Suing For Peace:

International Investment Law and the Regulation of Sanctions

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Glossary of Acronyms

BIT	Bilateral Investment Treaty
CPTPP	Comprehensive and Progressive Trans-Pacific Partnership Agreement
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
ILC	International Law Commission
MFN	Most Favoured Nation
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

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Introduction

There is a problem in international investment law. For any given sanction, it is uncertain how many investors might be adversely affected, how many investors have corresponding jurisdiction to raise arbitral claims, how many investment obligations have been breached, and whether any defences might be available. Without certainty, international investment law cannot effectively achieve its aims: promoting foreign direct investment (FDI), depoliticising investment disputes, and providing a fair standard of treatment. This problem affects states, sanctions-targets, and any other enterprise that does business with a sanctions-target.

It matters because most international investment agreements (IIAs) permit investors to force state-parties into arbitration and seek damages.[1] For this dissertation, it is sufficient to note that states generally comply with the resulting arbitral decisions as a matter of course.[2] Whereas states can afford to ignore their obligations under environmental or human rights treaties at relatively low cost, the same is not true of their obligations under IIAs. Surprisingly, the problem has received little attention to date. This is likely to change. To understand why, it is useful to place the problem in its wider political and historic context.

There is a longstanding tension between economic openness and security competition. Economic openness is a function of state cooperation to reduce barriers to trade and investment. Security competition generally involves heightened militarisation in response to mutual fears around the use of force. It hinders cooperation because it drives states to mistrust one another. States must choose between mutual gains through trade and investment and relative gains through economic warfare. Disagreements over human rights exacerbate this tension. How can states effectively cooperate to reduce barriers to trade and investment while they compete for security and disagree over human rights?

[1] Brazilian IIAs instead provide for inter-state arbitration and generally emphasise dispute prevention over dispute resolution. See Michelle Sanchez Badin and Fabio Morosini *Navigating Between Resistance and Conformity With the International Investment Regime* (Cambridge University Press, 2017) at 232-234.

[2] There are two primary enforcement mechanisms: the ICSID Convention and the New York Convention. The ICSID Convention directs state-parties' national courts to recognise and enforce ICSID awards and to apply the arbitral rules contained in the ICSID Convention. The New York Convention directs state-parties to implement legislation that provides for the recognition and enforcement of arbitral awards through the relevant national courts. See generally Alan Alexandroff and Ian Laird "Compliance and Enforcement" in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (ed) *The Oxford Handbook of International Investment Law* (Oxford University Press, New York, 2008) 1171.

Throughout the 1990s, many assumed that this tension had been definitively resolved in favour of economic openness.[3] The Soviet Union had dissolved, the Cold War had ended, and even China had acceded to the World Trade Organisation (WTO).[4] Multilateral frameworks to promote trade and investment were ascendant. Francis Fukuyama famously argued that history itself had ended.[5] The "Washington Consensus" emerged.[6] Efficiency gains through trade and investment would guarantee global prosperity. Economic integration would bind states together politically.[7] These political ties would, in turn, promote world peace and the rights of the individual, independent of their home-state.

This is not the world of 2022. Security competition is on the rise. Relations between permanent members of the Security Council are deteriorating. States increasingly rely on sanctions to correct, punish, and deter proscribed conduct, both within UN frameworks and beyond them.[8] Potential adverse effects on foreign investors include abruptly diminished cashflow, loss of control over their investments, and even wholesale expropriation. As economic openness continues to give way to disagreements over security and human rights, foreign investors increasingly risk getting caught in the crosshairs.

The primary instrument of state cooperation regarding investment is international investment law. It regulates states' treatment of foreign investors. It resides primarily in IIAs.[9] IIAs require the parties to comply with various obligations concerning the treatment of investments made by investors from other parties. The United Nations Conference on Trade and Development (UNCTAD) reports that 2,555 IIAs are in force.[10] Of these, 87% are bilateral investment treaties (BITs) signed between just two states and 13% are free trade agreements (FTAs) that include investment chapters.[11]

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[3] Francis Fukuyama *The End of History and The Last Man* (Penguin, London, 1992).
[4] Harry Harding "Has US China Policy Failed" (2015) 38 TWQ 95 at 101-103.
[5] Fukuyama, above n 3.
[6] Jeffrey Nugent "Re-examination of Development Policies and Strategies: Some Political Economy Lessons" in Akira Kohsaka (ed) *New Development Strategies Beyond the Washington Consensus* (Palgrave McMillan, London, 2004) 39 at 41-42.
[7] Harding, above n 4, at 101-103.
[8] Jean-Marc Thouvenin "History of implementation of sanctions" in Masahiko Asada (ed) *Economic Sanctions in International Law and Practice* (Routledge, 2020) 83 at 88-89.
[9] Andrew Newcombe and Lluís Paradell *Law and Practice of Investment Treaties* (Kluwer Law International, The Netherlands, 2009) at 1.
[10] UNCTAD "International Investment Agreements Navigator" (4 October 2022) Investment Policy Hub <https://investmentpolicy.unctad.org/international-investment-agreements>.
[11] Like the above figures, this dissertation does not include contracts between individual investors and states when it refers to IIAs. Whether such contracts should be treated as creating obligations under international law (i.e., internationalised) is neither uncontroversial nor directly relevant to this dissertation. See generally Jean Ho

Other sources of international investment law include the national laws of the state in whose territory a given investment is made (hereafter referred to as the "host-state") and general rules and principles of public international law (including customary law). Host-states' national laws are relevant because they define the contractual and proprietary interests that make up a given investment.[12] General rules and principles of public international law are relevant both because IIAs are subject to them and because they apply to states whether or not they have entered into any IIAs. A customary law exists if it is supported by state practice (states' widespread compliance with the rule) and opinio juris (states' perception that they are obliged to comply).[13]

This dissertation analyses how international investment law should respond to sanctions in situations where they cause losses to foreign investors. It focusses primarily on IIAs. However, many relevant defences reside in customary law instead.

The dissertation comprises four chapters. Chapter 1 provides further geopolitical context on sanctions. Chapter 2 elaborates on the importance of two competing objectives that arise in sanctions-contexts: balancing IIAs' achievement of their aims with states' latitude to prioritise national security and human rights. Chapter 3 analyses how IIAs currently respond to sanctions. My key finding is that states are probably liable to a far wider range of arbitral claims than either states or investors currently realise. Chapter 4 argues that IIA reform should focus on responding to sanctions with greater certainty and lenience. This will help IIAs balance the competing objectives identified in Chapter 2. I then advance four proposals to achieve this balancing of objectives. First, IIAs should not rely on denial of benefits clauses to regulate treaty-shopping by investors from sanctioned states. Second, IIAs should not rely on security exceptions to regulate sanctions. Third, IIAs should expressly subordinate IIA obligations to competing obligations under listed security and human rights treaties. Fourth, IIAs should clarify that the customary law of countermeasures applies to investor-state disputes.

"Internationalisation and State contracts: are State contracts the future or the past?" in Chin Leng Lim (ed) *Alternative Visions of the International Law on Foreign Investment* (Cambridge University Press, 2016) 377.

[12] Newcombe and Paradell, above n 9, at 86.

[13] Karen Openshaw and Wade Mansell *International Law: A Critical Introduction* (2nd ed, Hart Publishing, Oxford, 2019) at 30-33.

A Note on International Investment Law

Two unique features of international investment law have shaped this dissertation's arguments.

The first is that international investment law is not a consistent and universal body of laws. There are approximately 2,555 different IIAs. This makes definitively answering whether sanctions are consistent with international investment law impossible. However, most IIAs are similar. They generally define the same key terms, impose similar obligations, and carve out similar exceptions. Identifying patterns across IIAs supports judicious generalisations about their content and permits an abstract analysis of how they generally respond to sanctions. The UNCTAD's mapping tool has been invaluable in this regard. At the time of writing, it has identified relevant patterns across 1,859 IIAs that are currently in force.[14]

The second is that IIAs' interpretation is not bound by precedents. The Vienna Convention on the Law of Treaties (VCLT) governs IIAs' interpretation because it reflects customary law. It establishes that IIAs are to be interpreted in good faith according to the ordinary meaning of their terms, having regard to context, object, and purpose.[15] Recourse may only be had to supplementary means of interpretation, like past arbitral decisions, to confirm the interpretation that follows or resolve ambiguities in that interpretation.[16] The ensuing contradictions between past decisions compound the difficulty of predicting how tribunals will respond to sanctions. However, tribunals tend to refer to past decisions as a matter of course. Emphasising patterns in widely cited decisions permits probabilistic claims about future arbitral decisions.

[14] UNCTAD "International Investment Agreements Navigator" (4 October 2022) Investment Policy Hub <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping>.
[15] Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 31.
[16] Vienna Convention on the Law of Treaties, above n 15, art 32.

Chapter 1 Geopolitical Context

My introduction argued that investors are increasingly likely to be affected by sanctions. This chapter explains and justifies that position more fully. In particular, I explain what sanctions are, discuss the differences between autonomous sanctions and UN sanctions, and identify recent trends in states' sanctions policies.

Sanctions defy straightforward definition. Strictly speaking, they are coercive economic measures taken in response to violation(s) of international law in execution of a decision of a competent social organ (i.e., the UN).[17] However, when states and groups of states impose similar restrictions outside UN frameworks, they nonetheless describe these restrictions as "autonomous sanctions".[18] Further, the Security Council frequently refers to its enforcement measures as sanctions even in response to lawful acts.[19] This dissertation discusses sanctions in a broader sense, as including any coercive economic measure taken against a target.

Sanctions vary in breadth and severity. The target can be a state or an individual. Embargoes prohibit dealings with the target, asset freezes prevent the target from accessing its assets (including its bank accounts), and travel bans restrict the target's movement across borders. Embargoes can apply to all dealings with the target, or only to specific assets and services. In every case, sanctions are designed to impose coercive economic pressure. Treaties generally emphasise the correction of a proscribed activity. Key examples of proscribed conduct include armed attacks, human rights violations, terrorism, and trade in narcotics. However, sanctions simultaneously punish and deter. These latter aims are not legal justifications of sanctions, but they remain politically important.

Distinctions must be drawn between autonomous sanctions and UN sanctions because autonomous sanctions are significantly more likely to breach international investment law.[20]

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[17] Georges Abi-Saab "The Concept of Sanctions in International Law" in Vera Gowlland-Debbas (ed) *United Nations Sanctions And International Law* (2001) 1 at 32-33 and 39.
[18] Masahiko Asada "Definition and legal justification of sanctions" in Masahiko Asada (ed) *Economic Sanctions in International Law and Practice* (Routledge, 2020) 1 at 4.
[19] Ibid at 4.
[20] See pages 34-37 of this dissertation.

Autonomous sanctions are coercive economic measures taken by states or groups of states outside UN frameworks. These might be required under security treaties and human rights treaties. For example, parties to the North Atlantic Treaty must "take such action as [they deem] necessary … to restore and maintain the security of the North Atlantic area [in response to an armed attack against one or more state-parties]".[21] Parties to the Convention on the Prevention and Punishment of Genocide must "undertake to prevent and to punish [genocide]".[22] Meeting such obligations often requires sanctions, amongst other things, even though the relevant treaties never directly refer to sanctions.

UN sanctions are coercive economic measures taken by states in execution of a Security Council decision. No other organ of the UN has the power to implement or recommend sanctions.[23] Chapter VII of the UN Charter empowers the Security Council to decide upon sanctions and to call upon states to apply them.[24] Many states have argued that this power should be conditional on the exhaustion of Chapter VI's more peaceful mechanisms. However, neither the General Assembly nor the Security Council has adopted a resolution making it so.[25]

The Security Council's power is triggered by its determination that there is a threat to the peace, a breach thereof, or an act of aggression.[26] "Acts of aggression" is a relatively narrow concept. It necessarily entails a breach of international law on someone's part. By contrast, threats to, and breaches of, the peace are conceptually broad and malleable. Peace requires not only the absence of armed conflict but also the conditions that support states' political, economic, and social development.[27] Breaches of international law are not necessarily required. The Security Council has imposed sanctions in response to internal armed conflicts, proliferations of arms, human rights breaches, attempts to undermine democracy, and terrorist activity.[28]

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[21] North Atlantic Treaty 199 UNTS 67 (opened for signature 19 June 1951, entered into force 23 August 1953), art 5.
[22] Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277 (opened for signature 9 December 1948, entered into force 12 January 1951), art 1.
[23] Philippe Achilleas "United Nations and Sanctions" in Masahiko Asada (ed) *Economic Sanctions in International Law and Practice* (Routledge, 2020) 24 at 26.
[24] The security council may also impose sanctions under Article 94 to enforce judgments of the International Court of Justice. However, this clause is rarely relied upon. Sanctions are also possible through Articles 5, 6, and 19 in response to breaches of the Charter itself. However, the sanctions that these clauses permit are administrative and not economic. For more on this issue, see generally Achilleas, above n 23.
[25] Ibid at 28.
[26] Charter of the United Nations, art 39.
[27] Achilleas, above n 23, at 28.
[28] Ibid at 28.

