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ECONOMIC SANCTIONS AND ARTICLE V(2)(B) OF THE NEW YORK CONVENTION: A TOUCHY INTERACTION EXACERBATED BY THE UKRAINE-RUSSIA CONFLICT

Alberto Pomari*

ABSTRACT

States have deployed an unprecedented wave of unilateral sanctions in response to the Russian invasion of Ukraine. They have also escalated the political connotation of economic sanctions by aggressively implementing them extraterritorially. This exercise of lawfare, substituting economic sanctions for armed conflict, raises the question of whether to consider unilateral sanctions elements of public policy within the meaning of Article V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This article seeks to clarify the interplay between Article V(2)(b) and economic sanctions. Explaining the two different approaches that domestic courts implement worldwide, recent court decisions in Ukraine and Russia are analyzed to demonstrate that the once prevailing exclusion of economic sanctions from the purview of Article V(2)(b) in the name of transnational public policy is no

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longer tenable. A three-prong test is proposed to determine when Article V(2)(b) apply to economic sanctions, finding that public policy defense can only be successfully raised when: (1) the sanctions express a specific, ex-ante identifiable public policy; (2) the recognition and enforcement of the award touch and concern the public at large; and (3) recognizing and enforcing the award in the face of sanctions would shock the conscience of the court.

I. INTRODUCTION

The Ukraine-Russia conflict represents a watershed for the international order. From now on, there will be a before and after: the world as we knew it before the war and the geopolitical stage born after the full-scale invasion of Ukraine.¹ Yet, some elements of continuity are easily identifiable—one of which is undoubtedly the exponential increase in governments' use of economic sanctions.² Virtually no day passes without the media announcing a state imposing, stiffening, expanding, or enforcing some new forms of sanctions against foreign individuals, companies, and/or state entities.³ Economic sanctions have indeed become the beating heart of states' foreign policies.⁴ While the Ukraine crisis was not the initiator of this massive wave of sanctions, it has undoubtedly amplified it.

A review of the responses to international crises in the past couple of decades demonstrates the central role of sanctions in forging the new political order.⁵ Before 1990, the United Nations Security Council imposed economic sanctions on only two separate

¹ See Ingrid Wuerth Brunk & Monica Hakimi, *Russia, Ukraine, and the Future World Order*, 116 AM. J. INT'L L. 687, 688 (2022) (arguing the Russian invasion of Ukraine “is among the most—if not the most—significant shocks to the global order since World War II”).

² See generally KERN ALEXANDER, *ECONOMIC SANCTIONS: LAW AND PUBLIC POLICY* xii (2009) (“The United States has a long tradition of using unilateral and extraterritorial sanctions as an important component of its foreign policy.”).

³ See Constantinos Syropoulos et al., *The Global Sanctions Data Base—Release 3: COVID-19, Russia, and Multilateral Sanctions*, 32 REV. INT'L ECON. 12, 12 (2023).

⁴ See generally Mary Ellen O'Connell, *Debating the Law of Sanctions*, 13 EUR. J. INT'L L. 63, 75 (2002).

⁵ See, e.g., *Overview of sanctions and related tools*, E.U. COMM'N, https://finance.ec.europa.eu/eu-and-world/sanctions-restrictive-measures/overview-sanctions-and-related-resources_en#more-about-sanctions (last visited Jan. 14, 2023); see Ethan Kessler, *Working Paper: How Economic Sanctions are Used in U.S. Foreign Policy*, CHI. COUNCIL ON GLOB. AFFS. (Mar. 2, 2022), <https://www.jstor.org/stable/resrep42021>.

occasions.⁶ Conversely, from 1990 through 2017, it approved 176 resolutions to establish, implement, or extend sanctions regimes, with only three decisions to terminate existing sanctions.⁷ As of August 2023 the European Union had more than forty different sanctions regimes against thousands of foreign companies and individuals.⁸ Statistical evidence shows the United States' lead in this trend: since the 1990s, the country has imposed two-thirds of the world's economic sanctions, 75% of which are unilateral.⁹ The United States Treasury 2021 Sanctions Review showed a 933% increase in the designations the Office of Foreign Assets Control issued since 2000, with a total of 9,421 listings in 2021.¹⁰ The United Kingdom follows closely behind: in 2022, 800 sanctions were designated and £22.7 billion worth of assets were frozen under the sole Russian sanctions regime.¹¹ These figures demonstrate two features of the current political era. First, economic sanctions have become the chief tool for states to impose their foreign policy in the

⁶ The only pre-1990 mandatory sanctions regimes approved by the U.N. Security Council were against Rhodesia (1966) and South Africa (1977). See, respectively, S.C. Res. 232 (Dec. 16, 1966); S.C. Res. 418 (Nov. 4, 1977).

⁷ *Graphs on currently active sanctions regimes and restrictions*, U.N. S.C. PRACS. & CHARTER RSCH. BRANCH 1, 9 (June 30, 2017), https://www.un.org/en/sc/repertoire/data/sanctions_regimes_graphs.pdf.

⁸ See *Consolidated Financial Sanctions List*, E.U. COMM'N (Apr. 4, 2024), [https://www.nevisfsrc.com/themencode-pdf-viewer-sc/?tnc_pvwf=ZmlsZT1odHRwczovL3d3dy5uZXZpc2ZzcmMuY29tL3d3wLWNvbnRlbnQvdXBsb2Fkcy8yMDIyLzA3L0VVLUNvbnNvbGlkYXRIZC1GaW5hbmNpYWwtU2FuY3Rpb25zLUxpc3QtMTMtSnVseS0yMDIyLnBkZiZzZXR0aW5ncz0xMTEwMTEwMTEwMTEwMSZsYW5nPWVuLVVT#page=&zoom=auto&pagemode=.](https://www.nevisfsrc.com/themencode-pdf-viewer-sc/?tnc_pvwf=ZmlsZT1odHRwczovL3d3dy5uZXZpc2ZzcmMuY29tL3d3wLWNvbnRlbnQvdXBsb2Fkcy8yMDIyLzA3L0VVLUNvbnNvbGlkYXRIZC1GaW5hbmNpYWwtU2FuY3Rpb25zLUxpc3QtMTMtSnVseS0yMDIyLnBkZiZzZXR0aW5ncz0xMTEwMTEwMTEwMTEwMSZsYW5nPWVuLVVT#page=&zoom=auto&pagemode=)

⁹ Manu Karuka, *Hunger Politics: Sanctions as Siege Warfare*, in *SANCTIONS AS WAR: ANTI-IMPERIALIST PERSPECTIVES ON AMERICAN GEO-ECONOMIC STRATEGY* 51, 55 (Stuart Davis & Immanuel Ness eds., 2022).

¹⁰ *The Treasury 2021 Sanctions Review*, U.S. DEP'T TREASURY 1, 2 (Oct. 2021), <https://home.treasury.gov/system/files/136/Treasury-2021-sanctions-review.pdf> (outlining exponential increase in sanctions since September 11, 2001, terrorist attacks).

¹¹ Office of Financial Sanctions Implementation, HM TREASURY, *OFSI Annual Review 2022-23* (Dec. 2023), https://assets.publishing.service.gov.uk/media/657acdef095987001295e088/OFSI_Annual_Review_2022_to_2023_Strengthening_our_Sanctions.pdf.

international arena.¹² Second, the escalation of their use reached its peak with the ongoing Ukraine-Russia fighting season.¹³

International obligations might act as a guardrail against the political parochialism informing sanctions.¹⁴ Among the sources of such obligations, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereinafter, “Convention”) deserves close scrutiny.¹⁵ Since sanctions primarily target business transactions, and the Convention governs recognition and enforcement of commercial international awards in 172 states, their interaction is almost inevitable.¹⁶ The Convention is a supranational instrument of uniform law drafted to harmonize the recognition and enforcement regime for international arbitral awards, with a view toward promoting international trade.¹⁷ To that end, the Convention narrows the grounds for refusing recognition and enforcement of foreign awards to the specific enumeration of

¹² See Karuka, *supra* note 9, at 55 (“As with siege warfare historically, sanctions have been presented as a gentler alternative to war. A policy of collective punishment, sanctions have been consistently justified as a means to trigger political pressure on governments.”).

¹³ Data regarding some of the states’ responses to Russia’s full-scale invasion of Ukraine is enlightening. As of June 2023, the European Union alone has approved eleven packages of sanctions against any entities found or believed to assist Russia in its invasion of Ukraine. Since February 2022, the U.S. Treasury has implemented more than 2,500 sanctions against Russia and its affiliates. Canada and Japan have also followed suit, targeting more than 1,900 individuals and entities with their economic sanctions. Australia itself has imposed more than 1,000 unilateral individual sanctions. See Press Release, U.S. Dep’t of Treasury, Targeting Key Sectors, Evasion Efforts, and Military Supplies, Treasury Expands and Intensifies Sanctions (Feb. 24, 2023).

¹⁴ See, e.g., Ella Koeze, *Boycotts, Not Bombs: Sanctions Are a Go-To Tactics, With Uneven Results*, N.Y. TIMES (Mar. 11, 2022), <https://www.nytimes.com/interactive/2022/03/11/world/economic-sanctions-history.html>.

¹⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38.

¹⁶ See *Contracting States*, N.Y. ARB. CONVENTION, <https://www.newyorkconvention.org/countries> (last visited Jan. 15, 2024).

¹⁷ See, e.g., *Scherk v. Alberto-Culver*, 417 U.S. 506, 520 n.15 (1973) (“The goal of the Convention . . . was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.”); Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 MICH. J. INT’L L. 115, 117 (2018) (“The New York Convention was adopted to address the needs of the international business community and to facilitate international trade and commerce.”).

Article V, so as to exclude the possibility for domestic courts to espouse chauvinistic, politically motivated objections.¹⁸ Article V(2)(b) is one of the listed exceptions to the Convention's pro-enforcement attitude and provides a safety valve when the foreign award would infringe the enforcing state's public policy.¹⁹ In applying this provision, states are nonetheless bound by the international character of the Convention, which precludes them from concealing parochial goals behind the cloak of public policy.²⁰

Economic sanctions challenge the traditional Convention's repugnancy for parochialism, engendering a considerable degree of tension between competing forces. The seminal *Parsons* case is a classic illustration of this delicate interaction.²¹ There, an American corporation (Overseas) entered into an agreement with an Egyptian company (RAKTA) for the construction of a paperboard mill in Egypt.²² The U.S. State Department was supposed to fund the project.²³ When Egypt started to display a hostile attitude toward the United States in relation to the impending Arab-Israeli Six Day War, the Egyptian and U.S. governments severed their diplomatic ties.²⁴ The sanctions impacted the project in two ways.²⁵ First, the Egyptian government ordered all American nationals to leave Egypt absent the grant of a special visa.²⁶ Second, the U.S. State

¹⁸ Cf. *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 283 (3d Cir. 2003) (explaining that "courts strictly have limited defenses to enforcement to the defenses set forth in Article V of the Convention" to comply with the Convention's basic goal of "liberaliz[ing] procedures for enforcing foreign arbitral awards") (quoting *Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier*, 508 F.2d 969, 973 (2d Cir. 1974)).

¹⁹ UNCITRAL SECRETARIAT, *GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS* 9–10 (George A. Bermann & Emmanuel Gaillard eds., 2017).

²⁰ Cf. Richard A. Cole, *The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards*, 1 OHIO ST. J. ON DISP. RESOL. 365 (1986).

²¹ *Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier*, 508 F.2d 969 (2d Cir. 1974).

²² *Id.* at 972.

²³ *Id.*

²⁴ See *A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: Egypt*, OFF. HISTORIAN, U.S. DEP'T OF STATE, <https://history.state.gov/countries/egypt#:~:text=The%20United%20Arab%20Republic%20severed,June%201967%20Arab%20Israeli%20War> (last visited Jan. 15, 2024)

²⁵ *Parsons*, 508 F.2d at 972.

²⁶ *Id.*

Department withdrew the funds.²⁷ Consequently, Overseas notified RAKTA of their inability to complete the project.²⁸ Arbitration ensued and RAKTA prevailed in the dispute.²⁹ Since most of Overseas' assets were in the United States, RAKTA sought confirmation of the arbitral award in the Southern District of New York under the New York Convention.³⁰

Considerable tension emerged between the sanctions levied, which are arguably the most powerful arrows in the political quiver of governments, and Article V(2)(b) of the Convention, which has an international character that mandates an anti-parochial approach.³¹ Overseas argued that, "as a loyal American citizen," it must abide by the foreign policy decisions of its government, justifying its abandonment of the project with RAKTA due to the adopted sanctions.³² Indeed, completing the project would contravene U.S. public policy as it defied the "national policy" expressed by the sanctions.³³ Conversely, RAKTA strenuously opposed the public policy argument, pointing to Article V(2)(b) as a narrow exception within the Convention's broader pro-enforcement spirit.³⁴ The Second Circuit rejected the idea that unilateral sanctions are expressions of public policy for purposes of Article V(2)(b) because these measures are parochial tools geared toward transient political goals of foreign policy.³⁵

For nearly forty years, scholars and practitioners regarded the influential *Parsons* decision as gospel, with numerous jurisdictions implementing the decision worldwide, thereby resolving the tension in favor of the Convention's international spirit.³⁶ However, the dramatic upheaval caused by the Ukraine-Russia war escalated the tension and severely undermined the long-standing *Parsons* holding.³⁷ To advance their states' war-related or foreign policy-related interests, domestic courts started to bend the public policy exception of Article V(2)(b) into a broad national security defense, masquerading the political provincialism of

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 974.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* ("In equating 'national' policy with United States 'public' policy, the appellant quite plainly misses the mark.").

³⁶ *See infra* Part IV(A).

³⁷ *See infra* Part V.

unilateral sanctions as public policy.³⁸ The Current upended socio-political environment has dictated this metamorphosis into a national security umbrella designed to act as a parochial shield. Recent decisions in Ukraine and Russia—the two countries most directly impacted by the latest developments of geopolitics—starkly illustrate this rising trend.³⁹

This article proceeds as follows. In Part II, the political nature of economic sanctions as powerful foreign policy tools that take precedence over any purported legal restraints is explored. In Part III, the public policy defense of Article V(2)(b) of the Convention is analyzed, addressing the three distinct notions of domestic public policy, international public policy, and transnational public policy. Next, in Part IV, the conclusions of the first two parts are combined to illustrate the inherent tension between economic sanctions and Article V(2)(b). The two solutions often reached by courts are then explored. First, it is argued the majority approach has traditionally followed *Parsons* and excluded economic sanctions from the scope of Article V(2)(b) in the name of anti-parochialism. Second, it is shown the once minority approach to include economic sanctions within the concept of international public policy might soon turn into the majority. Part V offers evidence that courts in Russia and Ukraine, two of the countries with the highest stakes in the current geopolitical earthquake, have already implemented a profound departure from *Parsons*, interpreting Article V(2)(b) as a catch-all national security defense. In Part VI, a three-prong test is proposed to fight off this devolution while still allowing for political realism, concluding that its application to economic sanctions furthers the consistency goal of the Convention. Part VII provides closing remarks about the current fork in the road that courts face and its ramifications for the Convention's longevity.

³⁸ See, e.g., Case No. 3K-3-255-611/2022, Lithuanian Supreme Court, Civil Cases Division (Nov. 9, 2022); Avia FED Serv. JSC v. Artem State Joint Stock Holding Co., Case No. 824/100/19, Ruling of the Supreme Court of Ukraine (Feb. 13, 2020); Ostchem Holding Limited v. Odesa Portside Plant, Ukrainian Supreme Court, case No. 824/241/2018 (June 8, 2021) (Ukraine); Uraltransmash v. PESA, Verkhovnyi Sud Rossiiskoï [Russian Federation Supreme Court], case No. 309-EC21-6955 (Dec. 9, 2021) (Russ.). For a more extensive analysis on these cases, see *infra* Part IV.

³⁹ See generally Syropoulos et al., *supra* note 3, at 13–15.

II. THE POLITICAL DNA OF ECONOMIC SANCTIONS

History has unequivocally revealed that governments cannot survive without a distinctive foreign policy capable of promoting their political values beyond their borders. Under international law, a government may theoretically exist and be recognized based merely on the effective authority it exerts domestically, known as the effective control requirement.⁴⁰ However, in reality, no government has been able to endure without the ability to pursue and further its interests in external politics.⁴¹ The aftermath of the Cold War neatly demonstrated that influencing foreign countries, their economies, political philosophies, policy, and values are indispensable ingredients for the political survival of domestic agendas.⁴² Over the past couple of decades, rampant globalization has further underscored the vitality of governments' foreign affairs.⁴³ The interdependence among economies and societies has irreversibly bound executives' domestic actions' needs for a robust foreign policy, compelling these leaders to seek ways and resources to articulate, enforce, and impose their stance on the world stage.⁴⁴

⁴⁰ U.N. SCOR, 5th Sess., Supp. Jan.-May 1950, U.N. Doc. S/1466 (1950); *see also* STEFAN TALMON, *RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW: WITH PARTICULAR REFERENCE TO GOVERNMENTS IN EXILE* 64 (2001).

⁴¹Instructive is President Aristide's case. In 1991, a military junta successfully executed a coup d'état against Haiti's President-elect Jean-Bertrand Aristide. For more than three years, the coupe regime was able to exercise full control over Haiti's territory and people, thus meeting the effective control test. Nonetheless, the military junta eventually had to step down because of its inability to develop a foreign policy capable of sparking international relations. *See* Edward Collins, Jr. & Timothy M. Cole, *Regime Legitimation in Instances of Coup-Caused Governments-in-Exile: The Cases of Presidents Makarios and Aristide*, 5 J. INT'L L. & PRAC. 199–200 (1996).

⁴² *See, e.g.*, KAI HE, *CHINA'S CRISIS BEHAVIOR: POLITICAL SURVIVAL AND FOREIGN POLICY AFTER THE COLD WAR* 17–18 (2016) (discussing the political-survival model to suggest that “how to deal with a foreign policy crisis depends on how the top decision-makers perceive their political survival status at the time of the crisis”).

⁴³ *See* Charles J. Dunlap Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT'L AFFS. 146, 146–47 (2008).

⁴⁴ CECIL V. CRABB, *AMERICAN FOREIGN POLICY IN THE NUCLEAR AGE* 1 (2d ed. 1972) (“Reduced to its fundamental ingredients, foreign policy consists of two elements: national objectives to be achieved and the means for achieving them. The interaction between national goals and the resources for attaining them is the perennial subject of statecraft.”).

Foreign policy is also instrumental in the international race to gain superpower status as states that cannot effectively persuade or coerce other countries to align with the norms and interests, their foreign policy promotes risk being relegated to irrelevance.⁴⁵ International law is a fierce arena: norms and policies that are not complied with, and whose violations are left unpunished, will sooner or later be replaced by alternative rules.⁴⁶ States without authority sufficient to impose their foreign policy will also find themselves replaced in the global chessboard for political primacy.⁴⁷

At this point, this article draws its first crucial conclusion. Foreign policy serves two intrinsic goals: domestic survival and international primacy, both driven by national political interests.⁴⁸ This political connotation stands as the ultimate culprit behind international disagreements over foreign situations. It is but a truism that most international conflicts arise from conflicting political interests rather than genuine legal or ideological disputes. Consequently, nations find themselves challenged to influence hostile countries and align them with their foreign policy objectives. In the international context, though, many traditional compliance instruments have proven to be blunt due to the nature of the players involved—they are all equal sovereigns.⁴⁹ Since sovereignty entails freedom to regulate oneself and set one’s own policies, it poses a hurdle to the transnational crystallization of a state’s foreign policy.⁵⁰ Accordingly, states strive to develop impactful measures

⁴⁵ See Brian C. Schmidt, *The Primacy of National Security*, in FOREIGN POLICY: THEORIES, ACTORS, CASES 188, 193 (Steve Smith et al. eds., 2016) (arguing offensive realism “compels foreign policy makers to maximize their state’s relative power position”).

