The Relationship between Sanctions imposed by the European Union and Investor Protection under Bilateral Investment Treaties (BITs)

Gabija Beglecovaitė

Lawyer's Assistant at law firm Constat, fifth-year Law student at Vilnius University Faculty of Law, specializing in International and European Union Law

*This article examines the relationship between EU sanctions and the protections granted under Bilateral Investment Treaties (*BITs*) concluded by Member States with third countries such as Russia and Belarus. While* BITs *offer certain protections to foreign investors such as fair and equitable treatment for investments, full protection and security, protection from discriminatory measures and protection against expropriation, these safeguards may be affected by restrictive EU measures (sanctions). Conflicts arise when sanctions affect investments protected by* BITs*, potentially leading to investor-state claims. However, under the principle of the primacy of EU law, Member States must give precedence to European Union law. This obligation is confirmed through the duty of sincere cooperation under Article 4(3)* TEU*, Article 351* TFEU *and the binding nature of sanctions adopted under Articles 29* TEU *and 215* TFEU*. EU regulations are directly applicable and binding in their entirety, as set out in Article 288* TFEU*. Consequently, Member States cannot refuse to apply these regulations or give effect to obligations that undermine EU law.*

INTRODUCTION

Since March 2014,[1] the European Union ("**EU**") has progressively imposed restrictive measures ("**sanctions**" or "**restrictive measures**") against the Russian Federation ("**Russia**") in response to violations of international law, including the unlawful annexation of Crimea and the city of Sevastopol. On February 24, 2022, Russia launched a full-scale invasion of Ukraine ("**Invasion**"). Following this, the EU, along with other non-EU countries such as the United States, the United Kingdom, Canada, Japan, Australia, and others[2] adopted new and more comprehensive sanctions targeting the Invasion. Moreover, the EU has imposed sanctions on Belarus, Iran, and North Korea in response to their military support, including deliveries of unmanned aerial vehicles, which further contribute to the Invasion.[3]

[1] European Parliamentary Research Service, 'Timeline of EU sanctions' (n.d.) <https://epthinktank.eu/2023/03/13/eu-sanctions-on-russia-overview-impact-challenges/timeline-of-eu-sanctions/> accessed 6 July 2025; *The Diplomatic Service of the European Union*, 'Russia's illegal annexation of Crimea and the city of Sevastopol: EU extends sanctions for further year' (19 June 2024) <https://www.eeas.europa.eu/delegations/ukraine/russias-illegal-annexation-crimea-and-city-sevastopol-eu-extends-sanctions-further-year_en?s=232> accessed 6 July 2025; The Council of the European Union 'EU sanctions against Russia' (n.d.) <https://www.consilium.europa.eu/en/policies/sanctions-against-russia/> accessed 6 July 2025.

[2] Statista Research Department 'Sanctions on Russia over the war in Ukraine - statistics & facts' (21 May 2025) <https://www.statista.com/topics/10518/sanctions-on-russia-over-the-war-in-ukraine/#topFacts> accessed 6 July 2025.

[3] B Smith and E Thomson, 'EU Adopts New Belarus Sanctions Package' (*Global Sanctions and Export Controls Blog*, 8 July 2024) <https://sanctionsnews.bakermckenzie.com/eu-adopts-new-belarus-sanctions-package/> accessed 6 July

At the time this article was drafted, seventeen packages of sanctions have been adopted, with the latest set of economic and individual restrictive measures, being adopted by the Council of the European Union ("**Council**") on May 20, 2025.[4] The Council itself has stated that this is the largest sanctions package to date, significantly increasing pressure on the Russian economy. According to the High Representative for Foreign Affairs and Security Policy and chair of the Foreign Affairs Council, Kaja Kallas, "*This round of sanctions on Russia is the most wide-sweeping since the start of the war, together with new hybrid, human rights, and chemical weapons-related sanctions. In this 17th package, we include Surgutneftegas – a Russian oil giant – as well as almost 200 vessels in Russia's shadow fleet*".[5] Sanctions were also imposed on over 45 Russian companies and individuals supplying the Russian military with drones, weapons, ammunition, military equipment, critical components, and logistical support.[6] In the author's opinion, this sanctions package is unlikely to be the final one. The media have already featured numerous statements from heads of state and politicians concerning the adoption of the eighteenth sanctions package.[7]

Although the EU primarily aims to compel Russia to cease its unlawful actions against Ukraine, EU Member States ("**Member States**") have previously concluded bilateral investment treaties ("**BITs**") with Russia and Belarus. Under these treaties, Russian and Belarusian investments in those Member States enjoy certain protections, such as fair and equitable treatment for investments, full protection and security, national treatment and most-favoured-nation treatment, protection from discriminatory measures and protection against expropriation.

In this context, a key legal dilemma arises: can investors from sanctioned countries rely on BIT provisions to challenge the enforcement of EU sanctions, arguing that such measures violate their investment protections? This article addresses that question by examining the relationship between EU sanctions and BITs in light of the principle of the primacy of EU law. It argues that, despite the protection afforded by

2025; The Council of the European Union, 'EU sanctions against Belarus' (n.d.) <https://www.consilium.europa.eu/en/policies/sanctions-against-belarus/> accessed 6 July 2025; The Council of the European Union, 'EU sanctions against Iran' (n.d.) <https://www.consilium.europa.eu/en/policies/sanctions-against-iran/> accessed 6 July 2025; The Council of the European Union, 'EU sanctions against North Korea' (n.d.) <https://www.consilium.europa.eu/en/policies/sanctions-against-north-korea/> accessed 6 July 2025.

