Controlling the trade of strategic goods

SANCTIONS AND PENALTIES

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May this raise new scientific interests and debates.

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01

Legal concepts of restrictive measures (sanctions)

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1. INTRODUCTION

The legal concepts of sanctions and measures – both terms being uses separately as well as jointly and synonymously – are applied in International Law, European Law and in national law. Originating from the old administrative law and language of the United Kingdom and of France the present meaning of sanction(s), however, is based on the Charter of the UN as defined and applied by the Security Council (UNSC).[1] Chapter VII of the Charter[2] refers to action to be taken by the Security Council in response to any "threat to the peace, breach of the peace, or act of aggression". The UNSC also determines what measures both involving and not involving the use of armed force are to be employed to give effect to a given decision of the UNSC. Such are interruption of economic relations and of means of communication as well as severance of diplomatic relations.[3] Should such measures that are not involving the use of armed forces be inadequate or insufficient, the UNSC may decide

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1 Prior to the establishment of the UNO the Covenant of the League of Nations provided enforcement of international responsibilities through economic and military sanctions. However, the Covenant did not provide for binding decisions: The Council of the League was only responsible for recommending military force. www.http: Covenant of the League of Nations.

2 UN Charter, Chapter VII "Action with Respect to the Threat to the Peace, Breaches of the Peace and Acts of Aggression." Articles 39 – 51.

3 UN Charter, Chapter VII, Article 41.

to take action which include blockades and other operations by air, sea, or land forces of Members of the United Nations to maintain or restore international peace.[4]

It was, however, the UN General Assembly in 1961 that approved a resolution calling on all States to conclude an agreement to ban further acquisition and transfers of nuclear weapons and prohibiting nuclear weapon States to transfer to any recipient nuclear weapons or other nuclear explosive devices… or to encourage any non-nuclear weapon State to manufacture or otherwise acquire nuclear weapons, nuclear explosive devices. A draft nuclear non-proliferation treaty was then considered in the frame of the Geneva Disarmament Conference. Within a short period of time, the Treaty on the Non-Proliferation of Nuclear Weapons opened for signature 1968, and entered into force 1970 - initially with 3 States (Soviet Union, United Kingdom and United States) of the now five nuclear weapon States i.e. China, France, Russia the United Kingdom and the United States, and an open number of non-nuclear weapon states.

The basic concepts agreed are embodied in articles I, II and III of the NPT. Article I sets forth the obligations of each nuclear-weapon State Party, notably not to transfer to any recipient nuclear weapons or explosive devices. Article II is addressed to each non-nuclear weapon State Party, not to receive the transfer, nor to manufacture nuclear weapons (etc.). A further essential provision of the NPT is contained in Article III by establishing (paragraph 1) the obligation of non-nuclear weapon States, Party to the Treaty, to accept safeguards set forth in an Agreement to be negotiated and concluded with the International Atomic Energy Agency and the Agency's safeguards system for the exclusive purpose of verification of the fulfilment of its obligations under the NPT.

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4 UN Charter, Chapter VII, Article 42.

The EURATOM Treaty[5] establishing the European Atomic Energy Community entered into force 1958, one year after entry into force of the IAEA, creating a binding legal framework which includes a system of Safeguards and Inspections – somewhat similar to the IAEA Safeguards – for the 28 Members States of the European Union.[6] In the present context mention must be made to non-compliance and infringement procedures of the EU i.e. violations of European law.[7]

The permanent 'link' between the IAEA, the UNSC and the NPT is the basis of the fundamental order of a functioning international non-proliferation regime.

In the broader context covering international, European and national law, the terms 'sanction' and 'measures', frequently 'restrictive measures', cover a wide spectrum of legal acts notably of a punitive nature which elude a single definition. Both sanctions and measures are decided by the United Nations Security Council, the Council of the European Union and in the 'internal' context, by individual States. Sanctions adopted by the UNSC are uniquely of universal applicability.

In specific cases only, the term "embargo" i.e. the oldest term applied to punitive measures by one or several States against another State is still being used. It originates in the Napoleonic wars and defines a government decision prohibiting commercial trade, notably the departure of commercial ships in the context of international hostilities. Presently, an embargo means a government order to

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5 'The European Atomic Energy Community and its primary law" Wolfgang Kilb; in "International Nuclear Law: History Evolution and Outlook" pp.43 90. 10th Anniversary of the International School of Nuclear Law. OECD 2010 NEA no. 6934.

6 Euratom is a separate legal entity within the EU at the same level as the EU Treaty and the TFEU(Treaty on the Functioning of the EU).

7 Wolfgang Kilb: *ibid*. pp: 67-70.

restrict commerce or other exchanges with a given country: There are also different types of embargoes applied in addition to trade embargos namely strategic embargos, oil and arms embargos.[8]

The term 'arms control' is not linked to the present subject. It is generally associated with the concept of arms limitation and of disarmament.

2. LAWFUL AUTHORITIES EMPOWERED TO ADOPT AND IMPLEMENT SANCTIONS

The origin, legal validity, scope, content, purpose and duration of a sanction or restrictive measure is determined by the powers of the competent statutory body i.e. the UNSC, the EU Council and the government of the sovereign State.

Both the UN Security Council and the EU Council may decide, adopt and implement sanctions / restrictive measures on States, economic entities and individuals: sanctions decided by the UNSC are of direct concern to all UN Member States as well as to the EU; Sanctions / restrictive measures adopted by the European Council (regulations) are directly applicable to the EU Member States. They are binding in their entirety. EU regulations take precedence over conflicting – internal – measures of a Member State.

Certain intergovernmental organizations[9] are also empowered by their Statute to adopt measures against States upon a decision taken by the respective governing body. Notably, the IAEA Statute under Article XIX 'Suspension of privileges' provides that "A Member that is in arrears in the payment of its financial contributions shall have no vote, etc." A member which has persistently violated the

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8 Example: UNSC Resolution 1747 'Iran embargo'. Presently over ten States are under UNSC arms embargo.

9 The OSCE is sometimes erroneously mentioned as mandated to adopt sanctions or measures. The OSCE is an international forum for confidence building measures and security cooperation in Europe by inter alia establishing a Code of Conduct on Political – Military Aspects.

provisions of the Statute or of any agreement entered into by it pursuant to this Statute may be suspended from the exercise of the privileges and rights of membership by the General conference recommendations by the Board of Governors.

The third level is the sovereign State: Sanctions adopted autonomously i.e. by a national Government in conformity with its laws, either in implementation of or in addition to measures adopted by UNSC or EU Council, are binding on the citizen, on companies or other legal entities of that country. Such sanctions are notably administrative / financial or criminal penalties.

2.1. The United Nations Organisation

Two intergovernmental organizations hold the legal capacity to adopt and enforce sanctions on the basis of their respective Statutes. First, historically,[10] the UN Charter[11] granted[12] the UN General Assembly clearly defined but limited functions and powers: The General Assembly may consider any question or any matter within the scope of the Charter, make recommendations to 'the Members of the UN or to the Security Council" as well as "discuss any question relating to the maintenance of international peace and security brought before it by any Member or by the Security Council".[13]

Chapters V, VI and VII concern the powers of the Security Council, – notably its main roles: Chapter VI, "Pacific Settlement of Disputes" - notably – disputes brought to the Security Council by any Member State, and Chapter VII[14] which defines specifically the powers to "make recommendations or decide what measures

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10 The League of Nations provided in its Covenant enforcement of international responsibilities by way of economic and military sanctions." http://www.Covenant of the League of Nations.

11 The Charter of the United Nations Organisation entered into force 24. 10. 1945. The Statute of the International Court of Justice was set up by the Charter.

12 Charter of the United Nations: Chapter IV: The General Assembly. Articles 10-22.

13 UN Charter Article 10. 11.

14 UNO Charter: Chapter VII: "Action with Respect to Threats to the Peace, Braches of the Peace, and Acts of Aggression. "articles 39-41, 42".

shall be taken… to maintain or restore international peace and security". The Security Council may decide to adopt measures that do not involve the use of armed force in order to give effect to its decisions..".[15] Article 41 encompasses a broad range of enforcement options that do not involve the use of armed force.

However, if those measures are considered to be inadequate, the Security Council may also take action that include blockades and other operations by land, sea or by air and sea as well as land forces of Members of the UN".[16]

Under present international circumstances such decisions, however, appear to be politically unrealistic.

In terms of international legal hierarchy, in the present context, the UN Charter provides that "[T]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the Charter"[17] Measures adopted by the UN Security Council under Chapter VII are considered international binding law" (quote UNSC). Decisions of the Security Council on non-procedural matters notably on specific sanctions or measures require an affirmative vote of nine members of the Council including concurring votes of the permanent members of the Security Council: such Resolution is not adopted in the case of a veto by one or more Permanent Members.[18]

A somewhat different novel link was recently established between the Organisation for the Prohibition of Chemical Weapons (OPCW) and the United Nations Security Council on the basis of a UNSC resolution. The newly established "OPCW-United Nations-Joint Investigative Mechanism" submitted for the first time a Report to the Security Council.[19] "The Mechanism was mandated to iden-

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15 UN Charter, Chapter VII, Article 41.

16 UN Charter, Chapter VII, Article 42.

17 UN Charter, Article 25.

18 UN Charter. Article 27.

19 UN Security Council. S/ 2016/142: Letter dated 12 February 2016 from the (OPCW) Secretary -General addressed to the President of the Security Council. Pursuant to para. 11 of SC Resolution 2235 (2015).

tify to the greatest extent feasible individuals, entities groups or Governments who were perpetrators, organizers, sponsors or otherwise involved in the use of chemicals as weapons."[20] The UNSC resolution,[21] however, does not refer to any sanction regime in the this context but to ceasefire monitoring, verification and reporting mechanism, prevention and suppression of acts committed by terrorist groups (named) and, to UN support for a continued political process.

→ UNSC SANCTIONS PRACTICE[22]

Over the past fifty years the Security Council has established 26 sanctions regimes[23] concerning States as well as 'entities' as e.g. ISIL (Da'esh,) Al-Qaida and the Taliban. As of 31 December 2015, there were a total of 623 individuals and 398 entities designated for targeted sanctions measures such as asset freeze, travel bans and arms embargos and financial and commodity restrictions.[24] Over the recent past, cooperation on sanctions was expanded between the Security Council and Interpol.[25]

A number of country or entity-specific Sanctions Committees function independently and follow regularly the effects of the sanctions adopted. Each of these sanctions committees is chaired by a non-permanent member of the Security Council committees. There is also a comprehensive list of individuals under sanction as well as a 'Focal point for Delisting' and an 'Office of the Ombudsperson'. The

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20 Security Council Doc. S/2016/142 12. February 2016. Page 3.

21 UN Security Council Resolution S/RES/2254b(2015) 18 December 2015.

22 Terminology of the UN Charter in particular the UNSC i.e. 'measures' a generic term, used exclusively as a synonym to 'sanctions'. UN Charter, Chapter VII: Article 39-42

23 https://www.un.org/sc/suborg/en/sanctions.

24 Security Council Sanctions Committee website / also: United Nations Security Council Sanctions List.

25 S/RES /1699 (2006).Security Council resolution on increased cooperation between the United Nations and Interpol.

Security Council also applies sanctions as part of a comprehensive strategy encompassing peacekeeping to support peaceful transitions, constrain terrorism and protect human rights.[26]

→ THE CASE OF IRAN[27]

The long, sensitive and complex history of the discovery first in 2002 of non-declared nuclear installations in Iran, followed by further IAEA reports concerning notably the enrichment plant in Natanz, the UNSC adopted 2006 a Resolution under Chapter VII on sanctions against Iran. The European Council adopted a sequence of sanctions 2010, and further broadened measures in 2011and 2012.[28] The 'Joint Plan of Action' adopted January 2015 b the E3+3[29] was accepted by Iran. The final agreement reached including the end of the sanction regime… is beyond the scope of this article.

3. THE EUROPEAN UNION

3.1. Principles

The possibility to adopt and apply sanctions against a State for the European Union should be considered carefully. Regarding its organization and its powers to constrain its members, the EU

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26 History of a case of political sanctions: 1966 The United Nations Security Council took a historical step: For the first time in its 21 years of existence, it resorted to mandatory economic sanctions to try to bring down a legitimate government. Object of the sanctions was Prime Minister Ian Smith's white-supremacist regime in Rhodesia, which has been deplored as an international renegade ever since it broke away from British rule thirteen months earlier. By a vote of 11 to 0 with four abstentions the Security Council declared an international embargo on 90% of Rhodesia's exports, forbade the U.N.'s 122 UN Member States to sell oil, arms, motor vehicles or airplanes to the Rhodesian 'Regime'.

27 "Internationale Verhandlungen mit dem Iran: ein letzter Zwischenbericht?, Dr. Odette Jankowitsch-Prevor. In„ atw International Journal for Nuclear Power nucmag.com 8/9 2015 Vol.60 (2015) Issue 4. April.

28 Council Implementing Regulation (EU) no. 54/2012 and Regulation no. 961/2010; thereafter Implementing Regulations no. 54/2012.

29 Code for: { E= Europe} Germany, France, UK, + China, Russia, USA.

is more than an international organization, however, it is still an association of states that can't do more that its members have agreed to delegate.

The difficulty with restrictive measures is that they are pursing a political objective (fight against terrorism, WMD proliferation, human rights violation) but consist in most of cases in economic restrictions (exports and imports prohibition, freezing of financial assets). Even though EU Member States have agreed to develop a common foreign policy, this is a competence subject to specific rules and procedures. Decisions are in most cases adopted unanimously by the member States within the Council, legislative acts are excluded and the EU Court of Justice has no jurisdiction. That is since the entry into force of the Lisbon Treaty.

To the contrary, economic restrictions are elements of the export policy, a subsection of the common commercial policy, i.e. in the exclusive competency of the EU based on EU law adopted in co-decision by the Council and the Parliament.

To reconcile the Foreign Policy of Member States and Common Commercial Policy, the EU Treaty includes a provision which grants the Council to decide on "the interruptions or reductions in part or completely, of economic and financial relation with one or more third states" and "it shall inform the European Parliament thereof".

However, most sanctions involving the interruption of economic relations usually start by a weapons trade prohibition. The regulation of this trade is an exception to the EU Common Commercial Policy and has been considered by Member States as their national exclusive competence.

Therefore, EU restrictives measures adopted against third states could take different forms depending on the category of goods or services targeted (i.e. weapons, dual-use items, capital movements and payments).

Finally, EU restrictives measures are based to a large extent on the implemention of a given, specific UNSC resolution. Out of a total number of 41 States only 12 States are targeted by EU sanctions that are not implementing UNSC resolution.[30]

→ RESTRICTIVE MEASURES ON CONVENTIONAL WEAPONS TRADE ADOPTED BY THE EU

Even though EU treaties do not exclude the possibility for the EU to regulate weapons trade, Member States have always acted as if this was one of their exclusive competencies.[31] Therefore, in case the scope of restrictive measures against a State or against non-State actors includes conventional weapons, only a CFSP Council decision can potentially be adopted on the basis of article 29 TEU. Such decision usually defines the political objective of the measure(s) as well as the authorities targetted but does not provide the list of weapons concerns by the measures.

Since entry into force of the Lisbon Treaty and the increasing concern about terrorist acts and WMD proliferation, restrictive measures regarding transfer of conventional weapons have been part of a set of broader measures which include conventional weapons related material, dual-use items, certain services, as well as the freezing of funds and economic interrests. However, a considerable majority of CFSP Council decisions taken include embargos on conventional weapons. This is usualy formulated as e.g. the following: "The sale, supply, transfer or export of arms and related material of all types,

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30 States concern by EU restrictive measures not grounded on an UNSCR are Belarus (Council decision 2012/642/CFSP (OJ L 285, 17.10.2012, p. 1)), Burma (Council decision 2013/184/CFSP (OJ L 111, 23.4.2013, p. 75)), Burundi (Council decision (CFSP) 2015/1763 (OJ L 257, 2.10.2015, p. 37)), China (Declaration of European Council, Madrid, 27.6.1989)), Egypt (Council decision 2011/172/CFSP (OJ L 76, 22.3.2011, p. 63)), Republic of Guinea (Conakry) (Council decision 2010/638/CFSP (OJ L 280, 26.10.2010, p. 10)), Moldova (Council decision 2010/573/CFSP (OJ L 253, 28.9.2010, p. 54)), Russian Federation (Council decision 2014/386/CFSP (OJ L 183, 24.6.2014, p. 70)), Syria (Council decision 2013/255/CFSP (OJ L 147, 1.6.2013, p. 14)), Tunisia (Council decision 2011/72/CFSP (OJ L 28, 2.2.2011, p. 62)), USA (Joint Action 1996/668/CFSP (OJ L 309, 29.11.1996, p. 7) and Council regulation (EC) no. 2271/1996 (OJ L 309, 29.11.1996, p. 1)).

31 See Article 352 of the Treaty on the Functioning of the European Union (TFEU).

including weapons and ammunition, military vehicles and equipment, paramilitary equipment and spare parts for the aforementioned to Sudan by nationals of Member States or from the territories of Member States, or using their flag vessels or aircraft, shall be prohibited whether originating or not in their territories".[32]

The Council does not list in the annex of its decision weapons and munitions or categories covered by the embargo. The exact scope is left under the interpretation of Member States authorities. However, a common military list used as reference by most of Member States has been adopted and regularly updated.[33]

Except for Belarus, Myammar, the Russian Federation, Syria and China conventional weapons restrictive mesures adopted by the EU consists in implementation of an UNSCR.

Restricitive measures on dual-use items adopted by the EU contrary to conventional weapons, restrictive measures concerning dual-use items are an exclusive competence of the EU. The process requires the adoption of two instruments.

Firstly, a foreign policy decision adopted by the Council setting the political objective of restrictive measures and operations targeted. E.g. for Belarus where the Council expressed "concern about the continued lack of respect for human rights, democracy and rule of law in Belarus, and that political prisoners have not been released or rehabilitated"[34] or for the Russian Federation where the Council condammned "the unprovoked violation of Ukrainian sovereignty and territorial integrity by the Russian Federation and called on the Russian Federation to immediately withdraw its armed forces to the areas of their permanent stationing, in accordance with the

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32 Council decision 2014/450/CFSP of 10 July 2014 concerning restrictive measures in view of the situation in Sudan and repealing Decision 2011/423/CFSP (OJ L 203 11.7.2014, p. 106–112).

33 Common military list of the European Union adopted by the Council on 9 February 2015 (OJ C129 21.4.2015, p. 1–32).

34 Council decision 2012/642/CFSP of 15 October 2012 concerning restrictive measures against Belarus.

relevant agreements".[35] Concerning operations most of Council decisions used the UNSC 1540 wording by controlling "sale, supply, transfer or export" and also providing "directly or indirectly, technical assistance, brokering services or other services related".

Regarding the list of items to be controlled, the situation is somewhat more difficult as the Council does not often use the term dual-use[36] and items are usually not listed in its decisions. Most restrictive measures request to control "arms related materiel and services" that include only dual-use items related to conventional weapons and not to WMD. Only in decisions concerning the Russian Federation, Iran and North Korea the scope is enlarged to dual-use goods and technology related to WMD.

A Council regulation implementing and defining restrictive measures systematically completes the Council decision. As long as these measures constrain by interrupting partly or completely economic relation with a third country, the EU common commercial policy, an EU exclusive competence ruled by EU law, it requires the adoption of an EU regulation on the basis of article 217 of TFEU. E.g. the Regulation adopting restrictive measures against the Central African Republic provides that "certain measures set forth in UNSCR 2127 (2013) as well as in UNSCR 2134 (2014) fall within the scope of the Treaty on the Functioning of the European Union and, therefore, notably with a view to ensuring their uniform application by economic operators in all Member States, regulatory action at the level of the Union is required for their implementation".[37]

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35 Council decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ L229 31.7.2014, p. 13).

36 Only in decisions concerning Iran (Council decision 2010/413/CFSP (OJ L 195, 27.7.2010, p. 39)) and the Russian Federation (Council decision 2014/512/CFSP (OJ L 229, 31.7.2014, p. 13)).

37 Council regulation 224/2014 of 10 March 2014 concerning restrictive measures in view of the situation in the Central African Republic Council decision 2014/512/CFSP (OJ L 70, 11.3.2014, p. 01).

If most Regulations restate objectives and principles of the restrictive measures as defined by Council decision (prohibition to export, supply services and providing technical assistance.), Regulations also include necessary elements to implement the Decision, as the list of items concerned by the measures. E.g. for North Korea where the Regulation stipulates that it "derogates from existing Community legislation that provides for general rules on exports to, and imports from, third countries, and in particular from Council regulation (EC) No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology; most of these items and technology should be covered by this Regulation".[38]

If restrictives measures are like for weapons implemented by Members States authorities, for dual-use items, the list is legally binding and regulation principles might be challenged in front of the EU Court of Justice.

→ RESTRICTIVE MEASURES ON FREEZING OF FUND AND FINANCIAL ASSETS ADOPTED BY THE EU

The Council regularly adopted restrictive measures on freezing funds and financial assets since the relevant provision has been introduced in the Treaty. As concerns dual-use items, two instruments, are required namely a CFSP Council decision setting objectives and principles as well as a Council regulation designating natural and legal persons, entities or bodies concerned by the measures. The EU Parliament contested in 2012 the legal basis for that Regulation. The view was that since entry into force of the Lisbon Treaty, restrictive measures directed against certain persons and entities must have been adopted in codecision and not by the Council alone. The Court of Justice rejected that argument.[39]

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38 Council regulation 329/2007 no. 329/2007 of 27 March 2007 concerning restrictive measures against the Democratic People's Republic of Korea (OJ L 88, 29.3.2007, p. 01).

39 Judgement of the Court 19 July 2012 Case C-130/10.

EU financial regulations on restrictives measure are the most frequently adopted instruments; they are, however, also most contested by the targeted persons and entities. This concerns in particular foreign terrorist organisations (AL Qaida) and certain citizens from Iran, Syria, Ukraine, and Russian Federation. The Court had to consider on several occasions action againt a Regulation initiated by a natural or legal person who considered to be inadvertently included in the list. The Court affirmed that in some cases the Council did not have the competence for listing the entities (without a joint proposal from the EU's High Representative).[40] In other cases sanctions pronounced lacked intention and evidence,[41] or violated the principle of legal certainty[42] because of insufficient elements of proof, or their secrecy and vagueness.[43]

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

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

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

43 See, for example, as for Iranian entities, ECJ (European Court of Justice), case T-181/13, *Sharif University of Technology v. Council*, 3 July 2014, not yet published; case T-228/02, *Organisation des Modjahedines du peuple d'Iran v. Council*, 12 December 2006, ECR, 2006, II-04665; case T-489/10, *Islamic Republic of Iran Shipping Lines and Others v. Council*, 16 September 2013, published in the electronic Reports of Cases (Court Reports - general); case T-494/10, *Bank Saderat Iran v. Council*, 5 February 2013, published in the electronic Reports of Cases (Court Reports - general); case T-35/10, *Bank Melli Iran v. Council*, 6 September 2013, published in the electronic Reports of Cases (Court Reports - general); case T-390/08, *Bank Melli Iran v. Council*, 14 October 2009, ECR, 2009, II-03967; case T-284/08, *People's Mojahedin Organization of Iran v. Council*, 4 December 2008, ECR, 2008 II-03487; case T-256/07, *People's Mojahedin Organization of Iran v. Council*, 23 October 2008, ECR, 2008, II-03019; case T-262/12, *Central Bank of Iran v. Council*, 18 September 2014, not yet published; case T-392/11, *Iran Transfo v. Council*, 16 May 2013, not yet published; case T-13/11, *Post Bank Iran v. Council*, 6 September 2013, published in the electronic Reports of Cases (Court Reports - general – 'Information on unpublished decisions' section); case T-563/12, *Central Bank v. Council*, 25 March 2015, not yet published; case T-9/13 and T-10/13, *National Iranian Gas Company (NIGC) and Bank of Industry and Mine (BIM) v. Council*, 29 April 2015, not yet published; case T-433/13, *Petropars et others v. Council*, 5 May 2015, not yet published; T-176/12, *Bank Tejarat v. Council*, 22 January 2015, not yet published; T-420/11 and T-56/12 *Ocean Capital Administration GmbH & Others, and IRISL Maritime Training Institute and Others v. Council*, 22 January 2015, not yet published.

3.2. Sanctions adopted and implemented by individual States "internal sanctions"

The sovereign State, its laws and regulations as discussed in several contributions to this Volume are the definitive level of implementation of sanctions. This "third level" somewhat hypothetically presented as following the highest level, namely the UNSC sanction regimes having universal validity and second, by the EU Council regulations entering directly the legal corpus of the sovereign State, Member of the EU. In the present context, this applies in particular to EU dual-use regulations including control lists of dual-use items requiring inter alia an export licence.

However, the hierarchy of sanctions and their implementation need to be presented from the perspective of the State: regardless of the source having adopted a binding sanction regime, penalties both administrative and criminal are autonomously decided by the sovereign State Member of the United Nations and of the European Union.

In the following chapters of this publication, these issues are discussed and analysed notably as regards the State.

Chapter
02

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

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1. INTRODUCTION

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

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

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

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

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

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

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

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

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

2. THE NOTION OF SANCTION

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

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

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

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

In general, sanctions are characterized by the following elements:

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

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

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

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

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

3. SANCTIONS IN STRATEGIC TRADE AREA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

54 See Resolution 748 (1992) against Libya.

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

These sanctions can be divided into two subcategories:

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

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

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

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

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

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

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

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

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

The following scheme summarizes our classification of sanctions:

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

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

A. "Supranational Sanctions"

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

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

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

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

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

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

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

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

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

The features of sanctions regimes are then described hereafter.

A.1. At the international level

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

→ THE UNITED NATIONS FRAMEWORK

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

→ CRITICAL REMARKS ON THE UN SYSTEM

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

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

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

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

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

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

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

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

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

80 UN Doc. S/2006/997.

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

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

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

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

82 Such as S/PV.6964.

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

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

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

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

A.2. At the European Union level

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

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

→ THE EU FRAMEWORK

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

→ CRITICAL REMARKS ON THE EU FRAMEWORK

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. "Implementing Sanctions"

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

As mentioned, this group includes two subcategories:

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

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

B.1. National norms implementing legally binding rules

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

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

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

→ INTERNATIONAL LAW BASIS

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

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

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

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110 It is provided by Article 103 of UN Charter.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

→ EUROPEAN LAW BASIS

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

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

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

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

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

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

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

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

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

→ EXPORT CONTROL REGIMES' BASIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

127 Public Statement for Plenary, 3 December 1999.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

→ UN GENERAL ASSEMBLY'S BASIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. CONCLUSION

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

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

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

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

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

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

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

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

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

Chapter
03

Sanctions and strategic trade controls: Two heads of Hydra?

Andrea viski

1. INTRODUCTION

Following the discovery of the A.Q Khan network and the increased threat of non-state actors aquiring or using weapons of mass destrication (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. Moreoever, 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

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160 For more on the definitions of export controls, strategic export controls, and strategic trade controls, see Catherine Dill and Ian Stewart: Defininig 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.

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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.

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-

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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]

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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 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]

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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.

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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 santions 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]

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172 Se 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 measures 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 idenpendently 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 tricker 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?

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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 idenfication 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 were 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.

Chapter
04

Political and economic effects of sanctions on targeted States

Mwita Chacha

1. INTRODUCTION

The use of non-coersive foreign policy tools to get States to alter their behaviour has become a common feature of contemporary international politics.[175] These non-coersive tools have mainly taken the form of sanctions unilaterally or multilaterally applied to the targeted State(s). Recent cases of the deployment of sanctions include those employed by the United States and the European Union against Russia following its annexation of Crimea and United Nations sanctions against Iran and North Korea over their nuclear weapons programmes. Despite their prominence in contemporary international politics, the effect of these sanctions on the behaviour of States remains contested.

Despite their perceived advantage as being a less violent means of facilitating state behaviour change, comprehensive sanctions have been criticized for their ineffectiveness. Tostensen and Bull argue that these sanctions tend to not attain their stated goal while heightening humanitarian suffering.[176] Others including Brzoska, Torbat, Lopez and Cortright, and Hufbauer, Schott, and Elliott find a limited number of conventional sanctions cases that could be

175 Drezner, Daniel W. "Sanctions sometimes smart: targeted sanctions in theory and practice." *International Studies Review* 13.1 (2011): 96-108.

176 Tostensen, Arne, and Beate Bull. "Are smart sanctions feasible?." *World politics* 54.03 (2002): 373-403.

deemed "successful".[177] These observations of the ineffectiveness of comprehensive sanctions triggered the emergence of smart sanctions as a supposedly more precise and efficient tool targeting specific actors and/or sectors and not an entire state.

Smart sanctions seek to address the main pitfalls of conventional sanctions. These sanctions focus on specific aspects of the political leadership and/or economy of the targeted states, unlike comprehesive sanctions that tended to have negative consequences on the target's population.[178] Despite this "smart" turn, the effectiveness of this type of sanctions also remains debateable. Von Soest and Wahman for instance find that democracy sanctions—sanctions imposed to facilitate popular participation in politics—tend to increase the level of democracy in targeted autocratic states.[179] Shagabutdinova and Berejikian also find smart financial sanctions to be more effective in their objective of altering targeted state's policy while having no adverse effect on the human rights record of targeted states.[180] Conversely, Gordon observes that smart sanctions like arms embargoes suffer from poor coordination among the sanctioning states that render these smart sanctions ineffective.[181] Corroborating this observation, a 2013 report from the Targeted Sanctions Consortium concluded that smart sanctions are effective only in about 22% of all cases examined.[182]

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177 Brzoska, Michael. "From Dumb to Smart-Recent Reforms of UN Sanctions." *Global Governance* 9 (2003): 519; Lopez, George A., and David Cortright. "Economic sanctions and human rights: Part of the problem or part of the solution?." *The International Journal of Human Rights* 1.2 (1997): 1-25; Hufbauer, Gary Clyde, Jeffrey J. Schott, and Kimberly Ann Elliott. *Economic sanctions reconsidered: History and current policy*. Vol. 1. Peterson Institute, 1990.

178 Shagabutdinova, Ella, and Jeffrey Berejikian. "Deploying Sanctions while Protecting Human Rights: Are Humanitarian "Smart" Sanctions Effective?." *Journal of Human Rights* 6.1 (2007): 59-74.

179 Von Soest, Christian, and Michael Wahman. "Are democratic sanctions really counterproductive?" *Democratization* 22.6 (2015): 957-980.

180 Shagabutdinova and Berejikian, 2007.

181 Gordon, Joy. "Smart sanctions revisited." *Ethics & International Affairs* 25.03 (2011): 315-335.

182 Biersteker, T., et al. "The Effectiveness of United Nations Targeted Sanctions, Findings from the Targeted Sanctions Consortium." *Graduate Institute for International Studies, Geneva* (2013).

Non-proliferation sanctions including those dealing with nuclear security issues have become the most common smart sanction tool the international community uses to control the the proliferation of weapons of mass destruction. The International Atomic Energy Agency defines nuclear security as "the prevention and detection of, and response to, theft, sabotage, unauthorised access, illegal transfer or other malicious acts involving nuclear material, other radioactive substances or their associated facilities".[183] According to Boreston and Ogilvie-White the global nuclear security regime includes such binding arrangements like the UN Security Council resolutions 1373 and 1540 and technical assistance arrangements like the Global Initiative to Combat Nuclear Terrorism and the Proliferation Security Initiative all of which seek to advance global non-proliferation norms.[184]

Non-proliferation sanctions are imposed with the explicit goal like that of other sanctions being behavior change. In a report prepared for the US Office of the Secretary of Defence by the RAND Corporation and the National Defence Research Institute, Speier, Chow, and Starr write the aim of non-proliferation sanctions is "usually to stop specific programmes for NBC [(nuclear, biological, and chemical)] weapons or missiles and, most frequently, to stop international transfers that contribute to such programmes".[185] Examples of cases where non-proliferation sanctions were imposed include those against Iran, Iraq, Libya, and North Korea. With the increasing global acceptance of nuclear non-proliferation and security as a means to prevent weapons of mass destruction from falling into the wrong hands, states have put up multilateral strategic trade controls and a nuclear security and non-proliferation regime. The UN Security Council has been the main multilateral framework used to

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183 IAEA. "Concepts and terms." http://www-ns.iaea.org/standards/concepts-terms.asp. (2016).

184 Boureston, Jack, and Tanya Ogilvie-White. "Expanding the IAEA's nuclear security mandate." *Bulletin of the Atomic Scientists* 66.5 (2010): 55-64.

185 Speier, Richard, Brian G. Chow, and S. Rae Starr. *Nonproliferation sanctions*. Rand, 2001.

impose non-proliferation sanctions. For example, it was through the efforts of the UN Security Council resolutions 1718 (2006) and 1737 (2006) that sanctions were imposed against North Korea and Iran respectively against their alleged nuclear weapons programmes.[186] In both cases, the UNSC cited multilateral frameworks such as the Nuclear Non-Proliferation Treaty and the International Atomic Energy Agency's safeguards agreements. In a majority of cases however, non-proliferation sanctions have been imposed unilaterally, mainly by the United States in concert with its allies.

In this essay, I provide an overview of the effects of nuclear non-proliferation and security sanctions on the targeted states. Specifically, I evaluate the extent to which these sanctions attained their political objective of behavior change and the potential economic consequences of these sanctions on the targeted states. In providing this evaluation, I make use of the Economic Sanctions Reconsidered, 3rd Edition Database developed by Hufbauer, Schott, Elliott, and Oegg (HSEO hereafter).[187] These data are not the only available collection of sanctions cases. The Threats and Imposition of Sanctions (TIES) dataset that Morgan, Bapat, and Kobayashi developed also covers a wide array of sanctions cases.[188] However, the Hufbauer et al data explicitly identifies cases of nuclear security sanctions that are of interest in this essay. This evaluation is not the first of its kind in the literature on non-proliferation sanctions. Brzoska reviews cases of US-imposed sanctions.[189] Dreyer

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186 Arms Control Association. "Chronology of US-North Korean Nuclear and Missile Diplomacy." https://www.armscontrol.org/factsheets/dprkchron (2016a); Arms Control Association,. "Timeline of Nuclear Diplomacy with Iran." https://www.armscontrol.org/factsheet/Timeline-of-Nuclear-Diplomacy-With-Iran (2016b).

187 Hufbauer, Gary C., Jeffrey J. Schott, Kimberly A. Elliott, and Barbara Oegg. "Economic Sanctions Reconsidered (Washington, DC: Peterson Institute for International Economics)." (2007).

188 Morgan, T. Clifton, Navin Bapat, and Yoshiharu Kobayashi. "Threat and imposition of economic sanctions 1945–2005: Updating the TIES dataset." *Conflict Management and Peace Science* (2014): 0738894213520379. The TIES data include two broad categories of issues precipitating the imposition of non-proliferation sanctions: denial of strategic materials and terminating weapons/materials proliferation.

189 Brzoska, Michael. "From Dumb to Smart-Recent Reforms of UN Sanctions." *Global Governance* 9 (2003): 519.

and Luego-Cabrera on the other hand edited a report on European Union sanctions, although the report does not focus exclusively on non-proliferation sanctions.[190] This essay however offers a broader evaluation that captures nuclear non-proliferation and security sanctions episodes covered in the HSEO database. This essay therefore complements the specific studies of non-proliferation and arrives at conclusions similar to those in these previous assessments.

2. THE EFFECTS OF NON-PROLIFERATION SANCTIONS

The HSEO database is one of the most comprehensive datasets of economic sanctions states have imposed against other states. The HSEO database defines economic sanctions as "deliberate, government inspired withdrawal, or threat of withdrawal, of customary trade or financial relations".[191] This definition is similar to that alluded to by the UN Security Council where sanctions the Security Council has threatened and/or imposed "have ranged from comprehensive economic and trade sanctions to more targeted measures such as arms embargoes, travel bans, and financial or commodity restrictions".[192] A unique aspect of this database is its qualitative case studies of each of the cases in the database. The database identifies 204 cases of economic sanctions imposed between the years 1914 and

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190 Dreyer, Iana and José Luengo-Cabrera. "On target? EU sanctions as security policy tools." *Issue* Report no. 25, September (2015).

191 Hafbauer, et al (2007).

192 Security Council Report, "UN Sanctions." Special Research Report no. 3 (November) (2013). Although not explicit, the UN Charter references the use of economic restrictions as means of obliging behavior change in Article 41: "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations."

2006.[193] In each case study and in the full dataset, the HSEO database includes information on the target(s) and sender(s) of sanctions and their duration, goals of the sender, the reactions of the target and third-party states, international organization involvement, the economic and political impacts of the sanctions, and specific political and economic indicators on the target state such as regime type, its trade levels, gross national product.

The goal of sanctions constitutes the foreign policy objective of the sender state that motivates the threat and imposition of sanctions against the target state. In the HSEO database, four goals are of interest: nuclear policy, nuclear non-proliferation, nuclear safeguards, and nuclear testing. These four get plausibly close to issues pertaining to nuclear security and non-proliferation. For instance, Canada imposed sanctions against India in the form of suspension of nuclear cooperation and threatened to withhold non-food aid following India's explosion of a nuclear device.[194] The qualitative assessment of this sanctions episode summarizes the goals of Canada succinctly as one that was motivated by Canada's concerns regarding the spread of nuclear weapons.[195] The qualitative assessment of US sanctions against Pakistan also highlights this goal: the US sought to limit the ability of Pakistan to import goods and material that could be used to make a nuclear weapon through sanctions that would motivate Pakistan not to develop such weapons.[196]

In addition to the goals of sanctions, the HSEO also gives an account of the salience of these goals. Five categories are noted in the dataset itself. These include modest policy changes (1), regime change and democratization (2), disruption of military adventures (3), military impairment (4), and other major policy changes (5). For the four nuclear security related issues motivating sanctions, the goal of

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193 These data have yet to be updated till the year 2015. The other large-N sanctions database, the Threat and Imposition of Sanctions (TIES) dataset (Morgan et al 2014) includes observations between 1945 and 2005.

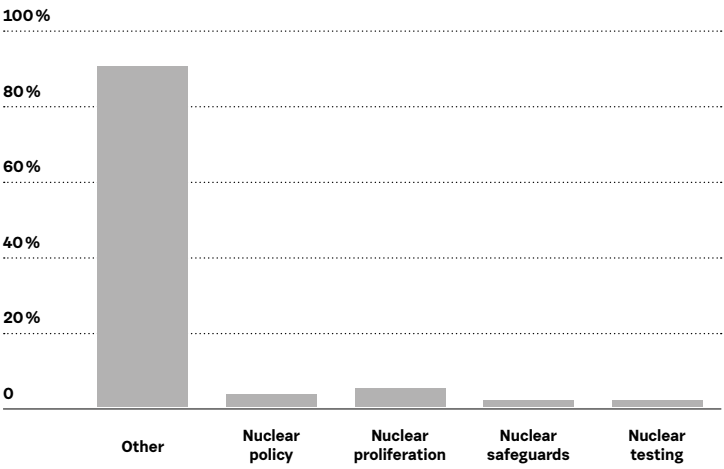
194 Hafbauer et al 2007.

195 *Ibid.*

196 *Ibid.*

sender states has mainly been military impairment. The Iran case in the HSEO data epitomizes this category. Following its investigations on Iran's nuclear programme, the IAEA referred Iran to the UN Security Council over concerns that it was trying to develop nuclear weapons.[197] The US authorities have justified sanctions as a means of ensuring Iran abandon its nuclear weapons ambitions.[198] The 2015 Joint Comprehensive Plan of Action between the P5+Germany and Iran suggests that the sanctions the US and UNSC had imposed may have served to militarily impair Iran through it giving up its nuclear weapons programme and making its nuclear programme more transparent in exchange of sanctions relief.[199]

Chart 1. Goal of sanctions.



Sanctions motivated by nuclear security issues have been limited during the period covered in the HSEO dataset. Chart 1 graphs the percentages of goals of sanctions, concentrating on those related

197 *Ibid.*

198 *Ibid.*

199 Arms Control Association 2016b.

to nuclear non-proliferation and security issues. The most significant observation from this chart is the few cases of nuclear issues as precipitators of sanction imposition. As depicted in Chart 1, only 10,3% (21 out of 204) of the cases during the duration in the dataset involved sanctions imposed because of nucler security (nuclear policy at 3,4%, nuclear proliferation at 4,41%, and nuclear safeguards and testing at 0,98% each).

2.1. Types of Nuclear Non-Proliferation and Security Sanctions

Despite their limited instances, nuclear non-proliferation and security goals have resulted in the threat and imposition of specific sanctions against targeted states. These sanctions aim to cause damage to the economy of the targeted states. HSEO database identifies the following sanctions type: interruption of commercial finance, aid, and other official finance, interruption of exports from the sender to the target, and interruption of imports by the sender from the target. Chart 2 summarizes these types of sanctions imposed to attain nuclear security goals.

Chart 2. Types of nuclear security sanctions imposed.

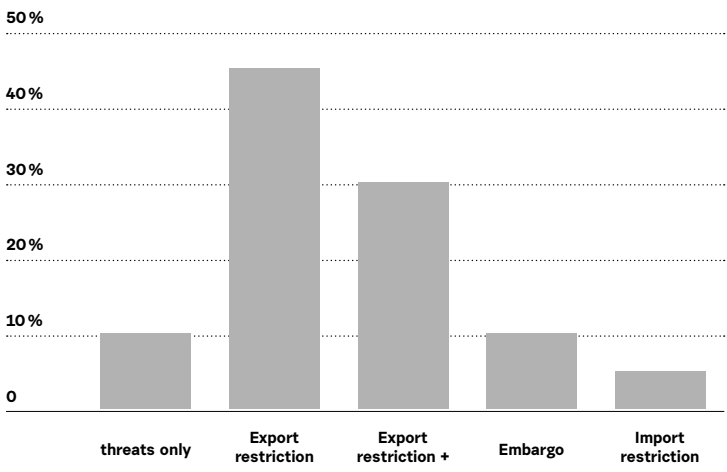


Chart 2 provides a summary of these specific types of nuclear security sanctions that were eventually imposed as recorded in the HSEO dataset. The first category includes cases where only threats, but no sanctions were imposed while the rest of the categories detail economic sanctions imposed. The third category, "export restriction +," are cases were export restrictions along with restrictions of "commercial finance, aid, and other official finance" were the sanctions imposed.[200] The fourth category, embargoes, are cases where import and exports were restricted along with restrictions of "commercial finance, aid, and other official finance" were the sanctions imposed.[201]

Chart 2 reveals that export restrictions and halting the other financial flows are the most common sanctions deployed to achieve nuclear security and non-proliferation goals. For instance, restrictions in financial flows has been a common type of sanction the UN Security Council has imposed against North Korea as documented in UNSC resolutions 1695 (2006), 1874 (2009), 2094 (2013), and 2270 (2016).[202] Indeed, the observations in Chart 2 are not surprising given the obligations outlined in multilateral nuclear non-proliferation arrangements. The Nuclear Non-Proliferation Treaty's Article III for example obliges its signatories not to provide non-nuclear weapons states with nuclear materials unless there are strict safeguards in place.[203] The UN Security Council Resolution 1540's Article 3 on the other hand calls on states to set up national export controls systems so as to mitigate the proliferation of dual-use goods include nuclear material.[204] One mechanism of punishing violators of these nuclear security and non-proliferation norms that

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200 Hafbauer et al 2007.

201 *Ibid*.

202 Arms Control Association 2016a.

203 United Nations Office for Disamarment Affairs. Treaty on Non-Proliferation of Nuclear Weapons. http://disarmament.un.org/treaties/t/npt/text.

204 United Nations Security Council. Resolution 1540. http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1540%20(2004) 2004.

the UN Security Council relies upon has been "complete or partial interruption of economic relations" as recommended in Article 41 of the UN Charter that empowers the Security Council to employ such measures.[205]

2.2. Primary Sanctions Senders and Targets

The non-proliferation sanctions identified in Chart 2 are both unilateral and multilateral. The HSEO data also identifies the actors that threatened to impose sanctions and the targets of these sanctions. These are both states and international organizations. Table 1 reveals a comprehensive list of all nuclear security and non-proliferation sanctions cases in the HSEO database. As depicted in Table 1, the most prominent state, primary sender that threatens and/or imposes sanctions, is the United States. The US has been the primary actor in 15 of the 21 cases of nuclear sanctions. In two of these 15 cases, sanctions against North Korea, the US has acted in concert with the United Nations. Along with the US, Canada has been the primary sanctioner in four cases, two of which were the result of nuclear safeguards disagreements, while in one case it has coordinated with the United States (sanction threats against South Korea). Australia has sanctioned in two cases both of which were the result of nuclear testing concerns.

Table 1 also reveals the issue that precipitated the threat or imposition of sanctions and the targets of these sanctions. In 15 cases, sanctions where threatened and/or imposed due to the senders' concerns regarding the target state violating various aspects of nuclear non-proliferation. The targets of these sanctions are a diverse group of states, unlike the sender states and include some that have been successful at acquiring nuclear weapons technology such as India and Pakistan and some that were deterred from pursuing nuclear weapons technology like Argentina, Brazil, South Africa,

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205 United Nations. Charter of the United Nations. http://www.un.org/en/charterunited-nations/.

and South Korea. Table 1 also highlights that sanctions against Iran have been on going since 1984, although the UN's imposition did not commence until the mid 2000s.

Table 1. Senders and Targets of Nuclear Security Sanctions

Target	Sender	Duration	Goal	Sanction
France	Australia	1983-1986	Testing	Export restriction
France	Australia	1995-1996	Testing	Import restriction
EC[c]; Japan	Canada	1977-1978	Safeguards	Export restriction
India	Canada	1974-1976	Proliferation	Export restriction+
Japan; EC[c]	Canada	1977-1978	Safeguards	Export restriction
Pakistan	Canada	1974-1976	Proliferation	Export restriction
Argentina	United States	1978-1982	Policy	Export restriction
Brazil	United States	1978-1981	Policy	Export restriction
China	United States	1991-	Proliferation	Export restriction+
India	United States	1998-2001	Proliferation	Export restriction+
India	United States	1978-1982	Policy	Export restriction
Iran	United States	1984-	Proliferation	Embargo
Iraq	United States	1980-2003	Proliferation	Export restriction
Libya	United States	1978-2004	Proliferation	Embargo
N. Korea	United States	2002-2006	Proliferation	Export restriction+
N. Korea	United States	1993-1994	Proliferation	Threat
Pakistan	United States	1998-2001	Policy	Export restriction+
Pakistan	United States	1979-1997	Policy	Export restriction+
South Africa	United States	1975-1982	Policy	Export restriction
S. Korea	United States	1975-1976	Proliferation	Threat
Taiwan	United States	1976-1977	Policy	Export restriction

[a] denotes the United Nations was secondary sender;
[b] denotes Canada was secondary sender;
[c] denotes the European Community. Source: Haufbauer et al (2007)

Other sanction cases identified in Table 1 however are those against States for violating nuclear safeguards and not non-pro-

liferation. Two cases stand out and are briefly summarized here. In 1977 Canada suspended shipment of uranium to Japan and the European Community because of disagreements on the nuclear safeguards arrangements, specifically uranium reprocessing in these two targets.[206] In this particualt case, Canada was negotiating directly with the European Community given that the EC was composed of key Canadian uranium importers such as the United Kingdom, Germany, and France.[207] The embargo on shipments was only lifted after the European Community and Japan reached an agreement with Canada on strengthening their respective nuclear safeguards.[208] Sanctions against France for nuclear testing in Mururoa atoll in the South Pacific in 1983 and 1995 resulted in Australia banning the export of uranium to France and restrictions on procuring defence goods from France.[209] It was only after France signed the Treaty of Rarotonga that made the South Pacific a nuclear-free zone, the French signing of the Comprehensive Test Ban Treaty, and France halting any nuclear tests that Australia normalized its relations with France through the elimination of the previously imposed sanctions.[210]

Finally, Table 1 also identifies the type of sanction imposed in each specific case. As noted on Chart 1, export restrictions are the most common type of sanction imposed along with halting financial flows. Embargoes, or sanctions restricting imports and exports along with financial flows were only imposed in two cases: Iran and Libya.

2.3. Economic and Political Effects of Nuclear Security Sanctions

The economic and political effects of nuclear security sanctions vary to a great extent. Politically, these sanctions may have been

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206 Jennekens, Jon. "Canadian Involvement in International Nuclear Cooperation." Atomic Energy Control Board, Ottawa, Canada (1981).

207 Jennekens 1981.

208 Hafbauer et al 2007.

209 *Ibid.*

210 *Ibid.*

responsible for behavior change in the cases of Argentina, Brazil, South Africa, and South Korea, as noted above. Yet these sanctions did not have any effect on India, Pakistan, and North Korea.

The HSEO database includes estimates of the economic cost of sanctions on target states. For example, following US imposition of export restrictions against Brazil's access to low-enrinched uranium, Brazil suffered an economic loss valued at US dollars 5 million.[211] In per capita terms, this economic loss amounted to US dollars 0,04.[212] These economic costs of nuclear security sanctions vary between negligible in cases where sanctions were threatened but not imposed such as US sanctions threats towards North Korea in the 1993-1994 period to US dollars 678 million as a result of US sanctions against India in 1998-2001 period.

The political effects of nuclear security sanctions also exhibit a similar variation. HSEO database identifies four categories of policy outcomes: failed outcome (1) where the sender's goal was not attained, unclear but positive outcome (2), positive outcome (3), and successful outcome where the policy goals of the sender were attained (4).[213] Given that policy goals of senders might be attained via other means and not exclusively through the threat and/or imposition of sanctions, the HSEO data also evaluates the extent to which sanctions were responsible for the policy outcomes. The four categories of interest here include negative contribution (1), minor contribution (2), substantial contribution (3), and decisive contribution (4). These two indicators are then used to evaluate the successfulness of sanctions or the extent to which the policy goal obtained was the result of sanctions.

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211 *Ibid.*

212 *Ibid.*

213 The HSEO database codebook (Hafbauer et al 2007) elaborates on these indices further. A failed outcome (1) includes instances where despite sanction threat and/or imposition, the target did not alter its behavior. An unclear but possibly positive outcome (2) encompasses those cases where sanctions were not decisive on their own in getting the target to alter its behavior. A positive outcome (3) constitutes cases where "the sender's goals were partially realized." A successful outcome (4) includes cases where"the sender's goals were largely or entirely realized."

Table 2 provides a summary of these political and economic effects. Two cases have been excluded owing to lack of data on their economic effects: North Korea in 1993-1994 and South Korea in 1975-1976 when the US threatened but did not impose sanctions. Additionally, Table 2 identifies the status of the target State, that is, whether the target State is recognized in the Non-Proliferation Treaty as a nuclear weapon State (NW State), a non-nuclear weapon state (NNW State), or those that are not signatories of the NPT. Table 2 not only reveals the previously noted observation that economic costs have varied, but also the limited variation in policy outcomes. In 10 of the 19 cases being displayed, the policy outcomes of nuclear security and non-proliferation sanctions were unclear, albeit positive and only successful in two cases: Taiwan and Libya. In most cases, these sanctions appeared to have tangentially contributed to the policy outcomes the HSEO database identifies. Sanctions contributed decisively in the policy goal of the sender in one case, Taiwan. In one non-proliferation case, Libya, sanctions contributed substantially to the policy goal of the sender. To reiterate, the Taiwan and Libya are the only instances in the HSEO database deemed to have resulted in the policy outcome sought by the target. In two cases, North Korea (2002-2006) and Pakistan (1979-1997) sanctions contributed negatively leading to no behavior change. Finally, sanctions seem to have contributed substantially in the nuclear safeguards disagreement cases between Canada and the EC and Japan and only tangentially in nuclear testing disagreements between France and Australia. The statistics depicted in Table 2 lead to one conclusion that others have previously reported on the effect of non-proliferation sanctions: their direct effect has tended to be insignificant.

Additionally Table 2 also leads one to the following question: what can explain the variation in the success of nuclear security sanctions? To answer this empirical question, I outline a brief argu-

ment and test it on the 19 cases of nuclear security sanctions.[214] One argument may be that the extent of economic costs can help to explain whether sanctions would be effective in attaining their objective or not. As more societal actors are adversely affected by the economic limitations that sanctions represent, decisionmakers in the target state may find it in their interest to alter their behavior towards that which the sanctions senders desire. In other words, nuclear security sanctions would be more successful in instances where they are economically costly to the target state.

