



Economic Sanctions as an Exception to Complying with International Trade and Investment Obligations *

Summary

*** Please note that this summary of the panel was AI-generated and therefore has not been fully vetted for accuracy.**

During the Washington Arbitration Week session, the panel discussed the increasingly relevant topic of economic sanctions as exceptions to international trade and investment obligations. The discussion was initiated by a panelist who expressed gratitude for the opportunity to engage in this timely topic, particularly in light of the ongoing geopolitical tensions, notably the conflict between Russia and Ukraine.

The panelists provided a framework for understanding economic sanctions, which can be imposed by individual states or international bodies like the UN for reasons including national security, foreign policy, and combating terrorism. They noted a shift from broad, country-wide sanctions to more targeted measures aimed at specific sectors or individuals. This evolution reflects a growing complexity in how sanctions are defined and applied.

The discussion highlighted key legal concepts, including the jurisdiction of arbitration tribunals when states invoke national security exceptions. It was noted that while historically, states have sought to avoid judicial scrutiny of their security measures, recent jurisprudence suggests that tribunals are increasingly willing to assess the validity of such claims. The panel emphasized that essential security interests must be clearly articulated and justified, even if a state is not directly involved in a conflict.

Panelists included Jim Mendenhall, Craig Garver, Christina Shultz, and Nikhil Kilgore, each bringing unique perspectives from their respective legal backgrounds in international arbitration and trade policy. Mendenhall focused on the complexities of jurisdiction concerning national security exceptions, while Garver expanded on the implications of sanctions in investment arbitration contexts. Shultz discussed practical challenges in arbitration proceedings due to sanctions, such as payment difficulties and the impact on tribunal composition. Kilgore contributed insights on how sanctions can serve as both obstacles and aids to enforcement of arbitration awards.

The session concluded with a Q&A, addressing questions about the immunity of state assets



from sanctions and the public policy defenses available to states in investment disputes. The panelists underscored the importance of understanding the evolving legal landscape surrounding sanctions to effectively navigate the complexities of international arbitration.

Authors

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Topics

International trade, economic sanctions

Category

WAW

Full Transcript

00:00:02

And for that very generous

00:00:04

introduction and then I guess

00:00:06

the lesson is don't write

00:00:08

emails making suggestions cuz it

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may it may end up

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with you being put on

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a committee. But really it's

00:00:14

a pleasure to be here

00:00:15



and I thank Washington arbitration

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week for what looks like

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just a splendid week of

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offerings that we all hope.

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We can take maximum advantage

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of, so congratulations to you

00:00:26

and the organizers. So Jose,

00:00:30

Antonio said that the topic

00:00:32

of our panel economic sanctions

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as an exception, to international

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trade and investment, obligation is

00:00:38

nothing. If not topical and

00:00:41

and it's it's a totally

00:00:43



becoming more. So with each

00:00:45

year that goes by, I'm

00:00:47

going to do a tiny

00:00:48

bit of stage setting before

00:00:51

we turn it over to

00:00:52

the panelist for what we

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hope will be a dynamic

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discussion and and will also

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include an opportunity for those

00:00:59

of you in the audience

00:01:00

to ask questions. Because you're

00:01:03

probably here because you run

00:01:04

into these issues in the

00:01:07



course in the course of

00:01:08
your work. So I can

00:01:11
namik sanctions and then we'll

00:01:13
talk in a moment about

00:01:14
what that really encompasses. Cuz

00:01:16
even in this panel, I

00:01:17
think we have perhaps slightly

00:01:19
different views from a definitional

00:01:23
perspective. But economic sanctions may

00:01:25
be imposed by countries, or,

00:01:28
by International, or Regional bodies

00:01:31
such as the UN or

00:01:32
that you you, for various

00:01:34



reasons, National Security, non proliferation

00:01:37

of weapons of mass destruction

00:01:40

or nuclear goods are technology.

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Foreign policy concerns that can

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be as diverse as countering

00:01:49

terrorism and Corruption, avoiding, a

00:01:53

drug trafficking and and many

00:01:55

other kinds of things and

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in recent years to make

00:02:00

a bad pun sanctions have

00:02:01

proliferated As a tool, particularly

00:02:05

of foreign policy. And I

00:02:06

think we've seen that most

00:02:08



clearly with the ongoing conflict

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between Russia and and Ukraine.

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Did they really become a

00:02:17

preferred tool of of of

00:02:19

of of dealing with and

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responding to political conflict? Now,

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the proliferation of sanctions reflects

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a couple of phenomena first

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it reflects the number of

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authorities or jurisdictions that are

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imposing them for a long

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time that you asked, was

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the major actor in this

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area and it's still a

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very big actor. But, but

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the EU is Very active,

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especially since the Advent of

00:02:50

the Russian war, in, in,

00:02:53

in imposing sanctions. And most

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people think that's here to

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stay the the so you

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have more countries imposing sanctions

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on a multilateral coordinated basis,

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which of course, enhances their

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effectiveness and you have major

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changes in how sanctions are

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framed and targeted. If you

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go back to our oldest

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in the in the US

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at least standing in Bargo,

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it's the Cuban embargo from

00:03:22

the early 1960s and that

00:03:24

was a broad-based going to

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Country focused set of sanctions

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that Encompass dealings with with

00:03:33

a wide array of actors

00:03:36

in Cuba. We've had a

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trend. However away from those

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broad country bass sanctions too

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much more targeted sanctions whether

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they're focused on sectors of

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it at. I mean, or

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particular individuals, even though they're

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often associated with specific regimes

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and you can think of

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Venezuela. Me and Mom are

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even even Russia in that

00:03:58

contact. Now, we're going to

00:04:00

talk a lot more among

00:04:02

our panelists about what sanctions

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do. And as I said,

00:04:06

there's actually probably not full

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of green mint as to

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what sanctions are at their

00:04:12

core. My definition and I'll

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just put it out there

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for others to react. Is

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that the, of course, I'm

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anxious restrict dealings with sanction

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person, and often flow Downstream

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to those. They control, they

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may also block funds and

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there can be other things

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but will it will? It

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will talk about those. We're

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also going to talk about

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the status of sanctions as

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a matter of international law

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and then we'll go I

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want to discuss how sanctions

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affect disputes both in the

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trade and investment contact. Know

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some things that sanctions aren't

00:04:56

I would put it out

00:04:58

there for it for just

00:05:00

for some level setting at

00:05:01

the beginning is is that

00:05:03

there's there's sanctioned so-called sanctions

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are imposed by the World

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Bank and other International financial

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institutions. Those are really procurement

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Department eligibility decisions and they're

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not really what we're talkin

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about today. We can talk

00:05:19

about where the we're talkin

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about, economic boycotts, and anti-boycott

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legislation within sanctions or other

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trade controls. And I think

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we're also going to touch

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on what are referred to

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as blocking statues, which are

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counter sanctioned. So that's more

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or less the scope. We're

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going to start with trade

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and then and then go

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to investment. And as I

00:05:43

said, we're going to make

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this as interactive as possible.

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We've divided the sea. The

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four segments want? We have

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four panelists. One of whom

00:05:51

will lead on each segment

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and then others will be

00:05:55

free to come and tape

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comment as they as they

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deem appropriate. So I'm going

00:06:00

to introduce them in the

00:06:01

order that they are going

00:06:02

to be in a leading

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the discussion. So, first is,

00:06:07

is Jim Mendenhall. Jim is

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a partner in the global

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arbitration trade and advocacy group

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and Sibley in Austin in

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Washington DC, where he concentrates

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on International, arbitration trade policy,

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trade litigation and National security-related

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proceedings under under Schiff is

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he has a significant background

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and governments having served in

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various positions in the office

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of the US trade representative

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for a number of years

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culminating in, in his Service

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as general counsel of u,

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s t r and end

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his portfolio included. Pretty much

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all of the issues. I

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think we're good. We talking

00:06:48

about today. So so wonderful

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to have Jim kicking us

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off and I think you'll

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Focus mostly in your initial

00:06:56

remarks on trade, but but

00:06:59

I'm sure I'm sure we'll

00:07:01

go into Investments as well.

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Next will have the Craig

00:07:05

Garver was a diver was

00:07:07

an associate at Allen &

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overy also here in Washington.

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D.c. Craig has a very

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interesting practice that focuses on

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International Investment arbitration both commercial

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and construction and complex commercial

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litigation including in the antitrust

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realm and the US federal

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and state courts. And I

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understand he's also been involved

00:07:31

in a number of Investigations

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that have sanctions dimensions. Next.

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And with particular thanks to

00:07:39

her for for jumping in

00:07:41

to replace one of her

00:07:42

colleagues we have Christina Should

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students choose based in London.

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She's a senior associate with

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Clifford chance, she advises on

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a wide range of commercial,

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and investment, treaty arbitration matters.

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And also has significant experience

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in transnational and English, High

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Court litigation and Regulatory anti-corruption,

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Compliance matters, and I see

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Christina you spend some time

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in Moscow. So I give

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you probably have some stories

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to tell I would guess.

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Last but not least, we

00:08:16

have the Kilgore who's a

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partner at Covington & Burling.

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And and what I think

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is interesting about this group

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of palaces that nobody is

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a single suit player. You

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all crossover in multiple ways

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that are very interesting soda.

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Kill advises financial institutions and

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global companies. And cross-border disputes

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and and domestic and international

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investigations and enforcement actions and

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he has done a significant

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work, it appears that involved

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in the bank, secrecy act

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and money, laundering statutes to

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Consumer Fair, lending, statutes and

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related Financial Services Regulatory and

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compliance matters, as well as

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extensive experience in the disputes

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Arena. Both Financial commercial, and

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treaty-based arbitration. So that's our

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panel. I think you'll agree

00:09:13

with me that they're very

00:09:15

well-equipped to explore these issues.

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And I'll ask Jim to

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start us off, please talk

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about trade and then what

00:09:24

what's the architecture here? Jim

00:09:26

trade, and the National Security

00:09:32

exception applicable in the trade

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context, but it's the discuss.

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Is actually equally applicable on

00:09:37

the investment context as the

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provisions overlap, and in some

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cases are actually identical. I'm

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in a lot of these

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agreements so and I'll go

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through a really focusing on

00:09:49

the environment issues me, the

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Central Security exceptions in the

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wording of those exceptions, and

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application of those exceptions overtime.

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And understanding of it in

00:09:59

this context, really there are

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two issues that continually come

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up first, is whether a

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tribunal even has jurisdiction to

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review a matter in which

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the responding state has invoked

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the Central Security or national

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security. And then if so,

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what is the scope of

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that exception in front for

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many decades? I think it's

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fair to say countries tried,

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very hard to avoid this

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question as much as possible.

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There were exceptions built into

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a number of agreements including

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the dog at General agreement

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on tariffs and trade and

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success. But for a long

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time, countries tried very hard

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to avoid putting themselves and

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putting panels in a position

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to have to interpret and

00:10:44

apply those provision. That is

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changed in recent years, not

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in ways that will impact

00:10:49

both trade and investment. These

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issues are quite complicated. People

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can have written books without

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reaching definitive conclusions on these

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matters. I'm going to short-circuit

00:11:01

that and provide a very

00:11:02

brief analysis without reaching a

00:11:04

definitive conclusion on these matters

00:11:06

and I will go through

00:11:08



and provide some simplifying assumptions

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just because these are the

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complex Topic in the simplifying.

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Assumptions include really three main

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main points. I'm going to

00:11:19

skip the discussion of whether

00:11:21

a particular sanction, actually implicates

00:11:23

investment, or trade, and there

00:11:26

are issues under its as

00:11:29

to whether or not, for

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example, of trade sanction, necessarily

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implicate. Some investment obligation. Let's

00:11:34

just assume that it is.

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I'll trade and investment. I

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will not focus, especially on

00:11:40

sanctions that are called for

00:11:43

by the UN pursuant to

00:11:45

chapter 7 or otherwise because

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it's, there's relatively straightforward, I

00:11:51

believe, it's this United Nations

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cold for a sanction, it's

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going to be hard for

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a 90. Lb are trying

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to second-guess that something at

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the end of the day

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and there are no exceptions

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that are specifically tailored for

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that purpose. And then the

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third, it goes to questions

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of wording of these. Invite

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have these security exception. If

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you look at these kinds

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of exceptions across agreements really,

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they're all over the place,

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they're all dressed in that

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drafted in different ways and

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you have to look very

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closely at the wording in

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any particular context to see

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whether an exception applies, it's

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hard to make generalization in

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Broad terms. I think there

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are there three categories of

00:12:29

of Central Security exceptions. The

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first is, simply a complete

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removal of the issue from

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the jurisdiction of a of

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a panel oratory tribunal. There

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aren't many agreements were. This

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is so explicit, but there

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are a few, including, for

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example, the US Korea have

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to get a Werebear. Expressly

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said, the matters are removed

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from the scope of the

00:12:52

tribunal has jurisdiction in the

00:12:54

country in books of the

00:12:55

provision. That's the end of

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the matter is, there are

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the second set of Provisions,

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which says, things like nothing

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in the agreement precludes. I

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remember, or a safe from

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taking measures that are necessary

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to address to Central Security

00:13:13



concern and then there's a

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third category which is which

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has been well, that we're

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a lot of the debate

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has been focused recently, which

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says nothing in the agreement,

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Shoppers Food & Party from

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taking measures that it considers

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are necessary for the protection

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of its essential security. Interest

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and other various hybrid agreements

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which are which raised their

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own issues example, the Canada

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agreement includes both the probation

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to protect public security and

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public order as well as

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separate Central Security. It's not

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entirely clear where, that's where

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this place is a sec.

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But for purposes of this

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discussion will focus on the

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WTO provision which also appears

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in the investment context in

00:13:52

a number of different agreement

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and I'll Focus there because

00:13:55

the lab discussion Compass has

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a lot of the issues

00:13:58

that also come up in

00:13:59

the investment context. So the

00:14:02

WTO security exception, exception applicable

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specifically in the context of

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God is an article 21

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of the guy and their

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various pieces of it. But

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for purposes of this analysis

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of focusing section B, says

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that nothing in the agreement

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shall be construed to prevent

00:14:18

a Contracting party from taking

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any action, which it considers

00:14:21

necessary for the protection of

00:14:23

a of a to Central

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Security interest related to three

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different areas. When is fissionable

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materials won't focus. The other

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is materials for purposes of

00:14:33

establishing and supplying a military

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establishment. And the third is

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I'm taking in time of

00:14:38

war or other emergency in

00:14:40

international relations. Now for a

00:14:43

long time, panels and tribunals

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have assumed that this provision

00:14:47

is self jumping because it

00:14:49

says that, nothing and nothing

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in the back or the

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exception said that nothing in

00:14:53

the agreement. Shall be construed

00:14:54

to prevent a party from

00:14:56

taking any action, which it

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considers to be necessary to

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do those things and you

00:15:01

look at the icj jurisprudence

00:15:02

and investor-state arbitration. They often

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say that if you look

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at that at that prison

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in that language that considers

00:15:12

language that makes itself judging

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and and that's an end.

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So it in if a

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dispute arose in that context,

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that would be myself judging

00:15:21

provision and an invocation of

00:15:22

that provision is outside the

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jurisdiction of tribal for panels.

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It turns out that that

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is incorrect that date based

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on recent Iwco jurisprudence, that

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is not a self-charging provision

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and it's come up. And

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in at least two different

00:15:36

cases. First came up in

00:15:39

the case, dealing with Russia

00:15:41

and Ukraine, but not in

00:15:42

the context of the more

00:15:44

recent dispute context of the

00:15:45

2014 2015 events, where Russia

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had taken certain measures to

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prevent Transit across its border

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with Ukraine. Ukraine challenge that

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measure in the WTO. And

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Russia said this isn't essential

00:16:01

security issue measure that we've

00:16:03

taken you the WTO panel

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of no jurisdiction to review

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what we've done. That the

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panel came down and said,

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no, that's not right. We

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do get to judge what

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you've done. There's nothing taking

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it out of the jurisdiction

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of the tribunal. Despite the

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language that says, I'm as

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a member can take whatever

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measures. I deem that it

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considers to be necessary. It

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said, first of all, we

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get to judge whether or

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not. For example, there is

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an emergency, an emergency and

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international relations. It said that

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is an objective tests. We

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get to decide what that

00:16:34

is. And that is not

00:16:35

to self judging myself judging

00:16:37

matter. I'm enabling the name,

00:16:41

tripartite, what that meant, and

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they said, things like that.

00:16:44

For example, that emergency in

00:16:46

international relations relates to a

00:16:49

military action reward or something

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similar to that. It may

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not rise to the level

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of award, but it rises

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to the level of some

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military defense related interest. It

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is not any emergency in

00:16:59

international relations, nor is it

00:17:01

a political dispute. Your political

00:17:03

disputes are not enough. You

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have to have something higher

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than that, okay? So if

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that's the case, one Bay

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Rays ask the question, well,

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what about sanctions that are

00:17:11

related to things, like human

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rights violation, is that an

00:17:15

emergency in international relations and

00:17:17

relations or not it if

00:17:19

if you're imposing sanctions to

00:17:21

deal with human rights issues,

00:17:22

but you're not involved in

00:17:23

the conflict with the kitten

00:17:24



country. Where sanctioning that at

00:17:27

least is an issue for

00:17:29

consideration. The other thing that

00:17:31

the panel said with respect

00:17:32

to emergency and international relations

00:17:34

Is, it doesn't matter if

00:17:36

you yourself contributed to that

00:17:37

emergency Which is contrary to

00:17:39

customary international law or rules

00:17:41

on the Sesame. Even if

00:17:44

you contributed to the emergency,

00:17:45

you're not off yet. That's

00:17:48

that's that that's it doesn't

00:17:50



make you like I'm so

00:17:51

you can still invoke this

00:17:52

provision even if you are

00:17:54

partially responsible for creating the

00:17:55

emergency in the first place.

00:17:57

So they said, emergency and

00:17:59

international relations is an objective

00:18:01

test essential security interests and

00:18:04

in determining whether or not

00:18:05

it measures necessary to protect

00:18:06

those essential security. Interest is

00:18:09

more subjective but still not

00:18:12

entirely within the discretion of

00:18:14



the of the state taking

00:18:16

taking the action. So I'm

00:18:18

they said, for example, at

00:18:20

a minimum the, the invocation

00:18:22

of that provision has to

00:18:23

be in good faith. and

00:18:26

there has to be a

00:18:27

minimum requirement of plausibility, you

00:18:29

can't, you can't, you have

00:18:30

to have a possible relationship

00:18:31

between the action that you've

00:18:33

taken and your essential security

00:18:35

interest here at, in the

00:18:38



context of, of the, Ukraine

00:18:40

matter when my task is,

00:18:45

Is the action of a

00:18:46

third country, sanctioning Russia, for

00:18:48

example, doesn't fall within the

00:18:50

scope of that exception, if

00:18:51

you're not directly involved in

00:18:52

that conflict. So, for example,

00:18:53

is the United States imposing

00:18:56

sanctions on Russia, necessary for

00:19:00

the protection of the US

00:19:01

US own essential security interest

00:19:04

when the US is not

00:19:06



directly involved in that conflict.

00:19:08

Although now, it has become

00:19:10

more involved in food through

00:19:11

the provision of weapons and

00:19:12

such. So maybe it does,

00:19:14

but there are at least

00:19:14

questions here about if you

00:19:16

were a third party to

00:19:17

a conflict. To what extent

00:19:19

can you invoke? This permission

00:19:20

to impose sanctions country. The

00:19:27

bigger the bigger point to

00:19:28

take away from this is

00:19:29



that is that the the

00:19:32

the whole idea of the

00:19:33

long-held position at least articulated

00:19:35

by the United States that

00:19:36

a central security, provisions are

00:19:38

self-driving and all contacts. If

00:19:40

he is no longer to

00:19:40

be true, the W2 several

00:19:43

police to W two panels

00:19:44

have taken issue with that

00:19:46

interpretation. There have been a

00:19:47

number of investors State arbitration

00:19:50

tribunals with your reach different

00:19:51



conclusions about how the provision

00:19:53

should be applied or provision

00:19:55

similar to this should be

00:19:56

applied. But it generally held

00:19:58

that these kinds of Provisions

00:19:59

are not self judging absent

00:20:01

and explicit indication in the

00:20:02

text that they should be

00:20:03

or removal of jurisdiction of

00:20:06

the tribunal to assess those

00:20:07

issues. And so, at a

00:20:08

minimum, it it does appear

00:20:10

that tribunals will do their

00:20:12



utmost to reach these issues

00:20:14

and not simply defer to

00:20:16

Estates invocation of the essential

00:20:18

security interest and stop there.

