a certain duration, participation in the risks, and a contribution to the economic development of the host State. The *Salini* test has not been entirely without criticism or controversy, in particular with respect to the elements of duration and contribution to the host State's economic development.

[267] Compare, e.g., *Romak SA (Switzerland) v. The Republic of Uzbekistan* (Award, 26 November 2009) UNCITRAL, PCA Case No AA280 (*Romak v. Uzbekistan*), para 209-242 (taking the view that there is an inherent meaning to the term investment that could be applied to IIA definitions); with *Dayyani v. Korea I* (where the tribunal reportedly did not agree that an inherent meaning to 'investment' is implicit in IIA definitions beyond what the treaty text provides).

[268] See, e.g., Canada-China, art 1(4); Canada-Moldova BIT, art 1 ('covered investment'); CETA, art 8.1 ('covered investment'); Canada-Russia BIT, art I(b).

order to carry out important functions under the contract.[269]

### iii. Investments 'in accordance with law'

173. IIA definitions of investment also tend to include a legality condition. That is, they specify that the assets forming the investment must have been 'invested',[270] 'made',[271] 'established or acquired',[272] in accordance with the laws and regulations of the host State. As interpreted by tribunals, this condition is jurisdictional, meaning that it relates to the scope of IIA coverage and to the tribunal's competence to decide. As such, it is temporally limited to illegalities during the making of the investment which, in principle, may include attempts to evade sanctions.[273] Subsequent illegal conduct is not covered by the legality condition, although it will be a relevant consideration during the merits of the case.

174. In the absence of a legality condition in the IIA's definition of investment, or in situations where the legality condition may be temporally unavailable, the doctrines of clean hands and international public policy may be available to the host State. Doctrinally, a successful invocation of these doctrines will result in a finding of inadmissibility of the claims concerned rather than in a finding of a lack of arbitral jurisdiction.

175. No temporal limitation applies to these doctrines and, therefore, they can be invoked for illegalities that post-date the establishment or the making of the investment.[274] However, the illegalities alleged must be serious, widespread and bear a close relationship to the investor's claims.[275] That is, trivial or sporadic breaches, as well as serious breaches that are not associated with the claims brought, will be excluded.

176. Applying this test in the context of alleged sanctions violations, the tribunal in *Bank Melli v. Bahrain* held that not all international sanctions constitute fundamental rules of (international) law capable of triggering the clean hands or international public policy doctrines. For the tribunal, UN sanctions clearly fall under the rubric of fundamental rules of international law, but unilateral sanctions do not, as they often seek to advance non-universal political or economic interests of the particular sanctions-imposing

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[269] *SGS Société Générale de Surveillance SA v. Republic of the Philippines* (Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004) ICSID Case No ARB/02/6 (*SGS v. Philippines*), paras 99-112.

[270] See, e.g., *Agreement on Reciprocal Promotion and Protection of Investments between the Government of the Kingdom of Bahrain and the Government of the Islamic Republic of Iran* (signed 19 October 2002, entered into force 12 November 2004) (Bahrain-Iran BIT), art 1(1).

[271] See, e.g., CETA, art. 8.1 ('covered investment').

[272] See, e.g., *Agreement between the Arab Republic of Egypt and the Federal Republic of Germany Concerning the Encouragement and Reciprocal Protection of Investments* (signed 16 June 2005, entered into force 22 November 2009) (Egypt-Germany BIT), art 1(1).

[273] *Bank Melli v. Bahrain*, paras 355-361.

[274] Ibid., paras 362-375.

[275] Ibid., para 376.

State.[276] The tribunal further opined that domestic sanctions regimes that incorporate and apply UN sanctions will not qualify as fundamental rules of international law forming part of international public policy if they diverge from the scope of the UN sanctions (e.g., by targeting additional persons).[277]

### 2. Denial of benefits clauses

177. Denial of benefits (DoB) clauses are provisions that seek to exclude certain categories of investors from the IIA's protective scope.[278] Among the policy reasons for having a DoB clause are reciprocity between the treaty parties and the exclusion of shell companies from availing IIA benefits.[279] DoB clauses are not typically found in most traditional IIAs, although their prevalence has grown in the past two decades.[280] According to UNCTAD, only 421 of the 2,823 IIA mapped include a DoB clause.[281]

178. Absence of a DoB clause in the applicable IIA is construed as a deliberate choice of the contracting parties to not exclude a certain category of investors from availing benefits arising from the treaty.[282] In these situations tribunals have refrained from incorporating implied grounds for denying treaty benefits to an otherwise covered investor, such as enquiring into the investor's corporate structure,[283] or determining whether the investor has any real operations in the home State.[284] It thus follows that, denying IIA benefits presupposes (i) that the applicable IIA contains a DoB clause, (ii) that the host State seeks to deny the treaty's benefits for reasons that are explicitly covered by the language of the DoB clause, and (iii) that the denying host State actively invokes the DoB clause.

179. Most older-generation Canadian IIAs do not include DoB clauses, whereas later IIAs tend to include them. The language of DoB clauses in these IIAs generally remains consistent with respect to their scope, allowing a contracting State, among other things,

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276 Ibid., para 381-382.

277 Ibid., para 383.

278 Loukas Mistelis and Crina Baltag, 'Denial of Benefits Clause', [2019] Max Plank Encyclopedia of International Procedural Law <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3286.013.3286/law-mpeipro-e3286>.

279 Loukas A Mistelis and Crina Mihaela Baltag, 'Denial of Benefits and Article 17 of the Energy Charter Treaty', [2009] 113(4) Penn St L Rev 1301, 1302.

280 Loukas Mistelis and Crina Baltag, 'Denial of Benefits Clause', [2019] Max Plank Encyclopedia of International Procedural Law <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3286.013.3286/law-mpeipro-e3286>.

281 UNCTAD, IIA Navigator (IIA Content Mapping), as of writing <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping/Content>.

282 See, e.g., *Tokios Tokelés v. Ukraine*, para 36.

283 See, e.g., *Charanne BV Construction Investments SARL v. The Kingdom of Spain* (Award, 21 January 2016) SCC Case No V 062/2012 (*Charanne v. Spain*), para 412-417.

284 See, e.g., *Garanti Koza LLP v. Turkmenistan* (Award dated 19 December 2016) ICSID Case No ARB/11/20 (*Garanti Koza v. Turkmenistan*), para 222.

to deny the IIA's benefits to

> *… an investor of the other Party that is an enterprise of the other Party and to investments of that investor if investors of a non-Party own or control the enterprise and the denying Party adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of [the IIA] were accorded to the enterprises or to its investments.*[285]

180. DoB clauses using similar language could cover sanctions imposed by the host State.[286] On its face, the language may appear to cover secondary sanctions ('measures with respect to the non-Party that prohibit transactions with the enterprise') as well as situations where a sanctioned entity attempts an otherwise permissible asset restructuring through which to channel an investment in the host State ('measures with respect to the non-Party … that would be violated or circumvented if the benefits of [the IIA] were accorded to the enterprises or to its investments').

181. Canada's 2021 Model FIPA replicates this language but takes it a step further, by also more clearly covering situations where imposed sanctions relate to the 'maintenance of international peace and security' (i.e., UN sanctions).[287]

182. The above remarks notwithstanding, States must be aware of further issues associated with invoking DoB clauses, notably (i) the timeliness and modalities of the invocation of the DoB clause and (ii) the temporal effect of the DoB clause once it has been invoked.

183. With respect to the **timeliness and modalities of invocation**, it bears recalling that DoB clauses do not have automatic effect but must be specifically invoked by the denying host State.[288] The mechanism for invoking a DoB clause also varies from IIA to IIA: some

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[285] See, e.g., Canada-Mongolia BIT, art 18(1).

[286] For example, it is along these lines that the EU and Switzerland have sought to deny the benefits of Part III of the *The Energy Charter Treaty* (signed 17 December 1994, entered into force 16 April 1998) (ECT) to Russian and Belarussian investors (see art 17(2)(b) ECT (1994), which contains a substantially equivalent provision).

See International Energy Charter, 'The European Union, Euratom, and Member States deny advantages of Part III under Article 17 of the ECT' [25 September 2024] <https://www.energycharter.org/media/news/article/the-european-union-euratom-and-member-states-deny-advantages-of-part-iii-under-article-17-of-the-e/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=9e458838b7cb582400ce8ad44d762d1e>; International Energy Charter, 'Swiss Confederation Denies Advantages of Part III under Article 17 of the ECT' [2 October 2025] <https://www.energycharter.org/media/news/article/swiss-confederation-denies-advantages-of-part-iii-under-article-17-of-the-ect/?tx_news_pi1%5Bcontroller%5D=News&tx_news_pi1%5Baction%5D=detail&cHash=79b8553633a91255743d20d896743500>.

[287] 2021 Canada Model FIPA, art 17.

[288] *Plama Consortium Ltd v. Republic of Bulgaria* (Decision on Jurisdiction, 8 February 2005) ICSID Case No ARB/03/24 (*Plama v. Bulgaria*), para 155.

clauses allow for unilateral invocation,[289] while a minority contain language which requires the IIA parties to jointly agree to the clause's invocation.[290] For DoB clauses permitting unilateral invocation, an issue could arise with respect to the point in time when the clause may be invoked. Some tribunals have held that a DoB clause may be invoked even after an ISDS claim has been brought, since the investor is assumed to have been aware of the possibility that the host State may invoke the clause, provided that the requirements are satisfied.[291] Certain DoB clauses also provide for this explicitly (e.g., Article 16 of the Canada-China BIT (2012)).

184. With respect to the **temporal effect** of DoB clauses once invoked, the issue is whether the denial of the treaty's benefits would be applicable only for disputes arising after the date of notification of such denial, i.e., prospectively, or whether, instead, the effects of the denial would apply as of the time at which the factor justifying denial obtained, i.e., retrospectively. Arbitral tribunals have adopted divergent approaches with respect to giving retrospective or prospective effect to DoB clauses. Ultimately, the divergence of views among tribunals on this question is not principally due to manifest differences in the treaty language used. Rather, it appears that the divergence is due to each tribunal's particular construction of the applicable IIA's specific object and purpose, and balance of rights and obligations, also taking into account the nature of the applicable IIA (whether it is bilateral or multilateral). (**Box III**)

**Box III: Tribunals' approaches to the temporal effect of DoB clauses**

A number of tribunals applying the DoB clause in Article 17 of the ECT (1994) have interpreted it to have **prospective effect only**.[292] Such an interpretation has been followed in light of the object and purpose of the ECT being the promotion of long-term cooperation in the energy field (Article 2 ECT) and the 'promotion, protection and treatment of investments' (Article 10 ECT).[293] As reasoned by the tribunal in *Plama v. Bulgaria*, giving retrospective effect to the ECT's DoB clause would have serious implications for investors as they would be unable to plan in the long-term and would be deprived of legal certainty with respect to their rights in the host State.[294]

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[289] See, e.g., CETA, art 8.16.

[290] See, e.g., *Agreement between the Government of the Republic of Singapore and the Government of the United Arab Emirates on the Promotion and Protection of Investments* (signed 24 June 2011, entered into force 17 May 2012) (Singapore-UAE BIT), art 14.

[291] See, e.g., *Guaracachi America, Inc and Rurelec PLC v. The Plurinational State of Bolivia* (Award, 31 January 2014) PCA Case No 2011-17 (*Guaracachi v. Bolivia*), para 372.

[292] See, e.g., *Yukos Universal Limited (Isle of Man) v. Russian Federation* (Interim Award on Jurisdiction and Admissibility, 30 November 2009), UNCITRAL, PCA Case No AA 227 (*Yukos v. Russia*), para 458; *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan* (Award [excerpts], 22 June 2010) ICSID Case No ARB/07/14 (*Liman Caspian v. Kazakhstan*), para 225; *Plama v. Bulgaria*, paras 162-163.

[293] *Yukos v. Russia*, para 458.

[294] *Plama v. Bulgaria*, paras 162-163.

By contrast, a number of tribunals applying other IIAs have construed DoB clauses contained thereunder to have **retrospective effect**.[295] That is even when the language of those DoB clauses was virtually identical to the ECT: the phrase '[e]ach Contracting Party reserves the right to deny ...', found in the ECT, is identical to the phrase '[e]ach Party reserves the right to deny …', found in the Bolivia-United States BIT (1998) and the Ecuador-United States BIT (1993), the IIAs that were at issue in the two cases mentioned immediately below.

