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War and International Investment Law: Possible Breaches and Possible Defences for Economic Sanctions Against Russia by I. Bogdanova and R. Polanco Lazo

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War and International Investment law: Possible Breaches and Possible Defences for Economic Sanctions Against Russia

Iryna Bogdanova[*] *and Rodrigo Polanco*[**]

I. Introduction

On 24 February 2022, the Russian Federation launched a full-scale invasion of Ukraine. At the time of writing, the fighting continues, with the frontlines constantly shifting, at the cost of several thousand lives, many of them civilians.

The aggression has triggered a wave of economic sanctions against Russia and Russian investors. Some of them were already in place following Russia's illegal annexation of the Crimean peninsula and the start of a military conflict in eastern Ukraine in 2014. This time, however, the implementation of such sanctions has been broader and more far-reaching.[1]

These economic sanctions are diverse and range from sanctions against Russian sovereign debt and freezing of the Russian Central Bank's assets to technological and transportation sanctions. They also include restrictions against hundreds of Russian companies and thousands of Russian citizens.[2] The imposed restrictions sparked recurrent debates on the legality of unilateral economic sanctions, their effectiveness, enforcement and circumvention practices. Besides these traditional concerns, a new issue that attracted significant attention is the possibility of using international courts and tribunals, or international arbitration, to challenge the legality of economic sanctions. Recently initiated investor-state disputes against Ukraine,[3] Luxembourg,[4] and Canada,[5] later discussed in this article, illustrate this tendency.

In such a context, this article explores the potential role of international investment arbitration in providing Russian companies and individuals with a right to question economic sanctions' legality and seek redress and in allowing states that imposed such measures to defend their right to do so under international law.

After this introduction, this article proceeds in three parts. The first part describes and classifies imposed economic sanctions, setting the stage for a subsequent discussion. Following this, the focus shifts to discussing these restrictions against the background of the respective obligations under the international investment agreements (IIAs) concluded between the countries that

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[1] Iryna Bogdanova, 'The Role of Technology Sanctions in Crippling Russia's War Machine' (*International Institute for Sustainable Development*, 26 September 2022) <https://www.iisd.org/articles/policy-analysis/technology-sanctions-russia-war> accessed 7 November 2024.

[2] 'Sanctions Against Russia – a Timeline' (*S&P Global Market Intelligence*, 26 February 2024) <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/sanctions-against-russia-8211-a-timeline-69602559> accessed 7 November 2024. According to the Council of the European Union, 1706 individuals and 419 entities are sanctioned. Council of the European Union, EU sanctions against Russia <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/> accessed 7 November 2024.

[3] ABH Holdings v. Ukraine, (ICSID Case No. ARB/24/1); CTF Holdings S.A. v. Ukraine (ICSID Case No. ARB/24/35).

[4] Mikhail Fridman v. Luxembourg (ad hoc arbitration, UNCITRAL Arbitration Rules 2021).

[5] Volga-Dnepr Airlines, LLC v. Canada (ad hoc arbitration).

have imposed them and Russia. Finally, the possibility of justifying such policies on public policy and/or national security grounds is examined.

The conclusion recapitulates whether the existing state practice of economic sanctions in case of aggression is compatible with the standards of treatment prescribed under the IIAs, whether such practices could be justified on public policy and national security grounds, and what they imply for the future of international investment arbitration.

II. Economic Sanctions Imposed Against Russia After 24 February 2022

Russia's aggression against Ukraine in the early hours of 24 February 2022, provoked an immediate reaction from a coalition of states willing to exert economic pressure on the United Nations Security Council (UNSC) permanent member. This coalition is comprised not only of the states that are frequent users of economic sanctions – United States, Canada, and European Union (EU) Member States – but also of the states that are less engaged in their use and attempt to maintain neutrality in their foreign policy, such as Switzerland.[6] The initial sanctions were followed by subsequent rounds, the imposition of a significant share of which was coordinated through the G7 group.

Diverse types of economic restrictions have been imposed against the Russian Federation, and some of them also target Belarus. These economic sanctions include trade sanctions[7] (e.g., import and export prohibitions, revocation of the most-favoured-nation status), financial sanctions[8] (e.g., partial removal of the Russian financial institutions from the SWIFT financial messaging system, prohibition on transactions with the Russian Central Bank), enhanced export controls[9] (i.e., prohibitions on the supply of dual-use goods), energy-related sanctions[10] (e.g., oil price caps), transport sanctions[11] (e.g., prohibition on the use of the European Union's ports by the vessels registered under Russian flag), sanctions targeting listed individuals[12] (e.g.,

[6] The Federal Council, 'Switzerland adopts EU sanctions against Russia' Press release 28 February 2022, <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-87386.html> accessed 7 November 2024; Yann Fauconnet, 'Neutralitätsrechtliche Einordnung der schweizerischen Sanktionen gegen Russland im Ukraine-Krieg' (2022) 2 ex/ante – Zeitschrift der juristischen Nachwuchsforschung 3.

[7] G7 Leaders' Statement' 11 March 2022 <https://www.consilium.europa.eu/media/54778/220311-g7-leaders.pdf> accessed 7 November 2024.

[8] U.S. Department of the Treasury, 'U.S. Treasury Announces Unprecedented & Expansive Sanctions Against Russia, Imposing Swift and Severe Economic Costs' Press release 24 February 2022 <https://home.treasury.gov/news/press-releases/jy0608> accessed 7 November 2024; Council Regulation (EU) 2022/345 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (2022) OJ L63/1.

[9] U.S. Department of Commerce, Bureau of Industry and Security, 'Six Months into Russian Invasion, Commerce Actions Making a Difference in Support of Ukrainian People' Press release 25 August 2022 <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3123-2022-08-24-press-release-commerce-actions-in-support-of-ukraine/file> accessed 7 November 2024.

[10] Council of the European Union, 'Russian Oil: EU Agrees on Level of Price Cap' Press release 3 December 2022 <https://www.consilium.europa.eu/en/press/press-releases/2022/12/03/russian-oil-eu-agrees-on-level-of-price-cap/> accessed 7 November 2024.

[11] Council of the European Union, 'EU Adopts Fifth Round of Sanctions Against Russia over Its Military Aggression Against Ukraine' Press release 8 April 2022 <https://www.consilium.europa.eu/en/press/press-releases/2022/04/08/eu-adopts-fifth-round-of-sanctions-against-russia-over-its-military-aggression-against-ukraine/> accessed 7 November 2024.

[12] Russian Elites, Proxies, and Oligarchs (REPO) Task Force, a multilateral task force responsible for identifying and freezing the assets of sanctioned individuals and companies, reported that "more than $58 billion worth of sanctioned Russians' assets in financial accounts and economic resources" were blocked or frozen. Russian Elites,

asset freezes and travel bans). The most recent efforts are directed at enhancing economic sanctions effectiveness through their improved enforcement.[13]

Investment restrictions exemplify one more type of economic sanctions that have been undertaken. These restrictions can take the form of a complete ban on new investments in a sanctioned country, a partial ban on investment in certain sectors of the economy, or investment above a defined threshold. On 6 April 2022, the President of the United States issued a new Executive Order 14071, which prohibited "new investment in the Russian Federation by a United States person, wherever located".[14] For the purposes of this investment ban, the term ''United States person'' was defined as "any United States citizen, lawful permanent resident, entity organised under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States."[15] In March 2022, the EU announced its fourth package of sanctions, which included a ban on new investments in the Russian energy sector.[16] It is hard to envision a situation where these particular types of restrictions might be incompatible with obligations under existing IIAs, as they concern the home state and only refer to "new investment" – meaning investment that has not yet been established in Russia.

However, other types of economic sanctions might raise a question of their compatibility with the IIAs signed between the sanctioning states and the Russian Federation. For example, EU sanctions (colloquially called "restrictive measures") include an obligation to freeze "[a]ll funds and economic resources belonging to, owned, held or controlled by any natural or legal persons, entities or bodies, or natural or legal persons, entities or bodies associated with them, as listed in Annex I".[17] Annex I contains a list of sanctioned natural and legal persons, entities and bodies.[18] The abovementioned wording implies that not only assets ("funds and economic resources") of the sanctioned persons ("natural or legal persons, entities or bodies […] as listed in Annex I") but also assets of "natural or legal persons, entities or bodies associated with them" should be frozen.

Additionally, EU sanctions require that "[n]o funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural or legal persons, entities or bodies, or natural or legal persons, entities or bodies associated with them, as listed in Annex I."[19] This restriction is interpreted broadly: "Making funds available to a designated person or entity, be it by way of payment for goods and services, as a donation, in order to return funds previously held under a contractual arrangement, or otherwise, is generally prohibited unless it

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Proxies, and Oligarchs (REPO) Task Force, Joint Statement from the REPO Task Force. March 9, 2023 <https://home.treasury.gov/news/press-releases/jy1329>, accessed 7 November 2024.

[13] European Parliament, EU sanctions: new rules to crack down on violations. Press Releases. 12 March 2024 <https://www.europarl.europa.eu/news/en/press-room/20240308IPR19002/eu-sanctions-new-rules-to-crack-down-on-violations>, accessed 7 November 2024.

[14] Executive Order 14071 of April 6, 2022, Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression, Fed Reg Vol 87 No 68.

[15] Ibid.

[16] Council of the European Union, 'Russia's Military Aggression Against Ukraine: Fourth EU Package of Sectoral and Individual Measures' Press release 15 March 2022 <https://www.consilium.europa.eu/en/press/press-releases/2022/03/15/russia-s-military-aggression-against-ukraine-fourth-eu-package-of-sectoral-and-individual-measures/> accessed 7 November 2024.

[17] Article 2(1), 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, last amended by Council Implementing Regulation (EU) 2024/849 of 12 March 2024.

[18] Ibid.

[19] Article 2(2), ibid.

is authorised by the competent authority pursuant to the relevant derogation provided for in the Regulation."[20]

The requirement "associated with" applies both to the obligation to freeze assets and the prohibition on making funds or economic resources available and is defined through the ownership or control. This interpretation of "associated with" is further confirmed by the EU Best Practices for the effective implementation of restrictive measures[21] and the other documents issued to clarify the scope of the EU restrictive measures.[22] To put it differently, if a non-sanctioned entity is owned or controlled by a sanctioned person, its assets should also be frozen, and no funds or economic resources could be made available to it.[23]

The abovementioned economic restrictions might have detrimental effects on the free movement of payments and capital as well as undermine other business operations of any entity that is owned or controlled by a sanctioned person irrespective of the fact under the laws of which country such an entity is incorporated. We will now discuss this, and other potential violations of IIAs to which Russia and states imposing these sanctions are a party. In the next section, we will explore possible defences.

III. Economic Sanctions Against Russia: Potential Breaches of IIAs

The aforesaid economic sanctions belong to the economic sanctions imposed outside of the UN framework and without the authorisation of the UNSC, i.e., unilateral economic sanctions. It is worthwhile to explain what types of restrictions this term covers. Unilateral economic sanctions can be defined as restrictive economic measures imposed by individual states or groups of states (e.g., EU) against other states, their bodies, government officials, legal entities and nationals, without any prior authorisation of an international (e.g., UNSC) or regional (e.g., the African Union) organisation, i.e., based on states' domestic laws.[24] Other terms are also used to denote such unilateral state actions: as non-UN sanctions, autonomous sanctions, or restrictive measures.[25]

While the legality of unilateral economic sanctions has been debated at length, it is worth emphasising that their legal status remains unsettled.[26] Despite this ambiguity, their detrimental effects urge targeted states and entities to question their legality before various international courts and tribunals. In the past, sanctioned states challenged the legality of unilateral economic sanctions based on their alleged inconsistency with the obligations under bilateral treaties (e.g.,

[20] Council of the European Union, EU Best Practices for the effective implementation of restrictive measures, Doc. 10572/22, 27 June 2022, updated July 2024, at § 49.
[21] "The freezing covers all funds and economic resources belonging to or owned by designated persons and entities, and also to those held or controlled by such persons and entities." § 34, ibid.
[22] Asset freeze and prohibition to provide funds or economic resources, Frequently asked questions on asset freezes following sanctions adopted in view of Russia's military aggression against Ukraine and Belarus' involvement in it <https://finance.ec.europa.eu/publications/asset-freeze-and-prohibition-provide-funds-or-economic-resources_en> accessed 7 November 2024.
[23] Ibid.
[24] Iryna Bogdanova, 'Targeted Economic Sanctions and WTO Law: Examining the Adequacy of the National Security Exception' (2021) 48 Legal Issues of Economic Integration 171.
[25] Ibid, at pp. 173-174
[26] Iryna Bogdanova, *Unilateral Sanctions in International Law and the Enforcement of Human Rights* (Brill Nijhoff 2022).

1955 Treaty of Amity, Economic Relations, and Consular Rights), human rights obligations, and obligations under World Trade Organisation (WTO) law.[27]

Fierce opposition to comprehensive sanctions, i.e., economic sanctions targeting the whole country and its economy, on the grounds of their detrimental impact on the population of the targeted state, paved the way for increased use of targeted sanctions.[28] The present-day economic sanctions are mostly targeted, implying that they focus on specific sectors of the economy, certain entities, or even named individuals and their assets.[29] This peculiarity of the active sanctions regimes makes international investment arbitration particularly attractive for foreign investors who might suffer economic losses due to them.

Investor-state dispute settlement (ISDS) could be a suitable international forum to scrutinise the legality of unilateral economic sanctions for several reasons. First, investors might initiate a dispute against the sanctioning host state without any involvement of their home state. Although state-to-state dispute settlement is also envisaged by IIAs, thus allowing a sanctioned state to initiate a dispute against a sanctioning state, it should be noted that, as a matter of fact, such disputes are not frequent.[30] Second, states' obligations under the existing IIAs are formulated very broadly, and various types of economic sanctions might be potentially incompatible with such obligations.[31] Third, the jurisdiction of the relevant investment tribunal over such a claim can be established fairly straightforward. Jurisdictional preconditions for any potential claim arguing a violation of IIAs essentially require: (i) existence of a "protected investment" in a territory of a host state; (ii) existence of a dispute between the parties regarding

[27] The disputes recently initiated before the International Court of Justice are: Certain Iranian Assets (Islamic Republic of Iran v. United States of America); Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates). Some of the disputes initiated before the WTO were filed in order to challenge restrictions that were a part of broader politically-tainted economic sanctions such as Russia – Measures Concerning Traffic in Transit (DS512) and Saudi Arabia – Measures concerning the Protection of Intellectual Property Rights (DS567).

[28] "By the mid-1990[s], it was no longer enough for sanctions to achieve foreign policy goals, they had to do so without excessive harm to civilians in the target country, or third countries, as in Yugoslavia." Kimberly Ann Elliott, 'Assessing UN Sanctions after the Cold War: New and Evolving Standards of Measurement (UN Sanctions: New Dilemmas and Unintended Consequences)' (2009) 65 International Journal 85, 90, at p. 92.

[29] The empirical data proves this observation: "Because of growing humanitarian concerns worldwide and consistent with the global shift from comprehensive/nationwide sanctions to smart/targeted sanctions, the imposition of financial sanctions has increased steadily from the early 1980s onwards." Constantinos Syropoulos et al., *The Global Sanctions Data Base Release 3: COVID-19, Russia, and Multilateral Sanctions*, WIFO Working Papers 651/2022, November 2022, at p. 9.

[30] Michel Potestà, State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential? in Nerina Boschiero, Tullio Scovazzi, Cesare Pitea and Chiara Ragni (eds.), *International Courts and the Development of International Law* (TMC Asser Press 2013) 753–68; Nathalie Bernasconi-Osterwalder, *IISD Best Practices Series: State-State Dispute Settlement in Investment Treaties* (International Institute for Sustainable Development 2014).

