2-6-U26-2902

INTERNATIONAL AND EUROPEAN SANCTIONS FOR THE TRADE OF DUAL-USE GOODS AND TECHNOLOGIES: A COMPARATIVE OVERVIEW

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ABSTRACT

Freedom of trade encounters some limits when the object of trade is constituted by dual-use goods and technologies, which are materials and items normally used for civilian/peaceful purposes that also have military applications. One form of controlling their trade is represented by the imposition of sanctions for the cases of violation of trade rules. International and European Union (EU) sanctions in this area may address the State ('comprehensive' sanctions, such as embargoes and financial measures), or specific individuals or groups involved in legal activities ('targeted' or 'smart' sanctions, such as asset freezes and travel bans).

This paper aims to develop a comparative analysis between measures imposed at the level of the United Nations (UN) and within the EU framework.

Key Words: dual-use goods, sanctions, embargo, target measures.

INTRODUCTION

One of the basic rules in trade law is the freedom of trade. However, such a rule encounters some limitations when the object of trade is constituted by dual-use goods and technologies.

Despite the difficulty of defining what 'dual-use' means,[2] there is a common understanding that the term refers to goods having either peaceful (civilian/commercial) or non-peaceful/military applications. They could be physical or encompass intangible technology: in the first category there are goods like chemical, biological, nuclear materials, delivery systems and surveillance technology that could be used for human rights abuses, while to the second group belong, for instance, software and emails that could spread illicit knowledge and are spreading intangible know-how regarding knowledge and research.

Since these goods may affect non-economic needs, such as national security, public morals, public order, etc., it is necessary to control their trade and diffusion through trade control rules. For this reason, measures that provide for surveillance on all activities conducted by individuals, organizations, and groups regarding dual-use items have been introduced by States and individual actors. The controlled 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 of goods. It is also important to fix restrictions, bans and penalties in case of violation of trade control rules. Therefore, the issue of sanctions is a relevant component of control of dual-use goods.

SUPRANATIONAL SANCTIONS FOR THE TRADE OF DUAL-USE ITEMS

In general terms, sanctions are a reaction to the violation of a rule. If we refer to sanctions for the trade of dual-use items and consider the supranational level (keeping aside the national sanctions), it emerges that such measures have the following characteristics:

- author (who): supranational organizations at the international or regional level;

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[2] In this context, we make reference to dual-use as applied to Weapons of Mass Destruction (WMD) export controls, keeping aside the broader notion of dual-use dilemma, which means that a research or its applications may be used for civilian uses or for building weapons and other military purposes. About the multiple meanings of 'dual-use', see Atlas and Dando, 2006.

- target (to whom): States (these are the so-called 'comprehensive or broad-based sanctions'), or single individuals/enterprises ('targeted or smart sanctions') (Hufbauer and Oegg, 2000);
- purpose (why): (i) coercive purpose, when sanctions seek behavioural change from groups and individuals held responsible for illicit behaviour; (ii) constrain, if they look to undermine the targets' capacities to achieve their objectives; and (iii) signal, if they disapprove of certain actions;
- nature (what/how): they can consist of economic or non-economic measures. The first group includes (Chan and Drury, 2000; Fruchart, Holtom *and* Wezeman, 2007): (i) the interruption of normal economic transactions or restriction of access to economic resources for a target country. This is the case with the embargo of a country, and it may refer to all its resources ('comprehensive embargo') or to specific goods, such as arms, some services like technical assistance and training (this is a 'selective embargo'), and (ii) financial sanctions, consisting in restrictions on support for trade, and restrictions on access to capital, resources and financial transactions (asset freezes) (Tostensen and Bull, 2002).

Non-economic sanctions include: transport measures (preventing a person from getting a visa, or banning aircrafts from entering or transiting a country), and political and diplomatic measures (consisting in the expulsion of diplomats, the restrictions or breaking of diplomatic relationships with a country, or the suspension or expulsion of the target state from international organizations).

Sanctions enacted at the international and EU level and having as an object dual-use goods are economic in nature, but their aim is to obtain political or policy results, such as the determination of a change in political regime, the blockage of a proliferation program, the end of the violation of human rights and democratic liberties, etc. Thus, they have foreign policy purposes.

