

**AMICUS CURIAE BRIEF TO THE COURT OF JUSTICE OF THE EUROPEAN UNION ON THE IMPLICATIONS OF THE COUNCIL DECISION (CFSP) 2025/1495 OF 18 JULY 2025 AND COUNCIL REGULATION 2025/1494 OF 18 JULY 2025 FOR INVESTOR-STATE DISPUTE SETTLEMENT**

Honourable Justices of the General Court of the European Union,

The Russian Arbitration Association respectfully submits this amicus curiae brief in relation to Council Decision (CFSP) 2025/1495 of 18 July 2025 and Council Regulation 2025/1494 of 18 July 2025 (the "**18<sup>th</sup> Sanctions Package**").

This brief is submitted to assist the General Court of the European Union (the "**EU**") (the "**Court**" or the "**CJEU**") in its consideration of the complex legal questions raised in *Ber v Council* (T-640/25), *Shelkov v Council* (T-655/25), *Zhukova v Council* (T-698/25), and *Vakorin v Council* (T-699/25).

As an entity with expertise in international arbitration, the Russian Arbitration Association is strongly interested in ensuring that the CJEU is fully informed of the broader legal, social, and policy implications of the issues presented in these cases.

Our submission does not seek to advocate for any party but instead aims to provide an objective perspective on the matter at hand, drawing upon our collective experience. We assure the Court that neither the Russian Arbitration Association nor any of the drafters of this brief has any interest in the outcome of, or any conflict of interest with respect to, any party to the cases pending before the Court, and that none of them represents any such party. Consequently, we offer an impartial and independent perspective on the matter at hand.

Finally, we acknowledge the limitations set forth in the 1957 Treaty on the Functioning of the EU (the "**TFEU**") regarding third-party interventions in the preliminary ruling procedure before the CJEU. Nevertheless, we respectfully request that the Court consider our perspective as it deliberates on this crucial legal issue. We respectfully urge the Court to annul the provisions of the Council Decision (CFSP) 2025/1495 of 18 July 2025 and Council Regulation 2025/1494 of 18 July 2025 that undermine the foundation of investor-state dispute settlement.

Sincerely,

Russian Arbitration Association

27 April 2026

## TABLE OF CONTENTS

I.	OVERVIEW OF THE 18 <sup>TH</sup> SANCTIONS PACKAGE .....	5
II.	THE 18 <sup>TH</sup> SANCTIONS PACKAGE VIOLATES INTERNATIONAL LAW .....	6
A.	The Prohibition of Recognition Provision .....	6
1.	Article 60 of the VCLT and <i>exceptio inadimplenti non est adimplendum</i> .....	7
2.	The Prohibition of Recognition Provision violates Articles 26 and 27 of the VCLT .....	16
3.	The Prohibition of Recognition Provision contradicts the New York Convention and the Washington Convention.....	19
4.	Application of the Prohibition of Recognition Provision may amount to the violation of investment treaty standards, including expropriation .....	30
5.	The Prohibition of Recognition Provision interferes with bilateral agreements between EU Member States and third States.....	32
B.	The Damages Provision .....	33
C.	The Objection Obligation .....	35
D.	Additional practical risks for the EU Member States related to international law violations .....	36
III.	VIOLATION OF THE PRINCIPLES OF LEGAL CERTAINTY AND PROTECTION OF LEGITIMATE EXPECTATIONS.....	37
A.	The general principles of legal certainty and legitimate expectations in EU law .....	37
B.	Incompatibility of the 18 <sup>th</sup> Sanctions Package with the principles of legal certainty and legitimate expectations.....	38
1.	Breadth and indeterminacy of the enforcement prohibition .....	38
2.	Breach of investors' legitimate expectations relating to access to an effective dispute settlement mechanism .....	40
IV.	THE 18 <sup>TH</sup> SANCTIONS PACKAGE VIOLATES THE PRINCIPLES OF EQUALITY AND NON-DISCRIMINATION .....	42
A.	EU legal framework on equality and non-discrimination.....	44
B.	Analysis.....	46
1.	Different treatment.....	46
2.	No objective justification.....	47
V.	THE 18 <sup>TH</sup> SANCTIONS PACKAGE VIOLATES THE FUNDAMENTAL RIGHT TO PROPERTY .....	48
A.	The scope of the right to property .....	48

B.	Arbitral awards as "possessions" in the meaning of Article 1 of the Protocol	
	No. 1.....	50
1.	Claims confirmed by arbitral award as "possessions" .....	50
2.	Arbitral awards as "possessions" .....	52
C.	Limitations on the right to property .....	54
1.	Deprivation of possessions .....	54
2.	Regulation of the use of property.....	56
3.	Justification of limitations under the 18 <sup>th</sup> Sanctions Package.....	57
VI.	RIGHT TO AN EFFECTIVE REMEDY .....	60
A.	Access to court to an effective remedy .....	61
B.	Existing restrictions on the right to access to court and to an effective remedy imposed by the EU regulations and their practical effect .....	63
1.	Absence of a clear interpretation of the scope of Article 11 of the Regulation No. 833/2014 leads to risks of prejudice of the right of access to court and to an effective legal remedy.....	64
2.	Impact of the amended Articles 5n(1)(a), 5(h) Regulation No. 833/2014 on right to an effective remedy .....	66
C.	Restrictions imposed by the 18 <sup>th</sup> Sanctions Package on the right to an effective remedy/access to court.....	67
1.	Automatic denial of enforcement of ISDS awards against the EU Member States obstructs the right to resolve a case before an independent and impartial tribunal .....	68
2.	Prohibition to apply for assistance against Member States harms the equal treatment, threatens the independent and impartial tribunal .....	69
D.	Right to be heard.....	70
1.	EU law on the right to be heard .....	70
2.	ECHR and international law on the right to be heard.....	72
E.	Existing restrictions on the right to be heard imposed by EU sanctions and their practical effect .....	73
1.	Impact of the 18 <sup>th</sup> Sanctions Package on the right to be heard.....	74
2.	Restrictions imposed by 18 <sup>th</sup> Sanctions Package on the right to be heard.....	75
F.	Russian courts' response to the EU law imposing restrictions on the right to an effective remedy and the right to be heard.....	77
1.	Responsive measures adopted by Russian courts .....	78
2.	The limitations adopted by the EU add to the grounds for the Russian courts' finding exclusive jurisdiction against foreign companies .....	80

3.	Russian courts may extend their exclusive jurisdiction to disputes with foreign states .....	81
VII.	EU-RUSSIA PARTNERSHIP AND COOPERATION AGREEMENT .....	82
VIII.	INTERACTION BETWEEN INTERNATIONAL LAW AND EU LAW .....	83
A.	The <i>Achmea/Komstroy</i> background .....	84
B.	National court responses outside the EU in relation to the Achmea objection .....	87
1.	Switzerland .....	87
2.	United Kingdom .....	88
3.	United States .....	88
4.	Singapore .....	89
C.	Does the EU Commission have competence to halt non-EU investor-state arbitration related to sanctions? .....	90
D.	Recognition and enforcement of arbitral awards in third countries .....	91
1.	Domestic sanctions: approach of the US and UK courts .....	92
2.	Foreign sanctions: approach in third countries .....	95
IX.	IMPLICATIONS OF THE PROVISIONS IN DISPUTE ON INTERNATIONAL ARBITRATION .....	97
A.	<i>De facto</i> exclusion of the investment arbitration mechanism for the resolution of Russian investors' claims .....	97
B.	Disproportionality of investors' protection .....	98
C.	Practical unenforceability of the awards and fragmentation of related court proceedings .....	98
D.	Fragmentation of enforcement .....	99
E.	Pressure on the arbitral tribunals .....	100
F.	Challenges in appointing the European arbitrators in sanctions-related disputes .....	101
X.	ECONOMIC ANALYSIS OF THE IMPACT OF CONTESTED NORMS ON THE INVESTMENT CLIMATE IN THE EU AND THE EU MEMBER STATES .....	101
A.	Impact of the 18 <sup>th</sup> Sanctions Package on investment climate .....	102
B.	Application of major economic analysis of law criteria proves economic inefficiency of the 18 <sup>th</sup> Sanctions Package .....	103
1.	Failure to meet the Kaldor–Hicks criterion .....	104
2.	The Pareto criterion shows that the 18th Sanctions Package is inefficient as it creates a welfare disbalance .....	105
XI.	CONCLUSION .....	106

## I. OVERVIEW OF THE 18<sup>TH</sup> SANCTIONS PACKAGE

1. This amicus curiae brief is focused on three new instruments introduced by the 18<sup>th</sup> Sanctions Package, which may be summarised as follows.
2. Article 11(2a) of Council Regulation (EU) No. 833/2014 of 31 July 2014 ("**Regulation 833/2014**"), as amended by the 18<sup>th</sup> Sanctions Package, impose an obligation on Member States not to recognise, enforce or give effect to awards rendered by investment treaty tribunals not seated in the EU ("**Foreign Awards**") against EU Member States, which hold Member States responsible for, or in relation to, the adoption and/or implementation of sanctions and related judicial or administrative measures (the "**Prohibition of Recognition Provision**"). Article 11(2b) of Regulation 833/2014 extends this prohibition to any requests for assistance or penalties based on such decisions.
3. Article 11e of Regulation 833/2014 also provides a right to damages, including legal costs, for Member States and the EU itself from the persons mentioned above who "*initiated, intervened or participated in the investor-State dispute settlement in connection with measures imposed under this Regulation or Regulation (EU) No 269/2014,*" and from persons, entities, or bodies that own or control them (the "**Damages Provision**").
4. Article 11f of Regulation 833/2014 additionally requires the invocation of any available objections in investor-State disputes related to sanctions (the "**Objection Obligation**").
5. Council's press release dedicated to the 18<sup>th</sup> Sanctions Package is of particular interest to the present amicus brief, since the High Representative for Foreign Affairs and Security Policy and chair of the Foreign Affairs Council Kaja Kallas stated that:

*"The EU is also introducing measures to protect member states from illegitimate Bilateral Investment Treaty (BIT) arbitration proceedings launched by Russian companies and individuals, including oligarchs and their proxies (i.e. damages recovery provision to be taken by member states, tailored non-recognition provision in the EU for those*

*arbitration proceedings and an obligation on member states to act in BIT proceedings*)"<sup>1</sup> (emphasis added).

6. Therefore, the 18<sup>th</sup> Sanctions Package added new instruments to EU law. According to the Council, these provisions are intended to undermine allegedly "*illegitimate*" investor-state arbitration proceedings. In essence, the 18<sup>th</sup> Sanctions Package seeks to obstruct claims and prevent Member States and the EU itself from being held liable under international law.
7. We firmly believe that the provisions introduced by the 18<sup>th</sup> Sanctions Package violate fundamental principles of EU and international law, undermine the integrity of investor-state dispute settlement, and set a deeply troubling precedent for the rule of law and investment protection within the EU. We respectfully urge the Court to annul the provisions of the Council Decision (CFSP) 2025/1495 of 18 July 2025 and Council Regulation 2025/1494 of 18 July 2025 that undermine the foundation of investor-state dispute settlement on the grounds set out below.

## II. THE 18<sup>TH</sup> SANCTIONS PACKAGE VIOLATES INTERNATIONAL LAW

8. This section of the amicus curiae brief highlights the scope of international law violations resulting from the Council's adoption of the 18<sup>th</sup> Sanctions Package.
9. Put straightforwardly, the Prohibition of Recognition Provision seeks to exclude a particular category of disputes from the investment treaty undertakings of EU Member States, while the Damages Provision *de facto* undermines the conduct of investor-state dispute settlement ("**ISDS**") as well as the enforcement of investment treaty awards.
10. Below we review these provisions from the perspective of international law and their correlation with EU Member States' international obligations.

### A. The Prohibition of Recognition Provision

11. The Prohibition of Recognition Provision precludes Member States from recognising, enforcing or otherwise giving legal effect to Foreign Awards, as well as to any

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<sup>1</sup> Council, Russia's war of aggression against Ukraine: EU adopts 18th package of economic and individual measures, 18 July 2025, URL: <https://www.consilium.europa.eu/en/press/press-releases/2025/07/18/russia-s-war-of-aggression-against-ukraine-eu-adopts-18th-package-of-economic-and-individual-measures/>.

administrative or judicial measures adopted by a foreign authority or court following the rendering of such awards, or in support of proceedings intended to lead to or facilitate their enforcement.

12. The language of Regulation 2025/1494 includes the following wording in its recitals:

*"Member States should, with due respect for their applicable international obligations, not recognise or enforce any injunction, order, relief, judgment of a court other than a court of a Member State or other court, arbitral or administrative decision issued in proceedings other than those in the Member States pursuant to or derived from investor-State dispute settlement proceedings in connection with measures imposed under Regulation (EU) No 833/2014 or Regulation (EU) No 269/2014"* (emphasis added).

13. This underlined passage supports the consideration that Member States cannot invoke Regulation 833/2024 to evade their applicable international obligations.
14. This caveat is missing from the actual amendments inserted in Regulation 833/2024. However, the recitals may be relied on to resolve issues of interpretation arising from ambiguous provisions.<sup>2</sup> Therefore, it could be concluded that the Prohibition of Recognition Provision is only valid to the extent that it does not conflict with the international obligations of EU Member States, including obligations related to investment treaty arbitration.
15. Moreover, the fact that this caveat appears in the recitals but not in the text of Article 11 itself may signal that some Member States expressly opposed its inclusion in Regulation 833/2024.

**1. Article 60 of the VCLT and *exceptio inadimplenti non est adimplendum***

16. The "anti-ISDS" provisions of Article 11(2a), as well as of Article 11e of Regulation 833 may have a backfiring effect on the current and potential investment arbitration claims of the European investors against the Russian Federation under the applicable BITs. From public international law perspective, one can consider two

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<sup>2</sup> *Klimas, Tadas and Vaiciukaite, Jurate*, 'The Law of Recitals in European Community Legislation', ILSA Journal of International & Comparative Law, Vol. 15, 2008, P. 33.

hypothetical responses by the Russian Federation to the "anti-ISDS" unilateral restrictive measures, which stem on the general principle of reciprocity.

17. *First*, the referred provisions of Regulation 833 can give rise to terminating or suspending the applicable BITs between the Russian Federation and EU Member States, based on Article 60 of the Vienna Convention on the Law of Treaties (the "VCLT"). As a remedial action, the Russian Federation may initiate partial or entire termination or suspension of the BITs with EU Member States.
18. *Second*, the Russian Federation may resort to the general principle *exceptio inadimplenti non est adimplendum* (exception of non-performance), e.g., to justify jurisdictional and admissibility objections in the pending and potential arbitrations launched by the European investors.<sup>3</sup>

**(a) Article 60 of the VCLT**

19. Article 60(1) of the VCLT ("Termination or suspension of the operation of a treaty as a consequence of its breach") provides that a material breach of a bilateral treaty by one of the parties can be a ground for the termination or suspension of a treaty:

*"1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part."*

20. Article 60(3) of the VCLT defines material breach for the purposes of a treaty termination or treaty suspension as follows:

*"3. A material breach of a treaty, for the purposes of this article, consists in:*

*(a) a repudiation of the treaty not sanctioned by the present Convention;*  
*or*

*(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty."*

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<sup>3</sup> E.g., pending arbitrations in *Wintershall v the Russian Federation* (I), (II); *Fortum v the Russian Federation* (I), (II). Threats of disputes were reported, e.g., claims of Rockwool A/S under the Denmark-Russia BIT.

21. The underlying idea of Article 60 of the VCLT is the general principle of *inadimplenti non est adimplendum*, which had long been recognised as part of customary international law prior to the adoption of the VCLT.<sup>4</sup> According to the principle, a party cannot be held to respect its obligations under a treaty if the other party refuses to honour them, and if both obligations form a synallagma, establishing negative aspect of the general principle of reciprocity.<sup>5</sup>
22. As follows from Article 60(3)(b) of the VCLT, as a trigger for the right to suspend or to terminate a treaty, a qualified, "material" breach is required. A material breach occurs when two preconditions are present:
- a) there is a violation of a treaty provision; and
  - b) violated treaty provision is essential to the accomplishment of the object or purpose of the treaty.<sup>6</sup>
    - i. *Violation of a treaty provision*
23. With regard to the first element of a material treaty breach under Article 60(3)(b) of the VCLT, the relevant BIT provisions are the ISDS clauses. Most ISDS clauses in the modern BITs are formulated in a way to provide binding commitments to refer the ISDS disputes to international arbitration, constituting formal international law obligations of the contracting states. For instance, Article 8(2) of the Russia-Sweden BIT.<sup>7</sup> The ISDS clauses in some modern BITs incorporate an express commitment to consider any

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<sup>4</sup> Simma, Tams in: *The Vienna Conventions on the Law of Treaties: A Commentary* (2nd Edition), 2025, p. 1534, referring to Grotius, *De Iure Belli Ac Pacis Libri Tres*, vol. II, c.15, § 15; de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains*, vol. I, c.13, § 200.

<sup>5</sup> Simma, Tams, *Ibid*, referring to Waldock, Second Report, *YILC*, 1963, vol. II, p 73.

<sup>6</sup> See Xiouri, *The Breach of a Treaty* (Brill, 2021), p. 71-72.

<sup>7</sup> If the dispute cannot thus be settled within a period of six months from the date of written notification of the claim, it shall at the request of the investor be submitted to an ad hoc arbitral tribunal established under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

ensuing arbitral award as final and binding, and to execute it.<sup>8</sup> The examples are Article 10(3) of the Russia-Lithuania BIT<sup>9</sup> and Article 8 of the Russia-Norway BIT.<sup>10</sup>

24. EU Member States materially violate the ISDS clauses of the applicable BITs by introducing the following ISDS-related measures under the Regulation 833:
- a) a prohibition for the courts of the EU Member States to recognise and enforce arbitral awards ensuing from the sanctions-related Investor-State arbitrations against a EU Member State (Article 11(2a) of the Regulation 833); and
  - b) allowing such EU Member State to recover damages from claimants in such arbitrations, persons and companies controlled by them (Article 11e of the Regulation 833).
25. The unilateral restrictions introduced to the Regulation 833 frustrate the effect of the ISDS clauses to the extent as to render them meaningless. EU Member states *de facto* expressed their wish not to be bound by the ISDS clauses of the BITs in the sanctions-related arbitrations. Even though the state's consent to arbitrate disputes with an investor of another contracting party, as expressed in the ISDS clause, may formally remain not withdrawn in such scenario, the real effect of the restrictions under Article 11(2a), Article 11e of Regulation 833 is to disregard the contracting state's commitment to arbitration and to a final and binding force of the ensuing arbitral award, so as to deprive the investors of an effective legal remedy that would be otherwise available under the ISDS clause of the BIT. Such effect in practice would be akin to the state's revocation

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<sup>8</sup> See R Echandi, Non-Compliance with Awards: The Remedies of Customary International Law, 2012, Proceedings of the ASIL Annual Meeting 119.

<sup>9</sup> 2. If such dispute can not be settled amicably within six months from the date of the written notification referred to in paragraph 1 of this Article, the dispute, at the request of either party and at the choice of an investor, shall be submitted to:

- a) competent court or court of arbitration of the Contracting Party in which territory the investments are made;
- b) the Arbitration Institute of the Stockholm Chamber of Commerce;
- c) the Court of Arbitration of the International Chamber of Commerce;
- d) an ad hoc arbitration in accordance with Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

3. The arbitral decision shall be final and binding on both parties of the dispute. Each Contracting Party shall undertake to execute such decision in accordance with its legislation.

<sup>10</sup> The arbitral awards are recognised and enforced in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards done in New York on June 10, 1958.

of the standing offer to arbitration in the ISDS clause of the BIT in the sanctions-related context or to a *sui generis* carve-out from the BIT.

26. If an investor receives a favourable arbitral award in a sanctions-related context against an EU Member State, even if the arbitration is seated outside the EU, pursuant to Article 11(2a) of Regulation 833, the implications for the investor are that the award would be unenforceable in EU territory. The implications could potentially be even wider in terms of the non-enforceability: the defeated EU Member State could oppose the enforcement of a negative award in third jurisdictions outside the EU by recognising (and, if necessary, enforcing) an "anti-enforcement" declaratory judgement obtained from a competent court of an EU Member State. Such an 'anti-enforcement' declaratory judgement would state that an award enforcement would imply a breach of mandatory EU law by the Respondent State, and its liability under EU law.
27. Similar "anti-enforcement" techniques have been attempted by EU Member States in the context of the intra-EU arbitral awards. For example, in a pair of the intra-EU solar arbitrations *NextEra Energy Global Holdings BV v Kingdom of Spain*<sup>11</sup> and *Blasket Renewable Investments LLC (formerly - AES Solar and others (PV Investors)) v Kingdom of Spain*,<sup>12</sup> the Kingdom of Spain received a declaratory judgement from a competent Dutch court<sup>13</sup> and further used it in the third jurisdictions, including in the U.S., to "torpedo" the enforcement attempts of the winning investors. An issue that may arise in such context is to what extent the third jurisdictions courts would give deference to such declaratory judgments of the courts of EU Member States, and how such jurisdictional conflicts would be resolved, which creates an additional layer of uncertainty for foreign investors in the sanctions-related BIT arbitrations.
28. Another implication for a Claimant-investor, as well as for the persons and companies controlled by the Claimant-investor, arising from Article 11(e) of the Regulation 833, is the exposure to monetary liability in the territory of EU, and potentially in the third jurisdictions. Article 11(e) of the Regulation 833 imposes on the Respondent States an obligation ("shall") to take measures to recover any direct or indirect damages before

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<sup>11</sup> *NextEra Energy Global Holdings BV v Kingdom of Spain*, ICSID Case No. ARB/14/11.

<sup>12</sup> *Blasket Renewable Investments LLC (formerly - AES Solar and others (PV Investors)) v Kingdom of Spain*, PCA Case No. 2012-14.

<sup>13</sup> *E.g.*, Judgment of the Amsterdam District Court of 5 February 2025.

the competent courts of a Member State from a Claimant-investor or its controlled persons and companies.

29. Similar "anti-arbitration" techniques have been attempted by EU Member States in the context of the intra-EU arbitral awards. For example, in *LC Corp v The Republic of Poland*, the Republic of Poland received a declaratory judgement from a competent Dutch court<sup>14</sup> that ordered specific performance by the investor, *inter alia*, to cooperate with the state in terminating the London-seated BIT arbitration by filing a joint application to the arbitral tribunal within two weeks from service of the declaratory judgment. The declaratory judgment imposed a daily penalty for the claimant's non-compliance for each day elapsed after the deadline, in the amount of EUR 100,000 for each day, up to a maximum of EUR 10,000,000.
30. The above practical implications for the Claimant-investors are tantamount to the revocation of the Respondent State's offer to arbitrate BIT disputes, as envisaged in the ISDS clause. The ISDS-related unilateral restriction measures introduced to the Regulation 833 effectively disregard the international law obligations of EU Member States under the respective BITs to honour the commitment to arbitration and to a final and binding force of the ensuing arbitral award.

*ii. Essentialness of a violated treaty provision to the accomplishment of the treaty's object or purpose*

31. With regard to the second element of a material treaty breach under Article 60(3)(b) of the VCLT — essentialness of a violated treaty provision to the accomplishment of the treaty's object or purpose — "*it is meant to refer to a provision at the heart of a treaty, and without which the future performance of a treaty would be without interest to the parties.*"<sup>15</sup> The *travaux préparatoires* suggest that for a provision to be essential, it need not necessarily regulate the central purpose of the treaty. Rather, when replacing the term "fundamental breach" — which had appeared in Fitzmaurice's draft Articles 57 — by "material breach," the International Law Commission (ILC) intended to broaden the scope of the provision so as to cover provisions which the parties considered to be

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<sup>14</sup> Judgement of the Amsterdam Court of Appeal of 22 April 2025, ECLI:NL: GHAMS:2025:1065.

<sup>15</sup> Simma, Tams, referring to M. Goma, *supra* n 27, p 31.

essential despite their ancillary character.<sup>16</sup> In the words of the tribunal in an arbitration between Croatia and Slovenia, Article 60(3)(b) of the VCLT

*"does not refer to the intensity or the gravity of the breach, but instead requires that the provision breached be essential for the accomplishment of the treaty's object and purpose."*<sup>17</sup>

32. It is generally recognised by legal scholars that the violation of dispute-settlement provisions in a treaty otherwise concerned with different matters can constitute a "material breach."<sup>18</sup> Indeed, the dispute resolution clauses were the main example given for such provisions by the ILC.<sup>19</sup>

33. In the context of the BITs, the ISDS clauses are essential to achieve the object and purpose of the BITs, being traditionally promotion and reciprocal protection of the investments and establishing favourable frameworks for foreign investments. The preambles of the BITs are usually illustrative for establishing the object or purpose of the BITs. For instance, the preamble of the Russia-Sweden BIT includes the wording as follows:

*"Desiring to create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting party,*

*Recognizing that a fair and equitable treatment of investments on a reciprocal basis will serve this aim, [...]."*<sup>20</sup>

34. The ISDS clauses in the BITs meet the test of essentialness. The BITs rely on the idea that states might breach certain substantive protections accorded to foreign investments

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<sup>16</sup> Simma, Tams, referring to ILC Commentary, *YILC*, 1966, vol. II, p 255 (para. 9).

<sup>17</sup> Arbitration Between Croatia and Slovenia, Partial Award of 30 June 2016, para. 215.

<sup>18</sup> Simma, Tams, referring to Waldock's Second Report, *YILC*, 1963, vol. II, p 75 (para. 11).

<sup>19</sup> Ruiz Fabri, Ayman in: *General International Law in International Investment Law*. Edited by Andreas Kulick and Michael Waibel, Oxford University Press referring to 'Documents of the fifteenth session including the report of the Commission to the General Assembly' *YILC* 1963, Vol II, Doc A/ CN.4/ 156 and Add1– 3, 175, para 11: '[f] or example, a clause providing for compulsory arbitration in the event of a dispute as to the interpretation or application of the treaty is purely ancillary to the main purposes of the treaty, but it may well be regarded by some parties as an essential condition for agreeing to be bound by the treaty'.