I test this argument by estimating a linear regression using the HSEO data. The dependent variable is *success*, which is the interaction between policy outcome and sanction contribution. As noted earlier, this interaction evaluates the extent to which sanctions contributed to the policy outcome the sanctions sender wanted. This variable ranges between 1 and 16: a value of 1 indicates that the policy outcome desired was not achieved and sanctions contributed negatively to this outcome while a value of 16 is indicative of instances where the policy outcome desired was successfully achieved and sanctions contributed to this outcome decisively.

214 Only 19 cases are estimated because two cases, South Korea (1975-1976) and North Korea (1993-1994), were only instance of sanctions threats and no decipherable economic impact could be noted.

Table 2. Summary of Economic and Political Effects of Sanctions

Target	NPT Status	Cost	Cost/ capita	Policy Outcome	Sanction contribution
France	NW State	0.001	0.001	Failed	Minor
France	NW State	0.001	0.001	Unclear	Minor
EC; Japan	Various	40	0.15	Positive	Substantial
India	N/A	33	0.06	Unclear	Minor
Japan; EC	Various	75	0.66	Positive	Substantial
Pakistan	N/A	13	0.18	Unclear	Minor
Argentina	NNW State	0.2	0.001	Unclear	Minor
Brazil	NW State	5	0.04	Unclear	Minor
China	NW State	54	0.05	Unclear	Minor
India	N/A	678	0.72	Failed	Minor
India	N/A	12	0.02	Unclear	Minor
Iran	NNW State	545	7.27	Unclear	Minor
Iraq	NNW State	22	1.71	Unclear	Minor
Libya	NNW State	309	114.4	Success	Substantial
N. Korea	N/A	127.6	5.67	Failed	Negative
Pakistan	N/A	456	4.06	Unclear	Minor
Pakistan	N/A	456	4.06	Failed	Negative
S. Africa	N/A	2	0.08	Unclear	Minor
Taiwan	N/A	17	1.01	Success	Decisive

Target costs are in millions of US Dollars while Cost/capita are in US Dollars.
Data source: Hufbauer, et al (2007).

The variable of interest is *cost/capita* that captures the monetary value of the losses as a result of the economic sanctions on the target per capita. Additionally, I control for potential factors contributing to the success of sanctions. These include the *duration* of the sanctions in number of years, whether the sanctions were unilaterally imposed by the United States (*US sanctions*), the extent of international cooperation in the imposition of sanctions

(*international cooperation*), and the nature of political and trade ties between the sender and the target (*prior ties* and *trade links*).[215] The estimates of the linear regression are presented in Table 3.

Table 3. Determinants of Sanctions Success

Variable	Estimates	
Cost/ Capita	0.1**	(0.026)
Duration	-0.263	(0.185)
US Sanctions	2.084	(2.619)
International cooperation	-1.733	(1.541)
Prior Ties	0.805	(2.755)
Trade Links	0.003	(0.04)
R-squared	0.519	
Root MSE	3.246	
N	19	

Notes: Robust standard errors in parenthesis.
** denotes statistical significance at 95% confidence interval.
Data source: Hufbauer, et al (2007).

The results reveal some support for the hypothesis that high economic effect of sanctions on the target is positively associated with sanction success. Indeed, this is the only covariate in Table 3 that returns a statistically significant estimate. These results should be interpreted with some caution given the limited number of nuclear security sanctions in the HSEO data (only 19 cases in the data). The recent cases of UN, US, and EU sanctions against Iran are not included in the data. Additionally, Cold War era cases of US sanctions against the Soviet Union and China to limit their access to strategic dual-use goods are also not included in the cases esti-

215 There are four levels of *international cooperation*: no cooperation (1); minor cooperation (2); modest cooperation (3); significant cooperation (4). *Prior ties* includes the following categories: antagonistic (1); neutral (2); cordial (3). *Trade links* "equals the average of presanction target-country exports to the sender country as a percentage of total target-country exports and imports from the sender country as a percentage of total target-country imports" (HSEO database).

mated in Table 3. However, the results presented in Table 3 can be seen as pointing at the duality of the economic and political effects of sanctions: where economic effects are high such as for instance in the recent case of Iran, there is a likelihood that the sanctions imposing such economic costs can yield the policy outcome the sanctions senders seek.

3. CONCLUSION

In this essay, I sought to provide an evaluation of the economic and political effects of nuclear non-proliferation and security sanctions on target states. Nuclear security represents non-proliferation efforts that states have taken unilaterally and multilaterally. Sanctions imposed with the goal of advancing nuclear non-proliferation and security have tended to be smart and targeting the economic welfare of the suspected violators of nuclear security norms.

Using a database that Hufbauer, Schott, Elliott, and Oegg developed, this essay has showed that sanctions specifically applied to advance nuclear security have been limited.[216] There were only 20 out of 204 cases of threats and imposition of nuclear security sanctions during the time period covered in this database.[217] These sanctions have usually sought to impose economic costs on the target states in the form of restrictions in trade and other financial flows. Additionally, the United States appears to be the main sender of sanctions, only going through multilateral channels in a few cases. Finally, the HSEO database reveals that the economic and political effects of these sanctions have been minor to neglegible. In the 19 cases where sanctions were imposed, only two resulted in the policy outcome the senders sought. Finally, I provided preliminary statistical evidence to suggest that high economic costs of sanctions

216 Hafbauer et al 2007.

217 Although these data commence in 1916, years relevant for this study are those after WWII to 2006 when nuclear non-proliferation became an important global issue.

are positively associated with the success of nuclear security sanctions. This finding would appear to be in line with the implication of sanctions against Iran: the Iranian policymakers may have been moved to make certain concessions in exchange for an easing of the sanctions that the UN (specifically the P5 + Germany) had imposed as outlined in the Joint Comprehensive Plan of Action.

As previously noted, HSEO data are not the only source of sanctions information. Those in the Threat and Imposition of Sanctions (TIES) data that Morgan, Bapat, and Kobayashi (2014) are also notable in the sanctions literature.[218] The TIES data covers the period between 1945 and 2005.[219] These data identify two categories of sanctions that get at non-proliferation issues: strategic good aquisition and weapons/material proliferation.[220] An examination of sanctions that result from these two issues appear to suggest that they have been few compared to other issues motivating sanctions, corroborating this essay's findings.[221] Additional, the TIES data reports that the US has been the most active sender and the economic and political effects of these sanctions are suspect.[222] However, these two categories also encompass other attempts at gaining strategic goods beyond nuclear and WMD technology and also include the proliferation of weapons other than nuclear, biological, and chemical weapons.[223] Put differently, these two non-proliferation categories do not ascertain beyond a reasonable doubt that it was in fact WMD isssues that inspired the threat or imposition of sanctions.

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218 Morgan et al 2014.

219 *Ibid.*

220 *Ibid.*

221 *Ibid.*

222 *Ibid.*

223 *Ibid.*

Finally, the observation that nuclear security sanctions have had a negligible effect on targeted states should not suggest that non-proliferation efforts have not worked. The few cases of nuclear security sanctions in the HSEO database implies that there have been few cases of nuclear proliferation that attract international attention. Crucially, the emergence of numerous multilateral arrangements like the Nuclear Non-Proliferation Treaty, the Chemical Weapons Convention, the Biological Weapons Convention, and the UN Security Council Resolution 1540 have resulted in the emergence, spread, and internalization of non-proliferation norms globally. Table 4 summarizes the coverage of these multilateral frameworks. These norms have in turn influenced states not to pursue developing or acquring WMD technology. Put differently, the potential for UNSC and unilateral sanctions for violating these global norms enshrined in these multilateral frameworks can be argued to influence states not targeted with sanctions indirectly not to pursue or facilitate the development and proliferation of WMD technology.

Chapter
05

Examining the implementation of UN sanctions on Iran

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1. INTRODUCTION

On 4 February 2006, the IAEA Board of Governors voted to refer allegations of Iranian non-compliance with the country's International Atomic Energy Agency (IAEA) safeguards agreement to the UN Security Council. Various rounds of diplomacy followed coordinated with the adoption of four rounds of iteratively tougher Security Council resolutions starting with 1737 in 2006 and ending with 1929 in 2010. These measures were 'targeted' in nature on certain specifically prohibited activities and designated individuals and entities.[224] Certain states also adopted a range of unilateral sanctions that were complementary to the UNSC resolutions.[225] By the time of the interim nuclear agreement (the Joint Plan of

224 Beginning in 2006, the UNSC adopted a total of seven resolutions, four of which imposed sanctions against persons or entities involved in Iran's nuclear proliferation activities. See Arms Control Association "UN Security Council resolutions on Iran: Fact Sheets and Briefs" www.armscontrol.org, October 2015. Available at: http://www.armscontrol.org/factsheets/Security-Council-Resolutionson-Iran (Accessed 18 Feb 2016).

225 US and European Union's sanctions cover Iran's trade and financial activities and human rights abuses, apart from its weapons development-related programmes. See US Department of Treasury "Iran Sanctions" www.treasury.org, February 2016. Available at https://www.treasury.gov/resource-center/sanctions/Programs/Pages/iran.aspx and European External Action Service "European Union: Restrictive Measures (sanctions) in force January 2016. Available at http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf (Accessed 18 Feb 2016).

Action) in November 2013, Iran was subject to an intense, complex and multi-layered sanctions framework that affected nearly every aspect the country's economy, government and life of its citizens.

Of particular note, however, is the targeted nature and scope of the UN sanctions resolutions. Unlike sanctions on Iraq in the 1990s, the purpose of UN sanctions on Iran was not to cripple the country's economy through the adoption of a wide-ranging embargo. Instead, the UN resolutions contained limited measures that related to constraining Iran's nuclear, missile and military programmes. The resolutions also included designations, i.e. lists of individuals and entities, connected with prohibited activities, and imposed restrictions on the movement of designated individuals in the Iranian regime as well as requirements to freeze assets of designated individuals and entities. The objective of the sanctions was primarily to constrain Iran's actions until a diplomatic resolution to the case could be found, and to pressure Iran diplomatically into reaching a negotiated solution.

It is against these more modest objectives that this paper, in the first instance, examines UN sanctions on Iran. This is achieved by reviewing compliance with the sanctions resolutions primarily by examining information collected by the sanctions committee set up by the Security Council to oversee implementation of the sanctions as well as its related 'panel of experts'. Consideration is also given to the functioning of these bodies, particularly in relation to their ability to collect and report on information related to potential non-compliance. A related factor is that of willingness and capacity to implement the sanctions in countries other than Iran and the ability of the UN apparatus to provide support to states to this end.

While it is appropriate in the first instance to restrict an evaluation of the effectiveness of the UN sanctions that were adopted in relation to Iran, it is also necessary to give consideration to the question of whether the nature and scope of the sanctions architecture that was adopted was in fact suited to the objectives set for it.

We have examined this question by considering how effective the measures were in constraining Iran's nuclear, missile, and military programmes.

While the question of how non-UN sanctions affected the Iranian calculus and contributed (or otherwise) to the agreement of the Joint Comprehensive Plan of Action (JCPOA) in July 2015 is interesting, it is largely beyond the scope of this chapter, which focuses instead on UN-related measures. However, this chapter would not be complete without an examination of how UN sanctions measures enabled and supported – or otherwise – unilateral measures.

Gaining insight into these matters at this point is vital. While the UN sanctions measures were suspended on 'implementation day' of the Iran nuclear agreement (16 January 2016), the JCPOA and UNSCR 2231 contains measures intended to prevent Iranian illicit trade over the next decade.[226] Additionally, Resolution 2231 contains a so-called 'snapback mechanism' which could result in the UN sanctions returning.[227] As such, it is vital to understand if and how the sanctions worked in order to inform implementation of measures to prevent Iranian non-compliance in the future.

In examining these matters, this chapter draws primarily upon three sets of information. The first is published information from the 1737 and its 'Panel of Experts'. The second is media reporting concerning the committee and panel's work. The third is information compiled by Project Alpha at King's College London in relation to the implementation of UN sanctions on Iran. Evidently, there

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226 Resolution 2231, adopted by the UNSC in July 2015, endorsed the JCPOA. It was implemented in January 2016 after confirmation from the IAEA that Iran had satisfied the requirements stipulated in the action plan. Provided all provisions are met, Termination is scheduled ten years after the adoption date. See UNSC "Resolution 2231 (2015), www.unsc.org, Feb 2016. Available at http://www.un.org/en/sc/2231/ (Accessed 18 Feb 2016).

227 *Ibid.* - A JCPOA member State can raise non-performance of JCPOA commitments, whereby the SC shall resolve whether to continue in effect of the termination of previous resolutions - 1696, 1737, 1747, 1803, 1835, 1929 and 2224. If decision is not made 30 days after the member State's notification, effectivity of previous resolutions shall be restored.

is some overlap between these information sources. The personal experiences of the authors also provide contextual reference for this analysis.

This chapter proceeds as follows. First, a brief chronology of the Iran file is set out highlighting, in particular, the adoption of UN resolutions. Second, an overview of the requirements of the resolutions is laid out. The measures are categorised as prohibitions on transfers of nuclear and dual-use goods and technologies, asset freezes, travel bans [etc]. The implementation and monitoring mechanism established by the UN is also outlined. Next, the implementation of sanctions on Iran is examined. This is achieved by looking at statistics related to implementation reports submitted to the 1737 committee. The reporting to and reporting by the panel of experts and 1737 committee in relation to non-compliance is also scrutinised. The next section analyses the effect of the sanctions on Iran's prohibited programmes. This includes an examination of Iran's ability to import goods for the programme despite the sanctions and the advancement of the programmes over the sanctions period. Finally, consideration is given to how the UN measures related to the implementation of complementary unilateral measures. The chapter concludes that while there are grounds to believe that UN sanctions have slowed Iran's nuclear and missile developments, the measures did not prevent such advancements altogether. Such measures can, however, contribute to the monitoring of Iran's nuclear programme in the future.

2. IRAN AND SANCTIONS

The United Nations Security Council adopted a number of sanctions resolutions against Iran. These measures were adopted primarily in order to induce Iran to return to the negotiating table in order to reach a conclusion over the future of its much-disputed nuclear programme.

2.1. Brief Chronological narrative

The sanctions period is a relatively short part of a much longer story concerning Iran's nuclear programme and its relations with western countries. Prior to the Islamic Republic in the 1970s, Shah-led Iran had sought to develop a substantial nuclear infrastructure funded by the country's oil wealth and enabled by a close relationship with the United States and other western powers. In 1967, Iran acquired the Tehran Research Reactor from the United States along with a small quantity of highly enriched uranium fuel that has remained in Iran to this day.[228] It also signed contracts with German and Russian companies to acquire the Bushehr Nuclear Power Plant (BNPP) and was negotiating over the supply of a commercial-scale reprocessing capability.[229] In 1970, Shah-era Iran had signed the NPT and undertaken other non-proliferation commitments.

After the Islamic revolution, the country's nuclear programme stalled, with the Islamic Republic dismissing nuclear power as 'un-Islamic'. Ironically, there are signs that Iran's inability to cancel Shah-era contracts prevented the whole-scale abandonment of nuclear activity in Iran. Following the Iran-Iraq war in 1980 - 1988, Iran is believed to have grown interested in developing nuclear weapons technology, mainly to achieve self-reliance should a decision be taken to seek nuclear weapons themselves.[230] The then President of Iran, Ali Akbar Hashemi Rafshanjani, has recently been quoted as saying, for example, that:

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228 Nuclear Threat Initiative "Tehran Research reactor (TRR)", www.nti.org, 23 Aug 2013. Available at http://www.nti.org/facilities/182/ (Accessed 18 Feb 2016).

229 The initial contract was signed in 1976 with Siemens KWU but the plant was damaged by Iraqi airstrikes between 1984-88. A new agreement was signed with the Russian government in 1995 that made use of the original equipment and structures. See World Nuclear Association "Nuclear Power in Iran" www.world-nuclear.org Jan 2016. Available at http://www.world-nuclear.org/information-library/country-profiles/countries-g-n/iran.aspx (Accessed 18 Feb 2016).

230 Chubin, S. "The Politics of Iran's Nuclear program" The Iran Primer, United States Institute of Peace. Available at http://iranprimer.usip.org/resource/politics-irans-nuclear-program (Accessed 18 Feb 2016).

"As I have said, when we started the [nuclear] work, we were at war, and we wanted to have such an option for the day our enemies wanted to use nuclear weapons. This was [our] state of mind, but things never become serious."[231]

Iran sought support from international suppliers in taking forward its renewed interest in nuclear technology. It concluded contracts to complete the Bushehr 1 nuclear power plant.[232] It also signed an agreement with AQ Khan over supply of centrifuge technology and was alleged to have launched a programme with the specific purpose of designing nuclear weapons.[233]

Iran's progress on the nuclear front appeared to be slow during the Iran-Iraq war and the period that followed. Nonetheless, concerns about Iran's nuclear activities came to the fore in 2002, when the National Council for Resistance of Iran (an opposition group) revealed details of an underground uranium enrichment site (the Natanz Fuel Enrichment Plant).[234] It was also around this time that full details of the AQ Khan proliferation network were becoming known to western intelligence agencies.

An initial round of diplomacy followed led by the E3 (France, Germany and the United Kingdom). In 2003, Iran agreed to suspend its nuclear activities and to voluntarily adhere to the Additional Protocol.[235] This lasted only until 2006 when, after the election of President Mahmoud Ahmadinejad, Iran abandoned its commitment

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231 As reported in the The Jerusalem Post, "Former Iran president indirectly admits country sought nuclear weapons", Available online at: http://www.jpost.com/Middle-East/Iran/Former-Iran-president-indirectly-admits-country-sought-nuclear-weapons-430302 (Accessed 22 March 2016).

232 World Nuclear Association "Nuclear Power in Iran" www.world-nuclear.org Jan 2016. Available at http://www.world-nuclear.org/information-library/country-profiles/countries-g-n/iran.aspx (Accessed 18 Feb 2016).

233 Laufer, M. "A.Q. Khan Nuclear Chronology" Sep 2005, Carnegie Endowment for International Peace. Available at http://carnegieendowment.org/2005/09/07/a.-q.-khan-nuclear-chronology (Accessed on 18 Feb 2016).

234 The Institute for Science and International Security "Nuclear Sites". www.isisnucleariran.org, Available at http://www.isisnucleariran.org/sites/detail/natanz/ (Accessed on 18 Feb 2016).

235 The Center for Arms Control and Non-Proliferation "Factsheet: Iran and the Additional Protocol" Jul 2015, Available online at http://armscontrolcenter.org/factsheet-iran-and-the-additional-protocol/ (Accessed on 18 Feb 2016).

to the agreement. It broke the IAEA seals that had temporarily ensured that nuclear equipment and materials could not be used and resumed its nuclear programme. It was this reduced cooperation and the outstanding questions about the past nature of Iran's nuclear programme that resulted in the IAEA's Board of Governors referring the case to the UN Security Council in 2006.

As noted above, the UN Security Council adopted a total of four sanctions resolutions following Iran's continued refusal to suspend proliferation-sensitive nuclear activities (now including heavy-water-related activities). These resolutions contained repeated and enhanced provisions requiring Iran to halt its proliferation-sensitive activities and demonstrate the peaceful nature of its nuclear programme. Iran did not do so and further revelations followed. These included the discovery of another secret enrichment site near Qom, which was announced to the world by the leaders of France, the United States, and the United Kingdom in 2009.[236] This was followed by another SC resolution, 1929, which imposed further sanctions and created a panel of experts to monitor Iranian compliance.[237]

It is principally this sanctions landscape that is of interest in this paper. No further UN resolutions containing new sanctions measures were adopted following Resolution 1929 (2010). Although Resolution 2231(2015) includes restrictions on certain activities that were originally covered by sanctions, it is not itself a sanctions resolution. The resolution endorsed the JCPOA between the E3+3[238] and Iran and paved the way for lifting of the four UN sanctions resolutions. It also created an architecture for managing the Iran nuclear file for the next decade.

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236 Nikou, S. "Timeline of Iran's nuclear Activities" The Iran Primer, United States Institute of Peace. Available online at http://iranprimer.usip.org/resource/timeline-irans-nuclear-activities (Accessed on 18 Feb 2016).

237 Arms Control Association "UN Security Council resolutions on Iran: Fact Sheets and Briefs" www.armscontrol.org, October 2015. Available at: http://www.armscontrol.org/factsheets/Security-Council-Resolutions-on-Iran (Accessed 18 Feb 2016).

238 France, Germany, United Kingdom, United States, Russia, China.

It should be borne in mind that, although no further sanctions resolutions were adopted by the United Nations, various other measures were effected by other states over the decade prior to the passage of resolution. Perhaps most notable among these were the US unilateral sanctions that had a substantial effect on US and non-US individuals and entities and EU sanctions. Both expanded dramatically following adoption of Resolution 1929 (2010).

2.2. Overview of UN measures

It is the UN measures that are of principle interest to this paper. The UN adopted a range of measures that fall within the definition of 'targeted' sanctions. Details of the provisions of the four resolutions are described later (see next section: Examining Implementation of UN Security Council resolutions on Iran).

Targeted sanctions were developed as a tool towards the end of the Iraqi 'sanctions decade' of the 1990s.[239] The process of developing targeted sanctions was led by states, such as Sweden, Norway and Switzerland, acting in concert with a number of non-governmental organisations which were concerned about the humanitarian impact of sanctions on Iraq. The objective in developing the targeted sanctions toolset was to identify measures that could constrain a state's ability to pursue policies of concern while also sparing the target country's population from the harm associated with a full economic embargo. The targeted sanctions toolset that was devised included measures such as designations, asset freezes, travel bans, and arms embargos – measures that were intended to affect decision makers and impact on involved in activities of concern but not on the population at large.

It is notable that the UN sanctions on Iran included a prohibition on the import of nuclear and missile-related goods and technology. Combating WMD proliferation by Iran was perhaps

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239 See for example, "Summary of the interlaken process", Watson Institute for International Studies Brown University. Available online at: http://www.watsoninstitute.org/tfs/CD/ISD_Summary_of_Interlaken_Process.pdf (accessed 27 March 2016).

not foremost in the minds of those who conceptualising the targeted sanctions toolset in the 1990s, and so no specific controls over such activities are included in the targeted sanctions approach. Nonetheless, conceptually at least, the restrictions on nuclear and missile-related goods invoked by the Security Council on Iran are consistent with targeted sanctions principles: the measures are intended to restrain the ability of states to pursue programmes of concern; they affect the state's actions rather than its populations; and their broader economic effect is limited.

Iran provides the first real-world case study in which WMD-related measures were adopted and then terminated by the Security Council since the UN moved towards the principle of targeted sanctions following the Iraqi sanctions episode of the 1990s. UN sanctions against North Korea are the only other example of targeted sanctions against a state-sponsored WMD programme, but these are still in effect and indeed have recently been strengthened under Resolution 2270 (2016). The UN did not adopt sanctions in the other recent major proliferation episode – the attempt of Syria to secretly construct a graphite-cooled reactor provided by North Korea, which was destroyed by Israel in 2007.[240]

3. EXAMINING IMPLEMENTATION OF UN SECURITY COUNCIL RESOLUTIONS ON IRAN

UN sanctions resolutions on Iran were preceded by Security Council Resolution 1696 (2006) adopted on 31 July 2006 under Article 41 of Chapter VII of the UN Charter (Chapter VII resolutions are binding on all UN Member States). This demanded that Iran suspend all enrichment and reprocessing activities, including research and development, and called upon Iran to take steps

240 Nuclear Threat Initiative "Al-Kibar" www.nti.org. 06 Dec 2013, Available online at http://www.nti.org/facilities/461/ (Accessed on 18 Feb 2016).

required by the IAEA Board of Governors.[241] The Resolution set a deadline of 31 August for the IAEA DG to report that Iran had complied.

Iran did not comply and later that year the Security Council imposed the first of four Chapter VII sanctions resolutions (the fourth resolution was passed in 2010). It should be noted that all four sanctions resolutions contained wording which emphasised the importance of political and diplomatic efforts to find a negotiated solution leading to a long-term comprehensive agreement and international confidence in the exclusively peaceful nature of Iran's nuclear programme. UN sanctions were a means to this end. They were not an end in themselves.

The four resolutions included three main elements: measures binding on Iran, measures binding on UN member states, and a framework for management of these sanctions by the Security Council. These are explored in turn below.

The resolutions were intended progressively to increase pressure on Iran, partly through increasingly forceful language (for example, the Security Council "called upon" certain provisions in early resolutions but "decided" these provisions in later resolutions) and by increasing the range and scope of prohibited activity. But although early resolutions were passed unanimously the later ones were not, and despite Iran's continuing refusal to suspend proliferation-sensitive activities, the Security Council made no serious attempts to pass further sanctions resolutions after 2010. There was no possibility of the P5 reaching agreement on further measures against Iran. Unilateral sanctions became the main vehicles to encourage change of behaviour by Iran.

3.1. Measures binding on Iran

Under the first sanctions resolution, Resolution 1737 (2006) of 27 December 2006 (passed unanimously), the Security Council reaffirmed the requirements on Iran under Resolution 1696 (2006)

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241 Under resolution GOV/2006/14.

but specified which of Iran's nuclear activities (characterized as "proliferation sensitive nuclear activities") should be suspended. They included all enrichment-related and reprocessing activities, including research and development, and also work on all heavy water-related projects, including the construction of a research reactor moderated by heavy water. The IAEA was to be provided access and cooperation to verify suspension as well as to verify Iran's compliance with the steps previously required by the IAEA Board of Governors. Iran was to verify the Additional Protocol. Iran was also prohibited from exporting items listed in the versions of the NSG Guidelines and of the MTCR Guidelines current at the time.

Following Iran's refusal to comply with Security Council demands, the second sanctions resolution, 1747 (2007) followed quickly, on 24 March 2007 (and was passed unanimously). This reaffirmed the requirements laid down on Iran by Resolution 1737 (2006). It also prohibited Iran from exporting, in any fashion, arms or related materials. The third resolution, 1803 (2008) of 3 March 2008 (passed with one abstention, Indonesia), followed Iranian continued refusal to suspend proliferation sensitive nuclear activities, and also lack of cooperation with IAEA as required under Iran's Safeguards Agreement (in particular Iran's interpretation of its obligations under Modified Code 3.1). This resolution reaffirmed Iran's obligations in the same terms as the previous two resolutions.

The fourth and final sanctions resolution, 1929 (2010) of 9 June 2010 (vote of 12 in favour to two against (Brazil, Turkey), with one abstention (Lebanon)), followed two more years of continuing refusal by Iran to comply with previous Security Council resolutions, by the discovery of an undeclared enrichment facility under construction at Qom, and by Iranian tests of ballistic missiles. In addition to the requirement on Iran to implement previous Security Council resolutions, Resolution 1929 (2010) focused on Iran's IAEA obligations but also specified a wide range of other requirements and prohibited activities, in unprecedented detail.

Iran was required to cooperate fully with the IAEA, in particular with regards to the investigation into the possible military

dimensions (PMD) of its nuclear programme.[242] Iran was obliged to comply fully with its IAEA Safeguards Agreement (in particular the Modified Code 3.1 and the Additional Protocol requirements).

Iran was to suspend all reprocessing, heavy water-related and enrichment–related activities. Iran was forbidden from beginning construction of new uranium-enrichment, reprocessing or heavy-water-related facilities and to cease any construction already taking place.

Iran was prohibited from involvement in any commercial activity abroad relating to production of uranium or of items on the current NSG Part 1 list, in particular uranium-enrichment and reprocessing activities and heavy-water activities.

Iran was also prohibited from involvement in any commercial activity abroad relating to technology related to ballistic missiles capable of delivering nuclear weapons. Furthermore, Iran was forbidden from undertaking any activities related to ballistic missiles capable of delivering nuclear weapons, including launches using ballistic missile technology.

These measures were reinforced by corresponding measures binding on other UN member states.

3.2. Measures binding on UN member states

The controls the Security Council required UN Member States to implement fell into the following categories: transfers of prohibited items (exports, transhipments etc); services related to such transfers (financial, brokering, etc); movements of individuals associated with prohibited activities; freezing of assets of individuals or entities involved in prohibited activities. As with the requirements specifically on Iran, each successive resolution increased the range and scope of requirements on UN member states as a whole.

Under the first sanctions resolution (1737 (2006)), States were required to prevent the transfer to Iran, by any means, of items, materials, equipment, goods and technology which could contrib-

242 And specifically with a further IAEA resolution, GOV/2009/82.

ute to Iran's prohibited activities. These were specifically defined as those included in the NSG Part 1 lists then current. Exceptions were specified in respect of items transferred in connection with Russia's development of the Bushehr nuclear reactor. The transfer bans also extended to items contained in the MTCR lists then current (with certain exceptions for UAVs, and other items if the Security Council or Committee so determined).

States were also required to prevent transfers under a series of so-called "catch-all" provisions based on the State's own determination of end-use. For example, items on the NSG Part 2 lists then current if the State determined that they would contribute to Iran's prohibited activities, and other items that would contribute to prohibited activities or to other topics of IAEA concern.

The transfer bans extended to technical assistance or training, financial assistance, brokering or other services. However, States were entitled to make use of limited exceptions to certain of the transfer bans if for example they could verify end-use or end-use location, and the Committee itself could determine that any particular transfer would not contribute to Iran's prohibited activities.

States were also required to notify the Committee in the event of entry into or transit through their territory of individuals designated by the Committee as involved in prohibited activities.

States were in addition required to freeze funds, other financial assets and economic resources owned or controlled by individuals or entities designated by the Security Council or Committee for involvement in prohibited activities, including individuals or entities acting on their behalf or at their direction, or entities owned or controlled by them. The resolution included grounds for exceptions to freezes, for example in connection with contracts with designated individuals or entities which pre-dated the resolution.

Finally, States were asked to prevent any specialised teaching or training of Iranians that could contribute to Iran's prohibited activities.

The main new measure introduced under Resolution 1747 (2007) was a request for States to exercise restraint in supplying

certain categories of conventional arms and related material to Iran, including related technical assistance, financing or other services. The resolution included a further list of designated individuals and entities subject to asset freezes, and States were requested to exercise restraint in regarding travel in their territories of such individuals.

Travel provisions were further strengthened under Resolution 1803 (2008): lists of individuals were added who were prohibited from travel, and further designations for asset freezes. All items contained in the NSG Part 2 list were banned for transfer to Iran (except for those for light water reactors, or for technical cooperation projects with the IAEA), and UAV-connected items. New financial measures were imposed, including a call for vigilance over support for trade with Iran, and over the activities of financial institutions dealing with Iranian banks. An important new development was a request for States to carry out inspections of cargo carried by Iran Air Cargo or IRISL if States had "reasonable grounds to believe" that prohibited goods were involved.

All these measures were strengthened and expanded under Resolution 1929 (2010), the fourth and final UN sanctions resolution. States, previously requested to exercise restraint over transferring certain categories of arms and related materials, were now prohibited from doing so. Travel bans were imposed on all listed individuals. Asset freezes were extended to further lists of individuals and entities. References to NSG and MTCR lists were updated to reflect then current versions. States were requested to carry out inspections of any cargo to or from Iran if they had "reasonable grounds to believe" that prohibited goods were involved, and to cooperate with inspections on the high seas. States were authorised to seize and dispose of any prohibited items found during these seizures or inspections. Bunkering services were prohibited to Iranian vessels if States had "reasonable grounds to believe" that prohibited goods were being carried.

States were called upon to prevent provision of financial services (including insurance) if States had "reasonable grounds to believe" that prohibited activities were involved. States had to

ensure that their individuals or entities exercise vigilance when doing business with Iranian individuals or entities if States have "reasonable grounds to believe" that such business could contribute to prohibited activities. States were called upon to prevent the opening of new branches or subsidiaries by banks in their territories in Iran, or vice-versa, if they had "reasonable grounds to believe" that such business could contribute to prohibited activities.

In addition, States were requested or required to provide a variety of different reports to the Committee on implementation of certain of the provisions of these four resolutions. These provisions related to asset freeze requirements (paragraphs 13-15 of Resolution 1737 (2006)), travel by designated individuals, exceptions to bans on transfers of prohibited items, and cargoes inspected by States on the basis of "information that provided reasonable grounds to believe" that prohibited items were involved (within five working days), together with a subsequent report with details, including of disposal of the cargo. In addition, States were also required, for each resolution, to submit a report on implementation within 60 days of the resolution.

Although the Committee received a number of reports under these various provisions, insufficient information is in the public domain to be able to analyse them in any detail, with the exception of implementation reports and to a lesser extent inspection reports. Summaries of inspection reports were included in a number of final reports of the Panel of Experts published by the Security Council.

Regarding implementation reports, the Panel found that only a small percentage of states reported as required within 60 days, and in their June 2011 report, the Panel recorded that 67% of UN Member States had yet to submit an implementation report against any of the resolutions. In June 2013 the Panel found that over half the UN States had yet to submit an implementation report against any of the resolutions for, and this remained true in June 2014 and June 2015.

It would seem reasonably straightforward for States to submit implementation reports, and there are likely several reasons

why so many did not do so. These included 'UN reporting fatigue' among states which may have believed that amongst their various UN obligations, sanctions on Iran were not a high priority, or they lacked political will to implement certain UN resolutions effectively. It is also possible that some states simply did not understand their obligations in relation to UN resolutions concerning Iran, or even if they did, they did not have the legislation or governmental procedures in place to implement them effectively.

By contrast, reports from States of inspections of cargoes show a different trend. From a low number recorded in the Panel's first final report (June 2011), the number of cases under investigation peaked in 2014 (30 cases recorded in the Panel's 2014 report). Subsequent numbers fell dramatically, perhaps because States were reluctant to report while negotiations with Iran were taking place under the Joint Plan of Action or perhaps because fewer cargoes were being inspected.[243]

Judging by 90-day reports of the 1737 Committee, and the final reports of the Panel on Iran, most states seem to have been broadly compliant with the requirements of the resolutions. It is possible that Democratic People's Republic of Korea (DPRK) worked with Iran to circumvent sanctions related to ballistic missiles, but no evidence was presented either to Committee or to the Panel of specific technical cooperation.[244]

Furthermore, no evidence was presented that any State had wilfully violated the resolutions, with one exception. That exception related to Iranian Republican Guard Corps. (IRGC) General

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243 See for example "Implementation of the Joint Plan of Action from November 24, 2013 in Geneva Between the P5+1 and The Islamic Republic of Iran and Provision of Limited, Temporary, and Targeted Sanctions Relief" US Treasury, 20 January 2014 (http://www.state.gov/r/pa/prs/ps/2014/01/220054.htm).

244 Panel 2013 report.

Qasem Soleimani, who despite being designated under Resolution 1747 (2007), and thus under a travel ban, visited Syria on several occasions and Moscow at least once according to media reports.[245]

Most importantly, because preventing transfers to Iran of prohibited items, or items intended for prohibited activities, was one of the most important objectives of UN sanctions, no reports were received of state-authorised transfers of nuclear, missile or arms-related material and related services. Furthermore, a dataset maintained by Project Alpha of all publicly known transfers of items relevant for Iran's nuclear or missile programmes shows that no transfers are known to have been expressly authorised by exporting governments for nuclear and missile end uses in Iran with the exception of purported missile coopetition between Iran and North Korea (which is also under UN sanctions).

This said, there were clear differences of opinion between different States over interpretation of certain sanctions provisions. For example, export control authorities interpreted "catch-all" provisions in different ways. The requirement to take action if States possessed "information that provides reasonable grounds to believe" was open to different interpretations of "possessed", "reasonable grounds" and "believe". As a consequence, some States would prevent export of, or interdict, cargoes containing dual-use items and others would not. Iran was aware of such inconsistencies and almost certainly planned procurement of UN-prohibited items accordingly.

While there are no signs that states were complicit in prohibited transfers to Iran the Project Alpha dataset shows that non-state

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245 Paragraph 95 of Report of June 2014 by UN Panel on Iran (S/2014/394), Paragraph 67 of Report of June 2014 by UN Panel on Iran (S/2014/401), "How Iranian general plotted out Syrian assault in Moscow", Laila Bassam and Tom Perry, Reuters 6 October 2015; Russia: "Top Iranian Commander Did Not Visit Moscow" 'Last Week' Russia New.Net, 15 August 2015.

actors from certain states nonetheless were frequently involved in prohibited transfers such prohibited transfers. Iran's programme had a clear preference for EU and US origin items.[246]

Other states feature prominently on the dataset as diversion or trans-shipment points. China, for example, has been heavily criticised for taking a lax approach to enforcement of sanctions on North Korea and Iran, in particular interpreting "catch-all provisions" very narrowly, although there are signs that China has boosted efforts in recent years.[247] Other notable transhipment States included Singapore and UAE – both states that have taken substantial steps in recent years to improve the implementation of non-proliferation controls with the adoption of comprehensive strategic trade control legislation.

3.3. Non-state actors

One reason that implementation of UN sanctions was difficult for states was the involvement of non-state actors in prohibited activities. Effective implementation of UN sanctions required State authorities to inform non-State actors of their obligations under the resolutions and to be in a position to monitor their performance and if necessary enforce sanctions implementation. Not all States are in a position to do this. It is thus worth examining the role of non-state actors in implementing UN resolutions on Iran in more detail.

Generally, UN resolutions are binding on states rather than on non-state actors. As a matter of principle and sovereignty, it is for states to adopt and enforce any laws that are necessary to ensure that the actions of non-state actors are consistent with the obligations of states. This is perhaps demonstrated best in Security Council Resolution 1540, which is not a sanctions resolution and was

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246 Unpublished Dataset assembled by Project Alpha related to nuclear and missile-related equipment, goods and materials to Iran. Project Alpha, King's College London.

247 Stewart, I, "China and Non-Proliferation: Progress at Last?", The Diplomat, March 25, 2015. Available online at: http://thediplomat.com/2015/03/china-and-non-proliferation-progress-at-last/ (Accessed 27 March 2016).

not specifically aimed at any one state WMD programme. In that resolution, states are expressly required to take a range of actions in order to prevent non-state actor involvement in proliferation, including implementation and enforcement of export controls and border controls.

Practically every known case of Iranian illicit procurement has involved at least one (and usually several) non-state actors that have been either complicit or partly complicit in supplying goods to Iran. A key challenge in exploring such cases is the complex nature of supply chains. While there is not enough information available on how Iranian procurement agents operate to draw definitive conclusions, analysis of certain cases indicates common characteristics which might suggest a common approach. It appears from these cases that Iranian procurement agents establish long term relationships with complicit or semi-complicit businessmen outside the territory. These semi-complicit businessmen in turn facilitate the procurement of the necessary goods. Analysis of the Project Alpha dataset suggests that these facilitators tend not to procure the goods directly from manufacturers, but instead either through third companies (which are sometimes front companies) or through non-standard sales channels (i.e. resold stock, internet trading platforms etc).

3.4. The Cheng Network

A particularly illuminating case is that of the Cheng network.[248] Cheng was a Chinese national that, over a number of years, worked to facilitate the sale of materials and equipment to Iran. Cheng's Iranian contact was Seyed Abolfazl Shahab Jamili who is associated with two Iranian companies, Nicaro Co. Ltd., and Eyvaz Technic Manufacturing Company. It is known that Jamili was procuring goods on behalf of Kalaye Electric Company, which had responsibilities for the development of Iran's centrifuge enrichment capability.

248 For a detailed overview of the Cheng Case, see: Stewart, I., "The Chinese Smuggler and the Iran Deal", The Diplomat. Available online at: http://thediplomat.com/2016/03/the-chinese-smuggler-and-the-iran-deal/ (Accessed 27 March 2016).

In 2009, Jamili asked Cheng to acquire capacitance manometers – a type of pressure transducer that is used to measure vacuum pressures in centrifuge cascades. Such pressure transducers are manufactured by only a handful of companies worldwide and are controlled by members of the Nuclear Suppliers Group. As the technical specifications appear to meet the thresholds set out in Nuclear Suppliers Group Part 2 (dual-use) list in use at the time – incorporated into UN sanctions resolutions on Iran – it is almost certain that this supply was in breach of UN sanctions on Iran.

Cheng approached MKS Shanghai Ltd, a wholly owned subsidiary of the manufacturer, MKS Instruments Ltd, which is based in Andover, Massachusetts. Staff at MKS Shanghai Ltd advised Cheng that they could not sell the goods direct and referred Cheng instead onto another businessman, Wang Ping. Ping, Cheng and another Chinese National, Qiang Hu (aka Jonathan Hu) then conspired to have the US-origin pressure transducers diverted to Iran. In some cases, Cheng directed the shipments via third countries, including Singapore and Hong Kong. Cheng admitted removing the packaging labels from some of the boxes to reduce the likelihood that the goods would be stopped on route to Iran.

Through this scheme, more than 1,000 pressure transducers were diverted to Iran. As set out below, Iran is not known to have a domestic manufacturing capability for these items. 1,000 units would also likely be sufficient to operate Iran's entire enrichment capability for a number of years. The price Jamili paid to Cheng and the base price of the pressure transducers are known. It has therefore been possible to calculate the approximate financial incentive for the conspirators in this case, which equated to around a 100% markup on the items that retail for around 1,000 US dollars each. This substantial markup likely explains why individuals such as Hu and Cheng were willing to supply the goods to Iran despite restrictions.

3.5. UN management of Iran sanctions

UN sanctions resolutions are normally managed on a day-to-day basis by Committees, subsidiary bodies of the Security Council.

Iran sanctions were managed by the Committee established pursuant to Resolution 1737 (2006).[249] This committee was tasked with seeking information from States and the IAEA regarding implementation of the resolution, to examine and take action on alleged violations, to decide on requests for exemptions; to add as necessary to lists of prohibited items and designations, to set out guidelines on implementation and to report every 90 days to the Security Council. The last point is particularly important: the 90-day reports were published on the UN website and, although agreed by consensus by the Committee (and thus largely expunged of issues politically sensitive to any one member), they provided insights into the workings of the Committee and reports submitted by States.

Many UN sanctions committees are supported by panels of experts, and the Iran Panel was created with a renewable yearly mandate under Resolution 1929 (2010).[250] The Panel's terms of reference included assisting the Committee, gathering, examining and analysing information regarding implementation of sanctions, making recommendations to improve implementation, and submitting interim and final reports. The first of the Panel's final reports (of June 2011) was not published, following disagreement on the point within the Security Council. Subsequent final reports, the last dated June 2015, can be found on the UN website.[251]

The Panel confined itself to technical aspects of sanctions provisions in carrying out its mandate but decisions made by the committee generally reflected positions of the Security Council. It operated by consensus which meant in practice that it often failed to take action, for example by designating additional individuals or

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249 Para 18 of Resolution 1737 (2006).

250 Formal title: Panel of Experts established pursuant to Resolution 1929 (2010).

251 Following Implementation Day of the JCPOA (16 January 2016) the great majority of material relating to Iran sanctions and the work of the 1737 Committee has been removed from the UN website. However 90-day reports can be found at: http://www.un.org/en/sc/meetings/ (and can also be found on non-UN websites such as Iran Watch). Reports of the UN Panel are most easily found by searching on their UN document numbers (S/2012/395, S/2013/331, S/2014/394 and S/2015/401).

entities proposed by the Panel of Experts following investigations into incidents of Iranian non-compliance, or following up with Iran itself. The Committee was often divided in its judgements about the quality of the Panel's work. Perhaps the most telling indicator of the Committee's collective view was that it implemented only a few of the 55 recommendations contained in Panel final reports.[252] As a result, the Panel's final recommendation was that "… the Panel refrains from additional recommendations to those already proposed in the Panel's previous final reports".[253]

The Panel carried out its mandate by means of three main activities. The first, visits by the Panel, encouraged States to gather relevant information and review implementation procedures beforehand, and to seek views of the Panel regarding best practices of sanctions implementation. Such consultations undoubtedly improved the effectiveness of implementation of sanctions by States. They also usually provided the Panel with important information on the challenges of implementation of sanctions and on possible violations. The Panel was invited to visit more than 80 States, some on two or three occasions.

In addition the Panel conducted a programme of outreach to States, the private sector (banks, manufacturers, freight forwarders, carriers, insurance companies, etc.) and academia by means of seminars or workshops organised by think tanks or academic institutions. As a result of consultations and outreach, the Panel built up strong cooperative relationships with many States and private sector entities.

The Panel also conducted formal inspections of cargoes seized, interdicted[254] or otherwise reported by States as possible violations of sanctions. More than 50 items were inspected or investigated on

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252 30 of which can be found in the 2011 final report that the Council decided not to publish on the UN website.

253 2015 Panel report.

254 Interdiction as used herein refers to the act of stopping goods in transit – most usually based upon intelligence information. The legal basis for such actions was usually UN sanctions resolutions.

these bases and detailed reports submitted with recommendations for Committee action. The great majority of cargoes inspected or investigated by the Panel were seized on the basis of "catch-all provisions". Many items fell below control thresholds. Less than 10% of the items were listed by NSG or MTCR,[255]

It is not clear why, of those items inspected by the Panel, so few fell within the control lists. It is possible that States chose to report interdictions of non-listed items but not of listed items, although this would seem unlikely since it is often easier for a State to justify seizing an item listed under UN resolutions, and thus prohibited for transfer to Iran, than on the basis of "catch-all provisions" which require a determination by the State itself. It is also possible that the state of development of Iran's prohibited activities was such that Iran did not need to procure many listed items. It is also possible that some goods and materials included in NSG and MTCR lists relate to items that can be substituted by State-sponsored proliferation programmes. It is also possible that States failed to detect listed items that they were in a position to interdict, or that they were not supplied with relevant information by other States.

It is also notable that at least some cases probably relevant to UN sanctions were not, in fact, reported to the Panel.[256] For example, the Cheng case noted above was not reported to the Panel despite there being a prima facie case to conclude that the case constituted a violation of UN sanctions on Iran.

While there may be many reasons for this, it is possible that some may have been related to the Panel itself. Concerns have been

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255 Listed items included high-grade carbon fibre, alumininium 7075 alloy, aluminium 2024 alloy and titanium alloy (see for example, Annex 2 of the Panel's 2014 Report).

256 For example, the Cheng case noted above was not reported to the Panel despite there being a prima facie case to conclude that the case constituted a violation of UN sanctions on Iran.

expressed elsewhere about the objectivity of UN panels of experts established in support of sanctions committees, and calls made for appointments on the basis of expertise and merit.[257]

4. EXAMINING EFFECT OF UN MEASURES ON IRAN'S PROHIBITED ACTIVITIES

As mentioned above, Iran refuted the authority of the UN Security Council to take up the nuclear file and refused to comply with the requirements of the resolutions. Iran ignored the resolutions and pursued its nuclear programme.

The primary manifestation of this was Iran's refusal to suspend uranium enrichment and its work on heavy water reactor and related facilities at Arak. However, Iran also continued ballistic missile development and arms imports/exports. Between imposition of the first UN sanctions resolution in 2006, and cessation of work under the JPA in November 2013, Iran advanced its programmes considerably. Examining the effect of the arms embargo is beyond the scope of this paper. Nonetheless, it is worth examining developments of Iran's nuclear and missile programmes.

4.1. Nuclear

When the Security Council adopted its first resolution on Iran, the country had only 164 centrifuges deployed at the above-ground pilot fuel enrichment plant at Natanz. By the time that the Joint Comprehensive Plan of Act was agreed in July 2015, Iran had amassed a substantial nuclear infrastructure. Iran had deployed around 16,500 centrifuges at its Natanz enrichment site and around

257 See for example, page 25 and Recommendation 36 of the Compendium of the High Level Review of UN Sanctions, June 2015), UN document A/69/241-S/2015/432.

2,710 centrifuges at its Fordow enrichment site.[258] Around 1,000 of the installed centrifuges were of a more advanced design (the IR2m and the IR4) although with the exception of a small number devoted to R&D, none of these had been fed with UF6. These designs represent a considerable advance in capability over the IR1.

By mid-2015 Iran had therefore certainly mastered enrichment – at least through the IR1 centrifuges. It could be argued, however, that Iran had not been able to advance more rapidly to use of the more advanced designs precisely because of UN sanctions which slowed Iran's ability to procure the necessary materials (e.g. high strength carbon fibre, maraging steel).

Iran's ability to produce key items indigenously is limited and it cannot produce key materials required for higher performance centrifuges (IR-2s, Ir-4Ms), see Table 2 below.[259]

Table 2

Item	Specifications	Current Indigenous Production Capability
Rotors	Aluminium 7075	Possibly
	High-strength Carbon Fibre	No
	Maraging Steel	No
Casings	Aluminium 6061	Yes
Piping	Aluminium 6061	Yes
Lubricant	Flourinated Oils	Probably not
Frequency Converters	Capable of output beyond 1000hz	Yes
Pressure Transducers	Corrosion-resistant	No

This table illustrates the necessary scope of Iranian procurement of dual-use goods from outside of the country for production

258 IAEA Board of Governors, 'Implementation of the NPT Safeguards Agreement and relevant provisions of Security Council resolutions in the Islamic Republic of Iran,' GOV/2014/58, 7 November 2014, http://www.iaea.org/sites/default/files/gov2014-58.pdf, accessed 8 December 2014.

259 Table reproduced from; Stewart, I., Gillard, N., "Iran's illicit procurement activities: past, present and future', 24 July 2015. Available online at: http://www.projectalpha.eu/proliferation/item/download/60_934e53cf3172986aac0bdd9eb4307da1 (Accessed 25 February 2016).

of higher performance centrifuges. It is not possible to conclude definitively how much of the materials and equipment Iran acquired during the sanctions period, nor the extent to which Iran tried to substitute below-threshold items. However, it is understood that when Iran implemented the Additional Protocol prior to 2006, the IAEA found parts for around 5,000 IR-1 centrifuges.

Iran's heavy water facilities have similarly grown since they first became public in 2002. In 2003, Iran announced to the IAEA that it was constructing a heavy water production plant at Arak and plans for construction of a heavy water reactor.[260] The heavy water production plant was producing heavy water from 2006.[261] The heavy water reactor was close to completion but did not go critical at the time that the Joint Comprehensive Plan of Action was concluded in 2015.

Less information is available about Iranian procurement for the heavy water reactor and related facilities compared to the enrichment facilities. However, a number of significant individual cases have come to light. For example, between 2007 and 2009, Iran sought 1,767 valves for the heavy water reactor from Europe and India. Of this number, 1,163 valves are believed to have reached Iran's programmes. This case was reported to and investigated by the Panel of Experts.[262]

4.2. Missile

Iran did not suspend development of its ballistic missile programme as required by UN Security Council resolutions. Iran created a number of new types of ballistic missile procurements and further developed a number of existing systems. Iran also engaged in extensive illicit procurement for missile end uses.

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260 Gov/2004/11, IAEA "Implementation of the NPT safeguards Agreement in the Islamic Republic of Iran", 13 March 2004.

261 Gov/2014/10, IAEA "Implementation of the NPT safeguards Agreement in the Islamic Republic of Iran", 20 February 2014.

262 UN Panel of Experts established pursuant to Resolution 1929 (2010), Final Report 2013.

Missile Name	Type	Range		Payload	
Fajr-3	Solid	45	km	45	kg
Fajr-5	Solid	70-80	km	90	kg
Fateh-110	Solid	200	km	500	kg
Ghadr-1	Liquid	600	km	750	kg
Iran-130/Nazeat	Solid	90-120	km	150	kg
Nazeat-6	Solid	100	km	150	kg
Nazeat-10	Solid	140-150	km	250	kg
Oghab	Solid	40	km	70	kg
Qiam 1	Liquid	500-1000	km	500	kg
Sejil/Ashura	Solid	500	km	750	kg
Shahab-1	Liquid	300	km	1,000	kg
Shahab-2	Liquid	500	km	730	kg
Shahab-3	Liquid	800-1300	km	100	kg
Zelzal-1	Solid	125	km	600	kg
Zelzal-2	Solid	200	km	600	kg

Shortly after the conclusion of the Joint Comprehensive Plan of Action in 2015, Iran conducted tests of two new missiles. The characteristics of these systems is noted below.

Missile Name	Type	Range		Payload	
Fateh-313	Solid	500	km	<500	kg
Emad	Liquid	1,700	km	<750	kg

No data are available on the number of each type of missile held in Iran's inventory. With the exception of missile tests, there is also a lack of visibility around Iranian ballistic missile developments to allow conclusions to be reached about Iranian missile developments during the sanctions period. Nonetheless, it is clear from the fact that Iran had two new versions of missiles ready to test at the end of the sanctions period that substantial development did take place.

