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THE UKRAINE CONFLICT - WHAT IS AT STAKE?

by Papito Francis Ojok

I. INTRODUCTION

To understand what is at stake in the Russia-Ukraine conflict, the Institute for Energy Law, in conjunction with Center for American and International Law, on March 9, 2022, organized a panel discussion entitled, “*The Ukraine Conflict - What is at Stake?*” Professor Frederic Sourgens (“Prof. Sourgens”), Senator Robert J. Dole, Distinguished Professor of Law and Director of the Washburn Oil and Gas Law Center of Washburn University School of Law, moderated the panel. The following distinguished international lawyers and arbitrators spoke at the panel:

1. Professor Harry W. Sullivan, Jr. (“Prof. Sullivan, Jr.”), international energy attorney based in Dallas, Texas, Executive Professor at Texas A&M School of Law, and Adjunct Professor at SMU’s Dedman School of Law.
2. Dr. Leila Nadya Sadat (“Dr. Sadat”), James Carr Professor of International Criminal Law at Washington University School of Law, director of the Whitney R. Harris World Law Institute, Special Adviser on Crimes Against Humanity to the International Criminal Court Prosecutor, and President of the American Branch of International Law Association.
3. Mr. Baiju Vasani (“Mr. Vasani”), Senior Fellow in International Law at SOAS University of London, served as lead counsel and arbitrator in cases under the auspices of the International Centre for Settlement of Investment Disputes and the International Court of Arbitration, and served as counsel to the Russian Federation.
4. Dr. Danae Azaria (“Dr. Azaria”), Associate Professor at the Faculty of Laws of University College London, Principal Investigator of a Starting Grant of the European Research Council (ERC), and Director of a research project entitled “State Silence.”

This article analyzes the issues discussed during the panel, including: (1) the humanitarian crisis as a result of the Russia-Ukraine conflict, and legal actions being



taken against the Russian Federation; (2) the impact of the conflict on the oil and gas sector; (3) sanctions against the Russian Federation and Russian oligarchs; (4) a hold on the certification of the Nord Stream 2 pipeline by the German government; (5) potential actions of the Russian Federation in response to these actions and sanctions; and (6) potential investment disputes arising out of the conflict.

II. HUMANITARIAN CRISIS AND LEGAL ACTIONS AGAINST RUSSIA

Dr. Sadat commenced the discussion by giving an overview of the response of states and the international community to Russia's invasion of Ukraine on February 24, 2022. Article 2(4) of the Charter of the UN ("UN Charter") commands all Members of the UN to refrain from the threat or use of force against the territorial integrity or political independence of any state. According to her, Ukraine's response to the conflict was to institute a claim with the UN Security Council, the body vested with the primary responsibility to maintain international peace and security, for an emergency session condemning Russia's actions. Dr. Sadat explained that, out of the fifteen Security Council members, eleven voted in favor. China, India, and the United Arab Emirates abstained. Russia, a permanent member of the UN Security Council, overruled the majority.¹ The General Assembly, however, condemned Russia's incursion into Ukraine, and by an overwhelming vote, demanded that Russia immediately end its military operations in Ukraine.

Dr. Sadat continued that Ukraine also instituted a claim with the International Court of Justice against Russia under Article VIII of the Genocide Convention. According to her, Ukraine accused the Russian Federation of violating the Convention and asked the court for provisional measures to stop the violence. At the time, Ukraine already had another case pending against Russia under the Terrorism Financing Convention.

According to Dr. Sadat, the European Court of Human Rights ("ECtHR") has also issued provisional measures against Russia, ordering it to "refrain from military

¹ UN Charter art. 27, ¶ 3 ("Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.").



attacks against civilians and civilian objects.” Meanwhile, the European Union has levied sanctions consisting of restrictions on finance, energy, technology, dual-use goods, industry, transport and luxury goods against Russia and Russian nationals. Individual States, such as the US, Canada, and Switzerland have imposed similar sanctions.

III. IMPACT ON THE OIL AND GAS SECTOR

The Ukraine conflict has caused a significant impact on the oil and gas industry. According to Prof. Sullivan, Jr., Russia is a major, if not the largest, exporter to global markets. In Europe alone, for instance, the EU imported over 155 billion cubic meters of natural gas from Russia in 2021, accounting for around 45% of EU gas imports and close to 40% of its total gas consumption.