<sup>20</sup> Similarly, the preamble of the Russia-Lithuania BIT stipulates:

- desiring to establish favourable conditions for investments made by investors of one Contracting Party in the territory of the other Contracting Party,

- recognising that the promotion and reciprocal protection of investments, based on the present Agreement, will be conducive to the development of mutually beneficial trade and economic, scientific and technical co-operation.

and investors. In such case, one of the investment treaty solutions to remedy a potential breach is to resort to the ISDS clause. The violations of the ISDS clauses, as a result of the restrictions introduced to the Regulation 833, defeat the object and purpose of the BITs: favourable conditions for foreign investments require independent dispute resolution system, which should be de-politicised and neutral with regard to foreign investors. International arbitration has been recognised as such system that is able to safeguard the need for independence and de-politization, as compared to national court of the Host State.

35. It is commonly understood that a failure to comply with an arbitral award based on an investment treaty amounts to a material breach that defeats the accomplishment of the object and purpose of that treaty within the meaning of Article 60 of the VCLT.<sup>21</sup>
36. The introduction of Article 11(2a) of the Regulation 833, mandating the non-compliance with arbitral awards by EU Member States in the sanctions-related arbitrations, *per se* constitutes a material breach of the applicable BIT.

**(b) *Exceptio inadimplenti non est adimplendum***

37. The defence of *exceptio adimpleti non est adimplendum* consists in the non-performance by a party of a treaty obligation for so long as the other contracting party has not performed a synallagmatic<sup>22</sup> obligation under the same treaty.<sup>23</sup> Synallagmatic obligations are those based on reciprocity, namely, arising from the bilateral or multilateral treaties. Such an obligation has been described as one which would "*correspond to, or [is] directly connected with, the obligation breached,*"<sup>24</sup> in the sense that it is "*either a precondition or a concurrent condition to the performance of the same*

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<sup>21</sup> Ruiz Fabri, Ayman, *Ibid*, p. 17, para. 230. A similar view is supported by Hee Suh Jae and Mbengue Makane Moïse in: Compliance with Arbitral Awards, Jus Mundi, <https://jusmundi.com/en/document/publication/en-compliance-with-arbitral-awards#:~:text=A%20State%20award%20debtor%20that,7>.

<sup>22</sup> The word synallagmatic is derived from the Greek word συνάλλαγμα (contract or covenant).

<sup>23</sup> Xiouri, *The Exceptio Non Adimpleti Contractus in Public International Law* (March 11, 2019). SSRN: <https://ssrn.com/abstract=5163709> or <http://dx.doi.org/10.2139/ssrn.5163709>.

<sup>24</sup> *Ibid*.

or a related obligation by the other party,"<sup>25</sup> so that the non-performance be "equivalent and corresponding."<sup>26</sup>

38. There is overwhelming support for the view that the *exceptio* constitutes a general principle of law in the sense of Article 38(1)(c) of the ICJ Statute, given the extensive comparative law background of the notion in domestic contract laws, as well as the recognition of the *exceptio* as a general principle of law in individual opinions of PCIJ and ICJ judges, in the awards of many international arbitral tribunals and by an important part of the doctrine.<sup>27</sup>
39. The obligations of the contracting parties arising from the BITs can be considered as synallagmatic: by their nature, the BITs provide undertakings for reciprocal protection of the investments and investors of one contracting party in return to the same volume of treaty protection to those of the other party. Thus, a BIT contracting party can withhold performance of its obligations in case of non-performance by the other BIT party based on the defence of the *exceptio*.
40. As discussed *infra* (Sections A(1)(a)(i)–A(1)(a)(ii)), the ISDS-related unilateral restrictive measures introduced by the 18<sup>th</sup> Sanctions Package to Regulation 833 amount to a material breach of the ISDS clauses in the respective BITs. The response to the BIT breach by EU Member States from the other contracting party (the Russian Federation) can envisage a reciprocal denial of the same right under the BIT to the European investors, or non-performance of the same BIT obligation as that underlying the breach, i.e. the ISDS clause. This implies that the Russian Federation can, e.g., raise objections to the jurisdiction and admissibility of the investment treaty claims of European investors in the pending or potential arbitral proceedings, or issue a unilateral statement to a similar effect.

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<sup>25</sup> Special Rapporteur Crawford, *Second Report on State responsibility*, Addendum 2, UN Doc A/CN.4/498/Add.2 ('Crawford II Add 2'), para 318.

<sup>26</sup> Special Rapporteur Fitzmaurice, *Fourth Report on the Law of Treaties*, ILCYB 1959-II, p. 46, draft art 20 (1).

<sup>27</sup> Xiouri, *Ibid.*

## 2. The Prohibition of Recognition Provision violates Articles 26 and 27 of the VCLT

41. The 18<sup>th</sup> Sanctions Package contradicts the two most relevant articles of the VCLT (26 and 27), which are violated by invoking the Prohibition of Recognition Provision and read as follows:

*"Article 26  
"Pacta sunt servanda"*

*Every treaty in force is binding upon the parties to it and must be performed by them in good faith.*

*Article 27  
Internal law and observance of treaties*

*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."*

42. From the perspective of international law and of the states outside the EU, EU law is domestic law, as detailed in Section VIII below.
43. *First*, according to the well-established principle of international law (also codified in Article 27 of the VCLT), a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This principle is foundational in public international law and is intended to ensure that treaty obligations prevail over domestic legal orders, including EU law.
44. Arbitral tribunals have consistently applied Article 27 to reject attempts to invoke internal law, including EU Regulations, as justification for non-performance of international treaty obligations.
45. For example, in *Sun Reserve v Italy*, the tribunal held that:

*"...in support of their arguments, Claimants have relied on Article 3 of the ILC Articles on State Responsibility and Article 27 VCLT, to argue that these provisions prohibit the use of domestic law to justify a breach of international law. Article 3 of the ILC Articles on State Responsibility provides:*

*The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.*

*Similarly, Article 27 VCLT provides:*

*A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.*

*The Tribunal understands the above provisions to codify the principles that a State cannot invoke its domestic law to either (i) influence or affect the characterization of an internationally wrongful act; or (ii) justify its failure to perform a treaty obligation. Thus, the Tribunal agrees with the proposition advanced by Claimants that domestic law cannot be relied upon by Italy to excuse itself from or to justify a breach of international law."<sup>28</sup>*

46. In line with the above example, the tribunal in *Fynerdale Holdings BV v The Czech Republic* noted that "*indeed, in accordance with Article 27 VCLT, the Czech Republic cannot rely on EU law to excuse its failure to comply with the Treaty's terms, because EU law qualifies as internal law of Member States.*"<sup>29</sup>
47. Doctrinal commentary and scholarly analysis reinforce the prohibition on invoking Article 27 of the VCLT as a foundational rule of public international law, intended to ensure the supremacy of international obligations over domestic law, including regional legal systems such as EU law.<sup>30</sup>
48. Consequently, no provisions of Regulation 833/2024 may be used to justify non-compliance with international legal obligations.

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<sup>28</sup> *SunReserve Luxco Holdings SRL v Italy*, SCC Case No. 132/2016, Final Award, 25 March 2020, ¶ 981.

<sup>29</sup> *Fynerdale Holdings BV v The Czech Republic*, PCA Case No. 2018-18, Award, 29 April 2021, ¶ 200.

<sup>30</sup> "Les Etats ne sauraient renoncer aux mesures d'exécution sur leurs biens détenus par les banques centrales en France", note sous Cass. civ. Ire, 12 mai 2021, *Revue de l'Arbitrage* Vol. 2021 No. 4, 2021, P. 1145.

49. On a separate note, we highlight the recent Singapore court decision, in which the court rejected Spain's objections based on EU law arguments and emphasised the binding nature of ICSID awards, which cannot be challenged in national courts.<sup>31</sup>
50. *Second*, another relevant long-standing international law principle of *pacta sunt servanda*, codified in Article 26 of the VCLT, cannot be circumvented by Regulation 833/2024.
51. As the ICSID tribunal explained:
- "...if there must be a "hierarchy" between the norms to be applied by the Tribunal, it must be determined from the perspective of public international law, not of EU law [...]"*
- This follows from the basic public international law principle of pacta sunt servanda. If one or more parties to a treaty wish to exclude the application of that treaty in certain respect or circumstances, they must either make a reservation [...] or include an unequivocal disconnection clause in the treaty itself [...]"*
- EU law does not and cannot 'trump' public international law."*<sup>32</sup>
52. However, Regulation 833/2024 specifically and expressly constrains the recognition and enforcement of Foreign Awards arising from investor-State dispute arbitral proceedings stemming from the violation of investment treaties between EU Member States and third states.
53. While CJEU case law has previously identified possible conflicts between EU law and arbitral awards (as discussed in Section VIII regarding the *Achmea* and *Komstroy* cases), previous EU legislation has never categorically barred the recognition or enforcement of Foreign Awards. Nor has EU law, to date, sought to interfere with investment treaties between Member States and third states.
54. *Lastly*, even if Regulation 833/2024 could create conflicting rights and obligations for parties to international treaties, such as the VCLT, the 1958 United Nations Convention

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<sup>31</sup> NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. v Kingdom of Spain, Judgment of the High Court of Singapore [2026] SGHC 43.

<sup>32</sup> RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, ¶¶ 75, 85, 87.

on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**"), or the 1965 Convention on the Settlement of International Investment Disputes (the "**Washington Convention**"), it would not apply to parties of such treaties.

55. It follows from the wording of Article 31 of the VCLT that:

*"Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs [...]"*

*"When the parties to the later treaty do not include all the parties to the earlier one [...] as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations."*

56. Consequently, the consistent rule of international law is that the treaty to which both states are parties governs their mutual rights and obligations, rather than the treaty to which only one of them is a party.

57. Therefore, the introduced Prohibition of Recognition Provision of the 18<sup>th</sup> Sanctions Package is, in any case, at odds with the VCLT.

### **3. The Prohibition of Recognition Provision contradicts the New York Convention and the Washington Convention**

58. The Prohibition of Recognition Provision of the 18<sup>th</sup> Sanctions Package is inconsistent with Member States' multilateral obligations under the New York Convention and the Washington Convention, as well as with related case law.

59. All 27 Member States have ratified the New York Convention;<sup>33</sup> 25 have ratified the VCLT;<sup>34</sup> and 26 have ratified the Washington Convention.<sup>35</sup> Although Russia has not ratified the latter, investors of contracting states to the Washington Convention might nonetheless be affected by the 18<sup>th</sup> Sanctions Package, for example, if their claims were

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<sup>33</sup> UNCITRAL, New York Convention, Contracting States, available at: <https://www.newyorkconvention.org/contracting-states/contracting-states>.

<sup>34</sup> United Nations Treaty Collection, VCLT, available at: <https://treaties.un.org/pages/showdetails.aspx?objid=080000028003902f>.

<sup>35</sup> United Nations Treaty Collection, Washington Convention, available at: <https://treaties.un.org/pages/showDetails.aspx?objid=080000028012a925>.

lodged under Regulation No. 269/2014 of 17 March 2024 in connection with asset freezing.

60. In addition to the VCLT, we will focus on the two most relevant, widely recognised treaties — the New York Convention and the Washington Convention.
61. The New York Convention provides narrow and specific exceptions from the duty to recognise and enforce an arbitral award, with, *inter alia*, the avenues under Article V(2):

*"(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or*

*(b) The recognition or enforcement of the award would be contrary to the public policy of that country."*

62. In our opinion, the Prohibition of Recognition Provision does not fit within those exceptions and even attempts to circumvent them.
63. As explained below, the key and almost sole justification for Regulation 833/2014 in implementing the 18<sup>th</sup> Sanctions Package is the concept of presenting sanctions as part of public policy.
64. The 18<sup>th</sup> Sanctions Package states that any breach of Prohibition of Recognition Provision should be treated as a violation of the public policy of the EU and its Member States in its recitals:

*"...the recognition or enforcement by Member States of an injunction, order, relief, judgment of a court other than a court of a Member State or other court, arbitral or administrative decision issued in proceedings other than those in the Member States pursuant to or derived from investor-State dispute settlement proceedings which could lead to the satisfaction of any claims in connection with measures imposed under Regulation (EU) No 833/2014 and Regulation (EU) No 269/2014 should be regarded as violating the public policy of the Union and the Member States." (emphasis added).*

65. However, the Prohibition of Recognition Provision should not, among other things:
  - a) interpret the public policy exception in the New York Convention broadly;

- b) define the content of public policy in EU legislation and equate the introduction of sanctions to public policy;
  - c) imply that public policy exemption only applies in a certain category of cases.
66. Italy, a Member State, put forward the following notable viewpoint during the development of the New York Convention: "*public policy*' was a matter within the discretionary power of each country."<sup>36</sup>
67. We note that, for example, Greece representatives had the following position "*upon might be worded in such a way that the fact that a foreign award was incompatible with fundamental principles of the law (ordre public) would be sufficient grounds for refusing recognition.*"<sup>37</sup>
68. According to the results of the deliberations, all attempts to expand the wording public policy with the phrase "*or with fundamental principles of the public policy*" were rejected by a majority vote.<sup>38</sup>
69. Public policy as a ground for refusing the recognition or enforcement of Foreign Awards under Article V(2)(b) of the New York Convention is overwhelmingly considered to include only a very limited number of fundamental rules or values. In the vast majority of jurisdictions, courts narrowly interpret or apply these rules and values by requiring a certain level of intensity for a given circumstance to be held contrary to public policy.<sup>39</sup>
70. For instance, in *Parsons & Whittemore Overseas Co.*, the United States Court of Appeals for the Second Circuit stressed the importance of construing the Article V(2)(b)

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<sup>36</sup> Report of the United Nations Commission on International Trade Law on the Work of Its Forty-Sixth Session, U.N. Doc. A/CN.9/796 (2013), available at [https://www.newyorkconvention.org/media/uploads/pdf/5/7/57\\_e-conf-26-sr17.pdf](https://www.newyorkconvention.org/media/uploads/pdf/5/7/57_e-conf-26-sr17.pdf).

<sup>37</sup> Addendum to the Report of the Secretary-General on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc. E/2822/Add.2 (1956), available at [https://www.newyorkconvention.org/media/uploads/pdf/1/2/126\\_doc-12-e-2822-add-2.pdf](https://www.newyorkconvention.org/media/uploads/pdf/1/2/126_doc-12-e-2822-add-2.pdf).

<sup>38</sup> Report of the United Nations Commission on International Trade Law on the Work of Its Forty-Sixth Session, U.N. Doc. A/CN.9/796 (2013), available at [https://www.newyorkconvention.org/media/uploads/pdf/5/7/57\\_e-conf-26-sr17.pdf](https://www.newyorkconvention.org/media/uploads/pdf/5/7/57_e-conf-26-sr17.pdf).

<sup>39</sup> Report on the Public Policy Exception in the New York Convention, International Bar Association, October, 2015, P. 18.

exception narrowly, and excluded foreign policy measures from the scope of public policy, in the following terms:

*"In equating 'national' policy with United States 'public' policy, the appellant quite plainly misses the mark. To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.' Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis. [...] To deny enforcement of this award largely because of the United States' falling out with Egypt in recent years would mean converting a defense intended to be of narrow scope into a major loophole in the Convention's mechanism for enforcement. We have little hesitation, therefore, in disallowing Overseas' proposed public policy defense."<sup>40</sup>*

71. In the very recent *Satoriagricultural Consultancy & Projects Management L.L.C. S.P.Cv T&R Productions LLC* decision, Judge Beryl A. Howell of the U.S. District Court for the District of Columbia elaborated on the case law confirming that it is not enough that the award conflicts with the interests of the state to deny recognition of an arbitral award under the public policy exception of the New York Convention, in the following terms:

*"the question is whether recognition and enforcement of the awards will violate the public policy of the United States, because TV-Novosti, the original claimant in the arbitration, is currently sanctioned by the United States government [...]*

*'The public policy defense under Article V(2)(b) of the New York Convention is to be construed narrowly,' Hardy Expl. & Prod. (India), Inc. v. Gov't of India, Ministry of Petroleum & Nat. Gas, 314 F. Supp. 3d 95, 109 (D.D.C. 2018) [...]*

*'A judgment is unenforceable as against public policy to the extent that it is 'repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.' TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 938 (D.C. Cir. 2007) (quoting Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986) (quoting Tahan v. Hodgson, 662 F.2d*

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<sup>40</sup> 508 F.2d 969, ¶¶ 10–11. Subsequent US case law has remained consistent with *Parsons*, see *Ministry of Defence of the Islamic Republics of Iran v Gould Inc.*, 887 F.2d 1357; *MGM Productions Group v Aeroflot Russian Airlines*, (2003) 573 F.Supp 2d 772 (SDNY); *Iranian Co. Z v Swiss Co. X*, Case 4A\_250/2013, 21 January 2014 (Swiss Federal Tribunal).

*862, 864 (D.C. Cir. 1981))). Application of the public policy exception is thus appropriate only when an arbitral award 'tends clearly' to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property.' Id. (quoting Ackermann, 788 F.2d at 841) [...]*

*To deny recognition of an arbitral award under the public policy exception of the New York Convention, a court must find that the award conflicts with 'fundamental notions of what is decent and just,' Tahan, 662 F.2d at 864 (quoting Restatement (Second) Conflict of Laws § 117, cmt. c (1971)), not merely that the award conflicts with the interests of the United States. Thus, courts confronted with arbitral awards owed directly to sanctioned parties have recognized such awards. See Cubic, 665 F.3d at 1100 (confirming award in favor of sanctioned Iran); see also *Belship Navigation, Inc. v. Sealift, Inc.*, No. 95-cv-2748 (RPP), 1995 WL 447656, \*6 (S.D.N.Y. July 28, 1995) (enforcing arbitration agreement under the New York Convention against sanctioned Cuba)" (emphasis added).*

72. The content of public policy should be determined on a case-by-case basis by the court of the state in which recognition and enforcement are sought, not predetermined by any local law adopted by the EU.
73. The substantive content of public policy is a matter to be decided by such court, while the "scope" or the "outer limits" of public policy remain a matter for interpretation under the New York Convention.<sup>41</sup>
74. It is well established that "public policy" within the meaning of Article V(2)(b) of the New York Convention refers to the public policy of the forum State. As to whether the concept possesses a universal or transnational dimension, judicial approaches diverge across jurisdictions.<sup>42</sup>

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<sup>41</sup> *Andrea Bonomi*, 'The Concept of Public Policy under the 1958 New York Convention: An Autonomous Interpretation?' in Franco Ferrari and Friedrich Rosenfeld (eds), *Autonomous versus Domestic Concepts under the New York Convention* (Kluwer Law International 2021), PP. 315, 322; *Franco Ferrari and Friedrich Rosenfeld*, *International Commercial Arbitration* (2nd edn, Oxford University Press 2021), p. 231.

<sup>42</sup> UNCITRAL Secretariat Guide to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) 2016 edition. pp. 243 et seq.

75. We acknowledge that national courts commonly rely on "international public policy" rather than "domestic public policy" when enforcing foreign arbitral awards.<sup>43</sup>
76. Domestic public policy encompasses mandatory provisions of the forum's legal order applicable in purely internal situations and incapable of contractual derogation. International public policy, by contrast, refers to those core principles and values of the forum considered so essential that they must be upheld even in cases with a foreign element.<sup>44</sup>
77. The ground for refusal set out in Article V(2)(b) of the New York Convention operates as an autonomous first tier. At a second tier, the substantive content of "public policy" is supplied by national law. The principles constituting public policy are thus defined by the legal order of the court seized. Accordingly, the content of public policy forms part of the forum's domestic legal system and is not altered by the varying terminology occasionally employed in its description.<sup>45</sup>
78. In France, for example, the public policy referred to in Article V(2)(b) of the New York Convention is defined as "international public policy". This, however, is not an autonomous category, but a French international public policy: the French fundamental principles that under French law are relevant in the international context — as opposed to the French rules that are mandatory domestically.<sup>46</sup>
79. Consequently, Article V(2)(b) of the New York Convention is typically invoked "*only in cases of fundamental injustice that strike at the heart of the legal system*"<sup>47</sup> or when "*the award is so offensive to justice as to be unacceptable to the forum.*"<sup>48</sup>

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<sup>43</sup> Emmanuel Gaillard and John Savage (eds), Fouchard, Gaillard, Goldman On International Commercial Arbitration (Kluwer Law International 1999), p. 998. *Ashlock Company Division of Vistan Corporation v Procesadora Rengo SpA* (Chilean Corte Suprema, First Civil Chamber, 27 July 2023, No 133313-2022) (2024) XLIX ICCA Yearbook Commercial Arbitration, p. 76.

<sup>44</sup> Public Policy and the New York Convention in Practice: Substantial Convergence or Resisting Fragmentation? *Jus Mundi Arbitration Review (JMAR) Volume 2 Issue 1 2025*, 2025, p. 70.

<sup>45</sup> The New York Convention: The Interplay of Domestic Law and an Autonomous International Legal Order from a French Perspective, *Jus Mundi Arbitration Review (JMAR) Volume 2 Issue 1 2025*, 2025, p. 55.

<sup>46</sup> The New York Convention: The Interplay of Domestic Law and an Autonomous International Legal Order from a French Perspective, *Jus Mundi Arbitration Review (JMAR) Volume 2 Issue 1 2025*, 2025, p. 55.

<sup>47</sup> *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2016] EWHC 2513 (Comm).

<sup>48</sup> *Westland Helicopters Ltd v Arab Organisation for Industrialisation* [1995] 1 Lloyd's Rep 485 (CA).

80. The prevailing legislative, doctrinal, and judicial practice supports the view that the definition or rules of application of public policy should not be provided in EU legislation in a rigid or exhaustive manner. Instead, public policy is best left as a flexible, context-dependent concept, determined by national courts in the light of their own fundamental values and interests.
81. The above inference is supported, for example, by the Luxembourg Court of Appeal holding that:

*"Article V(2)(b) of the New York Convention allows the courts of a Contracting State to refuse recognition and enforcement of an award if they find that such recognition or enforcement would be contrary to the public policy of that State. Since the concept of public policy is not defined by this Convention, it is for the courts of the Contracting States to define it.*

*While public policy is defined differently from State to State, case law tends to rely on the ground of public policy to refuse recognition and enforcement of an award under Article V(2)(b) in cases where the fundamental values of a legal system have been derogated from. [...] Most courts give the concept of public policy a narrow interpretation. [...] The exceptional nature of the public policy argument explains why a higher standard of proof is in principle required by the courts to refuse recognition and enforcement under Article V(2)(b)."<sup>49</sup> (emphasis added).*

82. Moreover, arbitral tribunals have treated the *Achmea* judgment and subsequent EU declarations as having limited or no binding effect outside the specific context of intra-EU BITs, and have emphasised that such instruments do not automatically alter the application of public policy exceptions under international treaties.
83. For example, the UNCITRAL tribunal in *WCV and Channel Crossings v Czech Republic* stated that:

*"EU public policy does not form part of Dutch public policy for the purpose of evaluating the enforceability of the award – otherwise, EU Member States"courts could scrutinize questions of EU law considered*

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<sup>49</sup> *Ascom Group S.A., Anatolie Stati, Gabriel Stati and Terra Raf Trans Trading Ltd. v Republic of Kazakhstan (I)*, SCC Case No. 116/2010, Judgment of the Luxembourg Court of Appeal (Unofficial English Translation), 19 December 2019, ¶¶ 168-181.

*by arbitral tribunals, thus ensuring the consistency of EU law and in turn rendering null the basis for the Achmea Judgment.*"<sup>50</sup>

84. Tribunals have also emphasised that the primacy of EU law within the EU legal order does not translate into primacy over international treaty obligations as a matter of public international law.
85. For instance, in *Landesbank Baden-Württemberg v Spain*, the ICSID tribunal explained:
- "...Tribunal [...] derives its authority not from national or EU law but from an international agreement and from the rules of public international law. There is therefore no question of it being bound by the CJEU Achmea Judgment, although it will, of course, give great weight to that Judgment as an expression of the position under EU law."*<sup>51</sup>
86. The tribunal also confirmed that it *"is not an institution of the European legal order, and it is not subject to the requirements of this legal order."*<sup>52</sup>
87. Therefore, the definition or rules of application of public policy should not be provided in EU legislation.
88. At the same time, we see that in some cases courts of EU Member States tend to the position that the mere recognition of an arbitral or judicial award amounts to a potential violation of sanctions.<sup>53</sup>
89. For example, on 23 May 2025, the Stuttgart Regional Court refused to enforce the arbitral award by a Moscow-seated tribunal on the grounds that it concerned claims

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<sup>50</sup> *WCV Capital Ventures Cyprus Limited and Channel Crossings Limited v The Czech Republic*, PCA Case No. 2016-12, Second Interim Award on Intra-EU Objection, 29 September 2020, ¶ 489.

<sup>51</sup> *Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, ¶ 102.

<sup>52</sup> *Landesbank Baden-Württemberg, HSH Nordbank AG, Landesbank Hessen-Thüringen Girozentrale and Norddeutsche Landesbank-Girozentrale v Kingdom of Spain*, ICSID Case No. ARB/15/45, Decision on the "Intra-EU" Jurisdictional Objection, 25 February 2019, ¶ 178.

<sup>53</sup> German Arbitration Digest: Higher Regional Court of Frankfurt am Main, 12 June 2025, Case No. 26 Sch 12/24 (GAD 2025, 25) (summary of a decision refusing enforcement of a foreign arbitral award on public-policy grounds), German Arbitration Digest (DIS), available at [https://www.disarb.org/fileadmin/user\\_upload/Wissen/GAD/2025/GAD\\_2025-25\\_OLG\\_Frankfurt\\_26\\_Sch\\_12-24.pdf](https://www.disarb.org/fileadmin/user_upload/Wissen/GAD/2025/GAD_2025-25_OLG_Frankfurt_26_Sch_12-24.pdf); Nutartis bylose e2T-75-798/2023 (10 Apr. 2025) (civil court decision of the Lietuvos apeliacinis teismas concerning recognition and enforcement of a foreign arbitral award in case e2T-75-798/2023), available at <https://liteko.teismai.lt/viesasprennimupaieska/tekstas.aspx?id=2637ed98-49ec-463f-83ad-338085875e95>.

affected by (a different part of) restrictions in Article 11 of Regulation 833/2024, as a result of which it deemed the enforcement contrary to public policy.<sup>54</sup>

90. Similarly, the Paris Court of Appeal held in *Sofregaz v NGSC* (in the context of an annulment proceeding related to an award rendered by a tribunal seated in Paris) that the sanctions adopted by the EU (in that case, with respect to Iran) form part of public policy.<sup>55</sup>
91. The question of how EU Member States' courts have to approach claims captured by Article 11 of Regulation 833/2024 has recently been referred to the CJEU by the Swedish Court of Appeal, in *Reibel*.<sup>56</sup>
92. The Russian Arbitration Association already submitted its *amicus curiae* brief in relation to *Reibel*<sup>57</sup> and we therefore will not repeat the same in this document.
93. The most recent practical example is the request made by the Regional Court of Riga (Latvia) in case C-701/25 (*Grainexport v SIA Graudu sabiedrība*), which was referred to the CJEU at the end of 2025.

