

Sanctions and strategic trade controls: Two heads of Hydra?

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1. INTRODUCTION

Following the discovery of the A.Q Khan network and the increased threat of non-state actors acquiring or using weapons of mass destruction (WMD), the international community increased attention on the role of trade controls as a nonproliferation strategy. The passage of United Nations Security Council Resolution (UNSCR) 1540 (2004) obliged all Member States to implement trade controls, leading to the creation of nascent governmental authorities dealing with the legislation and enforcement of international legal obligations.¹⁵⁸ Meanwhile, trade controls in the form of sanctions, embargoes and restrictions have been used increasingly by states as a political, security and economic tool.¹⁵⁹ While the ultimate ends of both strategic trade controls and sanctions, embargoes and restrictive measures may differ, the agencies, procedures and mechanisms implementing them are often the same from an operational point of view. Moreover, the entities subject to both are also often the same – mainly industry and in some cases academic/research institutes.

This chapter aims to provide a comparative study of what are commonly referred to as strategic trade controls and sanctions, embargoes and restrictive measures. Such a comparative study is useful for measuring effectiveness and moreover questioning

158 United Nations Security Council Resolution 1540, UN/SC/1540/2004, http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1540%20%282004%29&referer=http://www.un.org/en/sc/1540/&Lang=E.

159 David J. Lektzian and Christopher M. Sprecher, "Sanctions, Signals, and Militarized Conflict," *American Journal of Political Science* 51:2 (April 2007), pp. 415-431.

what is meant by effectiveness in both cases. The methodology used by the author frames the structure of the chapter. First, the two fields will be defined in order to put the comparative analysis in context. Second, the objectives of both instruments will be examined for commonalities and points of divergence, followed by an analysis of the stakeholders as well as the operations involved. This comparison will be supplemented throughout with technical analysis regarding practical considerations of how these controls are implemented with the aim of identifying points of intersection and overlap. The chapter will then examine the ways in which sanctions are evaluated as effective, and whether the same applies for strategic trade controls. The conclusion will focus on lessons learned from the comparative study as well as future challenges and ideas to overcome them.

2. DEFINITIONAL EVOLUTION

Before proceeding with the objectives of this chapter, the terms subject to comparative analysis must be defined: strategic trade controls on the one hand, and sanctions on the other. This task is increasingly complicated due to the fast-changing nature of both fields, albeit for different reasons.

Starting with strategic trade controls, the term itself only recently became accepted in research and policy circles due to the evolution of the field itself. Previously, what are now understood as strategic trade controls on dual-use goods were referred to universally as export controls. With the increase in the operations, stakeholders, and legal obligations involved, the field moved beyond the procedures involved in just export, and spread to transit, trans-shipment, re-export, financing, and more.

UNSCR 1540 (2004) Operative Paragraph III.d played a significant role in the process by expanding the scope of traditional export controls. The paragraph calls on Member States to “establish, develop, review and maintain appropriate effective national export

and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations.” Having to comply with the operative paragraph means controlling more than just exports of items that can be used in a WMD programme, mainly defined by the control lists and guidelines of the four international supplier regimes, but actually controlling the entire path of the item throughout the supply chain.¹⁶⁰ Important to the comparative analysis is that strategic trade controls involve authorisations by licencing authorities of dual-use materials, equipment and technology that could be used in a WMD programme. Exporters must know if the good they wish to export is controlled either because it is on a control list, or list of items requiring authorisation, or if it is covered potentially by a catch-all clause where under certain conditions, when there is reason to believe such items are intended for use in connection with a WMD weapons, the items are subject to authorisation even if they are unlisted.¹⁶¹ Exporters then apply to their licencing authorities, who either authorise the export or issue an export denial.

Sanctions generally have no universally agreed definition. The most precise one, and that which is used by government agencies to explain them to exporters, is that they are political trade tools put in place by the United Nations (UN) and the European Union (EU). The objective of UN sanctions are to “implement decisions by its Security Council to maintain or restore international peace

160 For more on the definitions of export controls, strategic export controls, and strategic trade controls, see Catherine Dill and Ian Stewart: *Defining Effective Strategic Trade Controls at the National Level*, *Strategic Trade Review* 1:1 (Autumn 2015), pp. 4-17.