4.3. Unilateral measures

There are a number of instruments in addition to UN sanctions that may have contributed, directly or indirectly, to the goal of frustrating Iran's prohibited activities, principally unilateral (or autonomous) sanctions.[263] There are overlaps between UN and unilateral sanctions that makes it difficult to identify the effects of specific measures, but is nonetheless valuable to explore them.

Unilateral sanctions were adopted by some states in order to increase the pressure on Iran to negotiate over its nuclear programme. In some cases however, the primary purpose of these measures has been broader than the concerns about Iran's nuclear programme. For example, sanctions have been adopted by the US and EU in response to Iran's support of terrorism and human rights violations.

The United States has gone farthest in adopting sanctions against Iran. The US has had in place a near embargo on trade by its nationals with Iran for many years following the seizure of the US Embassy in Tehran in 1979. In fact, with the possible exception of food and similar transactions, the level of trade between the US and Iran was so low that it seems doubtful that sanctions measures could reduce trade further. In order to increase the impact of its unilateral sanctions, the US also adopted so-called 'extraterritorial' measures intended to influence the decisions of non-US individuals and entities, based outside the United States. These measures include:

A. A prohibition on dealings with "Specially Designated Nationals" (SDNs). SDNs are similar in intended effect to designations of individuals and entities under UN resolutions (but probably carry additional weight because of US enforcement practices). There are signs that this type of measure was effective in persuading many foreign companies, including major Chinese entities from trading with Iran. However, proliferators have been dynamic

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263 Interdiction as used herein refers to the act of stopping goods in transit – most usually based upon intelligence information. The legal basis for such actions was usually the UN sanctions resolutions.

enough in nature to quickly set up new companies with the purpose of bypassing the effect of SDNs and similar measures under other autonomous sanctions regimes.

B. Financial sanctions: the US (followed by the EU) adopted a range of measures intended to ensure that Iran could not misuse the financial system to facilitate its financing of proliferation. These measures were coupled with substantial fines for banks found to be in non-compliance (including many non-US banks). Iran was designated a jurisdiction of primary money-laundering concern in November 2011 under Section 311 of the USA Patriot Act. Separately, the Financial Action Task Force called for its members to apply counter-measures to deal with money laundering and financing of terrorism risks in connection with Iran (although sanctions as such were not specified). Major Iranian banks were cut-off from the SWIFT messaging system in March 2012 following EU sanctions against provision of financial messaging services to Iranian banks. Financial sanctions and other measures thus had a substantial impact on international banks' ability to do business with Iran and the practical effect of all this was that western banks all but eliminated business relationships with Iran. Problematically, however, little is known about how Iran pays for items that it acquires illicitly, which of course make up only a very small proportion of Iran's financial transactions with the outside world. As such, it is difficult to determine whether these financial measures had a substantial effect in constraining Iran's prohibited activities. What can be concluded with certainty is that these measures made it significantly difficult for Iranian entities to access the international banking system and this had a major impact on Iran's economy.

A third important set of unilateral sanctions related the oil and gas sector. The US (and from 2010, the EU) imposed restrictions on the export of oil and gas from Iran and on investment in Iran's oil and gas sector. These measures certainly affected Iran's

economy, with foreign currency reserves, for example, reducing sharply after 2010. While such measures likely also contributed to popular pressure in Iran to resolve the nuclear issue. However, it seems unlikely that the level of economic hardship caused by these sanctions would have directly affected funding Iran's nuclear and missile programme. President Ahmadinejad claimed in 2011, for example, that the budget of the Atomic Energy Organization of Iran was 300 million US dollars per year – a small percentage of the Iranian government's budget.

4.4. Interdiction and enforcement

UN sanctions resolutions on Iran included requirements for States to prevent the transfer of prohibited goods and materials to Iran. Although under UN resolutions, the lists of prohibited goods and materials were restricted to versions of the NSG and MTCR lists, the categories of prohibited goods and materials were significantly widened under unilateral regimes (particularly the US and EU). Goods and materials were intercepted by many countries either following enhanced customs checks and procedures or interdiction operations. Enhanced customs checks and procedures involved careful scrutiny by the authorities of exports to Iran, and outreach and engagement of firms that might produce the types of items that Iran's prohibited programme required, or might be involved in the shipping process. Interdiction operations were usually carried out on the basis of intelligence (possibly shared by partner States) that goods and materials were thought to be either in violations of sanctions or otherwise intended to support Iran's prohibited activities. Details of the number of such 'interdictions' that have taken place are not available. Nonetheless, the authors believe that perhaps a hundred so shipments have been detained in this way.

As noted above, some of these cases resulted in reports being made to the UN sanctions panel of experts. However, it is apparent that many such cases were not, in fact, reported, particularly if they involved goods or materials which, although banned under autonomous regimes, were not banned under UN resolutions. The authors

note that Resolution 2231 (2015) contains no provisions explicitly requiring States to report interdictions, so it is possible that future such incidents might not be reported. This would be a missed opportunity to bring any evidence of possible Iranian non-compliance with the JCPOA to the attention of the Security Council.

5. CONCLUSIONS

The purpose of UN sanctions on Iran was to slow development of Iran's nuclear programme and encourage Iran to enter into a diplomatic process to resolve it. The contribution of UN sanctions should be judged against this objective, even though UN sanctions were also used as the basis for unilateral measures adopted by States, including the US and EU Member States.

Iran lacked, and continues to lack, the ability to produce indigenously many items required in its nuclear and missile programmes. Iran was dependent on acquiring these items abroad. It is possible however that Iran had stocks of goods and materials prior to the sanctions taking effect. And it made strenuous efforts to indigenize production of prohibited goods and materials (such as carbon fibre). It should be assumed that not all attempts by Iran to procure goods during the sanctions period were stopped and that, despite the substantial number of shipments that were interdicted, it is likely that Iran was able to obtain substantial amounts of goods and technology while under UN sanctions, between December 2006 and January 2015.

From this examination, it is apparent that while UN sanctions may have slowed development of Iran's nuclear programmes, it did not completely stop it. IAEA reports document the growth of the IR-1 programme, at least, during the period of UN sanctions. But by comparison with the IR-1 programme, Iran appears to have been less successful in bringing into production more advanced centrifuges, and the heavy water reactor at Arak remained far from completion. Furthermore, it is apparent also that implementation

by Member States of UN sanctions measures provided some degree of visibility into Iranian illicit procurement. This is important in its own right as it demonstrates that, as States implement Resolution 2231 (2015), Iran can not expect any future illicit procurement to go undetected.

Chapter
06

Russian reaction to EU sanctions targeting import and export of military equipment and related materials

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Following the Russian military intervention in Crimea, and the controversial referendum leading to its integration into the Russian Federation in March 2014, a number of Western countries decided to adopt sanctions against specific Russian actors.

This article explores on the EU sanctions related to military and dual-use goods and technologies and the reaction of the Russian Federation to them.

1. SANCTIONS OVERVIEW

In order to "de-escalat[e] the crisis in Ukraine"[264] and "to express its support for the country's territorial integrity and sovereignty",[265] the European Council agreed on a number of restrictive measures. They can be classified in 4 following categories:

A. Diplomatic measures (since March 2014):

Instead of the G8 summit, which was planned to take place in Sochi, the meeting was held in Brussels in June 2014 without the participation of Russia. The majority of the EU Member States supported the suspension of negotiations over Russia's joining the

264 European Union, "EU sanctions against Russia over Ukraine crisis", Highlights, Newsroom, Last update: 11/03/2016, http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions/index_en.htm.

265 *Ibid.*

OECD and the International Energy Agency.[266] The EU-Russia summit was cancelled and the Council of the EU decided not to hold regular bilateral summits. Bilateral talks with Russia on visa matters as well as on the New Agreement between the EU and Russia were suspended.[267]

B. Restrictive measures (asset freezes and visa bans – since April 2014):

Restrictive measures against specific natural and legal persons, including those "responsible for action against Ukraine's territorial integrity, persons providing support to or benefitting Russian decision-makers and 13 entities in Crimea and Sevastopol that were confiscated or that have benefitted from a transfer of ownership contrary to Ukrainian law".[268]

C. Restrictions for Crimea and Sevastopol (since June and December 2014):

Substantial restrictions on economic exchanges with the territory (including a ban on imports of products from Crimea unless they have Ukrainian certificates, on investments in Crimea, tourism services, export of goods and technology for the transport, telecommunications and energy sectors or the exploration of oil, gas and mineral resources, technical assistance, brokering, construction or engineering services related to infrastructure in the same sectors).[269]

D. Measures targeting sectoral cooperation and exchanges with Russia ("Economic" sanctions – since July and September 2014):

Measures to "limit access to EU capital markets for Russian State-owned financial institutions, impose an embargo on trade in

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266 *Ibid.*

267 European Union, "EU sanctions against Russia over Ukraine crisis", *op.cit.*

268 *Ibid.*

269 *Ibid.*

arms, establish an export ban for dual-use goods for military end users, and curtail Russian access to sensitive technologies particularly in the field of the oil sector".[270]

These measures put an embargo on the import and export of arms and related material from/to Russia, covering all items on the EU common military list, with some exceptions.

The Council regulation (EU) no. 833/2014[271] addressed more precisely the dual-use goods and sensitive technologies as follows: It shall be prohibited to sell, supply, transfer or export, directly or indirectly, dual-use goods and technology, whether or not originating in the Union, to any natural or legal person, entity or body in Russia or for use in Russia, if those items are or may be intended, in their entirety or in part, "for military use or for a military end-user".[272] Where the end-user is the Russian military, any dual-use goods and technology procured by it shall be deemed to be for military use.[273]

However, "[t]he competent authorities may […] grant an authorisation where the export concerns the execution of an obligation arising from a contract or an agreement concluded before 1 August 2014".[274]

The Regulation was revised on 3 October 2015 and permitted the sale, supply, transfer or export to Russia and/or the import, purchase or transport from Russia of certain EU Common Military List pyrotechnics where for use by the European space industry.

This Regulation also prohibited "to provide, directly or indirectly, technical assistance […], financing or financial assistance […] related to the goods and technology listed in the Common Military

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270 European Council, "Statement by the President of the European Council Herman Van Rompuy and the President of the European Commission in the name of the European Union on the agreed additional restrictive measures against Russia", Press Statement EUCO 158/14, Brussels, 29 July 2014.

271 The Regulation is directly applicable in all EU Member States.

272 Highlighted by the author.

273 European Union, Council regulation (EU) no. 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, Article 2 (1), Official Journal of the European Union, L 229/1, 31 July 2014, Brussels.

274 Council regulation (EU) no. 833/2014, Article 2, paragraph 2.

List; […]technical assistance or brokering services[…], financing or financial assistance related to dual-use goods and technology […] to any natural or legal person, entity or body in Russia or for use in Russia, if the items are or may be intended, in their entirety or in part, for military use or for a military end-user".[275] It excludes, however, "contract or an agreement concluded before 1 August 2014, and to the provision of assistance necessary to the maintenance and safety of existing capabilities within the EU".[276]

From October 2015, the existing prohibition on the provision of certain ancillary services related to these activities (technical assistance, brokering services, financing, financial assistance and other services) was also removed.[277]

This Regulation applies "to any person inside or outside the territory of the Union who is a national of a Member State"; "to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State;" as well as "to any legal person, entity or body in respect of any business done in whole or in part within the Union".[278] However, the regulation does not have an extra-territorial application while the "EU candidate countries are systematically invited to align themselves with EU restrictive measures".[279]

"Finally, exports of certain energy-related equipment and technology to Russia will be subject to prior authorisation by competent authorities of Member States. Export licences will be

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275 Council regulation (EU) no. 833/2014, Article 4.1 (a), (b), (c), (d).

276 Council regulation (EU) no. 833/2014, Article 4.2.

277 Baker & McKenzie, "EU amends arms embargo against Russia to benefit European space industry", Sanctions Update, Blogs, 1 October 2015, http://www.bakermckenzie.com/sanctionsnews/blog.aspx?entry=3612.

278 Council regulation (EU) no. 833/2014, Article 13 (c), (d), (e).

279 Council of the European Union, Fact Sheet: EU restrictive measures, Press Office, 29 April 2014, Brussels.

denied if products are destined for deep water oil exploration and production, arctic oil exploration or production and shale oil projects in Russia".[280]

2. IMPACT OF THE EU SANCTIONS ON RUSSIA'S MILITARY AND DUAL-USE INDUSTRY

The most direct impact of the Ukrainian crisis was the sudden freezing of the Russian-Ukrainian Military cooperation with significant repercussion on the Russian defence industry. Even if only 4,4 % of Russia's total imports come from Ukraine,[281] Russia has been dependent on the supply of some crucial subcomponents for its industry produced in Ukraine as a consequence of the common past.[282] Major supplies included key components for its warships, aircraft (such as helicopter engines[283]) and weapons systems and related services (including, helicopters Mi-8, frigates, weapons for MiG-29, certain torpedo systems as well as air defence systems). "Russian defence officials openly recognise that 30% of Ukrainian

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280 EU Delegation to the United Nations official website, "Background note: EU restrictive measures in view of the situation in Eastern Ukraine and the illegal annexation of Crimea Economic sanctions", Ref: CL14-145EN, 29 July 2014.

281 Igor Sutyagin, Michael Clarke, "Ukraine Military Dispositions", *Briefing Paper*, Royal United Services Institute, April 2014.

282 During the Soviet Union, different soviet republics shared the military-industrial complex of the union. When Ukraine became independent in 1991, it inherited around 750 sites of defence industry as well as 140 scientific and technical institutions involved in the defence contracts [Ukraine – Idex/Special Issue (Kyiv: ISC Ukrriat)]. It is estimated that in total 35% of Ukrainian industry was linked to the defence sector. In 1993, Russia and Ukraine signed an Agreement on Industrial and Scientific-Technical Cooperation of Defence Industry Enterprises. In 2014, Russia-Ukraine defence trade turnover included 7-8 thousand items, while the cooperation involved 1330 enterprises of the Russian Federation and Ukraine.

283 "The company Motor Sich has been delivering some 400 engines a year for Russian Mil and Kamov combat and transport helicopters under a five-year, 1.2 billion US dollars contract signed in 2011." In: Julian Cooper, "Sanctions Will Hurt Russia's Rearmament Plans", *The Moscow Times*, 12 August 2014.

imports to Russia's defence industry cannot be substituted domestically".[284] Besides, "one out of every five pieces of Russian military hardware is either Ukrainian or depends upon Ukrainian parts."

As mentioned above, among different restrictive measures introduced by the European Union is a ban on new arms contracts with Russia. According to the SIPRI, between 2011 and 2013, Russian arms contracts with the EU were worth 75 million US dollars.[285] Russia's defence imports from Europe were about 300 million euros (400 million US dollars) in 2013.[286] In the context when "Russia is actively expanding the production of arms and keeps their exports at a significant level (more than 10 billion US dollars a year)",[287] this ban has rather symbolic dimension. Nevertheless, due to the sanctions Russia lost at least two important military import deals with the EU countries: two Mistral-class helicopter-carrying assault ships from France (with the option of building two more under licence in Russia) and the contract with German Rheinmetall to help build a combat training center in the Volga region.[288]

The sanctions related to dual-use goods and technologies have a significantly bigger impact on Russia. Some estimates the value of EU exports of such equipment to Russia at about 20 billion euros per year.[289] Introduced by the EU and other countries among other economic measures, these sanctions became particularly sensitive

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284 Igor Sutyagin, a military analyst at the RUSI think-tank in London, in: Jonathan Marcus, "Russia boosts military might despite sanctions", *BBC News: Europe*, 8 May 2015.

285 *TIV of arms exports from Russia*, 2010–2013, SIPRI, in: Jarosław Ćwiek-Karpowicz, Stanislav Secrieru (eds), "Sanctions and Russia", The Polish Institute of International Affairs (PISM), Warsaw, 2015, p. 85.

286 Alexander Panin, "Sanctions on Technology Imports Leave Russia Playing Catch Up", *The Moscow Times*, 3 August 2014, http://www.themoscowtimes.com/article.php?id=504484, retrieved on 30 October 2015.

287 Andrey Movchan, Senior Associate and Director, Economic Policy Program, Carnegie Moscow Center, *Economic FAQ*, Carnegie Moscow Center web-site, http://carnegie.ru/commentary/2016/03/04/ru-62952/iuue, retrieved on 4 March 2016.

288 For more details please see Julian Cooper, Centre for Russian and East European Studies, University of Birmingham and Chatham House, London, "Sanctions Will Hurt Russia's Rearmament Plans", *The Moscow Times*, 12 August 2014

289 PISM, op.cit.

in the context of the ambitious plan to rearm the Russian military to 70% new or modern equipment by 2020 that was announced by the Russian Defence Minister in January 2013. As part of this plan, Russia was supposed to modernize its production base to manufacture new generation armaments including the S-500 air defence system, the fifth-generation fighter jet and three new families of tanks and armoured vehicles.[290] This modernization is essential as "Russia's domestic machine tool industry is unable to produce this advanced weaponry and can meet barely 10% of needs".[291]

Particularly important for Russian defence industry is the import of foreign electronics. Some estimates that up to 50% of the microelectronics used in modern information systems in the Russian military are imported. The electronics that are produced domestically are mainly replication of foreign approaches at a design stage.[292] As to the electronic components, up to 80% of the chip-sets for the most critical electronics in the Russian electronics industry are imported mainly from the West.[293] To achieve self-reliance in this particular category can take more than 6 years as a best scenario.[294] But, according to Russian specialists, Russian technology will be anyway lagging behind due to the significant drawbacks in R&D, professional resources, management, economic and other factors.[295] "Metaphorically speaking, Russia would have to make a bicycle that the rest of the developed world is already riding on and while doing so a new generation of that bicycle will be invented

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290 Julian Cooper, op.cit.

291 *Ibid.*

292 Alexander Larionov, the Deputy Chief Designer of MKB Vympel for *Voyenno Promyshlennyy Kuryer no. 25 (543)*, July 16, 2014, in: Roger McDermott, "Russian Defence Industry Creaks Under Rearmament Program", *Eurasia Daily Monitor*, Volume 11, Issue 133, The Jamestown Foundation, 22 July 2014.

293 Igor Sutyagin for BBC News, op.cit.

294 Julian Cooper, op.cit.

295 *Voyenno Promyshlennyy Kuryer no. 25 (543)*, July 16, 2014.

so [Russia] would still stay behind".[296] It concerns not only electronics – according to the representative of Rostec Corporation[297] in its Annual Report 2014, the sanctions can negatively affect "the lack of access to new technologies that could theoretically contain dual-use elements".[298]

As civil production is often integrated in the defence sector in Russia, the sanctions related to dual-use items have also an impact on the civil industry It concerns, for example, civil aviation, automotive industry, space sector as all of them operates with a significant number of the machineries and components imported from the western countries or dependent on foreign services and investments. In 2013, "imports of all types of engineering products from the EU supply 20% of the Russian domestic demand".[299]

The sanctions can also threaten the fulfilment of Russian contracts with third countries. For example, in 2009 Russia and India signed a 10-year contract for joint production of helicopters, infantry fighting vehicles and fifth-generation fighters.[300] As part of the deal, Russia has to provide to India 272 SU-30 fighters that normally feature French-installed electronics. In December 2015, just ahead

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296 Yevgeny Nadorshin, chief economist at the *AFK Sistema* holding company, in: Alexander Panin, "Sanctions on Technology Imports Leave Russia Playing Catch Up", *The Moscow Times*, 3 August 2014, http://www.themoscowtimes.com/article.php?id=504484, retrieved on 30 October 2015.

297 Rostec, formerly Rostekhnologii, is a Russian state corporation created to promote the development, manufacture and export of hi-tech industrial products for civil and defence sectors. According to the EU sanctions, Individual and legal entities from the EU are prohibited from: supplying, selling, and/or transferring dual-use products; providing financial or brokerage services related to dual-use products to Concern Kalashnikov, Concern Sirius, RT-Stankoinstrument, RT-Chemcomposite, Tula Arms Plant, Machine Engineering Technologies, High Precision Systems, and Basalt; providing financing with a repayment period of more than 30 days to OPK Oboronprom and the companies under its control (ownership of more than 50% of shares). The CEO of Rostec Corporation, Sergei Chemezov, is on the EU list of sanctioned persons.

298 Alla Laletina, Head of the Legal Department, Rostec Corporation, in: "Annual Report for 2014", p. 35.

299 A.A. Shirov, A.A. Yantovskiy, V.V. Potapenko (Institute of economic forecasting RAS), "Estimating potential effect of sanctions on economic development in Russia and EU", *World Economic Association*, 20 January 2015.

300 PISM, op.cit., p. 89.

of Indian Prime Minister's visit to Moscow, India's autonomous auditing agency announced that the aircrafts "[…] suffers from technical problems in the fly-by-wire systems and radar warning receivers", while the operational readiness and serviceability of most of them was low mainly due to a lack of spares.[301]

The same situation can occur to the Russia's tanks T-90 that it mainly exports to India and Algeria. The tanks have the thermographic cameras supplied by French company Thales. According to the *EUobserver*, "both sides' officials declined to tell *EUobserver* if Thales still works with Rosoboronexport despite the EU ban".[302] Besides, as the sanctions apply to the contracts signed after 1 August 2014, "[t]his means that if Thales and Rosoboronexport have an old, loosely-worded "framework" contract, which does not specify the number of units to be delivered, Thales can keep selling systems, components, and related services, while having "strictly respected" the EU ban".[303]

While some EU companies are trying to continue their deals with Russia, others are blocking the deals even with those entities that are not on the sanction lists. It does not have a direct effect on Russia's defence companies, however, as all of them are currently under the EU sanctions with small exceptions. But it can have a potential effect on the subsidiaries, service providers, etc.

For example, the Annual Report of the Russian corporation Rostec highlights the potential harmful effect of the sanctions on "the investment attractiveness of the corporation's projects and the capitalization of its brand" as well as on "the profit received

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301 According to Comptroller and Auditor General (CAG) Report, in: Vivek Raghuvanshi, "India's Auditing Agency Punches Holes in Russian Sukhoi", *Defence News*, 21 December 2015, http://www.defencenews.com/story/defence/2015/12/21/indias-auditing-agency-punches-holes-russian-sukhoi/77688164/, retrieved on 1 March 2016.

302 Andrew Rettman, "French eyes for a Russian tiger", *Investigation, EUobserver*, 25 August 2015, Brussels.

303 *Ibid.*

by Rostec from the ownership of equity positions and shares in its subsidiaries,[304] due to the impossibility of obtaining financing from the US and the EU".[305]

Other sanctions introduced by the European Member States, in particular the economic ones, can also have a potential negative impact on Russian defence industry. The EU introduced restrictions on receiving funding from the European financial institutions by the sanctioned entities. While some argue that "foreign financing is very important for the Russian corporate sector, as it represents roughly 40% of total external funding",[306] according to the Rostec Annual Report for 2014, "Rostec and its subsidiaries are pursuing financing from the Russian market, so there are no liquidity problems due to the introduction of sanctions".[307] However, the sanctions target 5 major Russian majority state-owned banks as well by limiting their access to EU primary and secondary capital markets.

The sanctions on Russia came at time in which the country is going through economic slowdown due to other factors such as the significantly low oil prices, falling rouble and low level of investment activity. In this context, the sanctions put an additional pressure on Russian economy and thus on Russian companies.

3. RUSSIAN REACTION TO THE EU SANCTIONS

Since the adoption of the first restrictive measures against Russia related to the Ukrainian crisis, Russian government has been reacting using its usual popularization and propaganda technics.

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304 The total number of Rostec subsidiaries exceeds 700, according to its Annual Report for 2014. A significant number of them is depended on the external financing and, thus, were hit by the EU and the US economic restrictive measures.

305 Rostec Corporation, "Annual Report for 2014", p. 35.

306 Sergei Gorbunov (Ph.D., CFA), "What Do Western Sanctions on Russia Mean for Russian Companies?", Enterprising Investor, CFA Institute, 7 August 2014.

307 Rostec Corporation, op.cit.

The emphasis was made on the harmful effect of the sanctions for the EU itself. The Russian Ministry of Foreign Affairs in its English version of the official statement on the EU restrictive measures of the 11st of September 2014 highlighted that "our might-have-been strategic partner is not simply acting by inertia, but that its actions are illogical and make no sense".[308] The original Russian version of the same statement was, however, slightly different, saying that the EU actually made its choice against the peaceful resolution of the Ukrainian internal crisis and its member states (by their actions) "put their own citizens at risks of the confrontations, economic stagnation and unemployment".[309] The statement ends with a call to the EU leaders "Give the people a chance for peace at last".[310] It is still not very clear, though, who are these 'people' (EU citizens? Russians? Ukrainian? Everyone?). The fact that this message wasn't translated to any other EU languages presented on the Russian MFA website[311] along with other similar 'messages' brings one to a conclusion that the major targeted group of these political statements are still the Russians.

The EU restrictive measures against Russia, besides being 'illogical and making no sense', were also characterized by Russian officials as 'unilateral illegal restrictive measures' that contradict the International Law.[312] The possibility of filing lawsuits over the sanctions against Russian entities within the WTO framework were several times pronounced by the Russian officials, including Alexei Ulyukaev, Minister of Economy of Russia. However, to date, neither side has initiated any formal proceedings under the WTO dispute settlement process with regards to the sanctions or

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308 Ministry of Foreign Affairs of the Russian Federation, "Comment by the Information and Press Department of the Russian Foreign Ministry on the new EU restrictive measures against Russia", 2112-11-09-2014, 11 September 2014, Moscow, Russia.

309 *Ibid*. Free translation by the author.

310 *Ibid*. Free translation by the author.

311 The statement is available in German, English, Spanish, Russia and French.

312 For examples, Russian President Vladimir Putin claimed, "the sanctions introduced against Russia is nothing else but a denial of the basic principles of the WTO. The idea of the equal access to the goods and services markets is breached."

retaliatory measures. Although, certain Russian entities[313] filed cases in the European courts in response to the restrictive measures against them. Almaz-Antey – Russian Buk missile complex producer - appealed to the Court of Justice in May 2015 against the European Council because of the financial and reputational losses. According to the latest news, it is also seeking compensation for experiment it conducted into the causes of the downing of MH17 that worth 10 million rubles (163,000 US dollars).[314] However, to date, no further information is publicly available about the details of this case.

Some other WTO-inspired ideas were mentioned in the official statements such as "principle of reciprocity" as well as "Security Exceptions" from the Article XXI of the General Agreement on Tariffs and Trade (GATT) that became almost a 'legal basis' for the Russian 'counter-sanctions' according to the Russian leaders. These special economic measures are aimed at ensuring the security of the Russian Federation, according to the respective regulation. Thus, while the EU sanctions are considered 'illegal', the measure applied by the Russian Federation "[…] does not run counter to Russia's obligations in the WTO".[315] "In our WTO accession agreement, we set it such that in the interests of ensuring the country's security, we have the right to impose certain restrictions," confirms President Putin.[316]

An ambiguity in referring to the International Law became very common for the modern practice of the Russian political state-

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313 Among them are Rosneft, the Sberbank, VTB and VEB state banks, as well as Russian oligarch Arkady Rotenberg.

314 Almaz-Antey's CEO Yan Novikov was cited as saying by *Izvestia*, in: Eva Hartog, "Buk-Missile Manufacturer Almaz-Antey Wants EU to Compensate MH17 Experiment", *The Moscow Times*, 16 October 2015, http://www.themoscowtimes.com/news/article/buk-missile-manufacturer-almaz-antey-wants-eu-to-compensatemh17-experiment/539288.html, retrieved on 1 March 2016.

315 Statement by Vladimir Putin, President of Russia, in: Fyodor Lukyanov, "The sanctions war and the role of the WTO", "Russia Beyond The Headlines", 26 September 2014, http://rbth.com/opinion/2014/09/26/the_sanctions_war_and_the_role_of_the_wto_40135.html, retrieved on October 2015.

316 *Ibid.*

ment making. Many examples could be found in the statements related to the independence of Kosovo, Georgian War, human rights violations, etc.

3.1. Russia's counter-sanctions agains the EU

As to specific measures in response to the EU sanctions, Russia introduced the so-called 'counter-sanctions' in August 2014 - embargo on certain raw materials, agriculture and food products with the EU origin as "an application of the Article XXI of GATT". "They have restricted access [for Rosselkhozbank] to credit resources in international banks… In effect they are creating more favourable terms for their goods on our market, so our retaliatory steps are quite justified…", President Putin has stressed.[317] Furthermore, since March 2014 a number of the EU officials were banned to travel to Russia, among them 89 politicians and public figures from 17 European countries.

These measures were adopted and came into force with the Presidential Decree no. 560 from 6 august 2014 "On the application of certain special economic measures to ensure the security of the Russian Federation" that was supplemented with a resolution by the Government of the Russian Federation "On Measures on the Implementation of the Decree" from 7 August 2014.

The President of the Russian Federation is empowered to decide on the participation, adoption, duration or lifting of the sanctions[318] and other restrictive measures by Russia in accordance with the Constitution and the Federal Laws, such as of 30 December 2006 no. 281-FZ "On the Special Economic Measures" and of 28 December 2010 no. 390-FZ "On Security". The decrees of the President of the Russian Federation on "special economic measures are applied in cases of emergence of set of the circumstances requiring immediate reaction to international and illegal act or unfriendly

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317 Fyodor Lukyanov, op.cit.

318 Federal Law of the Russian Federation from 8 December 2003 no. 164-FZ "On the Fundamentals of the State Regulation of Foreign Trade Activity", Article 13.3, Article 37.

action of the foreign state or its bodies and officials, posing threat to interests and to safety of the Russian Federation and (or) the breaking rights and freedoms of her citizens, and also according to resolutions of the Security Council of the United Nations".[319] Thus, "application of special economic measures" represents one of the "activities for the security" of the Russian Federation.[320] The implementation of such measures is also based on the resolutions and normative acts adopted by the government, ministries and public agencies concerned.

Neither the Decree from August 2014 nor the following Resolution of the government on the implementation of the restrictive measures indicates the liability for their breach. According to the Russian administrative and customs legislation, in such cases a legal entity can potentially bear fines in amount from 100,000 to 300,000 rubles for the importation onto the territory of the Russian Federation of products subject to prohibition and/or restrictions.[321]

As to the Custom Union between Russia, Belarus and Kazakhstan and its regulations, the embargoes or any import restriction measures should be coordinated and adopted by the Commission of the Custom Union. In exceptional cases, however, such measures can be adopted unilaterally with some conditions.

Additional restrictive measures were discussed by Russian officials but were never adopted, for example a ban on the corporate debts reimbursement to the West, the confiscation/seizure of foreign property, the restriction on the access to space technologies and capacity, to the storage of radioactive wastes in Russia, a ban on the return of temporarily supplied equipment, etc.[322]

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319 Federal Law of the Russian Federation from 30 December 2006 no. 281-FZ "On the Special Economic Measures", Article 1.2.

320 Federal Law of the Russian Federation from 28 December 2010 no. 390-FZ "On Security", Article 3.5.

321 Norton Rose Fulbright LLP website, Russian sanctions, August 2014, available at: http://www.nortonrosefulbright.com/knowledge/publications/119478/russian-sanctions.

322 Tatiana Romanova, "Razrushenie proydennogo", *The New Times* N°21, 22 June 2015, p.36.

3.2. Import Substitution

Interestingly enough, the Russian reaction was not only negative. While some mentioned that the idea of "tightening the belts" in the difficult for the country time is already familiar to Russians, others found a positive side to the extension of sanctions. According to the Vice speaker of the State Duma Nikolay Levichev, "by extending the sanctions against Russia, the EU is also extending Russia's import substitution programme, and programmes to provide small businesses with support, support for farmers, and our initiatives towards the technical and technological renovation of industrial production", for which Russia can only be thankful.[323]

Russia's military and defence industry hit by the break of the long cooperation with Ukraine and export ban for dual-use goods and sensitive technologies from the EU countries had as a crucial task to find the substitution of these products. An import substitution programme had started already before the sanctions but have to be further expanded due to the sanctions. In August 2013, a regulation was passed banning the use of foreign machine tools if their Russian equivalents were available. "The aim of this move was to revive the destroyed Soviet machine tool industry and to raise the share of Russian-made equipment to one third of the industry's requirement".[324]

While Russian high rank officials continuously downplay the significance of the impacts on the military industry, indicting a time span of 2,5 to 3 years for replacement of the Ukrainian manufactured equipment, replacement of Western supplies will definitely take much more time and would most probably prove impossible to substitute. The Russian industry and Trade Ministry estimates that "if the import substitution policy is successfully implemented, Russia's

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323 Nikolay Levichev, Vice speaker of the State Duma for *RIA-novosti, International Information Agency "Russia today"*, 22 June 2015, http://ria.ru/world/20150622/1080206694.html, retrieved in October 2015.

324 Alexander Korolkov, "Russian defence sector eyes change of focus to limit effect of sanctions", *Russia Beyond The Headlines*, 27 December 2014.

reliance on Western suppliers for the most "critical" industries can be expected to decline from 70–90 to 50–60 % by 2020".[325] Some argue that "without being able to import ready-made technology, Russia would have to once again engage in a tiresome race to catch up with the West".[326]

The inevitable consequence for Russia is to look for new suppliers, i.e. China. Indeed, according to Russian press reports, "Russian aerospace and military-industrial enterprises will purchase electronic components worth several billion dollars from China".[327] "Establishing large-scale cooperation with Chinese manufacturers could become the first step toward forming a technology alliance involving BRICS member states", said Andrei Ionin, chief analyst at GLONASS Union [Russia's satellite navigation system].[328] Russia is also cooperating with China "in the development of missiles, warships, engines, transport helicopters and aircraft".[329] "Cooperation with China also opens the Russian defence industry up to development through Chinese financing, offsetting budgetary concerns".[330]

However, Chinese technologies being already secondary will not help Russia considerably. Sanctions in the context of the overall economic slowdown and deep problems in the Russia's defence industry will most probably result in a lag from the world military suppliers.

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325 Ren Zhongxi, "Russia to replace all imported military components", *Xinhua*, 31 July 2014.

326 Yevgeny Nadorshin, chief economist at the AFK Sistema holding company, in: Alexander Panin, op.cit.

327 "Rossiya zakupit kitayskuyu mikroelektroniku na 2 mlrd US dollars", *Izvestia*, 6 August 2014, http://izvestia.ru/news/574886, retrieved in October 2015.

328 "Rossiya zakupit…", op.cit.

329 "The Hidden Challenges of Modernizing Russia's Military", Analysis, *Stratfor*, 6 May 2015, USA, https://www.stratfor.com/analysis/hidden-challenges-modernizing-russias-military.

330 *Ibid.*

Chapter
07

The US 'Conflict Minerals' Law: Is there an indirect sanctioning mechanism?

Giuseppina Squillaci

1. INTRODUCTION

The US "Conflict Minerals" legislation, namely Section 1502 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act[331] (DFA), sheds light on an interesting aspect concerning the link between sensitive trade control and sanctions. Indeed, the provision triggers what could be conceived as an *indirect sanctioning mechanism.* This expression refers to a "system of penalties" which is implicitly imposed for those legal entities failing to comply with the obligations prescribed by the law in question. Particularly, although the aforementioned Section 1502 does not contain any *ban* or *penalty*[332] for the infringement of the disclosure requirements mandated for the addressed issuers, the "adverse impacts" of Section 1502 have resulted both in a *de facto ban* on Congolese minerals and in a *naming and shaming* mechanism compelling companies to abide their law obligations. Moreover, it results interesting to note that not only does the US law indirectly affect its primary target to comply

331 The document is available at the following website: https://www.sec.gov/about/laws/wallstreetreform-cpa.pdf.

332 That Section 1502 places no ban or penalty on the use of conflict minerals has been extensively reiterated by both the scientific community and several non-governmental organisations interested in tackling the illicit trade in "conflict minerals". To deep in knowledge, it is possible to consult the following website: https://www.globalwitness.org/en/archive/dodd-frank-acts-section-1502-conflict-minerals/; or Sharretts, Paley, Carter & Blauvet, P.C., International Trade Counsel for Toy Industry Association, "Dodd-Frank Act Conflict Minerals Reporting Requirements", *International Trade Bullettin,* September 2012.

with its disclosure requirements, but also it manages to impose the aforesaid obligations on several foreign firms by exercising its extraterritorial jurisdiction.

2. THE NORMATIVE FRAMEWORK

Before entering at the core oft the issue, it results necessary to briefly contextualise what is meant by "Conflict Minerals". As far as the definition is concerned, the concept of "conflict resource" emerged for the first time in the late 1990s, in line with the international debate related to the so-called *conflict/blood diamonds* and it was initially discussed at the United Nations level. It was only in 2006 that a non-governmental organisation, *Global Witness*, proposed a definition for *conflict resource,* as follows: Natural resource whose systematic exploitation and trade in a context of conflict contribute to, benefit from, or result in the commission of serious violations of human rights, violations of international humanitarian law or violations amounting to crimes under international law.[333]

Nevertheless, the term "conflict minerals" entered into the international vocabulary only after the enactment of Section 1502 providing the following definition: (A) columbine-tantalite (colt an), cassiterite, gold, wolframite, or their derivatives; or (B) any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country.[334]

Therefore, at the present, doling with conflict minerals basically means coping with tin, tantalum, tungsten and gold - the

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333 Marcus Tullius Cicero, "The Sinews of War. Eliminating the Trade in Conflict Resources", *Global Witness*, 2006, available a: https://www.globalwitness.org/sites/default/files/import/the_sinews_of_war.pdf.

334 Dodd-Frank Act, *Section 1502*, H. R. 4173—843.

so-called '3TG' - which could be found in an endless number of products such as cell phones, car, laptop computers, medical devices, airplanes and machine tools.[335]

Concerning the normative framework of reference, international, regional, national and private industry provisions[336] have been delivered in order to break the link between the illegal exploitation in natural resources and the armed conflict in the so-called *conflict-affected and high-risk areas.* Nonetheless, several prominent actors like the United States and the United Nations have focused on a specific geographical area, namely the Democratic Republic of the Congo (DRC) and its nine "adjoining/covered countries".[337]

On the whole, the rationale a the basis of these initiatives lies in the willingness to both promote and boost a responsible way of sourcing by exercising supply chain *due diligence* transparency.[338] This concept has been defined by the Organisation for the Economic Co-operation and Development (OECD) as an on-going, proactive and reactive process through which companies can ensure that they respect human rights and do not contribute to conflict. Due diligence can also help companies ensure they observe international law and comply with domestic laws, including those governing the illicit trade in minerals and United Nations sanctions.[339]

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335 Drimmer J. C. and Philips N. J., "Sunlight for the Heart of Darkness: Conflict Minerals and the First Wave of SEC Regulation of Social Issues", *Human Rights & International Legal Discourse,* Vol. 6, 2012, p. 8.

336 To get a complete picture of the normative framework please consult: Grieger G., "Minerals from conflict areas. Existing and New Responsible-sourcing Initiatives", *European Parliamentary Research Service,* 2014, pp. 1-8.

337 Precisely, these Covered Countries are: Democratic Republic of the Congo, Central Africa Republic, South Sudan, Zambia, Angola, the Republic of the Congo, Tanzania, Burundi, Rwanda, Uganda.

338 Specifically, in monitoring that the whole supply chain exercised *due diligence,* issuers can assure that the materials they use are not been originated in conflict areas and, consequently, are "free of conflict". Indeed, it is common to label the final products as "conflict-free".

339 OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Second Edition*, OECD Publishing, 2013, p. 13. Available at http://dx.doi.org/10.1787/9789264185050-en.

Assumed this normative backdrop, the focus of this contribution rests upon the US national legislation on "conflict minerals" since it is viewed as the main statutory provision able to exert an *indirect sanctioning* power on its target, the Securities and Exchange Commission (SEC) listed companies. However, it could be interesting to note that also the United Nations Security Council Resolution 1952 of 2010[340] triggers a sort of *sanctioning mechanism* aimed at putting pressure on issuers to exercise due diligence and, as a result, to be implicitly subjects of the disclosure requirements mandated by Section 1502.

In plain terms, Section 1502 requires certain public companies, registered on an American Exchange, to provide disclosures about the use of specified conflict minerals emanating from the DRC and nine adjoining countries. Conceived just as *disclosure* or *reporting* requirement[341] the aim of Section 1502 is to dissuade companies from continuing to engage in trade that supports regional conflicts. Indeed, as the Congress clearly stated in the Prologue:

It is the sense of Congress that the *exploitation* and *trade of conflict minerals* originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly *sexual – and gender-based violence*, and contributing to an emergency humanitarian situation therein.[342]

As evident, the ostensible goals of Section 1502 are humanitarian and diplomatic in nature and have little to do with the primary focus of the Dodd-Frank Act: tackling the financial crisis through a financial regulatory reform.[343] As a result, the main "unintended consequences", following the enactment of the American bill on minerals, have been

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340 United Nations, UN Security Council Resolution 1952, S/RES/1952 (2010).

341 To deepen, consult "Progress and Challenges on Conflict Minerals: Facts on Dodd-Frank 1502", Enough Project, January 2016. Available at: http://www.enoughproject.org/special-topics/progress-and-challenges-conflict-minerals-facts-dodd-frank-1502.

342 Dodd-Frank Act, *Section 1502,* H. R. 4173—838.

343 Woody K. W., "Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog", *Fordham Law Review,* Vol. 81(3), 2012, p. 1317.

originated by this constituency 'incoherence'. Moreover, the fact that the SEC was appointed as the only authority for the implementation of Section 1502 implicitly confirms the legislative 'discrepancy' between ends and means at the basis of the whole Dodd-Frank act. Indeed, as Karen E. Woody remarks "Requiring SEC to enforce these disclosure requirements […] demands that it oversees diplomatic and humanitarian regulations for which it lacks the institutional competence".[344] To be clear, the SEC was established in 1934 with its threefold mandate/mission, as follows: "a) protect investors; b) maintain fair, orderly and efficient markets; and c) facilitate capital formation".[345] Regarding Section 1502, the SEC adopted in August 2012 an Implementing Final Rule explaining in detail a three-step process the companies have to undertake in order to comply with the disclosure requirements of the US conflict minerals law.[346]

3. NON-COMPLIANCE

Basically, non-compliance with Section 1502 means failing to disclose the information prescribed by the law according to the specific form established (the Form SD)[347] and an international due diligence framework of reference, such as the 2012 OECD Due Diligence Guidelines. However, are there any consequences for issuers using conflict minerals in their products but complying with Section 1502 disclosure obligations? Definitely not. As a matter of fact, there are not, at the present moment, sanctions for non-compliance with

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344 *Ibid.,* p. 1341.

345 To deepen consult the US Securities and Exchange Commission website: https://www.sec.gov/about/whatwedo.shtml.

346 The SEC Final Rule document is available at the following website: https://www.sec.gov/rules/final/2012/34-67716.pdf. However, since the accurate and detailed nature of the document, it is possible to get a comprehensive overview of the prosivisions by consulting: Ernst & Young, "Conflict Minerals. What you need to know about the new disclosure and reporting requirements and how Ernst & Young can help", 2012. Available at: http://www.ey.com/Publication/vwLUAssets/EY_CnflictMinerals/$FILE/EY_ConflictMinerals.pdf.

347 To have a concept of the Form SD see: http://us.practicallaw.com/0-521-4859.

Section 1502. Nevertheless, it is interesting to know that, even the concept of non-compliance, *eo ipso,* reveals several different understandings. For instance, legally speaking, there are at least three direct consequences for those who fail to comply with the rule, as follows:

1. The SEC Office of Enforcement has the power to take enforcement actions against non-compliant companies; (even if is unlikely that the SEC will endorse it)
2. Section 18 of the Securities and Exchange Act of 1934[348] provides a private right against any person who makes a false statement on which a purchaser or seller of a security relies, unless the person can show he did not know the statement was false or that the statement did not affect the price of the security;
3. Other Conflict Minerals law[349]: some US cities and states have started to pass laws on conflict minerals in line with the US one. Specifically: *California SB 861* - which passed in 2011 - bars state officials from awarding procurement contracts to companies that have failed to comply with the SEC's conflict minerals rule.[350] Maryland, Massachusetts, and the cities of Pittsburgh, Pennsylvania, and Petersburg, Florida have adopted or considered to adopt similar legislations.

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348 Securities and Exchange Act, 1934. Available at: https://www.sec.gov/about/laws/sea34.pdf.

349 Another thing worth mentioning is that Canada is currently involved in seeking to adopt a "Conflict Minerals Act" (Bill C-486) requiring "Canadian companies to exercise due diligence in respect of the exploitation and trading of designated minerals originating in the Great Lakes Region of Africa in seeking to ensure that no armed rebel organization or criminal entity or public or private security force that is engaged in illegal activities or serious human rights abuses has benefited from any transaction involving such minerals". However, the bill has been defeated. The document is available at the following website: http://www.parl.gc.ca/content/hoc/Bills/412/Private/C-486/C-486_1/C-486_1.PDF.

350 It is noteworthy to say that since January 2012 US companies that do business in California have been subject to the *California Transparency in Supply Chains Act of 2010* (SB-657). The law requires retail sellers and manufacturers doing business in the state to disclose - by posting on their websites - their efforts to eradicate slavery and human trafficking from their direct supply chains for tangible goods offered for sale. The document is consultable at the following address: http://www.state.gov/documents/organization/164934.pdf.

Despite its "just reporting requirement" nature, the enactment of Section 1502 has activated a process of remarkable *indirect pressure* exerted by various stakeholders on companies, especially NGOs, in order to push these to meet their obligations under the law. After all, as the famous Supreme Court Justice Louis Brandeis suggested, "sunlight is said to be the best of disinfectants".[351]

4. AN INDIRECT PENALISING SYSTEM

Beyond the unintended consequences of Section 1502, the indirect penalizing system described at the beginning of this contribution, actually triggers a twofold mechanism. Pragmatically, on the one hand, the US proposal results overturned in a *de facto* ban by penalizing the very beneficiaries it intends to help the Congolese people (negative effect). On the other, the legislation profits from its "naming and shaming" nature by managing to oblige issuers to comply with SEC disclosure requirements in order to "save their face", the so-called reputational risk (positive outcome).

4.1. A de facto embargo

Described as a *de facto embargo*[352], nicknamed "Obama's Law",[353] Section 1502 has effectively imposed a ban on Congolese mineral exports and put million of Congolese miners out of work because the eastern DRC economy still depends on its mining industry to a considerable extent.[354] Indeed, the high-level of unemployment

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351 Drimmer J. C. and Philips N. J., 2012, p. 12.

352 Woody K. E., 2012, p. 1345.

353 Seay L. E., "What's Wrong with Dodd-Frank 1502? Conflict Minerals, Civilian Livelihoods, and the Unintended Consequences of Western Advocacy", Center for Global Development, Working Paper 284, 2012, p. 1. See also "Africa and 'Obama's Embargo'", *Wall Street Journal,* 18 July 2011. Available at: http://www.wsj.com/articles/SB10001424052748703956604576109773538681918.

354 "Notably from eastern DRC where mineral trade is estimated to account for roughly 90% of export revenue", Grieger G., 2014, p. 4.

forced a large number of artisanal miners to join armed groups or engage in mineral smuggling as the solely alternative for making a living.[355]

Politically and locally speaking, the US conflict minerals bill has not passed 'indifferent'. Specifically, the disastrous economic effects produced by Section 1502 have been compounded by the so-called DRC President Joseph "Kabila's ban" who, in an attempt to boycott Section 1502, imposed a general suspension of mining exploitation in the areas of North Kivu, South Kivu and Maniema provinces[356] from September 2010 to April 2011.

As a matter of fact, Section 1502 has resulted in a "strong deterrent" for reporting companies - the so-called *competitive disadvantage* - as well as it has caused a *market distortion* on Congolese minerals.

→ COMPETITIVE DISADVANTAGE

Assumed that, as Commissioner Gallagher have observed, Section 1502 may "contribute to a reduction in, or abandonment of, commercial activity in DRC leading to a '*de facto* economic embargo' on minerals sourced from the region",[357] it is interesting to focus on another interrelated negative aspect regarding the ban on Congolese minerals. Particularly, even though the US legislation aims at the harmonisation of standards, the disclosure requirements, which impose *per sè* a certain degree of liabilities on companies, "will function to create a *market disincentive* with regard to sourcing from the region".[358] Indeed, the aforementioned ban has inadvertently prompted a chain reaction devastating economic results. In a *vicious circle* dynamic, when companies recognise that, in order to comply with the disclosure requirements of the conflict minerals legisla-

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355 *Ibid.*

356 ITRI. Delivering the future of the tin. "DR Congo mining ban announced by President Kabila: impact on iTSCi project", 13 September 2010. Available at https://www.itri.co.uk/index.php?option=com_zoo&task=item&item_id=992&Itemid=177.

357 Arimatsu L. and Mistry H., "Conflict Minerals: The Search for a Normative Framework", Chatham House, International Law Programme Paper, IL PP 2012/01, 2012, p. 27.

358 *Ibid.*

tion, they face potential legal and economic consequences for their activities (e.g. compliance costs, and operational, reputational and legal risks),[359] they will probably feel discouraged to undertake the requirements mandated by the conflict minerals law. As a result, if the minerals, which companies depend on, contribute to the conflict in the DRC, they could simply decide to divest from the region by rendering Congolese minerals valueless, leaving a mining-depended economy in ruins.[360] Perfectly in line with these assumptions, as Drimmer and Philip explain, the 'transparency' aspired through the disclosure requirements mandated by Section 1502 "will lead those 'downstream' in the supply chain, and consumers, to disfavour companies using conflict minerals in their products and processes".[361]

→ MARKET DISTORTION

Economically speaking, the *de facto* ban has brought a sort of market distortion according to which "American companies rather than run the risk of buying any minerals that might have been smuggled from the Congo are simply refusing to buy minerals from central Africa".[362] For instance, Arimatsu and Mistry stressed, the feasibility of determining if a product has been effectively 'contaminated' by a conflict minerals in order to label it as "DRC conflict free" is all but ascertained. Rather, it is more probable that "businesses would simply source from outside the region to avoid breaching the rigid requirement".[363] Therefore, by restricting the effective US's business ability to obtain minerals from the DRC and Covered Countries, Section 1502 of the DFA has opened the door for other

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359 Mini-roundtable, "Conflict Minerals Disclosure Requirements". *Risk & Compliance*, October-December 2014, p. 124. Available at: www.riskandcompliancemagazine.com.

360 Ochoa C. and Keenan P. J., "Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation", *Maurer School of Law: Indiana University,* Faculty Publications, Paper 1316, 2011, p. 148.

361 Drimmer J. C. and Philips N. J., 2012, p. 15.

362 Woody K. E., 2012, p. 1346. See also, "Congo: America Gives China A Mineral Monopoly", *StrategyPage, the News as History,* 16 August 2011. Available at https://www.strategypage.com/qnd/congo/20110829.aspx.

363 Arimatsu L. and Mistry H., 2012, p. 27.

investors, which can benefit from the unintended consequences of the conflict minerals Bill. Concretely, Section 1502 gave Chinese firms a virtual monopoly on some Congolese minerals. As a civil society member, Jason Lueno Maene, pointed out in relation to the Chinese mineral buyers: *They are paying 20 percent less, maybe even 30 percent less than the old price, because now they are the only buyers [...] The lower price means fewer people are bringing minerals to sell, and a lot of mines have suspended operations. But the Chinese are buying what comes to them. Their warehouses are full, with constant turnover.*[364]

4.2 The efficacy of a naming and shaming legislation

According to Bryan Stuart Silverman, disclosure laws are used as a shaming mechanism. Indeed, by "alerting shareholders to offensive corporate practices, the laws can indirectly modify substantive corporate practices through shareholders demands".[365] By taking a wider perspective, the effects of Section 1502 have literally transformed it in a *naming and shaming* legislation since it cannot mandate companies to stop or even cease their use of conflict minerals. The 'shaming' should incite issuers to make change and to become proper corporate actors in line with the conflict minerals legislation. It is implicit and indirect the effect the law aims at attending: in a *virtuous circle* perspective, the law boosts companies to be 'responsible' by means of the disclosure requirements, which, being available on websites, constitute an incentive for issuers to

364 Magistad M. K., "Slideshow: Why Chinese Mineral Buyers are Eying Congo", PRI's The World, Conflict and Justice, 26 October 2011. Available at: http://www.pri.org/stories/2011-10-26/slideshow-why-chinese-mineral-buyers-are-eying-congo.