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<sup>54</sup> Sch 3/24, High Regional Court of Stuttgart, 13 May 2025. Appeal against the ruling is pending. The High Regional Court of Cologne appears to have recognised an SCC award subject to subsequent confirmation, at the execution phase, that payments to be made would comply with sanctions. See 19 Sch 26/23, 24 May 2024.

<sup>55</sup> 60 ILM 326, ¶ 57 on p. 333: "De telles sanctions internationales ainsi transposées au sein de l'Union européenne, et donc dans l'ordre juridique interne en France, peuvent être assimilées à des lois de police françaises et, en ce qu'elles visent à contribuer au maintien ou au rétablissement de la paix et de la sécurité internationales, être tout autant intégrées dans la conception française de l'ordre public international dès lors que les règles et valeurs ainsi véhiculées font partie de celles dont l'ordre juridique français ne doit pouvoir souffrir la méconnaissance." ("*Such international sanctions, as transposed within the European Union and thus into France's domestic legal order, may be treated as French overriding mandatory provisions and, insofar as they are intended to help maintain or restore international peace and security, they may also be incorporated into the French notion of international public policy, provided that the rules and values they carry are among those that the French legal system cannot allow to be violated.*") (unofficial translation).

<sup>56</sup> Case C-802/24, *Reibel*: Request for a preliminary ruling from the Svea hovrätt (Sweden) lodged on 20 November 2024 – NV *Reibel v JSC VO Stankoimport*, OJ C, C/2025/535, 3.2.2025.

<sup>57</sup> Amicus Curiae Brief of the Russian Arbitration Association (RAA) to the Court of Justice of the European Union in *Reibel* (Case C-802/24) (amicus brief addressing interpretation of Article 11 of Council Regulation (EU) No. 833/2014 in arbitration disputes, submitted in the preliminary-ruling procedure arising from a reference by the Svea Court of Appeal in the dispute between NV *Reibel Global Solutions Building* (Belgium) and JSC VO *Stankoimport* (Russia), 14 May 2025), available at [https://arbitration.ru/upload/medialibrary/46a/s986k88t8o6m8xv813gawgnbkz2tc3va/RAA-Amicus-Reibel-Case-C\\_802-24-dated-14-May-2025.pdf](https://arbitration.ru/upload/medialibrary/46a/s986k88t8o6m8xv813gawgnbkz2tc3va/RAA-Amicus-Reibel-Case-C_802-24-dated-14-May-2025.pdf) (discussing the application of EU sanctions law to arbitration and recognition/enforcement in the context of the preliminary-ruling request to the CJEU).

94. The court asked, for instance, whether compliance with the sanctions regime is part of public policy within the meaning of the New York Convention.
95. The court also asked whether it should reject the claim, stay proceedings or recognize the arbitral award with a reservation that it cannot be enforced until the sanctions are lifted.
96. With that said, even if EU Member States' courts relied on Article V(2)(b) of the New York Convention, the Prohibition of Recognition Provision (as codified) still would not be able to amount to public policy for the following reasons.
97. First, the Prohibition of Recognition Provision applies to parties subject to sanctions and to Russian nationals ((Article 11e of Regulation 833/2014, referencing Article 11(1)(a)–(c)).
98. Even if, *arguendo*, its application to parties subject to sanctions could be defended on public policy grounds (*quod non*), application to Russian nationals is irreconcilable with any public policy and could be considered as racial discrimination as defined and prohibited by the International Convention on the Elimination of All Forms of Racial Discrimination.
99. Second, Regulation 833/2024 allows tribunals seated in EU Member States to rule on sanctions-related investment treaty arbitrations and does not prevent the recognition and enforcement of such awards, but precludes the same for tribunals seated outside the EU.
100. There does not appear to be any justifiable basis for the argument that the compliance of recognition or enforcement with public policy depends merely on where the seat of a tribunal was (or where the tribunal conducted the proceedings).
101. Moreover, the Prohibition of Recognition Provision at the very least omits to address how and why sanctions-related awards from non-EU tribunals are considered to present a public policy risk, whereas similar awards from EU-based tribunals are not.
102. The dependence on the jurisdiction "*from which*" the award originates raises an overt element of discrimination in how EU law could constrain EU Member States' application of the New York Convention.

103. In any case, according to consistent case law and legal doctrine, the threshold to refuse recognition and enforcement by applying public policy is very high,<sup>58</sup> and the Prohibition of Recognition Provision or any provisions of EU Regulations would not be applicable as public policy for the purposes of the New York Convention.
104. By contrast, the enforcement framework established by the Washington Convention does not contemplate exceptions akin to those available under the New York Convention.
105. In this regard, Lord Lloyd-Jones and Lord Sales explained in *Micula*, drawing on the *travaux préparatoires* of the relevant provisions of the Washington Convention and the associated commentary, that:

*"[I]t is arguable that there is scope for some additional defences against enforcement, in certain exceptional or extraordinary circumstances which are not defined, if national law recognises them in respect of final judgments of national courts and they do not directly overlap with those grounds of challenge to an award which are specifically allocated to Convention organs under articles 50 to 52 of the Convention."*<sup>59</sup>

106. As with the New York Convention, the question of whether the Prohibition of Recognition Provision can be reconciled with these *exceptional or extraordinary situations* must depend on the respective jurisdiction where the recognition or enforcement is sought.
107. Therefore, considering that any decisions that actually violate public policy would be dealt with at the local court level, the Prohibition of Recognition Provision seems not useful, and, on the contrary, it emerges that Article 11 is applied in cases where no actual violation of public policy could be proven.

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<sup>58</sup> The New York Convention: The Interplay of Domestic Law and an Autonomous International Legal Order from a French Perspective, *Jus Mundi Arbitration Review (JMAR)* Volume 2 Issue 1 2025, 2025, p. 54.

<sup>59</sup> *Micula & Ors v Romania* [2020] UKSC 5 (19 February 2020), ¶ 78.

#### **4. Application of the Prohibition of Recognition Provision may amount to the violation of investment treaty standards, including expropriation**

108. First, most of BITs expressly stipulate an undertaking to comply with awards of treaty tribunals.<sup>60</sup> The application of the provisions of the Prohibition of Recognition Provision constitutes an attempt to upend these obligations, and, therefore, a stand-alone treaty breach.
109. Second, investment treaties, both bilateral and multilateral, often define "investment" in broad, asset-based terms.
110. For example, the EU-Singapore Investment Protection Agreement defines "investment" as *"every kind of asset which has the characteristics of an investment"* and explicitly lists as protected forms: *"claims to money or to other assets, or to any contractual performance having an economic value"*.<sup>61</sup>
111. Similarly, the Japan-Jordan BIT includes *"claims to money and to any performance under contract having a financial value"*.<sup>62</sup>
112. Therefore, an investment treaty award against a EU Member State, arising out of the imposition of the sanctions by that Member State on assets under its jurisdiction, could itself qualify as a protected investment.
113. According to the case law, the host State's refusal to recognise or enforce a foreign award may amount to the violation of investment treaty standards, including expropriation.<sup>63</sup>

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<sup>60</sup> See, for example, Article 10(4) of the BIT in force between Luxembourg and Russia.

<sup>61</sup> Investment Protection Agreement Between the European Union and Its Member States, of the One Part, and the Republic of Singapore, of the Other Part (2018), adopted on 19 October 2018.

<sup>62</sup> Agreement Between Japan and the Hashemite Kingdom of Jordan for the Promotion and Protection of Investment (2018), adopted on 27 November 2018.

<sup>63</sup> *Saipem S.p.A. v The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction, 21 March 2007, ¶ 127; *White Industries Australia Limited v The Republic of India*, Final Award, UNCITRAL, 30 November 2011, ¶ 7.6.10.; E Bouwer, 'Revealed: Tribunal majority in Windoor v Kazakhstan qualifies SCC award as protected investment, finds breach of FET in court's refusal to enforce it, and orders respondent to pay around 50 million EUR in damages, plus partial success fee | Investment Arbitration Reporter', *IAReporter*, 9 June 2025.

114. As summarized in *White Industries v India*:

*"In similar circumstances to the present case, the tribunal in Saipem determined that the residual contract rights arising from the investment, as crystallised in the ICC Award, were an investment' within the BIT's definition and were also capable of expropriation."*<sup>64</sup>

115. Both the *Saipem* and the *White Industries* tribunals characterized the award as an investment with reference to the underlying rights which "*crystallised*" in the awards.

116. Therefore, preventing the enforcement of an investment treaty award against the Member State may constitute an unlawful expropriation of the investment unless it is proven that the state acted within its police powers.

117. Third, in light of the fact that investment treaties frequently engage or incorporate other applicable rules of international law favourable to investors, the prohibition of recognition and the Damages Provision framework may furnish a jurisdictional basis for investors to invoke before treaty tribunals any resulting violations of international law, alongside the discrete breaches of the treaty itself.<sup>65</sup>

118. Finally, it bears noting that there have been historical instances in which States enacted domestic legislation aimed at depriving investors of access to investment arbitration.

119. Three Latin American States denouncing the Washington Convention (Bolivia in 2007, Ecuador in 2009, and Venezuela in 2012), have terminated a number of BITs and adopted domestic legislations to limit investors' rights.<sup>66</sup>

120. The most recent example was when Kyrgyzstan introduced a new multi-tier dispute settlement mechanism in 2025. The amendments aimed to revise the ISDS clauses contained in BITs by introducing changes to domestic investment law. This intent is evident from the wording of Article 23, which states that an investment dispute may be resolved through international arbitration only if an international treaty and/or

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<sup>64</sup> *White Industries Australia Limited v The Republic of India*, Final Award, 30 November 2011, ¶¶ 12.3.3.–12.3.6, available at: <https://jsumundi.com/en/document/decision/en-white-industries-australia-limited-v-the-republic-of-india-final-award-wednesday-30th-november-2011>.

<sup>65</sup> See, for example, Article 3(5) of the Netherlands-Russia BIT.

<sup>66</sup> See: Lazo, R., *Is There a Life in Latin America After ICSID Denunciation?* *Transnational Dispute Management*, Vol. 11, Issue 1, 2014.

investment agreement between the investor and the Kyrgyz Republic contains a corresponding and valid arbitration clause, and provided that the dispute has not been resolved through negotiations, mediation, or the judicial bodies of the Kyrgyz Republic.<sup>67</sup>

121. This approach is subject to criticism<sup>68</sup> and is unlikely to achieve the intended effect on ISDS clauses in Kyrgyzstan's BITs unless these clauses are explicitly contingent upon domestic law.

### **5. The Prohibition of Recognition Provision interferes with bilateral agreements between EU Member States and third States**

122. In addition to BITs, the Prohibition of Recognition Provision interferes with bilateral agreements between EU Member States and third States which may govern the recognition or enforcement of foreign judgments.
123. For example, in Germany, judgments of Israeli courts are to be recognised or enforced in accordance with the 20 July 1977 agreement between the Federal Republic of Germany and the State of Israel on Mutual Recognition and Enforcement of Judgments in Civil and Commercial Matters.
124. Another example could be the 9 September 1991 Convention on judicial assistance, recognition and enforcement of judgements in civil and commercial matters between the French Republic and the United Arab Emirates<sup>69</sup> or the 17 October 1989 Treaty on judicial assistance and the recognition and enforcement of judgments in civil matters between the Italian Republic and the Federative Republic of Brazil.

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<sup>67</sup> See: Hannepes Taychayev, Kyrgyzstan Introduces New Multi-Tier Dispute Settlement Mechanism in Investment Law 2025, Kluwer Arbitration Blog, available at <https://legalblogs.wolterskluwer.com/arbitration-blog/kyrgyzstan-introduces-new-multi-tier-dispute-settlement-mechanism-in-investment-law-2025/>.

<sup>68</sup> Kyrgyzstan Introduces New Multi-Tier Dispute Settlement Mechanism in Investment Law 2025, ISDS Platform (republishing the Kluwer Arbitration Blog article on Kyrgyzstan's reforms to dispute settlement procedures under its 2025 investment law), available at <https://www.bilaterals.org/?kyrgyzstan-introduces-new-multi>.

<sup>69</sup> Convention Between the Government of the French Republic and the Government of the United Arab Emirates on Judicial Cooperation, United Nations Treaty Series, No. 558 (signed 28 Apr. 1993).

## B. The Damages Provision

125. Regulation 833/2024 addresses the situation where a foreign judgment or award, related to sanctions, is enforced against EU Member States. Article 11(e) Regulation 833/2024 creates a *sui generis* cause of action, and imposes an obligation on EU Member States to rely on it. Article 11(e) Regulation 833/2024 also grants *sui generis* jurisdiction to Member State courts over Damages Provision. To the best of our knowledge, such a scenario is unprecedented in practice. However, we agree with the following most recent critics:

*"There is no basis, either in the Washington Convention or the New York Convention, for the idea that, where an award is unenforceable in jurisdiction A, but enforced in jurisdiction B, jurisdiction A may subsequently intervene to undo enforcement in jurisdiction B by allowing for the recovery of any sums thus incurred.*

*Such an idea is clearly in tension with the basic customary principle - one that underlies the entire system of international arbitration - that the enforcement of judgments or awards is the exclusive prerogative of the territorial sovereign. It is also very clearly in tension with principles of comity - since the EU is questioning the authority of foreign courts to grant enforcement in their own territory, claiming extraterritorial authority to decide in their place, and ultimately causing the non-EU enforcement proceedings to have been a waste of foreign resources."*<sup>70</sup>

126. As is the case with the Prohibition of Recognition Provision, the recitals of Regulation 2025/1494 include a caveat referring to international law obligations which does not appear in the Damages Provision wording. Specifically, recital (23) provides as follows:

*"It is therefore necessary to enable competent authorities or the Union, where applicable, to recover in proceedings before a court of a Member State any damages caused, including legal costs and costs incurred in the event of non-compliance with the arbitral award by the other party, from those persons, entities or bodies and from persons, entities or bodies that own or control those persons, entities or bodies, as a consequence of an investor-State dispute settlement in connection with measures imposed under Regulation (EU) No 833/2014 or Council Regulation (EU) No 269/2014, provided that all available legal remedies in the relevant jurisdiction have been exercised. Competent authorities*

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<sup>70</sup> Toni Marzal, "EU Sanctions and the Undoing of International Investment Arbitration" dated 15 January 2026.

*should recover such damages in accordance with Union law and customary rules of international law"* (emphasis added).

127. Therefore, the Damages Provision should not be in contradiction to the international legal obligations of the EU and its Member States.
128. We consider that all considerations outlined above with respect to the Prohibition of Recognition Provision apply *mutatis mutandis* to the Damages Provision. However, there are a number of additional issues that have come to our attention regarding the Damages Provision set out below.
129. Member States have obligations to recognise arbitration agreements and to accordingly refer parties to arbitration, in particular, in accordance with Article III(1) and (2) of the New York Convention.
130. The attempt to confer jurisdiction on EU Member State courts over Damages Provision conflicts with Member States' obligations not to proceed with court proceedings insofar as a matter is to be referred to arbitration.
131. In *Greece v United Kingdom* (ICJ, 1950s), a Greek shipowner (Ambatielos) suffered losses because the UK failed to deliver ships under contract and then could not obtain effective legal relief in British courts (including denial of evidence, appeal, etc.). The Greek government — on behalf of its national — brought the case to the International Court of Justice (ICJ), alleging that the UK had denied justice to the Greek investor by failing to provide effective judicial protection.
132. The ICJ found that the UK was obliged under the treaty to submit the dispute to arbitration (though it did not decide the substantive merits of the investor's loss). The case is historically important because it treated failure of domestic courts to provide justice as an obligation of States under international law and held the State responsible for failing to fulfil treaty obligations related to arbitration and judicial protection.
133. Moreover, the following terms of the 18<sup>th</sup> Sanctions Package are causing further confusion and remain to be interpreted:
  - a) "*sufficient connection*" under Article 11d of Regulation 833/2014; and

- b) parties who "*initiated*," "*intervened*" in or "*participated*" in ISDS-proceedings under Article 11e of Regulation 833/2014.

134. The EU and its Member States have been vocal opponents of attempts by other States to exercise jurisdiction in circumstances where jurisdictional nexus is thin.<sup>71</sup> Depending on how EU Member State courts approach the "*sufficient connection*" threshold, it is arguable that the exercise of jurisdiction is impermissible as a matter of customary international law.

135. Moreover, we consider that the wide list of parties, who may be affected as "participants" in investor-State dispute proceedings amount to a violation of the customary international law procedural standards, as they effectively punish counsel, experts and witnesses.

### C. The Objection Obligation

136. As with the two instruments above, the recitals of Regulation 2025/1494 include a caveat that is broader than the Regulation 833/2014 provisions. Specifically, recital (24) provides as follows:

*"Where Member States are confronted with arbitral awards rendered against them in investor-State dispute settlement proceedings in connection with measures imposed under Regulation (EU) No 833/2014 or Regulation (EU) No 269/2014, they should invoke any objection available to them in domestic or foreign proceedings for the recognition and enforcement of such awards. This includes raising the objection that the recognition or enforcement of the award would be contrary to the public policy of the country where recognition and enforcement is sought, pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958." (emphasis added).*

137. By directing Member States to invoke "*any objection available*," the recital encourages an unqualified assertion of all potential grounds of resistance, irrespective of considerations such as legal ethics, cost efficiency, good faith considerations.

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<sup>71</sup> Brief of Federal Republic of Germany as Amicus Curiae in Support of Respondents, *Kiobel v Royal Dutch Petroleum Co* No 10-1491 (2 February 2012); Brief of the European Commission on behalf of the European Union in Support of Neither Party No 10-1491 (13 June 2012); Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of the Respondents, *Kiobel v Royal Dutch Petroleum Co*, No 10-1491 (3 February 2012).

#### **D. Additional practical risks for the EU Member States related to international law violations**

138. Bearing in mind the above, we consider the Prohibition of Recognition Provision, the Damages Provision and the objection duty to have many additional downsides for the EU and its Member States.
139. First and foremost, these instruments are disadvantageous as they make EU Member States very unattractive to investors.
140. Second, these instruments are giving other countries, including Russia, the opportunity to respond, in particular, in three ways:
- a) officially declaring that they would not enforce any awards, judgements, etc., issued in favour of EU Member States and their investors;
  - b) introducing counter-measures;
  - c) using Regulation 2025/1494 to argue that there could not be any reciprocity<sup>72</sup> with EU Member States;
  - d) further developing arguments regarding the denial of access to justice,<sup>73</sup> which, for example, are currently being actively applied to bring sanctions-related disputes to Russia.<sup>74</sup>

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<sup>72</sup> For examples where Russian courts have already referred to the absence of reciprocity with certain Member States — see Appeal Ruling of the Second Court of Appeal of General Jurisdiction dated 20 October 2025 No. 66-494/2025 (the court refused to recognize the Lithuanian court's decision because the legal assistance treaty has been terminated, and reciprocity in the enforcement of Russian judgments has not been proven) or Ruling of the Arbitration Court of St. Petersburg and Leningrad Region Case No. A56-49800/2024 (the court refused recognition of a German court's decision because the court of the first instance had failed to verify the existence of reciprocity).

<sup>73</sup> Although not an investment treaty case, *Almonacid-Arellano v Chile* (Inter-American Court of Human Rights) held that domestic judicial refusals to investigate or enforce rights (due to an amnesty law) violated the American Convention on Human Rights because they denied judicial protection. This is widely cited in international law as denial of justice by domestic courts and has been used to hold states internationally accountable.

<sup>74</sup> Russian courts directly refer to Article 5n of Regulation 833/2014, and we believe they will also refer to the new paragraphs of Article 11 and Article 11e. For examples of references to 5n, see the Decision of the Arbitration Court of the West Siberian District dated 8 April 2025 No. F04-906/ 2025 in case No. A45-8140/2024 or the Decision of the Arbitration Court of the Kaluga Region dated 01.04.2025 in case No. A23-6553/2021. The Russian courts deemed dispute resolution clauses to be unenforceable due to sanctions-related restrictions on engaging foreign legal counsel, as this prevented effective legal protection, put Russian parties at a disadvantage, and impeded their access to justice.

141. Third, these instruments are opening a door to the imposition of interim measures in disputes involving EU Member States, including security for claims.

### III. VIOLATION OF THE PRINCIPLES OF LEGAL CERTAINTY AND PROTECTION OF LEGITIMATE EXPECTATIONS

#### A. The general principles of legal certainty and legitimate expectations in EU law

142. Legal certainty, as a fundamental principle of EU law, operates as an overarching "umbrella" principle encompassing several interrelated requirements, including protection of legitimate expectations, of vested rights and non-retroactivity.<sup>75</sup> As the CJEU has consistently held, this principle requires the rules of law to be clear, precise, certain and foreseeable in their effects, so that individuals can unequivocally ascertain their rights and obligations and regulate their conduct accordingly.<sup>76</sup>
143. In this respect, legal certainty should be understood not as a requirement of absolute precision or stability, but rather as a fiduciary principle aimed at protecting the trust that individuals and entities are entitled to place in the legal order.<sup>77</sup> Its practical function is to ensure that public authorities do not, without sufficient justification and adequate safeguards, undermine this trust by abruptly modifying the legal framework. The element of legitimate expectations, as a corollary to the principle of legal certainty, is aimed at protecting this trust that individuals may reasonably place in the reliability of the legal framework.<sup>78</sup>

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<sup>75</sup> J. Van Meerbeeck, "The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust", In *European Law Review* Vol. 41, 2016, p. 280 // URL: [https://dial.uclouvain.be/pr/boreal/object/boreal%3A177694/datastream/PDF\\_01/view](https://dial.uclouvain.be/pr/boreal/object/boreal%3A177694/datastream/PDF_01/view).

<sup>76</sup> *Rosneft* (Case C-72/15), Judgment of the Court (Grand Chamber) of 28 March 2017, ¶ 161 // URL: [https://infocuria.curia.europa.eu/tabs/document?source=document&docid=189262&doclang=EN&text=&utm\\_source=.](https://infocuria.curia.europa.eu/tabs/document?source=document&docid=189262&doclang=EN&text=&utm_source=.) *IATA and ELFAA* (Case C-344/04), Judgment of the Court (Grand Chamber) of 10 January 2006, ¶ 68 // URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62004CJ0344>.

<sup>77</sup> J. Van Meerbeeck, "The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust", In *European Law Review* Vol. 41, 2016, pp. 284–286.

<sup>78</sup> *Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt* (Case C-201/08), Judgment of the Court (Third Chamber) of 10 September 2009, ¶ 46 // URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=ecli:ECLI:EU:C:2009:539#point53>. *Agrenergy Srl and Fusignano Due Srl v Ministero dello Sviluppo Economico* (Joined Cases C-180/18, C-286/18 and C-287/18), Judgment of the Court (Tenth Chamber) of 11 July 2019, ¶¶ 29–30 // URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A62018CJ0180>. *Nizar Assaad v Council of the European Union* (Case

144. Understanding of the legal certainty principle is particularly important in areas characterized by a high degree of regulatory discretion, such as restrictive measures. While the EU enjoys a wide latitude in pursuing the protection of its essential security interests and policy objectives, the exercise of that discretion still remains subject to the requirement that the adopted legal rules maintain a required level of predictability and coherence. This is particularly important with regard to those rules on which individuals and economic operators reasonably relied when structuring their conduct and availing themselves of dispute settlement mechanisms.
145. In this context, the provisions of the 18<sup>th</sup> Sanctions Package undermine the principles of legal certainty and protection of legitimate expectations required under EU law, particularly in relation to the legal effects of established dispute settlement mechanisms.

## **B. Incompatibility of the 18<sup>th</sup> Sanctions Package with the principles of legal certainty and legitimate expectations**

### **1. Breadth and indeterminacy of the enforcement prohibition**

146. The 18<sup>th</sup> Sanctions Package introduces a prohibition on the enforcement and recognition of arbitral decisions issued within investment arbitration proceedings where such decisions "*could lead to the satisfaction of any claims in connection with measures imposed under this Regulation [2025/1494] or Regulation (EU) No 269/2014*", which are invoked by Russian persons or entities.<sup>79</sup>
147. The restrictions introduced cannot be described as clear and having a foreseeable effect. Conversely, the implications of the application of Article 1, paragraphs 18–20 of the 18<sup>th</sup> Sanctions Package can spin out of control.
148. The scope of prohibition is exceptionally broad and indeterminate. A decision cannot be enforced if it "*could lead to the satisfaction of any claims in connection with*" restrictive measures. This wording does not distinguish between, on the one hand,

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T-426/21), Judgment of the General Court (Fourth Chamber, Extended Composition) of 8 March 2023, ¶ 186 // URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62021TJ0426>. J. Van Meerbeeck, "The Principle of Legal Certainty in the Case Law of the European Court of Justice: From Certainty to Trust", In European Law Review Vol. 41, 2016, p. 280.

