

# Chapter 2

## Embargoes and International Sanctions from an Industry Perspective

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Embargoes and other coercive measures have been in existence since Antiquity. One of the first documented international embargoes dates back to the IXth century in Western Europe, when the Emperor Charlemagne (Charles the Great) decided to forbid the selling and exportation of Frank swords outside the Frank Empire, as well as preventing Frank blacksmiths from travelling abroad. These swords were made of an alloy of steel that made them light, flexible and solid. The decision was confirmed by Charlemagne's grandson Charles the Bald in the Edict of Pistres in 864. This is one of the first export control legal acts.

### 2.1 Coercive Measures: Tools for International Relations

Countries violating their international obligations, in particular when committing unlawful acts are responsible and expose themselves to the imposition of coercive measures that may include, among other things, embargoes and other international sanctions. Coercive measures may also encompass the sending of military troops (for peacekeeping missions, military intervention, blockade, etc.), the temporary or definitive suspension of diplomatic relations, or customs and trade barriers. The imposition of international sanctions is one of the most useful and adaptive tools in international relations.

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By imposing sanctions, a country or an international organization, such as the United Nations—although some other international bodies may decide the imposition of sanctions—has several objectives:

- Put pressure on the opposite party (or country) in the framework of bilateral or multilateral negotiations;
- Urge the opposite party to cease an infringement of international law;
- Impose international pressure with regard to the country's internal situation, especially in case of important human rights or humanitarian law violations.

Coercive measures may be comprehensive but most are targeted and designed as a middle step between international protestations and armed intervention. They are also seen as a credible alternative, especially for countries that have limited military capacities but important economic ties with the country under consideration. Coercive measures must consequently be considered as a political tool that is mainly used for diplomatic purposes.

All countries are entitled to impose international sanctions, but most embargoes are decided by the United Nations Security Council (UNSC) or regional organisations such as the European Union (EU). They are then enforced collectively by Member States to enhance their efficiency. However, some international sanctions are unilateral, such as the trade restrictions imposed by the United States of America against Cuba.<sup>1</sup>

Correct and effective implementation of international sanctions call for a holistic approach that must involve all relevant stakeholders, and more particularly both public and private sectors, as well as Non-Governmental Organisations, the media, multinational companies, and public opinion. Such an approach is particularly requested in order to ensure a coordinated and efficient implementation and enforcement of sanctions, avoid collateral and undesired effects (both humanitarian and economic), and assess the impact on international law and diplomacy.

## **2.2 Coercive Measures and Effectiveness: Balancing the Consequences**

Coercive measures are designed to force the opposite party to abide by its international obligations. However, the imposition of international sanctions requires elaborating and implementing a strategy based on the effects to be realized.

- Conflict resolution, including intra-state conflicts (e.g. Democratic Republic of the Congo, Cote d'Ivoire). The aim of such sanctions is to weaken one or both of the parties to the conflict in order to allow military defeat, to create an

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<sup>1</sup>See in particular the Cuban Democracy Act of 1992 (22 U.S.C. chapter 69) and the Helms-Burton Act of 1996 (22 U.S.C. chapter 69a).

incentive for negotiation or cease-fire, or to enforce the implementation of a peace agreement.

- Protection of civilians (e.g. Somalia, Sudan). The imposition of sanctions may also prevent or stop massive human rights violations or at least limit as much as possible the opposing party's funding and supplying of weapons and ammunitions.
- Counter-terrorism (e.g. sanctions against Al-Qaeda, Hezbollah). Quite similarly, the purpose of sanctions can be to limit terrorist organizations' capabilities and financing, as well as promote justice and accountability.
- Democratisation (e.g. Iraq, Guinea-Bissau). In countries subject to military dictatorship or after a coup, embargoes and sanctions may be necessary to put international pressure on the country under consideration and ease democratic transition, and if necessary create some incentive for the restoration of constitutional order.
- Non-proliferation (e.g. North Korea, Iran). Probably one of the most sensitive categories of embargoes, although difficult to enforce efficiently. Such sanctions are designed to constrain the ability of a country to develop—or help develop—nuclear, chemical and biological weapons, as well as ballistic missiles. These sanctions regimes are mostly based on Non Proliferation Treaty (NPT)<sup>2</sup> enforcement.