[4] Council Decision (CFSP) 2025/931 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2025] OJ L2025/931; Lietuvos Respublikos užsienio reikalų ministerija, 'ES didina sankcijų naštą Rusijai: patvirtintas 17-asis sankcijų paketas, ribojimai nustatyti net keturiuose režimuose' (20 May 2025) <https://www.urm.lt/naujienos/141/es-didina-sankciju-nasta-rusijai-patvirtintas-17-asis-sankciju-paketas-ribojimai-nustatyti-net-keturiuose-rezimuose:44171> accessed 6 July 2025.

[5] The Council of the European Union, 'Russia's war of aggression against Ukraine: EU agrees 17th package of sanctions' (20 May 2025) <https://www.consilium.europa.eu/en/press/press-releases/2025/05/20/russia-s-war-of-aggression-against-ukraine-eu-agrees-17th-package-of-sanctions/#:~:text=This%20round%20of%20sanctions%20on%20Russia%20is%20the,as%20almost%20200%20vessels%20in%20Russia%E2%80%99s%20shadow%20fleet> accessed 6 July 2025.

[6] Ibid.

[7] Cédric Vallet, 'La Commission européenne propose un 18e train de sanctions contre la Russie' (*Le Monde*, 10 June 2025) <https://www.lemonde.fr/international/article/2025/06/10/la-commission-europeenne-propose-un-18-train-de-sanctions-contre-la-russie_6612100_3210.html> accessed 6 July 2025; 'EU aims to agree 18th Russia sanctions package next week, diplomats say' (*Polskieradio.pl*, 16 June 2025) <https://www.polskieradio.pl/395/7785/Artykul/3538545,eu-aims-to-agree-18th-russia-sanctions-package-next-week-diplomats-say> accessed 6 July 2025; LRT, 'Nausėda: naujasis sankcijų Rusijai paketas vienas stipriausių' (*LRT.lt*, 26 June 2025) <https://www.lrt.lt/naujienos/pasaulyje/6/2598083/nauseda-naujasis-sankciju-rusijai-paketas-vienas-stipriausiu?srsltid=AfmBOoqxaf27i4LhZOtg0ESM3P5CsmLLCTZZmeWMqj95sFjNH1dFSoup> accessed 6 July 2025; Devdiscourse News Desk, 'Hungary and Slovakia Block 18th EU Sanctions Package Against Russia' (*Devdiscourse*, 23 June 2025) <Hungary and Slovakia Block 18th EU Sanctions Package Against Russia> accessed 6 July 2025.

BITs, Member States are bound to ensure the full effectiveness of EU law.

To support this position, the article first analyzes the guarantees provided under BITs, focusing on two specific treaties: (1) the Lithuania-Russia BIT and (2) the Lithuania-Belarus BIT. These treaties have been selected due to their significance in Lithuania's legal and political debates and the controversies they have provoked. Furthermore, both involve countries that are the main targets of the EU sanctions regime. While these treaties serve as case studies, the investment guarantees they contain are common across most BITs. This demonstrates that the analysis has broader applicability. The article then explores how these guarantees are affected by the implementation of EU sanctions, particularly in light of the principle of the primacy of the EU.

I. EXTRA-EU *BITs*: PURPOSE, GUARANTEES AND THE CURRENT SITUATION IN LITHUANIA

1.1. EXTRA-EU *BITs*: PURPOSE

Extra-EU BITs are international agreements concluded between a Member State and a third country with the primary objective of creating a favorable and secure environment for foreign investors. The primary objective of BITs encompasses two interrelated aspects: (1) BITs establish a stable and predictable legal framework for the management and protection of foreign investments, and (2) they contribute to the host state's economic development and foster economic relations between the contracting parties.[8] Consequently, the main beneficiaries of these treaties are investors from third countries.

1.2. GUARANTEES PROVIDED BY *BITs*: ANALYSIS OF THE LITHUANIA-RUSSIA AND LITHUANIA-BELARUS *BITs*

Extra-EU BITs provide specific legal guarantees to investors from third countries as explicitly outlined in the treaties themselves. To illustrate how these guarantees function in practice, each guarantee will be analyzed through the Lithuania-Russia and Lithuania-Belarus BITs.

1.2.1. THE PRINCIPLE OF FAIR AND EQUITABLE TREATMENT ("*FET*")

The first and one of the most important guarantees provided in both the Lithuania-Russia and Lithuania-Belarus BITs is the principle of FET. According to Article 3(1) of Lithuania-Russia BIT[9] and Article 2(2) of the Lithuania-Belarus BIT,[10] each contracting party must accord fair and equitable treatment in its territory to investors, their investments and activities related to those investments. This provision explicitly prohibits discriminatory measures that could hinder the management, maintenance, use, enjoyment and disposal of investments.

Although the FET standard plays an important role in all BITs, its definition varies between treaties. As outlined in the UNCTAD Series on issues in international investment agreements regarding fair and equitable treatment, at least four distinct approaches to defining this standard can be identified.[11] First, some treaties omit any direct reference to FET and instead rely on other principles of international law. Second, the hortatory approach encourages states to provide fair and equitable treatment but does not impose a binding obligation. Third, some treaties impose a clear and binding obligation on the host state to provide fair, just, or equitable

[8] Tarcisio Gazzini, 'Bilateral Investment Treaties' in T Gazzini and E De Brabandere (eds), *International investment law: the sources of rights and obligations* (2012), p. 8.