<sup>79</sup> Council Regulation (EU) 2025/1494 of 18 July 2025 amending Regulation (EU) No 833/2014, OJ L, 19.7.2025, Article 1, ¶ 18.

claims seeking to circumvent or neutralise the effects of EU sanctions and, on the other hand, claims seeking compensation for alleged breaches of international investment obligations arising from the adoption and improper application of those measures.<sup>80</sup>

149. Such indeterminacy is indeed problematic in the context of investment arbitration proceedings today. A significant number of such proceedings involving Russian investors currently concern issues, in one way or another, linked to the adoption or implementation of restrictive measures. However, in most such cases, the claims do not address or dispute the legality of the adoption of EU sanctions as such. Rather, the disputes concern mostly the manner in which those sanctions have been interpreted and applied by the respondent State in the specific circumstances of the investor. In particular, it is frequently alleged that States have adopted measures going beyond what is required under the applicable sanction regime, including through overly expansive interpretations or precautionary overcompliance. Such measures may involve the suspension or termination of licenses, contracts or economic activities that are not expressly prohibited by the sanction framework, but which nonetheless cause significant harm to the investor and violate the applicable BIT. Claims arising from such situations are thus directed not at neutralising the sanctions regime itself, but at assessing whether the State has acted in conformity with its international obligations (both under the sanctions regime and under the BIT).
150. Thus, the restrictive measures in question potentially capture any investor-state decisions addressing the legality of effects of sanctions as such and extend to an indeterminate range of factual and legal situations, without providing objective or foreseeable criteria enabling the affected investors to determine in advance whether the given decision falls within the scope of the enforcement prohibition.
151. As a result, the absence of any distinction in the contested provision between claims challenging the lawfulness of sanctions as such, and claims addressing the legality and proportionality of their concrete application by the State further contributes to the uncertainty as to its scope. Investors cannot reasonably foresee whether arbitral awards

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<sup>80</sup> See also about the assessment of appropriateness of the measures based on the objectives pursued *Rosneft* (Case C-72/15), Judgment of the Court (Grand Chamber) of 28 March 2017, ¶ 146–147 // URL: [https://infocuria.curia.europa.eu/tabs/document?source=document&docid=189262&doclang=EN&text=&utm\\_source=](https://infocuria.curia.europa.eu/tabs/document?source=document&docid=189262&doclang=EN&text=&utm_source=) *Council of the European Union v Manufacturing Support & Procurement Kala Naft Co., Tehran* (Case C-348/12 P), Judgment of the Court (Fifth Chamber) of 28 November 2013, ¶ 120.

examining instances of overcompliance or misapplication of restrictive measures will be regarded as decisions capable of "*leading to the satisfaction of claims in connection with*" sanctions and thus be subject to the enforcement prohibition.

152. The absence of any limiting criteria or contextual guidance as to the required degree of connection between the claim and the restrictive measures exacerbates this uncertainty. The contested provision does not specify whether a causal link, a direct legal connection, or a mere factual relationship suffices to trigger the enforcement prohibition. The vagueness of those provisions also arms the Member States with a dangerous weapon, enabling them to introduce a sanctions-related argument for the sole purpose of sweeping the claim under the umbrella of the 18<sup>th</sup> Sanctions Package.
153. Such indeterminacy is difficult to reconcile with the requirement, inherent in the principle of legal certainty, that rules be formulated in a clear and predictable manner.

## **2. Breach of investors' legitimate expectations relating to access to an effective dispute settlement mechanism**

154. Taking into account the above, i.e., that the provisions of the 18<sup>th</sup> Sanctions Package prohibit enforcement of virtually any arbitral award that concerns the restrictive measures anyhow and was issued in favour of Russian investors, such provisions essentially violate the investors' expectations of the availability of effective protection.
155. Investment treaties were designed to provide investors with specific guarantees against the risk of State interference, including by granting access to independent and neutral dispute settlement mechanisms.<sup>81</sup> The availability of investor-State arbitration constitutes a central element of the investment protection regime, intended to remove disputes from domestic political or judicial influence and to ensure impartial adjudication of claims arising from alleged breaches of the treaty. It has long been recognised that the investor-State dispute settlement mechanism reinforces "*the*

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<sup>81</sup> "These disputes are transferred from the political bilateral arena to a judicial forum especially charged with the settlement of mixed investor-State disputes. The dispute settlement process is depoliticized and subjected to objective legal criteria." C. Schreuer, Investment Protection and International Relations, in *Transnational Dispute Management*, Vol. 4, No. 1, 2007, p. 346.

*credibility of the commitments they [States] make in their international investment agreements.*"<sup>82</sup>

156. Investors contemplating investments could therefore reasonably take into account, when structuring their investment decisions, the existence of guarantees provided by investment treaties.<sup>83</sup> In particular, they could legitimately rely on the availability of an effective dispute resolution, including the prospect that a final and binding arbitral award would be capable of recognition and enforcement. Absent such guarantees, investors might have assessed the legal and political risks of investing in a fundamentally different manner or refrained from investing altogether.
157. The provisions of the 18<sup>th</sup> Sanctions Package profoundly alter that legal environment. Although formally framed as a prohibition on recognition and enforcement of awards, the practical effect of the enforcement ban is to deprive the investor-State dispute settlement mechanism of its effectiveness. Such a mechanism which outcomes cannot, as a matter of principle, be recognised or enforced within the EU (i.e., within the respondent States) ceases to offer meaningful protection. In such circumstances, the right to initiate arbitral proceedings and, thus, to protect the investor's rights risks becoming purely theoretical.
158. However, the Court's settled case-law confirms that any economic operator on whose part the national authorities have promoted reasonable expectations may rely on the principle of the protection of legitimate expectations.<sup>84</sup> In this regard, protection of legitimate expectations should extend to situations in which investors have relied, in good faith, on provisions of applicable investment treaties, under which the States had committed to protect investors' interests and to grant protection embodied in the

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<sup>82</sup> OECD, D. Gaukrodger, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* (OECD Working Papers on International Investment, 2012/03), p. 10.

<sup>83</sup> Surveys demonstrate that most of transnational corporations surveyed take into account the existence of investment treaty "to a very great extent" or "to a limited extent" when taking a decision on which market to invest in. See UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment*, 2009, p. 51.

<sup>84</sup> *Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt* (Case C-201/08), Judgment of the Court (Third Chamber) of 10 September 2009, ¶ 53 // URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=ecli:ECLI:EU:C:2009:539>. *Agrenergy Srl and Fusignano Due Srl v Ministero dello Sviluppo Economico* (Joined Cases C-180/18, C-286/18 and C-287/18), Judgment of the Court (Tenth Chamber) of 11 July 2019, ¶ 31 // URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A62018CJ0180>.

investor-State arbitration mechanism. The sudden neutralisation of the enforcement component of investor-State arbitration disrupts expectations of the sanctioned and Russian investors that were formed on the basis of existing treaty commitments and long-standing enforcement practices, without providing transitional safeguards or compensatory mechanisms.

159. It is undisputed that the EU enjoys broad discretion to amend its regulatory framework, including through the adoption of restrictive measures. In this regard, the Court confirmed that economic operators cannot legitimately expect that an existing legal situation will remain unchanged. However, the Court also recognised that the elements of foreseeability and abruptness of the adopted measures should be taken into account, especially in cases of economic operators having made costly investments under an existing legal framework.<sup>85</sup>
160. In this regard, it cannot be maintained that the changes introduced by the 18<sup>th</sup> Sanctions Package were foreseeable for investors acting as prudent economic operators. While investors could reasonably anticipate that the regulatory environment governing their activities might evolve over time, they could not have foreseen a measure that neutralises a core guarantee of the international investment protection regime. The provisions of the 18<sup>th</sup> Sanctions Package interfere not merely with ancillary procedural arrangements but essentially devalue the investors' right to recourse to an effective dispute settlement mechanism. Such interference cannot be compatible with the principle of protection of legitimate expectations.

#### **IV. THE 18<sup>TH</sup> SANCTIONS PACKAGE VIOLATES THE PRINCIPLES OF EQUALITY AND NON-DISCRIMINATION**

161. The 18<sup>th</sup> Sanctions Package violates the principles of equality and non-discrimination and therefore should be annulled. As established in jurisprudence of the Court, measures that are incompatible with fundamental rights and general principles of law forming an integral part of EU law must not be upheld within the EU:

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<sup>85</sup> *Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt* (Case C-201/08), Judgment of the Court (Third Chamber) of 10 September 2009, ¶ 52 // URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=ecli:ECLI:EU:C:2009:539>.

*"As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures.*

*In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those States"<sup>86</sup> (emphasis added).*

162. According to the CJEU case law, the principle of equality encompasses the principle of non-discrimination. In *Glatzel*, it was articulated that "[t]he principle of equal treatment is a general principle of EU law, enshrined in Article 20 of the Charter [equality before the law], of which the principle of non-discrimination laid down in Article 21(1) of the Charter is a particular expression."<sup>87</sup> Similarly, in *Léger*, the CJEU held that "Article 21(1) [non-discrimination] is a particular expression of the principle of equal treatment."<sup>88</sup>
163. As discussed below, the 18<sup>th</sup> Sanctions Package fundamentally violates both the general principle of equality and its manifestation in the non-discrimination principle under EU law. Specifically, it violates:
- a) Articles 20 and 21 of the 2000 Charter of Fundamental Rights of the EU (the "CFR");
  - b) Articles 10 and 18 of the TFEU;
  - c) Articles 2 and 5 of the 1992 Treaty on EU (the "TEU");
  - d) Article 14 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (the "ECHR"), along with Article 1 of the Protocol No. 12 thereto.<sup>89</sup>

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<sup>86</sup> Case 4-73, *J. Nold v Commission*, EU:C:1974:51, ¶ 13.

<sup>87</sup> Case C-356/12, *Glatzel v Bayern*, EU:C:2014:350, ¶ 40.

<sup>88</sup> Case C-528/13, *Léger v Ministre*, EU:C:2015:288, ¶ 48.

<sup>89</sup> Article 6(3) of the TEU expressly sets forth that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the EU Member States, constitute general principles of EU law. Additionally, as provided under Article 52(3) of the CFR, insofar as the latter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the

## A. EU legal framework on equality and non-discrimination

164. Article 20 of the CFR provides that everyone is equal before the law. As elaborated in the CFR Explanations, Article 20 constitutes a general principle of law recognised by virtually all constitutions of the EU Member States and by the CJEU. It is also established by Article 2 of the TEU, which enshrines equality as the foundational value of the EU.
165. According to Article 21 of the CFR, any discrimination on any ground, such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation, or nationality, is prohibited. The CFR Explanations clarify that Article 21 addresses discrimination by the institutions and bodies of the EU when exercising powers conferred under the EU treaties, and by Member States when implementing EU law.
166. Non-discrimination is also codified in both the TFEU and TEU. Article 2 of the TEU provides that this value is common to the EU Member States in a society in which non-discrimination prevails. In turn, Article 10 of the TFEU sets forth that in "*defining and implementing its policies and activities, the EU shall aim to combat discrimination.*" The same idea is provided in its Article 18: "[w]ithin the scope of application of the Treaties [the TFEU and TEU], and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."

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ECHR. This provision does not prevent EU law from providing more extensive protection. The CJEU also considers the ECHR provisions to be general principles of EU law (see in particular Case C-185/95, *Baustahlgewebe v Commission*, EU:C:1998:608, ¶¶ 20–21). Additionally, as discussed in the Explanations relating to the CFR (the "**CFR Explanations**"), "[t]he reference to the ECHR covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union" (emphasis added).

167. Similarly, Article 14 of the ECHR provides that the enjoyment of the rights and freedoms set forth therein must be secured without discrimination regardless of the grounds. Article 1 of the Protocol No. 12 thereto extends the scope of this rule to, inter alia, cases where a person is discriminated:

- a) in the enjoyment of any right specifically granted to an individual under national law;
- b) in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
- c) by a public authority in the exercise of discretionary power;
- d) by any other act or omission by a public authority.<sup>90</sup>

168. The essence of the principles of equality and non-discrimination has been repeatedly articulated by the CJEU. For example, in *Arcelor*, the CJEU held that for an EU measure to meet the general equality requirements, it must treat different situations in the same way unless the goal of the measure in question objectively warrants differential treatment:

*"[t]he general principle of equal treatment, as a general principle of Community law, requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.*

*A breach of the principle of equal treatment as a result of different treatment presumes that the situations concerned are comparable, having regard to all the elements which characterise them.*

*The elements which characterise different situations, and hence their comparability, must in particular be determined and assessed in the light of the subject-matter and purpose of the Community act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account*<sup>91</sup> (emphasis added).

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<sup>90</sup> Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms. Council of Europe. 4 November 2000. P. 5. URL: <https://rm.coe.int/16800cce48>.

<sup>91</sup> Case C-127/07, *Arcelor v Ministre*, EU:C:2008:728, ¶¶ 23, 25–26.

169. The European Court of Human Rights (the "ECtHR") articulated practically the same test in *Abdulaziz v United Kingdom*:

*"...a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised'."*<sup>92</sup>

170. In *Queen v Minister of Agriculture, Fisheries and Food*, the CJEU followed a more deliberative approach, holding that:

*"...when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued."*<sup>93</sup>

171. Under the test of proportionality, the aims pursued each have to be scrutinised *strictu sensu*.<sup>94</sup> Thus, as follows from the cited legal authorities, a difference in treatment is justified provided that it is based on an objective and reasonable criterion, i.e., if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment.

## **B. Analysis**

172. The 18<sup>th</sup> Sanctions Package provisions impose discriminatory treatment for Russian persons involved in sanctions-related ISDS proceedings. As demonstrated below, this violates the EU law principles of equality and non-discrimination.

### **1. Different treatment**

173. The 18<sup>th</sup> Sanctions Package violates the rule established in EU law that comparable situations must not be treated differently, as demonstrated in the hypothetical scenario below.

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<sup>92</sup> *Abdulaziz v UK* Series A No. 94 (1985) EHRR 471, ¶ 72. See also: Article 5(1) of the TEU; Case C-380/09 *P Melli Bank v Council*, Judgment of 13 March 2012, ¶ 52.

<sup>93</sup> Case C-331/88, *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others*, ECLI:EU:C:1990:391, ¶ 13. See also: Case T-262/15 *Kiselev v Council*, Judgment of 15 June 2017, ¶ 87; EU Charter of Fundamental Rights: A Commentary, ed. by Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, Oxford, 2nd edition, p. 510.

<sup>94</sup> EU Charter of Fundamental Rights: A Commentary, ed. by Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, Oxford, 2<sup>nd</sup> edition, p. 510.

174. A Russian investor owns a manufacturing company in an EU Member State that produces specific goods. An identical company, owned by a Chinese investor, operates in the same country and produces the same goods. Both companies exported mainly to Russia. In 2022, the EU amended its Regulation 833/2014 and prohibited exports of those goods to Russia, resulting in a substantial decline in the investors' revenues and significant losses.
175. Both investors commenced investment arbitrations under the applicable BITs and ultimately obtained awards ordering the Member State to pay compensation. Due to the 18<sup>th</sup> Sanctions Package the Russian investor cannot enforce the award in any EU Member State, while the Member State must oppose the award and, most importantly, may claim damages against the Russian investor. In the meantime, the Chinese investor can enforce the award throughout the EU, face no claim in damages, and the EU Member State will not be obliged to raise public policy objections against the enforcement.
176. These situations are comparable in all respects, as they involve identical investments, identical harm from identical measures, identical claims, and identical awards. The only difference is the investors' nationality, i.e., Russian or Chinese. The 18<sup>th</sup> Sanctions Package applies automatically to the Russian investor, without any assessment of whether enforcing this specific award would frustrate the EU sanctions' objectives.
177. Therefore, the 18<sup>th</sup> Sanctions Package violates EU law on equality and non-discrimination, as set out in Articles 20 and 21 of the CFR, Articles 10 and 18 of the TFEU, Article 2 of the TEU, Article 14 of the ECHR, and Article 1 of the Protocol No. 12 thereto.

## **2. No objective justification**

178. The 18<sup>th</sup> Sanctions Package also lacks objective justification since the enacted measures violate the principle of proportionality. Articles 11e and 11f of Regulation 833 should be annulled on this basis alone.
179. In the light of the decisions articulated above, as well as the objective declared by the EU Council, the Court should consider the fact that the sole objective of the 18<sup>th</sup>

Sanctions Package is to impede pending and potential claims of all Russian nationals under investment treaties and protect EU Member States from liability.

180. Since this objective does not serve the public interest, it is not legitimate. While the CJEU has recognised that measures adopted under the common foreign and security policy may pursue legitimate public interests, a clear distinction must be drawn between measures aimed at protecting individuals, such as from terrorism or human rights abuses, and the measures designed to shield Member States from obligations they have previously voluntarily assumed under international treaties.
181. The objective pursued is other than increasing the pressure exerted on the Russian Federation as was, for example, at stake at the CJEU case on prohibitions and restrictions in providing consulting legal services under Article 5n of Regulation 833.<sup>95</sup>
182. Consequently, the measures introduced in the 18<sup>th</sup> Sanctions Package, namely Articles 11e and 11f of Regulation 833, should be annulled, as they lack objective justification and are disproportional, resulting in non-equality and discrimination of Russian nationals.

## V. THE 18<sup>TH</sup> SANCTIONS PACKAGE VIOLATES THE FUNDAMENTAL RIGHT TO PROPERTY

### A. The scope of the right to property

183. The right to property in the EU is a fundamental human right guaranteed *inter alia* by Article 17 of the CFR which provides as follows:

*"1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.*

*2. Intellectual property shall be protected."*

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<sup>95</sup> ECJ. Case T-797/22 *Ordre néerlandais des avocats du barreau de Bruxelles*. Judgment of 2 October 2024, ¶¶ 174-176.

184. As expressly stated under Article 52(3) of the CFR, the meaning and scope of the fundamental right to property provided by the CFR shall be the same as under the ECHR, save for where the EU law provides a more extensive protection thereto:

*"In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."*<sup>96</sup>

185. The second sentence of this provision provides that EU law must ensure a level of protection at least equivalent to that guaranteed by the ECHR. The Presidium of the ECHR, a body responsible for drafting the CFR, confirms this alignment. The Explanations to the CFR state that while the wording of Article 17 of the CFR has been updated, it retains the same meaning and scope as Article 1 of the Protocol No. 1 to the ECHR (the "**Protocol No. 1**"), in accordance with Article 52(3) of the CFR.<sup>97</sup>

186. Under Article 1 of the Protocol No. 1:

*"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

*The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure payment of taxes or other contributions or penalties."*

187. All EU Member States have ratified the Protocol No. 1, thereby binding themselves to it. Consequently, the standard of protection under Article 17 of the CFR must be at least equal to that provided under the cited Article 1 of the Protocol No. 1. Deviation from

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<sup>96</sup> CFR, Article 52, URL: <https://fra.europa.eu/en/eu-charter/article/52-scope-and-interpretation-rights-and-principles>.

<sup>97</sup> Explanations relating to the Charter of Fundamental Rights (OJ C 303, 14.12.2007), Explanation on Article 17 – Right to property, URL: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC\\_2007\\_303\\_R\\_0017\\_01](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2007_303_R_0017_01). See also Journal of the European Union (Official Journal of the European Union C 303/17) dated 14 December 2007, URL: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:FULL:EN:PDF>: "This Article [Article 17 of the Charter] is based on Article 1 of the Protocol to the ECHR [...] This is a fundamental right common to all national constitutions. It has been recognised on numerous occasions by the case-law of the Court of Justice".

the required standard is permitted only where the CFR affords more extensive protection, not the other way around.

## **B. Arbitral awards as "possessions" in the meaning of Article 1 of the Protocol No. 1**

188. In cases involving interference with the enforcement of arbitral awards and the assessment of violations of Article 1 of the Protocol No. 1, established case law demonstrates that a State's failure to enforce a final award constitutes interference with the right to property.
189. The concept of possession within the meaning of Article 1 of the Protocol No. 1 has a broad autonomous meaning.<sup>98</sup> The scope of this term has been developed in the jurisprudence of the ECtHR to including *inter alia* rights arising from arbitration awards, claims confirmed by such awards, as well as final arbitral awards themselves.<sup>99</sup>

### **1. Claims confirmed by arbitral award as "possessions"**

190. A notable example in the ECtHR practice is *Kin-Stib & Majkic v Serbia* case, where ECtHR ruled that the State's failure to enforce a final, binding domestic arbitration award violated the applicants' right to enjoyment of possessions under Article 1 Protocol No. 1. A "*claim established in the arbitration award*" was expressly recognized as "possession" within the meaning of Article 1 Protocol No. 1:

*"Turning to the present case, it is firstly noted that the claim established in the arbitration award undisputedly amounts to a possession within the meaning of Article 1 of Protocol No. 1."<sup>100</sup> (emphasis added).*

191. ECtHR noted that only a *sufficiently established* and *enforceable* claim would amount to a "possession" in the ECHR's meaning. The court, however, balanced it with the fact that it is the State's responsibility to ensure the enforceability of arbitral awards.<sup>101</sup> Since "*the Serbian authorities have thus clearly not taken the necessary measures to fully*

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<sup>98</sup> See e.g. Aida Grgiæ, Zvonimir Mataga, et al., 'The Right to Property under the European Convention on Human Rights', Human rights handbooks No. 10, pp. 6–7, URL: <https://rm.coe.int/168007ff55>.

<sup>99</sup> Ibid.

<sup>100</sup> *Kin-Stib and Majkić v Serbia* (Application no. 12312/05), Judgement dated 4 October 2010, ¶ 84, URL: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-98355%22%5D%7D>.

<sup>101</sup> Ibid., ¶ 83.

*enforce the arbitration award in question and have not provided any convincing reasons for that failure*",<sup>102</sup> the ECtHR established a violation of Article 1 Protocol No. 1.

192. Based on that decision, the doctrine confirms that arbitral awards are recognised as "*a crystallization of the rights arising out of the underlying contract*",<sup>103</sup> and interference with enforcement of arbitral awards affects the primary right confirmed by such awards.
193. In an earlier case, *Stran Greek Refineries and Stratis Andreadis v Greece*, the ECtHR also found a violation of Article 1 of the Protocol No. 1 due to the State's failure to enforce an arbitral award. The rights confirmed by the award were recognised as possession. Notably, the State itself was a debtor under the arbitral award as the tribunal upheld the applicants' claims under a state contract. Subsequent to the award, the Greek Parliament enacted Law No. 1701/1987, which retroactively annulled the state contract, the arbitration clause, and any resulting arbitration awards.<sup>104</sup>
194. In the proceedings before the ECtHR, Greece objected to the recognition of the award as a possession, arguing that the criterion of enforceability was not met and that it was not for the ECtHR to determine enforceability, as that competence belonged to national courts.<sup>105</sup>
195. The ECtHR dismissed the objection on the following basis:

*"The Court agrees with the Government that it is not its task to approve or disapprove the substance of that award. It is, however, under a duty to take note of the legal position established by that decision in relation to the parties.*

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<sup>102</sup> Ibid., ¶ 85.

<sup>103</sup> Yarik Krivoi, 'The European Court of Human Rights: an Arbitration Award Can Be Expropriated' dated 9 December 2010, CIS Arbitration Forum, URL: <https://cisarbitration.com/2010/12/09/the-european-court-of-human-rights-an-arbitration-award-can-be-expropriated/>.

<sup>104</sup> As cited by the ECtHR in *Stran Greek Refineries and Stratis Andreadis v Greece*, Case No 22/1993/417/496, Judgment dated 09 December 1994, ¶ 20, URL: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57913%22%7D>: "3. Any principal or ancillary claims against the Greek State, expressed either in foreign or local currency, which arise out of the contracts entered into between 21 April 1967 and 24 July 1974, ratified by statute and terminated by virtue of Law no. 141/1975, are now proclaimed time-barred. 4. Any court proceedings at whatever level pending at the time of the enactment of this statute, in respect of claims within the meaning of the preceding paragraph, are declared void."

<sup>105</sup> *Stran Greek Refineries and Stratis Andreadis v Greece*, Case No 22/1993/417/496, Judgment dated 9 December 1994, ¶ 60, URL: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57913%22%7D>.

*According to its wording, the award was final and binding; it did not require any further enforcement measure and no ordinary or special appeal lay against it.*

*62. At the moment when Law no. 1701/1987 was passed the arbitration award of 27 February 1984 therefore conferred on the applicants a right in the sums awarded. Admittedly, that right was revocable, since the award could still be annulled, but the ordinary courts had by then already twice held - at first instance and on appeal - that there was no ground for such annulment. Accordingly, in the Court's view, that right constituted a "possession" within the meaning of Article 1 of Protocol No. 1 (P1-1)."<sup>106</sup> (emphasis added).*

196. Therefore, despite the introduction of a law that made the enforcement of arbitral awards illegal, the ECtHR ruled that the award had been issued before that prohibition took effect. Consequently, the rights to the sums awarded were enforceable and constituted possessions.
197. Drawing a comparison with these examples, arbitral awards rendered in favour of Russian investors and against Member States likewise confirm rights that may be regarded as possessions, as confirmed by arbitral awards, within the meaning of the ECHR. The measures imposed by the 18<sup>th</sup> Sanctions Package do not affect the finality of arbitral awards. Where the seat of arbitration is outside the EU, courts of the Member States lack jurisdiction, and thus their decisions cannot affect the award's finality either. Furthermore, these arbitral awards confirm and enforce rights that occurred prior to the awards' issuance. Accordingly, the rights recognised by such awards constitute possessions under the ECHR's definition, even if the awards are rendered after the adoption of restrictive measures. Therefore, refusing recognition, implementation and enforcement of arbitral awards would interfere with the rights conferred by those awards and thus with "possessions" under Article 1 of the Protocol No. 1 and Article 17 of the CFR.

## **2. Arbitral awards as "possessions"**

198. In addition to the rights confirmed by arbitral awards, the ECtHR has also recognised that final arbitral awards themselves may constitute possessions.

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<sup>106</sup> *Stran Greek Refineries and Stratis Andreadis v Greece*, Case No 22/1993/417/496, Judgment dated 9 December 1994, ¶ 61, URL: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-57913%22%7D>.

199. In *BTS Holding v Slovakia*, the ECtHR held that Slovakia violated BTS Holding's right to property under Article 1 of the Protocol No. 1 by refusing to enforce a Paris-seated ICC arbitral award against the Slovak National Property Fund. The arbitral award itself was recognised as a protected possession. In *obiter* the ECtHR noted that the debtor under the award was "*an agency of the State, that the payments it was ordered to make under the award originated from an investment transaction [...] the payment under the award would ultimately have to be made from the State budget*",<sup>107</sup> thereby making the case another relevant example for recognizing investor-State arbitral awards as possessions.
200. In analysing if a "possession" is present, the ECtHR has confirmed its previous line of case law that claims are considered a possession if they are enforceable. More so, it determined that a claim recognised by an arbitral award is considered to be enforceable due to the existence of the award:

*"The Court reiterates that a "claim" can constitute a "possession" within the meaning of Article 1 of Protocol No. 1 if it is sufficiently established to be enforceable, for example by virtue of an arbitration award."*<sup>108</sup>  
(emphasis added).