Once the strategy—or the goals—has been established, international sanctions can rely on a set of different coercive measures that allow maximizing the effects while balancing with potential drawbacks. To this end, arms embargoes (including export, import, transfer, brokering, associated services, financing, etc.) are one of the most effective tools with a very limited negative impact on the country's population or economic resources. Such embargoes are strong political signals and are widely used, especially by the United Nations or the European Union, in most of the sanctions regimes currently in place.

Travel ban and assets freeze (including financial sanctions) are also relatively common and easy to implement. However, the imposition of financial sanctions against a country needs a particularly wide international cooperation in order to enhance its efficiency. Such sanctions may also have an adverse impact on the country's population and economy and include the severance of diplomatic relations.

Finally, trade restrictions that can extend from rare resources to strategic goods such as nuclear devices, food, or oil and gas are the most comprehensive coercive measures and can be assimilated to boycott. Such sanctions may have an important impact on the country's population and need to be carefully balanced and targeted in order to limit their negative side effects.

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<sup>2</sup>The Treaty on the Non-Proliferation of Nuclear Weapons is an international treaty aiming at preventing the proliferation of nuclear weapons and related weapons technology and to promote cooperation in the peaceful use of nuclear energy. The treaty was signed on 1 July 1968 in New York (United States) and entered into force on 5 March 1970.

Every sanctions regime is unique, with a specific purpose, timing, and consequences that may vary in time in order to ensure an effective and useful application. Proper sequencing of the different types of sanctions, as well as the implementation and enforcement mechanisms are essential to establish efficient embargoes with positive political and diplomatic outcomes.

## 2.3 Legal Framework of International Sanctions

Coercive measures and embargoes date back to the Antiquity. However, during the XXth and XXIst centuries, and more particularly since the end of the Cold War era, international sanctions have been widely used in different situations. Sanctions can be decided by international organisations such as the United Nations Security Council (UNSC), the European Union, the Economic Community of Western African States (ECOWAS), and the Organization for the Security and Cooperation in Europe (OSCE), or by individual states that may decide to enforce unilateral embargoes worldwide, such as the United States of America.

After the First World War, the League of Nations<sup>3</sup> was tasked with maintaining international peace and enforcing international obligations by common actions,<sup>4</sup> as well as taking ‘any action that may be deemed wise and effectual to safeguard the peace of nations’.<sup>5</sup> Although this allowed the League of Nations under Article 16 of the Covenant to impose the ‘severance of all trade and financial relations’, as well as the ‘prevention of all financial commercial or personal intercourse between the nationals of the Covenant-breaking State and the nationals of any other State’, such financial, economic and diplomatic measures were inconsistently applied until the third decade of the twentieth century.

*The United Nations legal framework.* Since the Second World War and the creation of the United Nations,<sup>6</sup> coercive measures may be decided by the United Nations Security Council (UNSC) as a political body. They are mainly imposed under the United Nations’ Charter Chapter VII that allows the Security Council to take actions and not only formulate recommendations. Such actions may include

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<sup>3</sup>The League of Nations was an intergovernmental organization founded in 1920, following the Paris Peace Conference that ended the First World War. Its principal mission was to maintain world peace through collective security and disarmament and settling international disputes through negotiation and arbitration.

<sup>4</sup>Article 8 of the Covenant of the League of Nations, signed on 28 June 1919 in Paris (France) and effective on 10 January 1920.

<sup>5</sup>*Ibid.*, art. 11.

<sup>6</sup>The United Nations is an intergovernmental organization established in 1945 as a replacement for the ineffective League of Nations to promote and preserve international peace and cooperation. The United Nations Charter was signed on 26 June 1946 in San Francisco (United States) and entered into force on 24 October 1946.

the use of armed force, but also encompass binding economic sanctions or arms embargoes.

