Chapter
02

In search for a definition of sanctions in the context of strategic trade control

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1. INTRODUCTION

One of the basic rules in trade law is the freedom of trade. However, such rule encounters some limitations, derogations and exceptions when the object of trade is constituted by strategic and sensitive items.

The concept of "strategic trade" is one of the most ambiguous ones, and there is not a common definition of it. Even if the General Agreements on Tariffs and Trade (GATT) does not offer such an explanation, its Article XXI can be construed as referring to strategic trade, as much as it states that the provisions of GATT (grounded on free trade) need not apply in cases where "essential security interests" are involved. The concept of "essential security interests" is also vague, as it is left upon the individual parties to the GATT to decide what it means. Despite such 'slippery slope' in the definition of terms, it results, however, that strategic trade is linked to norms and measures that aim at controlling trade, in order to ensure the protection of non economic needs, such as national security, public morals, public order, etc.

This area finds at the intersection of commercial and foreign policy.

For ensuring the protection of non economic interests, it is necessary to introduce measures that provide for controls on all activities conducted by individuals, organizations, and groups regarding goods, equipment, materials, services related to strategic

items: these activities shall cover the whole supply chain, including design, development, production, possession, delivery, transport, transit, trans-shipment, financing, brokering, exports, re-exports, transfers and imports.

The actors intervening in the draft of rules and controls are mainly the States, and the international and regional organizations; then, important subjects are national licencing authorities and enforcement agencies such as customs, border security, police and armed forces, if needed.

The targets of such measures of control could be the States, if the rules at the international or regional level are addressing them, and/or the operators involved in strategic trade.

Considering the ways in which States organize such controls, the reality shows that they have introduced control lists, licences and authorisations granted on the basis of conditions and criteria, information-sharing and cooperation between authorities and operators, duties of transparency through reports, records, declarations and screenings. Moreover, measures exist that consist of restrictions, bans and penalties providing that consequences in case of violation of strategic trade rules. Therefore, the issue of sanctions is a relevant part of the strategic trade law, and it inserts within that context.

The purpose of this contribution is to define what sanctions in strategic trade mean and to systematize them accordingly.

2. THE NOTION OF SANCTION

The etymology of the word "sanction" is quite interesting: it derives from the Latin *sanctus*, "sacred, holy", and so the verb "to sanction" means "to make holy, to make irrevocable, to approve, to give a holy feature to something" as a first sense. In the course of time, the notion has been elaborated on, up to meaning "to prohibit" a behaviour or an action.

So, the word has mainly two dimensions: it can mean "to approve" or "to punish",[44] according to the context.

Although there is not a universal definition, the common understanding considers the sanction as the reaction for the violation of a rule. Therefore, within a legal system, sanctions are usually the consequence that the legal system has provided in case of infringement of a rule. Thus, it is the 'reaction' for the violation of rules, and the rules could be not only legal ones, but moral/ethical or political too. It should be said that the existence of a rule does not automatically entails the formulation of a sanction in order to ensure the enforcement of the rule itself. However, sanctions are usually the most preferred instrument and they constitute the 'flipside' of the rule.

A sanction is usually linked to responsibility, and responsibility is mainly recognised upon the subject who has committed the banned action or who has omitted to exercise the due conduct, or – in extreme cases – who simply possesses a certain good, or is in a position of care and control for others' behaviours, regardless of his personal intention and will (cases of "strict liability").[45]

In general, sanctions are characterized by the following elements:

— author/sender (who): it is the subject that decides the enactment of a sanction;
— target (to whom): it is the recipient, the addressee that is affected by a sanction (it is usually the author of the violation of the rule, but it is not always the case, i.e. in cases of "strict liability");
— purpose (why): it is the aim for which the sanction is imposed. It could be a coercive or punitive one, or for signalling or rectifying a wrong action, or for the implementation of other

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44 See http://dictionary.cambridge.org/dictionary/english/sanction.

45 This is the case, for instance, of the possession of animals (if they cause damages, their owner is responsible), or it is the case of father's responsibility for actions committed by the children, in the name of parental responsibility. In these hypotheses, it is not necessary to prove the fault or negligence by the person of reference, but the responsibility is recognised immediately upon him/her, regardless of culpability.

rights and obligations, or for the restoration of a previous situation, which has been affected by the illicit behaviour, or for preventive and deterrent reasons in order to avoid the future commission of the same action;

— nature/feature (what/how): it is the typology of the sanction. It can be positive (an incentive to change the behaviour) or negative (a punishment), according to the so-called "stick and carrot" method.[46] Sanctions could have a trade, financial, cultural, travel, political, diplomatic nature, or belong to the area of administrative, criminal or civil law.

3. SANCTIONS IN STRATEGIC TRADE AREA

Moving to the area of strategic trade, it results that sanctions can be divided into three categories, which in our understanding can be divided as following:

A. "supranational sanctions";
B. "implementing sanctions";
C. *tertium genus*: "unilateral sanctions" and "countermeasures", which is a specific typology, not entering the previous two categories.

In the first category (**A**), sanctions have the following characteristics:

— author/sender (who): supranational organizations at the international or regional level;
— target (to whom): States (they are the so called "comprehensive or broad-based sanctions"), or single individuals/enterprises ("targeted or smart sanctions");[47]

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46 Cortright, D., and Lopez, G.A., *Bombs, Carrots, and Sticks: The Use of Incentives and Sanctions*, Arms Control Association, 2005, http://www.armscontrol.org/act/2005_03/Cortright.

47 Hufbauer, G.C., and Oegg, B., "Targeted Sanctions: A Policy Alternative?," Paper for a symposium on "Sanctions Reform? Evaluating the Economic Weapon in Asia and the World," 23 February 2000, https://www.piie.com/publications/papers/paper.cfm? Research ID=371.

— purpose (why): (i) coercive purpose, when sanctions seek behavioural change from groups and individuals held responsible for an illicit behaviour; (ii) constrain, if they look for undermining the targets' capacities to achieve their objectives; and (iii) signal, if they disapprove certain actions. In general, these measures are aimed at maintaining or restoring peace and security;
— nature/feature (what/how): they can consist of economic measures related to:[48] (i) interruption in normal economic transactions or restriction of access to economic resources for a target country. This is the case of embargo to a country, and it can be referred to all its resources ("comprehensive embargo") or to the ban of exporting to a country or supplying it with certain goods such as arms[49] and services like technical assistance and trainings (this is a "selective embargo").[50] There could be also the boycott, which is the import/customs restrictions, and total suspension or block of imports from the addressed country. It can be a ban on imports of raw materials or goods, such as oil, rough diamonds, timbers, luxury goods, diamonds, dual-use items, fruits, meat, etc.; (ii) financial sanctions consisting in restrictions on support for trade (restriction on financial aid), and restrictions to access to capital, resources and financial transactions (asset freezes).[51] It means that funds, such as cash, cheques, bank deposits, stocks, shares may not be accessed, moved or sold by the targeted State, or entity or specific persons.

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48 Chan, S., and Drury, A.C., "Sanctions as Economic Statecraft: an Overview," in S. Chan and A.C. Drury (ed.), *Sanctions as Economic Statecraft: Theory and Practice,* Houndmills, *Basingstoke* and New York: *Macmillan Press* and St. Martin's Press, 2000, pp. 1-16.

49 Sanctions addressing specific goods are labelled as "selective sanctions".

50 Fruchart, D., *Holtom*, P., *Wezeman, S.T., United Nations Arms Embargoes. Their Impact on Arms Flows and Target Behaviour*, Uppsala: Stockholm International Peace Research Institute (SIPRI) and the Department of Peace and Conflict Research, Uppsala University, 2007.

51 Tostensen, A., and Bull, B., "Are Smart Sanctions Feasible?," in *World Politics* 54:3, 2002, pp. 373-403.

It can be noted that, beyond the economic sanctions, there could be other types of measures, pursuing non economic aims. They are, for instance, transport, political and diplomatic measures.

As for transport sanctions, two subgroups are identified: visa bans, which prevent a person from getting a visa (in order to enter a country for participating to an event, a sport competition, a political meeting, etc.[52]), or from transiting the country of the sender (or those groups of senders enforcing the sanctions regime); or aviation bans that restrict or ban ships or aircraft registered in and out of a designated target country.[53]

Political and diplomatic measures consist of the case of expulsion of diplomats,[54] the restrictions or breaking of diplomatic relationships with a country, the suspension or expulsion of the target state from international organizations, the limitation of its rights/freedoms/obligations within an organization, or the suspension of its agreements.

In this context, our analysis focuses exclusively on economic measures, keeping aside transport, political and diplomatic measures.

In the second one (**B**), sanctions are enacted at the national level. They are implementing supranational (i.e., international and regional) sanctions, aforementioned in category (**A**). It means that these sanctions find their legal or political basis in supranational rules. More precisely:

— author/sender (who): national States;
— target (to whom): single citizens/enterprises/companies;

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52 See, for example, Resolutions 748 (1992) and 883 (1993) against Libya, and Resolution 757 (1992) against FRY, which called for non-participation by FRY sportsmen in international events, and suspension of government-sponsored scientific and cultural exchanges, as well as visa refusal to certain high-level officials.

53 For instance, as regards flight bans, see Resolution 670 (1990) to Iraq.

54 See Resolution 748 (1992) against Libya.

— purpose (why): punitive and deterrent (as they punish certain behaviour and induce the violators and the others not to repeat or commit the same behaviour);
— nature/feature (what/how): (i) administrative sanctions (characterised by the relationship with authorities), such as revocation of licences; loss of access to trade facilitation privileges; loss of property rights and/or confiscation; closure of a company; change of person legally responsible for exports in a company; mandatory compliance training, etc.; (ii) criminal sanctions (having a punitive nature), such as fines, prison sentences; and (iii) civil sanctions (with a remedial nature), i.e. pecuniary remedies for the restoration of the loss or the violation, compliance notice (written notice issued by competent authorities which requires the violator to take actions to comply with the law), stop notice (written notice to ask to stop to carry on an illicit action).