Prof. Sullivan, Jr. noted that a quarter of Russian gas flows through pipelines that ran from Ukraine into Europe. He pointed out that, at the start of the conflict, there was some hesitation at the prospect of Ukraine shutting off these gas pipelines on which a significant population of the rest of Europe depended. According to him, to reduce the EU’s reliance on Russia’s natural gas, the EU will have to substantially develop its oil and gas infrastructure and look to other sources.

There are in total 36 LNG import terminals across Europe, many of which are in Spain but are not well-connected to the rest of the continent. As such, Prof. Sullivan, Jr. believes that gas supply from Spain could only marginally contribute to address any supply shortage. Europe can increase natural gas imports from the US, but that will prove challenging as that would entail building more pipelines.

He suggested that the alternative is to liquify natural gas. This process requires extracting natural gas and shielding it down to a very low temperature until it turns into liquid form. In 2020, global liquefied natural gas (“LNG”) trade volume reached nearly 500 billion cubic meters. Prof. Sullivan, Jr. estimates that Europe will need 150 million tons of LNG to make up for the amount of gas that it would no longer be importing from Russia. This also poses a challenge because not even the US would have enough supply of LNG for this purpose, and after liquefying natural gas, there



must exist infrastructure to receive it, store it, and then reconvert it into gaseous form.

Prof. Sullivan, Jr. suggested that another alternative entails increasing reliance on fossil fuels. He points out, however, that this will likewise prove problematic considering not only because a substantial part of fossil fuels used in Europe comes from Russia, but also because of environmental concerns tied to their use. He mentioned that many European states are transitioning into renewable energy sources and many international oil companies are divesting and moving assets to more environment-friendly options. He said it is likely that many of these developments would be put on hold to satisfy energy demand through fossil fuels.

Prof. Sullivan, Jr. concluded that one thing is clear: amid the difficulty of finding other sources of energy supply outside of Russia, the disruption of the oil and gas market has resulted in higher prices of goods and services, affecting households worldwide.

IV. SANCTIONS

Dr. Danae noted that Russia's use of force against Ukraine has given rise to unprecedented and increasing unilateral restrictive measures against Russia. Several Member States of the World Trade Organization ("WTO"), such as Canada and the UK, have closed their ports to Russian vessels.

According to Dr. Danae, the US has adopted an import ban on crude oil, certain petroleum products, liquefied natural gas, and coal from Russia. She continued that, as of the date of the panel discussion, there had been no showing that the US had invoked the security exceptions under Article 21 of the General Agreement on Tariffs and Trade ("GATT") to justify its trade measures against Russia. Under Article 21 of the GATT, each WTO member can take any action it considers necessary for the protection of its essential security interests, in times of war or other emergency in international relations. According to her, Russia could challenge the invocation of a security exception under Article 21 of the GATT. However, if the exception meets the corresponding requirements, the measure would not violate the imposing Member State's obligations under the GATT. There is no rule of *stare decisis* in WTO dispute



settlement. Dr. Danae, however, cautioned that adopting overbroad interpretations of the GATT security exceptions may undermine the object and predictability of the WTO legal framework.

In the context of the Ukraine conflict, Dr. Danae opined that the security exceptions appear to be a more tenable justification to take unilateral restrictive measures for GATT Member States directly affected by or involved in the conflict, such as EU countries. For other GATT Member States, not as directly affected by or involved in the conflict, such as the US, some other connection of their essential security interest affected by the war must be established. For Dr. Danae, the restrictions imposed by the US may be *prima facie* inconsistent with its obligations under the GATT.

Dr. Danae explained that in case a WTO Member State is unable to meet the requirements to invoke the security exceptions under the GATT, there are non-punitive countermeasures available. Examples of these countermeasures are trade restrictions in response to breaches of general international law outside the WTO context, the purpose of which is to induce Russia to comply with its international obligation to cease acts of aggression. Be that as it may, she explained that these countermeasures raise two concerns: (1) whether under general international law, third-party countermeasures are even permissible; (2) if so, what the conditions for their lawfulness are. Countermeasures must, in any event, be proportional to the injury suffered.