Having determined the existence of a threat to, or breach of, the peace, the Security Council may then decide upon complete or partial interruption of economic relations with the target(s) and call upon states to do the same.[29] Where the relevant Security Council resolution decides upon sanctions, all UN members must impose them.[30] The Security Council may pass a resolution that merely authorises or recommends sanctions instead.[31] In either case, the sanctions must be imposed to restore international peace and security and may not be imposed merely to punish or deter proscribed conduct.[32]

Two special cases warrant attention. First, where a Security Council resolution directs states to impose sanctions on unspecified targets meeting various conditions, the sanctions are properly considered UN sanctions even though states have exercised autonomous judgement in identifying particular targets.[33] Second, where the Security Council lifts sanctions and states do not follow suit, UN sanctions transform into autonomous sanctions.[34]

Two recent trends have exacerbated the potential for conflict between sanctions and international investment law.

The first trend is that autonomous sanctions represent a growing share of sanctions generally.[35] Deteriorating relations between permanent members of the Security Council have exacerbated the risk that prospective sanctions resolutions will be vetoed.[36] This has made waiting for the Security Council before responding to a given threat to international peace and security increasingly untenable. Russia's armed attack against Ukraine illustrates the problem, as does China's genocide against Uyghur Muslims.[37] New Zealand imposed its first ever autonomous

[29] Charter of the United Nations, arts 39 and 41.
[30] Asada, above n 18, at 5.
[31] Ibid at 6 and 9.
[32] Charter of the United Nations, art 39.
[33] Asada, above n 18, at 10.
[34] Ibid at 10.
[35] Thouvenin, above n 8, at 88.
[36] For more on Sino-US disagreements over security and human rights, see generally Junya Ishii "Indo-Pacific Diplomacy, the Quad and Beyond: Democratic Coalition in the Era of U.S.–China Global Competition" in Earl Carl Jr (ed) *From Trump to Biden and Beyond* (Palgrave McMillan, 2021) 151.
[37] For more on the sanctions-implications of the conflict between Russia and Ukraine, see generally Katariina Simonen "Final Comment: Legal Review of New EU Sanctions Against Russia in Light of Recent Jurisprudence of the European Courts" in Ali Marossi and Marissa Basset (ed) *Economic Sanctions under International Law* (T.M.C. Asser Press, 2015) 237.
For more on China's genocide, see generally Azeem Ibrahim *The Uyghur Genocide: An Examination of China's Breaches of the 1948 Genocide Convention* (Newlines Institute for Strategy and Policy, Washington DC, 2021).

sanctions in response to the former.[38] More broadly, the challenges facing multilateralism are connected to mounting security competition in East Asia, and to domestic backlash against the liberal international order within its Western architects.[39] States and non-UN institutions that have a strong record of imposing autonomous sanctions include Australia, Canada, the US, the UK, the European Union, the Organisation of American States, and also various Arab states.[40]

The second trend is that sanctions are increasingly likely to target capital exporters that have signed multiple IIAs. In the 1990s, the UN imposed sanctions against various states, including Haiti, Iraq, Liberia, Rwanda, Somalia, and Yugoslavia.[41] However, these states were the source of little outward investment. Today, Russia's relations with the West are already dominated by sanctions and countersanctions.[42] Meanwhile, China has imposed multiple sanctions against Australian businesses despite its IIA with Australia.[43] These states are the source of significant amounts of outward investment. Most importantly, Haiti, Iraq, Liberia, Rwanda, and Somalia are party to a cumulative total of only 14 IIAs; Australia, China, Russia, and the US are party to a cumulative total of 190.[44]

However, one trend has mitigated the potential for conflict between sanctions and international investment law, at least in respect of IIAs' non-discrimination obligations.[45] This is the shift towards "smart" sanctions.[46] These do not target entire states. Instead, smart sanctions target individual investors based on their complicity in the relevant proscribed conduct or their importance to the targeted regime. This shift has been spurred by concerns that indiscriminate embargoes are moral and political failures.[47]

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[38] Russia Sanctions Act 2022 (NZ), s 3.
[39] For further discussion of mounting security competition and its implications for international norms concerning law and commerce, see John Mearsheimer "Bound to Fail: The Rise and Fall of the Liberal International Order" (2019) 43 Int. Secur. 7.
[40] Thouvenin, above n 8, at 86-87.
[41] Ibid at 86-87.
[42] Bruce Jentleson "Russia-Ukraine Sanctions" *The Wilson Quarterly* (online ed, Washington Quarterly, Summer 2022).
[43] Ye Xue "Fear and Greed: Mapping the Australian Debate on China's Economic Sanctions" (2022) 37 Pacific Focus 5 at 15; Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China [2015] ATS 15 (signed 17 June 2015, entered into force 20 December 2015).
[44] UNCTAD "International Investment Agreements Navigator" (4 October 2022) Investment Policy Hub <https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping>.
[45] See pages 23-24 of this dissertation.
[46] Pierre-Emmanuel Dupont "Legality of Economic Sanctions under International Law and EU Law: The Case of Iran" (2011) 4 IJIEL 48 at 49.
[47] The embargo imposed against Iraq by *Resolution 661 (1990)* notoriously had the effect of imposing famine and poverty on innocent Iraqi citizens. Worse, Saddam Hussein's regime profited from the situation by eliminating domestic dissent and controlling black-market activity. See Thouvenin, above n 8, at 87.

Chapter 2 Competing Objectives

For any law to be effective, it must achieve the aims for which it has been designed. For any law to be appropriate, it must balance those aims against competing political, moral, and economic concerns. For any law to be desirable, it must do both. This dissertation evaluates international investment law's response to sanctions against two competing objectives: IIAs' achievement of their aims and states' latitude to prioritise national security and human rights. This chapter elaborates on what these objectives entail, how they clash in sanctions contexts, and why international investment law's response to sanctions should heed both.

2.1 Aims of International Investment Law

2.1.1 Promoting FDI

FDI refers to capital flows between states. Capital means any asset that is deployed in the production of further goods or services. The relevant capital asset is usually, but not necessarily, money. IIAs promote FDI by forcing host-states to bear the cost of political risks. Political risks are disruptions to the business operating environment through political and regulatory action. The imposition of sanctions is a political risk. By contrast, examples of business risks include volatile prices and exchange rate fluctuations. All other things being equal, political risks reduce the expected profitability of a given investment and deter FDI. Of particular concern to foreign investors is that political risks often grow over time.[48]

Protecting investors against political risks benefits investors and host-states alike. Whereas investors receive protection from risk, host-states receive greater access to the capital they need to establish businesses and infrastructure.[49]

[48] Whereas the growth of the host-state's industrial capacity usually increases its bargaining power, the investor's prior commitment of capital undermines its ability to threaten withdrawal and exacerbates its vulnerability. See Theodore Moran "Multinational Corporations and Dependency: A Dialogue for Dependentistas and Non Dependentistas" (1978) 32 Int. Organ. 79 at 82-84.

[49] I note that IIAs' effectiveness at promoting FDI is controversial. Recent evidence suggests that they are at least somewhat effective at attracting FDI but that their effectiveness varies according to the level of political risk associated with a given industry, whether the IIA has strong arbitration clauses, and whether the host-state is minimising political risk effectively in the first place.
See Eun Mi Kim and Heon Joo Jung "International treaties and foreign direct investment: an empirical analysis of effects of bilateral investment treaties on South Korea's FDI" (2020) 25 J. Asian Pac. Econ 402 at 413; Sarah Danzman "Contracting with Whom? The Differential Effects of Investment Treaties on FDI" (2020) 42 Int.

Traditionally, this aim is considered most relevant in cases of vertical FDI (capital flows from developed to developing states). There are two reasons. First, the investment opportunities are presumed to be more profitable (and hence common) due to the relatively low wages in developing states. Second, the political risks are presumed to be greater due to the relevant governments' relatively high instability and corruption.

However, IIAs' language is neutral. The US-Argentina BIT, for example, protects Argentine and US investors alike.[50] Investment protections apply equally in cases of horizontal FDI (capital flows between developed states) and reverse vertical FDI (capital flows from developing to developed states). Horizontal FDI might be profitable where the host-state offers a more favourable regulatory environment or corporate tax rate, where the host-state has signed regional FTAs that confer tariff preferences in third markets, or just generally where the investor is looking to expand production. Reverse vertical FDI might be profitable where the host-state offers a more highly-skilled workforce. Both entail political risks and both are governed by international investment law. For example, a Canadian funeral company brought a claim against the US after its Canadian identity was weaponised against it in a Mississippi jury trial.[51] Moreover, developed states are more likely to pursue regulations that are adverse to investors, including regulations relating to labour and the environment.

The aim of promoting FDI is evident in most BITs' preambles. Typical in this respect is the Philippines-Switzerland BIT (1997). Its preamble provides that

> *The Government of the Republic of the Philippines and the Swiss Federal Council*
>
> *Desiring to intensify economic cooperation to the mutual benefit of both States,*
>
> *Intending to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party,*

Interact. 452 at 473; And Jennifer Tobin and Susan Rose-Ackerman "When BITs have some bite: The political-economic environment for bilateral investment treaties" (2011) 6 Rev. Int. Organ. 1 at 17-23.

[50] Treaty Between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment TIAS 94-1020 (signed 14 November 1991, entered into force 20 October 1994).

[51] *Loewen Group, Inc. and Raymond L. Loewen v United States of America (Award)* (2003) 128 ILR 334.

Recognizing the need to promote and protect foreign investments with the aim to foster the economic prosperity of both States,

Have agreed as follows.[52]

The tribunal in *SGS v Philippines* described that BIT as a "treaty for the promotion and reciprocal protection of investments" and inferred a general principle that ambiguous clauses should be resolved in investors' favour.[53] However, many recent BITs also cite other aims in their preambles.[54] Common examples include states' right to regulate, sustainable development, the environment, and social investment aspects (defined as including human rights, labour rights, health, and poverty). Sometimes these competing aims overlap with the promotion of FDI (as with investment in low-emission energy production), but sometimes they do not. The *SGS v Philippines* principle is less likely to apply to IIAs that list multiple aims.

2.1.2 Depoliticising Investment Disputes

IIAs do not cite depoliticisation in their preambles. Tribunals do not cite it in their decisions. Nonetheless, this aim both underpins international investment law and directly bears on how it should respond to sanctions. To understand why, it is useful to consider international investment law's history.

For most of history, foreign investors have been expected to bear the cost of political risks themselves.[55] Diplomatic protection originated in the Middle Ages and was the earliest international legal doctrine to afford investors some protections.[56] Wrongs to foreign investors were treated as wrongs to their home-state. Politicians resolved disputes through coercive "gunboat diplomacy".[57] Imperial Britain responded to expropriations with military

[52] Agreement Between the Republic of the Philippines and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments RS 0.975.264.5 (signed 31 March 1997, entered into force 23 April 1999), preamble.
[53] *SGS Société Générale de Surveillance S.A. v Republic of the Philippines (Jurisdiction)* (2004) 129 ILR 444 at [116].
[54] The UNCTAD has mapped out 219 such IIAs in force as of 4 October 2022.
[55] Newcombe and Paradell, above n 9, at 3-5.
[56] Ibid at 5.
[57] Ibid at 8-9.

interventions.[58] The problems were threefold: diplomatic protection escalated investment disputes, relied on the power of the investor's home-state, and could not easily be accessed by investors.

Modern international investment law evolved in response to these problems.[59] Investors can now rely on lawyers to resolve disputes through argument and arbitration. Investment disputes have successfully been depoliticised. This relates to the promotion of FDI because it gives investors clearer standards of protection and more accessible enforcement mechanisms. It also relates to the maintenance of a more peaceful and rules-based international order. The effects of investment disputes are contained because investors need not rely on economic and military escalation to vindicate their interests. Depoliticisation even relates to international fairness. Investors from weak states receive the same protections as investors from powerful states because their protections are guaranteed by law rather than force.

Whether imposed to correct, punish, or deter proscribed conduct, sanctions inevitably reflect and escalate existing tensions between the concerned states.[60] International investment law's depoliticising function is particularly urgent in situations where a peaceful and rules-based international order is under particular strain.

2.1.3 Promoting Fair Treatment of Investors

States create political risks and yet, absent IIAs, foreign investors bear the costs. International investment law aims to address this apparent unfairness. Although influential, I consider fairness the least important of the three aims I have identified for two reasons.