These sanctions can be divided into two subcategories:

A.1. National measures implementing legally binding supranational norms ('hard law' rules), such as national sanctions for violation of international or regional embargoes or other trade sanctions;

B.2. national measures implementing politically binding norms ('soft law' rules), such as national sanctions for the violation of export control regimes, enacted at the international level in the five *fora* of Zangger Committee, the Nuclear Suppliers Group, Australia Group, the Wassenaar Arragement and the Missile Technology Control Regime, and at the EU level (namely, the Regulation 428/2009).

The third category (**C**) is a peculiar group. It is the case in which national States do not give implementation to international or regional sanctions, but they decide their own sanctions towards a State and impose them. So, in this case, the legal ground can be found in the national law.

These sanctions could be: unilateral by one single State to another State as such or to some of its national people, or decided by a community of States towards the targeted State and/or some of its citizens. In this latter case, the community of States, which are in a position of equality one to each other (horizontal relations), launch the so-called "countermeasures". They are adopted for obliging the violator to respect its obligations. The target is represented by a State as such or by individuals.

Unilateral sanctions can also affect people (enterprises, companies, single traders) having neither the targeting State's nor the target one's citizenship. Indeed, the sanctioning State can decide to apply the same ban to foreign stakeholders (subsidiaries and licencee) of the company that belongs to the sanctioning country. This is the phenomenon of the so-called "extraterritoriality", and thus the indirect target of sanctions is represented by people who are nationals of another State which is neither the sanctioning, nor the sanctioned one. These sanctions are characterized by:

— author/sender (who): national States;
— target (to whom): another State and/or its citizens (directly), and other nationals (indirectly);
— purpose (why): punitive and deterrent (as they punish certain behaviour and induce the violators and the others not to repeat or commit the same behaviour);
— nature/feature (what/how): they can consist of the withdrawal, or threat of withdrawal, of trade and financial relations with a target country. Therefore, there could be the provision of embargoes, or ban of financial aid and investment assistance.

These measures can also consist of visa bans and diplomatic measures such as the expulsion of diplomats from a country[55] or the

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55 See the case of Iranian students taking hostages and retaining in the US Embassy in Teheran the whole US diplomatic and consular staff. Another case is the request of withdrawal of 105 Soviet officials from UK diplomatic and trade establishment in London, for reasons of excessive intelligence gathering by Soviet officials. See Denza, E., *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, Oxford: Oxford University Press, 2008, pp. 77-78.

breaking off of diplomatic relations with a country[56] or the reduction in the number of diplomats sent to another country. However, our attention is focused on economic measures only.

The following scheme summarizes our classification of sanctions:

SANCTIONS			
	Supranational sanctions	Implementing sanctions	Unilateral measures and countermeasures
Who	international and regional organizations	national States	national States
To whom	- States - target people	- citizens - companies	- States - target people - other countries and people (extraterritoriality effect)
Why	- coercive - constraint - signal	- punitive - deterrent	- punitive - deterrent
How	- economic (trade and financial) measures - transport (visa and aviation) bans - political and diplomatic measures	- administrative - criminal - civil measures	- economic (trade and financial) measures - visa bans - political and diplomatic measures

56 See Iran's breaking with the UK in 1951, and the severance of UK's relations with Argentina during the Falkland/Malvinas Islands crisis in 1982.

A. "Supranational Sanctions"

The first category includes sanctions that are enacted at the international and regional (EU) level. They are economic in nature, but their aim is to obtain political or policy results, such as the determination of a change in political regime change, the blockage of a proliferation programme, the end of the violation of human rights and democratic liberties, etc. Thus, they have foreign policy purposes.

These measures are considered as a policy instrument and a sort of third way between military action and diplomacy, since they are not military, but have a punitive value.[57]

If historically, economic sanctions have often been coupled with acts of warfare, it is only after the World War I that the idea of sanctions as an alternative to conflict started to appear.[58] Woodrow Wilson, the American President in office at the time, boosted the diplomatic thought rather than military intervention, and proclaimed: "A nation that is boycotted is a nation in sight of surrender. Apply this economic, peaceful, silent, deadly remedy and there will be no need for force".[59] This quotation, at the origin of the modern idea of sanctions, shows how much hope has surrounded the notion of economic restrictive measures in being them a substitute for war and a deterrent means.

After Wilson's declaration, sanctions were adopted as a means of policy enforcement by the League of Nations, and then by the United Nations.[60]

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57 Wallensteen, P., and Staibano, C. (eds.), *International Sanctions: Between Words and Wars in the Global System*, London: Routledge/Frank Cass, 2005.

58 Alikhani, H., *In The Claw Of The Eagle*, London: Centre for business studies, 1995.

59 Hufbauer, G.C., "Economic Sanctions: America's Folly." Presentation, Council of Foreign Affairs, 10 November 1997, http://www.cfr.org/trade/economic-sanctions-americas-folly/p62.

60 Elliott, K.A., Hufbauer, G.C., Oegg, B., "Sanctions," in *The Concise Encyclopedia Of Economics*, Washington DC: Library of Economics and Liberty, 2008.

More recently, regional organizations like the European Union[61] have started using them as a meaningful instrument.

The features of sanctions regimes are then described hereafter.

A.1. At the international level

The difficulty of imposing sanctions at the international level resides in the fact that in the international society there are no public authorities with executive and judicial powers as the ones in national States. Moreover, international law is more similar to a coordination law, in which the States are equal from the juridical point of view and their sovereignty remains a relevant point to respect. Thus, the individuation of sanctions and most of all the enforcement of the sanctions are not easy tasks to accomplish.

→ THE UNITED NATIONS FRAMEWORK

The United Nations framework remains the main point of reference of international sanctions for restoring international legality and ensuring the protection of collective security, which is the *raison d'être* of the United Nations and it was also embedded in Articles 10 and 11 of the Covenant of the League of Nations.

In the League of Nations, sanctions were imposed for the cross border aggression by Yugoslavia (1921); against Greece (1925); and Italy (1935) for the invasion of Ethiopia.

Then, during the Cold War, the Security Council imposed them only against Southern Rhodesia from 1965 to 1979 for its unilateral declaration of independence from Great Britain, and in the form of voluntary and mandatory arms embargo in 1963 and 1977 respectively, to pressure the South African regime to end apartheid.[62] They were considered as a tool for procrastinating military intervention, which was ultimately going to occur.

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61 Hufbauer, G.C., Schott, J., Elliott, K.A., Oegg, B., *Economic Sanctions Reconsidered*, Washington: Peterson Institute for International Economics, 3rd ed., 2007.

62 Hufbauer, G.C., Schott, J., Elliott, K.A., *Economic Sanctions Reconsidered*, Supplemental Case Histories 24-25, 33-34, 285-86, 2nd ed., 1990.

When the first sanctions intervened with the prohibition on the sale of oil, weapons and ammunition, and on the purchase of asbestos, chrome, sugar, tobacco and other exports from Rhodesia, the Security Council (hereafter SC)'s power was deeply discussed.[63] The legal basis for its role was found in Chapter VII of the UN Charter, entitled "Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression".[64] Indeed, in case of threats to peace and security, or aggressions, the SC – after the initial determination of the existence of threat (Article 39) - could provide upon a State the "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication" (Article 41). If these measures are inadequate, the SC could take action by air, sea, or land forces, including "demonstrations, blockade, and other operations" (Article 42).

In the first years, there was also the debate about the limits of such power, as the SC was not authorised to enter the domestic jurisdiction, and its sanctions (for instance against South Africa) for the promotion of human rights and against apartheid were seen as *ultra vires*.[65]

Later on, the debate ended up in stating that the list of sanctions embedded in these legal provisions is not exhaustive, and it is likely

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63 For the protection of collective security, the Assembly General (AG) can have joint competence with the SC, for instance in case of expulsion of a State from the UN or the suspension of its rights, because of its violation of the measures decided by the SC. In reality this power, based on Article 5 of UN Charter, has never been exercised by the Assembly General. The power to lift such sanctions relies upon the SC. Moreover, the AG can recommend some restrictive measures towards a State, but the SC is not obliged to adopt them. This hypothesis occurred in 1950, when the AG censured the behaviour of Romania, Bulgaria and Hungary because of their lack of execution of some dispositions of the Treaty of Peace, namely the resolution of controversies for human rights disputes.

64 In the Covenant of the League of Nations, Article 16.1 stated that, if any League member resorted to war against another member, all other members were immediately and automatically to subject the former to a severance of all trade and financial relations, and prevent all financial, commercial, or personal intercourse between the nationals and the nationals of the offending State: this was a 'primitive' form of sanctions.

65 Fenwick, C.G., "When Is There a Threat to the Peace? Rhodesia," in *American Journal of International Law* 61: 753, 1967.

to imagine that the SC could broaden the typologies on a case-by-case basis, and according to the specificity of situations.[66] The SC is also called upon to adjust these sanctions from time to time.

It should be noted that the recourse to Chapter VII is the *extrema ratio* for the SC, because it is considered to be more proper to begin with actions under Chapter VI (Pacific settlement of Disputes) before resorting to more interventions pursuant to Article 41.