365 Silverman B. S., "One Mineral at a Time: Shaping Transnational Corporate Social Responsability Through Dodd-Frank Section 1502", *Oregon Review of International Law,* Vol. 16(127), p. 144.

respect the law. In other terms, it could be probable that corporate actors comply with the conflict minerals obligations in order to "save their faces" - namely, a reputational damage/risk.[366]

All things considered, the *naming and shaming* mechanism is believed to be a successful deterrent to oblige issuers to exercise due diligence and to comply with the disclosure requirements of Section 1502. However, more than being 'pushed' by *noble purposes*, companies or issuers feel obliged to abide their conflict minerals law obligations just to maintain *credibility* at international and national level, and in economic terms, to keep their revenues alive. Indeed, the *name and shame* is nothing more than a subtle *ruse* that leverages on an international common sense.

Ultimately, the final assessment of Section 1502 is all but promising: "the expected high compliance costs, an extensive administrative burden [...] coupled with the scarcity of traceability and certification schemes on the ground to perform supply-chain due diligence have prompted many companies to pull out of the region altogether".[367]

5. THE INDIRECT EXTRATERRITORIAL JURISDICTION

Another interesting aspect concerning Section 1502 is that the legislation could be enter into the domain of what has been identified as a "common habit" of the US governmental action: attending *extraterritorial* goals by means of indirect approaches.[368] Dealing with Section 1502 as an expression of the US extraterritoriality means to define the legislation as "just foreign policy masquerad-

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366 "The requirement under Section 1502 for companies to disclose on their website whether they are sourcing labelled "DRC conflict free", or on the contrary, "not DRC conflict free has created significant reputational risks", Grieger G., 2014, p. 4. See also Mini-roundtable, 2014, p. 124; and Arimatsu L. and Mistry H., 2012, p. 34.

367 Grieger G., 2014, p. 3.

368 Woody K. E., 2012, p. 1345.

ing as securities regulation".[369] Indeed, the law has a foreign policy objective with an intended "ultimate effect outside the borders of the US".[370] Specifically, the Congress would have chosen a direct extraterritorial jurisdiction to address the stated aim of the conflict minerals legislation: "improve the security situation in the DRC by supporting a conflict-free mining economy that benefits the Congolese people".[371] This goal would have been achieved by simply banning any product from any company, domestic or foreign, to be sold in the US if it contained conflict minerals. However, in doing so the Congress would not have had influence on companies not registered on an American exchange and therefore not recipient of Section 1502. Instead, by selecting a more indirect approach, it could control all companies belonging to the supply chain in which the final product is manufactured. In other words, the Congress has chosen the strategy that allowed it to influence the majority of the issuers, even those that are not directly subject to the Section 1502 disclosure requirements.[372] Indeed, any foreign company outside the direct umbrella of conflict minerals requirements could easily be involved by feeling the pressure of those companies that comply with the aforementioned obligations. Therefore, they could choose to meet the standards of the provision, even if they are not theoretically obliged to do so.

In theory, at first glance, it may seem that the US legislation on conflict minerals is narrower in scope than the two international provisions committed in addressing the issue - namely, the OECD Due Diligence Guidance and the resolutions delivered at the United Nations Security Council level, included the UN Due Diligence Guidelines.[373] Indeed, if the former is addressed to only

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369 Drimmer J. C. and Philips N. J., 2012, p. 18.

370 *Ibid.*

371 As quoted in Woody K. E., 2012, p. 1345: 155 CONG REC. 10599–10600 (2009) (statement of Sen. Feingold).

372 Woody K. E., 2012, pp. 1342-1343.

373 The UN Due Diligence Guidelines is available at http://www.un.org/News/dh/infocus/drc/Consolidated_guidelines.pdf.

SEC-registered companies, the latter are addressed to "all companies in the mineral supply chain that supply or use tin, tantalum, tungsten and their ores or mineral derivatives and gold sourced from conflict-affected and high-risk areas".[374]

In practice, as explained above, the legal 'gap' is "likely to make little difference since the SEC-reporting companies will necessarily require all those companies with which they do business to comply with the terms of the Dodd-Frank Act".[375]

6. THE RISE OF SOCIAL CONSCIOUSNESS FOR CORPORATIONS

However, to what extent should companies, issuers or corporations feel obliged to have a "responsible-sourcing" behaviour? Is it sufficient the indirect effect triggered by Section 1502 to persuade issuers to be 'proper' corporate actors? In other words, although the effective deterrent exerted by the US conflict minerals bill, the successful outcome of influencing more issuers than those directly involved under the legislation is mainly due to the favourable intersection of aims with another, and broader, trend of international concern: the rise of the Corporate Social Responsibility.[376]

Firstly endorsed at UN level through the *Guiding Principles on Business and Human Rights*[377], over the two past decades companies started to recognise the impossibility to do business without take care of human rights principles. The corporate social impact has became the more and more an element to take into consideration

374 Arimatsu L. and Mistry H., 2012, p. 27.

375 *Ibid.*

376 Noteworthy, the concept of Corporate Social Responsability (CSR) has been endorsed at the European Commission level since 2011 through "A renewed EU strategy 2011-2014 for Corporate Social Responsability", COM(2011) 681 final, Brussels, 25-10-2011.

377 United Nations, UN Human Rights Officer, "Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect, and Remedy" Framework", New York and Geneva, 2011. Available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

in setting a business, in assessing an economic strategy or in outlining the pros and cons of a corporate action. On an operational level, "companies can no longer serve as passive participants in host countries, contributing to the local economy and seeking to avoid harm".[378] Therefore, maintaining a sort of "social licence"[379] to operate means to consider the respect of the stakeholders in the local communities companies do business, to provide economic aids if necessary and to include the local needs when developing a particular business strategy. Eventually, companies have to assess "likely adverse human rights impacts by considering applicable laws, regulations, norms and the expectations".[380]

In this framework, Section 1502 could be viewed as "a reflection of now well-recognized market trends making social criteria more important to investors".[381] Nevertheless, in light of the considerations drawn above, it seems not quite accurate to associate Section 1502 with an investor focus. Rather, the conflict minerals legislation could be best viewed as "a new kind of mechanism to compel corporations - like states and individuals before them - to play a role in protecting human rights".[382] Eventually, the ultimate effect of Section 1502 remains to be seen since, so far, the law has damaged the very beneficiaries it intended to help: the Congolese people.

7. THE UNSCR 1952

The United Nations focus in tackling the sensitive situation in the DRC has been primarily addressed to severe the linkage between armed conflict and illegal exploitation on minerals and to maintain the peace and security in the region through good governance and transparency. Since 2004, with the UNSCR 1533, a

378 Drimmer J. C. and Philips N. J., 2012, p. 1.

379 *Ibid.*

380 Drimmer J. C. and Philips N. J., 2012, p. 20.

381 *Ibid.,* p. 16.

382 *Ibid.,* p. 18.

Committee of the Security Council (Sanction Committee) as well as a Group of Experts have been instituted to strongly act and monitor the particular situation in the DRC, especially in the eastern part. However, the overlap of strategies among the different initiatives delivered have created a sort of 'confusion' that has made the UNSC "one-size-fits-all" approach little accurate to deal with the conflict minerals issue.

Nonetheless, by officialising the UN DD Guidelines through the UNSCR 1952 of 2010 a kind of *indirect sanctioning power* has been set up. Precisely, by paragraph 8 of the Resolution 1952 the Security Council not only support the work carried out by the Group of Experts through the UN DD Guidelines, but also requires the *Sanction Committee* whether to designate an individual or entity supporting the illegal armed group in the eastern part of the DRC through illicit trade of natural resources for sanctions, whether the individual or entity has exercised *due diligence*.[383] As a result, this provision gives the DD guidelines an immediate legal effect.

Therefore, even if on paper, the UN DD Guidelines have not a direct legal force on member states or individual and entities operating in or from their jurisdiction, the fact that the Sanction Committee can consider to designate sanctions depending on the exercise of due diligence constitute an *indirect pressure* on companies to comply with the guidelines, and in a wider perspective, to be subject of the disclosure requirements of Section 1502.[384]

To avoid the risk of being the subject of coercive measures, companies will need to design and implement strategies to mitigate the risk of providing direct and indirect support not only to organized armed groups as defined by the Security Council, but also to criminal network and/or perpetuators of serious human rights abuses [...].[385]

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383 UNSCR 1952, p. 3.

384 Arimatsu L. and Mistry H., 2012, pp. 17-18.

385 *Ibid.,* p. 18.

8. CONCLUSION: WHAT COULD BE THE CONTRIBUTION OF A CONSOLIDATED PENALTY SYSTEM?

Taking everything into account, even the mere perspective or the fear of a sanctioning mechanism could be used as a "stick against flagrant violators".[386] In addition, as Ochoa and Keenan points out, the imposition of "targeted sanctions" in the domain of Section 1502, could become a "more popular and more useful tool for states to employ".[387] Specifically, targeted sanctions may include: a) naming specific actors and conflict leaders; b) prohibiting business dealings with named entities; and c) imposing asset freezes and travel bans for named entities.[388]

However, at the present, the unexpected outcomes of Section 1502 constrain the effective functionality of a "conflict minerals regime".

In this framework, the 2014 EU Commission proposal, further amended by the European Parliament on May 2015, for a regulation of the European Parliament and of the Council setting up a Union system for supply chain diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas[389] could be an efficient response to the Section 1502 unintended consequences. Peculiarly,

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386 Hughes J., "Mini-roundtable, Conflict Minerals Disclosure Requirements", p. 136.

387 Ochoa C. and Keenan P. J., 2011, p. 152.

388 *Ibid.*

389 This document is available at the following website: http://eur-lex.europa.eu/resource.html?uri=cellar:5de359c4-a5f8-11e3-8438-01aa75ed71a1.0002.01/DOC_1&format=PDF. For an explanatory summary of the EU proposal consult, Squillaci G., ESU-Ulg trainee (under the supervision of Professor Quentin Michel), "Technical note on the EU Commission proposal, and on the European Parliament amendments of 20 May 2015, for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas", (Brussels, 5.3.2014 COM(2014) 111final 2014/0059 (COD)), *European Security Studies of Liège,* 28 August 2015.

it could be viewed as a way to overcome the US "market distortion" abovementioned and as a way to create legislative ground on the US conflict minerals Law. This should lead to a double positive effect: in particular, to enhance the credibility of the Section 1502 and in more general terms, to contribute to make the system more effective as occurred in the case of the *Kimberley Process Certification Scheme* (KPCS).[390]

390 The KPCS is an "international governmental scheme governing the link between diamonds and conflict". It requires its members to enforce the obligations prescribed through domestic legislation. The core document of the Kimberley Process Certification Scheme is available at: http://www.kimberleyprocess.com/en/kpcs-core-document. Instead, to get a comparison between Section 1502 and the KPCS see: Woody K. E., 2012, pp. 1347-1350.

Chapter
08

Trade restrictions and sanctions: Perspective of European industry in a multi-layered compliance scenario

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1. INTRODUCTION

In the debate on the implementation of embargoes and sanctions in case of violation, this Chapter is aimed at highlighting the perspective of European industries in particular in the field of aerospace and defence. Whenever confronted with United States-origin items or technical information, contractors dealing with items classified as dual-use or military operate in a "multi-layered" compliance scenario. Several sets of regulations require compliance with embargoes and restrictions at different levels, and non-compliance may entail different sanctioning measures. Through analysis of a "corporate perspective" this chapter wants to focus on the lessons learned for the businesses and the importance of a robust internal compliance programme.

2. EMBARGOES, SANCTIONS AND PENALTIES IN CASE OF VIOLATIONS

Export controls are intimately linked to the ability of governments to guarantee their national security and the attainment of foreign policy objectives. In this sense, implementing effective enforcing measures is key to ensure their implementation. These may target governments of third countries, but also non-state enti-

ties and individuals and specific "blacklisted" persons, firms and organizations. While some are more widely used than others, the general goal is always to force a change in behavior.

The enactment of arms embargoes, the decision to restrict trade with certain countries through import and export bans, but also specific entities, may affect whole countries'economy but also target specific companies or even individuals, like in the case of asset freezes and travel bans. If this happens mainly in instances where a close circle of people is able to influence foreign policy decisions, such measures are also often adopted to react to specific export control violations.

When a natural or legal person commits a violation, the authority/ies responsible for enforcement may hand out sanctions ranging from administrative penalties to criminal charges, up to life imprisonment, and even death penalty, as is the case in Malaysia since the Strategic Trade Act of 2010.[391]

More frequently, suspension of export licences is a tool used by licencing authorities whenever a change in the political situation of the country of final destination justifies it, but may also be utilized to sanction specific abuses. A policy of licence denial or "debarment" for exporters that committed violations may also be a convenient corrective measure, often enforced through the adoption of "black lists".

In spite of a varied toolbox, striking the right balance to effective, proportional and dissuasive sanctions may be challenging. "Smart" sanctions remain a key question as their deployment is rarely precise enough to affect only the targeted entity or economy, without impact on the rest of the related supply chain.

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391 David Albright, Paul Brannam, and Christina Walrond, "Malaysia finally adopts national export controls", Institute for science and international security (ISIS report April 2010). www.isis-online.org

3. INTEGRATING A "MULTI-LAYERED" COMPLIANCE SCENARIO

In times when sanctions and export controls are forcing themselves onto the corporate compliance agenda as never before, extra-territoriality of US regulations adds to the complexity of the task by requiring multiple requirements to be conciliated and integrated in each company's internal compliance programme.

In a domain that is by definition very relevant to national security interests, differences exist in the European Union in the interpretation, administration and enforcement at member states' level. On the other hand, when dealing with US-origin goods, US regulations are enforced extra-territorially: as a result of theories of "extended jurisdiction", the United States *de facto* attribute nationality to items originated in the country. As a consequence, whenever these items are listed in specific "control lists" and correspond to the criteria for control, US regulations will apply on the items, wherever located, and to their re-transfer or re-export to third party recipients within the same country or abroad. In this context, American export controls represent an additional burden for European companies.[392]

Therefore, a company established in the European Union member state will need to take into account national and/or European regulations applicable to their products, embargoes and sanctions adopted by the UN Security Council, but also the laws of the respective countries of suppliers and subcontractors and eventually the laws of the country of the customer.

Each of these can have an impact on supply chain coordination, and ultimately influence the company's ability to respect contractual obligations.

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392 Rosa Rosanelli, "US Export Control Regulations Explained to the European Exporter: A Handbook", University of Liège, January 2014. Available: http://local.droit.ulg.ac.be/jcms/service/index.php?serv=49&cat=3

4. EXPORT CONTROLS: A EUROPEAN CORPORATE PERSPECTIVE

Although not legally binding in the European Union, from the point of view of exporters, compliance with US regulations is inevitable.

Corporate interests need to preserve their businesses, avoid sanctions, protect their reputation, and guarantee their ability to maintain the robustness of their global supply chain and be able to participate to public procurement tenders.

In the most recent years, European economic operators have witnessed that US export control violations can lead to severe fines and criminal or civil sanctions, but also to loss of market shares, ban from receiving any US items, and important reputational damage both for companies and senior executives.

In 2012, French aeronautics spare parts company Aerotechnics France was accused to have illegally exported US military items to Iran: the names of the company and of its CEO were added to the US Entity List. When a new company was created from it, with a new managerial board, the Commerce Department evidenced a direct nexus with the previous company and listed the new firm and CEO as well. Only months later, the names were finally taken off the list.[393]

Not always sanctions are rooted in willful misconduct: sometimes the complexity of regulations may entail violations for lack of knowledge or understanding, or lack of competent resources to be full-time responsible for export compliance. The broadness of certain regulations, which in general do not require knowledge, sometimes imposes an extremely challenging task on exporters.

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393 See Department of Commerce,Bureau of Industry and Security, Addition of Certain Persons to the Entity List and Implementation of the Entity List Annual Review Changes, Federal Register Volume 77, no. 25, April 2012.

On 25 February 2016, the Office of Foreign Assets Control ("OFAC") announced that Halliburton Atlantic Limited had settled charges in connection with unlicenced exports to the joint venture that was granted the concession to the Cabinda Onshore South Block in Angola.[394] While the US Department of Treasury does not enforce sanctions on Angola, the issue was that Unión Cuba-Petróleo (CUPET) owns a 5% interest in this joint venture.

The Cuban Assets Control regulations are different from other OFAC provisions, in that they prohibit any dealings in property in which any Cuban "has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect". In this sense, the transfers would have been illegal even if CUPET had a 0,0001% interest in an Angolan company that had a 0,0001% interest because the regulation covers "any interest … direct or indirect".[395]

In the case of Halliburton and OFAC above, it appears evident that while non compliance with the regulations entails objective liability, the risk for businesses is very high as it is extremely challenging to confirm that there is no Cuban interest, past or present, in any foreign customer before exporting goods or services to that customer. For US foreign affiliates in the European Union, there may be additional challenges: under Article 5 of Council regulation 2271/96, there is clearly a prohibition to comply with extraterritorial laws such as the US National Defence Authorisation Act, the Cuban Liberty and Democratic Solidarity Act, and the US Iran and Libya Sanctions Act. Complying with those extraterritorial requirements may entail, in other words, a violation of EU regulations, directly applicable in each EU Member State and on the same level as national law.

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394 Office of Foreign Assets Control (OFAC), Enforcement Information for February 25, 2016,https://www.treasury.gov/resourcecenter/sanctions/CivPen/Documents/20160225_Halliburton.pdf.

395 C. Burns, "Haliburton Fined for Exports to Angolan Entity with a 5 Percent Cuban Owner", February 26, 2016, http://www.exportlawblog.com.

On 22 February 2016, OFAC announced that CGGVeritas S.A, a French company, and its US and Venezuelan affiliates had agreed to settle allegations related to exports of US-origin parts and equipment for oil and gas exploration and seismic surveys to two vessels in Cuban waters, in violation of the US embargo on Cuba, in spite of the potential conflict between the US and EU Regulation.[396]

When passing from theory to practice of export controls, it is clear that an element to be taken into account is the intrinsic political and technological nature of these regulations and the need of industries to have clear and discernible guidance. Striking the right balance to "smart" restrictions means identifying clear guidance and adapting requirements for exports to the different types of products, their specific end user and end-use, and resist to the temptation to "stick a political label" on a country or a category of products.

A more recent example in the European debate concerned the development of a so-called "human security" approach, taking into consideration the links between security and human rights. While the categories of goods that are subject to authorisation are by definition "sensitive" or potentially "dangerous", the general political principle of taking into account potential consequences of a transfer on international security and human rights violations should be already integrated in the general considerations of each licencing authority. However, making it a criterion in itself would be very risky, because of its political and generic non-specific nature and consequent confusion for the businesses to determine what constitutes a violation but also because this could make it very easy to be manipulated.

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396 Office of Foreign Assets Control, Enforcement Information for February 22, 2016, https://www.treasury.gov/resourcecenter/sanctions/CivPen/Documents/20160222_CGG.pdf.

5. CONCLUSION

It has been already mentioned how critical it is for European businesses to integrate multi-layered compliance requirements in their internal compliance schemes.

If extra-territorial enforcement of US export control regulations on the territory of other States has been subject to debate in the European Union since the early 1980s, and compliance with certain laws has been explicitly prohibited by the EU, implementation of US export control regulations is nevertheless a requirement in any internal compliance programme of companies that although legally incorporated in Europe, procure items, receive technical data and cooperate with international partners on programs including US technology or that are by-products of US technologies.

In a context where responsibility for violation is objective, a key role to prevent sanctions is played by the establishment of internal compliance programmes ("ICPs"), which allow providing evidence that best efforts to prevent violations from occurring have been put in place and that the firm is engaged in ensuring compliance as a priority. In this sense, Management commitment is extremely relevant: management needs to lead by example and can ultimately take the essential decisions, such as committing to sufficient resources or encourage personnel to report anomalies without fear of retaliation.

An effective ICP entails standardizing operational written compliance policies and procedures, creating safeguards and engage personnel making it accountable. Because of the complexity of regulations and the difficulty to explain extraterritorial regulations, training and awareness-raising are very important, and need to be accompanied by continuous risk assessment and lean management.

Part 02.

Implementation of penalties and sanctions by States

Chapter
01

Designing and implementing appropriate and effective penalties for dual-use trade control offences

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1. INTRODUCTION

Enforcing national and international law regulating the trade in dual-use items and arms is key for effective controls. However, the design of penalties and their application in investigation and prosecution has not been a major focus of national, regional and international political or legal discussion to date. This chapter explores the specifics of this issue from a comparative perspective. Section II sets out the international legal and political framework for penalties and prosecutions in the area of dual-use and conventional arms trade controls. Section III shows the diversity of national penal provisons, comparing countries in the EU and South East Asia. Section IV outlines challenges of translating political and legal terms into effective enforcement. Section V presents the conclusions.

2. INTERNATIONAL LEGAL AND POLITICAL FRAMEWORK

As in other policy areas, there are currently no international legal standards regarding penalties for trade control offences regarding arms and dual-use items. Somewhat vague requirements can be derived from United Nations Security Council resolutions and from the international treaties regarding nuclear, biological and chemical (NBC) weapons. The Arms Trade Treaty (ATT) makes no provisions regarding penalties. None of the four export control regimes currently provide guidance on penalties and prosecutions.

The 1993 Chemical Weapons Convention (CWC) requires states parties to 'adopt the necessary measures to implement its obligations under this Convention'. This explicitly includes the obligation to 'prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity'; and to extend this legislation 'to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law'. The CWC even requires that each state party 'shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation' of these obligations.[1] The 1972 Biological and Toxin Weapons Convention (BTWC) only provides that '[each] State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere.'[2] The 1968 Non-Proliferation Treaty (NPT) does not make reference to enforcement or penalties.[3] The Arms Trade Treaty (ATT), which entered into force in December 2014, obliges States Parties to 'take appropriate measures to enforce national laws and regulations that implement the provisions of this Treaty'.[4] This aspect has been absent from ATT discussions in the context of the preparatory

1 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, entered into force 29 April 1997, http://www.opcw.org/chemical-weapons-convention/articles/article-vii-national-implementation-measures/, Article VII.

2 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, entered into force 26 Mar. 1975, http://www.opbw.org/, Article IV.

3 Treaty on the Non-Proliferation of Nuclear Weapons, entered into force 5 March 1970.

4 Article 14. http://www.un.org/disarmament/ATT/.

meetings and the first meeting of Conference of States Parties to date, and appears to have received little attention in related seminars and capacity-building activities. While this is likely due to the recent adoption of treaty's entry into force, which required an initial focus on resolving financial, procedural and organisational questions, enforcement measures including penalties are a crucial element of the treaty's effectiveness and impact.

UN Security Council Resolution 1540 *inter alia* requires states to: adopt and enforce legislation prohibiting non-state actors from engaging in NBC proliferation activities; and 'take and enforce effective measures to establish domestic controls to prevent the proliferation of nuclear, chemical, or biological weapons and their means of delivery, including by establishing appropriate controls over related materials'. These are specified as to comprise border controls and law enforcement efforts as well as controls on export, re-export, transit, trans-shipment, financing and transport. This explicitly includes 'appropriate laws and regulations' and 'establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations'. The resolution defines a non state-actor as an 'individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution'. It can thus apply to recipients but also suppliers of WMD-relevant items. Related materials in turn are defined to also comprise equipment and technology and are now widely interpreted to refer to WMD-related dual-use items as defined by the multilateral export control regimes.

For all abovementioned international conventions and resolutions, states determine the ways in which they will implement these obligations. Depending on the laws that are applicable to specific activities within a given legal system, penalties can vary considerably.

UN sanctions on the transfer of arms and dual-use items do not include any specific requirements or guidance on penalties. For example, UN Security Council Resolution 1737 provides that 'States shall take the necessary measures to prevent the supply, sale

or transfer' of certain items to Iran, while UN Security Council Resolution 1696 calls on states to prevent the transfer of specified items to the Democratic People's Republic of Korea (DPRK or North Korea) 'in accordance with their national legal authorities and legislation and consistent with international law'.[5]

3. NATIONAL PENALTY SYSTEMS

Internationally and within the EU, national penalty systems for dual-use trade control offences differ considerably, regarding (a) the types of specific penalties and their severity, e.g. regarding the length of prison sentences; (b) the types of generic penalties that may be or have been applied to strategic trade control offences, such as smuggling or falsification of documents; (c) the overall design of the criminal justice system and the system for administering non-criminal penalties; and (d) the actual application of penalties in cases. Generally, penalties available can be divided into administrative and criminal penalties. Administrative penalties can include fines; the revocation of licences; the loss of access to trade facilitation privileges (e.g. simplified licencing or customs procedures); the loss of property rights through confiscation; the temporary or definitive closure of a company; the change of the person legally responsible for exports in a company; and mandatory compliance training. Criminal penalties include fines but primarily are prison sentences, which may be suspended.

3.1. Examples of penalty systems in the EU

Penal law has remained within the national competence of EU member states across all issue areas, including criminal procedural laws. These include the modalities for deciding whether to take a case to court. Depending on national legal traditions, penal provisions

5 UN Security Council Resolution 1737, 23 December 2006; and UN Security Council Resolution 1696, 31 July 2006.

can be placed in a specific law, such as the foreign trade, economic crimes and/or customs act, or in the penal code. A combination thereof is also possible.

The only EU-wide legislation regulating arms exports concerns embargoes (see below). The EU Common Position on exports of military equipment contains no reference to penalties, while the 2003 Common Position on Arms Brokering states: 'Each Member State will establish adequate sanctions, including criminal sanctions, in order to ensure that controls on arms brokering are effectively enforced.'[6]

The legal framework for prosecuting dual-use offences in the EU is a combination of EU and national laws. The EU Dual-use Regulation is directly applicable across the EU and includes the control list of dual-use items for which a licence is required for export and, in certain limited cases, brokering and transit.[7] EU member states are responsible for enforcing these provisions. In addition, the Regulation allows for some national discretion, which has implications for potential offences. Article 24 of the EU Dual-use Regulation requires member states to 'take appropriate measures to ensure proper enforcement of all the provisions of this Regulation' and to 'lay down the penalties applicable to infringements of the provisions of this Regulation or of those adopted for its implementation'. Article 24 also provides that penalties for breaches of the regulation be effective, proportionate and dissuasive. Similar wording has been used in EU arms and dual-use embargoes and sanctions. However, the translation of these provisions into national criminal penalties and administrative sanctions differs

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6 Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, *Official Journal of the European Union*, L335, 13 December 2008, pp. 99–103; Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, *Official Journal of the European Union*, 25 June 2003, L156, p. 79.

7 Council regulation (EC) no. 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, *Official Journal of the European Union*, L134, 29 May 2009. The Regulation entered into force on 27 August 2009.

enormously.[8] Additionally, penalties for violating embargoes also differ, as do institutional competence and the interpretation and application of basic concepts in penal law—such as aiding and abetting, attempt, support, negligence and intent. To date, no significant efforts have been made to develop agreed standards on what is meant by 'appropriate measures' or by 'effective, proportionate and dissuasive' in this context, neither within the EU nor at the international level. However, it should be noted that different avenues and apparent differences may effectively lead to the same, or similar, results in terms of the administration of sanctions and the outcomes of prosecutions.

→ GERMANY

They key elements of legislation for German penalties are to be found in the Foreign Trade Act and the War Weapons Control Act, and the accompanying orders. Germany has revised penal provisions for dual-use and arms trade controls a number of times, most recently in 2013 with the most fundamental revision since the adoption of these laws over 50 years ago.

The revised act and implementing provisions entered into force on 1 September 2013. While the maximum penalty of 15 years imprisonment — the highest maximum possible for fixed-term prison sentences in the German legal system — remains, a number of important changes have been adopted. Previously, in order for certain offences to be considered criminal, it was necessary to prove that the alleged offence seriously endangered Germany's external relations, thus constituting 'aggravating factors'. The current law no longer requires these aggravating factors. Instead, basically all breaches committed with intent are considered criminal offences.

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8 The most recent comparison of penalties dates back to 2005/2006: European Commission, Directorate-General for Trade, Working Party on Dual-use Goods, Report on the answers to the questionnaire DS6/2005 rev. 3 on existing sanctions—implementation of Article 19 of Council regulation 1334/2000, DS 37/4/2005 rev. 4, 11 May 2006; and 'Sanctions imposed by EU member states for violations of export control legislation', Draft rev. 14, September 2005.

Negligent acts will only constitute an administrative offence.[9] The only exceptions are violations of arms embargoes, where both intentional and negligent (*leichtfertige*) offences constitute a criminal offence.

Also, a voluntary self-disclosure provision for certain negligent formal or procedural errors was newly introduced. Lower maximum sentences (e.g. 5 years), and certain minimum prison sentences (e.g. 3 months) are proscribed for specified offences. The provisions in force until 2013 can however still be applied to prior offences, and thus up to 20 years. As previously, fines of up to 500,000 euros can be imposed; and in specified minor offences up to 30,000 euros. These administrative offences are classified as *Ordnungswidrigkeiten*, a German particularity. *Ordnungswidrigkeiten* can be imposed by an administrative authority, and no criminal procedure is required although the provisions of the criminal procedural law have to be applied.[10] For example, a CEO can be fined if an offence occurs due to a breach of duty of care, such as a result of lack of training or compliance procedures.[11]

Few countries have investigators and/or prosecutors, or units within the respective services, that are specialised in breaches related to foreign trade control. In Germany, since 1 January 2007 major WMD-related dual-use trade offences can be transferred to a specialised prosecution unit of the Federal Prosecutor General (*Generalbundesanwalt*).[12] A central, federal authority (the German Customs Criminological Office, *Zollkriminalamt* and its

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9 *Gesetz zur Modernisierung des Außenwirtschaftsrechts* [Law on the Modernisation of Foreign Trade Law] of 6 June 2013, *Bundesgesetzblatt* (Federal Gazette), part I, no. 28, 13 June 2013, pp. 1482-1496. Available at http://www.bgbl.de.

10 "Unless otherwise provided by this Act, the provisions of general statutes concerning criminal proceedings, particularly those of the Code of Criminal Procedure, of the Courts Constitution Act and of the Youth Court Act, shall apply mutatis mutandis to the regulatory fining proceedings", *Ordnungswidrigkeitengesetz*, Article 46. The Regulatory Offences Act, sometimes also translated as Administrative Offences Act.

11 Article 130, *Ordnungswidrigkeitengesetz*.

12 2. *Justizmodernisierungsgesetz* [Second Justice Modernization Law], 22 December 2006, http://www.gesmat.bundesgerichtshof.de/gesetzesmaterialien/16_wp/jumog2/bgbl106s3416.pdf.

local branches, recently transformed into a department within the Directorate General for Customs) is responsible for investigating criminal offences, while regional customs authorities are in charge of imposing administrative sanctions.

Criteria in the decision regarding the amount of the fine are: acknowledgement of the fault; whether a licence would have been granted if applied for; whether an offence had been committed before or someone is a first offender; whether the offence was committed on behalf of a third party; whether lack of due diligence was involved; the size of the company– if an individual is fined, the amount is likely to be smaller than for a company; the reason for the offence (e.g. new compliance officer in charge or position vacant etc.). The offender can go to court if he or she disagrees with the decision and wishes to subject it to a judicial test. Challenges occur if the company in question does not exist any more, or the department in charge has been spun off, and legal succession is not clear.[13]

In addition to fines, access to facilitated customs procedures may also be suspended or denied as an administrative sanction, which constitutes a very serious measure for companies. The economic advantage gained through the illegal activity may also be taken away. The maximum fine is 500,000 euros per offence; actual fines up to 490,000 euros have been imposed in the past, and this can be complemented through taking away the economic advantage.

Germany is among the countries with the highest number of actual prosecutions for both embargo breaches and regular trade control offences, and has thus gathered substantial practical experience in processing such cases. It is also one of the few countries in the EU where long prison sentences have been the consequence.[14]

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13 This section is based on information provided by the German authorities.

14 For examples of cases see Bauer, S., 'Prosecuting WMD-related dual-use trade control offences in the European Union: penalties and prosecutions', *Non-proliferation Paper* no. 30, July 2013; and for example http://www.welt.de/regionales/koeln/article125007745/Bundesanwaltschaft-laesst-Deutsch-Iraner-festnehmen.html; http://www.lto.de/recht/hintergruende/h/embargo-iran-waffen-handel-dual-use.

→ THE NETHERLANDS

In the Netherlands, the national legal framework regarding export control for arms and dual-use items comprises: the Strategic Goods Order; the Strategic Goods Decree 2012; and the Strategic Services Act 2012 (which controls brokering, technical assistance and intangible transfers of technology). Arms exports are additionally governed by the Arms and Munitions Act, while legislation on sanctions includes the 1977 Sanctions Act and Embargo Orders. The export of chemicals is also regulated by the Chemical Weapons Convention Implementing Act and the Chemical Weapons Convention Implementing Order. Finally, the General Customs Act also applies to arms and dual-use exports. Export control offences as defined by these acts can be punished according to the Economic Offences Act. Penalties for export control breaches can be divided into misdemeanours and felony offences. For misdemeanours, the maximum prison term is one year. In addition, a fine of category 4 (ranging from 20,250 to 81,000 euros), and community service can be imposed. For felony offences, the maximum imprisonment is 6 years, and penalties can include community service and a category 5 fine (from 81,000 to 810,000 euros). In the Netherlands, both companies and individuals can be prosecuted.

Additional administrative penalties include: (a) deprivation of certain (public) rights; (b) full or partial closing down of a company for a maximum of one year; (c) confiscation of goods; (d) confiscation of the profit; (e) publication of the sentence; and (f) placing a company under judicial supervision. If the Prosecutor considers there is sufficient evidence he or she can also propose a settlement to the suspect.

While prosecutors in the Netherlands usually apply the Economic Offences Act for export control violations regarding strategic goods, one individual who supplied chemicals that were

used by Iraqi President Saddam Hussein as chemical weapons against Iraq's Kurdish population was charged with genocide and crimes against humanity.[15]

Examples of prosecutions include the case of Henk Slebos, who provided dual-use items to his university friend A. Q. Khan in Pakistan. A District Court imposed 12 months imprisonment (with 8 months suspended) and a fine of 100,000 euros. The Amsterdam Court of Appeal subsequently imposed 18 months imprisonment (with 6 months suspended) and a fine of 135,000 euros.[16] Other cases taken to court in recent years include the export of afterburners for military fighters, which resulted in a 10,000 euros fine and forfeiture of the goods; and the export of M113 and M60 tank parts, which resulted in a 75,000 euros fine and 240 hours of community service.

→ THE UNITED KINGDOM[17]

In the UK, for offences regarding the export of military and dual-use goods, the maximum penalty for deliberate offences is up to 10 years imprisonment (14 years if nuclear material is involved)

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15 This was because the export of those chemicals was not in violation of foreign trade legislation at the time of their export. Later exports did not take place from the Netherlands and, even if they had, the statute of limitation would have applied. At the time, dual-use brokering was not subject to control. The individual was acquitted of the Genocide Convention Implementation Act but found guilty of violating the Criminal Law in Wartime Act, in conjunction with the Dutch penal code. District Court of The Hague, Case 09/751003-04, Judgement LJN: AU8685 of 23 December 2005; and Court of Appeal of The Hague, Case 09/751003-04, Judgement LJN: BA673 of 9 May 2007. These and other rulings can be accessed at http://www.haguejusticeportal.net/. See also van der Wilt, H. G., 'Genocide, complicity in genocide and international v. domestic jurisdiction: reflections on the van Anraat case', *Journal of International Criminal Justice*, vol. 4, no. 2 (July 2006), pp. 239–57; and van der Wilt, H. G., 'Genocide v. war crimes in the van Anraat appeal', *Journal of International Criminal Justice*, vol. 6, no. 3 (July 2008), pp. 557–67.

16 This case is summarized in Bauer 2013 (note 14), and Wetter, A., *Enforcing European Union Law on Dual-use Goods*, SIPRI Research Report no. 24, 2009.

17 This section is based on information provided by UK HMRC for a study conducted by the author for the Swedish Parliamentary Committee on Arms Exports (KEX) in 2014. For further detail, see Bauer, S., 'Penalties for export control offences for dual-use and export control law: a comparative overview of six countries', April 2014, in *Skärpt exportkontroll av krigsmateriel – DEL 2, bilago, Slutbetänkande av Krigsmaterielexportöversynskommittén, KEX*, SOU 2015:72, Stockholm 2015, pp. 753-770, http://www.sou.gov.se/wp-content/uploads/2015/06/1_SOU-2015_72_DEL-2_sid-1-818_webb.pdf.

and/or a fine of any amount.[18] If the offence was not deliberate, the exporter and their agent can be fined at a specified level on the Standard Scale, or can be given a fine of three times the value of the goods. The offence is thus a strict liability offence, as the Customs Act defines it as an offence to export goods or take them to a place to be exported (for example a port or airport) if there is any prohibition or restriction on their export. Both companies and individuals can be prosecuted in the UK.

Fines imposed have ranged from 1,000 to 575,000 British pounds. The fine is calculated according to the goods and destination (e.g. how serious an offence it was) and also sometimes the value of the goods and the profit they made. Also, Her Majesty's Revenue and Customs (HMRC, the British customs agency), issue many written warnings for first-time offences if they are not serious. They can also charge a 'restoration penalty' if the exporter wants to have his or her goods back and apply for a licence. This is calculated based on the value of the goods and the seriousness of the offence.[19] In deciding whether to apply restoration penalties, HMRC will consider the risk that restoring the goods would result in the exporter's attempting to evade the controls for a second time. When Customs issues a fine instead of criminal prosecution, this is called a 'compound penalty'. Sometimes the exporter is given the choice of whether to pay a fine or go to court. The majority of breaches of export controls have resulted in the control authority (HMRC or the Home Office Border Force) issuing a fine or written warning. Only around 1% of cases result in criminal prosecution; a small percentage of cases result in large financial penalties (fines) in lieu of prosecution, while the vast majority of cases are dealt with by small fines (restoration penalties) and/or official written warnings.

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18 The relevant law is in Section 68(1) and (2) of the Customs and Excise Management Act of 1979. The penalties are in Section 68(3). http://www.legislation.gov.uk/ukpga/1979/2.

19 These powers are regulated under Section 152 of the 1979 Customs and Excise Management Act http://www.legislation.gov.uk/ukpga/1979/2.

Examples of prosecutions since 2005 include prosecutions for export licencing offences, but also trafficking and brokering ('trade') offences.[20] Details have been published by the British authorities through press releases and information in the annual report on arms exports. Serious deliberate offences resulting in prosecution and imprisonment are fairly rare—not normally more than five per year, and some years only one or two cases. Examples of cases where compound penalties have been issued can be found on the website of the British export licencing authority.[21] According to information provided by UK Customs in 2013, about

3.2. Examples of penalty systems in Asia

→ REPUBLIC OF KOREA

In terms of criminal sanctions, the Foreign Trade Act provides two penalty provisions for export violations related to strategic items. First, anyone who exports items without a licence to facilitate international proliferation of strategic items faces imprisonment for up to seven years or a fine not exceeding five times the value of the exported or brokered items.[22] Second, anyone who exports items without a licence or who obtains a licence fraudulently faces imprisonment for up to five years or a fine not exceeding three times the value of the exported goods.[23] Attempt of specified violations is to be treated as completed for the purpose of punishment (Article 55).

The Foreign Trade Act contains three types of administrative sanctions: (a) banning all exports or imports of strategic items for up to three years by a person who has exported any strategic items without an export licence or situational licence inter alia[24]; (b) an 'educational order' to take a training course to any person who has

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20 http://blogs.bis.gov.uk/exportcontrol/category/prosecution/.

21 http://blogs.bis.gov.uk/exportcontrol/prosecution/compound-penalty-cases/.

22 Foreign Trade Act, Article 53(1). An English version of the act can be found at http://www.moleg.go.kr/english/korLawEng?pstSeq=54776

23 Foreign Trade Act (previous note), Article 53(2).

24 Foreign Trade Act (previous note), Article 31(1).

exported strategic items without an export licence or a situational licence or obtained an export licence or a situational licence by fraud or other wrongful means;[25] and (c) a civil fine not exceeding 20 million won, for example, for failure to submit a report or data or has submitted a false report or data.[26]

The Korea Customs Service (KCS) is responsible for investigating foreign trade offences as judicial police in accordance with the Customs Act, including powers to search and arrest.[27] The officers can search offenders under the Foreign Trade Act and arrest them at the scene. Bringing a case to court is the responsibility of the Prosecutors' Office.

There have been a number of recent prosecution cases, including a case involving the illegal export of equipment for the production of shells to Myanmar, disguised as agricultural machines. The cases resulted in fines as well as suspended prison terms. The case also illustrates an important point in strategic trade prosecutions. The Republic of Korea's supreme court in December 2010 charged the suspects with illegitimate export only for the period after October 2004. Prior to that, the relevant regulation defined the export restriction for strategic items to apply to an "area which could jeopardize the international peace and community safety". This was considered too broad and imprecise, and lacking legal clarity. The law was later revised to specifically mention each country of which export is restricted, and the current regulation requires all strategic material exports to obtain valid approval regardless of the importing country.[28]

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25 Foreign Trade Act (previous note), Article 49.

26 Foreign Trade Act (previous note), Article 59(1)3.

27 Customs Act, Law no. 11 602 as amended up to 1 January 2013, http://www.law.go.kr/lsInfoP.do?lsiSeq=131363, Articles 295 and 296. For further detail on the role of South Korean Customs, See Lee, J., Lee, J., South Korea's Export Control System, SIPRI Background Paper, November 2013, http://books.sipri.org/product_info?c_product_id=468.

28 Korea Strategic Trade Institute (KOSTI), [Annual report 2011] (KOSTI: Seoul, 2011), in Korean. English translation of document provided to author by KOSTI in November 2015). See also Lee (note 27).

A company that exported dual-use machine tools without the necessary licences to China, India and other countries between 2005 and 2008 was fined 50 million won and one month of export restriction. In 2011, 21 administrative measures for violations of the Foreign Trade Act were imposed.[29] These included warnings and educational orders for to 15 companies, export restrictions up to two months and fines for 3 companies, and 3 cases where export and import restrictions were imposed for up to three months. This overview of cases provides interesting insights into the actual application of penalties. It also includes cases where the company had been unaware, and exported to destinations not considered highly sensitive, where a fine and warning letter were the result.

→ MALAYSIA

With the death penalty explicitly included in the 2010 Strategic Trade Act (STA), Malaysia has the most severe penalties for strategic trade control offences of all countries worldwide. The death penalty may be reconsidered in the context of the 2016 legal revision, as it has been subject to severe criticism given that the penalty could also be imposed without intent, if death is the result of the act.[30] Article 9 of the STA also foresees up to life imprisonment and severe fines, including a minimum fine of 30 million Ringgit for a specified offence committed by a 'body corproate' (equivalent of almost 7 million euros). A person convicted of an export, transshipment or transit offence may also be disqualified from holding or obtaining an STA permit (Article 9).[31] To date, no court cases have been the result of these provisions.

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29 See Lee (note 27).

30 http://www.str.ulg.ac.be/wp-content/uploads/2016/03/Strategic-Trade-Review-Issue-02.pdf.

31 For the Strategive Trade Act 2010, see http://www.miti.gov.my/index.php/pages/view/2581?mid=287.

4. TRANSLATING POLITICAL TERMS INTO LEGAL CONCEPTS

The way political terms are translated into legal concepts or norms can vary considerably, as can the national definition of legal concepts that are agreed at international level, the legal consequences for breaches at the national level, and their application through the national legal system. Due to these four steps in the interpretation, conceptualisation and application of norms, what constitutes an offence may differ considerably from country to country, even where the original source of the law is the same.

Importantly, due to the low number of foreign trade control related cases in the vast majority of countries, in many or even most countries, little attention has been given to a systematic, deliberate and coherent approach. Where cases have occurred, at least initially, prosecutors often had to apply penalties for regular offences such as fraud, or even unrelated offences such as tax evasion. This has at times resulted in very low penalties and often only fines, when compared to penalties for similar cases in some other countries such as Germany or the US. Among investigators, prosecutors and judges not familiar with the specifics of foreign trade control offences, and in particular those involving dual-use items, common misperceptions include: (a) that dual-use items are harmless since they mostly have civilian uses; (b) that generic legal provisions are sufficient to prosecute such cases; and (c) that provisions regarding hazardous goods could be applied, although very few dual-use items constitute hazardous items as such unless they are used to build a nuclear weapon or missile, for example, but are otherwise common industrial products.

4.1. 'Effective' and 'appropriate'

UN Security Council Resolution 1540 uses the terms 'effective' and 'appropriate' 11 times each. Regarding effectiveness, an important question to consider is prevention, although the relative

importance of prevention differs in national legal doctrines. Legal theory distinguishes between 'special' and 'general' prevention. Special prevention aims to stop an offender from committing further crimes; if the offender is part of a network, special prevention is also a possible contribution to disrupting wider illegal activities. General prevention aims to deter other acts that could or would contribute to proliferation.[32] Closely related to this is the issue of the appropriate deterrent for companies and individuals. Whereas fines, loss of property rights (confiscation) and privileges are obvious penalties (also) for companies, prison sentences clearly can only be applied to individuals. Effectiveness can also be interpreted to apply to the actual application of the penalties and to the overall system. Where penalties only exist on paper but are known or believed not to be enforced, their effectiveness can be called into question.

The criterion of appropriateness also raises several questions. Should this criterion be assessed in relation to the seriousness of the crime, including its consequences or potential consequences? Should consideration be given to the subjective perspective, and thus the individual perpetrator, and in particular his or her intent? Or should appropriateness be considered in relation to other offences within the same legal system? This criterion refers to both penalties for other offences such as fraud, murder, and other trade-related offences such as embargo violations. Countries may have very different penalties for dual-use trade offences related to chemical weapons and offences related to nuclear weapons, due to the different origins and context of the legislation. Furthermore, as has been pointed out, corresponding penalties may be found either in specific legislation or in the penal code, depending on the country.

The term in the EU Dual-use Regulation related to appropriate is 'proportionate'. Defined as such, the scope of an offence and the penalty assigned to a breach has to fit the national legal tradition and system and be proportionate to the offence and to other offences. Furthermore, the EU requirement for penalties to be 'dissuasive'

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32 For further detail see Wetter (note 16).

relates to the deterrence and prevention point discussed above, and both the EU Dual-use Regulation and UN Security Council Resolution 1540 use the term 'effective' in relation to penalties.

4.2. Different types of act and degrees of involvement

Regarding the acts to which penalties are applied, there is a wide range of possible acts of involvement in an illegal transaction. A focus on the exporter can pose a problem from a prosecution perspective, since another actor may be the main or even the only perpetrator. Moreover, the range of actors and their types of involvement in export control related offences has expanded considerably due to the increased complexity of legal trade flows, company structures, modes of transport and illegal procurement patterns. The use of intermediaries, front companies, shell companies and diversion or trans-shipment points has multiplied the number and types of actors and activities involved in transfers. Although the term 'export controls' continues to be used, 'trade controls' more accurately reflects reality as it specifically includes export associated activites such as brokering, transit, trans-shipment, financial flows. Moreover, technological developments have added to the complexity of prosecution cases through their impact on both the type of items transferred and the way and ease with which they are transferred. Technology transfer can occur by electronic means, which legally constitutes an export, or through the oral transfer of know-how. The latter is a form of technical assistance, which can also take place through manual services. These developments create strong demands and challenges from both a conceptual legal and practical enforcement perspective.

In addition, there are different degrees to a person's responsibility. Theoretically, the subjects of punishment could include anyone acting on their own initiative; anyone who organizes an illegal transport and orders the staff to carry it out; anyone who knows about or tacitly approves infringements in his or her area of responsibility but does not intervene; or anyone who is accounta-

ble for the violation because of a breach of his or her duty of care. Whether in particular the latter two types of involvement can be subject to criminal prosecution will again differ from country to country.

4.3. Penalizing attempt

Given the main goal of trade control enforcement efforts being prevention, the question of whether and how to penalize the attempt to commit an offence is an important question. Enforcement authorities usually are either obliged to stop a suspected illegal shipment, or otherwise have to weigh the risks of a so-called controlled delivery—where the item is monitored even outside the country in order to identify further actors involved before stopping a transaction. This can be particularly useful in the discovery of illegal networks rather than individual, one-off offences. Whether or not it is considered a priority to stop the item rather than to let it proceed and establish an offence, legislators need to determine whether the intent to export should be penalized.

Penal codes can provide for the offences of attempting to commit a crime or conspiracy to commit a crime—even if the item has not left a specific territory or the transaction been completed. British Customs legislation makes the attempt to circumvent export restrictions an offence.[33] Regarding whether intent to commit a crime is applicable, the key question is not only what legally constitutes intent, but also when the export legally takes place—for example, on submission of the customs declaration, or once the national border is crossed and national jurisdiction ends.[34]

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33 See Section 68(2) of the British Customs and Excise Management Act: 'Any person knowingly concerned in the exportation or shipment as stores, or in the attempted exportation or shipment as stores, of any goods with intent to evade any such prohibition or restriction as is mentioned in subsection (1) above shall be guilty of an offence under this subsection and may be detained.' The complete text of the act can be found at http://www.legislation.gov.uk/ukpga/1979/2/section/68.

34 E.g. in the Netherlands submitting an export declaration for a transaction that would be illegal is considered an offence. Attempt also constitutes an offence, but only in cases of intent.

5. CONCLUSIONS

National approaches to penalizing export control offences for dual-use and military items vary considerably. This is the case even within the EU where a common law is in place for trade in dual-use items, and common criteria apply to the arms trade. The differences include the balance between criminal and administrative penalties; the forms of administrative penalties and severity of criminal penalties; their application in actual administrative or criminal procedures; the actors and actions related to export control offences that can be subject to punishment; the powers of authorities to impose administrative sanctions without participation of a court as well as the procedures and modalities involved; and the types of law in which export control-related penalties can be found.

These differences can be attributed to a number of factors, including the overall philosophy and structure of the laws, and the legal system; the size and scope of the arms and dual-use industry; and how seriously the government takes trade-related offences involving dual-use items and arms.

There is also a considerable difference in the number of prosecutions that countries have brought. This can be attributed to a number of factors, such as the differing numbers of detections of illegal transactions, differing volumes of export transactions, and varying priorities and resources of enforcement and prosecution authorities.

Given the importance that has been assigned to preventing the proliferation of nuclear, biological and chemical weapons and to controlling flows of conventional weapons, the low degree of attention and resources focused on enforcement and penalties in preventing their illegal spread may be surprising. While this may be partly due to resource constraints, common gaps between political statements and resource allocation for implementation, and countries' insistence on maintaining national autonomy in judicial matters, enhanced information exchange on specific cases

and penal provisions, development of guidance, sharing effective practices and lessons learned, and further scholarly research could go a long way in clarifying the choices available to policy makers and law makers, and facilitating the effective implementation and enforcement of legal norms that have been adopted.

Chapter
02

Enforcement of trade control provisions in France

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1. INTRODUCTION

The structure of the legal corpus of France, Member of the European Union, is the result of intertwined international, European and national norms. International and European norms are on top of the legal pyramid. In view of the "monist" legal doctrine[35] followed in France, international norms apply directly without any requirement for their translation into national law. Therefore, in areas regulated by norms of external origin, France needs not and does not develop additional laws and regulations.

As regards penalties applicable infringements of the dual-use trade control provisions, monism shall be read as expression of national sovereignty. In the EU Regulation 428/2009, the reference to penalties is limited to the requirements of setting "effective, proportionate and dissuasive penalties applicable to the infringements of the provisions"[36] and of communication of the "laws, regulations and administrative provisions adopted in implementation" of the Regulation.[37] A European regulation, unlike a directive, does not require further implementing acts, normally, but directly apply in all Member States' legal systems. Due to the fact that the adoption

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35 Monism is the legal theory according which a legal system must be considered as a whole and all the norms, independently from their origin, belong to the same structure. Dualism, as opposite to monism, considers that several legal orders can exist in parallel but do not meet and their norms have a value only for the order in which they are.

