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REGULATING STATES' SOVEREIGN RIGHTS UNDER TODAY'S GLOBAL CHALLENGES

This panel was convened at 12:00 p.m. on Friday, March 31, 2023, by its moderator, Crina Baltag, of Stockholm University, who introduced the panelists: Luciana Ricart, partner of Curtis, Mallet-Prevost, Colt & Mosle LLP; Nikhil V. Gore, partner of Covington & Burling LLP; Benjamin Salas Kantor; research scholar at Columbia Law School; and Viren Mascarenhas; partner of Milbank LLP.

Remarks by Crina Baltag,* Luciana Ricart, Nikhil V. Gore,*** Benjamin Salas Kantor,**** and Viren Mascarenhas*******

As Crina explained, state sovereignty is usually considered in the context of political power, and in particular by highlighting the absence of the notion of sovereignty in early societies. However, the emergence of states and, by way of consequence, of the political powers, is not the sufficient condition for the existence of sovereignty. Sir Francis Harry Hinsley, in his book on *Sovereignty*, explains that sovereignty appeared when the "community responds to the state and the state responds to the community, in which it rules that the discussion of political power can take place in terms of sovereignty." As further addressed by Crina, the concept of sovereignty has been affected by the increased complexity of the community, of the state itself, and of the association between the two. In any case, again quoting from Hinsley, states have never "been able to conduct [their] relations with the community effectively without compromise and delicacy." Furthermore, and in the context of the evolving role of the states and of the relations between states, Crina emphasized the increasing need for regulation by the state, mindful of the need to actively and appropriately consider the societal interests. On this note, the panel addressed the state's right to regulate access to its territory as an undisputed principle of international law, with new global circumstances leading to renewed challenges to the limits of such sovereignty, including in the context of new exceptions related to terrorism and cyberattacks and the recent worldwide seizure on Russian assets following Russia's invasion of Ukraine, to the restrictions on access to territory imposed by states to address national security concerns or to protect against the spread of COVID-19, and even to restrictions to access to evidence within a state's jurisdiction.

Luciana Ricart focused her first intervention on the state's right to regulate access to territory and restrictions to address national security concerns, in particular in the context of new global challenges to national security. Luciana explained that states traditionally enjoy freedom in regulating access to their territory and that the proliferation of regional and multilateral treaties and governance mechanisms facilitating international travel and trade over the past half century increased

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the perception—at least for individuals and non-state actors—that in the modern world territorial borders are of lesser relevance. However, this perception has been recently challenged as states have imposed restrictions on access to their territory for a variety of purposes. National security concerns have undergone a transformation from their traditional meaning of interstate conflicts during the Cold War to encompass new global challenges to national security that do not necessarily involve interstate dynamics. Some of these challenges have been referred to as "actor-less" risks, which include terrorism, cyberattacks, pandemic diseases like COVID-19 and even climate change. Although these new global challenges generally lack an interstate dimension, Luciana explained that attempts are sometimes made to frame them in an interstate framework by attributing conduct to another state, such as state-sponsored terrorism, state-sponsored cyber-activity, or efforts to hold China responsible for the COVID-19 pandemic through blame or legal action. Within this context, Luciana posed the question of whether the measures implemented by states to address these new global threats or circumstances impact the well-established principle of public international law that affirms states' right to regulate access to their territory. To explore this question, Luciana examined the measures adopted by states in response to the COVID-19 pandemic. States have reasserted their right to regulate access to their territory by implementing a wide range of measures, including travel restrictions, quarantine and isolation measures, and sometimes up to complete closure of borders. Additionally, states have imposed capital controls and export restrictions. These public health measures enacted to limit the spread of the virus have raised questions in various areas of law, including human rights and asylum protection, and there has been considerable debate about the potential surge of investor-state arbitration cases in response to these measures. Despite these discussions, there are currently only a limited number of known claims threatened or initiated under investment treaties. These include the threatened claims against Peru concerning the emergency measure of suspension of the collection of toll fees on the country's road network in response to the outbreak of COVID-19 as well as the case of *ADP International S.A. and Vinci Airports S.A.S. v. Republic of Chile*, ICSID Case No. ARB/21/40, brought by two French companies owning an interest in a Chilean company that holds a 2015 concession of Santiago's airport, and requesting a renegotiation of the concession terms in light of the decrease of the airport's passenger traffic in the context of the COVID-19 pandemic.