The conditions and the framework on the basis of which they can be enacted have been drawn: sanctions must be effective, in accordance with the purposes and principles of the UN (Article 24) and in conformity with the principles of justice and international law (Article 1.1), respecting the principle of equal rights and the self-determination of peoples (Article 1.2) and human rights (Article 55).[67]

Trade sanctions are disposed by the SC through Council resolutions, as long as the illegal activities represent a breach to peace and security.[68]

The adoption of sanctions requires a majority of 9 of the 15 members of the SC, and no veto by any of the five permanent members. The abstention does constitute neither negative vote nor veto.[69]

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66 Carisch, E., and Loraine, R-M., "Global Threats and the Role of United Nations Sanctions," in *International Policy Analysis*, 2011, http://library.fes.de/pdf-files/iez/08819.pdf.

67 As for the human rights to be respected while enacting sanctions, it could be observed that the Universal Declaration of Human Rights provides some rights that are particularly vulnerable under sanctions regimes, such as the right to life (Article 3), the right to freedom from inhuman or degrading treatment (Article 5), the right to an adequate standard of living (Article 25). Then, the International Covenant on Economic, Social and Cultural Rights provides for the right to an adequate standard of living (Article 11), the right to health (Article 12) and the right to education (Article 13), while the International Covenant on Civil and Political Rights protects the right to life in article 6.

68 For all the resolutions, see http://www.un.org/en/sc/documents/resolutions.

69 Considering briefly the procedure for the conclusion of the resolution, there are usually unofficial meetings among the permanent members and then a private consultation between all the members of the SC. When consensus is reached around the content of the resolution, there is a public meeting during which the President of the SC announces that an agreement has been achieved on a text. The text is spread in public, and the formal vote follows. After that, States can make explanatory statements.

A sanction resolution usually establishes a Sanctions Committee for monitoring the implementation of sanctions.[70] The decisions are taken by consensus, and most meetings are informal and held in closed session.

Moreover, the Council mandates a Panel of Experts to assist the Committee in monitoring the compliance to the sanctions regime.[71] They are not UN staff, have a consultancy contract, and are supposed to be independent and follow severe operative standards. Their reports are referred to the Sanctions Committee and they require consensus among the Committee members.[72]

For example, through Resolution 1737 (2006), the SC adopted certain measures relating to the Islamic Republic of Iran such as nuclear programme-related embargo, bans on export and import of materiel from and to Iran, specific assets freeze and travel bans on designated persons and entities. At the same time, a specific 1737 Committee[73] was established in order to undertake the tasks set out in the same Resolution. Moreover, in 2010 a Panel of Experts to assist the Committee in carrying out its mandate has been appointed.

So far, the UN has imposed sanctions 32 times on 21 different countries since Cold War. The reasons have been different: for cases of nuclear proliferation (South Africa 418, Iraq 661, the Democratic

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70 Sanction Committees are pursuant to Article 29 of UN Charter and Rule 28 of the Security Council's provisional rules of procedure. They are composed by 15 Members of the Council (each year five of the no permanent members are replaced), and chaired by the Ambassador of an elected State Member of the Council. The Committee usually receives the report from the State about the measures adopted for the compliance. It can also receive instances of non compliance by other States. The chairmen of these Committees are chosen from among no Permanent Members, and serve for at least a year.

71 The Panel is composed of 5 to 8 members, who give information on compliance and make recommendations to the Security Council on ways to improve sanctions effectiveness. Each of the members has a specific area of expertise, such as arms, finance, aviation, or commodity sanctions. The Panels are created for an initial period of six months to a year. They are appointed by the Secretary General.

72 See UN Security Council Informal Working Group on General Issues of Sanctions, *Best Practices and Recommendations for Improving the Effectiveness of United Nations Sanctions*, 2007, based on the Report S/2006/997.

73 Its mandate has then been expanded to apply also to the measures imposed in resolutions 1747 (2007) and 1803 (2008) and to the measures decided in Resolution 1929 (2010).

People's Republic of Korea (DPRK) 1718 and Iran 1737 regimes[74]), for civil wars and cross-border conflicts (Somalia and Eritrea 751/1907, Liberia 1521, Democratic Republic of the Congo (DRC) 1533, Côte d'Ivoire 1572, Sudan 1591 and Taliban 1988 regimes), against terrorism (Libya 748 (1992-2003), Sudan 1054 (1996-2001), the Al-Qaida 1267 and Lebanon 1636 regimes), in order to promote democratisation (Iraq 1518 and Guinea-Bissau 2048 sanctions regimes), for the protection of civilians and humanitarian purposes (Somalia 751, DRC 1533, Côte d'Ivoire 1572, Sudan 1591, Libya 1970).[75]

Since the 1990s, when the "sanctions decade"[76] began, targeted sanctions, addressing specific listed people and groups,[77] have been introduced, in order to adjust the limits and the humanitarian effects provoked by sanctions against non responsible civilians. The most emblematic case is the one of terrorism sanctions against Taliban or Al-Qaida groups. Other targeted sanctions are the ones imposed in the context of an intrastate conflict, for non-proliferation, counter-terrorism, democratisation and protection of civilians.

Therefore, if the first generation of sanctions addressed States as a whole, later on and nowadays there is the preference to identify specific restrictive measures targeted to the people responsible of the violation.

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74 UN Sanctions regimes are identified by the number of SC Resolutions, establishing the related Sanctions Committee.

75 For all these data, see UN Security Council Report, *UN Sanctions, Special Research Report,* November 2013, no. 3, pp. 3-5.

76 Cortright, D., and Lopez, G., *The Sanctions Decade: Assessing UN Strategies in the 1990s*, Boulder, CO: Lynne Rienner Publishers, 2000.

77 The discussion on targeted sanctions starts in 1998/1999 at the Interlaken Process, which focused on the issue of targeted financial sanctions; then, it continued at the Bonn-Berlin Process, focused on travel and air traffic related sanctions as well as on arms embargoes; and at the Stockholm Process dealing with the practical feasibility of implementing and monitoring targeted sanctions. See Fernandez, J.W., *Smart Sanctions: Confronting Security Threats with Economic Statecraft,* 25 July 2012, http://www.state.gov/e/eb/rls/rm/2012/196875.htm. See also http://www.smartsanctions.ch.

→ CRITICAL REMARKS ON THE UN SYSTEM

Critically speaking, the most relevant issue in terms of evaluation of UN sanctions remains the one of effectiveness, i.e. sanctions' capacity to produce the effects they pursue. The evaluation of effectiveness is not an easy task to accomplish, since the factors determining the decision to adopt sanctions and the consequences that they could provoke depend on several and complex elements. Moreover, it changes if the evaluation is made considering short-term outcomes or long-term ones: what does not occur in the short-term could be reached in the long period. Sanctions produce several effects at the political, economic, social and humanitarian level (e.g. the increase of authoritarian powers and corruption, inflation, recession, poverty, deterioration of living conditions, etc.) and sometimes these effects could affect neighbouring States or third States too in unexpected ways, such as favouring other markets.

Therefore, it is important to evaluate *a priori* the intensity of sanctions, consider possible alternatives, and define clearly their strategic objectives *ex ante*, in order not to incur in unforeseen consequences and to increase their results, without creating excessive burdens on States and people targeted. In this sense, it is also central that the SC or other UN bodies verify, and progressively and constantly check the impact of sanctions. Indeed, what has occurred so far is that sanctions have been sometimes applied without a clear understanding on how they could be used, their effects and results.

It can be noted, then, that some notions are not clear in UN Resolutions, despite their being key provisions on the regime, such as the term "luxury goods" in Resolution 1718 (2006) against North Korea.[78] This leaves the margin of appreciation to States quite open. The same occurs in Resolution 1737, imposed on Iran, which

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78 Resolution 1718 (2006) provides ban on transfer from or to the DPRK of chosen heavy arms and the items listed in S/2006/814 (guidelines of the Nuclear Supplier Group), S/2006/815 (Annex of the Missile Technology Control Regime) and S/2006/816 (Common Control Lists of the Australia Group); prevention of exports of luxury goods to the DPRK; freezing assets of and prohibition of travels by the DPRK persons designated by the Security Council; and rejection of any technical training or service related to the aforementioned actions.

demands the States to evaluate if the items subject to the Nuclear Suppliers Group dual-use control list would contribute to enrichment-related, reprocessing or heavy water-related activities. Thus, it is up to States to consider the intended application of imported goods by end-users. The possible discrepancies between States in this regard manifest a sort of weakness of the SC Resolutions.

Despite their existence, the mechanisms of monitoring assistance, enforcement, evaluation and implementation of adopted sanctions are still weak. In particular, in case the sanction is not respected by the target State there is no possibility of intervention by a judicial or police body. In 2006, the Working Group on the General Issues on Sanctions,[79] which is composed of the representatives of States belonging to the UNSC, drafted a set of recommendations,[80] which underlined the importance of communication and information-sharing between sanctions committees and the UN Secretariat for ensuring a proper management of sanctions, the need of standard reports of the monitoring mechanisms, the increase of public briefings by sanctions committees, more public information available through the media, so as to boost transparency and public perception of the legitimacy of sanctions.

Then, the reports released by the Panels of Experts that should be approved with consensus by all the Committee members risk being delayed because of *de veto* power by Sanctions Committee, and their meeting are not recorded, thus giving a sense of suspected secrecy.

As for targeted sanctions, the issue of listing and delisting people and protecting their rights to due process, to be heard, to review the process and other fundamental rights has come into question since the Nineties. However, despite the existence of Focal Points for Delisting, created within the Secretariat by Resolution 1730 (2006) for receiving all requests for delisting, and the creation of the Office of the Ombudsperson by Resolution 1904 (2009) to

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79 It is an informal group, created in 2000 (UN Doc. S/2000/319).