⁴⁶ Diana Panke & Ulrich Petersohn, *Why International Norms Disappear Sometimes*, 18 EUR. J. INT’L RELS. 720, 721 (2011) (“[T]he necessary condition for norm disappearance is that an actor violates a norm while no central enforcement authority or individual state is willing or capable of punishing non-compliance. This can trigger non-compliance cascades, in which other actors also start violating the norms instead of sanctioning non-compliance behavior.”).

⁴⁷ *Id.*

⁴⁸ Cf. Donald E. Nuechterlein, *National Interests and Foreign Policy: A Conceptual Framework for Analysis and Decision-Making*, 2 BRIT. J. INT’L STUD. 246, 264 (1976) (arguing national interests “may be divided into four basic needs or requirements which account for all of a country’s foreign policies”).

⁴⁹ Hans J. Morgenthau, *The Problem of Sovereignty Reconsidered*, 48 COLUM. L. REV. 341, 344 (1948).

⁵⁰ *Id.* (explaining that, “aside from these few common and necessary rules of international law, each individual state is indeed the highest law giving authority insofar as the rules of international law binding upon it are

to ensure international acceptance or, at the very least, acquiescence to their (foreign) political interests.⁵¹

Traditionally, states design and employ three categories of norm enforcement tools to advance their foreign policy: (1) social sanctions, (2) economic sanctions, and (3) military operations.⁵² Social sanctions primarily aim to expose an actor's violations to public opinion, thereby triggering diplomatic isolation and casting the actor out from the international community.⁵³ Because the effectiveness of these reputation-smearing tools depend on the fear of losing social status, social sanctions are ineffective against actors that are indifferent to stigmatization.⁵⁴ This limitation is evident in the current geopolitical landscape, where countries like Iran, Russia, and Belarus openly embrace and take pride in their anti-Western stance, rendering social sanctions ineffective.⁵⁵ When diplomacy and social sanctions fail, punitive measures kick in and can take the form of economic sanctions and/or military actions.⁵⁶ Given the constrained use of military hostilities in modern times, states have increasingly turned to economic sanctions aimed at hurting offending actors' economies.⁵⁷ The strategy behind these measures

concerned," further adding that "no rules of international law are binding upon it except those it creates for itself through consent[;]" in essence, "there is no law giving authority above it, for there is no state or group of states which can legislate for it").

⁵¹ Samuel P. Huntington, *Why International Primacy Matter*, 17 INT'L SEC. 68, 70 (1993).

⁵² Jennifer L. Erickson, *Punishing the violators? Arms embargoes and economic sanctions as tools of norm enforcement*, 46 REV. INT'L STUD. 96, 100 (2019).

⁵³ See Alastair Iain Johnston, *Treating International Institutions as Social Environments*, 45 INT'L STUD. Q. 487, 499 (2001) (arguing social sanctions typically involve "shaming, shunning, exclusion, and demeaning, or dissonance derived from actions inconsistent with role and identity"). Although not exclusively, social sanctions mainly operate with respect to violations of human rights. See, e.g., Elvira Dominguez-Redondo, *The Universal Periodic Review—Is There Life Beyond Naming and Shaming in Human Rights Implementation?*, 4 N.Z. L. REV. 673, 673 (2012) ("Naming and shaming' is the most widely used pressure mechanism by international bodies in charge of monitoring human rights compliance.").

⁵⁴ Johnston, *supra* note 53, at 500.

⁵⁵ See Erickson, *supra* note 52, at 96.

⁵⁶ HOSSEIN ASKARI ET AL., *ECONOMIC SANCTIONS: EXAMINING THEIR PHILOSOPHY AND EFFICACY* 4 (2003).

⁵⁷ *Id.* ("[T]he imposition of economic sanctions is a practical response to domestic political disputes as much as an instrument to advance the interests of sender countries in international disputes."). For the limited

is to cripple the economy of target states and entities, exerting pressure without resorting to brute force.⁵⁸ This approach is indeed directed at obtaining compliance by starving the offending actors economically.⁵⁹

While economic sanctions may be intended to protect human rights and redress international law violations, they are in fact inherently political in their nature.⁶⁰ The definition of economic sanctions as “the deliberate, government-inspired withdrawal, or threat of withdrawal, of customary trade or financial relations” clearly reflects these measures’ political DNA.⁶¹ Sanctions have effectively become the contemporary substitute for armed conflicts; their utilization has seen, over the past decade, such a dramatic spike that economic sanctions can rightfully be described as today’s most potent tool of “lawfare.”⁶² As this term implies, economic sanctions are ultimately a cocktail of national security considerations, domestic interests, and political ambitions.⁶³ To mention one example, the regulation governing sanctions in the United Kingdom explicitly permits the use of these instruments to protect “the interest of national security” and further “foreign policy objective[s] of the government.”⁶⁴ Indeed, unilateral sanctions serve as the primary political instrument available to governments to protect, advance, and assert their parochial interests.⁶⁵ Moreover, the latest extraordinary challenges to the international order have spurred an unprecedented wave of economic sanctions as part of a larger

circumstances in which international consensus permits war, *see generally* U.N. Charter art. 51 (prohibiting any recourse to military force to solve international disputes with the exception of the collective enforcement action and the right of individual or collective self-defense).

⁵⁸ ASKARI ET AL., *supra* note 56, at 4.

⁵⁹ *Id.*

⁶⁰ *Cf.* E.U. COMM’N, *supra* note 5 (declaring that “[i]n spite of their colloquial name ‘sanctions’, EU restrictive measures are not punitive. They are intended to bring about a change in policy or activity by targeting entities and individuals in non-EU countries, responsible for such malignant behaviour.”).

⁶¹ GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED* 3 (3d ed. 2009).

⁶² *See* Dunlap Jr., *supra* note 43, at 146 (2008) (defining lawfare “as the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective”).

⁶³ *Id.*

⁶⁴ Sanctions and Anti-Money Laundry Act 2018, c. 1 § 1(2) (UK).

⁶⁵ *See, e.g.*, Kessler, *supra* note 5, at 15 (“[S]anctions have served the parochial interests of policymakers in the sanctions-imposing states by punishing actions by target states seen as unacceptable, fulfilling domestic political desires.”).

political agenda that aims to establish a new geopolitical framework.⁶⁶

Even if one were to believe that sanctions are instruments nations devise to redress international wrongdoings, international law offers little support to curb the political motives and parochial objectives driving these actions.⁶⁷ The absence of a customary duty to maintain friendly commercial relationships with other entities confers unrestricted liberty on states to impose economic sanctions, so long as they do not infringe on any specific obligations voluntarily undertaken by the state.⁶⁸ The famous case of *Nicaragua v. United States* decided by the International Court of Justice (ICJ) in 1986 explicitly acknowledged this fundamental reality.⁶⁹ With respect to the trade embargo the United States imposed on Nicaragua, the court ruled that, “A State is not bound to continue particular trade relations longer than it sees fit to do so in

⁶⁶ According to the U.S. Department of Treasury Fact Sheet, the United States has sanctioned—since February 2022—over 2,500 Russia-related entities, and over 80% of Russia’s banking sector by assets are under U.S. sanctions, including the top 10 Russian-owned banks; all members of the Russian State Duma (450) and the Federation Council (170) have been sanctioned, as well as 47 Russian governors. *See* Press Release, U.S. Dep’t of Treasury, FACT SHEET: Disrupting and Degrading – One Year of U.S. Sanctions on Russia and Its Enablers (Feb. 24, 2023); *see also* Research Briefing, House Commons Library, Sanctions Against Russia (Sept. 20, 2023). In response to the 2022 invasion of Ukraine, the United Kingdom has sanctioned 1,627 new individuals, 238 entities, 29 banks with global assets worth £1 trillion, and 129 oligarchs with a combined net worth of over £145 billion; additionally, £18 billion of Russian assets in the United Kingdom have been frozen. *See EU sanctions against Russia explained*, COUNCIL OF EU & EUR. COUNCIL, <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/> (last visited Mar. 27, 2024). Similarly, the European Union has reacted by imposing sanctions on 1800 individuals and entities, freezing €21.5 billion of assets, and banning over €43.9 billion in exported goods to Russia and €91.2 billion in imported goods. *Id.*

⁶⁷ *See* Paul de Waart, *Economic Sanctions Infringing Human Rights: Is There a Limit?*, in *ECONOMIC SANCTIONS UNDER INTERNATIONAL LAW: UNILATERALISM, MULTILATERALISM, LEGITIMACY, AND CONSEQUENCES* 135 (Ali Z. Marossi & Marisa R. Bassett eds., 2015) (arguing under international law “it is difficult to draw a line between a State’s own legitimate economic interests and illegal pressure put upon another State”).

⁶⁸ *See* Erickson, *supra* note 52, at 101–02.

⁶⁹ *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14 (June 27).

the absence of a treaty commitment or other specific legal obligation.”⁷⁰

The political soul of economic sanctions ultimately prevails even when apparent international obligations would seem to apply.⁷¹ For instance, the international regulation of countermeasures might be invoked to apply some (very) loose restrictions to the sanctioning state.⁷² The *Air Services* tribunal defines countermeasures as measures “contrary to international law but justified by a violation of international law allegedly committed by the State against which they are directed.”⁷³ This means states should only be permitted to adopt economic sanctions in response to unlawful actions of another state—not solely for achieving political objectives informing their foreign policy.⁷⁴ The International Law Commission’s Articles (ILC “Articles”) on the Responsibility of States for Internationally Wrongful Acts support this customary understanding.⁷⁵ Although not customary law themselves, the Articles are generally recognized as a good delineation of what international customs have come to recognize.⁷⁶ Under the Articles, countermeasures should: (1) be

⁷⁰ *Id.* ¶ 276.

⁷¹ See *Report of the International Law Commission on the work of its fifty-third session*, [2001] 2 Y.B. Int’l L. Comm’n 10, U.N. Doc. A/56/10, available at https://legal.un.org/ilc/documentation/english/reports/a_56_10.pdf.

⁷² *Id.* (clarifying that countermeasures taken by states in response to international wrongdoing “have taken such forms as economic sanctions or other measures”); see also Mary Ellen O’Connell, *Debating the Law of Sanctions*, 13 EUR. J. INT’L L. 63, 75 (2002) (“Countermeasures law has continued to adapt to the non-war setting and provides a set of appropriate standards that are equally applicable to multilateral and unilateral measures.”).

⁷³ *Air Services Agreement Case (France v. U.S.)*, 18 R.I.A. 416, § 83 (1978), <https://www.iilj.org/wp-content/uploads/2016/08/Air-Services-Arbitration-France-v.-US.pdf>.

⁷⁴ See Lori F. Damrosch, *The Legitimacy of Economic Sanctions as Countermeasures for Wrongful Acts*, 37 BERKELEY J. INT’L L. 249, 254 (2019) (distinguishing between economic sanctions “imposed for reasons of foreign policy” and those imposed for “the purpose of enforcing international law by inducing the target to come into compliance with its legal obligations”).

⁷⁵ See U.N. Doc A/56/10, *supra* note 71, ¶¶ 76–77.

⁷⁶ *Cf. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment on the Merits, 2005 I.C.J. Rep. 168, ¶¶ 160, 293 (Dec. 19) (explicitly referencing the International Law Commission’s Articles); see also *Cargill, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, § 381 (Sept. 18, 2009) (“The possibility that countermeasures may be invoked as a circumstance precluding the

adopted only against states which are “responsible for an internationally wrongful act,”⁷⁷ (2) have the duration limited to the time of non-compliance,⁷⁸ and (3) be proportional to the wrongdoing.⁷⁹ Nevertheless, the current practice of economic sanctions hardly satisfies any of these requirements as these measures are frequently tailored to achieve overarching political goals.⁸⁰ Not to mention states can easily circumvent the minimal procedural requirements set forth in the Articles by invoking the urgent (political) nature of sanctions.⁸¹

The protection of human rights is arguably the most stringent constraint that international law holds states to.⁸² Article 50 of the ILC Articles mandates this limitation, and courts routinely uphold it.⁸³ The ICJ also signaled a growing commitment to

wrongfulness of an act is an aspect of customary international law.”). For more information on the customary law regarding circumstances precluding wrongfulness, *see* U.N. Doc A/56/10, *supra* note 72, at ch. V.

⁷⁷ U.N. Doc A/56/10, *supra* note 71, at art. 49(1).

⁷⁸ *Id.* at art. 49(2).

⁷⁹ *Id.* at art. 51.

⁸⁰ *Cf.* ALI Z. MAROSSO & MARISA R. BASSET, *ECONOMIC SANCTIONS UNDER INTERNATIONAL LAW: UNILATERALISM, MULTILATERALISM, LEGITIMACY, AND CONSEQUENCES* 135 (2015) (arguing under international law, many unilateral sanctions should be declared unlawful because “[e]conomic sanctions are said to be used not so much to restore legality as to force or at least influence a country, entity, or individual to change policies (or even its government), or at least to demonstrate the sender’s opinion about the other’s policies”).

⁸¹ *See* U.N. Doc A/56/10, *supra* note 71, at art. 52(2) (“Notwithstanding paragraph 1(b) [creating a duty to notify and offer to negotiate with the target state] the injured State may take such urgent countermeasures as necessary to preserve its rights.”).

⁸² *See* Ingrid Wuerth, *International Law in the Post-Human Rights Era*, 96 *TEX. L. REV.* 279 (2017) (arguing international law nowadays calls for a “reorientation of sovereignty in favor of human rights couched as either the right of other states to intervene or as the responsibility of sovereigns to protect individual rights”).

⁸³ *See, e.g.*, *Joined Cases C-402 & C-415/05P, Kadi, Al Barakaat Int’l Found. v. Comm’n*, 2008 E.C.R. I-6352 (refusing to implement the sanctions imposed by the U.N. Security Council against individuals and organizations designated by the Security Council Sanctions Committee due to human rights violations); *Case T-727/08, Abdelrazik v. Can. (Minister of Foreign Affairs)*, [2010] 1 F.C.R. 267 (holding that U.N. Security Council sanctions against a Canadian citizen designated as providing financial support to Al-Qaeda were unlawful in that they violated the human rights of a Canadian citizen).

protecting human rights against excessive economic sanctions.⁸⁴ Between the lines of the order for interim measures in the *Alleged Violations* dispute between Iran and the United States, the ICJ held that sanctions affecting “the importation and purchase of goods required for humanitarian needs” cannot be justified by the fact that they are “necessary to protect . . . essential security interests.”⁸⁵ This landmark decision attempts to establish a supranational legal framework with binding authority over sanctioning measures pursued in the name of foreign policy and national security interests.⁸⁶ Nevertheless, jealous of its autonomy in pursuing political interests in foreign relations, the United States has criticized the ICJ, defied the interim order, and toughened sanctions against Iran.⁸⁷ Another touchdown for politics against international law.

The Iran-United States case is a quintessential manifestation of the dramatic tension between the political nature of economic sanctions and the principles of international law.⁸⁸ States often utilize economic sanctions, which traditionally receive substantial discretion with little-to-no judicial oversight as tools to advance

⁸⁴ For an in-depth analysis of the ICJ’s Order with respect to the interplay between economic sanctions and human rights, see Seyed M. Razavi & Fateme Zeynodini, *Economic Sanctions and Protection of Fundamental Human Rights: A Review of the ICJ’s Ruling on Alleged Violations of the Iran-U.S. Treaty of Amity*, 29 WASH. INT’L L.J. 303 (2020).

⁸⁵ *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. U.S.) Provisional Measures*, 2018 I.C.J. 24, ¶¶ 32, 69 (Oct. 3).

⁸⁶ *Id.*

⁸⁷ See Roberta Rampton et al., *U.S. withdraws from international accords, says U.N. world court ‘politicized,’* REUTERS (Oct. 3, 2018), <https://www.reuters.com/article/us-usa-diplomacy-treaty/u-s-withdraws-from-international-accords-says-u-n-world-court-politicized-idUSKCN1MD2CP#> (discussing how the then U.S. National Security Adviser John Bolton publicly criticized the ICJ for being “politicized and ineffective” and threatened that the United States would withdraw from international agreements that could expose it to other binding decisions by the ICJ).

⁸⁸ Cf. Anthony M. Solis, *The Long Arm of U.S. Law: The Helms-Burton Act*, 19 LOY. L.A. INT’L & COMP. L.J. 709, 711 (1997) (arguing the distinction between the foreign policy nature of sanctions and international law is important because “[international law] operates within a delicate regime that depends largely on the volition of its followers, while [U.S. foreign policy] is a function of U.S. hegemony and the resources—political, economic, and military—that the United States can bring to bear to effectuate its policies”).

their foreign policy objectives.⁸⁹ By contrast, international law places importance on adhering to certain limitations deemed essential to uphold the fundamental values of the international community.⁹⁰ This tension is especially problematic in the current international landscape as international law obligations may impede attainment of the political and military objectives behind sanctions. While the ability to unilaterally impose one's own foreign policy is conducive to international political hegemony, violations of international law are increasingly frowned upon, carrying the risk of backfire. Nonetheless, when faced with the uncomfortable decision to either prioritize compliance with international law or strategic national interests, states choose the latter option.⁹¹ In other terms, political parochialism ordinarily trumps international duties and commitments.

The issue of extraterritoriality vividly demonstrates the inherent parochialism within the implementation of economic sanctions and its ability to override the limitations that should spring

⁸⁹ Many jurisdictions limit judicial scrutiny over foreign policy matters by relying on the “one voice” doctrine or similar grounds. *See, e.g.*, *Zivotofsky v. Kerry*, 576 U.S. 1, 46 (2015) (holding unconstitutional acts that “would not only prevent the Nation from speaking with one voice but also prevent the Executive itself from doing so in conducting foreign relations”); *Deutsche Bank AG v. Cent. Bank of Venezuela*, [2022] EWHC (Comm) 2040, ¶191 (UK) (acknowledging “the fundamental rule of UK constitutional law that the executive and the judiciary must speak with one voice on issues relating to the recognition of foreign states, governments and heads of state”); *Cons. Stato*, 27 luglio 2011, n. 4502 (It.) (excluding judicial review of acts “pertaining to the fundamental activities of a democratic country in the realm of international affairs or relations between constitutional actors, which require latitude in order to be carried out”).

⁹⁰ For instance, under no circumstances can states violate or derogate from rules of *jus cogens* because they embody the fundamental values and interests shared by the International Community as a whole. *See* THOMAS WEATHERALL, *JUS COGENS: INTERNATIONAL LAW AND SOCIAL CONTRACT* 16 (2015) (arguing that norms of *jus cogens* limit the freedom of States “as an expression of the social contract of the international community”).