00:20:20

That, that entire idea that

00:20:22

you've been staking out of

00:20:23

jurisdictions, are ghost family. Tribunal

00:20:26

sense of the rule of

00:20:27

law & Justice. The big

00:20:29

change, I'm sure we'll want

00:20:33

to come back to this

00:20:34

in the questions, but but

00:20:36

I wonder if any of

00:20:39



our other panelists has comments

00:20:42

or questions about this? I

00:20:43

found myself thinking about the

00:20:45

question that you yourself raised

00:20:47

jamwiches it which is what

00:20:50

about things like human rights-based

00:20:53

sanctions or Global Magnet School

00:20:56

sanctions, which I think are

00:20:58

are are much more foreign

00:21:00

policy based somewhere, arguably, National

00:21:03

Security based, or mixed. And

00:21:05

and and I think we're

00:21:06

in a world where the

00:21:07



the reasons that sanctions are

00:21:09

imposed for by countries often,

00:21:11

go far beyond that kind

00:21:13

of traditional security interests that,

00:21:17

that, that that have dominated

00:21:19

the WTO. And and and

00:21:21

I see j-type discussions that

00:21:23

you've talked about Yeah, I

00:21:27

mean I'll try to respond

00:21:29

to that but welcome the

00:21:30

views of the other panel

00:21:31

members as well. I mean,

00:21:34

I think it is a

00:21:36



it is a legitimate issue

00:21:37

that comes up, and I

00:21:38

in the context of the

00:21:39

WTO comes up in the

00:21:40

context of investment investment agreements,

00:21:43

as well, know the WTO

00:21:44

agreements have other exceptions. That

00:21:45

one might in both dealing

00:21:47

with things like public morals

00:21:48

or it's going to go

00:21:49

to that one couldn't vote.

00:21:50

For example in the perhaps

00:21:52

in the end I'm in

00:21:54



the human rights contacts. The

00:21:56

other thing is something several

00:21:58

Provisions are biscuits. Goes to

00:21:59

the issue of the drafting

00:22:00

of the particular provision being

00:22:02

very important. So the WTO

00:22:04

provision is her very specific

00:22:06

in the kinds of essential

00:22:07

security interest that are in

00:22:08

play. If you look at

00:22:10

some other investment agreements, it's

00:22:12

written a bit broader. So

00:22:13

it may talk about generally

00:22:15



the maintenance and restoration of

00:22:16

International Peace and security, for

00:22:17

example which is in the

00:22:19

US Bahrain FDA, which provides

00:22:22

a lot more leeway to

00:22:23

determine you not to assess

00:22:24

whether or not it measures

00:22:25

is appropriately. You know, within

00:22:27

that within the category of

00:22:28

a Central Security or not,

00:22:30

Read any edit comments or

00:22:33

thoughts from the other panelists

00:22:34

or, or from the audience

00:22:36



will move on to focus

00:22:37

more on investment in the

00:22:38

moment. So particular, if you

00:22:40

have trade related questions, it

00:22:42

would be a great time

00:22:43

to put them forward. Christina,

00:22:44

you look like, you might

00:22:45

want to say something. Yes,

00:22:47

two points. One is to

00:22:49

remember that in the trace

00:22:51

fear, the sanctions do tend

00:22:53

to affect the import of

00:22:56

goods in the movement of

00:22:58



goods and trade flows generally

00:23:00

many modern sanctions Target individual.

00:23:03

Sometimes our sectoral sections but

00:23:05

they're also sanctions against individuals

00:23:08

and their companies. And I

00:23:09

think that's where we end

00:23:10

up more, and the investment

00:23:11

context, rather than the trade

00:23:13

context. I thought was really

00:23:15

interesting how James thought to

00:23:17

compare approaches and talked about

00:23:19

tribunals that are looking at

00:23:21

the trade regulations. But since

00:23:24



that's a space to watch

00:23:25

to see how those two

00:23:27

Fields, interact, I just have

00:23:29

a question for James. Which

00:23:30

of the following my understanding

00:23:32

is that there is no

00:23:33

appeal in the 2014, Russia,

00:23:36

Ukraine case I was wondering

00:23:38

why not it strikes. Me

00:23:41

that Russia would be a

00:23:42

country. That would be very

00:23:43

keen to appeal because it

00:23:45

seems like the type of

00:23:46



country that would like these

00:23:48

Provisions to be self judging.

00:23:49

I was wondering if you

00:23:50

had any insights on that.

00:23:53

I'm trying to remember the

00:23:54

timing of the of the

00:23:55

case, I mean, that as

00:23:56

of today, at least the

00:23:57

Appellate body is dysfunctional in

00:23:59

the WTF, it doesn't exist.

00:24:00

So there's nowhere to appeal

00:24:01

at the time. It was

00:24:03

it remain. It was, it

00:24:04



was fun, but there was

00:24:05

no appeal. I don't know

00:24:08

the answer to that. I

00:24:09

don't know why they didn't

00:24:10

appeal in. I just speaking

00:24:13

from experience, in other cases,

00:24:14

often parties, don't appeal because

00:24:17

I don't want the answer,

00:24:18

right? They they they're afraid

00:24:20

what the answer is going

00:24:21

to be in. It will

00:24:22

be it will fall in

00:24:22

the wrong place. So, they'd

00:24:24



rather just live with the

00:24:25

live, with the outcome of

00:24:27

the above the panel, and

00:24:28

leave it at that goes

00:24:29

to the issue. I was

00:24:30

talking about in the beginning,

00:24:31

countries are very, very nervous

00:24:33

about the security exceptions because

00:24:35

the potential for abuse is

00:24:38

by brought if they truly

00:24:39

are self judging that anybody

00:24:40

looking for anything that country's

00:24:43

really want to avoid that

00:24:44



outcome. Read, great question, Christina.

00:24:48

Any other comments from from

00:24:50

Gregor and the kill or

00:24:51

so, if not, we can,

00:24:53

and I don't see any

00:24:54

from the audience at this

00:24:55

point. So what Craig, why

00:24:58

don't we move on to

00:25:01

focus more on the investment

00:25:03

side and and, and, and

00:25:04

maybe you can lay out

00:25:06

for us house, sanctions play

00:25:09

out, and in the dispute

00:25:12



framework that most of our

00:25:15

audience is dealing with sure

00:25:17

will. Thank you very much

00:25:18

Lucinda. And let me Begin

00:25:20

by Antonio the rest of

00:25:23

the organising team and of

00:25:25

course, my my Palace and

00:25:26

very happy to be speaking

00:25:27

to you this afternoon. I'm

00:25:29

going to take the Baton

00:25:30

from listen to excuse me

00:25:32

and talk a little bit

00:25:32

more about stage setting and

00:25:34



maybe even hopefully create a

00:25:37

conceptual framework to guide the

00:25:38

rest of our discussion and

00:25:40

I'm going to break that

00:25:41

into two sections. The first

00:25:44

to borrow from Raymond Carver,

00:25:46

What are we talkin about

00:25:47

when we talk about sanctions

00:25:48

now listen to in your

00:25:50

introduction you gave a very

00:25:52

compelling definition of going to

00:25:55

push the boundaries a little

00:25:56

bit and try to broaden

00:25:57



that definition and I think

00:25:59

that'll be useful for how

00:26:00

we approach the rest of

00:26:02

discussion. And then, secondly, I'm

00:26:03

going to talk about sanctions

00:26:05

and interests. International arbitration intercept.

00:26:08

So first what do we

00:26:10

mean by sanctions? It's not

00:26:12

a simple answer. I take

00:26:14

a very proud of you.

00:26:15

I will encourage you to

00:26:16

as well but it's also

00:26:18

very Dynamic spoke about the

00:26:21



kind of to change it

00:26:21

for decades from very comprehensive,

00:26:23

two more targeted, but they

00:26:25

also change even daily. So

00:26:27

the benefit of sanctions regime

00:26:29

is that they can be

00:26:30

imposed quickly especially in the

00:26:32

US under delegated authority. So

00:26:34

for example, following the Russian

00:26:36

invasion of Ukraine in February

00:26:39

of this year, they rolled

00:26:41

out something very quickly so

00:26:42

they can respond, you know,

00:26:45



as events unfold. What time?

00:26:47

But I'm to start by

00:26:49

kind of breaking it into

00:26:50

the sanctions understood on the

00:26:52

plain of international law and

00:26:54

sanctions understood on the plain

00:26:55

of domestic law. Even though

00:26:57

they obviously do overlap, a

00:26:59

great deal on the international

00:27:01

plane, I'd start with H

00:27:04

or text, the UN Charter.

00:27:05

So under chapter 7, which

00:27:07

is important. I prefer you

00:27:09



to article 41, which gives

00:27:11

the security Council authority to

00:27:14

recommend sanctions and call upon

00:27:16

members of the United Nations

00:27:18

to apply them. This provides

00:27:22

a very good starting definition,

00:27:23

which I'm going to court

00:27:24

for a fact. The measures

00:27:27

of the security Council can

00:27:29

impose quotes, may include complete

00:27:31

or partial Interruption of economic

00:27:33

relations, and the railsea. Aeropostale

00:27:36

telegraphic radio in other means

00:27:38



of communication, and the severance

00:27:40

of diplomatic relations. So getting

00:27:42

this dates back to 1945.

00:27:44

And in, from that very

00:27:45

early stage, we see that

00:27:46

week There seems to be

00:27:48

broader than simply complete or

00:27:51

partial Interruption of economic relations,

00:27:52

are there. That's very significant

00:27:54

and it's done, right? The

00:27:56

security Council sanctions regime has

00:27:58

given rise to a number

00:28:00

of standing bodies on. So

00:28:02



you have the resolution 1373

00:28:04

counter-terrorism committee 1540, committee concerning

00:28:08

weapons of mass destruction and

00:28:09

they're very active bodies. I'm

00:28:11

kind of setting regulations for

00:28:13

member states, to, to follow,

00:28:14

and Implement outside of the

00:28:17

context of the charter. We

00:28:19

might also consider sanctions to

00:28:21

be a form of countermeasures.

00:28:22

That's why I quit Professor

00:28:24

Laurie, damn Ross. And her

00:28:26

definition, which also provides kind

00:28:28



of rationale for imposing sanctions

00:28:30

by saying using an economic

00:28:33

sanctions for enforcement purposes, their

00:28:35

measures taken by a state

00:28:36

that perceives itself. Aggrieved by

00:28:39

breach of international law to

00:28:40

affirm its own rides and

00:28:41

post costs on the alleged

00:28:43

violator, deter future violations and

00:28:45

potentially providing mean To make

00:28:47

its own Hole, by example,

00:28:49

for sequestering funds, from which

00:28:50

reparations ultimately could be paid.

00:28:53



I want to drill down

00:28:55

on one phrase within that.

00:28:57

So a state that perceives

00:28:59

itself, agreed, agreed by breach

00:29:02

of international law, is a

00:29:04

little bit back to my

00:29:05

gym was disgusting, disgusting to

00:29:07

me in terms of such

00:29:08

measures. But again, comparing to

00:29:10

what we were just thinking

00:29:12

about a moment ago, outside

00:29:13

the context of article 41

00:29:15

you have states that need

00:29:16



to justify the measures are

00:29:18

taking on their own ground.

00:29:19

They're not imposed by the

00:29:21

security Council. May begin to

00:29:23

invite a little bit of

00:29:24

disagreement on whether they're at

00:29:27

justified in doing that or

00:29:28

not. When we consider its

00:29:30

sanctions is formed to counter

00:29:31

measures of course then we

00:29:32

have to have recourse to

00:29:33

the articles on state responsibility

00:29:34

in the conditions that they

00:29:36



impose on the veil ability

00:29:38

of countermeasures international playing turning

00:29:41

to the domestic. You know,

00:29:43

there multiple forms of sanctions

00:29:44

operating domestic law in the

00:29:46

first are there. Elations implementing

00:29:48

the security Council mandated sanctions

00:29:52

regimes that we discussed the

00:29:53

moment ago. The second there

00:29:55

might be a chance to

00:29:57

go further than what the

00:29:59

security Council requires. Where are

00:30:00

completely unrelated to what the

00:30:02



security Council requires a kind

00:30:05

of, some of the boundary-pushing

00:30:06

regime's like them mcnitzky sanctions

00:30:09

or other human rights regimes

00:30:11

that we spoke about earlier.

00:30:11

And again, please raise a

00:30:14

lot of questions because they

00:30:15

need to be justified on

00:30:17

their own, rather than simply

00:30:18

relying on Security Council binding

00:30:20

Authority soon. United States, we

00:30:22

have to bust, legislative, Authority,

00:30:24

trading with others, delegated the

00:30:28



authority, to the executive branch

00:30:29

to impose sanctions. But this

00:30:31

kind of robust Foundation isn't

00:30:33

universally the case. I just

00:30:36

listened, I mentioned in her

00:30:37

introduction. You know the US

00:30:39

has been kind of a,

00:30:40

A L & M by

00:30:41

far his most comprehensive sanctions

00:30:42

regime more recently the European

00:30:45

Union, others jurisdictions. I'm following

00:30:47

suit, but a lot of

00:30:49

Partners elsewhere in the world

00:30:50



basically transpose us regulations or

00:30:54

kind of followed the lead,

00:30:55

so to speak and it

00:30:56

might not have the robust

00:30:58

at legal framework for doing

00:31:00

that. The significance of this,

00:31:02

is it the less underlying

00:31:03

Authority. The more likely a

00:31:06

particular sanction, regulation or measure

00:31:08

could be seen as discriminatory

00:31:10

arbitrary or otherwise ill-founded. So

00:31:13

I think the important thing

00:31:14

is you know, how have

00:31:15



your Legal Foundation for the

00:31:18

specific measures to rest on.

00:31:19

In the US we take

00:31:23

the term to be synonymous

00:31:24

with ofac sanctions but again

00:31:26

I I considered to be

00:31:27

potentially broader including travel bans

00:31:30

on getting the asset freezes

00:31:31

Capital. Restrains trade embargoes restrictions

00:31:33

and even one. That might

00:31:36

be a little challenging to

00:31:38

our traditional definition of sanction.

00:31:42

So in 2009, the US

00:31:44



Supreme Court had occasion to

00:31:46

a pint of Pawn weather

00:31:48

executive branch of 42. Comprehensively

00:31:51

lift sanctions against The Rock

00:31:52

include removing Rock from dfsi

00:31:58

a terrorism exception. Is that

00:32:00

narrow question was posed before

00:32:02

the court in a case,

00:32:03

called Republic of Iraq, verse

00:32:04

Pee, Dee and the court

00:32:06

Rose, excuse me, the Court

00:32:08

Road, stripping. The immunity that

00:32:09

foreign sovereigns ordinarily enjoy is

00:32:12



as much a sanction as

00:32:13

eliminating. Bilateral, Assistance or prohibiting,

00:32:15

exported Munitions the application to

00:32:18

sanction, affects the jurisdiction of

00:32:19

the federal courts, but that

00:32:21

fact alone does not deprive.

00:32:22

It of its character is

00:32:23

a function. So, we often

00:32:25

tend to think of stopping

00:32:26

the munity is kind of

00:32:27

analytically distinct from sanctions, writ

00:32:30

large, maybe that's not necessarily

00:32:32

the case. Now, Good reason.

00:32:36



I'm urging us to take

00:32:37

a very broad view of

00:32:38

it is almost as an

00:32:41

issue spotting exercise. So we

00:32:43

do kind of a sovereign

00:32:44

immunity differently than we approach

00:32:46

trade restrictions asset freezes things

00:32:50

of that nature. But taking

00:32:51

more broader view can raise

00:32:54

questions for us that we

00:32:56

will want to get out

00:32:57

in front of, on behalf

00:32:58

of our clients times. We're

00:33:00



going to take away here

00:33:01

is that an ounce of

00:33:02

prevention is worth a pound

00:33:03

of cure and the more

00:33:04

Broadview you can take the

00:33:07

easier, it is to get

00:33:07

out in front of issues

00:33:08

that might affect you or

00:33:09

your clients later. So leaving

00:33:12

that behind the second part.

00:33:14

I want to talk about

00:33:14

ways that sanctions can interact

00:33:16

with International treason proceedings, and

00:33:19



it doesn't excuse. I see

00:33:21

three main ways. The first

00:33:23

is applicable law and that's

00:33:25

what I mentioned a moment

00:33:26

ago. The second is bearing

00:33:28

directly upon the preceding, and

00:33:30

the last is affecting enforcement.

00:33:32

So very briefly talked about

00:33:35

a certain Provisions, equally applicable

00:33:37

and investment context, but we

00:33:40

might also see sanctions effects

00:33:42

to the gallery. Requirement to

00:33:44

the definition of investment. It

00:33:46



could easily come into play

00:33:47

in a denial of benefits

00:33:48

apt in its preparation and

00:33:51

other measures necessity or Clauses

00:33:55

about light, affecting the proceedings

00:33:58

on sanctions might affect arbitrator

00:34:00

appointment on. So some B

00:34:02

have Clauses restricting. The toys

00:34:04

of arbitrators two individuals of

00:34:05

a nationality that maintains diplomatic

00:34:07

relations with a Contracting party.

00:34:09

They might take the form

00:34:11

of Directions on Council or

00:34:13



even payments institutions are arbitrators,

00:34:15

they need to go through

00:34:16

in order for the preceding

00:34:17

could to convince or complete.

00:34:19

And finally, they can also

00:34:22

affect enforcement as well. I

00:34:25

don't want to get too

00:34:26

far over my skiis because

00:34:27

I know some of the

00:34:28

other parents are going to

00:34:28

speak on this, but even

00:34:30

if you know, a party

00:34:32

or proceeding doesn't have an

00:34:34



underlying assumptions issue, when you

00:34:36

go seek to enforce award,

00:34:38

if the Judgment debtor or

00:34:40

the app has been selfish

00:34:40

of dissensions, that's another fertile

00:34:43

for we have, counseled overcome

00:34:44

very briefly. So the takeaway

00:34:49

I think overall is to

00:34:50

take intentionally Broadview. I think

00:34:53

that helps us is Council

00:34:54

clients. I think you're probably

00:34:57

very aware of the front

00:34:58

end aspects of sanctions day

00:35:00



they were or where they

00:35:02

affect regulation. Think they need

00:35:03

to comply with them, but

00:35:05

they might not always be

00:35:06

aware of a way that

00:35:08

sanctions can affect a particular

00:35:09

dispute after. The fact, even

00:35:11

if We're at you so

00:35:12

much for text Ali. It's

00:35:14

incumbent upon us to bring

00:35:16

those issues, to their attention

00:35:17

and incumbent upon us as

00:35:18

arbitration Warriors to be in

00:35:20



very close contact with our

00:35:21

attention, Specialists colleagues given the

00:35:23

very Dynamic nature of the

00:35:24

field. I'll leave it at

00:35:26

that. Thanks very much. Craig,

00:35:29

thank you for the very

00:35:30

useful framework and your observations

00:35:34

and we could probably debate

00:35:35

debate, what the scope of

00:35:37

sanctions should be endlessly, and

00:35:39

I'm sure my other colleagues

00:35:40

will have used, but comments

00:35:42

from the rest of the

00:35:43



panel nikhil, Christina gym, You're

00:35:48

going to talk about some

00:35:49

of these issues and spend

00:35:50

them out a little bit

00:35:51

more. But but how about

00:35:54

on the definition of this

00:35:55

year? I thought it was

00:35:59

I thought it was interesting.

00:36:00

I have to stay in

00:36:01

preparing for this title. I

00:36:03

equated sanctions with economic sanctions.

00:36:06

Which Craig has. Convinced me

00:36:07

was, was my error. I

00:36:09



think that an interesting point

00:36:12

there, Craig raises potato in,

00:36:14

the current situation, and also

00:36:15

relates to a point that

00:36:16

James Ray says, you speaking

00:36:19

about countermeasures and the idea

00:36:21

of collective countermeasures. And also

00:36:24

Collective self-defense is independent and

00:36:27

separate and apart from the

00:36:35

WTO and investment regime. And

00:36:37

I think those are both

00:36:38

important Concepts the other. The

00:36:42

other point, perhaps this relates

00:36:45



more to something to James

00:36:46

would say, but I think

00:36:47

one interesting aspect of the

00:36:49

essential security interests definition in

00:36:54

the WTO agreements, but also,

00:36:57

In a number of this

00:36:59

is that the emergency or

00:37:01

the security interest is not

00:37:02

necessarily defined as an emergency,

00:37:05

involving the state concerned and

00:37:08

I don't have this in

00:37:09

front of me, but my

00:37:09

recollection is for the WTO.

00:37:11



At least it just says

00:37:13

it an emergency or situation

00:37:15

of War, something like that

00:37:16

in international relations. It doesn't

00:37:18

say, you know, to which

00:37:19

I be adopting stated a

00:37:22

party or anything without affecting.

00:37:24

So the idea that there

00:37:25

are, I think, at least

00:37:27

three legs to stand on

00:37:29

to defend just to be

00:37:31

transparent here, actions against Russia

00:37:34

on the basis of a

00:37:36



collective mechanism or a collective

00:37:38

situation. That requires a response

00:37:40

is is is important to

00:37:42

keep in mind. Thank you.