80 UN Doc. S/2006/997.

review delisting requests for the Al-Qaida regime only (and recently with Resolution 2253 (2015) for ISIL (Da'esh) regime too), the system still needs improvements: indeed, the Focal Point has a limited impact on rights and scarcely had effective results,[81] while the limited competence for the Ombudsperson on two sanctions regimes only has been criticised. Yet, all the proposals[82] to broaden its mandate have been blocked,[83] and thus the protection of targeted individuals' rights still remain weak.

It can be added that the lack of implementation is visible in the fact that not always individual subject to targeted sanctions are aware of them. Sanctions should be notified via their permanent mission to the UN, but in reality this does not occur so precisely, and so it weakens the application of targeted sanctions.[84]

Beyond the subsidiaries bodies mentioned above, the UN has tried to engage in the process of implementation other organizations such as the IAEA (e.g. the case of the verification of Iran's compliance with Resolution 2231 (2015)), or through the creation of special commissions (such as the International Commission of Inquiry, UNICOI, established by the UNSC Resolution 1013 (1995) for the control of the supply of arms and materials to Rwandan government forces), or through the establishment of other panels of experts (e.g. the ones that have investigated the eventual violation of sanctions in Sierra Leone, Angola and Liberia[85]). Clearing house mechanisms would be needed for UN Panels of experts, sanctions committees and monitoring teams.

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81 Hovell, D., *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making*, Oxford: Oxford University Press, 2016.

82 Such as S/PV.6964.

83 See UN Doc. S/2014/725, Concept Paper on Security Council Working Methods (8 October 2014), discussed on the Security Council Working Methods, 7285th Meeting of the SC.

84 Eriksson, M., *Targeting Peace: Understanding UN and EU Targeted Sanctions,* Farnham: Ashgate, 2011, p. 127.

85 See reports: UN Doc. S/2000/203 about Angola; S/2000/1195 about Sierra Leone; and S/2001/1015 about Liberia.

One of the main problems is the absence of a system of control of the UNSC resolutions and of the SC's work. Indeed, no judicial body is competent for intervening in a legally binding way, and thus it means that ultimately the controller for the SC remains the SC itself.

A.2. At the European Union level

The framework of trade sanctions enacted at the international level is complemented by regional sanctions, viewed as a means to strengthen the international community's response to threats to international peace and security.

While the others regional organizations have applied sanctions only towards their members, i.e. on their own territories of reference, the European Union has a specific sanctions policy towards third countries (non-member States too).[86]

→ THE EU FRAMEWORK

The European External Action Service (EEAS) uses the terms "sanctions" and "restrictive measures" interchangeably. The purpose of these measures is "to bring about a change in activities or policies such as violations of international law or human rights, or policies that do not respect the rule of law or democratic principles",[87] "to

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86 It does not mean that the EU does not apply any sanctions towards its Member States. In reality the system is done in such a way that the Commission is called upon to monitor the implementation of EU law, and it may take action if a Member State is suspected of breaching EU law. If no solution can be found, the Commission can open formal infringement proceedings and eventually refer the Member State to the European Court of Justice (Article 258 TFEU). Moreover, if a State does not comply with the ECJ's judgments, the Commission may refer the matter to the Court of Justice again, and the Court's decision must be accompanied by a proposal for a penalty and/or lump sum payment (Article 260 TFEU). In terms of the respect of EU common values (listed in Article 2 TEU), the European Council has full discretion in judging when such violation occurs by a Member State. However, rather than adopting sanctions (which has never occurred so far), the attention is given to conditionality clauses (pre-membership). In addition, the Commission can launch a rule-of-law supervisory process, but it cannot impose sanctions. It can simply recommend that Member States do it, via the EU Council.

87 European External Action Service, Sanctions or restrictive measures, 2015, http://eeas.europa.eu/cfsp/sanctions/index_en.htm

support of efforts to fight terrorism and the proliferation of weapons of mass destruction [...] and maintain and restore international peace and security".[88] These objectives, which are labelled as the "primary" ones are complemented by "secondary" internal goals (which concern the sender, e.g. to build an image) or "tertiary" purposes (related to the international scene, e.g. to show support for the United Nations).[89]

In the course of time, the EU has adopted export/import restrictions, financial measures and travel bans as sanctions upon States and listed/targeted individuals and enterprises for non economic reasons.

It has sometimes given implementation to UN sanctions, while in other cases the EU has adopted its own measures (such as in the case of Russia for Ukraine's invasion). It must be taken into account that the EU is obliged to implement those measures under a bilateral agreement with the UN, and the restrictive measures decided autonomously shall be "in conformity with international law". Moreover, since all EU members are also members of the United Nations, any EU sanctions are subject to the UN obligations of EU member States.[90]

Trade restrictions for non economic reasons towards third countries are adopted in the framework of the Common Foreign and Security Policy (CFSP), and pursue the specific objectives of TEU, namely mentioned in Article 3.5, in particular: the contribution to peace and security, the protection of human rights, the strict observance and the development of international law, including respect for the principles of the United Nations Charter. Moreover, they

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88 Council of the EU, "Basic principles on the use of restrictive measures (sanctions)", 10198/1/04 Rev. 1, Brussels, 7 June 2004, paragraphs 1-6.

89 See Portela, C., "The EU's 'Sanctions Paradox'," in *Stiftung Wissenschaft und Politik Comments*, October 2007/C 18, pp. 6-7.

90 This is emerged in 2008, when the President of Zimbabwe, Robert Mugabe, was banned by the EU from visiting any EU member state, but he was not prevented from attending the UN Food Conference in Rome and from visiting the Vatican. So, the EU had to respect each UN Member State's freedom to decide who should represent it at UN meetings.

should be in line with the principles mentioned in Article 21 TEU founding the EU's external action, such as the respect of democracy, of the rule of law, of fundamental rights and freedoms and of UN's rules.

As regards the competences for the adoption of the sanctions, these cut across the horizontal (between EU institutions) and vertical (between EU and Member States) division of competences. Indeed, there are different decision making procedures and legal instruments.

Briefly, the procedure entails different phases. The proposal is done by Member States, assisted by Council Secretariat, or by the High Representative of the Union for Foreign Affairs and Security Policy (HR), jointly with the EU Commission, or by the HR or by the European External Action Service (EEAS). After the political discussion at the level of the Regional working party of the Council, which is the Group responsible with relations with the third country concerned, and the technical discussion in the Council's Foreign Relations Counsellors Working Party (RELEX), the proposal is submitted to the Permanent Representatives Committee (COREPER) and to the Council, where it is adopted in the form of a Council decision: it is taken at unanimity, pursuant to Article 29 TEU. An exception to unanimity is provided by Article 31.2 TEU, which allows the qualified majority when the Member States' Ministers act on the basis of a previous decision of the Council, or upon a proposal presented by the HR at the specific request of the Council.[91] After the adoption, the Parliament is informed. Then, the phase of implementation of Council decisions is twofold, and there is a "two-track procedure", which depends on the content of the decision at stake:

a. If the sanction consists of a general embargo (included embargo on dual-use items and services related to military technology), or financial measures, the Council decision should be followed

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91 The States have also the possibility of 'constructive abstention' (Article 31.1 TEU): they can opt out without blocking the adoption of the Decision (unless one third of the members representing one third of the population abstain and qualify their abstention).

by a regulation, adopted on the basis of Article 215 TFEU[92] (as these measures contain trade elements). Such Regulation, like any other one, is directly applicable on companies, enterprises, and individuals. Member States may take "secondary sanctions", i.e. measures that provide for penalties in case of violation of EU restrictive measures defined in the Council decision and Council regulation, and measures that ensure the implementation, monitoring and enforcement of the adopted penalties;

b. If the sanction consists of an arms embargo (also covering goods of the Common Military List), or travel bans, the Council decision is directly implemented by Member States and no other act is needed.

The States have the duty to notify the Commission on the implementing measures that they have chosen. In case of negligence in following this duty, the Commission can start an infringement procedure against the State.

An example of the system of EU sanctions as referred to WMD and dual-use goods is the one of Syria. Intervening for the concerns about the internal repression of Syrian citizens and for the proliferation of WMD, as well as for regional instability and violation of human rights, the EU imposed several restrictive measures. As for dual-use goods, the EU adopted Council decision 2012/206/CFSP,[93] providing ban on exports of certain goods which might be used for the manufacture and maintenance of equipment which might be used for internal repression and related services, including the prohibition on the sale, supply, transfer or export of equipment or

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92 It is up to the Council, acting by a qualified majority on a joint proposal by the HR and the Commission, to adopt the measures, after the analysis by RELEX and the COREPER. The Parliament is informed. Legally speaking, this Regulation shall follow the adoption of a Council decision. In reality, the proposals for the CFSP Decision and the Regulation are drafted and discussed together, in order to allow the Council to adopt them simultaneously.

93 Council of the EU, Council decision 2012/206/CFSP, in OJ L 110, 24 April 2012, p. 36.

software intended for use by the Syrian Government in monitoring or interception of Internet and telephone communications. These provisions have been followed by Regulation 509/2012,[94] which has included the ban to the supply of other dual-use items and dual-use chemicals as defined in EU Regulation 428/2009.

To complete the framework, it is worth mentioning two bodies that are of particular relevance in the whole context of sanctions: the Foreign Relations Counsellor Working Party, which is called upon for the monitoring and evaluation of the EU sanctions, and the European Court of Justice (ECJ) that exercises a judicial role in the context.[95]

If initially the Court reviewed only the legality of the procedures followed for taking the decisions under the CFSP framework, in the course of time it has broadened its scrutiny.