[9] Agreement Between the Government of the Russian Federation and the Government of the Republic of Lithuania on the Promotion and Reciprocal Protection of the Investments (adopted 29 June 1999, entered into force 24 May 2004).

[10] Agreement between the Government of the Republic of Belarus and the Government of the Republic of Lithuania on promotion and protection of investments (adopted 5 March 1999, entered into force 16 May 2002).

[11] UNCTAD, 'Series on issues in international investment agreements: Fair and equitable treatment' (1999) UNCTAD/ITE/IIT/11, 3, p. 2.

treatment to foreign investors. Finally, the most common approach integrates FET into a broader standard of investment protection that also includes obligations such as national treatment, most-favoured-nation treatment and the duty to provide full protection and security.

Both the Lithuania-Russia and Lithuania-Belarus BITs reflect the third approach. It expressly requires each contracting party to provide fair and equal treatment to each other's investments as well as investors and to refrain from discriminatory measures. This creates a binding obligation for the parties.

In the *Indian Metals & Ferro Alloys Ltd v Republic of Indonesia*, the arbitral tribunal identified core principles encompassed within the FET standard, including: "*(1) the host state must respect the investor's reasonable and legitimate expectations; (2) the host state cannot act in arbitrary or discriminatory; (3) the host state must act in a transparent and consistent manner; (4) the host state is obliged to act in good faith; (5) the host state must respect due process and procedural propriety; (6) the principle of proportionality*".[12]

It is important to note that not every inconsistency or lack of transparency by the host state constitutes a breach of the FET standard. The state's "*conduct need not be outrageous or amount to bad faith to breach the fair and equitable treatment standard*".[13] In practice, arbitral tribunals have found breaches of the FET standard in various situations, such as failure to provide adequate protection, denial of due process or justice, absence of a stable and predictable legal framework, insufficient transparency, bad faith or frustration of the investor's reasonable and legitimate expectations.[14]

Moreover, arbitrary actions are generally considered inconsistent with the obligation to provide fair and equitable treatment.[15] In *EDF (Services) Limited v Romania,* the tribunal outlined four types of measures that may be regarded as arbitrary: "*(1) a measure that inflicts damage on the investor without serving any apparent legitimate purpose; (2) a measure that is not based on legal standards but on discretion, prejudice or personal preference; (3) a measure taken for reasons that are different from those put forward by the decision maker; (4) a measure taken in wilful disregard of due process and proper procedure*".[16]

Overall, FET imposes an obligation on host states to ensure fairness, transparency and legal certainty in their treatment of foreign investors.

1.2.2. FULL PROTECTION AND SECURITY STANDARD ("*FPS*")

Article 2(2) of the Lithuania-Belarus BIT[17] states that investments made by investors of the other contracting party shall enjoy full legal protection and security. This standard is commonly expressed in BITs as "full protection and security", although variations such as "constant protection and security", "protection and security" or "physical protection and security" can also be found in practice.[18] These linguistic differences do not appear to affect the substance of the obligation.

---

[12] *Indian Metals & Ferro Alloys Ltd v Republic of Indonesia*, PCA Case No 2015-40, para [226].

[13] *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/11/2, para [543].

[14] Anastasiya Ugale and Ioana Knoll-Tudor, 'Fair and Equitable Treatment' (Jus mundi, 16 September 2024) <https://jusmundi.com/en/document/publication/en-fair-and-equitable-treatment> accessed 6 July 2025; Florencia Sarmiento and Suzy Nikièma, 'Le traitement juste et équitable: pourquoi est-il important et que peut-on faire' (*International Institute for Sustainable Development*, November 2022) <https://www.iisd.org/system/files/2022-11/fair-equitable-treatment-fr.pdf> accessed 6 July 2025, p. 5.

[15] 'Fair and Equitable Treatment in Investment Arbitration' (*ACERIS LAW LLC*, 23 January 2022) <https://www.acerislaw.com/fair-and-equitable-treatment-in-investment-arbitration/#_ftn17> accessed 6 July 2025.

[16] *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/13, para [303].

[17] Agreement between the Government of the Republic of Belarus and the Government of the Republic of Lithuania on promotion and protection of investments (adopted 5 March 1999, entered into force 16 May 2002).

[18] Mahnaz Malik, 'The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?' (*International Institute for Sustainable Development*, November 2011) <https://www.iisd.org/system/files/publications/full_protection.pdf> accessed 6 July, p. 2.

Traditionally, the FPS standard referred mainly to physical protection.[19] Under this interpretation, the host state must take active measures to protect the investment from harmful effects. Such harm may arise from non-government actors, including demonstrators, employees or business partners, or from acts committed by the host state and its organs.[20] Over time, arbitral tribunals extended this standard to cover all types of protection, including physical, legal and commercial.

In *Siemens A.G. v The Argentine Republic*, the tribunal explained: "*As a general matter and based on the definition of investment, which includes tangible and intangible assets, the Tribunal considers that the obligation to provide full protection and security is wider than "physical" protection and security. It is difficult to understand how the physical security of an intangible asset would be achieved. In the instant case, "security" is qualified by "legal"*".[21] A similar conclusion was reached in *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, where the tribunal stated that FPS goes beyond physical protection: "*it implies a state's guarantee of stability in a secure environment, both physical, commercial and legal*".[22]

Other tribunals have confirmed this broader interpretation. In *CME Czech Republic B.V. v The Czech Republic*[23] and *Ronald S. Lauder v The Czech Republic*,[24] the tribunals found that the FPS also includes the protection of legal rights, such as the availability of a judicial system that protects the investor's interests.[25]

However, it should be noted that the FPS is not absolute. Most arbitral tribunals interpret it as a due diligence standard. A host state is not expected to prevent every injury but must exercise reasonable care and take reasonable actions within its power to prevent injury to the investor.[26]

1.2.3. NATIONAL TREATMENT AND MOST-FAVOURED-NATION TREATMENT

Article 3(2) of the Lithuania-Russia BIT[27] stipulates that investments shall receive treatment no less favourable than that accorded by the host state to its own investors or to investors of third states. A similar provision is found in Articles 3(1) and 3(2) of the Lithuania-Belarus BIT.[28] These provisions establish two core principles of international investment law: national treatment and most-favoured-nation treatment ("**MFN**").