36 Council regulation (EC) no. 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, Recital 19 and Article 24.

37 *Ibid.*, Article 25.

and enforcement of civil, penal and predominantly administrative provisions and procedures remain a sovereign national capacity in the absence of exclusive European competence and enforcing authority, additional texts are required from the States in order to give strength to the Regulation. The risk is that enforcement differs between 2 States regardless the fact they adhered the same trade control provisions.

As regards sanctions adopted against a third State or persons that are decided in response to international security concerns, the EU usually acts on two levels: through a regulation where it relates to its fields of competence, through a Common Foreign and Security Policy (CFSP) decision where a coordinated approach of its Member States is needed but outside the EU competences. The first is a legally binding although the second is a political instrument which, if it is not legally binding as such, produces legal effects on the European private actors and may consequently may require further implementation measures. As for France, there are only a limited number of national texts that translate these restrictive measures into national law.

A ceetain paradox may arise in enforcing trade control provisions due to the application of the monist doctrine. On the one hand, a situation which normally requires none or little implementation because the provisions are set at a higher level or norms results in the existence of an important number of texts. On the other hand, a situation which could normally require extensive implementation leads to adoption of very few texts only.

2. PENALTIES FOR INFRINGING DUAL-USE TRADE CONTROL PROVISIONS

In implementation of Article 24 of the Regulation 428/2009, France had to design penalties that, together with the action of the enforcing agencies, give strength to the trade control provisions.

2.1. Sources

In the legal apparatus, dual-use-related provisions are contained in both specific texts dealing with this area or, as it is mostly the case regarding the penalties, in general texts, which cap activities of the society and individuals in general.

→ IN THE DUAL-USE SPECIFIC TEXTS

Despite its direct applicability, a regulation allows for the Member States organising its implementation through national texts, provided that they do not contradict the European norm. As for the dual-use Regulation, it is necessary, to many respects such as the creation and running of a licencing authority or the penalties in case of infringements of the provisions, to produce such implementing texts.

France, which system is driven by a civil law culture, had consequently adopted a set of regulations for adapting it to some of its "national specificities". The controls are organised by decrees[38] and arrêtés, that implement the decrees.[39] The EU general licences are implemented by the way of arrêtés.[40] The option left by the

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38 The main one being the Decree n°2001-1192 of 13 December 2001 *relatif au contrôle à l'exportation, à l'importation et au transfert de biens et technologies à double usage.*

39 Such as the Arrêté of 13 December 2001 *relatif au contrôle à l'exportation vers les pays tiers et au transfert vers les Etats membres de la Communauté européenne de biens et technologies à double usage* and the Arrêté of 13 December 2001 *relatif à la délivrance d'un certificat international d'importation et d'un certificat de vérification de livraison pour l'importation de biens et technologies à double usage.*

40 See Arrêté of 31 July 2014 *relatif à la licence générale "biens à double usage pour forces armées françaises"* and Arrêté of 31 July 2014 *relatif à la licence générale "Salons et Expositions" "Exportations et transferts au sein de l'Union européenne de biens à double usage importés pour la tenue de salons et d'expositions sous le régime douanier de l'admission temporaire".*

Regulation to adopt national general licences is used via arrêtés.[41] Additional controls are implemented by the way of arrêtés on "tear gas and riot control agents"[42] as well as some "civil helicopters and their spare parts"[43]. Administrative bodies have also been set up or (re-)organised for their respective fields of competence by specific decrees[44] and implementing arrêtés[45]. Certain laws may be also particularly relevant as they directly relate[46] to dual-use goods.

All these texts set out provisions designating the authority in charge of its execution. In relation with dual-use in general, it is most often the Minister in charge of Customs or one of its Directorate General. For specific areas, it can also be another authority or a joint responsibility of different ministries. However, only very few of these texts effectively contain penalties applicable in case of

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41 See Arrêté of 18 July 2002 *relatif à la licence générale "biens industriels" pour l'exportation des biens industriels relevant du contrôle stratégique communautaire* for some listed industrial goods, arrêté of 18 July 2002 *relatif à la licence générale "graphite" pour l'exportation des graphites de qualité nucléaire*, for nuclear-grade graphite, Arrêté of 14 May 2007 *relatif à la licence générale "produits biologiques" pour l'exportation de certains éléments génétiques et organismes génétiquement modifiés*, for certain genetically modified organisms, and the arrêté of 18 July 2002 *relatif à l'exportation des biens à double usage chimiques et à la licence générale "produits chimiques"*, for some listed chemical products.

42 See Arrêté of 31 July 2014 *relatif aux exportations de gaz lacrymogènes et agents antiémeute vers les pays tiers*.

43 See Arrêté of 31 July 2014 *relatif aux exportations d'hélicoptères et de leurs pièces détachées vers les pays tiers*.

44 See Decree n°2010-292 of 18 March 2010 *relatif aux procédures d'autorisation d'exportation, de transfert, de courtage et de transit de biens et technologies à double usage et portant transfert de compétences de la direction générale des douanes et droits indirects à la direction générale de la compétitivité, de l'industrie et des services*, which re-organised the ministerial competences in dual-use trade controls and foresees the creation of the SBDU as well as Decree n°2010-294 of 18 March 2010 *portant création d'une commission interministérielle des biens à double usage*, which created the interministerial dual-use goods commission (CIBDU), placed under the authority of the Prime Minister.

45 See Arrêté of 18 March 2010 *portant création d'un service à compétence nationale dénommé " service des biens à double usage ",* which created the licencing authority, the Dual-Use Goods Service (SBDU).

46 See Law n°2004-575 of 21 June 2004 *pour la confiance dans l'économie numérique*, which establishes specific controls for cryptographic products that are implemented by a separate authority from the SBDU. This law is implemented by Decree n°2007-663 of 2 May 2007 *pris pour l'application des articles 30, 31 et 36 de la loi no. 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique et relatif aux moyens et aux prestations de cryptologie*.

infringement of the controls by a trade operator of dual-use items. The Decree 2001-1192, which is the main "dual-use specific" text, establishes in its Article 1 possibilities to penalize trade licence holders. The Arrêté of 13 December 2001, which implements the Decree's provision in its Article 21, details these possibilities according to the degree of non-compliance *vis-à-vis* with the obligations of these licencees. Accordingly, a licence can be:

- Revoked if obtained from a false declaration or by fraud;
- Repealed if the obligations assumed to are not respected;
- Suspended, modified or repealed in the cases foreseen by articles 11[47] and 13[48] of the EU Regulation.

The French regulations, in general, do not establish penalties as these are generally considered to be the competence of the Nation through its representation, i.e. the legislator. The Law no. 2004-575, in relation to cryptographic products, contains detailed provisions on the penalties attached to infringements of its provisions.

Among all the legal texts that organise the dual-use trade controls at the national level, only very few of them and only for few cases of infringements contain references to penalties. These penalties are set out in the texts touching on the society's and individuals' activities in general.

→ IN THE GENERAL APPLICABLE TEXTS

The Customs Code contains provisions concerning illicit movements of dual-use goods. It defines, in its Article 38, the "prohibited goods"[49], which include the dual-use goods as defined by the European Regulation.

The Penal Code, in its Book IV Title I titled "Infringement to the fundamental interest of the Nation", defines the fundamen-

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47 For example, cases for which an other Member State is in position to express its views on a licence to be granted or already granted, notably for protecting its "essential security interests".

48 For example, cases for which a denial for a similar export had been issued by an EU Member State.

49 In Article 427, the Customs Code additionally defines what is the "import of prohibited goods".

tal interests of the Nation. The non-proliferation of weapons of mass-destruction (WMD) is clearly – though not expressely– linked[50] to these fundamental interests.

The Internal Security Code does not provide more elements on the infringements than their prosecution but it founds the competence of the specialised intelligence services for gathering intelligence information on fundamental interests of the Nation such as the non-proliferation of WMD[51].

Since the adoption and codification of the Law no. 2011-266 of 14 March 2011[52] concerning the fight against proliferation of WMD and their means of delivery, the Defence Code is the source containing the most extensive references to penalties applicable to infringements of trade controls. It is directed at proliferative criminal intentions and acts and is divided, in order to cover them, in 4 thematic chapters dealing respectively with the nuclear weapons, the WMD means of delivery, the biological weapons and the chemical weapons.

The dual-use trade-related penalties in the French legislation equally originate from both the – illicit – trade aspect, covered mainly by the Customs Code and the security – WMD non-proliferation – one, covered by a specific text. The purpose of a dual-use trade control system, namely to prevent the non-proliferation of WMD, is sought from two different angles. The first is dealing with the diversion of legitimate trade. The second is dealing with deliberate acts of proliferation.

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50 See Article 410-1: "Les intérêts fondamentaux de la nation s'entendent au sens du présent titre de son indépendance, de l'intégrité de son territoire, de sa sécurité, de la forme républicaine de ses institutions, des moyens de sa défense et de sa diplomatie, de la sauvegarde de sa population en France et à l'étranger, de l'équilibre de son milieu naturel et de son environnement et des éléments essentiels de son potentiel scientifique et économique et de son patrimoine culturel."

51 Internal Security Code, Article L811-3.

52 Law n°2011-266 of 14 March 2011 *relative à la lutte contre la prolifération des armes de destruction massive et de leurs vecteurs*, on the fight against WMD proliferation.

2.2. Infringements

The legal framework covers a wide range of behaviours and actions qualified as infringements to the dual-use trade controls. These infringements may constitute, according to their level of seriousness, a violation, an offence or a crime[53].

There are 4 classes of violations (1, 2, 3 and 5) that are defined under articles 410 to 413 bis of the Customs Code. These are the competence of the tribunaux de grande instance (high courts). They are less relevant regarding dual-use trade controls than the offences. Articles 414 and 414-1 qualify first-class offences such as the trafficking and imports or exports of prohibited goods – of which the dual-use ones are part of – without authorisation. Money laundering related to illicit movement of goods is qualified as a second-class offence under Article 415. The offences, which are liable to up to 10 years imprisonment – or 20 in case of repeated offence – and complementary sentences such as administrative penalties, are the jurisdiction of the tribunaux correctionnels (criminal courts). Above this 10-year threshold, the facts are re-qualified as crimes and fall into the jurisdiction of the cours d'assises (court of assizes), which can also pronounce prison and complementary sentences.

The legal framework aims at targeting exhaustively the behaviours and actions that may constitute a threat of WMD proliferation, notably trough procurement channels. The Customs Code covers the illegal movement of dual-use goods under Article 414 and the attempt of the offence under Article 409 for treating it like the offence itself.

The Penal Code attempts to describe infringements of the "fundamental interests of the Nation" as they relate to the dual-use trade controls and, more generally, the non-proliferation of WMD, lists as crimes the transfer of material assigned to national defence purposes (Article 411-3), information or material "likely to

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53 When going through them, the reader must however bear in mind that the French legislation does not make the difference in principle between exports, brokering, transit or transhipment, as the dual-use legislation covers all these movements under the single name of "export".

affect" these fundamental interests (Article 411-6), the efforts for collecting these information of material (Article 411-7 and 411-8). It establishes also as an offence the provocation of these crimes when these have not been committed (Article 411-11).

The Defence Code contains provisions aimed at enforcing non-proliferation of WMD in general and provides for a more extensive list of intents and actions that can constitute an infringement to dual-use trade controls. As concerns the nuclear domain, it sets out legal infringements pertaining to illegal nuclear-related activities, for impeding the normal control of these activities and for providing false information in relation to these controls (articles L1333-9 and L1333-12). In relation to WMD in general, the Defence Code does not follow a parallel structure between the different thematic sections (nuclear, means of delivery, biological and chemical). Therefore, some of these actions and behaviours may be expressly covered in some of these areas only. It notably defines an infringements related to the export without authorisation of listed materials, to leading or organising an activity with the purpose of disseminating chemical weapons (Article L2342-59), to the fraudulent acquisition of the authorisation of material-related or trade activities, to the active violation, alone and within the context or organised crime, and the collusion. Attempt is directly addressed only in cases of import of WMD delivery means (Article L2339-10), illicit import or export of nuclear material (Article L1333-9) and in cases where the author(s) had warned the authority about the infringement and cases of provocation to the infringement (for nuclear, biological and chemical areas). These infringements concern both physical and moral persons.

The Defence Code also establishes a specific infringement for the financing services related to proliferation of WMD through procurement channels of nuclear, biological and chemical related-material and the means of delivery[54]. The provision, which has the same content in all areas, establishes the following: "The fact

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54 See articles L1333-13-5 (nuclear), L2339-15 (means of delivery), L2341-2 (biological) and L2342-60 (chemical).

to supply financing in collecting or managing funds, stocks or any good or providing advice to this end, in the intent to see these funds, stocks or goods used or knowing they would be used to this end, entirely or partly, with view to commit the infringements established in the (corresponding articles), is liable to the same penalties foreseen in the (corresponding articles), independently from the effective realisation of this infringement".

The intentional element is generally absent from the definition of these offences and crimes. However, it has to be noticed that intent is mentionned in relation to the financing, as a component of the definition of this infringement. The nuclear section refers to the "objective of proliferation" in relation to an export without authorisation (Article L1333-13-4). The chemical section makes reference to intent only with respect to the lead or organisation of an activity for the purpose of disseminating WMD (Article L2342-59). There is no reference to intent in the biological or delivery means-related sections of the Code.

The Customs Code does not expressly consider criminal intent as a characteristic of the infringement. However, Article 414 covers both "illicit trafficking" and "export or import without authorisation", which factually have the same effect. It is not clear, therefore, but rather an assumption to characterise proliferation intent as a defining element between the provisions of the Defence Code and those of the Customs Code where it relates to dual-use trade controls.

2.3. Penalties

The legal framework distinguishes between administrative and criminal penalties. The administrative penalties generally include fines, revocation of licences, loss of access to trade facilitation privileges, loss of property rights (confiscation), closure of companies,

recall of persons legally responsible for exports in a company, mandatory compliance training[55]. The criminal penalties refer to fines and prison sentences.

In the dual-use specific texts, few provisions only describe penalties. In the main text, Decree 2001-1192, the possibility is established in the Article 1 to suspend, modify, withdraw or abrogate the export, brokering, transit licences. The implementing arrêté – Arrêté of 13 December 2001 –, in its Article 21, details this provision in establishing that the licence can be withdrawn if obtained on the basis of false information or by fraud, abrogated in case of violation of the commitments, suspended, modified or abrogated in the cases described in articles 11 and 13[56] of the dual-use Regulation.

Unlike the other "dual-use specific" texts, the law on cryptographic products contains penalties of both administrative and criminal natures. Article 34 prohibit putting such products on the national market and, complementarily, obliges the distributor to withdraw all the items already in circulation. Article 35 establishes criminal liabilities, *i.e.* prison and fines, for illicit export of such items, as well as complementary – administrative – penalties that are similar to those foreseen by the Defence Code. These penalties are without prejudice to the Customs Code provisions.

The Customs legislation sets out such combination of penalties also. Article 61 bis of the Customs Code and Decree N° 2012-945[57] describe in details the power of the Customs agent for – temporarily and for the needs of further investigations – immobilising goods that are suspected of being in violation with the trade controls. The key provision on customs penalties nonetheless remains Article

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55 Sybille Bauer, "WMD-related dual-use trade controls offences in the European Union: penalties and prosecution", EU Non-Proliferation Consortium, *Non-Proliferation Papers* no. 30, July 2013.

56 Respectively in the cases of a threat to a national security interest of a Member State or of sovereign decision of the licencing authority.

57 Decree n°2012-945 of 1 August 2012 *relatif aux conditions d'immobilisation par les agents des douanes des biens à double usage non communautaires en transit à destination de pays tiers*.

414 of the Customs Code, which establishes that illicit trafficking or export or import without authorisation of dual-use items is liable to a maximum sentence of 5-year prison, the seizure of the item, of the transport means involved, of all the objects which contributed to committing the fraud, of the direct or indirect profits originating from this fraud and a fine amounting up to three times the value of the object of the fraud. The prison sentence may be as high as 10 years and the fine 5 times the value of the fraud if these items are considered dangerous[58] as well as listed by an arrêté of the Customs Minister or if the fraud has been committed in the context of organised crime.

The Penal Code contains mostly[59] criminal penalties as well as fines[60] for infricgements of dual-use trade controls-related fundamental interests of the Nation it defines. In addition, in Article 414-5, it provides the possibility for the judiciary to pronounce complementary administrative sentences which are similar to many of those described in the Defence Code. Some of them are also reproduced in the list of complementary penalties contained in the law related to cryptographic products[61].

The Defence Code, complementarily to the criminal penalties, establishes an extensive list of administrative penalties the judiciary can select from. This list is the same for the WMD nuclear, chemical, biological and delivery means-related[62] and concerns the physical persons only. The violators of the provisions contained in articles L1333-9 and 1333-11 to L1333-13-6 are liable to:

- The interdiction of citizen and family rights[63];
- The prohibition to perform a public function or a professional or social activity in the context an offence or crime was committed;

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58 For health, (ethics) or public security.

59 See articles 411-3, 411-6, 411-7, 411-8 and 411-11.

60 Fines have a mixed – administrative and criminal – nature.

61 Article 35.

62 Respectively at articles L1333-13-7, L2342-77, L2341-5-1 and L2339-17.

63 Such as voting, being elected and being a guardian.

- The closing, definitively or for a maximum 5-year period of the facilities of the company that have been used for committing the infringements;
- The exclusion from public tenders for a minimum duration of 5 years;
- The seizure of the WMD-related goods as well as the equipment which has been used for the production, the use or transport of these goods;
- The publication or advertisement of the judicial sentence;
- The prohibition of stay on the national territory;
- The exclusion from the French national territory of foreigners, definitively or for a minimum duration of 10 years.

Alternative penalties are also listed in the Defence Code, with reference to the Penal Code, for the non-physical persons[64].

The judge is independent in applying the above-mentioned penalties. However, the law allows for grading penalties. For instance, the Defence Code foresees an attenuated liability for the author, the partner or the person having attempted to commit who inform the authorities about the possible infringement[65]. The penalty may even be avoided if the person informs the authorities before it results in casualties[66]. As for the chemical-related material, a scaling in the severity of the penalty is also foreseen as it implements measures adapted to the different categories of chemicals contained in the Chemical Weapons Convention[67].

The penalties, even if inserted by a unique law and codified within the same text, may indeed differ from one area to the other. Comparing penalties established for offences committed in relation to nuclear, biological, chemical materials and the WMD means of delivery is particularly illustrative.

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64 See for example Defence Code, Article L2342-78 regarding chemical weapons-related goods.

65 See for example Article L2341-6 for the biological weapons-related material.

66 See for example Article L2341-6-1 for the biological weapons-related material.

67 See articles L2342-59 and following.

Comparison of penalties: penalties foreseen for an illicit export of goods allowing for WMD proliferation in the context of organised crime

Nature of the proliferation	Defence Code provision	Penalties
Means of delivery	(Article L2339-14)	20 years prison + 3 million euros
Biological	(Article L2341-4)	30 years prison + 5 million euros
Chemical	(Article L2342-60)	30 years prison + 5 million euros Life + 7,5 million euros if leading or organising the proliferation
Nuclear	(Article L1333-13-4)	20 years prison + 7,5 million euros 30 years prison + 7,5 million euros if encouraging or provoking the proliferation

One could legitimately question some of these observations. It is the case notably with the fact that the encouragement or provocation of the proliferation of WMD is, in the nuclear area, more severely sanctioned than the intentional and tangible act. It is also the case with the fact that leading proliferation-oriented organisation is only targeted in the chemical domain and not in the other ones. Finally, it may also seem difficult to apprehend why penalties are not harmonised between the different domains. The differences in the severity of the penalties, indeed, can also be noticed for other scenarios of infringements than the scenario taken as an example. No real explanation or motivation for these differences, however, can be found in the text itself, in a possible preamble of the law which would have stated the reasons for considering the risks associated in different ways, or even in the international conventions – or related national declarations – that form the basis of these prohibitions.

2.4. Implementation of the penalties

In order to achieve their full deterring potential, the penalties shall not be used only as a punishing instrument but must also be promoted in order to prevent economic and trade operators from engaging in proliferating activities.

In this respect, it would appear that France is lacking the processes that can ensure the information on penalties is adequately disseminated to the right stakeholders, in the right form and in the right time.

The website of the licencing authority, the SBDU, does not contain any information on penalties for which the operators are liable if they infringe the dual-use trade controls and related procedures. The section for frequently asked questions on its website, in which it explains and comments the licencing procedures to the attention of non-experts, does not contain any reference to liability. The industry's outreach activities it organises are not used in principle for disseminating such information. In practice and in the absence of a legal office in the Service or of a regular contact with the judiciary (prosecutors or judges), its agents, when they are in position to evoke these penalties on a case-by-case basis with the operators, usually recall the Customs – Article 414, in a first place – and the Defence codes' provisions. These agents may themselves be unfamiliar with the provisions contained in the Penal or Defence codes, which can be explained by the very limited number of judicial cases France has had and, therefore, the limited information on practical implementation of the penalties. The other implementing agencies may also suffer from a lack of information on how the penalties are practically applied.

Only one case can be found from a search of the most French important legal database[68]. The decision of the Cour de Cassation[69] (criminal chamber of the Court) 01-88.491 of 11 December 2002 concerns an unauthorised export of dual-use goods. However, this happened before the adoption of European regulations 1334/2000 and 428/2009 and the judicial decision only confirmed a sentence to a fine amounting to 100,000 euros for the exporter. It was justified by Customs legislation provisions. Additional cases could also be

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68 For access to the texts and the decisions, consult: www.legifrance.gouv.fr.

69 The Cour de Cassation is the highest jurisdiction of the civil and penal legal orders. Its role is only to review the correct application of the law by the courts of appeal but it does not judge the case at the basis of the dispute.

found concerning an unauthorised export of cultural goods, for which the penalties associated generally obey the same logic as the dual-use goods in terms of trade controls[70]. However, none of these cases made use of penalties other than – criminal[71] – fines and no case could be found to illustrate the application of more administrative penalties.

In the French legal system, the burden of proof in the judicial treatment of a case is on the prosecution. The Code of Criminal Procedure does not limit the range of evidences the judge can base his or her decision on and, in principle, the Internal Security Code allows the use of intelligence technics and services for criminal investigations touching on the "fundamental interests of the Nation" such as in the WMD-proliferation domain[72]. However, the value of the intelligence-based evidence is not really clear in the legal system. The *Teixera v. Portugal*[73] and *Schenk v. Switzerland*[74] decisions of the European Human Rights Court respectively legitimate the use of undercover technics in criminal investigations and the acceptance of evidences that are in principle illegal for justifying a court decision, only when the violation is not provoked by the investigator. However, the French jurisprudence is more ambiguous. The Cour de Cassation[75] decided that a simple ploy, without any provocation from the agent, was an unfair means to obtain an evidence although the Law no. 2004-204 of 9 March 2004 defined the situations for which recourse to surveillance, undercover and taping operations for fighting organised crime are allowed.

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70 See Cour de Cassation (criminal chamber), case 94-83.737 of 3 October 1996 and Cour de cassation (criminal chamber), case 85-94.755 of 23 March 1987.

71 Although fines can be of criminal or administrative nature in principle, in these examples they were decided by criminal courts.

72 Article L811-3.

73 European Court of Human Rights, no. 44/1997/828/1034, 9 June 1998. Link: http://hudoc.echr.coe.int/eng?i=001-58193#{%22itemid%22:[%22001-58193%22]}.

74 European Court of Human Rights, Application no. 10862/84, 12 July 1988. Link: http://hudoc.echr.coe.int/eng?i=001-57572#{%22itemid%22:[%22001-57572%22]}.

75 See Cour de Cassation (criminal chamber), case 06-87-753 of 7 February 2007 and case 08-81.045 of 4 June 2008, which are two distinct decisions on the same proceedings.

Finally, one must legitimately suppose that, given the absence of specific "dual-use jurisdiction", the scarcity of the case law and the uncertainty surrounding the value to be recognised to investigation technics that – in the dual-use area – are key, the question of the knowledge of the actors of the judiciary, and even the question of their awareness, remains open. In such circumstances, indeed, there may be very few prosecutors – if any because they are usually dealing with infringements in general, notwithstanding their objects – who could be considered as guardians of the French dual-use trade control legislation and its effective enforcement.

3. SANCTIONS

3.1. The domestication into the French legislation

In terms of implementation of international restrictive measures – also referred to as "sanctions" – set by countries in reaction to the violation by another country of peace and security principles and rules, the role incumbent to French legislation and the dual-use trade bodies is limited.

In implementation of the monist legal doctrine, France does not need to further domesticate the restrictive measures such as the embargoes as they are meant to be directly applicable in the national legal apparatus and to be detailed enough not to require additional descriptions. In fact, there only 2 "implementing" decrees: one defines the authorities[76] referred to in the European Community (EC) Regulation 423/2007 on Iran and one[77] details the scope of the embargo against Libya. No such domesticating act had been established for other international restrictive measures.

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76 Decree N°2008-83 of 24 January 2008 *relatif aux mesures restrictives à l'encontre de l'Iran prévues par le règlement (CE) no. 423/2007 du Conseil du 19 avril 2007.*

77 Decree N°92-387 of 14 April 1992 *relatif à l'application de la résolution 748 du Conseil de sécurité des Nations Unies*, abrogated by Decree N°2004-372 of 29 April 2004.

As regards these international restrictive measures for their implementation by the French actors, the governance body is the DG Treasury of the Ministry of Economy and Finances. It publishes on its website[78], for the attention of the economic operators, the texts of these international sanctions which, thereby, shall be considered directly applicable by them. The Treasury is the competent administration for all restrictive measures (economic, financial, etc.) independently from the scope of the international texts. In the case of dual-use goods, the SBDU acts as the controlling authority. The SBDU is associated in the negotiations with the other relevant ministries and in permanent contact with the Treasury for the definition of implementing procedures[79]. It is thus able to inform and advise the dual-use operators on matters related to these sanctions.

Despite the formal absence of further implementing legislation on the restrictive measures, the Treasury provides guidance on their implementation. To this end, it issues and keeps up-to-date a Guide de bonne conduite/Foire aux questions (guide of good conduct/ frequently asked questions) on the implementation of economic and financial sanctions[80] in general and publish it on its website. This information document provides answers to basic questions an operator may have concerning the application of sanctions to a given situation but does not establish any binding norm.

In the case of the restrictive measures against Russia in the context of the conflict in Ukraine and the annexation of Crimea, established by regulations (EU) no. 833/2014 of the Council of 31 July 2014 and N°960/2014 of the Council of 8 September 2014, the same philosophy applies. Norms of European origin directly apply to the French legislation without any further domestication needed, or effectively acted. Nevertheless, in this case, the Treasury went beyond the mere general guidance of the Guide. It drafted a specific note, available on its website, on the *Implementation of the Regulation*

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78 See: http://www.tresor.economie.gouv.fr/sanctions-financieres-internationales.

79 Interview of SBDU representatives with their permission, 16 October 2015.

80 Available (in French only): http://www.tresor.economie.gouv.fr/File/406872.

(EU) no. 833/2014 of the Council of 31 July 2014[81]. This is however not a legal act but it comments on the different amendments of the regulations and the ways they shall be implemented – competence of the authorities, their contact details, procedures, etc. – in the French national context.

The Guide contains a specific chapter[82] on the dual-use goods with a military end-use in Russia or dual-use goods aimed at military end-users in which the Treasury clearly establishes the competence of the SBDU for issuing the trade authorisations and comments on articles 2 bis and 4 of the Regulation (EU) no. 833/2014 amended. Though it can be acknowledged that interpreting the provisions can be a source of obligation, the primary objective of the document and its form is to remain an information support. In addition, it must be noted that Article 2 bis, as it is emphasised by the Treasury, sets out controls of the dual-use ancillary services where the Regulation 428/2009 formally excludes them from its scope… Would this be a glance at the future of the European dual-use trade control system?

3.2. Penalties for the infringement to restrictive measures

The national legislation has set specific provisions for criminalising the infringements to restrictive measures. These provisions, however, are substantially the same for the measures of national origin[83] (Customs Code, Article 459, Paragraph 1) as for European and international measures (Customs Code Article 459 Paragraph 1bis). The "guide of good conduct" notably refers to these provisions and explains that their implementation is the responsibility of the Minister in charge of Customs.

Article 459 of the Customs Code targets the actions and attempts (Paragraphs 1 and 1bis) as well as the provocation (Paragraph 3)[84] to

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81 Available (in French only): http://www.tresor.economie.gouv.fr/File/407575.

82 See pages 6 and 7.

83 Though such national measures are rare, as stated above.

84 Independently from actual effects or their absence.

infringe either the national legislation or regulation on the financial relations with foreign countries or the EU restrictive measures that are taken on the basis of the Treaty on the Functioning of the EU (Article 215) or on the basis of international obligations.

These offenses are punishable by sentences up to 5-year imprisonment, a fine amounting from 1 to 2 times the value of the infringement for the acts or attempts and from 450 to 225,000 euros for the provocation, and to the publication of the sentence in media. In the first two cases, the violator is also liable to the seizure of the object of the infringement, of the means and of the products or profits of the infringement. The violators can additionnally, in the case of infringements of the national legislation or regulation on the financial relations with foreign countries, be prohibited to exercise elective or key positions within trade instances such as trade chambers, trade courts or labour courts.

4. CONCLUSION

The French legal system is characterised by complementary texts, norms and obligations concerning dual-use goods. It may be very positive in the sense that it allows for different acts and intents to be judged fairly, according to their level of seriousness *vis-à-vis* the non-proliferation of the WMD. But it may also be more negative in the sense that it likely blurs the – necessary – understanding the dual-use actors, e.g. the operators, the licencing authority and the prosecutors shall have of these penalties and make it more difficult in general to enforce these obligations.

Nonetheless, from a governance aspect and despite the existence of several but complementary bodies in the management of the dual-use trade controls, the "one-stop shop" role carried out by the Service des Biens à Double-Usage undoubtedly makes these controls more understandable and thus easier to comply with for the economic and trade operators.

Chapter
03

Enforcing sanctions through trade controls in Greece

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1. CONCEPTUALISING 'SANCTIONS'

What do we mean by 'sanctions'? What is the relationship between sanctions and trade controls? The 2015 Chaudfontaine seminar focused partly on the conceptual problematic connecting to the term of sanctions. The first understanding sees sanctions as coercive measures decided by states, regional and international organisations with a view to bringing about a change to a policy or practice of a given country. In this case, sanctions represent a foreign policy measure targeting foreign states, entities and individuals. They may include positive inducements as part of a 'sticks and carrots' strategy and, they may provide for humanitarian exemptions satisfying for instance the basic needs of targeted persons. Sanctions or alternatively 'restrictive measures' may also bring severe unintended consequences.[85] In response to that problem there has been a shift from traditional restrictions of sweeping or indiscriminate nature such as comprehensive embargoes towards more sophisticated and carefully crafted sanctions targeting, for instance, certain industry sectors or individuals. Distinguishing between the society as a whole and the ruling elite or specific illicit groups is an applicable

85 Whereas the term 'sanctions' is not explicitly used in the relevant UNSC resolutions, it has prevailed the international discourse (think of sanction committees). In the EU, the term 'restrictive measures' is used most often in formal legal texts.

practice today.[86] Further, sanctions can range from more soft and symbolic types such as the severance of diplomatic relations (to more harsh ones such as the withdrawal of economic assistance, bans on capital investment, restrictions on arms, dual-use goods and other commodities (e.g. oil and refinery products) as well as denying access to financial markets.

The second understanding sees sanctions as measures set by a national state with the aim to punish a violation of law by any natural or legal person or entity established in its territory. In this case, sanctions are referred alternatively as penalties. In the context of non-proliferation and trade controls, penalties may range from formal or informal warnings (e.g. communication letters) to life imprisonment and even death sentence.[87] Between of these two 'extremes', penalties may take different forms such as revocation or suspension of export licences, withdrawal of trade facilitations, loss of property rights, suspension of a firms exporting activities and even closure of the company. Mandatory export compliance training is a further example of an innovative measure to be considered.[88] Economic penalties can be the result of both administrative and criminal nature as provided in the law and depending on the severance of the violation.

The main connection between the two understandings is the fact that a violation of either sanctions measures or trade control law leads to certain penalties. Also in practical terms, both measures may intent to punish wrongdoings and correct cases of non-compliance with international and national laws. Besides, sanctions

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86 For a comprehensive analysis of the WMD related sanctions see: Bernardt Sitt et al., Sanctions and Weapons of Mass Destruction in International Relations (*Geneva Paper* 16), Geneva Centre for Security Policy, 2010, retrieved from: http://www.cesim.fr/documents/publications/geneva_paper_16.pdf

87 Sibylle Bauer, "WMD-Related Dual-Use Trade Control Offences in The European Union: Penalties and Prosecutions," EU Non-Proliferation Consortium, *EU Non-Proliferation Papers* no. 30, SIPRI, (July 2013): 3, retrieved from: http://www.sipri.org/research/disarmament/eu-consortium/publications/nonproliferation-paper-30

88 *Ibid*, 4.

are frequently implemented through dual-use trade controls and arms controls. The table below summarises the main features of each concept.

Function	Sanctions	Penalties
Defining feature:	Foreign policy instrument	National prosecution
Decision-making:	National, regional & international	National
Intent:	Deterrence and prevention	Deterrence and prevention
Objective:	Change policy or conduct	Punish and correct a wrongdoing
Subject:	States, individuals & entities	Individuals & entities
Effectiveness:	(?)	(?)
Other:	Alternative to violence	Non-compliance with national laws

2. THE NATIONAL UNDERSTNADING AND IMPLEMENTATION OF 'SANCTIONS' IN GREECE[89]

From the preamble, it is useful to clarify that the Greek understanding and practice follows the same logic as described above. Sanctions (κυρώσεις) denote both coercive measures aimed at changing the behaviour of a State and punishments imposed for breaking a law. In the latter case the word 'ποινές' that means penalties is most commonly used.

Greece may implement 'sanctions' pursuant to a UN resolution, a CFSP decision or a national act[90]. With regards to UN sanctions,

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89 All the official legal texts referred to in this section can be found in the website of National Printing Office available only in Greek: http://www.et.gr/index.php?option=com_wrapper&view=wrapper&Itemid=108&lang=el.

90 Presently, Greece does not implement any unilateral measures. An example coming from the recent past concerned the economic embargo imposed against Former Yugoslav Republic of Macedonia.

Greece still makes use of an old 'forcible law' adopted during the "colonels' dictatorship".[91] According to this, UN measures adopted pursuant to Article 41 of Chapter VII of the UN Charter require fist the publication of a Ministerial Decision by the Minister of Foreign Affairs and second, the enactment of a Presidential Decree. Greek officers and the Supreme Court have acknowledged that this represents a time consuming process that needs to be changed. A draft bill accelerating the implementing process for the entrance into force of such UN measures has yet to be enacted. Furthermore, the same old law stipulates the penalties applying for violations of UN sanctions. Failure to comply with the UN sanctions results to imprisonment up to 5 years without redemption and/or a pecuniary penalty. Commodities or products that are exported from or imported to or, traversing by the Greek territory in violation of UN sanctions are subject to confiscation. So applies also for the means of transports as long as their owner is aware of the prohibited activity.

Depending on their type, EU sanctions may be implemented either directly by the Member States as it is the case with arms embargoes and travel bans or through a Regulation adopted under Article 215 of TFEU as it is the case for economic measures halting partly or completely economic relations with a country[92]. Therefore, EU sanctions may also require the adoption of secondary national legislation either pursuant to a CFSP Decision or for specifying certain aspects of an EU regulation.

Most interestingly, the Greek legislation appears to discriminate somehow between penalties applying for the violation of EU sanctions and those concerning infringements to UN sanctions. More particularly, Article 458A of the penal code sets spe-

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91 Forcible Law 92/1967 as amended by Article 39 of law 2145/1993 (A' 139).

92 EU restrictive measures shall be adopted by the Council as a CFSP Decision under Article 29 of the TEU (adopted by the Council, acting by qualified majority, on a joint proposal from the High Representative and the Commission, under Article 215 of Treaty on the Functioning of the European Union). For an analysis of the applicable practices at the EU level see: European Commission-Restrictive measures 2008, Website of the External Action Service, available in: http://www.eeas.europa.eu/cfsp/sanctions/docs/index_en.pdf.

cific penalties in the case of wilful violation of EU sanctions that are considerably lower than those provided for violations of UN sanctions: imprisonment of up to two years unless a more severe punishment is applicable under other law.[93] This could be seen as problematic given that most of the time EU sanctions are adopted following a resolution of the UN Security Council and in any case, both sources of legislation seek to achieve similar objectives relating to security and foreign policy.

Concerning dual-use trade controls, although the EU Regulation is directly applicable, all Member States have adopted some type of secondary legislation implementing and specifying the provisions of the Regulation. Besides, Article 24 of the Regulation sets that it lies with the national authorities to adopt penalties that are effective, proportionate and dissuasive and, Article 25 requires from Member States to inform the Commission of the laws, regulations and administrative provisions in implementation of the Regulation.

In the past, in Greece the Ministerial Decision clarifying certain provisions of the EU Regulation provided for both administrative and criminal penalties by reference to Law 936/1979 concerning external trade contraventions in general.[94] However, with a view to improving the exporting environment for business it was deemed as necessary to abolish this law. In its replacement, Article 36 of the Law 4072/2012 provides solely for administrative sanctions to be imposed by the Minister of Economy, Development and Tourism in case of violations of the provisions relating to external trade. Indeed, depending on the severity of the violation, the law provides for either temporary suspension of a firm's activities for up to one year or fine up to 100,000 euros. Despite that, the prosecutor can still rely on the provisions of the National Customs Code setting that exporting or importing restricted goods without a licence

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93 Law 4205/2013 amended the Penal Code by laying down 458A on EU sanctions.

94 Ministerial Decision 1837/E321837/09 of the Ministry of Economy, Development and Tourism.

shall amount to smuggling.[95] Article 157 of the Code lays down the minimum penalties applying for least and most serious smuggling infringements. For instance, a violation committed repeatedly or involving three or more accomplices or fraudulent means is considered as more serious and it is punished with at least one year of imprisonment. An attempt to export or import unlawfully is punished with the same penalties as those applying for actual violations. In practical terms, the mere act of intending to export a dual-use good without a licence most probably due to ignorance is not punished. The exporter is referred to the competent authority so as to apply for an export authorisation. Also, customs officers may proceed to audits, confiscation of goods and preliminary investigations with the aim of verifying a case of non-compliance. The powers and duties of the customs authority in prosecuting trade law violations are detailed in the Customs Code.

It must be noted that concerning the actual enforcement of sanctions, the Hellenic Financial Intelligence Unit (FIU) established initially by the Ministry of Finance in 2008 is an independent Authority gathering officers and scientific experts from different public services such as the Bank of Greece, the Hellenic Capital Market Commission, the Ministry of Finance and the Ministry of Justice with a view to implementing effectively financial sanctions and related measures.[96] More broadly, the Authority's mission comprises countering money laundering, terrorist financing and investigation of funding sources. Although the FIU takes care only

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95 Law 2960/2001 establishing the National Customs Code.

96 The Hellenic FIU is a member of the Egmont Group of Financial Intelligence Units. Its full name is 'Anti-Money Laundering, Counter-Terrorist Financing and Source of Funds Investigation Authority' and tis is structured around three units: The Financial Intelligence Unit (FIU), The Financial Sanctions Unit (FSU) & The Source of Funds Investigation Unit (SFIU). Its mission, according to L.3691/2008, as amended by L.3932/2011, is the collection, investigation and analysis of suspicious transactions reports (STR's) that are forwarded to it by legal entities and natural persons, under special obligation, as well as every other information that is related to the crimes of money laundering and terrorist financing and the source of funds investigation. Information retrieved from the public website of the FIU available in: http://www.hellenic-fiu.gr/index.php?option=com_content&view=frontpage&Itemid=54&lang=en.

of the enforcement of financial sanctions, it seems that in practice the Authority examines and deals with all preliminary investigation aspects relating to sanction measures. This means that whenever the customs intercept an export that is for instance, prohibited under dual-use related sanctions, they refer the case to FIU for further action. Besides, the FIU's president is an acting Public Prosecutor to the Supreme Court of Greece.

3. AN ASSESSMENT OF THE GREEK SYSTEM

One could assess the functioning of the Greek system concerning the application of penalties on the basis of the principles set in the Regulation. To begin with, the element of effectiveness could be evaluated by looking into the number of cases caught in respect of export control violations.[97] In the past, for dual-use related exports, fines have been imposed by the Ministry of Economy and judicial authorities.[98] However, since 2013 the Ministry of Economy has not imposed any pecuniary sanctions for an export control violation[99]. This could be a combination of different factors such the relatively low number of dual-use exports from Greece and the fact that the revamped FIU undertook lately a more active role in prosecuting also trade violations as a result of sanction measures. In any case, there are no publicly available data concerning proliferation-related violations. Although for security or economic reasons the details of suspicious or judicial cases may need to be kept secret publishing examples of punishments resulting from violations of export

97 Overall effectiveness of a penalties system requires taking into account different aspects and it is not easy to be assessed. Preventing a violator from committing further crimes or completing attempted ones is a relevant aspect to examine. Considering the deterrence power and the number of cases referred to the public prosecutor each year in relation to the estimated volume of dual-use trade are further paths to take.

98 Interview with the former Director of the licencing authority, (imports-exports, Ministry of Finance).

99 Information retrieved after communication with the Department of specialised exports of the Greek Ministry of Finance, Development and Tourism.

controls and sanctions could increase the deterrence power of the law. In relation to this, tracking and keeping records of the export law violations -included attempts – can be a useful practice also for the purpose of future risk assessment. Besides, it helps maintaining the institutional memory of the administration at a good level.

In terms of dissuasiveness, carefully articulated and strict penalties are reasonably of importance for every legal system. As Bauer notes in the area of non-proliferation and trade controls, States may adopt differing penalties for offences related to chemical and nuclear weapons due to different origins and contexts of the legislation.[100] Furthermore, each legal system is a complex construction where different laws may apply for WMD-related, arms control and terrorism offenses, etc. This should not be seen necessarily as problematic. Instead, it represent an opportunity in that the prosecutor may rely on different channels for tackling a case depending on the gravity and the specific conditions of a violation. Whereas this is applicable also in the Greek context, unnecessary overlaps in the legislation concerning essentially similar violations should be fixed. Also, making widely known in the relevant government's website the harsh consequences brought by trade control violations could further increase the deterrent power of the Greek system.

Concerning proportionality, a "penalty assigned to a breach has to fit the national legal tradition and be proportionate to the offence and to other offences".[101] In that regard, penalties may escalate depending on the gravity, the impact of the violation and the existence or not of intent. The actual assessment of a case against such factors is to be done primarily by the judiciary authorities. The Greek system seems to take into account the principle of the proportionality differentiating for instance between wilful violations and acts of negligence.

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100 Bauer, "WMD-Related Dual-Use Trade Control Offences in the European Union: Penalties and Prosecutions, *op. cit.*, p.6.

101 *Ibid.*

In sum, one could argue that the Greek system provides the legal basis for punishing violations of different severity. However, enhancing legal clarity is sine qua non for the overall effectiveness and deterrence of the trade control system and related sanction measures. Legal clarity is not limited to spelling out provisions for effective penalties. For instance, incorporating into law certain rules with regards to who shall be accountable in the case of an export control violation could reinforce compliance with the law. Potentially all actors involved in the supply chain, such as producers, traders, financers and freight forwarders may have a responsibility to implement due diligence measures. Also, there might be no need to differentiate between penalties for violations of the EU Sanctions and penalties for UN sanctions or trade controls.

Last, the nature of trade control and sanction violations may warrant a closely coordinated prosecution process engaging officers from different agencies and ministries. Whereas the establishment of an Agency employing officers and experts from different Ministries may represent a best practice, a clear delineation of the competencies is of central importance. The responsibilities of each authority involved in the prosecution of an export control violation should be well-defined. Therefore, an unclear division of competencies can lead to ineffective enforcement of the law.

Chapter
04

Penalizing export control violations: The case of Hungary

Tamás Bittman
Licencing officer

1. INSTITUTIONAL AND LEGAL FRAMEWORK

As in other States the tasks of export control and implementation of restrictive measures are carried out in Hungary by different offices. The Hungarian Trade Licencing Office occupies a central role in fulfilling Hungary's non-proliferation related commitments and gives effect to the trade related restrictive measures. Government Decree 320/2010 on the Hungarian Trade Licencing Office and the Regional Meteorology and Technical Safety Authorities designates the Office as authority to perform tasks related to foreign trade administration. The Government Decree merges the foreign trade administration with the activity of licencing of military production and the provision of military services. This solution allows that the entire spectrum of trading with military or military related items is licenced and monitored by the same authority and can give an important leverage in some situations. The paragraph "on the designation of authority for foreign trade administration and supervision of military production and service provision"[102] provides that the following foreign trade activities are to be licenced by the designated authorities of the Office:

- to act as licencing authority for foreign trade in goods, services and property rights as well as licencing the import of commodities dangerous to public safety;
- licencing activities related to the export, transit, transfer and brokering of dual-use items and issues international import certificates.

102 Act CIX of 2005.

– licencing activities of non-dual-use items as prescribed in international restrictive measures
– licencing and monitoring the production of military items and provision of services
– on the basis of Hungary's international commitments licencing and monitoring the export, import, transit and transfer of defence-related articles.[103]

The following table shows the fields of responsibility of the Authority of Defence Industry & Export Control with respective legal sources:

Field of responsibility	Primary legislation*	Secondary legislation
Defence industrial licencing and monitoring	Act CIX of 2005 on the licencing of the manufacture of military products and the provision of military services	Gov. Decree 301 of 2005 on the detailed rules of the licencing of manufacturing military products and the provision of military services
Arms trade control	Act XXIX of 2004 on the amendment, repeal and codification of legislations in connection with accession to the European Union. (Further referred as Law on Accession) Act CIX of 2005	Gov. Decree no. 160/2011 on licencing of export, import, transfer and transit of military equipment and service and on certification of undertakings
Export control (dual-use items)	Regulation 428/2009/EC (further referred as "Dual-use Regulation") Law on Accession	Gov. Decree 13/2011 on foreign trade of dual-use items
Implementation of trade restrictions and embargos	Act XXIX of 2004	Gov. Decree 13/2011 Gov. Decree no. 160/2011(this law implements the arms embargos

* This table shows only those laws which represent the cornerstone of Hungarian export systems. The Acquis Communautaire contains numerous legal instruments on export control and counter-proliferation.

Foreign trade of dual-use items is an EU harmonised area the only primary detailed legislation in force is the Regulation 428/2009/EC. Although Hungarian Act no. XXIX of 2004 stipulates that in

103 Act XXIX of 2004.

line with international obligations and commitments or directly applicable legal acts of the European Union (i.e. Council regulations), legislative acts adopted by Parliament or Government may constrain the export, import or transit of certain goods, services or rights with material value. This Act only establishes the legal base of export control of military and dual-use items but in both cases separate legislation is required to define under what circumstances foreign trade is to be constrained.

The secondary legislation – Governement Decree 13/2011 – ensures proper implementation of the EU "Dual-use Regulation" by defining the administrative framework and the rules for licencing delegated by the Regulation. However, this Governement Decree has a wider scope than the mere implementation of the "Dual-use Regulation": it also regulates the export licencing of goods restricted by international sanctions and contains certain national provisions on technical assistance to military end-user in order to implement Joint Action of the Council no. 401/2000/CFSP in national law. There are separate legislations in force for the implementation of the Chemical Weapons Convention and the Convention on the Prohibition of Bacteriological (Biological) and Toxin Weapons respectively, however the export licencing procedure for materials covered by the two conventions is regulated by Governement Decree 13/2011(and ultimately by the "Dual-use regulation").

From a regulatory point of view, the export control of military items is a more complicated field because the legislative autonomy of the State continues to cover the area although some elements of conventional arms control are also subject to relevant legal acts of the European Union. Therefore, the primary source of law is the Act CIX of 2005 which empowers the Government to adopt separate legislation on licencing of foreign trade as well as on transit of military items. Government Decree 160/2011 regulates the export, import, transit and transfer of military products, defines the types of

licences to be issued, prescribes the procedural elements[104] of licencing, ensures the implementation of relevant international law in the field and establishes conformity between European and national law. It also contains the military list (ML) of Hungary. The ML lists items controlled as military items. The first twenty-two chapters are in conformity with the ML list of the European Union as prescribed in Commission Directive 2012/10/EU "amending Directive 2009/43/EC of the European Parliament and of the Council as regards the list of defence-related products". In addition four national chapters have been added to cover every product with internal or external security specificities.[105] The Decree acts as a conduit for the arms trade related legislation of the European Union through which becomes an integral part of the national legal system. Conversely the Decree will contain every EU-level legislation affecting arms trade laws ranging from directives and common positions i.e. Transfers Directive[106] to arms embargos enacted in Council decision on CFSP matters.

Hungary is a member of all non-proliferation regimes and party to all international treaties aiming at preventing proliferation of weapons of mass destruction and curbing illegal trade of conventional arms. UNSC Resolution 1540 commits the international community to adopt effective legislative measures to prevent the proliferation of WMDs and their means of delivery. After joining the European Union, Hungary undertook a comprehensive reform of its export control system. The EU Dual-use Regulation replaced the national list for dual-use items and the arms trade legislation introduced new legal criteria to the existing Hungarian law. This modern export control system needs effective enforcement

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104 The licencing procedure is more formalized in regard of military items than that of dual-use items, a committee consisting of delegates from ministries and other governmental institutions scrutinizes every licence application.

105 These chapters are: Equipment specially designed for military use, services specially designed for military use, equipment for coercion and crime surveillance, secret service devices.

106 Directive 2009/43/EC of the European Parliament and of the Council of 6 May 2009 simplifying terms and conditions of transfers of defence-related products within the Community.

measures as well as penalties that are effective, proportionate and dissuasive to deter economic operators from transgressing export control regulations. The following chapter describes the system of administrative and criminal penalties applied in connection with violations of export control legislations.

2. SYSTEM OF PENALTIES

There are two types of sanctions depending on the seriousness of violations committed. Generally, administrative sanctions are applied for petty crimes; these penalties are predominantly imposed on licencees who failed to comply with the applicable rules. If the breach of export control laws is serious and the criminal intent can be proven, criminal sanctions are to be applied as provided by the Hungarian Criminal Code.

2.1. Administrative sanctions

As mentioned earlier administrative sanctions can be applied if the crime committed is not serious or the perpetrator acted in good faith without criminal intent. In case of dual-use items applicable administrative penalties are contained in the implementing legislation (13/2011) of the EU "Dual-use Regulation". The legislation establishes two types of administrative sanctions. Fines are established for most of the cases. In practice to promote such legal principles as proportionality and gradualness, the Authority issues warning letters for first time offenders. Government Decree 13/2011 empowers the Authority to exert strict monitoring of transactions to keep violators under close scrutiny i.e. performs on-site. The Authority may exercise pressure on an economic operator to amend its internal compliance programme. In addition the Authority can involve the Custom Administration which conducts rigorous physical checks.

There are three categories of fines depending on the type of violation, its seriousness and the harm caused. Fines ranging from 400-17,000 euros may be imposed in case of provision of false data

that might deceive the authority in the licencing procedure, infringing obligations relating to provision of data keeping, notification, cooperation, declaration, registration. Threatening or infringing non-proliferation commitments or national security interests of Hungary, and infringing restrictive measures set out in international sanctions.[107] Administrative sanctions only apply if the infringement of international sanctions was committed inadvertently: the intentional transgression of non-proliferation commitments and sanctions is categorised as criminal law.

The notification, cooperation, declaration and registration obligations are important elements for implementing catch – all clauses; the economic operators are required to notify the Authority if it is presumed that the product may require a licence for particular end-user countries. After contacting the Authority operators are under obligation to submit every piece of information regarding the planned transaction and cooperate with the Authority.

The second category of fines covers offences which arise from breaches of specific conditions stipulated in licences. Government Decree 13/2011 states that fines in worth of 1,700-17,000 euros are to be inflicted for conducting foreign trade in dual-use items, including brokering activity or the provision of technical assistance, if not in accordance with the terms and conditions of the issued licences. At present the third category of fines is about aggravated circumstances of the second category and applies to cases when the breach in the terms and conditions of the issued licences are so serious that it violates foreign and security policy interests of Hungary, as well as its international commitments. In this case the fines are comprised between 17,000 and 34,000 euros.[108] These are serious transgressions of the regulations on dual-use trade and, as a consequence, persons who commit these offences may be subject to criminal prosecution as the part dealing with criminal offences will show.