⁹¹ A glaring example is the common practice by the five permanent members of the U.N. Security Council to use their veto power to further their national interests notwithstanding overt international law violations. *See, e.g.*, Jennifer Trahan, *Legal Issues Surrounding Veto Use and Aggression*, 55 CASE W. RES. J. INT’L L. 93, 141 (2023) (noting for a long time “vetoes were simply used by the US and USSR to protect their own geopolitical interests, regardless of whether the UN’s Purposes and Principles or obligations under international law were being violated”).

from these measures' international character. Extraterritoriality is a fundamental principle that should govern the implementation of sanctions and stems from the core concept that all states are equal sovereign entities in the international community.⁹² According to this principle, restrictive measures should only have binding force over natural and legal entities falling under the jurisdiction of the imposing state.⁹³ Although scholars have proposed different tests, extraterritoriality is typically said to occur when a state asserts jurisdiction over conduct or actors lacking a substantial nexus with its territory.⁹⁴ From the perspective of international law, extraterritoriality of economic sanctions is an unacceptable violation of the bedrock principle upon which the entire international community is built.⁹⁵ From a purely political standpoint, extraterritoriality is a crucial tool to propagate and enforce the state's foreign policy.⁹⁶

Countries have repeatedly adopted and implemented extraterritorial sanctions.⁹⁷ Even jurisdictions that traditionally disapprove extraterritoriality, such as the European Union, have resorted to it to safeguard Western values and foreign policies from the political threat posed by Russia's invasion of Ukraine.⁹⁸ Article 13(d) and (e) of the E.U. Regulation No. 833/2014 and Article 17(d) and (e) of the E.U. Regulation No. 269/2014 exemplify measures targeting entities with even minor connections to the European Union, regardless of whether the transaction violating the sanctions against Russia occurs within the Union's territory or has any impact

⁹² The *Antelope*, 23 U.S. 66, 122 (1825) ("No principle of general law is more universally acknowledged, than the perfect equality of nations. It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone.").

⁹³ *Id.*

⁹⁴ See Susan Emmenegger, *Extraterritorial Economic Sanctions and Their Foundation in International Law*, 33 ARIZ. J. INT'L & COMP. L. 631, 641 (2016) ("Under the substantial territorial nexus approach, two important categories of cases are included in the definition of territorial jurisdiction: first, the cases where conduct occurs, in substantial part, within the domestic territory. Second, the cases where conduct outside territorial borders produces substantial effects within those borders.").

⁹⁵ See Council Regulation 2271/96, of Nov. 22, 1996 O.J. (L 309) 1, 1 (EC) ("[B]y their extra-territorial application such laws, regulations and other legislative instruments violate international law.").

⁹⁶ See Emmenegger, *supra* note 94, at 647–49.

⁹⁷ See, e.g., Cuban Liberty and Democratic Solidarity Act of 1995 (Helms-Burton), 22 U.S.C.A. §§ 6021–6091.

⁹⁸ See Council Regulation 833/2014, 2014 O.J. (L 226/1) 1 (EU); Council Regulation 269/2014, 2014 O.J. (L 78/6) 6 (EU).

there.⁹⁹ The common criticism is that economic sanctions with extraterritorial reach cease to be “consistent with international law,” and instead morph into “a codification of . . . foreign policy.”¹⁰⁰ This is precisely the principle that states are vigorously attempting to establish as a corollary of extraterritorial sanctions’ legitimacy. In other words, states seek to legitimize that political considerations underlying their economic sanctions should not automatically comport with the international legal framework but should shape and transform it.¹⁰¹ In Thomas Mann’s words, “everything is politics”—economic sanctions included.¹⁰²

III. THE PUBLIC POLICY EXCEPTION OF THE NEW YORK CONVENTION

The highly political nature of economic sanctions clashes with the international character of the New York Convention. In particular, the tension surfaces when dealing with the public policy defense of Article V(2)(b), which empowers domestic courts to decline the recognition and enforcement of a foreign arbitral award if doing so would be “contrary to the public policy of that country.”¹⁰³ Since the Convention does not define the term “public policy,” interpretative uncertainties arise as to the elements that may justify such a denial. Strict textualism would give domestic courts considerable discretion in determining the enforcing state’s public policy. However, this interpretation opens the door to parochial misuses of Article V(2)(b).¹⁰⁴ The close link between a state’s public

⁹⁹ *Id.*

¹⁰⁰ Solis, *supra* note 88, at 711; *see also* ALEXANDER, *supra* note 2, at xii (“The United States has a long tradition of using unilateral and extraterritorial sanctions as an important component of its foreign policy.”).

¹⁰¹ *Cf.* Brice M. Clagett, *Title III of the Helms-Burton Act is Consistent with International Law*, 90 AMER. J. INT’L L. 434, 440 (1996) (noting that, “Title III is a powerful dissuasive to the immoral trafficking in stolen property that today plays a major role in keeping Castro in funds and therefore in power, and that directly affects the rights and interests of the United States and its nationals. It is a legitimate exercise of U.S. jurisdiction, and the international rule of law should be a principal beneficiary of its enactment.”).

¹⁰² THOMAS MANN, *THE MAGIC MOUNTAIN* (1924).

¹⁰³ *See* UNCITRAL SECRETARIAT, *supra* note 19, at art. V(2)(b).

¹⁰⁴ *Cf.* Homayoon Arfazadeh, *In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception*, 13 AM. REV. INT’L ARB. 43, 50–51 (2002) (maintaining that applying Article V(2)(b) on the basis of national interests and domestic legal principles would constitute “a serious abuse or misuse of the public policy exception”).

policy and its foreign policy may lead a court to naturally prioritize the state's political and local interests when evaluating the foreign arbitral award's enforcement.¹⁰⁵ Justice Burrough's oft-quoted characterization of the public policy defense as a "very unruly horse . . . never argued at all but when other points fail powerfully warns about this risk of political abuses and opportunism."¹⁰⁶

By contrast, Article V(2)(b)'s legislative history suggests a restrictive reading. The public policy exception of the 1927 Geneva Convention required that, for recognition and enforcement, the award be "not contrary to the public policy or the principles of law of the country."¹⁰⁷ Mindful of the overly sweeping language, the drafters of the New York Convention deliberately dropped the reference to the "principles of law of the country."¹⁰⁸ This omission indicates an intent to establish a more rigorous and internationally uniform concept of public policy.¹⁰⁹ Purposivism reinforces the need for an autonomous notion devoid of local biases.¹¹⁰ The New York Convention serves the goal of promoting uniformity across countries in recognizing and enforcing foreign awards.¹¹¹ Like any other instrument of uniform law, its essence and purpose would be seriously undermined, if not entirely frustrated, if national courts

¹⁰⁵ See Helen M. Ingram & Suzanne L. Fiederlein, *Traversing Boundaries: A Public Policy Approach to the Analysis of Foreign Policy*, 41 W. POL. Q. 725, 725 (1988) (arguing that "complex interdependence" characterizes public policy and foreign policy since "the line between domestic and international affairs has blurred").

¹⁰⁶ *Richardson v. Mellish*, 2 Bing. 229, 252 (1824) (UK).

¹⁰⁷ Geneva Convention on the Execution of Foreign Arbitral Awards, Sep. 26, 1927, 92 L.N.T.S. 301, art. 1(e).

¹⁰⁸ See Nivedita Chandrakanth Shenoy, *Public Policy Under Article V(2)(b) of the New York Convention: Is There a Transnational Standard?*, 20 CARDOZO J. CONFLICT RESOL. 77, 84 (2018).

¹⁰⁹ See *Kashani v. Tsann Kuen China Enterprise Co.*, 118 Cal. App. 4th 531, 555 (2004) ("Considering the legislative history of Article V(2)(b), the [New York] Convention can be said to refer to 'international public policy' as distinct from 'domestic public policy.'").

¹¹⁰ The New York Convention, as any other international treaty, is to be interpreted in light of its object and purpose. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 325(1) (1986)). The purpose of the New York Convention is to "encourage the enforcement of international arbitration awards and unify the standards by which these awards are enforced in its member countries." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520, n. 15 (1974).

¹¹¹ *The New York Convention*, <https://www.newyorkconvention.org> (last visited May 28, 2024).

were to apply Article V(2)(b) through the lenses of their domestic law and policy.¹¹²

Thus, a clear line of demarcation must be drawn between the domestic public policy of a state and the concept of public policy the New York Convention envisions.¹¹³ Domestic public policy, also referred to as domestic public order, comprises the legal system's fundamental principles, as well as its social, political, and economical strategic interests.¹¹⁴ It comes as no surprise that domestic public policy places great importance on localism and political interest safeguarding.¹¹⁵ When acting under the umbrella of domestic public policy, courts are indeed empowered and required to decline recognition and enforcement of foreign decisions that threaten the country's national interests.¹¹⁶

The autonomous concept of public policy that the Convention envisions calls for a much narrower scope of application. Indeed, Article V(2)(b) has typically been interpreted as "international public policy" confined to the "forum state's most basic notions of morality and justice."¹¹⁷ The misleading nature of

¹¹² See, e.g., *Traxys Europe S.A. v Balaji Coke Industry Pvt Ltd.*[No.2] (2012) FCA 276, ¶ 98 (Austl.) (rejecting that domestic policy should guide the interpretation of Article V(2)(b) because, "too rigid an application of the public policy of the domestic jurisdiction runs the risk of undermining the very purpose of the Act, being the facilitation of enforcement and the maintenance of certainty of foreign arbitral awards").

¹¹³ *CBX v. CBZ*, [2020] SGHC(I) 17, 36 (Sing.) ("[W]hether an award violates the 'public order' of a country and whether it is contrary to 'public policy' under the New York Convention and the Model Law are two different questions."). This statement has been left undisturbed by the Singapore Court of Appeals' reversal in *CBX v. CBZ*, [2022] 1 SLR 47.

¹¹⁴ TIM CORTHAUT, E.U. ORDRE PUBLIC 23 (2012) (defining domestic public policy as "the complex of norms at the very heart of a political entity expressing and protecting the basic options taken by that entity in respect of its political, economic, social and cultural order").

¹¹⁵ See, e.g., Cass. civ, 28 dicembre 2006, n. 27592, Foro it. 2007 (It.) (holding that domestic public policy encompasses "all those principles . . . that in a given historical juncture constitute the cornerstone of the ethical, social, and economic structure underpinning the national community, thus conferring on said community a clearly distinct and unmistakable physiognomy").

¹¹⁶ Cf. Kent Murphy, *The Traditional View of Public Policy and Ordre Public in Private International Law*, 11 GA. J. INT'L & COMP. L. 591, 603 (1981) (arguing that "[t]here is a consensus among legal writers that national interests will sometimes be held to supersede rights acquired in a foreign jurisdiction" when applying the public policy exception).

¹¹⁷ *Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1974).

the phrase “international public policy”—used in most jurisdictions—is apparent. “International” is not the source of the policy but rather its subject matter. In other words, the adjective “international” does not denote values that are acknowledged and shared across multiple state lines. To the contrary, it identifies those domestic principles that are so fundamental to the enforcing state as to also be applied to the transnational controversies brought within its territory.¹¹⁸ As such, the doctrine of international public policy highly constrains but does not completely eliminate parochialism as it was born and still remains a domestic-oriented notion.¹¹⁹ As the Hong Kong Court of Final Appeal correctly held, the essence of international public policy is unambiguously the protection of local interests even in those instances when the relevant public policy aligns with that of many other countries.¹²⁰ It follows that political considerations of the enforcing state can be factors in the Article V(2)(b) analysis, though in more limited circumstances.¹²¹ Case law

¹¹⁸ Shenoy, *supra* note 108, at 80 (arguing that “[t]ransnational or supranational public policy is understood to imply something different from international public policy” as the latter is “confined to violation of truly fundamental conceptions of legal order in the country concerned”).

¹¹⁹ Mark A. Buchanan, *Public Policy and International Commercial Arbitration*, 26 AM. BUS. L.J. 511, 514 (1988) (noting that international public policy, “includes those standards or rules of a given state's domestic public policy that will also be applied by that state in an international context.” adding that “the two can be distinct in that many states will not strictly impose all of the constraints of their domestic public policy upon international trade, where more freedom and flexibility is generally viewed as a necessity”).

¹²⁰ Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd., [1999] 1 H.K.L.R.D 1, 40–41(C.F.A.) (H.K.) (explaining, “Art. V(2)(b) specifically refers to the public policy of the forum. No doubt, in many cases, the relevant public policy of the forum coincides with the public policy of so many other countries that the relevant public policy is accurately described as international public policy. Even in such a case, if the ground is made out, it is because the enforcement of the award is contrary to the public policy of the forum”).

¹²¹ *Id.*

adhering to this characterization of public policy abounds in numerous jurisdictions—e.g., Spain,¹²² Egypt,¹²³ and India.¹²⁴

Pointing to a perceived contradiction in fixating international public policy on the domestic values of the particular enforcing state, some scholars have argued that Article V(2)(b) should more properly be given a transnational meaning.¹²⁵ As aptly put by Lebanese courts, transnational public policy encompasses only those “rules of important nature that are applied in so many countries thus giving them an international character.”¹²⁶ If the premise is that public policy is contravened only if the award “disregards those essential and broadly recognized values which . . . should be the founding stones of any legal order,” the logical consequence is that national interests must be left out of the equation.¹²⁷ This understanding of Article V(2)(b) as a set of transnational principles banishes political chauvinism in the name of the truly international character of the Convention.¹²⁸ In what is

¹²² S.T.S., Apr. 5, 1966 (R.J., No. 1684) (Spain) (declaring international public policy as “the set of legal, public and private, political, economic, moral and even religious principles, which are absolutely obligatory for the preservation of social order in a population and in a particular time”).

¹²³ Mah. kamat al-Naqd. [Court of Cassation], 815/52, session of 21 May 1990 (Egypt) (holding that when it comes to Article V(2)(b) foreign rules are contrary to Egyptian public order when they are “in conflict with social, political, economic or moral bases which relate to the supreme interests of the community”).

¹²⁴ *Renusagar Power Co. v. General Electric Co.*, (1994) 3 SCR 22, 27 (India) (holding that Article V(2)(b) “must be construed to mean the doctrine of public policy as applied by the courts in which the foreign award is sought to be enforced,” which includes the protection of “(i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) injustice or morality”).

¹²⁵ JULIAN D. M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 423 (2003) (arguing that arbitral tribunals face concepts of transnational public policy every time “factual or substantive issues are alleged to be contrary to fundamental international standards”); *see generally* Michael Pryles, *Reflections on Transnational Public Policy*, 24 J. INT’L ARB. 1 (2007).

¹²⁶ *Isti’nāf* [Court of Appeal] Beirut, 7th Civ. Chamber, Oct. 7, 2005 (Leb.), published in 33 *LEBANESE REV. ARAB INT’L ARB.* 31 (2005).

¹²⁷ Tribunal fédérale [TF] [Swiss Supreme Court] Mar. 8, 2006, 4P.278/2005 at 227 (Switz.) (holding that transnational public policy is supported by “concepts prevailing in Switzerland”).

¹²⁸ Political chauvinism ordinarily indicates an exaggerated form of nationalism that posits one’s own nation is superior to others, thus regarding them and their actions as a threat to its political and cultural survival. *See generally* MINABERE IBELEMA, *CULTURAL CHAUVINISM:*

arguably the most persuasive endorsement of transnational public policy, the Report published by the International Law Association recommends:

Nevertheless, in order to determine whether a principle forming part of its legal system must be considered sufficiently fundamental to justify a refusal to recogni[z]e or enforce an award, a court should take into account, on the one hand, the international nature of the case and its connection with the legal system of the forum, and, on the other hand, the existence or otherwise of a consensus within the international community as regards the principle under consideration (international conventions may evidence the existence of such a consensus). When said consensus exists, the term “transnational public policy” may be used to describe such norms.¹²⁹

Arbitral Tribunals have also suggested that international consensus must consecrate a principle for it to fall within an international-oriented definition of public policy.¹³⁰ More importantly, many jurisdictions have started to free themselves of any trace of parochialism and embrace the transnational doctrine of

INTERCULTURAL COMMUNICATION AND THE POLITICS OF SUPERIORITY (2021).

¹²⁹ Pierre Mayer & Audley Sheppard, *Final Report on Public Policy as a Bar to Enforcement of International Arbitration Awards*, 19 ARB. INT’L 249, 259 (2003).

¹³⁰ See, e.g., *World Duty Free Company Ltd. v. The Republic of Kenya*, ICSID Case No. Arb/00/7, Award, ¶ 157 (Oct. 4, 2006) (noting the term international public policy “is sometimes used with another meaning, signifying an international consensus as to universal standards and accepted norms of conduct that must be applied,” adding “it has been proposed to cover that concept in referring to ‘transnational public policy’ or ‘truly international public policy’”); see J. Gillis Wetter, *Issues of Corruption before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Gunnar Lagergren’s 1963 Award in ICC Case No. 110*, 10 ARB. INT’L 277, 294 (1994) (finding corruption to be violative of public policy because it constitutes “an international evil . . . contrary to good morals and to an international public policy common to the community of nations”).

public policy. These jurisdictions include Italy,¹³¹ the United Kingdom,¹³² Switzerland,¹³³ and France.¹³⁴

Setting aside the differences separating these two doctrines, advocates of international and transnational public policy all agree that the Convention was not “meant to enshrine the vagaries of international politics under the rubric of ‘public policy.’”¹³⁵ It follows that states should be precluded from refusing recognition and enforcement of foreign arbitral awards simply because they may contravene their local political interests.¹³⁶ However, the veracity

¹³¹ Cass., sez. un., 5 luglio 2017, n. 16601 (It.) (“Public policy gradually transitioned from being an instrument to safeguard national valued to be used as a barrier against the recognition of judgments, to a concept promoting the search of principles common to the Member States with respect to fundamental rights.”); App., 4 Dec. 1992, XXII Y.B. COMM. ARB. 725, 726 (It.) (“We must say where the consistency [with public policy] is to be examined, reference must be made to the so-called international public policy, being a body of universal principles shared by nations of similar civilization, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions.”).

¹³² *Westacre Investments Inc. v. Jugoimport-SPDR Holding Co.* [2000] QB 288 (Eng.) (“[T]here are some rules of public policy which if infringed will lead to non-enforcement by the English court whatever their proper law and wherever their place of performance but others are based on considerations which are purely domestic.”).

¹³³ Tribunal fédérale [TF] [Federal Supreme Court] Apr. 19, 1994, 120 BGE II 155 (Switz.) (suggesting that the New York Convention “seems to require a broad interpretation of the notion of public policy, i.e. the choice of a transnational or universal public policy, including the fundamental principles of law which are binding without regard to the relationship of the dispute to a particular country”).

¹³⁴ Cour de cassation [Cass.] [Supreme Court for Judicial Matters], May 25, 1948, No. 83-11.421 (Fr.) (defining public policy, although in an arbitration-unrelated context, as “the reservation of such principles of universal justice which are considered by French opinion as having an absolute international value”).

¹³⁵ *Parsons & Whittemore Overseas Co. v. Société Générale de L’Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1974) (“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.”).

¹³⁶ Linda Silberman, *The New York Convention after Fifty Years: Some Reflections on the Role of National Law*, 38 GA. J. INT’L & COMP. L. 25, 35 (2009) (“Of course, the standard for ‘public policy’ in the context of the New York Convention and international arbitration should not be one of parochial or national interests, but of broader international scope.”).

of this statement is severely called into question when the implementation of the Convention intersects economic sanctions.

