CHAPTER 2

The Legality of Unilateral Economic Sanctions under Public International Law

This chapter discusses the legality of coercive economic measures imposed by individual states – unilateral economic sanctions – under public international law. At the outset, the terminology used to define coercive economic measures is clarified. Subsequently, the legality of unilateral economic sanctions is reviewed in light of the principles embedded in the UN Charter, the authority to impose countermeasures stipulated in the Draft articles, established principles of jurisdiction in international law and the immunities that international law accords to states, as well as to state officials. In the last section, the consistency of unilateral economic sanctions with WTO law is examined.

This chapter addresses two questions: First, what norms of public international law might be infringed by the states that impose unilateral economic sanctions? Second and more implicitly, to what extent does public international law constrain powerful states from overusing economic coercion? In order to answer the first question, I analyse the legality of unilateral economic sanctions against the background of various norms and principles of public international law. As regards the second question, the assumption is that the questionable legality of unilateral economic sanctions, reinforced by the decentralised system of public international law enforcement, enables more powerful states not only to use, but also to misuse economic sanctions. In order to illustrate this assumption, I discuss extraterritorial economic sanctions and the emergence of the correspondent-bank account jurisdiction that allows US domestic courts to ascertain jurisdiction over the conduct of foreign nationals that occurred abroad and thus enforce US unilateral financial sanctions by bringing criminal charges against them.

One minor clarification: I will not explore the legal questions brought up by the imposition of unilateral economic sanctions in the context of international investment disputes and international commercial arbitration, since this lies beyond the scope of the present study.
1 Unilateral Economic Sanctions: In Search of Definitional Clarity

There is no one well-accepted definition of economic sanctions. Yet what is agreed is that economic sanctions lie at the crossroads between economic and political rationales. Perry Bechky claims that “sanctions are a political tool – but a political tool that operates through economic regulation.” By the same token, Andreas Lowenfeld, in his numerous publications on the subject, argues that economic sanctions are “economic controls for political ends.”

In this book, unilateral economic sanctions are defined as restrictive economic measures imposed by an individual state against another state and/or its government officials, legal entities and nationals in pursuit of political objectives and without any prior authorisation from an international or regional organisation. Unilateral economic sanctions, which are the subject matter of this study, may be imposed for a variety of reasons and take different forms.

Unilateral economic sanctions do not fall squarely within a single existing legal category in international law. As such, several different legal categories might be used to characterise such restrictions. In particular, this diversity is exemplified by categories such as retorsion, reprisals, countermeasures, third-party countermeasures (solidarity measures) and sanctions. Each of these categories is discussed below.

1.1 Retorsion

Retorsions are defined as “acts which are wrongful not in the legal but only in the political or moral sense, or a simple discourtesy.” In the same vein, Elizabeth Zoller describes retorsion as “an unfriendly but nevertheless lawful act by the aggrieved party against the wrongdoer.” The concept of retorsion hinges on the incompleteness of public international law. In other words, states are entitled to freedom of action if no rule constrains them. The rationale behind this conclusion has been well expressed by Elizabeth Zoller: “the

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340 Zoller (n 86) 5.
scope of retorsion is basically as wide as that of the nonregulated conduct of states."^341

Retorsion belongs to the instruments of self-help deployed unilaterally by states. These instruments may be punitive or may aim at goals such as retribution or deterrence.^342 Scholars provide numerous examples of the acts that fall under the definition of retorsion: “terminating the payment of development aid or the provision of military assistance; unilaterally imposing legally permissible economic sanctions such as an arms embargo; recognition of a situation (the sovereignty of a third State over territory also claimed by the target State); suspending, terminating, or refusing to prolong a treaty; and withdrawing from an international organization in order to protest this organization’s political activities.”^343 The proportionality requirement, which is of significance for countermeasures, does not apply to acts of retorsion.^344

Unilateral economic sanctions may, in some circumstances, be characterised as acts of retorsion. For instance, the withdrawal of voluntary aid programmes constitutes an act of retorsion.^345 Trade embargoes and other restrictions on trade might represent retorsions or be tantamount to countermeasures, depending on the scope of such restrictions and states' membership at the WTO.^346 Indeed, states that are not WTO Members and are not bound by international obligations under the multilateral or bilateral trade agreements may restrict trade with each other. However, in reality, such instances are very rare.