161 “The EU Dual-Use Export Control Regime,” Directorate General for Trade, European Commission, 2014, http://trade.ec.europa.eu/doclib/docs/2014/february/tradoc_152181.pdf.

and security” while the EU also uses them to advance its Common Foreign and Security Policy.¹⁶² Less detached definitions in academic literature vary, but all note that the aim of sanctions is to elicit behavioural change through a variety of tools using, but not exclusively, changes to trade relations. Apart from trade restrictions or prohibitions, states may use travel bans, asset freezes, freezes on high level visits, suspension of aid, or investment and loan bans to try to change the targeted state’s behaviour.¹⁶³

These acts verge on fulfilling another definition of “sanctions” whereby they mean punishment in a broader sense subsequent to behaviour the sanctioning state deems necessary to change. Here the main difference between strategic trade controls and sanctions becomes clearer: while the former requires that certain traded goods receive authorisation or denial, trade-related sanctions, or embargoes, prohibit trade of certain goods to a specific destination. However, embargoes constitute only one form of sanctions, as the general definition of sanctions clearly extends beyond simply trade.

Therefore, comparing strategic trade controls and sanctions, the former are limited in breadth and operation, even as their scope has expanded since UNSCR 1540 (2004). So can strategic trade controls be considered as simply a subset or type of sanction, or are they an altogether different creature? The following sections will seek to answer this question as well as demonstrate what lessons can be learned for increased effectiveness of both.

162 “Sanctions, Embargoes and Restrictions,” Department of Business, Innovation and Skills, United Kingdom, <https://www.gov.uk/guidance/sanctions-embargoes-andrestrictions>.

163 Anthonius W. de Vries, Clara Portela and Borja Guijarro Usobiaga, “Improving the Effectiveness of Sanctions: A Checklist for the EU,” Center for European Policy Studies, 2014, <https://www.ceps.eu/system/files/CEPS%20Special%20Report%20No%2095%20SanctionsChecklistDeVriesPortelaGuijarri.pdf>.

3. OBJECTIVES: A COMPARATIVE VIEW

Sanctions are imposed for a variety of reasons. The most basic reason for which most states implement them is because they are obliged to do so in order to comply with United Nations Security Council resolutions, which apply to all UN Member States if they are passed under Chapter VII of the United Nations Charter. The necessity to comply may come from agreement by Member States regarding the nature of the resolution, but may also come from the need or desire to adhere to international norms and not act unlawfully, as doing so may itself inspire “sanctions.” Apart from simply complying with obligations, sanctions themselves are imposed, as mentioned in the previous section, to delay or stop an activity from taking place. For example, UNSCR 1737, 1747, 1803, and 1929 were aimed at delaying and ultimately stopping Iran from developing a nuclear weapons programme. The resolutions included measures such as arms embargoes, asset freezes, travel bans, financial sanctions, and others.¹⁶⁴

This objective is similar but not identical to another: applying pressure in order to catalyse political change or affect behaviour. Of course, aiming to delay or stop a specific activity from taking place, such in the case of Iran’s nuclear weapons programme, could be subsumed by this objective, yet it is important to differentiate as sanctions aimed at delaying or stopping a specific activity differ in broadness and aim from sanctions whose objective is to affect the behaviour of a state in a more general sense. For example, the UK implemented EU sanctions on the Republic of Guinea (Conakry), in the form of 2009/799/CFSP (now lifted) for a variety of reasons, listed officially as, “concerns about internal repression, regional instability and other human rights violations; concerns about the development of weapons of mass destruction; foreign policy and international treaty commitments including as a result of the

164 IAEA and Iran: UN Security Council resolutions and Statements,” AEA, [https:// www.iaea.org/newscenter/focus/iran/iaea-and-iran-un-security-council-resolutionsand-statements](https://www.iaea.org/newscenter/focus/iran/iaea-and-iran-un-security-council-resolutionsand-statements).

imposition of European Union (EU) or United Nations (UN) trade sanctions or arms embargoes; national and collective security of the UK and its allies".¹⁶⁵ The methods used for the sanctions included an arms embargo, transit restrictions, travel bans and asset freezes. These measures aimed to change the overall behavior of the government rather than one specific activity, and sanctions with such broader objectives exist for many other countries.

The objectives to change one specific activity or catalyze broader change are the most clear-cut, yet other objectives may exist for the imposition of sanctions, such as using them as simply a show of power. This can be a residual affect of imposing sanctions, such as Russian sanctions against the EU. These sanctions banned food imports from EU countries just days after the EU extended sanctions against Russia for its alleged support of pro-Russian rebels in the east of Ukraine.¹⁶⁶ While the Russian sanctions could have been imposed to change European behavior, this is doubtful, as the form of the sanctions could not realistically change any specific behavior. Instead, the sanctions can be perceived as a direct show of power and retaliation to EU sanctions.