IV. ECONOMIC SANCTIONS AND PUBLIC POLICY: A SEISMIC STRESS

Due to the recent escalating use of sanctions, the relationship between Article V(2)(b) and economic sanctions has become a central topic of debate.¹³⁷ Numerous courts are confronted with the thorny question of whether and to what extent domestic courts can refuse to recognize and enforce foreign arbitral awards on grounds they may interfere with unilateral regimes of restrictive measures. The crux of the matter is whether the Convention considers economic sanctions, which are an integral part of states' strategic interests, elements of international and/or supranational public policy. This issue brings to the forefront the irreducible friction between the political soul of economic sanctions and the international spirit of Article V(2)(b).

Courts have implemented two different approaches to tackle this issue. Jurisdictions embracing the conservative, domestic-influenced notion of international public policy tend to view sanctions as public policy ingredients.¹³⁸ In contrast, courts in those countries that have transitioned toward the doctrine of transnational public policy staunchly reject any form of parochialism, including that of economic sanctions.¹³⁹ Because the latter approach gained considerable prominence in the pre-2014 international landscape, this will be explored first.¹⁴⁰

A. THE ANTI-PAROCHIAL EMPHASIS OF THE MAJORITY APPROACH

It cannot be doubted that the autonomous and international flavor of Article V(2)(b) looks suspiciously to the parochial function of economic sanctions. Building on this observation, it has often been posited that foreign policy disputes leading up to sanctions are

¹³⁷ See, e.g., Steve Ngo & Steven Walker, *Impact and Effects of International Economic Sanctions on International Arbitration*, 88 *ARB.: INT'L J. ARB., MEDIATION & DISP. MGMT.* 388 (2022).

¹³⁸ See *infra* Part IV(B).

¹³⁹ See *infra* Part IV(A).

¹⁴⁰ Cf. PIERRE LALIVE, *Transnational (or Truly International) Public Policy and International Arbitration*, in *COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION* 258 (ICCA Congress Series, N.Y. vol. 3, 1986) (presenting a variety of judicial decisions as indicative of transnational public policy).

overly protectionist and political in their nature to justify a public policy argument.¹⁴¹ The advantages of this approach lie in the clearcut distinction it effectuates between the political interests driving sanctions and the narrower set of fairness and moral justice contemplated by the Convention. By signing this uniform law instrument, the Contracting States voluntarily accept to partake in the Convention's harmonization effort. Accordingly, reliance on interests other than those shared by the international community—such as those enshrined in unilateral sanctions—should not affect the Convention's implementation.¹⁴² Thus, in the context of economic sanctions, the majority approach appears to favor the transnational reading of public policy and abhors the idea that sanctions may be brought within the scope of Article V(2)(b).

As mentioned in the introduction, the leading case illustrative of this approach is the U.S. Second Circuit's *Parsons* decision.¹⁴³ Before exploring the court's reasoning, the nucleus of operative facts should be assessed. An International Chamber of Commerce (ICC) tribunal rendered an award in favor of an Egyptian corporation against an American corporation.¹⁴⁴ It then sought recognition and enforcement in the United States.¹⁴⁵ Against the backdrop of the diplomatic sanctions surrounding the Arabi-Israeli war, the American debtor opposed the confirmation petition.¹⁴⁶ One of the defenses was that Article V(2)(b) barred recognition and enforcement because completing the project would contravene U.S. public policy since the sanctions identified Egypt as a hostile country.¹⁴⁷

The court rejected this argument, pointing out it centered solely upon parochial goals pursued by the United States through

¹⁴¹ *Cf. Lobo v. Celebrity Cruises, Inc.*, 488 F.3d 891, 895 (11th Cir. 2007) (holding that the U.S. Supreme Court found “strongly persuasive evidence of congressional policy” in favor of uniform enforcement of arbitration agreements, despite the potential presence of parochial policies present in other parts of the U.S. Code” (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974))).

¹⁴² Reliance on self-interest-oriented domestic rules would otherwise inevitably undermine the purpose of the Convention, which is “to facilitate the cross-border recognition and enforcement of arbitral awards by establishing a single, uniform set of rules that apply world-wide.” *Yugraneft Corp. v. Rexx Mgmt. Corp.*, [2010] S.C.R. 649, 657 (Can.).

¹⁴³ *Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier*, 508 F.2d 969, 969 (2d Cir. 1974).

¹⁴⁴ *Id.* at 972.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 974.

unilateral sanctions, that were implemented as part of its political agenda.¹⁴⁸ Specifically, the court ruled that economic sanctions do not intersect Article V(2)(b) of the Convention, interpreting that provision as a “parochial device protective of national political interests [that] would seriously undermine the Convention’s utility.”¹⁴⁹ To the contrary, the court famously elevated the “supranational emphasis” of the Convention to a paramount principle governing sanctions disputes.¹⁵⁰ It is worth noting the Second Circuit accompanied this holding with the explicit warning that disagreements between governments over foreign policy matters should not cause Article V(2)(b) to devolve into a major, catch-all defense.¹⁵¹

Parsons ushered what has gradually become the majority solution to the problematic connection between economic sanctions and public policy.¹⁵² That is, the Convention’s public policy exception is available only when the award is repugnant to values and principles that many other jurisdiction would acknowledge as prevailing as well.¹⁵³ Unilateral sanctions rarely crystalize or embody transnational principles; instead, they are the quintessential expression of political localism that pervade a state’s foreign policy.¹⁵⁴ Accordingly, they typically cannot form the basis of an Article V(2)(b) defense.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* (“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.”).

¹⁵² *See, e.g.,* *Brostrom Tankers AB v. Factorias Vulcano SA*, [2004] 2 IR 191, 198 (Ir.) (holding the court “derive[s] considerable assistance from the decision in *Parsons and Whitmore Overseas Company v. Société Générale de L’Industrie du Papier*, a decision of Circuit Judge Joseph Smith”).

¹⁵³ John Y. Gotanda, *Charting Developments Concerning Punitive Damages: Is the Tide Changing?*, 45 COLUM. J. TRANSNAT’L L. 507, 512 (2007) (arguing the public policy standard set out by *Parsons* “encompasses only those basic notions of morality and justice accepted by civilized countries”); *see also* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 827 (2d ed. 2000) (interpreting *Parsons* as requiring an absolute “‘supranational emphasis’ rather than reliance on ‘national political interests’”).

¹⁵⁴ *See, e.g.,* 50 U.S.C. § 1701, which authorizes the President of the United States to impose unilateral sanctions to deal with “any unusual or extraordinary threat . . . to the national security, foreign policy, or economy of the United States.”

Other jurisdictions have also espoused the *Parsons* ruling, which prioritizes the international character of the New York Convention over provincial interests embedded in economic sanctions.¹⁵⁵ In the recent case of *Sofregaz v. NGSC*, an ICC tribunal issued an award in favor of an Iranian company (NGSC) against its French counterparty (Sofregaz) for breaching a contract for the conversion of a natural gas site into underground storage.¹⁵⁶ Under the contract, NGSC provided Sofregaz with letters of credit from different banks to guarantee timely payments.¹⁵⁷ However, complications arose between the end of 2006 and the start of 2008, when the U.N. Security Council, the European Union, and the United States promulgated restrictive measures against Iran.¹⁵⁸ These sanctions impacted a broad swath of transactions with Iranian entities, including operations and money transfers in the gas sector.¹⁵⁹ As a result, banks declined to extend or reissue the letters, leading to Sofregaz terminating the contract.¹⁶⁰ After prevailing in arbitration, NGSC applied for recognition and enforcement of the award in France, a party to the Convention.¹⁶¹

In the ensuing proceedings before the Paris Court of Appeals, NGSC raised the Article V(2)(b) defense, pointing to economic sanctions imposed, inter alia, by the United States and the U.N. Security Council against Iran.¹⁶² NGSC's basic argument emphasized that the enforcement of the award is contrary to public policy because it gives effect to a contract that could not be performed under current sanctions regimes.¹⁶³ With respect to the unilateral sanctions implemented by the U.S. authorities, the court unequivocally held they did not amount to public policy under Article V(2)(b) as they could not "be regarded as the expression of an international consensus."¹⁶⁴ Nonetheless, the Paris Court of

¹⁵⁵ See *Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier*, 508 F.2d 969, 969 (2d Cir. 1974).

¹⁵⁶ Cour d'appel [CA] [regional court of appeal] Paris, June 3, 2020, No 19-07261 (Fr.).

¹⁵⁷ *Id.* ¶ 7.

¹⁵⁸ *Id.* ¶ 9.

¹⁵⁹ See *id.* ¶¶ 1–3.

¹⁶⁰ *Id.* ¶ 8.

¹⁶¹ *Id.* ¶ 15.

¹⁶² Cour d'appel No 19-07261, ¶ 60 ("In his legal opinion, Professor (B.) . . . considers that 'there is no doubt that the various programmes of US sanctions aiming Iran constitute American mandatory laws.'").

¹⁶³ *Id.* ¶ 36.

¹⁶⁴ *Id.* ¶¶ 61–63 (holding that "a foreign mandatory law may be seen as coming under French international public policy, only insofar as it carries

Appeal did refuse to recognize and enforce the award since the sanctions imposed by the U.N. Security Council fit within the “truly international” nature of the public policy exception.¹⁶⁵ By virtue of such ruling, the French court endorsed the view that unilateral sanctions, at least when imposed by a foreign state, fail the transnational spirit of Article V(2)(b).¹⁶⁶ The French Supreme Court affirmed.¹⁶⁷

International tribunals have ruled consistently with the principles of law enunciated in *Parsons* and *Sofregaz*.¹⁶⁸ In a recent investment dispute adjudicated by the Permanent Court of Arbitration (PCA), the responding state objected to the admissibility of the claim on the basis that the investor engaged in activities repugnant to economic sanctions, thus in violation of international public policy.¹⁶⁹ The investor was a bank established in Bahrain but owned by two of Iran’s largest financial institutions.¹⁷⁰ In 2015, Bahrain shut down the bank and liquidated its assets, justifying the decision on grounds that the bank had effectuated a scheme of systemic violations of the sanctions imposed by multiple actors against Iran.¹⁷¹

The PCA tribunal began its analysis by noting economic sanctions do not automatically constitute elements of international public policy “as some may seek to advance non-universal political

the values and principles that cannot be disregarded by this international public policy even in an international context”).

¹⁶⁵ *Id.* ¶ 54 (noting, “in this respect, international sanctions resulting from the United Nations Security Council resolutions, insofar as they are imposed on Member States and therefore on France, may be assimilated to foreign mandatory rules of public policy and/or really international mandatory laws, and cannot be ignored by an arbitration court if the litigious situation that it must rule on lies within the scope of these sanctions”).

¹⁶⁶ *Id.*; see *Parsons & Whittemore Overseas Co. v. Société Générale de L’Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1974) (“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.”).

¹⁶⁷ Cour de cassation [Cass.] [Supreme Court for Judicial Matters] Feb. 9, 2022, No. 20-20.376 (Fr.).

¹⁶⁸ See Cour d’appel [CA] [regional court of appeal] Paris, June 3, 2020, No 19-07261 (Fr.); *Parsons*, 508 F.2d at 969.

¹⁶⁹ *Bank Melli Iran v. Bahrain*, PCA Case No. 2017-25, Award (Nov. 9, 2021).

¹⁷⁰ *Id.* at 1, 30.

¹⁷¹ *Id.* at 74–75, 92.

or economic interests of specific States.”¹⁷² Although not within the context of the Convention, the tribunal’s holding aligned with the prevailing view that a distinction must be drawn between sanctions manifesting transnational consensus and those used as a parochial, foreign policy tool.¹⁷³ So understood, “the sanctions introduced by the UN Security Council qualify as norms of what is generally called transnational or truly international public policy.”¹⁷⁴ The PCA tribunal explicitly employed the terminology “transnational or truly international public policy” to back the proposition that only sanctions manifesting the “universality” of foreign policy concerns can be said to be international public policy.¹⁷⁵ On the flip side, the PCA tribunal categorically declined to consider national (U.S.) and regional (E.U.) sanctions as ingredients of international public policy because “they lack the degree of universality that characterizes UN sanctions.”¹⁷⁶

Interestingly, the tribunal’s reasoning significantly narrowed the doctrine of transnational public policy in two ways. First, it called for international consensus among countries with respect to both foreign policy goals underlying sanctions and single entities and/or industries targeted.¹⁷⁷ Second, the tribunal operated under the assumption that only U.N. sanctions can constitute evidence of the transnational consensus necessary for economic sanctions to be considered public policy.¹⁷⁸ The ramifications of these succinct comments, encapsulated in a single, small paragraph out of the 836 comprising the award, are of tremendous magnitude. They lead to the hyper-restrictive rule that unilateral sanctions do not “constitute fundamental rules of law forming part of international public policy, insofar as they diverge from the scope of the UN sanctions.”¹⁷⁹ As a result, the court does not consider any state discretion in the implementation of sanctions aimed at the same goals or justified by the same findings as the U.N. sanctions.

¹⁷² *Id.* at 102.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 103.

¹⁷⁷ *Id.* (“More specifically, not all the persons that the U.S. and EU included in their respective lists of sanctioned entities featured in the UN sanctions.”).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

This line of argument has been fertile in many other countries, including Ireland,¹⁸⁰ Switzerland,¹⁸¹ and Italy.¹⁸² In these jurisdictions, the struggle between politics and the international character of the Convention is resolved in the latter's favor.

B. THE DOMESTIC-INFLUENCED POSTURE OF THE MINORITY APPROACH

Some jurisdictions have gone the opposite route.¹⁸³ Article V(2)(b) has been firmly anchored to the laws and values of the enforcing state, including expressions of its local and political identity.¹⁸⁴ It is no surprise these jurisdictions reject the idea of transnational public policy and embrace the traditional notion of international public policy.¹⁸⁵ This allows them to bake domestic interests into the interpretation of Article V(2)(b).¹⁸⁶ It is important to note, though, that courts in these countries do not deny the international character of the Convention—they merely interpret it differently.¹⁸⁷ The international character of the Convention is not understood as the aspirational goal of ultimate, complete homogeneity among jurisdictions.¹⁸⁸ To the contrary, legal and political realism inevitably directs enforcing courts to take into account the social, political, and economic situation at the time of enforcement.¹⁸⁹ And economic sanctions are the prime indicators of

¹⁸⁰ *Brostrom Tankers AB v. Factorias Vulcano SA*, [2004] 2 IR 191, 198 (Ir.).

¹⁸¹ Tribunal fédérale [TF] [Federal Supreme Court], Jan. 21, 2014, 4A 250/2013 1, 5 (Switz.) (suggesting that U.N. sanctions are part of Swiss public policy by virtue of their nature of “international policy”).

¹⁸² Cass. civ., 24 novembre 2015, n.23893 (It.) (declaring the U.N. sanctions against Iraq “undoubtedly [constitute] public policy” within the meaning of the New York Convention given their “international and supranational nature”).

¹⁸³ See James D. Fry, *Désordre Public International under the New York Convention: Wither Truly International Public Policy*, 8 CHINESE J. INT’L L. 81, 82 (2009).

¹⁸⁴ *Id.* at 81, 93, 124.

¹⁸⁵ *Id.* at 81, 93.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 81, 92–93.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 120 (adding, “however, political reality and the trading that comes with all negotiations where parties are trying to reach an agreement made the New York Convention what it is today—a set of maximum standards for states in deciding whether to recognize and enforce an international arbitral award, with the public policy defense expressly and implicitly

the socio-political characteristics relevant to any Article V(2)(b) analysis.¹⁹⁰ Accordingly, this approach elevates economic sanctions to fundamental values of the enforcing state in its international relations, thus tainting Article V(2)(b) with the nationalism that inevitably comes along international political disputes.¹⁹¹

This approach has been the minority for decades, overshadowed by *Parsons* disciples.¹⁹² However, the revived conflict between the western world and eastern countries (such as Russia and Belarus) has given rise to a new, highly adversarial socio-political environment.¹⁹³ As a consequence, the domestic-influenced notion of international public policy may soon turn the tables against the transnational reading of the Convention, at least in cases involving economic sanctions.¹⁹⁴ To exemplify this historically minority stance, two cases will be brought to the forefront: *Sofregaz* and a recent decision by the Lithuanian Supreme Court.¹⁹⁵ It is noteworthy that each respective case was decided in the aftermath of the Ukraine-Russia tension that broke out in 2014.

For the first time in the above-mentioned *Sofregaz* decision, a western court explicitly declared that E.U. unilateral sanctions can be considered international public policy for Article V(2)(b) purposes.¹⁹⁶ There, the Paris Court of Appeal reasoned that the sanctions levied by the European Union on Iran, unlike those imposed by the U.N. Security Council, are not a manifestation of international consensus.¹⁹⁷ To the contrary, they are the fruit of the political decisions unilaterally made by the European Member States in furtherance of the E.U. foreign policy.¹⁹⁸ Nonetheless, this type of sanction, unlike the U.S. unilateral measures, was deemed

reserving a significant amount of discretion and control for enforcement States”).

¹⁹⁰ *Id.* at 81.

¹⁹¹ *See generally id.*

¹⁹² *See generally* *Parsons & Whittemore Overseas Co. v. Société Générale de L’Industrie du Papier*, 508 F.2d 969 (2d Cir. 1974).

¹⁹³ *See* Timothy Garton et al., *United West, divided from the rest: Global public opinion one year into Russia’s war on Ukraine*, EUR. COUNCIL ON FOREIGN RELS. (Feb. 22, 2023), <https://ecfr.eu/publication/united-west-divided-from-the-rest-global-public-opinion-one-year-into-russias-war-on-ukraine/>.

¹⁹⁴ *See* Fry, *supra* note 183, at 81.

¹⁹⁵ Cour d’appel [CA] [regional court of appeal] Paris, June 3, 2020, No 19-07261 (Fr.); Case No. 3K-3-255-611/2022, Lithuanian Supreme Court, Civil Cases Division (Nov. 9, 2022).

¹⁹⁶ Cour d’appel [CA] [regional court of appeal] Paris, June 3, 2020, No 19-07261 (Fr.).

¹⁹⁷ *Id.* ¶¶ 56–57.

¹⁹⁸ *Id.*

an integral part of “international public policy” because, due to their binding nature on France, they are assimilable to “French mandatory laws.”¹⁹⁹ Therefore, even in the absence of transnational consensus, unilateral sanctions of the enforcing state do satisfy, according to the court, Article V(2)(b) insofar as they reflect the enforcing jurisdiction’s non-waivable socio-political tenets.²⁰⁰ This judgment signals the willingness of French courts to uphold the political interests pursued by France (and the European Union) via economic sanctions. All of this is done by bringing sanctions within the nomenclature of international public policy.