- In *Ulysseas v. Ecuador*, applying Article 1(2) of the now terminated Ecuador-United States BIT (1993), the tribunal supported its view that DoB clauses have retrospective effect on the basis that the host State's exercise of the right to deny benefits is a right that may be exercised at any point in time during the life of the investment and, therefore, was a risk of which investors had been aware at the time of making the investment.[296]

- In *Guaracachi v. Bolivia*, applying the similarly worded DoB clause in Article XII of the now terminated Bolivia-United States BIT (1998), the tribunal also gave retrospective effect to the treaty's DoB clause. The tribunal reasoned that, because the purpose of a DoB clause is to give a State the right to deny treaty benefits to investors, it would be appropriate that the scope of this right includes the ability to do so when the benefits are actually being claimed before an arbitral tribunal.[297] It would be 'odd', according to the tribunal, for a State to examine whether the requirements of a DoB clause had been fulfilled in relation to an investor with whom the State had no dispute.[298] The tribunal further noted that the text of the IIA did not clearly entail that the denial of benefits would be effective only from the date when the host State exercised its right.[299]

### 3. Exceptions for essential security interests

185. Exceptions for essential security interests (ESI exceptions) provide that the IIA parties are not precluded from adopting necessary measures to protect their essential security interests. Thus, measures taken by the host State in pursuance of an ESI exception would be justified and would not engage the host State's international responsibility, even if it

[295] Loukas Mistelis and Crina Baltag, 'Denial of Benefits Clause', [2019] Max Plank Encyclopedia of International Procedural Law <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3286.013.3286/law-mpeipro-e3286>.

[296] *Ulysseas Inc v. The Republic of Ecuador* (Interim Award, 28 September 2010) UNCITRAL (*Ulysseas v. Ecuador*), para 173.

[297] *Guaracachi v. Bolivia*, para 376.

[298] Ibid., para 379.

[299] Ibid., paras 376-378.

is possible to conclude that these measures may otherwise have been in breach of the host State's IIA obligations towards investors in the absence of the ESI exception.[300]

186. ESI exceptions are not prevalent in IIAs. According to UNCTAD, only 606 of the 2,823 mapped IIAs contain an ESI exception.[301] Canada's IIA practice with respect to ESI exceptions varies. Older-generation Canadian IIAs contain no ESI exceptions (e.g., Canada-Russia BIT (1989) or Canada-Venezuela BIT (1996)). But, Canada's newer-generation IIAs tend to include such exceptions. Among the latter, one can make the following broad remarks:

187. Canadian IIAs with ESI exceptions tend to contain 'self-judging' language. That is to say, they provide that the host State is not precluded from adopting measures that 'it [i.e., the State] considers necessary' for the protection of its essential security interests.

188. Not all Canadian IIAs clarify the range of essential security interests covered under their ESI exceptions. Thus, some IIAs, such as the CPTPP (2018), simply provide that a party is not precluded from applying measures that it considers necessary for the 'fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.'[302] By contrast, other Canadian IIAs contain a closed list of protected essential security interests.[303]

189. Invocation of ESI exceptions has given rise to a series of legal issues with which arbitral tribunals have had to grapple. These issues prominently include (i) the scope of the State's 'essential security interests', (ii) the nexus that must exist between the measure taken and the situation endangering the State's 'essential security interests', (iii) the effect of the presence of self-judging language in the exception, as well as (iv) the extent to which there is a timeliness requirement regarding the invocation of the exception.

### i. Scope of 'essential security interests' of a State

190. As mentioned, ESI exceptions can be divided into those that contain a list of the essential

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[300] See, e.g., *Riverside Coffee, LLC v. Republic of Nicaragua* (Award, 17 October 2025) ICSID Case No ARB/21/16 (*Riverside Coffee v. Nicaragua*), para 250; *Angel Samuel Seda and others v. Republic of Colombia* (Award, 27 June 2024) ICSID Case No ARB/19/6 (*Seda v. Colombia*), paras 731-741; *Deutsche Telekom AG v. Republic of India* (Interim Award, 13 December 2017) PCA Case No 2014-10 (*Deutsche Telekom v. India*), para 227; *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India (I)* (Award on Jurisdiction and Merits, 25 July 2016) PCA Case No 2013-09 (*Devas v. India*), paras 293-295. On ESI exceptions generally, see Cheng Bian, 'The Essential Security Interest Exception Clause in International Investment Agreements and Arbitration' in Yuwen Li, Feng Lin, and Cheng Bian (eds), *National Security in International and Domestic Investment Law* (Routledge 2023) 27.

[301] UNCTAD, IIA Navigator (IIA Content Mapping), as of writing <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping/Content>.

[302] CPTPP, art 29.2(b).

[303] See, e.g., *Free Trade Agreement between the Government of Canada and the Government of the Republic of Chile* (signed 5 December 1996, entered into force 5 July 1997) (Canada-Chile FTA), art O-02; CETA, art 28.6; Canada-Moldova BIT, art 17(4)(b).

security interests protected and those that do not.

191. An example of the former can be seen in Article 28.6 of CETA (2016) which provides:

> *Nothing in this Agreement shall be construed: …*
>
> *b. to prevent a Party from taking an action that it considers necessary to protect its essential security interests:*
>
> > *i. connected to the production of or traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods and materials, services and technology undertaken, and to economic activities, carried out directly or indirectly for the purpose of supplying a military or other security establishment;*
> >
> > *ii. taken in time of war or other emergency in international relations; or*
> >
> > *iii. relating to fissionable and fusionable materials or the materials from which they are derived; or*
>
> *c. prevent a Party from taking any action in order to carry out its international obligations for the purpose of maintaining international peace and security.*

192. ESI exceptions of this type have the advantage of clarity and specificity. For example, the above provision from CETA (2016) covers **unilateral sanctions** aiming to combat illegal arms trading (under letter *b.i*); **unilateral sanctions** imposed in response to war or other emergency in international relations (under letter *b.ii*: arguably sanctions arising out of the war in Ukraine would fall under this heading as a matter of concern affecting the international community as a whole);[304] **unilateral sanctions** relating to nuclear materials (under letter *b.iii*: arguably sanctions against, e.g., Iran's nuclear program would fall under this heading even when they go beyond the relevant UN sanctions); as well as measures taken by a CETA contracting party to implement **multilateral sanctions** pursuant to UN Security Council resolutions (under letter *c*).

193. At the same time, listing the essential security interests that are covered has the disadvantage of narrowing the ESI exception's ambit, insofar as the list is exhaustive and the security interest that the host State wishes to pursue in a given situation may not be clearly covered.

194. In this connection, ESI exceptions which provide simply that an IIA party is not

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[304] For a definition of 'emergency in international relations' in the trade context, see *Russia–Measures Concerning Traffic in Transit* (Report of the Panel, 5 April 2019) WT/DS512/R (*Russia–Traffic in Transit*), para 7.76:

> *An emergency in international relations would, therefore, appear to refer generally to a situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a state. Such situations give rise to particular types of interests for the Member in question, i.e. defence or military interests, or maintenance of law and public order interests.*
>
> [footnotes in original omitted]

precluded from applying necessary measures for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or 'the protection of its own essential security interests' (e.g., Article 29.2(b) CPTPP (2018)) may offer a potential advantage to the invoking State. That said, arbitral jurisprudence on the exact scope of covered 'essential security interests' in those situations is not uniform.

195. Some tribunals, e.g., in *Devas v. India* and *Deutsche Telekom v. India*, have adopted a more stringent test. According to these tribunals, the word 'essential' means that it is not just any kind of public interest or security-related interest that will be enough to trigger the ESI exception. Rather, a security interest is 'essential' to the extent that it goes to the core of a State's security, notably, territorial integrity, national defence, and military threats.[305] Situations of internal civil strife have on occasion be considered as falling under the rubric of essential security interests,[306] though not always so.[307]

196. But other tribunals, e.g., in *Seda v. Colombia*, have adopted a less stringent test. Under this approach, although an 'essential' security interest must be of higher importance than just any interest and must relate to matters of security, 'security' is itself defined broadly in terms of 'threats'.[308] The essential security interests at issue in the *Seda* case concerned Colombia's fight against organized crime, money laundering and drug trafficking. The tribunal accepted Colombia's arguments that these were essential security interests for Colombia and further recognized that Colombia had a wide margin of appreciation to identify the scope of its own essential security interests (this finding was arguably easier on account of the self-judging language of the applicable ESI exception).

197. Transposing the above to sanctions, the extent to which restrictive measures pursuant to sanctions would be covered under an ESI exception with no list may depend on the interpretive approach one follows. Under the *Devas* and *Deutsche Telekom* approach, it appears that sanctions would be covered to the extent they target investors that the host State believes pose a threat to its territorial integrity, national defense or internal peace and security. By contrast, the *Seda* approach may leave open the possibility to justify

[305] *Devas v. India*, paras 243, 245, 354-361; *Deutsche Telekom v. India*, paras 236, 281-284.

[306] See, e.g., *Riverside Coffee v. Nicaragua*, para 277.

[307] In the context of the 2001 Argentine financial crisis, cf e.g., *CMS v. Argentina*, para 355 (dismissing the ESI exception defense on the finding that the crisis 'was severe but did not result in total economic and social collapse'); with *LG&E v. Argentina*, paras 237-238 (upholding the ESI exception defense on the finding that the crisis had caused 'devastating conditions—economic, political, social—in the aggregate', and clearly rejecting the view that the ESI exception is only applicable in situations of military action and war).

In both cases, the applicable ESI exception was found in Article XI of the Argentina-United States BIT (1991), which provides:

> *This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.*

[308] *Seda v. Colombia*, paras 641-650.

sanctions that aim to safeguard broader, country-specific threat-related interests.

### ii. Nexus between measure(s) taken and essential security interests protected

198. The nexus requirement describes the connection that must exist between the measure adopted and the essential security interest to be protected. Different ESI exceptions may provide for different nexus requirements, thus resulting in tribunals taking diametrically opposite positions even with respect to the same factual matrix.

199. In *Devas v. India*, at issue was India's decision to cancel the lease of electromagnetic spectrum to foreign investors and reserve it for military and public use. The ESI exception in Article 11(3) of the applicable India-Mauritius BIT (1998) provided that the contracting parties were not limited in their right to take any action 'directed to' the protection of their essential security interests. The arbitral tribunal construed the phrase 'directed to' as being akin to the phrase 'related to'.[309] As such, it did not require that the measure was necessary for the protection of the essential security interest at issue, but only that the measure was related to addressing the essential security interest. The tribunal thus held that India's measures were justified under the ESI exception to the extent that they related to military use.

200. By contrast, in *Deutsche Telekom v. India*, a case concerning the exact same fact pattern as *Devas*, the tribunal took the opposite view with respect to the military necessity of India's measures. The *Deutsche Telekom* tribunal applied Article 12 of the Germany-India BIT (1995), which provided that neither contracting party was prevented from applying prohibitions or restrictions 'to the extent necessary' for the protection of its essential security interests. The tribunal reasoned that the term 'necessary' required that the measure was:

> *<u>principally targeted</u> to protect the essential security interests at stake and was <u>objectively required</u> in order to achieve that protection, taking into account <u>whether the [S]tate had reasonable alternatives, less in conflict or more compliant with its international obligations</u>.*[310]

At the same time, the tribunal accepted that a nexus of necessity does not go as high as requiring that the measure taken is the 'only way', or absolutely indispensable, for the protection of the essential security interest at issue.[311] This is a clear rejection of older jurisprudence coming out of the Argentine cases which interpreted the ESI exception in the Argentina-United States BIT (1991) by direct reference to the CIL defense of necessity.

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309 *Devas v. India*, paras 233-245.

310 *Deutsche Telekom v. India*, para 239 [emphases added].

311 Ibid., para 238. For a similar finding in another case, see *Riverside Coffee v. Nicaragua*, para 251.

201. On the facts, the *Deutsche Telekom* tribunal held that India's measures were not necessary to protect the stated essential security interests (relating to military needs) *at the time they were enacted*, inasmuch as there appeared to be no imminent threat to these interests at the relevant time.[312]

### iii. Self-judging language

202. Some ESI exceptions contain what is known as self-judging language ('it considers'). The presence of self-judging language seeks to ensure that it is the State that invokes the exception who should be the judge of the need or the necessity of the adopted measures in connection with the claimed essential security interest. Even so, ISDS tribunals have held that the presence of self-judging language does not grant untrammeled discretion to a State to protect its essential security interests and does not insulate the State from any review of its measures. Thus, on the one hand, tribunals have consistently dismissed the argument that the presence of self-judging language deprives them of the power to review the State's invocation of an ESI exception; while, on the other hand, they have taken the view that their inquiry would be limited to a good faith review of the State's conduct, that is, determining whether the invocation of the ESI exception has been genuine (i.e., for the protection of its own essential security interests) and not pretextual.[313]

203. In other words, the inclusion of self-judging language in ESI exceptions serves to effectively limit a tribunal's scope to review and sit in judgment of the host State's determinations regarding the adopted measure(s). In so doing, self-judging language can help to temper the potential stringency that the presence of a necessary nexus might otherwise imply. Thus, in interpreting the ESI exception of the Colombia-United States TPA (2006)[314]—containing self-judging language and a necessity nexus—the tribunal in *Seda v. Colombia* emphasized its limited, 'light-touch' scope of review, and held that Colombia need not demonstrate before the tribunal that the measure was the only way, the main avenue, or even the best available, to fulfil the stated purpose.[315] Rather, it was sufficient for Colombia to demonstrate that the measure taken was plausibly connected to its stated objective so that, on its face, it *could serve* its intended purpose.[316]

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[312] *Deutsche Telekom v. India*, paras 284-291.

