Elgar Encyclopedia of International Economic Law

Edited by

Thomas Cottier

Professor Emeritus, World Trade Institute, Bern, Switzerland, and Adjunct Professor of Law, University of Ottawa, Canada

Krista Nadakavukaren Schefer

Co-Head of Legal Services, Swiss Institute of Comparative Law, and Senior Fellow, World Trade Institute, Bern, Switzerland

With

Jonas Baumann, Brigitta Imeli and Julian Powell, *Assistant Editors*
Rebecca Gilgen, *Language Editor*

Edward Elgar PUBLISHING

Cheltenham, UK • Northampton, MA, USA

(vi) Political decision-making and enforcement

Once the problem-solving process has enabled the parties to find a solution to the conflict, it is paramount to ensure its effective implementation and to provide that such solutions receive the approval and endorsement of the highest political authority within the host State.

International investment law, however, should entail much more than investor-State disputes, it should be an instrument for governance. In a globalized world where patterns of international production are leading every day to a higher level of interaction among foreign and local investors, governments, and civil society, one trend has become increasingly clear: there is an evident need for an international investment regime that promotes the maximization of the positive impact of foreign investments in host countries as well as the mitigation of any potential negative effect.

ROBERTO ECHANDI AND MARIANA HERNANDEZ CRESPO GONSTEAD

Selected References

Mariana Hernandez Crespo, 'From Paper to People: Building Conflict Resolution Capacity and Frameworks for Sustainable Implementation of IIAs to Increase Investor-State Satisfaction' in UNCTAD (ed), *Investor-State Disputes: Prevention and Alternatives to Arbitration II, Proceedings of the Washington and Lee University and UNCTAD Joint Symposium on International Investment and Alternative Dispute Resolution, held on 29 March 2010 in Lexington, Virginia, USA* (UN 2011)

Roberto Echandi, 'Complementing Investor–State Dispute Resolution: A Conceptual Framework for Investor–State Conflict Management' in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy* (World Trade Forum, CUP 2013)

Roberto Echandi, 'Can International Investor-State Disputes be Prevented? Empirical Evidence from Settlements in ICSID Arbitration' (2014) 29(1) *ICSID Review* 41–65

Mariana Hernandez Crespo Gonstead, 'From Clash to Complementarity: The Potential of Investor-State Co-Mediation to Foster and Retain Foreign Direct Investment' (forthcoming 2017) 33 Ohio St J on Disp Resol 1

Mariana Hernandez Crespo Gonstead, 'A New Chapter in Natural Resource-Seeking Investment: Using Shared Decisions System Design (SDSD) to Strengthen Investor-State and Community Relationships' (2017) 18(3) Cardozo Conflict Resol J

Part II Section VII

Economic Sanctions

not only decision-makers, but also individuals and entities associated with or taking part in the broader 'supply chain' of the proscribed activities.

Typology of targeted sanctions

Sanctions can be targeted in a number of different ways. Individual sanctions (e.g. asset freezes, travel bans) are applied to designated individuals and corporate entities. Diplomatic sanctions impose restrictions on the diplomatic activity of a government or political entity and include measures such as restrictions on diplomatic personnel, closing of embassies or offices of representation, suspensions of membership to regional organizations and revisions of visa policy. Sectoral sanctions affect a particular sector of a country and include measures such as arms embargoes, restrictions on proliferation-sensitive technology and transportation restrictions. Commodity sanctions limit trade in specific resources of the targeted entity. While these apply most commonly to natural resources (e.g. oil, timber, diamonds, charcoal), they can also be applied to luxury goods, cultural property, or chemicals. Financial sector sanctions have a broader impact on the economy and include measures such as conditional investment bans, sovereign wealth fund restrictions, and other restrictions. It is useful to think about these different types of sanctions on a continuum, based on their degree of discrimination, with the most 'targeted' measures (individual sanctions) on one end and relatively more 'comprehensive' ones (like broad financial sector restrictions) on the other.