Luciana explained that it remains to be seen how tribunals will resolve COVID-19-related cases. In the past, many tribunals have assessed a state's response to a crisis by applying treaty-based or customary law exceptions or circumstances precluding wrongfulness, rather than interpreting the scope of the underlying investment protection standards. Most commentary on potential COVID-19-related arbitration claims have followed this approach, known as the "exceptions paradigm," which suggests that the measures taken in response to a crisis like the pandemic are typically prohibited by investment obligations. However, Luciana clarified that the right to regulate under customary international law allows for flexible interpretation of treaty standards, and it is coupled with the substantial deference that international law generally grants to domestic authorities in regulating matters within their borders. This principle has been emphasized in cases such as *Saluka v. Czech Republic*, *SDMyers v. Canada*, and *Philip Morris v. Uruguay.*

In wrapping up her intervention on this point, Luciana shared her insights on the possible reasons behind the relatively low number of publicly disclosed interstate dispute settlement (ISDS) cases related to COVID-19. She raised the question of whether this scarcity indicates a recognition of states' authority to regulate or if there are other factors influencing the situation. One possible factor she highlighted is the absence of statute of limitations clauses in numerous treaties, which may cause investors to adopt a wait-and-see approach. Luciana also proposed the notion that investors might be hesitant to initiate ISDS cases challenging COVID-19 measures due to concerns about the

perceived stigma associated with attacking states during a time when concerted efforts are being made to combat the pandemic.

Benjamin Salas Kantor continued the discussion on the *ADP and Vinci Airports v. Chile* investment arbitration mentioned by Luciana. Summarizing, the case concerned a concession for the renovation, expansion and operation of the Santiago airport obtained by two French investors. The French investors claimed that Chile, by adopting measures during the COVID-19 pandemic, including closure of borders, quarantines, and suspension of flights and commercial activities, breached its obligations under the French-Chile Bilateral Investment Treaty. Claimants argued that the suspension of air traffic and airport commercial activities reduced passengers by 93 percent and income by U.S.$80 million, destroying the economic-financial equilibrium of the concession and risking its viability. Claimants further alleged that Chile's refusal to recompose the economic and financial equilibrium of the concession was against fair and equitable treatment, national and most-favored-nation treatment, and full protection and security under the French-Chile Bilateral Investment Treaty.

As Benjamin indicated, Chile's defense is centered around two questions. Whether the measures adopted during the COVID-19 pandemic fall within the scope of a states' right to regulate and, thus, are in conformity with treaty investment obligations. Or, alternatively, whether those measures constitute an exception, envisaged by the treaty itself or under customary international law, to the obligations owed to foreign investors under the French-Chile bilateral investment treaty (BIT). Benjamin examined each of these defenses and highlighted the broad regulatory autonomy of states to enact measures to protect the health, safety, and welfare of their citizens. He recalled that the International Court of Justice (ICJ), in *Certain Iranian Assets (Islamic Republic of Iran v. Unites States of America)*, stated that the *bona fide* non-discriminatory exercise of regulatory powers with a legitimate public welfare purpose does not give rise to compensation. He also recalled the decisions of the arbitral tribunals in *Saluka v. Czech Republic* confirming a state's broad police powers, and in *PMI v. Uruguay*, where the tribunal recognized that public health is an essential manifestation of the state's police power.

Referring back to the issue of national security, one significant factor discussed during the panel was the evolving approach to essential security interests of states, particularly in response to the threat of terrorism. Luciana mentioned in this context the measures taken by the Quartet States (Bahrain, Egypt, Saudi Arabia, and the UAE) against Qatar in June 2017 by which they reasserted their right to regulate access to their territory by closing their land, naval, and aerial borders for travel and transport to and from Qatar, and suspended postal services with Qatar.