The first reason is that all investment involves risks. States do not generally socialise the cost of business risks because the same actor who expects to gain by taking a given risk should bear the cost if that risk fails. Investors are expected to factor business risks into their valuations and bear the relevant costs themselves. It is unclear why this principle should not apply to

[58] Charles Lipson *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (Berkeley: University of California Press, 1985) at 54.
[59] Newcombe and Paradell, above n 9, at 9-10.
[60] Isabella Bunn *The Right to Development and International Economic Law* (Hart Publishing, Oxford, 2012) at 225.

political risks, nor why the general public should bear the costs. Concerned investors can, and should, consider political risk insurance.[61]

The second reason is that international investment law explicitly and intentionally affords foreign investors greater protections than their domestic counterparts. This disparity can be justified by economic and geo-political considerations. It is not obvious that it can be justified by the aim of promoting fairness. The Calvo Doctrine – an early rival to modern standards of international investment law embraced by many Latin American states – famously argued that this disparity violated both the absolute equality of foreigners with nationals and the sovereign equality of all states.[62]

Nevertheless, preambular language about the protection and promotion of investment is just as capable of implying an intention to promote fairness as an intention to promote FDI. Tribunals have emphasised this aim in decisions about the definition of investment and the scope of fair and equitable treatment (FET).[63]

2.2 National Security and Human Rights

2.2.1 National Security

National security refers to the set of policies by which states protect their territory, protect their population, and maintain public order.[64] International investment law's aims often overlap with national security. Insofar as IIAs support states' economic development by promoting FDI, they support the industrial base on which their respective military capabilities ultimately rely.[65] Moreover, IIAs clearly support states' national security to the extent that they depoliticise disputes that would otherwise be resolved through military force. However, tensions arise between national security and international investment law in sanctions-contexts. States often cite national security to justify sanctions that they have imposed in response to

[61] See, for example, Chubb "Political Risk Insurance" (18 July 2022) <https://www.chubb.com/us-en/business-insurance/political-risk.html>.
[62] Newcombe and Paradell, above n 9, at 13.
[63] Ibid at 114.
[64] *Russia – Measures Concerning Traffic in Transit* WT/DS512/R, 5 April 2019 (Report of the Panel) at [7.130].
[65] See generally Jonathan Kirshner "The Political Economy of Realism" in Ethan Kapstein and Michael Mastanduno (ed) *Unipolar Politics: Realism and State Strategies after the Cold War* (Columbia University Press, 1999) 69 at 71.

armed attacks and terrorist activity.[66] These same sanctions directly undermine the promotion of FDI, the depoliticisation of disputes, and the fair treatment of investors.

States must safeguard their own national security because they cannot rely on supranational authorities to protect them.[67] Consider the Security Council. The UN confers primary responsibility for international peace and security upon this supranational authority.[68] The Security Council has failed to guarantee Ukraine's national security because it can only constrain Russia's behaviour to the extent that Russia allows. More broadly, international institutions can only constrain states to the extent that their member states allow.

States cannot be complacent about their national security because security competition is endemic to international relations.[69] Consider the Asia-Pacific region. China cannot be certain of the US' future intentions around the use of force, nor can the US be certain of China's. Each requires relative military capability over the other to protect itself. Worse, China's and the US' common understanding of this logic drives each to fear the other's intentions.[70] China militarises in fear of the US; the US militarises in fear of China in turn. The root uncertainty can sometimes be mitigated. It can never be erased altogether.

A state that neglects its national security risks collapse. National security underpins the state's ability to pursue any secondary objectives, whether they relate to economic development or human rights. International investment law's response to sanctions must give due deference to states' latitude to prioritise national security.

2.2.2 Human Rights

Human rights are a set of entitlements that belongs to all people by virtue of their humanity.[71] Examples include the right to property and the right to effective legal remedies.[72] Other legal

[66] Machiko Kanetake "Implementation of Sanctions - Japan" in Masahiko Asada (ed) *Economic Sanctions in International Law and Practice* (Routledge, 2020) 136 at 147.
[67] John Mearsheimer "Structural Realism" in Tim Dunne, Milja Kurki, and Steve Smith (ed) *International Relations Theories: Discipline and Diversity* (Oxford University Press, 2016) 51 at 53.
[68] Charter of the United Nations, art 24.
[69] Mearsheimer, above n 67, at 53.
[70] For more on security competition between China and the US, see generally Andrew Hastie and Graham Allison *Destined for War: Can America and China Escape Thucydides' Trap* (Scribe Publications, 2017).
[71] Jack Donnelly *International Human Rights* (Westview Press, 2013) at 21.
[72] *Universal Declaration of Human Rights* GA Res 217A (1948), arts 2, 17, and 8.

rights belong to citizens or residents of a particular state by virtue of their legal status within that state. Human rights depend on international law instead.[73] International investment law often overlaps with human rights. The minimum standard of treatment supports the right to effective legal remedies, and the obligation to compensate investors for expropriations supports the right not to be arbitrarily deprived of one's property.[74] A minority of IIAs even directly cite human rights in their preambles.[75] However, tensions arise between human rights and international investment law in sanctions-contexts. States frequently cite human rights to justify sanctions against rights-breaching states.[76] These same sanctions directly undermine the promotion of FDI, the depoliticisation of disputes, and the fair treatment of investors.

Sanctions are often ineffective at correcting the behaviour of rights-breaching regimes. Whereas broad sanctions risk punishing innocent civilians and entrenching the sanctioned regime's power, smart sanctions risk impotence because egregious rights-breachers tend to structure their economies autarkically.[77] Ironically, sanctions that are intended to vindicate human rights might even breach the human right to development.[78]

Nevertheless, faced with the reality that no supranational body can enforce human rights obligations against unwilling states, the international community must choose between sanctioning rights-breaching regimes and engaging with them.[79] Sanctions at least remain a useful instrument for deterring future rights-breaches by other states and for delegitimising rights-breaching regimes.[80] Engagement tends only to enrich rights-breaching regimes without achieving either outcome.[81] The moral significance of this becomes apparent when we consider for whom human rights exist: people who cannot rely on national laws to secure their most basic entitlements. International investment law's response to sanctions must heed this moral imperative.

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[73] Donnelly, above n 71, at 21.
[74] See pages 24-27 of this dissertation.
[75] The international community ultimately rejected earlier attempts to merge IIA obligations with human rights into one coherent regime, though the fact that this was considered reflects the similarities between the two regimes. See Martins Paparinskis "Investment arbitration and the law of countermeasures" (2009) 79 BYIL 264 at 325-326.
[76] Donnelly, above n 71, at 143.
[77] Ibid at 143.
[78] Bunn, above n 60, at 221.
[79] Michael Ewing-Chow "First Do No Harm: Myanmar Trade Sanctions and Human Rights" (2007) 5 JHR 153 at 153-153.
[80] Donnelly, above n 71, at 144.
[81] Ewing-Chow, above n 79, at 153-153.

2.3 International Investment Law's Legitimacy

International investment law depends on states' consent. In the long run, states will withdraw from IIAs if they cease to believe that IIAs further their interests. The achievement of international investment law's aims – the promotion of FDI, the depoliticisation of disputes, and the fair treatment of investors – is thus contingent on its perceived legitimacy. This legitimacy is increasingly under fire.[82] Critics argue that international investment law is too uncertain to achieve its aims, and that its breadth undermines states' internal sovereignty and regulatory capacity.[83] Meanwhile, sanctions' potential to breach IIAs is rising.[84] Responding to sanctions in a way that balances the competing objectives identified in this chapter is important for its own sake. However, it is also instrumentally important. Insofar as this balance furthers states' interests, achieving it will help international investment law maintain its legitimacy during a period of backlash against it.

[82] See generally Gregory Shaffer and Sergio Puig "Imperfect Alternatives: Institutional Choice and the Reform of Investment Law" (2018) 112 AJIL 361.
[83] Ibid.
[84] See pages 7-8 of this dissertation.

Chapter 3 International Investment Law's Current Response

A sanction breaches an IIA if it falls within that IIA's scope and breaches any investment obligations under it.

Any resulting breach might be defensible based on an exception within the relevant IIA.

If not, then the breach might nonetheless be defensible based on principles of public international law that are external to IIAs. This chapter considers three such defences. First, that the breach is justified by competing obligations under security or human rights treaties that prevail over the IIA. Second, that the breach is defensible under the customary law of countermeasures. Third, that the breach is defensible under some other customary doctrine.

My key finding is that most sanctions breach international investment law without defence.

Analysing international investment law's response to sanctions requires a highly abstract analysis of how many different treaties respond to many different sanctions. This can be difficult to follow without grounding the relevant interpretive issues in real situations. For ease of reference, I will entertain a hypothetical. Let us say that the UK and Russia have entered into a BIT that provides for investor-state arbitration.[85] Despite this, the UK decides to impose, suddenly and without much warning, wide-reaching sanctions against multiple Russian businesses in response to Russia's armed attack against Ukraine.[86] Most have their assets frozen. Some are even embargoed, making all dealings with them a criminal offence under the UK's laws. Russian businesses can challenge these sanctions through the UK's courts, but they must first rely on a government review process that offers no guaranteed timeline for completion.[87] The sanctions remain in force throughout this whole period. So far, no imagination is required.

[85] Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Promotion and Reciprocal Protection of Investments 1670 UNTS 27 (signed 6 April 1989, entered into force 3 July 1991).
[86] Foreign, Commonwealth, and Development Office "UK sanctions relating to Russia" (5 August 2022) <https://www.gov.uk/government/collections/uk-sanctions-on-russia>.
[87] Foreign, Commonwealth, and Development Office "How to request variation or revocation of a sanctions designation or review of a UN listing" (5 August 2022) <https://www.gov.uk/government/publications/making-a-sanctions-challenge-how-to-seek-variation-or- revocation-of-a-sanctions-designation>.

We shall now invent a character – Vasili Kuragin – and consider his place in our story. Kuragin is a wealthy Russian oligarch and shareholder in many companies, operating both domestically and abroad. He personally owns Football United – an English Premier League team. He recently borrowed a large sum of money from Bank Vietnam to finance its acquisition of new players. He also recently entered into a major sponsorship deal with Sports Limited, a Croatian company. Then there is Bombs Incorporated, in which Kuragin owns a 60% share. The other 40% is owned by Funds Incorporated, a Chinese investment fund with hundreds of shareholders from all over the world. Bombs Incorporated owns several bakeries throughout the UK. It is also rumoured to sell weapons to Russia's armed forces. Now, imagine that the UK has frozen Vasili Kuragin's assets in its territory and embargoed Bombs Incorporated.

This hypothetical will permit me to refer back to a consistent fact scenario throughout this chapter. Nonetheless, to capture the full spectrum of issues that arise under international investment law, it will sometimes be useful to vary these facts or consider other examples.

3.1 Scope

This section of my dissertation analyses the range of persons who have jurisdiction to challenge sanctions through investor-state arbitration. My key findings are that sanctioned individuals can often overcome nationality-based constraints on their jurisdiction, that their shareholders, creditors, and business partners (hereafter referred to as "collateral targets") will usually have jurisdiction to raise overlapping claims, and that a few IIAs expressly deny their benefits to investors that are owned or controlled by persons from a state that the host-state has sanctioned.

Put otherwise, sanctions have the potential to affect a far wider range of investors than states necessarily intend or understand. The economic disruption caused by freezing Vasili Kuragin's assets ripples outwards to Bank Vietnam and Sports Limited. The economic disruption caused by embargoing Bombs Incorporated ripples upwards to Funds Incorporated and its shareholders. Globalisation has exacerbated this problem. Modern multinational companies have highly complex corporate structures. This creates multiple stakeholders, all belonging to various nationalities. Accurately predicting the arbitral risk that follows from a single sanction requires states to identify a wide range of affected stakeholders, assess their nationalities, cross-check those nationalities against the IIAs it has signed, and determine how many of these stakeholders own or control assets that amount to investments under the relevant IIAs.

3.1.1 Sanctioned Individuals

Most IIAs define which persons are investors through two criteria: their connection to a covered investment and their nationality.[88]

Some IIAs extend jurisdiction to persons who have made, are making, or have attempted to make an investment in the host-state's territory; others only include persons who have made an investment in the host-state's territory.[89] Vasili Kuragin will pass either threshold. IIAs usually define investment broadly as "every kind of asset" or "every kind of investment in the [host-state's] territory" before non-exhaustively listing examples.[90] The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) provides

> ***investment*** *means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:*
>
> *(a) an enterprise;*
>
> *(b) shares, stock and other forms of equity participation in an enterprise;*
>
> *(c) bonds, debentures, other debt instruments and loans;*
>
> *(d) futures, options and other derivatives;*
>
> *(e) turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;*
>
> *(f) intellectual property rights;*
>
> *(g) licences, authorisations, permits and similar rights conferred pursuant to the Party's law; and*
>
> *(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens and pledges,*

[88] The UNCTAD has mapped out only 32 IIAs in force that do not define investments, and only 63 that leave investors undefined, as of 4 October 2022.
[89] Dean Merriman and Tania Voon "Incoming: How International Investment Law Constrains Foreign Investment Screening" (2022) 24 JWIT 1 at 15-16.
[90] The UNCTAD has mapped out only 32 IIAs in force that adopt the alternative approach (exhaustively listing which assets qualify as investments) as of 4 October 2022.

> *but investment does not mean an order or judgment entered in a judicial or administrative action.*[91]

This is an extremely wide range of assets. Asset freezes and embargoes affect every single one. Sanctioned individuals need only control one such asset in the host-state's territory to establish their potential jurisdiction. The movement of capital is not required. The CPTPP only cites the commitment of capital, and only then as a possible characteristic of investment and not a necessary one.[92] The protections that IIAs afford FDI generally extend to a far wider range of indirect risk-bearing activities whose value might be compromised by the host-state's actions.[93] Vasili Kuragin's football club and Bombs Incorporated's bakeries are both clearly investments. Relevantly though, this means that measures designed to block the flow of capital *from* the host-state will only be regulated by international investment law when they affect investments (or attempted investments) in the host-state's territory.