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107 Government Decree 13/2011.

108 *Ibid.*

In addition to imposing fines, the Authority may use other corrective measures in case of contravention of administrative laws. The Authority may deprive the licencee of his rights or privileges. These are discretionary powers of the Authority, which may be stand-alone or ancillary punishments. Generally, the following measures may be applied: revocation of licence, modification of global licences i.e. less or items destinations or stricter terms and conditions.

The export licencing of military items belongs to a different domain. Before applying for an export licence the applicant has to fulfil some specific prerequisites The producers and traders of military items have to obtain an activity licence and anyone who intends to export such items prior to the actual export has to apply for a negotiation licence to third countries. The negotiation licence virtually functions as a safety valve because application with high risk factors may be rejected in an early stage, without causing contractual damage to parties.

Generally, in the case of foreign trade with military items, the fines are higher than those for breaches in connection with_ dual-use items. International traders of military items are faced with_ almost the same administrative requirement as for dual-use items. For this reason the following sections mention only issues which are significantly different from the administrative regulation of dual-use items. Fines up to 17,000 euros are to be levied for contract making without a negotiation licence. In contrast with the case of dual-use items there are some categories of military items which are subject to transit licencing because of security reasons. Transportation of military goods without the proper authorisation fined up to 17,000 euros. Economic operators carrying out brokering activities, foreign trade in military items, providing services without proper licence, or violating the provisions of Council regulation (EC) no. 1236/2005 are to be fined up to 33,000 euros. The provision of false data able to deceive the Authority, or making false statements may be punished by a fine of up to 33,000 euros.[109] Applicants for military export licences

109 Decree no. 160/2011.

are expected to select their foreign partners with more circumspection than applicants for dual-use export licences. Although exporters of dual-use items have to verify the foreign partners' reliability it is not required to make a statement on it. Exporters of military items have to declare that their foreign partners are registered in their home country and operate lawfully. False declaration is punished by a fine up to 33,000 euros. This fine applies also for transgressions of terms and conditions stipulated by the Authority in the licences.[110]

2.2. Criminal sanctions

Criminal sanctions for infringement of Hungary's non-proliferation policy are listed in the Hungarian Penal Code. The Criminal Code distinguishes two categories of criminal offences: felonies are serious criminal offences and punishable by more than 2 years imprisonment. Any other offences are defined as misdemeanor. In every case violation of export control regulation is defined as felony. The penal code does not explicitly mention that the negligence is subject to criminal penalty. In such cases administrative sanctions are to be used.

The former Criminal Code[111] was amended several times over past years. The transition to market economy, the privatization of state owned enterprises, the cessation of state monopoly on foreign trade and the removal of crimes from the Penal Code which followed the planned economy's logic like unauthorised foreign trade activity required the inclusion of crimes related to illegal foreign trade in arms and other related items. The new title "Infringement of Obligations Relating to the Trade with Internationally Controlled Products and Technologies" covers arms and dual-use items as well. During the 1990ies Hungary became party to all relevant non-proliferation regimes and signed the Chemical Weapons Convention which increased the number of commodities covered by this title.

Hungary's accession to the European Union made the update of the Penal Code necessary inter alia with regard to the imple-

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110 *Ibid.*

111 4th Act of 1978 on the Criminal Code, 2012.

mentation of international sanctions and foreign trade in dual-use products. Before Hungary's accession to the European Union the infringement of international sanctions was addressed under title "Breach of Hungary's obligations under international law" penalized the breach of economic (including trade) and financial restrictive measures enforced under Hungary's international obligations. This section enabled breaches of sanction imposed by UN Security Council to be prosecuted.

After accession the title has been revised and renamed "Violation of International Economic Restrictions" which – in addition to UN Security Council sanctions – penalizes breaches of EU sanctions as provided in Regulations or in common positions of the Council.

The Criminal Code of 2012[112] integrates every aspects of strategic trade control in one chapter ranging from trade restrictions due to international sanctions (together with financial sanctions), through restrictions on trading in dual-use items to arms trade controls. A new chapter called "Criminal Offenses Against International Commitment for Reasons of Public Security" has been established which contains the following non-proliferation and export control related titles:

- Criminal Offenses with Weapons Prohibited by International Convention
- Violation of International Economic Restrictions
- Failure to Report Violation of International Economic Restrictions
- Criminal Offenses with Military Items and Services
- Criminal Offenses with Dual-Use Items

2.3. Breaching economic sanctions and other restrictive measures

Violation of international _economic restrictions covers two categories of restrictive measures. As mentioned earlier the first category of restrictive measures originates from Hungary's commitments under international law these are particularly sanc-

112 100th Act of 2012 on the Penal Code, 2012.

tions adopted by UN SC. Beside international legal obligations the Criminal Code penalizes breaches of restrictive measures enacted by the European Union. The definition of restrictive measures covers Council regulations on restrictions of capital movements and payments as stipulated in Article 75 of the Treaty on the Functioning of the European Union (further referred as TFEU), and decisions taken by the Council on the "interruption or reduction, in part or completely, of economic and financial relations with one or more third countries" in accordance with Article 215 of TFEU. Moreover the definition restrictive measures extends to any decision or regulation adopted by authorisation of the earlier mentioned regulations and Council decision adopted under Article 29 of the Treaty on the European Union (further referred as TEU). This article of the TEU empowers the Council to adopt decisions defining the approach of the Union to a particular matter of a geographical or thematic nature. According to this paragraph any person who violates the obligation for freezing funds or economic resources or any economic, commercial or financial restriction is guilty of a felony punishable by imprisonment between one to five years. If the sanctions act orders an arms embargo and the violation is committed in connection with arms and related material (in the Criminal Codes wording: trafficking in firearms, ammunition, explosives, blasting agents or equipment for the use thereof) the penalty shall be imprisonment between five to ten years. To broaden the scope of the paragraph, the definition of arms and related materiel is supplemented with the term "any product designed for military use". In some special cases the phrase "any product designed for military use" may cover certain types dual-use products especially if there is an arms embargo in force prohibiting the sale of dual-use items for military end-users or military end-use.[113]

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113 *Ibid.*

The failure to report violation of international economic restrictions is penalized as misdemeanour and punishable by imprisonment not exceeding one year.[114]

2.4. Violations of arms trade restrictions

Criminal offences with weapons prohibited by international Conventions are liable to the most serious punishments. The Penal Code states "any person who develops, manufactures, obtains, uses or possesses, or decommissions without authorisation, transfers to a person without proper authorisation, imports or exports, or transports in transit through the territory of Hungary weapons prohibited by international conventions is guilty of a felony punishable by imprisonment between 5 to 15 years.[115] The same punishment is applied for unauthorised operation of facilities producing such weapons and for "provision of technical assistance for the development, manufacture, assembly, quality control, operation, maintenance or repair of weapons prohibited by international convention." If the development, productions and trade with these weapons is committed on a commercial scale, in criminal association with accomplices by a public official, the penalty shall be between 10 to 20 years or life imprisonment.[116]

The Title on "Criminal offences with Military Items and Services" deals with crimes committed with items listed on Hungary's ML list and addresses both internal commercial activities and the foreign trade in arms. In this manner the production and marketing of military items, the provision of military services, the import, export or transit of these items without authorisation is punished as a felony with imprisonment between 2 to 8 years. This Title deals also with two crimes which are considered border cases between arms trade control and the control of dual-use items. The first is the provision of technical assistance for the development, production,

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114 *Ibid.*

115 *Ibid.*

116 *Ibid.*

handling, operation, maintenance, repair, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices, including the missiles capable of delivering such weapons. The other is the provision of technical assistance to military end-users established in countries subject to arms embargo. Both crimes are punished in the same manner as the unauthorised export of weapons. Although the 2000/0401/CFSP Council Joint Action is implemented through Government Decree 13/2011 the sanctioning is dealt with in this section. Under aggravating circumstances, the above mentioned crimes are punished with imprisonment between 5 to 10 years. Even the preparation is punished with imprisonment between 1 to 5 years.[117]

2.5. Export control violations with dual-use items

Until 2012 dual-use items were addressed together with military items. As a result of the separation of crimes committed with dual-use items form violations of arms trade restrictions, dual-use export control violations became one of the less strict sanctioned offences in the chapter. According to the "Commentary to the Criminal Code", the legislator decided to use less severe sanctions for crimes with dual-use items due to the fact that more types of items are concerned with varying level of danger. Without aggravating factors, the export of 'dual-use items' to a destination outside the European Community in an unauthorised manner is punishable with imprisonment between 1 to 5 years. If the export control violations are committed with nuclear dual-use items or with item covered by the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, the punishment is imprisonment between 2 and 8 years.[118]

The Criminal Code broadly defines the dual-use items stating that 'dual-use items' shall mean the items defined in point 1 of Article 2 of Council regulation (EC) no. 428/2009. This section states,

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117 *Ibid.*

118 *Ibid.*

that "dual-use items mean items, including software and technology, which can be used for both civil and military purposes, and shall include all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices".[119] There is however no reference to any definitive list determining the items which are categorised as 'dual-use'. It is contested but this wording may enable violations of catch-all controls to be prosecuted, if the perpetrator has been notified by the Authority in advance that the intended export is subject to a prior licencing procedure and the criminal intention can be proven.

The above mentioned criminal penalties remained more or less un-amended over the years. This shows that the Criminal Code of Hungary found the balance between the seriousness of the crime and the punishment in case of proliferation related crimes.

Punishment (in terms of years in prison)

Felony	Criminal punishment	Aggravated circumstances
Breaching economic sanctions and other restrictive measures	1 to 5 years	5 to 10 years
Criminal Offenses with weapons prohibited by international Conventions	5 to 15 years	between 10 to 20 years or life imprisonment
Criminal Offenses with Military Items and Services	2 to 8 years	5 to 10 years
Provision of technical assistance for development, production, handling, operation, maintenance, repair, detection, identification or dissemination of WMDs	2 to 8 years	5 to 10 years
Provision of technical assistance to military end-users established in countries subject to arms embargo	2 to 8 years	5 to 10 years
Export control violations with dual-use items	1 to 5 years	2 and 8 years

119 Council regulation (EC) 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.

3. CONCLUSION

This chapter showed what are the penalties – both administrative and criminal – applicable in the case of export control violations and breaches of international sanctions. Beside describing the system of penalties, the article presents the legal sources and institutional functioning of the Hungarian export control system for dual-use and military items.

With regard to the administrative sanctions it must be pointed out that these types of sanctions function as a corrective measure for unintended offences; therefore the Authority may use ancillary penalties other than fines which are in some cases more suitable to achieve compliance on the side of economic operators. The application of administrative sanctions is more flexible than the criminal ones due to the variety of available measures.

In the context of Hungarian Criminal Code penalties prescribed for export control violation are strict compared to penalties for other offences. This article places the Criminal Code's provisions on export control in a historical context. Over the past two decades Hungary's new international commitments, the transition to market economy and the accession to the European Union necessitated the improvement and revision of the Criminal Code's provisions on export control.

Chapter
05

Italy's sanctions system related to dual-use trade violations

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The Italian sanctions system concerning dual-use trade violations is organised around one single legal act, Legislative Decree no. 96/2003 of 9 April 2003, implementing (EC) Regulation no.1334/2000, the so called "dual-use Regulation".[120] Since the entry into force of (EU) Regulation no. 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items,[121] replacing (EC) Regulation No 1334/2000, Legislative Decree no. 96/2003 (which is, however, in course of amendment) directly implements (EU) Regulation no. 428/2009. Legislative Decree 96/2003 has three fonctions:

1. Implemenation of (EU) Regulation no. 428/2009;
2. Internal violations: establishment of a regime of internal sanctions for violations of dual-use legislation (at the EU level, such as EU Regulation no. 428/2009, as well as at the national level, such as Legislative Decree no. 96/2003);
3. External violations: establishment of a regime of external sanctions for violations of dual-use trade embargoes decided at the international and European level (UN and/or EU embargoes).

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120 Decreto legislativo 9 aprile 2003, n. 96 *Attuazione di talune disposizione del regolamento (CE) n. 1334/2000 che istituisce un regime comunitario di controllo delle esportazioni di prodotti e tecnologie a duplice uso, nonché dell'assistenza tecnica destinata ai fini militari, a norma dell'articolo 50 della legge 1° marzo 2002, no. 39* (GU n. 102 del 5-5-2003). Available at: http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2003;096.

121 (EU) Regulation no. 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, Official Journal of the European Union, L 134/1 of 29/5/2009. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:134:0001:0269:en:PDF.

It is worth to highlight that the same sanctions, laid down in Article 16 of Legislative Decree 96/2003, are applied for internal and external violations.

Given the shared sanctions framework for internal as well as for external violation of dual-use legislation, the analysis of the content of Legislative Decree 96/2003 will be presented in part 1 on internal sanctions, while part 2 will deepen some other aspects of external sanctions. Part 3 will explore other forms of sanctions adopted in Italy in the field of dual-use trade control and will draw some final considerations.

1. INTERNAL SANCTIONS

Article 16 of Legislative Decree 96/2003 establishes seven possibilities of infringements, listed in a decreasing order, from the toughest to the softest provision.

The first case of infringement, providing the toughest sanction for violations of dual-use trade legislation, is the export of dual-use goods and technology without licence or licence obtained with false declarations and/or documentations. For this case of infringement, the law provides administrative sanctions from 25,000 up to 250,000 euros and criminal penalties going from 3 up to 6 years of imprisonment. The confiscation of concerned goods is also provided, according to Article 444 of the Italian penal code.

The second case of infringement is the export in deviation from licence' s obligations. In this hypothesis, administrative fines go from 15,000 up to 150,000 euros, criminal penalties establish imprisonment from 2 up to 4 years and the possibility for goods concerned to be confiscated is also provided. In case of confiscation, the concerned firm is also constrained to pay the lease of the wherehouse where the goods are stored during the seizure.

The third case of infringement establishes only crinimal penalties, with imprisonment up to 2 years in case of omission of notification to national competent authorities in case there is a risk of diversion for concerned goods and technology.

On the contrary, the infringement of omission of record-keeping for at least 3 years, or the non transmission of information upon request of competent authority establishes only administrative fines from 15,000 up to 90,000 euros.

The provision of technical assistance is sanctioned according to the end-use of concerned dual-use goods and technology: in case of WMD end-use, the provider is sanctioned with administrative fines from 15,000 up to 150,000 euros or imprisonment from 2 to 4 years; in case of military end-use or destination to an embargoed country, sanctions decrease with administrative fines from 10,000 up to 50,000 euros and imprisonment up to 2 years.

Finally, the transmission via internet or via other electronic devices of listed items without licence or with a licence obtained with false documentations is sanctioned with administrative fines from 10,000 up to 50,000 euros, imprisonment up to 2 years and with the seizure of the website containing the information.

The Italian legislative framework establishing sanctions for violation of dual-use internal legislation has been considered by a case-law of the Italian High Court (Corte di Cassazione), which clarifies the concept of imputability in case of delegation. In fact, the law states that, being the firm' legal representative the person directly responsible for compliance, in case of infringement of trade controls legislation, the legal representative is directly responsible and, therefore, subject to sanctions. Indeed, the simple acceptance of the office implies duties of supervision and control. But in case of delegation, the imputability could falls upon the delegate instead of the legal representative if, and only if, some conditions are met.

The conditions that have to be met for the delegation to work as exemption of criminal liability and listed in this case-law (No 43818 of 9 October 2008)[122] are the following:

1. Delegation must be explicit and precise;
2. The delegate person must be professionally and technically qualified;
3. Delegation must be justified on the ground of the firm's organisational needs;
4. Delegation must imply also a transfer of decisional power and budget management;
5. The existence of the delegation must be judiacially prooved.

It is worth to notice that the Italian jurisprudence is not rich of case-laws related to violation of dual-use trade legislation. More important, it does seem that, in the few cases dealt by Italian courts on dual-use trade controls violations, sanctions applied have beeen quite smooth. As example, in the case-law presented above, the Italian firm *Italchimici s.p.a.* exported without authorisation 243 barrels of cyanide, which is an item listed in Annex I to (EU) Regulation No 428/2009 and, therefore, subjet to prior authorisation. Considering the case of infringement that is export without authorisation, the Court should have applied administrative fines from 25,000 up to 250,000 euros or imprisonment from 3 up to 6 years, accordingly with Article 16 of Legislative Decree 96/2003. Instead, the Italian company was sanctioned with the payment of a fine of 18,000 euros. The lower amount of the attributed fine is explained, by the Court, by the concession of a series of generic extenuating circumstances.[123]

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122 *Sentenze Cassazione penale, sezione III, Sentenza* no. 43818 *del* 09/10/2008.

123 Generic extenuating circumstances are established by Article 62 bis of the Italian penal code. The article establishes that the concession of some generic extenuating circumstances is left to the discretionary power of the judge. Some examples of generic extenuating circumstances are the absence of previous criminal records, a sponatneous confession of the crime, proper behaviour during the trial or cooperative attitute during the trial (as established by Article 62 of the penal code).

As regard the national competent authority responsible for the supervision and implementation of sanctions in case of infringement of dual-use legislation, this is the Ministry of Economic Development (MED), in its Division of International Trade, which is also the licences issuing authority. The MED, in its duty of supervision of compliance with dual-use trade legislation is supported by the Customs Agency and the *Guardia di Finanza*, a special police body (althoug *Guardia di Finanza* depends directly on the Ministry of Economy and Finance).

2. EXTERNAL SANCTIONS

As for the implementation of external sanctions, as explained in the introduction, Article 16 of Legislative Decree 96/2003 applies also in this case.

In other words, Article 16 of Legislative Decree 96/2003 implements the provision established by each EU Regulation/Council decision when calling Member States to lay down "effective, proportionate and dissuasive penalties" for infringements of the concerned Regulation/Council decision establishing restrictive measures as, for example, Article 8 of Council regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia' actions destablilising the situation in Ukraine: 1. Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive.[124]

If Article 16 of Legislative Decree 96/2003 has been and continue to be the legal basis in the Italian legislative framework to establish penalties in violation of EU restrictive measures related to dual-use trade (or UN embargoes related to dual-use trade imple-

124 Council regulation (EU) no. 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia' actions destabilising the situation in Ukraine, *Official Journal* of the European Union, L229/1 of 31 July 2014.

mented through the EU legislation), it is worth to notice that as far as restrictive measures against Iran were concerned, another Italian Legislative Decree established santions for infringement of Council regulation (EC) No 423/2007 concerning restrictive measures against Iran.

Legislative Decree 64/2009[125] (now repealed) established stricter penalties compared to Legislative Decree 96/2003. In fact, for trade operations related to Annex I of Regulation 423/2007, that is to say, goods and technologies contained in Nuclear Suppliers' Group (NSG) and Missile Technology Control Regime (MTCR) lists, Legislative Decree 64/2009 established only criminal penalties, with imprisonment from 3 up to 8 years; while for trade operations related to Annex II of Regulation 423/2007 (which means goods and technologies that could contribute to enrichment-related, reprocessing or heavy water-related activities, development of nuclear weapon delivery systems or other about which IAEA expressed concerns) 2 up to 6 years of imprisonment.

As it is evident from the comparaison of the two Legislative Decrees establishing penalties for violation of dual-use trade embargoes, the Italian legislator's will was to establish a stricter (and maybe more dissuasive) sanctions framework for trade of sensible items with Iran. In this perspective, there are no administrative sanctions possible, but only imprisonment which, in the case of trade operations related to items listed in Annex I of Regulation 423/2007 provides 3 up to 8 years instead of 2 up to 6 years of imprisonment (the "toughest" penalty for dual-use trade violation in the Italian system) established in Legislative Decree 96/2003.

It is worth noticing that the Italian competent authority for the implementation of embargoes related to dual-use items is the Ministry of Economic Development, Division of International

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125 Decreto Legislativo 14 maggio 2009, n. 64 - *Disciplina sanzionatoria per la violazione delle disposizioni del Regolamento (CE) n. 423/2007, concernente misure restrittive nei confronti dell'Iran*, published on the Gazzetta Ufficiale, no. 138 of 17 June 2009. Available at: http://www.gazzettaufficiale.it/gunewsletter/dettaglio.jsp?service=1&datagu=2009-06-17&task=dettaglio&numgu=138&redaz=009G0076&tmstp=124531965287.

Trade; the same competent authority responsible for the implementation of internal penalties for dual-use trade legislation violations. However, the Ministry of Economic Development (which is also the Italian licencing authority) is responsible only for commercial (or objective) embargoes. The competent authority for the implementation of subjective and financial embargoes is the Financial Security Committee (FSC), depending from the Ministry of Economy and Finance and more precisely from the Treasury Department. It is plausible to suppose, then, that whenever a restrictive measure concerning dual-use items is adopted and it includes restrictions not only for goods and technology, but also financial operations related to them and, possibly, linked to a list of persons and entities, there will be a cooperation between the Ministry of Economic Development and the Financial Security Committee, each of them responsible for the implentation of its field of competence.

Besides the responsibility of these two competent authorities, there is also, according to the case, the involvement of the Ministry of Foreign Affairs and the Ministry of Defence, the latter, especially in the case of arms embargoes.

3. "UNCONVENTIONAL" FORMS OF SANCTIONS

Since few years, the responsibility mechanism in trade controls has been reversed with the economic operator (exporters, brokers, etc.) called to actively contribute to the fight against illicit trade. The so called "suspicios clause" in the EU dual-use Regulation is an example. As stated in Article 4(5) of EU Regulation 428/2009: "A Member State may adopt or maintain national legislation imposing an authorisation requirement on the export of dual-use items not listed in Annex I if the exporter has grounds for suspecting that those items are or may be intended, in their entirety or in part, for any of the uses referred to in paragraph 1".

This provision also known as the "suspicion clause" establishes the possibility for a Member State to impose an export authorisation if an exporter has grounds for suspecting that the dual-use item not listed in Annex I, he or she intends to export, will contribute to the elaboration of a weapon of mass destruction or military items listed in the EU Military List. The responsibility to appreciate the risk lies with an exporter. If an exporter, intentionally or by negligence omits to apply for an export authorisation, his or her responsibility could be engaged and administrative and/or criminal sanctions could be applied.[126]

Considering this increasing political and legal responsibility of economic operators involved in trade controls, the equally increasing role of targeted sanctions against one specific company it is not very surprising. If targeted sanctions, with a related lists of persons and entities are quite common at the international level, though UN Security Council resolutions and, on the European level, through Regulations and Council decisions, such sanctions are not very common at the national level, at least in the EU practice. Still, there are at least two ways in which national targeted sanctions against one specific company can be implemented. In a first scenario, it is not very appropriate to use the term "sanction" since the measure adopted is a catch-all clause intended to control the export of one specific company. However, the following example of adoption of a catch-all clause against the Italian company *Hacking Team*, shows how a control measure can operate as a *de facto* sanction.

In the second scenario, the imposition of a targeted sanction against one company originates from a third State. In the case-study illustrated below, the United States, well-known for the extra-territorial application of some of its legislation, imposed sanctions on a list of companies and individuals accused of having contributed to Iran's nuclear programme. The case of an Italian company (*Dettin s.p.a.*), listed among others on the US "black list", will be discussed.

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126 Quentin Michel, "The European Union Dual-Use Items Control Regime: Comment of the Legislation Article-by-article", August 2015, DUV5Rev4). Available on: http://www.esu.ulg.ac.be/file/20150812094802_Vademecum-DUV5Rev4.pdf.

3.1. Scenario 1: a catch-all clause as de facto sanction – The Hacking Team case

It is interesting to notice that the "imposition" of a catch-all clause could also work as a *de facto* sanction, especially if established on the product(s) of a specific/targeted company. The administrative procedures required by the implementation of a catch-all clause, in fact, could be quite lengthy, hampering the concerned company from exporting.

This has been the case, in Italy, with the decision of the Ministry of Economic Development to establish a catch-all clause, on the basis of Article 4 of (EU) Regulation 428/2009, to monitor the exports of the Italian company, *Hacking Team*. The company exports a surveillance software, which at the time of the establishment of the catch-all clause, was not subject to any prior export authorisation, as it is today following the entry into force of the Commission Delegated Regulation (EU) No 1382/2014 of 22 October 2014.

Following the MED' s decision to establish the catch-all clause on *Hacking Team*' s product, *Galileo Remote Control System*, the Italian company asked for the annulment of the measure because *de facto* prevented the company' s export operations for some of the following constraints:

- The company has very tight delivery deadlines incompatible with timing of administrative procedures required for the implementation of the catch-all clause;
- End-users are mainly governmental security and law enforcement agencies having specific needs in terms of secrecy and quick delivery;
- The software requires constant updates through a *camouflage* software in order to not be detected by third parties and this implies a regular supply of such software in very short time;
- Delay in deliveries would mean payment of penalties, which, in the end, could cause a problem of solvability of the company.

One month later after the establishment of the measure, on 27 November 2014, the MED ordered the suspension of the catch-all clause for a period of six months and, as already mentioned, in January 2015, Commission Delegated Regulation entered into force updating Annex I to EU Regulation 428/2009 and subjecting some intrusion software to prior export authorisation.

Leaving aside any discussion on the short life of the catch-all clause established by the Italian competent authority and the reason for the imposition of such measure[127], it is interesting to notice that what is a "preventive" measure at the origin also works in the sanctions logic.

However, for several reasons the effectiveness of catch-all clauses as *de facto* sanctions is questionable. The first reason lies in the political nature of the decision to establish or not a catch-all clause "to punish" a company. In fact, it is not surprising that the government (in this case, the Ministry of Economic Development), which is supposed to impose a sanction, could also be a client of the company (in this case, it was the Ministry of Defence, among other governmental agencies). In other words, there would be a lack of legal certainty and a conflict of interest. Second reason to distrust the adoption of catch-all clauses as sanction measures lies in the structure of the EU internal market. The adoption of catch-all clauses, in fact, could result in a market distortion. At both the internal (within the EU) and the international levels, the imposition of such measure on exports of a given company could lead to a lack of competitiveness for the targeted firm, advantaging foreign competitors not constrained by this type of control.

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127 *Hacking Team* has been severely accused, by many human rights defenders and NGOs, as well as by some Members of the European Parliament, of violating human rights and fundamental freedoms by selling its surveillance software to authoritarian regimes. On this basis, it seems quite *bizarre* that the Italian competent authority chose Article 4 and not Article 8 as legal basis for the establishment of the catch-all clause. In fact, Article 8 provides the possibility for Member States to adopt a catch-all clause for reasons of public security and human rights considerations.

3.2. Scenario 2: targeted sanctions imposed by a third State – The Dettin s.p.a. case

On 29 August 2014, the US Government imposed sanctions on persons involved in certain Iran-related activities. Specifically, the US Treasury Department, Office of Foreign Assets Control (OFAC) imposed sanctions on eight individuals, fourteen entities, and six vessels; while the US Department of State sanctioned two entities.

Among the listed persons and entities, there was the Italian company *Dettin s.p.a.* active in the production of equipment for the chemical and petrochemical industry as well as textile machinery.

The company was included in the US Specially Designated Nationals List (SDN List), according to the Iran Sanctions Act of 1996, as amended by Iran Threat Reduction and Syria Human Rights Act of 2012. It is worth noticing that the EU considered this US law to be in violation of international law because of its extra-territorial effects.

The above referred US law established sanctions with a duration of 24 months, reducible to 12 months, following the US authority's discretional power.

Following the intervention of Italian authorities, *Confindustria*,[128] as well as the legal assistance from some important law firms (which reassure the full compliance of the Italian company with existing export control legislation) on 19 November 2015, the US Office of Foreign Assets Control (OFAC) of the US Treasury Department announced the revocation of sanctions against the Italian company.[129]

The *Dettin s.p.a.*, active since more than forty years in the production of stainless steels, would have supplied items and assistance to an Iranian petrochemical industry for a value of more than 250,000 US dollars.

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128 *Confindustria* is the main association representing manifacturing and service companies in Italy.

129 Studio Legale Padova, *Comunicato stampa: Recovate le sanzioni USA alle Dettin s.p.a.*, posted on 23 November 2015. Available on: http://www.italia.co/politica-societa/commercio-con-liran-revocate-le-sanzioni-usa-allazienda-veneta-dettin-s-p-a/.

This US Treasury Department, Office of Foreign Assets Control's decision (to sanction a foreign company) is part of the so-called US "secondary sanctions". These are sanctions that can be imposed by the competent authority of the US to any individual or entity (even to foreign entities) which deliberately supply to Iran items (or assistance) related to sectors listed in the US law (such as the energy sector, petrochemical, transport, etc.).

The Italian company was sanctioned by the US authority despite an export authorisation delivered by the Italian competent authority and the fact that such export operations were carried out in full compliance with the Italian and the European legislation on export controls.

As for the damages caused to the company, considering that 95% of the revenues originate from the export activity, beside the so-called reputational damage and the loss of market shares, there have also been commercial damages: revenues declined up to 15%. The company also suffered a strong financial strain due to loan refusals by banks and credit institutions.[130]

Despite the happy /expensive ending of the story, the extra-territorial effects caused by some countries' legislation (USA) remain questionable and, *de facto*, a further source of potential sanctions.

The practice of issuing legislation with extra-territorial effects regarding trade controls dates back to 1996 with the adoption, by the USA of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (Helms-Burton Act).[131] On the other hand, the EU's practice to protect itself from such types of "external interferences" stopped in 1996. In fact, while the US adopted the Helms-Burton Act, aiming at establishing a sort of mechanism of sanctions against States assisting Cuba (under US embargo since 1960), the EU pro-

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130 Giovanna Lucietto, *Fine di un incubo: Dettin esce dalla black list*, Il Giornale di Vicenza, posted on 24/11/2015. Available on: http://www.ilgiornaledivicenza.it/home/economia/fine-di-un-incubo-dettin-esce-dalla-black-list-1.4463615?refresh_ce#scroll=1471.

131 Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996. Available on: http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.927.ENR:.

tected itself with the adoption of Regulation (EC) No 2271/96 of 22 November 1996[132] shielding against the effects of extra-territorial application of legislation adopted by a third country. But while the US keeps issuing legislation with such effects, notably as regards trade controls, the EU does not keep the pace; updating Regulation 2271/1996 does not seem to be on the agenda. Resignation? Maybe. Meanwhile, in a note of September 2014, one of the biggest Italian law firms, specialised in trade controls and embargoes, warned European exporters from carrying out commercial and/or financial operations with Iran, in order to comply with EU as well as with US legislation, as concerned transactions with Iran.[133]

4. CONCLUSION

From this brief overview of the Italian sanctions regime of dual-use trade control violations, the system seems to be easy, being organised around one single legal act (Legislative Decree No 96/2003 of 9 April 2003). However, a wider inquiry revealed that there can be sanctioning measures which reach beyond the legislative framework of reference *stricto sensu.* The first case study, on the Italian company *Hacking Team,* shows how a catch-all clause imposed on all transfers of a company could affect the company itself, causing commercial and reputational damages. The second case study, on another Italian company, *Dettin s.p.a.*, draws attention to the phenomenon of extra-territoriality of some third States' legislative acts and, notably, the potential of such third State to act as sanctioning authority.

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132 Council regulation (EC) no. 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, *Official Journal of the European Union*, L 309, 29/11/1996. Available on: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996R2271:EN:HTML.

133 Studio Legale Padovan, Client Alert Export Control, September 2014, Sanzioni USA contro l'Iran: le sanzioni USA colpiscono anche le imprese europee – update. Available on: http://www.studiopadovan.com/allegati/Client_Alert_Export_Control_USA.pdf.

Several criticisms can be addressed to both "unconventional" sanctioning instruments.

Concerning the use of catch-all clauses, the political nature of the decision to establish or not a catch-all clause in order "to punish" a company risks to result in a lack of legal certainty as well as in conflicts of interest. Moreover, the adoption of catch-all clauses could result in market distortions, on both the internal (within the EU) and the international level, given the absence of competitiveness of the targeted firm.

As regards sanctions imposed by third States, by issuing acts with extra-territorial effect, the main objection to such legislation is the doubtful legitimacy to impose sanctions on other States' actors, thereby interfering with internal matters and established national legislation.

However, conventional forms of sanctions established by internal legislation are also not exempt from reproach. The "legal certainty" characterising legislative sanctions seems to have been missing in cases when companies, brought to court for infringements of trade control laws, were sanctioned with penalties that, in the best scenario, seem to be far from "effective, proportionate and dissuasive".

A step forward to implementing effective, proportionate and dissuasive penalties would be to adapt these last ones to characteristics of the targeted firm, notably to its turnover. It is clear that the impact of penalties, especially the payment of fines, will depend on the size of the company at fault. The impact will inevitably be higher on SMEs that also have greater difficulties in bearing the costs of compliance. In this perspective, there is a risk that, at the end, complying with legislation becomes only a matter of … "Affordability".

Anyway, in the absence of a collection of available data on the numbers and typology of sensitive trade control violations, it is difficult to estimate whether the common practise is infringement or compliance and, under the first hypothesis, what is the impact on the lawbreaker.

Chapter
06

China's national sanction system of strategic export control

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1. INTRODUCTION

Although the risk of proliferation of weapons of mass destruction (WMD) and their means of delivery has been recognized internationally since 1950s[134] and eventually led to an international obligation for non-proliferation set forth by UN Security Resolution 1540, China's legislative building of arms and dual-use export control is still at an early development stage.

Historically speaking, at the time when most of the existing non-proliferation regimes were established during the Cold War period, China has been recognized as a Soviet Country and a high-tech importer, thereby was not invited to participate in the contemporary international non-proliferation cooperation. Later, although China has become a member of the International Atomic Energy Agency (IAEA) since 1984, and acceded to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) in 1992, China's importance in international non-proliferation cooperation was

134 In 1958, COCOM was established between a few NATO countries, it was later replaced by a more open and transparent dual-use regime–the Wassenaar Arrangement in 1994. Meanwhile, during, other non-proliferation cooperation regimes target specific threats including chemical and biological weapons (The Australia Group), nuclear weapons (Nuclear Suppliers Group), delivery systems (Missile Technology Control Regime), were also established between 1980s and 1990s.

not emphasised until the beginning of 21st Century[135] when China finally became a major high-tech supplier with accelerated trade and R&D capacity.[136] Accordingly, China's domestic legal procedures for export control in military and sensitive products, nuclear, chemicals, biological agents, and missile-related technologies were formally completed at the end of 2002, just a few months prior to the adoption of UN Resolution 1540 in 2004.

Due to such historical factors, it may be evident that China's legislative building of strategic export control systems is largely politically motivated by the international norm rather than its own national needs. And more evidences can be found in China's practice in drawing up its strategic export control lists. For example, as a member of NSG, Chinese nuclear control list is reportedly completely equal to the Zangger Committee and the NSG lists, and undergoes constant updates corresponding to changes made to those lists. Similarly, although China's application for admission to Australia Group (AG) and Missile Technology Control Regime (MTCR) has yet been remains stalled, such attempts indeed forced China to expand its chemical control list to signal its commitment with the AG on tighten export controls on dual-use chemicals; and to introduce missiles-related export control regulation that are roughly parallel to the structures within MTCR.

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135 To note that, from the middle 1990s, China began to take a number of important steps to govern and limit the export of WMD-related products and expressed interest in joining most of the existing non-proliferation regimes. However, its effort only succeed in nuclear area – it joined the Nuclear Suppliers Group in 2004. See at: "China Joins Nuclear Suppliers Group", *Xinhua News Agency,* May 28, 2004, available at: http://www.china.org.cn/english/2004/May/96780.htm.

136 According to the World Bank Trade Data, in 1996, the US was by far the leading exporter of high-tech products with the value of 138 billion US dollars, followed by Japan (101 billion US dollars) and Germany (61 billion US dollars). At that time, China accounted for only 15.8 billion US dollars at the thirteenth. However, between 2000 and 2005, China was the country with the largest growth in high-tech trade, its high-tech exports and imports surged ahead at an annual average growth rate of 26.0% to 30.8%. In 2001 China was ranked as the seventh major exporter and since 2005, China has become the biggest high-tech exporter of the World. Source: World Bank, Data, High-technology exports (current US dollars). Data available at: http://data.worldbank.org/indicator/TX.VAL.TECH.CD/countries/CN-US?order=wbapi_data_value_2002%20wbapi_data_value&sort=desc&page=2&display=default.

On the other hand, while the above appears to demonstrate China's willingness to follow international norms of WMD non-proliferation, in the area of dual-use and end-user controls where nations have sole discretion to make decisions with regards to their own national security and foreign policy concerns, China's attitude is divergent from the common practice in western world. The reasons may be obvious: on the one hand, since China does not belong to the Wassenaar Arrangement and have no intention to follow the norms, principle and guidelines provided by this dual-use regime, Chinese government still resorts to UN Resolution 1540 as the legal base of its pursue of curb and monitor of dual-use goods and technologies trade. Therefore, Chinese dual-use control list only covers items relating to *nuclear, biological and chemical Weapons, missiles, and very small part of computers*,[137] which is much narrower than the Wassenaar List or the EU dual-use list. On the other hand, since China has long-lasting diplomatic and trade relationships with many developing countries which were or still are subject to western economic sanctions, its category of proscribed/sensitive countries (also known as destination or end-user) only contains two types of countries: (a) countries with no diplomatic relations with China;[138] and (b) countries subject to UN sanctions.[139] Thus, at the international level, the legal source of Chinese arms and strategic trade controls is China's voluntarily compliance with existing WMD non-proliferation regimes and its obligations under UN Resolution 1540 and UN embargo decisions.

At the national level, China government's legitimacy to control trades toward third countries is generally granted by the Foreign

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137 The most recently updated Chinese dual-use list is available at: http://images.mofcom.gov.cn/aqygzj/201506/20150630150011045.pdf.

138 There are currently 22 countries that have not establish diplomatic relations with China, see the list at: http://cs.mfa.gov.cn/zlbg/bgzl/qtzl/t1094257.shtml.

139 See UN sanction lists at: https://www.un.org/sc/suborg/en/sanctions/un-sc-consolidated-list#compositionlist.

Trade Law of the People's Republic of China.[140] Under articles 16 and 17 of the Foreign Trade Law, it provides that the state has explicit power to take necessary measures to regulate national imports and exports for reasons of safeguarding "national security, public interests or public ethics" and "under the international treaties or agreements to which the People's Republic of China is a signatory or has entered".[141] Article 19 sets up a licence administration on goods and technology whose import or export is restricted "in accordance with laws and administrative rules",[142] and Article 18 requires the State Council and other relevant departments under the State Council to act as the relevant competent authorities to draw up, revise and publish those control lists. In order to effectively implement the export control regulations, China has established a system involving licence application, licence review, document issuance, Customs control and inspection which applies to all related exporters and other stakeholders. The competent authorities of Ministry of Commerce (MOFCOM) and General Administration of Customs (GAC) have formulated a various types of export control lists, and are exercise supervision over export control co-ordinately to promote the government's capability to effective.

It is notable that, although China has reportedly commenced to enact an overall export control law to govern its national export control activities, prior to this article, legislations related to Chinese export control framework are still fragmented. The first fragmentation is the shared competence between governmental agencies where export control of items in different categories (e.g. nuclear, chemical, biological, missiles, and dual-use) are executed separately

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140 Foreign Trade Law of the People's Republic of China was passed on 12 May 1994 during the 7th meeting of the Standing Committee of the Eighth National People's Congress and amended during the 8th meeting of the Standing Committee of the Tenth National People's Congress on 6 April 2004. [Hereafter as "Foreign Trade Law"].

141 Paragraph 1 and 11 of Article 16 of the Foreign Trade Law.

142 Paragraph 10 of Article 16 and Article 19 of the Foreign Trade Law.

by different competent authorities.[143] Such division of power and responsibility leads to the second fragmentation at legislative level, where individual competent authorities have the power to issue separate administrative regulations[144] to stipulate the controlled items list, licencing requirements, administrative procedures and legal liabilities for items subject to them. Moreover, because the control list of those export control Regulations only covers conventional weapons and WMD-related dual-use products, if China government plans to impose provisional or additional export control measures for unlisted items to third countries on the basis of UN Sanctions, those decisions and provisional control lists will

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143 China's export control system has an inter-agency coordinating mechanism which involves the participation and cooperation of a number of Chinese Governmental agencies: China's nuclear export control is executed by the State Administration of Science, Technology and Industry for National Defence (SASTIND) and the Ministry of Commerce (MOFCOM) of the Government of the People's Republic of China, in coordination with other relevant governmental agencies. Arms control, including the export control of missiles, and facilities and key equipment used directly for the production of missiles is executed by SASTIND and competent department under the Ministry of National Defence. While the export of nuclear dual-use items and technologies for civilian use fall under the control of the MOFCOM, decision should also be made jointly with other competent governmental agencies. For example, the export of nuclear dual-use items and missile-related dual-use items and technologies is subject to joint examination by MOFCOM and SASTIND. The export of dual-use biological agents and technologies related to animals and plants is subject to examination by MOFCOM, in consultation with the Ministry of Agriculture if needed. The export of dual-use biological agents and technologies related to humans is subject to examination by MOFCOM, jointly with National Health and Family Planning Commission, in consultation with Ministry of Industry and Information Technology if needed. The export of controlled chemicals is subject to examination by the State Development and Reform Commission, jointly with and MOFCOM.

144 In particular, export control regulations including: Regulations of the People's Republic of China on Control of Nuclear Export, Regulations of the People's Republic of China on Control of Nuclear Dual-Use Items and Related Technologies Export, Regulations of the People's Republic of China on Export Control of Dual-Use Biological Agents and Related Equipment and Technologies, Regulations of the People's Republic of China on the Administration of the Controlled Chemicals, Measures on Export Control of Certain Chemicals and Related Equipment and Technologies, Regulations of the People's Republic of China on Export Control of Missiles and Missile-related Items and Technologies, The Measures on the Administration of Export Registration for Sensitive Items and Technologies, The Measures for Administration on Import & Export Licencing of Dual-use Items and Technologies, The Measures for Classification Administration of Civil Aviation Parts Export and The Administrative Measures for the General Licence for the Export of Dual-Use Items and Related Technologies.

be issued in the form of domestic decree. Similarly, because all of those export control regulations are at the administrative level, if exporters violate those Regulations or decrees, officials always need to resort to "catch-all" liability clauses set forth in laws of higher level – such as Criminal Law, Foreign Trade Law, Customs Law or Administrative Punishments Law[145] – to identify the particular legal consequence of such violation, especially criminal liabilities. Since the liabilities of export control violations are defined quite scattered over a numbers of Chinese legislations, it therefore leads to the third fragmentation at the enforcement level.

Within the national export control legal framework, a valid law enforcement mechanisms must be guaranteed to ensure the effectiveness of the whole system. To this end, this chapter aims to look into China's intricate national provisions related to its implementation of penalties – also known as internal sanctions – in case of violations of strategic trade controls. Meanwhile, since China starts to play a more and more important role in international non-proliferation cooperation, this chapter also explores how a UN Sanctions can be implemented within China's export control framework.

2. CHINESE INTERNAL SANCTION SYSTEM FOR THE INFRINGEMENT OF EXPORT CONTROL LAWS AND REGULATIONS

2.1. Competent authorities and decision-making process of ascertaining liabilities for export control violations

Because Chinese Government has established an inter-agency coordinating mechanism for export control and set out in detail the duties, division of tasks and work procedures of relevant export

145 To note, the Regulations of the PRC on the Import and Export Control of Goods and the Regulations of the PRC on the Import and Export Control of Technologies can also provide legal basis for China's non-proliferation export control.

control departments in different regulations or laws, the liabilities of the violation of certain legislation are mainly rest in a set of export control regulations, Foreign Trade Law of the PRC, the Customs Law of the PRC, the Administrative Punishments Law of the PRC, and the Criminal Law of the PRC.

Generally speaking, the Criminal Law of the PRC is one of the oldest and most important Basic Laws under China's legal system, it has the solo competence to stipulate criminal liabilities for illegal acts which may constitute crimes.[146] Since the legislative process of enacting or amending of Criminal Law is much stricter and more time-consuming than that of administrative regulations,[147] China's internal sanction system for export control was designed through a bottom-up approach, whereby the Customs authority will firstly resort to particular export control Regulations which nominate the types of crimes and stipulate administrative penalties of a certain illegal export activities. If a crime is constituted, the Customs authority will leave the case for criminal court to decide its criminal penalties. For example, as a typical penalty clause, Article 18 of Regulations of the People's Republic of China on Export Control of Dual-Use Biological Agents and Related Equipment and Technologies states that "Those who export dual-use biological agents and related equipment and technologies without being licenced … shall be investigated for criminal liability in accordance with the provisions of the criminal law on *the crime of smuggling, the*

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146 Article 8 of the Legislation Law of the PRC states that "Only national law may be enacted in respect of matters relating to… crimes and criminal sanctions". It echoes with the wording of Article 9 that "… National People's Congress and the Standing Committee thereof have the power to make a decision to enable the State Council to enact administrative regulations …, except where the matter relates to crime and criminal sanctions, the deprivation of a citizen's political rights, compulsory measure and penalty restricting the personal freedom of a citizen…"

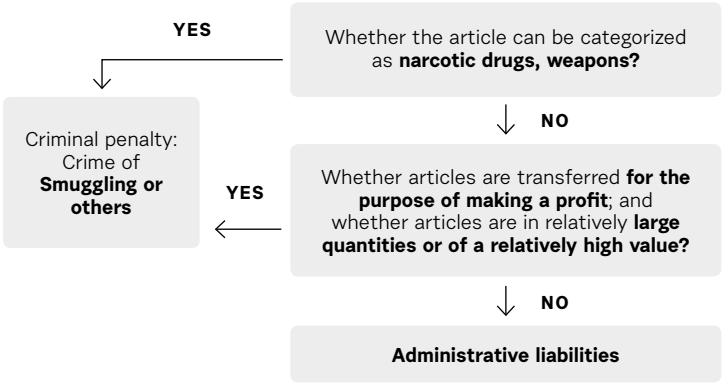
147 According to Legislation Law of the People's Republic of China, Basic Laws such as Criminal Law of the PRC is enacted and amended by the National People's Congress which meets once a year; General Laws such as Foreign Trade Law of the PRC, the Customs Law of the PRC, the Administrative Punishments Law of the PRC are enacted and amended by the Standing Committee of National People's Congress which meets every two months; and administrative regulations are drafted by the relevant agencies of the State Council when it deems necessary to enact an administrative regulation.

crime of illegal business operations, the crime of divulging State secrets or other crimes; if such acts are not serious enough for criminal punishment, by distinguishing different circumstances, they shall be punished in accordance with relevant provisions of the Customs Law, or be given a warning, confiscated of their illegal income, and fined not less than 50,000 yuan but not more than 250,000 yuan…".

In this light, although the liability of a certain violation seems to be decided jointly by both administrative and judicial jurisdictions, the major work such as detect and investigation are mainly conducted by officers in Customs authorities.

In general, when an exporter was caught by the Customs for exporting goods and technologies without proper licence, the Customs authority will exert its power of investigation, and based on their findings, the Customs authority need to make two decisions regarding the nature, quality and value of certain articles: (a) are those exported articles related to narcotic drugs or weapons?[148] (b) If not, are those articles in large quantity and of a high value while the exporter have intention of making profit?

Figure 1 the decision-making process of Customs Authorities on liabilities in case of violation



148 The word "weapons" here refers to not only conventional arms, but also WMD weapons and nuclear, missile-related items.

If the articles can't be categorized as nuclear, weapons or drugs, and *are neither* large in quantity or of high value *nor* exported for the purpose of making profit, the Customs authority can resort to relevant export control regulation to determine administrative liabilities[149], including warning, confiscation of illicit proceeds, fines, suspension or even revocation of foreign trade licences.

On the other hand, if there is a "yes" for either questions in the figure, such illegal act will be considered as crime of smuggling, and in accordance with the Criminal Procedure Law, certain case shall be filed for investigation by the internal anti-smuggling investigation organ of the Customs Authority at the place where the crime of smuggling is committed.[150] Since a criminal case of smuggling is complicated and has many links to other illegal activities such as forging export licence, divulging State secrets, or even the abuse of power of State officials, this anti-smuggling Customs organ will be in charge of investigating, collecting evidence, deciding the application of law[151] and filling criminal charges before the case is submitted to local Prosecuting Authority for criminal prosecution. The judges in criminal court will thereby determine the criminal punishment according to the relevant provision in Criminal law of the PRC, including fines, prison sentences or even death penalties.

2.2. Different types of export control violations and related liabilities

While the punishments for violations of the export control Regulations are determined by fragmented legislations and jurisdictions under Chinese legal system, certain administrative and criminal liabilities are defined in accordance with the law breakers' particular actions and position. For example, illegal export activ-

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149 According to articles 47 and 48 of the Custom Law of the PRC.

150 Judicial Interpretation of Supreme People's Court, Supreme People's Procuratorate and General Administration of Customs, *Notice on Issuing the "Opinions on Some Issues concerning the Application of Law for Handling Cases of the Crime of Smuggling"*, July 8, 2002, – [2002]139 –.

151 See next section for the laws that can be applied to export control violations.

ities undertaken by exporter side including not only export items without licence but also export items beyond the approved scope, or forge, alter, buy or sell export licences; and officials in competent authorities may also be committed violation due to their negligence or abuse of power. According to those penalty clauses in existing export control Regulations, an outline of the liabilities in relation to particular violations is provided as follows:

→ LIABILITIES FOR ILLEGAL EXPORT OF GOODS OR TECHNOLOGY

Exporters who export certain nuclear, biological agents, chemicals and related equipment and technologies without being licenced or export certain items beyond the scope of the export licence without authorisation, shall be investigated for criminal liability in accordance with the Article 151 (smuggling of arms), Article 153 (smuggling of less sensitive items), Article 225 (illegal business acts), Article 398 (divulging State secrets) or other relevant provisions of the Criminal Law.

In particular, the smuggling of arms, missiles or other ammunitions, or nuclear materials shall be sentenced to imprisonment of over 7 years, with a fine or forfeiture of property; for the less serious offenses, an imprisonment of 3-7 years with fine shall be sentenced. Offences of an extraordinarily serious nature shall be punished with life imprisonment or death, with forfeiture of property.[152] The illegal export of less sensitive items or provisionally restricted items shall be respectively punished according to *the value* of smuggled goods, for example: for goods carrying a tax of over

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152 It is notable that, the indicators of seriousness are not confined to the nature, quantity and value of the articles but also law breaker's attitude, the course of action, even his position in the illegal dealing. According to past judicial practice, the punishment for arm related smuggling can be very severe. A case in 2011 shows that, the person who continuously bought and sale guns and bullets between China and Thailand for three times, and instigates others to join his business. He eventually sold nine guns and 200 bullets in total and led to life imprisonment, a fine of 100,000 yuan, and deprivation of political rights. Judgement of Guangxi High Court, 24 May 2014, (2013). For details see: http://www.chinacourt.org/article/detail/2013/10/id/1104164.shtml.

500,000 yuan, the exporter shall be punished with imprisonment of over 10 years or life imprisonment, with a fine of 1-5 times of the evaded taxes; for goods carrying a tax of over 150,000 yuan but less than 500,000 yuan, the exporter shall be punished with imprisonment of over three years but less than 10 years, with a fine of 1-5 times of the evaded taxes.

If exporters, either intentionally or negligently, transfer items or technology that may result to revealing of state secrets, they shall be given a criminal detention or fixed-term imprisonment for up to 7 years, according to the seriousness of circumstances.

In the circumstances that such acts are not serious enough for criminal punishment, by distinguishing different circumstances, they shall be punished in accordance with relevant provisions of the export control Regulations and Customs Law, certain administrative punishments includes warning, confiscation of illegal income, fines up to 5 times of illegal turnovers, and suspend or even revoke the licencing for their foreign trade operations.

→ LIABILITIES FOR FORGING, ALTERING OR BUYING EXPORT CONTROL LICENCE

If exporters or other individuals are found to counterfeit, alter, buy or sell export licences, they shall be penalized in accordance with the provisions of relevant laws and administrative regulations. The criminal liability is based on Article 225 (illegal business acts), Article 280 (forge, alter, or trade officials documents) or other relevant provisions of the Criminal Law. It is notable that, for exporters who use illegal licencing document or obtain licence by fraud or other illegal means, such violations are normally committed on the basis of illegal business acts[153], which leads to less than 5 years of fixed-term imprisonment, fines for the amount between 1-5 times of illegal income, and confiscation of property. And for non-exporters, their

153 According to Article 225 of the Criminal Law, the person who purchase and sell import-export licences, certificates of origin, and operation permits or approved documents stipulated by other laws and administrative regulations can be punished under the crime of illegal business acts.

violations shall be punished under the crime of forge, alter, or trade officials documents, which leads to fixed-term imprisonment for up to 3 years, criminal detention, control, or deprivation of political rights, and when the circumstances are serious, the sentence is to be 3-10 years of fixed-term imprisonment.