Lithuania was another country to first presage that the changed international landscape necessitates a renewed preference for a domestic-oriented notion of international public policy when dealing with economic sanctions.²⁰¹ In a recent case, a Belarussian company applied for the recognition and enforcement in Lithuania of a foreign judgment obtained in Belarus against a Lithuanian company.²⁰² The Lithuanian debtor opposed the motion, arguing that behind the Belarus creditor stood an entity targeted by the sanctions imposed by the European Union on Belarus.²⁰³ The Belarussian company sought recognition under a treaty in force between the two countries, requiring recognition of foreign judgments unless it would violate the public policy of the enforcing state.²⁰⁴ While the wording of the treaty may differ from the Convention, the judgment remains highly instructive in understanding where domestic courts are heading in the interpretation of public policy when economic sanctions are implicated.²⁰⁵

The Lithuanian Supreme Court started off by noting that, for purposes of recognizing and enforcing foreign judgments in Lithuania, grounds for refusal listed in the applicable treaty can be

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Case No. 3K-3-255-611/2022, Lithuanian Supreme Court, Civil Cases Division (Nov. 9, 2022); *see also Significant Case Law of the Supreme Court of Lithuania on Recognition and Enforcement of Foreign Judgments Related to Sanctioned Persons*, ELLEX (Dec. 16, 2022), <https://ellex.legal/significant-case-law-of-the-supreme-court-of-lithuania-on-recognition-and-enforcement-of-foreign-judgments-in-favour-of-sanctioned-persons/>.

²⁰² Case No. 3K-3-255-611/2022, Lithuanian Supreme Court, Civil Cases Division (Nov. 9, 2022).

²⁰³ *See generally id.*

²⁰⁴ *Id.*

²⁰⁵ *See* ELLEX, *supra* note 201.

generally synthesized as establishing a public policy exception.²⁰⁶ Therefore, the court did not focus on language used by the treaty, but rather interpreted the scope of the public policy defense under international law.²⁰⁷ Based on this premise, the court clarified public policy of the state is understood as “international public policy.”²⁰⁸ According to the court, international public policy does not necessarily require supranational consensus on a particular values’ importance.²⁰⁹ To the contrary, it more broadly encompasses all “vital interests of the state and society . . . [including] the fundamental principles underlying the legal system of the state and the functioning of the state and society.”²¹⁰ In its conclusion, the court held sanctions imposed by the European Union qualify as elements of international public policy.²¹¹ The court indeed promulgated and implemented these measures to avoid a prejudice to “the sovereignty or security of [the European Union]” as well as “the rights and legitimate interests of its citizens.”²¹² Consequently, the Supreme Court vacated the lower court’s judgement confirmation.²¹³

Two clarifications are necessary to reiterate the bearing of this judgment on the analysis of Article V(2)(b) of the Convention.²¹⁴ First, even though the Convention was not the applicable law in this case, the Lithuanian Supreme Court based its decision on the broader concept of international public policy.²¹⁵ Given the generality of the holding rooted in international law, there are notable arguments to extend to the interpretation of the public policy defense of the Convention.²¹⁶ Second, the court’s language mirrors decisions delivered by courts that support the domestic-centered reading of Article V(2)(b) in passing upon petitions for the

²⁰⁶ Case No. 3K-3-255-611/2022, Lithuanian Supreme Court, Civil Cases Division, ¶¶ 17–19 (Nov. 9, 2022).

²⁰⁷ *Id.* ¶ 14 (ruling that, present an international treaty, “the procedure for recognition of a foreign judgment means nothing more than checking whether there are no grounds for non-recognition of the judgment”).

²⁰⁸ *Id.* ¶ 18.

²⁰⁹ *Id.*

²¹⁰ *Id.* ¶ 19 (“The purpose of public order is to protect the fundamental, vital interests of the state and society, i.e. the concept of public order includes the fundamental principles underlying the legal system of the state and the functioning of the state and society.”).

²¹¹ *Id.* ¶ 23.

²¹² *Id.* ¶ 24.

²¹³ *See* ELLEX, *supra* note 201.

²¹⁴ *See generally* Case No. 3K-3-255-611/2022, Lithuanian Supreme Court, Civil Cases Division (Nov. 9, 2022).

²¹⁵ *See id.* ¶ 18.

²¹⁶ *See generally id.*

recognition of foreign awards.²¹⁷ This combination of factors suggest that Lithuania courts are likely to extend the domestic-influenced approach to Article V(2)(b) of the Convention.²¹⁸ It is important to note that this interpretation is vastly different than the circumscribed public policy doctrine upheld by the *Parsons* court in light of the Convention's supranational purpose and intent.²¹⁹ Thus, the political environment upended by economic sanctions will likely leave Lithuania as another state departing from *Parsons*.

V. THE EARTHQUAKE OF THE UKRAINE-RUSSIA WAR: A NEW PAROCHIAL COURSE

Prior to 2014, the forces of globalization and a desire for uniformity led states to mitigate their political differences and create a secure, risk-free environment for international business.²²⁰ To instill confidence in international investors, the doctrine of transnational public policy has been used to harmonize how Article V(2)(b) is domestically implemented.²²¹ Winds of change have been blowing ever since, and, as seismology teaches, forces pulling in opposite directions engender tensional stress responsible for violent, abrupt shakings. Numerous sanctions imposed in reaction to the annexation of Crimea by Russia have exacerbated the tension between political measures of foreign policy and the concept of public policy. The outbreak of military hostilities in February 2022 was the straw that broke the camel's back.²²² The ongoing conflict

²¹⁷ See generally *supra* Part III.

²¹⁸ *Id.* ¶ 18 (defining public policy narrowly to “cover only the fundamental foundations of the social order of the Republic of Lithuania,” adding “it may be infringed only in exceptional cases where the enforcement of a foreign judgment may lead to consequences which are unacceptable from the point of view of the Lithuanian legal system”).

²¹⁹ See *Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier*, 508 F.2d 969, 973 (2d Cir. 1974).

²²⁰ See Martin Shapiro, *The Globalization of Law*, 1 IND. J. LEGAL STUD. 37, 61 (1993) (suggesting that globalization reduces political differences among countries since “[t]he globalization of markets and business enterprise generates the growth of a worldwide law of business transactions”).

²²¹ See, e.g., Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1333 (2003) (discussing the profound link between globalization and “the emergence of a transnational, global arbitration culture”).

²²² See Center for Preventative Action, *War in Ukraine*, GLOBAL CONFLICT TRACKER (updated Jan. 18, 2024) <https://www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine> (“In early February 2022,

between Russia and Ukraine sparked a legal earthquake, reviving conspicuous parochialism in the Convention's enforcement.²²³

Many countries have capitalized on the opportunity to challenge the transnational interpretation of Article V(2)(b) presented by Ukraine-related lawfare, particularly in light of the national security concerns that allegedly justify the new wave of economic sanctions.²²⁴ Pressured by penetrating, widespread narratives surrounding the war, governments have enlisted domestic courts to implement and protect their foreign agenda. To that end, courts have strategically characterized economic sanctions as an integral part of state promoted and protected values in international relations. This means that the days of using Article V(2)(b) as a transnational guardrail against the parochialism behind economic sanctions are probably gone. States are now reverting to the domestic concept of international public policy, using it as a disguise for their political and strategic interests. Recent developments in the legal systems of Ukraine and Russia, the two countries directly involved in this new chapter of geopolitics, further illustrate this shift.

A. UKRAINE: FROM THE SUPRANATIONAL APPROACH TO A PAROCHIAL NATIONAL SECURITY DEFENSE

Countless sanctions following the so-called “Revolution of Dignity” of 2014 have provided Ukrainian courts ample opportunity to determine whether these restrictive measures of foreign policy can meet the Convention definition of public policy.²²⁵ At first, Ukraine seemed to adopt the view enforced by Western jurisdictions—that is, economic sanctions are too political of an

satellite imagery showed the largest deployment of Russian troops to its border with Belarus since the end of the Cold War.”).

²²³ Cf. OLENA PEREPELYNSKA, *Ukraine: Recognition and Enforcement of Foreign Arbitral Awards*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN RUSSIA AND FORMER USSR STATES 517, 555–60 (Roman Zykov ed., 2021).

²²⁴ See generally *infra* Part V(A) & (B).

²²⁵ The 2014 Revolution of Dignity, also known as the Maidan Revolution, was a wave of protests and violent clashes between the Ukrainian people and the state forces of the then pro-Russia President Viktor Yanukovich. Its aim was to sever the authoritarian partnership with Russia and replace it with closer ties to the European Union in the name of freedom and democracy. For an analysis of how this Revolution affected Ukrainian policies, see MYCHAILO WYNNYCKYJ, *UKRAINE'S MAIDAN, RUSSIA'S WAR: A CHRONICLE AND ANALYSIS OF THE REVOLUTION OF DIGNITY* 213 (2019).

instrument to fall within the scope of the public policy defense. However, political pressure, weighed in and not-so-gently nudged the judiciary into a parochial reading of Article V(2)(b). The *Avia* saga is arguably the best showcase of the political turnaround forced upon the Ukrainian judiciary.²²⁶

Before the civil unrest of 2014, a Russian company (*Avia*) active in the military defense industry entered into a contract with a Ukrainian company (*Artem*) for the supply of military goods.²²⁷ While *Avia* regularly made the down payments due, *Artem* failed to deliver the goods or return the down payments received.²²⁸ In January 2018, *Avia* commenced arbitration and secured three arbitral awards against *Artem*.²²⁹ The following year, *Avia* applied for recognition and enforcement in Ukraine.²³⁰ *Artem* resisted the petition, invoking Article V(2)(b) of the Convention and moved to dismiss the application on public policy grounds.²³¹ Namely, it pointed out that the award's ultimate beneficiaries were Russian companies that had been subjected to sanctions in the meantime.²³²

The trial court refused to recognize and enforce the award, concluding it would otherwise breach Ukraine's public policy.²³³ It held that payments to Russian companies, with Ukraine having declared Russia as an aggressor state, would violate basic tenets of Ukrainian public policy.²³⁴ According to the court, payments to

²²⁶ See *id.* at 554–59; Olga Kokoz, *Is There Room for Sanctions in Public Policy? Opposite Approaches in the Recent Case Law of the Ukrainian Supreme Court*, KLUWER ARB. BLOG (Apr. 17, 2020), <https://arbitrationblog.kluwerarbitration.com/2020/04/17/is-there-room-for-sanctions-in-public-policy-opposite-approaches-in-the-recent-case-law-of-the-ukrainian-supreme-court/>; Vsevolod Volkov, *Enforcement of arbitral awards by sanctioned entities: courts test public policy exception*, LEXOLOGY (Sept. 26, 2019), <https://www.lexology.com/commentary/arbitration-adr/ukraine/everlegal/enforcement-of-arbitral-awards-by-sanctioned-entities-courts-test-public-policy-exception>.

²²⁷ *Avia-FED Serv. JSC v. Artem State Joint Stock Holding Co.*, Case No. 761/46285/16-C, Ruling of the District Court of Kyiv City (May 31, 2017).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.* (holding the foundational elements of Ukrainian public policy are violated when the actions under scrutiny “[are] explicitly prohibited by law or are detrimental to sovereignty and security of the state; [affect] the interest of large social groups and are incompatible with the principles of

sanctioned entities constitute “real or potential threat[s] to the national interests, national security, sovereignty and territorial integrity of Ukraine.”²³⁵ The Kyiv Appellate Court upheld the judgment.²³⁶ The Ukrainian Supreme Court, however, reversed and remanded.²³⁷ The Supreme Court referenced the concept of international public policy as incorporating only those “inalterable principles which demonstrate the stability of the international order.”²³⁸ Due to their transient political nature, the court deemed that economic sanctions were not expressive of immutable principles, adding up to a stable international framework.²³⁹ To the contrary, the court reasoned that refusing recognition and enforcement of foreign awards due to economic sanctions would be “an artificial regulatory barrier, which is absolutely unacceptable from the point of view of international law.”²⁴⁰

On remand, the trial court granted recognition and enforcement.²⁴¹ The Appellate Court affirmed, holding that “the mere fact that the claimant is put on the [sanctions] list . . . does not mean that the enforcement of the ICAC award . . . will violate Ukrainian public order as the award concerns only private relations between the commercial entities in relation to the performance of a contract they have entered into.”²⁴² The Supreme Court eventually sanctioned this approach and aligned Ukraine with the traditionally prevailing *Parsons* stance of Western jurisdictions.²⁴³ It essentially declared that economic sanctions lack the requisite universality or transnational consensus because they are tainted by the transitory

economic, political and legal order of the state; . . . [or are] contrary to the fundamental constitutional rights of a human and a citizen”).

²³⁵ *Id.*

²³⁶ Avia FED Serv. JSC v. Artem State Joint Stock Holding Co., Case No. 761/46285/16-C, Ruling of the Kyiv City Court of Appeal (Nov. 8, 2017).

²³⁷ Avia FED Serv. JSC v. Artem State Joint Stock Holding Co., Case No. 761/46285/16-C, Resolution of the Ukrainian Supreme Court (Sept. 5, 2018).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ Avia FED Serv. JSC v. Artem State Joint Stock Holding Co., Case No. 761/46285/16-C, Ruling of the District Court of Kyiv City (Dec. 6, 2018) (noting that “suspension of the performance of the economic and financial obligations may be applied at the enforcement proceedings stage and may not serve as grounds to reject the motion to enforce the award”).

²⁴² Avia FED Serv. JSC v. Artem State Joint Stock Holding Co., case No. 761/46285/16-C, Kyiv City Court of Appeal [Kyiv Ct. App.] (June 12, 2019).

²⁴³ See *Parsons & Whittemore Overseas Co. v. Société Générale de L’Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1974).

nature of foreign politics.²⁴⁴ Additionally, because the Convention's international character is geared toward a consistently stable cross-borders order, the Court concluded these political measures could not be qualified as public policy within the meaning of Article V(2)(b).²⁴⁵

This outcome was not a surprise. Only two years before, the Ukrainian Supreme Court reversed a district court's decision in favor of a company entitled to payments for modernization works to the power grid in Crimea, that would not recognize an arbitral award.²⁴⁶ The court deemed national security concerns arising after Crimea went under Russian control as insufficient.²⁴⁷ As the Supreme Court clarified, international public policy only encompasses "unchanging principles that express the stability of the international system," whereas it determined that Crimea's occupation was a temporary foreign policy fallout with Russia.²⁴⁸ In another sanctions dispute, the Ukrainian Supreme Court unambiguously declared economic sanctions cannot lead to the refusal of recognition and enforcement of a foreign award in sanctioned entities' favor.²⁴⁹ The court emphasized that the temporary nature of economic sanctions does not violate the immutable principles informing Ukrainian public policy.²⁵⁰

It took only five weeks from *Avia I* for politics to force a parochial volte-face onto the judiciary.²⁵¹ The *Avia I* decision produced a flood of criticism that the Supreme Court had sabotaged the fight against Russia.²⁵² In *Avia II*, part of the same string of Artem/Avia judicial battles, the lower courts recognized and enforced a second award consistent with the previous supranational ruling by the Ukrainian Supreme Court, but court quashed their

²⁴⁴ See *Avia FED Serv. JSC v. Artem State Joint Stock Holding Co.*, Case No. 761/46285/16-C, Resolution of the Ukrainian Supreme Court (Jan. 9, 2020).

²⁴⁵ *Id.*

²⁴⁶ *Posco Daewoo Co. & Hyosung Co. v. PJSC Nat'l Power Co. Ukrenergo*, Case No. 796/3/2018, Ruling of the Supreme Court of Ukraine (July 23, 2018).

²⁴⁷ See generally *id.*

²⁴⁸ *Id.* ¶ 34.

²⁴⁹ *JSC Normetimpex v. PrJSC Zaporizhtransformator*, Case No. 824/146/19, Ruling of the Supreme Court of Ukraine (Mar. 19, 2020).

²⁵⁰ See generally *id.*

²⁵¹ *Avia FED Serv. JSC v. Artem State Joint Stock Holding Co.*, Case No. 761/46285/16-C, Resolution of the Ukrainian Supreme Court (Sept. 5, 2018).

²⁵² See, e.g., TCH.ua, *Are Ukrainian defense factories at risk of termination due to lawsuits from Russia*, YOUTUBE (Feb. 23, 2023), https://www.youtube.com/watch?v=IJ_pTqVJwms.

decision and disavowed its own precedent after only thirty-five days.²⁵³ Specifically, the court declared that for purposes of the Convention, public policy is to be understood as extending to those principles that “relate primarily to the national security of Ukraine.”²⁵⁴ This was not the only seed of parochialism the Supreme Court sowed.²⁵⁵ It went further to rule that recognition and enforcement must be refused anytime the award would contradict the “political, social, and economic interests of the state.”²⁵⁶ Accordingly, the court declared awards in favor of Russian target companies could not be recognized because sanctions on Russia “are one of the new aspects of public policy in Ukraine.”²⁵⁷ Reaching levels of parochialism that were considered unthinkable just a few years prior, the foregoing statements of law ended up morphing Article V(2)(b) into a national security exception.²⁵⁸ The very same scenario *Parsons* warned against.²⁵⁹

There is no doubt that economic sanctions are an effective, legitimate tool for governments to address national security concerns.²⁶⁰ Nevertheless, it is also undisputed that the Convention did not wish to permit states to manipulate Article V(2)(b) for the creation of a preferential treatment for its ever-changing political, social, and economic interests.²⁶¹ However, in Ukraine, the political

²⁵³ See *Avia FED Serv. JSC v. Artem State Joint Stock Holding Co.*, Case No. 824/100/19, Ruling of the Supreme Court of Ukraine (Feb. 13, 2020).

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Cf. Ostchem Holding Ltd. v. Odesa Portside Plant*, Case No. 824/241/2018, Ruling of the Supreme Court of Ukraine (June 8, 2021) (refusing recognition of an award on public policy grounds insofar as it had been rendered against a Ukrainian company of strategic importance to the economy and security of the State).

²⁵⁹ See *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier*, 508 F.2d 969, 973 (2d Cir. 1974).

²⁶⁰ See 50 U.S.C. § 1701; Sanctions and Anti-Money Laundry Act 2018, § 1(2)(b) (UK); Special Economic Measure Act, S.C. 1992 § 3.1 (Can.); Autonomous Sanctions Act 2011 § 3(3)(b) (Austl.); *Yassin Abdullah Kadi v. Council of the European Union*, European Court of Justice, ECLI:EU:C:2008:461, § 343 (2008).

²⁶¹ See *Traxys Europe S.A. v Balaji Coke Industry Pvt Ltd.[No.2]* (2012) FCA 276, ¶ 105 (Austl.) (holding that “the scope of the public policy ground of refusal is that the public policy to be applied is that of the jurisdiction in which enforcement is sought, but it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in that jurisdiction which enliven this particular statutory exception to enforcement . . . [public policy] should not be used to give effect to

convenience of invoking national security to increase the fighting season against Russia has ultimately prevailed. As a result, the country's obligation to apply the Convention as a supranational instrument of uniform law took a back seat to the political interest pursued by economic sanctions against Russia. This is possible because courts have characterized sanctions as components of international public policy justified under the guise of national security allegations. Clearly, it did not bother the Ukrainian Supreme Court that turning Article V(2)(b) into a national security catch-all defense would inject unapologetic parochialism into the Convention's application.²⁶²

B. RUSSIA'S OVERREACHING PAROCHIALISM

Unlike Ukraine, Russia has never seriously attempted to masquerade its parochial public policy interpretation.²⁶³ In the notorious *United World* case, a Russian Commercial Court refused to recognize and enforce an award on public policy grounds because the award would adversely impact a Russian region's local economy.²⁶⁴ The *Promcontroller* case is another recent reiteration of Russia's protectionist attitude, reaffirming its public policy use to safeguard the country's political and provincial interests from foreign awards.²⁶⁵ There, the Russian Supreme Court upheld the lower court's refusal to recognize and enforce an Italian manufacturer's foreign award against an indirectly state-owned Russian company.²⁶⁶ The court applied, among other provisions,

parochial and idiosyncratic tendencies of the courts of the enforcement state").

