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Sanctions as an Institutionalized Structural Barrier in International Investment Law

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1. Round 1

1.1. Reviewer 1

Reviewer:

In the paragraph beginning "The significance of this issue becomes even more apparent," the discussion of secondary sanctions should distinguish more carefully between primary sanctions, secondary sanctions, sectoral sanctions, asset-freezing measures, export controls, financial restrictions, and sanctions adopted pursuant to United Nations Security Council resolutions. These categories differ substantially in legal basis, territorial reach, addressees, enforcement mechanisms, and implications for state responsibility. The current formulation may incorrectly suggest that all sanctions produce equivalent effects under international investment law. A typology should therefore be introduced early in the article and used consistently throughout the analysis.

In the fourth paragraph of the Introduction, the article asks whether sanctions may breach standards such as fair and equitable treatment, full protection and security, indirect expropriation, and free transfer of funds. This research question should be reformulated to distinguish the conduct of the host state from that of the sanctioning third state. An investment treaty claim ordinarily requires an applicable treaty, jurisdiction over the respondent state, conduct attributable to that state, and breach of a specific obligation. The present wording occasionally treats the economic effects of sanctions as though they automatically constitute treaty breaches. The article should clarify that harmful economic consequences alone are insufficient unless the legally relevant conduct can be attributed to the respondent and satisfies the elements of the invoked treaty standard.

In the paragraph stating that sanctions may cause "a form of indirect expropriation," the analysis should engage more rigorously with the established threshold for indirect expropriation. A substantial reduction in profitability or market value does not ordinarily suffice. The author should examine the severity, duration, irreversibility, character, and proportionality of the interference, as well as the extent to which the investor has been substantially deprived of the use, control, or economic benefits of the investment. The distinction between non-compensable regulatory measures and compensable indirect expropriation should also be addressed. Otherwise, the discussion may overstate the likelihood that sanctions-related losses qualify as expropriation.

In the paragraph beginning "Accordingly, in investment law, sanctions are not merely an 'external restriction,'" the discussion of necessity, proportionality, good faith, and respect for third-party rights combines several legal regimes without specifying their doctrinal sources. The author should distinguish between treaty-based security exceptions, customary international law circumstances precluding wrongfulness, general principles of treaty interpretation, international human rights limitations, and rules concerning countermeasures. Necessity under customary international law, for example, has restrictive conditions and differs from force majeure and treaty-specific essential-security clauses. The article should avoid treating these doctrines as a single general defence available to sanctioning or host states.

The final paragraph of the Introduction identifies a broad range of issues, including attribution, causation, compensation, regulatory autonomy, and deprivation of proprietary benefits, but the article does not clearly explain its methodological framework for addressing them. The phrase "descriptive–analytical method" is too general for a legal article of this scope. The author should specify whether the research relies on doctrinal analysis of treaty texts, arbitral awards, customary international law, state practice, sanctions legislation, or comparative treaty practice. The criteria used to select sources and the boundaries of the inquiry should also be stated, particularly whether the article focuses on unilateral sanctions, secondary sanctions, sanctions affecting Iran, or the broader international legal order.

In the paragraph concerning the free transfer of funds, the article should examine the precise wording of transfer provisions and their exceptions. The assertion that sanctions "effectively suspend and neutralize this treaty right" is plausible as a factual observation, but the legal analysis should address whether the host state itself imposed or maintained the restriction, whether the transfer was legally authorized domestically, whether an international bank independently refused the transaction, and whether the treaty contains security, balance-of-payments, taxation, bankruptcy, or law-enforcement exceptions. These factual and treaty-specific distinctions are decisive in determining breach.

In the section "Sanctions as a Risk Beyond the Host State," the sentence "Sanctions transfer investment risk from the level of 'state conduct' to the level of the 'structure of international power'" is theoretically important but requires a stronger connection to positive international law. The author should explain how a structural-power analysis can be translated into legal concepts such as jurisdiction, attribution, aid or assistance, coercion, due diligence, causation, or shared responsibility. Otherwise, the structural argument remains primarily sociological and does not fully resolve the doctrinal problem of identifying a legally responsible actor.