00:37:44

Christina gym. Just confirm that

00:37:49

details recollection of article. 21

00:37:53

is correct the languages taken

00:37:56

in time of war or

00:37:56

other emergency and international relations.

00:37:58

But there's a link here

00:38:00

in the sense that the

00:38:03

sanction must be necessary for

00:38:05

the protection of the state's

00:38:07



essential interest. So you might

00:38:09

have some sort of armed

00:38:10

conflict or other International emergency

00:38:12

but the state itself must

00:38:15

be able to articulate the

00:38:16

links to its own security

00:38:18

interest. Gyminators before we will

00:38:24

have difficulty justifying sanctions against

00:38:36

Russia a challenge in the

00:38:39

WTF. I don't see that

00:38:40

being seriously challenged in the

00:38:42

WTF. I could be wrong

00:38:44

about that, but the point,

00:38:46



I think it's the right

00:38:46

one. While emergency in international

00:38:48

relations is not specific to

00:38:50

a, to a participant in,

00:38:51

in that emergency necessarily. It

00:38:54

does have to be the

00:38:55

measure is to be necessary

00:38:56

to protect the Central Security

00:38:58

interest and Emmett tribunals and

00:39:00

panels have attached, great, meaning

00:39:02

to essential. And it's not

00:39:05

just any interest. It has

00:39:07

to be a security interest

00:39:07



in has to be an

00:39:08

essential interest. So, if you

00:39:10

are not a participant in

00:39:12

a, in a In a

00:39:14

military conflict or other are

00:39:16

other similar situation. You know,

00:39:19

how do you get to

00:39:20

the point of justifying essential?

00:39:21

I think that I think

00:39:22

the pad, the panel has

00:39:23

gotten around that by saying

00:39:24

all you have to do

00:39:26

is issue a possible connection,

00:39:27



like it's a very low

00:39:28
part to show it, but

00:39:31
it is an issue that

00:39:32
the country's going to have

00:39:33
to Grapple with. Should they

00:39:34
Burt Reynolds? Matt said, we

00:39:37
need to be careful that

00:39:38
there's no indication of article

00:39:41
21 for protection is purposes.

00:39:43
So there's famous case about

00:39:45
the Swedish shoe industry, rather

00:39:47
than attempt to say that

00:39:49
sweet needs to protect, its

00:39:51



ability to provide boots to

00:39:52

his army that was not

00:39:54

very persuasive. This was not

00:39:56

an essential security need Right

00:39:59

to grab cash. Alright, Christina.

00:40:01

Well, let's let's pick up

00:40:03

on Craig's framework and an

00:40:06

end talk more about these

00:40:08

issues in the context of

00:40:10

proceeding. Sure, I'd like to

00:40:13

go through four areas. First

00:40:15

of all, the practicalities of

00:40:16

carrying out arbitrations the investment,

00:40:19



treaty obligations. When one or

00:40:20

more participants in the proceedings

00:40:21

are subject to sanctions laws.

00:40:23

Secondly, jurisdictional and admissibility issues

00:40:27

already prefigured by Craig of,

00:40:30

interplay of sanctions and stunners

00:40:31

of protection and denial of

00:40:33

benefits when it comes to

00:40:36

the practicalities, I see there

00:40:37

being three sets of issues.

00:40:39

First there is the difficulty

00:40:42

at times of paying or

00:40:44

receiving payments for the provision

00:40:45



of legal, and other services.

00:40:47

In light of asset, freezes

00:40:49

or prohibitions on dealing with

00:40:50

Fun Zone. Held or controlled

00:40:52

by designated person. Know who

00:40:56

might be designated in a

00:40:57

nice DS dispute, this could

00:40:59

be the investor claimant, or

00:41:02

it could be instrumentality is

00:41:03

of the host age. If

00:41:04

your heart an opening from

00:41:06

Lucinda, it's nowadays, it's quite

00:41:07

rare for a state itself

00:41:08



to be sanctions. So just

00:41:13

looking at the British contacts,

00:41:15

which is if it was

00:41:16

familiar to me, I noticed

00:41:18

that the state of Russia

00:41:19

is not sanctions but of

00:41:21

course he bodies in the

00:41:24

Russian States, a friend since

00:41:25

the Russian Central Bank and

00:41:27

also a number of banks,

00:41:28

which are the purely commercial

00:41:30

or have partial or whole

00:41:32

state ownership. Of course, would

00:41:35



make it difficult. For example,

00:41:36

for Russia, to be paying

00:41:38

lawyers and Broad Existence of

00:41:41

sanctions may also impact on

00:41:43

the availability of various actors

00:41:44

to participate in the October

00:41:46

seedings, as Craig already pointed

00:41:49

out, this could be the

00:41:50

party's lawyers expert Services providers,

00:41:53

members of the tribunal, depending

00:41:55

where they're from, or where

00:41:56

they're based. And also the

00:41:58

arbitral institution which might have

00:42:00



difficulties again in receiving funds.

00:42:02

The first have to look

00:42:06

at the scope of our

00:42:08

sanctions laws, ordinarily they apply

00:42:11

to persons from a particular

00:42:13

jurisdiction, so ofac regulations, apply

00:42:17

to u.s. persons. Similarly, the

00:42:20

sanctions and money laundering act

00:42:22

2018 applies to UK Nationals

00:42:24

and you wreck regulations, apply

00:42:27

to EU Nationals. And in

00:42:30

these three jurisdictions, we also

00:42:32

have a dress sectional Nexus

00:42:35



of people are located either

00:42:37

within the EU. The United

00:42:38

States are the UK then

00:42:40

Just a few application of

00:42:42

the laws to them now

00:42:44

and all these places and

00:42:45

many other jurisdictions licenses can

00:42:47

be applied for to get

00:42:50

around the limitations of the

00:42:53

sanctions and in the number

00:42:56

of regulations when it comes

00:42:58

to Legal disputes, there are

00:42:59

General licenses in the UK.

00:43:02



There was recently in an

00:43:05

accident enabling for Council and

00:43:09

Russian related cases to be

00:43:11

paid up to 500,000 pounds

00:43:14

if they were instructed before.

00:43:17

Designation. And for work occurring,

00:43:19

after the designation an additional

00:43:22

five hundred thousand pounds can

00:43:24

be paid beyond that there's

00:43:26

a need for a separate

00:43:27

license in the EU. In

00:43:31

July this year that you

00:43:33

adopted seven sanctions package, which

00:43:37



allows for legal fees. Agent

00:43:40

transactions, which are strictly necessary

00:43:42

to ensure access to judicial

00:43:44

administrative or autotroph, proceedings in

00:43:47

a member State as well

00:43:48

as for the recognition or

00:43:49

enforcement of a judgment or

00:43:51

an arbitration award rendered in

00:43:53

a member state. If such

00:43:54

transactions are consistent with objectives

00:43:57

of the key sections regulations,

00:43:59

when it comes to arbitral

00:44:03

institutions. I'm glad reports that

00:44:05



there are also a number

00:44:06

of General licenses ofac has

00:44:09

given General license to fish

00:44:11

in a number of contacts.

00:44:12

So, for example, is General

00:44:14

license. Number 18, applies to

00:44:17

excited and other International organizations

00:44:20

and transactions and activities involving

00:44:22

the sanction Taliban and are

00:44:25

the haqqani network that's from

00:44:27

December 2021. And also, the

00:44:30

Ukraine, Russia, sanctions regulations at

00:44:33

31 CFR part. 500 589

00:44:36



have a similar authorization for

00:44:39

excited and a number of

00:44:40

international organizations. The picture is

00:44:43

similar in the UK, the

00:44:46

office of financial sanctions implementation

00:44:48

has granted a licence to

00:44:49

the I c. I a

00:44:50

in relation to Russia and

00:44:52

Belarus cases, but only four

00:44:54

cases administered under the I c. I a

00:44:56

rules of arbitration. There's a

00:44:59

special license requirement for using

00:45:01

phone cases administered by the

00:45:02



LCA. This can be very

00:45:04

relevant in the investment treaty

00:45:06

contacts. As for the SEC,

00:45:09

which is also frequently, used

00:45:11

and Ice dies disputes and

00:45:12

I see which sometimes these

00:45:14

ICS disputes. The EU seven

00:45:18

steaks in packaged legislation is

00:45:21

helpful there. The second issue

00:45:25

and watch a highlight was

00:45:26

the ability or willingness of

00:45:29

the tribunal to make costs

00:45:30

orders orders for payment of

00:45:32



security. For costs. The question

00:45:34

here is who will hold

00:45:35

the funds in my own

00:45:38

experience. I have seen situations

00:45:40

where the banks in question

00:45:42

have been very nervous about

00:45:44

US dollar payments and the

00:45:45

prospect of secondary sanctions. Nowadays,

00:45:48

parties are thinking about using

00:45:50

other currencies, not the dollar,

00:45:52

but even so, we have

00:45:55

noticed that some banks are

00:45:57

overly cautious. And I have

00:45:59



seen a situation in the

00:46:00

court context, where the section

00:46:03

party actually wrote to the

00:46:05

court funds office saying, oh,

00:46:06

are you really sure you

00:46:08

can hold these funds the

00:46:10

bank and trust in God

00:46:11

very nervous and then lo

00:46:13

and behold, we had difficulty

00:46:14

getting the security for costs

00:46:16

that have been ordered Issue

00:46:20

Number 3 is what happens

00:46:23

when the respondent state is

00:46:25



sanctions or key actors. So

00:46:28

let's say the Russians Central

00:46:29

Bank, for example, that it

00:46:31

fails to pay its share

00:46:31

of the administrative costs, the

00:46:34

claimant, then step in and

00:46:36

cover the respondents share, that's

00:46:38

frequent practice in ordinary time.

00:46:41

So I'm sure that proceedings

00:46:42

can continue. But what happens

00:46:44

if there's a concern, that

00:46:46

this payment could actually prove

00:46:48

to the benefits of the

00:46:50



respondent in a way, that's

00:46:51

inconsistent with sanctions. I'd like

00:46:55

to know move to jurisdictional

00:46:57

admissibility issues. I had done

00:47:00

a search for cases, dealing

00:47:02

with sanctions and jurisdiction admissibility,

00:47:06

and was amazed that they're

00:47:08

actually very very few cases

00:47:09

of the sort. There's a

00:47:11

very recent one that I'd

00:47:12

like to bring to your

00:47:13

attention which is Bank melli

00:47:14

Iran and Banks said about

00:47:16



to run versus Kingdom of

00:47:18

Bahrain, which was a PCA

00:47:19

case decided in November 2021

00:47:22

hear you had to arrange

00:47:25

and financial institutions which were

00:47:29

sdns under the us around

00:47:31

Financial sanctions regulations which had

00:47:34

invested in an institution named

00:47:36

Future bank and bufferin. The

00:47:40

question was whether the fact

00:47:43

that these were experienced and

00:47:45

had engaged had allegedly engaged

00:47:47

in unlawful activity in Bahrain

00:47:50



in violation of Bahraini law

00:47:53

and also sanctioned flaws. Barge,

00:47:56

these two claimants from pursuing

00:47:58

their claim. The tribunal noted

00:48:01

here is that for a

00:48:02

jurisdictional objection to succeed here.

00:48:05

The illegality must have occurred

00:48:07

at a time at which

00:48:09

the investment was made not

00:48:11

thereafter. And in this case,

00:48:13

there is a key insufficient

00:48:14

evidence to demonstrate that the

00:48:17

claimants major investment unlawfully or

00:48:20



for the overarching, purpose of

00:48:22

engaging in illegal activities. So

00:48:24

no bar on jurisdiction. But

00:48:29

there's a question as to

00:48:30

admissibility because there's an allegation

00:48:33

that the unlawful conduct tainted,

00:48:36

the claim The tribunal had

00:48:39

this to say not every

00:48:41

unlawful activity will render an

00:48:43

Investor's claims and invisible and

00:48:45

International Education has to have

00:48:47

this affect the legal. Conduct

00:48:49

must be one serious and

00:48:51



widespread and two very close

00:48:54

relationship to the claims. On

00:48:57

the one hand sporadic, and

00:48:59

trivial violations of the law

00:49:00

will not trigger the inadmissibility

00:49:02

of the claims. On the

00:49:04

other hand, the fact that

00:49:06

an investor has committed serious.

00:49:07

Violations of the law does

00:49:09

not mean that such investor

00:49:10

must be denied access to

00:49:12

International treaty arbitration as a

00:49:14

blanket measure. Even in a

00:49:15



situation where the particular claims

00:49:17

do not arise out of

00:49:19

the illegal activities, to Warrant

00:49:21

a sanction as stringent as

00:49:22

the inadmissibility of the claims,

00:49:24

the two requirements of seriousness

00:49:26

and connexity must be cumulatively

00:49:29

satisfied. In this case, again

00:49:33

there was insufficient evidence to

00:49:35

substantiate the respondents preliminary objections

00:49:38

and therefore the assertion that

00:49:41

the claims were inadmissible where

00:49:44

denied, so the tribunal decided

00:49:49



that, yes, there could be

00:49:51

an illegality issue here, but

00:49:53

this is not a preliminary

00:49:54

issue is something to be

00:49:55

dealt with on the Merritt.

00:49:59

Coming out to the intersection

00:50:00

of sanctions and Matt's claims

00:50:03

against. There are currently very

00:50:07

few cases that address this

00:50:10

issue. I wanted to bring

00:50:12

to your attention that July

00:50:14

2020. Qatar, Airways has issued

00:50:18

ICS proceedings against the UAE

00:50:20



and Saudi Arabia and Egypt,

00:50:22

claiming that measures taken by

00:50:24

the states to present that

00:50:26

prevent the airline from entering

00:50:27

their airspace under more General

00:50:30

airspace blockade against Qatar as

00:50:33

well as the revocation of

00:50:36

the claimants license to operate

00:50:38

in. Those jurisdictions amounted to

00:50:40

an illegal expropriation and breach

00:50:43

of the fvt standard. Those

00:50:45

cases are still pending, but

00:50:47

I would submit to you,

00:50:48



they're very interesting ones to

00:50:50

watch. One could envisage cases

00:50:54

arising out of the imposition

00:50:56

of primary or secondary sanctions

00:50:58

for example, pertaining to the

00:51:00

freezing of assets. Those could

00:51:03

well be claims against the

00:51:04

host Age Again, props for

00:51:07

indirect expropriation fut violation of

00:51:10

legitimate expectations There could also

00:51:14

be State measures in response

00:51:16

to sanctions. For example, we

00:51:18

know from the reasons, Russia,

00:51:21



Ukraine conflict that Russia has

00:51:23

seized the number for an

00:51:25

aircraft. And what could it

00:51:27

match? And that over time,

00:51:28

there could be claims against

00:51:29

Russia relating to its treatment

00:51:32

of the aircraft lessors and

00:51:36

their Investments. Boost a tickly

00:51:39

might invoke sanctions as a

00:51:41

defense referring to public order

00:51:43

National Security and SSD. Those

00:51:45

are points we already have

00:51:46

discussed but we should remember

00:51:48



is that where the sanctions

00:51:51

arm out of domestic law.

00:51:54

We are in the realm

00:51:55

of fact, and I see

00:51:57

us rather than law. And

00:51:59

so be interesting, where was

00:52:02

State tries to raise related

00:52:04

claims? How a tribunal, well,

00:52:06

work with that defense? Finally

00:52:10

I want the time of

00:52:18

Craig already has alluded to

00:52:20

some investment treaties include denial

00:52:23

of advantageous Provisions. Enabling a

00:52:25



whole state select to declare

00:52:26

that protections are in applicable

00:52:28

to certain categories of persons.

00:52:30

And here again, when concedes

00:52:32

that sanctions could be a

00:52:33

trigger for denying advantages. Thank

00:52:36

you. Thank you. And I

00:52:37

would say I'm there, there

00:52:39

are actually a number of

00:52:40

cases in the pipeline. I'm

00:52:42

aware of certain that the

00:52:43

US has a claim pending

00:52:45

against it. I think under

00:52:46



the Ukraine bit, if I'm

00:52:48

not mistaken for some designations,

00:52:51

I'm involved as an arbitrator

00:52:54

in a proceeding against the

00:52:56

Central American country, which is

00:52:57

kind of a downstream issue

00:52:59

where some of the owners

00:53:00

of a financial institution with

00:53:02

designated by Outback and that

00:53:04

led the consequences in the

00:53:06

host countries. Are these things

00:53:07

can take a lot of

00:53:08

different Permutations any comments from

00:53:10



the panel before. We move

00:53:12

to the enforcement topic that

00:53:14

Nick is going to lead

00:53:15

us on Craig. Jim nichil

00:53:19

very briefly, say I appreciate

00:53:22

it. The citations of the

00:53:24

Qatar Airways cases, which I've

00:53:25

always found very fascinating until

00:53:27

further notice where the 42

00:53:29

points, one that they also

00:53:32

gave rise to a lot

00:53:33

of. I'm sick of bathing

00:53:34

suits at the WTO, which

00:53:35



didn't progressed significantly far. But

00:53:39

brought to the fore, a

00:53:40

lot of the same issues

00:53:40

in the investment contacts and

00:53:42

in the trade contacts. So

00:53:43

I think ties together nicely.

00:53:44

What we talking about exactly

00:53:46

2 in those flora and

00:53:48

others. The quartet States took

00:53:52

measures against Qatar, characterize, those

00:53:54

as counter measures in response

00:53:56

to a breach of international

00:53:58

law. They're trying again, to

00:54:01



illustrate the point. I was

00:54:02

trying to make her earlier

00:54:03

about, we're operating on domestic

00:54:05

regulations, but seeking International all

00:54:07

justification for that. There ain't

00:54:09

there she was what one

00:54:10

case involving Qatar and Saudi

00:54:12

what, which did get a

00:54:13

resolution to reach a final

00:54:15

resolution in the WTO released

00:54:16

at the panel stage, right?

00:54:17

Involving intellectual property where somebody

00:54:21

basically there was a cutter

00:54:26



Broadcasting network called bien and

00:54:30

Saturday was letting take a

00:54:32

pirated version of that called

00:54:34

be out its flourishing in

00:54:36

Saudi Arabia and refused to

00:54:39

prosecute the out for a

00:54:40

criminal violations. And so forth

00:54:42

in the book National Security,

00:54:43

National Security, exception of the

00:54:44

WTO as justification and the

00:54:47

tribunal said the panel said,

00:54:48

no, in that case that

00:54:49

there was not, as there's

00:54:49



not a possible connection between

00:54:51

non-prosecution with pirated activity in

00:54:54

your sector security interest that

00:54:55

sounded invoke. So it does

00:54:58

have some teeth, the kill

00:55:03

over to you for the

00:55:04

last word on this and

00:55:05

then move us straight into

00:55:06

the enforcement topic. If you

00:55:08

would sure. I mean, I

00:55:11

think, you know, one interesting

00:55:13

issue that has come up,

00:55:14

is the attempt of sanctions

00:55:17



days to use sections of

00:55:19
effectively, as a shield. And

00:55:21
we'll talk about that more

00:55:22
in the info. Again, again,

00:55:24
for some discussion with respect

00:55:25
to Crystal X in Venezuela.

00:55:26
But you see it with

00:55:29
the invocation of Nothing due

00:55:33
process, paranoia is quite the

00:55:35
word, but you know how

00:55:38
to do due process, Shadow,

00:55:39
puppetry by the Russian Federation,

00:55:42
when it comes to defend

00:55:44



claims Against Terror or the

00:55:46

other things against it, and

00:55:47

I doubt that Russia is

00:55:49

the only state to have

00:55:50

given given it a try.

00:55:52

When you see, for example,

00:55:54

is in the proceedings of

00:55:58

it that are going to

00:55:58

moving ahead to in The

00:56:00

Hague thunderbitch under other treaties.

00:56:03

You know, there is that

00:56:03

their arguments from Russia that

00:56:05

sanction show that basically there

00:56:06



is biased legal environment and

00:56:09

it's unable to get, you

00:56:10

know, appropriate legal representation in

00:56:12

the seat thing, that's important

00:56:13

contacts for the point. Christina

00:56:15

was making about how both

00:56:18

the United States. You know

00:56:19

if there's a fact license

00:56:20

place to allow for example

00:56:22

lcial arbitration to go ahead

00:56:25

to allow, exit arbitration to.

