



The Role of Investor-State Arbitration in Promoting the Rule of Law in Economic Sanctions

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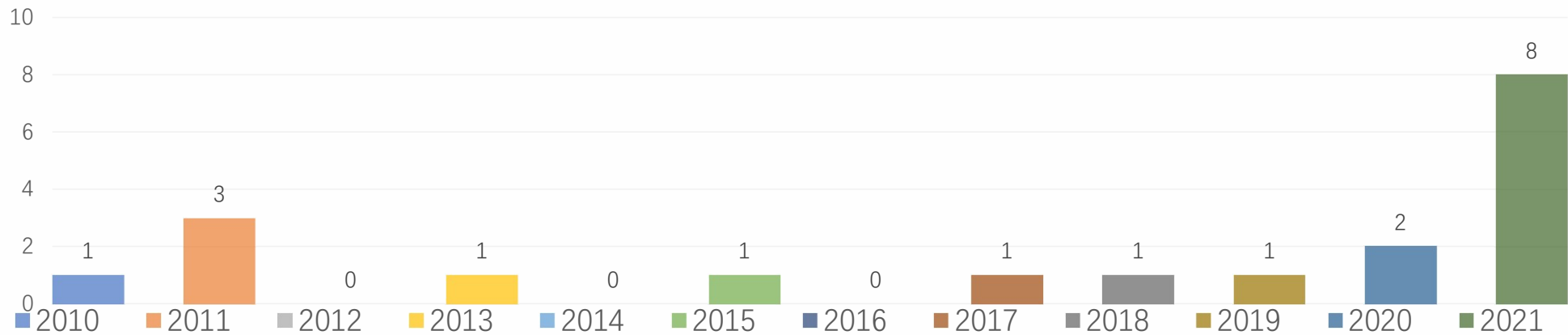
1. An Empirical Analysis of Economic Sanctions in ISA

| Year | Case |
|------|--------------------------------------------------|
| 2010 | Pezold v. Zimbabwe |
| 2011 | Stati and others v. Kazakhstan |
| 2011 | Crystallex v. Venezuela |
| 2011 | Koch Minerals v. Venezuela |
| 2013 | General Dynamics v. Libya |
| 2015 | Dayyani v. South Korea (I) |
| 2017 | Bank Melli Iran and Bank Saderat Iran v. Bahrain |
| 2018 | Al Awamleh and others v. Qatar |
| 2019 | VEB v. Ukraine |
| 2020 | Nord Stream 2 v. European Union |

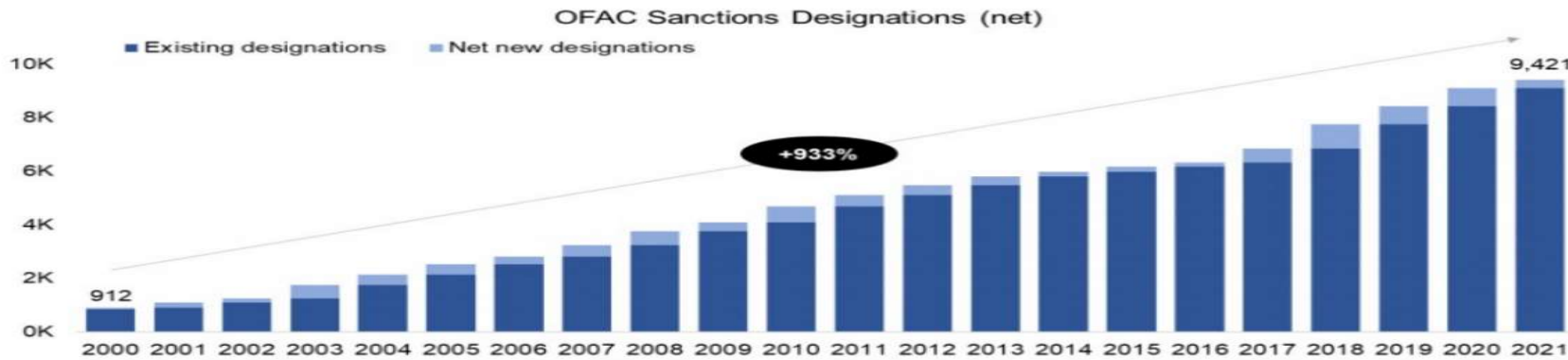
| Year | Case |
|------|------------------------------------|
| 2020 | Wang Jing et al. v. Ukraine |
| 2021 | Central Bank of Iran v. Bahrain |
| 2021 | Alpene v. Malta |
| 2021 | Qatar Airways v. Bahrain |
| 2021 | Qatar Airways v. UAE |
| 2021 | Qatar Airways v. Egypt |
| 2021 | Qatar Airways v. Saudi Arabia |
| 2021 | Dayyani v. South Korea (II) |
| 2021 | Iran's Central Bank v. South Korea |



The year of case distribution is positively correlated with the change in the number of economic sanctions