Difference to comprehensive sanctions

While targeted sanctions vary in the degree of discrimination and differ from comprehensive sanctions in that they are not imposed indiscriminately on an entire population, this does not mean that they do not provoke unintended consequences. Because they involve prohibitions, targeted sanctions often result in increases in corruption and criminality or lead to harmful effects on neighbouring States. Sanctions targeting key economic sectors such as oil or finance affect entire populations and are more likely to result in declines in standards of living or humanitarian crises. Targeted sanctions may also lead to positive unintended consequences, such as improved regulations in natural resources or finance. Still, targeted sanctions are considered more normatively acceptable than comprehensive sanctions, which inflict very high costs on innocent civilians. Targeted measures are qualitatively different from comprehensive sanctions, which are an 'all or nothing' policy instrument which halts all international economic and commercial transactions with a country. In this sense, comprehensive sanctions are not a flexible or agile policy instrument, and are intended to isolate the target completely. By contrast, targeted sanctions can be manipulated in response to target behavior, increasing restrictions or providing encouragement as necessary. Like comprehensive sanctions, they should be seen as policy instruments that exist within a larger bargaining framework between senders and targets. Unlike comprehensive measures, however, they can be applied in an incremental manner and be ratcheted upward or downward in response to actions taken by targets, or to changes on the ground. Targeted sanctions are more adaptable than comprehensive sanctions and can be more easily calibrated to influence or affect targets.

Complexity and challenges

As this instrument came to be more widely used, so it also grew more complex. The central aspect of this evolving complexity was the diversification of targets of individual sanctions. In line with changes in the legal and practical understanding of sanctions, they were imposed not only on State actors, but also on rebel groups participating in local disputes or civil wars. This was the case, for example, with the targeting of the National Union for the Total Independence of Angola's (UNITA's) leadership in Angola. Second, by the turn of the present century individual sanctions were targeting not only the leaders of illegitimate regimes or rebel groups, but also their family members and supporters, along with persons and private companies engaged in the supply chain of their activities—seeking to indirectly influence their policy either by coercing a change of behavior, or by constraining their capacity to conduct that policy.

A study of individual UN sanctions found that, contrary to initial expectations about individual targeted sanctions, leaders are not the most frequently targeted group. Out of a total of 446 non-terrorism-related individual UN sanctions analysed, almost half (209) targeted administrators, and another 80 targeted supporters. In these cases, the authors rightly argue, sanctions are closely associated with 'criminal procedures', since they judge the participation of individuals in some internationally proscribed activities.

For this reason, targeted sanctions have suffered numerous legal challenges. These have been primarily concerned with the absence of fundamental human rights in the designation of individuals, most notably by the Security Council. In the understanding that these measures were unlikely ever to be lifted, litigation processes challenged their authority to impose individual sanctions without upholding the most basic principles of due process. These judicial processes constituted the first ever robust challenge to the Council's authority in domestic courts and constituencies, establishing dangerous precedents with immense implications for its institutional prerogatives as established in the Charter. For its part, the UNSC tentatively and reluctantly addressed the issue with improvements in its listing and de-listing procedures, and with the establishment of the Office of the Ombudsperson. This was an important (although restricted) institutional innovation that established, at least informally, an imperfect form of 'judicial' review. In spite of these changes, legal challenges have continued to arise, in some cases proving to be pertinent in the eyes of the courts.

Still, while targeted and comprehensive sanctions co-existed until 2003, more targeted types of sanctions have become the standard. The Security Council stopped imposing comprehensive sanctions in 1994, and moved towards more targeted types of sanctions in the last two decades. This is in spite of the fact that within sanctions regimes, measures tend to become less targeted over time. However, sanctions might have in practice broader impacts in the population than originally intended. As sanctions are incorporated into domestic law, their scope might be expanded in line with governments' own political goals. Similarly, private sector entities, such as banks, which are directly responsible for implementing targeted financial sanctions may find it simpler or less costly to make broader restrictions on an entire country or sector than going through the resource intensive process of identifying specific accounts, resulting in overcompliance and less targeted sanctions.