00:56:27

Go ahead not just with

00:56:28

respect to Russia also, with

00:56:29



respect to Yuna free sample

00:56:31

of Ghana stone. And, you

00:56:32

know, Christina. But also, you

00:56:36

know, similar exemptions is I

00:56:38

understand to adopt in the

00:56:39

UK and the importance of

00:56:42

having carved in Portsmouth or

00:56:46

he's our financial crime, enforcement

00:56:48

authorities in particular, be sensitive

00:56:50

to the need to continue

00:56:51

to facilitate, you know, the

00:56:53

Turning of the wheels of

00:56:54

Justice against these targets of

00:56:56



Sanchez's is critical both. I

00:56:59

think in terms of allowing

00:57:01

claimants to move forward with

00:57:02

their claims. But also in

00:57:04

terms of continuing to demonstrate

00:57:06

that there is sort of

00:57:07

fair play and their access

00:57:09

to the courts, you know,

00:57:11

any countries that impose economic

00:57:14

sanctions. It's it's interesting to

00:57:16

listen to. We should almost

00:57:19

another cat but, you know,

00:57:20

there's this whole question of

00:57:21



section 311 designations and basically

00:57:24

shut down uniform and bags.

00:57:26

And one of them femex

00:57:28

or tried to challenge side

00:57:29

with limited success in US

00:57:31

courts of this whole other

00:57:32

And you process question. Is

00:57:34

there a possible you so

00:57:35

into Mystic Court as well?

00:57:36

But I think I probably

00:57:37

beyond the scope of what

00:57:38

we're supposed to be talking

00:57:39

about. V. The impact of

00:57:45



sanctions on enforcement and I

00:57:47

think the premise of discussions

00:57:50

on this topic is, is

00:57:51

often its actions are an

00:57:53

obstacle to enforcement because assets

00:57:56

that you could otherwise used

00:57:57

to satisfy an award or

00:57:59

blocked or copy transferred. Sanchez,

00:58:02

but also can be an

00:58:04

aid to enforcement has been

00:58:05

I'll come to or at

00:58:08

least in theory. They should

00:58:09

be available as an aid

00:58:11



to enforcement because really, if

00:58:14

you think about them us

00:58:15

sanctions, at least your kind

00:58:16

of the ultimate freezing measure.

00:58:17

They're just they're conscious of

00:58:20

paper. So you got a

00:58:23

lot of stuff sitting there

00:58:24

that should in theory, be

00:58:25

available to judgment. Creditor is

00:58:27

it appropriate cooperation from the

00:58:29

Department of Treasury in state

00:58:31

and so we'll come back

00:58:32

to that. Actions can block

00:58:37



or interfere with enforcement. There

00:58:39

are two basic points to

00:58:40

bear in mind as the

00:58:41

first is that, us sanctions

00:58:44

regulation don't necessarily block The

00:58:47

Taking of a ripped or

00:58:48

attachment or other in from

00:58:50

measure preservation. My understanding is

00:58:52

that there's some recent James

00:58:53

Bond Franz and from the

00:58:55

court of justice of the

00:58:56

European Union that takes a

00:58:57

different position in the EU.

00:58:58



But in the US, that's

00:58:59

not necessarily. The case is

00:59:01

going to depend on the

00:59:03

phrasing of the specifics actions

00:59:04

regulation and executive order. but

00:59:07

the transfer of assets is

00:59:08

generally going to require a

00:59:10

license and that need for

00:59:14

a licensed. Effectively turns award

00:59:16

enforcement from a Judicial question

00:59:19

into one that has at

00:59:20

least some political aspects. And

00:59:22

so you actually see this

00:59:23



quite well Illustrated like what

00:59:26

I can get probably The

00:59:27

best-known Saga of trying to

00:59:28

do somebody trying to enforce

00:59:29

an award against Action Tax

00:59:31

assets. Which is Crystal axe

00:59:33

versus Venezuela in the attempt

00:59:34

by Crystal X. To enforce

00:59:36

again. It's the Citco shares

00:59:39

held by Baeza. And you

00:59:42

know, now we're sitting six

00:59:43

years after the award and

00:59:44

I think four years after

00:59:46



Crystal ax in dischley, got

00:59:47

an order from Judge Stark

00:59:50

on the District of Delaware.

00:59:52

In the meantime just started

00:59:54

going to the federal circuit.

00:59:55

The Administration has changed. You

00:59:58

somehow kept control of the

00:59:59

case Crystal. I said, no,

01:00:01

actual money award. And so

01:00:06

Yeah, there's there's got a

01:00:08

two points to meet at

01:00:09

the Crystal exogamy illustrates and

01:00:11

perhaps, just a back up

01:00:12



here in case people aren't

01:00:14

familiar with a crystal ax,

01:00:15

has a bit award claim

01:00:18

in with it, with an

01:00:20

award against Venezuela. Think the

01:00:22

value of the award is,

01:00:25

if I recall correctly to

01:00:26

the 1.2 of 1.4 billion,

01:00:27

I think you'll get may

01:00:28

have been 1.4 billion

01:00:29

and they're seeking to enforce

01:00:30

1.2 billion in the United

01:00:32

States. If we, but it's

01:00:33



in that range and their

01:00:38

theory is that kind of

01:00:40

Visa was with operators and

01:00:41

Alter Ego of Russia, Russia

01:00:45

Venezuela. And that, you know,

01:00:48

they should be able to

01:00:48

enforce the rewarding and spend,

01:00:50

as well as shares at

01:00:51

Citgo, held by television. And

01:00:54

they jump through all these

01:00:55

hoops and successfully obtained, an

01:00:57

order saying that those assets

01:00:59

are susceptible of enforcement The

01:01:02



issue they have at this

01:01:03

point is essentially a pure

01:01:05

ofac licensing issue. Now over

01:01:08

the past few years, what

01:01:11

judge starts her. Ministration of

01:01:12

the case has demonstrated that

01:01:14

the US federal courts, may

01:01:15

be willing to work with

01:01:16

Clay, mix to get all

01:01:17

the way up to actual

01:01:20

monetization of the asset. And

01:01:22

he's taking, really a series

01:01:24

of Fairly significant directions to

01:01:27



tee up a potential sale

01:01:29

of the Citgo shares. I

01:01:31

think there's an auction, actually,

01:01:32

that is being marketed as

01:01:35

we speak in there. We'll

01:01:36

go ahead next year. But

01:01:39

there is still no license

01:01:40

from treasury that will allow

01:01:41

the winner of the auction

01:01:43

to benefit from the sciortino,

01:01:46

take the shares and benefit

01:01:49

from the shares. If you're

01:01:51

curious, wine auction process is

01:01:53



necessary, I think it was

01:01:54

intended as a way of

01:01:55

valuing, the shares in the

01:01:57

claimants are going to be

01:01:58

able to stick their their

01:01:59

award rather than staking dollars.

01:02:03

So they would either get

01:02:05

a payoff from the auction

01:02:06

winner or they would get

01:02:07

the actual shooter since they

01:02:08

are the winner cuz they

01:02:09

are the winning bid. So,

01:02:11

with all the infrastructure have

01:02:13



been having been set up

01:02:14

and with, with all that,

01:02:15

cooperation from the court, Yeah,

01:02:18

what's left is a license

01:02:20

from a fact that allows

01:02:21

the auction to be consummated.

01:02:22

And holed up here, is

01:02:25

that after the United States,

01:02:27

recognize the opposition Administration in

01:02:31

Venezuela, the US government ceased

01:02:34

to favor, you know, allowing

01:02:37

the award to be because

01:02:39

it had me do the

01:02:42



ice Ezra claims on the

01:02:44
assets and I was a

01:02:46
position taken by the doj

01:02:47
under President Trump. It's been

01:02:48
maintained as far as I've

01:02:50
seen by the car and

01:02:51
Treasury Department and it's worth

01:02:54
highlights. The fact that foreign

01:02:56
policy you know gets involved

01:02:58
with you and then insert

01:03:00
starts away and when you

01:03:01
were trying to figure out

01:03:02
how to enforce an award

01:03:03



against action that affects you

01:03:05

see this even more clearly,

01:03:06

or as clearly With respect

01:03:09

to our concept, when I

01:03:10

guess it's in here. Folks,

01:03:13

may have seen the news

01:03:14

earlier this year with a

01:03:16

headline being that a bed

01:03:18

of about 7 billion in

01:03:19

offensive Bank assets on deposit

01:03:21

with the US Federal Reserve

01:03:23

about, huh, would be made

01:03:27

available for plaintiffs with terrorism-related

01:03:29



judgments against the Taliban and

01:03:32

the other half would be

01:03:33

sent to a fund. That

01:03:35

could use it for the

01:03:35

benefit of the Austin people.

01:03:38

Now, there was a fair

01:03:40

amount about cry and, you

01:03:42

know, when you can some

01:03:43

ways Justified, perhaps out of

01:03:45

private, the prospect about gun

01:03:47

Central Bank assets, being used

01:03:49

to satisfy us legal claims

01:03:51

at a time of widespread

01:03:52



economic Devastation and hunger enough.

01:03:55

It's time to assess just

01:04:02

that the terrorism Risk, insurance

01:04:04

act a law doctor shortly

01:04:06

after 9/11 provides an exception

01:04:08

to, sovereign immunity to plaintiffs

01:04:10

seeking to enforce terrorism-related judgments

01:04:13

against blocked asset. Including potentially

01:04:17

block Central Bank assets. And

01:04:19

the plaintiffs were claiming that,

01:04:20

that's what they had that

01:04:22

they fell within. This exception

01:04:23

is a few other Hoops,

01:04:24



including relating to States wants

01:04:26

her dead ignition switch. I

01:04:27

won't get into that. The

01:04:29

claimants basically said that, you

01:04:31

know, they had the ability

01:04:33

to use a post 9/11

01:04:34

law, that was specifically meant

01:04:36

to benefit, people like them

01:04:37

to claim a set of

01:04:40

the weed for a controlled

01:04:41

by the Taliban. The claimants

01:04:45

frankly face some very significant

01:04:48

hurdles for their, they would

01:04:51



be making you lost. They

01:04:52

succeeded with the US did

01:04:55

was reduce the potential pot

01:04:56

of money. The plaintiffs could

01:04:57

claim against by half because

01:04:59

remember, the statute only applies

01:05:00

to block assets. So the

01:05:02

assets that are for that

01:05:03

are unblocked and fun spring

01:05:05

into this fun for the

01:05:06

benefit of the Austin, people

01:05:07

are no longer available for

01:05:09

collection. So if you step

01:05:11



back and think about it,

01:05:12

what do US government did

01:05:13

in February and then sort

01:05:15

of took further steps in

01:05:17

September to solidify, it was

01:05:18

reduce the amount of money

01:05:19

available to terrorism-related payment center

01:05:22

on 9/11 law by ha.

01:05:24

Which to me suggests perhaps

01:05:27

that there is a broader

01:05:28

position that the US government

01:05:31

is concerned that the US

01:05:32

government has about having locked,

01:05:34



Sovereign assets, available for judgment

01:05:39

for creditor collection because that

01:05:41

reduces but perhaps foreign policy

01:05:44

negotiating Leverage Real quick. So

01:05:48

how does that apply to

01:05:49

our current crisis in in

01:05:51

in Russia and Ukraine? The

01:05:55

first thing to note is

01:05:56

well, there is a fair

01:05:59

amount of Russian Sovereign money

01:06:01

in the United States. I

01:06:02

think it's 38 billion as

01:06:05

the estimator Russian, Central Bank

01:06:06



Reserves, Frozen on deposit with

01:06:09

the US Federal Reserve. There's

01:06:11

billions more in state-owned Enterprises

01:06:15

and privately owned Russian assets

01:06:17

that have been blocked or

01:06:18

that would be subject walking

01:06:19

if they were to enter

01:06:20

the United States and the

01:06:23

US government has faced substantial

01:06:25

Public Law, VA to seize

01:06:27

some set of these blocked

01:06:28

assets and to make them

01:06:29

available for the benefit of

01:06:30



Ukraine. We represent Ukraine unless

01:06:36

I know one of the

01:06:36

partners at Craigs firm issue

01:06:39

related to any of us

01:06:45

are going to be able

01:06:46

to talk about it. But

01:06:48

what I say is that

01:06:48

relevant officials in the US

01:06:50

government, I think have taken

01:06:51

if you publicly that the

01:06:54

US does not have authority

01:06:55

to seize assets under IEP.

01:07:01

It only has the authority

01:07:02



to freeze dog to seize

01:07:04

and that you would need

01:07:05

other legislation to change this

01:07:07

position. But I think the

01:07:10

important question is do you

01:07:12

need legislation or you know,

01:07:14

is there any sort of

01:07:15

constitutional bar and I would

01:07:16

submit under the circumstances. There

01:07:18

is no constitutional bar for

01:07:20

reasons. We talk about some

01:07:21

other time. So I will

01:07:22

pause their recognizing that we

01:07:24



only have 15 minutes left.

01:07:27

Right. Well that's, that's really

01:07:28

helpful in The Killing it.

01:07:31

And it an interesting. I'll

01:07:32

just say that I think

01:07:33

there is on your last

01:07:34

point. A real question cuz

01:07:38

you got these different buckets

01:07:39

of assets that have been

01:07:40

frozen under the under the

01:07:43

Russian sanctions in particular. And

01:07:45

and if we have civil

01:07:48

and criminal forfeiture laws, as

01:07:50



you know, that apply when

01:07:52

people are around conducted or

01:07:56

find liable for certain kinds

01:07:58

of offenses. But of course,

01:08:00

if you're no ligarq, you

01:08:02

happen to have your property

01:08:04

seized because you're, there's a

01:08:06

belief in the US government

01:08:07

that you're connected to to

01:08:09

the Russian regime is. So

01:08:12

it's a bit of a

01:08:13

leap, I think to Ted

01:08:15

to try to say that

01:08:16



those assets should essentially be

01:08:18

converted and used for before

01:08:20

the payment of claims. So

01:08:22

there's reason for there to

01:08:24

be a live debate, at

01:08:25

least at least admire. I

01:08:28

need a shoes with respect

01:08:30

to some of these assets.

01:08:31

Of course, we shouldn't forget

01:08:32

that. I know there people

01:08:35

on the line who are

01:08:36

involved at the state department

01:08:37

back in the Iran claims

01:08:38



Sarah. It was it was

01:08:41

block assets of her on

01:08:43

that that were initially allocated

01:08:46

under the Algiers Accords to

01:08:49

the settlement of disputes by

01:08:50

the US claims that was

01:08:52

not by you in a

01:08:53

relaxed little action of the

01:08:54

United States that converted them

01:08:57

to that use. It was

01:08:58

by agreement of the two

01:08:59

countries and you'd hope you

01:09:00

could come to some agreement

01:09:02



before it before you had

01:09:04
and you get a lot

01:09:05
of relaxing, but we may

01:09:06
see that cuz the public

01:09:08
pressure is very great understandably,

01:09:11
in many ways, other comments

01:09:12
from the panel and those

01:09:15
in the audience. If you

01:09:16
have questions, if this discussion

01:09:18
has sparked and a any

01:09:20
thoughts or concerns that you

01:09:22
are free to put your

01:09:23
questions in the chat, we'd

01:09:25



like to hear here. Reactions.

01:09:27

That as you can see,

01:09:28

we've got a wealth of

01:09:29

experience and insights to to

01:09:34

share on a on a

01:09:35

range of issues under this

01:09:37

broad topic. So please feel

01:09:38

free to put your questions

01:09:40

in the chat. A a

01:09:44

square. If we're waiting for

01:09:45

questions, if I may make

01:09:47

one small point, which is

01:09:50

when it comes to asset

01:09:52



forfeiture, civil asset, forfeiture does

01:09:55

not require a conviction conviction

01:09:57

and the treatment of oligarch

01:10:03

assets. It's sort of worth

01:10:04

worth recalling, what we do

01:10:06

to our own before we

01:10:08

apply to hire bar to

01:10:09

return to Russian oligarchs. Although

01:10:12

I do, I mean, you

01:10:13

know, how do you say

01:10:13

there is a very valid

01:10:15

debate about the type of

01:10:16

system we have? And I

01:10:18



think some of the initial

01:10:19

legislation figured some cash back,

01:10:20

even from the ACLU. So

01:10:22

there's a lot of good

01:10:23

faith, truth about sex. Any

01:10:31

other comments from our panelists?

01:10:34

We do have a question

01:10:35

in the chat from Ramiro

01:10:38

Gomez. Got it all day

01:10:39

asking whether a head of

01:10:40

state's assets, enjoyed immunity, against

01:10:44

ask, anybody want to tackle

01:10:46

that one? I would say

01:10:55



it depends on the wording

01:10:56

of the sanctions law and

01:10:58

whether the head of states

01:10:59

is him or herself designated

01:11:02

under those sanctions. But I

01:11:06

know and interesting topic Topic

01:11:08

at the moment because President

01:11:10

Putin is repeated to hold

01:11:11

assets, through middlemen, throughout the

01:11:14

world and that would be

01:11:16

an interesting source of assets.

01:11:19

If one were to move

01:11:20

against them. Thank you. We

01:11:26



have another question that has

01:11:30

come in from Victoria kind

01:11:33

of money with, which is

01:11:34

in a scenario where an

01:11:36

investor brings an f e

01:11:37

a t, or expropriation claim

01:11:39

for losses incurred, as a

01:11:41

result of international sanctions to

01:11:43

what extent can a respondent

01:11:45

state rely on a public

01:11:46

policy defense? If no essential

01:11:49

security? Interest is involved is

01:11:52

because the state is not

01:11:53



a party to the conflict.

01:12:01

I think it's Michael. I'll

01:12:04

give it a shot. I

01:12:05

think it's a good question.

01:12:06

I supposed to start with.

01:12:09

Again, I'm not sure the

01:12:12

state would need to be

01:12:13

a party to a conflict

01:12:14

in order to win the

01:12:16

vote via Central Security interests.

01:12:17

So, I am, I picking

01:12:19

up on the point that

01:12:20

James made about these essential

01:12:22



security Interest, being the Central

01:12:24

Security interest of the state.

01:12:26

Take a range of states

01:12:28

have an interest in territorial

01:12:30

Integrity. That is an essential

01:12:32

security interests that they could

01:12:34

positively assert. This is not

01:12:35

the same as starting an

01:12:37

interest in supplying Boots. The

01:12:49

public policy defenses is Interesting.

01:12:53

And I would be inclined

01:12:55

to think that. Again, if

01:12:56

you could articulate a connection

01:12:58



between, you know, possible public

01:13:01

policy through portion of Stanford

01:13:03

that this action figure relates

01:13:05

to. You could do that.

01:13:07

And one situation where I

01:13:09

think it might be useful

01:13:12

to think about the public

01:13:13

policy defense is actually in

01:13:16

the context of oligarch, or

01:13:17

kleptocrats Focus action. We're really

01:13:19

part of the justification is

01:13:21

not a security interest, its

01:13:23

public order to effectively sort

01:13:26



of a quasi criminal regime.

01:13:27

So I think I could

01:13:29

be quite a plausible, argument

01:13:30

getting in the right circumstances.

01:13:33

Yeah, so it's more of

01:13:34

a police Powers kind of

01:13:35

argument or anything else, which

01:13:39

we know can be a

01:13:39

defense to expropriation. Climes for

01:13:42

instance Okay, well, she ain't

01:13:47

no other questions in the

01:13:49

chat. Thank you for for

01:13:51

those questions. I think we're

01:13:54



slightly the past the time

01:13:57

where we're supposed to break,

01:13:58

you out into chat groups.

01:14:02

So I'm going to turn

01:14:04

things back to Jose, Antonio

01:14:06

to help us do that.

01:14:08

But first, let me please

01:14:10

join me and virtually thanking

01:14:12

the palace. For what I

01:14:13

thought was a fascinating discussion.

01:14:15

We could frankly go on

01:14:16

on some of these topics

01:14:17

for a very long time,

01:14:19



but I really appreciate all

01:14:21

of the the thought that

01:14:23

went into the, the different

01:14:25

comments and The Interchange. So

01:14:27

it's been great. Great fun

01:14:29

for me and I hope

01:14:31

it's been useful for you

01:14:32

in the audience. Jose Antonio

01:14:33

back over to you. And

00:00:03

for that very generous introduction

00:00:05

and then I guess the

00:00:06

lesson is don't write emails

00:00:08

making suggestions cuz it may

00:00:10



it may end up with

00:00:11
you being put on a

00:00:12
committee. But really it's a

00:00:14
pleasure to be here and

00:00:15
I thank Washington arbitration week

00:00:17
for what looks like just

00:00:18
a splendid week of offerings

00:00:20
that we all hope. We

00:00:22
can take maximum advantage of,

00:00:24
so congratulations to you and

00:00:27
the organizers. So Jose, Antonio

00:00:30
said that the topic of

00:00:32
our panel economic sanctions as

00:00:34



an exception, to international trade

00:00:36

and investment, obligation is nothing.

00:00:39

If not topical and and

00:00:42

it's it's a totally becoming

00:00:43

more. So with each year

00:00:46

that goes by, I'm going

00:00:47

to do a tiny bit

00:00:49

of stage setting before we

00:00:51

turn it over to the

00:00:52

panelist for what we hope

00:00:54

will be a dynamic discussion

00:00:55

and and will also include

00:00:57

an opportunity for those of

00:00:59



you in the audience to

00:01:01

ask questions. Because you're probably

00:01:03

here because you run into

00:01:05

these issues in the course

00:01:07

in the course of your

00:01:08

work. So I can namik

00:01:12

sanctions and then we'll talk

00:01:13

in a moment about what

00:01:15

that really encompasses. Cuz even

00:01:17

in this panel, I think

00:01:18

we have perhaps slightly different

00:01:20

views from a definitional perspective.