Unlike sanctions, strategic trade controls do not have such broad geopolitical aims. First, they are concerned with only a specific set of dual-use items related to WMD, and more specifically, while the ultimate aim may be to altogether stop such a programme from being built, the more direct and realistic aim is to delay or impede progress through restricting the goods, knowledge and technology necessary for such a programme to be built. Indeed, strategic trade controls, even if extended beyond dual-use goods to military items, do not by definition target one specific country, but rather establish through legislation a set of criteria (which may, in the case of certain countries, include necessitating export author-

165 "Embargoes and Sanctions on the Republic of Guinea," Department for Business, Innovations and Skills, UK Government, <https://www.gov.uk/guidance/armsembargo-on-the-republic-of-guinea>.

166 "Russia Extends Tit-for-Tat Sanctions against West," *Al-Jazeera*, June 24. 2015.

isation to specific destinations) according to which certain items are subject to authorisation. This objective is more pragmatic and limited than sanctions.

Iran sanctions are again a good example. Previous to the sanctions, dual-use goods destined for Iran were governed by strategic trade legislation states imposed whereby certain goods required a licence for export. Countries' lists for nuclear-related goods are usually derived from INFCIRC254 Parts I and II of the Nuclear Suppliers Group (NSG). The entire dual-use control list for nuclear-related goods of the NSG was then incorporated into UN sanctions, which banned outright trade of those goods to Iran as part of a more general aim to stop Iran's nuclear weapons programme.¹⁶⁷

Apart from delaying or stopping an activity from taking place, strategic trade controls have other objectives that are unrelated to sanctions and which demonstrate that they are not just a subset of them. Strategic trade controls can in fact be used to promote trade and investment, as implementing them can be a signal to the international community that it is safe and secure to develop dual-use industries and knowledge. For example, many Southeast Asian countries are keen to effectively implement strategic trade controls not just to comply with UNSCR 1540, but also because they see it as encouraging investment from international companies to open subsidiaries, or even to encourage national dual-use production and export.¹⁶⁸ Finally, strategic trade controls can also be used as a tool to protect technology – indeed, many international export control regimes have been accused of doing just that by non-members, although a country could also unilaterally choose to impose export controls to protect certain sensitive industries and technologies.¹⁶⁹

167 United Nations Security Council Resolution 1929, SC/Res/1929, 2010.

168 See: "Special Section: Strategic Trade Controls in Southeast Asia," *Strategic Trade Review* 2:2 (Spring 2016), pp. 72-139.

169 Andy Rachmianto, "Indonesia's Approach to Strategic Trade Controls: The Perspective of a Developing and Archipalegic Country," *Strategic Trade Review* 2:2 (Spring 2016), pp. 130-139.

Both strategic trade controls and sanctions are implemented by states in order to comply with international legal obligations and to have an effect on States' behavior. The scope of that effect is the main divergence between the two areas, and beyond that, the objectives differ even more as trade controls can be used to encourage investment or trade as well as protect supplier advantage.

While the discussion regarding definitions and objectives signal that sanctions and strategic trade controls are mostly separate with few overlaps, a more analytical discussion concerns the freedom with which strategic trade controls can be turned into a form of sanctions. This regards specifically the potential use or even abuse of end-user controls and catch-all controls to impose sanctions that are not officially referred to as sanctions. In practice, this means the subjection to licencing and denial of all items with a certain characteristics, end-use, or end-user to a certain destination. On the other hand, sanctions on dual-use goods are basically export denials – meaning that potentially they are two sides of the same coin. The only differentiation, apart from this procedural question clearly distinguishing the two areas, is the objectives discussed.

4. STAKEHOLDERS

Stakeholders involved in sanctions are operators, or those who are forbidden by sanctions to trade in certain items, will differ from those involved in strategic trade controls, in that they most likely will be much broader. While WMD-related dual-use operators already cover a broad scope of areas, operators affected by sanctions cover potentially every area of trade. For example, the United States embargo against Cuba covered, at least for a certain time period, trade of all goods and services between the two countries, in order to completely isolate Cuba.¹⁷⁰

170 "US-Cuba Relations," Council on Foreign Relations, March 24, 2016, <http://www.cfr.org/cuba/us-cuba-relations/p11113>.

This meant that all companies exporting any good to Cuba would be doing so illegally and could be prosecuted. In addition, all stakeholders involved in the complete supply chain – brokers, shippers, financing organizations – are also liable depending on the scope of sanctions. Under strategic trade controls, only the operators of the supply chain directly related to controlled and listed dual-use items are liable.