1.2 Reprisals
Reprisals are defined as “measures undertaken by one subject of public international law to coerce another subject of public international law to abide by its legal obligations towards the first of the subjects mentioned.”^347 Another definition of reprisals can be found in the Naulilaa arbitration: “acts of self-help by the injured State, acts in retaliation for acts contrary to international law on the part of the offending State, which have remained unredressed after

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^341 ibid 6.
^342 Giegerich (n 339).
^343 ibid.
^344 ibid.
^345 ibid.; Ruys (n 4) 24.
^346 Ruys (n 4) 25.
a demand for amends.” Thus, the right to enact reprisals is conditional upon the existence of an earlier violation of international law.

The classical law of reprisals predated the law of state responsibility, the emergence of which mirrored the evolution of international law as a more coherent system. The eighteenth-century luminary Emer de Vattel mentioned reprisals as a possible alternative to war. Vattel not only pointed out the term, but also provided a detailed description of the circumstances under which recourse to reprisals was lawful.

With time, the term “reprisal” evolved and changed its meaning. Elizabeth Zoller observes: “there seems to be very little in common between what reprisals originally were, i.e. acts of armed violence, and what they legally are taken for today, namely the right for the wronged state not to perform a rule of international law in dealings between itself and the wrongdoer.” James Crawford contends that recent developments in public international law have deprived the concept of its meaning. More specifically, it was replaced by two concepts: self-defence, which is allowed under certain circumstances, and non-forcible countermeasures. Indeed, after the ILC adopted the Draft articles, the concept of countermeasures overshadowed that of reprisals. Suffice it to say that “most authors consider reprisals either to fall within the concept of countermeasures or to equal that concept.”

Another point of view is that the present-day concept of reprisals denotes only countermeasures taken in times of war. The commentary to the Draft articles stipulates: “More recently, the term ‘reprisals’ has been limited to action taken in time of international armed conflict; i.e. it has been taken as equivalent to belligerent reprisals.”

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348 Responsibility of Germany arising out of damage caused in the Portuguese colonies of southern Africa (Naulilaa incident), 2 RIAA 1025 (Award of July 31, 1928).
350 ibid.
351 Ruffert (n 347).
352 Zoller (n 86) 35–36.
354 ibid.
356 Ruffert (n 347).
357 ILC, ‘Draft articles’ (n 90) 128.
The distinction between the concepts of retorsion and reprisals remains hazy. Thomas Giegerich buttresses this conclusion: “Retorsion and reprisals can be placed on a sliding scale of self-help measures with a grey area instead of a precise line between the two.” Giegerich sets out the following reasons for this: “One reason for this uncertainty is that the illegality of the initial act of the target State (opening the possibility of using reprisals instead of retorsion) and/or the compatibility of the reacting State’s measures with its own international legal obligations (compelling it to invoke reprisals and not only retorsion as a justification) will often be disputed, the allocation of the burden of proof uncertain, and compulsory third-party dispute settlement unavailable.”

Unilateral economic sanctions can be invoked as a response to a previous violation of international law and may be contrary to international obligations of the imposing state. Thus, they might potentially fall under the definition of reprisals. Yet, more often unilateral economic sanctions are considered to be tantamount to countermeasures or third-party countermeasures, as the concept of reprisals has been less used in recent years.

1.3 Countermeasures
The term countermeasures came to the forefront of international law in the 1970s. In the 1980s and 1990s, the ICJ followed this trend, relying upon the concept of countermeasures in a number of its decisions. Elizabeth Zoller, writing after the concept was acknowledged in the Air Services Agreement arbitration and the ICJ dispute United States Diplomatic and Consular Staff in Tehran, identified two core attributes of the newly introduced concept of countermeasures: they are “unilateral in form and remedial in purpose.”

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358 Giegerich (n 339).
359 ibid.
360 Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France [1978] 18 RIAA 417 [80]. In this respect, Math Noortmann points out: “The Tribunal in the Air Services Agreement case copied the term ‘countermeasures’ from the memorial of the US, which used ‘countermeasures’ to describe its measures against French airlines. Reuter, a member of the abovementioned Tribunal, held, at a meeting of the International Law Commission on Article 30 of Part One of the Commission’s Draft on State Responsibility, that the term ‘countermeasures meant nothing.’ He revealed that the Tribunal was merely “seeking to avoid the words ‘reciprocal obligations’ and ‘reprisals.” Noortmann (n 355).
362 Zoller (n 86) 3.
The normative content of the concept was framed as a part of the broader effort to codify international rules concerning the responsibility of states. The Draft articles define the ambit of countermeasures as follows: “Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.”

International law scholars define countermeasures as “unilateral measures adopted by a State in response to the breach of its rights by the wrongful act of another State that affect the rights of the target State and are aimed at inducing it to provide cessation or reparations to the injured State.”