The more important constraint on sanctioned individuals' jurisdiction is the nationality requirement. Most IIAs only extend jurisdiction to investors who are state-parties, citizens of a state-party, or legal persons constituted under a state-party's laws.[94]

Some IIAs extend jurisdiction to permanent residents as well as citizens.[95] Tribunals are competent to assess investors' citizenship or residency based on national laws and decline jurisdiction accordingly.[96] A minority of IIAs explicitly deny jurisdiction to dual-nationals.[97]

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[91] Comprehensive and Progressive Trans-Pacific Partnership Agreement [2018] NZTS 10 (signed 8 March 2018, entered into force 30 December 2018), art 9.1.
[92] Ibid, art 9.1.
[93] Engela Schlemmer "Investment, Investor, Nationality, and Shareholders" in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (ed) *The Oxford Handbook of International Investment Law* (Oxford University Press, New York, 2008) 49 at 56.
In *Fedax N.V. v The Republic of Venezuela (Jurisdiction)* (1997) 37 ILM 1378 at [41], the tribunal decided that the similarly broad definition in the (now-terminated) Netherlands-Venezuela BIT included promissory notes held by Fedax that Venezuela had originally issued to a domestic company even though Fedax had not directly invested in Venezuela. In *Československá Obchodní Banka v Slovak Republic (Jurisdiction)* ICSID ARB/97/4, 24 May 1999 at [72], the tribunal decided that individual transactions that do not themselves constitute investments may establish an investor's jurisdiction provided that they form part of a wider operation that does.
[94] Schlemmer, above n 93, at 71.
[95] The UNCTAD has mapped out 215 such IIAs in force as of 4 October 2022.
[96] *Hussein Nuaman Soufraki v The United Arab Emirates (Award)* ICSID ARB/02/7, 7 July 2004 at [63].
[97] The UNCTAD has mapped out 100 such IIAs in force as of 4 October 2022.

Whether dual-nationals can claim the full-suite of protections afforded to citizens of both states is uncertain under most IIAs.[98] The correct approach is probably to recognise that inferring special restrictions on dual-nationals' rights would contradict a good faith interpretation of the ordinary meaning of the relevant IIA's terms.

Legal persons have jurisdiction as investors when they are constituted under the national laws of a state-party to the relevant IIA. This depends on those states' national laws. Some IIAs extend jurisdiction to legal persons that are "controlled directly or indirectly" by investors of a state-party whether or not they themselves are constituted under a state-party's laws.[99]

Just as investment does not require the movement of capital, a legal person's nationality does not require the use of capital from any particular state.[100] This makes most constraints on investors' jurisdiction to challenge sanctions surmountable. Imagine if the UK had not entered into a BIT with Russia. Vasili Kuragin might incorporate a company under China's laws and invest through it instead. So too might Bombs Incorporated. This would ensure both investors' jurisdiction to challenge future sanctions.[101]

Investors' ability to gain jurisdiction in this way is subject to the customary doctrine of abuse of rights.[102] It prevents parties from exercising their rights for purposes other than those for which the rights were established.[103] Tribunals that rely on this doctrine will deny jurisdiction to an investor that clearly changed its corporate structure for the sole purpose of raising an arbitral claim against the host-state.[104] Treaty-shopping is more likely to succeed if the investor acts before the risk of sanctions clearly materialises, and if the investor can justify its corporate structure by reference to legitimate business reasons (e.g., tax advantages).

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[98] This question was raised and left unresolved in *Hussein Nuaman Soufraki*, above n 96, at [42].
[99] Agreement on Encouragement and Reciprocal Protection of Investments Between the Kingdom of the Netherlands and the Argentine Republic [1994] Tractatenblad 005099 (signed 20 October 1992, entered into force 1 October 1994), art 1(b).
[100] *Tokios Tokelés v Ukraine (Jurisdiction)* ICSID ARB/02/17, 29 April 2004 at [77]. The relevant tribunal president's dissenting opinion reflects that tribunals have at least some discretion to deviate from this doctrine. See *Tokios Tokelés v Ukraine (Dissenting Opinion)* ICSID ARB/02/17, 29 April 2004 at [20].
[101] The tribunal endorsed treaty-shopping in *Hussein Nuaman Soufraki*, above n 96, at [83].
[102] Zongnan Wu "Orascom TMT Investments v Algeria - A New Trend on the Doctrine of Abuse of Rights in the Context of Parallel Proceedings?" (2019) 34 ICSID Review 196 at 199.
[103] Ibid at 199.
[104] *Philip Morris Asia Limited v The Commonwealth of Australia (Award)* (2017) 169 ILR 422 at [585]-[588].

3.1.2 Collateral Targets

Sanctions frustrate a wider range of stakeholders than just their direct targets. When an investor is sanctioned, its shareholders miss out on dividends, its creditors miss out on loan repayments, and its business partners miss out on potentially lucrative contracts. All of these collateral targets can raise overlapping claims against the host-state.[105] Funds Incorporated has shares in Bombs Incorporated. Bank Vietnam has made loans to Vasili Kuragin. Sports Limited has a sponsorship contract with Kuragin. All of these assets are investments in the UK's territory.

Collateral targets' jurisdiction is subject to the same nationality-based requirements as sanctioned individuals' jurisdiction. They can succeed in establishing jurisdiction in some situations where the sanctioned individual itself cannot. Consider New Zealand's sanctions against Russia.[106] Affected Russian companies cannot raise claims against New Zealand because New Zealand has not entered any IIAs with Russia. However, any Chinese shareholders in, creditors of, or business partners with these companies can raise claims against New Zealand through the New Zealand-China FTA.[107]

3.1.3 Denial of Benefits

A minority of IIAs deny their benefits to legal persons that are owned or controlled by investors from non-parties (or from the host-state) under various listed circumstances.[108] A minority of denial of benefits clauses list ownership or control by persons from a state that the host-state has sanctioned.[109] Tribunals usually interpret control holistically, considering shareholding, managerial responsibility, voting rights, and board members' nationalities.[110] The upshot is that these clauses prevent sanctioned individuals and their shareholders from treaty-shopping. However, they do not prevent their creditors and business partners from treaty-shopping in situations where they do not share the sanctioned individual's nationality.

[105] Schlemmer, above n 93, at 81-86.
[106] Russia Sanctions Act 2022 (NZ).
[107] Free Trade Agreement Between the Government of New Zealand and the Government of the People's Republic of China 2590 UNTS 101 (signed 7 April 2008, entered into force 1 October 2008).
[108] The UNCTAD has mapped out only 172 IIAs in force that include such a clause of 4 October 2022.
[109] The UNCTAD has mapped out only 79 IIAs in force that include such a clause of 4 October 2022.
[110] Newcombe and Paradell, above n 9, at 69.

3.2 Investment Obligations

This section illustrates the risk that sanctions will breach an IIA by reference to a range of obligations that are common to most IIAs. Sanctions need only breach one obligation to breach an IIA. My key findings are that sanctions often breach states' non-discrimination obligations, usually breach the minimum standard of treatment, and almost always breach the obligation not to expropriate without compensation. However, claims relating to these obligations will usually be more credible when raised by sanctioned individuals themselves than when raised by collateral targets.

3.2.1 Non-Discrimination

Most IIAs contain two obligations that prevent nationality-based discrimination: most favoured nation (MFN) treatment and national treatment.[111] Neither exists in customary law.[112]

MFN clauses generally oblige the host-state to accord investments of investors of a state-party treatment no less favourable than it accords to investments of investors of any third state.[113] Key differences between MFN clauses include whether they apply broadly to investors or narrowly to investments that investors have already made, whether they specify the activities to which the obligation applies, and whether they provide an express comparator.[114] National treatment clauses generally oblige the host-state to accord investments of investors of a state-party treatment no less favourable than it accords to investments of national investors.[115] As with MFN clauses, national treatment clauses vary according to whether they apply before an investment has been made and whether they provide an express comparator.[116]

Most sanctions risk breaching national and MFN treatment because they target investors based on their nationalities. States can argue that such differences are justified by non-discriminatory

[111] The UNCTAD has mapped out only 22 IIAs without MFN clauses in force, and only 255 without national treatment clauses, as of 4 October 2022.
[112] Newcombe and Paradell, above n 9, at 149 & 194.
[113] Pia Acconci "Most-Favoured Nation Treatment" in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (ed) *The Oxford Handbook of International Investment Law* (Oxford University Press, New York, 2008) 363 at 371 & 374.
[114] Newcombe and Paradell, above n 9, at 203.
[115] Ibid at 156.
[116] Ibid at 156.

public policy rationales.[117] The UK might argue that its sanctions against Vasili Kuragin and Bombs Incorporated are not based on their Russian nationalities per se but on the objective of encouraging Russia to cease actions destabilising Ukraine.[118] Non-discrimination clauses that provide an express comparator permit host-states to argue more forcefully that the claimants are not "in like circumstances" with investors from other states.[119]

These arguments are highly fact-dependent. Whether the host-state has imposed similar sanctions in response to similar behaviour in the past should usually be relevant. Such consistency helps demonstrate that the host-state is genuinely motivated by a non-discriminatory public policy rationale and not the investors' nationalities. The sanctioned individuals' connection with the proscribed conduct should also be relevant. The argument that sanctions are motivated by the objective of encouraging Russia to cease actions destabilising Ukraine is more credible insofar as the targets are in a position to finance that war, and less credible insofar as they are not. Smart sanctions are less likely to breach non-discrimination obligations than indiscriminate embargoes.

Non-discrimination obligations do not protect collateral targets. Even when collateral targets' investments are treated less favourably based on a discriminatory measure, this discrimination is not based on their own nationalities. Instead, collateral targets are discriminated against based on the sanctioned individual's nationality. Funds Incorporated, Bank Vietnam, and Sports Limited are all treated equally negatively despite their various nationalities.

3.2.2 Minimum Standard of Treatment

The minimum standard of treatment resides in customary law. It includes the obligations to provide FET to investors' investments and to provide full protection and security to investors' investments.[120] These obligations are enforceable through arbitration because they are echoed in most IIAs.[121]

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[117] *GAMI Investments, Inc v Government of the United Mexican States (Merits)* (2004) 44 ILM 545 at [114]. Although this case concerned national treatment, the same reasoning applies to analysis of MFN treatment.
[118] Foreign, Commonwealth, and Development Office, above n 86.
[119] *Apotex Holdings Inc and Apotex Inc v US (Award)* ICSID ARB(AF)/12/1, 25 August 2014 at [8.57].
[120] Newcombe and Paradell, above n 9, at 233.
[121] The UNCTAD has mapped out only 79 IIAs without FET clauses, and 236 IIAs without full protection and security clauses, in force as of 4 October 2022. Moreover, IIAs that do not directly require the minimum standard of treatment might still indirectly impose the relevant obligations by virtue of their MFN clauses.

IIAs vary in the level of detail with which they describe FET. Some IIAs define it by reference to the customary law of FET, some IIAs list specific activities that fall within FET (e.g., the obligation not to deny justice in adjudicatory processes), and some IIAs do both.[122] However, most IIAs leave FET undefined.[123] The tribunal's definition of FET in *Tecmed v Mexico* is a useful and influential reference point. That definition included complying with the investor's legitimate expectations, affording them due process in proceedings that affect their investments, and offering a stable and transparent regulatory environment so that they can anticipate and plan for upcoming changes.[124]

Most sanctions risk breaching this obligation because they are enacted suddenly and without procedural guarantees; sanctioned individuals are rarely afforded the right to challenge sanctions through the host-state's courts (or any other national adjudicatory process) despite the seriously adverse consequences for their investments.[125] The sanctions against Vasili Kuragin and Bombs Incorporated were imposed overnight and without individual warnings. Unusually, the UK does permit Kuragin and Bombs Incorporated to review these sanctions through its courts. However, the process remains slow, and the sanctions remain in force until its completion. This procedural unfairness is inevitable. If targets were warned, or if sanctions only took effect on completion of a fair adjudicative process, targets could evade the sanctions by selling their investments. Therefore, sanctions generally entail both a denial of due process and a failure to offer a stable and consistent regulatory environment.

The extent to which FET protects a collateral target probably depends on that collateral target's stake in the profitability of the sanctioned individual's investments. It would be impractical and onerous to extend due process rights to every tangentially affected investor. Funds Incorporated can more reasonably expect due process rights in relation to the UK's embargo against Bombs Incorporated than Funds Incorporated's hundreds of shareholders.

[122] Free Trade Agreement Between New Zealand and the Republic of Korea [2015] NZTS 10 (signed 23 March 2015, entered into force 20 December 2015), art 10.7.
[123] The UNCTAD has mapped out 1,424 IIAs that leave FET undefined in force as of 4 October 2022.
[124] *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States (Award)* ICSID ARB (AF)/00/2, 29 May 2003 at [154].
[125] Pierre-Emmanuel Dupont "The Arbitration of Disputes Related to Foreign Investments Affected by Unilateral Sanctions" in Ali Marossi and Marissa Basset (ed) *Economic Sanctions under International Law* (T.M.C. Asser Press, 2015) 197 at 204.

Most tribunals interpret full protection and security as requiring the protection of the investor's investments from third parties and from organs of the host-state.[126] Some tribunals have interpreted it as including guarantees of legal and regulatory security alongside physical security.[127] In *CME v Czech Republic*, the host-state breached full protection and security by fostering a legal environment in which the investor's business partner was permitted to terminate an important contract.[128] By similar reasoning, embargoes risk breaching full protection and security by creating legal environments in which investors' business partners are not only permitted but obliged to terminate important contracts.[129] This obligation probably protects sanctioned individuals and collateral targets equally.