Both principles are designed to prevent discrimination based on the investor's nationality.[29]

---

[19] For example, in *Saluka Investments B.V. v The Czech Republic*, arbitral tribunal stated that "*the "full security and protection" clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force*". (Saluka Investments B.V. v The Czech Republic, UNCITRAL, para [484].

[20] O Moussly, 'Same Concept, Different Interpretation: The Full Protection and Security Standard in Practice' (*Kluwer Arbitration Blog*, 27 October 2019) <https://arbitrationblog.kluwerarbitration.com/2019/10/27/same-concept-different-interpretation-the-full-protection-and-security-standard-in-practice/> accessed 6 July 2025; *Frontier Petroleum Services Ltd. v The Czech Republic*, Final Award, para [261].

[21] *Siemens A.G. v The Argentine Republic*, ICSID Case No ARB/02/8, para [303].

[22] *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No ARB/05/22, para [729].

[23] *CME Czech Republic B.V. v The Czech Republic*, UNCITRAL.

[24] *Ronald S. Lauder v The Czech Republic*, UNCITRAL, para [314].

[25] *Frontier Petroleum Services Ltd. v The Czech Republic*, Final Award, para [265].

[26] Daniel Müller, Arne Fuchs and Maximillian Pika ,'Full Protection and Security (FPS)' (*Jus mundi*, 3 June 2025) <https://jusmundi.com/en/document/publication/en-full-protection-and-security-fps> accessed 6 July 2025.

[27] Agreement Between the Government of the Russian Federation and the Government of the Republic of Lithuania on the Promotion and Reciprocal Protection of the Investments (adopted 29 June 1999, entered into force 24 May 2004).

[28] Agreement between the Government of the Republic of Belarus and the Government of the Republic of Lithuania on promotion and protection of investments (adopted 5 March 1999, entered into force 16 May 2002).

[29] UNCTAD, 'Series on Issues in International Investment Agreements II: MOST-FAVOURED NATION TREATMENT' (2010) UNCTAD/DIAE/IA/2010/1, p. 27.

However, differential treatment is not automatically prohibited. States may treat foreign investors differently, provided that such measures are legitimate and do not intentionally result in discrimination. As stated by the tribunal in *Parkerings-Compagniet AS v Republic of Lithuania "to violate international law, discrimination must be unreasonable or lacking proportionality, for instance, it must be inapposite or excessive to achieve an otherwise legitimate objective of the State. An objective justification may justify differentiated treatments of similar cases. It would be necessary, in each case, to evaluate the exact circumstances and the context"*.[30]

Under the national treatment standard, the host state is obliged to provide foreign investors and their investments with treatment that is no less favourable than that granted to domestic investors.[31] In other words, national treatment is the principle of giving foreign investors the same treatment as one's own nationals.

By contrast, MFN treatment obliges the host state to provide investors from one contracting party treatment no less favourable than that granted to investors from any third state.[32] This is a relative standard, requiring a comparison between the treatment afforded to two foreign investors in similar circumstances.[33] The main idea is to prevent a state from favouring one foreign investor over another without legitimate justification. However, MFN treatment does not mandate equal treatment for all foreign investors, regardless of their specific business activities or circumstances. Different treatment is justified when the investors are not legitimate comparators, for example, they do not operate in the same economic sector or do not have the same corporate structure.[34]

In order to determine a violation of the MFN principle, several cumulative conditions must be satisfied: (1) the claimant must qualify as a foreign investor, (2) the foreign investor invoking the MFN clause must be in the same economic or business sector as the third-State investor who received more favourable treatment, and (3) there must be differential treatment between the two investors, resulting from actions taken by the host state.[35]

In conclusion, while the national treatment and MFN treatment provisions aim to ensure non-discriminatory treatment of foreign investors, not all instances of differential treatment constitute a breach. Such treatment does not amount to a violation if it is justified, proportionate to the pursued objective, and based on reasonable and objective criteria.

1.2.4. PROTECTION AGAINST EXPROPRIATION

Another guarantee provided by BITs is the protection against unlawful expropriation. The term "expropriation" refers to an act by the state that deprives a foreign investor of their property or investment, either directly or indirectly.[36] It

[30] *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8, para [368].

[31] Principles of the trading system' (*World Trade Organization*, no date) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm> accessed 6 July 2025; Anastasiya Ugale and Ivan Cisar, 'National Treatment' (*Jus mundi*, 13 November 2024) <https://jusmundi.com/en/document/publication/en-national-treatment> accessed 6 July 2025; Will Kenton, 'National Treatment: Meaning, Advantages and Disadvantages' (*Investopedia*, 30 January 2021) <https://www.investopedia.com/terms/n/nationaltreatment.asp> accessed 6 July 2025.