One particularly tricky area that has been developed to a greater extent in strategic trade controls than for broader economic sanctions involve the handling of intangible transfers. Many countries now control intangible transfers through their strategic trade legislation. In fact, this area of strategic trade controls has evolved as far as having an accepted definition of intangible transfers through the Wassenaar Arrangement, the export control regime controlling conventional arms and dual-use technologies, which define them as “Specific information necessary for the development, production, or use of [controlled] goods or software” such as blue prints, plans, diagrams, models, formulae, tables, source code, engineering designs and specifications, models and instructions, written or recorded on other media or devices.¹⁷¹ This definition may vary from one piece of legislation to another, but the overall idea is the same, that not just material items are controlled.

Sanctions, on the other hand, do not generally include or emphasise intangible transfers. This may be because usually the goods subject to sanctions are of a less sensitive nature – for example, a banana can’t directly be used in a weapons programme, or because the goods in question clearly only have a single use, such as the case of weapons subject to arms embargos. It may be worth examining whether for other less clear-cut cases, embargoes should more explicitly control intangible transfers, and if so, whether it may be possible to draw upon the extensive existing literature on intangible transfers in the context of strategic trade controls.

171 The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies. The Wassenaar Arrangement. (2013). Definitions and terms used in these lists, <http://www.wassenaar.org/controllists/index.html>.

Another issue from the point of view of operators – and one that signals clear intersection in the effects and scope of both strategic trade controls and sanctions – is compliance. More specifically, from the point of view of exporters, are compliance procedures the same for both areas, or different? The logical counterpoint being, are strategies used to break the law the same, or different? From exporters' point of view, compliance with sanctions and strategic trade controls, for those that produce dual-use goods, differs only insofar as the difference between a ban or authorisation. If the good to be exported is sanctioned, there is no need to apply for a licence. If the good to be exported is a listed dual-use good, a licence application must be filed with the national licencing authority. In practice, operators try to keep track of these procedures through databases they manage or pay external companies or access to the latest databases of information. For medium or large companies, the resources used to keep track of this information are greater than for small and medium sized enterprises (SMEs). SMEs may not only lack in resources to follow the latest updates, but may not even be aware that the goods they export are subject to a ban or authorisation process. Efforts to find synergies between the two areas in order to make the latest updates as current and streamlined as possible will increase exporter compliance and make both strategic trade controls and sanctions more effective.

From the point of view of companies with the intention to export illegally, the methods to do so will differ only minimally between sanctions and strategic trade controls. One strategy exporters may choose is to evade the authorisation process altogether for listed dual-use items, in which case their methods will duplicate methods used to break sanctions. Otherwise, exporters may provide false information during the licencing process to receive an authorisation and try to export the good “legally”.¹⁷²

172 See Glenn Anderson, “Points of Deception: Exploring how Proliferators Evade Controls to Obtain Dual-Use Goods,” *Strategic Trade Review* 2:2 (Spring 2016), pp. 4-25.

5. THE MEANING OF EFFECTIVENESS

While in many respects sanctions and strategic trade controls are two separate fields with some divergence of definitions, objectives and stakeholders, when it comes to measuring effectiveness, the two are remarkably similar. This section will examine these common points and explore the consequences, especially regarding potential methods to overcome implementation challenges. On one hand, effectiveness can be measured in terms of the characteristics of strategic trade controls and sanctions themselves. In this respect, the two are remarkably similar. These factors are:

5.1. Universality of implementation

Both sanctions and strategic trade controls are ineffective if stakeholders do not implement them. In terms of national implementation of sanctions, this means UN Member States implementing UN sanctions, and EU Member States implementing EU sanctions. In addition, all agencies involved, such as licencing authorities, customs, intelligence services, etc must have the resources to properly implement sanctions, from passing the proper legislation to enforcement procedures. For strategic trade controls, universality of implementation directly affects effectiveness. If few countries implement controls, illegal importers will target countries without controls in place. Looking at the sheer number of countries implementing sanctions and strategic trade controls is not, an independently adequate measure of effectiveness due to other factors. It can, however, be a useful starting point.

5.2. Compliance

Having sanctions and/or strategic trade control legislation in place cannot be a reliable measure of effectiveness if operators involved in the supply chain are uncompliant. Ensuring compliance means employing methods that are the same for both fields. This includes having clear and current legislation that is accessible to

operators, conducting outreach in order to build awareness of the law as well as the consequences of breaking it, the promotion and implementation of internal compliance programmes (ICPs), and other structures and procedures companies must have in place to make sure they comply with the law.

In addition, a variety of external factors may also affect how well sanctions and strategic trade controls are able to reach their objectives. These are:

5.3. Degree of alternative suppliers

If alternative suppliers are able to provide the items that targeted end-users are unable to procure due to embargoes or export denials, both strategic trade controls and sanctions' effectiveness will be compromised. This measure of effectiveness may also be used when deciding whether the costs of imposing sanctions outweigh the benefits in an overall analysis of the best foreign policy tools available to achieve a desired result. For strategic trade controls, the matter is trickier due to the sensitivity of goods involved. The more potential alternative suppliers are available, the greater the need to make sure they abide by trade control regulations.