Authors revised the manuscript and uploaded the document.

1.2. Reviewer 2

Reviewer:

In the first paragraph under "The Position of Sanctions in the Architecture of International Investment Law," the sentence "Sanctions effectively neutralize states' protective obligations" is too categorical. Sanctions may impede performance, increase costs, or create conflicting legal obligations, but they do not necessarily extinguish or neutralize treaty obligations as a matter of law. The author should differentiate between factual impediment, legal impossibility, suspension, breach, and justification. It would also be useful to analyse whether a host state retains due-diligence obligations to mitigate sanctions-related harm, provide alternative payment channels, issue regulatory exemptions, facilitate licences, or maintain access to domestic remedies.

In the paragraph discussing the historical limitations of bilateral investment treaties, the article states that the absence of explicit sanctions provisions has "contributed to inconsistent awards and fragmentation in arbitral practice." This conclusion requires direct support through analysis of relevant arbitral decisions. The author should identify specific awards involving sanctions, exchange controls, emergency measures, blocked transfers, financial restrictions, or third-state regulatory pressure, and compare the tribunals' approaches. At present, the article frequently refers to arbitral inconsistency in abstract terms without demonstrating the existence, scope, or doctrinal causes of such inconsistency.

In the paragraph beginning "By targeting the vital arteries of an economy," the statement that a host state "may in practice fail to fulfil obligations such as fair and equitable treatment, full protection and security, and freedom of transfer" needs a more precise analysis of the standard of conduct applicable to each obligation. Fair and equitable treatment, full protection and security, and free-transfer clauses do not impose identical forms of responsibility. Some obligations may require due diligence, others may prohibit specific restrictions, and many transfer clauses contain balance-of-payments, insolvency, criminal-enforcement, or security exceptions. The article should analyse each standard separately rather than grouping them as functionally equivalent guarantees.

In the paragraph describing sanctions as a "self-executing structure," the treatment of overcompliance is insightful but should be legally differentiated from formal state-imposed sanctions. The author should ask when the conduct of banks, insurers, law firms, or multinational corporations can be attributed to a state, and when it remains independent private conduct. The article should also consider whether private actors are responding to legal prohibitions, ambiguous regulatory guidance, enforcement risk, reputational pressure, or internal risk-management policies. This distinction is essential because overcompliance may be economically caused by sanctions without constituting legally attributable state conduct.

In the paragraph on the structural redefinition of investment risk, the author argues that sanctioned countries may be "marginalized in informal market rankings." This economic proposition should be supported by a clearer analytical framework or empirical evidence. The article could identify measurable consequences such as increases in sovereign-risk premiums, financing costs, insurance premiums, discount rates, project abandonment, foreign direct investment decline, or restrictions on correspondent banking. Although the article is doctrinal rather than empirical, carefully selected economic indicators would substantiate the claim that sanctions produce enduring structural effects beyond individual transactions.

In the first paragraph under "Sanctions and the Erosion of the Fundamental Principles of International Investment Law," the analysis of legitimate expectations should be refined. The article currently suggests that any sanctions-induced transformation of the investment environment may impair legitimate expectations. However, arbitral practice generally requires expectations to be reasonable, investment-specific, and based on clear representations, commitments, or the legal framework existing at the time of investment. The author should address whether investors entering politically sensitive or previously sanctioned markets can reasonably expect the absence of future sanctions and whether foreseeability, due diligence, and the investor's own risk assessment affect the availability of protection.

In the paragraph on full protection and security, the statement that the standard includes "legal, administrative, and commercial security" should be qualified. Arbitral tribunals have differed on whether full protection and security extends beyond physical security to legal security, and the scope of the standard depends significantly on treaty wording and applicable jurisprudence. The author should distinguish the physical-protection approach from broader interpretations and should explain whether disruption of banking, insurance, or supply chains falls within the host state's due-diligence obligations. Without this distinction, the article may attribute an excessively expansive content to the standard.

Authors revised the manuscript and uploaded the document.

2. Revised

Editor's decision: Accepted.
Editor in Chief's decision: Accepted.