201. The ECtHR further noted that under Slovakian law Foreign Awards are in principle enforceable which led to a conclusion that not only the claim but the arbitral award confirming such a claim constitute protected possessions. Where State courts interfere with the enforcement of arbitral awards, this does not deprive those awards of their status of "possessions":

*"[T]he Court finds that the applicant company's award was sufficiently established to amount to a "possession" within the meaning of Article 1 of Protocol No. 1. The obstacles to its enforcement, as established by the domestic courts, pertain to the questions of interference with the applicant company's rights under that provision and, as the case may be,*

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<sup>107</sup> *BTS Holding, A.S. v Slovakia* (Application no. 55617/17), Judgment (Merits) dated 30 June 2022, ¶ 69, URL: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-218080%22%7D>.

<sup>108</sup> *BTS Holding, A.S. v Slovakia* (Application no. 55617/17), Judgment (Merits) dated 30 June 2022, ¶ 49, URL: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-218080%22%7D>.

*compliance of that interference with the applicable requirements.*"<sup>109</sup>  
(emphasis added).

202. Therefore, the ECtHR recognized both the claim confirmed by the arbitral award and the award itself as "possessions" under Article 1 of the Protocol No. 1 and, thus, Article 17 of the CFR.

### C. Limitations on the right to property

203. The right to property is not absolute and can be subject to certain restrictions on its enjoyment. Article 17 of the CFR establishes two grounds for limitation of the right to property: *deprivation of possessions* (2<sup>nd</sup> sentence) and *regulation of the use of property* (3<sup>rd</sup> sentence). As such, in order for a refusal by a Member State court to recognise, implement or enforce a claim confirmed by an arbitral award, that is, to restrict the right to property, a justification must be established.

#### 1. Deprivation of possessions

204. The 2<sup>nd</sup> sentence of Article 17 of the CFR provides:

*"No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss."*

205. Deprivation of possessions means a "*measure completely and permanently depriving the owner of her/his property.*"<sup>110</sup> According to the Court's approach, the deprivation of possessions does not require the transfer of ownership or title to be established, but rather that the cancellation of those rights results in the owners being deprived of them.<sup>111</sup> The CJEU also indicated that the regulations of the use of property may equate

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<sup>109</sup> *BTS Holding, A.S. v Slovakia* (Application no. 55617/17), Judgment (Merits) dated 30 June 2022, ¶¶ 50, 53, URL: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-218080%22%7D>.

<sup>110</sup> EU Charter of Fundamental Rights: A Commentary, ed. by Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, Oxford, 2<sup>nd</sup> edition, p. 505.

<sup>111</sup> Judgment of the Court (Grand Chamber) of 21 May 2019 in Case 235/17 (*European Commission v Hungary*), ¶ 84, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62017CJ0235>.

to deprivation if the owner of the property does not "[remain] *free to dispose of it or to put it to other uses which are not prohibited*."<sup>112</sup>

206. The measures imposed by the 18<sup>th</sup> Sanctions Package prohibit the recognition, implementation or enforcement of any injunction, order or relief issued by a judicial court other than a court of a Member State, or any arbitral or administrative decision issued in the proceedings other than those in the Member States, pursuant to or derived from investor-State dispute settlement proceedings against a Member State, which could lead to the satisfaction of any claims relating to measures imposed under Regulations Nos. 833/2014 and 269/2014. As is apparent from the wording of the measure, its implications extend beyond the arbitral awards or other decisions, which are considered self-sufficient possessions under Article 17 of the CFR. The measure also affects primary possessions that are the subject of investor-State claims against a Member State.
207. *First*, this measure covers all actions that an "owner" of an arbitral award or other decision may take while disposing of or using it freely, in particular to recognise, give effect or enforce them against a certain State. Even assuming that any of that would be possible outside the Member States, the 18<sup>th</sup> Sanctions Package provides the Member State with the entitlement to recover any damages, including legal costs, incurred by them as a consequence of investor-State dispute settlement proceedings. Thus, the measure effectively deprives Russian persons of their rights under an arbitral award or decision leaving the latter without any economic value.
208. *Second*, the primary feature of arbitral awards or other decisions rendered in the course of investor-State dispute settlement is that they aim to compensate investors for losses resulting from State's actions. Thus, the prohibition of recognition, implementation or enforcement of such award or decision also result in indirect deprivation of the primary investments into Member States, which were intended to be safeguarded through investor-State proceedings.
209. *Third*, in the context of investor-State arbitration, the inability to enforce an arbitral award against a State in its territory (and more so within the entire EU), effectively deprives the investor of possessions: of its rights which were guaranteed by the

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<sup>112</sup> Judgment of the Court of 13 December 1979 in Case 44/79 (*Liselotte Hauer v Land Rheinland-Pfalz*), ¶ 19, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61979CJ0044>.

investment treaties and crystallised by the issuance of arbitral awards, as well as of the arbitral awards themselves.

210. Moreover, the measures practically prohibit the Member States from taking any actions that could result in the satisfaction of claims related to the restrictive measures, rendering the prohibition territorially unlimited and confirming that the measures imposed effectively amount to expropriation. Therefore, the investors are deprived of both their primary and secondary property rights – such as the frozen assets themselves and the arbitral awards issued to protect those assets.
211. Thus, by enactment of the 18<sup>th</sup> Sanctions Package the Council effectively deprived Russian persons of their rights to property by prohibiting the free disposal and usage of arbitral awards that would be rendered in their favour, usually in relation to their previous investments, in the course of investor-State disputes against Member States.

## 2. Regulation of the use of property

212. The 3<sup>rd</sup> sentence of Article 17 of the CFR provides: "*The use of property may be regulated by law in so far as is necessary for the general interest.*"
213. Regulation of the use of property "*covers all measures defining or limiting the exercise of property rights.*"<sup>113</sup> In particular, the CJEU has unequivocally pronounced that any temporal precautionary measure that entails a restriction of the exercise of the right to property falls under the 3<sup>rd</sup> sentence of Article 17.<sup>114</sup>
214. As previously discussed, the 18<sup>th</sup> Sanctions Package effectively deprives Russian persons of their rights to use, dispose of and bequeath the arbitral awards and other decisions rendered in their favour. Nevertheless, even if that is not the case, the 18<sup>th</sup> Sanctions Package is still subject to the 3<sup>rd</sup> sentence of Article 17, which means that all necessary safeguards must be in place to be considered justifiable.

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<sup>113</sup> EU Charter of Fundamental Rights: A Commentary, ed. by Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, Oxford, 2<sup>nd</sup> edition, p. 504.

<sup>114</sup> Judgment of the Court of 13 December 1979 in Case 44/79 (*Liselotte Hauer v Land Rheinland-Pfalz*), ¶ 19, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61979CJ0044>; Judgment of the Court (Grand Chamber) of 3 September 2008 in Joined Cases C-402/05 P and C-415/05 P (*Kadi*), ¶ 385, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62005CJ0402>.

### 3. Justification of limitations under the 18<sup>th</sup> Sanctions Package

215. Though the right to property is not absolute, the EU institutions still must not "*manifestly and gravely disregarded the limits of its [their] discretion*".<sup>115</sup> These limitations are laid down in Article 17 in conjunction with Article 52(2) of the CFR<sup>116</sup> that stipulates:

*"Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others."*

216. Consequently, apart from the criteria established by Article 17 of the CFR, every limitation of the rights to property shall (a) be provided by law, (b) respect the essence of the rights to property, (c) be proportional, meaning that they must be necessary and appropriate to meet objectives of general interest recognised by the EU or the need to protect the rights and freedoms of others. Furthermore, the limitations may not exceed those provided by under the ECtHR.<sup>117</sup>

#### (a) Provided by law

217. The provided by law criterion is met when restrictions are present in a clear, foreseeable and accessible legal framework.<sup>118</sup> The measures in question were adopted by the relevant EU institutions by implementing the 18<sup>th</sup> Sanctions Package. The latter indicates that the prohibition on recognition and enforcement of arbitral awards and other decisions related to investor-State disputes initiated by Russian persons against Member States is worded broadly to exclude any possibility of negative consequences

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<sup>115</sup> Judgment of the General Court (Fourth Chamber, Extended Composition) of 13 July 2018 in Case C-786/14 (*Bourdouvali*), ¶ 290, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62014TJ0786>; Judgment of the Court (Grand Chamber) of 16 June 2015 in Case C-62/14 (*Gauweiler and Others*), ¶ 68, and the case-law cited.

<sup>116</sup> Judgment of the Court (Grand Chamber) of 21 May 2019 in Case C-235/17 (*Commission v Hungary*), ¶¶ 88–89, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62017CJ0235>.

<sup>117</sup> Explanations relating to the Charter of Fundamental Rights (*OJ C 303, 14.12.2007*), Explanation on Article 17 — Right to property, URL: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC\\_2007\\_303\\_R\\_0017\\_01](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2007_303_R_0017_01).

<sup>118</sup> *Kurić and Others v Slovenia*, Judgment of the ECHR on Application no. 26828/06 dated 26 June 2012, ¶ 341.

of the EU sanctions policy against the Russian Federation for Member States. This is evidenced from:

- a) The scope of arbitral or court documents that fall under the prohibition, which include any "*injunction, order, relief, judgment,*" "*arbitral or administrative decision,*" "*pursuant to or derived from investor-State dispute settlement proceedings against a Member State*".
- b) The purpose of the prohibition, which is to prevent "*the satisfaction of any claims in connection with measures imposed under*" Regulations No. 833/2014 and No. 269/2014 (emphasis added).
- c) The scope of actions that are covered by the implemented measures, which are recognition, implementation or enforcement of arbitral or court documents.
- d) The list of persons, whose claims under the arbitral awards and other decisions related to investor-State disputes initiated by "*legal persons, entities or bodies listed in the Annexes*" to Regulation No. 833/2014 "*or legal persons, entities or bodies established outside the Union whose proprietary rights are directly or indirectly owned for more than 50 % by them*", the "*any other Russian person, entity or body*" and "*any person, entity or body acting through or on behalf*" of them.
- e) The mechanism of reimbursement of "*any direct or indirect damages, including legal costs, incurred by that Member State as a consequence of investor-State dispute settlement proceedings brought against a Member State*".

**(b) Consistency with the essence of the rights to property**

218. The essence of the right to property is disrespected when the guarantee of property is deprived of its substance, meaning that the measure in question affects the enjoyment of the right to property more than marginally or partially or more than only with respect to certain modalities of this right.<sup>119</sup>

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<sup>119</sup> EU Charter of Fundamental Rights: A Commentary, ed. by Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, Oxford, 2<sup>nd</sup> edition, p. 515. See also Judgment of the Court of 6 December 1984 in Case 59/83 (*Biovilac*), ¶ 22, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:61983CJ0059>.

219. The broad wording of the 18<sup>th</sup> Sanctions Package clearly indicates that the acts in question are not limited only to certain modalities of the right to property in relation to arbitral awards or other decisions in relation to investor-State arbitration against Member States. The right to property in relation to such awards or decisions implies that the owner of such award or decision may enjoy it only by virtue of their recognition, implementation or enforcement against a State. It is evident that the mere possession of an award or decision, without the concomitant ability to utilise or dispose of it, renders the award or decision devoid of value. This effectively results in the owners of the award or decision being deprived of the substance of their right to it.
220. Furthermore, the essence of the award or decision rendered in the course of investor-State dispute settlement proceedings is to protect and guarantee the protection of an investor from being deprived of its investment by the State, with appropriate compensation of losses. However, without the possibility to recognise, implement or enforce a decision, such protection and guarantees become futile, thereby depriving them of their fundamental essence. This assertion is explicitly articulated in the provisions of the 18<sup>th</sup> Sanctions Package, which unequivocally stipulate that the aforementioned measures are intended to preclude the satisfaction of any claims pertaining to measures imposed on Member States in the context of investor-State disputes.
221. Consequently, given their broad wording, the 18<sup>th</sup> Sanctions Package affects the very essence of the right to property under Article 17 of the CFR, as it effectively eliminates the substance of enjoyment of awards and other decisions related to investor-State dispute settlement proceedings.

**(c) Proportionality**

222. As elaborated above in section IV(B)(2) of this brief, the measures adopted by the 18<sup>th</sup> Sanctions Package are not proportionate and necessary to the pursued (illegitimate) objective, that is, the interests are not fairly balanced.
223. The scope of the measures in question is broad, diminishing the very essence of and prohibiting every element of enjoyment of the right to property over the arbitral award or decision rendered in the course of investor-State dispute settlement proceedings. It

also affects the possibility of protecting the initial possessions (investments), which were supposed to be compensated by such awards and decisions.

224. The measures cannot be avoided.<sup>120</sup> The measures provide the Member States with entitlement to recover all damages including legal costs, incurred by that Member State as a consequence of investor-State dispute settlement proceedings brought against it. Furthermore, any attempt to enjoy the right to property over an arbitral award or decision would be considered as a violation or circumvention of the EU sanctions, which entail criminal liability in all Member States, in accordance with Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures.<sup>121</sup>
225. The measures also provide no rules to mitigate interference with the right to property over an arbitral award or decision, such as derogations and exceptions, transitional period, periodic re-examination or any other safeguards that an arbitral award or decision may be recognised, given effect or enforced after the EU sanctions would be lifted.<sup>122</sup>
226. Consequently, the 18<sup>th</sup> Sanctions Package constitutes a deprivation of possession (or, alternatively, regulation of the use of property) that is not justifiable under the test of proportionality in violation of Article 17 of the CFR.

## VI. RIGHT TO AN EFFECTIVE REMEDY

227. The right of access to court ensures that the law and its application in practice allow the person to access the courts and tribunals to determine the person's right and receive a remedy.

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<sup>120</sup> Judgment of the Court (Fifth Chamber) of 22 October 1991 in Case C-44/89 (*Georg von Deetzen*), ¶ 29, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61989CJ0044>.

<sup>121</sup> Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673 (*OJ L*, 2024/1226, 29.4.2024), URL: <https://eur-lex.europa.eu/eli/dir/2024/1226/oj/eng>.

<sup>122</sup> Judgment of the Court (Grand Chamber) of 3 September 2008 in Joined Cases C-402/05 P and C-415/05 P (*Kadi*), ¶¶ 364–365, URL: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62005CJ0402>.

228. This right enshrines access to arbitral tribunals and state courts for the purposes of recognition and enforcement of any award the arbitral tribunal rendered. Specifically, the European Court of Human Rights recognised since *Stran Greek Refineries* that an arbitral award creates "a civil right" protected by Article 6 of the ECHR.<sup>123</sup>

**A. Access to court to an effective remedy**

229. Access to courts and effective remedy are fundamental rights in the EU stemming from the constitutional traditions common to the Member States. Article 47 of the CFR and Article 19(1) of the TEU ensure the right to effective protection in courts with high procedural standards of access to courts and independent adjudication of disputes. In addition, Article 13 of the ECHR guarantees the right to an effective remedy before the national authority in situations where rights and freedoms are infringed by persons carrying out official duties.

230. In order to ensure that these rights are guaranteed, case law establishes requirements in order to ensure impartial resolution of the disputes. Several factors are taken into account, including whether jurisdiction is obligatory, whether the tribunal is independent and whether the rules of law are applied. In addition, another level of control is achieved by the judicial review:

*"It should be noted that the effectiveness of the judicial review guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union requires, in particular, that the Courts of the European Union ensure that the decision by which restrictive measures were adopted or maintained, which affects the person or entity concerned individually, is taken on a sufficiently solid factual basis. That entails a verification of the factual allegations in the summary of reasons underpinning that decision, with the consequence that judicial review cannot be restricted to an assessment of the cogency in the abstract of the reasons relied on, but must concern whether those reasons, or, at the very least, one of those reasons, deemed sufficient in itself to support that decision, is substantiated."*

231. It is important to point out that EU courts' application of law in relation to human rights is greatly influenced by international instruments:

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<sup>123</sup> *Stran Greek Refineries and Stratis Andreadis v Greece*, app. no. 13427/87, Judgment of 9 December 1994; see also *Xavier Lucas c. France*, req. n. 15567/20, Arrêt 9 juin 2022.

*"Fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories."*

232. The legal acts do not provide a definition of an effective remedy. The CJEU has acknowledged the responsibility of Member States to provide remedies that are sufficient to guarantee the effective judicial protection of rights in areas covered by EU law. It is stated that the TFEU established a complete system of legal remedies and procedures to ensure the rule of law:

*"It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. In particular, in Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. Natural and legal persons are thus protected against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in the second paragraph of Article 173 of the Treaty. Where the Community institutions are responsible for the administrative implementation of such measures, natural or legal persons may bring a direct action before the Court against implementing measures which are addressed to them or which are of direct and individual concern to them and, in support of such an action, plead the illegality of the general measure on which they are based. Where implementation is a matter for the national authorities, such persons may plead the invalidity of general measures before the national courts and cause the latter to request the Court of Justice for a preliminary ruling."*

233. Recent case law also demonstrates that even the restrictive measures *"should be applied in accordance with the fundamental rights and principles recognised by the CFR, and in particular the rights to an effective remedy and to a fair trial."* It was highlighted that in accordance with Article 47 of the CFR of being advised, defended and represented should be guaranteed.

234. Right to an effective remedy covers not only access to court and impartial adjudication of the dispute, but the enforcement stage as well. It means that the court decision has to be effective:

*"The right to an effective remedy, enshrined in Article 47 of the Charter, would be illusory if the legal order of a Member State allowed a final, binding judicial decision to remain ineffective to the detriment of one party..."<sup>124</sup>*

**B. Existing restrictions on the right to access to court and to an effective remedy imposed by the EU regulations and their practical effect**

235. According to the EU law, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.<sup>125</sup>
236. The 18<sup>th</sup> Sanctions Package introduces new measures which may result in a limitation of a fundamental right of access to court and to an effective legal remedy as recognised by Article 47 of the CFR and its interpretations by the CJEU.<sup>126</sup>
237. The measures inserted into Article 11 of Regulation 833/2014 limit not only the potential enforcement of investor-state arbitration awards, but also judicial assistance in furtherance of such arbitration, and entitle the Member States to unilaterally recover costs and damages resulting from the said proceedings. The unclear scope of Article 11, bolstered by new provisions, leads to the following consequences. On the one hand, the tension between the opposing jurisdictions and their judicial systems is growing, as described in Section VI(F) below regarding Russia's response to the measures adopted by measures. On the other hand, the enacted measures, as they are written, limit

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<sup>124</sup> *Deutsche Umwelthilfe*, Judgment of 19 December 2019, C-752/18, EU:C:2019:1114, ¶ 36; *XXX v État belge*, Judgment of the Court (Fifth Chamber) of 29 July 2024, C-14/23, ¶ 63.

<sup>125</sup> See Section VI(A) above. The CJEU interpreted Article 47 of the Charter as each Member State "must order its national law in such a way that applicants for international protection are able to exercise their right to an effective remedy, as guaranteed by Article 47 of the Charter." In relation to arbitration, the right to effective legal protection through arbitration guarantees access to an independent and impartial tribunal for the adjudication of rights violations, ensuring a fair and public hearing within a reasonable timeframe.

<sup>126</sup> See Section VI(A).

fundamental procedural rights to an effective legal remedy which should be available to anyone irrespective of their background.

238. The unclear interpretation and the growing scope of Article 11 of Regulation 833/2014 (a.k.a. "no-claims-clause") may undermine the right of access to court and to an effective legal remedy. Section VI(B)(1) below focuses on how Article 11 is formulated with ambiguity, lacking the clarity and precision necessary for consistent legal application. The following Section VI(B)(2) covers the consequences of the ban on enforcement of the ISDS awards against the EU Member States.

**1. Absence of a clear interpretation of the scope of Article 11 of the Regulation No. 833/2014 leads to risks of prejudice of the right of access to court and to an effective legal remedy**

239. The use of overly vague concepts and criteria in interpreting a legislative provision can render the provision itself incompatible with the requirements of clarity and foreseeability as to its effects.<sup>127</sup> A legal provision thus should be clear enough for its application to be foreseeable.
240. Article 11 of the Regulation No. 833/2014 states the following:

*"[N]o claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under the Regulation No. 833/2014, including claims for indemnity or any other claim of this type, such as a claim for compensation or a claim under a guarantee, notably a claim for extension or payment of a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, of whatever form, shall be satisfied."*

241. Since its adoption, the said provision has been causing uncertainty with courts and arbitral tribunals considering whether to apply it. For instance, it is not clear what can be interpreted as "indirectly affected by sanctions." It is also unclear whether Article 11 fully prohibits any type of relevant proceedings, including international arbitration.

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<sup>127</sup> Guide on Article 7 of the European Convention on Human Rights: [https://ks.echr.coe.int/documents/d/echr-ks/guide\\_art\\_7\\_eng](https://ks.echr.coe.int/documents/d/echr-ks/guide_art_7_eng).

242. Under Article 11, in a number of EU countries, state courts have refused to enforce arbitral awards in favour of Russian entities, citing fundamental principles of national law.<sup>128</sup> Others have granted enforcement, highlighting the lack of uniformity in judicial practice.<sup>129</sup>
243. In *Stankoimport*, the CJEU is now considering the scope of the no-claims clause interpretation.<sup>130</sup> The issues raised in *Stankoimport* in connection with this provision's interpretation have already been addressed in an *amicus curiae* brief of the Russian Arbitration Association.<sup>131</sup>
244. In brief, the RAA working group found that the interpretation of Article 11 of the Regulation No. 833/2014 should be limited, as not extending to arbitration proceedings seated within the EU. Otherwise, a broad interpretation of Article 11 would lead to significant negative consequences for the EU as a seat of arbitration, limit application of the law of the Member States as governing international commercial contracts, encourage Russian parties to seek resort under Russia's countermeasures and exclusive competence of Russian courts. The said *amicus curiae* brief predicted that a wide interpretation of Article 11 of the Regulation No. 833/2014 may increase a number of investment claims against the EU.
245. Another similar request to the CJEU regarding the interpretation of Article 11 of the Regulation No. 833/2014 has been made recently in *Aero VIM*.<sup>132</sup>
246. Lack of consistency in interpreting the EU sanctions and their scope creates inequality in the applicable standards of the protection of rights. As "*no claims ... shall be satisfied*," it raises issues of whether a claim of a Russian party may be considered at all

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<sup>128</sup> Rosneft v Petrohim International Carriers: <https://lt.sputniknews.ru/20231207/sud-v-litve-razreshil-kompanii-ne-platit-shtraf-rosneft-31299858.html>.

<sup>129</sup> The Czech Republic 20 Cdo 136/2023-362: <https://www.zakonyprolidi.cz/judikat/nscr/20-cdo-136-2023.2>.

<sup>130</sup> Case C-802/24, Reibel: Request for a preliminary ruling from the Svea hovrätt (Sweden) lodged on 20 November 2024 – NV Reibel v JSC VO Stankoimport.

<sup>131</sup> The full text in the English language is available here: [https://arbitration.ru/upload/medialibrary/46a/s986k88t8o6m8xv813gawgnbkz2tc3va/RAA-Amicus-Reibel-Case-C\\_802-24-dated-14-May-2025.pdf](https://arbitration.ru/upload/medialibrary/46a/s986k88t8o6m8xv813gawgnbkz2tc3va/RAA-Amicus-Reibel-Case-C_802-24-dated-14-May-2025.pdf).

<sup>132</sup> Case C-290/25, Spocure: Request for a preliminary ruling from the Landgericht Mainz (Germany) lodged on 16 April 2025 – Spocure LLC v Aero VIM GmbH.

and satisfied after a consideration by a court of an Member State, within an arbitration proceeding seated in the EU, or even by other fact-triers outside of the EU in cases where just law of an EU Member State applies.

## 2. Impact of the amended Articles 5n(1)(a), 5(h) Regulation No. 833/2014 on right to an effective remedy

247. Broad interpretation of the transactional ban, albeit with exclusions for the legal services ensuring the right to an effective legal remedy, creates a case-by-case compliance difficulties when assessing what transactions are exactly exempt from the ban. As a result, a Russian party seeking an effective legal remedy may still face hurdles and delays just to exercise that right.
248. Article 5(h) Regulation No. 833/2014, as amended by the 18<sup>th</sup> Sanctions Package, prohibits any transactions with sanctioned legal persons listed in Annex XIV (and the entities where they own more than 50%). According to paragraph 2 of the Preamble of the Council Implementing Regulation to the 18th Sanctions Package, the ban "should be interpreted in a broad sense, and should encompass all kinds of transactions."
249. On 22 January 2026, the European Commission published FAQ, reaffirming the exceptions from legal advisory services prohibitions.<sup>133</sup> The sanctions do not apply to services that are strictly necessary for the exercise of the right of defence in judicial proceedings and the right to an effective legal remedy; or to ensure access to judicial, administrative or arbitral proceedings in an EU Member State, or for the recognition or enforcement of a judgment or an arbitration award rendered in a EU Member State, provided that such provision of services is consistent with the objectives of Regulations 833/2014 and 269/2014.
250. However, these exceptions do not primarily address the practical challenges of funding the costs essential to any legal proceeding. Even where the provision of legal advice itself is permitted, the necessary associated financial transactions are often obstructed. In practice, banks may block or severely delay payments for expenses critical to

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<sup>133</sup> Provision of Services Related Provision: Article 5n of Council Regulation 833/2014. Frequently Asked Questions – as of 22 January 2026, available at: [https://finance.ec.europa.eu/system/files/2023-07/faqs-sanctions-russia-services-provision\\_en.pdf](https://finance.ec.europa.eu/system/files/2023-07/faqs-sanctions-russia-services-provision_en.pdf)

mounting a defence or enforcing a right, such as court or arbitration filing fees, payments for expert witnesses, fees for certified translation services or document legalisation required by the court, the transfer of funds to cover adverse cost awards or court-ordered damages. The guidance of a "broad" interpretation of the ban would oblige the entities complying with the sanctions to apply more often to the authorities for clarification whether a particular payment falls under a ban. Such applications protract legal proceedings, not only for the parties affected by sanctions but also the opposing parties from the EU, who, apart from their defence, may have counterclaims against Russian parties. As a result, neither party may rely on a timely resolution of their case, which overall is hampering the system of arbitration.

251. As a result, payment of the costs necessary to protect a legal right in general in proceedings involving Russian parties may be possible only on paper, but face unnecessary hurdles and delays in practice, obstructing the right to an effective remedy.