Under Article 39 of the UN Charter, the UNSC may interfere when a certain international situation represents a ‘threatening against peace, an encroachment of peace, or an aggression act’. In such cases, the UNSC is entitled to impose political and economic measures, either without (art. 41) or with (art. 42) the use of military force. According to the Charter, such actions ‘may include’—but are not limited to—blockade, complete or partial interruption of economic relations, severance of diplomatic relations, etc.

The UN Charter does not specify under which situations sanctions must be applied, or the types of measures to be implemented, leaving room for interpretation and adaptation by the UNSC to implement effective measures tailored to the situation under consideration rather than imposing mandatory coercive actions such as an arms embargo. Most sanctions regimes are decided under Article 41, without the use of armed force.

Since international sanctions imposed by the UNSC under Chapter VII are compulsory for United Nations Member States, effectiveness can only be reached through international cooperation and global implementation. One of the first mandatory broad sanctions to be imposed by the UNSC consisted of Resolutions 181 & 182 (1963) and 418 (1977) against the South African Apartheid regime. The sanctions (military embargo) were decided in response to the political system of Apartheid, its regional military aggression in the Southern African sub-region, and the pursuit of a nuclear weapons program by the Government of South Africa. Several sanctions regimes were later implemented, mainly focusing or restricting weapons trade and nuclear-related sanctions (cf. UNSC Resolution 661 (1990) against Iraq).

In the 1990s, the UNSC started to establish more targeted sanctions in order to reduce as much as possible the negative consequences of comprehensive sanctions regimes [cf. Liberia—Res. 788 (1992), Rwanda—Res. 918 (1994), or Yugoslavia/Kosovo—Res. 1160 (1999)]. Targeted sanctions were designed to minimize humanitarian impact that might result from comprehensive sanctions, as well as improve efficiency and targeting of sanctions that proved to be ineffective when too broad.

Finally, and more specifically since 2000, sanctions are designed to target States (including failed States) as well as non-state actors, extending from rebel groups and arms dealers to terrorist organizations and decision-making individuals that threaten peace. Although fine-tuning international sanctions in order to better target the effects to be obtained and to minimize unintended side effects is certainly an improvement, such sanctions proved to be far more difficult to implement in an effective way, especially regarding their financial aspects and consequences for other countries.

## 2.4 The European Union Legal Framework

From the European Union perspective, international sanctions are called restrictive measures. The European Union enforces embargoes and sanctions decided by the UNSC (of which two European Union member States, France and the United Kingdom, are permanent members,). However, the European Union may also impose autonomous measures as part of its Common Foreign and Security Policy (CFSP). Restrictive measures, from the European Union's perspective, are part of a global toolkit necessary to bring a change in policy or activity by the opposite party that can be a foreign country or Government, or dedicated entities or individual.

*Legal basis.* The legal basis for the European Union to impose restrictive measures—and have them enforced by its 28 Member States—lies in both the Treaty of the European Union (TUE) and the Treaty on the Functioning of the European Union (TFUE).

- Under Article 21§2 of the TUE, the advancement of ‘democracy, rule of law, human rights and the principles of international law’, as well as the preservation of peace and international security, the respect of the United Nations Charter and the international law are under the competence of the European Union Council,<sup>7</sup> as part of the European Union's external actions. The external action of the European Union is coordinated by the High Representative of the Union for Foreign Affairs and Security Policy, currently Ms. Federica Mogherini from Italy.
- Under articles 30 and 31 of the TUE,<sup>8</sup> all matters linked to the European Union's Common Foreign and Security Policy (CFSP) may be referred to the European Union Council. Such matters include the imposition of restrictive measures as part of the Union's foreign policy.
- Under Article 215 of the Treaty on the Functioning of the European Union,<sup>9</sup> the imposition of restrictive measures is decided by the EU Council, with proper information of the EU Parliament and the EU Commission, especially when the said measures necessitate the adoption of a legal act by the EU Council—i.e. the ‘interruption or reduction, in part or completely, of economic and financial relations with one or more third countries’.
- Finally, under Article 275, the Court of Justice of the European Union has jurisdiction to review the legality of decisions providing restrictive measures against natural or legal persons adopted by the EU Council. Under Article 275, several blacklisted natural or legal entities were removed from the listing for lack of legal grounds.