[31] Discussing how unilateral economic sanctions might impact foreign investments Sabrina Robert-Cuendet, distinguished tree main categories of such measures: sanctions restricting the admission of foreign investments, sanctions impairing the foreign investors' activity, and sanctions affecting the existence of foreign investments (i.e., expropriation). Sabrina Robert-Cuendet, Unilateral and extraterritorial sanctions and international investment law in Charlotte Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions*, (Edward Elgar Publishing 2021).

any such “protected investment”; (iii) existence of consent to arbitration. However, this is not always easy: almost 25% of ISDS cases have been dismissed for lack of jurisdiction.[32]

As discussed in the preceding section, several countries have imposed economic sanctions on the Russian Federation after its illegal aggression against Ukraine. Many of these countries have a bilateral investment treaty (BIT) in force with the Russian Federation or with its predecessor, the Union of Soviet Socialist Republics – USSR (see Table 1 below).

Table 1. Russian BITs with countries that have imposed economic sanctions

	Name	**Date of signature**	**Date of entry into force**
1	Finland - USSR BIT (1989)	1989-02-08	1991-08-15
2	Belgium - Luxembourg - USSR BIT (1989)	1989-02-09	1991-08-18
3	United Kingdom - USSR BIT (1989)	1989-04-06	1991-07-03
4	Germany - USSR BIT (1989)	1989-06-13	1991-08-05
5	France - USSR BIT (1989)	1989-07-04	1991-07-18
6	Netherlands - USSR BIT (1989)	1989-10-05	1991-07-20
7	Canada - USSR BIT (1989)	1989-11-20	1991-06-27
8	Austria - USSR BIT (1990)	1990-02-08	1991-09-01
9	Spain - USSR BIT (1990)	1990-10-26	1991-11-28
10	Switzerland - USSR BIT (1990)	1990-12-01	1991-08-26
11	Republic of Korea - USSR BIT (1990)	1990-12-14	1991-07-10
12	Bulgaria - Russian Federation BIT (1993)	1993-06-08	2005-12-18
13	Greece - Russian Federation BIT (1993)	1993-06-30	1997-02-23
14	Romania - Russian Federation BIT (1993)	1993-09-29	1996-07-20
15	Denmark - Russian Federation BIT (1993)	1993-11-04	1996-09-25
16	Russian Federation - Slovakia BIT (1993)	1993-11-30	1996-08-02
17	Czech Republic - Russian Federation BIT (1994)	1994-04-05	1996-06-06
18	Hungary - Russian Federation BIT (1995)	1995-03-06	1996-05-29
19	Albania - Russian Federation BIT (1995)	1995-04-11	1996-05-29
20	Russian Federation - Sweden BIT (1995)	1995-04-19	1996-07-07
21	Norway - Russian Federation BIT (1995)	1995-10-04	1998-05-21
22	Italy - Russian Federation BIT (2002)	1996-04-09	1997-07-07
23	North Macedonia - Russian Federation BIT (1997)	1997-10-21	1998-07-09
24	Japan - Russian Federation BIT (1998)	1998-11-13	2000-05-27
25	Russian Federation - Ukraine BIT (1998)	1998-11-27	2000-01-27
26	Lithuania - Russian Federation BIT (1999)	1999-06-29	2004-05-24
27	Russian Federation - Singapore BIT (2010)	2010-09-27	2012-06-16

[32] Matthew Hodgson, Yarik Kryvoi and Daniel Hrcka, ‘2021 Empirical Study: Costs, Damages and Duration in Investor-State Arbitration’ (June 2021) <https://www.biicl.org/documents/136_isds-costs-damages-duration.pdf> accessed 7 November 2024.

These BITs concluded by Russia have standards of protection commonly included in investment treaties, both substantive and procedural. Substantive standards include, among others, national treatment (NT),[33] most-favoured-nation (MFN) treatment,[34] fair and equitable treatment (FET),[35] full protection and security (FPS),[36] and protection against illegal expropriation.[37] Procedural standards include the possibility of bringing claims against the host state outside of domestic courts using ISDS, mainly through investor-state arbitration.[38] The most common ISDS options prescribed by the BITs signed by the Russian Federation are ad hoc arbitral tribunals established under the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules, arbitration by the International Centre for Settlement of Investment Disputes (ICSID) or by the Arbitration Institute of the Stockholm Chamber of Commerce.[39]

What is noteworthy is that some of the BITs described in Table 1 explicitly allow investors to bring only one type of dispute against the host state: the dispute to define the amount that ought to be paid in the case of expropriation (and not the fact that there had been an expropriation). For example, Article 10 of the Belgium - Luxembourg – USSR/Russian Federation BIT (1989) reads as follows:

1. *Any dispute between a Contracting Party and an investor of the other Contracting Party concerning the amount or manner of payment of compensation payable under Article 5 of this Agreement [compensation derived from expropriation] shall be the subject of a written notification, accompanied by a detailed aide-memoire, which the investor shall send to the Contracting Party involved in the dispute. To the extent possible, the parties to the dispute shall endeavour to settle the dispute on a mutually acceptable basis.*
2. *If the dispute cannot be so resolved within six months from the date of the written notification referred to in paragraph 1 of this Article, it shall be submitted, at the option of the investor:*
   2.1. to the Arbitration Institute of the Stockholm Chamber of Commerce;

[33] For example, Article 3(1) Romania - Russian Federation BIT (1993); Article 3 Norway - Russian Federation BIT (1995); Articles 3(2), 4, 5(3) and 8(4) Japan - Russian Federation BIT (1998); Article 3(2) Lithuania - Russian Federation BIT (1999).
[34] For example, Article 2 Belgium - Luxembourg - USSR BIT (1989); Article 3(1) Romania - Russian Federation BIT (1993); Article 3 Norway - Russian Federation BIT (1995); Articles 2(2), 3(1), 4, 5(3) and 8(4) Japan - Russian Federation BIT (1998); Article 3(2) Lithuania - Russian Federation BIT (1999).
[35] For example, Article 4(1) Belgium - Luxembourg - USSR BIT (1989); Article 2(3) Romania - Russian Federation BIT (1993); Article 3 Norway - Russian Federation BIT (1995); Article 3(1) Lithuania - Russian Federation BIT (1999).
[36] For example, Article 4(2) Belgium - Luxembourg - USSR BIT (1989); full and unconditional legal protection is guaranteed under Article 2(2) Romania - Russian Federation BIT (1993); the most constant protection and security is guaranteed under Article 3(3) Japan - Russian Federation BIT (1998); Article 2(2) Lithuania - Russian Federation BIT (1999).
[37] For example, Article 5 Belgium - Luxembourg - USSR BIT (1989); Article 5 Romania - Russian Federation BIT (1993); Article 5 Norway - Russian Federation BIT (1995); Article 5 Japan - Russian Federation BIT (1998); Article 6 Lithuania - Russian Federation BIT (1999).
[38] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (3rd edition, Oxford University Press 2022) 16.
[39] For example, Article 8 Romania - Russian Federation BIT (1993); Article 8 Norway – Russian Federation BIT (1995); Article 11 Japan - Russian Federation BIT (1998); Article 9 Russian Federation - Singapore BIT (2010).

2.2. to ad hoc arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). [translated from Russian language]

This issue has been brought to the forefront by the recent investor-state dispute initiated by the sanctioned Russian oligarch Mikhail Fridman against Luxembourg. In his Request for Arbitration, Fridman advances two legal arguments: first, that the tribunal also has jurisdiction to determine whether expropriation took place; and second, that the scope of Article 10 of the Belgium - Luxembourg - USSR BIT (1989) could be broadened through the BIT's MFN clause.[40]

It is important to note that the Russian aggression against Ukraine does not call into question the validity of the BIT between the two states, as well as between Russia and third states. As Ackermann and Wuschka have pointed out, in the past, the outbreak of war would have automatically terminated most treaty relations between belligerents.[41] Today, this rule has been replaced by a presumption of continuity. Under the Vienna Convention on the Law of Treaties (VCLT),[42] only in exceptional circumstances can a state lawfully suspend or terminate certain treaties, notably as a result of a material breach by one of the parties (Article 60), the supervening impossibility of performance (Article 61) and fundamental change of circumstances (Article 62). Moreover, the severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty, unless the existence of diplomatic or consular relations is indispensable for the application of the treaty (Article 63). The ILC Draft Articles on the Effects of Armed Conflict on Treaties are based on the principle that the existence of an armed conflict does not ipso facto terminate or suspend the operation of treaties between the parties to the conflict and between them and a state not party to the conflict (Article 3).[43]

If we analyse the most common economic sanctions imposed against Russia, some of them might, depending on how they have been implemented, imply a breach of the obligations undertaken by the host states in such BITs with respect to Russian investors and investments.

Before we delve into the discussion of possible violations of the standards of treatment guaranteed under BITs, one essential aspect should be addressed: could an individual EU Member State be a respondent in an investor-state dispute if such a dispute emerged as a result of the EU decision to impose economic sanctions (restrictive measures)? Any violation of the BITs provisions requires an act of a state or an act attributed to a state, for example, a legislative or executive act, in some instances, an action or inaction of the state's courts.[44] In the context of EU economic sanctions (restrictive measures), this requirement would be hard to fulfil in

[40] Lisa Bohmer, Russian businessman lodges first known treaty arbitration against Luxembourg, alleging that EU sanctions amount to "witch-hunt" against wealthy Russian individuals and asking for upwards of 16 billion USD in damages, *IAReporter*, 13 August 2024 <https://www.iareporter.com/articles/breaking-russian-businessman-lodges-first-known-treaty-arbitration-against-luxembourg-alleging-that-eu-sanctions-amount-to-witch-hunt-against-wealthy-russian-individuals-and-asking/> accessed 7 November 2024.
[41] Tobias Ackermann and Sebastian Wuschka, 'The Applicability of Investment Treaties in the Context of Russia's Aggression against Ukraine' (2023) 38 ICSID Review - Foreign Investment Law Journal 453, at pp. 4–5.
[42] Vienna Convention on the Law of Treaties (Opened for Signature 23 May 1969, Entered into Force 23 January 1980) (1980) 1155 UNTS 331.
[43] International Law Commission, 'Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries, 2011' (2011) II Yearbook of the International Law Commission 108.
[44] Dolzer, Kriebaum and Schreuer, note 38, at p. 151.

view of the legal and institutional frameworks enabling the imposition of EU restrictive measures. The imposition of EU restrictive measures is a two-step process: first, a Council Decision is adopted in the Common Foreign and Security Policy (CFSP) framework (by unanimity), and second, a Council Regulation is adopted to formulate the exact scope of EU restrictive measures (by qualified majority).[45] In such a way, the political decision to impose EU restrictive measures takes legal shape through two instruments: Decisions and Regulations. The Council's Decisions are binding only on EU Member States, whereas Regulations are directly applicable in the EU Member States and binding upon their domestic constituencies (legal entities, individuals).[46] Considering that the decision to impose EU restrictive measures is taken by the EU institutions and not individual EU Member States, a respondent state such as Luxembourg in Fridman v Luxembourg could theoretically argue that such actions could not be attributed to it, but instead should be attributed to the EU that has not signed BIT with the Russian Federation.

1. Expropriation

1.1 Indirect expropriation

Scholars and practitioners discussing the impact of economic sanctions on the host state obligations warned of a potential claim that such measures could be incompatible with the prohibition of expropriation. Van Aaken, writing after the first wave of economic sanctions targeting the Russian Federation in 2014, argued that "there is little doubt that a longer-term asset freezing, without due process, is an expropriation even if the legal title is not taken".[47] Beess und Chrostin contends that both UN-authorised and unilateral economic sanctions might give rise to diverse investor-state claims.[48] In particular, she observed that: "[r]elevant protections in this context to which a qualified investor may be entitled under a BIT are the protection from expropriation without compensation […]."[49]

It should be highlighted that, as a rule, economic sanctions are enacted as temporary measures of constraint, and they do not entail a formal transfer of ownership. In this regard, the EU's Best Practices for the effective implementation of restrictive measures clarify the scope of the freezing of funds as follows: "The freezing of funds, unlike confiscation, does not affect the ownership of the funds concerned."[50] In a similar vein, the UK Office of Financial Sanctions Implementation (OFSI) makes this point explicit in its guidance: "[a]n asset freeze does not involve a change in ownership of the frozen funds or economic resources, nor are they confiscated or transferred to OFSI for safekeeping."[51] Therefore, in order to succeed with the

[45] As commentators observe: "The terminology of Article 29 TEU and a systematic interpretation of both provisions point toward a system by which the CFSP-decision is limited to establishing the overall policy whereas the details of the restrictions are determined by the non-CFSP act based on Article 215 TFEU." Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin, *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019), at p. 1635.
[46] Article 288, Treaty on the Functioning of the European Union (TFEU).
[47] Anne van Aaken, 'International investment law and decentralized targeted sanctions: an uneasy relationship,' Columbia FDI Perspectives, No. 164, January 4, 2016.
[48] Jessica Beess und Chrostin, 'Unilateral and Multilateral Sanctions in Investment Treaty Arbitration', Proceedings of the ASIL Annual Meeting 2016.
[49] Ibid.
[50] Council of the European Union, note 20, at § 44.
[51] Office of Financial Sanctions Implementation (OFSI), *UK Financial Sanctions General Guidance* (Gov.UK, published 13 February 2024) <https://www.gov.uk/government/publications/financial-sanctions-general-guidance/uk-financial-sanctions-general-guidance#what-financial-sanctions-restrict> accessed 7 November 2024.

claim of expropriation, investors should argue and prove that such action as an extended freezing of assets and/or economic resources constitutes an indirect expropriation.

Claims of indirect expropriation are not novel in the context of ISDS. The often-cited definition of indirect expropriation included by Professors Sohn and Baxter in the 1961 Draft Convention on the International Responsibility of States for Injuries to Aliens reads as follows: "A 'taking of property' includes not only an outright taking of property but also any such unreasonable interference with the use, enjoyment, or disposal of property as to justify an inference that the owner thereof will not be able to use, enjoy, or dispose of the property within a reasonable period of time after the inception of such interference."[52] More recently, it has been defined as "a situation in which an investor's legal title is not extinguished but the actions of a state are, in legally significant respects, analogous to direct expropriation".[53] Thus, indirect expropriation can derive from the regulatory actions of a host state, i.e., regulatory takings, which could clash with the states' right to regulate.[54]

Expropriation provisions in the BITs signed by the Russian Federation and states that imposed economic sanctions contain the prohibition that "investments […] cannot be expropriated, nationalised or subjected to other measures having a similar effect."[55] This formulation covers both direct and indirect forms of expropriation.

Some IIAs include provisions providing further guidance about the determination of whether a measure or series of measures, constitutes an indirect expropriation, typically stating that it requires a case-by-case, fact-based inquiry that considers, among other factors, the economic impact of the measures and their duration, the extent to which the measures interfere with the possibility to use, enjoy or dispose of property, and the character of the measures, notably their object, context and intent. These treaties also usually establish that except in rare circumstances where the impact of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures designed and applied to protect legitimate public policy objectives – like safety – do not constitute indirect expropriation.[56] However, none of the Russian BITs described in Table 1 above include such provisions.

In the context of economic sanctions taking the form of asset freezes entailing freezing of funds and other economic resources, the quintessential question is whether such a government action constitutes an instance of indirect expropriation, for which compensation is required. In essence, the answer to this question is closely intertwined with how broad or narrow indirect expropriation is understood. Katia Yannaca-Small formulates the question regarding the ambit of indirect expropriation as follows: "to what extent a government may affect the value of

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[52] Louis B. Sohn and R. R. Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens: II. Draft Convention on the International Responsibility of States for Injuries to Aliens', 55:3 The American Journal of International Law, Jul. 1961, pp. 548-584, (Article 10(3)(a)).

[53] Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge University Press 2014), pp. 229–272.

[54] Ana Maria Daza-Clark, Regulatory Expropriation, *Jus Mundi*, last updated: 23 September 2024, <https://jusmundi.com/en/document/publication/en-regulatory-expropriation#:~:text=However%2C%20like%20direct%20expropriation%2C%20regulatory,the%20value%20of%20the%20property> accessed 7 November 2024.