For cases that do not constitute crimes, the Customs Authorities shall impose administrative penalties, including confiscation of illicit proceeds, fines for up to 5 times, and the MOFCOM can suspend or revoke the licencing for exporters' foreign trade operations.

→ LIABILITIES FOR NEGLIGENCE OR ABUSE OF POWER OF AUTHORISED STATE PERSONNEL

If State personnel in charge of control abuse their powers, neglect their duties or extort or accept money or properties from others by taking advantage of their positions, they shall be investigated for criminal liability in accordance with articles 383, 385 and 386 (the crime of accepting bribes), Article 397 (the crime of abuse of power and the crime of neglect of duties) and other provisions of the Criminal Law. The State personnel who accept money or properties from others and give favour to their export control licence are guilty of the crime of bribery, and can be sentenced to fixed-term imprisonment, life imprisonment or even death depending on the amount of their accepted bribes, with confiscation of properties. State personals who abuse their power or neglect their duties that causing great losses to public property and the state's and people's interests, will lead to criminal detention or fixed-term imprisonment for up to 3 years, and when the circumstances are exceptionally serious, they shall be sentenced for 3-7 years fixed-term imprisonment.

If such acts are not serious enough for criminal punishment,[154] they shall be given administrative sanctions according to Civil Servant Law of the PRC[155] for warning, demerit, gross demerit, demotion, and dismissal from position or expulsion.

→ LIABILITIES FOR EXPORT BUSINESS THAT IS OPERATED WITHOUT REGISTRATION

According to Article 9 of the Foreign Trade Law and export control Regulations, exporters of arms, nuclear, biological, chemical and missile-related items and technologies shall register themselves with the competent department in charge of foreign economic relations and trade of the State Council (namely the MOFCOM). If entities or individual conduct export of certain items and technologies without registration, MOFCOM shall ban such illegal activities according to law. And relevant competent departments of the State shall impose punishment thereon in accordance with relevant laws and administrative regulations, such as forbidding the company from operation of import and export of goods and technologies for up to 3 years.

→ LIABILITIES FOR PROVIDING BROKERING SERVICE, TECHNICAL ASSISTANCE, TRANSPORTING AND FINANCIAL SERVICES OF CONTROLLED ITEMS WITHOUT THE RESPECTIVE LICENCE, REGISTRATION OR AUTHORISATION.

According to Article 156 of the Criminal Law, whoever colludes with smugglers by supplying them with loans, funds, accounts, invoices, proofs, or such conveniences as transportation, safe-keeping, and mailing services, shall be regarded and punished as smuggling accomplices. For accomplice who instigates others to commit

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154 When the amount of bribe is 1,000 – 10,000 and actively returning the illegally obtained money, or the amount is less than 5,000 yuan.

155 Civil Servant Law of the People's Republic of China, adopted at the 15th Session of the Standing Committee of the Tenth National People's Congress on 27 April, 2005.

a crime shall be punished according to the role he plays in the joint crime; for accomplice who plays a secondary or supplementary role, he shall be given a lesser punishment or a mitigated punishment or be exempted from punishment in accordance with the relevant crimes.

2.3. Intention is not a key element for determining liabilities

It is notable that, according to the above summary, in most of the cases the criteria of penalties are decided by competent authorities regarding the nature, value and quantity of the controlled items *rather than* the intention of exporters. It is mainly because that, on the one hand, China's export control system has provides two safeguards to limit legal exposure by negligence: (a) the "overall control principle" which require an exporter, if he knows or should know that there is a proliferation risk of his commodities, to apply for an export licence even if the item or technology is not; and (b) the "end-user and end-use certification" which required to be signed and submitted by end-users rather than exporter himself. On the other hand, besides the export control licencing system, China also imposes a foreign trade registration requirement to all entities and individuals who undertake cross-border trade activities, and requiring the most sensitive items–namely conventional arms, WMD weapons and nuclear-related materials to be only produced and traded by national owned entities. Those safeguards and registration requirement, along with the narrow and explicit scope of controlled item lists, can easily lead to a presumptive fact that once an exporter has conducted illegal exports, such as export without licence or forge export licence, they are deemed to have the intention to do so. Thus, the only intention that matters to the evaluation of liability for violations is "for the purpose of making profits", which is still related to value and quantity of certain commodity.

3. CHINA'S WAY OF IMPLEMENTING EXTERNAL SANCTION MEASURES TO THIRD COUNTRIES

As referred to in the introduction section, the legal base for Chinese authorities to impose export control on unlisted items is mainly provides by Article 18 of the Foreign Trade Law which stipulates that, as the competent authority in charge of foreign trade under the State Council, Department of Foreign Trade of MOFCOM shall coordinate with the other competent agencies and make decisions to provisionally restrict or ban the import or export of unlisted special goods or technologies in accordance with international treaties or agreements.

According to China's past practice, the UN sanctions can be easily turned into generally binding and directly applicable legal obligations through administrative approach: after a UN Security Council Resolution enters into force, Department of International Cooperation will start to implement certain Resolution by sending notification to all relevant departments calling for cooperation; after a communication period,[156] competent authorities which normally includes Ministry of Commerce, General Administration of Customs, and other departments whose jurisdiction relating to the controlled item scope of the UN Security Council Resolution will together published the announcement of provisional control, which explicitly outlines their decision of imposing provisional export control measures, the proscribed countries and a Chinese version of controlled items list in accordance with the lists referred by the UN Security Council Resolution. This announcement will

156 For example, after UN Security Council Resolution 2094 towards North Korea was imposed on 7 March 2013, Department of International Cooperation decided to implement it and called for inter-agency cooperation on 25 April 2013; on 23 September 2013, the announcement co-decided by MOFCOM, Ministry of Industry and Information Technology, General Administration of Customs and National Nuclear Safety Administration was published and entered into force.

be published and circulated as a domestic decree between all competent authorities, and automatically become one part of Chinese strategic export control system.

For liabilities in case of violation, the criteria of liabilities for violations of such provisionally restrict or ban have been stipulated in a "catch-all" provision (Article 61) of the Foreign Trade Law. It grants the Department of Foreign Trade of MOFCOM power to order Customs authorities to rectify the illegal act, confiscate illegal gains, and impose a fine of up to 5 times of the amount of the illegal gains, revoke licence and forbidden business operation. In additional, if crime is constituted, the criminal liabilities shall be ascertained similarly by the criminal court on the basis of Criminal Law.

In addition, this chapter needs to point out that, although China's imposition of external sanctions seems to be a pure knee-jerk reaction according to UN sanctions, it does not mean Chinese decision-makers seldom have their own foreign policy concerns in this area. On the contrary, since China is one of the five permanent members of the UN Security Council, Chinese representative has the rights to *veto* any substantive Security Council resolution which maybe against China's interests. Thus, China's political concern has already been embedded in every effective UN Security Council Resolution. Moreover, China's foreign policy concerns can also be revealed when Chinese government decides *not* to impose sanctions to a third country. To pose a concrete example, the Russian military intervention in Ukraine in 2014 has prompted a number of governments to apply sanctions against Russia. Sanctions were approved by the United States, the Member States of European Union and many other countries and international organizations, voluntarily.[157] China, on the other hand emphasised that, because China respects "international law and norms" and "the independence, sovereignty and territorial integrity of Ukraine", it encouraged the

157 Since Russia, as a permanent member of UN Security Council, has the right to veto UN decisions, it is not possible for the Security Council to make a collective decision and call for all Member states to imposing sanction against Russia.

relevant parties "to resolve their internal disputes peacefully within the legal framework",[158] and would not provide external interference in the Russian and Ukraine.

4. CONCLUSION

To conclude, despite the absence of a particular and unified export control legislation, China does have a well-founded administrative and criminal operation system, which is capable of providing national penalties to a various type of illegal export control activities. By resorting to the penalty clauses in a set of export control regulations, the catch-all penalty clauses in Foreign Trade Law, Customs Law and the Criminal Law, China's internal sanction system is in fact quite comprehensive and strict, because the legal liabilities are not only applied to the illegal activities of exporters but also to the illegal acts of whoever may be involved in the transaction, even the negligence of authorised officers.

On the other hand, while UN Security Council resolutions can be effectively implemented within Chinese export control system; due to its divergent foreign policy concerns and trade partnerships, China indeed holds a passive attitude to act in conformity with western countries when they decide to impose additional external export control sanctions to third countries.

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158 Shannon Tiezzi, "China Backs Russia on Ukraine", *The Diploma*, 4 March 2014. Available at: http://thediplomat.com/2014/03/china-backs-russia-on-ukraine.

Chapter
07

Implementation by Poland

Irena Kolakowska-Falkowska

1. INTERNAL SANCTIONS: PENALTIES FOR WEAPONS OF MASS DESTRUCTION PROLIFERATION-RELATED OFFENCES

Polish Law[159] provides two legal bases for prosecuting proliferation-related offences. The first is a provision in the Criminal Code that relates to production and transfer of weapons of mass destruction (WMD). The second are the penalites listed in the national law on the control of trade in dual-use items. When prosecuting a WMD-related offence, including illegal trade in dual-use items, national enforcement authorities, according to their individual judgement, decide to choose the most relevant legal basis between these two sources. The following paragraphs present the two legal frameworks in detail (see List of penalities in Table 1).

1.1. Criminalization of WMD-related offences

Chapter 16 of the Polish Criminal Code[160] catalogues crimes against peace, humanity and war crimes. Two articles refer to WMD-related offences. First, Article 120 provides that a person using a weapon of mass destruction prohibited by international law shall be sentenced to imprisonement of 10 years, up to 25 years, or to a life sentence. Second, Article 121, provides a penalty of imprisonement for one year up to 10 years for an array of different offences relating to the illegal development of WMD, i.e.: manufacture, development, collection, acquisition, selling, storing,

159 A general discription of enforcement of the EU dial use trade controls, including penal provisions may be found in: Sibylle Bauer, WMD-Related Dual-Use Trade Control Offences in The European Union: Penalties and Prosecutions, *Non-Proliferation Papers*, no. 30 July 2013.

160 The Law on Criminal Code, 6 June 1997 (Dz.U.1997.88.553).

transporting, developing or transferring WMD. "Illegal" in this case should be understood d as: in contravention of prohibitions set forth by international law or by specific provisions of national law[161].

With these two provisions in place Poland fullfils international obligations set out in three corner stone treaties relating to WMD:

- Treaty on the Non-Proliferation of Nuclear Weapons (1968),
- the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons (1972) and
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993).

Additionaly, the provisions of Article 121 are an implementing measure of the United Nations Security Council resolutions (UNSCR) which impose sanctions on the supply of dual-use items for development of WMD and their means of delivery. It is also relevant to note that Article 121 of the Criminal Code is listed in the national "1540 Implementation Matrix"[162] as a measure of enforcement with regard to the UNSCR 1540 (2004) which obliges States to impose regulations that prohibit and prevent non-State actors from developing or acquiring WMD and their delivery means.

1.2. Penalities listed in the national Export Control Law

The organisation and functioning of the trade control system regarding arms and dual-use goods is governed in Poland by the Law of 29 November 2000 on foreign trade in goods, technologies and services of strategic importance to the security of the State and to maintaining international peace and security (further referred

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161 Article 121 of the Criminal Code reads: "A person who, in contravention of the prohibitions of the international law or provisions of law, manufactures, collects, acquires, sells, stores, transports or transmits the WMD or develops them with the view to their manufacturing or use, shall be sentenced to imprisonment for 1 year up to 10 years."

162 http://www.un.org/en/sc/1540/national-implementation/1540-matrix/committee-approved-matrices.shtml#P.

to as the "Law on the export control").[163] Chapter 6 of this Law lists criminal, administrative and financial penalties applicable to violations of the Polish and European Union's[164] export control regulations (see table 1).

The most important provision (Article 33.1) states that a person trading in strategic goods (dual-use goods or arms) without an authorisation, or in contravention thereof may be punished by imprisonment for up to 10 years. According to Article 33.2, if a person carries out trade in violation of the conditions set forth in the authorisation and acts without intent, and, if this person undertakes a command the person shall be liable to a fine, non-custodial sentence (community works) or imprisonment of up to 2 years. In 2012 a provision was added in the Law (Article 33.2a) criminalizing false or incomplete information in an application submitted for a trade authorisation. Such an offence is liable to a fine, non-custodial sentence (community works) or imprisonment of up to 2 years.

In case of all three above mentioned offences, the court may also issue a forfeiture order with respect to items in question or other items used in order to commit the offence or resulting from such offence, including cash and securities (Article 33.4). It is important to stress that pursuing to the provision, this refers also to items that are not the offender's property. Thus the Law provides enforcement authorities with the right to effectively confiscate the item or the funds and prevent them for contributiong further to the proliferators' efforts.

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163 For a detailed discription of the Polish export control system please refer to: Irena Kolakowska, Searching for the Balance:Non-proliferation, Security and Economy. Export Control System in Poland.,in: Quentin Michel (ed.), *Sensitive Trade. The Perspective of European States*, Brussels, P.I.E. Peter Lang, Coll. Non-Proliferation, no. 5, 2011; and Irena Kolakowska-Falkowska, "European Dual-Use Trade Controls: Poland Beyond Materiality and Borders", Liège, *Les Cahiers de Sciences Politiques*, no. 28, 2013.

164 Council regulation (EC) no. 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items; Common Position 2008/944/CFSP *defining common rules governing control of exports of military technology and equipment* and Directive 2009/43/EC *simplifying terms and conditions of transfers of defence-related products within the Community* (Intra Community Transfers Directive).

Any company (i.e. a legal person) carrying out trade without valid authorisation, is liable to a financial penalty of up to 50,000 euros (equivalent to 200,000 Polish zloty) imposed by the trade control authority by way of an administrative decision (Article 37). If an enterprise carries out a trading activity in contravention of the conditions set forth in the authorisation, the enterprise is liable to a financial penalty of up to 25,000 euros (100,000 Polish zloty). The same applies if the enterprise provides false or incomplete information in its application for the authorisation (Article 38).

Table 1. Penalities relevant to WMD proliferation-related offences

Action	Penal provisions	Financial penalties	Administrative
WMD-related offences: manufacture, development, collection, acquisition, selling, storing, transporting, developing or transmiting the WMD	imprisonment for 1 year up to 10 years		
trade without or contrary to authorisation (Article 33 STC Law)	imprisonement: 1 – 10 years		confiscation of goods
trade contrary to authorisation, without intent, plus compliance action (Article 33 STC Law)	non-custodial sentence (community works) imprisonment of up to 2 years	fine	confiscation of goods
false or incomplete information in application (Article 33 STC Law)	- non-custodial sentence (community works) - imprisonment up to 2 years	fine	
Regarding legal person: trade with no authorisation (Article 37 STC Law)			50,000 euros
Regarding legal person: trade contrary to authorisation or false information in application (Article 38 STC Law)			25,000 euros

→ PROSECUTION CASES

On the basis of publicly available data this author was able to identify two cases concerning trade in strategic goods that took place during last 16 years which ended with a conviction. The first relates to a intended export of dual-use items without a licence (breach of Article 33.1 of the Export control Law). Although the verdict was not available, other related court procedeeings reveal that additionaly to the conviction, a court decided also to confiscate the dual-use goods involved. These did however, not belong to the convicted person but to another company, unintentionally involved in this illicit transaction.[165]

The second case concerns a group of offenders that were found guilty of exporting military items, in particular rocket engines dismantled from demilitarized missiles (court ruling from 20 May 2011 (IV K 36/10) District Court in Warsaw). The offenders were sentenced to 1 up to 2 years of imprisonement suspended for 2 or 3 years and for fines (up to 4,000 euros).

Moreover, in 2005, Polish authorities arrested a UK citizen of Iranian origin suspected by the US of supplying WMD-related materials and military technology to Iran. US issued an international arrest warrant after Mr. Manzarpour for exporting in 2004 without a proper licence to UK and then to Iran a one-engine, ultralight plane "Berkut" made of fibreglass and carbon (the plane was self-assembled). For this he would face an imprisonement and a fine in the US. Mr. Manzarpour claimed that he had a licence for exporting the plane from UK to Iran and that no authorisation was needed for transfer between US and UK. Final decision of the Polish court in second instance was issued in 2008. It was decided against an extradiction to the US because the deed was not considered a

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165 After the confiscation of the goods the company decided to file a constitutional complaint in the Constitutional Court in Poland (case no. Ts 32/13, brought by Euroturbine B.V. N. based in The Netherlands). The company aimed at proving that the fact that they were not informed about the criminal court rulling against the offender (different person) which involved confiscation of their goods and which resulted in a lack of possibility to claim the goods was unconstitutional. The complaint was rejected on the basis that it did not fulfil the formal requirements.

crime in Poland (the plane was not considered to be covered by the military export control list in Poland). Mr. Manzarpour spend nearly two years in arrest in Poland before he was released before the final verdict. He was also previously convicted in the US, in 1998, for other export control violations.[166]

2. EXTERNAL SANCTIONS. IMPLEMENTATION OF THE EU AND UN WMD-RELATED EMBARGO DECISIONS

An analysis of the implementation in Poland of the UN and EU sanctions on WMD-related activities starts with a general notice on the relevant legal framework. According to the Constitution of the Republic of Poland[167] (Article 9) "The Republic of Poland shall respect international binding law". Further, Article 91.3 of the Constitution says that: "If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws". This includes abiding by the embargoes imposed by the Council of the European Union.

In Poland there is no single act referring to the implementation of international sanctions. The restrictions on trade in dual-use goods are enforced in the export control process governed by the Export Control Law presented above. In the export control licencing process, the main responsibility for assessing licence applications against international sanctions rests with the Ministry of Foreign Affairs (Departement of Security Policy), which is an advisory body. The Ministry of Development is the export control authority and takes opinions presented by the MFA into account when issuing export licences.

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166 Accessed on 24 March 2016: http://www.iranwatch.org/suppliers/ali-asghar-manzarpour; http://wiadomosci.wp.pl/query,ali%20asghar%20manzarpour,szukaj.html.

167 Constitution of the Republic of Poland, 2 April 1997, (Dz.U.1997.78.483)

Implementation of all other sanctions, concering assets freeze, visa ban, oil and gas embargos as well as luxurious goods, that are often in relation to WMD-related activities as in the case of the DPRK, is not covered by any separate law. Their application is the task of different ministries in charge of relevant sectors of the economy. However, in order to coordinate efforts within the government, an Interagency Committee on Implementation of Sanctions' oversees the process and is in charge of resolving problematic issues. The leading role in this process lies with the Departement of International Law in the Ministry of Foreign Affairs.

As to the implementation of international sanctions on trade in dual-use goods two "mechanisms" may be mentioned that serve this purpose: a) direct application of EU sanctions; and b) provisions of national Law on Export Control. Until recently there was also a national list of prohibited end users, but it is no longer used. These measures will be presented in the following paragraphs.

2.1. Direct application of EU sanctions

All WMD-related UN Security Council sanctions are implemented within the legal framework of the European Union. This can be implemented by way of EU regulations or CFSP Council decisions. Following EU law, both measures are directly applicable by the Member States. Therefore all UN sanction regimes are binding upon EU Member States.

A review of the EU embargoes reveals that most, if not all, of WMD-related sanctions are imposed by way of both instruments at the same time: i.e. EU regulations and Council decisions. The EU regulations have a general application and are binding in their entirety. They take precedence over conflicting measures of a Member State and are directly applicable towards legal and natural person. This means a prohibition for legal and natural persons to engage in trade with a sanctioned entity – a State or a non-state actor. The scope of the provisions of the EU regulations includes trade in dual-use items.

On the other hand, Council decisions aim at shaping the policies of Member States, or to be more specific, of their national authorities. Council decisions therefore apply directly to these authorities. This means that governments are bound to follow the political guidance set in the Council decision, including taking into account EU embargoes in the licencing process Council decisions may refer to both dual-use items and arms.

2.2. National assessment criteria

However, Polish Law on export control also contains separate provisions that allow to enforce international prohibitions: the existence of a given embargo is mentioned as one of the criteria against which a licence applications should be assessed. Article 16.1.2.a of the Law on export control states that no licence shall be issued if it is in contradiction to the UN, EU or OSCE sanctions.[168] This provision echoes Article 12.1.b of the EU Regulation 428/2009 and the Article 2.1 of the Council Common Position 2008/944/CFSP (even though formally OSCE does not have a authority to impose sanctions).

In Poland, the Ministry of Foreign Affairs (MFA) is responsible in particular for assuring that international sanctions are taken into account in the licencing process concerning trade in dual-use or military items. The MFA's opinion is then provided to the trade control authority (Ministry of Development).

2.3. National list of sanctioned States

Until recently the Polish government by virtue of an executive order regularly adopted two lists of States with which trade is: (a) prohibited, or (b) restricted. Although the legal basis for this mechanism is still in place, it is no longer in use since 2014. Nevertheless,

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168 In 1992, in response to the armed conflict between Armenian and Azerbaijan over the area of Nagorno-Karabakh the Organization for Security and Co-operation in Europe (OSCE) requested its participating States to impose an embargo on arms deliveries forces engaged in combat in the Nagorno-Karabakh area. *http://www.sipri.org/databases/embargoes/eu_arms_embargoes/azerbaijan.*

it is worth describing the case and presenting the reasons that made the mechanism obsolete. The lists were established by the Council of Ministers on the basis of Article 6b of the Law on export control. The Law indicated that the lists shall include countries with which trade in strategic items shall be forbidden or limited. When drafting the lists, the government shall take "into account public security and human rights, and in the case of military goods also defence or security needs of the Republic of Poland, commitments of the Republic of Poland arising from international agreements and arrangements, as well as alliance commitments", including: NPT, CWC, BTWC, the Australia Group, the Missile Control Technology Regime, the Zangger Committee, the Nuclear Suppliers Group, the Wassenaar Arrangement and the Hague Code of Conduct Against Ballistic Missile Proliferation.

A ban or restriction was imposed on States. However, the list of prohibitions included a ban of export to any country if the items were to be used by Al Quaida terrorist organisation.

In practice, the list of sanctioned States mirrored the existing embargoes imposed by the UN Security Council or the European Union. The scope of the banned goods reflected exactly the area covered by international sanctions. If there was an exemption to the embargo, it was also taken into account on the list. When it comes to sanctions on dual-use items there were only two States on the last version of the list (enacted on 20 October 2009): Iran and the Democratic Republic of Korea. DPRK was banned from all dual-use deliveries and Iran from items indicated on the UN sanction lists of that date.

The second list was intended to indicate recipients that should be not banned but only restricted from receiving dual-use items or military goods. However the Law on export control formaly did not specify what such restriction should cover, or how it differs from a total ban on trade. In practice, it meant a greater scrutiny and vigilance in assessing the applications in the licencing process with the final decision undertaken after informing the Council of

Ministers on the case and of its consent.[169] The last version of the list included: the Democratic Republic of China,[170] Taiwan, Cuba and Syria.

In the course of the long existence of the prohibitions and restriction lists some substantial problems were identified that finaly led to the cancelation of theis mechanism. First, the review process of the lists was rather cumbersome – they were to be accepted by the government. Therefore this process was carried out than only on an annual basis. At the same time, due to the dynamic evolution of the international situation which resulted in frequent imposition of sanctions by the UN Security Council and EU Council, the lists were often outdated soon after their revision.

Second, the existence of the lists confused exporters. States named on the lists were often regarded by business as the only banned or restricted end users. This resulted in a view that all other States were legitimate recipients of arms or dual-use goods. This argument was used by the enterpreneurs against taking into account other criteria listed in the national Law and in the EU Common Criteria on arms export, especially after 2008 when the EU Criteria became binding.

Finaly, independently from the above mentioned considerations, the Governmental Legislation Centre, located in the Prime Minister's Chancellery, decided in 2014 that the lists enacted in the form of governmental decree are unconstitutional. The reasoning was that any circumventing of the freedom of citizen (in this case it was a freedom to choose a trade partner) cannot be restricted by virtue of a decision by the Council of Ministers but only by a law adopted by the Parliament.

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169 According to an official of the Ministry of Foreign Affairs of the Republic of Poland – conversation in November 2015.

170 It should be noted that the EU embargo on arms exports to China was imposed on the basis of the Declaration of the European Council, is still binding but was not reintroduced as a CFSP decision or a EU Regulation afterwards.

As a result, the Governmental Legislative Centre decided to review the Law on export control and to delete the provision concerning the lists of prohibitions and restrictions. The review is yet to be undertaken.

In the opinion of the author, a final abandonnement of a national sanctions list would be of advantage. This would result in more clarity regarding the legal restrictions on the side of the exporters. There would be no competing "frameworks" concerning restrictions of trade,(meaning UN/EU/OSCE sanctions vs. national control list). At the same time, it might be more burdensome for the enterpreneurs to follow exisiting UN, EU and OSCE sanctions. This requires implementation of at least basic internal compliance programmes on the side of the business and more vigorous awareness raising on the side of the authorities.

Chapter
08

Sanctions and penalties for the infringement of dual-use trade controls under Spanish Law

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This chapter is divided in two parts. First we will explain the national understanding of the term *sanction* under Spanish Law, i.e. the legal texts that regulate the control of dual-use goods trade at a domestic level and the types of sanctions foreseen in case of infringement. In the second part we will be looking at the way Spain's authorities implement international decisions regarding embargoes and what measures have been taken when embargoes have not been respected. Our general evaluation of the Spanish legal system will be provided in the context of the final considerations.

1. INTERNAL SANCTIONS

1.1. National understanding of the term "sanction"

Just like many other Spanish words, the term "sanction" -*i.e.* "*sanción*"- comes etymologically from Latin (*sanction, -onis*), just as it does in French or in English.

The concept of "sanción" means "*castigo*", which could be translated as "*penalty*" in English or as "*punition*" in French. In Spain the term sanction is understood as the "punishment that arises from committing certain actions and that does not necessarily have to be prescribed by the Law"[171] – for instance, social sanctions.[172] This is the meaning understood in common language and so it is reflected

171 Moliner, M., *Diccionario de Uso del Español*, Madrid, Ed. Gredos, 1980.

172 Silva-Sánchez, J. M,. "Una primera lección de Derecho Penal", in Luzón Peña, D. M., *Derecho Penal del Estado Social y Democrático de Derecho. Libro homenaje a Santiago Mir Puig*, Madrid, La Ley grupo Wolters Kluwer, 2010, pp. 76-83.

in Spanish Law. The general understanding of the term sanction in Spanish Law is therefore the "punishment or penalty prescribed by the Law for the infringement of rules".[173]

Depending on the infringed rule and the branch of Law we might be looking at, the prescribed sanction will present differences, even in its name, as in Spain, different terms are used for the different kinds of punishment.

In Criminal Law any punishment gets the generic name of *pena*.[174] These penalties are classified in three different categories by the Spanish Criminal Code: severe penalty – *pena grave* –, less severe penalty – *pena menos grave* – and lighter penalty – *pena leve* –.[175] In the case of Administrative and Civil Law, the term used to refer to the punishment for when a negligent conduct takes place is – in both cases – *sanción*.

While criminal and civil sanctions – which are not incompatible with one another – must be imposed by a judicial body, administrative sanctions are imposed by the Administration. These are, however, subject to judicial control and can always be appealed against in case of being considered unjust. Fines or citations are two examples of a typical administrative sanction.

Generally, private sanctions in civil Law are related to compensation (using the Spanish term *indemnización*) and tend to have a monetary aspect which may entail a civil-private sanction as well.[176]

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173 Mir Puig, S., *Derecho Penal, Parte General*, Barcelona, Editorial Reppertor, 2015, pp.45-46.

174 Which is translated in English as "sentence" or "penalty" and is equivalent to the French word "peine". All translations into English and French have been done according to the *Oxford Spanish Dictionary,* Oxford, Oxford University Press, 2008, and *Dictionnaire Français-Espagnol,* Paris, Larousse,1991.

175 Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal. Article 33.3-5

176 Silva-Sánchez, J. M., "Una primera lección de Derecho Penal", in Luzón Peña, D. M., *Derecho Penal del Estado Social y Democrático de Derecho. Libro homenaje a Santiago Mir Puig*, Madrid, La Ley grupo Wolters Kluwer, 2010, pp. 76-83.

Whatever the ultimate aim of the sanction i.e. prevention, compensation or punishment no one denies that its imposition is associated with an illegal conduct. Therefore, a sanction is a threat used by the Law to dissuade anyone from committing a crime.[177]

In the legislative field of trade in sensitive goods, sanctions are indeed an effective means of enforcing trade control legislation. They act as dissuasive measures and, thus fulfill a preventive function that enforces the implementation of Spanish Law and its sensitive trade control regulations.

1.2. Brief presentation of Spanish trade control legislation regarding sensitive goods

Export control of dual-use technologies is both a European and a national competency. Therefore the rules and regulations governing such transfers are applicable to all States of the European Union, that are required to adopt certain specific regulations and investigate any breaches against them.

In view of Spain's international commitment, national control authorities apply Council regulation 428/2009, which sets up a Community regime for the control of the export, transfer, brokering and transit of dual-use items[178] amended by later regulations.[179] It is also committed with UNSC 1540 Resolution, by adopting domestic legislation that fights the proliferation of nuclear, chemical and biological weapons and their means of delivery because of their threatening character against international peace and security.[180]

The Spanish control system assumes also all the commitments undertaken within the framework of the most important inter-

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177 Mir Puig, S., *Derecho Penal, Parte General*, Barcelona, Editorial Reppertor, 2015, pp.45-46.

178 Council regulation (EC) no. 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ L 134.

179 The last one being: Regulation (EU) no. 599/2014 of 16 April 2014 of the European Parliament and of the Council amending Council regulation (EC) no. 428/2009.

180 UN Security Council, Security Council Resolution 1540 (2004) concerning weapons of mass destruction, 28 April 2004, S/RES/1540 (2004).

national control and non-proliferation *fora* of which Spain is a member (*i.e.* Wassenaar Arrangement, the Australia Group, the MTCR – Missile Technology Control Regime, the NSG and the Zangger Committee).[181]

These obligations and commitments regarding trade control regulations are set out in three texts of the Spanish legislative regime.

The oldest reference to crimes and sanctions in connection with dual-use material in domestic regulations relates to the smuggling of such goods – as well as defence material –.[182] It is an Organic Law from 1995, known as the Anti-smuggling Act, which was recently modified in 2015.[183]

This text categorizes as crime "the unauthorised export of defence or dual-use material – worth at least 50,000 euros – or the export of such with an authorisation obtained by means of a fraudulent or incomplete declaration" (Article 2.2. c.1º). This conduct is subject to criminal and civil penalties foreseen in articles 3-7.

If the value of the smuggled dual-use goods is inferior to 50,000 euros, article 11 of that same text categorizes it as an administrative infraction. These infractions are divided into three types. Depending on the degree of the breach, the infraction will be either *minor* (when the value of the smuggled items is less than 6,000 euros), *serious* (between 6,000 and 18,000 euros) or *very serious* (more than 18,000 euros but less than 50,000 euros). Each category of infringement implies its own administrative sanction, as we will see. The resistance, refusal or obstruction to the authorities will also be considered as an administrative infraction, which implies economic sanctions as well (Article11.4)

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181 Muro Martínez, R., "Ley sobre el control del comercio exterior de material de defenca y de doble uso", in *Boletín Económico de ICE*, no. 2933, Madrid, Ministerio de Industria, Turismo y Comercio, 2008.

182 However, the first Organic Law to include the smuggling of dual-use goods as a crime in the Spanish system was Ley Orgánica 3/1992, de 30 de abril, *por la que se establecen supuestos de contrabando en materia de exportació*n de material de *defenca o material de doble uso,* BOE no. 105, 1 de mayo de 1992, which was substituted by the LO 12/1995, the current one.

183 Ley Orgánica 12/1995, de 12 de diciembre, de *Represión del Contrabando, Texto Consolidad*. BOE no. 227, de 22 de septiembre de 2015.

To remedy a possible fraud – consisting in the commitment of a plurality of smaller smuggling acts whose individual value does not reach the level of a crime – the Spanish legislator also criminalizes and sanctions anyone who smuggles various quantities of items whose accumulated value equals or surpasses the 50,000 euros (Article 2.4).

We see how the distinction between crime and administrative infractions is based on the financial value of the smuggled goods. This approach might appear a bit unsual to certain Member States who consider that proliferation has nothing to do with value, since a very unexpensive item could have very high proliferation implications. This quantitative criterion – regardless of its consistency from a proliferation point of view – has to be understood taking into account the 'historical background' of the legislator. Indeed, the wording of this Organic Law suggests that the mindset while drafting these provisions was the crime of smuggling as a general phenomenon, rather than the dual-use export.

At a more specific legislative level the Law 53/2007 (in force since 2008) *which controls external trade in defence and dual-use items.*[184] This was the first time that a regulation of this rank was enacted to deal with these matters in the Spanish legal system.[185]

Law 53/2007 is implemented through the Royal Decree 679/2014 as of the 1st of August,[186] *which approves the regulation for the control of external trade in defence materials, other materials and*

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184 *Ley 53/2007, de 28 de diciembre, sobre el control del comercio exterior de material de defenca y de doble uso. BOE no. 312, de 29 de diciembre de 2007.*

185 In the Spanish legal system there are two kinds of Laws: ordinary Law and Organic Law. The difference is based on procedural and substantive factors. An Organic Law must be adopted by an absolute majority of the *Congreso de los Diputados* (Congress of Deputies) and it is required to regulate specific subject matters established in the Spanish Constitution. Any other subject which needs to be regulated under the law will have the form of an ordinary Law – which is adopted by simple majority. Until Law 53/2007, dual-use items were note even regulated by Law Sánchez Morón, M., *Derecho Administrativo Parte General*, Madrid, Tecnos, 2011, pp. 164-168.

186 *Real Decreto 679/2014, de 1 de agosto, por el que se aprueba el Reglamento de control del comercio exterior de material de defenca, de otro material y de productos y tecnologías de doble uso. BOE no. 207, de 26 de agosto de 2014.*

dual-use products and techonologies. This Royal Decree introduces all necessary changes in the regulation of (defence and) dual-use transfers in order to implement the corresponding international commitments. It was also adopted to reflect the signing[187] and ratification[188] by Spain of the Arms Trade Treaty in 2014.

Law 53/2007 provides that export authorisations are denied to conflict areas or regions where human rights are violated, and in other cases (Article 8). Another worth mentioning aspect of this Law is that according to its Article 3 *technical assistance* transfers (Article 3.14) will be considered as other regulated operations (i.e. export, import, brokering, etc.).

Broadly speaking, the aforementioned Law – toghether with the Royal Decree that develops it – establishes a licencing system which requires an authorisation every time a listed product (included in the Annex I of the 428/2009 EU Regulation) is exported by Spain to a country outside the European Union. Non-listed products may require an authorisation from the competent authorities whenever the operator has been informed or he/she knows that the exported items might be used partly or entirely in connection with weapons of mass destruction. This provision called "catch-all clause" or *cláusula escoba* in Spanish is contained in article 4 of the EU Regulation and will also apply in case dual-use items are purchased by a State that is under an arms embargo by the United Nations or the European Union.

The authorisation and licencing process established by the Spanish legislation in order to control the exports and guarantee the compliance with relrevant international commitment is set forth in the aforementioned texts (*i.e.* Law 53/2007 and Royal Decree

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187 Soria López, J. M., *Intervención del Ministro de Industria, Energía y Turismo en la ceremonia especial para la firma del Tratado sobre el Comercio de Armas, Naciones Unidas*, New York, 2013.

188 Toledo Segarra, M., "España ratifica el Tratado sobre Comercio de Armas de Naciones Unidas", en *Boletín del Instituto de Estudios sobre Conflictos y Acción Humanitaria*, Madrid, IECAH, 2014.

679/2014). Since many levels of authority are involved in the export and import of dual-use goods and its security consequences, several bodies take part in the process.

The Secretariat of State for Trade -attached to the Ministry of Economy and Competitiveness – is the body responsible for authorising each external trade transaction concerning defence material, other material and dual-use items and technologies. It has to be duly informed by the Inter-Ministerial Regulatory Board on Foreign Trade in Defence and Dual-Use Material before deciding on any authorisation. This process is made on a case by case basis.[189] As the name indicates, the Regulatory Board is composed of representatives from all Ministries with a direct interest in dual-use trade.[190]

Once the authorisation is granted, the Deputy Directorate-General for International Trade in Defence and Dual-Use Material is the competent body to issue the licence.[191] The Deputy DG is a specific organ currently belonging to the Ministry of Economy and Competitiveness aswell.

Export applications are analysed on a case by case basis by the competent organs.[192] Nevertheless, infringements of the legal obligations may still occur. As regards the sanctioning regime the same Law 53/2007 refers to the Ant-Smuggling Act and the Criminal Code, which establish the sanctions for each type of crime and infraction.

1.3. Types of sanctions

Failure to comply with the regulation is punished by the Spanish legal system. Article 24 of the EU Regulation establishes

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189 *Secretaría de Estado de Comercio, Ministerio de Economía y Competitivad. Estadísticas españolas de exportación de material de defenca, de otro material y de productos y tecnologías de doble uso, Año 2014. Gobierno de España, 2015.*

190 Ministry of Interior, Ministry of Industry, Tourism and Trade, Ministry of Defence, Ministry of External Affairs and Cooperation and Ministry of Economy and Finance.

191 The Deputy Directorate-General of International Trade in Defence and Dual-Use Material also serves as the Secretariat of the Interministerial Regulatory Board on External Trade in Defence and Dual-Use Material.

192 Muro Martínez, R., "Ley sobre el control del comercio exterior de material de defenca y de doble uso", in *Boletín Económico de ICE*, no. 2933, Madrid, Ministerio de Industria, Turismo y Comercio, 2008.

that "the penalties applicable to infringements of the provisions (…) must be effective, proportional and dissuasive". Due to the leeway countries have as regards the interpretation and implementation of such "effective, proportional and dissuasive" penalties, the types and degrees of sanctions may differ substantially across the EU.[193] The Preamble and article 10 of the Law 53/2007 and its complementary Royal Decree 679/2014 refers to the Anti-Smuggling Organic Law in order to determine the criminal penalties and civil and administrative sanctions that will be imposed for the commitment of crimes or infractions against sensitive trade control regulations.

Article 3 of the Anti-Smuggling Act establishes imprisonment of up to five years and a fine of up to six times the value of the smuggled dual-use goods for any person commiting the defined crime. If the crime was due to a reckless conduct the penalty will be imposed at the lower degree prescribed by the Law (Article 3.1). However, if the crime was committed by or on behalf of persons, entities or organisations whose nature or activity make it particularly easy to commit, the penalty will be imposed at the higher degree (Article 3.2).

In case of *criminal liability* of a legal person, a fine of twice to four times the value of the goods will be imposed. Equally it is forbidden to accept any public subsidies or public aid for contracting Public Administrations or for enjoying tax or National Insurance benefits or incentives from one to three years (Article 3.3.a). Additionally, the legal person will have to face suspension of the activities relating the smuggled dual-use goods for a period from six months to two years (regardless of the kind of activity -import, export, trade, etc.-) (Article 3.3.b).

Regarding *civil responsibility*, Article 4 establishes that in the proceedings for smuggling, civil liability will include all tax debt owed to the Tax Administration that were not settled due to prescription or other causes (foreseen in the General Tax Law

193 Bauer, S., "WMD-Related Dual-Use Trade Control Offences in the European Union: Penalties and Prosecutions", *Non-Proliferation Papers*, EU Non-Proliferation Consortium, no. 30, July 2013, p.5.

58/2003).[194] This shall include all accrued interest as well. A crime cannot be a taxable event. However, the prejudice experienced by the State as a result of smuggling is remedied through a civil penalty – which could be understood as a compensation.

For implementation of criminal fines and civil sanctions (Article 4 bis), judges and courts may seek assistance of the Tax Administration, which will require payment of the fine and the civil sanction by an administrative enforcement procedure (under the terms established in the General Tax Law).

Any penalty imposed for a crime of dual-use goods smuggling, entails the *confiscation* of all goods, property, profit obtained, as well as instruments, machinery and means of transport involved in the crime perpetrated. If seizure is not possible, according to Article 5, the monetary equivalent will be confiscated.

Administrative sanctions apply to the infractions listed under Article 11 of the Anti-Smuggling Act. The pecuniary fine will be proportional to the value of the smuggled dual-use goods. The sanction will also imply temporary closing or suspension of the activities for a duration of up to 12 months – depending on the scale of the infraction (Article 12.2). Administrative sanctions are compatible with the requirement of tax liability (Article 14 bis.2).

Although the penalty system for breach of the Regulation regarding dual-use goods is contained in the Anti-smuggling Act, there is an article in the general Criminal Code that requires a specific comment. Article 345 of the Criminal Code criminalizes certain conducts regarding dual-use items, but only in the case of nuclear or radioactive material. Hence, it criminalizes the possession, processing, use, transport, etc., of hazardous nuclear or radioactive materials if any of those actions are undertaken in violation of the aforementioned Laws. The sanction for this crime is imprisonment from 1 to 5 years, a fine from 6 to 18 times the value of the goods months and special disqualification from excercising the perpetrators

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194 *Ley 58/2003, de 17 de diciembre, General Tributaria. BOE no. 302, de 18 de diciembre de 2003.*

profession for a period of up to 3 years.[195] It must be highlighted that such a sanction, however, does not exist regarding chemical or biological items.

Any smuggling implying criminal and/or civil liability may be accompanied by aggravating factors if the author is a recidivist. Article 22.8 of the Spanish Criminal Code, provides that any person who has been sentenced in a criminal proceedings for the same type of violation, will face aggravation as to their responsibility, although among the published sentences regarding dual-use smuggling crimes there cannot be found any relevant example.

2. EXTERNAL SANCTIONS

2.1. The incorporation of International Organisations Acts into Spanish Law

The incorporation of binding resolutions adopted by international organisations into domestic Law is not expressly regulated by the Spanish Constitution.[196] There are no constitutional or legal norms contemplating such general issue, although it is clear that due to their international legal status, all binding resolutions from intergovernmental organisations enjoy primacy over any previous or subsequent domestic laws. Hence, the same articles that are valid for the introduction of International Treaties into domestic Law will be applicable – by analogy – for the reception of acts and decisions of international organisations – taking into account their different legal nature.[197] This was confirmed by the doctrine of the Spanish Council of State (*Consejo de Estado*) through its statement that: "Resolutions adopted by International Organisations of which

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195 *Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal. BOE no. 281, de 24 de noviembre de 1995*, Article 345.

196 Casanovas, O. and Rodrigo, Á. J., *Compendio de Derecho Internacional Público*, Tecnos, Madrid, 2013, pp.140-141.

197 Díez de Velasco, M., *Instituciones de Derecho Internacional Público*, Madrid, Tecnos, 2013, pp. 261-267.

Spain is a member are assimilated to Treaties concluded by Spain. Thus, such resolutions are automatically incorporated into domestic Law once they have been approved in the international arena and published in the BOE (Official Gazette – *Boletín Oficial del Estado*)".[198] Nevertheless, if an act has been already approved by the competent organisations, the requirement of the official publishing may be substituted by the development of internal legislation regulating that precise act.

Implementation by the national authorities depends on the direct or non-directy applicability of the provisions. In the latter case, non self-executing provisions are implemented through the promulgation of specific norms.[199]

In cases where resolutions adopted by international organisations to be introduced in Spanish Law that are considered to have a direct influence on the rights of citizens, specific disposition may have to be adopted, in the form of a Ministerial Order.[200] A relevant example is the introduction of UNSCR 661 in 1990 with regard to the commercial restrictions imposed against Iraq. Implementation of this Resolution was through a special order of the Ministry for Industry, Trade and Tourism.[201]

The appropriate legal instrument to implement the international rules depends on the relevant internal regulation. The competent body to adopt such an act depends on the internal distribution of powers – between State and Autonomous Communities. Regarding dual-use trade control resolutions, however, Autonomous

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198 *Dictamen 984/93/927/93, de 9 de septiembre de 1993, del Pleno del Consejo de Estado relativo a la introducción en el derecho interno español de la resolución 827 (1993) del Consejo de Seguridad de las Naciones Unidas por la que se crea un Tribunal Penal para el castigo de los crímenes internacionales perpetrados en la antigua Yugoslavia en Casos.*

199 Like it happened with UNSCR 827 (1993) establishing an International Criminal Tribunal for the Former Yugoslavia, which was implemented through Organic Law 15/1994, of the 1st of June.

200 Pastor Ridruejo, J. A. *Curso de Derecho Internacional Público y Organizaciones Internacionales*, Madrid, Tecnos, 2010, p. 180.

201 *Orden Ministerial de 31 de mayo de 1991 por la que se modifica el régimen comercial de intercambios con Irak. Ministerio de Industria, Comercio y Turismo. BOE no. 133, 4 de junio de 1991.*

Communities do not play any role. Relations between these resolutions and the Spanish Constitution are governed by the principle of consistency.

Regarding the reception of binding resolutions from the European Union, regulations and directives are part of the domestic legal system, as European rules. There is no need for any incorporation technique, since their institutional completion and publication in the Official Journal of the European Union are the only two conditions according to the founding Treaties (Article 297 TFEU).[202] European Law enjoys primacy over any previous or subsequent domestic laws. Such primacy has been acknowledged both by ordinary courts and by the Constitutional Court, not without certain doubts about the effects for internal rules. Their entry into force and effects also depend on the EU's own rules: regulations are directly applicable; the transposition of directives (i.e. law enforcement) may be within the competence of the State and/or of the Autonomous Communities – in accordance with the statutes of autonomy.[203]

In brief, decisions regarding international embargoes taken by the United Nations or the European Union, will be implemented by Spain through their official publication and – only in certain cases – through the adoption of a specific Law.

2.2. Specific steps taken by Spain to ensure that embargo decisions are observed

Once Spain has published the acts in the *Official Bulletin of the State* (BOE) or once it has adopted the corresponding Laws or Ministerial Orders, specific measures are taken to ensure the enforcement of WMD-related embargo decisions. Indeed, the above described control legislation is implemented by different levels of national authorities and all of them participate in making sure that embargos are respected and sensitive trade is controlled.

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202 Casanovas, O. and Rodrigo, Á. J., *Compendio de Derecho Internacional Público*, Tecnos, Madrid, 2013, pp.140-141.

203 *Tribunal Constitucional, Sentencia 252/1988, de 20 de diciembre de 1988.*

The Deputy DG of International Trade in Defence and Dual-Use Material – as discussed above – is competent to issue exporting licences for dual-use goods. Regarding exports to countries under embargoes, this body implements systematically the so called "catch-all clause" -under which an authorisation can be required for export of dual-use items that are not listed in the aforementioned Annex I of the Community Regulation.[204]

The Secretariat of State for Trade keeps all data concerning the authorised export operations. Data corresponding to the actually completed exports is available at the Department of Customs and Excise Duties of the National Tax Administration Agency -attached to the Ministry of Finance and Public Administration. Law 53/2007 aims at creating an interconnected system in which all units of the administration which are directly affected by foreign trade of dual-use goods could be involved in its control.[205]

In order to have updated databases on the suppliers and related companies, all external trade operators in defence and dual-use technologies must submit their complete information to the Special Register for such type of transfer (known as REOCE, for its Spanish acronym).[206] Operators also have the obligation to inform the Administration anytime they intend to export to a State which is under an international embargo. They are also obliged to notify the authorities of any subsequent change that may take place in the export conditions -quantities, quality of the goods, type of transport- after the permit has been issued. (Article 15.1 Royal Decree). Failure to comply with these obligations may also lead to the commitment of a smuggling crime or infraction.

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204 *Secretaría de Estado de Comercio, Ministerio de Economía y Competitivad. Estadísticas españolas de exportación de material de defenca, de otro material y de productos y tecnologías de doble uso, Año 2014. Gobierno de España.*

205 Muro Martínez, R., "Ley sobre el control del comercio exterior de material de defenca y de doble uso", in *Boletín Económico de ICE*, no. 2933, Madrid, Ministerio de Industria, Turismo y Comercio, 2008.

206 *Secretaría de Estado de Comercio, Ministerio de Economía y Competitividad. Guía del operador de materia de defenca, otro material y productos y tecnologías de doble uso. Gobierno de España.*

2.3. Case-Law of crimes and infractions by Spanish operators.

Spain's heavy industry is starting to obtain a reputation among countries interested in developing a nuclear industry.[207] Inspite of having strong competitors among other European countries which are specialised in the manufacture of machine-tools or bombs, Spain is considered to be at the forefront of the production of certain items like valves or electrical discharge machines (EDM). The last "Statistical Report on Spanish Exports of Defence Material, Other Material and Dual-Use Items and Technologies" – published in December 2015 – proves that the most exported category of dual-use goods in 2015 was the materials processing category – category 2. It also points out that the value of Spanish exports of dual-use goods has increased by 187,54% over the last decade.[208]

The destination of such exports – apart from clarifying the flows in trade partnerships – also sheds a light about the way in which Spanish authorities implement the control legislation when it comes to dual-use goods. USA has been the main destination of Spanish dual-use exports in recent years.[209] However, over the last decade, the other main recipients of dual-use shipments have been States under international embargoes – i.e. Iran, P.R. of China or Lybia. In such cases, all applications are analysed individually and the export of dual-use goods to these countries is the result of the application of the catch-all clause, which takes the international sanctions into consideration and avoids automatic denials. The interest of Spanish authorities in granting export licences in such

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207 Kern, S., "European Dual-Use Exports to Iran Continue Apace", Gatestone Institute, International Policy Council, April 2014.

208 In accordance with the Secretary of "State for Statistical Export Reports" – which can be found under www.comercio.es in 2005 Spanish exports of dual-use goods yielded 58,6 million euros. In 2014 Spanish exports of dual-use goods were valued at 168,5 million euros – the official annual results of 2015 have not been published yet.

209 It has been the number one destination of Spanish exports for five years, and it has occupied the top three in seven occasions over the last decade, in accordance with the "Secretary of State for Statistical Export Reports 2005-2015".

cases is obvious. The fact that several States under international embargoes are to be found among the main destinations of dual-use exports can be explained based on the importance of the dual-use sector for the Spanish economy. In times of crisis these powerful industries have boosted the exports of these goods to any demanding States. In any case, it appears that the interpretation of the catch-all clause allows broad discretion to exporting States.

The last Statistical Export Report also shows a sharp reduction in the number of dual-use items exported to Iran. These exports have decreased by 40% in only one year.[210] At the same time, some of the most recent prosecution cases against Spanish companies are connected to Iran. This could arise some questions about whether this decrease is at all connected with the dismantling of several smuggling operations.

In the past few years there have been a couple of cases – some of them still open – in which heavy-industry companies have been investigated and even sentenced for not respecting the embargoes established by the United Nations and the European Union. As an illustrative example, it is relevant to mention one of the most recent ones, in which the authorities detected a sudden decrease in the number of authorisation requests from a heavy industry company in northern Spain.[211]

The company Fluval Spain, S.L. had continued to produce the same number of machinery units but it had stopped asking for the usual number of export authorisations. Intrigued by the unexpected descent of requests, the authorities decided to investigate the company's behaviour. In January 2013, a truck on its way to the UAE with Iran as its final destination was intercepted at the Spanish boarder. The agents found it was carrying valves whose authorisation had not been required and that had been modified for purposes other than the usual, breaching not only the international embargo, but

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210 *Secretaría de Estado de Comercio, Ministerio de Economía y Competitivad. "Estadísticas españolas de exportación de material de defenca, de otro material y de productos y tecnologías de doble uso, Año 2015". Gobierno de España.*

211 This case is also known as "Operación Alfa" www.policia.es/prensa/20130111_2.html.

also the regular European regulations.[212] The value of those 44 alloy valves was 2,631,935 euros – prices in the black market reach much higher ranges than they do in the legal flow – and the result of such a violation was two years of prison for the two managers and an 8 million euros fine for the commitment of a smuggling crime.[213]

Only a few months afterwards, another Company – Ona Electroerosion, S.A.-, specialised in electrical discharge machining (EDM) was also convicted of smuggling dual-use goods to Iran. This time the purchase had been made through a Turkish enterprise which ended up being a front company located in a small Istanbul apartment in which it would be physically impossible to fit the seven machines that had been illegaly sold. Despite the previous denial of an authorisation to export such items to Iran, the Spanish company still intended to supply the machines to manufacture propellers for power plants that could be used in Iran's nuclear programme. Their purpose of using front companies located in Turkey for the triangulation of illegal purchases was prevented by the security forces through the so-called *Operación Kakum* in 2012.[214] The sentence – which was issued in June 2014 – declared the company guilty of a smuggling crime and it was condemned to a 1,841,176 euros fine and a prohibition to trade with Iran for 3 years.[215] The Company's manager avoided imprisonment – set as 16 months and 1 day – by paying a 48,900 euros fine instead.[216]

One of the cases which is currently in the pre-trial phase[217] is the so-called *Operación Terracota*. In the spring of 2014 Spain's

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212 The composition of the valves had at least 58% of nickel and between 20.0 and 23.0% of chromium. Anything that surpasses the 25% is illegal according to EU Regulation.