The origin of the modern idea of sanctions dates back to the period after World War I (Alikhani, 1995) when the American President Woodrow Wilson affirmed:

> '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' (Hufbauer, 1997).

The League of Nations firstly and then the United Nations (Elliott, Hufbauer and Oegg, 2008) have used sanctions as a meaningful instrument for pursuing their purposes. Over the years, the European Union (EU) has moved in the same direction.

AT THE INTERNATIONAL LEVEL

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. It is possible to distinguish the UN interventions into two categories: legally binding (formal) sanctions and non-legally binding (informal) ones.

Since informal sanctions are secondary (Talmon, 2003) and do not determine legal duties upon States, our attention is devoted to legally binding sanctions only.

Chapter VII UN Charter and UN Resolutions

The main 'actor' for the imposition of sanctions is the Security Council (SC).[3] The legal basis for its role is 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'. Indeed, in case of threats to peace

[3] A limited role is recognized for the Assembly General (AG), which can decide on the expulsion of a State from the UN or the suspension of its rights because of violation of the measures decided by the SC. This power, based on art. 5 of the UN Charter, has never been exercised. Moreover, the AG can recommend some restrictive measures towards a State, but the SC is not obliged to adopt them.

and security, or aggressions, the SC – after the initial determination of the existence of a threat (art. 39) – could bring upon a State the 'complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication' (art. 41).

In the first years of the UN's activities, there was a debate about the limits of the SC's power, as its sanctions were seen as *ultra vires* entering domestic jurisdiction (Fenwick, 1967, p. 753). Later on, the debate ended up in stating that the list of sanctions embedded in the aforementioned legal provisions is not exhaustive, and one could imagine that the SC could broaden the typologies on a case-by-case basis (Carisch and Loraine, 2011).

Nowadays, the recourse to Chapter VII is the *extrema ratio* for the SC: it is more proper to begin with actions under Chapter VI (Pacific settlement of Disputes) before resorting to more interventions pursuant to art. 41.

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

Thus, sanctions referring to dual-use items find their legal basis in art. 41 UN Charter, and they are imposed by the SC through legally binding resolutions, as long as the illegal activities represent a breach of peace and security.[4]

The adoption of sanctions requires a majority of 9 out of the 15 members of the SC, and no veto by any of the five permanent members. Abstention constitutes neither a negative vote nor a veto.

A sanction resolution usually establishes a Sanctions Committee for monitoring the implementation of sanctions.[5] Moreover, the Council mandates a Panel of Experts to assist the Committee in monitoring compliance with the sanctions regime. Their reports, taken by consensus, are referred to the Sanctions Committee (UN Security Council, 2006).

Since the 1990s, when the 'sanctions decade' (Cortright and Lopez, 2000) began, targeted sanctions, addressing specific listed people and groups,[6] 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 that of terrorism sanctions against Taliban or Al-Qaida groups.

Considering, in particular, the UN sanctions related to dual-use items (even if the UN texts never mention the expression 'dual-use' as such), it can be noted that the first category to be addressed has been that of chemical weapons and related products that could be used for the production of Weapons of Mass Destruction (WMD). For instance, during the Iran–Iraq, conflict, the SC requested the States to prohibit the export of those materials (res. 612 (1988)). Then, in res. 687 (1991) Iraq was requested to destroy and remove all the WMD arsenals (chemical and biological arsenals, and ballistic missiles: para. 8), and an embargo on WMD dual-use related items, technology and materials was established (para. 10, 12, 20 and 24).

The most emblematic cases of sanctions related to dual-use items are represented by Iran and North Korea. In case of Iran, res. 1696 (2006) required States to 'prevent the transfers of any items, materials, good and technology that could contribute to Iran's enrichment-related and reprocessing activities and ballistic missile programmes' (para. 5). Then, res. 1737 (2006) added the prohibition of technical or financial assistance, training, or resources related to

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

[5] Sanction Committees are pursuant to art. 29 of the UN Charter and Rule 28 of the Security Council's provisional rules of procedure.