[55] For example, Article 5 Norway - Russian Federation BIT (1995); Article 5 Belgium-Luxembourg - Russian Federation BIT (1989).

[56] See among many others, EU - Singapore Investment Protection Agreement (2018), United States - Mexico - Canada Agreement (USMCA) (2018), and Colombia - Israel FTA (2013).

property by regulation […] for a legitimate public purpose without effecting a 'taking' and having to compensate a foreign owner or investor for this act."[57]

Based on the analysis of the relevant case law, she identifies the following criteria which are taken into account when deciding on whether a government measure meets the threshold of being indirect expropriation: "(i) the degree of interference with the property right, including the duration of the regulation; (ii) the character of governmental measures, that is, the purpose and the context of the governmental measure; (iii) the proportionality between the public policy objective pursued by a measure and the impact of such measure on the property of the investor; and (iv) the interference of the measure with reasonable and investment-backed expectations."[58] Other commentators discern identical factors that should be considered: severity of deprivation caused by a state measure(s), duration of a state measure(s), whether a state measure(s) caused a loss of control over an investment, the purpose of a measure and legitimate expectations of investors.[59]

The degree to which government action should interfere with the property right to reach the threshold of indirect expropriation has been evaluated differently by the tribunals. However, the analysis of the existing case law demonstrates tribunals' leaning towards several criteria that could objectively establish a deprivation tantamount to indirect expropriation.[60] These criteria are: negative impact on the property's economic value (i.e., economic loss or damage), substantial impairment of the investor's economic rights (deprivation of ownership or control/management of a business), and duration of the measures.[61]

Even though, in general, tribunals' findings are inconclusive regarding the prevalence of one criterion over the other,[62] the element of 'substantial deprivation' of an investment seems to be key.[63] In Pope & Talbot v Canada, the tribunal asserted that "under international law, expropriation requires a 'substantial deprivation'."[64] In CMS v Argentina, the tribunal observed: "The standard that a number of tribunals have applied in recent cases where indirect expropriation has been contended is that of substantial deprivation."[65]

Duration of regulation or measures impacting a protected investment has been a factor used to determine if such actions could constitute an indirect expropriation. The case law in this regard is ambiguous. In LG&E v Argentina, the tribunal emphasized that "[g]enerally, the expropriation must be permanent, that is to say, it cannot have a temporary nature"[66] and

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[57] Katia Yannaca-Small, Indirect Expropriation and the Right to Regulate: Has the Line Been Drawn?, in Katia Yannaca-Small (ed.) *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2nd edition Oxford University Press 2018) pp. 562-593, at p. 563.
[58] Ibid, at p. 576.
[59] Dolzer, Kriebaum and Schreuer, note 38, Chapter VII.
[60] Yannaca-Small, note 57, at pp. 576-582.
[61] Ibid; In the similar vein, a United Nations Conference on Trade and Development (UNCTAD) study defines instances of indirect expropriation as "measures short of physical takings may amount to takings in that they result in the effective loss of management, use or control, or a significant depreciation of the value, of the assets of a foreign investor". UNCTAD, *Series on Issues in International Investment Agreements: 'Taking of Property'* (2000) at p. 4.
[62] Ibid, at p. 581.
[63] Ibid; Dolzer, Kriebaum and Schreuer, note 38, at p. 157.
[64] Pope & Talbot v. Canada, Interim Award, 26 June 2000, at § 102.
[65] CMS Gas Transmission Company v. The Argentine Republic, (ICSID Case No. ARB/01/8), Award (May 12, 2005), at § 262.
[66] LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, (ICSID Case No. ARB/02/1), Decision on Liability, 3 October 2006, at § 193.

eventually rejected the claim of indirect expropriation because "the effect of the Argentine State's actions has not been permanent on the value of the Claimants' shares', and Claimants' investment has not ceased to exist."[67] In setting the standard of what actions could be recognized as indirect expropriation, the tribunal in Biwater v Tanzania observed that "a substantial deprivation of rights, for at least a meaningful period of time, is required."[68] Contrary to these views, the tribunal in S.D. Myers v Canada held that[69]:

> *An expropriation usually amounts to a lasting removal of the ability of an owner to make use of its economic rights although it may be that, in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation,* ***even if it were partial or temporary****.* [Emphases added]

In deciding whether a regulatory measure meets the threshold of indirect expropriation, investor-state tribunals have relied upon different analytical frameworks: (i) focused exclusively on the effects of the measure(s) on a protected investment (either effect on economic value approach endorsed in Metalclad v Mexico[70] or effect as a substantial deprivation of property rights advanced in Pope & Talbot v Canada[71]); (ii) focused on the effects of the measures on a protected investment and exempted actions that meet certain characteristics; (iii) focused on balancing the effects of the measures on a protected investment with the characteristics of the undertaken measures.[72] In other words, investment tribunals have interpreted elements required for establishing indirect expropriation in a number of ways that are hard to reconcile within the boundaries of one analytical approach. Squaring each of these approaches to indirect expropriation with the freezing of assets and economic resources as a form of economic sanctions might render different results.

In the recent dispute initiated by the sanctioned Russian oligarch Mikhail Fridman against Luxembourg, in advancing the argument that EU economic sanctions had 'catastrophic consequences' on Fridman's business and, as a result, amount to an unlawful expropriation, the claimant puts forward several reasons. First, the claimant argues that he lost control over his investment, and could not receive dividends or liquidate his assets; second, that EU sanctions deprived the claimant of "substantially the entire value of his investments"; and third, as a result of EU sanctions the claimant's assets are frozen for over two years and that these measures are "indefinite and by now, permanent".[73] As this summary demonstrates, the claimant heavily relies upon three factors that featured prominently in the abovementioned case law on indirect expropriation: loss of the investment's value, loss of control over the investment and the alleged permanent nature of the measures taken.

Luxembourg, as a respondent in Fridman v Luxembourg, would most probably argue that the adoption of the EU economic sanctions (restrictive measures) and their implementation should not be attributed to it, but instead should be attributed to the EU and the legal entities incorporated or doing business in Luxembourg, e.g., banks and other financial institutions. This

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[67] Ibid, at § 200.
[68] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, (ICSID Case No. ARB/05/22), Award, 24 July 2008, at § 463.
[69] S.D. Myers, Inc. v. Government of Canada, UNCITRAL, Partial Award, 13 November 2000, at § 283.
[70] Metalclad Corporation v. The United Mexican States (ICSID Case No. ARB(AF)/97/1).
[71] Pope & Talbot v. Canada, note 64.
[72] While Bonnitcha offers this taxonomy of approaches, he acknowledges that the more conventional approach in the literature is to distinguish between tribunal decisions that focus exclusively on the effects of the measure and those that also take into account the purpose of the measure. Bonnitcha, note 53.
[73] Bohmer, note 40.

point has been mentioned above. Besides this, the Belgium - Luxembourg - USSR BIT explicitly allows an investor to bring only one type of investor-state dispute, namely disputes "concerning the amount or manner of payment of compensation payable under Article 5 of this Agreement". This might significantly narrow down the jurisdiction of the tribunal and prevent it from hearing other claims, including the claim of a potential indirect expropriation.

Turning to the question of whether EU economic sanctions could be tantamount to indirect expropriation, several observations are worthwhile. To start with, the objective of economic sanctions, irrespective of a state or group of states enacting them, is to cause economic suffering – the degree of such a suffering varies – and, in such a way, pursue political goals. One recent study identifies the following possible objectives of economic sanctions: "[…] the desire to demonstrate the sender's willingness and capacity to act, to anticipate or deflect criticism, to maintain certain patterns of behaviour in international affairs, to deter further engagement in the objectionable actions by the target and third parties, to support international institutions, to promote subversion in the target or to assuage domestic audiences."[74] Thus, it should not come as a surprise that the EU economic sanctions targeting Russian oligarchs would cause economic harm to them and potentially their business interests. The more intricate question is whether such a harm could qualify as a 'substantial' economic deprivation and whether it leads to a loss of control over an investment. Any such finding would heavily depend on the particular facts of a case. Furthermore, the proportionality of the imposed economic restrictions viewed through the lens of the objective(s) pursued may also play a role in the legal analysis.

Economic sanctions are, as a rule, introduced as temporary measures of constraint. For example, EU economic sanctions (restrictive measures) are adopted for a limited period (for 6 or 12 months, depending on the sanctions regime) and are subject to periodic renewals, which should be agreed upon by unanimity in the form of Council Decision. In addition to the periodic reviews, sanctioned persons might challenge their designation before the Court of Justice of the European Union, and, if successful, their designation will be annulled.[75]

However, we know from Tippetts[76] and other US-Iran cases that ostensibly temporary measures can be sufficiently permanent to become expropriatory. Yet, at what point this happens is something that is likely to be determined on a case-by-case basis. For example, it would be for the claimant to demonstrate before the investment tribunal that despite procedural guarantees provided to the sanctioned persons, the EU restrictive measures are of a permanent nature.

Finally, it is important to note that not all state actions, even when they cause a negative impact on the value of property or the functioning of a business, constitute an indirect expropriation. Even if they do, the police powers doctrine that is 'widely accepted in international law'[77] exempts states from paying compensation for such actions. The possible application of this doctrine as a defence in investor-state disputes over economic sanctions is discussed in Part IV section 2.1.5.

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[74] Peter-Tobias Stoll and others, *Extraterritorial sanctions on trade and investments and European responses* (2020), at p. 15.

[75] The legal basis for such reviews is provided in Article 24 TEU, and Articles 275 and 263 of the TFEU, which allow any natural or legal person to institute proceedings before the Court of Justice of the European Union if certain preconditions are fulfilled.

[76] Iran-US Claims Tribunal, Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA, 6 IRAN-U.S. C.T.R., at 219 et seq.

[77] Yannaca-Small, note 57, at p. 585.

Recently, there have been instances when economic sanctions resulted in the confiscation of previously frozen assets and economic resources, and now we turn to this discussion.

1.2 Direct expropriation

Confiscation of the assets of Russian entities or sanctioned Russian individuals could violate BIT clauses that protect against unlawful expropriation or measures that have "similar consequences" to expropriation, like confiscation. All the BITs included in Table 1 have such a clause.

For example, Article 4, paragraph 1 of the BIT with Germany (1989) provides that:

> *(1)* ***Dispossession measures, including nationalization or other measures having similar consequences****, may be applied in the territory of one Contracting Party to investments of investors of the other Contracting Party only in cases where these dispossession measures are carried out for reasons of public necessity, in accordance with the procedure established under the legislation of that Contracting Party and with the payment of compensation. Such measures must not be discriminatory in nature.* [Emphasis added]

Likewise, Article 5(1) of the BIT with Ukraine stipulates:

> *Expropriation*
>
> *1. The investments of investors of either Contracting Party, carried out on the territory of the other Contracting Party,* ***shall not be subject to expropriation, nationalization or other measures, equated by its consequences to expropriation*** *(hereinafter referred to as expropriation), with the exception of cases, when such measures are not of a discriminatory nature and entail prompt, adequate and effective compensation.* [Emphasis added]

Article VI of the Canada - USSR BIT, in the relevant part, reads as follows:

> *Expropriation*
>
> *Investments or returns of investors of either Contracting Party* ***shall not be nationalized, expropriated or subjected to measures having an effect equivalent to nationalization or expropriation*** *(hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose, under due process of law, in a non-discriminatory manner and provided that it is accompanied by prompt, adequate and effective compensation.* [Emphasis added]

After the Russian Federation launched a full-scale invasion, Ukraine adopted a new law on confiscation and amended its sanctions legislation, thus establishing two parallel legal regimes allowing confiscation of the Russian property and property of the sanctioned Russian nationals.[78] In March 2022, a new Law, "On the Basic Principles of Forcible Seizure of

[78] In March 2022, the Law 'On the Basic Principles of Forcible Seizure of Property of the Russian Federation and its Residents in Ukraine' (Закон України № 2116-IX Про основні засади примусового вилучення в Україні об'єктів права власності Російської Федерації та її резидентів від 03.03.2022) was adopted (hereinafter: Law of Ukraine № 2116-IX). In May 2022, Ukraine's law "On Sanctions" was amended to allow confiscation of the

Property of the Russian Federation and its Residents in Ukraine", was adopted.[79] Pursuant to this law, the confiscation (forcible seizure) "is carried out on the grounds of public necessity (including cases when it is urgently required by military necessity)",[80] it applies only to the property of the legal entities incorporated in Ukraine but owned directly or indirectly by the Russian Federation[81] and is carried out without any compensation (reimbursement).[82] The National Security and Defense Council of Ukraine decides to prescribe compulsory asset confiscation, which is enacted by the President's decree.[83] In other words, the law gives the executive branch the power to authorise confiscation without any judicial oversight, but the Parliament should approve such decisions.[84]

The application of this law resulted in the confiscation of the assets owned by the subsidiaries of two major state-owned Russian banks (the private Sberbank and the state-owned Vnesheconombank), which instigated threats of initiating investment arbitration in order to claim damages based on the Russia-Ukraine BIT (1998).[85]

In May 2022, Ukraine's law "On Sanctions" was amended to allow the confiscation of the assets of sanctioned private individuals and legal entities if certain preconditions are fulfilled.[86] To be more specific, Article 4 of the amended law reads: "The types of sanctions under this Law are as follows: […] 1^1) confiscation of assets belonging to an individual or legal entity, as well as assets in respect of which such a person may directly or indirectly (through other individuals or legal entities) perform actions identical in content to the exercise of the right to dispose of them, into the state's revenue".[87] During the period of martial law, frozen assets[88] can be confiscated if they are owned by an individual or legal entity that either (i) caused significant damage to the national security, sovereignty or territorial integrity of Ukraine, or (ii) provided substantial assistance in performing actions that caused significant damage to the national security, sovereignty or territorial integrity of Ukraine.[89] According to the law, the Ministry of Justice has to submit an application to the High Anti-Corruption Court,[90] which may permit the confiscation of frozen assets.[91] The persons whose assets might be confiscated have a right to submit their arguments before the court, and the court is obligated to rule in

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assets of sanctioned persons. Закон України № 2257-IX Про внесення змін до деяких законодавчих актів України щодо підвищення ефективності санкцій, пов'язаних з активами окремих осіб від 12.05.2022. (hereinafter: Law of Ukraine № 2257-IX).

[79] Law of Ukraine № 2116-IX.

[80] Article 2(1), ibid.

[81] Article 1, ibid.

[82] Article 2(2), ibid.

[83] Article 3(1), ibid.

[84] Article 3(4), ibid.

[85] Vladislav Djanic, Two Russian Banks Threaten Treaty Arbitration Against Ukraine Following Seizure of Their Assets in the Context of the Ongoing Russia-Ukraine War, *IAReporter,* 12 May 2022 <https://www.iareporter.com/articles/two-russian-banks-threaten-treaty-arbitration-against-ukraine-following-seizure-of-their-assets-in-the-context-of-the-ongoing-russia-ukraine-war/> accessed 7 November 2024. Maksym Savchuk, Heorhiy Shabayev, and Nadia Burdyey, 'Ukraine's Confiscation of Russian Assets Stymied By Bureaucracy, Investigation Finds', Radio Free Europe, March 2023 <https://www.rferl.org/a/ukraine-investigation-bureaucracy-russia-assets/32325221.html> accessed 7 November 2024.

[86] Law of Ukraine № 2257-IX.

[87] Закон України № 1644-VII Про санкції від 14.08.2014 (hereinafter: Law of Ukraine № 1644-VII).

[88] The assets should have been frozen after May 12, 2022, when the law "On Sanctions" was amended, to allow their confiscation in exceptional circumstances. Article 6(3), ibid.

[89] Article 5^1, ibid

[90] Article 5(1), ibid.