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<sup>7</sup>Treaty of the European Union, Official Journal of the European Union C 326/13 of 26 October 2012, art. 21 (p. 16).

<sup>8</sup>*Ibid.* (p. 18).

<sup>9</sup>Treaty on the Functioning of the European Union, Official Journal of the European Union No. C326/47 of 26 October 2012, art. 215 (p. 98).

Consequently, restrictive measures as foreign relations decisions are under the responsibility of the EU Council, along with implementing regulation necessary for economic and financial sanctions, while travel bans and arms embargoes do not need additional implementation measures to be applied by EU Member States. The EU Council and the High Representative are key players, with important inputs from the EU Parliament and Commission, especially for economic and financial aspects (EU Commission), as well as for Human Rights and other political aspects (EU Parliament), whereas the EU Court of Justice is entitled to ensure compliance of acts resulting from a EU Council Decision, to ensure legality and compliance with the Treaties and the rules of proceedings.

*The EU and restrictive measures.* The European Union has an extensive use of restrictive measures that became a central tool of the Union's external action especially since the 1990s. Restrictive measures are flexible tools that allow rapid decision and enforcement (around one month) that better fit political timing and constraints. Moreover, sanctions allow better targeting to avoid the abovementioned side effects on civil populations or potential negative consequences for the Union's commerce or interests. Finally, and considering the reluctance of some Member States to conduct military action outside of the European Union (or their lack of capacity), restrictive measures are one of the few tools that provide tangible action while being cost efficient in a complex budgetary environment.

The European Union implemented all recent United Nations' Security Council embargoes, but also decided independent ones, for example against China,<sup>10</sup> Bosnia Herzegovina,<sup>11</sup> Egypt,<sup>12</sup> Myanmar,<sup>13</sup> and several other countries. The scope of sanctions decided by the European Union, although quite similar to United Nations' coercive actions, often adds travel bans in addition to the classic arms embargoes, economic sanctions and financial sanctions.

The other specificity of EU sanctions lies in the ability of blacklisted natural or legal entities to contest the legal grounds of their listing on sanction lists and obtain their removal from the EU Court of Justice, which could potentially hamper the efficiency of the considered restrictive measure. This jurisdictional impact of the EU Court of Justice over the effectiveness of sanctions is one of the growing challenges that will face the European Union's international sanctions framework. Financial sanctions may also prove difficult to enforce. They need careful and extensive regulation and close cooperation with international banks as well as non-EU countries. Considering the potential lack of cooperation of certain countries, especially for sanctions not decided by the UNSC, such measures are easily escaped.

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<sup>10</sup>Declaration of the European Council in Madrid, 27 June 1989.

<sup>11</sup>Since 1991, cf. Council Decision 2011/173/CFSP of 22 March 2011, Official Journal of the European Union L76, p. 68.

<sup>12</sup>Since 2011, cf. Council Decision 2011/172/CFSP of 22 March 2011, Official Journal of the European Union L76, p. 63.

<sup>13</sup>Since 1991, cf. Council Decision 2013/184/CFSP of 22 April 2013, Official Journal of the European Union L111, p. 75.

Correct and coordinated implementation of EU sanctions is another growing topic within the EU. Member States' are responsible for the implementation and enforcement of EU embargoes and their interpretation of the EU Council Decision may vary regarding the scope of the sanctions or the implementation of catch-all clauses allowing the controlling of purely civil goods when they may be diverted for a military end-use in an embargoed country. The lack of a level playing field with non-EU based companies, and potentially with EU companies depending on national interpretation, is a challenge that the EU will need to tackle in the near future in order not to hamper the EU economy in difficult times, especially when sanctions decided by the EU Council may backfire on EU industries as has been the case with Russia: the EU aerospace industry raised concerns to their national authorities given that more than 50% of their supplies of titanium<sup>14</sup> came either from Crimea or from Russia.