The right to impose countermeasures is not an absolute right, and the exercise of this right is restricted in several ways. The Draft articles distinguish between injured and non-injured states, and the entitlement to impose countermeasures is granted only to injured states. The final text reflects the then-prevailing traditional theory: only states whose subjective rights were violated could invoke the state responsibility of another state. The legality of countermeasures imposed by non-injured states – third-party countermeasures – is discussed in more detail in section 3 of this chapter. The question of whether the Draft articles reflect customary international law is a part of that discussion.

The conditions for the use of countermeasures are enlisted in Articles 49 and 51 of the Draft articles. The former article stipulates object and limits of countermeasures, while the latter prescribes that such measures should be proportional to the injury suffered by the state imposing them. Furthermore, countermeasures may not affect international obligations enumerated in Article 50 of the Draft articles.

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363 Article 49(2) ILC, ‘Draft articles’ (n 90).
365 Article 42 lays out the definition of an injured state for the purposes of invoking state responsibility of another state. This definition is narrow and excludes states that are not directly affected by the violation. Article 48 stipulates the rules for an invocation of responsibility by a state other than an injured state. According to this article, non-injured states are not allowed to resort to countermeasures. ILC, ‘Draft articles’ (n 90).
366 Crawford (n 353) 542.
367 ILC, ‘Draft articles’ (n 90).
368 Article 50 of the Draft articles reads as follows: “1. Countermeasures shall not affect: (a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (b) obligations for the protection of fundamental human rights; (c) obligations of a humanitarian character prohibiting reprisals; (d) other obligations under peremptory norms of general international law. 2. A State taking countermeasures is not relieved from fulfilling its obligations: (a) under any dispute settlement procedure
State practice bears witness to the fact that unilateral economic sanctions are frequently used as countermeasures. Describing the state practice of applying countermeasures, Antonios Tzanakopoulos contends that “countermeasures are predominantly economic in nature.”

1.4 Third-Party Countermeasures (Solidarity Measures, Countermeasures in the Collective Interest)

Third-party countermeasures (solidarity measures, countermeasures in the collective interest) are countermeasures imposed by a non-injured state or a group of states. The Draft articles prescribe a narrow and rigid definition of an injured state. As a result, a significant portion of the imposed countermeasures fall under the definition of third-party countermeasures. Put differently, the majority of the third-party countermeasures have been imposed against states that violated the norms of international law, which protect community interests.

The debate concerning whether states should be allowed to act as representatives of humankind and protect certain common values goes back to the seventeenth century. Martin Dawidowicz provides an excellent historical overview of this long-lasting discussion. Initially, two opposing views dominated the debate: one emphasising the necessity to protect community interests and another focusing on the negative aspects of granting such power to individual states. In the twentieth century, the third approach emerged: it

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370 The Draft articles do not employ terms such as third-party countermeasures, solidarity measures or countermeasures in the collective interest. All these terms were introduced by international legal scholars.
371 Article 42 ILC, ‘Draft articles’ (n 90).
373 Dawidowicz, Third-Party Countermeasures in International Law (n 372); Dawidowicz, ‘Public Law Enforcement without Public Law Safeguards?’ (n 372).
374 Dawidowicz, ‘Public Law Enforcement without Public Law Safeguards?’ (n 372) 337–348.
375 Dawidowicz, ‘Public Law Enforcement without Public Law Safeguards?’ (n 372).
was argued that the enforcement of community interests and values should be exercised through international institutions.\textsuperscript{376} Despite these theoretical debates and the proposal made by the special rapporteur James Crawford to recognise third-party countermeasures,\textsuperscript{377} the final text of the Draft articles leaves the question of the legality of third-party countermeasures uncertain.\textsuperscript{378}

The legality of third-party countermeasures is discussed in section 3 of this chapter, while the characterisation of unilateral economic sanctions imposed to redress human rights violations and their legality are discussed in chapter 4.

1.5 \textit{Sanctions}

The term sanction is not a legal term of art and has a certain notoriety. Moreover, the use of the term by political scientists and economists provides little clarity regarding its definition and ambit. The term was initially used by the ILC in its work on the Draft articles,\textsuperscript{379} but it was then decided to replace it with the more neutral concept of countermeasures.\textsuperscript{380}

Tom Ruys discerns three approaches to defining the term “sanction”: a purpose-oriented definition, an author-oriented definition and a definition focused on the types of measures imposed.\textsuperscript{381} The purpose-oriented approach focuses on the measure’s objective of responding to a breach of a legal norm.\textsuperscript{382} The author-oriented approach is related to the identity of the sanction’s author, thus narrowing down the definition of sanctions to actions undertaken by international organisations.\textsuperscript{383} The third approach equates sanctions with economic restrictions.\textsuperscript{384}

