

REEXAMINING INTERNATIONAL LAW AT THE INTERNATIONAL, REGIONAL, AND STATE LEVELS (NEW VOICES)

This panel was convened at 9:00 a.m., on Friday, April 1, 2016, by its moderator, Martin Scheinin of the European University Institute, who introduced the panelists: Jessica Beess und Chrostin of King & Spalding LLP; Yang Liu of the University of California, Los Angeles School of Law; Vincent-Joël Proulx of the National University of Singapore Faculty of Law; and Shana Tabak of Georgia State University College of Law.*

UNILATERAL AND MULTILATERAL SANCTIONS IN INVESTMENT TREATY ARBITRATION

By Jessica Beess und Chrostin[†]

Iran, Iraq, Lebanon, Libya, the Russian Federation, Syria—these are but a fraction of the states currently subject to some form of sanctions, whether economic or other. Sanctions often have adverse effects on targeted states, but also on individuals and companies doing business in those countries. Traditionally, depending on the states and parties involved, the international fora in which disputes arising from or relating to economic sanctions are most commonly heard are the International Court of Justice (the Court), the European Court of Justice, and the Iran-United States Claims Tribunal.¹ This paper posits that (1) we may expect to see claims arising from economic sanctions in investment treaty arbitration, and (2) as in the jurisprudence of the Court,² sanctions ordered or authorized by a resolution of the United Nations Security Council (Resolution) will likely supersede contrary international treaty obligations whereas sanctions imposed by regional or domestic policy may not.

A growing number of bilateral investment treaties (BITs) offer qualified foreign investors and their investments certain protections from detrimental interference by states in which a foreign investment has been made (Host States).³ BITs generally require that the Host State, which is a contracting party to the BIT, treat foreign investors of the other contracting party and their investments in the Host State fairly and equitably, in a reasonable and nondiscriminatory manner so as not to impede the investment, and afford the investment full protection and security. They also protect qualified investments from expropriation without compensation, and often allow the protected investor to institute investment treaty arbitration proceedings against the Host State in case of a violation of the BIT.⁴

* Mr. Scheinin did not contribute remarks for the *Proceedings*.

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¹ Disputes relating to or arising out of sanctions regimes may also be brought in domestic courts, but this paper is concerned with *international* dispute resolution options.

² Discussion of the European Court of Justice and the Iran-U.S. Claims Tribunal, and their respective jurisprudence, is omitted here due to the brevity of this summary paper although the author addressed these at the ASIL Annual Meeting 2016.

³ BITs are international agreements between two countries that provide investors of either contracting party who have made a qualified investment in the other contracting party certain rights and protections. The applicable BIT usually sets forth the definitions of “investment” and “investor.”

⁴ Most BITs contain dispute resolution clauses applicable to disputes between a protected investor and the Host State. Where the relevant dispute resolution clause provides that the investor may elect to arbitrate its dispute with the Host State, such clause is generally interpreted as the Host State’s consent to investment treaty arbitration. The investor manifests its consent by filing the arbitration claim.

To date, there have been no investment treaty arbitrations in which the core of the investor's claims arose directly out of a sanctions regime. But due to the nature of the protections afforded through BITs, it is likely that an investor may be protected from harm—or entitled to relief for harm caused—by sanctions in investment treaty arbitration. Relevant protections in this context to which a qualified investor may be entitled under a BIT are the protection from expropriation without compensation and the right to nonimpairment of the use, enjoyment, and sale of its investment. It is easy to imagine a scenario in which sanctions could have the result of expropriating or impairing an investor's investment, and consequently might trigger the protections contained in an applicable BIT. As one renowned commentator, professor, and arbitrator has written, the recent wave of sanctions against Russia, a country that imports *and* exports investments, “may soon be expected to lead to disputes either by commercial arbitrations or sometimes also by investment arbitrations[.]”⁵ Should an investor decide to pursue relief in arbitration, however, the unilateral or multilateral nature of the sanction(s) at issue may be outcome-determinative for the reasons discussed below.

International law does not adopt the doctrine of *stare decisis* or binding precedent. Nevertheless, investment arbitration tribunals look to the decisions of other international adjudicative bodies and *ad hoc* investment arbitration tribunals for guidance. An analysis of the jurisprudence of the Court shows that, if the sanction at issue is adopted or authorized by a United Nations Resolution under Chapter VII of the Charter of the United Nations (the Charter), the Resolution will likely outrank other international rights and protections an investor may have. By contrast, sanctions imposed pursuant to regional or domestic policy do not enjoy such immunity. A brief discussion of the *Pan Am* (or *Lockerbie*) case⁶ and the *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua case*)⁷ illustrates this point. In *Pan Am*, Libya applied to the Court for provisional measures to protect its rights under the 1971 Montreal Convention. According to Libya, the threat of economic sanctions by the United States and the United Kingdom infringed those rights. These sanctions, however, had been authorized by Security Council Resolution 748. The Court was tasked with determining the status of Chapter VII sanctions vis-à-vis United Nations member states' other international law obligations.