[6] The discussion on targeted sanctions started in 1998/1999 at the Interlaken Process, which focused on the issue of targeted financial sanctions; it continued at the Bonn-Berlin Process, 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, 2012.

certain nuclear and ballistic missile-related goods (para. 6), while the further res. 1747 (2007) banned the supply, sale, or transfer of major military weapons systems and related material to Iran (para. 6), and it prevented the entry or transit of people involved with Iran's proliferation of sensitive nuclear activities or in the development of nuclear weapon delivery systems, such as for the procurement of the prohibited dual-use items, goods, equipment, materials and technology (para. 2). Regarding the Democratic People's Republic of Korea (DPRK), res. 1695 (2006) required the States to prevent missile and missile-related items, materials, goods and technology being transferred to DPRK's missile or WMD programs, as well as the procurement of those items, and any financial resources in relation to DPRK's missile or WMD programs (para. 3 and 4). Then, res. 1718 (2006) provided an embargo on items, as set out in the Nuclear Suppliers Group Lists and Missile Technology Control Regime (MCTR), also taking into account the Australia Group list, and it banned any form of transfer and procurement of those items (para. 8 (a) and (b)).

In some cases, the issue of dual-use items appears in the context of targeted sanctions. Res. 1333 (2000) and 2160 (2014) against Taliban forces in Afghanistan prevented States from pursuing the sale, supply, or transfer of chemical acetic anhydrite to any person in the territory of Afghanistan under Taliban control (para. 10 of res. 1333 and para. 9 of res. 2160).

Some Remarks on the UN Regime

Keeping aside the issue of effectiveness, i.e. sanctions' capacity to produce the effects they pursue, which depends on several factors (Elliott, 1998), one important element to be underlined is that UN resolutions appear sometimes unclear as for the notions that they mention. For example, the term "luxury goods" in Res. 1718 (2006) against North Korea remains undefined, and so it leaves the margin of appreciation quite open for States. This can generate possible discrepancies between different States in the implementation process.

Moreover, the mechanisms of monitoring assistance, enforcement, evaluation and implementation of adopted sanctions are still weak. In particular, if the sanction is not respected by the target State, there is no possibility of intervention by a judicial or police body, despite the draft of recommendations that pushes towards this sense (UN Security Council, 2006). Although the UN tries to engage other organizations in the control phase, it results that the ultimate controller of sanctions is the SC itself.

As for target 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. The UN is not party to any universal or regional treaty for the protection of human rights. However, the influence of the European Union and the development of the international human rights law have strongly contributed to the importance of these individual rights and the necessity to respect them in the context of sanctions too. This has led to the creation of Focal Points for Delisting, established within the Secretariat by Res. 1730 (2006) for receiving all requests for delisting, and the inauguration of the Office of the Ombudsperson by Res. 1904 (2009) to review delisting requests for the Al-Qaida regime only (and recently with Res. 2253 (2015) for the ISIL (Da'esh) regime too). Despite the existence of these two bodies, the system still needs improvements, such as the expansion of the mandate for the Ombudsman (Hovell, 2016).

AT THE EU 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 other regional organizations (such as the League of Arab States or the African Union: Hellquist, 2014) have applied sanctions only towards their own members, i.e. on their

own territories of reference, the European Union has a specific sanctions policy towards third countries (non-Member States too).[7]

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 [...], to support of efforts to fight terrorism and the proliferation of weapons of mass destruction [...] and maintain and restore international peace and security' (European External Action Service, 2015).

In the course of time, the EU has adopted restrictive measures both against third States and against individuals. The measures against third countries could be both legally binding (formal) and non-legally binding (informal). The measures against listed/targeted individuals and enterprises for non-economic reasons could be only formal, and the focus is posed on this category only.

Formal sanctions are the measures adopted in the Common Foreign and Security Policy (CFSP) framework, and they consist of export/import restrictions, financial measures and travel bans as sanctions upon States and/or listed/targeted people.

Informal sanctions have been introduced outside the CFSP, and they mainly have a diplomatic, political or financial measure (with the only exception of an arms embargo on China, imposed informally in 1989 through a Presidential Statement).