5.4. Precision of targets

For strategic trade controls, precision of targets essentially refers to making sure that dual-use items do not end up contributing to a WMD programme. Targeting is done through licencing criteria which play into the decision of licence approval or denial through a mix of factors such as end-user, end-use, destination, and characteristics of an item. The more precise the criteria are, the more likely the target will be precise. In addition, the system must be sensitive to methods proliferators will use to export illegally, such as the falsification of documents. For sanctions, precision of targets may have a broader meaning due to the scope of such sanctions being broader as well. For example, if the objective is to force democratic elections to take place in a country ruled by a military dictatorship, embargoes on basic necessities may work in

the regime's favor rather than against them. In the case of DPRK sanctions, the DPRK uses UN sanctions to build animosity towards the international community and allegiance to the State, potentially hurting the sanctions' objectives.¹⁷³ Therefore, in terms of sanctions targets refer to the country targeted as well as the goods under embargo and both must be carefully considered in order to increase effectiveness.

5.5. Combination with other Policy Tools

Strategic trade controls cannot, alone, effectively delay or stop an illegal WMD programme from being built. In the same line, sanctions cannot be the only tool used to achieve behavioral change in a target country. Other foreign policy tools, such as diplomacy, threat or use of force, deterrence, or foreign aid, among other tools, should work together to ensure the desired outcome.

5.6. Political Factors in Targeted Country

While strategic trade controls and sanctions can be effective in their own right in bringing about desired objectives, effectiveness may also be dependent on political factors in targeted countries. For example, a change in leadership, an economic crisis, or a wave of political protest may inspire political decisions in target countries that would not otherwise take place solely due to sanctions or trade controls.

5.7. Time

Finally, the factor of time is an important consideration for measuring effectiveness but may also be a point of differentiation between strategic trade controls and sanctions. For sanctions, time is both an internal and external measure of effectiveness, albeit subjective depending on the point in time chosen for analysis. For example, did UN sanctions on Libya achieve their objectives?

173 "North Korea Using U.N. Sanctions to Unite Public Opinion behind Leadership," Yonhap News Agency, January 31, 2013, <http://english.yonhapnews.co.kr/northkorea/2013/01/30/8/0401000000AEN20130130011600325F.HTML>.

Perhaps analyzed on 19 December 2003, one could argue that sanctions were effective, because Libya gave up its nuclear weapons programme.¹⁷⁴ However, given the current political and security situation in Libya as of 2016, the positive effect of sanctions is more debatable. This issue must be considered when sanctions are developed and implemented in order to imagine a more long-term view of potential effects and outcomes.

For strategic trade controls, the issue of time is less pertinent to effectiveness. Of course, the longer controls are in place and implemented effectively, the more likely they are to achieve their desired effect. However, since the objectives are more limited in scope, time plays a lesser role.

6. CONCLUSION

This chapter has demonstrated points of commonality and divergence between strategic trade controls and sanctions in terms of definitions, objectives, stakeholders and measures of effectiveness. What is of interest to this analysis is identification of strengths in one area that can be shared with another, or where both areas share commonalities that can be used as lessons to increase effectiveness. Throughout the comparative study, several such points were identified, namely the focus on intangible transfers of technology, the use of catch-all and end-user controls, and the necessity of clear and streamlined communication between national authorities and operators along the supply chain.

The perspective from which strategic trade controls and sanctions have the most in common is through measures of effectiveness. This information can be used to share methods and procedures that may be pertinent to one or the other in order to increase the effectiveness of both. Focusing on universal implementation and

174 "Chronology of Libya's Disarmament and Relations with the United States," Arms Control Association, February 2014, <https://www.armscontrol.org/factsheets/LibyaChronology>.

compliance are the two areas where effectiveness can be increased. Conducting capacity-building programmes in countries with weak implementation and compliance, implementing risk-assessment procedures and targeting, enhancing information-sharing and inter-agency communication, devoting resources to outreach to operators, and enhancing the type and size of penalties for violations are just some areas of convergence that can be implemented to increase effectiveness.

This comparative analysis yields a final, general point: the supremely important role of trade. Both strategic trade controls and sanctions in the form of embargos and trade restrictions manipulate free exchange of goods in order to bring about foreign policy objectives. Increasing the effectiveness of both tools can render them ever more powerful in influencing the course of the future of the international community.