**C. Restrictions imposed by the 18<sup>th</sup> Sanctions Package on the right to an effective remedy/access to court**

252. The EU is a community based on the rule of law inasmuch as neither its member states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. It is stated by the Court in *'Les Verts' v European Parliament*.<sup>134</sup>
253. The right to an effective remedy and access to court is one of the foundational pillars of the rule of law within and outside the EU. The EU's anti-ISDS measures severely restrict the right to an effective remedy and access to court for natural and legal persons affected by sanctions, including Russian nationals.
254. Firstly, inspired by the constitutional principles of the Member States and Article 13 of the ECHR, Article 47 of the CFR guarantees these rights, creating reasonable expectations of proper judicial remedies to protect infringed rights. In *Heylens*, the Court affirmed that:

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<sup>134</sup> Case 294/83, *'Les Verts' v European Parliament*, judgment of 23 April 1986, [1986] ECR 1339.

*"The existence of a judicial remedy against any decision by a national authority to deny the benefit of that right is essential to ensure effective protection of the individual's right."<sup>135</sup>*

255. However, the mere consideration of investment arbitration claims and the further enforcement of arbitral awards against Member States as "illegal" and "unlawful" pose a real threat to the principles that the EU's judicial system, as represented by the CJEU, has protected since its foundation.
256. For instance, the rights to have a (1) fair hearing within a (2) reasonable time by an (3) independent and impartial tribunal are being dismantled in the circumstances where enforcement is sought in a competent court of a Member State. Under this anti-ISDS regime, the right to fair hearing (trial) is infringed since investors do not have legal tools to defend themselves through the traditional means under bilateral or multilateral treaties.

**1. Automatic denial of enforcement of ISDS awards against the EU Member States obstructs the right to resolve a case before an independent and impartial tribunal**

257. Under EU law, access to an effective legal remedy means not only the right to access a court or arbitration, but also the possibility to enforce the resulting judgment or award.
258. The 18<sup>th</sup> Sanctions Package prohibits enforcement of ISDS arbitration awards against Member States. Said unilateral measure obstructs the right to apply to arbitration and obtain an enforceable award of an independent and impartial tribunal, if the tribunal awards against a Member State.
259. If an affected investor obtains an award against a Member State, it is unlikely, in the sense of the 18<sup>th</sup> Sanctions Package, that such Member State will comply with the said award voluntarily. The investor will have to look for alternative jurisdictions where the Member State may have assets and prove that such assets are free of immunity. If the investor fails, this will mean that the investor's remedy cannot be effective, in breach of their fundamental right recognised by Article 47 of the CFR. On the other hand, if the investor had an opportunity to participate in the recognition and enforcement court

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<sup>135</sup> Case C-222/86, *Unectef v Heylens*, <https://infocuria.curia.europa.eu/tabs>.

proceedings, the state court would consider whether the award complies with the EU public policy, allowing the investor to rely on the fundamental right to an effective legal remedy.

## **2. Prohibition to apply for assistance against Member States harms the equal treatment, threatens the independent and impartial tribunal**

260. The 18<sup>th</sup> Sanctions Package restricts EU courts from assisting sanctioned Russian parties in pursuing ISDS claims against EU Member States. This prohibition encompasses judicial assistance to arbitral tribunals, such as evidence-taking, witness hearings, and interim measures, in ISDS proceedings.<sup>136</sup>
261. As a unilateral measure, Article 11(2b) of Regulation 833/2014 denies sanctioned Russian claimants access to EU court support, creating a disbalance in equal treatment. Under these provisions, claimants should face heightened evidentiary and logistical burdens when securing EU-based witnesses or documents, while EU respondents encounter no reciprocal restrictions. This asymmetry primarily affects arbitrations seated in the EU, where EU national courts routinely provide and are committed to providing such assistance.
262. Arbitral tribunals are entitled to request assistance from EU courts to demonstrate procedural fairness toward sanctioned claimants' applications. However, arbitrators, being aware of Article 11(2b)'s prohibitive scope, are likely to disregard such requests, anticipating certain refusals. Tribunals thus resort to alternative mechanisms available in arbitration proceedings (e.g., party compliance or document production orders), which may not fully mitigate the resulting imbalance without compromising arbitration's core principles of independence and impartiality.
263. Thus, prohibition to apply for assistance harms equal treatment, threatens independency and impartiality of tribunals.
264. In Case C-279/09, the Court found that national courts shall decide whether the right to an effective remedy implies a right to legal aid. In their analysis, competent courts have to assess several criteria, such as the subject matter of the litigation, whether the

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<sup>136</sup> See Articles 11(2)(a) and 11(2)(b) of the Regulation No. 833/2014.

applicant has a reasonable prospect of success, the importance of what is at stake for the applicant in the proceedings, the complexity of the applicable law and procedure, and the applicant's capacity to represent himself effectively.<sup>137</sup>

265. Finally, the notion of reasonable time under Article 47 of the CFR, which is vague per se, can be interpreted differently in the context of the brand-new EU regime towards investor claimants. This inevitably creates legal uncertainty and burdens parties and tribunals with an additional legal framework to analyse when deciding whether investors can seek effective remedies and protect their rights before a competent court or tribunal (e.g., the tribunal may require additional time to assess the risks of non-enforcement).
266. Labelling investment arbitration and enforcement awards as "illegal" and "abusive" creates undue prejudice towards investors and even arbitrators, even when the proceedings are commenced to avoid the new EU anti-ISDS regime.

#### **D. Right to be heard**

##### **1. EU law on the right to be heard**

267. According to Article 41 of the CFR, the right to be heard is vested to any person regardless of their nationality. The wording is as follows:

*"Every person is guaranteed to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.*

*This right includes: the right of every person to be heard, before any individual measure which would affect him or her adversely is taken; the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy; the obligation of the administration to give reasons for its decisions.*

*Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance*

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<sup>137</sup> Case C-279/09, DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, <https://infocuria.curia.europa.eu/>.

*of their duties, in accordance with the general principles common to the laws of the Member States."*

268. The right to be heard is described as one of the rights of the defence, inalienable component of the right to effective judicial protection.<sup>138</sup> In case *Hoffman-La Roche v Commission* it was highlighted that right to be heard is strongly connected with a risk of introduction of penalties:

*"Observance of the right to be heard is in all proceedings in which sanctions, in particular fines or penalty payments, may be imposed a fundamental principle of Community law which must be respected even if the proceedings in question are administrative proceedings."*<sup>139</sup>

269. However, later cases demonstrate a broader approach, highlighting the key role of the principle in the Community law which means that the right must be guaranteed even without explicit rules.<sup>140</sup>

270. The right to be heard consists of several parts. Firstly, "*person should be placed in a position in which they may effectively make known their views*" regarding the circumstances.<sup>141</sup> It means access to the relevant documents and arguments on which the allegations are based, as well as the actual ability to present the arguments before the competent authority.

271. Secondly, right to be heard poses an obligation on the responsible body to review the circumstances of the case impartially and with due attention. As it was highlighted in *Huntamaki Holding Sarl v European Commission*:

*"It must be recalled that the obligation to state reasons is a general principle of EU law, enshrined in the second paragraph of Article 296 TFEU and in Article 41(1) of the Charter, under which any legal act adopted by the EU institutions must state the reasons on which it is based. That obligation means that the EU institutions must disclose clearly and*

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<sup>138</sup> *Openbaar Ministerie*. Judgment of the Court of 26 October 2021. C-428/21 PPU and C-429/21 PPU, ¶ 48.

<sup>139</sup> *Hoffmann-La Roche & Co. AG v Commission of the European Communities*. Case 85/76. Judgment of the Court of 13 February 1979. European Court Reports 1979 -00461. ECLI identifier: ECLI:EU:C: 1979:36, ¶ 9.

<sup>140</sup> Judgment of the Court of 12 February 1992. Kingdom of the Netherlands, Koninklijke PTT Nederland NV and PTT Post BV v Commission of the European Communities.

Joined cases C-48/90 and C-66/90. European Court Reports 1992 I-00565. ECLI identifier: ECLI:EU:C: 1992:63.

<sup>141</sup> *Mediocurso - Estabelecimento de Ensino Particular Ld. v of the European Communities Commission*, C-462/98 P, EU:C:2000:480, ¶ 36; Judgment of the Court of 21 November 1991. Technische Universität München v Hauptzollamt München-Mitte. Case C-269/90, ¶ 25.

*unequivocally the reasoning of the author of the measure in such a way as to enable, on the one hand, interested parties to ascertain the reasons for the measure adopted in order to enable them to protect their rights, and, on the other hand, the court having jurisdiction to exercise its power of review.*"<sup>142</sup>

272. Failure constitutes a fatal infringement of a rule of law:

*"...the Court of Justice held that the General Court was fully entitled to find, notably in paragraphs 68 and 69 of its judgment, that the breach, over a period of almost three years, of the obligation on the Council to provide, in the event of a challenge, information or evidence substantiating the reasons for the adoption of restrictive measures against a natural or legal person constituted a sufficiently serious breach of a rule of law intended to confer rights on individuals."*<sup>143</sup>

## 2. ECHR and international law on the right to be heard

273. International law recognises that in arbitration, basic guarantees of fair hearing should be ensured. For example, the ECHR recognised that the independence and impartiality of arbitrators must be ensured.<sup>144</sup> The rationale of these decisions extends to a broader category of "minimum guarantees." Indeed, the court explained that, given the importance of the rights of access to court and fair hearing, certain basic guarantees must apply in arbitration.<sup>145</sup>

274. While States and other public bodies must ensure certain minimum guarantees in arbitration, even if the private parties intend to waive them, the obligation to ensure fair hearing certainly prevents States from imposing restrictions on the private parties' right to fair hearing in arbitration that they have not voluntarily waived. Indeed, if a State is required to annul an arbitral award rendered in its territory, when the "minimum guarantees" have not been respected,<sup>146</sup> it follows that the State cannot itself create barriers for the exercise of the same rights and compliance with the relevant guarantees.

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<sup>142</sup> Huhtamaki Holding Sàrl v European Commission. CJEU Case T-225/24. Judgment, ¶ 146.

<sup>143</sup> Council v Fulmen and Mahmoudian, C-280/12 P, EU:C:2013:775, ¶ 68.

<sup>144</sup> Beg S.p.A. v Italy, app. no. 5312/11, Judgment of 20 May 2021.

<sup>145</sup> Mutu and Pechstein v Switzerland, nos. 40575/10, 67474/10, Judgment of 2 October 2016, ¶ 96.

<sup>146</sup> Ibid.

275. With respect to access to legal counsel, the ECHR requires provision of free legal representation and legal aid in certain cases recognizing the importance of legal representation.<sup>147</sup> It follows that where a person can afford legal representation no barriers can be established on access to such representation, unless they are justified.
276. With respect to presentation of evidence and specifically expert opinions, the ECHR recognised that examination of expert evidence may represent an essential element of the right to be heard and fair hearing, ensuring that the parties are able to participate properly in the proceedings.<sup>148</sup>

**E. Existing restrictions on the right to be heard imposed by EU sanctions and their practical effect**

277. The right to be heard (*audi alteram partem*) constitutes a fundamental principle of EU law, explicitly enshrined in Article 41(2)(a) of the CFR, which guarantees every person the right to be heard before any individual measure adversely affecting them is taken. This principle requires that individuals have a genuine opportunity to present their case and make their views known effectively during proceedings concerning their interests. It encompasses not merely the formal opportunity to speak, but the substantive prospect that one's arguments will lead to an enforceable legal outcome and both parties will be treated equally in accordance with due process principles. The protection of fundamental rights forms part of the very foundations of the EU's legal order, and accordingly all its measures must be compatible with these rights, including the procedural safeguards inherent in the right to be heard.
278. The restrictive measures adopted by the EU, depending on their interpretation and application, may create difficulties for the affected parties presenting their case. First, existing transactional bans may create hurdles with arranging payments for the services necessary to fully present a party's case. Second, the restrictions on seeking judicial assistance in ISDS proceedings against the EU Member States may create hurdles to presenting a party's case when evidence collection is required.

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<sup>147</sup> *Airey v Ireland*, app. no. 6289/73, Judgment of 9 October 1979.

<sup>148</sup> *Mantovanelli v France*, app. no. 21497/93, Judgment of 18 March 1997.

## 1. Impact of the 18<sup>th</sup> Sanctions Package on the right to be heard

279. Effective representation by qualified legal professionals plays an important part of the right to be heard. The restrictive measures adopted by the EU do provide an exception permitting transactions necessary for representation in legal proceedings in the EU. However, the scope of this exception is not clear, which may potentially create additional hurdles in exercising the right to be heard. The measures lead to delays, whereas the duration of legal procedures is also an element of the right to be heard.<sup>149</sup> Furthermore, the transactional ban may narrow the choice of experts and technical tools required for a party to present their case, which does not directly violate the right to be heard but creates complications which could have been avoided.
280. Due to the limitation of allowed transactions to services "strictly necessary" for the legal defence, issues arise regarding services where it is less evident that they are "strictly necessary" specifically for the legal defence. For instance, it is not entirely clear whether preliminary legal assistance, such as preparing strategic memoranda and pre-arbitral claims, falls under this umbrella. At the same time, legal advice assessing risks and strategy before the proceedings is important to present a party's case in future proceedings. Additionally, a party may need an external legal opinion on issues of applicable law of a Member State to fully present its case but due to the lack of clarity of the scope of the transactional ban's application, the party's opportunities may be limited or advice may be delayed or increased in fees by seeking guidance regarding the sanctions' application, e.g. applying to authorities before engagement.
281. The same concerns hiring technical experts: the carve-out from the transactional ban does not clarify whether technical experts from the EU may provide reports to the parties falling under the transactional ban. At the same time, a case may depend on the outcome of the expertise. Therefore, a party is unnecessarily forced to look for alternative technical experts outside of the EU and not connected to the EU to fully exercise their right to be heard.
282. Additionally, due to the transactional ban, the affected parties' access to software which may be necessary for presentation of the case, e.g., for documents' disclosure, legal

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<sup>149</sup> *Codarcea v Romania*, App no 3167/04 (ECtHR, 2 December 2009).

research, and other similar services, may be limited. Although this does not directly hamper the parties' right to be heard, it may create additional unnecessary difficulties leading to inequality of the parties.

## **2. Restrictions imposed by 18<sup>th</sup> Sanctions Package on the right to be heard**

283. The 18<sup>th</sup> Sanctions Package systematically undermines the right to be heard by establishing a comprehensive barrier to the enforcement of arbitral awards obtained by sanctioned investors. The prohibition on Member States recognising or giving effect to such awards eliminates the practical significance of any hearing that may occur before an arbitration tribunal. When investors present their case, submit evidence, and participate in arbitral proceedings under bilateral investment treaties, for instance, their procedural participation becomes meaningless if the resulting decision cannot be enforced within the EU.
284. Additional concern can be raised in relation to the enforcement of the arbitral awards in competent courts of non-EU jurisdictions against the EU state, since such jurisdictions may have the status of a potential EU member state (e.g. Georgia) and thus can still deny enforcement of an "abusive" arbitral award based on reciprocity principles. Hence, the EU's anti-ISDS regime may potentially undermine enforcement even in the non-EU jurisdictions.
285. The mandatory requirement that Member States raise all available objections to the recognition and enforcement of awards creates a structural presumption against sanctioned parties that operates independently of the merits of their case or the quality of the hearing they received. This transforms enforcement proceedings in Member State courts into predetermined exercises where the outcome is dictated by sanctions policy rather than by evaluation of whether the investor was properly heard and whether due process was observed. As established in *Johnston*, effective judicial protection requires that courts genuinely examine whether rights have been respected, yet the anti-ISDS

measures preclude such examination by instructing courts to oppose enforcement regardless of procedural fairness.<sup>150</sup>

286. The prohibition, as a matter of fact, operates retroactively against investors who have already participated in arbitration proceedings or initiated claims with the legitimate expectation that their right to be heard would be respected and that favourable awards could be enforced. These investors engaged with arbitration tribunals, presented extensive written submissions, participated in oral hearings, and underwent cross-examination based on the understanding that bilateral investment treaties guaranteed both procedural rights and enforcement mechanisms. The subsequent elimination of enforceability renders their prior participation in these proceedings a procedural formality devoid of legal consequence, fundamentally breaching the principle that the right to be heard must provide meaningful protection rather than illusory participation.
287. Moreover, the sanctions regime fails to provide any alternative forum where sanctioned investors can meaningfully exercise their right to be heard regarding their treaty-based claims. While the measures prevent enforcement in EU Member States, they offer no substitute mechanism through which investors can present their case without undue prejudice and obtain binding relief. As the Court has recognised, drawing on Article 13 of the ECHR and the constitutional principles of Member States, the right to be heard must be accompanied by effective remedies.<sup>151</sup> The anti-ISDS measures create a procedural vacuum where investors possess formal procedural rights under international treaties but lack any practical avenue to exercise those rights in a manner that produces enforceable results.
288. The cumulative effect of these restrictions contradicts the principle established in *M.M. v Minister for Justice*, that procedural guarantees must enable affected parties to make their views known in conditions that preserve the effectiveness of their rights.<sup>152</sup> By severing the connection between hearing and remedy, between procedural

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<sup>150</sup> Case C-222/84, *Johnston v Chief Constable of the Royal Ulster Constabulary*: [https://infocuria.curia.europa.eu/tabs/document/C/1984/C-0222-84-00000000RP-01-P-01/ARRET/93487-EN\\_1-pdf](https://infocuria.curia.europa.eu/tabs/document/C/1984/C-0222-84-00000000RP-01-P-01/ARRET/93487-EN_1-pdf).

<sup>151</sup> Guide on Article 13 of the European Convention on Human Rights: [https://ks.echr.coe.int/documents/d/echr-ks/guide\\_art\\_13\\_eng](https://ks.echr.coe.int/documents/d/echr-ks/guide_art_13_eng).

<sup>152</sup> Case C-277/11, *M.M. v Minister for Justice*: [https://infocuria.curia.europa.eu/tabs/document/C/2011/C-0277-11-00000000RP-01-P-01/ARR\\_COMM/132206-EN-1-html](https://infocuria.curia.europa.eu/tabs/document/C/2011/C-0277-11-00000000RP-01-P-01/ARR_COMM/132206-EN-1-html).

participation and enforceable outcome, the 18<sup>th</sup> Sanctions Package reduces the right to be heard to an empty declaration. Sanctioned investors may speak but cannot be heard. The EU legal order refuses to listen in any meaningful sense, as it predetermines that no arbitral award in the investor's favour will receive recognition regardless of the fairness of the proceedings that produced it.

289. Further, Articles 11(2)(a) and 11(2)(b) of the Regulation No. 833/2014 limit judicial assistance in relation to ISDS, which may lead to a unilateral limitation of legal mechanisms of collecting evidence required for a party to fully present their case. Arbitrators lack the state's authority to compel a party to provide necessary evidence, secure evidence, or call witnesses. Therefore, the state courts' assistance may be important when a party is unwilling to provide evidence in arbitration or when the evidence belongs to a third party, so that the party can fully present their case. In such cases, the party may still exercise their right to be heard, but they are put in an unequal position with the opposing EU Member State, which may use its position to conceal evidence.
290. Finally, in *Kadi v Council*, the Court decided that: "*the protection of fundamental rights forms part of the very foundations of the Union legal order.*"<sup>153</sup> Hence, we can conclude that these fundamental procedural rights exist in interplay, and the corrosion of the right to be heard by the EU's anti-ISDS measures will inevitably dismantle the right to effective remedies, and vice versa.

**F. Russian courts' response to the EU law imposing restrictions on the right to an effective remedy and the right to be heard**

291. The measures imposed by the EU, including the adoption of the 18<sup>th</sup> Sanctions Package, prompt a reciprocal response from the Russian judicial system, which escalates tensions and multiplies obstacles to dispute resolution between the EU and Russian parties. Two efficient means were developed and have been widely used by Russian courts: establishing exclusive jurisdiction and ordering joint and several liability of Russian and foreign entities connected to a foreign debtor to recover compensation from assets

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<sup>153</sup> Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62005CJ0402>.

located in Russia. Since foreign businesses still have assets in Russia and there are signs that certain neutral or friendly-to-Russia jurisdictions may be willing to recognise and enforce Russian courts' judgments with the adoption of Articles 248.1 and 248.2 of the APC RF, associated real risks for the EU business should be taken into account in assessing the challenge of the 18th Sanctions Package.

## **1. Responsive measures adopted by Russian courts**

### **(a) Articles 248.1 and 248.2 of the APC RF**

292. Articles 248.1 and 248.2 of the APC RF, also called the Lugovoy Law, were adopted in 2020 and introduced specific measures:

- a) Under Article 248.1 of the APC RF, Russian courts establish their exclusive jurisdiction in relation to disputes involving persons under sanctions, as well as disputes caused by anti-Russia sanctions;
- b) Under Article 248.2 of the APC RF, Russian courts enjoy discretion to impose injunctions preventing the initiation or continuation of proceedings in a foreign court or international commercial arbitration seated outside the territory of the Russian Federation with a possibility to fine a party in case of the injunction's violation.

293. According to Article 248.1(2) of the APC RF, the exclusive jurisdiction of Russian courts should be established for the following disputes (the same criteria are applied when courts assess grounds for application of Article 248.2 of the APC RF):

- a) with participation of the persons under sanctions;
- b) with participation of one Russian or foreign person with another Russian or foreign person, if the basis for such disputes is sanctions within the meaning of Article 248.1 APC RF in relation to Russian individuals or legal entities.

294. Article 248.1(1) of the APC RF contains an exception to the general rule of its application: if an international treaty of the Russian Federation or an agreement of the parties provides for the consideration of disputes in a foreign court or international commercial arbitration seated outside the Russian Federation, the provision on the

exclusive jurisdiction of Russian courts does not apply. However, under Article 248.1(4) of the APC RF, the exclusive jurisdiction may also be established when a dispute resolution agreement is unenforceable because of the sanctions against one of the parties, which impede access to justice.<sup>154</sup>

295. While under Article 248.1 of the APC RF, Russian courts may resolve cases where a party is under sanctions or which concern sanctions, Article 248.2 of the APC RF sets up a preventive tool, prohibiting commencement or continuation of foreign litigation or international arbitration with a seat outside Russia. Article 248.2(2) of the APC RF requires, for its application, that either foreign proceedings have already been initiated against the applicant, or that there is evidence that such proceedings will be initiated.
296. Article 248.2(10) of the APC RF allows Russian courts to oblige the parties in breach of the imposed injunctions to pay a penalty up to the amount claimed in the foreign proceedings plus legal costs.
297. In several cases, the Russian Supreme Court clarified the application of Articles 248.1 and 248.2 of the APC RF. In *Uraltransmash*,<sup>155</sup> the Court established a rebuttable presumption that a party under personal sanctions faces restrictions on access to justice abroad, thereby requiring the legal provisions at hand to apply.
298. In 2024, the Russian Supreme Court adjusted the test in *NS Bank*,<sup>156</sup> where the subject matter of the dispute was found to have been related to sanctions. The Court established that, to ensure a constitutional right to judicial protection, in each case Russian courts should determine if there are legal grounds for adopting jurisdiction over the case, taking into account the time of dispute resolution clause's conclusion and *de facto* restrictions of access to justice, such as increased expenditures to engage counsel, complications with crossing borders, problems with paying arbitration fees, etc.

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<sup>154</sup> See, e.g., Saint Petersburg and Leningrad Region Ruling dated 15 March 2024, case No. A56-12077/2024.

<sup>155</sup> Russian Supreme Court Ruling dated 9 December 2021, case No. A60-36897/2020.

<sup>156</sup> Russian Supreme Court Ruling dated 28 November 2024, case No. A40-214726/2023.

**(b) Joint and several liability of Russian and foreign entities for the debts of the foreign entities in Russia**

299. Within a couple of years, the Russian legal system has seen an increasing number of cases in which, after adopting exclusive jurisdiction under Article 248.1 of the APC RF, Russian courts have issued judgments against those somehow associated with debtor entities with assets in Russia. In those cases, Russian courts order joint and several liability of companies being in the same group of companies regardless of their actual involvement in transactions at hand.<sup>157</sup>
300. In a couple of cases involving major US financial institutions, the Russian Supreme Court has indicated that the conditions for joining a related company as a co-respondent should be considered on a case-by-case basis and with attention to detail. In the rest of the cases involving the EU companies, Russian courts continue actively applying such a mechanism.<sup>158</sup>

**2. The limitations adopted by the EU add to the grounds for the Russian courts' finding exclusive jurisdiction against foreign companies**

301. The growing number of limitations adopted by the EU impacts the Russian courts' approach to establishing exclusive jurisdiction under Article 248.1 of the APC RF against foreign companies and imposing antisuit injunction under Article 248.2 of the APC RF.
302. When applying Articles 248.1 and 248.2 of the APC RF, apart from analysing whether a party is under sanctions or a dispute arose out of sanctions, Russian courts also often describe the facts that they find may impede a party's access to justice abroad. Usually, Russian courts consider the following grounds:

- a) Issues with hiring lawyers;

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<sup>157</sup> See, e.g., cases Nos. A40-19538/2024, A40-195134/2023, A41-64911/2023, etc.

<sup>158</sup> Russian Supreme Court Ruling dated 8 October 2025, case No. A40-194447/2023; Russian Supreme Court Ruling dated 12 May 2025, case No. A40-167352/2023.

- b) Difficulties with payments (e.g., arbitration fees, state fees);
  - c) Visa limitations, unavailability of direct flights;
  - d) Possible lack of impartiality towards a Russian party.
303. Russian courts also uphold other EU limitations raised by Russian parties as limiting their access to justice. For instance, in several cases, Russian courts cited limitations on crossing the European borders with personal laptops and smartphones as impeding access to justice.<sup>159</sup>
304. The growth of the restrictive measures adopted by the EU leads to a growing tension with Russian courts and are often cited by the parties asking for the Russian courts' exclusive jurisdiction against foreign companies.

### **3. Russian courts may extend their exclusive jurisdiction to disputes with foreign states**

305. As one of the factors for finding their exclusive jurisdiction under Article 248.1 of the APC RF, Russian courts consider limitations that impede access to justice abroad. In a number of cases, Russian courts found that they had exclusive jurisdiction over disputes involving foreign states. The 18<sup>th</sup> Sanctions Package can mould these incidents into a trend.
306. Initially, after 2022, in some cases initiated before Russian courts involving foreign states, Russian courts rejected their jurisdiction, citing the immunity of a foreign state.
307. However, in December 2024, the cassation court reversed the judgment of the court of first instance in *Alekseenko against Norway*,<sup>160</sup> declining its jurisdiction referring to the state's immunity.<sup>161</sup> The cassation court indicated that Article 248.1 of the APC RF did not apply as the dispute fell out of its scope. However, the court indicated that the lower courts had failed to properly analyse the limits of the state's immunity. As of now,

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<sup>159</sup> See, e.g., Saint Petersburg and Leningrad Region Ruling dated 15 March 2024, case No. A56-12077/2024.