[32] Suzy Nikièma, 'Série bonnes pratiques de l'IISD: La clause de la nation la plus favorisée dans les traités d'investissement' (*International Institute for Sustainable Development*, February 2017) <https://www.iisd.org/system/files/publications/mfn-most-favoured-nation-clause-best-practices-fr.pdf> accessed 6 July, p. 2.

[33] UNCTAD, 'Series on Issues in International Investment Agreements II: MOST-FAVOURED NATION TREATMENT' (2010) UNCTAD/DIAE/IA/2010/1, p. 26.

[34] Ibid.

[35] *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No ARB/05/8, para [371]; *Pope & Talbot Inc. v The Government of Canada*, UNCITRAL, para [78].

[36] Cambridge Dictionary (n.d.) <https://dictionary.cambridge.org/dictionary/english/expropriation> accessed 6 July 2025.

is important to note that expropriation is not illegal *per se* under international law.[37]

Article 6(1) of the Lithuania-Russia BIT and Article 5(1) of the Lithuania-Belarus BIT protect foreign investors from expropriation, nationalization or measures equivalent to those acts, unless specific cumulative conditions are fulfilled. For expropriation to be lawful, it must: (a) pursue a public interest, (b) comply with due process of law, (c) be non-discriminatory, and (d) include prompt, adequate and effective compensation.

The criterion of public interest is abstract and broad. It gives states the authority to decide for themselves what they consider useful or necessary for the public good.[38] Nevertheless, as it was held in *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, the justification of public interest cannot rest solely on the government's statement. The state must demonstrate the existence of a genuine public interest.[39]

The non-discrimination requirement prohibits expropriation that targets a foreign investor based on their nationality.[40] Discrimination in this context requires evidence of differential treatment between comparable parties without legitimate justification.[41]

The due-process requirement obliges the state to act under fair and transparent procedures established by law. Specifically, this principle requires (1) that the expropriation comply with procedures established in domestic legislation and with fundamental internationally recognized standards, and (2) that the affected investor have an opportunity to have the case reviewed before an independent and impartial body.[42] These safeguards are essential to prevent arbitrary or discriminatory conduct and to ensure the protection of the investor's legal rights.

Finally, for expropriation to be lawful, the state must provide prompt, adequate and effective compensation. Compensation is considered prompt if paid without delay; adequate, if it has a reasonable relationship with the market value of the investment concerned; and effective, if paid in a convertible or freely usable currency.[43]

Although expropriation is not inherently unlawful under international law, BITs require that the state meet all of the above cumulative conditions for such action to be lawful. Failure to comply with any of these requirements may result in the finding of unlawful expropriation and expose the state to international liability.

1.2.5. INVESTOR-STATE DISPUTE SETTLEMENT ("*ISDS*")

ISDS is a legal mechanism that allows a foreign investor to bring a claim against the host state in which the investment has been made. All BITs include ISDS mechanisms. Originally, these mechanisms were created to protect investors from arbitrary expropriation and ensure non-discriminatory treatment for foreign investments, particularly in countries

[37] Christoph Schreuer, 'The Concept of Expropriation under the ETC and other Investment Protection Treaties' (*International Centre for Settlement of Investment Disputes*, 20 May 2005) <https://icsid.worldbank.org/sites/default/files/parties_publications/C8394/Claimants%27%20documents/CL%20-%20Exhibits/CL-0272.pdf> accessed 6 July 2025; Will Kenton 'Expropriation: Definition, Purposes, and Compensation Concerns'(*Investopedia*, 24 September 2024) <https://www.investopedia.com/terms/e/expropriation.asp> accessed 6 July 2025.

[38] UNCTAD 'Series on Issues in International Investment Agreements II. EXPROPRIATION' (2012) UNCTAD/DIAE/IA/2011/7, p. 31-32.

[39] *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, ICSID Case No ARB/03/16, para [432].

[40] UNCTAD 'Series on Issues in International Investment Agreements II. EXPROPRIATION' (2012) UNCTAD/DIAE/IA/2011/7, p. 34.

[41] *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, ICSID Case No ARB/03/16, para [442].

[42] UNCTAD 'Series on Issues in International Investment Agreements II. EXPROPRIATION' (2012) UNCTAD/DIAE/IA/2011/7, p. 36.

[43] Ibid, p. 40.

perceived as high-risk.[44] In such countries, where the judiciary is not fully independent from the government, national courts may lack independence, impartiality, or neutrality, or may fail to offer effective dispute settlement mechanisms, for example due to clogged dockets, excessively lengthy procedures or because of access limitations for foreign investors.[45] To avoid this, arbitration was considered a more "neutral" mechanism to safeguard the enforcement of the host state's commitments to foreign investors.

Both Article 10 of the Lithuania-Russia BIT and Article 8 of the Lithuania-Belarus BIT provide that disputes between a host state and a foreign investor must first be resolved amicably, through negotiations if possible. Where an amicable solution cannot be reached, the investor is required to submit a written notice with detailed explanations and send it to the host state involved in the dispute.

According to Article 8(2) of the Lithuania-Belarus BIT,[46] if the dispute remains unresolved six months after the notice has been received, it may be submitted, at the request of either party and at the investor's discretion to: (1) an *ad hoc* arbitration in accordance with Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL); or (2) the International Centre for Settlement of Investment Disputes (ICSID).

In contrast, the Lithuania-Russia BIT provides a broader range of alternatives. Article 10(2)[47] stipulates that the dispute may be submitted to: (1) a competent court or court of arbitration of the host state in whose territory the investments are made; (2) the Arbitration Institute of the Stockholm Chamber of Commerce; (3) the Court of Arbitration of the International Chamber of Commerce; or (4) an *ad hoc* arbitration in accordance with UNCITRAL Arbitration Rules.