[313] *Riverside Coffee v. Nicaragua*, paras 252-259; *Seda v. Colombia*, paras 748-650, 755-756; see also *LG&E v. Argentina*, para 214. For a similar rejection of the view that the presence of self-judging language implies no review at all, see, in the trade context, *United States–Certain Measures on Steel and Aluminium Products* (Panel Report, 9 December 2022) WT/DS552/R (*US–Steel and Aluminum Products (Norway)*), paras 7.94, 7.116; *Russia–Traffic in Transit*, paras 7.63-7.65, 7.76-7.82, 7.100-7.202, 7.131-7.134, 7.145-7.146.

[314] *Colombia-United States Trade Promotion Agreement* (signed 22 November 2006, entered into force 15 May 2012) (Colombia-United States TPA), art 22.2.

[315] *Seda v. Colombia*, paras 650-655, 755-756, 783-787.

[316] Ibid.

### iv. Timely invocation of ESI exception

204. Some tribunals, most notably in *Riverside Coffee v. Nicaragua*, have further considered that an inquiry into the good faith invocation of an ESI exception also includes an examination of the timeliness of that invocation. According to the tribunal, that is so as to 'put the other [IIA parties] and their investors on notice of the non-applicability of [the IIA] to such measures'.[317] On the facts, the tribunal found that a televised address by the President of Nicaragua provided sufficient notice of the plausible invocation of Nicaragua's essential security interests, even though no mention was made in that address to the applicable IIA or the relevant treaty provision.[318]

## B. Defenses under customary international law

205. In addition to raising defenses emerging directly out of the applicable IIA, States facing investment claims challenging the application of sanctions-related measures may be able to invoke certain defenses under CIL. This section examines two such defenses in particular:

- Necessity (Section B.1);
- Force majeure (Section B.2).

206. Both defenses are provided in the ARSIWA, which, although not being a treaty, are widely understood as reflecting CIL.[319] The ARSIWA commentary makes clear that the Articles operate at the level of secondary norms.[320] Thus, defenses such as necessity and force majeure come into effect only after a final determination has been made that the State concerned has breached its primary international legal obligations, which may include obligations owed to foreign investors under an IIA.[321] In that situation, necessity

[317] *Riverside Coffee v. Nicaragua*, para 271; cf *Seda v. Colombia*, paras 613-602 (determining that no timeliness requirement is present, at least procedurally, for when a State can invoke the ESI exception).

[318] Ibid., paras 277-278.

[319] Lu Wang and Wenhua Shan, 'Force Majeure and Investment Arbitration' [2022] 37(1-2) ICSID Review–FILJ 138.

[320] *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] Vol II, Part Two Yearbook of the International Law Commission 31 (ARSIWA commentary), 31 (paras 1, 4):

> *The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow there-from. ...*
>
> *[I]t is not the function of the [A]rticles to specify the content of the obligations laid down by particular primary rules, or their interpretation. ...*
>
> *The [A]rticles take the existence and content of the primary rules of international law as they are at the relevant time; they provide the framework for determining whether the consequent obligations of each State have been breached, and with what legal consequences for other States.*

[321] This would include the situation where the host State has unsuccessfully invoked a treaty-based ESI exception.

and force majeure may be invoked by the violating State to excuse the violation and preclude the consequent liability to provide reparation, provided that the requirements under each type of customary law defense are met.

### 1. Necessity

207. Several ISDS tribunals have had to examine the criteria of the CIL defense of necessity in the context of the series of cases filed against Argentina following the latter's 2001 financial crisis. While the approach followed by many of these tribunal to either equate treaty-based ESI exceptions and the CIL defense of necessity, or to treat the two as in a relationship between a *lex specialis* and a *lex generalis* has been criticized,[322] the pronouncements made with respect to the content of the necessity defense under CIL would be useful in the present context of sanctions.

208. Under Article 25 ARSIWA, necessity may not be used as a defense to preclude the wrongfulness of an act attributable to a State, unless the act was the 'only way' for the State to safeguard an 'essential interest' against 'grave and imminent peril', and provided that the act in question does not seriously impair an essential interest of the State(s) toward which the obligation is owed or of the international community as a whole. However, in any case, necessity may not be invoked if the primary obligation breached excludes the possibility of invoking necessity or the invoking State has contributed to the situation of necessity. All these conditions must be fulfilled cumulatively.

209. Determining whether the conditions are met for the successful invocation of the necessity defense is a fact-intensive exercise which cannot be easily performed in the abstract. In the context of the present report, therefore, <u>the analysis will focus on only three of the conditions</u>: (i) the existence of an 'essential interest' of the State, (ii) the presence of a 'grave an imminent peril' against that interest, and (iii) the 'only way' requirement.

#### i. 'Essential interest'

210. The ARSIWA commentary makes clear that an 'essential interest' of a State cannot be predetermined; rather, it must be determined in light of all circumstances and, therefore, may extend to the 'particular interests of the State and its people, as well as of the international community as a whole.'[323] On its face, this statement appears to encompass sanctions imposed unilaterally—for the protection of a State's particular, defined interests—as well as multilaterally.

211. International jurisprudence corroborates the flexibility of the term 'essential interests'.

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[322] *CMS v. Argentina* (Decision of the ad hoc committee on the application of Annulment of the Argentine Republic, 25 September 2007), paras 124-136; *Continental Casualty v. Argentina*, paras 162-167. See also Jürgen Kurtz, 'Adjudging the Exceptional at International Investment Law: Security, Public Order And Financial Crisis' [2010] 59(2) ICLQ 325.

[323] ARSIWA commentary, 83 (para 15).

For instance, ISDS tribunals have held that 'essential interests' are not limited to interests relating to the very existence of the State, but may also include economic or financial interests related to the protection of the host State from 'any danger seriously compromising its internal or external situation'.[324] And, in *Gabčíkovo-Nagymaros*, the ICJ held that an interest to protect the natural environment could qualify as 'essential'.[325]

### ii. 'Grave and imminent peril'

212. Article 25 ARSIWA requires that the State invoking necessity under CIL must be responding to a 'grave and imminent peril' to its essential interests. The term 'peril' is satisfied in the presence of 'risk' and does require the occurrence of material damage.[326] Nevertheless, as the ICJ and the ARSIWA commentary have clarified, the peril 'has to be objectively established an not merely apprehended as possible' at the relevant time, as well as 'immediate' or 'proximate'.[327] But that not preclude scenarios where a peril appearing in the long term might be held to be 'imminent' as soon as it is established, at the relevant point in time, so that the realization of that peril in the present, based on reasonably available evidence, would still be certain and inevitable regardless of how far off it may be.[328]

213. Risks against which sanctions are imposed can, in principle, qualify as grave and imminent. That said, applying the requirement of grave and imminent peril is heavily fact-dependent and judgment-reliant. For instance, in the context of Argentina's financial crisis, arbitral tribunals have held divergent opinions with respect to whether that crisis qualified as grave and imminent peril. In one instance, the tribunal in *CMS v. Argentina* ruled in the negative after determining that the crisis was 'severe but did not result in total economic and social collapse.'[329] In another instance, the tribunal in *LG&E v. Argentina* found that the crisis represented an 'extremely serious threat to [Argentina's] existence, its political and economic survival, to the possibility of maintaining its essential services in operation, and to the preservation of its internal peace.'[330]

### iii. 'Only way'

214. A key requirement of the necessity defense under CIL is that the measures taken by the State must be the 'only way' to avert the grave and imminent peril to the essential

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[324] See, e.g., *LG&E v. Argentina*, para 251.

[325] *Gabčíkovo-Nagymaros (Hungary/Slovakia),* Judgment [1997] ICJ Rep 7, para 53.

[326] Ibid., para 54.

[327] Ibid.; ARSIWA commentary 83 (para 15).

[328] *Gabčíkovo-Nagymaros*, para 54; see also ARSIWA commentary 83 (paras 15-16).

[329] *CMS v. Argentina*, para 355.

[330] *LG&E v. Argentina*, para 257; Generally, see August Reinisch, 'Necessity in Investment Arbitration' [2010] 41 NYIL 147.

interests at issue. This is a high threshold to meet. The ARSIWA commentary makes clear that the necessity defense will fail if other lawful means were available to the invoking State, even if these were costlier or less convenient.[331] Moreover, the requirement is not limited to unilateral actions which may have been available to the invoking State, but can also include other forms of conduct available through international cooperation (with other States or international organizations).[332]

215. Determining whether the State's conduct was the only way to safeguard its essential interests is heavily fact-dependent and judgment-reliant. For instance, in the context of Argentina's financial crisis, some tribunals rejected the necessity defense on the basis that there were other lawful means available to Argentina even if costlier or less convenient;[333] whereas other tribunals partially accepted the defense, finding that a comprehensive economic recovery package of some kind was the 'only way' in the circumstances (while declining to opine on the exact manner in which that package was drafted).[334]

216. Transposing the above in the context of sanctions, measures taken by a State pursuant to **unilateral sanctions** regimes may face particular difficulties meeting the 'only way' requirement of necessity. As unilateral sanctions are policy actions of choice, it may be possible, in most situations, to point to alternative, less severe measures that a State could have taken to influence the conduct of other States and their investors. By contrast, implementing **multilateral sanctions** authorized by the UN Security Council may fare better. UN sanctions are binding on all UN members and the UN Charter's obligation to implement UN sanctions overrides other obligations under conventional and customary international law, with exception of *jus cogens* norms.[335] That is, provided that the implementing State does not go beyond the restrictive measures that the UN Security Council has authorized. As the ARSIWA's commentary has made clear, the necessity defense will not succeed if the conduct at issue 'goes beyond what is strictly necessary for the purpose'.[336]

### 2. Force majeure

217. Before examining the defense of force majeure under CIL, it bears noting at the outset that States may have at their disposal force majeure defenses based on dedicated clauses in contracts with investors. Such contractual force majeure clauses are beyond the scope

331 ARSIWA commentary 83 (para 15).

332 Ibid.

333 *CMS v. Argentina*, paras 323-324.

334 *LG&E v. Argentina*, para 257.

335 HRC, 'Thematic Study of the Office of the United Nations High Commissioner for Human Rights on the Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, including Recommendations on Actions Aimed at Ending Such Measures', A/HRC/19/33 [11 January 2012], 8 (paras 24-25).

336 ARSIWA commentary 83 (para 15).

of this report.[337]

218. Under Article 23 ARSIWA, force majeure is the occurrence of an 'irresistible force or of an unforeseen event' that is 'beyond the control of the State' making it 'materially impossible' in the circumstances to perform the international obligation in question. However, a force majeure defense will not succeed to preclude wrongfulness if the situation of force majeure was due to the conduct of the invoking State (solely or in combination with other factors) or if the invoking State has assumed the risk of that situation occurring which led to the allegedly errant measure being taken.

219. Establishing the defense of force majeure warrants a very high threshold which will not be met in instances where the performance of an obligations has merely become difficult, such as in situations involving political crises, economic/financial crises, or brought about by the neglect or default of the concerned State.[338] Invocations of force majeure have thus been less common in ISDS compared to invocations of necessity.

220. Even in situations of military conflict, a force majeure defense may fail on the requirement of material impossibility of performance of the primary obligation breached. In *Güris v. Syria*, the tribunal rejected Syria's force majeure defense based on, among other grounds, the fact that Syria was unable to demonstrate that the performance of its obligation to provide adequate monetary compensation to the investor for losses arising out of the Syrian conflict had become materially impossible in the circumstances.[339] As stated by the tribunal: 'war or armed conflict, in themselves and without more, do not excuse non-compliance with monetary obligations.'[340]

221. Sanctions-related measures face significant challenges meeting the high threshold of force majeure. Even if the invoking State is able to demonstrate the occurrence of an irresistible force or unforeseen event beyond its control, in most situations the defense is likely to falter at the material impossibility requirement.

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337 For an examination of investment awards dealing with contractual force majeure clauses, see Lu Wang and Wenhua Shan, 'Force Majeure and Investment Arbitration' [2022] 37(1-2) ICSID Review–FILJ 138.

338 ARSIWA commentary, 76 (para 3).

339 *Güris Construction and Engineering Inc v. Syrian Arab Republic* (Final Award, 31 August 2020) ICC Case No 21845/ZF/AYZ (*Güris v. Syria*), para 320.