<sup>160</sup> Kursk Region Arbitrazh (Commercial) Court Ruling dated 5 April 2024, case No. A35-6794/2023. See also Saint Petersburg and Leningrad Region Ruling dated 2 October 2023, case No. A56-81479/2023 (claims against Finland).

<sup>161</sup> Central Circuit Arbitrazh (Commercial) Court Resolution dated 12 December 2024, case No. A35-6794/2023.

considering the 18<sup>th</sup> Sanctions Package introducing limitations on pursuing claims against an EU Member State, the case is undergoing reconsideration and there is a possibility that Russian courts will establish their jurisdiction.

308. In another case considered in July 2025, Mr. Marchenkov applied to a Russian court with a claim concerning eurobonds against Belarus. A first-instance court recognised its exclusive jurisdiction over the case and indicated that the purpose of submitting any claim is the restoration of the rights of the injured party and that the right to judicial defence involves ensuring the guarantees of an effective remedy.<sup>162</sup>
309. The described court decisions reveal the ripeness of preconditions for Russian courts to find their exclusive jurisdiction in disputes involving EU states in response to the 18<sup>th</sup> Sanctions Package.

## VII. EU-RUSSIA PARTNERSHIP AND COOPERATION AGREEMENT

310. The Partnership and Cooperation Agreement<sup>163</sup> establishes a broad framework for cooperation between the European Communities and EU Member States and Russia and provides a set of specific obligations.
311. Promotion of investment is one of the specifically listed purposes of cooperation.<sup>164</sup> In line with this purpose the Partnership and Cooperation Agreement provides that the European Communities and Member States "shall aim" to establish "better conditions for investment protection".<sup>165</sup>
312. In addition, Article 98 of the Partnership and Cooperation Agreement provides that

*"each Party undertakes to ensure that natural and legal persons of the other Party have access free of discrimination, in relation to its own*

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<sup>162</sup> Moscow Arbitrazh (Commercial) Court Judgment dated 3 July 2025, case No. A40-309262/2024.

<sup>163</sup> Agreement on Partnership and Cooperation Establishing a Partnership between the European Communities and Their Member States on One Part, and the Russian Federation, on the Other Part, 24 June 1994 (the "**Partnership and Cooperation Agreement**").

<sup>164</sup> Partnership and Cooperation Agreement, Art. 1.

<sup>165</sup> Partnership and Cooperation Agreement, Art. 58(1).

*nationals to the competent courts and administrative organs of the Parties to defend their individual rights and their property rights... "166*

313. The restrictions the 18<sup>th</sup> Sanctions Package impose on (a) the pursuit of arbitration under investment protection treaties by Russian nationals and companies and (b) their access to EU courts for the purposes of effective enforcement of arbitral awards rendered in such arbitration, violate these provisions of the Partnership and Cooperation Agreement.
314. Importantly, the Partnership and Cooperation Agreement continues to be relevant not only for the Russian Federation and Russian nationals but also for the nationals of EU Member States. Specifically, Article 98 of the Partnership and Cooperation Agreement has been<sup>167</sup> and continues to be<sup>168</sup> relied upon as the basis for enforcement in Russia of judgments rendered by courts of Member States.
315. As elaborated in more detail in Section VIII of this submission, failure of EU Member States to comply with their obligations under applicable treaties may provide a basis for the responsive actions of the Russian Federation, including suspension of its commitments under such treaties, including the Partnership and Cooperation Agreement.

## VIII. INTERACTION BETWEEN INTERNATIONAL LAW AND EU LAW

316. The European Commission's extensive influence over investor-state dispute settlement within Europe is well familiar to the international legal community. The CJEU's rulings in *Achmea*, *Komstroy*, and *PL Holdings* have fundamentally and irreversibly transformed the intra-EU investment arbitration landscape, establishing the primacy of EU law over such mechanisms.
317. Now, the issue is whether this authority, understood as the primacy of EU law over Member States' BIT obligations, is capable of producing effects beyond the Union's internal legal space. If EU law has succeeded in reshaping the intra-EU investment

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<sup>166</sup> Partnership and Cooperation Agreement, Art. 98.

<sup>167</sup> Beginning with Resolution of the Supreme Commercial Court No. BAC-13688/09 dated 7 December 2009 (confirming enforcement of a judgment rendered by the Dordrecht District Court on the basis of Partnership and Cooperation Agreement) and Resolution of the Federal Commercial Court for the Moscow Circuit in case no. A40-119397/11 dated 19 April 2012 (confirming enforcement of orders of High Court of England and Wales).

<sup>168</sup> Resolution of the 13<sup>th</sup> Appellate Commercial Court in case no. A56-23597/2023 dated 14 February 2026 (confirming recognition and enforcement of the court of Antwerp on the basis of Partnership and Cooperation Agreement).

arbitration landscape, can the same constitutional logic extend into the extra-EU sphere? More specifically, can the EU sanctions regime, binding upon Member States as a matter of EU law, operate to condition, constrain, or otherwise undermine dispute-resolution commitments contained in bilateral investment treaties concluded with non-EU states? In essence, the question is whether the Union's internal legal imperatives, having transformed intra-EU arbitration, may also project outward and cast a comparable shadow over arbitral mechanisms in treaties concluded beyond the EU's borders.

318. If such an approach is not ultimately followed by the arbitral tribunals, the EU's 18<sup>th</sup> sanctions package also prohibits the recognition and enforcement of such sanctions-related awards in the territory of the EU. Such a prohibition, adopted by the EU both with respect to its intra-EU investment disputes and now in the 18<sup>th</sup> Sanctions Package, finds no echo in other jurisdictions. Notably, this prohibition extends beyond investment arbitration to encompass all commercial and investment awards related to sanctions. Courts in the United States and United Kingdom distinguish between recognition and enforcement, allowing the former while requiring licences for the latter; courts in Asia and the Middle East refuse to treat foreign sanctions as legitimate grounds for denying either. The practical effect of this external resistance is likely to be more limited than it may first appear: the EU's stance is most likely to raise obstacles within its own legal order, but it cannot, on its own, preclude recognition or enforcement of such awards in non-EU jurisdictions.

#### A. The *Achmea/Komstroy* background

319. In *Achmea*,<sup>169</sup> the CJEU held that intra-EU BIT arbitration clauses were incompatible with Articles 267<sup>170</sup> and 344<sup>171</sup> of the TFEU. The reasoning rested on three pillars: arbitral tribunals may interpret EU law,<sup>172</sup> they cannot refer preliminary questions to the

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<sup>169</sup> *Slovak Republic v Achmea BV*, Case C-284/16, 6 March 2018 ("*Achmea*").

<sup>170</sup> TFEU, article 267: "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union..."

<sup>171</sup> TFEU, article 344: "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein".

<sup>172</sup> *Achmea*, ¶¶ 41–42.

CJEU,<sup>173</sup> and national court review provides insufficient safeguards.<sup>174</sup> The analysis concluded that investment tribunals would thereby undermine the full effectiveness of EU law.<sup>175</sup> In response, most member states concluded the Agreement for the Termination of Bilateral Investment Treaties Between the Member States of the European Union (the "**2020 Termination Agreement**") which terminated their intra-EU investment treaties.<sup>176</sup>

320. *Komstroy*<sup>177</sup> extended this reasoning to ECT Article 26 arbitrations. The Court treated the ECT as EU law<sup>178</sup> and held that, while obligations may apply to third states, they cannot bind Member States inter se.<sup>179</sup> Notably, the Court exercised jurisdiction despite neither party being from a Member State, citing the need for uniform interpretation.<sup>180</sup>
321. *PL Holdings*<sup>181</sup> closed a potential circumvention route by ruling that *ad hoc* arbitration agreements between EU investors and Member States were equally incompatible with EU law.
322. While the majority of investment tribunals have dismissed jurisdictional objections<sup>182</sup> grounded in the *Achmea* decision, a notable exception emerged in *Green Power v Spain* — the first tribunal to decline jurisdiction on this basis.<sup>183</sup> In that case, the tribunal concluded that Spain's consent to arbitrate under the ECT was invalid for incompatibility with EU law.<sup>184</sup> This determination took into account significant legal

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<sup>173</sup> *Achmea*, ¶¶ 43–49.

<sup>174</sup> *Achmea*, ¶¶ 50–55.

<sup>175</sup> *Achmea*, ¶ 56.

<sup>176</sup> Agreement for the termination of Bilateral Investment Treaties between the Member States of the European Union of 5 May 2020, OJ L 169, 29.5.2020, pp. 1-41.

<sup>177</sup> *Republic of Moldova v Komstroy LLC*, Case C-741/19, 2 September 2021 ("*Komstroy*").

<sup>178</sup> *Komstroy*, ¶ 49.

<sup>179</sup> *Komstroy*, ¶ 65.

<sup>180</sup> *Komstroy*, ¶¶ 24–29.

<sup>181</sup> *Republic of Poland v PL Holdings Sàrl*, Case C-109/20, 26 October 2021 ("*PL Holdings*").

<sup>182</sup> *Mathias Kruck and others v Spain*, ICSID Case No. ARB/15/23; *Juvel Ltd v Poland*, ICC Case No. 19459/MHM; *Landesbank Baden-Württemberg and others v Spain*, ICSID Case No. ARB/15/45; *CEF Energia BV v Italy*, SCC Case No. 158/2015.

<sup>183</sup> *Green Power Partners K/S and SCE Solar Don Benito APS v Kingdom of Spain*, SCC Case No. V2016/135, Award, 16 June 2022 (*Green Power v Spain*).

<sup>184</sup> *Green Power Partners K/S, SCE Solar Don Benito APS v Kingdom of Spain*, SCC Case No. 2016/135, Award, 16 June 2022, ¶¶ 336 ff.

developments that occurred after the ECT's entry into force, including the 2020 Termination Agreement and the evolving jurisprudence of the CJEU.

323. Critically, the tribunal's reasoning turned on the procedural characteristics of the arbitration at issue. Because the arbitration was seated in Stockholm, Swedish law, which incorporates EU law as part of its domestic legal framework, governed the arbitration agreement. The tribunal drew a clear distinction between such non-ICSID arbitrations, which are anchored to a national legal seat, and ICSID arbitrations, which operate under a self-contained international legal regime without a designated seat. This distinction suggests that the *Achmea*-based objections may carry greater weight in non-ICSID proceedings where a Member State's law applies, whereas ICSID tribunals may remain more insulated from such challenges.
324. EU courts have consistently followed the *Achmea* ruling's directions. The German Federal Constitutional Court (BVG) issued two decisions on 23 July 2024 dismissing *Achmea*'s constitutional complaints.<sup>185, 186</sup> The first challenged the BGH's annulment of the *Achmea* award.<sup>187</sup> The BVG found procedurally that *Achmea* lacked protected legal interest due to the Termination Agreement's retroactive effect, and substantively that the CJEU judgment was neither arbitrary nor ultra vires, and that access to investor-state arbitration is not constitutionally protected.<sup>188</sup> The second complaint challenging Germany's ratification of the Termination Agreement was similarly dismissed.<sup>189</sup>
325. On 27 March 2025, the BGH refused enforcement of a cost award under the ECT and Germany-Czechoslovakia BIT,<sup>190</sup> holding that the arbitration agreement was invalid under Article V(1)(a) of the New York Convention due to incompatibility with EU

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<sup>185</sup> BVG, 2 BvR 557/19, judgment dated 23 July 2024.

<sup>186</sup> BVG, 2 BvR 141/22, judgment dated 23 July 2024.

<sup>187</sup> CJEU, C-284/16 (*Achmea* Opinion).

<sup>188</sup> BVG, 2 BvR 557/19, judgment dated 23 July 2024, ¶¶ 15 et seqq.

<sup>189</sup> BVG, 2 BvR 141/22, judgment dated 23 July 2024.

<sup>190</sup> BGH, I ZB 64/24, judgment dated 27 March 2025.

law.<sup>191</sup> This invalidity extended to the cost decision, which could not be severed from the underlying agreement.<sup>192</sup>

326. The Svea Court of Appeal annulled an ECT award in favour of Danish and Luxembourgish investors against Italy,<sup>193</sup> finding that ECT Article 26 is incompatible with EU law and violates Swedish *ordre public*.<sup>194</sup> However, the Swedish Supreme Court took a nuanced approach in a case involving five investors (including one Swiss national) against Poland,<sup>195</sup> reinstating the award insofar as it concerned the Swiss investor, holding that the ECT arbitration clause remains valid for non-EU investors and that this portion was legally severable.<sup>196</sup>
327. On 22 April 2025, the Amsterdam Court of Appeal ordered LC Corp BV to withdraw its London-seated arbitration against Poland,<sup>197</sup> holding that the BIT arbitration clause was no longer valid following *Achmea* and the 2020 Termination Agreement.<sup>198</sup> Non-compliance carries a daily penalty of EUR 100,000, up to EUR 10 million.<sup>199</sup>

## **B. National court responses outside the EU in relation to the Achmea objection**

### **1. Switzerland**

328. The Swiss Federal Supreme Court has consistently declined to follow CJEU jurisprudence. In *Natland v Czech Republic* (June 2024),<sup>200</sup> the Court dismissed a jurisdictional challenge, holding that the objection had been raised and rejected in earlier

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<sup>191</sup> BGH, I ZB 64/24, judgment dated 27 March 2025, ¶ 18.

<sup>192</sup> BGH, I ZB 64/24, judgment dated 27 March 2025, ¶ 51.

<sup>193</sup> *Athena Investments A/S v Italian Republic*, SCC Case No. 2015/095, award dated 23 December 2018.

<sup>194</sup> Svea Court of Appeal, Case No. T 3229-19, judgment dated 17 June 2024, pp. 12-13.

<sup>195</sup> Swedish Supreme Court, Case No. T 555-24, judgment dated 26 March 2025.

<sup>196</sup> Swedish Supreme Court, Case No. T 555-24, judgment dated 26 March 2025, ¶¶ 24–26.

<sup>197</sup> Amsterdam Court of Appeal, ECLI:NL:GHAMS:2025:1065, judgment dated 22 April 2025.

<sup>198</sup> Amsterdam Court of Appeal, ECLI:NL:GHAMS:2025:1065, judgment dated 22 April 2025, ¶¶ 4.11–4.12.

<sup>199</sup> Amsterdam Court of Appeal, ECLI:NL:GHAMS:2025:1065, judgment dated 22 April 2025, paragraph 4.19. See also, Amsterdam Court of Appeal orders discontinuance of intra-EU treaty arbitration against Poland by Practical Law Arbitration with A&O Sherman Netherlands available at: [https://uk.practicallaw.thomsonreuters.com/w-047-1468?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-047-1468?transitionType=Default&contextData=(sc.Default)&firstPage=true)

<sup>200</sup> *Natland Investment Group NV v The Czech Republic*, PCA Case No. 2013-35, award dated 15 December 2023.

proceedings.<sup>201</sup> In *EDF v Spain*,<sup>202</sup> the Court reaffirmed that EU law does not affect ECT arbitration agreements or awards when seated in Switzerland, emphasising Swiss arbitration law autonomy.<sup>203</sup>

## 2. United Kingdom

329. Meanwhile, the UK Supreme Court lifted the stay of enforcement,<sup>204</sup> holding that the duty of sincere cooperation did not require deferring to EU courts on prior treaty obligations.<sup>205</sup> In response, the Commission brought proceedings against the UK. The CJEU (March 2024) found that the UKSC had adopted an erroneous interpretation that "seriously compromised the EU legal order"<sup>206</sup> and should have sought a preliminary ruling.<sup>207</sup>
330. The UK Court of Appeal upheld registration of an ICSID/ECT award, rejecting Spain's arguments based on *Achmea/Komstroy* and sovereign immunity.<sup>208</sup> The Court held that by ratifying the ICSID Convention, Spain had submitted to UK court jurisdiction, with Article 54 constituting a clear waiver of immunity.<sup>209</sup> This case is now pending review at the Supreme Court of the United Kingdom.

## 3. United States

331. In *Blasket Renewable Investments v Spain*, the DC Circuit addressed enforcement of three ECT awards (NextEra,<sup>210</sup> 9REN,<sup>211</sup> AES Solar<sup>212</sup>). The Court held that the FSIA

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<sup>201</sup> Swiss Federal Supreme Court, 4A\_66/2024, judgment dated 13 June 2024, ¶ 4.2.

<sup>202</sup> *EDF Energies Nouvelles S.A. v Kingdom of Spain*, PCA Case No. AA613, award dated 11 April 2023.

<sup>203</sup> Swiss Federal Supreme Court, 4A\_244/2023, judgment dated 3 April 2024, ¶ 7.8.2.

<sup>204</sup> *Micula & ors v Romania* (European Commission intervening) [2020] UKSC 5.

<sup>205</sup> *Micula & ors v Romania* (European Commission intervening) [2020] UKSC 5, ¶ 118.

<sup>206</sup> CJEU 2024 Judgment, ¶ 87.

<sup>207</sup> CJEU 2024 Judgment, ¶ 153.

<sup>208</sup> *Infrastructure Services Luxembourg S.À.R.L. v Kingdom of Spain and Border Timbers Limited v Republic of Zimbabwe* [2024] EWCA Civ 1257, ¶ 8.

<sup>209</sup> *Infrastructure Services Luxembourg S.À.R.L. v Kingdom of Spain and Border Timbers Limited v Republic of Zimbabwe* [2024] EWCA Civ 1257, ¶¶ 59 et seqq.

<sup>210</sup> *NextEra Energy v Spain*, ICSID Case No. ARB/14/11, award dated 31 May 2019.

<sup>211</sup> *9REN Holding v Spain*, ICSID Case No. ARB/15/15, award dated 31 May 2019.

<sup>212</sup> *AES Solar v Spain*, PCA Case No. 2012-14, award dated 28 February 2020.

arbitration exception applied uniformly:<sup>213</sup> the ECT constituted an agreement to arbitrate, and whether it extended to intra-EU disputes was a scope question, not an existence question. However, the Court reversed anti-anti-suit injunctions on comity grounds.<sup>214</sup>

332. In June 2024, the EU and certain Member States issued a declaration emphasising that the ECT arbitration clause does not apply to intra-EU relations and that no new intra-EU arbitrations should be registered. Hungary issued a contrary unilateral declaration, asserting that *Komstroy* applies only prospectively and pending ECT amendment. The Commission has announced it will refer Hungary to the CJEU for contradicting the EU position and breaching sincere cooperation obligations.<sup>215</sup>

#### 4. Singapore

333. In a recent decision, the Singapore International Commercial Court dismissed an EU Member State's application to set aside an UNCITRAL award rendered under Article 26 of the Energy Charter Treaty (ECT), rejecting in particular the State's intra-EU objection based on *Achmea* and *Komstroy*.<sup>216</sup>
334. The Court held that the arbitration agreement was governed by public international law, not EU law, and that the EU principle of primacy operates only within the EU legal order and does not override treaty obligations on the international plane or bind courts of third States such as Singapore. It further found that Article 26 ECT constitutes a multilateral undertaking owed to all Contracting Parties and cannot be selectively disapplied between EU Member States absent a disconnection clause, and that neither the Brexit transition framework nor the ex-tunc effect of CJEU judgments invalidated the tribunal's jurisdiction. The Court also rejected the State's subject-matter, fork-in-the-road, public policy and natural justice objections, thereby upholding the award in full.
335. In the wake of *Achmea*, a pronounced split has emerged: courts within the EU have largely followed the CJEU, setting aside awards and refusing enforcement, while courts

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<sup>213</sup> *Blasket Renewable Investments LLC v Kingdom of Spain*, 23-7038 (D.C. Cir. 2024), p. 41.

<sup>214</sup> *Blasket Renewable Investments LLC v Kingdom of Spain*, 23-7038 (D.C. Cir. 2024), p. 41.

<sup>215</sup> Press release of the EU Commission, 17 July 2025, available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_25\\_1799](https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1799)

<sup>216</sup> [2026] SGHC(I) 1 (*DNZ v DOA and another*).

in Switzerland, the UK, and the United States have generally declined to adopt that reasoning, instead applying their own legal frameworks and treaty obligations. Given this fragmented enforcement landscape for intra-EU investment awards, a comparable divergence may well emerge in sanctions-related investment disputes.

**C. Does the EU Commission have competence to halt non-EU investor-state arbitration related to sanctions?**

336. While EU law is autonomous within its constitutional framework, the adherence of Member States to treaty obligations vis-à-vis third countries is grounded upon the fundamental principle of international law, *pacta sunt servanda*. The obligations of Member States under the BITs with third countries cannot be automatically extinguished through the operation of EU law.
337. That follows inter alia from Regulation (EU) No. 1219/2012. Article 3 Regulation (EU) No. 1219/2012 explicitly maintains in force the existing BITs with third countries, despite exclusive competence of the EU with respect to the common commercial policy under Article 3(1)(e) TFEU. It provides legal certainty for investors from the EU and third countries who benefit from investment protection under Member States' BITs concluded with non-EU states prior to the entry into force of the Lisbon Treaty on 1 December 2009. In case of incompatibility with EU law, the Regulation (EU) No. 1219/2012 provides a special mechanism for authorising Member States to amend or conclude BITs, to be requested from the European Commission (Article 7).
338. In addition, Article 351 of the TFEU expressly preserves pre-accession agreements and frames incompatibilities not as nullities but as conflicts requiring orderly resolution through renegotiation, adjustment, or termination in accordance with international law.
339. This approach is reinforced by Articles 3(5) and 21 of the TEU, which embed respect for international law within the Union's constitutional identity and favour good-faith compliance over unilateral disregard.
340. The wording of the 18<sup>th</sup> Sanctions Package raises serious systemic concerns for the European Union's credibility as a stable and predictable framework for foreign direct investment. Insofar as it signals that rights arising from prior treaty commitments - including dispute settlement undertakings - may effectively be thwarted through the

imposition of unilateral restrictive measures, it risks conveying that Member State obligations toward third-country investors are contingent upon shifting regulatory and geopolitical priorities. From the perspective of legal certainty and legitimate expectations, such an approach undermines the foundational premise on which cross-border investment is structured: that treaty-based protections and enforcement mechanisms will not be retrospectively impaired by internal regulatory action.

341. If prior commitments can be functionally displaced by sanctions instruments without formal treaty termination or internationally cognisable processes, the resulting perception is that the durability of Member State undertakings is conditional rather than binding - an outcome that sits uneasily with the EU's professed commitment to the rule of law, *pacta sunt servanda*, and the stability of the international investment regime.

#### **D. Recognition and enforcement of arbitral awards in third countries**

342. The 18<sup>th</sup> Sanctions Package bars the recognition and enforcement in the EU of certain non-EU arbitral awards and court judgments, creating a major obstacle to enforcement within the EU. It does not, however, set a global benchmark. Courts in other jurisdictions have taken divergent approaches to the tension between economic sanctions, including foreign sanctions, and judicial obligations under international conventions. Read broadly, the EU's stance is notably more far-reaching than most.
343. Although the EU's 18<sup>th</sup> Sanctions Package primarily targets investor-state disputes, the legal principles that courts in third countries apply when considering the recognition and enforcement of awards and judgments are generally universal. The case law from commercial arbitration and state court litigation therefore provides the most relevant available guidance on how non-EU courts are likely to approach the enforcement of sanctions-affected investment awards. The core legal question - i.e. whether the existence of foreign sanctions constitutes a public policy violation sufficient to deny enforcement - remains the same regardless of the nature of the underlying dispute.
344. While EU member states are prohibited from recognising, giving effect to, or enforcing any arbitral award or other relief in proceedings outside the EU that derive from or relate to ISDS proceedings (if this award/relief is not in line with Regulation (EU)

No. 833/2014 or Regulation (EU) No 269/2014), the other countries' courts take a more balanced approach in disputes involving sanctions.

345. For domestic sanctions - those imposed by the same state as the court - the United States and the United Kingdom offer a useful model. Their courts distinguish between recognising the right affirmed by an award and enforcing it. Recognition preserves access to justice; enforcement, and any resulting payment, may still be conditioned on obtaining a licence.
346. As for foreign sanctions, there have been no major decisions treating them as a valid ground to refuse recognition or enforcement of an arbitral award. Courts across Asia and the Middle East exemplify this approach. These jurisdictions prioritise domestic public policy and treaty obligations over the extraterritorial effects of foreign unilateral sanctions. This approach suggests that the EU's far-reaching 18<sup>th</sup> Sanctions Package may obstruct recognition within the EU, while doing little to prevent non-EU awards from being recognised elsewhere despite EU sanctions.

### 1. Domestic sanctions: approach of the US and UK courts

347. Courts in the United States and the United Kingdom have developed a framework that balances sanctions compliance with the right of access to justice. This approach is based on the distinction between the judicial act of recognising a foreign judgment or award and the subsequent process of its actual enforcement, meaning the transfer of funds or assets. This separation allows courts to affirm the legal validity of a claim without authorising an immediate, and potentially illegal, transfer of economic resources.
348. A ruling from the US District Court for the District of Columbia in January 2026 is a good illustration.<sup>217</sup> The case concerned the recognition and enforcement of three arbitral awards from the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation (ICAC). The awards, issued in February 2024, totalled nearly USD 14 million. They were originally rendered in favour of the Russian state-owned media company, TV-Novosti. The respondent was a

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<sup>217</sup> Joyce Hanson, "DC Judge OKs \$14M Award Despite Russian Sanctions", 9 January 2026, Law360 UK, available at: <https://www.law360.co.uk/articles/2428214/dc-judge-oks-14m-award-despite-russian-sanctions>.

Washington-based US company, T&R Production LLC. T&R Production LLC had a business relationship to produce political and international content for RT America.