The Court has affirmed that in some cases the Council did not have the competence for listing the entities (not having a joint proposal from the EU's High Representative).[96] In others, sanctions

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94 Council of the EU, Regulation (EU) no. 509/2012 of 15 June 2012 amending Regulation (EU) no. 36/2012 concerning restrictive measures in view of the situation in Syria, in OJ L 156, 16 June 2012. See also Council of EU, Regulation (EU) no. 697/2013 of 22 July 2013 amending Regulation (EU) no. 36/2012 concerning restrictive measures in view of the situation in Syria, in OJ L 198, 23 July 2013.

95 See, for example, as for Iranian entities, case T-181/13, *Sharif University of Technology v. Council,* 3 July 2014, not yet published; case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council*, 12 December 2006, ECR, 2006, II-04665; case T-494/10, *Bank Saderat Iran v. Council*, 5 February 2013, published in the electronic Reports of Cases (Court Reports - general); case T-13/11, *Post Bank Iran v. Council*, 6 September 2013, published in the electronic Reports of Cases (Court Reports - general – 'Information on unpublished decisions' section); case T-420/11 and T-56/12 *Ocean Capital Administration GmbH & Others, and IRISL Maritime Training Institute and Others v. Council, 22 January 2015, not yet published.*

96 Cases T-9/13 and T-10/13, *National Iranian Gas Company (NIGC) and Bank of Industry and Mine (BIM) v. Council*, 29 April 2015, not yet published.

lacked of motivation and evidence,[97] or violated the principle of legal certainty[98] because of insufficient elements to ground them, or their secrecy and vagueness.

Some sanctions have also generated human rights concerns, for violation of proportionality principle, insofar as the measures were disproportionate and infringed rights to defence and to effective judicial protection for listed people, the right to respect for personal and family life and the right to property. The ECJ has, thus, insisted on its right to effective judicial control on Regulations, even when implementing UNSC resolutions, since the respect of fundamental rights (as laid down in Article 6.1 TEU) forms part of the general principles of Community law.[99]

Therefore, although the EU is not a member of the United Nations, and Security Council resolutions are addressed to the UN Member States, not to the European Union as such, and although the ECJ does not arrogate the right to examine UNSC resolutions and enter the international law system, the Court has played an important role in the context of sanctions, most of all affirming that they should be in line with fundamental rights.[100]

So far, the EU has resorted to sanctions for several situations:[101] (i) conflict management (e.g. Afghanistan in 1996, Libya in 2011, Russia in 2014); (ii) democracy and human rights promotion (e.g. Uzbekistan in 2005 and Belarus in 2006); (iii) post-conflict institutional consolidation (e.g. the Federal Republic of Yugoslavia in

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97 See case T-380/14, *Pshonka v. Council,* case in course, submitted on 30 May 2014, against the lack of motivation and evidence as for the involvement of the target person in the pillage of Ukrainian funds.

98 See case T-12/11, *Iran Insurance Company v. Council*, 6 September 2013, published in the electronic Reports of Cases (Court Reports - general - 'Information on unpublished decisions' section); case T262/12, *Central Bank of Iran v. Council*, 18 September 2014, not yet published.

99 Joined Case C-402/05 and 415/05, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission*, 3 September 2008, ECR, 2008 I-06351.

100 Payandeh, M., and Sauer, H., "European Union: UN sanctions and EU fundamental rights," in *International Journal of Constitutional Law,* 7:2, 2009, pp. 306-315.

101 The list of EU sanctions can be found at http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf.

the 1990s and Guinea in 2009); (iv) non-proliferation (e.g. Libya in 1994 and Iran in 2007); and (v) countering international terrorism (e.g. Libya in 1999 and the EU's list of terrorist organisations).[102]

In case of targeted sanctions, it is relevant to consider the "Basic Principles on the Use of Restrictive Measures",[103] which tackles issues like terrorism and the proliferation of WMD, and insists on the respect of human rights, democracy, and the rule of law (i.e. good governance). Targeted sanctions are to be deployed in a flexible manner and on a case-by-case basis, and should be object of regular review. Moreover, the "Guidelines on Implementation and Evaluation of Restrictive Measures (sanctions) in the Framework of the EU Common Foreign and Security Policy"[104] specify when and how sanctions may be considered, and the EU Council developed the "EU Best Practices for the Effective Implementation of Restrictive Measures" with indications to EU Member States as to how improve and harmonise the implementation of targeted sanctions, such as the identification and designation of addressed people.

→ CRITICAL REMARKS ON THE EU FRAMEWORK

Critically speaking, it emerges that the European Parliament does not have a formal role in the adoption of CFSP sanctions, but it should simply informed. Its role has not been changed after the adoption of Lisbon Treaty. However, the Parliament has tried to be active in the area of sanctions. It has exercised a sort of sanctioning power by refusing to ratify external agreements with third countries, and insisting on conditionality clauses before signing them.[105]

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102 See Giummelli, F., and Ivan, P., "The effectiveness of EU sanctions. An analysis of Iran, Belarus, Syria and Myanmar (Burma)," in EPC issue paper, n. 76, November 2013, p. 6.

103 Council of the EU, Document 10198/1/04, REV 1. 2007.

104 Council of the EU, Document 15114/05 PESC 1084 FIN 475, 2005.

105 Zanon, F., "The European Parliament: An autonomous foreign policy identity?," in E. Barbe, and A. Herranz (eds.), *The Role of Parliaments in European Foreign Policy*, Office of the European Parliament: Barcelona, 2005. It should also be considered that, in reference to WMD items, the Council has adopted in 2003 a WMD clause to be inserted in any agreements with third countries, as a sort of conditionality clause to avoid proliferation.

The Parliament has also underlined the importance of creating a Sanction Unit within the Council Secretariat or the EEAS, called upon to conduct preliminary studies of vulnerabilities of sanctions regimes, the effects and impacts of sanctions, the compatibility and link with international ones. The Parliament has also claimed to scrutinise the reasons for the choice of targeted sanctions, the goals and progress of sanctions, at a minimum once a year, when the Council conducts the review that precedes the renewal of measures. It has insisted in the information before the adoption of the sanctions, and not only afterwards, especially for having a report on the political bargain with target countries. The Parliament would appreciate to receive regular hearings of experts from the countries affected, and to act as a human right watchdog in the imposition of sanctions.[106]

Thus, if the management of sanctions as regards the division of competences in the EU and the issue of implementation by Member States are quite clear, monitoring mechanisms result still fuzzy.[107] A proper mechanism to enhance coordination between Member States and monitoring, especially at the level of the Council's RELEX Working Group, would be needed.

It can be added that a place where the Parliament could have a bigger role is the one of informal sanctions, representing an alternative to the CFSP procedures.[108] This instrument has been used, for instance, for Pakistan and India for halting their nuclear tests,[109]

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106 EU Parliament, Directorate-General for External Policies of the European Union, Directorate B, Policy Department Study, "Impact of Sanctions and Isolation Measures with North Korea, Burma/Myanmar, Iran and Zimbabwe as Case Studies", AFET FWC 2009 01 Lot 2, May 2011, PE 433.794, pp. 29-31.

107 De Vries, A.W., and Hazelzet, H., "The EU as a New Actor on the Sanctions Scene," in P. Wallensteen, and C. Staibano (eds.), *International Sanctions: Between Words and Wars in the Global System*, Oxon: Frank Cass, 2005, pp. 99-10.

108 Portela C., *European Union Sanctions and Foreign Policy*. *When and Why do they Work?*, Oxon, UK: Routledge, 2010, p. 117.

109 In 1998 the Council asked for the postponement of the conclusion of the Partnership and Cooperation Agreement (i.e., deferral of signing international treaties), and it was interpreted the threat of a diplomatic sanction. However, this sanction never became reality, as the EU did not transpose this threat into a concrete CFSP act.

or towards China because of political repression and violations of human rights. These sanctions are usually contained in Council conclusions or presidential statements, and they do not lead to strong measures such as embargoes. The only exception is represented by China, because an arms embargo was decided outside the CFSP: apparently, it seems that an informal measure was chosen, but it should be taken in mind that at that time (1989) the adoption of a Presidential statement was the only possible instrument for imposing sanctions, and thus the embargo on China cannot be entirely considered as an informal measure. However, it did not have effects and its validity is still under discussion.

Even if the instrument of informal sanctions is more flexible and could involve more actors because of its lack of formality, it can also entail difficulties in terms of respects and compliance, and thus undermine the concrete EU's role in foreign policy issues, as these type of sanctions would be a mere signal of disapproval of a behaviour but without infliction of harm upon the targets.

In conclusion, the EU sanctions demonstrate the EU's will to exercise its role as a foreign policy actor at international level, although it should still boost more effectiveness and coherence.

B. "Implementing Sanctions"

The second category includes the national measures giving implementation to international and EU sanctions.

As mentioned, this group includes two subcategories:

B.1. National norms implementing legally binding rules; and

B.2. national norms implementing non-legally (politically) binding rules.

B.1. National norms implementing legally binding rules

In the first subcategory, single States are called upon to draw specific infringements in case of violation of an international or EU

sanction by companies or individuals. States have also an important role in the monitoring phase of the application of sanctions and for the enforcement of the committed violations.

These national norms find their legal basis on international legally binding documents (such as UNSC resolutions based on Article 41 UN Charter, or international treaties) and on EU legislation.

→ INTERNATIONAL LAW BASIS

As for the international law basis, it can be observed that the aforementioned UNSC resolutions, based on Chapter VII, are compulsory for all UN members, as indicated by Articles 2.5, 25, and 48.1 of the UN Charter. As for UN non members, Article 2.6 affirms that they shall be required to cooperate. Private persons within States (included NGOs) are obliged to respect the UN sanctions on the basis of the State's implementation. Only in exceptional cases, the SC can exempt one State from the execution of the UN sanctions (as it occurred for the exemption of Jordan from the ban to export oil from Iraq, since that oil was the only Jordan's source). UN provisions impose themselves upon any other agreement.[110]

There is not a particular model for the implementation of UNSC resolutions, but the main models entail: (a) the adoption of a general piece of legislation that allows for the transposition of the international law in the internal legal system, every time it occurs; or (b) a case-by-case transposition with specific laws or statutes or regulations according to the situation. The latter method allowed more flexibility and it is the most used, especially after the emerging of targeted sanctions.