²⁶² *Accord* Eugene Kazmin v. Republic of Latvia, Case No. 824/182/21, Ruling of the Supreme Court of Ukraine (Sept. 2, 2022) (holding the public policy exception is made out in situations the foreign award violates "legitimate interests of individuals, society and the state").

²⁶³ See generally Elliot Glusker, *Arbitration Hurdles Facing Foreign Investors in Russia: Analysis of Present Issues and Implications*, 10 PEPP. DISP. RESOL. L.J. 595, 607 (2010).

²⁶⁴ Postanovlenie Federalnoye Arbitrazh Suda Volgo-Vyatsky Oblast [FAS VVO] "United World v. Krasny Yakor" ot 17 fevral 2003 g. No. A43-10716/02-27-10 [Federal Commercial Court of the Volgo-Vyatsky Region, "United World v. Krasny Yakor," of Feb. 17, 2003, No. A43-10716/02-27-10] (Russ.).

²⁶⁵ Postanovlenie Plenuma Verkhovnogo Suda Rossiiskoi Federatsii "SPIG Spa v. ZAO PK Promcontroller" ot 2 oktiabria 2017 g. No. 305-ES17-10458 [Plenary Ruling of the Supreme Court of the Russian Federation, "SPIG Spa v. ZAO PK Promcontroller," of Oct. 2, 2017, No. 305-ES17-10458] (Russ.).

²⁶⁶ See generally *id.*

Article V(2)(b) of the Convention to deny recognition of the award.²⁶⁷ As the trial court stated, “Recognition and enforcement of a foreign arbitral award that . . . poses a threat to the normal operation of the state district power plant is contrary to the public policy of the Russian Federation.”²⁶⁸ These two cases show that Russian courts traditionally use public policy to protect parochial, strategic interests without qualms.²⁶⁹

The sanctions deluge that targeting Russia in response to the Ukraine invasion has escalated Russia’s already-established, parochial international arbitration approach.²⁷⁰ As part of its war efforts, Russia is actively seeking to shield its companies from adverse foreign decisions, lending the Convention’s vague public policy concept to this strategy.²⁷¹ In June 2020, Russia enacted Law 171-FZ, amending the Russian Commercial Code of Procedure to combat foreign sanctions against its nationals and “protect the right of sanctioned parties to access justice.”²⁷² The law’s most significant provision vests Russian state commercial courts with exclusive jurisdiction over disputes involving directly-sanctioned or indirectly-sanctioned entities, even when parties have agreed to arbitrate their claims.²⁷³ The Russian Supreme Court’s statutory provision interpretation in the following *Uraltransmash* case not only impacts the commencement of new arbitration proceedings, but also jeopardizes the enforcement of already-existent foreign awards.²⁷⁴

²⁶⁷ *Id.*

²⁶⁸ Postanovlenie Moskva Arbitrazh Sud “SPIG Spa v. ZAO PK Promcontroller” ot 16 mart 2017 g. No. A40-230545/16-29-2261 [Ruling of the Moscow Commercial Court, “SPIG Spa v. ZAO PK Promcontroller” of Mar. 16, 2017, No. A40-230545/16-29-2261] (Russ.).

²⁶⁹ See FAS VVO, 17 fevral 2003, “United World,” (A43-10716/02-27-10); VS RF, 2 oktiabria 2017, “Promcontroller,” (305-ES17-10450).

²⁷⁰ For a discussion on the amplification of sanctions, see COUNCIL OF EU & EUR. COUNCIL, *supra* note 66.

²⁷¹ See VS RF, 2 oktiabria 2017, “Promcontroller,” (305-ES17-10450).

²⁷² Federal’nyĭ Zakon RF o Zashchita ot Sanktsiy [Federal Law of the Russian Federation on Protection from Sanctions] June 8, 2020, No. 171-FZ. “[O]n amendments to the arbitration procedure code of the Russian Federation in order to protect the rights of natural persons and legal entities in connection with restrictive measures introduced by a foreign state, state association and (or) union and (or) state (interstate) institution of a foreign state or state association, and (or) union.”

²⁷³ Grazhdanskii Protsessual’nyĭ Kodeks Rossiĭskoĭ Federatsii [GPK RF] [Civil Procedural Code] art. 248.1(4) (Russ.).

²⁷⁴ Postanovlenie Plenuma Verkhovnogo Suda Rossiĭskoĭ Federatsii “Uraltransmash v. PESA” ot 9 dekabria 2021 g. No. 309-EC21-6955

In *Uraltransmash*, a Polish company commenced a Stockholm-seated arbitration against a Russian company pursuant to their agreement's dispute resolution clause.²⁷⁵ Due to the European Union imposing sanctions following the 2014 annexation of Crimea, the Russian respondent sought an anti-arbitration injunction before a Russian court, attempting to halt the ongoing arbitration per the new Law 171-FZ's provision.²⁷⁶ In the initial ruling, the Russian lower courts and Supreme Court declined to issue the injunction due to insufficient evidence that the sanctions had deprived the Russian corporation of due process.²⁷⁷ The Supreme Court explicitly ruled that the sanctioned entity must prove the sanctions at issue effectively deprive the party of its due process rights in a foreign-seated arbitration to establish exclusive jurisdiction per Law 171-FZ.²⁷⁸ The court imposed this burden as a sensible guardrail against purely parochial drifts.²⁷⁹

However, politics once again intervened and forced itself when the Deputy Justice of the Supreme Court directed the court to review the initial decision, which was eventually reversed a few months later.²⁸⁰ In the reviewed opinion, the Supreme Court declared that sanction-targeted entities are always entitled to an injunction against foreign-seated arbitration proceedings because "the mere fact of imposing restrictive measures in respect of a Russian person involved in a dispute in international commercial arbitration, located outside the territory of the Russian Federation,

[Plenary Ruling of the Supreme Court of the Russian Federation, "Uraltransmash v. PESA," of Dec. 9, 2021, No. 309-EC21-6955].

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ Postanovlenie Federalnoye Arbitrazh Suda Sverdlovsk Oblast "Uraltransmash v. PESA" ot 24 noiabria 2020 g. No. A60-36897/2020 [Ruling of the Federal Commercial Court of the Sverdlovsk Region, "Uraltransmash v. PESA," of Nov. 24, 2020, No. A60-36897/2020] (Russ.); Postanovlenie Federalnoye Arbitrazh Suda Ural Okrug "Uraltransmash v. PESA" ot 10 mart 2021 g. No. A60-36897/2020 [Ruling of the Federal Commercial Court of the Ural District, "Uraltransmash v. PESA," of Mar. 10, 2021, No. A60-36897/2020] (Russ.).

²⁷⁸ Postanovlenie Plenuma Verkhovnogo Suda Rossiiskoi Federatsii "Uraltransmash v. PESA" ot 28 mai 2021 g. No. A60-36897/2020 [Plenary Ruling of the Supreme Court of the Russian Federation, "Uraltransmash v. PESA," on May 28, 2021, No. A60-36897/2020].

²⁷⁹ *See id.*

²⁸⁰ Postanovlenie Plenuma Verkhovnogo Suda Rossiiskoi Federatsii "Uraltransmash v. PESA" ot 21 sentiabria 2021 g. No. 309-EC21-6955 [Plenary Ruling of the Supreme Court of the Russian Federation, "Uraltransmash v. PESA," on Sept. 21, 2021, No. 309-EC21-6955].

is sufficient to conclude that access to justice for such a person is restricted.”²⁸¹ Therefore it granted the injunction.²⁸²

One can easily anticipate the argument to extend *Uraltransmash* to Article V(2)(b) of the Convention. In that case, the court ruled sanctions automatically raise doubts about “the guarantees of a fair trial.”²⁸³ It follows that merely imposing sanctions creates an irrebuttable unfairness presumption, justifying staying foreign-seated proceedings against sanctioned Russian nationals.²⁸⁴ The logical corollary is that when foreign tribunals render those awards against target entities, they issue those decisions in the absence of due process. If that is the premise, it triggers Article V(2)(b) of the Convention because awards already rendered by tribunals seated in countries implementing sanctions against Russian entities can also be void of due process, thus violating Russian public policy.²⁸⁵ A Russian court recently endorsed this argument by declining a foreign award’s recognition and enforcement even though the award had been issued before the advent of the sanctions enacted in response to the Ukraine conflict.²⁸⁶ Namely, the court held that the countersanctions adopted against unfriendly countries make awards issued by tribunals sitting in those jurisdictions violate “the new public legal order.”²⁸⁷ The Appellate Court upheld the judgment, explicitly tying Article V(2)(b) to the new public policy that Russian

²⁸¹ Postanovlenie Plenuma Verkhovnogo Suda Rossiĭskoĭ Federatsii “Uraltransmash v. PESA” ot 9 dekabria 2021 g. No. 309-EC21-6955 [Plenary Ruling of the Supreme Court of the Russian Federation, “Uraltransmash v. PESA,” of Dec. 9, 2021, No. 309-EC21-6955].

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ Petitions to set aside said awards must be heard by the domestic courts of the country where the tribunal is seated, but the ensuing proceedings before these national judiciaries would automatically be void of due process due to the sanction’s regime implemented in that jurisdiction. *Cf.* Postanovlenie Arbitrazhnyy Sud Goroda Moskvy 13 dekabr’ 2023 No. A40-197598/23-68-1448 [Ruling of the Arbitration Court of Moscow of December 13, 2023, No. A40-197598/23-69-1448] (holding the mere “existence of a sanctions policy against [a Russian company] precludes the possibility of objective and impartial consideration of the dispute [against that entity]”).

²⁸⁶ Postanovlenie Arbitrazhnyy Sud Krasnodarskogo kraya 18 iyulya 2023 No. A32-47144/2022 [Ruling of the Arbitration Court of the Krasnodar Territory of July 18, 2023, No. A32-47144/2022].

²⁸⁷ *Id.*

countersanctions express.²⁸⁸ Therefore, Law 171-FZ can be understood as a statutory tool designed to protect Russia's political interests in the aftermath of the Ukraine invasion, even at the expense of its international obligations.²⁸⁹ The *Uraltransmash* interpretation of the intersection between economic sanctions and public policy was merely a legal expedient to attain this parochial goal.²⁹⁰

VI. A THREE-PRONG TEST TO BALANCE THE POLITICAL SOUL OF ECONOMIC SANCTIONS AGAINST THE INTERNATIONAL CHARACTER OF THE NEW YORK CONVENTION

The foregoing cases demonstrate the Ukraine-Russia conflict has ushered in an era where domestic courts assist the executive branch in pursuing foreign policy goals with significant political implications.²⁹¹ Courts have utilized the Convention's vague reference to enforcing state's public policy to engage in this protectionist endeavor.²⁹² While there are colorable, persuasive arguments against economic sanctions increasing inclusion under Article V(2)(b), dismissing this trend outright would be erroneous.²⁹³ Nobody disputes that unapologetic parochialism contradicts the spirit of the Convention.²⁹⁴ Nevertheless, allowing

²⁸⁸ Postanovlenie Arbitrazhnyy Sud Severo-Kavkazskogo Okruga 16 oktyabrya 2023 No. A32-47144/2022 [Ruling of the Arbitration Court of the North Caucasus District of October 16, 2023, No. A32-47144/2022].

²⁸⁹ Law 171-FZ of June 8, 2020, (Russ.) (giving sanctioned party right to ignore arbitration agreement and request that Russian state commercial court resolves the dispute instead).

²⁹⁰ See VS RF, 2 oktiabria 2017, "Promcontroller," (305-ES17-10450) (practicing parochial judicial protectionism by not recognizing foreign arbitral award against company partially owned by Russian State).

²⁹¹ See FAS VVO, 17 fevral 2003, "United World," (A43-10716/02-27-10); VS RF, 2 oktiabria 2017, "Promcontroller," (305-ES17-10450).

²⁹² See JULIAN D. M. LEW, *TRANSNATIONAL PUBLIC POLICY: ITS APPLICATION AND EFFECT BY INTERNATIONAL ARBITRATION TRIBUNALS* 1, 12 (2018).

²⁹³ *Id.* at 20 (pointing out that the E.U. regional public policy comprises not only its "fundamental moral values" but also "politic-economic interests reflected in boycotts and embargoes," thus promoting parochialism in sharp contrast to the Convention's transnational vocation).

²⁹⁴ See *id.* at 19–22 (distinguishing between international public policy under the New York Convention, "which pertains to the state's most basic notions of justice and morality," and regional public policy, which employs parochial interpretations based on "fundamental moral values . .

domestic courts to consider certain political foreign policy goals is crucial for the Convention's own functionality and longevity.²⁹⁵ States have always zealously safeguarded their sovereignty and may perceive the Convention's complete homogeneity as a politically relevant threat, especially during international clashes.²⁹⁶ Therefore, permitting courts to uphold the local forum's specific political interests inevitably ensures the Convention remains an enduring document adaptive for changes international political changes.²⁹⁷ This reality, while unpleasant, aligns with *realpolitik* truths.²⁹⁸ Over a century ago, a PCA tribunal recognized the central role of politics in international law in the *Russian indemnities* case, prophetically declaring that, "[I]nternational law must adapt itself to political necessities."²⁹⁹

Economic sanctions primarily exemplify international realism situations, dictating that the transnational public policy doctrine yields to domestic-influenced international public policy doctrine. There is little doubt that in the twenty-first century's global chessboard, restrictive measures represent war's modern, politically

. such as the principle of non-discrimination and the protection of human rights; and economic interests").

²⁹⁵ See *id.* at 54 (describing case where Swiss court refused to uphold contract promising secret influence, given that it violated both Swiss law and transnational public policy, aligning with broader international public policy against corruption and bribery contracts).

²⁹⁶ See *id.* at 19 n.54 (illustrating case concerning US embargo on Iran, stating that Iran's potential violation "does not contravene public policy as stated in the New York Convention," although posing politically relevant threat with an international power).

²⁹⁷ Cf. Fry, *supra* note 183, at 134 (explaining how "pushing for enforcement States to rely on truly international public policy, one runs the risk of throwing the baby out with the bathwater, so to speak—namely, losing the support of states that insist on retaining control over the enforcement process, which support has helped make the enforcement regime of the New York Convention the success that it has been over the past five decades").

²⁹⁸ See AUGUST LUDWIG VON ROCHAU, FOUNDATIONS OF REALPOLITIK 2 (1868) (defining *realpolitik* as something that "does not move in a foggy future, but in the present's field of vision, it does not consider its task to consist in the realization of ideals, but in the attainment of concrete ends, and it knows, with reservations, to content itself with partial results, if their complete attainment is not achievable for the time being," adding that "ultimately, the *Realpolitik* is an enemy of all kinds of self-delusion").

²⁹⁹ Russian Claim for Interest on Indemnities (*Russ. v. Turk.*), Hague Ct. Rep. (Scott) 297 (Perm. Ct. Arb. 1912).

necessary, substitute.³⁰⁰ While international law must acknowledge the reality of sanctions, it does not imply unfettered deference.³⁰¹ Sanctions are a new important variable in the international law equation, but they are not wild cards.³⁰² Thus, it becomes essential to clearly distinguish impermissible jingoistic considerations from legitimate political interests.³⁰³ Depending on where the line is drawn, economic sanctions may either fall within or outside the proper scope of Article V(2)(b) of the Convention.³⁰⁴ One must discard blind automatism in either direction for a balanced and nuanced approach.

In their recent work on the Convention, legal scholars Franco Ferrari, Charles Kotuby, and Friedrich Rosenfeld highlight three general considerations regarding the “autonomous boundaries” of Article V(2)(b).³⁰⁵ After stating the dangers of domestic courts’ ex post facto review, they identify three ways in which this defense’s wording constrains the scope of public policy in recognizing and enforcing foreign awards.³⁰⁶ First, the authors argue that courts must determine the term “policy” by “reference to a pre-existing set

³⁰⁰ Stuart Davis & Immanuel Ness, *Introduction: Why are Economic Sanctions a Form of War?*, in *SANCTIONS AS WAR: ANTI-IMPERIALIST PERSPECTIVES ON AMERICAN GEO-ECONOMIC STRATEGY* 1, 1 (Stuart Davis & Immanuel Ness eds., 2022).

³⁰¹ See Case C-83/94, *Germany v. Leifer*, 1991 E.C.R. I-323, § 35 (holding that, albeit not unfettered, “national authorities have a certain degree of discretion when adopting [restrictive] measures which they consider to be necessary in order to guarantee public security”).

³⁰² See LEW, *supra* note 292, at 15–16 (explaining how arbitrators must assess whether sanctions affect claim or contract validity, which depends on applicable substantive law, law of seat, or international law determined by UN Security Council).

³⁰³ *Cf.* *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, 2003 I.C.J. 803, ¶ 44 (Nov. 6) (holding, “[t]he evaluation of what essential security interests are and whether they are in jeopardy is first and foremost a political question and can hardly be replaced by a judicial assessment. Only when the political evaluation is patently unreasonable (which might bring us close to an ‘abuse of authority’) is a judicial ban appropriate”).

³⁰⁴ See Shenoy, *supra* note 109, at 102 (drawing attention to variability resulting from uncertainties in interpreting and applying the public policy defense, making it the Convention’s most significant aspect with potential discrepancies).

³⁰⁵ FRANCO FERRARI ET AL., *RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A CONCISE GUIDE TO THE NEW YORK CONVENTION’S UNIFORM REGIME* 145–46 (2023).

³⁰⁶ *Id.*

of principles and values” that courts cannot subjectively create.³⁰⁷ As they correctly note, caselaw endorses this “positivist approach.”³⁰⁸ For instance, the Eleventh Circuit read Article V(2)(b) to necessitate identifying “an explicit public policy that is well-defined dominant and is ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.”³⁰⁹ Accordingly, courts should implicitly read a specificity requirement into this element—meaning the reference to the alleged public policy must be specific.³¹⁰ This aligns with Article V(2)(b)’s context and purpose.³¹¹ Because this defense is designed to be a narrow exception, the public policy invoked to override the Convention’s general pro-enforcement attitude must be specific.³¹² By combining these two elements, the public policy ground must be specific and identifiable *ex-ante*.³¹³

Second, considering the courts’ responsibility for ascertaining whether their own initiatives violate public policy, Ferrari, Kotuby, and Rosenfeld conclude such policy must “have relevance for society as a whole.”³¹⁴ They cite cases from various jurisdictions to support this proposition, interpreting public policy as “the forum state’s most basic notions of morality and justice,” or as concerning “grave defect[s] which affect[s] the foundations of public and economic life.”³¹⁵ Rephrasing this critical condition requires the policy invoked to touch and concern the public at

³⁰⁷ *Id.* at 145.

³⁰⁸ *Id.* (citing *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F. Supp. 2d 936 (S.D. Tex. 2001)).

³⁰⁹ *Tecnicas Reunidas de Talara S.A.C. v. SSK Ingenieria y Construcccion S.A.C.*, 40 F.4th 1339, 1345 (11th Cir. 2022).

³¹⁰ *See id.* at 1344–45 (citing *Cvoro v. Carnival Corp.*, 941 F.3d 487, 496 (11th Cir. 2019)) (“The public policy defense under the Convention is very narrow and is likewise to be construed narrowly in the light of the presumption favoring enforcement of international arbitral awards.”).