3.2.3 Expropriation

States' obligation to compensate investors whose investments they have expropriated resides in customary law.[130] It is enforceable through arbitration because it is echoed in most IIAs.[131] Direct and indirect expropriations are both compensable. Direct expropriation means outright confiscation. Common examples include wartime requisitions of property and nationalisations of whole industries.[132] Indirect expropriation generally means any measure or series of measures that has the same effect as direct expropriation. Common examples include adverse regulations, denials of essential permits, and breaches of important contracts. However, whether a given measure constitutes indirect expropriation depends on its effects, not its form.[133] Some tribunals emphasise the extent of a measure's interference with the investor's rights and control; others emphasise the severity of its effects on the investor's profits.[134]

Sanctions probably breach this obligation in either case. Asset freezes and embargoes prevent investors from exercising any rights over, or deriving any profits from, their investments. Moreover, they apply indefinitely – ending only when the sanctioned investor (or its home-

[126] *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania (Award)* ICSID ARB/05/22, 24 July 2008 at [730].
[127] *CME Czech Republic B.V. v Czech Republic (Partial Award)* UNCITRAL 13 September 2001 at [613].
[128] Ibid at [613].
[129] Dupont, above n 125, at 206.
[130] Newcombe and Paradell, above n 9, at 322.
[131] The UNCTAD has mapped out only 6 IIAs without expropriation clauses in force as of 4 October 2022.
[132] Newcombe and Paradell, above n 9, at 324.
[133] Ibid at 326.
[134] The tribunal emphasised interference with rights in *Pope & Talbot Inc v Canada (Interim Award)* UNCITRAL 26 June 2000 at [102]. The tribunal emphasised deprivation of profits in *Metalclad Corporation v The United Mexican States (Award)* ICSID ARB(AF)/91/1, 30 August 2000 at [103].

state) corrects its behaviour to the host-state's satisfaction. More broadly, for any sanction to be intrusive, severe, and long-lasting enough to impose coercive economic pressure, it must equally be intrusive, severe, and long-lasting enough to entail indirect expropriation. Compensation is rare because it would defeat the point of the sanctions.[135] As with FET, the extent to which this obligation protects a collateral target probably depends on that collateral target's stake in the profitability of the sanctioned individual's investments.

The police powers doctrine resides in customary law and in the text of many IIAs.[136] It provides that states may expropriate in the course of collecting tax, upholding public order and morality, or protecting human health and the environment, without incurring an obligation to compensate investors.[137] However, this only defends expropriations that are non-discriminatory, bona fide, and aimed at general welfare.[138] Sanctions that breach national and MFN treatment will not be defended because they discriminate on nationality.[139] Other sanctions remain unlikely to be defended because they are not aimed at general welfare. Even if they were, arguing that sanctions uphold public order would remain far-fetched in most cases, and the potential injustice of expropriating from an investor based only on its home-state's conduct would undermine many arguments about public morality.

3.2.4 Stabilisation and Umbrella Clauses

Many IIAs contain umbrella clauses.[140] Umbrella clauses require states to observe commitments they have made to investors outside the IIA.[141] States often make commitments to investors by enacting laws (or entering contracts) that contain stabilisation clauses.[142] Stabilisation clauses promise to subject investors to regulations that are no less favourable than those that applied at the time the host-state originally permitted the investment. Sanctions risk breaching umbrella clauses when the relevant host-state has committed to a stabilisation clause outside the IIA and the legislative or regulatory framework that provides for the sanctions' imposition is newer than the relevant investments.

[135] Dupont, above n 125, at 203.
[136] Newcombe and Paradell, above n 9, at 358.
[137] Ibid at 358.
[138] Ibid at 358.
[139] See pages 23-24 of this dissertation.
[140] The UNCTAD has mapped out 859 IIAs with umbrella clauses in force as of 4 October 2022.
[141] Agreement Between the Government of Hong Kong and the Government of New Zealand for the Promotion and Protection of Investments [1995] NZTS 14 (signed 6 July 1995, entered into force 5 August 1995), art 3(2).
[142] UNCTAD *Investment Policy Monitor* "Investment Laws" (Special Issue, November 2016) at 5.

3.3 Treaty-Based Exceptions

At this point, it appears that the UK must pay compensation for expropriating Vasili Kuragin's football team, Bombs Incorporated's bakeries, Bank Vietnam's loan, Sports Limited's sponsorship deal, and Funds Incorporated's shares in Bombs Incorporated. Many of these stakeholders can also sue the UK for breaching the minimum standard of treatment. Kuragin and Bombs Incorporated might also be able to sue the UK for breaching its non-discrimination obligations. The question now becomes: can states defend their sanctions through any treaty-based exceptions? A sound defence would probably deter many claims if it existed.

This section discusses three types of exceptions: security exceptions, general exceptions, and exclusions from investor-state arbitration. My key finding is that most sanctions cannot be defended through treaty-based exceptions because most IIAs lack such exceptions. This leaves states in a dire position. States impose sanctions to protect their national security and to vindicate human rights breaches. They are even compelled to impose sanctions under some international treaties. They are breaching IIAs as a result. Worse, they are usually doing so without recourse to any exceptions in those IIAs. Other key findings in this section include that existing security exceptions defend most sanctions if they are self-judging but only a few security-related sanctions if they are not, that this analysis is highly fact-dependent in either case, and that other treaty-based exceptions probably cannot defend sanctions.

Tribunals generally agree that states bear the burden of proving that an exception applies and that its criteria are satisfied.[143] Beyond this point, the correct interpretive approach is uncertain. Past tribunals have argued that exceptions should presumptively be interpreted narrowly because they run counter to IIAs' aims around promoting FDI and treating investors fairly.[144] However, future tribunals might equally presume that exceptions should be interpreted broadly to recognise that treaty obligations derogate from states' sovereignty and should be applied narrowly.[145] The correct approach is probably to apply neither presumption, instead interpreting treaty exceptions like any other treaty clause: in good faith according to the ordinary meaning of their terms, having regard to context, object, and purpose.[146]

[143] Newcombe and Paradell, above n 9, at 485.
[144] *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic (Award)* ICSID ARB/01/3, 22 May 2007 at [331].
[145] Newcombe and Paradell, above n 9, at 485.
[146] Vienna Convention on the Law of Treaties, above n 15, art 31.

3.3.1 Security Exceptions

A minority of IIAs contain security exceptions.[147] For example, the CPTPP provides

> *Nothing in this Treaty shall be construed to*
>
> (a) ...
>
> (b) *preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance of international peace or security, or the protection of its own security interests.*[148]

The above exception refers to states' obligations with respect to the maintenance of international peace or security. This precludes states' liability for mandatory UN sanctions.[149] Non-mandatory UN sanctions cannot credibly be defended as obligations with respect to international peace or security because they are not obligations. Autonomous sanctions imposed pursuant to other security treaties probably can be defended on this basis. There are two reasons. First, even though states have surrendered primary responsibility for "international peace and security" to the Security Council, security treaties often frame their obligations to impose sanctions as complementing the Security Council's functions in situations where the Security Council has not yet taken the necessary measures.[150] Second, most security exceptions are modelled on the General Agreement on Tariffs and Trade (GATT).[151] It refers more narrowly to "obligations *under the UN Charter* for the maintenance of international peace and security".[152] Therefore, recourse to most IIAs' drafting history implies a deliberate departure from the GATT's narrower standard.

Many security exceptions do not refer to measures relating to international peace and security. Instead, they only defend measures relating to the host-state's security interests.

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[147] The UNCTAD has mapped out 264 IIAs with security exceptions in force as of 4 October 2022.
[148] Comprehensive and Progressive Trans-Pacific Partnership Agreement, above n 91, art 29.2.
[149] For more on the circumstances under which the Security Council can impose mandatory sanctions, see pages 6-7 of this dissertation.
[150] Charter of the United Nations, art 24; North Atlantic Treaty, art 5.
[151] Newcombe and Paradell, above n 9, at 491-493.
[152] General Agreement on Tariffs and Trade 55 UNTS 187 (signed 30 October 1947, last updated by the Marrakesh Agreement 15 April 1994), art XXI(c).

The first challenge when invoking these types of security exceptions is that they often exhaustively list the circumstances in which states can rely on them.[153] The GATT's exception only applies to security interests

> *(i) relating to fissionable and fusionable materials or the materials from which they are derived;*
> *(ii) relating to the traffic in arms, ammunition, and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; [or]*
> *(iii) taken in time of war or other emergency in international relations*.[154]

In *Russia – Measures Concerning Traffic in Transit,* a WTO disputes panel decided that whether such conditions have been met must be objectively assessed even when the rest of the security exception is self-judging.[155] This approach is likely to be influential because it reflects the words' ordinary meaning. Whether a measure was taken in time of emergency is objective.

The UK can probably rely on the second condition to defend its sanctions against Vasili Kuragin and Bombs Incorporated: relating to the traffic in arms. However, states will more often be able to rely on the third condition: taken in time of war or other emergency in international relations. "Emergency in international relations" must be a broader concept than war because war is cited as a mere example of an emergency. However, its meaning remains coloured by the fact that the rest of the listed items – war, arms trade, and nuclear power – all relate to military and defence.[156] Tribunals will probably interpret "emergency in international relations" as referring to periods of latent armed conflict and heightened security competition. Taken at their ordinary meaning, these clauses do not require any particular connection between the emergency and the sanctions. Instead, their primary significance is that they preclude states from relying on security exceptions to defend pre-emptive sanctions.

Having established that their sanctions were not pre-emptive, states must then prove that their sanctions protected their own security interests. The standard of review partly depends on

[153] The UNCTAD has mapped out 125 IIAs whose security exceptions include such lists in force as of 4 October 2022.
[154] General Agreement on Tariffs and Trade, above n 152, art XXI(b).
[155] *Russia – Measures Concerning Traffic in Transit*, above n 64, at [7.101].
[156] Ibid at [7.74].

whether the security exception refers to security interests or essential security interests. However, the key issue is whether the security exception is self-judging. Self-judging exceptions permit measures that states subjectively consider necessary; non-self-judging exceptions only permit measures that objectively are necessary.[157] The Hong Kong-New Zealand BIT includes an example of the latter.[158] Tribunals generally agree that the unilateral right to breach treaty obligations on a self-judging basis is too exceptional to be inferred.[159] Self-judging language must be explicit.

A rare few self-judging security exceptions are explicitly non-justiciable.[160] Sanctions cannot breach IIAs that contain these unless the host-state neglects to invoke the exception. Such gross oversight is almost inconceivable. Most self-judging security exceptions are justiciable. These remain subject to the VCLT's requirement that states perform treaties in good faith.[161] States must consider *in good faith* that a sanction is necessary for the exception to apply. The tribunal in *Enron* decided that the analysis of good faith belief in necessity involved a more deferential standard of review than the analysis of actual necessity.[162] The tribunal in *LG&E* (a related proceeding) took a different approach, interpreting self-judging and non-self-judging exceptions as establishing the same standard of review.[163] Most tribunals will probably prefer the *Enron* approach. The *LG&E* approach renders self-judging language redundant and defies the principle of effective interpretation. More recently, a WTO disputes panel interpreted the self-judging security exception in the GATT as involving a subjective analysis of good faith in *Russia – Measures Concerning Traffic in Transit*.[164]

In any case, the outcome of the analysis depends on what constitutes a security interest. Arbitral jurisprudence on this issue is uncertain. Whereas the tribunals in *Enron* and *CMS Gas* agreed that Argentina's economic crisis did not invoke its security interests, the tribunal in

[157] Katia Yannaca-Small "Essential Security Interests under International Investment Law" in *International Investment Perspectives 2007: Freedom of Investment in a Changing World* (OECD, 2017) 93 at 98-99.
[158] Agreement Between the Government of Hong Kong and the Government of New Zealand for the Promotion and Protection of Investments, above n 141, art 8(3).
[159] *CMS Gas Transmission Company v Argentine Republic (Award)* ICSID ARB/01/8, 12 May 2005, at [370]; *Enron Corporation and Ponderosa Assets*, above n 144, at [335].
[160] Comprehensive Economic Cooperation Agreement Between the Republic of India and the Republic of Singapore (signed 29 June 2005, entered into force 1 August 2005), art 6.12(4).
[161] Vienna Convention on the Law of Treaties, above n 15, art 26.
[162] *Enron Corporation and Ponderosa Assets*, above n 144, at [339].
[163] *LG&E Energy Corporation, LG&E Capital Corporation, and LG&E International Incorporated v Argentine Republic* (Decision on Liability) ICSID ARB/02/1, 3 October 2006 at [214].
[164] *Russia – Measures Concerning Traffic in Transit*, above n 64, at [7.130]-[7.135].

LG&E decided that the same crisis had become so severe that it threatened public disorder and even state collapse.[165] The customary law of necessity cannot neatly fill this gap because it subordinates the existence of necessity to various conditions that security exceptions do not.[166] Trade law jurisprudence might be more useful because the relevant exceptions are similar. In *Russia – Measures Concerning Traffic in Transit*, a WTO disputes panel suggested that security interests should be confined to the state's quintessential functions: the protection of its territory and its population from external threats, and the maintenance of law and public order.[167]

We can safely propose a few principles regarding states' ability to defend sanctions based on security exceptions. First, states can rely on a wider range of peripheral or tangential security threats, including those emanating from armed conflicts in distant regions or human rights breaches, under self-judging security exceptions. Second, states can rely on a wider range of peripheral or tangential security threats when the exception refers only to security interests and not essential security interests. Third, the connection will be more persuasive if the relevant security threat has taken place near the host-state's territory or against its population.[168] Poland can credibly argue that sanctioning Russia for its attack against Ukraine protected its own security interests. The UK probably cannot. Fourth, the connection will be more persuasive if the relevant security threat involves armed conflict or terrorist activity, and less persuasive if it concerns human rights breaches or trade in narcotics. American states cannot plausibly argue that genocides in Asia invoke their security interests, notwithstanding the moral urgency of imposing sanctions in such cases.