340 Ibid. [footnote in original omitted] The tribunal also observed that the IIA parties had already assumed the risk of war and similar conflicts by including a 'compensation for losses' provision in the treaty, so that a force majeure plea was in any case unavailable in relation war and other military conflicts (ibid., para 322).

# IV. ANNULMENT, SET-ASIDE, RECOGNITION, AND ENFORCEMENT OF SANCTIONS-RELATED INVESTMENT ARBITRAL AWARDS

222. The recognition and enforcement of ISDS arbitral awards in the context of international sanctions shows the interplay between the private rights of investors and the public security obligations of States. Against this backdrop, this section discusses matters pertaining to the annulment, set-aside, recognition and enforcement of sanctions-related arbitral awards, both ICSID (Section A) and non-ICSID (Section B). With respect to the latter, the section examines these issues as they may arise under domestic international arbitration laws and the 1958 New York Convention.[341]

223. The analysis in this section is not meant to be exhaustive or comprehensive of all legal issues that may arise under all jurisdictions where annulment, set-aside, recognition or enforcement proceedings may be brought by investors or States. Rather, the focus is on select legal issues and on a select number of jurisdictions.

## A. ICSID awards

### 1. ICSID annulment

224. Annulment is the sole remedy for setting aside ICSID awards.[342] Unlike the vacatur procedures available under national arbitration laws, ICSID awards are immune from domestic judicial scrutiny.[343] Rather, ICSID awards are subject only to an internal annulment procedure provided by Article 52 of the ICSID Convention.[344] Annulment requests are decided by an ad hoc committee of three members appointed by the Chairman of the ICSID Administrative Council.[345] The self-contained character of the ICSID Convention, including with respect to its annulment procedure, is among the most distinctive features of the ICSID arbitration regime.

225. Article 52(1) of the ICSID Convention provides an exhaustive list of five grounds on which an ICSID award may be annulled, that is when: (i) the tribunal was not properly constituted; (ii) the tribunal manifestly exceeded its powers; (iii) there was corruption on the part of a member of the tribunal; (iv) there was a serious departure from a fundamental rule of procedure; and (v) the award had failed to state the reasons on which it was

[341] *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (signed 10 June 1958, entered into force 7 June 1959) (New York Convention).

[342] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (submitted 18 March 1965, entered into force 14 October 1966) (ICSID Convention), art 53(1).

[343] ICSID Convention, art 53.

[344] Other post-award remedies that are available in the ICSID system include interpretation and revision (ICSID Convention, art 50-51). However, neither of these relates to the validity of awards and, therefore, are not examined in the report.

[345] ICSID Convention, art 52(3).

based.[346] ICSID annulment committees have repeatedly affirmed that this list is exhaustive and that the provision cannot be interpreted neither narrowly nor broadly, but in accordance with its object and purpose.[347]

226. None of these five grounds bears any immediate relevance to the fact that an ICSID award may have dealt with international sanctions. All the grounds for annulment deal exclusively with the integrity and fairness of the arbitral process. They are not directed at the substantive outcome of the dispute, the identity or the legal status of the parties to the arbitration, or the regulatory and other implications of giving effect to the award.

227. In particular, there is a clear absence of a 'public policy' annulment ground under Article 52 of the ICSID Convention—in contrast to the UNCITRAL Model Law which provides for a public policy exception at the set-aside stage.[348] As a result, a State seeking to annul an ICSID award against it has no avenue to challenge the award on the ground that the claimant was a designated person under a sanctions regime, or that the investment has since become subject to restrictive measures, or that payment of the award would require the State to direct funds to a sanctioned entity. Such considerations may go to the merits of the underlying dispute or perhaps to the execution of the award, but not to any defect cognizable under Article 52 of the ICSID Convention.

### 2. Recognition and enforcement of ICSID awards

#### i. Core principles (Articles 53 and 54 ICSID Convention)

228. Article 54(1) of the ICSID Convention imposes an obligation on the ICSID contracting States to recognize and enforce ICSID arbitral awards. It stipulates that every contracting State must recognize an award made under the Convention as binding and enforce the pecuniary obligations imposed by the award within its territory, as though it were a final judgement of a court in that State.[349]

229. In particular, and in contrast to the New York Convention, Article 54 of the ICSID Convention omits any reference to 'public policy' as a reason for refusing the recognition and enforcement of ICSID awards.[350] This omission was intentional. The drafters intended for the binding force and effective recovery of ICSID awards by ensuring that

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[346] ICSID Convention, art 52(1)(a)-(e).

[347] See, e.g., *Total SA v. Argentine Republic* (Decision on Annulment, 1 February 2016) ICSID Case No ARB/04/1 (*Total v. Argentina*), para 167.

[348] ICSID, 'Compliance with and Enforcement of ICSID Awards' [June 2024] (ICSID Enforcement Paper), 2 (para 8) <https://icsid.worldbank.org/sites/default/files/publications/Enforcement_Paper.pdf>; *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law* (UNCITRAL Model Law), art 34(2)(b)(ii).

[349] Shelley Jeremy, 'Enforcement and Recognition of ICSID Awards', Jus Mundi, para 4 <https://jusmundi.com/en/document/publication/en-enforcement-and-recognition-of-icsid-awards>.

[350] Cf New York Convention, art V(2)(b).

awards could not be subjected to substantive review by domestic courts.[351] Read in conjunction with Article 53(1), which states that ICSID awards shall be binding on the disputing parties and not be subject to any appeal or other remedy except those provided for in the Convention, Article 54(1) effectively eliminates domestic courts' discretion to review ICSID awards at the recognition and enforcement stage. Thus, the role of domestic courts with respect to ICSID awards is strictly limited to verifying the authenticity of the award as certified by the ICSID Secretary-General.[352]

230. Therefore, arguments rooted in a State's sanctions regime, including arguments that recognition or enforcement of an ICSID award would be contrary to restrictive measures or domestic sanctions legislation, do not constitute a valid basis to refuse recognition and enforcement. A more difficult question may arise where multilateral sanctions imposed by the UN Security Council are at issue, given their binding character. Schreuer's commentary suggests that the finality of ICSID awards under Article 54 of the Convention 'would also exclude any examination of their compliance with international public policy or international law in general'.[353] According to the commentary, observance of international law is the duty of the arbitral tribunal under Article 42 of the ICSID Convention and is subject to review by an ad hoc annulment committee, but not by the domestic courts at the recognition and enforcement stage.[354] This implies that the enforcing court would not have the discretion to refuse recognition or enforcement on the grounds that an ICSID award touches on UN sanctions commitments.

231. The sole exception, under Article 55 of the ICSID Convention, relates to the *execution* rather than the recognition or enforcement of ICSID awards. Article 55 provides as follows:

> *Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.*

This provision preserves the power of the State where recognition and enforcement are sought to execute an ICSID awards in accordance with its laws on State immunity from execution.[355] The execution of sanctions-related ICSID awards would fall under the provision of Article 55, as all other ICSID awards would.

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[351] ICSID Enforcement Paper, 15 (paras 49, 57, 72, 73). A proposal to include a public policy ground was considered by the drafters but was ultimately rejected by a large majority.

[352] Shelley Jeremy, 'Enforcement and Recognition of ICSID Awards', Jus Mundi, para 7 <https://jusmundi.com/en/document/publication/en-enforcement-and-recognition-of-icsid-awards>.

[353] August Reinisch, 'Article 54' in Stephan W Schill, Loretta Malintoppi, August Reinisch, Christoph H Schreuer and Anthony Sinclair (eds), *Schreuer's Commentary on the ICSID Convention* (3rd edn, CUP 2022), 1500 (para 103).

[354] Ibid.

[355] Katherine Reece Thomas and Doğan Gültutan, 'Enforcement of ICSID Awards and State Immunity: Should Immunity Trump All?' [2025] 41(3) Arb Int'l 607, 618.

### ii. A recent development: The EU's 18th Sanctions Package (2025)

232. Given the above core principles of ICSID recognition and enforcement, norm conflicts can arise when a State is required under an ICSID award to carry out an action that may be prohibited by a sanctions regime, such as paying compensation to a sanctioned investor. This problem is exemplified in the EU's 18th Sanctions Package, adopted on 18 July 2025. The sanctions package targets ISDS proceedings initiated by EU-sanctioned Russian and Belarusian entities.[356] It does so in three ways in particular.

- **First**, it imposes a blanket prohibition on EU Member States from recognizing or enforcing any arbitral award, judgment, or order issued in connection with ISDS claims pertaining to the EU's sanctions against Russia (Regulation (EU) 2025/1494)[357] and Belarus (Regulation (EU) 2025/1472).[358] This 'no-claims' mandate covers arbitral awards issued by tribunals seated outside the EU, as well as proceedings under the ICSID Convention.[359]

- **Second**, it imposes an obligation on EU Member States to oppose recognition and enforcement of ISDS arbitral awards pertaining to Russian and Belarussian sanctions by raising any available objection against their recognition and enforcement.[360]

- **Third**, it provides for a 'claw-back' (damages recovery) action, which gives EU Member States the right to bring legal action against specific individuals or entities in EU courts, in order to recover any damages or legal costs resulting from ISDS actions that were initiated outside the EU.[361]

233. The recitals of Regulations 2025/1494 and 2025/1472 explicitly state that it would be contrary to the public policy of EU Member States to recognize or enforce such ISDS awards.[362] It is evident that the above-mentioned obligations—especially the obligation to refuse recognition and enforcement, which includes ICSID awards—would put EU Member States in direct conflict with their obligations under Article 54 of the ICSID

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356 Toni Marzal, 'EU Sanctions and the Undoing of International Investment Arbitration', EJIL:Talk! [28 January 2025] <https://www.ejiltalk.org/eu-sanctions-and-the-undoing-of-international-investment-arbitration/>.

357 Council Regulation (EU) 2025/1494 of 18 July 2025 amending Regulation (EU) No 833/2014 Concerning Restrictive Measures in view of Russia's Actions Destabilizing the Situation in Ukraine [2025] OJ L1494 (Reg 2025/1494).

358 Council Regulation (EU) 2025/1472 of 18 July 2025 amending Regulation (EC) No 765/2006 Concerning Restrictive Measures in view of the Situation in Belarus and the Involvement of Belarus in the Russian Aggression against Ukraine [2025] OJ L1472 (Reg 2025/1472).

359 Paschalis Paschalidis, 'Targeting Russia and Belarus Through Investment Arbitration: The EU's 18th Sanctions Package', Opinio Juris [27 August 2025].

360 Reg 2025/1494, art 11f; Reg 2025/1472, art 8m.

361 Reg 2025/1494, art 11e; Reg 2025/1472, art 8l.

362 Reg 2025/1494, recitals 22, 24; Reg 2025/1472, recitals 7, 9.

Convention.[363]

234. It is not yet clear how this norm conflict will be handled by domestic courts in practice. Looking at the line of judgments following the ICSID awards in *Micula v. Romania*, where a similar in principle issue of EU public policy was in question, one may expect divergent approaches adopted by EU and non-EU domestic courts. (**Box IV**)

**Box IV: Domestic courts and the *Micula* line of cases**

*Micula v. Romania* is a prominent example of a conflict between the EU's autonomous legal order and the strict enforcement requirements under Article 54 of the ICSID Convention. The dispute concerned Romania's elimination of several tax incentives in order to comply with its EU accession requirements, culminating in the investors receiving a EUR 178 million ICSID award against Romania. According to the European Commission, Romania was not permitted to satisfy the award as doing so would constitute illegal 'State aid' incompatible with the EU internal market rules.

The investors sought to enforce the award in the United Kingdom. Addressing the conflict between EU law and the ICSID Convention, the UK Supreme Court in a unanimous 2020 ruling lifted the stay on the enforcement of the ICSID award.[364] According to the Supreme Court, the United Kingdom's responsibilities under the ICSID Convention existed before it joined the EU (the case was brought prior to the United Kingdom's EU withdrawal).[365] The Supreme Court further held that pre-existing treaty commitments owing to third States are safeguarded and cannot be superseded by EU law, citing Article 351 TFEU.[366] Notably, the Supreme Court also emphasized that Article 54(1) of the ICSID Convention protects awards from substantive review by national courts at the enforcement stage.[367] Ultimately, the Supreme Court concluded that the United Kingdom's international obligations under the ICSID Convention could not be limited by EU law.[368]

Conversely, the Court of Justice of the European Union (CJEU) took a fundamentally opposing view, emphasizing the autonomy and supremacy of EU law. In a 2022 ruling by the Grand Chamber, the CJEU set aside a previous General Court decision that had favored the investors, and thus established that the European Commission had the

[363] Toni Marzal, 'EU Sanctions and the Undoing of International Investment Arbitration', EJIL:Talk! [28 January 2025] <https://www.ejiltalk.org/eu-sanctions-and-the-undoing-of-international-investment-arbitration/>; Paschalis Paschalidis, 'Targeting Russia and Belarus Through Investment Arbitration: The EU's 18th Sanctions Package', Opinio Juris [27 August 2025].