As Luciana explained, the Quartet States justified their actions as lawful countermeasures driven by their national security concerns related to terrorism. Although these cases were framed in the context of addressing terrorism as a new global threat, Luciana indicated that they were primarily presented as an interstate threat due to the Quartet States' allegations against Qatar for sponsoring terrorists. In the period between June 2017 and June 2018, Qatar contested the Quartet States' measures by initiating several international legal cases before various dispute resolution fora, including the World Trade Organization (WTO), International Civil Aviation Organization (ICAO), the Universal Postal Union, the Committee on the Elimination of Racial Discrimination, and the ICJ. Investment treaty arbitrations were also initiated by Qatar Airways, Qatar's state-owned airline, against each of the Quartet States. The dispute between Qatar and the Quartet States came to an end in January 2021 when the Quartet States agreed to restore diplomatic ties and transportation links with Qatar. As a result, some of the complaints filed by Qatar did not reach a final decision. Nevertheless, Luciana explained that the legal proceedings and in particular the decision of the WTO Panel in *Saudi Arabia–IP Rights* provided valuable insights into the potential of international law to address new global threats to national security.

In examining the WTO proceedings in the context of the dispute between the Quartet States and Qatar, Luciana briefly explained that Qatar filed a case against Saudi Arabia, alleging violations of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) regarding the protection of intellectual property rights held by entities in Qatar. In June 2020, a WTO Panel partially excused Saudi Arabia for TRIPS violations, citing the provision on "essential security interests", which parallels Article XXI of the General Agreement on Tariffs and Trade (GATT). Qatar also initiated cases against the UAE, Saudi Arabia, and Bahrain, arguing that their trade restrictions on goods and services contravened the GATT and General Agreement on Trade in Servies (GATS). While a Panel was only constituted for the UAE case, no final report was issued after the restoration of ties between Qatar and the UAE in January 2021.

Luciana concluded by noting that the Quartet States-Qatar dispute raises critical questions about whether existing international law provides states with the necessary tools to address new global threats effectively. In her view, the presence of "essential security interests" clauses in trade treaties, coupled with the flexible interpretation of these provisions by WTO Panels, demonstrates the potential for a responsive and adaptable approach to security concerns. The rulings in cases such as *Russia-Transit* and *Saudi Arabia-IP Rights* showcase a flexible approach to national security adaptable to new threats.

Alluding to state sovereignty in the context of dispute resolution, one issue of concern in the past year has been the access to justice in the presence of economic sanctions. On July 21, 2022, the European Union adopted the seventh sanctions package, which clarified that transactions that are strictly necessary to ensure access to judicial, administrative or arbitral proceedings in an EU member state, as well as for the recognition or enforcement of a judgment or an arbitration award rendered in a member state, are exempted from the sanction's regime. However, other issues remain pending.

In this context, Nikhil Gore addressed the U.S. economic sanctions and anti-money laundering regime and, in particular, the freezing and rendering economically unusable the assets of foreign sovereigns, instrumentalities and officials; prohibiting foreign financial institutions, including foreign central banks, from accessing the international financial system; and imposing substantial risk on U.S. and global banks and corporations for doing business in jurisdictions where the U.S. government believes local officials are corrupt. Other provisions of U.S. law similarly vest significant discretion in the U.S. government over foreign officials and foreign sovereign assets. For example, the recognition power, and Section 25B of the Federal Reserve Act, have been used to give persons claiming to represent foreign governments authority over foreign sovereign assets even when those persons arguably do not control the governments of their home nations.

This background helps frame two narrow and discrete questions, which is where the sovereign immunity debate in the United States tends to focus: (1) should the government have the authority to not only impair the economic utility of foreign sovereign assets, but actually take those assets and redistribute them to third parties; and (2) should private litigants be able to sue foreign sovereigns, take those assets, and use them?

As Nikhil explained, with respect to terrorism, the United States has answered both questions in the affirmative, at least in some defined circumstances. For example: (1) the Foreign Sovereign Immunity Act's (FSIA) terrorism exception eliminates the jurisdictional immunity of a foreign state sponsor of terrorism for claims involving U.S. nationals or other persons with a close U.S. connection in which money damages are sought for personal injury or death that was caused by an act of terrorism; (2) the Terrorism Risk Insurance Act allows a U.S. court to attach blocked assets located in the United States to satisfy a judgment secured against a state sponsor of terrorism for claims "based upon an act of terrorism"; and (3) U.S. sanctions legislation was amended in 2001 to authorize the president to vest frozen assets under a narrow set of circumstances, including where