3.3.2 General Exceptions

General exceptions are the second treaty-based defence that this dissertation discusses. A minority of IIAs include them.[169] For example, the Pacific Agreement on Closer Economic Relations Plus provides that

[165] Newcombe and Paradell, above n 9, at 498.
[166] Ibid at 130.
[167] *Russia – Measures Concerning Traffic in Transit*, above n 64, at [7.130].
[168] Ibid at [7.135].
[169] The UNCTAD has mapped out 263 IIAs with general exceptions in force as of 4 October 2022.

> *For the purposes of Chapter 9 (Investment), subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between investments and investors of the Parties or of a non-Party where like conditions prevail, or a disguised restriction on international trade or investment flows, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures:*
>
> *(a) necessary to protect public morals or to maintain public order;*
>
> *(b) necessary to protect human, animal or plant life or health;*
>
> *(c) …*[170]

It is difficult to identify sanctions capable of triggering a general exception that breach investment obligations in the first place.[171] Sanctions that are necessary for the listed reasons are justified by non-discriminatory public policy rationales and thus should not breach non-discrimination obligations. Sanctions that are necessary for the listed reasons fall within the police powers doctrine and thus should not breach the obligation not to expropriate without compensation. Finally, sanctions that breach FET should not trigger a general exception because the decision not to afford investors due process rights or meet their legitimate expectations cannot ever be necessary for the listed reasons.

3.3.3 Exclusion from Arbitration

Exclusion from arbitration clauses are the final treaty-based defence that this dissertation discusses. They typically exclude non-discriminatory measures that are for the legitimate public welfare objectives of public health, safety, the environment, public morals and public order from arbitration.[172] Strictly speaking, these are not a defence for otherwise illegal measures. Measures to which these clauses apply remain in breach of the IIA. However, states can afford to impose such measures at relatively low cost because investors cannot vindicate the resulting breaches through arbitration.

[170] The Pacific Agreement on Closer Economic Relations Plus [2020] ATS 12 (signed 14 June 2017, entered into force 13 December 2020), chapter 11 art 1(5).
[171] Newcombe and Paradell, above n 9, at 505.
[172] Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China, above n 43, art 9.11(4)

At first glance, these exclusions seem more promising than general exceptions. More sanctions are for public morals and public order than are necessary for public morals and public order. However, these exclusions remain unlikely to apply to sanctions because sanctions do not credibly serve public welfare. I have already emphasised the difficulty of making arguments to that effect in my discussion of the police powers doctrine.[173]

3.4 Clashes Between Investment and Non-Investment Obligations

This section discusses whether states can defend their sanctions by arguing that they were obliged to impose those sanctions under other treaties. My key finding is that only mandatory UN sanctions can be defended in this way. The UK's sanctions against Vasili Kuragin and Bombs Incorporated remain without defence.

I begin my analysis with the caveat that the relationship between investment and non-investment obligations is deeply uncertain.

The VCLT regulates the interpretation of treaties that govern the same matter in contradictory ways.[174] Article 30 provides that newer treaties prevail unless the older treaty includes parties that the newer treaty does not.[175] The VCLT is supplemented by general principles of customary law. The International Law Commission's (ILC's) conclusions on the fragmentation of international law reflect these principles.[176] These principles include that competing rules should be interpreted in a manner that eliminates the contradiction where possible, that specific rules prevail over general rules (*lex specialis*), that newer rules prevail over older rules (*lex posterior*), and that the parties' clearly expressed intentions around priority should be followed where possible.[177]

[173] See page 27 of this dissertation.
[174] Vienna Convention on the Law of Treaties, above n 15, arts 30 and 59.
[175] Ibid, arts 30(3) and 30(4).
[176] Moshe Hirsche "Investment and Non-Investment Obligations" in Peter Muchlinski, Federico Ortino, and Christoph Schreuer (ed) *The Oxford Handbook of International Investment Law* (Oxford University Press, New York, 2008) 154 at 160.
[177] *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* [2006] vol 2, pt 2 YILC 178 at [251](b)(4), [251](b)(5), [251](b)(10), [251](b)(24), and [251](b)(27).

The problem is that past tribunals have tended to refer neither to these principles, nor to the VCLT, instead relying on ad hoc principles that they themselves invented.[178] The *Southern Pacific Properties* tribunal decided that Egypt's older obligation to the investor prevailed over its newer obligations under the UNESCO Convention *because* it was older.[179] The *Santa Elena* tribunal departed even more egregiously from the ordinary interpretive approach, refusing even to examine Costa Rica's evidence of competing obligations under other treaties.[180]

I have proceeded on the basis that future tribunals will follow the VCLT and the ILC's conclusions for two reasons. First, this is the correct approach from a legal interpretive perspective. Second, most tribunals will be forced to reach the same conclusions regardless. Insofar as past tribunals have erred, they have done so by giving too much priority to investment obligations. However, even tribunals following the wrong approach will be forced to concede that mandatory UN sanctions prevail over IIAs. Moreover, tribunals following the correct approach should still decide that non-mandatory UN sanctions breach international investment law and that IIAs prevail over obligations to impose autonomous sanctions.

3.4.1 UN Sanctions

The UN Charter provides

> *In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.*[181]

Obligations to impose mandatory UN sanctions unambiguously prevail over IIAs.[182] However, mandatory UN sanctions might still breach the minimum standard of treatment and the obligation not to expropriate without compensation. These obligations do not depend on "any other international agreement" because they also reside in customary law. Two points must be

[178] Hirsche, above n 176, at 173.
[179] *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt (Award)* ICSID ARB/84/3, 20 May 1992 at [157].
[180] *Compañia del Desarrollo de Santa Elena S.A. v Republic of Costa Rica (Award)* ICSID ARB/96/1, 17 February 2000 at [71]-[72].
[181] Charter of the United Nations, art 103.
[182] For more on the circumstances under which the Security Council can impose mandatory sanctions, see pages 6-7 of this dissertation.

made. First, investors cannot vindicate breaches of customary law through arbitration. To whatever extent mandatory UN sanctions breach customary law, states can afford to ignore these breaches at relatively low cost. Second, *specific* obligations to impose this or that mandatory UN sanction should prevail over the *general* investor protections found in customary law. Unfortunately for the UK, its sanctions against Vasili Kuragin and Bombs Incorporated are not mandatory UN sanctions. This defence will become increasingly irrelevant as mandatory UN sanctions continue to represent a declining share of sanctions generally.

Non-mandatory UN sanctions cannot credibly be characterised as obligations under the UN charter because they are not obligations. Some scholars have argued for a customary rule whereby otherwise unlawful sanctions are justified by Security Council resolutions.[183] In 1951, the UN General Assembly's Collective Measures Committee adopted a report concluding that "states should not be subjected to legal liabilities … for carrying out UN collective measures".[184] In 1966, Greece withdrew its complaints about the UK's sanctions against Southern Rhodesia after the Security Council authorised them.[185] However, evidence of positive state practice and opinio juris remains thin. States' lack of complaints about past non-mandatory UN sanctions does not plausibly imply that they believed they had no right to complain. Tribunals have rejected clearer customary doctrines than this, including in the *Southern Pacific Properties* and *Santa Elena* decisions. States probably cannot defend non-mandatory UN sanctions on this basis.

3.4.2 Autonomous Sanctions

Security and human rights treaties sometimes require states to impose autonomous sanctions.[186]

The principle of harmony directs tribunals to interpret competing rules in a manner that eliminates contradictions where possible.[187] IIAs cannot plausibly be interpreted as implicitly permitting sanctions because sanctions clearly breach multiple investment obligations. By

[183] Asada, above n 18, at 7-8.
[184] *Report of the Collective Measures Committee* UN Doc A/1891 (1951) at 33.
[185] Robert Kolb "Does Article 103 of the Charter of the United Nations Apply Only to Decisions or Also to Authorizations Adopted by the Security Council?" (2004) 64 HJIL 1 at 28.
[186] See page 6 of this dissertation.
[187] *Conclusions of the work of the Study Group*, above n 177, at [251](b)(4),

contrast, security and human rights treaties that require states to impose autonomous sanctions can plausibly be interpreted in a manner that eliminates contradiction with IIAs. This is because they usually require the achievement of a result rather than the achievement of that result through sanctions specifically.[188] This is particularly true of treaties whose obligations are self-judging.[189] Even if Ukraine were party to the North Atlantic Treaty, tribunals could easily interpret the UK's vague obligation to do what it deemed necessary as entailing no specific obligation to impose sanctions against Vasili Kuragin and Bombs Incorporated. Tribunals will probably refuse to interpret most security and human rights treaties as requiring IIA-breaching sanctions.

I have found no security or human rights treaties where the obligation to impose sanctions was drafted so unambiguously that the inconsistency could not be interpreted away. This likely reflects that the drafters intended at least to pay lip service to the idea that the Security Council should be primarily responsible for sanctions, even though this idea no longer matches the political reality. If tribunals were faced with such a clear obligation to impose sanctions, they would apply article 30 of the VCLT. The relevant security or human rights treaty would only prevail over the contradictory IIA if it included all of that IIA's state-parties as state-parties and was newer than that IIA.[190]

Exceptions might arise where the relevant IIA is drafted not to derogate from the relevant security or human rights treaty, or where that treaty is drafted to prevail over IIAs. In these situations, tribunals would not need to consider the principle of harmony or the order in which all the relevant treaties came into force. The obligations under the relevant security or human rights treaty would simply prevail over the IIA to the extent of any inconsistency between them.[191] However, these situations are rare. Non-derogation clauses in existing IIAs only apply where the competing rule from outside the IIA is favourable to the investor.[192] States cannot use them as a defence.

[188] See page 6 of this dissertation.
[189] North Atlantic Treaty, above n 21, art 5.
[190] Vienna Convention on the Law of Treaties, above n 15, arts 30(3) and 30(4).
[191] Ibid, art 30(2).
[192] The UNCTAD has mapped out 1361 IIAs with non-derogation clauses in force as of 4 October 2022.

3.5 The Customary Law of Countermeasures

Under customary law, states can defend otherwise unlawful acts by characterising them as lawful countermeasures.[193] This section discusses whether states can defend their sanctions by characterising them as lawful countermeasures. My key findings are that tribunals probably have jurisdiction to consider defences based on countermeasures, that such defences should be available in principle, but that they will usually fail. This doctrine represents the UK's best chance of defending its sanctions against Vasili Kuragin and Bombs Incorporated. However, its availability remains deeply uncertain.

The only consensus in past arbitral jurisprudence appears to be that the ILC's 2001 articles on state responsibility accurately reflect customary law.[194] I have proceeded on the basis that future tribunals will continue to accept this. However, relying on the ILC's articles will only remain valid so long as they continue to enjoy the support of widespread state practice and opinio juris; states cannot rely on the articles as if they were a direct source of treaty law.[195] The danger of relying on the articles is exacerbated by the fact that they were drafted to address disputes between states.[196] They might not neatly apply to investor-state disputes.

I also note that the ILC's articles would not apply if they were overridden by more specific rules within IIAs themselves.[197] Some FTAs regulate the circumstances in which states may suspend performance of obligations under the FTA in response to other parties' breaches.[198] These effectively authorise certain kinds of countermeasures and prevail over the customary law of countermeasures as *leges speciales*.[199] However, these treaty-based countermeasures regimes tend not to apply to obligations under FTAs' investment chapters. They do not prevent

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[193] *Responsibility of States for Internationally Wrongful Acts* [2001] vol 2, pt 2 YILC 26, art 22; *Cargill Incorporated v Mexico (Award)* ICSID ARB/05/2, September 18 2009 at [420].
[194] Junianto James Losari and Michael Ewing-Chow "A Clash of Treaties: The Lawfulness of Countermeasures in International Trade Law and International Investment Law" (2015) 16 JWIT 274 at 287-294; *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v The United Mexican States (Award)* ICSID ARB/04/5, 21 November 2007 at [118]; *Corn Products International, Inc. v United Mexican States (Decision on Responsibility (Redacted Version))* ICSID ARB/04/01, 14 January 2008 at [145]; *Cargill Incorporated*, above n 193, at [381].
[195] Paparinskis, above n 75, at 318.
[196] Martins Paparinskis "Circumstances Precluding Wrongfulness in International Investment Law" (2016) 31 ICSID Review 484 at 487.
[197] *Responsibility of States for Internationally Wrongful Acts*, above n 193, art 55.
[198] Agreement Between the United States Of America, the United Mexican States, and Canada (opened for signature CTS 2020/6 10 December 2019, entered into force 1 July 2020), art 31.19.
[199] James Losari and Ewing-Chow, above n 194, at 277.

states from characterising sanctions as lawful countermeasures for the purposes of defending their wrongfulness with respect to investment obligations under those FTAs.[200] I have found no BITs that include an equivalent regime.