CFSP Sanctions

Formal sanctions could be: (a) a 'rewriting' of UN SC resolutions into EU law, and thus constituting an implementation of UN sanctions, (b) EU supplementary sanctions, going beyond the UN ones and contributing to strengthening UN measures; and (c) EU autonomous sanctions, applied in absence of other sanctions.

a) On the basis of art. 48 of the UN Charter that allows States to implement UN sanctions through 'appropriate international agencies of which they are members', the EU has assumed a role as implementing agency of the UN. Then, art. 3.5 and art. 21 TEU indicate the EU's role in the contribution to peace and security, in respect of the principles of the UN Charter and international law. The EU sanctions on Liberia (Common Positions 2006/31/CFSP and 2004/487/CFSP), Iraq (Common Position 2003/495/CFSP), Guinea Bissau (Council Decision 2012/285/CFSP), Somalia (Common Position 2002/960/CFSP), the Democratic Republic of the Congo (Common Position 2005/440/CFSP), the Central African Republic (Council Decision 2013/798/CFSP), Sierra Leone (Common Position 1998/409/CFSP) and South Sudan (Common Position 2005/411/CFSP) are all examples of EU implementing sanctions;
b) and c) As for supplementary and autonomous sanctions, the EU has recognized that these measures could be made necessary by circumstances and they shall be 'in accordance with its Common Foreign and Security Policy and in conformity with international law' (Council of the EU, 2004). The EU pays attention to minimize humanitarian effects or adverse consequences for people or countries not targeted by sanctions.

Supplementary sanctions have been imposed in the case of Iran (Council Decision 2010/413/CFSP, 2011/235/CFSP and Council Regulation (EU) No 267/2012), North Korea (Council Decision 2013/183/CFSP and Council Regulation (EC) No 329/2007), Libya (Council Decision 2011/137/CFSP and Council Regulation (EU) No 204/2011) and Côte

[7] It does not mean that the EU does not impose any sanctions on its Member States. 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. Then, the EU Council has full discretion in judging when a State violates EU common values.

d'Ivoire (Council Decision 2010/656/CFSP, Council Regulation (EC) No 174/2005 and No 560/2005). They mainly take the form of additional names on UN targeted lists of individuals, as related to situations of non-proliferation and armed conflicts. Examples of autonomous sanctions are the cases of Syria (Council Decision 2013/255/CFSP), Russia (Council Decision 2014/145/CFSP), Ukraine (Council Decision 2014/386/CFSP, 2014/507/CFSP, and 2014/933/CFSP), Myanmar (Common Position 2006/318/CFSP), Zimbabwe (Common Position 2004/161/CFSP and Council Decision 2002/148/EC) and Belarus (Common Position 2006/276/CFSP). So far, the EU has resorted to sanctions for several situations.[8]

As regards the sanctions against third countries, they are adopted in the form of a Council decision, which is taken at unanimity, pursuant to art. 29 TEU.[9] The Parliament is only informed. Then, for the implementation of Council decisions there is a 'two-track procedure', which depends on the content of the decision at stake:

- if the sanction consists of a general embargo (including embargos on dual-use items and services related to military technology), or financial measures, the Council Decision should be followed by a Regulation, adopted on the basis of art. 215.1 TFEU. Then, Member States may take 'secondary sanctions', i.e. measures that provide for penalties in case of violation of EU restrictive measures, and measures that ensure the implementation, monitoring and enforcement of the adopted penalties;
- 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. 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.

With reference to sanctions against individuals, they are taken on the basis of art. 215.2 and art. 75 TFEU. The former covers the case of sanctions that derive from UN lists, i.e. when the initiator of sanctions is the UN, and these measures are taken on the basis of the two-track procedure. The latter is used for cases of 'internal terrorists', i.e. for counter-terrorism measures imposed by the EU for internal security reasons according to an ordinary legislative procedure without a prior CFSP decision (as stated by the EU Court of Justice in case C-130/10, *European Parliament v Council*, 19 July 2012).

Considering sanctions on dual-use items, it emerges that the EU has never adopted a systematic or general embargo on these goods, as it could be disproportioned, as the Guidelines for the imposition of sanctions affirm (Council of the EU, 2012, p. 53). So, the choice to target dual-use goods is made on a case-by-case basis. Examples of the system of EU sanctions as referred to WMD and dual-use goods and addressing both States and targeted individuals can be found in the cases of Iran, Syria and North Korea.

In the first one, Council Decision 2010/413/CFSP provided, for example, the prohibition upon Iran of materials contained in the Nuclear Suppliers Group, in the Missile Technology Control Regime lists, in Regulation 428/2009 and in SC resolutions, of additional items that could contribute to enrichment-related or heavy water-related activities or to the development of nuclear weapon delivery systems, and the prohibition on the supply of arms and related materiel.