[91] Article 5(3) and Article 5^1, ibid.

favour of the party whose evidence is more convincing than that of the other party.[92] In September 2023, the Deputy Minister of Justice reported that the Ministry filed 29 applications, and the court authorised confiscation in 28 cases.[93]

It has been reported that a Russian construction company, MJSC LSR Group, threatened to take Ukraine to arbitration following the seizure of its Ukrainian assets.[94] LSR Group is a major construction company in Russia, which wholly owns the German company Aeroc Investment Deutschland, which in turn owned the Ukrainian company Aeroc LLC. After Aeroc Investment Deutschland was added to the Ukrainian sanctions list in May 2023, the Ukrainian Ministry of Justice filed a lawsuit with the Ukrainian High Anti-Corruption Court requesting the seizure of LSR Group's indirect stake in Aeroc LLC, alleging that LSR Group had contributed to Russia's war against Ukraine by paying taxes to the Russian state and participating in the construction of housing for military personnel.[95] On 22 August 2023, a three-judge panel ordered the Ukrainian state to seize 100% of the shares of Aeroc LLC.[96]

Considering the relationship between the decisions issued by the High Anti-Corruption Court allowing the confiscation of Russian assets and Article 5(1) of Russia-Ukraine BIT (1998), the findings of the International Court of Justice (ICJ) are worth quoting. In Certain Iranian Assets, the ICJ concluded that a taking of property as a result of a judicial decision is not equal to an expropriation unless there is a "specific element of illegality"[97]:

> *The Court considers that a judicial decision ordering the attachment and execution of property or interests in property does not per se constitute a taking or expropriation of that property. A specific element of illegality related to that decision is required to turn it into a compensable expropriation. Such an element of illegality is present, in certain situations, when a deprivation of property results from a denial of justice, or when a judicial organ applies legislative or executive measures that infringe international law and thereby causes a deprivation of property.*

Although the decisions or findings of the ICJ are not binding for investment tribunals, in the past, arbitrators have anchored their legal arguments in the ICJ practice in order to add credibility to their awards.[98] Since Ukrainian law allows persons whose assets might be confiscated to submit arguments before the court, a claim of denial of justice could be hard to demonstrate; however, the question of whether the law as such is in compliance with international law and thus a claim based against that confiscation is actionable has yet to be determined. Some recent cases might do that soon.

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[92] Article 283[1], Кодекс адміністративного судочинства України № 2747-IV від 06.07.2005 (Code of Administrative Procedure of Ukraine).

[93] Анастасія Жарикова, 'Рік з першої конфіскації активів підсанкційного росіянина: в Мін'юсті прозвітували про роботу' *Економічна права* (7 вересня 2023), www.epravda.com.ua/news/2023/09/7/704071/ accessed 19 April 2024.

[94] Lisa Bohmer, Russian Construction Company Reportedly Threatens to Lodge Arbitration against Ukraine, IAReporter, 16 October 2023 <https://www.iareporter.com/articles/russian-construction-company-reportedly-threatens-to-lodge-arbitration-against-ukraine/> accessed 28 March 2024.

[95] Ibid.

[96] Ibid.

[97] International Court of Justice, *Certain Iranian Assets (Iran* v *USA)*, Judgment, 2023, at § 84.

[98] Christian J Tams and Eleni Methymaki, The World Court's Influence on Contemporary Investment Law in Hélène Ruiz Fabri and Edoardo Stoppioni (eds.), *International Investment Law: An Analysis of the Major Decisions* (Hart Publishing 2022) pp. 37–57.

At the time of writing, Ukrainian economic sanctions targeting Russian oligarchs and the legal entities under their ownership and control have triggered two pending investor-state arbitrations: ABH Holdings (ABHH) v Ukraine and CTF Holdings v Ukraine. Both disputes were filed by the legal entities partially owned by the sanctioned Russian oligarch Mikhail Fridman and incorporated in Luxembourg, invoking the BLEU (Belgium-Luxembourg Economic Union)-Ukraine BIT (1996).

In ABH Holdings v Ukraine, the claimant contends that as a result of the Ukrainian government's actions, JSC "Alfa-Bank" (renamed JSC "Sense Bank") was expropriated.[99] This was made possible first by sanctioning beneficial owners of the bank,[100] the move that was followed by the imposition of economic sanctions against ABHH and ABH Ukraine and other affiliated companies,[101] and second by amending Ukrainian legislation to allow nationalization of a bank owned by sanctioned persons.[102] The claimant argues that the nationalisation of its shares in JSC "Alfa-Bank" (JSC "Sense Bank") "constituted a 'measure' of 'expropriation or nationalization' or 'any other measure having the effect of directly or indirectly dispossessing' ABHH of its investment in Ukraine" in violation of Article 4 of the BLEU-Ukraine BIT (1996).[103]

In September 2024, Dutch financial company E.M.I.S. Finance B.V. submitted a notice of dispute to Ukraine under the Netherlands-Ukraine BIT (1994), arguing that the nationalisation of JSC "Alfa-Bank" (JSC "Sense Bank") "prevented it from collecting its loans from ABHU [a Cyprus-based entity partially owning Alfa-Bank], consequently resulting in the expropriation of E.M.I.S.' investment and the impairment of its capacity to continue operating its business."[104]

In another pending dispute, CTF Holdings, after being sanctioned in November 2023, lodged a treaty claim against Ukraine in August 2024.[105]

However, claims of direct expropriation could be brought against measures adopted by countries other than Ukraine. In June 2022, Canada amended its sanctions laws – the Special

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[99] ABH Holdings v. Ukraine, (ICSID Case No. ARB/24/1), Request for Arbitration, 29 December 2023 <https://www.italaw.com/sites/default/files/case-documents/180630.pdf> accessed 7 November 2024.

[100] Указ Президента України № 726/2022 від 19 жовтня 2022 року, Про рішення Ради національної безпеки і оборони України від 19 жовтня 2022 року «Про застосування та внесення змін до персональних спеціальних економічних та інших обмежувальних заходів (санкцій)» <https://www.president.gov.ua/documents/7262022-44481#:~:text=Відповідно%20до%20статті%20107%20Конституції,санкцій)»%20(додається> accessed 7 November 2024.

[101] Указ Президента України № 371/2023 від 5 липня 2023 року, Про рішення Ради національної безпеки і оборони України від 5 липня 2023 року "Про застосування персональних спеціальних економічних та інших обмежувальних заходів (санкцій)" <https://www.president.gov.ua/documents/3712023-47261> accessed 7 November 2024.

[102] Закон України "Про внесення змін до деяких законодавчих актів України щодо удосконалення процедури виведення з ринку банку в умовах воєнного стану", N 3111-IX, від 29.05.2023 [The Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Improving the Procedure for Withdrawing a Bank from the Market under Martial Law"].

[103] ABH Holdings v. Ukraine, note 99, at § 104.

[104] Dutch financial company puts Ukraine on notice of treaty dispute over nationalisation of Sense Bank, *IAReporter*, 1 October 2024 <https://www.iareporter.com/articles/dutch-financial-company-puts-ukraine-on-notice-of-treaty-dispute-over-nationalisation-of-sense-bank/> accessed 7 November 2024.

[105] Sanctioned Luxembourg-Based Company Lodges Treaty Claim Against Ukraine, *IAReporter*, 19 August 2024 <https://www.iareporter.com/articles/sanctioned-luxembourg-based-company-lodges-treaty-claim-against-ukraine/> accessed 7 November 2024.

Economic Measures Act and Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) – to allow the confiscation of sanctioned private and state-owned assets regardless of whether such assets were acquired legally or illegally.[106] According to these amendments, a property owned or controlled by (i) a foreign state, (ii) any person in that foreign state, or (iii) a national of that foreign state who does not ordinarily reside in Canada can be confiscated.[107] These confiscated assets can be used for the following purposes: "(a) the reconstruction of a foreign state adversely affected by a grave breach of international peace and security; (b) the restoration of international peace and security; and (c) the compensation of victims of a grave breach of international peace and security, gross and systematic human rights violations or acts of significant corruption."[108] Any such confiscation is a subject of judicial oversight. However it should be noted that the judge should determine only if: "the property (a) is described in an order made under paragraph 4(1)(b); and (b) is owned by the person referred to in that order or is held or controlled, directly or indirectly, by that person."[109]

In December 2022, Canada initiated the first process to seize and pursue the forfeiture of assets of Granite Capital Holdings Ltd., a company owned by sanctioned Russian oligarch Roman Abramovich.[110] In June 2023, the Canadian government ordered the seizure of a Russian-registered cargo aircraft "believed to be owned" by a subsidiary of two sanctioned Russian entities – Volga-Dnepr Airlines and Volga-Dnepr Group.[111] In response to this move, Volga-Dnepr Cargo Airlines threatened a dispute against Canada under Canada - USSR BIT (1989).[112] In August 2024, a complaint was lodged by Volga-Dnepr Cargo Airlines, alleging expropriation, as well as other breaches of the BIT.[113]

2. Transfer of Funds

Freezing assets, restricting the payments of Russian entities, or sanctioning Russian individuals could violate investment treaty provisions that guarantee investors the "prompt" or "free" transfer of funds in connection (or "related to") the investment. With slightly different wording, all the BITs included in Table 1 above have such a provision.

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[106] An Act to implement certain provisions of the budget tabled in Parliament on April 7, 2022 and other measures (Budget Implementation Act, 2022, No. 1), June 23, 2022, Statutes of Canada 2022, c. 10.
[107] Ibid.
[108] Ibid.
[109] Article 5.4(1), Special Economic Measures Act S.C. 1992, c. 17.
[110] Global Affairs Canada, 'Canada starts first process to seize and pursue the forfeiture of assets of sanctioned Russian oligarch', News release, 19 December 2022, <https://www.canada.ca/en/global-affairs/news/2022/12/canada-starts-first-process-to-seize-and-pursue-the-forfeiture-of-assets-of-sanctioned-russian-oligarch.html> accessed 7 November 2024.
[111] Global Affairs Canada, "Government of Canada orders seizure of Russian-registered cargo aircraft at Toronto Pearson Airport", News release, 10 June 2023, <https://www.canada.ca/en/global-affairs/news/2023/06/government-of-canada-orders-seizure-of-russian-registered-cargo-aircraft-at-toronto-pearson-airport.html> accessed 7 November 2024.
[112] Lisa Bohmer, Russian airline files notice of dispute over Canada's decision to seize aircraft, *IAReporter*, 16 August 2023 <https://www.iareporter.com/articles/russian-airline-files-notice-of-dispute-over-canadas-decision-to-seize-aircraft/> accessed 7 November 2024.
[113] Damien Charlotin, Russian airline lodges sanctions-related treaty arbitration against Canada, *IAReporter*, 26 August 2024 <https://www.iareporter.com/articles/russian-airline-lodges-sanctions-related-treaty-arbitration-against-canada/> accessed 7 November 2024.

For example, Article 8 of the BIT with Lithuania (1999) provides the following:

> *Article 8. Transfers of Payments*
>
> *1. Each Contracting Party shall guarantee to investors of the other Contracting Party, after the completion of all tax obligations,* ***free transfer abroad of payments in connection with the investments****, in particular:*
>
> *a) The initial capital and additional amounts for the maintenance or increase of the investment;*
>
> *b)* ***Returns****;*
>
> *c) Funds in repayment of loans, directly related to the investment;*
>
> *d) The proceeds from the total or partial liquidation or sale of the investments;*
>
> *e) Compensation referred to in the Article 6 of this Agreement* [Expropriation and Compensation];
>
> *f)* ***The earnings and other remuneration of the investor*** *of the other Contracting Party and key personnel authorised to work in connection with investments in the territory of the first Contracting Party.*
>
> *2. Transfers shall be made without undue delay in a freely convertible currency at the exchange rate applying on the date of transfer in accordance with currency regulations in force of the Contracting Party in whose territory the investment was made.* [Emphasis added]

Asset freezes and restrictions on making economic resources available, especially when they apply not only to the sanctioned individuals but also to the entities owned or controlled by them, might create a formidable obstacle to the transfer of funds. Being faced with significant financial penalties and reputational risks, banks, as well as other financial institutions, introduce string sanctions compliance programs and become hesitant to provide services to the sanctioned individuals and entities where the owner/major shareholder is sanctioned.

The most recent example of the banks' tendency to comply with foreign sanctions even when the state where the bank is incorporated did not impose any sanctions is the case of the sanctioned Russian oligarch Roman Abramovich and Israel's non-governmental rescue and recovery organisation ZAKA against Mizrahi Tefahot Bank Ltd.[114] The case was filed after the Israeli bank refused to transfer the donation from Roman Abramovich's bank account to ZAKA. The bank explained that the account had been frozen as a result of economic sanctions imposed by the EU and the United Kingdom against him.[115] The decision of the court of first

[114] Tel Aviv District Court, Case No. 59756-12-23, Roman Abramovich and ZAKA against Mizrahi Tefahot Bank Ltd.

[115] Dean Shmuel Elmas, 'Judge tells Mizrahi Bank to transfer Abramovich donation to ZAKA', *Globes*, 4 January 2024 <https://en.globes.co.il/en/article-court-tells-mizrahi-bank-to-transfer-abramovich-donation-to-zaka-1001467085> accessed 8 November 2024.

instance allowing this transfer has now been appealed to Israel's Supreme Court, which blocked the transfer pending a full hearing of the appeal.[116]

The imposition of sanctions has also led to the suspension of payment to the sanctioned legal entities. Inter RAO Lietuva, the Lithuanian subsidiary of Russian company Inter RAO, was included on a list of entities sanctioned by the Baltic governments, due to the company's alleged links with Vladimir Putin. Reportedly, Inter RAO Lietuva has initiated arbitration before the Stockholm Chamber of Commerce (SCC) against Litgrid, a Lithuanian state-owned company, and other transmission system operators based in the Baltic region, including Elering, a state-owned Estonian company. The dispute concerns the suspension of payments of around 13 million EUR for the supply of electricity, because of international sanctions imposed against the claimant. Payments stopped in May 2023, when the Baltic states suspended trade in Russian electricity supplied by Inter RAO Lietuvos, and Lithuanian authorities revoked the subsidiary's licenses. The SCC proceedings are contract-based, and it is unclear if they are also brought under the Lithuania-Russia BIT.[117] It is important to note that there is no BIT between Estonia and Russia.

Several recent IIAs include exceptions that allow host states to delay or prevent a transfer through the equitable, non-discriminatory and good-faith application of its laws and regulations, or to ensure compliance with orders or judgments in judicial or administrative proceedings.[118] However, none of the BITs included in Table 1 above have such a provision. That does not mean that some defences or exceptions could be implied in these treaties – as we will discuss later in this article – but the host state has the burden of proof that such defences or exceptions exist and that they are applicable to the case.

For example, in OI European Group v Venezuela, the tribunal held that the implementation of foreign exchange controls falls "within the financial and economic sovereignty of states" and does not constitute an undue restriction for the purposes of the applicable investment treaty.[119] Similarly, in Rusoro v Venezuela, the tribunal held that providing the "triple guarantee" of transfer of funds in respect of their investments without delay, in a convertible currency and at the rate of exchange prevailing at the time of transfer is respected, the investment treaty does not restrict the manner in which states parties choose to regulate their exchange control regime. States may choose to abolish all exchange control restrictions, set certain limits, or subject all foreign exchange transactions to administrative control.[120]

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[116] Nitsan Shafir, 'Supreme Court blocks Abramovich donation to ZAKA', *Globes*, 2 April 2024 <https://en.globes.co.il/en/article-supreme-court-blocks-abramovich-donation-to-zaka-1001475357> accessed 8 November 2024.

[117] Erik Brouwer, 'Baltic Round-Up: Pending High-Stake Disputes, a New Case Stemming from International Sanctions, a Dodged Treaty Claim, and Other Arbitration-Related News', *IAReporter*, 6 October 2023 <https://www.iareporter.com/articles/baltic-round-up-pending-high-stake-disputes-a-new-case-stemming-from-international-sanctions-a-dodged-treaty-claim-and-other-arbitration-related-news/> accessed 8 November 2024.

[118] See, among many others, Bahrain - Hong Kong BIT (2024), Angola - Japan BIT (2023), and Hungary - San Marino BIT (2022).