The main problems of transpositions of UN sanctions by States are represented by the time lag (as States delay the incorporation into domestic systems) and the lack of homogeneity. Indeed, some UNSC resolutions leave 'free space' to interpretation and are quite

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110 It is provided by Article 103 of UN Charter.

vague in definitions or exceptions, and so it is up to States to decide what to include in the object of sanctions. This leads to inevitable fragmentation and selection of the measures to adopt within States.

Beyond the UNSC resolutions imposing specific sanctions and leaving the space of intervention to States for the internal application, there are other SC resolutions focused on WMD and dual-use items, which are likewise legally binding: these resolutions leave a broader margin of discretion to States. In this regard, it is relevant to mention Resolution 1540 (2004), preventing States from supporting, by any means, non-state actors from developing, acquiring, manufacturing, possessing, transporting, transferring or using nuclear, chemical or biological weapons and their delivery systems;[111] Resolution 1887 (2009), entitled "Packaging Nonproliferation and Disarmament at the United Nations",[112] supporting the Nuclear Non-Proliferation Treaty; Resolution 612 (1988) and 620 (1988) on chemical weapons and related materials.[113] These resolutions require the States to establish and enforce appropriate criminal or civil penalties for violations of export control laws and regulations.[114]

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111 UN Security Council, Resolution 1540 (2004), 28 April 2004, http://www.un.org/en/sc/1540.

112 UN Security Council, Resolution 1887 (2009), 24 September 2009, S/RES/1887 (2009), http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4abcd4792.

113 UN Security Council, Resolution 612 (1988), 9 May 1988, https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/541/39/IMG/NR054139.pdf?OpenElement. UN Security Council, Resolution 620 (1988), 26 August 1988, https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/541/47/IMG/NR054147.pdf?OpenElement.

114 See operative paragraph 3 of Resolution 1540 (2004), paragraphs 13, 16, 17 of the Resolution 1887 (2009), paragraph 4 of Resolution 612 (1988), and paragraph 3 of Resolution 620 (1988).

Furthermore, the main treaties on WMD follow the same pattern: indeed, the 1993 Chemical Weapons Convention (CWC)[115] and the 1972 Biological and Toxin Weapons Convention (BTWC)[116] demand the States' definition of penalties.

In particular, the CWC provides in its Article VII that each State shall take "necessary measures to implement its obligations under this Convention". It also indicated what the content of such national norms should be, namely:

a. the prohibition of natural and legal persons anywhere on its territory from undertaking any activity prohibited to a State Party under this Convention, including enacting criminal legislation with respect to such activity;

b. the prohibition of any banned activity in any place under the State's control; and

c. the extension of criminal legislation to any activity prohibited to a State and undertaken anywhere by natural persons, possessing its nationality.

The choice of criminal law as the area of law under which to incardinate the national penalties for the violation of the conventional provisions shows the 'message' that the CWC aims to launch: since criminal law is the most 'intrusive' type of law, as it affects people's most intimate freedoms (corporal liberty too), and it subjects people to State punishments, the calling for such type of law is a clear sign of the gravity of the violations committed.

The BWC makes reference to the States' intervention, like the CWC, but differently from the latter, it does not indicate the field of law to be preferred for the enactment of the penalties: the

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115 The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction was signed on 13 January 1993 and in force since 29 April 1997. See https://www.opcw.org/chemical-weapons-convention/. See Article VII.

116 The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction was signed on 10 April 1972 and in force since 26 March 1975. See http://www.opbw.org/. See Article IV.

BWC simply indicates that it is under the State's discretion to do so, provided that the penalties are established "in accordance with its constitutional processes".

→ EUROPEAN LAW BASIS

As for the implementation of European sanctions, domestic legislation is required after the adoption on EU Council decisions, and it may be needed even in case of Council decision followed by EU regulation.

For the transposition of EU sanctions, Member States are called upon to introduce measures that prosecute the violators of embargoes or other EU trade sanctions. Such national measures should be "effective, proportional and dissuasive".[117] "Effectiveness" means that sanctions should constitute a sort of 'threat' that dissuade the violators to repeat the action; "proportionality" refers to the appropriate relationship between the seriousness of the offence and the type of chosen sanction; and "dissuasiveness" considers the prospect of the sanction to be sufficient to prevent the (rational) people from committing the violation.

Different legal traditions and cultures have led to different types of implementation of EU sanctions among Member States. There are States that are more committed to sanctions, as they recognize a national advantage in implementing sanctions and pressuring the targeted country (such as Eastern countries in case of sanctions upon Russia), and others less committed (such as Italy towards Russian sanctions).[118]

Along with the national implementation of CFSP sanctions, there are the national penalties in compliance with the main EU legal

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117 This is the expression which is always used in the EU context when referring to sanctions, not only limited to the foreign policy area. See, for instance, discrimination law (e.g. Directive 2000/43 and Directive 2006/54) and employment law (European Works Councils Recast Directive 2009/38/EC).

118 See Rettman, A., *Italy clarifies position on Russia sanctions*, 11 December 2015, https://euobserver.com/foreign/131514. Gera V., *AP Interview: Polish leader: Sanctions on Russia must remain*, 11 December 2015, http://www.businessinsider.com/ap-ap-interview-polish-leader-sanctions-on-russia-must-remain-2015-12?IR=T.

source related to export of dual-use items, which is the Regulation 428/2009.[119] Indeed, this Regulation contains a control list of dual-use items for which a licence is required for export and/or for brokering and transit, and it also confers responsibility upon Member States for the implementation and enforcement of its provisions, as well as for the adoption of proper penalties in case of infringements of the Regulation (Article 24). In this case too, the Regulation indicates that such penalties should be effective, proportionate and dissuasive. Since the legal decision is entirely left to national legislators and authorities, the Regulation works *de facto* as a directive seeking to harmonise the general rules among Member States but leaving them a large margin of appreciation.

As the analysis of the single national cases developed in the course of this publication will show, there is an interesting 'kaleidoscope' of differences between the States. At least at the EU level, some of them have preferred stricter penalties, others less intrusive ones, and have opted for administrative, civil or criminal ones, or for a mixed model.[120] In some cases the sanctioned target is represented by the exporters only, in others by all the subjects of the supply chain. Moreover, different levels of responsibility can be recognised: a violation may be related to the person's will and intent, or involve the mere lack of care or inertia.

B.2. National norms implementing non-legally (politically) binding rules

→ EXPORT CONTROL REGIMES' BASIS

This subgroup includes national sanctions for the violation of non-legally binding rules, among which there are mainly the export

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119 Council of the EU, Council regulation (EC) no. 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, 5 May 2009, in OJ L 134, 29 May 2009. It has been amended by Regulation 1232/2011 (new EUGEA), Regulation 388/2012 (Annexes updating), and Commission delegated Regulation 1382/2014 (Annexes updating).

120 See also Bauer, S., "WMD-Related Dual-Use Trade Control Offences in the European Union: penalties and Prosecutions," in *EU Non-Proliferation Consortium, Non-Proliferation Papers*, n. 30, July 2013, pp. 3.

control regimes, i.e. the international *fora* of countries involved in the supply of dual-use items and aiming at the regulation of their trade "with a view to conciliate the objective of a sound competition in trade with the non-proliferation of WMD".[121] These *fora* have drafted 'soft-law' rules and guidelines to be applied to exporters.[122]

As regards sanctions, the export control regimes leave the responsibility and choice upon States, in the belief that an effective control system implies a framework of sanctions too. All the *fora* follow this 'line of action', even if some of them (namely, the Wassenaar Arrangement) are more active than others in their analysis of the theme of sanctions.

In particular, the Nuclear Suppliers Group (NSG) in its Guidelines on nuclear material and on nuclear dual-use items encourages States to adopt penalties, and it suggests the suspension of trade in case of violation, or in most serious cases the termination of nuclear transfer to the guilty Recipient.[123] In reference to brokering, transit and trans-shipment controls, the NSG prefers the adoption of "effective penal provisions".[124]

The Wassenaar Arrangement (WA), which indicates as a matter of example the adoption of "criminal sanctions, civil fines, public-

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121 Michel, Q., Paile, S., Tsukanova, M., Viski, A., *Controlling the Trade of Dual-Use Goods. A Handbook*, Bruxelles: P.I.E. Peter Lang, 2013, p. 47.

122 These *fora* are: the Zangger Committee (1972-74) and the Nuclear Suppliers Group (1975), focused on nuclear items; the Australia Group (1984-85) dealing with biological and chemical items; the Wassenaar Arragement (1994) focused on conventional weapons and dual-use goods and technologies; the Missile Technology Control Regime (1987) referred to space launch vehicles and ballistic missiles. There was also the Coordinating Committee for Multilateral Export Controls (COCOM), created in 1949 and closed in 1994, because it was replaced by Wassenaar Arrangement.

123 See "Guidelines for the Export of Nuclear Material, Equipment and Technology", Point 11, "Implementation", INFCIRC/254/Rev.10/Part 1, and "Guidelines for Transfers of Nuclear-related Dual-use Equipment, Materials, Software and Related Technology", Point 4, "Establishment of Export Licencing Procedure", INFCIRC/254/Rev.8/Part 2.