Regarding dual-use goods in Syria, the EU adopted, for instance, Council Decision 2011/782/CFSP, prohibiting the export of certain dual-use items related to telecommunication or internet monitoring or interception items and technology, and regulation 509/2012, which included a ban on the sale, supply, transfer or export, directly or indirectly, to Syria of certain

[8] The list of EU sanctions can be found at http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf.
[9] Exceptions to unanimity and the possibility of opting out are provided by art. 31 TEU.

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dual-use items and dual-use chemicals as listed in Annex I of EU Regulation 428/2009 and certain additional chemicals.

With regard to North Korea, Council Decision 2010/800/CFSP and Council Regulation 329/2007 made reference to WMD goods and the dual-use items listed by regulation 428/2009.

To complete the framework, it is worth mentioning the role of the European Court of Justice (ECJ) in this context.[10] Although the ECJ cannot arrogate the right to examine SC resolutions and enter the international law system, it has affirmed that UN resolutions should be in line with fundamental rights, since the respect of fundamental rights (as laid down in art. 6.1 TEU) forms part of the general principles of Community law (as stated in 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). It has stated in some cases that the Council did not have the competence for listing the entities (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). In others, sanctions lacked motivation and evidence, or violated the principle of legal certainty (case T-262/12, *Central Bank of Iran v Council*, 18 September 2014) because of insufficient elements to ground them, or their secrecy and vagueness, or they were in contrast with the proportionality principle and infringed the rights to defence and to effective judicial protection for listed people, or the right to respect for personal and family life and the right to property.

Some Remarks on the EU Framework

Critically speaking, the European Parliament does not have a formal role in the adoption of CFSP sanctions, but it should simply inform. However, it has tried to be more active in the area of sanctions, claiming to scrutinise the reasons for the choice of targeted sanctions and the goals and progress of sanctions, at least once per year, and to be the human rights watchdog for sanctions (EU Parliament, 2011: 29–31).

A ‘sanction unit’ within the Council Secretariat or the EEAS would be needed in order to conduct preliminary studies on the effects and impacts of sanctions.

If the division of competences between the EU and Member States is quite clear, monitoring mechanisms still result as being fuzzy (De Vries and Hazelzet, 2005). A mechanism to enhance coordination between Member States and the EU should be established, especially at the level of the Council.

COMPARISON BETWEEN INTERNATIONAL AND EU SANCTIONS

The system of dual-use sanctions is clearly a ‘multilevel’ one, involving different actors at the international and European level.

International and EU sanctions are similar in their initially addressing States and progressively preferring targeted sanctions, since the latter category results in fewer humanitarian consequences. Moreover, it should never be forgotten that both the UN and the EU measures are justified only for the safeguard of peace and security.

Neither the UN nor the EU has opted for comprehensive dual-use sanctions. This has occurred because the notion of ‘dual-use’ itself is still unclear and general definitions are lacking; then, because the goods that could be included are so numerous and change continuously, in considering the evolution of techno-science, it is not feasible to address a whole category in a broad sense.

[10] See, for example, as for Iranian entities, case T-181/13, *Sharif University of Technology v Council*; case T-494/10*, Bank Saderat Iran v Council*; case T-35/10, *Bank Melli Iran v Council*; case T-13/11, *Post Bank Iran v Council*. As for Ukrainian applicants: case T-290/14, *Portnov v Council*; case T-331-2/14, *Azarov v Council*; case T-339/14, *Kurchenko v Council;* cases T-346-8/14, *Yanokovych v Council. As regards Lybian applicants: case* T-348/13, K*adhaf Al Dam v Council and Commission*, case T-436/11, *Afriqiyah Airways v Council.*

One common problem of international and EU sanctions is represented by the monitoring and implementation processes, as the margin left to States risks creating differences among them, and the surveillance of the application of sanctions is not so easy to pursue. Thus, it would be necessary to develop proper mechanisms that harmonise and control the application of supranational sanctions at the national level.

An important element is represented by the stress placed on the respect of human rights while imposing targeted sanctions. This is particularly stressed at the EU level, at the point that it has influenced the UN framework too.

In conclusion, the analysis shows that the recourse to sanctions concerning dual-use items is rare, and it represents an interesting way for controlling the trade of such 'sensitive' category of goods.

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