³¹¹ *See UNCITRAL SECRETARIAT*, *supra* note 19, at art. V(2)(b).

³¹² *See Tecnicas Reunidas de Talara S.A.C.*, 40 F.4th at 1345 (citing *Cvoro v. Carnival Corp.*, 941 F.3d 487, 496 (11th Cir. 2019)) (“The defense applies to only ‘violations of an explicit public policy that is well-defined and dominant and is ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.’”).

³¹³ *See id.*

³¹⁴ FERRARI ET AL., *supra* note 305, at 145.

³¹⁵ *Id.* (quoting *Parsons & Whittemore Overseas Co. v. Société Générale de L’Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1974)); *Bundesgerichtshof*, “*SpA Ghezzi v. Jacob Boss Söhne*” [Federal Court of Justice, “*SpA Ghezzi v. Jacob Boss Söhne*, German Federal Court of Justice”] Apr. 14, 1988 (Ger.).

large.³¹⁶ The legislative intent behind the public policy defense is to prevent a private decision from inadmissibly undermining an entire community's fundamental values without public oversight.³¹⁷ Therefore, domestic courts should not entertain arguments limited to the award's adverse repercussions on a particular debtor's interests and/or position.³¹⁸ Allowing such arguments would risk turning confirmation proceedings into an unacceptable instrument for rewriting the award through a parochial lens. Hence, only policy violations genuinely impacting general public and, by extension, the debtor can trigger Article V(2)(b).³¹⁹ Conversely, the public policy defense is inapposite where the argument merely revolves around offending society because it would injure one of its member's, the debtor's, interests.³²⁰ Entertaining such arguments would misuse the public policy defense to protect private interests rather than fundamental values.³²¹

Third, the three scholars suggest that the public policy allegedly breached must intensely diverge from the foreign award to warrant the conclusion that the award is "truly" contrary to the enforcing state's public policy.³²² To corroborate this assertion, they cite to an Austrian Supreme Court decision, which holds that, "[It] does not suffice that the law or legal relation itself is at odds with public policy; also its enforcement must be intolerable for the domestic legal system."³²³ The Convention requires substantially departing from the enforcing state's public policy to preserve its bias

³¹⁶ FERRARI ET AL., *supra* note 305, at 145.

³¹⁷ *Cf.* UNCITRAL SECRETARIAT, *supra* note 19, at 253–54 (illustrating Swiss case where arbitrator inserted contractual provision appointing himself as sole arbitrator for potential future disputes as extremely unacceptable behavior that no free and democratic legal system should support through enforcing subsequently-issued arbitral awards).

³¹⁸ *Id.* at 252 (suggesting for courts to instead entertain enforcement refusal arguments addressing "where the procedure followed in the arbitration suffered from serious irregularities, recognition, and enforcement").

³¹⁹ *See id.* ("It is thus common or courts to review awards brought before them for recognition and enforcement for fraud, bribery, or some other significant due process irregularity.").

³²⁰ *Id.* at 253.

³²¹ *See id.* (illustrating when Canadian courts denied enforcing award when tribunal violated due process principle requiring equal opportunities for parties to be heard and have their arguments considered, a fundamental value not exclusive to singular private interests).

³²² FERRARI ET AL., *supra* note 305, at 145.

³²³ *Id.* (quoting Oberster Gerichtshof [Supreme Court] Jan. 26, 2005, 3 Ob 221/04b, ENTSCHEIDUNGEN DES ÖSTERREICHISCHEN OBERSTEN GERICHTSHOFES IN ZIVILSACHEN ¶ 15 (Austria)).

and facilitate the foreign awards' free flow.³²⁴ If even a minimal divergence of the award from public policy were enough to render the award unenforceable, it would severely frustrate the Convention's objectives.³²⁵

A three-prong test can coherently organize the forgoing scholars' three observations.³²⁶ This test aims to prevent parochial misuses of the public policy defense and safeguard the autonomous nature of Article V(2)(b) of the Convention.³²⁷ More importantly, this three-prong test may prove particularly useful to mitigate tension between economic sanctions and the Convention's supranational spirit.³²⁸ This three-prong test is a well-structured tool that courts can employ to balance the legitimate socio-political concerns that economic sanctions caused against the need to avoid sheer parochialism in foreign award recognition and enforcement. In addition, it provides the international business community with greater enforcement outcome predictability.³²⁹ To better illustrate how this can be achieved, each prong of the test is analyzed in the context of economic sanctions.

A. SANCTIONS MUST EXPRESS A SPECIFIC, EX-ANTE IDENTIFIABLE PUBLIC POLICY

Under the first prong, economic sanctions can serve as a basis for denying recognition and enforcement of a foreign award only when the resisting party can point to an identifiable ex-ante sanctions regime.³³⁰ This, though, is not enough. Merely making general allegations about the existence of economic sanctions in the enforcing state as part of its overall foreign policy is insufficient to

³²⁴ See *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 973 (2d Cir. 1974) (explaining how Convention's pro-enforcement bias suggests public policy defense's limited interpretation, requiring expansive departure to undermine Convention's core purpose of eliminating prior enforcement barriers).

³²⁵ Superior Tribunal de Justiça [Superior Court of Justice], CFA 9.412, Relator: Ministro Felix Fischer, 19.4.2017, 1 (Braz.) (holding that a mere violation of a mandatory rule is insufficient to deny recognition and enforcement as "the notion of 'public order' only repels acts and legal effects that are absolutely incompatible with the Brazilian legal system").

³²⁶ FERRARI ET AL., *supra* note 305, at 146.

³²⁷ See Arfazadeh, *supra* note 104, at 50–51.

³²⁸ See generally Ngo & Walker, *supra* note 137.

³²⁹ See generally *id.*

³³⁰ Cf. FERRARI ET AL., *supra* note 305, at 145–46.

qualify those sanctions as governing public policy.³³¹ The identified sanctions, which allegedly express public policy values, must be specific and not merely part of a vast scheme of economic sanctions applied against a foreign state with which the award creditor has ties.³³² Recall in *Parsons*, the award debtor pointed to existing diplomatic sanctions that the U.S. government imposed on Egypt, thus meeting this prong's legalistic requirement.³³³ However, the argument ultimately failed because it relied on the general proposition that the debtor owed its home state an unspecified duty to be "a loyal American citizen."³³⁴

Three separate, yet related, considerations counter the argument that the mere existence of economic sanctions against a foreign state, with which the award creditor has ties, can serve as a valid ex-ante public policy for denying the foreign award's recognition and enforcement.³³⁵ First, the sole fact that an enforcing state imposes wide-ranging sanctions might signal the enforcing state's political attitude toward the target state and its nationals, but it does not speak to the balance of equities at stake in that specific case.³³⁶ Indeed, courts must balance political interests behind sanctions with private parties' interests and private parties' reliance on the Convention's pro-recognition vocation.³³⁷ To enable courts

³³¹ Tribunal fédérale [TF] [Federal Supreme Court], Jan. 21, 2014, 4A 250/2013 1, 5 (Switz.) (rejecting the argument that the award was contrary to Swiss public policy due to the existence of economic sanctions against Iran, because "the argument merely contains some general statements . . . [which] do not enable the court to understand why setting aside the objection raised by a Swiss company (the Appellant) to an order of payment concerning the amount awarded to an Iranian company (the Respondent) pursuant to an enforceable arbitral award would be incompatible with Swiss public policy").

³³² See *Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier*, 508 F.2d 969, 977 (2d Cir. 1974) ("The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement specified in the said Convention.").

³³³ *Id.* at 974.

³³⁴ *Id.*

³³⁵ See *Collins & Cole*, *supra* note 41, at 380.

³³⁶ *Id.* (arguing the public policy defense calls for a "a basic balancing test of public versus private interests" to be carried out on the facts of the specific case under scrutiny).

³³⁷ See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 723 F.2d 155, 168 (1st Cir. 1983) (holding that the provisions of Article V(2) of the New York Convention call for "a Scherk-type balancing exercise, therefore, we must weigh the private party's interest in the arbitration of international contract disputes against the public's interest in the preservation of economic order in the United States").

to strike this balance, it is necessary to specifically relate sanctions to the award and the consequences of its recognition. In a case before the Swiss Federal Tribunal concerning the recognition and enforcement of a foreign award sought by an Iranian company, the Swiss debtor vaguely pointed to the hostile attitude of Switzerland toward Iran by evidencing far-reaching sanctions.³³⁸ The court refused to apply Article V(2)(b), ruling that, “[G]eneral statements [about the sanctions regimes] . . . do not enable the court to understand why setting aside the objection raised by a Swiss company (the Appellant) to an order of payment concerning the amount awarded to an Iranian company (the Respondent) pursuant to an enforceable arbitral award would be incompatible with Swiss public policy.”³³⁹ The lack of a well-defined, specific policy to balance against the Convention’s call for uniformity specifically troubled the court.³⁴⁰

Second, if general allegations of unfairness or amorphous national security necessities attached to unilateral sanctions were enough to trigger Article V(2)(b), this would result in flat-out parochialism permeating the *Uraltransmash* decision.³⁴¹ In that case, the Russian Supreme Court held the mere presence of sanctions targeting the Russian company made the award repugnant to Russian public policy.³⁴² This approach’s arbitrariness is overt.³⁴³ The court made no specific allegations regarding the violation of the Russian company’s due process rights as a result of those sanctions.³⁴⁴ Instead, the court merely identified a potential state political interest in offering its target nationals relief from foreign sanctions without assessing the private creditor’s interests or the Convention’s goals. Drawing on the Swiss Supreme Court holding in the foregoing decision, Article V(2)(b) has become a balancing

³³⁸ Tribunal fédérale [TF] [Federal Supreme Court], Jan. 21, 2014, 4A 250/2013 1, 5 (Switz.).

³³⁹ *Id.* at ¶ 3.2.

³⁴⁰ *Id.*

³⁴¹ Postanovlenie Plenuma Verkhovnogo Suda Rossiiskoi Federatsii “Uraltransmash v. PESA” ot 21 sentiabria 2021 g. No. 309-EC21-6955 [Plenary Ruling of the Supreme Court of the Russian Federation, “Uraltransmash v. PESA,” on Sept. 21, 2021, No. 309-EC21-6955].

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ *Cf.* Postanovlenie Arbitrazhnyy Sud Krasnodarskogo kraya 18 iyulya 2023 No. A32-47144/2022 [Ruling of the Arbitration Court of the Krasnodar Territory of July 18, 2023, No. A32-47144/2022].

exercise—courts cannot blindly apply it whenever generic political interests might be at stake.³⁴⁵

Third, specificity is pivotal to avoiding parochial cherry-picking by domestic courts, which would otherwise enjoy nearly unfettered discretion to opportunistically defeat the Convention.³⁴⁶ Limiting court discretion in applying Article V(2)(b) is not only desirable from a policy perspective but also mandated by the Convention’s structure.³⁴⁷ It is settled that courts in the primary jurisdiction—that is, the jurisdiction where the tribunal is seated or whose law governs the arbitration—are given more discretion to set aside an award than courts in secondary jurisdictions called upon to recognize and enforce it.³⁴⁸ Nonetheless, the Second Circuit clarified that even when the Convention “seems to contemplate the unfettered discretion of a district court . . . discretion is constrained by the prudential concern of international comity, which remains vital notwithstanding that it is not expressly codified in the . . . Convention.”³⁴⁹ Since the Convention’s overall goal is to limit discretion for domestic courts in recognizing foreign awards, courts applying provisions, whose nature is explicitly to cabin their discretion, must *a fortiori* enjoy particularly limited judicial latitude. Since Article V(2)(b) is of such nature, the opportunism inherent in the reference to a generic scheme of sanctions is intolerable. Specific allegations and proof as to the impact of the ex-ante

³⁴⁵ See *Parsons & Whittemore Overseas Co. v. Société Générale de L’Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1974) (“Enforcement of foreign arbitral awards may be denied on [the basis of public policy] only where enforcement would violate the forum state’s most basic notions of morality and justice.”).

³⁴⁶ See UNCITRAL SECRETARIAT, *supra* note 19, at 125–26.

³⁴⁷ *Id.*

³⁴⁸ *Cf. Corporation AIC SA v. Hidroeléctrica Santa Rita S.A.*, 66 F.4th 876, 883-84 (11th Cir. 2023) (holding that courts in primary jurisdictions are not bound to the strict text of the Convention in identifying the grounds for vacatur, unlike courts in secondary jurisdictions which are bound by the limited exceptions of Article V).

³⁴⁹ *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92, 106 (2d Cir. 2016). Although the case was decided under the Panama Convention, the Second Circuit has explicitly extended it to the New York Convention in *Esso Expl. & Prod. Nigeria Ltd. v. Nigerian Nat’l Petro. Corp.*, 40 F.4th 56, 62 n.2 (2d Cir. 2022) (*Pemex* and other decisions on which we rely arise in the context of a later-enacted treaty known as the Panama Convention . . . It has long been established, and is not questioned here, that the Panama Convention is substantively identical to the New York Convention and that authority interpreting one may be applied to the other”).

sanctioning measures on the recognition and enforcement of the award are therefore necessary to fight off blatant chauvinism.³⁵⁰

B. RECOGNITION AND ENFORCEMENT MUST TOUCH AND CONCERN THE PUBLIC

The second prong of the test requires that recognizing and enforcing the award, notwithstanding the operative sanctions, have a direct bearing on society at large.³⁵¹ This is a fact-intensive inquiry. As the *Avia I* court held, sanctions impacting contractual relationships between private parties do not concern the public at large.³⁵² Nonetheless, factors like the nature of contracts involved (e.g., military equipment as opposed to general commodities) or actors at play (e.g., a strategic military entity as opposed to a local supplier of energy) may militate in favor of meeting the touch-and-concern requirement.³⁵³ A comparison of two of the Ukrainian cases previously mentioned may elucidate this inquiry. The *Avia* disputes centered on the delivery of, military equipment to one of the major contractors of the Russian army, thus justifying the fear that enforcing the award would directly impact the Ukrainian people.³⁵⁴ Conversely, in the *Normetimpex* case, the contract provided for the delivery of copper wires in relation to an energy project between two private parties that did not act on behalf of any state or state agency.³⁵⁵ In this scenario, it is hard to contend that directing the Ukrainian debtor to abide by the award matters to Ukrainian society as a whole.³⁵⁶

³⁵⁰ See Postanovlenie Arbitrazhnyy Sud Krasnodarskogo kraya 18 iyulya 2023 No. A32-47144/2022 [Ruling of the Arbitration Court of the Krasnodar Territory of July 18, 2023, No. A32-47144/2022] (basing the public policy violation on the mere existence of a “general scheme of sanctions” targeting Russian entities).

³⁵¹ FERRARI ET AL., *supra* note 305, at 145.

³⁵² *Avia FED Serv. JSC v. Artem State Joint Stock Holding Co.*, Case No. 761/46285/16-C, Resolution of the Ukrainian Supreme Court (Sept. 5, 2018).

³⁵³ *Avia FED Serv. JSC v. Artem State Joint Stock Holding Co.*, Case No. 824/100/19, Ruling of the Supreme Court of Ukraine (Feb. 13, 2020) (criticizing the *Avia I* decision for not considering that “the [award] creditor is a customer of military goods that can be used to the detriment of Ukrainian national security pending the [Russian] aggression”).

³⁵⁴ *Id.*

³⁵⁵ *JSC Normetimpex v. PrJSC Zaporizhtransformator*, Case No. 824/146/19, Ruling of the Supreme Court of Ukraine (Mar. 19, 2020).

³⁵⁶ *Id.* (refuting the argument that the consequences of the recognition and enforcement of the award would be of public concern due to the “withdrawal of capital and funds from Ukraine”).

A note of caution is necessary to clarify what the courts held in the *Avia* cases. The *Avia II* court's holding that the public policy defense can be used whenever national security is purported to be at risk is untenable and unacceptable.³⁵⁷ Parties would otherwise be able to short-circuit the requirement by maintaining the issue is either nonjusticiable or entitled to the extensive deference that traditionally constrains courts in the realm of national security.³⁵⁸ This is precisely what the *Parsons* court had in mind when indicating that denying enforcement of awards because two states are at loggerheads "would mean converting a defense intended to be of narrow scope into a major loophole."³⁵⁹ Allowing parties to invoke national security as a loophole to evade judicial review would turn Article V(2)(b) into an improper catch-all defense, shielding the merits of the defense against any meaningful judicial scrutiny.³⁶⁰ Because it is a settled principle that assessing public

³⁵⁷ *Avia FED Serv. JSC v. Artem State Joint Stock Holding Co.*, Case No. 824/100/19, Ruling of the Supreme Court of Ukraine (Feb. 13, 2020).

³⁵⁸ *See Trump v. Hawaii*, 138 S. Ct. 2392, 2422 (2018) ("The Executive's evaluation of the underlying facts is entitled to appropriate weight, particularly in the context of litigation involving 'sensitive and weighty interests of national security and foreign affairs.'"); Cons. Stato, 9 gennaio 2023, n. 289 (It.) (declaring the Executive "enjoys enormous discretion in light of the nature of the interests to be protected, pertaining to national security; thus qualifying as an action of top-level administration which is reviewable by administrative judges only insofar as manifestly illogical"). The highest administrative court in France, the Conseil d'Etat, stated that it is for the executive to determine whether given "activities may compromise national security, and [its] judgment may not be reviewed by the Court." George A. Bermann, *The Scope of Judicial Review in French Administrative Law*, 16 COLUM. J. TRANSN'L. L. 195, n.163, 231 (1977). *See also Begum v. Home Sec'y*, UKSC 7 (Feb. 26, 2021), <https://www.judiciary.uk/wp-content/uploads/2023/02/Shamima-Begum-OPEN-Judgment.pdf> (endorsing executive supremacy in areas of national security because "[t]he question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee") (citations omitted)).

³⁵⁹ *Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1974).

³⁶⁰ *Cf. Traxys Europe S.A. v Balaji Coke Industry Pvt Ltd.* [No.2] (2012) FCA 276, ¶ 105 (Austl.) ("The public policy ground does not reserve to the enforcement court a broad discretion and should not be seen as a catch-all defense of last resort.").

policy is within the province and duty of judges, courts should require a rigorous showing that declining the enforcement of the award is necessary to fend off an injury to the “vital interests of the state and society” as a whole.³⁶¹

As previously noted, the sanctions in *Avia I* and *II* likely meet the touch-and-concern requirement.³⁶² The sanctions in those cases prevented the Russian army from obtaining equipment necessary to feed the military hostilities against Ukraine.³⁶³ Clearly, there is nothing that touches and concerns the people as a whole more than an armed conflict against their own nation.³⁶⁴ Forcing a Ukrainian company to either supply goods or pay damages to a Russian company acting as the vital supplier of the Russian army would have jeopardized the security not only of the Ukrainian debtor, but also of all Ukrainian residents.³⁶⁵ Nonetheless, the reasoning offered by the Supreme Court in *Avia II* to deny recognition of the award on public policy grounds would fail the prong.³⁶⁶ While national security may constitute a legitimate justification, the mere parochial desire to protect Ukrainian companies from honoring their contractual obligations in the name of unsubstantiated national security seems to only concern the limited category of debtors, designed by virtue of unreviewable executive decisions, as holders of strategic interests.

³⁶¹ See Case No. 3K-3-255-611/2022, Lithuanian Supreme Court, Civil Cases Division (Nov. 9, 2022). For the proposition that public policy is a proper object of judicial scrutiny, see *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983) (“[T]he question of public policy is ultimately one for resolution by the courts.”).