[119] OI European Group B.V. v. Bolivarian Republic of Venezuela, (ICSID Case No. ARB/11/25), Award, 10 March 2015 [Spanish], at § 624.

[120] Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela, (ICSID Case No. ARB(AF)/12/5), Award, 22 August 2016, at § 576-577.

More recently, the tribunal in Smurfit v Venezuela considered that the investment treaty imposed an obligation on each party to provide for the transfer of funds. Such transfer shall be guaranteed "unless there is a necessary or reasonable ground to limit or delay such transfer".[121]

3. Fair and Equitable Treatment (FET)

The FET is considered to be "the most often invoked treaty standard in investor-state arbitration".[122] Notwithstanding this, the content of the FET standard remains "somewhat amorphous".[123] Due to the lack of a clear definition of the FET standard in most IIAs, the case law has applied it in several situations, in a very broad spectrum that includes, failure to comply with the duty of vigilance and protection, denial of due process or procedural fairness, failure to respect the investor's legitimate expectations, coercion and harassment by public authorities, failure to provide a stable and predictable legal framework, unjust enrichment, evidence of bad faith, lack of transparency and arbitrary and discriminatory treatment.[124] The interpretation of the normative content of the FET standard is defined by the language used in the provision guaranteeing this treatment to an investor and investment.[125]

The mere inclusion of a company on a list of sanctioned entities could also trigger arbitration based on a FET breach. For example, in Fridman v Luxembourg, the claimant argues that EU economic sanctions targeting him and his businesses breach fair and equitable treatment guaranteed under Article 4(1) of the Belgium/Luxembourg - Russian Federation BIT.[126] Article 4(1) reads as follows:

> *Each Contracting Party undertakes to provide in its territory for investments by investors of the other Contracting Party* ***fair and equitable treatment, excluding any unjustified or discriminatory measures which could interfere with the management, maintenance, enjoyment or liquidation of investments****.* [Translated from Russian language; emphasis added]

Likewise, in ABH Holdings v Ukraine, it is argued that the respondent failed to accord the investment "fair and equitable treatment" as is required under Article 3(1) and failed to provide the investment with "continuous protection and security" under Article 3(2) of the BLEU-Ukraine BIT (1996).[127]

Most of the BITs included in Table 1 above have a FET clause, with the notable exception of the treaty with Ukraine.

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[121] Smurfit Holdings B.V. v. Bolivarian Republic of Venezuela, (ICSID Case No. ARB/18/49), Award, 28 August 2024, at § 576 and 579.
[122] Katia Yannaca-Small, Fair and Equitable Treatment: Have Its Contours Fully Evolved?, in Katia Yannaca-Small (ed.) *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2nd edition Oxford University Press 2018), pp. 501-531, at p. 501.
[123] Ibid, at p. 502.
[124] Ioana Tudor, 'Actual Situations in Which the FET Standard Has Been Applied', in *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (Oxford University Press 2008) <https://doi.org/10.1093/acprof:oso/9780199235063.003.0006> accessed 8 November 2024.
[125] Yannaca-Small, note 122, at p. 504.
[126] Bohmer, note 40.
[127] ABH Holdings v. Ukraine, note 99, at § 106-107.

For example, Article 3(1) of the BIT with France (1989) stipulates that:

> *1. Each Contracting Party undertakes to ensure, in its territory and in its maritime zone,* ***fair and equitable treatment, in accordance with the principles of international law****, of investments made by investors of the other Contracting Party, excluding any unfair or discriminatory measure which might impede the management, maintenance, enjoyment or liquidation of such investments.* [Emphasis added]

In contrast, the BIT with Singapore (2010) simply mentions in Article 4(1) that:

> "*Each Contracting Party shall accord in its territory* ***fair and equitable treatment to investments of investors of the other Contracting Party***". [Emphasis added]

The case law interpreting the FET standard as including the respect of reasonable investment-backed expectations could be particularly important for ISDS claims involving economic sanctions.

It is plausible to argue that there could be no legitimate expectations derived from a presumption that EU sanctions could not apply to foreign individuals and entities under their ownership and control or cause them indirect economic harm when they target others. The Treaty on European Union (Maastricht Treaty) that came into effect in 1993 added the Common Foreign and Security Policy as the second pillar of the European Union and, as a result, included EU restrictive measures (sanctions) in the foreign policy toolbox of the Union. Since then, all EU Member States are obligated to implement and enforce EU sanctions once they are adopted.[128] Later, the right to impose economic sanctions was extended to also encompass a right to target non-state actors – "natural or legal persons and groups or non-State entities".[129] Against this background, it is a tenable legal position to argue that any foreign investor making an investment in any of the EU Member States since 1993 should be aware of the existing legal framework, which also encompasses EU restrictive measures. Needless to say, imposition of such restrictive measures, even if they do not directly target a foreign investor, might have a detrimental effect on investors or investments by constraining the ability to engage in certain business transactions with sanctioned individuals and legal entities.

Additional support for this line of argument could be found in the EU practice of employing restrictive measures. Indeed, the EU has implemented such measures on numerous occasions and for various reasons: e.g., to pursue objectives as diverse as democracy and human rights promotion, conflict management, non-proliferation, post-conflict restoration, and countering terrorism.[130] The great majority of the active EU sanctions regimes are country-specific restrictive measures: as of November 2024, 30 sanctions regimes out of 36 belong to this category.[131] This prevalence of the country-specific sanctions regimes showcases that it is typical for the EU to establish such regimes and then add names of the targeted individuals and legal entities that are either complicit in the sanctionable conduct or benefit from the regime/are associated with it. This is exactly the case with Mikhail Fridman who was added to the country-

[128] Treaty on European Union, OJ C 191, 29.07.1992, Title II, para. 81.
[129] Article 215 of the Treaty on the Functioning of the European Union (TFEU).
[130] Francesco Giumelli, Implementation of sanctions: European Union, in Masahiko Asada (ed.), *Economic Sanctions in International Law and Practice* (Routledge 2020).
[131] European Commission, EU sanctions tracker, https://data.europa.eu/apps/eusanctionstracker/.

specific sanctions regime targeting Russia for his connections with the current regime responsible for unprovoked military aggression.[132]

The argument that EU economic sanctions breach such elements of the FET standard as denial of justice and lack of the due process could be rebutted by the availability of a court review exercised by the Court of Justice of the European Union (CJEU).[133] A positive court decision in the case Fridman v Council (T-304/22) filed before the CJEU proves beyond any doubt that the justice was not denied to the claimant.[134] Furthermore, the availability of the de-listing procedure and the Council's regular reviews of the EU restrictive measures (every 6 or 12 months depending on the sanctions regime) also prove that justice is not denied to the sanctioned individuals and legal entities.[135]

In the recent investor-state arbitration awards, tribunals agreed that host states should be afforded some deference in determining public policies and taking regulatory measures. For example, the tribunal in Latam Hydro and CH Mamacocha v Peru considered that states "are to be afforded due deference in taking regulatory measures, in particular when such measures are taken to protect public interests" such as health and the environment.[136] Similarly, the award in Lee-Chin v Dominican Republic considers FET should not be interpreted "as a violation of both the State's general right to issue rules and regulations and its exceptional rights to act in emergency situations", or as an imposition of a frozen legal environment.[137] The tribunal in Horthel v Poland (Final) considered that FET requires governmental measures to be taken in furtherance of public policy objectives and a sovereign state deserves a degree of deference in its determinations of public policies and, is free to judge for itself what it considers useful or necessary for the public good. However, there should be a reasonable or logical nexus between the measures in question and the proclaimed public policy objectives. The idea is not to judge the actual efficiency of the measures, but to analyze whether the measures are taken in furtherance of the chosen policy objectives and are at least capable of achieving it.[138]

IV. Possible Defences Against ISDS Claims by Russian Investors

States should comply with obligations that have been undertaken in international agreements. However, international law also provides for different ways to avoid compliance. Viñuales distinguishes "Seven Ways of Escaping a Rule", which includes the delimitation of the scope of a norm or set of norms, specific carve-outs (e.g., exemptions or exclusions), flexibilities (e.g., temporal, reservations), derogations (e.g., suspending the effect of certain provisions in

[132] The relevant Council decision stated that Fridman "actively supported materially or financially and benefited from Russian decision-makers responsible for the annexation of Crimea and the destabilisation of Ukraine. He also supported actions or policies which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine." Council Decision (CFSP) 2022/337 of 28 February 2022 amending Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ 2022 L 59, p. 1.
[133] The legal basis for such reviews is provided in Article 24 TEU, and Articles 275 and 263 of the TFEU, which allow any natural or legal person to institute proceedings before the CJEU if certain preconditions are fulfilled.
[134] Judgment of the General Court, Fridman v Council, Case T-304/22, 10 April 2024.
[135] Council of the European Union, note 20.
[136] Latam Hydro LLC and CH Mamacocha S.R.L. v. Republic of Peru, (ICSID Case No. ARB/19/28), Award, 20 December 2023, at § 1032.
[137] Michael Anthony Lee-Chin v. Dominican Republic, (ICSID Case No. UNCT/18/3), Final Award, 06 October 2023, at § 442.
[138] Horthel Systems BV, Poland Gaming Holding BV and Tesa Beheer BV v. Republic of Poland, PCA Case No. 2014-31, Final Award, 16 February 2017, at § 267, 268 and 273.

case of public emergency), exceptions stricto sensu (e.g., general exceptions in GATT Art. XX), excuses (preclusion of responsibility, e.g., necessity defence, distress, and force majeure), and circumstances precluding wrongfulness (e.g., consent and self-defence).[139]

In the context of ISDS, several defences have been litigated that could be applicable to potential cases brought by Russian investors on the basis of the economic sanctions adopted against Russia: national security exceptions and customary international law defences such as countermeasures, necessity embodied in Article 25 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) adopted by the International Law Commission (ILC) in 2001, [140] as well as non-forcible self-defence and police powers doctrine.

1. National Security Exceptions Included in IIAs

Most IIAs currently in force do not include general exception clauses or exceptions for measures taken in the interest of national security. From 3324 IIAs concluded at the end of 2016, Sabanogullari identified only a small minority of 178 agreements with general exceptions provisions. Notwithstanding this, there is a discernable trend towards the growing inclusion of general and national security exceptions in recently concluded IIAs.[141]

Security exceptions in investment treaties have a more extended history than general exceptions, although exceptions for national security are still not frequent in the overall IIA landscape. The United States first began using security exceptions in investment treaties. The US practice of including security exceptions began already in its Friendship, Navigation, and Commerce (FCN) agreements.[142] As FCNs were the forerunners of BITs, it is not surprising that the first US BIT continued this practice. The 1982 Agreement with Panama includes a "not precluded" provision near the end of the treaty (Article X) that notes that the obligations contained in the treaty "shall not preclude" the signatory states from taking "*any and all measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace and security, or the production of its own essential security interests*". Similar wording is found in the other BITs the United States concluded with partners until 2001. The two subsequent BITs (with Uruguay in 2006 and Rwanda in 2012) contain a specific "Essential Security" exception in Article 18:

> *Nothing in this Treaty shall be construed:*
>
> *1. To require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or*

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[139] Jorge E Viñuales, Seven Ways of Escaping a Rule: Of Exceptions and Their Avatars in International Law in Lorand Bartels and Federica Paddeu (eds.), *Exceptions in International Law* (Oxford University Press 2020) <https://doi.org/10.1093/oso/9780198789321.003.0005> accessed 8 November 2024.

[140] ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries. Report of the International Law Commission, 53rd Session (A/56/10)' (2008) II Yearbook of the International Law Commission 31.

[141] Levent Sabanogullari, *General Exception Clauses in International Investment Law: The Recalibration of Investment Agreements via WTO-Based Flexibilities* (1st edition, Nomos Verlagsgesellschaft 2018) at p. 64.

[142] For example, Treaty of Amity, Economic Relations, and Consular Rights between the United States of America and Iran, 1955.

2. To preclude a Party from applying measures that it considers necessary for 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.

The NAFTA's Chapter 11, the first PTA with an investment chapter, does not have a chapter-specific exceptions clause, but the national security exception found in the Agreement's Article 2102 is fully applicable to Chapter 11:

1. Subject to Articles 607 (Energy – National Security Measures) and 1018 (Government Procurement Exceptions), nothing in this Agreement shall be construed:

(a) to require any Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests;

(b) to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests

(i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken 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 the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or

(c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

If we examine the investment treaties concluded by Russia, only the BITs with Hungary (1995), Sweden (1995) and Japan (1998) have national security exceptions.

The BIT with Hungary has a general national security exception. Article 2(3) provides that the agreement shall not preclude the application of either Contracting Party of "*measures, necessary* ***for the maintenance of defence, national security and public order****, protection of the environment, morality and public health*". [Emphasis added]

In contrast, in the BIT with Sweden, the national security exception is specific to the obligation to provide national treatment. Article 3(3) stipulates that each Contracting Party may have limited exceptions to national treatment in its legislation. Any new exception will not apply to investments made in its territory by investors of the other Contracting Party before the entry into force of such an exception, "*except when the exception is necessitated for* ***the purpose of the maintenance of defence****, national security and public order, protection of the environment, morality and public health*". [Emphasis added]

The BIT with Japan only deals with national security in its protocol and is also specific to national treatment. Number 5(1) establishes that notwithstanding the national treatment commitments of the agreement, each Contracting Party shall reserve the right to determine economic fields and areas of activities where activities of foreign investors shall be excluded

or restricted, in accordance with its applicable laws and regulations, "*in case it is really necessary for the reason of* ***national security***". [Emphasis added]

Another related question here would be whether a country can invoke a national security defence when adopting measures to defend another country (Ukraine) that is not party to the investment treaty potentially in dispute. We deal with the analysis of collective self-defence in section 2.1.4 below.

Few cases have explicitly discussed a plea under a specific national security exception in investment treaties. The first several investment disputes on exceptions clauses examined the security exception of the Argentina-United States BIT (1991) against the background of the Argentine financial crisis of 2001/2002. Two more recent decisions on the security exception concern India's decision to cancel an agreement over the lease of space segment capacity.

a) Cases Against Argentina

Although these cases concerned similar factual situations relating to Argentina's measures to cope with the crisis, the tribunals' findings differ significantly[143], including on the question of whether Article XI of the BIT was "self-judging" or not:

> **Article XI**
>
> *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.*

However, there appears to be a trend that a successful invocation of this defence precludes compensation. In CMS v Argentina,[144] the tribunal addressed whether the host could avoid liability by relying on the security exception of Article XI.[145] Although Article XI does not refer to economic difficulties specifically, it noted that nothing in either customary international law or the treaty would exclude major economic crises from its scope. It considered that "major economic emergencies" need to be included in "essential security interests" to ensure the treaty parties' interests are fully upheld.[146] The question of the self-judging nature of Article XI was next addressed. The tribunal compared its text with that of GATT Article XXI and concluded that Article XI's lack of explicit reference to the invoking state's determination of the need for the measure made it not self-judging, whereas GATT Article XXI was "clearly" self-judging.[147]

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[143] Kilian Wagner, 'Regulation by Exception – The Emergence of (General) Exception Clauses in International Investment Law?' (2024) 26 Austrian Review of International and European Law Online 77, at pp. 96–98.
[144] CMS Gas Transmission Company v. Republic of Argentina, (ICSID Case No. ARB/01/8), Award, 12 May 2005.
[145] The tribunal also examined the applicability of a plea of necessity under international law, but rejected this on the grounds of IIAs being agreements specifically aimed to regulate governmental conduct in times of crisis. Ibid, at §353-358.
[146] Ibid, at §359-360.
[147] Ibid, at §366-377.