"there has been an armed attack on the United States, or where Congress has enacted a law authorizing the President to use armed force against a foreign country, foreign organization, or foreign national." There has been reluctance, however, to adopt similar exceptions for cybersecurity or armed invasion of foreign sovereign territory. For example: (1) recent Congresses have debated, but not passed, the HACT Act, which would have permitted data breach litigation against foreign sovereigns that sponsored hacking activity, and which raised concerns it could expose the United States to reciprocal liability for its own cyber activity; (2) the United States has brought criminal prosecutions against foreign government-linked cyber actors, but with limited prospects of actually being able to arrest and punish the relevant individuals; and (3) legislation to permit the seizure of Russian sovereign assets frozen in the United States has not progressed, with some of the relevant concerns involving setting a precedent for future confiscation of the property of U.S. investors if a foreign country perceived a violation of international law by the United States.

Concluding, Nikhil indicated that, for now, beyond the area of terrorism, the traditional bargain in sovereign immunity may be holding to a greater extent than would have been expected this time last year. The basic U.S. position in the face of these emerging challenges remains reciprocal immunity, because of concerns that any change in position would expose U.S. sovereign assets abroad. But this position is enabled by the ability to use other powerful economic levers against foreign states, in the form of economic sanctions and trade controls. This raises two questions, the answers to which are not clear: (1) whether the United States is letting itself get left behind, particularly as it relates to efforts to hold Russia accountable at the international level, where Europe is arguably moving ahead of it; and (2) whether the U.S. position will change if, at some point in the future, foreign states find more effective ways to avoid the ramifications of U.S. sanctions and trade control laws.

Continuing on the issue of economic sanctions and state sovereignty, Viren Mascarenhas explained that states are coming up with new responses when other states unlawfully access their territories in novel ways, such as (1) exceptions to foreign sovereign immunity being legislated in response to new forms of cyberattacks; (2) sanctions/freezing of Russian assets in response to crime of aggression against Ukraine; and (3) consequences of occupation/annexation, as the case of the Crimea cases. Furthermore, in the context of state sovereignty in an evolving world, Viren questioned whether we are being incomplete by framing the discussion as access to a state's own territory, without fully considering unchartered territories, including space law and the high seas.

Continuing, Crina explained that we do witness a reassessment of state's sovereignty in light of the war and pandemic situations. Essentially, the state's right to regulate is an essential expression of its sovereignty. Brownlie and, later, Crawford have highlighted the inherent power to regulate in the public interest as a rule of customary international law.

The panel also looked at state sovereignty from the perspective of access to evidence in support of dispute resolution, when important evidence may be found in a state with no direct ties to the dispute. Recently, the U.S. Supreme Court rendered a unanimous in *ZF Automotive US, Inc. v. Luxshare, LTD.* settling the longstanding circuit split on whether an international arbitral tribunal constitutes a "foreign or international tribunal." The Supreme Court ruled that U.S. law does not allow federal courts to order discovery for arbitration seated abroad under Section 1782, Title 12, of the U.S. Code.

Lastly, in the context of climate change, Benjamin addressed the potential "regulatory chill" impeding the adoption of climate mitigation policies due to existing protections for foreign investors. He discussed different ways to approach the international environmental obligations of states in the context of investor-state dispute settlement. In particular, he noted that the language of bilateral investment treaties, including their preambular provisions, as well as the substantive

protections provisions are a relevant tool to address the sovereign right to regulate of states, including in the context of climate change mitigation. The discussion is timely, as the Energy Charter Treaty modernization has now been put on hold. Benjamin also recalled the recent cases of *Uniper and RWE v. The Netherlands* and *Rockhopper v. Italy,* where the question arose on how to strike the right balance between the state's right to regulate and its treaty-based obligation. In this context, Benjamin noted that states' obligations under investment treaties should be interpreted in light of any international environmental law rules applicable in the relations between the parties, under Article 31(3)(c) of the Vienna Convention on the Law of Treaties.

Concluding, Crina highlighted that when considering state sovereignty, we tend to consider the inward/internal vs. outward/international aspects. However, in the past years, we have increasingly experienced regionalism and the partial waiver of sovereignty, to the benefit of regional organizations, and such aspect must also be taken into account when taking a fresh look at state sovereignty.