3.5.1 Jurisdiction

Lawful countermeasures are limited to the non-performance of obligations owed to states that are responsible for an internationally wrongful act (i.e., any act or omission that breaches international law and is attributable to a state).[201] Therefore, tribunals must assess the investor's home-state's responsibility for an internationally wrongful act to determine whether the host-state's sanctions were lawful countermeasures. The problem is that tribunals' jurisdiction to determine this issue is widely contested. The *Monetary Gold* doctrine is a widely accepted principle of international law.[202] It provides that international adjudicative bodies only have jurisdiction over states insofar as states consent to such jurisdiction.[203] The basis of tribunals' jurisdiction over states resides in two clauses. Consent clauses establish the parties' consent to investor-state arbitration.[204] Governing law clauses empower tribunals to decide the issues in dispute in accordance with applicable rules of international law.[205]

Tribunals have interpreted these clauses differently. The *Corn Products* tribunal decided that the US had not expressly consented to its jurisdiction to assess Mexico's invocation of countermeasures merely by entering into an FTA that included consent and governing law clauses.[206] In parallel proceedings raised by different investors, the tribunals in *Archer Daniels Midland* and *Cargill* agreed that they lacked jurisdiction to decide whether the US had committed an internationally wrongful act.[207] However, both tribunals decided that NAFTA's governing law clause gave them jurisdiction to consider the other elements of Mexico's defence and thereby grant (or deny) Mexico's request for a stay of proceedings until a competent body assessed this final element.[208]

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[200] *Archer Daniels Midland*, above n 194, at [113]-[120].
[201] *Responsibility of States for Internationally Wrongful Acts*, above n 193, arts 49 and 2.
[202] Paparinskis, above n 75, at 337-338.
[203] *Case of the Monetary Gold Removed from Rome in 1943 (Italy v France, United Kingdom of Great Britain and Northern Ireland and United States of America) (Preliminary Questions)* [1954] ICJ Rep 19 at 31–33.
[204] The UNCTAD has mapped out 1,770 such clauses in IIAs as of 4 October 2022.
[205] Free Trade Agreement Between New Zealand and the Republic of Korea, above n 122, art 10.28.
[206] *Corn Products International*, above n 194, at [183].
[207] *Archer Daniels Midland*, above n 194, at [123]; *Cargill Incorporated*, above n 193, at [406] & [430].
[208] Ibid.

The *Corn Products* approach is more persuasive than the *Archer Daniels Midland* and *Cargill* approaches. It better aligns with IIAs' aims because it prevents proceedings from dragging out indefinitely. However, future tribunals should reject both approaches and instead accept jurisdiction to decide all the issues arising out of the customary law of countermeasures. Governing law clauses direct tribunals to decide the issues in dispute according to applicable rules of international law. Whether the investor's home-state committed an internationally wrongful act is clearly an issue in dispute when the host-state invokes countermeasures because this defence is clearly relevant to the wrongfulness of the host-state's sanctions with respect to international investment law. This best aligns with a good faith interpretation of governing law clauses' ordinary meaning.

3.5.2 Investors as Rightsholders

The argument that IIA-breaching sanctions cannot ever constitute lawful countermeasures can be framed variously. Sanctions might be measures taken against investors instead of states and thus fall outside the ambit of articles 22 and 49.[209] Alternatively, sanctions might affect rights similar to fundamental human rights and thus breach article 50(1)(b).[210] Both varieties rest on the same theory: investors are direct rightsholders under IIAs.[211]

Three competing theories enjoy arbitral support.[212] The direct theory is that IIAs give investors substantive rights that are independent of their home-state.[213] The intermediate theory is that IIAs give investors a procedural right to claim state responsibility for substantive obligations owed to their home-state.[214] The derivative theory is that IIAs merely permit investors to assert their home-state's rights.[215] Only the direct theory precludes states from invoking countermeasures. There is no problem under the intermediate theory because sanctions do not interfere with investors' procedural right to raise arbitral claims against states. There is no problem under the derivative theory because investors have no rights.

The intermediate theory is most persuasive.

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[209] *Responsibility of States for Internationally Wrongful Acts*, above n 193, arts 22 and 49.
[210] Ibid, art 50(1)(b).
[211] Paparinskis, above n 196, at 495-497.
[212] James Losari and Ewing-Chow, above n 194, at 289.
[213] *Corn Products International*, above n 194, at [165]-[173]; *Cargill Incorporated*, above n 193, at [422]-[430].
[214] *Archer Daniels Midland*, above n 194, at [171].
[215] *Loewen Group*, above n 51, at [233].

The derivative theory ignores international investment law's history and aims. International investment law evolved in response to problems caused by investors' dependence on their home-states.[216] Recognising investors' procedural right to raise arbitral claims against states underpins the depoliticisation of investment disputes.

The direct theory ignores the ordinary meaning of most IIAs' terms. No IIA explicitly gives investors substantive rights independent of their home-state.[217] The fact that most IIAs empower the parties to amend their terms precludes good faith inferences of an intention to give investors such rights.[218] Further, conflating investment obligations with human rights ignores a fundamental difference between them: investors benefit from IIAs by virtue of their nationality, human rights belong to all people by virtue of their humanity.[219] Advocates of the direct theory emphasise that investors control the conduct of the arbitration so fully that pretending these rights reside with their home-states would be a mere fiction.[220] This emphasis is misguided. Laws rely on fictions all the time. International investment law recognises perhaps the most contrived and simultaneously important fiction in legal history: corporate personality.[221]

3.5.3 Elements of the Defence

The defence that IIA-breaching sanctions are lawful countermeasures comprises five elements:

1. the sanction was against a state that is responsible for an internationally wrongful act;
2. the host-state was injured by the other state's wrongful act;
3. the host-state first called upon that state to cease its wrongful act and make reparations, notified that state of the incoming sanctions, and offered to enter into negotiations;
4. the sanction was proportionate to the injury; and
5. the sanction was imposed temporarily to induce the targeted state to cease its wrongful act and make reparations.[222]

[216] See pages 11-12 of this dissertation.
[217] James Losari and Ewing-Chow, above n 194, at 299.
[218] Ibid at 299.
[219] See pages 14-15 of this dissertation.
[220] James Losari and Ewing-Chow, above n 194, at 290.
[221] See pages 19-21 of this dissertation.
[222] *Responsibility of States for Internationally Wrongful Acts*, above n 193, arts 22, 49, 51, 30, 31, and 34-37. See also *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (Judgment)* [1997] ICJ Rep 7 at 83–85.

I address each in turn. States will often struggle to satisfy the first and third elements but should usually satisfy the other three.

To satisfy the first element, states must be confident that the investor's home-state is unambiguously responsible for an internationally wrongful act. Reasonable belief in such responsibility will not suffice if actual responsibility cannot be established.[223] Establishing the occurrence of an internationally wrongful act might be difficult where the relevant proscribed conduct is an armed attack that the investor's home-state defends as a measure taken in self-defence.[224] Imputing responsibility for an internationally wrongful act to the investor's home-state might be difficult where the relevant proscribed conduct was committed by a non-state actor. This will often be the case for sanctions that respond to terrorism and trade in narcotics.[225] Imputing responsibility for an internationally wrongful act to the investor's home-state will generally be impossible where that investor is a collateral target that does not share the sanctioned individual's nationality. The UK cannot rely on the customary law of countermeasures to defend against claims raised by Bank Vietnam, Funds Incorporated, or Sports Limited.

The second element is satisfied if the host-state has suffered any damage, material or moral, because of the investor's home-state's internationally wrongful act.[226] Armed attacks, human rights breaches, terrorism, and trade in narcotics can all credibly be characterised as morally injurious to the international community at large. Nonetheless, as with the invocation of security interests, the invocation of moral injury will be most persuasive if the relevant proscribed conduct has taken place near the host-state's territory or against its population.

The third element is rarely satisfied. Most states will call upon the targeted state to cease its wrongful acts and make reparations before resorting to sanctions, with such reparations including financial restitution of injured states, compensation for damages, or formal

[223] Mexico's submissions to the contrary were rejected in *Corn Products International*, above n 194, at [184].
[224] Charter of the United Nations, Article 51.
[225] Similar issues arise where states attempt to invoke self-defence in response to attacks by non-state actors. Israel's failure to impute the inciting armed attack to Palestine precluded Israel's invocation of self-defence in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136 at 139. Tribunals might rely on the jurisprudence in these cases to determine whether internationally wrongful acts are attributable to investors' home-states for the purposes of invoking countermeasures.
[226] *Responsibility of States for Internationally Wrongful Acts*, above n 193, arts 49 and 31.

apologies.[227] However, notification of incoming sanctions is rare, and offers of negotiation even rarer.[228] As I discussed in the context of FET, targets like Vasili Kuragin could evade the sanctions against them if they were individually warned. Nonetheless, states can minimise the risk of sanctions-evasion by warning the investor's home-state privately, by waiting only a day before imposing the relevant sanctions, and by withholding details about which investors will be targeted. Going forward, it would be wise for states to comply with this element's requirements. This should be straightforward because they should only apply before the first round of sanctions. It would be needlessly onerous to require repeated notifications and offers of negotiation, and it would be unrealistic to assume that such an unusual requirement is supported by widespread state practice or opinio juris.

The fourth element is highly fact-dependent. The tribunal in *Archer Daniels Midland* weighed the importance of the obligations that the countermeasure breached against the severity of the internationally wrongful act to which it responded.[229] This is the only obvious way to assess proportionality. It will usually operate to the host-state's advantage. The severity of the moral injury caused by an armed attack or a human rights breach will usually dwarf the importance of the investment obligations that a sanction has breached.

Finally, sanctions are only defensible as lawful countermeasures if they have been temporarily imposed to induce the investor's home-state to cease its internationally wrongful act and make reparations.[230] States must establish a credible connection between their sanctions and the coercion of the investor's home-state. Punishment and deterrence of proscribed conduct are not lawful justifications. Relatedly, sanctions will cease to be lawful countermeasures if they are continued after the relevant wrongful act has ceased or proceedings related to that act have come before a competent adjudicative body.[231]

[227] *Responsibility of States for Internationally Wrongful Acts*, above n 193, arts 34-37.
[228] Dupont, above n 125, at 204.
[229] *Archer Daniels Midland*, above n 194, at [155].
[230] *Responsibility of States for Internationally Wrongful Acts*, above n 193, arts 49, 30 and 31.
[231] Ibid, arts 52 & 53.

3.6 Other Customary Doctrines

The doctrines of consent and necessity also reside in customary law, as codified by the ILC's 2001 articles.[232] Neither can defend IIA-breaching sanctions. I address each in turn.

An investor's home-state might consent to sanctions in situations where the de jure government has lost control over its territory and wants to undermine the de facto government.[233] However, states can only suspend the operation of specific clauses if those clauses are an not essential basis of the parties' consent to be bound by the IIA as a whole.[234] Consenting to IIA-breaching sanctions means suspending that IIA's obligations around non-discrimination, the minimum standard of treatment, and expropriation.[235] Absent express direction otherwise, tribunals must recognise these obligations as an essential basis of the parties' consent to be bound by IIAs. IIAs would be pointless without them. If the host-state overcame this problem, it would remain uncertain whether investors' consent was also required.[236] It probably would not be required. Sanctions do not interfere with investors' procedural right to raise claims against states.[237]

States can invoke necessity to defend their sanctions under customary law if those sanctions were the only way to safeguard an essential interest against a grave and imminent peril, and only then if they did not seriously impair other states' essential interests.[238] The problem is that, the more broadly a state defines its own essential interests, the less persuasively it can argue that its sanctions did not impair the investor's home-state's essential interests. Moreover, unlike security exceptions, necessity requires states to argue that their sanctions were the *only* way of safeguarding an *essential* interest against a *grave and imminent peril*. Only sanctions imposed in response to armed attacks against the host-state's territory are likely to pass this threshold. However, states will probably remain unable to invoke necessity in these cases either because their sanctions impaired the aggressor's essential interests or because they themselves contributed to the state of necessity.[239]

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[232] *Responsibility of States for Internationally Wrongful Acts*, above n 193, arts 20, 23, and 25.
[233] Asada, above n 18, at 11.
[234] Vienna Convention on the Law of Treaties, above n 15, art 44(3)(b).
[235] See pages 23-27 of this dissertation.
[236] Paparinskis, above n 196, at 489.
[237] See pages 40-41 of this dissertation.
[238] *Responsibility of States for Internationally Wrongful Acts*, above n 193, art 25.
[239] Ibid, art 25.

Chapter 4 Reform

This chapter comprises three sections. The first section argues that reform should prioritise certainty, but only up to a point. The second section argues that reform should prioritise lenience, but only up to a point. Both arguments follow from the competing objectives I discussed in Chapter 2: balancing the achievement of IIAs' aims with states' latitude to prioritise national security and human rights.

The third section synthesises these arguments to advance four proposals. First, IIAs should not rely on denial of benefits clauses to regulate treaty-shopping by investors from sanctioned states. Second, IIAs should not rely on security exceptions to regulate sanctions. Third, IIAs should expressly subordinate IIA obligations to competing obligations under listed security and human rights treaties. Fourth, IIAs should clarify that the customary law of countermeasures applies to investor-state disputes.