Dr. Danae concluded that unilateral sanctions are a way by which one state can protect its essential security interests, enforce international obligations, and even break its silence and ensure the normative integrity of fundamental rules of international law. Still, reasonable care must be observed in resorting to these unilateral measures which, by their nature, are prone to abuse and can further aggravate disputes.

V. NORD STREAM 2

Nord Stream 2 is an \$11-billion gas pipeline in the Baltic Sea that connects Russia to Germany. The project was designed to double the flow of Russian gas directly to



Germany. In February 2022, Germany halted its certification. According to Dr. Danae, since the project is not yet operational, the stoppage does not raise any immediate energy security concern for Germany or the rest of EU.

However, Germany's actions may be a basis for foreign investors to seek claims under their respective home State's BITs with Germany. If the BIT does not include a security exception, Germany may struggle resisting an investment treaty claim against it. Dr. Danae cited the award in *ADM v. Mexico*² as an example. According to her, a similar claim was brought in ADM under the North American Free Trade Agreement and the tribunal found such a countermeasure to be disproportionate because it affects an individual investor's rights rather than the State against which the countermeasure was intended.

VI. POTENTIAL RUSSIAN RESPONSE TO SANCTIONS

Sanctions against the Russian government and Russian individuals have been in place since the start of the Crimea conflict in 2014, according to Mr. Vasani. In his opinion, it is unclear whether Russia would be justified under international law in imposing its own retaliatory measures against the states that imposed those sanctions. Diplomacy is one way to get those sanctions lifted, whether by the Russian government on its own behalf or through diplomatic espousal of its nationals' interests.

Another option is for affected Russian individuals or entities to bring legal actions in foreign domestic courts to challenge the foreign governments' sanctions against them and their assets. Another approach may be to petition the ECtHR on the ground that sanctioned individuals and their families could no longer enjoy basic human rights.

VII. INVESTMENT TREATY PROTECTION

Mr. Vasani analyzed the Ukraine conflict from the lens of investment protection and argued that the conflict will likely trigger two kinds of investment disputes. First, foreign investors in Russia whose assets have been taken by the Russian government

² *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award (Nov. 21, 2007).



may expose Russia to direct expropriation claims. Those who were forced to cease operations but continue to hold title to their investments may file indirect expropriation claims.

Second, if Russia takes over and exercises de facto control over parts of Ukraine, it is arguable that Ukrainian investors in those areas can bring claims under the Ukraine-Russia BIT. On the other hand, foreign investors from third states can potentially seek protection under investment treaties between Russia and their home states.

Yet, according to Mr. Vasani, instituting investment disputes on the theory of Russia's de facto control has met some resistance. A contrary interpretation is that, since Russia's occupation of certain parts of Ukraine was done through force and is, by that nature, considered annexation prohibited under international law, those parts unlawfully occupied by Russia remain to be Ukrainian territory which, in turn, prevents the institution of an investment treaty claim against Russia.

VIII. CONCLUSION

It remains to be seen whether Ukraine's "lawfare" strategy to hold Russia accountable would have any significant effect to stop the conflict. Thousands have died since the war began, and more and more people from all walks of life are displaced from their homes as the conflict grows. As the international community continues to impose economic pressure on Russia, and governments around the world, especially in Europe, scramble to find alternative sources of energy, even households that are miles and oceans away from the conflict are impacted.

The conflict in Ukraine has put international law to the test. We can only hope that the tools to restore peace in our current international legal order have matured enough from the last world war lest we end up in another.



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**INSTITUTE FOR TRANSNATIONAL ARBITRATION
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The Institute for Transnational Arbitration (ITA) provides advanced, continuing education for lawyers, judges and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, ITA has become an important global forum on contemporary issues in the field of transnational arbitration. The Institute's record of educational achievements has been aided by the support of many of the world's leading companies, lawyers and arbitration professionals. Membership in the Institute for Transnational Arbitration is available to corporations, law firms, professional and educational organizations, government agencies and individuals.

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