349. The dispute's context is important. On 20 August 2024, TV-Novosti assigned its full interest in the three awards to a United Arab Emirates-based entity, Satori Agricultural Consultancy and Projects Management LLC (SCPM). This transaction occurred just weeks before the United States government sanctioned TV-Novosti in September 2024 for alleged election interference. The assignment was made for a price of approximately RUB 2 million, or about USD 20,000, a small fraction of the awards' face value of nearly USD 14 million. Following the assignment, SCPM filed a petition in the US District Court for the District of Columbia to have the ICAC awards recognized and enforced.
350. The defendant, T&R Production, argued that enforcing the awards would violate U.S. sanctions and public policy. The defendant suggested the assignment was a sham transaction designed to circumvent the imminent sanctions.
351. The US court acknowledged that the timing of the transaction raised obvious questions and noted the possibility that the sale anticipated the U.S. sanctions. Despite these suspicions, the court held that mere suspicion of sanctions evasion was not sufficient to refuse recognition on public policy grounds under the New York Convention. The court further emphasised that the public policy exception must be applied narrowly, drawing a clear line between the judicial act of recognising an award and the executive act of enforcing it. It found that the recognition of an award does not, in itself, constitute a prohibited transfer of property to a sanctioned entity. The court's function was to confirm the legal validity of the arbitral decision. The separate question of whether a payment could be made under that confirmed award was a matter for the executive branch, specifically the Office of Foreign Assets Control (OFAC).
352. This principle appeared again in a U.S. District Court for the District of Columbia tentative order.<sup>218</sup> The case involved PJSC National Bank Trust, a Russian bank, seeking recognition of a 2024 Russian judgment for over USD 1.7 billion against Vadim

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<sup>218</sup> *Satoriagricultural Consultancy and Projects Management LLC v T&R Productions LLC*, case number 1:25-cv-01287, in the U.S. District Court for the District of Columbia.

- Belyaev. The defendant filed a demurrer to dismiss the action. The bank was on the Specially Designated Nationals (SDN) list maintained by OFAC.
353. The court rejected the defendant's argument that a pre-existing license was required for the court to simply recognise the foreign judgment. In the court's view, judicial determination of the parties' rights and obligations does not, in and of itself, cause any transfer of property. An OFAC license is required only for the later enforcement stage, which involves actions like execution that purport to transfer or alter blocked property.
354. For comparison, a similar position guides the UK approach. This was shown in the 6 October 2023, Court of Appeal decision in *Mints & Ors v PJSC National Bank Trust & Anor.*<sup>219</sup> This case did not involve the enforcement of a foreign award. Instead, it addressed the more fundamental question of whether a sanctioned entity could obtain a domestic monetary judgment in the first place. The claim was for approximately USD 850 million. It was brought by two Russian banks, PJSC National Bank Trust and PJSC Bank Otkritie, against Boris Mints and his sons, alleging a conspiracy to enter into uncommercial transactions.
355. During the proceedings, in 2022, PJSC Bank Otkritie was sanctioned by the UK. The defendants argued that PJSC National Bank Trust was also effectively controlled by sanctioned persons, namely the President of Russia and the Head of the Central Bank of Russia. Based on this, the defendants contended that any judgment for the banks would be equivalent to "making funds available" to a sanctioned person, which is prohibited by UK sanctions regulations.
356. The Court of Appeal rejected this argument. It affirmed that access to justice is a fundamental right under common law. This right includes not just the ability to initiate proceedings but also the right to have a claim heard and, if successful, to receive a judgment. The court concluded that the words "make funds available" are not an apt description of the court's essential function of ruling on a valid claim. It reasoned that the function of a court is to adjudicate legal rights, not to conduct financial transactions.

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<sup>219</sup> *Mints and others (Appellants) v PJSC National Bank Trust and another (Respondents)* [2023] EWCA Civ 1132.

A judgment crystallizes a pre-existing right. It does not create a new financial resource in the prohibited sense.<sup>220</sup>

357. The court also examined the mechanism for subsequent enforcement. It pointed to a provision in the UK's Russia sanctions regulations that permits payments into a frozen bank account in the UK to discharge an obligation that arose before the sanctions were imposed. The court concluded that a judgment does not create a new, post-sanctions obligation. Instead, it gives effect to the original, pre-sanctions obligation. Therefore, a defendant could lawfully satisfy the judgment by paying the awarded sum into a frozen account held by the sanctioned claimant. This approach preserves the claimant's right to a judicial remedy while ensuring that the sanctioned funds remain blocked and under the control of the UK authorities. The decision allows the banks' claim to proceed to trial. It also identifies a clear, lawful pathway for the potential enforcement of any future judgment.

## 2. Foreign sanctions: approach in third countries

358. Another model exists in jurisdictions that have not imposed sanctions on Russia. These jurisdictions do not consider foreign sanctions regimes as part of their domestic public policy. Courts in these countries focus on their obligations under the New York Convention and their own national laws. They often treat foreign sanctions as legally irrelevant to their analysis of whether to recognize and enforce a foreign judgment or award.
359. Israel provides an example of this neutral approach. On 7 August 2024, the Tel Aviv District Court considered a case for the recognition of a Russian court judgment (civil claim 40733-11-21). The judgment creditor was BM-Bank, part of the sanctioned VTB Group. The judgment debtor was businessman Telman Ismailov. The Russian judgment

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<sup>220</sup> *Mints and others (Appellants) v PJSC National Bank Trust and another (Respondents)* [2023] EWCA Civ 1132, ¶ 210, Sir Julian Flaux C: "[i]n my judgment, none of the other provisions of SAML A contains any clear and unambiguous curtailment on the right of access to the courts, including entry of judgment. On the contrary, I agree with the judge that section 44 of SAML A is predicated on the designated person being able to pursue civil proceedings to judgment since otherwise the statutory defence under that section would be unnecessary. Accordingly, the primary legislation in this case does not curtail that right or prohibit the entry of a money judgment in favour of the designated person. As set out above, I have determined, without reference to the principle of legality, that on their proper construction Regulations 11 and 12 do not prohibit the entry of a money judgment, but that if it were necessary to have resort to the principle of legality, the words of those Regulations should be read down and construed so as not to curtail the right of access to the court including to have a claim adjudicated upon and if successful, to obtain a money judgment."

imposed subsidiary liability on Mr. Ismailov for approximately \$293 million in connection with the bankruptcy of a company. In the Israeli proceedings, the defendant argued that recognizing the judgment would violate international sanctions imposed on BM-Bank. The Israeli court dismissed this argument. The court's reasoning was that Israel is not a party to the sanctions regimes against the Russian Federation. As a result, foreign sanctions are not part of Israeli law or its public policy. The defendant's argument was therefore rejected, and the Russian judgment was recognized.<sup>221</sup>

360. Similarly, the Supreme Court of Uzbekistan (Judicial Panel for Economic Affairs, Case No. 4-10-2225/540) upheld the recognition and enforcement of a Russian arbitral award (dated 18 October 2022, from the Russian Arbitration Center) in favour of JSC Zagorsk Pipe Plant against JSC Uzbekneftegaz for approximately \$13.5 million (debt, interest, and costs under an assignment agreement).<sup>222</sup>
361. The debtor argued that enforcement should be refused because the claimant's servicing bank (Gazprombank) was subject to US sanctions, which would contravene Uzbekistan's public policy or order. The Court rejected this argument, holding that US sanctions do not constitute grounds for refusal to recognize and enforce an arbitral award in Uzbekistan. It emphasized that recognition and enforcement of the award do not contradict or threaten the public order of Uzbekistan, as the sanctions are foreign (US) measures and do not affect Uzbek law or public policy. The Court focused on compliance with Uzbekistan's Economic Procedural Code and the New York Convention, finding no violations (e.g., no improper notification, excess of scope, or public policy breach). Sanctions were considered but deemed irrelevant to the enforcement analysis.
362. Hong Kong provides yet another example of a pragmatic jurisdiction focused on its own commercial law principles. In 2021, the High Court of the Hong Kong Special Administrative Region considered a case for the recognition of a Russian court

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<sup>221</sup> Alrud Guidebook, "Recognition and Enforcement of Russian Judgements abroad" 2025, available at: <https://www.alrud.ru/storage/alrud-recognition-and-enforcement-of-russian-judgements-abroad.pdf>.

<sup>222</sup> JSC Zagorsk Pipe Plant v JSC Uzbekneftegaz, Decision of the Supreme Court of Uzbekistan 4-10-2225/540, 2 mars 2023, available at: <https://jusmundi.com/fr/document/decision/ru-jsc-zagorsk-pipe-plant-v-jsc-uzbekneftegaz-reshenie-verkhovnogo-suda-uzbekistana-4-10-2225-540-thursday-2nd-march-2023>.

judgment (CACV 163/2021).<sup>223</sup> The claimant was the Organising Committee of the XXII Olympic Winter Games in Sochi. The defendant was a Hong Kong company, Pico Projects (International) Limited. The Russian court judgment was for the recovery of an unpaid profits tax, which the claimant framed as a claim for unjust enrichment.

363. In the Hong Kong proceedings, the defendant contended that the judgment was unenforceable because it was, in substance, an attempt to enforce a foreign tax law - something generally barred under the prohibition on enforcing foreign public laws. The Hong Kong court rejected that characterisation, focusing on the claim's true nature in private law. It held that the dispute was a commercial one between contracting parties concerning a payment obligation arising out of their contractual relationship. The fact that the sum corresponded to a tax payment did not convert the case into enforcement of a foreign tax regime; it remained a civil claim in unjust enrichment.

364. The court recognised the Russian judgment. This case, while, strictly speaking, not involving sanctions, shows Hong Kong's focus on the commercial and private law character of a dispute. The court filtered out foreign public law or policy issues that are not part of its own legal framework. This approach suggests that a Hong Kong court, when faced with an argument based on foreign sanctions, would likely assess it through the lens of its own domestic public policy, which is traditionally pro-enforcement and commercially oriented.

## **IX. IMPLICATIONS OF THE PROVISIONS IN DISPUTE ON INTERNATIONAL ARBITRATION**

### **A. *De facto* exclusion of the investment arbitration mechanism for the resolution of Russian investors' claims**

365. The Russian Federation is a contracting party to 18 bilateral investment treaties with the EU Member States.<sup>224</sup> After the 18<sup>th</sup> Sanctions Package was introduced, the arbitration

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<sup>223</sup>Autonomous Non-Commercial Organization "Organizing Committee of XXII Olympic Winter Games and XI Paralympic Winter Games of 2014 in Sochi" v Pico Projects (International) Limited, A56-23597/2023 ([2021] HKCA 1798), 3 December, (on appeal from HCA 359/2019), available at: [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=140607&QS=%24%28163%2F2021%29&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=140607&QS=%24%28163%2F2021%29&TP=JU).

<sup>224</sup> Austria, Belgium and Luxembourg, Bulgaria, Hungary, Germany, Greece, Denmark, Spain, Italy, Lithuania, the Netherlands, Romania, the Slovak Republic, Finland, France, the Czech Republic, and Sweden.

dispute-resolution mechanism enshrined in those bilateral investment treaties became futile, and Russian investors are restricted from pursuing remedies normally available under bilateral investment treaties and international arbitration frameworks.

366. While the EU law cannot invalidate the relevant dispute resolution provisions, any arbitral decisions, which "*could lead to the satisfaction of any claims in connection with [restriction] measures*" will not result in a tangible result for the investors in the EU, as they cannot be recognized, cannot be enforced, and cannot be given any effect in the EU.

### **B. Disproportionality of investors' protection**

367. Notably, the investment arbitration only against the EU Member States becomes pointless, while the European investors still enjoy protection of their investments made in the territory of the Russian Federation without any limitations. The EU creates a situation in which this class of investors is denied procedural avenues that remain fully accessible to European nationals.
368. This undermines the very purpose of entering into bilateral investment treaties, which is to promote mutual cross-border investment by providing investors with a stable, predictable, and legally secure framework for protecting their rights.
369. As a consequence, European investors are still expected to pursue their claims against Russia in the framework of investment arbitration, while this option was put out of the picture for the Russian investors in Europe.

### **C. Practical unenforceability of the awards and fragmentation of related court proceedings**

370. Even if an arbitral tribunal ultimately renders an award against an EU Member State in an investment arbitration initiated by a Russian investor, the practical value of that decision is severely curtailed under the 18<sup>th</sup> Sanctions Package. Such an award cannot be recognised or enforced within the EU, depriving investors of access to the very jurisdiction where the Member State's assets and commercial activities are typically located.

371. Beyond this internal bar, the Member State is also legally obliged to actively resist enforcement attempts abroad, meaning it must raise every available procedural and substantive defence in any foreign jurisdiction where recognition is sought, turning the enforcement phase into a prolonged and fragmented legal contest.
372. And even in the unlikely event that an investor succeeds in enforcing the award outside the EU, Article 11e enables the Member State to initiate its own legal action to recover any sums paid, effectively neutralising the benefit of enforcement and creating a perpetual cycle of litigation that further diminishes the award's utility.

#### **D. Fragmentation of enforcement**

373. The 18<sup>th</sup> Sanctions Package accelerates the fragmentation of international arbitration enforcement by creating an EU-specific regime that sharply diverges from the global enforcement framework established by the New York Convention and the ICSID Convention. Traditionally, arbitral awards benefit from a broad presumption of enforceability across jurisdictions, supported by uniform standards and a shared commitment to the finality of arbitration. By prohibiting the enforcement of certain awards within the EU and obliging Member States to oppose the enforcement abroad, the package introduces a significant asymmetry: the same award may be recognised in some jurisdictions but automatically rejected in others. This uneven landscape undermines the predictability that is essential to the coherence of the international arbitration system.
374. This will lead to multiplication of parallel proceedings and increase the likelihood of conflicting outcomes, where the enforceability of an award depends not on the merits of the case but on the jurisdiction in which enforcement is sought. The result is a more fractured global enforcement landscape in which legal certainty is diminished, and strategic forum shopping becomes more prominent.
375. This growing fragmentation also has systemic consequences for the legitimacy and functioning of investor-State arbitration. With key jurisdictions, such as the EU, carving out broad exceptions to enforcement, maintaining the uniform operation of international arbitration becomes increasingly difficult. States may be encouraged to adopt similar measures to protect their own regulatory autonomy, while tribunals and arbitral

institutions face the challenge of issuing awards that may have radically different legal effects across jurisdictions. Over time, these risks erode confidence in the enforceability of arbitral decisions and weaken the foundational principle of arbitration as a universally accepted mechanism for resolving cross-border investment disputes.

#### **E. Pressure on the arbitral tribunals**

376. The 18<sup>th</sup> Sanctions Package places arbitral tribunals under unprecedented pressure by weakening the enforceability of awards in disputes involving EU sanctions. Because Member States are now legally barred from recognising or executing such awards within the EU, tribunals are forced to conduct proceedings with the knowledge that their decisions may have no practical effect. This directly challenges a foundational premise of investor-State arbitration that a neutral tribunal can issue an award that will ultimately be enforceable under widely accepted international instruments such as the New York Convention or the ICSID Convention. When that premise is removed for an entire category of disputes, tribunals face the possibility that their work, even if procedurally sound, could be rendered symbolic.
377. Arbitral institutions also encounter increased procedural strain as a result of heightened jurisdictional objections and defences raised by EU Member States. Given that states are now obliged to resist enforcement everywhere, they are incentivised to aggressively challenge tribunals' jurisdiction from the outset, assert EU public-policy defences, and argue that certain claims are inadmissible or incompatible with EU law. This leads to more complex, heavily contested proceedings with additional rounds of briefing, expert evidence on EU law, and questions about the interaction between EU regulations and international investment agreements. Institutions must navigate these challenges while maintaining procedural fairness and managing increasingly technical disputes.
378. These developments also raise concerns about the perceived credibility and efficiency of international arbitration in sanctions-related disputes altogether. When tribunals know that EU Member States cannot voluntarily comply with an adverse award and are legally required to oppose its enforcement worldwide, they operate under an unusual degree of scrutiny. Parties may also question the value of arbitrating disputes whose enforceability is structurally impeded, which could discourage claims, unsettle expectations among investors, and strain the legitimacy of institutions administering

such cases. In this environment, tribunals and institutions must balance their mandate to adjudicate impartially with the practical reality that awards in these cases face extraordinary barriers to effectiveness.

#### **F. Challenges in appointing the European arbitrators in sanctions-related disputes**

379. The 18<sup>th</sup> Sanctions Package creates significant challenges in appointing European arbitrators in disputes involving Russian investors, as many EU practitioners may be unwilling or unable to accept such appointments due to regulatory exposure. Because the new rules prohibit the recognition and enforcement of awards connected to sanctions-related disputes and require Member States to resist enforcement worldwide, arbitrators may fear that participating in such proceedings will place them at odds with mandatory EU public-policy obligations. This can create uncertainty about whether accepting an appointment could later be interpreted as facilitating a process that the EU expressly seeks to neutralise. As a result, European arbitrators may decline appointments to avoid reputational, regulatory, or ethical complications, narrowing the available pool of qualified candidates.
380. Institutions may likewise hesitate to appoint European arbitrators in these disputes for fear of breaching EU regulations or undermining the enforceability of the proceedings they administer. This combination of legal uncertainty and institutional caution, amounting almost to paranoia, increases the difficulty of forming arbitral tribunals, potentially leading to delays, disputes over appointments, and greater reliance on non-EU arbitrators in contentious sanctions-related cases.

#### **X. ECONOMIC ANALYSIS OF THE IMPACT OF CONTESTED NORMS ON THE INVESTMENT CLIMATE IN THE EU AND THE EU MEMBER STATES**

381. This section assesses the 18<sup>th</sup> Sanctions Package and its impact on the EU investment climate from the perspective of economic analysis of law. Economic analysis of law offers an objective framework to evaluate whether limitations of the 18<sup>th</sup> Sanctions Package, including on the recognition, enforcement, and facilitation of judicial decisions and arbitral awards, as well as judicial assistance in ISDS disputes, and re-

instatement of the transactional bans, generate net social benefits or instead impose disproportionate and inefficient economic costs.

#### **A. Impact of the 18<sup>th</sup> Sanctions Package on investment climate**

382. A functioning investment climate depends not only on proclamation of substantive legal rights but also on the effective means to enforce those rights. Investors price risk based on the "host country environment" and "local institutions" which include availability of predictable dispute-resolution mechanisms and the ability to enforce judgments and arbitral awards internationally.<sup>225</sup> The EU restrictions on the enforcement of foreign judgments and awards in ISDS disputes undermine these conditions.
383. Nowadays, the EU practitioners state that it is especially much harder to "turn an arbitral award into money, because the geographical area a designated party can look for assets has become much smaller due to the extensive prohibition to recognize and enforce arbitral awards obtained by Russian Designated Parties."<sup>226</sup> The 18<sup>th</sup> Sanctions Package generates unnecessary transactional costs which cumulatively may negatively affect the EU's economy and investment climate:
- a) Derogation from the fundamental procedural rights in relation to investors from Russia may cause a cumulative effect of an unstable investment climate within the EU and investments from other jurisdictions, such as the U.S., due to the growing understanding that the rights of investors within the EU, including procedural ones, are vulnerable to the EU's unilateral decisions;
  - b) Lack of clarity regarding the carve-outs from the transactional bans leads to transactional costs for EU residents and authorities related to establishing whether a particular service falls under a carve-out or a licence is required. This also protracts legal proceedings not only for the persons affected by sanctions but also for the opposing parties from the EU;

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<sup>225</sup> E. Ricardo, R. Buitrago, Institutional quality and investment disputes in emerging and frontier economies, *International Business Review*, Volume 34, Issue 6, 2025, pp. 1, 3.

<sup>226</sup> Article. The EU's 18<sup>th</sup> sanctions package and its ban on ISDS outside the EU. <https://www.noerr.com/en/insights/the-eus-18th-sanctions-package-and-its-ban-on-isds-outside-the-eu>.

- c) There is a possibility of Russia's responsive counter-measures against the EU businesses that still have assets and/or claims in Russia. Russia has already introduced numerous counter-measures in relation to other sanctions packages adopted by the EU,<sup>227</sup> and each new sanctions package leads to new counter-measures;
- d) Prohibitions on enforcement of foreign arbitral awards and judgments in ISDS disputes in the EU will lead to a reciprocal approach of the state courts of Russia and amicable-to-Russia states towards EU Member State judgments and awards in general, resulting in an impossibility for the EU companies to enforce awards in said jurisdictions;
- e) Limitations on enforcement in the EU Member States mean that enforcement will be sought in other jurisdictions outside of the EU, which may result in greater costs and less predictability of the outcome in less experienced arbitration jurisdictions. A number of jurisdictions, such as South Africa<sup>228</sup> and India,<sup>229</sup> have already shown that they could potentially support Russian courts in respect of measures adopted against the parties from the "unfriendly-to-Russia" states.

**B. Application of major economic analysis of law criteria proves economic inefficiency of the 18<sup>th</sup> Sanctions Package**

384. The legislation needs assessment by objective criteria of the economic analysis of law, as the legislation does not exist in a vacuum but rather shapes the economy and society. Sections 1 and 2 below demonstrate that the main approaches adopted by the Economic Analysis of Law (Kaldor-Hicks and Pareto criteria) claim that the adopted measures are economically inefficient. This further shows that the measures adopted by the EU may have ultimate self-destructing effect on the EU and eventually the global economy.

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<sup>227</sup> Russia's Counter-Sanctions Overview. <https://www.nordicstar.law/en/news/russian-counter-sanctions-overview/>.

<sup>228</sup> See information about the interim measures against Google in South Africa <https://www.cliffedekkerhofmeyr.com/en/news/publications/2025/Practice/Dispute-Resolution/dispute-resolution-alert-22-may-recognition-and-enforcement-of-russian-lugovoy-law-judgments-in-south-africa>.

<sup>229</sup> See information about the interim measures against Tecnimont in India <https://kdb.legal/en/cross-border-legal-tensions-russian-english-and-indian-court-decisions-in-the-eurochem-tecnimont-dispute/>.

## 1. Failure to meet the Kaldor–Hicks criterion

385. Under the Kaldor-Hicks criterion, the adoption of the 18<sup>th</sup> Sanctions Package is inefficient as it affects many social groups apart from those affected by sanctions and its consequences may have long-lasting effects for the EU entities, rendering it at least difficult or totally impossible to compensate the resulting losses.
386. The Kaldor–Hicks criterion requires two conditions to be satisfied for an adopted measure to be efficient. First, the positive effects of the adopted measures should prevail over the negative ones. Second, the social groups who enjoy the benefits from the adopted measures should be able to compensate for the losses generated by such measures to preserve balance.<sup>230</sup>
387. The application of the Kaldor-Hicks criterion to sanctions is limited due to the inherent punitive nature of sanctions. At the same time, it allows to weigh the consequences of the adopted measures and to determine the level of the resulting disbalance between the economic actors.
388. Regarding the first condition, Section III above covers the negative consequences of the 18<sup>th</sup> Sanctions Package adoption for the actors not targeted by sanctions. While the 18<sup>th</sup> Sanctions Package is a measure against the actions of the entities whose position the EU does not support, in the end, in the sphere of economics, there are drawbacks for all market participants, including the EU entities. The adopted measures will have negative effect reflected in the financial and time losses of the EU entities, as well as lessen the EU's attractiveness to foreign investors due to less predictability of the standards of their rights' protection.
389. Regarding the second criterion, consideration of the long-term effects of the losses resulting from the 18<sup>th</sup> Sanctions Package shows that chances of their compensation are at least long dated:
- a) Projects with foreign investments usually require several years to develop. Foreign investors may leave the EU market or refrain at all from entering it due to less certainty regarding the investors' procedural guarantees, which can be

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<sup>230</sup> G. Dellis, *An Economic Analysis of Public Law*, Edward Elgar Publishing, 2021, p. 33.

revoked by the EU unilaterally, as implied by the 18<sup>th</sup> Sanctions Package. As a result, the EU's economy may shrink and it will take indefinite time to restore.

- b) As sanctions' scope widens, uncertainty about their application is growing. The uncertainty over the sanctions' application, inter alia, causes protraction of proceedings involving Russian entities, affecting the EU companies as well by provoking additional costs due to the increased amount of legal advice and overall time spent on proceedings. Russia's potential response may also lead to long-reaching risks of non-enforcement of judicial decisions and other counter-measures in Russia towards the EU entities, which may be supported by the "friendly-to-Russia" jurisdictions. Such issues will also have long-term consequences to the EU companies and will continue even after resolving a dispute, causing issues with enforcement and *de facto* recovery of funds. The final value of any potential judgment (even if hypothetically recovered years later) is also eroded by inflation and currency fluctuations.

## **2. The Pareto criterion shows that the 18th Sanctions Package is inefficient as it creates a welfare disbalance**

390. The 18<sup>th</sup> Sanctions Package proves inefficient under the Pareto criterion as well, as it worsens the position of several market participant groups at the same time.
391. Under the Pareto criterion, a regulatory measure can be considered welfare-enhancing only if it improves the position of at least one actor without worsening the position of any other. A situation is Pareto optimal (efficient) if it is impossible to improve the balance between economic actors further.<sup>231</sup>
392. In the case of the 18<sup>th</sup> Sanctions Package, as it imposes restrictive measures, as indicated in Section 1 above, the Pareto criterion application is limited as well due to the sanctions' automatically punitive nature. However, the Pareto criterion shows that the adopted measures are also inefficient for the rest of the market participants.

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<sup>231</sup> G. Dellis, *An Economic Analysis of Public Law*, Edward Elgar Publishing, 2021, pp. 32–33.

393. The 18<sup>th</sup> Sanctions Package is inefficient under the Pareto criterion, as it worsens the position of the following participants of the market:
- a) As described above, the fact that the EU may unilaterally withdraw the other investors' procedural guarantees shows that other investors may be vulnerable before the EU as well and leave due to the uncertainty regarding their procedural rights' protection;
  - b) It was also described above that uncertainty of the sanctions' interpretation causes long-term negative effects for the EU parties, due to the increased transactional costs to establish the scope of the sanctions' application;
  - c) Risks of the EU actors losing an option of enforcing judgments and awards in Russia and being affected by new counter-measures of Russia will affect their business and means of dispute resolution.

## XI. CONCLUSION

394. The 18<sup>th</sup> Sanctions Package, as analysed above, is incompatible with EU law and international law. We therefore hope that the Court annuls the provisions of the Council Decision (CFSP) 2025/1495 of 18 July 2025 and Council Regulation 2025/1494 of 18 July 2025 that undermine the foundation of investor-state dispute settlement. We believe that this outcome will have positive long-term consequences for the international arbitration community and the investment climate within the EU.
395. We remain at the Court's disposal should any further information be required.

Sincerely,

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