4.1 Certainty

4.1.1 Problems in the Law

International investment law's current response to sanctions is deeply uncertain. It is uncertain whether investors can establish jurisdiction by treaty-shopping.[240] It is uncertain whether sanctions breach non-discrimination obligations.[241] It is uncertain whether collateral targets can bring successful claims for breaches of the minimum standard of treatment or the obligation not to expropriate without compensation.[242] It is uncertain whether self-judging security exceptions establish a substantially different standard of review.[243] It is uncertain whether sanctions are ever necessary for the protection of security interests.[244] It is uncertain whether states can rely on their competing obligations under other treaties.[245] Finally, it is uncertain whether states can ever rely on countermeasures-based defences.[246]

[240] See page 21 of this dissertation.
[241] See pages 23-24 of this dissertation.
[242] See pages 24-27 of this dissertation.
[243] See page 31 of this dissertation.
[244] See page 32 of this dissertation.
[245] See pages 34-37 of this dissertation.
[246] See pages 38-43 of this dissertation.

Throughout Chapter 3, I endeavoured to identify the best and most persuasive responses to these issues under a range of IIAs. This has permitted me to argue that most sanctions probably breach international investment law without defence. However, tribunals have extensive leeway to depart from my arguments. There are few clear precedents on these issues, and such precedents would not be binding even if they existed. States and investors cannot be certain what future tribunals will decide.

The problems caused by uncertainty are fundamental. IIAs cannot effectively promote FDI unless investors can anticipate the likely extent of their protection against political risk. IIAs cannot offer a credible alternative to diplomatic protection if states cannot rely on them to be fair and consistent. IIAs cannot promote the fair treatment of investors if no one can even determine what such treatment entails.

4.1.2 Limiting Principles to Reform

The extent to which future IIAs can, or should, be reformed to codify and resolve these uncertainties is limited by three key principles.

The first principle is that it would be impractical to expect IIAs to identify in precise detail every possible interference with an investor and respond to each on its own terms. IIAs must rely on open-textured obligations, and on tribunals' discretion to apply them judiciously.

The second principle is that regulating states' behaviour too prescriptively would undermine international investment law's legitimacy. Advocates of an extensive or codified investment framework might emphasise that the enforceability of arbitral decisions makes it harder for states to ignore their obligations under IIAs than under other treaties.[247] However, international investment law still relies on states' consent. If it over-regulates states' conduct in situations where they deem key security or human rights interests at stake, states might simply prioritise those interests and withdraw from existing IIAs. This risk is exacerbated by two trends: the growing tension between states' sanctions policies and their investment law obligations, and the growing backlash against investor-state arbitration generally.

[247] See generally Alexandroff and Laid, above n 2.

The third principle is that, as international law has matured and broadened its reach, the risk of regulatory overlap by different branches of international law has grown. When the same concern is regulated by multiple distinct treaties, the risk that the same issue will be regulated in contradictory ways grows. These contradictions undermine international law's clarity and coherence. The international community demonstrated its awareness of this problem when it directed the ILC to investigate and report on it.[248] The integrity of international law is best served by ensuring that competing treaties confine themselves to addressing the specific problems that they were designed to address. IIAs are not designed to be the final arbiter of precisely which sanctions states should and should not be permitted to pursue. Many of the relevant concerns will be best identified and addressed through other fields of international law, including the UN Charter and the customary law of countermeasures.

Fortunately, reform can provide greater certainty without violating any of these three principles by clarifying IIAs' relationship with other relevant fields of international law. Namely, competing security and human rights treaties and the customary law of countermeasures.

4.2 Lenience

4.2.1 Problems in the Law

Most sanctions probably breach international investment law without defence. This would not be a major problem if states could rely on mandatory UN sanctions to vindicate their interests relating to national security and human rights. Nor would this be a major problem if states could safely bet that sanctions-targets rarely export capital or sign IIAs. However, autonomous sanctions feature prominently in states' national security and human rights policies.[249] Further, they are increasingly imposed against developed states with high FDI outflows and extensive protections under international investment law.[250] States cannot safely prioritise national security or human rights without risking forced pay-outs to the very regimes that their sanctions are designed to coerce, punish, and deter.

[248] *Conclusions of the work of the Study Group*, above n 177.
[249] See pages 13-15 of this dissertation.
[250] See page 8 of this dissertation.

4.2.2 Limiting Principles to Reform

Drafters of future IIAs should avoid the temptation to resolve these problems and achieve certainty by simply precluding states' liability for sanctions under IIAs.

The temptation is not entirely unreasonable. It would not grant states unlimited latitude to impose sanctions. Other fields of international law, notably including the UN Charter, trade law, and the customary law of countermeasures, would continue to regulate the circumstances in which states may or may not impose sanctions. Insofar as the problems posed by sanctions are recognised and addressed by these other fields of international law, IIAs need not be involved. Such problems might include that sanctions undermine targeted states' sovereignty, destabilise international relations, and are frequently relied upon to bully weaker states with smaller economies.[251]

Nevertheless, this temptation is misguided. Alongside all of the problems identified above, sanctions also deter FDI, politicise investment disputes, and are frequently unfair to investors who are not themselves complicit in the proscribed conduct to which the sanctions are responding. These are precisely the sorts of problems that international investment law aims to address.[252] International investment law would become impotent if states could circumvent their obligations merely by characterising a given economic restriction as a sanction. Instead, reform should carefully relax the circumstances in which states can defend their sanctions without opening the floodgates to a wide range of frivolous or unjustified sanctions.

Fortunately, reform can achieve this by clarifying the availability of defences based on competing obligations and the customary law of countermeasures.

[251] For more on the tensions between sanctions and state sovereignty, see generally Rahmat Mohamad "Unilateral Sanctions in International Law: A Quest for Legality" in Ali Marossi and Marissa Basset (ed) *Economic Sanctions under International Law* (T.M.C. Asser Press, 2015) 71. For more on sanctions' destabilising effects, see Bunn, above n 60, at 225. For an example of sanctions used to bully weaker states, see Xue, above n 43, at 15.
[252] See pages 9-13 of this dissertation.

4.3 Proposals

4.3.1 Denial of Benefits

IIAs should not rely on denial of benefits clauses to regulate treaty-shopping by investors from sanctioned states. These clauses are redundant because recent tribunals have generally been willing to regulate treaty-shopping through the customary doctrine of abuse of rights.[253] This redundancy is a problem because denial of benefits clauses risk prevailing over the doctrine of abuse of rights as *lex specialis*. Unlike that doctrine, denial of benefits clauses arbitrarily and unfairly permit a sanctioned individual's creditors and business partners to treaty-shop in situations where that individual and its shareholders cannot.[254]

4.3.2 Security Exceptions

Self-judging security exceptions give states too much latitude to impose frivolous and unjustified sanctions. A WTO disputes panel in *Russia – Measures Concerning Traffic in Transit* correctly (and perversely) interpreted such an exception as defending Russian restrictions against Ukrainian exporters even though Russia had initiated the armed conflict that triggered its security interests in the first place.[255] The problem is even worse with security exceptions whose self-judging character is expressly non-justiciable.

By contrast, non-self-judging security exceptions give states too little latitude to impose sanctions relating to human rights breaches. Moreover, their application is generally uncertain and fact-dependent. This does not mean future IIAs should be drafted without security exceptions. Recourse to non-self-judging security exceptions is important in a wider range of contexts than just the defence of sanctions. An obvious example is the defence of investment screening measures.[256] However, security exceptions are too narrow, uncertain, and imprecise a mechanism to regulate sanctions. IIAs must rely on some other additional mechanism(s).

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[253] See page 21 of this dissertation.
[254] See page 22 of this dissertation.
[255] *Russia – Measures Concerning Traffic in Transit*, above n 64.
[256] Screening measures generally restrict foreign investors' access to strategically important businesses like military technology, electricity, airports, and financial market infrastructure. States increasingly rely on them to preserve their capacity to operate autarkically during crises (i.e., their economic resilience) and to avoid dependence on potentially hostile foreign actors. For more on recent trends in the use of screening measures and their implications for international investment law, see generally Merriman and Voon, above n 89.

4.3.3 Non-Derogation Clauses

IIAs should expressly subordinate IIA obligations to competing obligations under listed security and human rights treaties. A model BIT clause might read

> *Nothing in this agreement shall be construed as derogating from the contracting states' obligations under [insert relevant agreements].*
>
> *This applies whether or not the contracting states' obligations under these agreements are favourable to the investor.*

A model FTA clause might read similarly but refer instead to "nothing in this chapter of this agreement…". Such clauses would permit tribunals to interpret general obligations under the listed security and human rights treaties as specifically requiring the imposition of sanctions.[257] Further, they would force tribunals to acknowledge that any such obligation arising under a listed treaty prevails over the IIA to the extent of the inconsistency between them.[258] This proposal would improve the certainty of international investment law's response to sanctions by clarifying the precise nature of IIAs' relationship with competing obligations under other treaties. It would also extend states' latitude to impose well-justified sanctions without opening the floodgates to a wider range of undesirable sanctions.

The test for invoking a non-derogation clause modelled after this proposal would depend on whether the competing obligation at issue was self-judging or not.

In the former case, the host-state must prove that

1. there existed a security threat or human rights breach so severe that its obligation to address the relevant threat or breach necessarily entailed sanctions; and
2. its sanction will assist in the coercion of the target.

In the latter case, the host-state must prove that

[257] See pages 36-37 of this dissertation.
[258] See pages 36-37 of this dissertation.

1. there existed a security threat or human rights breach so severe that its obligation to do what it considered necessary [in good faith] to address the relevant threat or breach necessarily entailed sanctions; and
2. it considered [in good faith] that its sanction will assist in the coercion of the target.

Defending sanctions that pass these thresholds would accommodate states' legitimate interests relating to national security and human rights without undermining IIAs' aims. For example, it would defend sanctions imposed against genocidal regimes (i.e., pursuant to the Convention on the Crime of Genocide) without defending China's unjustified sanctions against Australia. I discuss the types of sanctions that this would defend more fully in section 3.4.2. However, it would not defend the UK's sanctions against Vasili Kuragin and Bombs Incorporated because Ukraine has not acceded to the North Atlantic Treaty. Moreover, it would leave the application of the customary law of countermeasures highly uncertain. This proposal is appropriate but insufficient on its own.

4.3.4 Clarification of Issues Relating to Lawful Countermeasures

IIAs should clarify that the customary law of countermeasures applies to investor-state disputes. A model clause might read

> *The contracting-states consent to a tribunal's jurisdiction to decide the issues arising from the customary law of countermeasures during arbitration.*
>
> *Nothing in this agreement shall be construed as conferring upon investors substantive rights that are independent of their home-states except as it relates to investors' procedural rights before, during, and after investor-state dispute settlement mechanisms, including arbitration.*

The first part would make tribunals' jurisdiction to consider defences based on the customary law of countermeasures certain and explicit.[259] The second part would clarify that only the procedural right to raise arbitral claims against states resides with investors.[260] Put otherwise,

[259] See pages 39-40 of this dissertation.
[260] See pages 40-41 of this dissertation.

tribunals would be forced to accept that some IIA-breaching sanctions can be defended by characterising them as lawful countermeasures.[261] This proposal would improve the certainty of international investment law's response to sanctions. Moreover, it would extend states' latitude to impose well-justified sanctions without opening the floodgates to a wider range of undesirable sanctions.

Host-states would only be able to rely on such a clause to defend sanctions if

1. the sanction was against a state that is responsible for an internationally wrongful act;
2. the host-state was injured by the other state's wrongful act;
3. the host-state first called upon that state to cease its wrongful act and make reparations, notified that state of the incoming sanctions, and offered to enter into negotiations;
4. the sanction was proportionate to the injury; and
5. the sanction was imposed temporarily to induce the targeted state to cease its wrongful act and make reparations.[262]

Defending sanctions that pass this threshold would accommodate states' legitimate interests relating to national security and human rights without undermining IIAs' aims. I discuss the types of sanctions that this would defend more fully in section 3.5.3. It would probably defend the UK against claims raised by Vasili Kuragin or Bombs Incorporated. Further, states can easily ensure that similar sanctions constitute lawful countermeasures in the future by warning the investor's home-state in advance. This should not make sanctions-evasion inevitable so long as the warnings are private, vague, and swiftly followed through.

[261] See pages 40-41 of this dissertation.
[262] See page 41of this dissertation.

Conclusion

The international system has reached a turning point. Whereas the pendulum swung towards economic openness after the end of the Cold War, it now appears to be swinging back towards security competition and ideological conflict. A key herald of change has been the rise of autonomous sanctions against and between states that are deeply enmeshed in the world economy.

States, businesses, and international lawyers cannot expect international investment law to play the same role in this changing international order. However, they are all busy putting out fires. States are busy re-evaluating their sanctions policies in light of emerging security threats and human-rights breaches. Businesses are busy ensuring that they do not inadvertently breach any embargoes. International lawyers are busy advising both.

Against this backdrop, I have attempted to look forward at likely implications for investor-state arbitration. My key finding is that states are probably liable to a far wider range of arbitral claims than either states or investors currently realise. For any given sanction, there are probably multiple aggrieved investors with jurisdiction to raise arbitral claims, multiple investment obligations that have been breached, and few available defences. I have advanced various proposals, chief among them being the introduction of treaty clauses that improve states' access to defences based on competing obligations and the customary law of countermeasures.

The challenges facing international investment law extend far beyond those discussed in this dissertation. International investment law must navigate new investment screening regimes, new environmental policies, and newly invigorated nationalist backlash against international institutions. Popular interest in these issues should continue to grow. I hope that this dissertation has made an early, thoughtful, and useful contribution.

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