MARCOS TOURINHO

Selected References

Thomas Biersteker, Sue E Eckert and Marcos Tourinho, *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action* (CUP 2016)

Daniel W Drezner, 'Sanctions Sometimes Smart? Targeted Sanctions in Theory and Practice' (2011) 13(1) *International Studies Review* 96

Jeremy Farrall, *United Nations Sanctions and the Rule of Law* (CUP 2007)

Bardo Fassbender, 'Targeted Sanctions Imposed by the UN Security Council and Due Process Concerns: A Study Commissioned by the UN Office of Legal Affairs and Follow-up Action by the United Nations' (2006) 3 *International Organizations Law Review* 437

Peter Wallensteen and Helena Grusell, 'Targeting the Right Targets? The UN Use of Individual Sanctions' (2012) 18(2) *Global Governance: A Review of Multilateralism and International Organizations* 96

II.67 Unilateral Sanctions in International Economic Law

In the field of international relations, unilateral sanctions are measures imposed to deter or punish acts or activities deemed undesirable, even if those acts or activities are not per se contrary to public international law. Thus, unlike countermeasures, such sanctions (sometimes more neutrally called 'restrictive measures') are not always grounded on a prior violation of international law. Unilateral economic sanctions can therefore be defined as unfriendly acts of economic nature intended as a reaction to acts or situations disapproved for legal, political, economic, environmental, social, military, security or other reasons. While not all unilateral sanctions are economic in nature, many have at least an economic component. Often, a wide range of sanctions are imposed, containing both economic and political measures.

Sanctions are called 'unilateral' when they are decided individually by one State. This is in contrast to sanctions imposed collectively, usually pursuant to the decision of an international organization (e.g. Art. 41 United Nations (UN) Charter). This distinction may be blurred in reality, because (1) some international organizations (notably the European Union) impose unilateral sanctions; (2) international organizations sometimes allow or recommend sanctions without formally requesting their members to implement them; (3) unilateral sanctions

ELGAR ENCYCLOPEDIA OF INTERNATIONAL ECONOMIC LAW

are often imposed alongside (and supplementary to) sanctions decided by an international organization (e.g. the UN Security Council); and (4) allied States, while formally acting individually, tend to coordinate their 'unilateral' sanctions to more effectively achieve their common goals. The term 'unilateral' excludes sanctions taken or mandated by international organizations against their own members who do not abide by the rules of the organization (such as suspension of concessions in the World Trade Organization (WTO)).

Goals

The goals of unilateral economic sanctions vary according to the target, the sender, and what the latter perceives as the significant international problem(s) at the time. The different goals are not mutually exclusive, and may vary from regime change to the protection of human rights.

Sanctions imposed with the view of changing a State regime were used in the context of the fight against Communism during the Cold War and are still imposed nowadays against, for example, Islamic, authoritarian or 'brutal' regimes. The 1990s (sometimes called 'the sanctions decade') saw a surge in economic sanctions, explained to a significant extent by the measures against Iraq following the first Gulf War. Institutionalized racism, apartheid, colonialism and other massive violations of human rights also triggered a number of unilateral economic sanctions programs, notably in the African context. Further, numerous sanctions have been used to pursue military goals, for example to deter States from acquiring or developing particular types of weapons, in particular atomic or chemical equipment, or to induce them to withdraw from some military activity (acts of aggression, invasion of a foreign State, military support to rebels or groups seeking independence, etc.).

More recently, unilateral sanctions were imposed to combat international criminal activities such as drug trafficking, piracy or terrorism. These are conducted by groups independent from any State, or only remotely linked to a State (e.g. the al Qaeda network or the Taliban).

Targets

As instruments of international policy, sanctions may target a foreign State, hampering to varying degrees the economic relations between the sender and the target.

However, an increasing number of sanctions are aimed at individuals such as official or effective State rulers, their family members and business partners. Under the label of 'smart sanctions', these sanctions aim to affect only those who decide, implement, support or benefit from the undesirable behaviour without punishing the whole population. Individual targets also include terrorists, drug traffickers or, importantly, members of groups engaged in undesirable activities. Public or private companies and other internal or international entities, with or without a legal personality, can be included in the lists of involved persons.

Types

A wide range of sanctions is observed in contemporary practice. Economic sanctions can be divided into two major categories, depending on whether exchanges of goods and services, or financial transactions are concerned.