124 See "Good Practices for the Implementation of Brokering and Transit/Trans-shipment Controls", adopted by the 2014 NSG Plenary: http://www.nuclearsuppliersgroup.org/images/Files/National_Practices/National_Good_Practices.pdf.

ity and restriction or denial of export privileges",[125] leaves however free space to States' intervention, according to the domestic legal systems,[126] thus recognising the diversity of national frameworks worldwide. In its view, indeed, effective national export control enforcement includes "a preventive programme, an investigatory process, penalties for violations and international cooperation".[127]

The WA is very proactive in specifying the features that the penalties should possess: in its "Best Practices", the *forum* indicates that sanctions should be capable of punishing and deterring the violation ("effective and sufficient to punish and deter"[128]), "proportionate and dissuasive"[129] (as for the intangible transfers of technology), and "appropriate"[130] (as for small arms and light weapons). In the "Statements of Understanding" focused on the "Implementation of End-Use Controls for Dual-Use Items", the Annex orders the competent authorities to impose "proportionate and dissuasive penalties to deter infringements of the regulations",[131] and it boosts the exporters to be aware of such penalties, and collaborate with authorities in order to report suspicious activity or evidence of diver-

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125 Point 14, "Best Practices for Effective Enforcement" (Agreed at the WA Plenary, 1 December 2000), http://www.wassenaar.org/wp-content/uploads/2016/01/05Best-Practices-for-Effective-Enforcement.pdf.

126 See Annex, Point 8, Best Practice Guidelines on Internal Compliance Programmes for Dual-Use Goods and Technologies (Agreed at the 2011 Plenary), http://www.wassenaar.org/wp-content/uploads/2015/06/2-Internal-Compliance-Programmes.pdf.

127 Public Statement for Plenary, 3 December 1999.

128 Point 14, "Best Practices for Effective Enforcement" (Agreed at the WA Plenary, 1 December 2000), http://www.wassenaar.org/wp-content/uploads/2016/01/05Best-Practices-for-Effective-Enforcement.pdf.

129 Point C, "Best Practices For Implementing Intangible Transfer Of Technology Controls" (Agreed at the 2006 Plenary), http://www.wassenaar.org/wp-content/uploads/2015/06/ITT_Best_Practices_for_public_statement_2006.pdf

130 Best practice "Further agree" n. 3, letter (c), Best Practice Guidelines for Exports of Small Arms and Light Weapons (SALW) (Agreed at the 2002 Plenary and amended at the 2007 Plenary), http://www.wassenaar.org/wp-content/uploads/2015/06/SALW_Guidelines.pdf

131 Annex, Point 3, Statement of Understanding on Implementation of End-Use Controls for Dual-Use Items (Agreed at the 2007 Plenary), http://www.wassenaar.org/wp-content/uploads/2016/01/10Statement-of-Understanding-on-Implementation-of-End-Use-Controls-for-Dual-Use-Items.pdf

sion or misuse of items. Moreover, the "Best practice on Internal Compliance Programmes for Dual-Use Goods and Technologies" also mentions disciplinary measures upon the responsible staff, so stressing the relevance of deontological provisions, along the criminal, administrative or civil measures.[132]

Going more into detail, the WA prefers "adequate" criminal sanctions and administrative measures in the area of arms brokering[133], and only criminal sanctions for man-portable air defence systems (MANPADS).[134]

An important document to be mentioned is represented by the set of Guidelines, released by the Plenary in 2014,[135] which asks the applicants to provide information about penalties in place for the violations of export controls, in the light of transparency, cooperation and information-sharing.

In a sum, the WA prefers pointing out the principles that should guide the States in drafting the sanctions rather than indicating a precise and definite set of them: "proportionality" expresses the idea that the punishment imposed should be in proportion to the gravity of the crime committed, i.e. neither excessive nor useless in terms of effects (educational, punitive, deterrent, etc.), and necessary, in the sense that no other alternatives are possible or available; "dissuasiveness" indicates that they should convince the author of the illegal action or inaction not to repeat it again, thus determining psychological effects on the recipients; "effectiveness" refers to the fact that penalties should realize their objective or

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132 Annex, Point 8, Best Practice Guidelines on Internal Compliance Programmes for Dual-Use Goods and Technologies (Agreed at the 2011 Plenary), http://www.wassenaar.org/wp-content/uploads/2015/06/2-Internal-Compliance-Programmes.pdf.

133 See Point 3, Elements for Effective Legislation on Arms Brokering (Agreed at the 2003 Plenary), http://www.wassenaar.org/wp-content/uploads/2015/07/Elts_for_effective_legislation_on_arms_brokering.pdf

134 Point 4, Elements for Export Controls of Man-Portable Air Defence Systems (MANPADS) (Agreed at the 2003 Plenary and amended at the 2007 Plenary), http://www.wassenaar.org/wp-content/uploads/2015/06/Elements-for-Export-Controls-of-Manpads.pdf

135 Guidelines for Applicant Countries (Agreed at the 2014 Plenary), http://www.wassenaar.org/wp-content/uploads/2016/01/11Guidelines-for-Applicant-Countries.pdf

fulfil their purposes, which means that they must be successful; "sufficiency to punish, appropriateness and adequacy", then, express the mission that penalties should be enough to reach the purpose of punishing the guilty subject, and to achieve the required needs and objectives without excessive means.

The Australia Group (AG) likewise demand for the States' discretion, considering sanctions as part of national export control legislation.[136]

Finally, the Missile Technology Control Regime (MTCR) appeals the States in the same line,[137] putting the accent on deontology and psychological pressure on States, which includes a perception of reputational damage in case of non compliance. This approach has inspired the draft of the "International Code of Conduct against Ballistic Missile Proliferation (the Hague Code of Conduct)" too, which has been initiated by MTCR Partners in order to complement MTCR Guidelines.[138]

As seen, export control regimes opt for the indication of the features that national penalties should have, instead of indicating they type and content of them. By gathering different States that voluntarily agree to adopt some rules (included sanctions) and share the information with the others, it could be affirmed that export control regimes look like "peer-review mechanisms".[139] They work as an indirect form of control upon States that are part of the *fora,*

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136 AG, "Guidelines for Transfers of Sensitive Chemical or Biological Items" (June 2015), http://www.australiagroup.net/en/guidelines.html, Point 3.

137 Public Statement from the Plenary Meeting of The Missile Technology Control Regime (MTCR), Rotterdam, 9th October 2015, https://www.government.nl/documents/media-articles/2015/10/09/public-statement-from-the-plenary-meeting-of-the-missile-technology-control-regime-mtcr-rotterdam-9th-october-2015

138 In 1999, MTCR partners began consultation. The draft text was universalised in 2001 and open to all States. The Code was launched in The Hague in November 2002 and now has 130 subscribing States. The text of the Code can be found at: http://www.hcoc.at.

139 See the definition of 'peer review' as "*the systematic examination and assessment of the performance of a State by other States, with the ultimate goal of helping the reviewed State improve its policy making, adopt best practices, and comply with established standards and principles*" (Pagani, F., *Peer Review: A Tool for Co-operation and Change - An Analysis of an OECD Working Method*, OECD document SG/LEG(2002)1, 11 September 2002, paragraph 3).

as a peer to peer process: indeed, each State has to put pressure on and control the others, and no one is stronger or more authoritative than others. This is a positive aspect, as it represents an incentive process for States to adhere: by leveraging on psychological issues, States feel psychologically, instead of legally, obliged to act correctly and transparently, as they know that in case of non compliance there will be reputational damages upon them. So, peer-review increases transparency and cooperation, and it solicits States to engage actively in export control and in the definition of penalties, as well as to introduce best practices and awareness on the topics. On the other hand, such peer-review can entail negative issues in case of reluctance or fear by States to share their norms and adopted procedures. Some States can have problems of trust towards the others and doubts about confidentiality, so that they may be reluctant to share information; this inevitably blocks the mechanism and its efficiency.

→ UN GENERAL ASSEMBLY'S BASIS

National sanctions implementing non-legally binding rules can be encouraged by other documents too, beyond the export control regimes. In this context, it is worth mentioning some UN General Assembly's resolutions, which do not have a legally binding nature and assume the value of recommendations to States. They similarly insist on the adoption of national measures (included sanctions) for implementing the CWC,[140] the BWC[141] or for ensuring the control

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140 See, for instance, Resolution 69/67 (2014), paragraph 11; Resolution 55/33 (2000), paragraph 4.H; Resolution 68/45 (2013), paragraph 7, and Resolution 67/54 (2012), paragraph 5. In the same line, General Assembly's Resolutions 66/35 (2011), 65/57 (2010), 64/46 (2009), 63/48 (2008), 62/23 (2007), 61/68 (2006), 60/67 (2005), 59/72 (2004), 58/52 (2003), 57/82 (2002), 56/24 (2001) paragraph K.

141 See Resolution 69/82 (2014), initial *consideranda* in Resolution 68/69 (2013), Res. 67/77 (2012), Res. 66/65 (2011), Res. 65/92 (2010), Res. 64/70 (2009), Res. 63/88 (2008), Res. 62/60 (2007), Res. 61/102 (2006), Res. 60/96 (2005), Res. 59/110 (2004), Res. 58/72 (2003), 57/516 (2002), 56/414 (2001), 55/414 (2000).

of transfer of arms, military equipment and dual-use goods and technology as essential tools for the maintenance of international peace and security.[142]

A. Tertium Genus: "Unilateral Sanctions" and "Countermeasures"

This category includes sanctions that are adopted as unilateral decisions by a State, or countermeasures chosen by a group of States against another. They find their general legal basis in Article XXI GATT, but more specifically in national norms. They are not implementing international or regional frameworks, but represent an autonomous decision by States.

It is the hypothesis of a country that chooses to impose an embargo upon another, whose policies damage the sanctioning country, or infringe its rights and liberties.