## **2.5 Focus on the Extra-Territorial Application of U.S. Embargoes**

While the European Union's decisions regarding the implementation of sanctions regimes are applicable to all EU member States, the United States policy relating to embargoes tends to establish an extra-territorial application of U.S. regulations. The United States enforces various sanctions regimes: military sanctions under the International Traffic in Arms Regulations (ITAR),<sup>15</sup> commercial sanctions and end-use or end-user based controls under the Export Administration Regulations (EAR),<sup>16</sup> and financial sanctions under various sanction programmes administrated by the Department of the Treasury, Office of Foreign Assets Control (DoT/OFAC).

U.S. international sanctions apply as soon—and as long—as there is a nexus with U.S. jurisdiction. Regarding military items, all ITAR-controlled items exported from the United States are controlled under the ITAR and thus subject to a prior authorisation from the U.S. authorities. However, once exported, either for stocking purposes or for integration into a higher assembly, and ultimately into the final product, the ITAR-controlled commodity remains subject to an export

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<sup>14</sup>Titanium is often alloyed with iron, aluminium or other metals to produce a strong and light-weight alloy for aerospace applications (jet engines, airframe, spacecraft, etc.), as well as for several other industrial, medical and high-tech applications.

<sup>15</sup>The ITAR (22 C.F.R. Part 120) is the military export control regime established in the U.S. pursuant to the Arms Export Control Act of 1976 (22 U.S.C. ch. 39). The interpretation and enforcement of ITAR is under the responsibility of the Department of State, Directorate of Defence Trade Controls (DoS/DDTC).

<sup>16</sup>The EAR (15 C.F.R. Part 730 and following) is the dual-use export control regime established in the U.S. pursuant to the Export Administration Act of 1979 (50 U.S.C. Ch. Appendix—Export Regulation). The interpretation and enforcement of the EAR is under the responsibility of the Department of Commerce, Bureau of Industry and Security (DoC/BIS).



authorisation, regardless of its incorporated state. This means that all foreign persons that will be involved in the manufacturing, exportation and financing of the utilisation of a foreign-made product incorporating a U.S.-origin ITAR-controlled component will need prior vetting from the U.S. authorities. Should an ITAR controlled item be exported to a non-vetted foreign person (or country), the United States will consider this as a breach of U.S. regulations and the concerned entities, including foreign nationals or foreign-owned legal entities, may face prosecution in the U.S. The principle is quite similar regarding dual-use goods controlled under the EAR, although the U.S. considers that foreign-made items incorporating less than a certain amount of U.S.-controlled dual-use items are not subject to U.S. jurisdiction.<sup>17</sup>

As a consequence, the export of such items to a country subject to a U.S. embargo<sup>18</sup> is prohibited either when occurring from the U.S., or occurring outside of the U.S. but involving U.S. products, even when they are incorporated. Several companies (U.S.-based or foreign ones) have been prosecuted in the past for violating U.S. regulations and most of them finally agreed to pay heavy fines or to enter into a Consent Agreement with the U.S. authorities. Sanctions for not complying with U.S. embargoes may result in fines, debarment from export privileges in the U.S. (including re-export authorisations), imprisonment, and potentially blacklisting (and therefore the impossibility for the blacklisted company to enter into any business in the U.S. or with a U.S. national or U.S. entity).

U.S. financial sanctions necessitate a legislative act or an executive order to implement new sanctions. They are similar to the ITAR and EAR in their philosophy and enforcement methods, including extra-territorial application and potential violations from non-U.S. persons any time there is a nexus with the U.S. financial system. As a consequence, any operation involving a U.S. person (including for financing, banking, insurance, etc.) or using the U.S. currency may fall under U.S. jurisdiction.<sup>19</sup> The Office of Foreign Assets Control is also responsible for enforcing U.S. financial sanctions and more and more U.S. and foreign persons are being prosecuted, with an increased number of cases since the 2000s.