To conclude, ISDS mechanisms offer a neutral and independent venue for the resolution of disputes between investors and host states. They help to ensure that investors' rights are protected against unfair, arbitrary or discriminatory treatment by the host state. By enhancing legal certainty and protection, ISDS mechanisms help investors feel more secure and encourage them to invest in other countries.

1.3. CURRENT SITUATION IN LITHUANIA

In response to the Invasion and other hostile actions, the Parliament of the Republic of Lithuania adopted legislation to denounce three treaties with Russia and Belarus. These laws provide for the termination of the Lithuania-Russia BIT,[48] the Lithuania-Belarus BIT[49] and the Agreement between the Government of the Republic of Lithuania and the Government of the Russian Federation on the Avoidance of

[44] Latek M and Puccio L, 'Investor-State Dispute Settlement (ISDS) State of play and prospects for reform' (*European Parliamentary Research Service*, 26 January 2015).

[45] S Schill, '*Access to Justice in Investment Dispute Settlement*' (*Kluwer Arbitration Blog*, 10 February 2020) <https://arbitrationblog.kluwerarbitration.com/2020/02/10/access-to-justice-in-investment-dispute-settlement/> accessed 6 July 2025; UNCTAD 'Series on issues in international investment agreements: DISPUTE SETTLEMENT: INVESTOR-STATE' (2003) UNCTAD/ITE/IIT/30, p. 5.

[46] Agreement between the Government of the Republic of Belarus and the Government of the Republic of Lithuania on promotion and protection of investments (adopted 5 March 1999, entered into force 16 May 2002).

[47] Agreement Between the Government of the Russian Federation and the Government of the Republic of Lithuania on the Promotion and Reciprocal Protection of the Investments (adopted 29 June 1999, entered into force 24 May 2004).

[48] Law of the Republic of Lithuania on the Denunciation of the Agreement between the Government of the Republic of Lithuania and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments (adopted 1 October 2024, entered into force 11 October 2024) TAR No 17760.

[49] Law of the Republic of Lithuania on the Denunciation of the Agreement between the Government of the Republic of Lithuania and the Government of the Republic of Belarus on the Promotion and Protection of Investments TAR No 17759.

Double Taxation of Income and Capital and the Prevention of Fiscal Evasion.[50]

In the explanatory memorandum to the draft laws,[51] the Ministry of Foreign Affairs of the Republic of Lithuania stated that, in its opinion, the denunciation of the treaties is appropriate given the geopolitical situation – namely, the ongoing, unprecedented military aggression by Russia and its accomplice Belarus against Ukraine, and the serious violations of international law. It also emphasized that, in practice, interstate economic cooperation with the aggressor states has been completely suspended and is no longer feasible; that investments by businesses from aggressor states in Lithuania should not be encouraged; that Lithuanian businesses should assess the risks of operating in the markets of aggressor states; and that the provisions of the treaties no longer reflect modern standards of investment protection agreements. Moreover, the Ministry of Finance of the Republic of Lithuania noted that promoting closer economic ties with an aggressor state no longer aligns with Lithuania's national interests.[52]

After the denunciation laws were adopted, the Governments of Belarus and Russia were notified through diplomatic channels about Lithuania's decision to terminate these treaties. The termination of the treaties took effect 12 months after the date of receipt of the notification. However, it is important to note that, according to the provisions of the BITs, the protection of investments made before the treaties' expiry will remain in force for an additional ten years after the termination.[53]

II. RELATIONSHIP BETWEEN SANCTIONS IMPOSED BY THE EU AND INVESTOR PROTECTION UNDER *BITs*

The relationship between EU-imposed sanctions and investor protection under BITs has become particularly important for Member States that are party to BITs with Russia and (or) Belarus. The majority of Member States have either previously concluded such treaties or still have them in force. For example, 23 Member States either previously had or still have BITs with Belarus (only Greece, Iceland, Malta, and Portugal have never concluded a BIT with Belarus).[54] A similar situation applies to BITs with Russia – 23 Member States have or once had BITs with Russia (only Estonia, Ireland, Latvia, and Malta have never concluded one).[55] In these circumstances, most Member States are bound by two distinct, but potentially conflicting obligations. On the one hand, Member States are responsible for the implementation and enforcement of EU sanctions and, on the other hand, they must uphold the protections granted to foreign investors under BITs.

These obligations are not always compatible and may come into conflict. BITs are designed to protect foreign investors from unfair, arbitrary, or discriminatory treatment by host states. However, the enforcement of EU sanctions, particularly those targeting specific individuals or entities (companies), can directly or indirectly affect the rights of investors from sanctioned countries. Measures such as asset freezes, payment restrictions or bans on commercial transactions might be viewed by affected investors as

[50] Law of the Republic of Lithuania on the Denunciation of the Agreement between the Government of the Republic of Lithuania and the Government of the Russian Federation for the Avoidance of Double Taxation of Income and Capital and the Prevention of Fiscal Evasion TAR No 17761

[51] Explanatory Memorandum on Draft Laws Reg. No XIVP-4136 and XIVP-4137 (16 September 2024).

[52] Explanatory Memorandum on the Draft Law 'On the Denunciation of the Agreement between the Government of the Republic of Lithuania and the Government of the Russian Federation for the Avoidance of Double Taxation of Income and Capital and the Prevention of Fiscal Evasion' (16 September 2024).

[53] Explanatory Memorandum on Draft Laws Reg. No XIVP-4136 and XIVP-4137 (16 September 2024).