Sanctions use has increased over the last 20 years



1. An Empirical Analysis of Economic Sanctions in ISA

□ Different sanctions found in Investor-State Disputes

| Types of Sanctions | Case Name |
|-------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------|
| Multilateral sanctions adopted by the UNSC | Stati and others v. Kazakhstan |
| Both multilateral sanctions adopted by the UNSC and unilateral sanctions issued by various countries | General Dynamics v. Libya Bank Melli v. Bahrain |
| Unilateral financial sanctions (US) | Crystallex v. Venezuela Koch Minerals v. Venezuela Dayyani v. South Korea (II) |
| Unilateral sanctions – close airspace | Qatar Airways v. Bahrain Qatar Airways v. UAE Qatar Airways v. Egypt Qatar Airways v. Saudi Arabia |
| Unilateral sanctions – arms embargo and asset freeze | General Dynamics v. Libya |



1. An Empirical Analysis of Economic Sanctions in ISA

□ Many issues related to economic sanctions raised, but have not been solved yet, mainly due to the following reasons:

| Status | Details |
|------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Still pending in arbitration | 11 cases raised during 2019–2021 |
| In concluded cases, several tribunals refused to analyse the sanction issue | In <i>General Dynamics v. Libya</i> , tribunal did not address whether the international sanctions constituted force majeure In <i>Dayyani v. South Korea (I)</i> , tribunal found it unnecessary to address claim whether Korea's imposition of sanctions on Iran itself constituted a BIT violation. |
| Still pending in recognition and enforcement | <i>Crystallex v. Venezuela</i> <i>Koch Minerals v. Venezuela</i> <i>Dayyani v. South Korea (II)</i> |



1. An Empirical Analysis of Economic Sanctions in ISA

□ The role of the host country in different cases

| The Role of the Host Country | Cases and Details |
|--------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------|
| As the initiator of sanctions | Qatar Airways v. Bahrain Qatar Airways v. UAE Qatar Airways v. Egypt Qatar Airways v. Saudi Arabia |
| As the third country of foreign sanctions | In Dayyani v. South Korea (I), Korea has to compliance with extraterritorial sanctions of other countries |
| As the target of sanctions | In General Dynamics v. Libya, Libya claims arisen from failure to perform obligations under the investment contract due to sanctions |



2. The Impacts of Economic Sanctions on ISA

| Impacts | Key Findings |
|-------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Procedural impacts (jurisdiction and admissibility) | <p>In <i>Stati and others v. Kazakhstan</i>, the tribunal refused to reject its jurisdiction on the grounds of sanctions</p> <p>In <i>Bank Melli v. Bahrain</i>, there was no violation of sanctions when the investment was established; only the sanctions adopted by the UNSC are part of international public policy.</p> |
| Substantial impacts (treatments and protection standards) | <p>FET, FPS, prohibition of expropriation, prohibition of arbitrary or discriminatory, due process, transparency, reasonable expectations, etc.</p> |
| The recognition and enforcement of investment arbitration awards | <p>In <i>Crystallex v. Venezuela</i> and <i>Koch Minerals v. Venezuela</i>, US District Court said they needed special permission from OFAC to disposing assets.</p> <p>In <i>Dayyani v. South Korea (II)</i>, South Korea District Court also need special permission from OFAC.</p> |
| Potential defense of the host country | <p>Security Exception, Force Majeure, Necessity, Counter-measure, etc.</p> |



3. Conflicts Between Economic Sanctions and International Investment Law

| Conflicts | Analyses |
|----------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Conflicts with obligation under investment treaty | <ul style="list-style-type: none">▪ UNSC Sanctions: UN Charter, Art.25, Art.103, Libya v. U.S.(1992 ICJ)▪ Unilateral Sanctions: Bank Melli v. Bahrain, UN Draft articles on Responsibility of States for Internationally Wrongful Acts 2001, Art.3 |
| Conflicts with public policies exceptions | <p>Public policy exceptions, Art.5.2.b of 1958 New York Convention, Art.5 of 2021 Singapore Mediation Convention</p> <ul style="list-style-type: none">▪ International public policy – UNSC sanctions only, in Bank Melli v. Bahrain▪ National public policy – different attitudes <p>ECJ in Eco Swiss ✓ Russian ✓ Ukraine, in 2020.1.9, case 761/46285/16-C ✗ Ukraine, in 2020.2.13, case 824/100/19 ✓</p> |



4. Conclusions

Conclusions

Positive Roles

- ISA might act as an effective tool for investors to challenge the States' unilateral sanctions, which accordingly might be ruled illegal for violating IIA provisions?

Limitations

- Tribunals are reluctant to discuss the issue of economic sanctions, i.e. Dayyani v. South Korea (I), General Dynamics v. Libya

Modernisation of Investment treaty

- Sanction elements in IIAs: Denial of Benefits, Transfer
- Embodied liberalisation introduce more sanction elements into IIAs



Appendix

Draft Model Clause for an IIA Sanction Clause (Exception or Right-to-Regulate)

- a. *Nothing in this Agreement shall be construed as prohibiting the host country from adopting economic sanctions.*
- b. *The host country's adoption of sanctions related measures shall not violate its investment protection obligations under this agreement.*
- c. *The sanctions of the host country should be based on the purpose of public interest, necessity, good faith, rationality, proportionality and compliance with due process.*
- d. *The jurisdiction and admissibility of the arbitral tribunal are not affected by the economic sanctions of the host country.*



Thank You

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