In Enron v Argentina,[148] the tribunal determined that without a definition of "essential security interest" it would draw a parallel with the international law on state of necessity.[149] Since the object and purpose of the treaty are to be used in situations of economic difficulty and hardship, it would not make sense to allow for a broad "escape route" from it.[150] The tribunal determined that Article XI's security exception is not self-judging. Rather, judicial control must examine whether the treaty's requirements have been met and can thereby preclude wrongfulness. It then decided that the Argentine crisis did not meet the customary law requirements of Article 25 ARSIWA, concluding that necessity or emergency is not conducive to the preclusion of wrongfulness.[151] The tribunal in Sempra v Argentina[152] took the same restrictive approach as in Enron and concluded that Article XI is not self-judging and that judicial review is not limited to an examination of whether its invocation or the measures adopted were taken in good faith.[153]

The tribunal in LG&E v Argentina concluded that Article XI was not self-judging, but if it were, Argentina's determination would be subject to a good faith review anyway. Determining that a severe economic crisis can constitute an essential security interest for the purposes of Article XI, the tribunal held that Argentina had experienced sufficiently "serious public disorders" from December 2001 until April 2003 to meet the threshold of constituting a threat to an essential security interest. However, it decided that Argentina was not liable to the investor for the damages suffered during the crisis. Even though Article XI did not specify whether compensation is owed or not, the tribunal found that the investor must bear the costs of the effect of the host's actions for the period of emergency.[154]

The tribunal in Continental Casualty v Argentina held that Article XI derogated from the other obligations of the BIT and therefore did not need to be interpreted narrowly. This is in contrast to the state of necessity, which is strictly linked to the existence of an "exceptional" circumstance. It concluded that a severe economic crisis could be considered to affect an essential security interest. However, the award uses a lower standard of severity than other tribunals, referring to a "grave crisis". It states that the protection of essential security interests does not require the "total collapse" of the country or that a "catastrophic situation" has already occurred before the competent national authorities can invoke their protection. The fact that the host state must be allowed a margin of appreciation in assessing the situation in which it finds itself leads the tribunal to conclude that, even if Article XI is not explicitly self-judging, the host state must be allowed a margin of appreciation in determining whether essential security

[148] Enron Creditors Recovery Corporation (formerly Enron Corporation) and Ponderosa Assets, L.P. v. Argentine Republic, (ICSID Case No. ARB/01/3), Award, 22 May 2007.
[149] Ibid, at §333.
[150] Ibid, at §331-332. Likewise, to interpret that such a determination is self-judging would be definitely inconsistent with the object and purpose of the treaty, depriving it of any substantive meaning.
[151] Ibid, at §339.
[152] Sempra Energy International v. Argentine Republic, (ICSID Case No. ARB/02/16), Award, 28 September 2007.
[153] Ibid, at §373, 379.
[154] LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentine Republic, (ICSID Case No. ARB/02/1), Decision on Liability, 3 October 2006, at §205, 206, 207-214, 228, 264. The tribunal's words are interesting, writing that there is no language on liability in Article XI, but they are "nevertheless" finding that the investor needs to bear the costs.

interests are at stake. Thus, the host state could not be held liable for taking measures falling within the security exception.[155]

The award in El Paso v Argentina also held that Article XI is a threshold requirement, so that if it applies, the substantive obligations of the treaty do not. It held that a state of emergency may be economic in nature and that the host state is generally not responsible for the consequences of a state of emergency unless it has contributed significantly to the situation.[156]

Finally, the award in Mobil v Argentina also found that Article XI was not self-judging and distinguished the security exception from the necessity defence, noting that although they were different, they both aimed to ensure flexibility in the application of international obligations and that their practical result could be the same: to remove the responsibility of the state. The majority of the tribunal held that the claimants bear the burden of proving the host state's contribution to the alleged necessity (in this case, the economic crisis that began in late 2001).[157]

b) Cases Against India

Two decisions have interpreted India's exception clauses in the BITs with Mauritius and Germany, which contain national security exceptions.

The first was in CC/Devas v India, a case brought on the basis of the India-Mauritius BIT (1998), which includes Article 11(3), an exception provision that combines health and essential security:

> *The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases in pets and animals or plants.*

The tribunal held that such a provision is not self-judging, as it clearly does not contain any explicit language conferring such discretion on the state. Since the term "directed to" is used, rather than the more usual "necessity", the tribunal concluded that the state did not have to prove necessity in the sense that the measure taken was the only one available to it in the circumstances. It still has to show that the measure is related to its essential security interest. An investor wishing to challenge a state decision in this respect faces a heavy burden of proof, such as bad faith, lack of authority, or application to measures that do not relate to essential

[155] Continental Casualty Company v. Argentine Republic, (ICSID Case No. ARB/03/9), Award, 5 September 2008, at §164-167, 178-181, 231-266. The tribunal particularly noted the term "*its* essential security interest" (emphasis supplied) in underlining the margin of appreciation.
[156] El Paso Energy International Company v. Argentine Republic, (ICSID Case No. ARB/03/15), Award, 31 October 2011, at §553, 554, 611, 615, 618, and 624. Such a contribution must be sufficiently substantial and not merely incidental or peripheral.
[157] Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic, (ICSID Case No. ARB/04/16), Decision on Jurisdiction and Liability, 10 April 2013, at §1024, 1028, 1039, 1056, 1063 and 1106.

security interests. The award stated that if a state properly invokes a national security exception under an investment treaty, it cannot be held liable for damages.[158]

The second decision was issued in Deutsche Telekom v India, where the tribunal had to apply another health-and-essential security exceptions clause, Article 12 of the Germany-India BIT (1995), but without the "directed to" language:

> *Nothing in this Agreement shall prevent either Contracting Party from applying prohibitions or restrictions to the extent necessary for the protection of its essential security interests, or for the prevention of diseases and pests in animals or plants.*

The award found that the treaty provision on essential security interests was not a self-judging clause, in the absence of clear indications to the contrary in the text. However, the tribunal accepted a degree of deference to the host state's assessment of the existence of essential security interests, neither reviewing the determination de novo nor requiring proof that the measure was the only way to achieve the stated purpose. The notion of national security cannot be stretched beyond its natural meaning and should include the presence of interests that are security related (as opposed to other public interests) and essential (i.e., going to the core of state security).[159]

2. Other Defences under Customary International Law

1.1 International Law as Applicable Law for ISDS

Paradoxically, the lack of protection guaranteed by general international law to foreign investors and their investments prompted the development of the *lex specialis* regime established by the numerous IIAs; yet, general international law still plays a role in this regime, and not a marginal one.[160] From the early days of the ISDS, the tribunals acknowledged that the BITs do not establish "a self-contained closed legal system", but one "in which rules from other sources" – of international and domestic nature – are also integrated.[161] Echoing the WTO pronouncements on the impossibility of clinically isolating international obligations under WTO law from public international law, investment tribunals also acknowledged the unattainability of such an idea.[162]

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[158] CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v. Republic of India, PCA Case No. 2013-09, Award on Jurisdiction and Merits, 25 July 2016, at §219, 233, 235-245, 293-294.

[159] Deutsche Telekom v. India, PCA Case No. 2014-10, Interim Award, 13 December 2017, at §231, 235, 236 and 238.

[160] Christian Tams and Eleni Methymaki argue that despite the lack of the unequivocal nexus between the ICJ's rigid approach to foreign investors and protection of their rights based on the general international law and the subsequent evolution of international investment law, it can be presumed that the former had some impact on the development of the latter. Tams and Methymaki, note 98.

[161] Asian Agricultural Products Ltd v Republic of Sri Lanka, Award (27 June 1990), (ICSID Case No ARB/87/3), at § 21.

[162] To support this conclusion, Franck Latty and Marina Sim quote Phoenix Action v Czech Republic, Award (15 April 2009) ICSID Case No ARB/06/5, at § 78, and later conclude that: "international law is applicable law in all treaty-based investment disputes, as many major decisions have recognized". Franck Latty and Marina Sim, The Applicable Law Saga in Hélène Ruiz Fabri and Edoardo Stoppioni (eds.), *International Investment Law: An Analysis of the Major Decisions* (Hart Publishing 2022) pp. 291–309.

This approach also reflects the rules on establishing applicable law prescribed by the ICSID Convention and the relevant arbitration rules such as UNCITRAL and ICC.[163] In particular, according to the ICSID Convention, if the parties have not agreed on the rules of law governing the dispute, the tribunal "shall apply […] such rules of international law as may be applicable".[164] In the meantime, respective UNCITRAL and ICC arbitration rules authorise tribunals to apply "the law" ("rules of law"), "which it determines to be appropriate".[165]

The use of norms and principles of public international law in the context of ISDS has been explicitly endorsed by the BITs signed between the sanctioning states and the Russian Federation. For example, Article 9(6) of the Belgium - Luxembourg – Russian Federation BIT (1989): "*The Arbitration tribunal shall make decisions on the basis of the provisions of this Agreement, as well as generally recognised norms and principles of international law*."

ISDS tribunals have relied on the rules of general international law. The most commonly used are the rules regulating the international responsibility of states[166] and the general law of remedies.[167] Less frequent is the use of general international law, including ICJ's pronouncements, to define the scope and limits of the relevant standards of treatment prescribed by the IIAs.[168]

In light of the above, sanctioning states can rely upon the defences available under customary international law in order to justify their economic sanctions in case of their potential incompatibility with the standards of protection guaranteed under the IIAs. The limited existing literature on the subject also endorses this approach.[169] Writing in 2021, Professor Sabrina Robert-Cuendet observed that "the link between international investment law and unilateral sanctions has never been the subject of advanced study."[170] The majority of these studies focuses on analysing the potential inconsistencies between various types of economic sanctions and standards of treatment guaranteed to foreign investments and investors under the IIAs.[171]

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[163] In the ISDS, the general approach to defining the applicable law constitutes of a logic consequence of steps: first, the tribunal decides if parties have defined the applicable law (e.g., in IIA or investment contract or any subsequent agreement between them); if not, as the second step, tribunals consult the relevant arbitration rules. Ibid.

[164] Article 42(1), Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

[165] Article 35(1), UNCITRAL Arbitration Rules (2021); Article 21(1), ICC Rules of Arbitration (2021).

[166] Latty and Sim, note 162, at p. 296.

[167] "[…] general principles have become a point of reference for investment tribunals who seek to anchor their decisions in a general law of remedies and ascertain the rules applicable when awarding reparation." Tams and Methymaki, note 98, at p. 52.

[168] Christian Tams and Eleni Methymaki analyzed to what extent the ICJ's pronouncements on the scope of the MFN clauses and on the concept of arbitrariness impacted interpretations developed by the investment tribunals and concluded: " […] (i) ICJ pronouncements have no binding authority, but (ii) they are attractive anchor points for investment tribunals who consider that a reference to ICJ jurisprudence will lend credibility to their awards." Ibid, at p.51.

[169] Robert-Cuendet, note 31; Pierre-Emmanuel Dupont, The Arbitration of Disputes Related to Foreign Investments Affected by Unilateral Sanctions, in Ali Z. Marossi and Marisa R. Bassett (eds.) *Economic Sanctions under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences* (T.M.C. Asser Press 2015), pp. 197-217.

[170] Robert-Cuendet, note 31, at p. 204.

[171] Sabrina Robert-Cuendet distinguishes between economic sanctions impairing foreign investments at the pre-establishment phase and economic sanctions hindering foreign investments at the post-establishment phase; the legality of each respective type of economic sanctions is examined against the background of the existing international investment law obligations. Robert-Cuendet, note 31; Pierre-Emmanuel Dupont considers the

Some also touch upon the issue of possible justifications raised by the states imposing economic sanctions.[172]

In the following sections, we examine the possibility of justifying violations of the standards of investment protection that result from the imposition of unilateral economic sanctions enacted outside of the UN framework based on the following grounds: (i) permissible countermeasures; (ii) necessity under Article 25 ARSIWA; (iii) non-forcible self-defence; and (iv) the exercise of the state's police powers.

1.2 Economic Sanctions Against Russia as Permissible Countermeasures

In the growing literature on economic sanctions, the invocation of countermeasures as a legal justification for their use has been extensively discussed in the context of unilateral economic sanctions imposed in excess of the existing UN sanctions[173] or in the absence of any UNSC resolution (unilateral/autonomous economic sanctions).[174]

Countermeasures are defined as "unilateral measures adopted by a State in response to the breach of its rights by the wrongful act of another State that affect the rights of the target State and are aimed at inducing it to provide cessation or reparations to the injured State."[175] Countermeasures, being self-help measures that apply in a decentralised system of international law enforcement, are subject to several procedural as well as substantive preconditions,

following standards of investment protection as the relevant ones: expropriation, FET, full protection and security, prohibition of arbitrary and discriminatory measures. Dupont, note 169.

[172] Sabrina Robert-Cuendet identifies the following possible justifications: the police powers doctrine, the national security exception, the denial of benefits clause. Robert-Cuendet, note 31; Pierre-Emmanuel Dupont discusses defenses such as countermeasures, national security clauses and non-precluded measures, as well as arguments related to the primacy of the EU law when EU-authorized restrictive measures (sanctions) are taken. Dupont, note 169. Jessica Beess und Chrostin argues that while the supremacy clause enshrined in Article 103 of the UN Charter would most likely supersede contractual obligations under the IIAs, the possibility to justify unilateral economic sanctions is less clear. Beess und Chrostin, note 48.

[173] N. Jansen Calamita argued that "[t]he limited scope of the Security Council's sanctions resolutions does not mean that additional reactive measures against Iran by states acting individually or in concert are foreclosed", and contended that such restrictive measures can be justified as countermeasures or alternatively as third-party or general interest countermeasures. N. Jansen Calamita, 'Sanctions, Countermeasures, and the Iranian Nuclear Issue,' 42:5 Vanderbilt Journal of Transnational Law November 2009; for the opposite view, see Pierre-Emmanuel Dupont, 'Countermeasures and Collective Security: The Case of the EU Sanctions Against Iran,' 17:3 Journal of Conflict and Security Law 2012, pp. 301-336.

[174] Bogdanova, note 26; Tom Ruys, Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework in Larissa van den Herik (ed.) *Research Handbook on UN Sanctions and International Law* (Edward Elgar Publishing 2017); Alexandra Hofer, Unilateral sanctions as a challenge to the law of state responsibility in Charlotte Beaucillon (ed.) *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar 2021).

[175] Federica I Paddeu, 'Countermeasures,' *Max Planck Encyclopedia of Public International Law* <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1020> accessed 8 November 2024.

compliance with which renders them legal.[176] The ILC codifies these preconditions in Articles 49–51 of the ARSIWA,[177] while the procedural ones are listed in Article 52.[178]

The full panoply of legal rights, including the right to take permissible countermeasures, is reserved for a state that is considered an "injured state" in the meaning of the ARSIWA.[179] Article 42 of the ARSIWA stipulates three categories of states that fall under the definition of an "injured state":

(i) the obligation breached was owed to a state individually (e.g., obligations under the bilateral treaty);
(ii) the obligation breached was owed to a group of states, including that state, or the international community as a whole, and the breach is of such a character as to "specially affect" the state (e.g., pollution of the high seas in violation of the United Nations Convention on the Law of the Sea that had a particularly negative impact on a state);
(iii) the obligation breached was owed either to a group of states, including that state, or to the international community as a whole, and the breach "is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation" (e.g., this is the so-called "integral" or "interdependent" obligation such as the one embedded in the disarmament treaties, nuclear-free zone treaties).[180]

Many states that imposed economic sanctions against the Russian Federation can be designated as "specially affected" states.[181] Russia's illegal aggression against Ukraine violates not only the treaty-based prohibition on the use of force engrained in Article 2(4) of the UN Charter[182] but also violates the peremptory norm of international law (*jus cogens*) that prohibits aggression.[183] Thus, economic sanctions against the Russian Federation are taken in response

[176] Countermeasures belong to the circumstances precluding wrongfullness only if they are imposed in accordance with the rules prescribed by the ARSIWA; otherwise, they are illegal. Article 22, ARSIWA.
[177] Among the most important restrictions are: countermeasures can be taken only against a state that is responsible for an internationally wrongful act (Article 49), the objective of the countermeasures is to induce compliance with international obligations (Article 49), countermeasures shall be, as far as possible, temporary in nature (Article 49), there is a defined group of international obligations that cannot be affected by countermeasures (Article 50), and countermeasures must be proportional (Article 51).
[178] Procedural preconditions include: a duty to call upon the responsible state to fulfil its obligations, a duty to notify the responsible state of a decision to take countermeasures, a duty to suspend countermeasures either if the wrongful act has ceased or if there is a pending dispute before the tribunal.
[179] Commentary at p. 117 stipulates: "In order to take such steps, i.e. to invoke responsibility in the sense of the articles, some more specific entitlement is needed. In particular, for a State to invoke responsibility on its own account it should have a specific right to do so, e.g. a right of action specifically conferred by a treaty, or it must be considered an injured State."
[180] Article 42, ARSIWA and the relevant commentary.
[181] The ILC Commentary clarifies that "[f]or a State to be considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed." ILC Commentary, at p. 119.
[182] Article 2(4) of the UN Charter reads as follows: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."
[183] International Law Commission included the prohibition of aggression into the non-exhaustive list of peremptory norms of general international law (jus cogens). International Law Commission, 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens)',*Yearbook of the International Law Commission*, 2022, vol. II, Part Two.

to a prior violation of international law, the circumstance which bolsters the argument that these measures are countermeasures.