[54] UNCTAD, 'International Investment Agreements Navigator: Belarus' (no date) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/18/belarus> accessed 6 July 2025.

[55] UNCTAD, 'International Investment Agreements Navigator: Russian Federation' (no date) <https://investmentpolicy.unctad.org/international-investment-agreements/countries/175/russian-federation> accessed 6 July 2025.

unlawful expropriation, a violation of fair and equitable treatment or a breach of other standards under BITs.

As a result, Member States may face investor-state claims alleging that sanctions breach host states obligations under BITs. This situation puts Member States in a difficult position. They are obliged to fully comply with EU sanctions, but at the same time, by doing so, they risk liability under BITs when those sanctions negatively impact protected investments. In this context, it is necessary to determine which obligations should take primacy in such cases – those arising from EU economic sanctions and EU law, or those arising from BITs and international investment law?

III. PRINCIPLE OF THE PRIMACY (SUPREMACY) OF EU LAW

In the author's view, to answer this question, the analysis should be conducted through the principle of the primacy of EU law. The main idea of this principle is that where a conflict arises between an aspect of EU law and an aspect of law in a Member State (national law), EU law will prevail.[56] As such, when obligations arising under BITs conflict with sanctions imposed by the EU, Member States are obliged to give priority to EU law. Although the principle of the primacy of EU law is not explicitly enshrined in the EU Treaties, Member States are nonetheless bound by it, as its content has been clarified through the jurisprudence of the Court of Justice of the European Union ("**CJEU**").

One of the earliest indications of this principle can be found in the judgment of 5 February 1963 in *Van Gend en Loos v Nederlandse Administratie der Belastingen*, where the CJEU recognized that EU law has direct effect: "*Independently of the legislation of Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage*".[57] Later, in *the Costa v ENEL* case, the CJEU affirmed the precedence of European Economic Community ("**EEC**") law over the national laws of the Member States. The CJEU clarified that by creating a Community of unlimited duration, Member States transferred the rights and obligations arising under the Treaty from their national legal system to that of the EEC, limited their sovereignty, and created a body of law that bound both their nationals and themselves.[58] Consequently, Member States may not adopt national legislation that contradicts EU law without calling into question the legal basis of the EU itself. If they nevertheless do so, EU law should take precedence over national laws in the domestic courts of the country concerned.[59] In *Costa v ENEL*, the CJEU indicated that the expression of the principle of the primacy of EU law is also reflected in Article 189 of the EEC Treaty (now Article 288 of the Treaty on the Functioning of the European Union[60] ("**TFEU**")), which states: "*A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States*".

In its subsequent jurisprudence, the CJEU reaffirmed that EU law has supremacy over conflicting national law, including provisions of "a *Member State's constitution or the principles of its national constitutional structure*".[61] In *Amministrazione delle finanze dello Stato v Simmenthal*,

[56] 'Primacy of EU law (precedence, supremacy)' (EUR-lex, no date) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Aprimacy_of_eu_law> accessed 6 July 2025; *Theodoros Adamakopoulos and others v Republic of Cyprus: Statement of Dissent of Professor Marcelo Kohen*, ICSID Case No ARB/15/49, para [3].

[57] Case 26/62 *Van Gend en Loos / Administratie der Belastingen* [1963] ECR 1963 p.1.

[58] Case 6/64 *Costa / E.N.E.L* [1964] ECR 1964 p. 1195.

[59] 'Precedence of European law' (EUR-lex, no date) <https://eur-lex.europa.eu/EN/legal-content/summary/precedence-of-european-law.html#keyterm_E0001> accessed 6 July 2025.

[60] Consolidated version of the Treaty on the Functioning of the European Union [2016]. OJ C202/47.

[61] Case 11/70 *Internationale Handelsgesellschaft mbH / Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1970 p. 1125.

the CJEU held that "*Community law provisions not only, by their entry into force, automatically render inapplicable any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States – also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions*".[62] Additionally, national courts of all levels must set aside any national law that conflicts with EU law.[63]

This jurisprudence confirms that EU law must take precedence over all conflicting national acts, including international agreements in which the Member State takes part. In the context of BITs, this means that where a Member State's obligations under a BIT conflict with obligations arising from EU law (such as compliance with sanctions), the EU law obligations must prevail.

This position is further supported by Article 351 of the TFEU. Article 351(1)[64] states: "*The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties*." However, the second paragraph of this Article explicitly requires taking all appropriate steps to eliminate any incompatibilities with EU law: "*To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established*". Therefore, if a BIT concluded before accession conflicts with the Treaties, the Member State must act to resolve this conflict by negotiating the modification of the incompatible provisions, terminating the BIT or considering the incompatible clauses inapplicable.[65]

It is also important to mention the principle of sincere cooperation, enshrined in Article 4(3) of the Treaty on European Union ("**TEU**").[66] Under this principle, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.[67] To ensure sincere cooperation, Member States have two obligations: (1) to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union and (2) to facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives. As such, allowing the application of BIT obligations that undermine the effectiveness of EU sanctions could be seen as violating the principle of sincere cooperation. Giving priority to BITs over EU sanctions could lead to legal consequences for the Member States.

Under Article 29 TEU,[68] the Council can adopt sanctions against governments of non-EU countries, non-state entities (such as companies), and individuals (such as terrorists) to bring about a change in their policy or activity.[69] Furthermore, Article 215 TFEU[70] allows the Council to adopt the necessary measures to implement decisions adopted under Article 29 TEU to ensure they are applied uniformly in all

[62] Case 106/77 *Amministrazione delle finanze dello Stato / Simmenthal* [1978] ECR 1978 p. 629.