[364] *Micula v. Romania* [2020] UKSC 5.

[365] Ibid., paras 59, 96-97.

[366] Ibid., para 113.

[367] Ibid., paras 68-70.

[368] Ibid., 109-118.

authority to determine the *Micula* award as illegal State aid.[369] Furthermore, in a different 2024 judgment, the CJEU criticized the UK Supreme Court's approach, holding that the United Kingdom had violated EU law by lifting the stay on enforcement.[370] It held that Article 351 TFEU could not be used to circumvent EU law in this context as the dispute exclusively concerned EU Member States and their citizens as opposed to non-EU third countries.[371]

Subsequent enforcement proceedings initiated by the investors have unfolded along these two extremes. Courts in Sweden and Luxembourg have refused enforcement following the CJEU decision.[372] However, courts in the United States have granted enforcement of the *Micula* award.[373]

## B. Non-ICSID awards

235. Different sets of rules apply with respect to the set-aside, recognition and enforcement of arbitral awards rendered outside the ICSID Convention framework. This includes awards rendered under the UNCITRAL Arbitration Rules or the ICSID Additional Facility rules, as well as awards rendered under the auspices of arbitral institutions, such as the ICC, LCIA, SCC, HKIAC or SIAC.

236. This section provides an overview of prevailing domestic jurisprudence on the matter of set-aside, recognition and enforcement of sanctions-related arbitral awards from a select number of jurisdictions.

### 1. Set-aside of non-ICSID awards

237. Unlike ICSID awards, non-ICSID awards must have a seat in a country. The law at the country of the seat of the arbitration (the *lex arbitri*) governs the conduct of the proceedings, including the validity of the final award. Thus, the award may be challenged before the courts at the seat of the arbitration. The seat's international arbitration legislation governs these challenges.

238. The UNCITRAL Model Law is adopted in many jurisdictions. The Model Law aims to harmonize international arbitration legislation across different jurisdictions. Under

369 Joined Cases C-638/19 P and C-639/19 P, *European Commission v. European Food SA*, ECLI:EU:C:2022:1.

370 Case C-516/22, *European Commission v. United Kingdom of Great Britain and Northern Ireland*, ECLI:EU:C:2024:231.

371 Ibid., para 21.

372 *Ioan Micula and others v. Romania through the Ministry of Public Finance*, Ä 2550-17, Dok.Id 574623 (23 January 2019); *Romania v. Ioan Micula and others*, Luxembourg Court of Cassation, Case No 116/2022, Judgment (14 July 2022).

373 *Ioan Micula et al. v. Government of Romania*, US Court of Appeals No 19-7127 (DC Cir May 19, 2020).

Article 34 of the Model Law, the courts at the seat may set aside an arbitral award if, among other grounds, the subject matter of the dispute is not capable of settlement by arbitration under that State's law,[374] or if the award is contrary to that State's 'public policy'.[375] In the context of sanctions-related arbitral awards, the 'public policy' ground under Article 34(2)(b)(ii) of the Model Law is the most commonly invoked ground for set-aside, although the 'non-arbitrability' ground under Article 34(2)(b)(i) of the Model Law has also been raised.

### i. Canada

239. Canada is an Model Law jurisdiction.[376] Canadian courts have construed narrowly the public policy ground of setting aside an international arbitral award. A reviewing court cannot set aside an international arbitral award simply because it considers that the tribunal wrongly decided a point of fact or law. Rather, judicial intervention would be warranted only when the tribunal's conduct is 'so serious as to offend [Canada's] most basic notions of morality and justice'.[377] Sanctions-specific set-aside applications invoking the public policy ground under Article 34(2)(b)(ii) of the Model Law are rare in Canada. However, the following case illustrates how Canadian courts have addressed arbitrability challenges under Article 34(2)(b)(i) of the Model Law in cases where UN sanctions are invoked.

240. In *La Compagnie Nationale Air France v. Libyan Arab Airlines*, a partial award affirming the tribunal's jurisdiction was rendered in an ad hoc UNCITRAL arbitration seated in Montreal. Air France challenged the partial award under Article 34(2)(b)(i) on the basis of non-arbitrability.[378] The case first came before the Quebec Superior Court, where the Court held that it was premature for it to intervene as the tribunal should be allowed to decide the jurisdictional question first, and the court could only review these issues after a final award was rendered.[379]

241. On appeal, the Quebec Court of Appeal examined the effects of UN Security Council sanctions against Libya. Air France had argued that the dispute could not have been arbitrated before an UNCITRAL tribunal seated in Montreal, as the UN embargo

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[374] UNCITRAL Model Law, art 34(2)(b)(i).

[375] Ibid., art 34(2)(b)(ii).

[376] See International Commercial Arbitration Act, RSO 1990, c I9 (Ontario); International Commercial Arbitration Act, RSBC 1996, c 233 (British Columbia); International Commercial Arbitration Act, RSA 2000, c I-5 (Alberta).

[377] *Consolidated Contractors Group SAL (Offshore) v. Ambatovy Minerals SA*, 2017 ONCA 939, para 56; *Prospector PTE Ltd v. CGX Energy Inc*, 2023 ONSC 4207, paras 40-41.

[378] *La Compagnie Nationale Air France v. Libyan Arab Airlines*, Quebec Court of Appeal, 31 March 2003, CanLII 35834 (QC CA), RJQ 717.

[379] *Compagnie Nationale Air France v. Libyan Arab Airlines*, [2000] RJQ 717.

rendered enforcement of the contract at issue impossible.[380] The Quebec Court of Appeal rejected the claim. The Court ruled that although embargoes imposed by UN Security Council resolutions are a matter of international public policy, their existence does not preclude an arbitral tribunal from exercising jurisdiction to assess the consequences of those sanctions on the parties' respective obligations.[381]

**ii. European Union**

242. Two categories of set-aside applications for sanctions-related arbitral awards before EU Member States' courts must be distinguished. The first category concerns arbitral awards relating to the EU's own sanctions regime. The second category concerns arbitral awards where non-EU sanctions regimes—such as UN sanctions or non-EU unilateral sanctions—are at issue.

243. For awards falling under the first category for implicating EU sanctions, the recent opinion of Advocate General Biondi in *NV Reibel v. JSC VO Stankoimport* (pending before the CJEU) is a relevant development. The case arose from a set-aside application before the Svea Court of Appeal in Sweden under Council Regulation (EU) No 833/2014. The Advocate General, on the one hand, accepted that the Regulation does not prohibit submitting to arbitration claims that may ultimately not be satisfied under the Regulation;[382] yet, on the other hand, opined that arbitral tribunals are bound by EU law and may not give a favorable response to such claims effected by EU sanctions.[383] Specifically, the Advocate General declared that arbitral tribunals must remain vigilant against any attempts to circumvent the measures imposed by the Regulation and arbitral awards must always remain open to effective judicial review.[384]

244. With respect to public policy, in particular, the Advocate General concluded that the duty to not satisfy claims implicating the provisions of Regulation No 833/2014 is a matter of EU public policy since said provisions are essential to the EU's mission of contributing to peace, security and mutual respect among peoples.[385] The Advocate General thus opined that EU domestic courts must determine whether tribunals have acted in line with the prohibition to give a favorable response to claims that may circumvent the EU's sanctions regime and, in the event that tribunals have not, must set aside these arbitral awards on public policy grounds.[386]

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[380] *La Compagnie Nationale Air France v. Libyan Arab Airlines*, Quebec Court of Appeal, 31 March 2003, CanLII 35834 (QC CA), RJQ 717, para 18.

[381] Ibid., paras 89-92, 95.

[382] Case C-802/24 *NV Reibel v. JSC VO Stankoimport*, Opinion of AG Biondi (26 February 2026), para 54.

[383] Ibid., paras 42, 47.

[384] Ibid., paras 48, 54.

[385] Ibid., paras 63-71.

[386] Ibid., para 78.

245. We note that the CJEU has not yet issued its final judgement in this case. However, we raise the Advocate General's opinion here as it may be reasonable to expect that, if confirmed by the CJEU, it will significantly reshape EU Member States' approach to the set-aside of arbitral awards involving the EU's sanctions framework.[387]

246. Conversely, for awards falling under the second category (not implicating EU sanctions), the success of the public policy ground for setting aside arbitral awards may vary by jurisdiction. Three EU jurisdictions are examined below in particular: France, the Netherlands and Sweden.

### *a. France*

247. Article 1520 of the French Code of Civil Procedure provides that an international arbitral award may be set aside when 'recognizing or enforcing the award would be contrary to international public policy (*ordre public international*)'.[388] The Paris Court of Appeal has exclusive jurisdiction over challenges to awards rendered in international arbitrations seated in France.[389]

248. In *Sofregaz v. NGSC*, the Paris Court of Appeal clarified the way French law distinguishes between different kinds of sanctions in set-aside proceedings. In this case, the French company Sofregaz had applied for the set-aside of an ICC award rendered in favor of its Iranian counterparty, claiming that enforcing the award would violate US, EU and UN sanctions and, therefore, be contrary to international public policy. The Court of Appeal established a clear distinction. It held that EU sanctions regulations and UN Security Council resolutions imposing sanctions are part of French international public policy because they are intended to promote global peace and security.[390] By contrast, US unilateral sanctions did not form part of French international public policy despite sharing the same geopolitical goal.[391]

249. Ultimately, the Court of Appeal found that the relevant UN and EU sanctions did not apply to the specific Sofregaz contract, thus rejecting the application on evidence, while affirming that a breach of international public policy must be 'effective' and 'concrete' to warrant set-aside.[392]

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[387] By the same token, the national approaches from courts in France, the Netherlands, and Sweden mentioned in this section must be read against this evolving backdrop to the extent that cases may involve EU sanctions.

[388] *Code de procédure civile* (France), art 1520.

[389] Ibid., art 1519.

[390] *Sofregaz v. NGSC*, Paris Court of Appeal (International Commercial Chamber), Decision No 19-07261 (3 June 2020) (*Sofregaz v. NGSC*), para 55.

[391] Ibid., para 67.

[392] Ibid., paras 50, 84, 94.

*b. Netherlands*

250. Set-aside applications in the Netherlands are governed by Article 1065(1)(e) of the Dutch Code of Civil Procedure (DCCP), which states that 'an award may be set aside where it or the manner in which it was made is contrary to public policy'.[393] Recently, the Court of Appeal of the Hague dealt with the set aside of the sanctions-related award in the *Bank Melli v. Bahrain* case. Bahrain sought to set aside the award on two grounds: first, that the tribunal had wrongly assumed jurisdiction given the alleged illegality of the investment due to violations of UN, EU and US sanctions; and second, that the award violated Dutch public policy because the tribunal had misapplied the sanctions regime and had effectively 'rewarded' the investors' violations.

251. The Hague Court dismissed both grounds. Dismissal of the first ground was for procedural reasons: Bahrain had characterized the illegality objection in its statement of defense as a matter of admissibility, rather than jurisdiction, and had thereby waived the right to raise it as a ground for set-aside under Article 1052(2) DCCP.[394] On the second ground, the Hague Court stressed its duty of restraint, finding no breach of Dutch public policy and holding that whether the tribunal's analysis of the sanctions regime was correct or not was not a matter reviewable in set-aside proceedings.[395]

*c. Sweden*

252. Section 33 of the Swedish Arbitration Act provides that an arbitral award is 'null and void' if it concerns a matter that cannot be resolved by arbitrators under Swedish law, or if the award or the manner in which it was made 'is clearly incompatible with the basic principles of the Swedish legal system.'[396] The Svea Court of Appeal (Svea hovrätt) in Stockholm has exclusive jurisdiction to hear challenges of awards seated in Sweden.[397]

253. At the time of writing, we could not locate any reported Swedish case that addressed the set-aside of an arbitral award on public policy grounds in the context of international sanctions. However, the following pending case, once decided, is expected to set a precedent on the treatment of EU sanctions within the Swedish public policy framework.

254. The *NV Reibel v. JSC VO Stankoimport* case, currently pending final adjudication in Sweden, has been mentioned above. The dispute arose from a goods and services contract under which the Belgian logistics company Reibel was to supply goods to Russian importer Stankoimport. The parties had agreed that EU sanctions against Russia would

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[393] Dutch Code of Civil Procedure, art 1065(1)(e).

[394] As reported in Erik Brouwer, 'Dutch Court Rejects Bahrain's Bid to Set Aside 214-Million-EUR Award', IAReporter [22 April 2025].

[395] Ibid.

[396] Swedish Arbitration Act, s 33(1).

