Sanctions-Related ISDS Disputes - Issues of Jurisdiction and Merits

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The intersection of economic sanctions and investor-state dispute settlement (ISDS) has become an increasingly complex and consequential area of international law, particularly in the field of arbitration. Geopolitical events, particularly Russia's invasion of Ukraine, have brought these issues to the forefront, creating challenges for investors, states, and arbitral tribunals.

On 15 October 2024, the British Institute of International and Comparative Law (BIICL) held a seminar on "Sanctions-Related ISDS Disputes - Issues of Jurisdiction and Merits" in cooperation with Arnold & Porter. The hybrid event took place at Arnold & Porter's London office and online, chaired by Professor Yarik Kryvoi, Investment Treaty Forum Director at BIICL. Speakers were Damroka Koscielak, member of the International and European Law Department at the Office of the General Counsel to the Republic of Poland; Dr. Paschalis Paschalidis from Arendt & Medernach, and Oonagh Sands from Fietta. The event was moderated by Dr. Joel Dahlquist from Arnold & Porter.

The seminar opened with an overview of recent developments in sanctions-related investment arbitrations. The panel noted that several claims have been notified and initiated based on measures taken in response to sanctions. These disputes concern both Western sanctions against entities allegedly connected to the Russian government and various countermeasures taken by the Russian government against entities from so-called "unfriendly jurisdictions".

A significant portion of the discussion focused on jurisdictional challenges likely to arise in these cases. The panel examined the narrow jurisdiction clauses often found in older bilateral investment treaties, particularly those signed between Western countries and Russia in the 1980s and 1990s. These clauses typically restrict jurisdiction to hearing compensation for expropriation, which may pose difficulties for claimants in sanctions-related disputes. The potential use of most favoured nation clauses to expand jurisdiction was explored, with reference made to relevant case law such as *Maffezini* and *Plama* as well as the general rules of treaty interpretation pursuant to the Vienna Convention on the Law of Treaties.

The panel then turned to substantive issues. The speakers discussed potential breaches of investment standards such as fair and equitable treatment and non-impairment clauses in the context of sanctions measures. The panel referenced the ICJ's findings in the *Certain Iranian Assets* case, which adopted a proportionality test for assessing the reasonableness of measures under a non-impairment clause. The invocation of essential security interests as a defence was also considered, with the panel noting the high threshold typically applied for such clauses.

Procedural aspects of sanctions-related disputes were addressed, including the challenges of selecting appropriate arbitral seats given the current geopolitical tensions. The panel suggested that traditionally neutral venues like Stockholm and Swiss seats could still be preferred, with Singapore, Malaysia, and Dubai also mentioned as potential options.

The discussion then shifted to EU law implications, given that most initiated and threated cases are based on treaties signed by at least one EU member state. The panel explained the division of competences between the EU and member states in imposing sanctions, noting that EU positions generally leave limited grounds for members to impose sanctions, particularly in the financial sector. This raises complex questions of attribution in investment arbitrations, as claimants may struggle to identify specific member state conduct when challenging EU-wide sanctions. The panel referred to cases of the ECHR such as *Bosphorus* and *Behrami* to highlight these complexities. From the discussions, the panel observed that attribution can be difficult to establish when a member translates EU law through a regulatory act, which does not entail measures of implementation and thus, no conduct from the member state under international law.

The potential application of the *Monetary Gold* principle was considered in cases where the EU is not a party to the proceedings but its actions are central to the dispute. According to this principle, an adjudicatory body cannot decide a dispute in which a third party's legal interests "would form the very subject-matter of the decision." The panel also touched upon the use of

countermeasures as a public international law defence, noting ongoing debates over the evolving understanding of permissible countermeasures since the ILC Articles on State Responsibility in the early 2000s.

Emergency arbitration procedures, and interim measures more generally, were discussed in the context of sanctions disputes, on the assumption that such requests will be brought (and in at least one case already has) to maintain the status quo while arbitrations are pending. The panel outlined the conditions for granting interim measures, including irreparable harm, urgency, and proportionality. They noted the high bar for demonstrating irreparable harm in financial matters and the reluctance of tribunals to encroach on state sovereignty, particularly in cases involving military aggression.

The seminar concluded with a brief discussion on enforcement challenges, noting that public policy considerations would likely play a significant role in the enforcement of awards related to sanctions disputes.

Throughout the event, the panel emphasized the complex interplay between international investment law, sanctions regimes, and geopolitical realities. The speakers highlighted that while these cases present novel challenges, tribunals are likely to draw on established principles of international law while adapting them to the unique context of sanctions-related disputes. The seminar provided valuable insights into this emerging and consequential area of international dispute resolution, setting the stage for further developments as more sanctions-related claims are expected to arise in the near future.

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