Such extraterritoriality of the U.S. regulations has been widely criticized in the past, including by the European Union in its EU Council Regulation No. 2271/96 of 22 November 1996<sup>20</sup>: ‘extra-territorial application of such law, regulation and other legislative instruments violate international law’ and ‘may have adverse effects on the interests’ of the European Union. However, even if this Regulation provides

<sup>17</sup>Cf. Export Administration Regulations Part 734.4 *de minimis*. This threshold is 25% of the fair market price value for all countries but only 10% for Cuba, Syria, Sudan, North Korea and Iran.

<sup>18</sup>Countries under U.S. embargo are listed in the ITAR Part 126.1 *embargoed countries*.

<sup>19</sup>For several examples cf. the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA—PL 111-195 of 1 July 2010), the Iranian Transactions and Sanctions Regulations (ITSR—31 C.F.R Part 560), or the Cuban Liberty and Democratic Solidarity Act of 1996 (PL 104-114 of 12 March 1996).

<sup>20</sup>EU Council Regulation (EC) No. 2271/96 of 22 November 1996, Official Journal of the European Union L309, p. 01.

protection against the extra-territorial application of several laws, including the U.S. embargo against Cuba, its effectiveness and applicability are very limited and has not prevented several major EU companies from being prosecuted by U.S. authorities and entering into Consent Agreements without any formal diplomatic protest from their home countries. Article 4 of the Regulation however states that ‘No judgment of a court or tribunal and no decision of an administrative authority located outside the Community giving effect, directly or indirectly, to the laws specified in the annex [a list laws considered as having extra-territorial application] or to actions based thereon or resulting there from, shall be recognized or be enforceable in any manner’, but no country seems to have filed a formal complaint.

## **2.6 Embargoes and International Firms—The Challenge of Export Compliance**

International sanctions decided by an assembly of states such as the United Nations or the European Union, or decided and implemented by a particular country, are essential in the conduct of international relations and the maintaining of peace by allowing coercive measures without the use of armed force and therefore reducing the threat of armed conflicts in the world.

However, their implementation and effectiveness have always been a challenge and will continue to remain so, especially considering the growing use of the Internet, the globalisation of the digital economy worldwide, the rapid increase of international exchanges of goods (either by land, by sea or by air) and the growing security challenges posed by low-intensity conflicts and global terrorism all around the globe.

Compliance with such sanctions by individuals and companies, under the global survey of their home countries’ national administrations as well as public opinion and Non-Governmental Organisations is an essential element of an ethical and responsible global trade. However, and despite increasing resources allocated to compliance in large companies with a worldwide footprint, the issue of compliance is far from being properly addressed. The overall complexity of sanctions regimes is one of the reasons why countries companies are struggling to enforce these sanctions regimes.

Some of the difficulties for a company when it comes to compliance with sanctions regimes are the following:

- Combination of different sanctions regimes—United Nations, European Union, national sanctions or restrictions—against the same country or target, therefore increasing the number of legal requirements to comply with;
- Diverging scope and interpretation of sanctions regimes implemented at a supra-national level, especially within the European Union, therefore resulting in the lack of a level playing field and different interpretations depending on the country (and creating an incentive for forum shopping);

- Evolving regulations and sanctions scope depending on political and diplomatic contingencies. Such evolutions are positive and necessary in order to minimize as much as possible the negative impact for civil populations, or to escalate diplomatic pressure on the target, but creates a lack of legal certainty and a more difficult implementation in industry, including in contractual clauses in sectors with relationships that can last ten years or more, as for the aerospace industry.

In order to better harmonize the implementation and enforcement of international sanctions and to ensure compliance by the private sector and civil opinion, there is a real need for more cooperation between countries, the United Nations and the private sector. These stakeholders need to be better involved in the drafting, elaboration and monitoring of international sanctions. Private sector initiatives following UNSC Resolution 1540 (2004) such as the Botticelli Project are an essential first step; in addition, deeper mutual understanding will be key in the future for enhanced effectiveness of sanctions regimes and—in the end—preservation of international peace.

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