[397] Ibid., s 43.

not constitute force majeure. However, the Belgian authorities refused to grant Reibel an export license by categorizing the goods as 'dual-use items' intended for military use. Stankoimport had already made advance payments of EUR 3.8 million. With no option to recover the advance, it terminated the contract and commenced an UNCITRAL arbitration seated in Stockholm.[398] The arbitral tribunal ordered repayment of the advance plus interest, finding that this was not a prohibited 'claim' under Article 11(1) of Council Regulation (EU) No 833/2014 as it was only intended to restore the parties to their pre-contractual positions.[399] However, the tribunal dismissed Stankoimport's claims for damages and contractual penalties, finding that these fell within the scope of Article 11(1) of the Regulation.[400] Reibel challenged the award before the Svea Court of Appeal on grounds of non-arbitrability and public policy.

255. The Svea Court of Appeal found that neither Swedish law nor EU law provided a clear answer on: (i) whether claims covered by Article 11(1) of the Regulation were arbitrable; (ii) whether the Regulation formed part of EU public policy; and (iii) whether the arbitral tribunal had correctly interpreted the scope of Article 11(1) of the Regulation with respect to repayment claims and interest.[401] As a result, the Court suspended the enforcement of the award and referred these three questions to the CJEU on 20 November 2024 (Case C-802/24).

### iii. Singapore

256. The Singapore International Arbitration Act 1994 (IAA) incorporates the UNCITRAL Model Law,[402] which provides that an award may be set aside by the courts at the seat where the award is in conflict with the seat's public policy.[403] Singapore courts interpret the public policy ground narrowly, requiring that the challenged arbitral award must 'shock the conscience', 'violate the forum's most basic notions of morality and justice', or be 'clearly injurious to the public good'.[404] A mere error of law or fact does not trigger any grounds for set-aside.[405]

257. Two recent cases demonstrate how Singapore courts approach set-aside applications

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[398] Hristina Todorovic, 'Swedish Court Seeks CJEU Preliminary Ruling on Interpretation of Sanctions Regulation that Banned Claims Originating from Russian Nationals', IAReporter [13 December 2024].

[399] *Joint Stock Company Foreign Trade Enterprise Stankoimport v. NV Reibel (II)* (Final Award, 5 December 2021) (*Stankoimport v. Reibel II*), para 190.

[400] Ibid., paras 192-193.

[401] *NV Reibel v. JSC VO Stankoimport*, Svea hovrätt (Svea Court of Appeal), Decision of 18 November 2024, para 67.

[402] International Arbitration Act 1994 (Singapore, Cap 143A), s 3.

[403] UNCITRAL Model Law, art 34(2)(b)(ii).

[404] *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* [2007] 1 SLR(R) 597 (*PT Asuransi v. Dexia*), para 59.

[405] Ibid., para 57.

touching on sanctions and foreign public policy, respectively.

258. In *DNZ v. DOA and DOB*, the Singapore International Commercial Court (SICC) dismissed claimant's (an EU Member State) application to set aside a Singapore-seated ECT award of approximately USD 240 million. The set-aside application was filed on several grounds, including breach of public policy due to the existence of an intra-EU dispute.[406] The claimant argued that enforcing the award would require it to breach its EU law obligations and risk infringement proceedings, which would be contrary to Singapore's public policy.[407] The SICC held that the claimant had failed to identify how an award allegedly contrary to EU law would violate Singapore's public policy in the circumstances, further highlighting that Singapore case law on public policy as a ground for set-aside typically involves illegal conduct, criminal behavior or illicit enterprise, but not mere allegations of errors of law or violations of another jurisdiction's public policy norms.[408] The SICC further held that it was not contrary to Singapore's public policy to hold the claimant to the consequences of its own treaty commitments, under the ECT, conflicting as they may be with another treaty (i.e., the EU treaties).[409]

259. While the *DNZ v. DOA and DOB* case did not deal with sanctions, its reasoning could apply to public policy challenges against sanctions-related arbitral awards. The judgment may suggest that invoking a foreign, unilateral sanctions regime or a foreign public policy norm before Singapore courts may not meet the narrow threshold for set-aside.

260. In another case, *DRL v. DRK*, a Singapore-seated SIAC arbitration was terminated by the tribunal under Article 32(2)(c) of the Model Law after international sanctions imposed on the claimant made it impossible for the arbitration to continue.[410] The sanctions froze the claimant's assets, cut it off from SWIFT, and rendered it unable to pay SIAC deposits or its own lawyers.[411] The claimant applied to the Singapore High Court to set aside the termination order on grounds of breach of natural justice, under section 24(b) of the IAA, and an inability to present its case, under Article 34(2)(a)(ii) of the Model Law.[412] The High Court dismissed the application, holding that there is no absolute and unqualified right to a merits determination in arbitration; and that Article 32(2)(c) of the Model Law empowers tribunals to terminate proceedings for impossibility regardless of the prejudice caused to either party or who caused the impossibility.[413] The High Court held that the tribunal had fulfilled its obligation of natural justice as it had given the claimant a fair

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[406] *DNZ v. DOA and DOB*, [2026] SGHC(I) 1, para 9.

[407] Ibid., para 124.

[408] Ibid., paras 126-129.

[409] Ibid., para 139.

[410] *DRL v. DRK* [2026] SGHC 32, paras 1, 14.

[411] Ibid., para 14.

[412] Ibid., para 3.

[413] Ibid., paras 49-51, 54-55.

opportunity to be heard on the termination application.[414]

### iv. Switzerland

261. Article 190(2)(e) of the Swiss Federal Act on Private International Law (PILA) includes the incompatibility of a Swiss-seated arbitral award with Swiss public policy as a ground for setting aside the award. Other grounds for set-aside under Article 190(2)(a)-(d) PILA include: an improperly constituted tribunal, a tribunal wrongly accepting or rejecting jurisdiction, a tribunal ruling *ultra petita* or *infra petita*, and a tribunal violating its duties to accord equal treatment or equal opportunity to the disputing parties.

262. *Fincantieri* is a landmark case on sanctions and arbitrability in Switzerland.[415] The dispute arose from a contract for the sale of military corvettes to Iraq, concluded between two Italian shipbuilding companies (the claimants in this case) and a Syrian intermediary (referred to as 'M' in the Swiss proceedings) who facilitated the transaction. The 1990 UN embargo against Iraq jeopardized the performance of this contract.

263. Parallel proceedings were initiated before the Italian courts and an ICC tribunal seated in Geneva.

264. The Italian court of first instance upheld the arbitrability of the dispute, but the Court of Appeal of Genoa reversed this decision. The Genoa Court held that the dispute was non-arbitrable under Italian law, holding that the sanctions rendered the rights under the contract 'unavailable' to the parties (*indisponibilità dell'obbligo*), the Italian law test for determining arbitrability.[416]

265. But the Swiss Federal Tribunal reached the opposite conclusion. The claimants had challenged the ICC tribunal's interim award on jurisdiction before the Swiss Federal Tribunal under Article 190(2)(b) PILA (erroneous acceptance or decline of jurisdiction). The Swiss Federal Tribunal upheld the tribunal's jurisdiction, applying a broad interpretation of arbitrability under Article 177 PILA, and thus holding that all claims of a financial nature are arbitrable under Swiss law.[417] Further, it held that while public order considerations might prevent the specific performance of the contract, the presence of a sanctions regime affects only the parties' contractual obligations on the merits.[418]

266. The Swiss Federal Tribunal thus concluded that the existence of the UN sanctions regime

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[414] Ibid., paras 5, 69.

[415] *Fincantieri Cantieri Navali Italiani SpA and OTO Melara SpA v. M and Tribunal Arbitral* ATF 118 II 353 (Tribunal fédéral, 23 June 1992) (*Fincantieri*).

[416] Eric De Brabandere and David Holloway, 'Sanctions and International Arbitration' (Grotius Centre Working Paper Series No 2016/058, 2016), 5-6 <https://www.universiteitleiden.nl/en/law/institute-of-public-law/grotius-centre/research/grotius-centre-working-paper-series>.

[417] *Fincantieri*, 355-358.

[418] Ibid.

did not render the dispute non-arbitrable under Swiss law, while also noting that public policy considerations could still arise at a later stage of the proceedings.[419]

**v. United Kingdom**

267. Set-aside applications in England and Wales are governed by section 68 of the Arbitration Act 1996, which provides for set-aside when ‘serious irregularity’ affecting the tribunal, the proceedings or the award cause ‘substantial injustice’, such as when the award or the way in which it was procured is ‘contrary to public policy’.[420]

268. It was not possible to locate reported cases in which a London-seated award has been successfully challenged for being contrary to international sanctions.[421]

**vi. United States**

269. The grounds for the vacatur of arbitral awards under section 10(a) of the Federal Arbitration Act (FAA) are exhaustive and narrow: fraud, corruption, partiality, arbitrator misconduct, or arbitrators exceeding their powers.[422] Unlike most countries, the FAA does not contain ‘public policy’ as a ground for vacating an award and US courts have consistently held that the FAA’s grounds are exclusive.[423]

270. At the time of writing, we could not locate any reported cases in which a US-seated arbitral award has been successfully vacated for involving any sanctions regime. US case law on sanctions and arbitral awards has developed in the context of recognition and enforcement under the New York Convention, rather than at the vacatur stage. The FAA vacatur framework focuses solely on specific defects in the arbitral process, making it an undesirable tool for challenging the validity of sanctions-related arbitral awards.

### 2. Recognition and enforcement of non-ICSID awards

271. The New York Convention governs the recognition and enforcement of arbitral awards made outside the ICSID framework. A Contracting State to the New York Convention may only refuse enforcement on a limited and exhaustive list of grounds provided in Article V of the Convention. In the context of international sanctions, the most pertinent ground for refusal is found in Article V(2)(b) of the Convention, which provides that recognition and enforcement of an arbitral award may be refused if doing so would be

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419 Ibid.

420 Arbitration Act 1996, s 68(2)(g).

421 One recent case in which a section 68(2)(g) challenge on public policy grounds succeeded was *Federal Republic of Nigeria v. Process & Industrial Developments Ltd* [2023] EWHC 2638 (Comm), where the High Court set aside an award of approximately USD 11 billion against Nigeria on the grounds that it had been procured by fraud, by way of false witness evidence and misappropriated privileged documents.

422 Federal Arbitration Act, 9 USC, s 10(a)(1)-(4).

423 *Hall Street Associates LLC v. Mattel Inc*, 552 US 576 (2008), 584.

contrary to the ‘public policy’ of the country in which recognition and enforcement is sought.

272. This section examines how courts in different jurisdictions have approached the recognition and enforcement of sanctions-related, non-ICSID arbitral awards.

### i. Canada

#### *a. The threshold of ‘public policy’ in the New York Convention under Canadian jurisprudence*

273. In Canada, both federal and provincial laws closely mirror the New York Convention and the UNCITRAL Model Law. Canadian courts have set a high bar for successfully invoking the public policy exception under Article V(2)(b) of the New York Convention.[424] The formulation of this threshold is found in *Schreter v. Gasmac Inc*, where the court held that the public policy exception exists solely to guard against enforcement of an award that offends Canadian principles of justice and fairness in a fundamental way, and that the defense must be interpreted narrowly.[425] This standard has been consistently reaffirmed in subsequent jurisprudence.[426] A party resisting enforcement must show that the award is contrary to Canada’s ‘essential morality’. It is not sufficient to argue that the tribunal erred on the merits or applied foreign law differently from Canadian law.

#### *b. Sanctions and enforcement in Canada: The* Angophora Holdings *case*

274. In *Angophora Holdings Limited v. Ovsyankin*, the Court of King’s Bench of Alberta addressed the intersection between Canada’s high threshold for the public policy defense and Canada’s sanctions framework. The case thus provides the framework for how Canadian courts enforce awards under the New York Convention when the parties are subject to sanctions under Canada’s SEMA.

275. The dispute involved an LCIA award of USD 43.2 million granted in favor of Angophora Holding Limited against Andrei Ovsyankin.[427] Angophora sought to enforce the award in Alberta. In response, Ovsyankin filed an application to stay the execution of the award, claiming that it would be contrary to Canada’s Special Economic Measures (Russia)

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[424] ‘Jurisdictional Analysis: Canada’ in *Delos Guide to Arbitration Places* (2nd edn, 2022), reprinted in Jus Mundi (2025) <https://jusmundi.com/en/document/publication/en-canada-2025-gap-2>.

[425] *Schreter v. Gasmac Inc* (1992), 7 OR (3d) 608 (Gen Div).

[426] See, e.g., *Corporacion Transnacional de Inversiones SA de CV v. STET International SpA* (1999), 45 OR (3d) 183 (Sup Ct) (holding that judicial intervention is only warranted when the outcome is ‘so fundamentally flawed that it cannot be condoned by Canadian law’); *Prospector PTE Ltd v. CGX Energy Inc,* 2023 ONSC 4207; *China Yantai Friction Co Ltd v. Novalex Inc,* 2024 ONSC 608 (reaffirming that the procedural irregularity must offend ‘a Canadian court’s most basic notions of morality and justice’).