³⁶² *Avia FED Serv. JSC v. Artem State Joint Stock Holding Co.*, Case No. 761/46285/16-C, Resolution of the Ukrainian Supreme Court (Sept. 5, 2018); *Avia FED Serv. JSC v. Artem State Joint Stock Holding Co.*, Case No. 824/100/19, Ruling of the Supreme Court of Ukraine (Feb. 13, 2020).

³⁶³ *Avia FED Serv. JSC v. Artem State Joint Stock Holding Co.*, Case No. 824/100/19, Ruling of the Supreme Court of Ukraine (Feb. 13, 2020) (holding that public policy was triggered because the award creditor was “registered in a state recognized as an aggressor against Ukraine [and] order[ed] military goods that can be used contrary to the interests of Ukraine’s national security and pose a threat of violation of the rights and freedoms of people living on its territory”).

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.*

C. RECOGNITION AND ENFORCEMENT IN THE FACE OF SANCTIONS MUST SHOCK THE CONSCIENCE OF THE COURT

The third and final prong of the test is arguably the most important. Courts should apply Article V(2)(b) only when the relevant sanctions are “truly” contrary to the public policy specifically identified as concerning the public at large.³⁶⁷ A sensible starting point to separate local favoritism from legitimate, albeit transient, political interests lies in the Austrian Supreme Court's requirement that enforcement of an award be “intolerable” for the domestic legal system.³⁶⁸ Other courts around the world have anchored the notion of international public policy on principles whose violation is intolerable.³⁶⁹ This “intolerable” requirement precludes courts from relying on a simple divergence between the award and conflicting interests of the enforcing state, thereby preventing the policy defense from turning, once again, into a parochial catch-all exception.³⁷⁰ However, the plain meaning of the term “intolerable”—i.e., something that is “unbearable” or not “capable of being borne or endured,”—is too indeterminate to conclude the analysis.³⁷¹ Therefore, further elaboration is necessary.

³⁶⁷ FERRARI ET AL., *supra* note 305, at 146.

³⁶⁸ *See* Oberster Gerichtshof [Supreme Court] Jan. 26, 2005, 3 Ob 221/04b, ENTSCHIEDUNGEN DES ÖSTERREICHISCHEN OBERSTEN GERICHTSHOFES IN ZIVILSACHEN ¶ 15 (Austria); *see also* UNCITRAL SECRETARIAT, *supra* note 19, at 241 (“In more recent decisions, the Swiss Federal Tribunal has defined an award which is contrary to public policy as an award which violates the Swiss concepts of justice in an ‘intolerable manner.’”).

³⁶⁹ *See, e.g.*, Cour d’appel [CA] [regional court of appeal] Paris, Oct. 16, 1997, No 96-84842 (Fr.) (defining international public policy as “the body of rules and values whose violation the French legal order cannot tolerate even in situations of international character”); Camera di Esecuzione e Fallimenti del Tribunale d’Appello [Debt Collection and Bankruptcy Chamber of the Court of Appeal], Mar. 5, 2018, 14.2009.104 (Switz.) (holding “it is an undisputed caselaw principle that the recognition and enforcement of a foreign judgment (or award) violates Swiss public policy when it offends the Swiss feeling of justice in an intolerable manner”).

³⁷⁰ Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd., [1999] 1 H.K.L.R.D 665 (C.F.A.) (H.K.) (“This is not to say that the reasons must be so extreme that the award falls to be cursed by bell, book, and candle. But the reasons must go beyond the minimum that would justify setting aside a domestic judgment or award.”).

³⁷¹ *Intolerable*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/intolerable> (last visited Feb. 1, 2024).

The “shock the conscience” test fashioned by multiple courts appears to be a rational and appropriate means to flesh out this standard and avoid any subjectivity loopholes.³⁷² Jurisdictions implementing such a test as part of their domestic law ordinarily require the conduct be “so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.”³⁷³ This profound connection between the intolerable standard and the shock the conscience test has found fertile soil in common law courts.³⁷⁴ The Supreme Court of India, for instance, has explicitly held in the arbitration context that, “[t]he public policy violation, indisputably, should be so unfair and unreasonable as to shock the conscience of the court.”³⁷⁵ However, courts in civil law jurisdictions and other legal systems have also acknowledged the concept of international public policy is inherently tied to the enforcing state’s collective conscience.³⁷⁶

If this test extended to the Convention, people or courts could only invoke Article V(2)(b) if the enforcement of a foreign award extremely outrages the enforcing state due to its applicable sanctions. Under this test, economic sanctions can be used as a helpful gauge to determine whether political values are fundamental to a community in a particular historical juncture rather than an automatic shield for alleged national security concerns. Indeed, the desirability of applying the shock-the-conscience test relies on the

³⁷² See, e.g., *CHY v. CIA*, [2022] SGHC(I) 3 (Sing.) (ruling that the violation of the public policy must be such that “the upholding of an arbitral award would ‘shock the conscience’, [be] ‘clearly injurious to the public good’ or ‘wholly offensive to the ordinary reasonable and fully informed member of the public[.]’”); *A v. R*, [2009] 3 H.K.L.R.D 389 (H.K.) (“If the public policy ground is to be raised, there must be something more, that is a substantial injustice arising out of an award which is so shocking to the Court's conscience as to render enforcement repugnant.”).

³⁷³ *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 847, n. 8 (1998)); see also *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 (ruling that in Canada, an extradition to a foreign country can be refused if granting the request “would be so outrageous as to shock the conscience of Canadians”).

³⁷⁴ See, e.g., *Hasenfus v. LaJeunesse*, 175 F.3d 68, 72 (1st Cir. 1999) (holding that to shock the conscience of the court the conduct must be “truly outrageous, uncivilized, and intolerable”).

³⁷⁵ *Associate Builders v. Delhi Dev. Auth.*, AIR 2014 SC 307 (India).

³⁷⁶ See, e.g., Cass. civ., sez. II, 30 settembre 1955, n. 2728 (It.) (suggesting that, unlike domestic public order, international public policy requires an assessment as to whether the foreign judgment is repugnant to the conscience of Italians).

possibility for courts to consider the political interests behind sanctions while still setting a high bar to preserve the Convention's general pro-enforcement rule and avoid whiffs of home cooking.

Sanctions are imposed, lifted, stiffened, and suspended at a pace that makes it difficult to determine whether enforcement of a particular award between private parties, even if directly benefiting a target entity, actually shocks the conscience of a court or duly informed citizen.³⁷⁷ As the Supreme Court of India held, a conscience cannot be shocked anytime “the court thinks [the award] is unjust on the facts of a case for which it then seeks to . . . do what it considers to be justice.”³⁷⁸ Against the backdrop of modern lawfare, this effectively means domestic courts cannot apply Article V(2)(b) anytime they believe recognizing an award would be unjust in light of general foreign policy manifested by the sanctions adopted by their home state; rather, the bar for relying on Article V(2)(b) is high.³⁷⁹

At the same time, this test would permit courts to weigh the socio-political role of sanctions by considering the “contemporary conscience” of the community or the courts themselves.³⁸⁰ By doing so, it inevitably draws the courts' attention to the moral, social, political, and economic sensibilities prevalent in the state at the time of enforcement.³⁸¹ Recognizing current sensibilities' fundamental role in the determination of a state's public policy is not a novel concept within the interpretation of the Convention.³⁸² It has been over thirty years since the New Zealand Court of Appeal held that Article V(2)(b) applications must be reflective of “changes in

³⁷⁷ Cf. Gary Clyde Hufbauer & Euijin Jung, *Economic Sanctions in the Twenty-First Century*, in RESEARCH HANDBOOK ON ECONOMIC SANCTIONS 32 (Peter van Bergeijk ed., 2021) (arguing that although economic sanctions “have flourished in the past two decades,” they appear to be “less important to the public than the outcome of military conflicts”).

³⁷⁸ *Id.* ¶ 22.

³⁷⁹ See FERRARI ET AL., *supra* note 305, at 146.

³⁸⁰ *Id.*

³⁸¹ See *Deutsche Schachtbau-Und Tiefbohrergesellschaft m.b.h. v. Ras Al Khaimah National Oil Co.*, [1987] 2 Lloyd's Rep. 246 (Eng.) (noting “some element of illegality or that the enforcement of the award would be clearly injurious to the public good or . . . that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised”); Cass. 6 dicembre 2002, n. 17349 (It.) (“[I]nternational public policy comprises (only) those fundamental principles that characterize the ethical attitude of a legal system in a given historical juncture.”).

³⁸² See *CBI New Zealand Ltd. v. Badger Chiyoda* [1989], 2 NZLR 669 (N.Z.).

society or in attitudes prevailing internationally.”³⁸³ Because economic sanctions are a reflection and embodiment of contemporary sensibilities within individual states and, more broadly, the international community, assessing the third prong of the test through a shock the conscience requirement enables domestic courts to consider socio-economic values expressed by economic sanctions without being accused of vile parochialism.³⁸⁴

One final clarification is necessary. Accepting the proposed test neither sacrifices nor betrays the thirst for consistency that permeates the Convention as a direct corollary of its international character.³⁸⁵ True, conditioning recognition and enforcement on (certain) economic sanctions implemented by the enforcing state will inevitably create differences among jurisdictions, and those differences might become significant. Courts in some states might be more prone to have their conscience shocked, thereby concluding economic sanctions are elements of international public policy more often than courts in other countries.³⁸⁶ However, the goal of international consistency should not be understood as achieving complete, yet unrealistic, homogeneity across legal systems.³⁸⁷ Instead, ambitions should be aimed at enhancing predictability for cross-border business operators.³⁸⁸ Consistency in the procedures, notions, and tests employed by domestic courts to effectuate the Convention can satisfy predictability.³⁸⁹ Article III of the Convention unequivocally ties the state’s obligation to recognize and enforce foreign arbitral awards to “the conditions laid down” by

³⁸³ *Id.* at 674.

³⁸⁴ Kim Richard Nossal, *International Sanctions as International Punishment*, 43 INT’L ORG. 301, 313 (1989) (noting that economic sanctions are enacted by policymakers when “their moral sensibilities [are] shocked by acts they regard as ‘wrongful’”).

³⁸⁵ HERBERT KRONKE ET AL., RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 4 (2010) (pointing out that “many judges are aware that, as virtually all modern transnational commercial law instruments explicitly provide, ‘regard has to be given to its international character and the need to promote uniformity in its application’”).

³⁸⁶ *Accord* Javier Garcia de Enterría, *The Role of Public Policy in International Commercial Arbitration*, 21 L. & POL’Y INT’L BUS. 389, 401–02 (1990).

³⁸⁷ *Cf.* Scherk v. Alberto-Culver Co., 417 U.S. 506, 506 (1974) (holding the Convention’s goal is to ensure “the orderliness and predictability essential to [any] international business transaction”).

³⁸⁸ *Id.*

³⁸⁹ KRONKE ET AL., *supra* note 385, at 4 (“Promotion in uniformity requires detailed knowledge of what courts in foreign countries are doing and how judges are reasoning in reaching their decisions.”).

the Convention, thereby harmonizing “the rules of procedure of the territory where the award is relied upon.”³⁹⁰ Of course, the solution proposed in this section may not guarantee a complete harmonization in the substantive decisions of domestic courts. Nevertheless, by virtue of a single, precise, three-prong test, the proposed solution combines a realistic interpretation of the Convention’s international character and goals with the procedural consistency much-needed by the business community and courts when grappling with the touchy connection between economic sanctions and Article V(2)(b).

VII. CLOSING REMARKS

The tension arising out of the interaction between Article V(2)(b) of the Convention and economic sanctions is inevitable. The Convention’s ratification was to promote uniformity and legal certainty in the international circulation of foreign awards.³⁹¹ To achieve this, courts must interpret the public policy defense outlined in Article V(2)(b) autonomously, free from any provincial bias.³⁹² However, challenges emerge when arbitral award recognition intersects with economic sanctions.³⁹³ Economic sanctions are essential tools for governments to advance and protect their political interests in foreign policy, but they inevitably carry a local perspective.³⁹⁴ The recent surge in sanctions following the Ukraine-Russia conflict and the resulting geopolitical shifts have exacerbated this tension and presented courts with a thorny issue.³⁹⁵ Courts face conflicting obligations: effectuating the international character of the Convention, which seeks to ensure the seamless recognition and enforcement of foreign awards, and upholding the economic

³⁹⁰ UNCITRAL SECRETARIAT, *supra* note 19, at art. 3.

³⁹¹ *Id.*

³⁹² *See, e.g.*, *Traxys Europe S.A. v Balaji Coke Industry Pvt Ltd.* [No.2] (2012) FCA 276, ¶ 98 (Austl.).

³⁹³ *See Parsons & Whittemore Overseas Co. v. Société Générale de L’Industrie du Papier*, 508 F.2d 969 (2d Cir. 1974).

³⁹⁴ HUFBAUER ET AL., *supra* note 61, at 3 (defining economic sanctions and their political DNA).

³⁹⁵ *See Avia FED Serv. JSC v. Artem State Joint Stock Holding Co.*, Case No. 761/46285/16-C, Resolution of the Ukrainian Supreme Court (Sept. 5, 2018); *Avia FED Serv. JSC v. Artem State Joint Stock Holding Co.*, Case No. 824/100/19, Ruling of the Supreme Court of Ukraine (Feb. 13, 2020); *Postanovlenie Plenuma Verkhovnogo Suda Rossiiskoi Federatsii “Uraltransmash v. PESA”* ot 21 sentiabria 2021 g. No. 309-EC21-6955 [Plenary Ruling of the Supreme Court of the Russian Federation, “Uraltransmash v. PESA,” on Sept. 21, 2021, No. 309-EC21-6955].

sanctions imposed by their respective states, which pursue political foreign policy goals.³⁹⁶

To solve this struggle most faithfully, given the international character of the Convention, some courts and scholars have advocated for a transnational understanding of public policy vis-à-vis economic sanctions.³⁹⁷ Under this view, Article V(2)(b) applies only when there is consensus within the international community regarding the importance of the policy at stake.³⁹⁸ However, since unilateral sanctions are typically imposed by states to further parochial interests in foreign policy, they are often transient in nature and do not meet a transnational reading of Article V(2)(b).³⁹⁹ This was the conclusion reached in *Parsons*, a case which quickly became the prevailing approach's foundation.⁴⁰⁰ Nonetheless, only in the pre-2014 world, during which political clashes were minimized or downplayed to promote international trade and business, was the divergence in political interests small enough for states to realistically accept such an interpretation of Article V(2)(b).⁴⁰¹

The Russia-Ukraine crisis, which started in 2014 and culminated in the ongoing war, has revolutionized the geopolitical landscape.⁴⁰² States are now fiercely engaged in a battle to validate their socio-political values and agendas on the international stage. To prevail in this fight, countries have imposed unparalleled sanctions on each other and their nationals. Politics have pressured courts into sustaining this effort by abandoning the *Parsons* rule in favor of a parochial reading of Article V(2)(b).⁴⁰³ The *Avia* cases in Ukraine and the interpretation of Law No. 171-FZ given by the Russian Supreme Court in *Uraltransmash* exemplify this troubling trend toward transforming Article V(2)(b) into a national security catch-all defense by masquerading strategic, yet parochial, interests underlying economic sanctions as automatic grounds of public policy.⁴⁰⁴ If this parochialism becomes dominant, it could inflict a mortal wound on the Convention.

³⁹⁶ See generally Ngo & Walker, *supra* note 137.

³⁹⁷ See LEW ET AL., *supra* note 125, at 423.

³⁹⁸ *Parsons*, 508 F.2d 969.

³⁹⁹ See Mayer & Sheppard, *supra* note 129, at 249.

⁴⁰⁰ 508 F.2d 969.

⁴⁰¹ See generally LALIVE, *supra* note 140.

⁴⁰² See generally Madina Khudaykulova et al., *Economic Consequences and Implications of the Ukraine-Russia War*, 8 INT'L J. MGMT. SCI. BUS. ADMIN. 44, 44 (2022).

⁴⁰³ See Karuka, *supra* note 9, at 51–55.

⁴⁰⁴ See *Avia FED Serv. JSC v. Artem State Joint Stock Holding Co.*, Case No. 761/46285/16-C, Resolution of the Ukrainian Supreme Court (Sept.

It is undeniable that the international character of the Convention rejects opportunistic interpretations designed to further transient national interests across the board.⁴⁰⁵ The socio-political circumstances of the historical juncture cannot be neglected altogether if the Convention is to be a living document with the ability to endure dire times, like the current ones.⁴⁰⁶ Today's geopolitical context involves a massive use of economic sanctions, leaving stakes too high for states to gloss over these political measures in the name of an alleged transnational nature of public policy. By contrast, the domestic-oriented lens of international public policy leaves room for the enforcing state's fundamental political, social, and economic interests.⁴⁰⁷ However, the uniformity that the Convention seeks requires a well-defined, rational procedure for courts to draw a line between legitimate political interests and inadmissible jingoism and for business actors to anticipate the potential outcome of the confirmation petition.⁴⁰⁸

The three-prong test proposed in this article responds to this necessity. While acknowledging the reality that states will not give up on seeing their sanctions are enforced to the fullest extent possible, using this test does not permit Article V(2)(b) to evolve into an unchecked catch-all container for national security arguments. To prevail on a public policy argument, three elements must be satisfied: (i) sanctions must identify a specific public policy identifiable ex-ante, (ii) sanctions must touch and concern the public at large, and (iii) the recognition and enforcement of the award at the sanctions' expense must be so outrageous as to shock the conscience of the citizens and/or the courts of the enforcing state.

Of course, accepting the proposition that politically motivated sanctions driven by parochial considerations and interests may find their way into Article V(2)(b) is a hard pill to swallow for the adamant defenders of the international character of the Convention. Nonetheless, it cannot be ignored that the lawfare

5, 2018); Avia FED Serv. JSC v. Artem State Joint Stock Holding Co., Case No. 824/100/19, Ruling of the Supreme Court of Ukraine (Feb. 13, 2020); Postanovlenie Plenuma Verkhovnogo Suda Rossiiskoi Federatsii "Uraltransmash v. PESA" ot 21 sentiabria 2021 g. No. 309-EC21-6955 [Plenary Ruling of the Supreme Court of the Russian Federation, "Uraltransmash v. PESA," on Sept. 21, 2021, No. 309-EC21-6955].

⁴⁰⁵ See generally Collins & Cole, *supra* note 41.

⁴⁰⁶ See Ingeborg Schwenzer & Pascal Hachem, *The CISG—Successes and Pitfalls*, 57 AM. J. COMP. L. 457, 469 (2009) ("[E]very uniform law has to rely on a certain imprecision . . . to be flexible enough to adapt to new factual and legal developments in decades to come.").

⁴⁰⁷ See Buchanan, *supra* note 119, at 511.

⁴⁰⁸ See *id.*

sweeping the world since 2014 opened a fork in the road. The Convention can either account for the current socio-political context and withstand the impact of the new parochialism spurred by the war in Ukraine by carving out some limited, rigorously defined room for unilateral sanctions, or it can stubbornly close the door of Article V(2)(b) in the name of a blind transnational dogmatism, eventually dissolving with it. Clearly, courts in Ukraine and Russia have shown no reluctance in paving the way for the latter option.