00:01:23

But economic sanctions may be

00:01:25



imposed by countries, or, by

00:01:28

International, or Regional bodies such

00:01:31

as the UN or that

00:01:32

you you, for various reasons,

00:01:34

National Security, non proliferation of

00:01:38

weapons of mass destruction or

00:01:40

nuclear goods are technology. Foreign

00:01:44

policy concerns that can be

00:01:46

as diverse as countering terrorism

00:01:49

and Corruption, avoiding, a drug

00:01:53

trafficking and and many other

00:01:55

kinds of things and in

00:01:57

recent years to make a

00:02:00



bad pun sanctions have proliferated

00:02:02

As a tool, particularly of

00:02:05

foreign policy. And I think

00:02:07

we've seen that most clearly

00:02:08

with the ongoing conflict between

00:02:11

Russia and and Ukraine. Did

00:02:16

they really become a preferred

00:02:17

tool of of of of

00:02:19

of dealing with and responding

00:02:23

to political conflict? Now, the

00:02:25

proliferation of sanctions reflects a

00:02:27

couple of phenomena first it

00:02:30

reflects the number of authorities

00:02:33



or jurisdictions that are imposing

00:02:34

them for a long time

00:02:37

that you asked, was the

00:02:38

major actor in this area

00:02:40

and it's still a very

00:02:41

big actor. But, but the

00:02:45

EU is Very active, especially

00:02:49

since the Advent of the

00:02:50

Russian war, in, in, in

00:02:54

imposing sanctions. And most people

00:02:56

think that's here to stay

00:02:57

the the so you have

00:03:01

more countries imposing sanctions on

00:03:04



a multilateral coordinated basis, which

00:03:06

of course, enhances their effectiveness

00:03:09

and you have major changes

00:03:11

in how sanctions are framed

00:03:13

and targeted. If you go

00:03:15

back to our oldest in

00:03:18

the in the US at

00:03:19

least standing in Bargo, it's

00:03:20

the Cuban embargo from the

00:03:22

early 1960s and that was

00:03:24

a broad-based going to Country

00:03:27

focused set of sanctions that

00:03:31

Encompass dealings with with a

00:03:35



wide array of actors in

00:03:37

Cuba. We've had a trend.

00:03:39

However away from those broad

00:03:41

country based sanctions too much

00:03:43

more targeted sanctions whether they're

00:03:45

focused on sectors of it

00:03:47

at. I mean, or particular

00:03:49

individuals, even though they're often

00:03:51

associated with specific regimes and

00:03:53

you can think of Venezuela.

00:03:55

Me and Mom are even

00:03:57

even Russia in that contact.

00:03:59

Now, we're going to talk

00:04:00



a lot more among our

00:04:02

panelists about what sanctions do.

00:04:05

And as I said, there's

00:04:07

actually probably not full of

00:04:09

green mint as to what

00:04:11

sanctions are at their core.

00:04:13

My definition and I'll just

00:04:15

put it out there for

00:04:17

others to react. Is that

00:04:19

the, of course, I'm anxious

00:04:21

restrict dealings with sanction person,

00:04:24

and often flow Downstream to

00:04:27

those. They control, they may

00:04:29



also block funds and there

00:04:34

can be other things but

00:04:37

will it will? It will

00:04:37

talk about those. We're also

00:04:39

going to talk about the

00:04:41

status of sanctions as a

00:04:43

matter of international law and

00:04:47

then we'll go I want

00:04:48

to discuss how sanctions affect

00:04:50

disputes both in the trade

00:04:52

and investment contact. Know some

00:04:54

things that sanctions aren't I

00:04:57

would put it out there

00:04:58



for it for just for

00:05:00

some level setting at the

00:05:01

beginning is is that there's

00:05:03

there's sanctioned so-called sanctions are

00:05:06

imposed by the World Bank

00:05:07

and other International financial institutions.

00:05:09

Those are really procurement Department

00:05:13

eligibility decisions and they're not

00:05:15

really what we're talkin about

00:05:17

today. We can talk about

00:05:19

where the we're talkin about,

00:05:20

economic boycotts, and anti-boycott legislation

00:05:25

within sanctions or other trade

00:05:27



controls. And I think we're

00:05:28

also going to touch on

00:05:30

what are referred to as

00:05:31

blocking statues, which are counter

00:05:34

sanctioned. So that's more or

00:05:37

less the scope. We're going

00:05:39

to start with trade and

00:05:41

then and then go to

00:05:42

investment. And as I said,

00:05:43

we're going to make this

00:05:44

as interactive as possible. We've

00:05:46

divided the sea. The four

00:05:47

segments want? We have four

00:05:50



panelists. One of whom will

00:05:52

lead on each segment and

00:05:53

then others will be free

00:05:55

to come and tape comment

00:05:57

as they as they deem

00:05:58

appropriate. So I'm going to

00:06:00

introduce them in the order

00:06:01

that they are going to

00:06:02

be in a leading the

00:06:04

discussion. So, first is, is

00:06:07

Jim Mendenhall. Jim is a

00:06:09

partner in the global arbitration

00:06:12

trade and advocacy group and

00:06:14



Sibley in Austin in Washington

00:06:16

DC, where he concentrates on

00:06:19

International, arbitration trade policy, trade

00:06:21

litigation and National security-related proceedings

00:06:26

under under Schiff is he

00:06:28

has a significant background and

00:06:30

governments having served in various

00:06:32

positions in the office of

00:06:34

the US trade representative for

00:06:36

a number of years culminating

00:06:38

in, in his Service as

00:06:39

general counsel of u, s

00:06:41

t r and end his

00:06:43



portfolio included. Pretty much all

00:06:45
of the issues. I think

00:06:46
we're good. We talking about

00:06:48
today. So so wonderful to

00:06:51
have Jim kicking us off

00:06:53
and I think you'll Focus

00:06:55
mostly in your initial remarks

00:06:57
on trade, but but I'm

00:07:00
sure I'm sure we'll go

00:07:01
into Investments as well. Next

00:07:04
will have the Craig Garver

00:07:05
was a diver was an

00:07:07
associate at Allen & overy

00:07:09



also here in Washington. D.c.

00:07:11

Craig has a very interesting

00:07:14

practice that focuses on International

00:07:16

Investment arbitration both commercial and

00:07:19

construction and complex commercial litigation

00:07:23

including in the antitrust realm

00:07:26

and the US federal and

00:07:27

state courts. And I understand

00:07:29

he's also been involved in

00:07:31

a number of Investigations that

00:07:33

have sanctions dimensions. Next. And

00:07:38

with particular thanks to her

00:07:39

for for jumping in to

00:07:41



replace one of her colleagues

00:07:42

we have Christina Should students

00:07:46

choose based in London. She's

00:07:48

a senior associate with Clifford

00:07:51

chance, she advises on a

00:07:54

wide range of commercial, and

00:07:56

investment, treaty arbitration matters. And

00:07:58

also has significant experience in

00:08:00

transnational and English, High Court

00:08:02

litigation and Regulatory anti-corruption, Compliance

00:08:06

matters, and I see Christina

00:08:08

you spend some time in

00:08:09

Moscow. So I give you

00:08:10



probably have some stories to

00:08:12

tell I would guess. Last

00:08:15

but not least, we have

00:08:17

the Kilgore who's a partner

00:08:18

at Covington & Burling. And

00:08:21

and what I think is

00:08:22

interesting about this group of

00:08:23

palaces that nobody is a

00:08:25

single suit player. You all

00:08:27

crossover in multiple ways that

00:08:30

are very interesting soda. Kill

00:08:32

advises financial institutions and global

00:08:35

companies. And cross-border disputes and

00:08:38



and domestic and international investigations

00:08:41

and enforcement actions and he

00:08:43

has done a significant work,

00:08:46

it appears that involved in

00:08:48

the bank, secrecy act and

00:08:50

money, laundering statutes to Consumer

00:08:53

Fair, lending, statutes and related

00:08:57

Financial Services Regulatory and compliance

00:09:00

matters, as well as extensive

00:09:03

experience in the disputes Arena.

00:09:06

Both Financial commercial, and treaty-based

00:09:09

arbitration. So that's our panel.

00:09:11

I think you'll agree with

00:09:14



me that they're very well-equipped

00:09:15

to explore these issues. And

00:09:18

I'll ask Jim to start

00:09:20

us off, please talk about

00:09:22

trade and then what what's

00:09:24

the architecture here? Jim trade,

00:09:30

and the National Security exception

00:09:33

applicable in the trade context,

00:09:34

but it's the discus. Is

00:09:36

actually equally applicable on the

00:09:37

investment context as the provisions

00:09:40

overlap, and in some cases

00:09:41

are actually identical. I'm in

00:09:43



a lot of these agreements

00:09:44

so and I'll go through

00:09:46

a really focusing on the

00:09:50

environment issues me, the Central

00:09:52

Security exceptions in the wording

00:09:54

of those exceptions, and application

00:09:56

of those exceptions overtime. And

00:09:57

understanding of it in this

00:09:59

context, really there are two

00:10:00

issues that continually come up

00:10:03

first, is whether a tribunal

00:10:05

even has jurisdiction to review

00:10:07

a matter in which the

00:10:10



responding state has invoked the

00:10:12

Central Security or national security.

00:10:13

And then if so, what

00:10:15

is the scope of that

00:10:16

exception in front for many

00:10:19

decades? I think it's fair

00:10:21

to say countries tried, very

00:10:23

hard to avoid this question

00:10:24

as much as possible. There

00:10:27

were exceptions built into a

00:10:29

number of agreements including the

00:10:30

dog at General agreement on

00:10:32

tariffs and trade and success.

00:10:36



But for a long time,

00:10:37

countries tried very hard to

00:10:39

avoid putting themselves and putting

00:10:42

panels in a position to

00:10:43

have to interpret and apply

00:10:44

those provision. That is changed

00:10:47

in recent years, not in

00:10:48

ways that will impact both

00:10:50

trade and investment. These issues

00:10:52

are quite complicated. People can

00:10:55

have written books without reaching

00:10:57

definitive conclusions on these matters.

00:11:00

I'm going to short-circuit that

00:11:01



and provide a very brief

00:11:02

analysis without reaching a definitive

00:11:04

conclusion on these matters and

00:11:07

I will go through and

00:11:08

provide some simplifying assumptions just

00:11:10

because these are the complex

00:11:12

Topic in the simplifying. Assumptions

00:11:15

include really three main main

00:11:17

points. I'm going to skip

00:11:20

the discussion of whether a

00:11:21

particular sanction, actually implicates investment,

00:11:24

or trade, and there are

00:11:26

issues under its as to

00:11:29



whether or not, for example,

00:11:30

of trade sanction, necessarily implicate.

00:11:32

Some investment obligation. Let's just

00:11:34

assume that it is. I'll

00:11:36

trade and investment. I will

00:11:38

not focus, especially on sanctions

00:11:41

that are called for by

00:11:43

the UN pursuant to chapter

00:11:46

7 or otherwise because it's,

00:11:49

there's relatively straightforward, I believe,

00:11:51

it's this United Nations cold

00:11:52

for a sanction, it's going

00:11:54

to be hard for a

00:11:55



90. Lb are trying to

00:11:57

second-guess that something at the

00:12:00

end of the day and

00:12:00

there are no exceptions that

00:12:01

are specifically tailored for that

00:12:03

purpose. And then the third,

00:12:05

it goes to questions of

00:12:06

wording of these. Invite have

00:12:07

these security exception. If you

00:12:10

look at these kinds of

00:12:12

exceptions across agreements really, they're

00:12:13

all over the place, they're

00:12:15

all dressed in that drafted

00:12:17



in different ways and you

00:12:19

have to look very closely

00:12:20

at the wording in any

00:12:21

particular context to see whether

00:12:23

an exception applies, it's hard

00:12:25

to make generalization in Broad

00:12:27

terms. I think there are

00:12:27

there three categories of of

00:12:30

Central Security exceptions. The first

00:12:33

is, simply a complete removal

00:12:35

of the issue from the

00:12:37

jurisdiction of a of a

00:12:38

panel oratory tribunal. There aren't

00:12:40



many agreements were. This is

00:12:43

so explicit, but there are

00:12:45

a few, including, for example,

00:12:47

the US Korea have to

00:12:48

get a Werebear. Expressly said,

00:12:50

the matters are removed from

00:12:51

the scope of the tribunal

00:12:53

has jurisdiction in the country

00:12:55

in books of the provision.

00:12:56

That's the end of the

00:12:57

matter is, there are the

00:12:59

second set of Provisions, which

00:13:01

says, things like nothing in

00:13:04



the agreement precludes. I remember,

00:13:07

or a safe from taking

00:13:08

measures that are necessary to

00:13:12

address to Central Security concern

00:13:14

and then there's a third

00:13:16

category which is which has

00:13:18

been well, that we're a

00:13:19

lot of the debate has

00:13:20

been focused recently, which says

00:13:22

nothing in the agreement, Shoppers

00:13:23

Food & Party from taking

00:13:24

measures that it considers are

00:13:26

necessary for the protection of

00:13:29



its essential security. Interest and

00:13:31

other various hybrid agreements which

00:13:32

are which raised their own

00:13:34

issues example, the Canada agreement

00:13:37

includes both the probation to

00:13:39

protect public security and public

00:13:40

order as well as separate

00:13:42

Central Security. It's not entirely

00:13:44

clear where, that's where this

00:13:45

place is a sec. But

00:13:47

for purposes of this discussion

00:13:48

will focus on the WTO

00:13:50

provision which also appears in

00:13:51



the investment context in a

00:13:52

number of different agreement and

00:13:54

I'll Focus there because the

00:13:56

lab discussion Compass has a

00:13:58

lot of the issues that

00:13:58

also come up in the

00:13:59

investment context. So the WTO

00:14:02

security exception, exception applicable specifically

00:14:06

in the context of God

00:14:07

is an article 21 of

00:14:08

the guy and their various

00:14:11

pieces of it. But for

00:14:12

purposes of this analysis of

00:14:13



focusing section B, says that

00:14:15

nothing in the agreement shall

00:14:17

be construed to prevent a

00:14:18

Contracting party from taking any

00:14:20

action, which it considers necessary

00:14:22

for the protection of a

00:14:24

of a to Central Security

00:14:25

interest related to three different

00:14:26

areas. When is fissionable materials

00:14:29

won't focus. The other is

00:14:31

materials for purposes of establishing

00:14:33

and supplying a military establishment.

00:14:35

And the third is I'm

00:14:38



taking in time of war

00:14:39

or other emergency in international

00:14:40

relations. Now for a long

00:14:43

time, panels and tribunals have

00:14:46

assumed that this provision is

00:14:47

self jumping because it says

00:14:49

that, nothing and nothing in

00:14:51

the back or the exception

00:14:52

said that nothing in the

00:14:54

agreement. Shall be construed to

00:14:55

prevent a party from taking

00:14:56

any action, which it considers

00:14:57

to be necessary to do

00:14:58



those things and you look

00:15:01

at the icj jurisprudence and

00:15:03

investor-state arbitration. They often say

00:15:08

that if you look at

00:15:10

that at that prison in

00:15:11

that language that considers language

00:15:13

that makes itself judging and

00:15:15

and that's an end. So

00:15:16

it in if a dispute

00:15:18

arose in that context, that

00:15:19

would be myself judging provision

00:15:21

and an invocation of that

00:15:23

provision is outside the jurisdiction

00:15:24



of tribal for panels. It

00:15:26

turns out that that is

00:15:27

incorrect that date based on

00:15:29

recent Iwco jurisprudence, that is

00:15:32

not a self-charging provision and

00:15:34

it's come up. And in

00:15:35

at least two different cases.

00:15:36

First came up in the

00:15:39

case, dealing with Russia and

00:15:41

Ukraine, but not in the

00:15:43

context of the more recent

00:15:44

dispute context of the 2014

00:15:46

2015 events, where Russia had

00:15:51



taken certain measures to prevent

00:15:52

Transit across its border with

00:15:54

Ukraine. Ukraine challenge that measure

00:15:57

in the WTO. And Russia

00:16:00

said this isn't essential security

00:16:01

issue measure that we've taken

00:16:03

you the WTO panel of

00:16:06

no jurisdiction to review what

00:16:07

we've done. That the panel

00:16:10

came down and said, no,

00:16:11

that's not right. We do

00:16:13

get to judge what you've

00:16:14

done. There's nothing taking it

00:16:15



out of the jurisdiction of

00:16:16
the tribunal. Despite the language

00:16:18
that says, I'm as a

00:16:19
member can take whatever measures.

00:16:21
I deem that it considers

00:16:22
to be necessary. It said,

00:16:24
first of all, we get

00:16:26
to judge whether or not.

00:16:27
For example, there is an

00:16:29
emergency, an emergency and international

00:16:31
relations. It said that is

00:16:32
an objective tests. We get

00:16:34
to decide what that is.

00:16:35



And that is not to

00:16:36
self judging myself judging matter.

00:16:38
I'm enabling the name, tripartite,

00:16:41
what that meant, and they

00:16:43
said, things like that. For

00:16:45
example, that emergency in international

00:16:47
relations relates to a military

00:16:49
action reward or something similar

00:16:51
to that. It may not

00:16:52
rise to the level of

00:16:53
award, but it rises to

00:16:55
the level of some military

00:16:56
defense related interest. It is

00:16:58



not any emergency in international

00:17:00
relations, nor is it a

00:17:01
political dispute. Your political disputes

00:17:03
are not enough. You have

00:17:04
to have something higher than

00:17:05
that, okay? So if that's

00:17:06
the case, one Bay Rays

00:17:09
ask the question, well, what

00:17:11
about sanctions that are related

00:17:12
to things, like human rights

00:17:13
violation, is that an emergency

00:17:15
in international relations and relations

00:17:17
or not it if if

00:17:20



you're imposing sanctions to deal

00:17:22

with human rights issues, but

00:17:23

you're not involved in the

00:17:23

conflict with the kitten country.

00:17:25

Where sanctioning that at least

00:17:27

is an issue for consideration.

00:17:30

The other thing that the

00:17:31

panel said with respect to

00:17:32

emergency and international relations Is,

00:17:34

it doesn't matter if you

00:17:36

yourself contributed to that emergency

00:17:38

Which is contrary to customary

00:17:40

international law or rules on

00:17:41



the Sesame. Even if you

00:17:44

contributed to the emergency, you're

00:17:47

not off yet. That's that's

00:17:48

that that's it doesn't make

00:17:50

you like I'm so you

00:17:51

can still invoke this provision

00:17:52

even if you are partially

00:17:54

responsible for creating the emergency

00:17:56

in the first place. So

00:17:58

they said, emergency and international

00:18:00

relations is an objective test

00:18:01

essential security interests and in

00:18:04

determining whether or not it

00:18:05



measures necessary to protect those

00:18:06

essential security. Interest is more

00:18:10

subjective but still not entirely

00:18:13

within the discretion of the

00:18:14

of the state taking taking

00:18:17

the action. So I'm they

00:18:19

said, for example, at a

00:18:20

minimum the, the invocation of

00:18:22

that provision has to be

00:18:23

in good faith. and there

00:18:26

has to be a minimum

00:18:27

requirement of plausibility, you can't,

00:18:29

you can't, you have to

00:18:30



have a possible relationship between

00:18:32

the action that you've taken

00:18:34

and your essential security interest

00:18:36

here at, in the context

00:18:39

of, of the, Ukraine matter

00:18:40

when my task is, Is

00:18:45

the action of a third

00:18:46

country, sanctioning Russia, for example,

00:18:48

doesn't fall within the scope

00:18:50

of that exception, if you're

00:18:51

not directly involved in that

00:18:52

conflict. So, for example, is

00:18:55

the United States imposing sanctions

00:18:56



on Russia, necessary for the

00:19:00

protection of the US US

00:19:02

own essential security interest when

00:19:06

the US is not directly

00:19:07

involved in that conflict. Although

00:19:09

now, it has become more

00:19:10

involved in food through the

00:19:11

provision of weapons and such.

00:19:12

So maybe it does, but

00:19:14

there are at least questions

00:19:15

here about if you were

00:19:16

a third party to a

00:19:17

conflict. To what extent can

00:19:19



you invoke? This permission to

00:19:20

impose sanctions country. The bigger

00:19:27

the bigger point to take

00:19:28

away from this is that

00:19:29

is that the the the

00:19:32

whole idea of the long-held

00:19:34

position at least articulated by

00:19:35

the United States that a

00:19:36

central security, provisions are self-driving

00:19:38

and all contacts. If he

00:19:40

is no longer to be

00:19:40

true, the W2 several police

00:19:43

to W two panels have

00:19:44



taken issue with that interpretation.