[427] *Angophora Holdings Ltd v. Ovsyankin*, 2022 ABKB 711 (*Angophora v. Ovsyankin*), para 4.

Regulations (SOR 2014-58) to liquidate his property and pay the proceeds to Angophora. Ovsyankin's case was based on the fact that Angophora was a wholly owned subsidiary of a Luxembourg fund which, in turn, was 50% owned by Gazprombank—a Russian institution sanctioned under Canadian law.[428]

276. The Court found that Ovsyankin had established a 'strong prima facie case' that Angophora was under the control of, or operating on behalf of, Gazprombank.[429] However, the Court ultimately rejected the application to stay the enforcement of the arbitral award, reasoning that Canada's sanctions regime is not meant to provide a means for debtors to hold off payments to their creditors or evade the enforcement of a final, valid arbitration award. The Court thus allowed the seizure and sale of the properties.[430] Nevertheless, the Court shifted the burden of sanctions compliance to the execution stage by stating that 'before distribution of the proceeds, persons in Canada may wish to be satisfied that they are not in breach of the Russian Sanctions by further action'.[431]

### ii. European Union

277. For reasons discussed in Section IV.B.1.ii, the recognition and enforcement of foreign arbitral awards before the courts of EU Member States could be categorized under two scenarios: (i) the recognition and enforcement of foreign arbitral awards relating to the EU's own sanctions regime, and (ii) the recognition and enforcement of foreign arbitral awards relating to non-EU sanctions (including UN or unilateral sanction).

278. For the former scenario, the EU's 18th Sanctions Package (discussed above) aims to provide a legal basis for EU Member States to refuse enforcement.

279. For the latter scenario, outcomes may vary by jurisdiction. Three EU jurisdictions are examined below in particular: France, the Netherlands and Sweden.

#### *a. France*

280. Under Article 1514 of the French Code of Civil Procedure an arbitral award shall be recognized or enforced if its existence is established and if such recognition or enforcement is not 'manifestly contrary to international public policy' (*ordre public international*). France applies the 'more favorable right' regime under the New York Convention,[432] meaning that more liberal or more favorable French domestic law provisions take precedence over the Convention. The case of *Sofregaz v. NGSC*

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[428] Myriam Seers, 'Canada – Arbitral Award Enforced despite Russian Sanctions' (Arbitrate.com, 23 November 2022).

[429] *Angophora v. Ovsyankin*, para 42.

[430] Ibid., paras 49-52.

[431] Ibid., para 50.

[432] New York Convention, art VII(1).

(discussed in Section IV.B.1.ii.a) demonstrates how various sanctions regimes form part of French international public policy. It was held in that case that, while the EU and UN sanctions regimes form part of French international public policy, other unilateral sanctions regimes do not.[433]

281. Nevertheless, it is not yet clear whether refusal of enforcement on account of the existence of UN and EU sanctions is automatic.

282. The issue arose in *Ministry of Oil and Minerals of Yemen v. DNO Yemen AS and Others*, a case involving an ICC award ordering DNO and other oil companies to pay damages to the Yemeni Ministry of Oil and Minerals and the Yemen Oil & Gas Corporation (YOGC) under a production-sharing agreement. DNO challenged enforcement, alleging that allowing the payments could lead to funds being transferred to entities controlled by Houthi rebel leaders who are subject to UN and EU sanctions.[434] The Paris Court of Appeal undertook an examination into whether enforcement would likely violate the applicable prohibitions by indirectly channeling money to sanctioned persons. Finding no proof that the Ministry or YOGC were under the authority of sanctioned Houthi leaders, and holding that it was not the enforcement court's responsibility to determine whether a party may utilize the money to violate international public policy through future human rights violations, the Court of Appeal dismissed the challenge.[435]

283. However, on appeal, the French Cour de cassation decided to refer the matter to the CJEU for a preliminary ruling, sending three questions on the interpretation of the EU's Yemen sanctions regime: (i) whether making funds available to non-targeted entities would trigger the Regulation's prohibition, when sanctioned entities exercise influence over the recipient entity that is competing with that of the (non-sanctioned) legitimate government; (ii) whether recipient entities should be presumed to be controlled by sanctioned entities when such influence is established and, if so, whether this presumption can be rebutted with contrary evidence; and (iii) when it is not possible on the basis of evidence to determine if the funds would be made available to the non-sanctioned legitimate government or the sanctioned entities exercising influence over the recipient entity, whether the mere reasonable risk that targeted persons may ultimately benefit from all or part of those funds provide a sufficient basis for applying the sanctions.[436] The CJEU's decision this regard will have wide implications: not only for

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[433] *Sofregaz v. NGSC*, para 67.

[434] '2024 Arbitration Year in Review – France' (Daily JUS, 2025) <https://dailyjus.com/world/2025/03/2024-arbitration-year-in-review-france>. See also Council Regulation (EU) No 1352/2014 of 18 December 2014 Concerning Restrictive Measures in View of the Situation in Yemen [2014] OJ L365/60; UNSC Res 2140 (26 February 2014).

[435] *Ministry of Oil and Minerals of Yemen v. DNO Yemen AS*, Paris Court of Appeal (Pôle 5 – Chamber 16), No 19/16601 (5 October 2021); '2024 PAW: Sanctions and Arbitration: Lessons Learned and Possible Strategies' (Kluwer Arbitration Blog) <https://legalblogs.wolterskluwer.com/arbitration-blog/2024-paw-sanctions-and-arbitration-lessons-learned-and-possible-strategies/>.

[436] Case C-842/24 *DNO Yemen*: Request for a preliminary ruling from the Cour de cassation (France), lodged 6 December 2024, C/2025/5431.

Yemeni sanctions, but potentially also for other EU sanctions regimes where an indirect benefit to designated individuals is at issue, as well as for all EU Member States' approach to these issues.

284. Pending the CJEU's judgment, the Opinion of Advocate General Szpunar was delivered on 19 March 2026. In his opinion, the Advocate General opined that (i) the Regulation's prohibition can apply even in the absence of control by a sanctioned entity, although the extent to which this is the case in practice would depend on the availability of evidence demonstrating 'whether the funds may be passed on to such persons or whether such persons have the ability to dispose of them' (which may include a situation where the sanctioned entities exercise influence over the recipient entity that is competing with that of the legitimate government);[437] (ii) the existence of a reasonable risk that sanctioned entities will benefit from all or part of the funds paid to the recipient entity, by reason of the enforcement of an arbitration award, triggers the Regulation's prohibition;[438] (iii) the fact that a sanctioned entity exercises influence over the recipient entity does not permit the presumption that the former controls the latter, yet where all available evidence indicate that there is a reasonable risk that the sanctioned entity will benefit from the funds paid to the recipient entity, the latter must establish that there is no such risk.[439]

### *b. Netherlands*

285. In the Netherlands, recognition and enforcement of foreign arbitral awards is governed by Articles 1075 and 1076 of the DCCP. Article 1075 is invoked where an applicable treaty for enforcement exists, such as the New York Convention. In the absence of such a treaty, Article 1076 provides an alternative framework under which foreign arbitral awards may be recognized and enforced. Article 1076 also includes a public policy ground for refusing recognition and enforcement.[440]

286. In *Crescent Petroleum Co. International Ltd v. National Iranian Oil Company (NIOC)*, Crescent obtained a London-seated PCA award against NIOC due to the latter's failure to supply gas under a Gas Supply Agreement.[441] Crescent sought enforcement in the Netherlands. In 2022, the District Court of Rotterdam granted enforcement, rejecting NIOC's public policy objections which primarily concerned corruption allegations and the claim that the tribunal did not take into consideration EU sanctions against Iran while

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[437] Case C-842/24, *DNO Yemen AS v. Petrolin Trading Limited, Moe Oil & Gas Yemen Limited, The Ministry of Oil and Minerals (of The Republic of Yemen), Yemen Oil & Gas Corporation / The Yemen Company, Dove Energy Limited, in liquidation*, Opinion of Advocate General Szpunar (19 March 2026), paras 52-53, 55-56.

[438] Ibid., para 93.

[439] Ibid., para 120.

[440] DCCP, art 1076(1)(B).

[441] See Susannah Moody, 'Iranian State Entity Fails in Dutch Appeal over Gas Award', Global Arbitration Review [26 January 2026].

determining compensation. In so doing, the Court found that these arguments had already been considered and rejected by the tribunal and the UK courts at the seat, and that NIOC had not presented new evidence in the Dutch proceedings.[442] Enforcement was further upheld by the Hague Court of Appeal and ultimately by the Dutch Supreme Court.[443]

287. While the Dutch proceedings focused mostly on the corruption allegations, NIOC raised the sanctions arguments more explicitly in parallel enforcement proceedings in Greece. The Athens Court of Appeal upheld enforcement. The Court rejected NIOC's argument that the arbitral award undermined sanctions against Iran, holding instead that NIOC had failed to demonstrate how the award conflicted with sanctions law and Greek public policy.[444]

288. It is noted that for disputes implicating the EU's own sanctions regime (particularly Regulation No 833/2014 against Russia), the Advocate General Biondi's Opinion in *NV Reibel v. JSC VO Stankoimport*, discussed in Section IV.B.1.ii, may require Dutch enforcement courts to apply a more searching standard of review. Furthermore, the blanket prohibition introduced by the 18th Sanctions Package (Regulation 2025/1494) now overrides any discretionary review for ISDS awards relating to the EU's Russian and Belarusian sanctions.

*c. Sweden*

289. In Sweden, the New York Convention is incorporated under Sections 53-55 of the Swedish Arbitration Act. Sections 54 and 55 provide the grounds under which an award may be refused recognition and enforcement, which include situations when 'it would be clearly incompatible with the basic principles of the Swedish legal system' to do so.[445]

290. At the time of writing, it was not possible to locate any reported Swedish case that has specifically addressed challenges to the enforcement of a foreign arbitral award on sanctions grounds. The Swedish sanctions case *NV Reibel v. JSC VO Stankoimport* is currently pending and arises in the set-aside context (discussed in Section IV.B.1.ii).

291. Furthermore, as previously mentioned, the EU's 18th Sanctions Package provides a legislative basis for refusing enforcement on public policy grounds in the sanctions context. Recital 22 of Regulation 2025/1494 states that the effective implementation of the 'no-claims clause' should be regarded as the 'public policy of the Union and the

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[442] *Crescent Petroleum Co International Ltd v. National Iranian Oil Co*, Rechtbank Rotterdam, Case No C-10-640294 / KG RK 22-659 (5 December 2022), para 4.21.

[443] Susannah Moody, 'Iranian State Entity Fails in Dutch Appeal over Gas Award', Global Arbitration Review [26 January 2026].

[444] Ibid.

[445] Swedish Arbitration Act, s 55(2).

Member States' for the purposes of recognition and enforcement of arbitral awards.[446] Recital 24 specifically points to the public policy ground under Article V(2)(b) of the New York Convention.[447] This formally codifies the view that EU sanctions form part of international public policy across all EU Member States in the enforcement context. For ISDS awards relating to the EU's Russian and Belarusian sanctions, this statutory ban could substitute the earlier case-by-case discretionary review.

**iii. Singapore**

292. Part III of the IAA governs the enforcement of foreign arbitral awards in Singapore, incorporating the New York Convention. Under Section 31(4)(b) of the IAA, enforcement may be refused if this would be 'contrary to the public policy of Singapore'. As discussed above, Singapore courts construe public policy narrowly.

293. In *DKB v. DKC*,[448] a recent US sanctions-related case before the SICC, DKB (the award creditor) sought the enforcement of a Swiss-seated arbitration in Singapore. DKC (the award debtor) applied to set aside the enforcement order on the ground that enforcement would be contrary to Singapore's public policy as doing so would violate US sanctions.[449] In parallel, DKC also sought a stay of enforcement on the basis that there was a post-award settlement deed between the parties containing an arbitration clause, and the question of whether DKC's failure to make payments under the deed (allegedly due to US sanctions) had to be resolved by arbitration first.[450]

294. The SICC granted a conditional stay of the enforcement proceedings on the ground that the sanctions defense and related contractual disputes fell within the scope of the settlement deed's arbitration clause and had to be resolved through arbitration before enforcement could proceed.[451] The Court did not decide on the substantive public policy question of whether US sanctions (which Singapore has not implemented) form part of Singapore's public policy for enforcement purposes under Section 31(4)(b) of the IAA. In a subsequent decision on 12 November 2025, the SICC ordered that certain preliminary legal questions, such as whether enforcement by entry of judgment in Singapore dollars (rather than the award's US dollar denomination) would address the sanctions concern, be determined separately.[452]

295. As of writing, the substantive ruling on the public policy question remains pending.

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446 Reg 2025/1494, recital 22.