As a result of this grave breach of the cornerstone principle of international law, other states were confronted with serious negative externalities. For example, the EU Member States had to encounter millions of refugees fleeing the war in Ukraine, a move that dramatically increased pressure on the governmental agencies, social security systems as well as educational systems of all EU Member States.[184] Beyond the financial expenses related to providing assistance to Ukrainian refugees, the EU, as well as other states, provided macro-financial aid to fund the most critical functions of the Ukrainian state, such as paying pensions and providing financial assistance to the internally displaced persons (as of December 2023, estimated 3.7 million persons).[185] These are a few examples of how Russia's unprovoked military aggression has negatively impacted sanctioning states, thus making it tenable to argue that these states are "specially affected" in the meaning of Article 42 of the ARSIWA.

Thus, the right to take countermeasures is not an absolute one: the ARSIWA explicitly grants this right to an injured state, as defined in Article 42. The ARSIWA remains ambivalent regarding the right of non-injured states to take countermeasures: Article 54 does not explicitly recognise the right of non-injured states to take countermeasures, yet it does not expressly prohibit it either.[186] Left to be decided by "the further development of international law",[187] it became a subject matter of ongoing and contentious legal debate.[188]

In the past, some scholars were sceptical of the possibility of justifying the violation of a host state obligation by relying upon the right to impose lawful countermeasures.[189] Dupont, for example, cites tribunals' findings in the three ICSID arbitrations initiated by the US companies against the government of Mexico: Corn Products International, Inc. v Mexico,[190] Archer Daniels Midlands (ADM) Company and Tate & Lyle Ingredients Americas, Inc. v Mexico,[191] and Cargill, Inc. v Mexico.[192] In these arbitration proceedings, Mexico argued that its actions (the imposition of an additional tax on high fructose corn syrup explicitly directed at the US

[184] As of November 2023, over 4.2 million people from Ukraine benefit from the special status of temporary protection offered by the European Union. Council of the European Union. Refugees from Ukraine in the EU. 8 February 2024 <https://www.consilium.europa.eu/en/infographics/ukraine-refugees-eu/> accessed 8 November 2024.

[185] "Regarding bilateral financial assistance, since the Russian invasion, the EU, Member States and the European Financial Institutions, stepped up their support in a Team Europe approach, mobilising EUR 59 billion for Ukraine's overall economic, social and financial resilience in the form of emergency macro-financial assistance, budget support, emergency assistance, crisis response and humanitarian aid." European Commission, Commission Staff Working Document, Ukraine 2023 Report: Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2023 Communication on EU Enlargement Policy, 08 November 2023 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52023SC0699> accessed 8 November 2024.

[186] For similar views, see Calamita, note 173, at pp. 1428-1430.

[187] ILC Commentary, at p. 139.

[188] Martin Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge University Press 2017); Martin Dawidowicz, 'Third-party countermeasures: A progressive development of international law', 29 Questions of International Law 2016, pp. 3-15.

[189] Dupont, note 169; Dupont, note 173.

[190] Corn Products International, Inc. v. Mexico, (ICSID Case No. ARB(AF)/04/01 (NAFTA)), Decision on Responsibility, 15 January 2008.

[191] Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States, (ICSID Case No. ARB (AF)/04/5), Award, 21 November 2007.

[192] Cargill, Incorporated v. United Mexican States, (ICSID Case No. ARB(AF)/05/2), Award, 18 September 2009.

companies operating on its domestic market) constituted lawful countermeasures taken in response to the US actions adversely affecting its producers in the US market.[193]

Tribunals opposed permissible countermeasures as a justification, but based their findings on different grounds: in Corn Products v Mexico, the tribunal decided that "there is no room for a defence based upon the alleged wrongdoing not of the claimant but of its State of nationality, which is not a party to the proceedings" (focusing on the independent rights of investors under the treaty).[194] The tribunal in ADM v Mexico concluded that "investors do not enjoy individual or independent rights" and tax could not qualify as permissible countermeasures "because it was not adopted to induce US' compliance with the NAFTA; nor does the Tax meet the proportionality requirements under customary international law."[195] This divergence of the legal opinions demonstrates one downside of the investment arbitral tribunals: by the reason of their decentralised nature, they engage with the legal arguments in a casuistic manner, which does not always contribute to, or could even undermine, the formulation of a consistent body of jurisprudence.

The same legal reasoning cannot apply in the context of economic sanctions enacted against the Russian Federation for its unprovoked and aggressive war against Ukraine, brimming with the threats to use nuclear weapons.[196] In the abovementioned investor-state disputes, the challenged measures were directed at private companies; in other words, the primary goal of such measures was to cause economic harm to the US businesses operating in Mexico and, in such a way, retaliate against the US actions. In the case of sanctions against the Russian Federation, they are aimed at targeting the state responsible for an internationally wrongful act and pursuing the goal of inducing compliance with international law.[197] Put differently, any adverse effects suffered by the Russian investors, be it a loss of economic value of an investment or termination of some business operations, are a side-effect of the economic sanctions. In light of this, it is a tenable legal position to argue that the conclusions reached by the tribunals in the abovementioned ISDS disputes are not directly applicable to the case at hand.

In light of the above, states that imposed economic sanctions against the Russian Federation would increase their chances to justify these actions if they argue that the primary target of their actions was the state – the Russian Federation – and the harm that was caused to the private entities and their owners was the byproduct. In this regard, the ILC Commentary acknowledges that private operators might be negatively affected by the permissible countermeasures: "This does not mean that countermeasures may not incidentally affect the position of third States or

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[193] "Mexico maintained that it was entitled to take countermeasures because the United States had violated its obligations under the NAFTA (a) by denying access for Mexican sugar producers to the United States market and (b) by frustrating the operation of the Chapter XX disputes settlement mechanism." Corn Products International, Inc. v. Mexico, note 190, at §182.

[194] Ibid, at §161.

[195] ADM v. Mexico, note 191, at §180.

[196] Guy Faulconbridge and Lidia Kelly, Putin warns the West: Russia is ready for nuclear war, *Reuters*, 14 March 2024 <https://www.reuters.com/world/europe/putin-says-russia-ready-nuclear-war-not-everything-rushing-it-2024-03-13/> accessed 8 November 2024.

[197] For example, the EU sanctions (restrictive measures) against the Russian Federation were enacted based on the Council Decisions and Council Regulations that explicitly mention the reasons for these measures: 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; Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.

indeed other third parties. […] The same is true if, as a consequence of suspension of a trade agreement, trade with the responsible state is affected, and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided."[198]

Furthermore, it would be worthwhile to mention that economic sanctions are taken in order to induce the Russian Federation to comply with its international obligations[199] – specifically, terminate its illegal aggression and pay compensation as required by the ARSIWA[200] and confirmed by the UNGA Resolution.[201] In explaining why only certain persons and entities are targeted, states might rely upon the similar argumentation that the Council of the European Union uses in the disputes before the CJEU: claim that sanctioned persons (individuals, entities, etc.) are closely affiliated with the Russian regime and benefit from it.[202]

1.3 Economic Sanctions Against Russia as a Necessity under Article 25 ARSIWA

Another potential justification that could be invoked by the states that imposed economic sanctions against the Russian Federation for its illegal aggression and brutal conduct of the war is customary international law defence of necessity embodied in Article 25 of ARSIWA, which reads as follows:

> *1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:*
>
> *(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and*
>
> *(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.*
>
> *2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:*
>
> *(a) the international obligation in question excludes the possibility of invoking necessity; or*

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[198] ILC Commentary, at p. 130.

[199] For example, tribunal in Archer Daniels Midlands Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico analyzed in detail whether the alleged countermeasures (i.e., tax) was intended to induce compliance with international obligations of another state, at § 134-151.

[200] Article 31 ARSIWA reads as follows: "The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."

[201] General Assembly of the United Nations (UNGA). Resolution ES-11/5 Furtherance of remedy and reparation for aggression against Ukraine. UN Doc. A/RES/ES-11/ 5, adopted 14 November 2022.

[202] In one of the recent cases filed by the sanctioned Russian oligarch Roman Abramovich before the Court of Justice of the European Union, the court reiterated its approach and pronounced that: "The Council in fact discharges the burden of proof borne by it if it presents to the Courts of the European Union a sufficiently specific, precise and consistent body of evidence to establish that there is a sufficient link between the person or entity subject to a measure freezing funds and the regime or, in general, the situations being combated (see judgment of 20 July 2017, Badica and Kardiam v Council, T-619/15, EU:T:2017:532, paragraph 99 and the case-law cited; judgment of 26 October 2022, Ovsyannikov v Council, T-714/20, EU:T:2022:674, paragraphs 63 and 66)." General Court, Judgement in Case T-313/22, Roman Arkadyevich Abramovich v. Council of the European Union and European Commission, 20 December 2023, at § 77.

(b) the State has contributed to the situation of necessity.

The ILC Commentary expounds the meaning of necessity as "consist[ing] […] in a grave danger either to the essential interests of the state or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the state invoking necessity on the other."[203] More importantly, the ILC Commentary supports its acceptance of necessity as a circumstance precluding wrongfulness by citing historical examples where states breached their obligations of an economic nature (e.g., the property rights of foreigners were violated in the Anglo-Portuguese dispute of 1832) in order to ensure the protection of their essential interests, which are closely related to the functioning of the state.[204]

To justify its conduct under the plea of necessity, several prerequisites should be fulfilled: (i) challenged measure safeguards an "essential interest" of the state; (ii) the measure addresses a "grave and imminent peril" to that interest; (iii) this measure should be the only way of safeguarding that interest; (iv) no other essential interest of another state, or the international community should be seriously impaired as a result; and (v) the state that is the author of the measures must not have "contributed to the occurrence of the state of necessity".[205] Regarding the qualifier "essential", the ILC affirmed that its existence "depends on all the circumstances, and cannot be prejudged."[206]

a) Cases Where Article 25 ARSIWA is Analysed in Relation to a Security Exception

Some of the cases mentioned previously analysed the application of Article 25 of ARSIWA in connection to an existing security exception in the applicable BIT.

In CMS v Argentina, the respondent state applied for annulment of the tribunal's award. Relating to national security, the annulment committee looked at the difference between the security exception of Article XI BIT and the necessity defence under international law. The security exception, said the committee, is a "threshold requirement": if it applies, the substantive obligations under the treaty do not apply. By contrast, the necessity defence of Article 25 of the norms of state responsibility excuses wrongful acts, meaning that there must first be a wrongful act. Thus, Article XI and Article 25 are substantively different for the annulment committee. For the committee, an invocation of necessity (as outlined in Article 25 ARSIWA) requires, that the action taken "does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole".[207]

In Enron v Argentina, the tribunal held that the Argentine crisis did not meet the customary law requirements of Article 25 ARSIWA, concluding that necessity or emergency is not conducive to the preclusion of wrongfulness.[208] After annulment was requested, the ad hoc annulment

[203] ILC Commentary, at p. 80.
[204] ICL Commentary, at pp. 81-82.
[205] Article 25, ARSIWA; Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, pp. 40– 41, § 51–52.
[206] ILC Commentary, at p. 83.
[207] CMS v Argentina, (ICSID Case No ARB/01/8), Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, at §129-130.
[208] Ibid. §339.

committee held – as did the CMS committee – that the requirements under Article XI are not the same as those under customary international law as codified by Article 25 ARSIWA.[209]

The ad hoc annulment committee in Sempra v Argentina, like in CMS and Enron, sought to clarify the effect of the exception clause to untangle the improper relation made in the award between Article XI and necessity under customary international law, holding again that Article 25 ARSIWA and the security exception in the BIT are different, the former presupposing a finding of a wrongful act, the latter holding the state to have not acted wrongly in the first place.[210]

In El Paso v Argentina, the tribunal noted that in order to analyse the consequences of Article 25 ARSIWA, it should first analyse whether or not the measures constitute a violation of the standards of treatment of the BIT. Only if the answer is affirmative, the tribunal has to consider whether the illegality can be set aside on account of a state of necessity.[211]

As mentioned, in LG&E v Argentina, the tribunal stated that Argentina's experience of "serious public disorders" from December 2001 until April 2003 fulfilled the requirements of the necessity defence under international law.[212]

The award in Deutsche Telekom v India distinguished the BIT's Article 12 from the international law defence of the state of necessity, holding that the BIT provision has no additional conditions than are set forth in the text.[213]

In CC/Devas v Mauritius, the tribunal found that the specific commitment clause does not allow the claimant to claim the more restrictive standards imposed upon the state by Article 25 of ARSIWA concerning a necessity defence. Accordingly, the conditions attached to the necessity defence under customary international law were not applicable.[214]

b) Cases Where Article 25 ARSIWA is Analysed Independently

In several other ISDS cases, Article 25 of ARSIWA has been analysed in its own terms, independently of the existence of security exceptions (or the lack thereof).