00:19:46

There have been a number

00:19:48

of investors State arbitration tribunals

00:19:50

with your reach different conclusions

00:19:51

about how the provision should

00:19:53

be applied or provision similar

00:19:55

to this should be applied.

00:19:56

But it generally held that

00:19:58

these kinds of Provisions are

00:19:59

not self judging absent and

00:20:01

explicit indication in the text

00:20:03

that they should be or

00:20:04

removal of jurisdiction of the

00:20:06



tribunal to assess those issues.

00:20:07

And so, at a minimum,

00:20:09

it it does appear that

00:20:10

tribunals will do their utmost

00:20:12

to reach these issues and

00:20:15

not simply defer to Estates

00:20:16

invocation of the essential security

00:20:18

interest and stop there. That,

00:20:21

that entire idea that you've

00:20:22

been staking out of jurisdictions,

00:20:24

are ghost family. Tribunal sense

00:20:26

of the rule of law

00:20:27

& Justice. The big change,

00:20:29



I'm sure we'll want to

00:20:33

come back to this in

00:20:34

the questions, but but I

00:20:38

wonder if any of our

00:20:39

other panelists has comments or

00:20:42

questions about this? I found

00:20:44

myself thinking about the question

00:20:46

that you yourself raised jamwiches

00:20:48

it which is what about

00:20:50

things like human rights-based sanctions

00:20:54

or Global Magnet School sanctions,

00:20:56

which I think are are

00:20:58

are much more foreign policy

00:21:00



based somewhere, arguably, National Security

00:21:03

based, or mixed. And and

00:21:05

and I think we're in

00:21:06

a world where the the

00:21:07

reasons that sanctions are imposed

00:21:09

for by countries often, go

00:21:11

far beyond that kind of

00:21:13

traditional security interests that, that,

00:21:18

that that have dominated the

00:21:19

WTO. And and and I

00:21:21

see j-type discussions that you've

00:21:23

talked about Yeah, I mean

00:21:27

I'll try to respond to

00:21:29



that but welcome the views

00:21:30

of the other panel members

00:21:31

as well. I mean, I

00:21:35

think it is a it

00:21:36

is a legitimate issue that

00:21:37

comes up, and I in

00:21:38

the context of the WTO

00:21:40

comes up in the context

00:21:41

of investment investment agreements, as

00:21:43

well, know the WTO agreements

00:21:44

have other exceptions. That one

00:21:46

might in both dealing with

00:21:47

things like public morals or

00:21:48



it's going to go to

00:21:49

that one couldn't vote. For

00:21:51

example in the perhaps in

00:21:53

the end I'm in the

00:21:54

human rights contacts. The other

00:21:56

thing is something several Provisions

00:21:58

are biscuits. Goes to the

00:21:59

issue of the drafting of

00:22:00

the particular provision being very

00:22:02

important. So the WTO provision

00:22:04

is her very specific in

00:22:06

the kinds of essential security

00:22:08

interest that are in play.

00:22:09



If you look at some

00:22:10

other investment agreements, it's written

00:22:12

a bit broader. So it

00:22:13

may talk about generally the

00:22:15

maintenance and restoration of International

00:22:16

Peace and security, for example

00:22:18

which is in the US

00:22:19

Bahrain FDA, which provides a

00:22:22

lot more leeway to determine

00:22:23

you not to assess whether

00:22:24

or not it measures is

00:22:25

appropriately. You know, within that

00:22:27

within the category of a

00:22:28



Central Security or not, Read

00:22:32

any edit comments or thoughts

00:22:33

from the other panelists or,

00:22:35

or from the audience will

00:22:36

move on to focus more

00:22:37

on investment in the moment.

00:22:39

So particular, if you have

00:22:40

trade related questions, it would

00:22:42

be a great time to

00:22:43

put them forward. Christina, you

00:22:45

look like, you might want

00:22:45

to say something. Yes, two

00:22:48

points. One is to remember

00:22:49



that in the trace fear,

00:22:51

the sanctions do tend to

00:22:54

affect the import of goods

00:22:56

in the movement of goods

00:22:58

and trade flows generally many

00:23:01

modern sanctions Target individual. Sometimes

00:23:04

our sectoral sections but they're

00:23:05

also sanctions against individuals and

00:23:08

their companies. And I think

00:23:09

that's where we end up

00:23:10

more, and the investment context,

00:23:12

rather than the trade context.

00:23:13

I thought was really interesting

00:23:15



how James thought to compare

00:23:17

approaches and talked about tribunals

00:23:20

that are looking at the

00:23:21

trade regulations. But since that's

00:23:24

a space to watch to

00:23:25

see how those two Fields,

00:23:27

interact, I just have a

00:23:29

question for James. Which of

00:23:30

the following my understanding is

00:23:32

that there is no appeal

00:23:33

in the 2014, Russia, Ukraine

00:23:36

case I was wondering why

00:23:38

not it strikes. Me that

00:23:41



Russia would be a country.

00:23:42

That would be very keen

00:23:44

to appeal because it seems

00:23:46

like the type of country

00:23:46

that would like these Provisions

00:23:48

to be self judging. I

00:23:50

was wondering if you had

00:23:50

any insights on that. I'm

00:23:53

trying to remember the timing

00:23:54

of the of the case,

00:23:55

I mean, that as of

00:23:56

today, at least the Appellate

00:23:57

body is dysfunctional in the

00:23:59



WTF, it doesn't exist. So

00:24:00

there's nowhere to appeal at

00:24:01

the time. It was it

00:24:03

remain. It was, it was

00:24:04

fun, but there was no

00:24:05

appeal. I don't know the

00:24:08

answer to that. I don't

00:24:09

know why they didn't appeal

00:24:10

in. I just speaking from

00:24:13

experience, in other cases, often

00:24:14

parties, don't appeal because I

00:24:17

don't want the answer, right?

00:24:19

They they they're afraid what

00:24:20



the answer is going to

00:24:21

be in. It will be

00:24:22

it will fall in the

00:24:22

wrong place. So, they'd rather

00:24:24

just live with the live,

00:24:27

with the outcome of the

00:24:28

above the panel, and leave

00:24:29

it at that goes to

00:24:29

the issue. I was talking

00:24:30

about in the beginning, countries

00:24:32

are very, very nervous about

00:24:34

the security exceptions because the

00:24:36

potential for abuse is by

00:24:38



brought if they truly are

00:24:39

self judging that anybody looking

00:24:41

for anything that country's really

00:24:44

want to avoid that outcome.

00:24:46

Read, great question, Christina. Any

00:24:48

other comments from from Gregor

00:24:50

and the kill or so,

00:24:51

if not, we can, and

00:24:53

I don't see any from

00:24:54

the audience at this point.

00:24:55

So what Craig, why don't

00:24:58

we move on to focus

00:25:02

more on the investment side

00:25:04



and and, and, and maybe

00:25:05
you can lay out for

00:25:06
us house, sanctions play out,

00:25:09
and in the dispute framework

00:25:13
that most of our audience

00:25:15
is dealing with sure will.

00:25:18
Thank you very much Lucinda.

00:25:19
And let me Begin by

00:25:20
Antonio the rest of the

00:25:23
organising team and of course,

00:25:25
my my Palace and very

00:25:26
happy to be speaking to

00:25:27
you this afternoon. I'm going

00:25:29



to take the Baton from

00:25:30

listen to excuse me and

00:25:32

talk a little bit more

00:25:32

about stage setting and maybe

00:25:35

even hopefully create a conceptual

00:25:37

framework to guide the rest

00:25:38

of our discussion and I'm

00:25:40

going to break that into

00:25:41

two sections. The first to

00:25:44

borrow from Raymond Carver, What

00:25:47

are we talkin about when

00:25:48

we talk about sanctions now

00:25:49

listen to in your introduction

00:25:51



you gave a very compelling

00:25:53

definition of going to push

00:25:55

the boundaries a little bit

00:25:56

and try to broaden that

00:25:57

definition and I think that'll

00:25:59

be useful for how we

00:26:01

approach the rest of discussion.

00:26:02

And then, secondly, I'm going

00:26:04

to talk about sanctions and

00:26:06

interests. International arbitration intercept. So

00:26:10

first what do we mean

00:26:11

by sanctions? It's not a

00:26:12

simple answer. I take a

00:26:14



very proud of you. I

00:26:15

will encourage you to as

00:26:16

well but it's also very

00:26:18

Dynamic spoke about the kind

00:26:21

of to change it for

00:26:21

decades from very comprehensive, two

00:26:23

more targeted, but they also

00:26:25

change even daily. So the

00:26:27

benefit of sanctions regime is

00:26:30

that they can be imposed

00:26:30

quickly especially in the US

00:26:32

under delegated authority. So for

00:26:35

example, following the Russian invasion

00:26:37



of Ukraine in February of

00:26:39

this year, they rolled out

00:26:41

something very quickly so they

00:26:42

can respond, you know, as

00:26:45

events unfold. What time? But

00:26:48

I'm to start by kind

00:26:49

of breaking it into the

00:26:51

sanctions understood on the plain

00:26:53

of international law and sanctions

00:26:54

understood on the plain of

00:26:55

domestic law. Even though they

00:26:57

obviously do overlap, a great

00:26:59

deal on the international plane,

00:27:02



I'd start with H or

00:27:04

text, the UN Charter. So

00:27:06

under chapter 7, which is

00:27:07

important. I prefer you to

00:27:09

article 41, which gives the

00:27:11

security Council authority to recommend

00:27:15

sanctions and call upon members

00:27:17

of the United Nations to

00:27:19

apply them. This provides a

00:27:22

very good starting definition, which

00:27:23

I'm going to court for

00:27:24

a fact. The measures of

00:27:27

the security Council can impose

00:27:29



quotes, may include complete or

00:27:31

partial Interruption of economic relations,

00:27:33

and the railsea. Aeropostale telegraphic

00:27:37

radio in other means of

00:27:38

communication, and the severance of

00:27:40

diplomatic relations. So getting this

00:27:42

dates back to 1945. And

00:27:44

in, from that very early

00:27:45

stage, we see that week

00:27:47

There seems to be broader

00:27:48

than simply complete or partial

00:27:51

Interruption of economic relations, are

00:27:53

there. That's very significant and

00:27:54



it's done, right? The security

00:27:57

Council sanctions regime has given

00:27:59

rise to a number of

00:28:00

standing bodies on. So you

00:28:02

have the resolution 1373 counter-terrorism

00:28:05

committee 1540, committee concerning weapons

00:28:08

of mass destruction and they're

00:28:09

very active bodies. I'm kind

00:28:12

of setting regulations for member

00:28:13

states, to, to follow, and

00:28:14

Implement outside of the context

00:28:18

of the charter. We might

00:28:19

also consider sanctions to be

00:28:21



a form of countermeasures. That's

00:28:23

why I quit Professor Laurie,

00:28:25

damn Ross. And her definition,

00:28:26

which also provides kind of

00:28:28

rationale for imposing sanctions by

00:28:31

saying using an economic sanctions

00:28:33

for enforcement purposes, their measures

00:28:35

taken by a state that

00:28:37

perceives itself. Aggrieved by breach

00:28:39

of international law to affirm

00:28:40

its own rules and post

00:28:42

costs on the alleged violator,

00:28:43

deter future violations and potentially

00:28:46



providing mean To make its

00:28:47

own Hole, by example, for

00:28:49

sequestering funds, from which reparations

00:28:51

ultimately could be paid. I

00:28:54

want to drill down on

00:28:56

one phrase within that. So

00:28:57

a state that perceives itself,

00:28:59

agreed, agreed by breach of

00:29:02

international law, is a little

00:29:04

bit back to my gym

00:29:05

was disgusting, disgusting to me

00:29:07

in terms of such measures.

00:29:09

But again, comparing to what

00:29:11



we were just thinking about

00:29:12

a moment ago, outside the

00:29:13

context of article 41 you

00:29:15

have states that need to

00:29:16

justify the measures are taking

00:29:19

on their own ground. They're

00:29:20

not imposed by the security

00:29:22

Council. May begin to invite

00:29:24

a little bit of disagreement

00:29:25

on whether they're at justified

00:29:27

in doing that or not.

00:29:28

When we consider its sanctions

00:29:30

is formed to counter measures

00:29:31



of course then we have

00:29:32

to have recourse to the

00:29:33

articles on state responsibility in

00:29:35

the conditions that they impose

00:29:37

on the veil ability of

00:29:38

countermeasures international playing turning to

00:29:42

the domestic. You know, there

00:29:43

multiple forms of sanctions operating

00:29:45

domestic law in the first

00:29:46

are there. Elations implementing the

00:29:49

security Council mandated sanctions regimes

00:29:52

that we discussed the moment

00:29:53

ago. The second there might

00:29:56



be a chance to go

00:29:57

further than what the security

00:29:59

Council requires. Where are completely

00:30:01

unrelated to what the security

00:30:02

Council requires a kind of,

00:30:05

some of the boundary-pushing regime's

00:30:07

like them mcnitzky sanctions or

00:30:09

other human rights regimes that

00:30:11

we spoke about earlier. And

00:30:13

again, please raise a lot

00:30:14

of questions because they need

00:30:15

to be justified on their

00:30:17

own, rather than simply relying

00:30:19



on Security Council binding Authority

00:30:20

soon. United States, we have

00:30:22

to bust, legislative, Authority, trading

00:30:24

with others, delegated the authority,

00:30:28

to the executive branch to

00:30:30

impose sanctions. But this kind

00:30:31

of robust Foundation isn't universally

00:30:34

the case. I just listened,

00:30:36

I mentioned in her introduction.

00:30:38

You know the US has

00:30:39

been kind of a, A

00:30:40

L & M by far

00:30:41

his most comprehensive sanctions regime

00:30:43



more recently the European Union,

00:30:46

others jurisdictions. I'm following suit,

00:30:47

but a lot of Partners

00:30:49

elsewhere in the world basically

00:30:52

transpose us regulations or kind

00:30:54

of followed the lead, so

00:30:55

to speak and it might

00:30:56

not have the robust at

00:30:58

legal framework for doing that.

00:31:00

The significance of this, is

00:31:02

it the less underlying Authority.

00:31:04

The more likely a particular

00:31:06

sanction, regulation or measure could

00:31:09



be seen as discriminatory arbitrary

00:31:11

or otherwise ill-founded. So I

00:31:13

think the important thing is

00:31:14

you know, how have your

00:31:15

Legal Foundation for the specific

00:31:18

measures to rest on. In

00:31:21

the US we take the

00:31:23

term to be synonymous with

00:31:24

ofac sanctions but again I

00:31:26

I considered to be potentially

00:31:28

broader including travel bans on

00:31:30

getting the asset freezes Capital.

00:31:31

Restraints trade embargoes restrictions and

00:31:35



even one. That might be

00:31:36

a little challenging to our

00:31:38

traditional definition of sanction. So

00:31:42

in 2009, the US Supreme

00:31:44

Court had occasion to a

00:31:46

pint of Pawn weather executive

00:31:49

branch of 42. Comprehensively lift

00:31:51

sanctions against The Rock include

00:31:53

removing Rock from dfsi a

00:31:58

terrorism exception. Is that narrow

00:32:01

question was posed before the

00:32:02

court in a case, called

00:32:03

Republic of Iraq, verse Pee,

00:32:05



Dee and the court Rose,

00:32:07

excuse me, the Court Road,

00:32:08

stripping. The immunity that foreign

00:32:10

sovereigns ordinarily enjoy is as

00:32:12

much a sanction as eliminating.

00:32:13

Bilateral, Assistance or prohibiting, exported

00:32:16

Munitions the application to sanction,

00:32:18

affects the jurisdiction of the

00:32:20

federal courts, but that fact

00:32:21

alone does not deprive. It

00:32:22

of its character is a

00:32:23

function. So, we often tend

00:32:25

to think of stopping the

00:32:26



munity is kind of analytically

00:32:28

distinct from sanctions, writ large,

00:32:30

maybe that's not necessarily the

00:32:32

case. Now, Good reason. I'm

00:32:36

urging us to take a

00:32:37

very broad view of it

00:32:38

is almost as an issue

00:32:41

spotting exercise. So we do

00:32:43

kind of a sovereign immunity

00:32:45

differently than we approach trade

00:32:47

restrictions asset freezes things of

00:32:50

that nature. But taking more

00:32:51

broader view can raise questions

00:32:54



for us that we will

00:32:57

want to get out in

00:32:57

front of, on behalf of

00:32:58

our clients times. We're going

00:33:00

to take away here is

00:33:01

that an ounce of prevention

00:33:02

is worth a pound of

00:33:03

cure and the more Broadview

00:33:05

you can take the easier,

00:33:07

it is to get out

00:33:07

in front of issues that

00:33:08

might affect you or your

00:33:10

clients later. So leaving that

00:33:13



behind the second part. I

00:33:14

want to talk about ways

00:33:15

that sanctions can interact with

00:33:17

International treason proceedings, and it

00:33:19

doesn't excuse. I see three

00:33:22

main ways. The first is

00:33:24

applicable law and that's what

00:33:25

I mentioned a moment ago.

00:33:26

The second is bearing directly

00:33:28

upon the preceding, and the

00:33:30

last is affecting enforcement. So

00:33:33

very briefly talked about a

00:33:36

certain Provisions, equally applicable and

00:33:38



investment context, but we might

00:33:40

also see sanctions effects to

00:33:43

the gallery. Requirement to the

00:33:44

definition of investment. It could

00:33:46

easily come into play in

00:33:47

a denial of benefits apt

00:33:49

in its preparation and other

00:33:51

measures necessity or Clauses about

00:33:55

light, affecting the proceedings on

00:33:58

sanctions might affect arbitrator appointment

00:34:00

on. So some B have

00:34:02

Clauses restricting. The toys of

00:34:04

arbitrators two individuals of a

00:34:05



nationality that maintains diplomatic relations

00:34:08

with a Contracting party. They

00:34:10

might take the form of

00:34:11

Directions on Council or even

00:34:13

payments institutions are arbitrators, they

00:34:15

need to go through in

00:34:16

order for the preceding could

00:34:18

to convince or complete. And

00:34:20

finally, they can also affect

00:34:22

enforcement as well. I don't

00:34:25

want to get too far

00:34:26

over my skis because I

00:34:27

know some of the other

00:34:28



parents are going to speak

00:34:29

on this, but even if

00:34:30

you know, a party or

00:34:32

proceeding doesn't have an underlying

00:34:34

assumptions issue, when you go

00:34:36

seek to enforce award, if

00:34:38

the Judgment debtor or the

00:34:40

app has been selfish of

00:34:41

dissensions, that's another fertile for

00:34:43

we have, counseled overcome very

00:34:47

briefly. So the takeaway I

00:34:49

think overall is to take

00:34:51

intentionally Broadview. I think that

00:34:53



helps us is Council clients.

00:34:56

I think you're probably very

00:34:57

aware of the front end

00:34:58

aspects of sanctions day they

00:35:00

were or where they affect

00:35:02

regulation. Think they need to

00:35:03

comply with them, but they

00:35:05

might not always be aware

00:35:07

of a way that sanctions

00:35:08

can affect a particular dispute

00:35:10

after. The fact, even if

00:35:11

We're at you so much

00:35:12

for text Ali. It's incumbent

00:35:15



upon us to bring those

00:35:16

issues, to their attention and

00:35:17

incumbent upon us as arbitration

00:35:19

Warriors to be in very

00:35:20

close contact with our attention,

00:35:21

Specialists colleagues given the very

00:35:23

Dynamic nature of the field.

00:35:24

I'll leave it at that.

00:35:26

Thanks very much. Craig, thank

00:35:29

you for the very useful

00:35:31

framework and your observations and

00:35:34

we could probably debate debate,

00:35:36

what the scope of sanctions

00:35:37



should be endlessly, and I'm

00:35:39

sure my other colleagues will

00:35:40

have used, but comments from

00:35:42

the rest of the panel

00:35:43

nikhil, Christina gym, You're going

00:35:48

to talk about some of

00:35:49

these issues and spend them

00:35:50

out a little bit more.

00:35:51

But but how about on

00:35:54

the definition of this year?