The most far-reaching sanction affecting goods and services is the full embargo, blocking all kinds of economic exchange between the sanctioning and the target States. More moderate are the export or import prohibition of certain types of goods to or from the target State. The goods whose export is usually restricted are those which are used to carry out the undesirable activities. These may be weapons or goods that could serve as such. These 'dual-use' goods may include aircraft, electronic equipment, and radioactive materials. Import restrictions put pressure on the target by imposing damage on significant sectors of its economy; for example, raw materials such as oil are frequent objects of import restrictions. In each case, the sender must carefully consider both the desired intensity of the sanctions and the potential backlash onto its own economy.

Financial sanctions take the form of freezing physical or financial assets located in, or transiting through, the sanctioning State, and prohibiting a range of financial and economic transactions including new investment, current payments, procurement, sales, leases and loans.

Travel prohibitions to and from the target State, or limited to designated natural persons,

are also used as sanctions. These may have economic, political and personal consequences depending on the individuals involved.

Finally, the cancellation, suspension or non-renewal of benefits or other preferential treatment previously accorded to the target State can be used as sanctions. This is also the case for other inimical or non-cooperative actions in the framework of international organizations (use of veto rights, blocking of accession process to an international organization, etc.).

Compatibility with international law

Economic sanctions as defined above are traditionally deemed to fall under the concepts of retorsion or countermeasures, depending on whether the act of the sanctioning State is intrinsically licit or not.

Retorsion measures do not raise major legal issues. They are at the discretion of any State, independent of the target State's prior behaviour. For example, the International Court of Justice (ICJ) declared that the principle of non-intervention was not violated by the considerable economic sanctions (embargo, end of economic aid) imposed by the United States against Nicaragua.[6]

Countermeasures, on the contrary, would be wrongful were they not aimed at enforcing the target State's cessation and reparation obligations following an international wrongful act. Moreover, they must conform to substantial and procedural conditions, among which proportionality between the violation and the sanction is the most important.

Even if they conform to customary international law, sanctions can constitute a breach of an international treaty. Some literature is devoted to the compatibility of unilateral economic sanctions with General Agreement on Tariffs and Trade (GATT)/WTO obligations of most-favoured-nation (MFN) treatment or market access, but other international economic law treaties may be involved as well (such as investment protection agreements).

The development of economic sanctions and the targeting of numerous individuals led to concerns about human rights violations, both on substantial and procedural grounds.

[6] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*. Merits, Judgment. ICJ Reports 1986, p. 14, para. 245.

Exemptions are sometimes provided for humanitarian reasons or to satisfy the basic needs of the persons involved. In Europe, European Court of Justice (ECJ) case-law clarified that property rights may not be restricted without adequate justification, the rights of the defence must be respected, and individuals hit by unilateral decisions imposing sanctions should have the right to an effective remedy.

The will of sanctioning States to design broadly encompassing sanctions and to prevent circumvention sometimes leads to extraterritorial measures or secondary sanctions, such as prohibitions imposed on foreign subsidiaries or branches of the sanctioning State's enterprises, or the sanctioning of foreign companies maintaining business relationships in the target State while no sanctions are imposed by their home State. This has raised difficulties in international relations; the relevant legal principles are those limiting the jurisdiction of States (i.e. mainly nationality and territoriality), but much uncertainty remains in practice.

HENRI CULOT

Selected References

Gary C Hufbauer, Jeffrey J Schott, Kimberly A Elliott and Barbara Oegg, *Economic Sanctions Reconsidered* (3rd edition, Peterson Institute for International Economics 2007)

Alexander Kern, *Economic Sanctions: Law and Public Policy* (Palgrave Macmillan 2009)

Andreas F Lowenfeld, *International Economic Law* (OUP 2002)

Michael P Malloy (ed), *Economic Sanctions* (Edward Elgar Publishing 2015)

Laura Picchio Forlati and Linos-Alexandre Sicilianos (eds), *Economic Sanctions in International Law/Les sanctions économiques en droit international* (Martinus Nijhoff 2004)

II.68 International Trade Sanctions and Awards in Commercial Arbitration

Due to geopolitical developments in Eastern Europe and the Middle East during recent years, there has been a marked increase in international trade sanctions imposed by the United Nations (UN), the European Union (EU) and sovereign States. Ranging from the embargo to the freezing of assets of listed persons, these