The award in BG Group Plc. v Argentina states that Article 25 ARSIWA can only relate to international obligations between sovereign states and, therefore, would not deprive a private investor of the right to compensation under the BIT. However, the tribunal also held that even if the defence were to apply, it would be exceptional and subject to strict conditions.[215]

The tribunal in National Grid v Argentina held that the absence in the treaty of a provision equivalent to Article XI of the US-Argentina BIT does not limit the powers that the state would have as a sovereign under international law, except to the extent provided in the treaty. The

[209] Enron v Argentina, (ICSID Case No ARB/01/3), Decision on the Application for Annulment of the Argentine Republic, 30 July 2010, at §404-405.
[210] Sempra v Argentina, (ICSID Case No ARB/02/16), Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010, at §175.
[211] El Paso v. Argentina, Award, at §554.
[212] LG&E v Argentina, Decision on Liability, at §245.
[213] Deutsche Telekom v. India, Award, at §225-229.
[214] CC/Devas v India, Award on Jurisdiction, at §252-266.
[215] BG Group Plc. v. Republic of Argentina, UNCITRAL, Award, 24 December 2007, at §408-410.

award notes that, although tribunals have accepted necessity as an admissible defence, it has rarely been found to exist in practice because of its exceptional nature.[216]

In Suez and Interagua v Argentina, the tribunal held that the severity of a crisis, whatever its degree, is not sufficient to allow the plea of necessity to relieve a state of its treaty obligations. According to the arbitrators, ICJ jurisprudence has cautioned against the exceptional nature of the necessity defence, noting that customary international law, as reaffirmed by Article 25 ARSIWA, imposes additional strict conditions in view of the frequency of crises and emergencies faced by states from time to time.[217]

SAUR v Argentina, Decision on Jurisdiction and Liability, confirms that necessity is recognised in customary international law, but points out that for the state to rely on necessity, there must be a link between the necessity and the measure: the measure must have been dictated by necessity and to prevent harmful effects on the common good.[218] Similarly, in EDF and Others v Argentina, the tribunal held that necessity under customary international law must be interpreted strictly and objectively, and not as an easy escape hatch for host states seeking to avoid treaty obligations.[219]

Some tribunals have taken a very strict approach to considering that the requirements of customary international law have been met. In Impregilo v Argentina (I), the award noted that the customary international law standard is, by definition, stringent and difficult to satisfy.[220] In the same vein, in South American Silver v Bolivia, the tribunal held that the plea of necessity is an exceptional one, arising where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the country invoking necessity on the other; it will only rarely be available to excuse the non-performance of an obligation. The tribunal notes that an essential condition for the application of necessity is the existence of an act by the host country which constitutes an internationally wrongful act and that such an act is the only means available to the country to protect an essential interest against a grave and imminent danger.[221] Finally, in von Pezold and Others v Zimbabwe, the tribunal held that a domestic declaration of a state of emergency can only serve as evidence of a state of emergency that may (or may not) give rise to a necessity defence under international law.[222]

Overall, the analysis of the existent ISDS case law, in which respondent states attempted to justify their actions by invoking the customary international law defence of necessity, demonstrates that the investment tribunals applied the requirements prescribed by the ARSIWA very stringently.[223] In practice, reliance on this defence is likely to be meaningless. As we saw

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[216] National Grid P.L.C. v. Argentina Republic, UNCITRAL, Award, 3 November 2008, at §254-257.
[217] Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentine Republic, ICSID Case No. ARB/03/17, Decision on Liability, 30 July 2010, at §236.
[218] SAUR International v. Argentine Republic, (ICSID Case No. ARB/04/4), Decision on Jurisdiction and Liability, 6 June 2012, at §458-460.
[219] EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic, (ICSID Case No. ARB/03/23), Award, 11 June 2012, at §1171.
[220] Impregilo S.p.A. v. Argentine Republic I, (ICSID Case No. ARB/07/17), Award, 21 June 2011, at §344.
[221] South American Silver Limited v. Plurinational State of Bolivia, PCA Case No. 2013-15, Award, 30 August 2018, at §613-616.
[222] Bernhard von Pezold and others v. Republic of Zimbabwe, (ICSID Case No. ARB/10/15), Award, 28 July 2015, at §624.
[223] For a similar conclusion, see Federica Paddeu and Michael Waibel, 'Necessity 20 Years On: The Limits of Article 25' 37:1-2 ICSID Review 2022, pp. 160–191.

in the Argentine cases, even when there was an actual threat to the existence of the respondent state (riots/fatalities, etc.), that was not enough to rely on the state of necessity defence.

1.4 Economic Sanctions Against Russia as Non-Forcible Collective Self-Defence

The right of individual or collective self-defence is a well-established right that is not only grafted onto the UN Charter[224] but has also gained the status of customary international law.[225] Building upon this cornerstone principle of international law, Article 21 of the ARSIWA precludes the state's international responsibility if a measure is taken in self-defence. The relevant provision reads as follows: "The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations."

However, the right of individual or collective self-defence is not an absolute one. It can be relied upon only "if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security".[226] In Military and Paramilitary Activities in and against Nicaragua, the ICJ defined the specific conditions that apply in the instances of collective self-defence. These conditions are as follows: the existence of an armed attack,[227] the injured state must declare itself as a victim of such armed attack,[228] and the state victim of an armed attack must request assistance for the right to collective self-defence to be permitted.[229] Additionally, the court pronounced that the conditions of necessity and proportionality must be met for the exercise of the right to collective self-defence.[230]

There is, obviously, no doubt that in the case of Russian aggression, such an armed attack occurred,[231] and the UNSC was prevented from fulfilling its primary function – to maintain international peace and security – by the veto power of the UNSC permanent member, who is the perpetrator of the attack.[232] Furthermore, immediately after the invasion started, Ukraine officially declared itself to be a victim of an armed attack and asked for assistance from the other states to repel this illegal aggression.[233] Hence, the formal prerequisites for the right of collective self-defence to apply were fulfilled.

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[224] Article 51, UN Charter.
[225] The ICJ declared that "the States represented in the General Assembly regard the exception to the prohibition of force constituted by the right of individual or collective self-defence as already a matter of customary international law." International Court of Justice, *Military and Parliamentary Activities in and against Nicaragua (Nicaragua v USA)*, Judgment, ICJ Rep 1986, at § 193, at p. 103.
[226] Article 51, UN Charter.
[227] International Court of Justice, note 225, at § 195.
[228] Ibid.
[229] Ibid, at § 199.
[230] Ibid, at § 194.
[231] "[…] the invasion of Russia satisfies the gravity requirement, in terms of scale and effect, which distinguishes an armed attack from a ('mere') use of force." André de Hoogh, The Elephant in the Room: Invoking and Exercising the Right of Collective Self-Defence in Support of Ukraine against Russian Aggression, *OpinioJuris*, 7 March 2022 <http://opiniojuris.org/2022/03/07/the-elephant-in-the-room-invoking-and-exercising-the-right-of-collective-self-defence-in-support-of-ukraine-against-russian-aggression/> accessed 8 November 2024.
[232] Pavel Doubek, War in Ukraine: Time for a Collective Self-Defense? *OpinioJuris*, 29 March 2022 <http://opiniojuris.org/2022/03/29/war-in-ukraine-time-for-a-collective-self-defense/> accessed on 8 November 2024.
[233] For example, Ukrainian President Volodymyr Zelenskiy called the NATO to establish a no-fly zone over Ukraine. Simon Lewis and Ingrid Melander, NATO rejects Ukraine no-fly zone, unhappy Zelenskiy says this

The next relevant question to be asked: what are the measures that are allowed as a result of the invocation of the right to collective self-defence? Traditionally, self-defence permits forcible measures, i.e., as a matter of law, right to self-defence functions as an exception to the prohibition of the use of force ("self-defence as counter-force").[234] Yet, it remains disputable if the right of individual or collective self-defence also encompasses non-forcible measures such as unilateral economic sanctions.[235]

Buchan, for example, presents a comprehensive legal analysis of the arguments that support the view that the right of individual or collective self-defence allows forcible as well as non-forcible responses.[236] The crux of his argument is that "the right of self-defence can be relied on to justify all measures necessary to ward off an armed attack."[237] Buchan holds that: (i) the right of self-defence was part of the duty of self-preservation and, in such a way, predates the principle of the non-use of force; (ii) the text of Article 51 of the UN Charter does not explicitly exclude non-forcible measures, and thus, the inclusion of non-forcible measures is supported by the interpretative maxim *in eo quod plus sit semper inest et minus* ('in the greater is always included the lesser'); (iii) structure of the UN Charter indicates that "[r]ather than being an exception to Article 2(4), […] Article 51 is an exception to the UN's collective security system"; (iv) state practice confirms the view that Article 51 encompasses the use of non-forcible and forcible measures to counter an armed attack.[238]

Other relevant questions to consider when discussing the ambit of the right of individual or collective self-defence are: What are the other instruments, short of the use of force, that states could potentially use in the situation of an aggressive war in Ukraine? If the use of economic sanctions is completely ruled out in such a situation, would it not imply that individual states that lack a military capacity to oppose a more powerful aggressor are, in fact, deprived of their right to individual and collective self-defence?

1.5 Economic Sanctions Against Russia as an Exercise of the State's Police Powers

The police powers doctrine asserts that a state has an inherent right to regulate in protection of public interest. To put it differently, when a state enacts bona fide, non-discriminatory, and proportionate regulations following due process, it is not acting wrongfully.[239] As Titi posits police powers encompass "sovereign powers relating to public policy".[240] We argue that public policy could be interpreted broadly to include foreign policy and its conventional instruments such as economic sanctions.

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means more bombing, *Reuters*, 4 March 2022 <https://www.reuters.com/business/aerospace-defense/nato-meets-ukraine-calls-no-fly-zone-hinder-russia-2022-03-04/> accessed 8 November 2024.

[234] "[…] the right of self-defence is presented as an exception to the principle of non-use of force." Russell Buchan, 'Non-forcible measures and the law of self-defence', 72:1 International and Comparative Quarterly Law Review, December 2022, pp. 1-33.

[235] Ibid.

[236] Ibid.

[237] Ibid, at p. 5.

[238] Ibid.

[239] Alice Osman, Police Powers Doctrine, *Jus Mundi*, 30 July 2024, https://jusmundi.com/en/document/publication/en-police-powers-doctrine#:~:text=The%20police%20powers%20doctrine%20provides,in%20accordance%20with%20due%20process.

[240] Catharine Titi, Police Powers Doctrine and International Investment Law, in Filippo Fontanelli, Andrea Gattini and Attila Tanzi (eds.) *General Principles of Law and International Investment Arbitration* (Brill 2018), pp. 323-343, at p. 324.

Police powers doctrine is recognized in customary international law, practice of international courts and tribunals and domestic legislation of states.[241] In the context of investor-state arbitration, this doctrine is predominantly used to distinguish between compensable and non-compensable regulatory measures.[242] In this paper, we discuss the police powers doctrine as a crucial factor that should be considered in order to decide if economic sanctions constitute an instance of expropriation. Furthermore, recognition of the state's right to regulate the conduct of the entities under its jurisdiction, e.g., order to freeze assets of sanctioned legal entities, as a legitimate exercise of police powers doctrine might have a bearing on a tribunal's decision regarding the violation of other standards of treatment.

In the recent case Certain Iranian Assets, the ICJ held that: "It has long been recognized in international law that the bona fide non-discriminatory exercise of certain regulatory powers by the government aimed at the protection of legitimate public welfare is not deemed expropriatory or compensable [citations ommitted]. Governmental powers in this respect, however, are not unlimited."[243] However, in the next paragraph, the court qualified the application of the police powers doctrine by positing the following: "[r]easonableness is one of the considerations that limit the exercise of the governmental powers".[244]

The application of the police powers doctrine has been discussed by numerous arbitral tribunals. In Methanex v USA, the tribunal held that "as a matter of general international law, a non-discriminatory regulation for a public purpose […] is not deemed expropriatory and compensable".[245] In Saluka v Czech Republic, the tribunal stated that "the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary international law today. There is ample case law in support of this proposition."[246] In a similar vein, in Tecmed v Mexico, the tribunal reasoned that: "[t]he principle that the State's exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever is undisputable."[247] At the same time, the tribunal cautioned against an overly broad application of this principle.[248]

In Total v Argentina, the tribunal recalled the requirements that regulatory measures taken in pursuance of police powers should meet: regulatory measures "when judged as legitimate, proportionate, reasonable and non-discriminatory, do not give rise to compensation in favour of foreign investors."[249] As the Saluka tribunal pointed out it is the duty of the tribunal to rule on whether regulatory measures meet those requirements: "[i]t thus inevitably falls to the adjudicator to determine whether particular conduct by a state 'crosses the line' that separates valid regulatory activity from expropriation."[250]

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[241] Ibid.
[242] Osman, note 239.
[243] International Court of Justice, note 97, at § 185.
[244] Ibid, at § 186.
[245] Methanex v. United States of America, Final Award (Aug. 3, 2005), Pt, IV, ch., at § 4.
[246] Saluka Investments B.V. v. Czech Republic, UNCITRAL, Partial Award (Mar. 17, 2006), at § 262.
[247] Técnicas Medioambientales Tecmed S.A. v. Mexico, (ICSID Case No. ARB (AF)/00/2), Award, 29 May 2003, at § 119.
[248] Titi, note 240.
[249] Total S.A. v. Argentine Republic, (ICSID Case No. ARB/ 04/ 1), Decision on Liability (Dec. 27, 2010), at § 197.
[250] Saluka Investments BV v Czech Republic, note 246, at § 263-264.

Below we provide some thoughts on how sanctioning states might argue that it would be excessive to interpret the use of such conventional foreign policy instrument as economic sanctions as an activity that 'crosses the line'.

First and foremost, the right to regulate in the protection of public interest could be interpreted as including the right to permit or prohibit business relations with the individuals or legal entities supporting the regime that destabilizes international and regional peace and security. It goes without a doubt that for many sanctioning states, especially those bordering Russia, the notion of public interest also covers national security in its traditional narrow meaning, i.e., security of the state borders and a lack of threat to one's statehood. Economic sanctions when imposed to reduce the capacity of the belligerent state to attack your territory should fall under the right to regulate in the protection of public interest. Second, the fact that many states globally – including Russia and China – have domestic laws allowing the imposition of both collective and unilateral economic sanctions confirms the plausibility of a claim that the use of economic sanctions falls under the sovereign powers relating to public policy and is covered by the police powers doctrine.

Since the exercise of police powers should be reasonable, in good faith and non-discriminatory, several observations are worthwhile. First, economic sanctions targeting Russian nationals and legal entities were taken in response to an unprovoked military aggression and the subsequent escalation of the military conflict. This demonstrates that the states enacting such measures acted in good faith and these measures are not disguised economic protectionism or nationality-based discrimination. Second, the historical record attests that in situations of military conflicts states – both engaged in such conflicts and not engaged – have been habitually resorting to the measures of economic coercion, i.e., economic sanctions.[251] Thus, this course of action is not unreasonable. To further buttress this view, it should be highlighted that Russia retaliated against economic sanctions, and some of these actions have already triggered investor-state disputes against it.[252]

V. Conclusion

The Russian full-scale invasion of Ukraine in February 2022 triggered a wave of diverse economic measures, including sectoral sanctions and restrictions against hundreds of Russian companies and thousands of Russian citizens.

This paper has explored the possibility to challenge these sanctions through investor-state arbitration. Economic sanctions, particularly asset freezes, may be argued to constitute indirect expropriation if they result in substantial deprivation of the investment's value, control, or management. The key factors include the duration of the sanctions, the economic impact, and whether the measures are temporary or permanent. Confiscation of assets, as seen in some cases, could be viewed as direct expropriation if it involves a formal transfer of ownership without adequate compensation. This is particularly relevant in instances where assets of sanctioned individuals or entities are seized.

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[251] In response to the Soviet Union's invasion of Afghanistan, the United States imposed a grain embargo. Another oft-quoted example are the restrictive measures enacted by the United Kingdom and other members of the European Economic Community in the midst of the Falklands crisis.

[252] Lisa Bohmer, Germany's Wintershall lodges duo of treaty arbitrations against Russia, *IAReporter*, 1 October 2024, https://www.iareporter.com/articles/germanys-wintershall-lodges-duo-of-treaty-arbitrations-against-russia/, accessed on November 13, 2024.

Sanctions may breach the FET standard if they are deemed arbitrary, discriminatory, or lacking in due process. The inclusion of entities on sanctions lists without clear justification or the opportunity for review could be seen as violating this standard. The FET standard also encompasses the protection of legitimate expectations. Investors might argue that they had a reasonable expectation that their investments would not be subject to such severe regulatory changes.

Freezing assets and restricting payments can violate treaty provisions that guarantee the free transfer of funds related to investments. This includes the transfer of returns, proceeds from liquidation, and other financial transactions necessary for the maintenance and operation of investments.

In a potential scenario where Russian investors use investor-state arbitration to challenge the legality of economic sanctions imposed by sanctioning host states, the investment treaties those countries have concluded with the Russian Federation (or the USSR) provide limited justifications. In fact, most of the IIAs to which the Russian Federation is a party do not contain public order or national security exceptions. If we examine those concluded with sanctioning states, only the Russian BITs with Hungary (1995), Sweden (1995) and Japan (1998) have national security exceptions.

Given this, respondents might invoke customary international law defences such as countermeasures or necessity embodied in Article 25 ARSIWA, which have allowed some states, although not many, to successfully defend their government policies before. We believe that at least three avenues of justification are available to these sanctioning states: the first option is qualification of economic sanctions as permissible countermeasures, while the second is qualification of economic sanctions as non-forcible self-defence. Additionally, the police powers doctrine provides a potential avenue for justifying sanctions as legitimate regulatory measures aimed at protecting public policy, including national security.

As explained, all these justifications could have different degrees of success. Their final test will be if respondent states use them as defences in the ongoing and future ISDS cases based on economic sanctions in response to the Russian aggression against Ukraine.