213 SJP 103/2015, Juzgado de lo Penal 1 de Bilbao de 4 de mayo de 2014. No. Resolución 134/2015. No. de Recurso 105/2015 de 4 de mayo de 2015.

214 *Gabinete de Prensa de la Agencia Tributaria, "La Agencia Tributaria desmantela una trama de contrabando de maquinaria destinada al programa nuclear de Irán", Notas de Prensa, Agencia Tributaria*, 26th November 2012.

215 SJP 138/2014, Juzgado de lo Penal 4 de Bilbao. No. Resolución 192/2014. No. de Recurso 181/2014 de 4 de junio de 2014.

216 This is the total amount of a 50 euros/day fine for a 32 months and 2 days period.

217 *Juzgado de Instrucción no. 6 de Tarragona.*

Guardia Civil dismantled a network of three Spanish nationals and an Iranian who were attempting to export industrial machines to Iran. Those two machines – which could be used to process enriching uranium and to manufacture missile cases –,[218] had been illegaly entered in Spain from the UK. The British company and the Spanish-Iranian network were aware – or should have been aware – of the fact that such items are covered by the NSG and MTCR control lists. For that reason they might have been waiting for the most appropriate moment to smuggle them without an authorisation that they would surely not be granted. The agents have so far confiscated the goods, plenty of documents and computer files regarding export operations, and 10,000 euros of cash – in both Iranian rials and euros. The detainees are likely to be charged with crimes of smuggling dual-use goods, belonging to a criminal organisation and money laundering.[219]

3. FINAL CONSIDERATIONS

As we have explained, Spain's domestic legislation incorporates and develops all international legal obligations and commitments regarding export controls of dual-use goods. This leads to major policy reforms and even – in some cases – to the adoption of rules at the highest level of the internal regulatory pyramid. This positive assessment, however, does not prevent us from noticing the existence of certain dysfunctionalities.

On one hand, this internal policy development remains dependent on the original parameters used by the Spanish legislation to address smuggling crimes or infractions as a general

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218 Components listed under Annex IV of the Council regulation (EC) no. 428/2009 of May 5 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.

219 *Gabinete de Prensa Guardia Civil, "Desarticulada una red que pretendía enviar a Irán equipos Industriales susceptibles de ser empleades para fabricar misiles", Notas de Prensa, Guardia Civil,* 7 July 2014.

phenomenon. This explains the use of a quantitative approach in order to distinguish the application of the administrative sanctions from the criminal penalties system.

On the other hand, the fact of maintaining independently the category of criminal possession, processing, use, transport, etc. of hazardous nuclear and radioactive materials (Article 345 Criminal Code) does not seem consistent with the unitary approach – i.e. nuclear, biological and chemical items – as the defined at the international level.

According to international guidelines and regulations, sanctions have to be "effective, proportional and dissuassive". In the Spanish framework it would be desirable – or, at least, worth considering to establish a sanctioning system especially designed for dual-use legislation infringements. Having a specific regime other than the Anti-smuggling act would facilitate the effectiveness and – probably – would discourage dual-use goods companies more directly. Nevertheless, within the Spanish criminal penalties framework, the penalties and prosecutions established in the current legislation can be qualified as efficient and proportionate. Heavy fines have proved to be very dissuasive. Since economic sanctions may reach six times the value of the smuggled items, not many companies decide to take such risks. The issue of reputation is a further matter to take into account while valuing the effect of prosecution measures. Spanish companies considered to be leading industries in their field are very concerned with their public image. Being sentenced – or even just investigated – may cause them important economic losses not directly linked to an economic judicial fine.

While coordination among the different State agencies has proved to be efficient in terms of detection and interruption of undergoing illegal tranfers, it seems that there is room for improvement in terms of prevention. The lack of balance between the increasing importance of Spanish dual-use goods exports and the still scarce police and judicial operations on the matter, suggests that dual-use trade controls do not yet constitute the principal issue of interest for anti-smuggling agents and customs authorities -inspite

of implementing the international obligations at a domestic level and admitting that there is a certain tendency that seems to take such controls more into account.

The full incorporation by States of all challenges linked to the prosecution and sanctioning of transnational illicit behaviour is undoubtedly a slow and progressive work that requires States to adapt – or even transform – their internal systems. To that effect, participation in international *fora* and organisations can be a decisive impulse. In fact, Spain has already had the opportunity to do so since it was appointed Chair of the committees set up under resolutions 1718 (on Democratic People's Republic of Korea's sanctions) or 1737 (on the Islamic Republic of Iran). Spain, who has until now presided over the Iran Sanctions Committee of the United Nations will now – that the sanctions have been lifted – work as a UNSC "facilitator" of the new functions of Resolution 2231 towards the implementation and compliance of the "Iranian nuclear deal".[220] Hopefully, having this prominent role is a good opportunity to raise awareness and to place the issue as an even more urgent priority for national security.[221]

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220 *Misión Permanente de España ante las NNUU,* "España en el Consejo de Seguridad de NNUU: Balance de 2015 y prioridades para 2016", *Ministerio Asuntos Exteriores y Cooperación, Nueva York, 2016.*

221 This wish has been stated by Spanish Authorities: Ministerio de Asuntos Exteriores y de Cooperación, "Aplicación del acuerdo nuclear con Irán", *Comunicado 014, 17th January 2016;* "Programa. España 2015-2016: Miembro no Permanente del Consejo de Seguirdad de las NNUU", *Oficina de Información Diplomática, Gobierno de España,* January 2015.

Chapter
09

The UK's enforcement of dual-use export controls

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1. INTRODUCTION

The United Kingdom has one of the longest standing export control systems in the world, with its origins dating back to at least the Second World War. This system has evolved over time – particularly after the end of the Cold War, the adoption of EU regulations, and the adoption of UNSC Resolution 1540.[222] The UK's long history with export controls and its advanced manufacturing base likely means that the country has among the greatest experience in enforcing export controls on dual-use items.

The purpose of this chapter is to examine the UK's enforcement of dual-use export controls. The chapter begins by providing a brief history of the UK's development of dual-use export controls. This includes examining the origins and history of UK export controls, how these measures transitioned to become an instrument of the Cold War, and the important events that shaped the modern enforcement environment, such as the Scott Inquiry into the sale of dual-use and military goods to Iraq. The infrastructure that was created to ensure that this Supergun scenario not be repeated is also examined. More recent enforcement practices are also examined. Finally, some current challenges in the enforcement landscape are set out.

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222 UNSCR 1540 creates legally binding obligations for Member States to enforce measures against the proliferation of WMD using controls. UN Security Council "UNSCR 1540", Available at http://www.ipu.org/splz-e/civ1540/1540.pdf accessed 21 March 2016.

2. BRIEF CHRONOLOGICAL HISTORY OF ENFORCEMENT OF EXPORT CONTROLS IN THE UK

The UK has continuously applied strategic trade controls in some form since 1939 when, at the outset of the Second World War, the "Trading with the Enemy Act" and "Import, Export and Customs Powers (Defence) Act" were quickly passed through Parliament and into law.[223, 224,225] This legislation served to prohibit "any commercial, financial or other intercourse with, or for the benefit of, an enemy or a person acting on behalf of an enemy".[226] The laws amounted to a blanket ban on economic interaction between the UK and those states with which it was at war. It should be noted that this was not the first attempt to control the movement of goods between the UK and its adversaries; for example a trading with the enemy act was passed at the beginning of the First World War, but was allowed to expire in the mid-1930s. Rather, the acts passed in 1939, mark the start of an unbroken period of controls over the trade in strategic goods that has lasted until the present day.

Indeed, the end of WWII did not bring an end to the perceived need for restrictions on trade. The rivalry between East and West brought with it a fresh imperative to control trade, and the controls that emerged during the Cold War were more focused than previous efforts. They were political instruments in and of themselves, designed to deprive the Eastern Bloc of specific capabilities and technologies. A key feature of the Cold War export

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223 "Trading with the Enemy Act 1939" available at http://www.legislation.gov.uk/ukpga/Geo6/2-3/89/enacted accessed 21 March 2016.

224 Measures to restrict trade between Britain and other nations had been put in place previously. For example during WW1. The underpinning legislation was eventually repealed.

225 "Import, Export and Customs Powers (Defence) Act", Chapter 69. Available at: http://www.legislation.gov.uk/ukpga/1939/69/pdfs/ukpga_19390069_en.pdf accessed 21 March 2016.

226 "Trading with the Enemy Act 1939", Chapter 89. Available at: http://www.legislation.gov.uk/ukpga/Geo6/2-3/89/enacted accessed 21 March 2016.

control landscape was The Coordinating Committee for Multilateral Export Controls (COCOM). COCOM was an informal multilateral organisation set up in 1947 which aimed to coordinate the national controls applied over the export of strategic technology and materials to communist states.[227] Unlike WWII era blanket trade bans, COCOM maintained several lists containing specific technologies. The aim of these lists was to allow trade to continue between East and West, whilst maintaining control over technologies that could be used to develop nuclear and conventional forces. This more targeted approach was in recognition that prohibiting all trade would harm economic growth in the west at the same time as harming the Soviet Bloc.

The next major development in the strategic export control landscape came in May 1974 when India conducted its first nuclear bomb test. Codenamed "Smiling Buddha," the Indian government claimed the test was a 'peaceful nuclear explosion'.[228] Despite its placid moniker, the test caused a great deal of concern internationally and highlighted how certain non-weapons specific nuclear technology could easily be used for the purposes of weapons development. It became apparent that further limits on the exports of nuclear equipment and technology were required. In response to the implications of the Indian nuclear test, the Nuclear Suppliers Group (NSG) was set up in 1975. Through meetings hosted by the UK, a "Trigger List" was created that placed controls on certain nuclear related technologies, essentially restricting such exports to those states that had specific safeguards in place with the International Atomic Energy Agency. In 1991, after the revelations of Iraqi weapons programmes, a "dual-use list" was drawn up in order to further

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227 Office of Technology Assessment. Chapter 8, Multilateral Export Control Policy: The Coordinating Committee (CoCom) in "Technology and East-West Trade". (November 1979). Available at https://www.princeton.edu/~ota/disk3/1979/7918/791810.PDF accessed 21 March 2016.

228 Nuclear Weapon Archive. "India's Nuclear Weapons Program" available from http://nuclearweaponarchive.org/India/IndiaSmiling.html accessed 21 March 2016.

tighten access to equipment that had scope to be used in a nuclear weapons programme but which also had established non-nuclear industrial uses.

In the 1980s the UK continued to play a leading role in further developing the global trade control landscape. The extensive use of chemical weapons by Iraq during the Iran-Iraq war in the 1980s – with certain precursor chemicals and chemical manufacturing equipment having been sold legally from the UK - served to highlight the necessity for states to better identify, and subsequently control, exports which would facilitate the development of chemical and biological weapons. The Australia Group, with its lists of controlled chemical and biological related goods, was subsequently established in 1985 in order to aid governments in the effective control of such technologies. The 1980s also saw the establishment of The Missile Technology Control Regime (MTCR). Set up in 1987, the MTCR sought to further respond to increased WMD proliferation through the enactment of controls on un-manned delivery systems and their means of production.

By the 1990s the Cold War had ended and so too had the need to enforce embargos on the Soviet states.[229] Indeed, COCOM had little relevance in the post-Cold War world. An arrangement that did not have an East vs West focus and allowed for the inclusion of former COMECON states was required. The Wassenaar Arrangement was established in July 1996 to fill this role, and deal with regional and international risks relating to the spread of conventional weapons and dual-use technology. Several former Soviet states were among its founding members.[230]

The 1990s also saw important domestic developments within the UK's export control framework. Following the end of the

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229 COMECON, the Council for Mutual Economic Assistance (CMEA), was established in 1949 to facilitate economic development in the Eastern European countries that comprised the Soviet bloc. Oxford Public International Law "Council for Mutual Economic Assistance" available at http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e606 accessed 21 March 2016.

230 Wassenaar Arrangement. "About Us", available from http://www.wassenaar.org/about-us/ accessed 21 March 2016.

Gulf War, questions were asked about the involvement of British companies in the supply of weapons and dual-use equipment to Saddam Hussein's regime. In 1992 the directors of the Coventry-based machine tool manufacturer Matrix Churchill, were put on trial for supplying the Iraqi regime with equipment and knowledge. However the trial collapsed when it was revealed that the company had been advised by government officials on how best to sell arms to Iraq. Government officials had also failed to identify the true end use of massive highly machined tubes being sought by Iraq from the UK: in the construction of the barrel for Saddam's so-called Supergun that could fire satellites into orbit (or nuclear weapons a very long way indeed). This scandal, referred to as the "Arms to Iraq Affair," culminated in the 1996 publication of The "Report of the enquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions", commonly referred to as the Scott Report.[231] One of the primary findings was the inadequacy of the existing legislation covering export controls, and lack of transparency. For example, the Import, Export and Customs Powers (Defence) Act 1939, allowed the government to issue regulations relating to the control of the export of particular goods to particular countries without first presenting them before Parliament. This Act was emergency legislation and should have lapsed in 1945, yet it remained, even being included as part of the Import and Export Control Act (1990).

Another important outcome of the Scott Report was to formalise the use of intelligence in support of export licencing and enforcement in the UK. This reinforced the importance of the 'Restricted Enforcement Unit' as a forum to coordinate UK enforcement actions in the UK and elsewhere.[232] This forum involves several relevant government departments, including the Foreign and

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231 "The Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions" Chapter 2.67. Available from http://www.iraqwatch.org/government/UK/Scott%20Report/Scott-TOC.htm accessed 21 March 2015.

232 *Ibid.*

Commonwealth Office, the Ministry of Defence, HM Revenue and Customs and the intelligence agencies.[233] This forum is a key focal point for interagency cooperation on enforcement action in the UK and continued to operate at least until one of the authors left government in 2010.

The UK's implementation of export controls began to shift for broader political reasons after this point. The UK, as a member of the EU, became bound by the European Council regulation 1334/2000 export controls were made a competence of the European Union under Article 30 of the Treaty establishing the European Community in June 2000.[234] As with other EU member states, the UK continued to be responsible for implementation of the regulation, however, meaning that the country would leverage its long experience in implementing non-proliferation measures to put the new EU regulation into effect.

A final important evolution of the implementation of export controls in the UK resulted from the adoption of Security Council resolutions. Of particular note was Security Council Resolution 1540 in 2004 which resulted in an expansion of controls to transit, transhipment and brokering activities. However, Security Council sanctions resolutions would also have an important effect on the UK's enforcement landscape as the trade-related provisions in these resolutions are generally implemented using the same apparatus that is used to implement export controls in the UK.

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233 Commons Debates - Previous sessions, "Trade and Industry" available from http://www.publications.parliament.uk/pa/cm199798/cmhansrd/vo980604/text/80604w07.htm accessed 21 March 2016.

234 Council of the European Union. "COUNCIL REGULATION (EC) no. 1334/2000" Available from http://www.sussex.ac.uk/Units/spru/hsp/documents/2000-0622%201334-2000.pdf accessed 21 March 2016.

3. THE CURRENT EXPORT CONTROL LANDSCAPE

There are several main components of the present UK export control system. The main legal basis for controls on the export of dual-use goods in the UK is the EU Dual-Use Regulation (also known as Council regulation No 428/2009), which is applicable to all EU countries. The EU issued legislation to control exports of dual-use items and technology in 2000 (through EC Regulation 1334/2000) with the regulation being re-issued in 2009. The regulation "sets out the scope, authorisations (including brokering), control measures, customs procedures and other measures concerning the control of dual-use goods across the EU."[235] Subsequently, UK enforcement of dual-use export controls finds its legislative foundation in The Export Control Act (2002). The Act provides a consolidated framework of controls, which largely served to replace the existing system of secondary legislation and executive discretion.[236] It provides guidance on how export controls can be imposed, when they can be imposed and who may impose them, within the UK. The Act enshrines the authority of the Secretary of State to impose export or trade controls in relation to any goods whose export, acquisition, disposal, movement or use could lead directly or indirectly to any provisions on a list of "relevant consequences."[237] Importantly, it also includes clauses for activities that could be associated with the illegal export of controlled goods, placing controls on trafficking and brokering, as well as on the provision of 'technical assistance'.[238] Another significant aspect of

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235 Department for Business, Innovation & Skills, "Controls on dual-use goods" Available from https://www.gov.uk/guidance/controls-on-dual-use-goods accessed 21 March 2016.

236 Joyner, D., "Non-proliferation Export Controls: Origins, Challenges, and Proposals for Strengthening" (Ashgate: Farnham, 2006), p. 142.

237 Export Controls Act 2002. Available from http://www.legislation.gov.uk/ukpga/2002/28/contents accessed 21 March 2016.

238 Export Control Act 2002, Section 3. Available from: http://www.legislation.gov.uk/ukpga/2002/28/section/3 accessed 21 March 2016.

this legislation allows controls to be imposed on acts undertaken outside the UK if they are carried out by a person who is or is acting under the control of a UK national.[239] The Customs and Excise Management Act (1979) serves to consolidate and codify the main customs powers of HMRC, the government department with the main responsibility for the enforcement of UK export control laws. Other legislation relevant to the UK enforcement of dual-use export controls include: The Terrorism Act (2000), Anti-Terrorism, Crime and Security Act (2001), Export of Goods, Transfer of Technology and Provision of Technical Assistance Order (2003), and the Trade in Goods Control Order (2003).

The list of dual-use items controlled by the UK is mostly drawn from EU legislation and their associated control lists. EU control lists in turn incorporate the guidance and control lists from the four multilateral export control regimes: the Australia Group (AG), The Missile Technology Control Regime (MTCR), The Nuclear Suppliers Group (NSG), and the Wassenaar Arrangement (WA). The UK has opted to add controls on certain "paramilitary" items as a result of its experience of Northern Ireland-related terrorism in the past.[240] All of the UK's control lists are published collectively as part of the UK Strategic Export Control Lists: Consolidated List of Military and Dual-Use Items.[241] Importantly, if a specific good is not listed on the control lists, it may still be subject to 'end-use' controls, and therefore require a licence in order to export. In keeping with the requirements of Resolution 1540, and building on the catchall concept developed by the UK, the British Government also has the

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239 Export Control Act 2002, Section 11. Available from: http://www.legislation.gov.uk/ukpga/2002/28/section/11 accessed 21 March 2016.

240 Export control Organisation. "Guidance on export of technology" Available from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/15203/Export_of_technology_Guidance_-_URN_10-660_-_new_logo_-_2012.pdf accessed 21 March 2016.

241 Department for Business, Innovation & Skills. "Consolidated list of strategic military and dual-use items that require export authorisation" Available at: https://www.gov.uk/government/publications/uk-strategic-export-control-lists-the-consolidated-list-of-strategic-military-and-dual-use-items-that-require-export-authorisation accessed 21 March 2016.

power to make non-listed goods subject to control. These so-called 'end use controls' apply to goods where there is a concern that the end-use may be in a WMD programme.[242]

The Export Control Organisation (ECO) is responsible for the issuing of licences for the export of goods included in the UK Strategic Export Control Lists. It monitors and enforces exporters' compliance with export controls through visits to exporters and audits of their business.[243] The primary organisation involved in the enforcement of UK strategic export controls is HM Revenue and Customs (HMRC). The police – and indeed the National Crime Agency - could become involved in export control issues, although, at least at the time of writing, this was not generally the case. The agency that first detects a suspected offence is the one responsible for its investigation. Although, most offences are detected by customs officers at the border, or during trade audits, both of which are carried out by HMRC.[244] HMRC fields a staff of customs officers posted at sea and air ports that see high freight traffic volumes. Export violations investigated by HMRC are then prosecuted by an independent entity, the Revenue and Customs Prosecution Office (RCPO). The RCPO was set up in 2005 in order to separate the investigation and prosecution functions for customs offences, which had previously been handled by customs service prosecutors. This relationship mirrors that of the Crown Prosecution Service (CPS) and the Police.

Under the Customs and Excise Management Act, breaches of export controls fall into two categories. Strict Liability Offences are

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242 Department for Business, Innovation & Skills and Export Control Organization. "Weapons of mass destruction: end-use control" Available from: https://www.gov.uk/guidance/weapons-of-mass-destruction-wmd-end-use-control accessed 21 March 2016.

243 Department for Business, Innovation & Skills. "Compliance and enforcement of export controls" (2012, September 6). Available at: https://www.gov.uk/guidance/compliance-checks-and-enforcement-of-export-controls-on-strategic-goods-and-technology accessed 6 April 2016.

244 Wetter, Anna. "Enforcing European Union Law on Exports of Dual-use Goods", SIPRI Research Report, no. 24 (2009). Available from: http://books.sipri.org/files/RR/SIPRIRR24.pdf accessed 21 March 2016.

offences that, regardless of the knowledge or intent of the exporter, lead to punishment. These types of offences therefore include acts of negligence, where an exporter may have been unaware that the goods being exported required a licence.[245] Punishment for this type of offence include: the seizure of goods, financial penalties up to three times the value of the goods exported (or attempted export), and if knowledge of a WMD end-use is proven, up to two years in prison.[246] Less serious cases could result in traders having to pay a compound penalty, which is a means by which HMRC can offer the exporter the chance to settle a case that would have justified being referred to the RCPO or CPS. This is offered in order to save the taxpayer and company time and legal fees.[247] The British government has been careful to establish that compounding should not be viewed as a light option. There is no maximum compound penalty limit. The largest compound penalty imposed for an export control related offence was for 575,000 British pounds in 2009.[248] Cases in which it has been proven that the exporter has deliberately attempted to circumvent export controls can result in more stringent penalties. Sanctions for this type of offence can involve prison sentences up to 10 years and unlimited fines.[249] Similar penalties can be imposed for acts relating to export control breaches, such as brokering and trafficking.

Perhaps the main practical tool for enforcement of export controls in the UK is the Customs system, Customs Handling of

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245 *Ibid*.

246 Croner-I, "Export licencing controls: not just military equipment". Available from https://app.croner.co.uk/feature-articles/export-licencing-controls-not-just-military-equipment?product=32 accessed 21 March 2016.

247 Department for Business, Innovation & Skills. "Compounding penalty cases." (2012, June 6).. Available from http://blogs.bis.gov.uk/exportcontrol/prosecution/compound-penalty-cases/ accessed 21 March 2016.

248 *Ibid*.

249 Croner-i. "Export licencing controls: not just military equipment", https://app.croner.co.uk/feature-articles/export-licencing-controls-not-just-military-equipment?product=32 accessed 21 March 2016.

Import and Export Freight (CHIEF). It is through this system that exporters declare their exports to customs. Exporters are required to link any associated licences with the export declaration.

Customs authorities are able to utilise information from the CHIEF system for purposes of risk profiling.[250] Risk profiling in the customs context is "a practical means of replacing random examination of documents and consignments with a planned and targeted working method, making maximum use of customs resources".[251] Factors that could be taken into account when conducting risk profiling could include whether a licence has been declared in relation to an export (or otherwise), whether the recipient or any other party is known to be of concern, and whether the destination is subject to sanctions or other restrictions. Customs can also create 'risk profiles' in response to either specific intelligence or targeted campaigns intended to identify specific types of shipment of possible concern.[252]

Another important enforcement tool relates to audits. In the UK, both HMRC and the Export Control Organisation can undertake audits of companies to ensure compliance with export control requirements.[253] Such audits routinely identify cases of non-compliance where, for example, the paperwork associated with an export is incomplete or incorrectly completed. However, audits might also be undertaken in more serious cases, including where it is believed that a company is involved in problematic transactions. Audits also provide an opportunity to ensure that companies are compliant

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250 HM revenue and Customs. "Customs Handling of Import and Export Freight: the processing system of trader declarations", Available from https://www.gov.uk/guidance/chief-trader-import-and-export-processing-system accessed 21 March 2016.

251 HM Revenue and Customs "INCHP08050 - Risk analysis: Part 1: risk analysis in Customs control", available from http://www.hmrc.gov.uk/manuals/inchpmanual/inchp08050.htm accessed 21 March 2016.

252 *Ibid*.

253 Department for Business Innovation and Skills "Compliance and Enforcement of Export Controls" available from https://www.gov.uk/guidance/compliance-checks-and-enforcement-of-export-controls-on-strategic-goods-and-technology accessed 21 March 2016.

with requirements to control intangibles, including with regards to technology. Customs officials typically would have no other way of ensuring compliance in this area as the "intangibles" are typically not detectable when they cross the border.

4. RECENT ENFORCEMENT ACTIONS

Typically, the UK undertakes a few hundred enforcement actions each year.[254] The majority of these are for violations that were non-deliberate in nature and the majority of cases are dealt with through an administrative penalty such as a warning letter. The most common issue, present in around 45% of instances of non-compliance, is incomplete or missing documentation. Other particularly common errors involve sanctioned or embargoed destination countries or goods which require a licence (found in 20 percent and 10% of instances respectively).[255] Cases deemed more serious – either because the exporter was aware of controls or because the export was seen to do harm by, for example, being destined for Iran – have been dealt with either through 'compound penalty' or prosecution. Prosecution is taken only in the most egregious of cases as there is a requirement for the prosecution authority to demonstrate that the prosecution is 'in the public interest'. A part of this determination relates to the harm done and the cost involved in pursuing the case. Cases that end in prosecution usually therefore involve either wilful and deliberate effort to evade controls or a repeat offence. Often it also involves destinations such as Iran. Several recent cases are examined below.

4.1. Delta Pacific Manufacturing

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254 Information relating to penalties and prosecutions from 2009-2013 provided to the Authors by HMRC.

255 "United Kingdom Strategic Export Controls Annual Report 2014", Available from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/446050/Strategic_Exports_AR14_tagged.pdf accessed 16th February 2016.

During an investigation conducted by HMRC into a Cambridgeshire-based Company called 'Delta Pacific Manufacturing' it was found that the company director, Gary Summerskill, had attempted to conceal the illegal export of alloy valves to Iran, making three illegal shipments, valued at 3.4 million British pounds, without an export licence. Six types of valves were exported by DPM Ltd, four of which were controlled. Summerskill attempted to circumvent the export ban by diverting the components through Hong Kong. Hong Kong customs authorities discovered the shipment who then alerted HMRC. A second shipment was routed through Azerbaijan, and used a different company name. Both shipments were to go on to an offshore oil company in Iran.[256] HMRC investigators found evidence that Summerskill was fully aware that the final destination of the goods was Iran and that they were subject to an export ban. It is clear too, that Summerskill had knowledge of the export licencing system as well as the sensitivity of the valves which his company dealt in, and therefore knew that he was acting illegally.[257] Summerskill pleaded guilty to 3 counts of exporting controlled goods contrary to section 68 (2) of the Customs and Excise Management Act 1979. He was sentenced on 14 March 2014 at the Central Criminal Court to 30 months in prison.[258] He was also ordered to pay 68,000 British pounds personally within 6 months of his conviction or serve a further 15 months in jail. Delta Pacific Manufacturing Ltd was charged with three counts of exporting or shipping as stores alloy valves from the United Kingdom, with intent to evade the prohibition or restriction in

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256 Department of Business, Innovation & Skills "Notice to exporters 2014/29: Illegal exporter to pay criminal profit." (2014, November 26). Available from http://blogs.bis.gov.uk/exportcontrol/uncategorized/notice-to-exporters-201429-illegal-exporter-ordered-to-repay-criminal-profit/ accessed 21 March 2016.

257 Iran Watch. "Illegal Exporter Ordered to Repay Criminal Profit", available from http://www.iranwatch.org/library/governments/united-kingdom/hm-revenue-customs/illegal-exporter-ordered-repay-criminal-profit accessed 21 March 2016.

258 Illegal exporter ordered to pay criminal profit [Press Release], HM Revenue & Customs. Available from http://www.mynewsdesk.com/uk/hm-revenue-customs-hmrc/pressreleases/illegal-exporter-ordered-to-repay-criminal-profit-1087729 accessed 21 March 2016.

force with respect to these goods by virtue of EC Regulation No 428/2009 Article 4. Fines totaling 1,072,000 British pounds were imposed on the company.[259]

4.2. NDT Mart

Another enforcement action, this time involving the export of radiation testing equipment, centres around Philip Bisgrove who was the owner of NDT Mart, a company which deals in non-destructive testing equipment. Bisgrove was jailed for eight months and fined 30,000 British pounds in October 2010, after pleading guilty to exporting controlled radiation testing equipment to Iran without a licence. Between 2007 and 2008, Bisgrove made 10 shipments of dosimeters and doserate meters, and three shipments of MY-2 electromagnets to Iranian Company Sakht Afzar Farayand Eng Co (SAFCO), as well as routing a consignment of equipment through Taiwan.[260] Dosimeters measure an individual or object's exposure to ionizing radiation and can be used in both medical and industrial processes. HMRC officers conducted a search of Bisgrove's home, taking emails, invoices and other documents as evidence. These documents revealed that Bisgrove was eminently aware of the necessity for a licence to export. Indeed, emails between Bisgrove and his contact at SAFCO, Peyman Rostami, showed that he had even discussed shipping goods through Dubai, Malaysia and China in order to avoid export controls.[261] In an attempt to conceal his activities, he paid a third company to ship and receive

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259 HM Revenue & Customs. "Illegal exporter ordered to pay criminal profit [Press Release]", Available from http://www.mynewsdesk.com/uk/hm-revenue-customs-hmrc/pressreleases/illegal-exporter-ordered-to-repay-criminal-profit-1087729 accessed 21 March 2016.

260 Iran Watch. "Philip Bisgrove." See http://www.iranwatch.org/suppliers/phillip-bisgrove accessed 21 March 2016.

261 HM Revenue & Customs "Businessman jailed for selling radiation detection equipment to Iran [Press Release]", (National) (2010). Available from http://www.mynewsdesk.com/uk/pressreleases/hm-revenue-customs-national-hm-revenue-customs-national-businessman-jailed-for-selling-radiation-detection-equipment-to-iran-498351 accessed 21 March 2016.

goods on behalf of NDT Mart.[262] Bisgrove initially tried to mislead the HMRC interviewers, and claimed he was not aware that the equipment required an export licence. However, when presented with evidence gathered by HMRC investigators, particularly his correspondence with SAFCO, he admitted knowing that a licence was required for the exports to be legal.[263]

4.3. Medrdad Salashoor

British businessman Mehrdad Salashoor was jailed for 18 months in March 2008 after admitting to exporting high-tech navigation equipment to Iran illegally. Salashoor exported gyrocompasses, which despite being designed as self-contained maritime navigation systems, contain accelerometers and gyros of adaptable for use in missile guidance systems, and are therefore classified as dual-use goods. The total value of the shipments was around 650,000 British pounds. In May 2006 Salashoor submitted an export licence enquiry relating to the export of eleven gyrocompass devices to Azerbaijan. He was informed that the export would indeed require a licence. Salashoor did not to apply for an export licence however, and instead diverted the goods to Malta, with instructions for onward-shipment to a company in Iran that was later found to be the Iranian Ministry of Defence. The export was blocked by the Maltese government, and the eleven devices were returned to the UK.[264] Salashoor subsequently attempted to find a new customer for the devices in Norway. Two of the devices were sent to Norway, supposedly to be fitted to two ships berthed in Oslo. Investigators discovered however that the ships did not exist and

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262 "Businessman jailed over radiation meter deal with Iran." *The Visitor.* Available from http://www.thevisitor.co.uk/news/local/businessman-jailed-over-radiation-meter-deal-with-iran-1-2161037 accessed 21 March 2016.

263 "Jail for boss who broke the rules." *The Business Desk.* Available from http://www.thebusinessdesk.com/northwest/news/78209-jail-for-boss-who-broke-export-rules.html# accessed 21 March 2016.

264 Department for Business, Innovation & Skills. "UK Businessman jailed for Iran missile guidance exports." Available from http://blogs.bis.gov.uk/exportcontrol/prosecution/uk-businessman-jailed-for-iran-missile-guidance-exports/ accessed 21 March 2016.

the goods were covertly diverted to Iran from Norway.[265] When HMRC Investigators visited Salashoor he provided them with a disc containing copies of email correspondence and contracts with an "Azeri Shipping Company". The contents of the disk presented an account that made Salashoor appear to have been misled by a series of middle men and front companies. The email records also suggest that Salashoor, on discovering about the Iranian element of the deal, attempted to prevent the devices from leaving Malta. HMRC investigators uncovered evidence from the disc that showed the documents were a cover story fabricated by Salashoor as part of an attempt to conceal his activities. Following his arrest, Salashoor was interviewed, and his computers and business records further analysed. This investigation revealed further illegal exports and revealed orders from the Iranian Air Force and the Iranian Ministry of Defence. Salashoor pleaded guilty to four offences of "Being knowingly concerned in the exportation of goods contrary to the Customs and Excise Management Act 1979," He also pleaded guilty to one count of perverting the course of public justice and three further counts relating to other illegal exports discovered as a result of his investigation.[266] He was ordered to pay a 432,970 British pounds confiscation order under the Proceeds of Crime Act (2002). He was ordered to pay that sum within 6 months or face a 3 year prison sentence by default.

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265 "British dealers supply arms to Iran." *The Guardian.* Available from http://www.theguardian.com/world/2008/apr/20/armstrade.iran accessed 21 March 2016.

266 Department for Business, Innovation & Skills. "UK Businessman jailed for Iran missile guidance exports." Available from http://blogs.bis.gov.uk/exportcontrol/prosecution/uk-businessman-jailed-for-iran-missile-guidance-exports/ accessed 21 March 2016.

5. RECENT CHALLENGES IN ENFORCEMENT OF EXPORT CONTROLS IN THE UK

There are of course numerous challenges to the effective enforcement of export controls in the UK and internationally. Some of these are technical, and some more abstract. All are compounded by a general reduction in government expenditure, which has resulted in a cutback in the number of staff working on export control-related issues in government.[267] The following section details several broadly applicable challenges to export control enforcement, including those posed by emerging technologies such as cloud computing, as well as issues relating to the engagement of stakeholders in academia.

5.1. Outreach and Awareness Raising

A key challenge to enforcement of export controls in the UK – as in many countries – relates to outreach and awareness raising. The UK Export Control Organisation has maintained an active outreach programme for many years.[268] This is complemented by activities of other government departments, including HMRC and the FCO.[269] However, there is a concern that this outreach is not resulting in a sufficiently broad awareness of export control issues – particularly among small and medium sized enterprises. The British government has taken measures in recent years to expand outreach – including by launching an annual "export control symposium".[270] The UK also undertakes targeted outreach, often in

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267 Wheeler, Brian. "Spending Review: Department-by-department cuts guide" available from http://www.bbc.co.uk/news/uk-politics-34790102 accessed 21 March 2016.

268 UK Government. "Quadripartite Select Committee First Report" available from http://www.publications.parliament.uk/pa/cm200506/cmselect/cmquad/873/87307.htm accessed 21 March 2016.

269 "UK Strategic Export Controls Annual Report 2014" available from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/446050/Strategic_Exports_AR14_tagged.pdf accessed 21 March 2016.

270 UK Government. "invitation: Export Control Symposium 2015" available from https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/441852/ECS-2015-Invitation-030715.pdf accessed 21 March 2016.

response to specific intelligence information concerning approaches to specific British companies. However, the concern about broader awareness remains.

It was partly for this reason that Project Alpha was launched at King's College London in 2010 with UK government funding. The project has worked on a sectoral basis to raise awareness in key sectors, such as the alloys industry, composites sector, and in academia (as set out below). The project has also made available free-to-access e-learning materials on export controls and other materials via its website intended to raise awareness about export control issues.

5.2. Cloud Computing

Strategic trade controls are designed not just to control the movement of physical goods, but also so called, intangible technology. That is, technology associated with controlled items and their use that may not have to take a physical form. This type of technology can include blueprints, operational manuals, and working knowledge and skills training.[271] How to control the spread and dissemination of intangible information has been a consistent challenge to the effectiveness of export controls both in the UK and around the world for some time. There was, for example, concern during World War I that the use of the telegraph to transmit data would lead to the loss of military secrets.[272]

Cloud computing, the practice of using a network of remote servers hosted on the internet to store, manage and process data, rather using than a local server or personal computer, may represent a new challenge in the enforcement of export controls in the UK and internationally, by challenging our current understanding

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271 The Wassenaar Arrangement "The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies."(2013). Definitions and terms used in these lists, http://www.wassenaar.org/controllists/index.html. accessed 21 March 2016.

272 Project Alpha. "Export controls and 3d printing". available from http://www.projectalpha.eu/news/item/236-export-controls-and-3d-printing accessed 21 March 2016.

of export control related concepts, and further obscuring intangible technology transfers from those government departments responsible for enforcement of export controls.[273] The question of how cloud-based services will impact the enforcement of export controls is becoming increasingly important too. Such services have enjoyed considerable growth in recent years and companies are increasingly migrating to cloud computing solutions in areas such as workforce automation, email and productivity suites.[274] The European Commission estimates that revenues in the EU cloud sector could reach 80 billion euros by 2020.[275]

The "location independence" of cloud computing services, that is to say, the lack of user control over the exact location of cloud infrastructure means that, for the first time, a transfer of data that would require an export licence between two companies based in the same country could result in an export taking place.[276] For example if a company based in the United Kingdom stores data on a remote server owned by another UK-based company which provides such cloud storage and commuting services, but the server in which that data is stored by the second company server is based in another country, an export takes place as soon the data is sent from the UK to the server.[277] In spite of the increased ambiguity that now exists within the definition of "export", the treatment of cloud computing under EU and by extension UK export control

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273 PCMagUK. "What is cloud computing?" Available from http://www.pcmag.com/article2/0,2817,2372163,00.asp accessed 21 March 2016.

274 Nagel, Trevor W. "Cloud services and export control: what you don't know can hurt you." White & Case Technology Newsflash available from http://www.whitecase.com/publications/alert/cloud-services-and-export-control-what-you-dont-know-can-hurt-you accessed 21 March 2016.

275 Mason Hayes & Curran Technology Law Blog. "Export control: how does it impact on cloud computing?" http://www.mhc.ie/latest/blog/export-control-how-does-it-impact-on-cloud-computing accessed 21 March 2016.

276 Liptrap, Hunter. "16 tips: cloud computing advantages and disadvantages" Simplify Workflow. Available from http://www.modgility.com/cloud-computing-advantages-and-disadvantages/ accessed 21 March 2016.

277 Ahmed, Sajid & Haellmigk, Philip "Cloud Computing and EU Export Compliance." Available from: http://www.worldecr.com/wp-content/uploads/Cloud-computing-issue-181.pdf accessed 21 March 2016.

law is not immediately clear. The EU Regulation includes within its definition of an "export"; "transmission of software or technology by electronic media… to a destination outside the EU; it includes making available in an electronic form such software and technology to natural and legal persons and partnerships outside the EU."[278] This suggests that there are two acts, either of which constitutes an export; transmitting software or data outside the EU and/or making software or data available to any person physically located outside the EU. The advent of cloud computing makes these two scenarios more distinct than has been the case before. Specifically, data could be transmitted outside the EU, but this does not mean that the data has necessarily been made available to anyone outside the EU, it is merely being stored there.

Cloud computing capabilities raise important questions within the context of intangible technology controls in the UK and globally. Chief among them; what acts now constitute an export of intangible technology? Guidance from the UK government on what constitutes a controlled transfer of data or software overseas hinges upon who has access to that data and from where. So while software or data may have been transmitted across a border and be physically stored in electronic form outside the EU, if no one has access to its content then the opportunity to make use of them has not in fact been transferred. This is an important and useful clarification, but does not put the issue to bed completely. This definitional distinction, whilst making sense, may prove hard to police reliably. What for example are the responsibilities and obligations of the cloud service provider in this scenario? Once the transfer has taken place, what duty of care do they have over the data that they are now, physically at least, in custody of? Further clarification may be required in order to make the responsibilities of all parties involved in cloud based activities clear and reduce the chances of inadvertent non-compliance. Further complications still, could come from states that play

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278 European Union "Council regulation (EU) 428/2009" available from: http://trade.ec.europa.eu/doclib/docs/2009/june/tradoc_143390.pdf accessed 21 March 2016.

host to cloud infrastructure. The debate over the degree to which a state is able to exercise sovereignty over that which is contained within its borders, specifically as that sovereignty relates to cloud infrastructure is one that has yet to finish playing out.

5.3. Academic Engagement

UK universities operate in an increasingly international arena with respect to their research and teaching collaborations. The research engagement between British universities and foreign partners is a necessary and valuable activity, and while the increasingly global outlook of UK educational institutions is generally welcomed by UK government, these kinds of activities are not without risk within the context of UK export controls. UK export controls relating to transfers of technology and technical assistance, are not limited in their applicability to just commercial entities. This means that UK universities and academics are also obliged to ensure that they do not become involved in the transfer of sensitive technology. The broad implication of this is that academics at universities may require export licences to carry out certain activities.

A particular challenge at the interface between academia and export controls relates to a lack of awareness. Most universities in the UK have in place their own export controls policies and in-house legal and research support services to advise academic staff on how to ensure compliance. However, ensuring that UK academics are aware, not simply of the idea that the work that they do may be subject to export controls, but also the kinds of actions that could constitute non-compliance is a challenging task. There are numerous circumstances under which an inadvertent violation of export controls could take place within the academic context, and legal practitioners working in the academic field face the challenge of communicating the conceptual nuances that exist within UK export control vernacular, that may result in accidental non-compliance. Specifically, this includes the numerous different kinds of acts that would constitute an "export". Activities such as the delivery of presentations at international conferences, or the

employment of a research assistant from another country, which are commonplace within academia, may be considered exports that would require a licence if sensitive technical information is involved. An added layer of complexity in the relationship between the academic world and export controls are the concepts of "basic scientific research," where "experimental or theoretical work [is being] undertaken principally to acquire knowledge of the fundamental principles or phenomena or observable facts and not primarily directed towards a specific practical aim or objective" and "in the public domain" whereby the information is "available without restriction upon further dissemination".[279] Decontrols apply to these kinds of information, and therefore no licence is required in order to disseminate this type of technology. However, the status of a given piece of research may be unclear or subject to dispute, the risk of inadvertent non-compliance.

The following case, while it relates to a US prosecution, serves as a useful illustration of the challenges posed by academic activities within the context of export controls. In 2009, John Reece Roth, a former emeritus professor of electrical engineering at the University of Tennessee (UT) in Knoxville was sentenced to four years in prison for non-compliance with export control requirements relating to a United States Air Force (USAF) funded-project subcontracted through the private company Atmospheric Glow Technologies (AGT) between 2005 and 2006. In April 2005 the USAF awarded a 749,751 US dollars contract to AGT. The Air Force was especially interested in research being conducted by Roth, UT professor and co-founder of AGT Daniel Sherman, and NASA scientist Stephen Wilkinson, into the application of plasma actuators to enhance flight performance of unmanned air vehicles (UAVs). AGT awarded Roth and UT a 73,000 US dollars – a-year subcontract to continue developing the actuators. During this time Roth insisted that a Chinese doctoral student assist him on the pro-

279 "19 Export Control Order 2008, Regulation 18". Available from: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/68680/Guidance_on_ accessed 21 March 2016.

ject. The student had been employed by UT College of Engineering as a graduate research assistant and graduate teaching assistant under Roth's supervision since August 2002. Sherman, who was concerned about a potential leak of sensitive information to the PRC, compromised with Roth, agreeing to appoint the student to work on basic research whilst US graduate student Truman Bonds conducted the more sensitive applied research. This arrangement did not prove sustainable, and the two began to share research with the support of both Sherman and Roth. Sherman later admitted that he had known research should have been restricted to US citizens.[280]

Moreover, in May 2006 Roth returned from a lecture tour in China to be met at the Detroit Airport by federal customs agents who photocopied documents in his briefcase and luggage; these included a report on the USAF project and an agenda that showed Roth had lectured on the plasma actuator project whilst in the PRC. Roth then flew to Knoxville where the FBI seized his computer and thumb drive. Another report from the Chinese research student was discovered, as well as a draft paper on plasma aerodynamics that had been sent to Roth in China via a Chinese professor because Roth's email was not working in the PRC. This method of transmission meant that a highly sensitive document had been sent to a Chinese scientist.[281] Roth was accused of one count of conspiracy to export defence articles and services to foreign nationals, 15 counts of exporting defence articles and services without a licence, and one count of wire fraud for defrauding UT of his honest services. Sherman, in the hope of avoiding multiple charges, pleaded guilty to one count of conspiring to violate export controls and supplied emails and journal entries for the prosecution. Sherman was sentenced to 14 months in prison and prohibited from working on federal contracts in the future. AGT tried for bankruptcy protection in March 2008 and pleaded guilty to 10 counts of export control

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280 Golden, Daniel. "Why the professor went to prison". Bloomberg Businessweek. Available at: http://www.bloomberg.com/bw/articles/2012-11-01/why-the-professor-went-to-prison#p3 accessed 4 February 2016.

281 *Ibid.*

violations in August 2008. The University of Tennessee was not prosecuted, as they claimed to be ignorant of Roth's actions and disclosed his violations to the government as soon as they became aware. While Roth was not responsible for the physical removal of sensitive physical goods from the USA, many of his actions were indeed exports, and thus violated the controls placed on the project.

The case is useful, in that it highlights several different examples of technological transfers that may not be immediately identified as exports. This is primarily due to the fact that the transfers involved intangible technology.[282] First, the employment of a Chinese national on the project and the subsequent sharing of sensitive research and knowledge while on US soil. Even though no goods had left US soil, this was still an export of technology.[283] His visit to China involved three methods of transfer that again, may not be hard to identify as exports. The act of bringing a laptop containing sensitive documents relating to the Air Force project, presenting on aspects of the project to audiences in China, and the emailing of documents to Chinese nationals, all represent technology transfers.

The ambiguity inherent in the interface between export controls and academia is added to further, not only by the upward trend in international research collaborations, but also by the types of research organisations with which it is possible to collaborate. There is a general trend towards university/industry research partnerships in the UK results in university research becoming increasingly "applied" in nature. Over the course of the past 10 years, UK universities have listed a number of research partners with proven links to the weapons programmes of several countries. It is important to stress however that these examples are not meant to be viewed as instances of non-compliance with UK export con-

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282 This includes, but is not limited to, software, instructions, working knowledge, design drawings, models, operational manuals, skills training, and parts catalogues.

283 Golden, Daniel. "Why the professor went to prison". Bloomberg Businessweek. Available at: http://www.bloomberg.com/bw/articles/2012-11-01/why-the-professor-went-to-prison#p3 accessed 4 February 2016.

trol laws, nor are they necessarily instances of institutions doing wrong in a philosophical sense. They are intended to highlight the complexity inherent in international academic collaboration by showing that many mainstream research partners in the fastest growing and most dynamic countries in the world, such as China and India, including some of the world's most respected universities, are also involved in work on weapons of mass destruction and their delivery systems. Collaborations between UK universities and foreign research partners have included activities with;

- The Indian National Aerospace Laboratories, which has been closely involved with the development of components for Indian ballistic missiles.
- China's National University of Defence Technology (NUDT).[284] NUDT is controlled by the People's Liberation Army and is involved in missile-related research. In February 2015, the US Government stated that NUDT has used US-origin computer components to produce supercomputers 'believed to be used in nuclear explosive activities.'[285] For that reason, NUDT is on a US Department of Commerce export control watch-list.[286]
- Pakistan's Atomic Energy Commission (PAEC) The PAEC oversees all of Pakistan's nuclear-related activities, including nuclear weapons research and production; and
- The Beijing Aeronautical Manufacturing Training and Research Institute (BAMTRI), a research subsidiary of Chinese state aerospace maker AVIC. In April 2014, the US Department

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284 University of Huddersfield. "National University of Defence Technology." https://www.hud.ac.uk/international/partnerships/china/nationaluniversityofdefencetechnology/ accessed 21 March 2016.

285 US Department of Commerce Bureau of Industry and Security. "Addition of certain persons to the entity list; and removal of person from the entity list based on a removal request." Federal Register, Vol. 80, no. 32 available from http://bis.doc.gov/index.php/forms-documents/doc_download/1196-80-fr-8524 accessed 21 March 2016.

286 US Department of Commerce Bureau of Industry and Security. "Addition of certain persons to the entity list; and removal of person from the entity list based on a removal request." Federal Register, Vol. 80, no. 32 available from http://bis.doc.gov/index.php/forms-documents/doc_download/1196-80-fr-8524 accessed 21 March 2016.

of Commerce stated that BAMTRI had supplied Iran's ballistic missile programme via a Chinese middleman named Li Fang Wei, who has been accused of repeatedly supplying dual-use goods to Iran's UN-prohibited ballistic missile programme.[287] BAMTRI remains on the US Department of Commerce's watch-list.

Again it is important to stress here that these collaborations are unlikely to have resulted in the transfer legally or otherwise of sensitive strategic technology. Rather they are meant to highlight just how complex the landscape of international academic collaboration is as it applies to the control of strategic exports. This is a situation that is only going to become more complex as more and more universities seek to expand their research footprint internationally. As a result, it will be essential for universities and individual academics alike to be cognizant of their legal obligations and ensure that proper oversight is exercised in order to avoid non-compliance with UK export control legislation.

6. CONCLUSIONS

The UK has been implementing export controls for a long time and is probably as a result among the most experienced of export control implementers. The UK has established a sophisticated enforcement architecture that is integrated into the cross-governmental apparatus. This apparatus is also well exercised in responding to specific cases, with a few hundred enforcement actions being taken each year. The general approach of the UK has been to take a tiered approach to enforcement, in which only the most serious cases progress to either compound fines or prosecution. Despite the UK's long experience in implementing export controls, there are substantial challenges to enforcement even in the UK. Several

287 Clover, Charles. (2013, June 23). "UK universities under scrutiny over China ties." *Financial Times*. Available from https://next.ft.com/af5ea60e-1578-11e5-be54-00144feabdc0 accessed 21 March 2016.

specific challenges were highlighted, including the difficulties associated with outreach and awareness raising, the difficulty in enforcing intangible technology controls, and the challenges of ensuring non-traditional sectors are compliant, such as the academic sector. These challenges have been compounded by resource constraints that resulted from the global recession in the late 2000s.These challenges likely apply in many countries other than the UK. One unique solution undertaken in the UK was to launch Project Alpha at King's College London. Project Alpha has helped to address at least some of the challenges facing export control enforcement in the UK and might thus serve as a model for other states to consider. Nonetheless, export controls are inherently challenging to implement, and it must be recognised that no country can have a perfect or full-proof system. As such, it is likely that there will be a constant effort to improve implementation of controls while, at the same time, proliferators continue to seek new ways to evade controls.

The "Chaudfontaine Group" was established in 2010 as an annual two-day meeting group gathering young Europeans with diverse academic backgrounds – lawyers, economists, political scientists – from relevant national authorities, European institutions, industry and researchers from European scientific centres. Its members are invited to discuss their respective viewpoints on strategic issues faced by the European trade of sensitive goods in a constantly and rapidly evolving international context.

In November 2015, at its sixth conference, the Group met, confronted views and analysed the effect of international restrictive measures on the trade of strategic goods, notably "dual-use", as well the legal penalties set by the States in case of infringements to the rules of the trade control system.

The authors herein analyse and debate the diversity of principles and provisions that can be met internationally as well as the practices in terms of implementation by the States and the economic actors.

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