Historically, the first examples are represented by the UK's sanctions against the USSR for the arrest of British citizens (1933) and by the US' measures against the UK and France for invading and occupying Suez (1956).

After World War II, the number of unilateral sanctions increased to a total of 155 cases, of which 73 percent were imposed by the US, 9 percent by the USSR and the remaining 18 percent distributed among 13 other States.[143] In reference to WMD area, it results that less than 15 per cent have dealt with this field, both in response to a direct threat of acquisition or use of WMD, and in response to activities that potentially could lead to the development of WMD.[144]

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142 Resolutions 59/66 of 22 November 2003, Res. 58/42 of 8 December 2004, Res. 60/69 of 8 December 2005.

143 Hufbauer, G.C., Schott, J., Elliott, K.A., Oegg, B., *Economic Sanctions Reconsidered*, Washington: Peterson Institute for International Economics, 3rd ed., 2007.

144 For instance, Australia has imposed sanctions against France in reaction to nuclear testing in the Pacific; Canada against the European Community and Japan to compel them to improve nuclear safeguards and to India and Pakistan to oblige them to apply safeguards.

The United States is the nation that has mostly resorted to this type of sanctions to influence the behaviour of other States, to induce policy change, to punish a targeted State and with deterrent purposes. The best known paradigm is the one of sanctions against Cuba: starting from the unilateral trade embargo imposed in 1960, the US bans have increased in the course of years through the Cuban Democracy Act of 1992,[145] the Helms-Burton Act of 1996,[146] and other legislative and executive decisions.

As regards WMD sanctions, it is meaningful to consider US sanctions against Iran. Through the "*Iran Sanctions Act*" (1996, latterly 2006), the US have imposed economic sanctions on any foreign person supplying Iran with goods, services or technology (including dual-use items) that could be used in the development of nuclear, biological or chemical weapons, or missile technology in Iran; while through the "Comprehensive Iran Sanctions, Accountability, and Divestment Act" (2010)[147] sanctions have been extended, punishing companies and individuals who aid Iranian petroleum sector.[148]

As for measures addressed to specific individual targets, the US have authorised – through Executive Order 13382 (2005) - the Treasury Department to block the US assets of entities judged to be engaged in or assisting proliferation, as well as the US assets of foreign banks that fail to follow the US lead. With Executive Order

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145 The Cuban Democracy Act bars from the United States market for six months any merchant ship that stops at a Cuban port, and it prohibits trade between Cuba and the foreign subsidies of United States companies.

146 The Helms-Burton Act allows for the extension of the Cuban embargo and financial sanctions to foreign firms with no connection to US ownership but using "*formerly American property*" in Cuba.

147 Public Law 111-195, 124 Statute 1312 Public Law 111–195, 1 July 2010.

148 See also "Iran Freedom Support Act" (2006), imposing sanctions and non-cooperation with US capital and diplomacy in the event of a third country assisting Iran. The act has been superseded and extended by the "Iran, North Korea and Syria Sanctions Consolidation Act" (2011), which places heavier sanctions on those assisting the Iranian energy sector and provides the framework through which the President must assist non-US countries in finding non-Iranian energy suppliers; and "Iran Non-Proliferation Act" (2000), superseded by the "Iran, North Korea, Syria Non-Proliferation Act" (2006), placing heavy diplomatic penalties on third countries making contributions or providing assistance to Iranian WMD and conventional weapons programmes.

13590 (2011), sanctions on Iranian energy sector have been broadened, and through Section 311 of the US Patriot Act the Treasury Department has obtained the authority to deny suspected individuals and companies the access to the US financial system.

This type of unilateral measures have been criticised by UN bodies.[149] Indeed, Article 2.4 of the United Nations Charter prohibits all UN members to resort to the threat or use of force against the territorial integrity or political independence of any State.[150] The use of force, interpreted as the military intervention, is thus prohibited, and the use of coercive economic measures is banned if States intervene in matters that are essentially within the domestic jurisdiction of the targeted State. Exceptions to this latter prohibition have been recognised "[...]where one or more States adopt unilateral measures in response to a clear violation of universally accepted norms, standards, or obligations, provided these States are not seeking advantages for themselves but are pursuing an international community interest; and where the economic measures constitute proportional countermeasures by a State for a prior injury, provided inter alia that the measures are not designed to endanger the territorial integrity or political independence of the target State."[151]

From this provision, it results that a State can impose unilateral sanction when it is in the interest of the whole international

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149 UN Docs. NRES/47/19 (1992), 48/16 (1993), 49/9 (1994), 50/10 (1995), 51/17 (1996), and 52/l0 (1997). See also Elimination of Coercive Economic Measures as a Means of Political and Economic Compulsion, Resolution of the United Nations General Assembly, A/RES/57/5 (November 1, 2002).

150 It is confirmed by the General Assembly's "Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty" (1965: UN Doc. NRES/2131 (XX) (1965)), the "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations" (UN Doc. NRES/2625 (XXV) (1970)); the "Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States" (UN Doc. NRES/36/103 (1981)), and the Resolution on "Economic Measures as a Means of Political and Economic Coercion against Developing Countries" (UN Doc. NRES/50/96 (1995)).

151 Part IV (paragraphs 53-94) of UN Doc. N52/459 (1997).

community. This explains why US sanctions against Cuba have encountered the criticism by the UN, being seen as lacking such international interest.[152]

Countermeasures *per se* would be illicit, but they become licit as a response to the illicit State's behaviour. They must respect the general principles of international law, the duty no to make recourse to force, and be proportional.

A problem related to unilateral sanctions is the one of "extra-territoriality", since the rule according to which "a State cannot take measures on the territory of another country by means of enforcement of national laws without the consent of the latter"[153] finds here an exception.

In case of Cuban embargo, extraterritoriality emerges by the fact that the executive branch is authorised or directed to impose sanctions (such as import bans and prohibitions on participation in federal procurements) to foreign companies that do business with Cuba.

Such extraterritorial effect arises, however, some criticism: for instance, the European Union has promulgated countermeasures in order to block the application of US sanctions within its jurisdiction. These 'blocking measures' forbid compliance with particular US extraterritorial sanctions, such as the Cuba embargo, or they provide for non-recognition of judgments and administrative decisions located outside the US and giving effect to the sanctions, and eventually establish an action for recovery of damages incurred for sanctions violations.[154] The EU has also initiated a WTO dispute settlement proceeding (in 2000) against Section 211 of the US Omnibus Appropriations Act of 1998 (Section 211), which was prohibiting US courts from considering or enforcing the trademark claims of

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152 Resolutions of the United Nations General Assembly, A/RES/47/19 (November 24, 1992), and A/RES/61/11 (November 8, 2006).

153 Brownlie, I., *Principles of Public International Law*, Oxford: Oxford University Press, 7th ed., 2008, p. 309.

154 See the Council of EU, Regulation 2271/96 of 22 November 1996, in OJ L 309, 29 November 1996, 1. At the moment, it is under discussion a new Proposal to amend or recast the Regulation, COM/2015/048 final – 2015/0027 (COD).

Cuban nationals, or their successors regarding property confiscated on or after January 1, 1959.[155] The WTO Appellate Body admitted that Section 211 violated national treatment and most-favoured nation provisions of the TRIPS Agreement.[156]

Therefore, the extraterritoriality of these sanctions have been contested broadly as it 'invades' other jurisdictions' competence and it exposes the US to legal proceedings, or its enterprises to double jeopardy, and thus limiting the foreign and security interests that unilateral sanctions would like to achieve.

3. CONCLUSION

The system of sanctions in the context of strategic trade control is clearly a 'multilevel' one, involving different political and legal actors.

We have distinguished sanctions into three groups: (a) "supranational sanctions", referring to the measures disposed at the international and regional level against States or targeted people, and consisting of trade or financial measures for achieving foreign policy and security purposes; (b) "implementing sanctions", which consist in the national implementation of supranational (both international and regional) norms. Thus, these sanctions find their legal or political basis in supranational rules, which can be legally binding ('hard law' rules), or politically binding norms ('soft law' rules); and (c) *tertium genus*, represented by "unilateral sanctions" and "countermeasures", decided by national States or group of States as an autonomous measure of retorsion or punishment against another State, and sometimes having even an extraterritorial effect.

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155 Request for the Establishment of a Panel by the European Communities, United States - Section 211 Omnibus Appropriations Act of 1998, WT/DS176/2, 7 July 2000, accepting the European Communities' 30 June 2000 request) ("European Communities Section 211 WTO Request").

156 Report of the Appellate Body, United States - Section 211 Omnibus Appropriations Act of 1998, WT/DS176AB/R, at §§ XII-XIII, 2 January 2002; WTO Section 211 CRS Report at CRS-3 to CRS-5.

This broad spectrum of sanctions shows the variety of 'reactions' for the violation of norms in the strategic trade area.

As the analysis has demonstrated, sanctions have been increasingly adopted in the course of time in different contexts, even if some gaps and limits remain at the international, European and national level. However, it is of utmost importance to explore the effects that they could produce, as they can be expected and unexpected, and they can develop in different directions, covering the political, economic, social, humanitarian dimension and addressing both the target State, and the targeting ones, as well as other 'actors' on the stage.

The analysis of the effects of sanctions is preliminary for the evaluation of their effectiveness,[157] which is the core issue to be examined when dealing with sanctions in order to understand if they are really a useful means to be adopted or not.

In conclusion, it seems to us that sanctions can be a relevant tool in trade control. Yet, their adoption cannot occur without a proper and deep understanding of their mechanisms of working, so as to evaluate their real utility.

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157 Portela, C., "The EU's Use of "Targeted" Sanctions Evaluating effectiveness," in *CEPS Working Documents,* no. 391, 2014, p. 24.