[63] Ibid.

[64] Consolidated version of the Treaty on the Functioning of the European Union [2016]. OJ C202/47.

[65] *Theodoros Adamakopoulos and others v Republic of Cyprus: Statement of Dissent of Professor Marcelo Kohen*, ICSID Case No ARB/15/49, para [18].

[66] Consolidated version of the Treaty on European Union [2016]. OJ C202/13.

[67] Consolidated version of the Treaty on the Functioning of the European Union [2016]. OJ C202/47.

[68] Consolidated version of the Treaty on European Union [2016]. OJ C202/13.

[69] EUR-lex (n.d.). *General framework for EU sanctions* [online]. https://eur-lex.europa.eu/EN/legal-content/summary/general-framework-for-eu-sanctions.html.

[70] Consolidated version of the Treaty on European Union [2016]. OJ C202/13.

Member States.

In practice, the imposition of EU sanctions follows a two-stage process. First, under the framework of the Common Foreign and Security Policy ("**CFSP**"), the High Representative of the Union for Foreign Affairs and Security Policy proposes sanctions. This proposal is then discussed by the relevant Council preparatory bodies, such as the Council working party responsible for the geographical region to which the targeted country belongs, the Working Party of Foreign Relations Counsellors, if required, the Political and Security Committee, and the Committee of Permanent Representatives (Coreper II).[71] After that, based on Article 29 TEU, the Council adopts CFSP decision unanimously. Where the decision includes asset freezes or other economic (or financial) sanctions, these measures must be implemented through a Council regulation.[72]

The second stage involves a joint proposal by the High Representative of the Union for Foreign Affairs and Security Policy and the European Commission to adopt the Council regulation under Article 215 TFEU.[73] This regulation is binding on all persons and entities within the EU and ensures their uniform application across all Member States. It is directly applicable and binding in its entirety, as set out in Article 288 TFEU. This means that Member States cannot refuse to apply the regulation or adopt conflicting national measures.

In conclusion, the primacy of EU law, the duty of sincere cooperation under Article 4(3) TEU and the obligation to take all appropriate steps to remove any incompatibilities between agreements and Treaties under Article 351 TFEU lead to a clear result – in the event of a conflict between BIT obligations and EU sanctions, Member States must give primacy to EU law.

However, while the legal hierarchy is clear, practical challenges remain in its implementation. In the author's view, it should also be noted that many BITs include sunset clauses, provisions that allow certain protections to remain in force for up to ten years after termination. As a result, full alignment with EU law may take considerable time. Moreover, the imposition of sanctions is not always foreseeable, as they often arise in response to sudden geopolitical developments. Nevertheless, sanctions the international community's collective response to serious breaches of international law or threats to peace and security.

In this context, even if Member States are unable to unilaterally amend or terminate BITs due to the reciprocal nature of such agreements, this does not justify non-compliance with EU law. The principle of *ex iniuria ius non oritur* supports the position that obligations under BITs cannot take precedence over sanctions that serve a higher purpose. Therefore, where BIT obligations conflict with EU sanctions adopted in accordance with international commitments and EU law, sanctions must prevail.

CONCLUSIONS

BITs concluded between Member States and third countries grant foreign investors a range of guarantees such as fair and equitable treatment, full protection and security, national treatment, most-favoured-nation treatment, protection against discriminatory measures and safeguards against unlawful expropriation. However, when these protections conflict with EU sanctions, Member States must give primacy to EU law. This conclusion follows from several EU law principles and provisions of the Treaties.

First, the principle of the primacy of EU law, as established by the jurisprudence of the CJEU, confirms that EU law must take precedence

[71] Council of the European Union (n.d.). *How the EU adopts and reviews sanctions* [online]. https://www.consilium.europa.eu/en/policies/sanctions-adoption-review-procedure/.

[72] Council of the European Union (n.d.). *How the EU adopts and reviews sanctions* [online]. https://www.consilium.europa.eu/en/policies/sanctions-adoption-review-procedure/.

[73] Ibid.

over all conflicting national acts, including international agreements to which a Member State is a party. This means that when a Member State's obligations under BIT are incompatible with its duties under EU law, EU law prevails. Second, under Article 4(3) TEU, Member States are bound by the duty of sincere cooperation, which obliges them to assist the Union in achieving its objectives and to refrain from any actions that could undermine the effectiveness of EU measures. Third, Article 351 of the TFEU acknowledges the continued validity of international agreements concluded before a Member State's accession to the EU. However, it also imposes an obligation on Member States to take all appropriate steps to remove any incompatibilities between those agreements and Treaties. In the event of a conflict, a Member State must act to resolve it by negotiating the modification of the incompatible provisions, terminating the BIT or considering the incompatible clauses inapplicable. Finally, EU sanctions adopted under Article 29 TEU and implemented through regulations under Article 215 TFEU, are directly applicable and fully binding in all Member States in accordance with Article 288 TFEU. As a result, BITs may not override or obstruct their enforcement.

While the legal hierarchy is clear, practical challenges remain, particularly due to sunset clauses that can prolong the legal effect of BITs for up to ten years after termination. Additionally, sanctions often arise unpredictably in response to geopolitical events, yet they reflect the collective will of the international community. Even where BITs cannot be immediately amended or terminated, the principle of *ex iniuria ius non oritur* supports the view that obligations under BITs cannot override sanctions serving a higher legal and moral purpose. Therefore, in the event of a conflict, EU sanctions must prevail.