447 Ibid., recital 24.

448 *DKB v. DKC* [2025] SGHC(I) 11; [2025] SGHC(I) 14; [2025] SGHC(I) 26.

449 *DKB v. DKC* [2025] SGHC(I) 26, para 2(a)-(c).

450 *DKB v. DKC* [2025] SGHC(I) 11, para 16.

451 Ibid., para 82.

452 See *DKB v. DKC* [2025] SGHC(I) 26.

Given Singapore's narrow public policy threshold under *PT Asuransi v. Dexia* and *DNZ v. DOA and DOB* (discussed in Section IV.B.1.iii), as well as in the more recent NextEra v. Spain judgment (concerning the dismissal of intra-EU ISDS objection to the enforcement of an ICSID award, relied upon by Spain also on public policy grounds),[453] it could be that foreign sanctions not implemented in Singapore may face a high threshold to constitute part of Singapore's public policy. However, when UN sanctions, which Singapore does implement, [454] are directly at issue, the argument for resisting enforcement may be stronger.

### iv. Switzerland

296. Foreign arbitral awards are recognized and enforced in Switzerland under the New York Convention, pursuant to Article 194 PILA. Swiss courts interpret the public policy ground in Article V(2)(b) of the New York Convention narrowly: only breaches of 'the most fundamental principles of the Swiss legal system' may justify a refusal to enforce.[455]

297. Switzerland is widely used as a seat of arbitration, and sanctions challenges would typically be filed at the set-aside stage under Article 190(2)(e) PILA.[456]

298. The Swiss Federal Tribunal's decision in *X. Ltd v. Société Z* involved an Iranian company and Swiss and Israeli counterparties in a crude oil delivery dispute where UN, EU, and Israeli sanctions were invoked. The court dismissed the challenge at a preliminary level, holding that generalized and abstract considerations of international policy were insufficient to justify refusal of enforcement or to establish a violation of Swiss law.[457]

299. While EU sanctions would not automatically qualify as Swiss public policy, Switzerland has autonomously adopted most of the EU's Russia sanctions since 2022.[458] This may bring EU sanction indirectly within the scope of Swiss public policy as a matter of Swiss law.

300. However, in *Beverly Overseas SA v. Privredna Banka Zagreb*, the Swiss Federal Tribunal held that UN arms embargoes reflect 'universal public order'.[459] In this case,

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[453] *NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v. Kingdom of Spain*, [2026] SGHC 43, paras 103-122.

[454] United Nations Act (Cap 339) (Singapore).

[455] 'International Arbitration Laws and Regulations Report 2025-2026: Switzerland' (ICLG), pt 11.5.

[456] PILA, art 190(2)(e).

[457] *X Ltd v. Société Z*, Tribunal fédéral, Case No 4A_250/2013, 3 (para 3.2).

[458] 'Switzerland – Adopts New European Union Sanctions against the Russian Federation and Belarus' (UNCTAD Investment Policy Hub, 10 June 2022) <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3990/switzerland-adopts-new-european-union-sanctions-against-the-russian-federation-and-belarus>.

[459] *Beverly Overseas SA v. Privredna Banka Zagreb*, Swiss Federal Tribunal, Case No 4C172/2000.

the claim concerned a promissory note issued by Croatia's largest bank in connection with a 1992 arms deal during the Yugoslav conflict. Beverly Overseas SA, a BVI-incorporated company had acquired the note. It brought proceedings in Switzerland for enforcement. The bank challenged enforcement on the basis of Article 20(1) of the Swiss Code of Obligations.[460] Since Switzerland was not a UN member at the time, the Court held that Security Council Resolution 713 was not directly binding as a matter of Swiss law. However, given the transaction's insignificant connection with Switzerland, the Court applied universal public order (*ordre public universel*) to assess the transnaction's morality under Article 20(1) of the Code of Obligations. The Court found that supplying arms in breach of a worldwide UN embargo offended fundamental values of non-violence and collective security, thus rendering the underlying contract immoral and void. The claim on the promissory note was accordingly dismissed.[461]

### v. United Kingdom

301. Sections 100-104 of the Arbitration Act 1996 govern the recognition and enforcement of foreign arbitral awards by incorporating the New York Convention in England and Wales. Under Section 103(3), enforcement may be refused if 'it would be contrary to public policy to recognize or enforce the award'. English courts have consistently construed this ground narrowly, as previously seen in the context of the *Micula* case (discussed in Section IV.A.2).

302. *MODSAF v. IMS* is a case that has dealt with sanctions and enforcement.[462] In the 1970s, IMS (owned by the UK Ministry of Defense) contracted to supply tanks and armored vehicles to the Iranian Ministry of Defense (MODSAF). Following the Iranian Revolution, the contracts were terminated. In 2001, an ICC tribunal seated in the Hague awarded MODSAF over GBP 140 million plus interest (subsequently reduced to approximately GBP 127.6 million by Dutch courts on partial set-aside).[463] MODSAF applied to enforce the awards in England, but was in the meantime designated as a sanctioned entity under Council Regulation (EU) 267/2012 concerning restrictive measures against Iran.[464]

303. It was understood that IMS could not lawfully pay MODSAF without violating the EU regulation. The question before the High Court was whether the Regulation's 'no claims'

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[460] Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations), art 20(1) (A contract is void if its terms are impossible, unlawful or immoral).

[461] Juliane Kokott and Patrick Sutter, 'Beverly Overseas SA v Privredna Banka Zagreb, Case No 4C172/2000' (2003) 97(1) AJIL 175.

[462] *Ministry of Defense and Support for Armed Forces of the Islamic Republic of Iran v. International Military Services Ltd* [2019] EWHC 1994 (Comm) (*MODSAF v. IMS*); aff'd [2020] EWCA Civ 145.

[463] *MODSAF v. IMS*, para 10.

[464] Council Regulation (EU) No 267/2012 of 23 March 2012 Concerning Restrictive Measures against Iran and Repealing Regulation (EU) No 961/2010, Annex IX [2012] OJ L088/1.

clause prevented MODSAF from enforcing the interest component accrued during the sanctions period.[465] The High Court held that the clause in fact barred enforcement of the post-designation interest, reasoning that the interest claim resulted directly from the sanctions.[466] The Court of Appeal also upheld this decision, holding that the no-claims clause 'evidently was intended to have confiscatory consequences'.[467] In essence, allowing MODSAF to claim that interest would have shifted the cost of sanctions from the designated person onto the counterparty, defeating the Regulation's Article 38 purpose of protecting innocent counterparties from bearing the financial consequences of sanctions-induced non-performance. Enforcement of the principal sum and pre-sanctions interest, however, was not refused—only the post-designation interest was refused for the reason that it accrued only because sanctions prevented payment.

### vi. United States

304. Recognition and enforcement of foreign arbitral awards in the United States is governed by Chapter 2 of the FAA.[468] Section 201 of the FAA implements the New York Convention. US courts have consistently construed public policy narrowly. *Parsons & Whittemore Overseas Co v. Société Générale de l'Industrie du Papier (RAKTA)*, held that national foreign policy does not equate to public policy under the New York Convention and that enforcement may only be refused where it would violate the forum's 'most basic notions of morality and justice'.[469] This rationale has been applied frequently by US courts when sanctions-related awards are challenged on public policy grounds.[470]

305. In *National Oil Corp v. Libyan Sun Oil Co*, Libyan State entity National Oil sought confirmation of an ICC award in its favor rendered in Paris. The respondent, Sun Oil, argued that US sanctions against Libya[471] rendered confirmation contrary to public policy. The US District Court for the District of Delaware confirmed the award, holding that it 'simply cannot conclude that to confirm a validly obtained, foreign arbitral award in favor of the Libyan Government would violate the United States' most basic notions

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465 Ibid., art 38. See also ibid., art 1(c)(v) (defining 'claim' to include a claim for recognition or enforcement of an arbitration award).

466 *MODSAF v. IMS*, para 70.

467 Ibid. [2020] EWCA Civ 145, para 59.

468 Federal Arbitration Act, 9 USC ss 201–208.

469 *Parsons & Whittemore Overseas Co v. Société Générale de l'Industrie du Papier (RAKTA)*, 508 F2d 969 (2d Cir 1974), 974 (para 9).

470 See, e.g., *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems Inc*, 665 F3d 1091 (9th Cir 2011) (*Ministry of Defense v. Cubic Defense Systems*); *National Oil Corp v. Libyan Sun Oil Co*, 733 F Supp 800 (D Del 1990) (*National Oil Co v. Libyan Sun Oil Co*); *MGM Productions Group Inc v. Aeroflot Russian Airlines*, 573 F Supp 2d 772 (SDNY 2003) (*MGM v. Aeroflot*).

471 Executive Orders 12543 and 12544 under the International Emergency Economic Powers Act (IEEPA); Libyan Sanctions Regulations, 31 CFR pt 550.

of morality and justice'.[472] However, the Court stayed execution of the judgment, noting that the President was empowered to prevent any transfer of funds through the Libyan Sanctions Regulations.[473] The Court ordered post-award interest to be deposited into an interest-bearing blocked account.[474] This establishes a distribution barrier, where the award is confirmed by the Court, but actual payment is blocked pending sanctions compliance.

306. In *Ministry of Defense v. Cubic Defense Systems*, Iran's Ministry of Defense obtained an ICC arbitral award against Cubic (a US corporation) from a 1977 contract for an air combat training system. Invoking several US sanctions regimes,[475] Cubic resisted confirmation arguing that doing so would amount to a violation of fundamental US public policy against economic support for the Government of Iran. The Ninth Circuit rejected Cubic's arguments and confirmed the award. The Court held that Cubic's arguments gave 'too little weight to this country's strong public policy in support of the recognition of foreign arbitration awards, and too much weight to the regulatory restrictions governing payment'.[476] The Court drew a sharp distinction between confirmation and payment, reasoning that '[c]onfirmation, standing alone, transfers no wealth to Iran,' as the President has the power to block the transfer of funds.[477] The applicable sanctions regulations prohibited only payment without a specific OFAC license—not the confirmation of the award.[478]

307. *SCPM v. T&R Productions* is the most recent case of sanctions-related enforcement, decided by the US District Court for the District of Columbia on 8 January 2026. The dispute arose from three contracts concluded by TV-Novosti (a Russian State-owned media company operating the RT America network) and T&R Productions (a Washington-based media company) in 2018 and 2021.[479] After TV-Novosti terminated the contracts in April 2022, it initiated arbitration before the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC).[480] In February 2024, the tribunal rendered three awards granting nearly USD

[472] *National Oil Corp v. Libyan Sun Oil Co*, para 76.

[473] Ibid., para 77.

[474] Ibid., para 87.

[475] Iranian Assets Control Regulations, 31 CFR pt 535; Iranian Transactions Regulations, 31 CFR pt 560; Weapons of Mass Destruction Proliferators Sanctions Regulations, 31 CFR pt 544.

[476] *Ministry of Defense v. Cubic Defense Systems*, para 18.

[477] Ibid., para 22.

[478] Ibid., para 21.

[479] *Satoriagricultural Consultancy and Projects Management LLC (SCPM) v. T&R Productions* (US District Court for the District of Columbia, 8 January 2026) (*SCPM v. T&R Productions*), 2.

[480] Ibid., 3.

14 million in TV-Novosti's favour.[481]

308. In August 2024, TV-Novosti assigned its interest in the awards to SCPM, an Emirati company, for approximately USD 20,000 (2 million RUB). One month later, in September 2024, TV-Novosti was sanctioned by OFAC for interfering with the 2024 US presidential elections. SCPM then filed for enforcement in the US, and T&R Productions did not appear.[482] The Court invited SCPM to address whether enforcement would contravene US public policy and requested the US Government's position. The Government declined to take a position.[483]

309. The Court granted recognition and enforcement by default judgment. It held that the public policy defense must be 'construed narrowly' and that an award may only be deemed unenforceable if it is 'repugnant to fundamental notions of what is decent and just'.[484] The Court found no basis to refuse enforcement: the assignment from TV-Novosti to SCPM had occurred before OFAC sanctions were imposed; OFAC sanctions operate only prospectively; and the US Government had implied that enforcement would not violate US law given the timing.[485] The Court drew an explicit distinction between confirmation and execution: payments greenlighted by the Court which violate US sanctions could still be blocked by OFAC at the execution stage.[486]

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[481] Ibid., 1.

[482] Ibid., 6.

[483] Ibid., 9.

[484] Ibid., 12.

[485] Ibid., 13, 14.

[486] Ibid.; also see Daniel Pakpahan, 'US Court Enters Default Judgment, Enforcing Award in Contract-Based Dispute Involving Sanctioned Russian State-Owned Media Company', IAReporter [13 January 2026].