00:35:56

I thought it was I

00:35:59

thought it was interesting. I

00:36:00

have to stay in preparing

00:36:01



for this title. I equated

00:36:04

sanctions with economic sanctions. Which

00:36:06

Craig has. Convinced me was,

00:36:07

was my error. I think

00:36:09

that an interesting point there,

00:36:13

Craig raises potato in, the

00:36:14

current situation, and also relates

00:36:15

to a point that James

00:36:17

Ray says, you speaking about

00:36:19

countermeasures and the idea of

00:36:21

collective countermeasures. And also Collective

00:36:24

self-defense is independent and separate

00:36:27

and apart from the WTO

00:36:36



and investment regime. And I

00:36:37

think those are both important

00:36:40

Concepts the other. The other

00:36:42

point, perhaps this relates more

00:36:45

to something to James would

00:36:46

say, but I think one

00:36:48

interesting aspect of the essential

00:36:50

security interests definition in the

00:36:54

WTO agreements, but also, In

00:36:58

a number of this is

00:36:59

that the emergency or the

00:37:01

security interest is not necessarily

00:37:03

defined as an emergency, involving

00:37:05



the state concerned and I

00:37:08

don't have this in front

00:37:09

of me, but my recollection

00:37:10

is for the WTO. At

00:37:11

least it just says it

00:37:13

an emergency or situation of

00:37:15

War, something like that in

00:37:16

international relations. It doesn't say,

00:37:18

you know, to which I

00:37:21

be adopting stated a party

00:37:22

or anything without affecting. So

00:37:24

the idea that there are,

00:37:25

I think, at least three

00:37:28



legs to stand on to

00:37:29

defend just to be transparent

00:37:31

here, actions against Russia on

00:37:35

the basis of a collective

00:37:37

mechanism or a collective situation.

00:37:39

That requires a response is

00:37:40

is is important to keep

00:37:42

in mind. Thank you. Christina

00:37:45

gym. Just confirm that details

00:37:50

recollection of article. 21 is

00:37:53

correct the languages taken in

00:37:56

time of war or other

00:37:57

emergency and international relations. But

00:37:59



there's a link here in

00:38:01

the sense that the sanction

00:38:04

must be necessary for the

00:38:05

protection of the state's essential

00:38:07

interest. So you might have

00:38:09

some sort of armed conflict

00:38:11

or other International emergency but

00:38:13

the state itself must be

00:38:15

able to articulate the links

00:38:17

to its own security interest.

00:38:22

Gyminators before we will have

00:38:34

difficulty justifying sanctions against Russia

00:38:37

a challenge in the WTF.

00:38:39



I don't see that being

00:38:41

seriously challenged in the WTF.

00:38:43

I could be wrong about

00:38:44

that, but the point, I

00:38:46

think it's the right one.

00:38:47

While emergency in international relations

00:38:49

is not specific to a,

00:38:50

to a participant in, in

00:38:52

that emergency necessarily. It does

00:38:54

have to be the measure

00:38:55

is to be necessary to

00:38:56

protect the Central Security interest

00:38:58

and Emmett tribunals and panels

00:39:00



have attached, great, meaning to

00:39:03

essential. And it's not just

00:39:05

any interest. It has to

00:39:07

be a security interest in

00:39:08

has to be an essential

00:39:08

interest. So, if you are

00:39:11

not a participant in a,

00:39:12

in a In a military

00:39:15

conflict or other are other

00:39:17

similar situation. You know, how

00:39:19

do you get to the

00:39:20

point of justifying essential? I

00:39:22

think that I think the

00:39:22



pad, the panel has gotten

00:39:23

around that by saying all

00:39:25

you have to do is

00:39:26

issue a possible connection, like

00:39:28

it's a very low part

00:39:29

to show it, but it

00:39:31

is an issue that the

00:39:32

country's going to have to

00:39:33

Grapple with. Should they Burt

00:39:34

Reynolds? Matt said, we need

00:39:38

to be careful that there's

00:39:40

no indication of article 21

00:39:41

for protection is purposes. So

00:39:43



there's famous case about the

00:39:45

Swedish shoe industry, rather than

00:39:48

attempt to say that sweet

00:39:50

needs to protect, its ability

00:39:51

to provide boots to his

00:39:53

army that was not very

00:39:54

persuasive. This was not an

00:39:56

essential security need Right to

00:39:59

grab cash. Alright, Christina. Well,

00:40:01

let's let's pick up on

00:40:03

Craig's framework and an end

00:40:06

talk more about these issues

00:40:08

in the context of proceeding.

00:40:10



Sure, I'd like to go

00:40:13

through four areas. First of

00:40:15

all, the practicalities of carrying

00:40:17

out arbitrations the investment, treaty

00:40:19

obligations. When one or more

00:40:20

participants in the proceedings are

00:40:22

subject to sanctions laws. Secondly,

00:40:24

jurisdictional and admissibility issues already

00:40:27

prefigured by Craig of, interplay

00:40:30

of sanctions and stunners of

00:40:31

protection and denial of benefits

00:40:33

when it comes to the

00:40:36

practicalities, I see there being

00:40:37



three sets of issues. First

00:40:40

there is the difficulty at

00:40:42

times of paying or receiving

00:40:44

payments for the provision of

00:40:45

legal, and other services. In

00:40:47

light of asset, freezes or

00:40:49

prohibitions on dealing with Fun

00:40:51

Zone. Held or controlled by

00:40:53

designated person. Know who might

00:40:56

be designated in a nice

00:40:57

DS dispute, this could be

00:41:00

the investor claimant, or it

00:41:02

could be instrumentality is of

00:41:03



the host age. If your

00:41:05

heart an opening from Lucinda,

00:41:06

it's nowadays, it's quite rare

00:41:07

for a state itself to

00:41:09

be sanctions. So just looking

00:41:13

at the British contacts, which

00:41:15

is if it was familiar

00:41:16

to me, I noticed that

00:41:18

the state of Russia is

00:41:19

not sanctions but of course

00:41:21

he bodies in the Russian

00:41:24

States, a friend since the

00:41:25

Russian Central Bank and also

00:41:27



a number of banks, which

00:41:29

are the purely commercial or

00:41:31

have partial or whole state

00:41:32

ownership. Of course, would make

00:41:35

it difficult. For example, for

00:41:37

Russia, to be paying lawyers

00:41:39

and Broad Existence of sanctions

00:41:41

may also impact on the

00:41:43

availability of various actors to

00:41:44

participate in the October seedings,

00:41:47

as Craig already pointed out,

00:41:49

this could be the party's

00:41:50

lawyers expert Services providers, members

00:41:54



of the tribunal, depending where

00:41:55

they're from, or where they're

00:41:56

based. And also the arbitral

00:41:58

institution which might have difficulties

00:42:01

again in receiving funds. The

00:42:05

first have to look at

00:42:06

the scope of our sanctions

00:42:09

laws, ordinarily they apply to

00:42:12

persons from a particular jurisdiction,

00:42:14

so ofac regulations, apply to

00:42:17

u.s. persons. Similarly, the sanctions

00:42:21

and money laundering act 2018

00:42:23

applies to UK Nationals and

00:42:25



you wreck regulations, apply to

00:42:28

EU Nationals. And in these

00:42:31

three jurisdictions, we also have

00:42:33

a dress sectional Nexus of

00:42:35

people are located either within

00:42:37

the EU. The United States

00:42:38

are the UK then Just

00:42:40

a few application of the

00:42:42

laws to them now and

00:42:44

all these places and many

00:42:45

other jurisdictions licenses can be

00:42:47

applied for to get around

00:42:51

the limitations of the sanctions

00:42:53



and in the number of

00:42:56

regulations when it comes to

00:42:58

Legal disputes, there are General

00:43:00

licenses in the UK. There

00:43:04

was recently in an accident

00:43:05

enabling for Council and Russian

00:43:09

related cases to be paid

00:43:11

up to 500,000 pounds if

00:43:16

they were instructed before. Designation.

00:43:18

And for work occurring, after

00:43:20

the designation an additional five

00:43:22

hundred thousand pounds can be

00:43:24

paid beyond that there's a

00:43:26



need for a separate license

00:43:28

in the EU. In July

00:43:31

this year that you adopted

00:43:33

seven sanctions package, which allows

00:43:37

for legal fees. Agent transactions,

00:43:41

which are strictly necessary to

00:43:43

ensure access to judicial administrative

00:43:45

or autotroph, proceedings in a

00:43:47

member State as well as

00:43:48

for the recognition or enforcement

00:43:50

of a judgment or an

00:43:51

arbitration award rendered in a

00:43:53

member state. If such transactions

00:43:55



are consistent with objectives of

00:43:57

the key sections regulations, when

00:44:01

it comes to arbitral institutions.

00:44:03

I'm glad reports that there

00:44:05

are also a number of

00:44:06

General licenses ofac has given

00:44:09

General license to fish in

00:44:11

a number of contacts. So,

00:44:13

for example, is General license.

00:44:14

Number 18, applies to excited

00:44:19

and other International organizations and

00:44:20

transactions and activities involving the

00:44:23

sanction Taliban and are the

00:44:25



haqqani network that's from December

00:44:27

2021. And also, the Ukraine,

00:44:30

Russia, sanctions regulations at 31

00:44:33

CFR part. 500 589 have

00:44:37

a similar authorization for excited

00:44:39

and a number of international

00:44:41

organizations. The picture is similar

00:44:44

in the UK, the office

00:44:46

of financial sanctions implementation has

00:44:48

granted a licence to the

00:44:49

l c. I a in

00:44:51

relation to Russia and Belarus

00:44:52

cases, but only four cases

00:44:54



administered under the ICA rules

00:44:57

of arbitration. There's a special

00:44:59

license requirement for using phone

00:45:01

cases administered by the ICA.

00:45:03

This can be very relevant

00:45:05

in the investment treaty contexts.

00:45:06

As for the SEC, which

00:45:09

is also frequently, used and

00:45:11

ICSID disputes and I

00:45:12

see which sometimes these ICS

00:45:15

disputes. The EU seven states

00:45:18

in packaged legislation is helpful

00:45:21

there. The second issue and

00:45:25



watch a highlight was the

00:45:26

ability or willingness of the

00:45:29

tribunal to make costs orders

00:45:31

orders for payment of security.

00:45:33

For costs. The question here

00:45:35

is who will hold the

00:45:36

funds in my own experience.

00:45:38

I have seen situations where

00:45:41

the banks in question have

00:45:42

been very nervous about US

00:45:44

dollar payments and the prospect

00:45:46

of secondary sanctions. Nowadays, parties

00:45:49

are thinking about using other

00:45:51



currencies, not the dollar, but

00:45:53

even so, we have noticed

00:45:56

that some banks are overly

00:45:58

cautious. And I have seen

00:45:59

a situation in the court

00:46:01

context, where the section party

00:46:03

actually wrote to the court

00:46:05

funds office saying, oh, are

00:46:07

you really sure you can

00:46:08

hold these funds the bank

00:46:10

and trust in God very

00:46:11

nervous and then lo and

00:46:13

behold, we had difficulty getting

00:46:14



the security for costs that

00:46:17

have been ordered Issue Number

00:46:20

3 is what happens when

00:46:23

the respondent state is sanctions

00:46:25

or key actors. So let's

00:46:28

say the Russians Central Bank,

00:46:29

for example, that it fails

00:46:31

to pay its share of

00:46:32

the administrative costs, the claimant,

00:46:35

then step in and cover

00:46:36

the respondents share, that's frequent

00:46:39

practice in ordinary time. So

00:46:41

I'm sure that proceedings can

00:46:42



continue. But what happens if

00:46:45

there's a concern, that this

00:46:47

payment could actually prove to

00:46:49

the benefits of the respondent

00:46:50

in a way, that's inconsistent

00:46:52

with sanctions. I'd like to

00:46:55

know move to jurisdictional admissibility

00:46:57

issues. I had done a

00:47:00

search for cases, dealing with

00:47:03

sanctions and jurisdiction admissibility, and

00:47:07

was amazed that they're actually

00:47:08

very very few cases of

00:47:09

the sort. There's a very

00:47:11



recent one that I'd like

00:47:12

to bring to your attention

00:47:13

which is Bank melli Iran

00:47:15

and Banks said about to

00:47:16

run versus Kingdom of Bahrain,

00:47:18

which was a PCA case

00:47:19

decided in November 2021 hear

00:47:23

you had to arrange and

00:47:26

financial institutions which were sdns

00:47:30

under the us around Financial

00:47:32

sanctions regulations which had invested

00:47:34

in an institution named Future

00:47:36

bank and bufferin. The question

00:47:42



was whether the fact that

00:47:43

these were experienced and had

00:47:46

engaged had allegedly engaged in

00:47:48

unlawful activity in Bahrain in

00:47:51

violation of Bahraini law and

00:47:53

also sanctioned flaws. Barge, these

00:47:56

two claimants from pursuing their

00:47:58

claim. The tribunal noted here

00:48:01

is that for a jurisdictional

00:48:03

objection to succeed here. The

00:48:06

illegality must have occurred at

00:48:08

a time at which the

00:48:09

investment was made not thereafter.

00:48:11



And in this case, there

00:48:13

is a key insufficient evidence

00:48:14

to demonstrate that the claimants

00:48:17

major investment unlawfully or for

00:48:20

the overarching, purpose of engaging

00:48:22

in illegal activities. So no

00:48:25

bar on jurisdiction. But there's

00:48:29

a question as to admissibility

00:48:31

because there's an allegation that

00:48:34

the unlawful conduct tainted, the

00:48:36

claim The tribunal had this

00:48:39

to say not every unlawful

00:48:42

activity will render an Investor's

00:48:44



claims and invisible and International

00:48:46

Education has to have this

00:48:48

affect the legal. Conduct must

00:48:50

be one serious and widespread

00:48:52

and two very close relationship

00:48:54

to the claims. On the

00:48:57

one hand sporadic, and trivial

00:48:59

violations of the law will

00:49:00

not trigger the inadmissibility of

00:49:03

the claims. On the other

00:49:05

hand, the fact that an

00:49:06

investor has committed serious. Violations

00:49:08

of the law does not

00:49:09



mean that such investor must

00:49:11

be denied access to International

00:49:12

treaty arbitration as a blanket

00:49:14

measure. Even in a situation

00:49:16

where the particular claims do

00:49:18

not arise out of the

00:49:19

illegal activities, to Warrant a

00:49:21

sanction as stringent as the

00:49:22

inadmissibility of the claims, the

00:49:25

two requirements of seriousness and

00:49:27

connexity must be cumulatively satisfied.

00:49:31

In this case, again there

00:49:33

was insufficient evidence to substantiate

00:49:36



the respondents preliminary objections and

00:49:39

therefore the assertion that the

00:49:41

claims were inadmissible where denied,

00:49:46

so the tribunal decided that,

00:49:50

yes, there could be an

00:49:51

illegality issue here, but this

00:49:53

is not a preliminary issue

00:49:54

is something to be dealt

00:49:56

with on the Merritt. Coming

00:49:59

out to the intersection of

00:50:01

sanctions and Matt's claims against.

00:50:05

There are currently very few

00:50:08

cases that address this issue.

00:50:10



I wanted to bring to

00:50:13

your attention that July 2020.

00:50:15

Qatar, Airways has issued ICS

00:50:19

proceedings against the UAE and

00:50:21

Saudi Arabia and Egypt, claiming

00:50:23

that measures taken by the

00:50:25

states to present that prevent

00:50:26

the airline from entering their

00:50:28

airspace under more General airspace

00:50:30

blockade against Qatar as well

00:50:34

as the revocation of the

00:50:36

claimants license to operate in.

00:50:38

Those jurisdictions amounted to an

00:50:40



illegal expropriation and breach of

00:50:43

the fvt standard. Those cases

00:50:45

are still pending, but I

00:50:47

would submit to you, they're

00:50:49

very interesting ones to watch.

00:50:51

One could envisage cases arising

00:50:55

out of the imposition of

00:50:56

primary or secondary sanctions for

00:50:59

example, pertaining to the freezing

00:51:00

of assets. Those could well

00:51:03

be claims against the host

00:51:05

Age Again, props for indirect

00:51:07

expropriation fut violation of legitimate

00:51:11



expectations There could also be

00:51:14

State measures in response to

00:51:16

sanctions. For example, we know

00:51:19

from the reasons, Russia, Ukraine

00:51:21

conflict that Russia has seized

00:51:24

the number for an aircraft.

00:51:25

And what could it match?

00:51:27

And that over time, there

00:51:28

could be claims against Russia

00:51:30

relating to its treatment of

00:51:33

the aircraft lessors and their

00:51:36

Investments. Boost a tickly might

00:51:40

invoke sanctions as a defense

00:51:41



referring to public order National

00:51:43

Security and SSD. Those are

00:51:45

points we already have discussed

00:51:47

but we should remember is

00:51:49

that where the sanctions arm

00:51:52

out of domestic law. We

00:51:54

are in the realm of

00:51:56

fact, and I see us

00:51:57

rather than law. And so

00:51:59

be interesting, where was State

00:52:02

tries to raise related claims?

00:52:04

How a tribunal, well, work

00:52:07

with that defense? Finally I

00:52:10



want the time of Craig

00:52:19

already has alluded to some

00:52:21

investment treaties include denial of

00:52:23

advantageous Provisions. Enabling a whole

00:52:25

state select to declare that

00:52:26

protections are in applicable to

00:52:29

certain categories of persons. And

00:52:31

here again, when concedes that

00:52:32

sanctions could be a trigger

00:52:34

for denying advantages. Thank you.

00:52:36

Thank you. And I would

00:52:38

say I'm there, there are

00:52:39

actually a number of cases

00:52:41



in the pipeline. I'm aware

00:52:42

of certain that the US

00:52:43

has a claim pending against

00:52:46

it. I think under the

00:52:47

Ukraine bit, if I'm not

00:52:48

mistaken for some designations, I'm

00:52:52

involved as an arbitrator in

00:52:54

a proceeding against the Central

00:52:56

American country, which is kind

00:52:57

of a downstream issue where

00:52:59

some of the owners of

00:53:00

a financial institution with designated

00:53:03

by Outback and that led

00:53:05



the consequences in the host

00:53:06

countries. Are these things can

00:53:07

take a lot of different

00:53:09

Permutations any comments from the

00:53:11

panel before. We move to

00:53:13

the enforcement topic that Nick

00:53:14

is going to lead us

00:53:15

on Craig. Jim nichil very

00:53:21

briefly, say I appreciate it.

00:53:23

The citations of the Qatar

00:53:24

Airways cases, which I've always

00:53:25

found very fascinating until further

00:53:28

notice where the 42 points,

00:53:30



one that they also gave

00:53:32
rise to a lot of.

00:53:33
I'm sick of bathing suits

00:53:34
at the WTO, which didn't

00:53:35
progressed significantly far. But brought

00:53:39
to the fore, a lot

00:53:40
of the same issues in

00:53:41
the investment contacts and in

00:53:42
the trade contacts. So I

00:53:43
think ties together nicely. What

00:53:44
we talking about exactly 2

00:53:47
in those flora and others.

00:53:49
The quartet States took measures

00:53:53



against Qatar, characterize, those as

00:53:54

counter measures in response to

00:53:56

a breach of international law.

00:53:58

They're trying again, to illustrate

00:54:02

the point. I was trying

00:54:02

to make her earlier about,

00:54:03

we're operating on domestic regulations,

00:54:05

but seeking International all justification

00:54:07

for that. There ain't there

00:54:09

she was what one case

00:54:10

involving Qatar and Saudi what,

00:54:12

which did get a resolution

00:54:13

to reach a final resolution

00:54:15



in the WTO released at

00:54:16

the panel stage, right? Involving

00:54:18

intellectual property where somebody basically

00:54:22

there was a cutter Broadcasting

00:54:28

network called bien and Saturday

00:54:31

was letting take a pirated

00:54:32

version of that called be

00:54:34

out its flourishing in Saudi

00:54:36

Arabia and refused to prosecute

00:54:39

the out for a criminal

00:54:40

violations. And so forth in

00:54:42

the book National Security, National

00:54:43

Security, exception of the WTO

00:54:45



as justification and the tribunal

00:54:47

said the panel said, no,

00:54:48

in that case that there

00:54:49

was not, as there's not

00:54:49

a possible connection between non-prosecution

00:54:52

with pirated activity in your

00:54:54

sector security interest that sounded

00:54:56

invoke. So it does have

00:54:58

some teeth, the kill over

00:55:03

to you for the last

00:55:04

word on this and then

00:55:05

move us straight into the

00:55:07

enforcement topic. If you would

00:55:09



sure. I mean, I think,

00:55:11

you know, one interesting issue

00:55:14

that has come up, is

00:55:15

the attempt of sanctions days

00:55:18

to use sections of effectively,

00:55:20

as a shield. And we'll

00:55:21

talk about that more in

00:55:23

the info. Again, again, for

00:55:24

some discussion with respect to

00:55:25

Crystal X in Venezuela. But

00:55:27

you see it with the

00:55:30

invocation of Nothing due process,

00:55:34

paranoia is quite the word,

00:55:35



but you know how to

00:55:38

do due process, Shadow, puppetry

00:55:40

by the Russian Federation, when

00:55:43

it comes to defend claims

00:55:45

Against Terror or the other

00:55:46

things against it, and I

00:55:47

doubt that Russia is the

00:55:50

only state to have given

00:55:51

given it a try. When

00:55:54

you see, for example, is

00:55:56

in the proceedings of it

00:55:58

that are going to moving

00:55:59

ahead to in The Hague

00:56:00



thunderbitch under other treaties. You

00:56:03

know, there is that their

00:56:03

arguments from Russia that sanction

00:56:05

show that basically there is

00:56:06

biased legal environment and it's

00:56:09

unable to get, you know,

00:56:10

appropriate legal representation in the

00:56:12

seat thing, that's important contacts

00:56:14

for the point. Christina was

00:56:15

making about how both the

00:56:18

United States. You know if

00:56:19

there's a fact license place

00:56:20

to allow for example lcia

00:56:23



arbitration to go ahead to

00:56:25

allow, exit arbitration to. Go

00:56:27

ahead not just with respect

00:56:28

to Russia also, with respect

00:56:30

to Yuna free sample of

00:56:31

Ghana stone. And, you know,

00:56:32

Christina. But also, you know,

00:56:36

similar exemptions is I understand

00:56:39

to adopt in the UK

00:56:40

and the importance of having

00:56:43

carved in Portsmouth or he's

00:56:47

our financial crime, enforcement authorities

00:56:49

in particular, be sensitive to

00:56:50



the need to continue to

00:56:51

facilitate, you know, the Turning

00:56:54

of the wheels of Justice

00:56:54

against these targets of Sanchez's

00:56:56

is critical both. I think

00:56:59

in terms of allowing claimants

00:57:02

to move forward with their

00:57:02

claims. But also in terms

00:57:04

of continuing to demonstrate that

00:57:06

there is sort of fair

00:57:08

play and their access to

00:57:09

the courts, you know, any

00:57:11

countries that impose economic sanctions.