The Court rejected the provisional measures request because the rights Libya claimed under the Montreal Convention, even if legitimate, could not be preserved in light of the Resolution. It noted that Article 25 of the Charter provides that the United Nations member states “agree to accept and carry out the decisions of the Security Council in accordance with the Charter.”⁸ Implementation of Resolutions is thus not discretionary. The Court further noted that Charter Article 103 provides that “in the event of a conflict between the obligation of the Members of the United Nations under the present Charter and their obligation under any other international agreement, their obligation under the present Charter shall prevail.”⁹ The Court understood this provision to require a finding that, as member states, the affected parties had agreed that Security Council-imposed obligations would prevail over other international agreements. On this basis, the Court ruled that the Security Council's

⁵ Karl-Heinz Böckstiegel, *Applicable Law in Disputes Concerning Economic Sanctions: A Procedural Framework for Arbitral Tribunals*, 30(4) *ARB. INT'L.* 605, 605 (2014).

⁶ Order with Regard to Request for the Indication of Provisional Measures in the Case Concerning Questions of Interpretations and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libya v. U.S.*), 1992 ICJ, 31 ILM (Apr. 14, 1992).

⁷ *Case Concerning the Military and Paramilitary Activities in and Against Nicaragua*, Merits, 1986 ICJ 14 (June 27).

⁸ UN Charter, Art. 25.

⁹ *Id.* Art. 103.

authorization of multilateral sanctions prevailed over Libya's rights under the Montreal Convention.

The *Nicaragua* case, by contrast, exhibits a different, though consistent, approach to the analysis of economic sanctions and their intersection with other international legal obligations. In the *Nicaragua* case, Nicaragua brought claims against the United States in connection with the latter's military and paramilitary activities in and against Nicaragua, including a complaint that the United States' imposition of economic measures against Nicaragua constituted a form of indirect intervention in its internal affairs and violated the 1956 Treaty of Friendship, Commerce and Navigation between Nicaragua and the United States (FCN).¹⁰ The measures of which Nicaragua complained included the United States' termination of economic aid to Nicaragua, its opposition and blockage of loans to Nicaragua by international financial bodies, and a total trade embargo. The United States adopted these measures unilaterally.

The Court held that the United States' unilateral economic measures against Nicaragua did not amount to a breach of customary international law, but they did breach the FCN. Without a Security Council Resolution that would prevail over conflicting international legal obligations, and that would, in effect, render the United States' economic measures multilateral sanctions, the United States' imposition of economic measures against Nicaragua constituted a breach of its bilateral treaty with Nicaragua.

In *Pan Am*, the Court recognized that Libya held rights under the Montreal Convention, but those rights were not entitled to protection in the face of Resolution 748. In the *Nicaragua* case, by contrast, the unilateral nature of the sanctions meant that there was no international legal principle or instrument that could elevate the sanctions above the United States' other international legal obligations.

Transposed to the investment arbitration context, this jurisprudence indicates that while investors may have legitimate claims against Host States under applicable BITs, the source of the sanction at issue may be outcome-determinative. Should an investment arbitration tribunal follow the reasoning of the Court, which closely tracks the language of the Charter, sanctions imposed by a Security Council Resolution may be immunized from attack, even where the investor has a legitimate claim under a BIT. Unilateral (or regional) sanctions, by contrast, may give rise to successful claims in investment arbitration, depending, of course, on the wording of the BIT¹¹ and the specific facts of the case.

THE JUDICIAL CONSTRUCTION OF GAPS AT THE INTERNATIONAL COURT OF JUSTICE

By Yang Liu*

First of all, I would like to sincerely thank the program committee for inviting me to the Annual Meeting and speak on this panel with these prominent young academic lawyers. It is truly my honor.

My talk is about how the International Court of Justice (ICJ) deals with legal gaps. My general point is that the Court deals with gaps strategically. Contrary to the conventional

¹⁰ Treaties of Friendship, Commerce and Navigation are the predecessor to BITs.

¹¹ Some BITs have clauses carving out sanctions and declaring the imposition of sanctions nonactionable conduct.

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