00:57:14



It's it's interesting to listen

00:57:17

to. We should almost another

00:57:19

cat but, you know, there's

00:57:21

this whole question of section

00:57:22

311 designations and basically shut

00:57:25

down uniform and bags. And

00:57:26

one of them femex or

00:57:28

tried to challenge side with

00:57:30

limited success in US courts

00:57:31

of this whole other And

00:57:32

you process question. Is there

00:57:34

a possible you so into

00:57:35

Mystic Court as well? But

00:57:37



I think I probably beyond

00:57:38

the scope of what we're

00:57:39

supposed to be talking about.

00:57:42

V. The impact of sanctions

00:57:46

on enforcement and I think

00:57:47

the premise of discussions on

00:57:50

this topic is, is often

00:57:51

its actions are an obstacle

00:57:53

to enforcement because assets that

00:57:56

you could otherwise used to

00:57:57

satisfy an award or blocked

00:57:59

or copy transferred. Sanchez, but

00:58:03

also can be an aid

00:58:04



to enforcement has been I'll

00:58:05

come to or at least

00:58:08

in theory. They should be

00:58:10

available as an aid to

00:58:12

enforcement because really, if you

00:58:14

think about them us sanctions,

00:58:16

at least your kind of

00:58:16

the ultimate freezing measure. They're

00:58:18

just they're conscious of paper.

00:58:20

So you got a lot

00:58:23

of stuff sitting there that

00:58:24

should in theory, be available

00:58:26

to judgment. Creditor is it

00:58:27



appropriate cooperation from the Department

00:58:29

of Treasury in state and

00:58:31

so we'll come back to

00:58:33

that. Actions can block or

00:58:37

interfere with enforcement. There are

00:58:39

two basic points to bear

00:58:40

in mind as the first

00:58:41

is that, us sanctions regulation

00:58:44

don't necessarily block The Taking

00:58:47

of a ripped or attachment

00:58:49

or other in from measure

00:58:50

preservation. My understanding is that

00:58:52

there's some recent James Bond

00:58:53



Franz and from the court

00:58:55

of justice of the European

00:58:56

Union that takes a different

00:58:57

position in the EU. But

00:58:58

in the US, that's not

00:59:00

necessarily. The case is going

00:59:01

to depend on the phrasing

00:59:03

of the specifics actions regulation

00:59:05

and executive order. but the

00:59:07

transfer of assets is generally

00:59:09

going to require a license

00:59:12

and that need for a

00:59:14

licensed. Effectively turns award enforcement

00:59:17



from a Judicial question into

00:59:20

one that has at least

00:59:20

some political aspects. And so

00:59:22

you actually see this quite

00:59:23

well Illustrated like what I

00:59:26

can get probably The best-known

00:59:27

Saga of trying to do

00:59:28

somebody trying to enforce an

00:59:29

award against Action Tax assets.

00:59:31

Which is Crystal axe versus

00:59:33

Venezuela in the attempt by

00:59:34

Crystal X. To enforce again.

00:59:37

It's the Citco shares held

00:59:39



by Baeza. And you know,

00:59:42

now we're sitting six years

00:59:43

after the award and I

00:59:45

think four years after Crystal

00:59:46

ax in dischley, got an

00:59:48

order from Judge Stark on

00:59:51

the District of Delaware. In

00:59:52

the meantime just started going

00:59:54

to the federal circuit. The

00:59:56

Administration has changed. You somehow

00:59:58

kept control of the case

00:59:59

Crystal. I said, no, actual

01:00:02

money award. And so Yeah,

01:00:07



there's there's got a two

01:00:08

points to meet at the

01:00:09

Crystal exogamy illustrates and perhaps,

01:00:11

just a back up here

01:00:13

in case people aren't familiar

01:00:14

with a crystal ax, has

01:00:15

a bit award claim in

01:00:18

with it, with an award

01:00:20

against Venezuela. Think the value

01:00:23

of the award is, if

01:00:25

I recall correctly to the

01:00:26

1.2 of 1.4 billion, I

01:00:27

think you'll get may have

01:00:28



been 1.4 billion and

01:00:29

they're seeking to enforce 1.2

01:00:31

billion in the United States.

01:00:32

If we, but it's in

01:00:34

that range and their theory

01:00:39

is that kind of Visa

01:00:40

was with operators and Alter

01:00:42

Ego of Russia, Russia Venezuela.

01:00:46

And that, you know, they

01:00:48

should be able to enforce

01:00:49

the rewarding and spend, as

01:00:50

well as shares at Citgo,

01:00:52

held by television. And they

01:00:54



jump through all these hoops

01:00:56

and successfully obtained, an order

01:00:57

saying that those assets are

01:00:59

susceptible of enforcement The issue

01:01:02

they have at this point

01:01:03

is essentially a pure ofac

01:01:06

licensing issue. Now over the

01:01:08

past few years, what judge

01:01:11

starts her. Ministratation of the

01:01:12

case has demonstrated that the

01:01:14

US federal courts, may be

01:01:15

willing to work with Clay,

01:01:16

mix to get all the

01:01:18



way up to actual monetization

01:01:20

of the asset. And he's

01:01:23

taking, really a series of

01:01:24

Fairly significant directions to tee

01:01:28

up a potential sale of

01:01:29

the Citgo shares. I think

01:01:31

there's an auction, actually, that

01:01:32

is being marketed as we

01:01:35

speak in there. We'll go

01:01:36

ahead next year. But there

01:01:39

is still no license from

01:01:40

treasury that will allow the

01:01:42

winner of the auction to

01:01:44



benefit from the sciortino, take

01:01:47

the shares and benefit from

01:01:49

the shares. If you're curious,

01:01:51

wine auction process is necessary,

01:01:53

I think it was intended

01:01:54

as a way of valuing,

01:01:55

the shares in the claimants

01:01:57

are going to be able

01:01:58

to stick their their award

01:02:00

rather than staking dollars. So

01:02:04

they would either get a

01:02:05

payoff from the auction winner

01:02:06

or they would get the

01:02:07



actual shooter since they are

01:02:08

the winter cuz they are

01:02:09

the winning bid. So, with

01:02:12

all the infrastructure have been

01:02:13

having been set up and

01:02:14

with, with all that, cooperation

01:02:15

from the court, Yeah, what's

01:02:18

left is a license from

01:02:20

a fact that allows the

01:02:21

auction to be consummated. And

01:02:24

holed up here, is that

01:02:25

after the United States, recognize

01:02:28

the opposition Administration in Venezuela,

01:02:31



the US government ceased to

01:02:35

favor, you know, allowing the

01:02:38

award to be because it

01:02:42

had me do the ice

01:02:43

Ezra claims on the assets

01:02:44

and I was a position

01:02:46

taken by the doj under

01:02:47

President Trump. It's been maintained

01:02:49

as far as I've seen

01:02:50

by the car and Treasury

01:02:51

Department and it's worth highlights.

01:02:55

The fact that foreign policy

01:02:56

you know gets involved with

01:02:58



you and then insert starts

01:03:00

away and when you were

01:03:01

trying to figure out how

01:03:02

to enforce an award against

01:03:03

action that affects you see

01:03:05

this even more clearly, or

01:03:06

as clearly With respect to

01:03:09

our concept, when I guess

01:03:10

it's in here. Folks, may

01:03:13

have seen the news earlier

01:03:15

this year with a headline

01:03:17

being that a bed of

01:03:18

about 7 billion in offensive

01:03:20



Bank assets on deposit with

01:03:21

the US Federal Reserve about,

01:03:25

huh, would be made available

01:03:27

for plaintiffs with terrorism-related judgments

01:03:30

against the Taliban and the

01:03:32

other half would be sent

01:03:34

to a fund. That could

01:03:35

use it for the benefit

01:03:36

of the Austin people. Now,

01:03:39

there was a fair amount

01:03:40

about cry and, you know,

01:03:42

when you can some ways

01:03:43

Justified, perhaps out of private,

01:03:46



the prospect about gun Central

01:03:47

Bank assets, being used to

01:03:49

satisfy us legal claims at

01:03:51

a time of widespread economic

01:03:53

Devastation and hunger enough. It's

01:03:55

time to assess just that

01:04:02

the terrorism Risk, insurance act

01:04:04

a law doctor shortly after

01:04:07

9/11 provides an exception to,

01:04:08

sovereign immunity to plaintiffs seeking

01:04:11

to enforce terrorism-related judgments against

01:04:13

blocked asset. Including potentially block

01:04:17

Central Bank assets. And the

01:04:19



plaintiffs were claiming that, that's

01:04:21

what they had that they

01:04:22

fell within. This exception is

01:04:23

a few other Hoops, including

01:04:25

relating to States wants her

01:04:26

dead ignition switch. I won't

01:04:28

get into that. The claimants

01:04:29

basically said that, you know,

01:04:31

they had the ability to

01:04:33

use a post 9/11 law,

01:04:34

that was specifically meant to

01:04:36

benefit, people like them to

01:04:38

claim a set of the

01:04:40



weed for a controlled by

01:04:41

the Taliban. The claimants frankly

01:04:45

face some very significant hurdles

01:04:49

for their, they would be

01:04:51

making you lost. They succeeded

01:04:52

with the US did was

01:04:55

reduce the potential pot of

01:04:57

money. The plaintiffs could claim

01:04:58

against by half because remember,

01:04:59

the statute only applies to

01:05:00

block assets. So the assets

01:05:03

that are for that are

01:05:03

unblocked and fun spring into

01:05:05



this fun for the benefit

01:05:06

of the Austin, people are

01:05:08

no longer available for collection.

01:05:09

So if you step back

01:05:11

and think about it, what

01:05:12

do US government did in

01:05:14

February and then sort of

01:05:16

took further steps in September

01:05:17

to solidify, it was reduce

01:05:19

the amount of money available

01:05:19

to terrorism-related payment center on

01:05:23

9/11 law by ha. Which

01:05:25

to me suggests perhaps that

01:05:27



there is a broader position

01:05:30

that the US government is

01:05:31

concerned that the US government

01:05:33

has about having locked, Sovereign

01:05:35

assets, available for judgment for

01:05:39

creditor collection because that reduces

01:05:42

but perhaps foreign policy negotiating

01:05:44

Leverage Real quick. So how

01:05:48

does that apply to our

01:05:49

current crisis in in in

01:05:51

Russia and Ukraine? The first

01:05:56

thing to note is well,

01:05:58

there is a fair amount

01:05:59



of Russian Sovereign money in

01:06:02

the United States. I think

01:06:02

it's 38 billion as the

01:06:05

estimator Russian, Central Bank Reserves,

01:06:06

Frozen on deposit with the

01:06:09

US Federal Reserve. There's billions

01:06:12

more in state-owned Enterprises and

01:06:15

privately owned Russian assets that

01:06:17

have been blocked or that

01:06:18

would be subject walking if

01:06:19

they were to enter the

01:06:20

United States and the US

01:06:23

government has faced substantial Public

01:06:25



Law, VA to seize some

01:06:27

set of these blocked assets

01:06:28

and to make them available

01:06:29

for the benefit of Ukraine.

01:06:32

We represent Ukraine unless I

01:06:36

know one of the partners

01:06:37

at Craigs firm issue related

01:06:41

to any of us are

01:06:45

going to be able to

01:06:46

talk about it. But what

01:06:48

I say is that relevant

01:06:49

officials in the US government,

01:06:50

I think have taken if

01:06:51



you publicly that the US

01:06:54

does not have authority to

01:06:56

seize assets under IEP. It

01:07:01

only has the authority to

01:07:02

freeze dog to seize and

01:07:04

that you would need other

01:07:06

legislation to change this position.

01:07:08

But I think the important

01:07:10

question is do you need

01:07:12

legislation or you know, is

01:07:14

there any sort of constitutional

01:07:16

bar and I would submit

01:07:17

under the circumstances. There is

01:07:18



no constitutional bar for reasons.

01:07:20

We talk about some other

01:07:21

time. So I will pause

01:07:23

their recognizing that we only

01:07:24

have 15 minutes left. Right.

01:07:27

Well that's, that's really helpful

01:07:30

in The Killing it. And

01:07:31

it an interesting. I'll just

01:07:32

say that I think there

01:07:33

is on your last point.

01:07:35

A real question cuz you

01:07:38

got these different buckets of

01:07:39

assets that have been frozen

01:07:42



under the under the Russian

01:07:44

sanctions in particular. And and

01:07:45

if we have civil and

01:07:48

criminal forfeiture laws, as you

01:07:51

know, that apply when people

01:07:53

are around conducted or find

01:07:57

liable for certain kinds of

01:07:58

offenses. But of course, if

01:08:01

you're no ligarq, you happen

01:08:03

to have your property seized

01:08:04

because you're, there's a belief

01:08:06

in the US government that

01:08:07

you're connected to to the

01:08:10



Russian regime is. So it's

01:08:13
a bit of a leap,

01:08:13
I think to Ted to

01:08:15
try to say that those

01:08:17
assets should essentially be converted

01:08:18
and used for before the

01:08:21
payment of claims. So there's

01:08:23
reason for there to be

01:08:24
a live debate, at least

01:08:26
at least admire. I need

01:08:28
a shoes with respect to

01:08:30
some of these assets. Of

01:08:31
course, we shouldn't forget that.

01:08:34



I know there people on

01:08:35

the line who are involved

01:08:36

at the state department back

01:08:37

in the Iran claims Sarah.

01:08:39

It was it was block

01:08:41

assets of her on that

01:08:44

that were initially allocated under

01:08:46

the Algiers Accords to the

01:08:49

settlement of disputes by the

01:08:50

US claims that was not

01:08:52

by you in a relaxed

01:08:53

little action of the United

01:08:55

States that converted them to

01:08:57



that use. It was by

01:08:58

agreement of the two countries

01:08:59

and you'd hope you could

01:09:01

come to some agreement before

01:09:03

it before you had and

01:09:05

you get a lot of

01:09:05

relaxing, but we may see

01:09:07

that cuz the public pressure

01:09:08

is very great understandably, in

01:09:11

many ways, other comments from

01:09:12

the panel and those in

01:09:15

the audience. If you have

01:09:16

questions, if this discussion has

01:09:18



sparked and a any thoughts

01:09:21

or concerns that you are

01:09:22

free to put your questions

01:09:24

in the chat, we'd like

01:09:25

to hear here. Reactions. That

01:09:28

as you can see, we've

01:09:29

got a wealth of experience

01:09:31

and insights to to share

01:09:34

on a on a range

01:09:36

of issues under this broad

01:09:37

topic. So please feel free

01:09:38

to put your questions in

01:09:40

the chat. A a square.

01:09:44



If we're waiting for questions,

01:09:46
if I may make one

01:09:48
small point, which is when

01:09:51
it comes to asset forfeiture,

01:09:52
civil asset, forfeiture does not

01:09:55
require a conviction conviction and

01:09:59
the treatment of oligarch assets.

01:10:03
It's sort of worth worth

01:10:04
recalling, what we do to

01:10:06
our own before we apply

01:10:08
to hire bar to return

01:10:11
to Russian oligarchs. Although I

01:10:12
do, I mean, you know,

01:10:13



how do you say there

01:10:13

is a very valid debate

01:10:16

about the type of system

01:10:17

we have? And I think

01:10:18

some of the initial legislation

01:10:20

figured some cash back, even

01:10:21

from the ACLU. So there's

01:10:22

a lot of good faith,

01:10:23

truth about sex. Any other

01:10:31

comments from our panelists? We

01:10:35

do have a question in

01:10:36

the chat from Ramiro Gomez.

01:10:38

Got it all day asking

01:10:39



whether a head of state's

01:10:41

assets, enjoyed immunity, against ask,

01:10:44

anybody want to tackle that

01:10:46

one? I would say it

01:10:55

depends on the wording of

01:10:56

the sanctions law and whether

01:10:58

the head of states is

01:11:00

him or herself designated under

01:11:03

those sanctions. But I know

01:11:06

and interesting topic Topic at

01:11:08

the moment because President Putin

01:11:10

is repeated to hold assets,

01:11:13

through middlemen, throughout the world

01:11:15



and that would be an

01:11:16

interesting source of assets. If

01:11:19

one were to move against

01:11:20

them. Thank you. We have

01:11:26

another question that has come

01:11:30

in from Victoria kind of

01:11:33

money with, which is in

01:11:35

a scenario where an investor

01:11:36

brings an f e a

01:11:37

t, or expropriation claim for

01:11:39

losses incurred, as a result

01:11:41

of international sanctions to what

01:11:43

extent can a respondent state

01:11:45



rely on a public policy

01:11:47

defense? If no essential security?

01:11:50

Interest is involved is because

01:11:53

the state is not a

01:11:54

party to the conflict. I

01:12:01

think it's Michael. I'll give

01:12:04

it a shot. I think

01:12:05

it's a good question. I

01:12:08

supposed to start with. Again,

01:12:10

I'm not sure the state

01:12:12

would need to be a

01:12:13

party to a conflict in

01:12:15

order to win the vote

01:12:16



via Central Security interests. So,

01:12:18

I am, I picking up

01:12:19

on the point that James

01:12:20

made about these essential security

01:12:22

Interest, being the Central Security

01:12:24

interest of the state. Take

01:12:27

a range of states have

01:12:28

an interest in territorial Integrity.

01:12:31

That is an essential security

01:12:33

interests that they could positively

01:12:34

assert. This is not the

01:12:36

same as starting an interest

01:12:38

in supplying Boots. The public

01:12:49



policy defenses is Interesting. And

01:12:53

I would be inclined to

01:12:55

think that. Again, if you

01:12:57

could articulate a connection between,

01:12:58

you know, possible public policy

01:13:01

through portion of Stanford that

01:13:03

this action figure relates to.

01:13:05

You could do that. And

01:13:07

one situation where I think

01:13:09

it might be useful to

01:13:12

think about the public policy

01:13:14

defense is actually in the

01:13:16

context of oligarch, or kleptocrats

01:13:18



Focus action. We're really part

01:13:20

of the justification is not

01:13:21

a security interest, its public

01:13:24

order to effectively sort of

01:13:26

a quasi criminal regime. So

01:13:28

I think I could be

01:13:29

quite a plausible, argument getting

01:13:31

in the right circumstances. Yeah,

01:13:33

so it's more of a

01:13:34

police Powers kind of argument

01:13:36

or anything else, which we

01:13:39

know can be a defense

01:13:40

to expropriation. Climes for instance

01:13:44



Okay, well, she ain't no

01:13:47

other questions in the chat.

01:13:49

Thank you for for those

01:13:52

questions. I think we're slightly

01:13:55

the past the time where

01:13:57

we're supposed to break, you

01:13:59

out into chat groups. So

01:14:03

I'm going to turn things

01:14:05

back to Jose, Antonio to

01:14:07

help us do that. But

01:14:08

first, let me please join

01:14:10

me and virtually thanking the

01:14:12

palace. For what I thought

01:14:14



was a fascinating discussion. We

01:14:15

could frankly go on on

01:14:17

some of these topics for

01:14:18

a very long time, but

01:14:20

I really appreciate all of

01:14:21

the the thought that went

01:14:23

into the, the different comments

01:14:25

and The Interchange. So it's

01:14:28

been great. Great fun for

01:14:29

me and I hope it's

01:14:31

been useful for you in

01:14:32

the audience. Jose Antonio back

01:14:34

over to you.