International legal scholars do not always agree on whether the term “sanction” can be used to denote unilateral restrictions imposed by individual

\textsuperscript{376} ibid.
\textsuperscript{377} In 2000, the Drafting Committee of the ILC had provisionally adopted Article 54 suggested by James Crawford, which recognised the countermeasures imposed by the non-injured states and established rules for their use. ibid.
\textsuperscript{378} Article 48 ILC, ‘Draft articles’ (n 90). For more on this debate, see Section 3 of this chapter.
\textsuperscript{379} Dawidowicz, ‘Public Law Enforcement without Public Law Safeguards?’ (n 372).
\textsuperscript{380} Martin Dawidowicz, in this context, states: “In 1979 the ILC rejected Special Rapporteur Ago’s proposed term ‘sanction’ and replaced it with the concept of ‘countermeasures.’ The reason for this change was that modern international law ‘reserve[d]’ the term ‘sanction’ for reactive measures applied by virtue of a decision taken by an international organization.” Dawidowicz, ‘Public Law Enforcement without Public Law Safeguards?’ (n 372) Footnote 1.
\textsuperscript{381} Ruys (n 4) 19.
\textsuperscript{382} ibid 19–20.
\textsuperscript{383} ibid 20–21.
\textsuperscript{384} ibid 21–22.
states. For example, a distinguished international lawyer, Alain Pellet, once contended that the term should be only used to denote restrictions authorised by the Security Council under Chapter VII of the UN Charter. Yet, recently he seems to be less convinced by this position and has even argued the opposite. Other scholars employ the term, but qualify it. In particular, Tom Ruys calls such measures “non-UN sanctions,” while Devika Hovell identifies them as “autonomous sanctions.” The recent study prepared at the request of the European Parliament’s Committee on International Trade also makes use of the term “sanction” to describe unilateral economic restrictions of individual states.

The convincing argument advanced by the supporters of the broad definition of the term sanction, which also encompasses unilateral measures adopted by states, is the abundance of pertinent state practice. Indeed, unilateral coercive measures are frequently imposed by the United States, Canada, Australia, the European Union member states and other states. As a rule, such restrictive measures are invoked without any prior authorisation from regional or international organisations, and the domestic laws regulate their invocation. The states that impose these measures have different names for them: the United States refers to such measures as “sanctions,” the European Union as “restrictive measures,” Canada as “special economic measures” and Australia as “autonomous measures.”

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385 Alain Pellet and Alina Miron, ‘Sanctions,’ *Max Planck Encyclopedia of Public International Law* [mpepil] <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e984?prdid=OPIL>. A similar view was expressed by the ILC in the commentary to the Draft articles. In particular, the ILC has made the following observation: “The term ‘sanctions’ has been used for measures taken in accordance with the constituent instrument of some international organization, in particular under Chapter VII of the Charter of the United Nations – despite the fact that the Charter uses the term ‘measures,’ not ‘sanctions.’” ILC, ‘Draft articles’ (n 90) 75.

386 Pellet (n 26).


389 Stoll and others (n 232).

390 “[..] such attempt to distinguish between the two terms [sanctions and countermeasures] on the basis of the identity of the author of the measures concerned is legally inaccurate, and moreover ignores the fact that the ‘sanction’ label is also commonly used to refer to measures adopted by States.” Ruys (n 4) 21.


392 ibid.

393 ibid.
The fine line distinguishing the concepts of retorsion, countermeasures, third-party countermeasures and sanctions is not self-evident. According to Tom Ruys, enforcement through non-forcible measures “remains plagued by a variety of delicate controversies and grey areas.”394 The rationale behind the current predicament has been well formulated by Ruys: “Efforts to clear the grey area by means of an in-depth assessment of State practice are complicated by the fact that States adopting economic sanctions often leave open whether the measures concerned are deemed to qualify as retorsions or as countermeasures.”395 Furthermore, states rely on their domestic laws and impose various economic restrictions as a response to the behaviour of other states, but hardly ever elucidate whether such restrictions are countermeasures or third-party countermeasures.

2 The Legality of Unilateral Economic Sanctions under the Charter of the United Nations

Political and ideological rifts continue to haunt the debate on the legality of unilateral economic sanctions. The crux of the debate revolves around the scope of the prohibition of the use of force and the scope of the principle of non-intervention. Both principles are engrained in the UN Charter – yet the question whether these principles restrain states’ ability to impose unilateral economic sanctions remains unsettled.

The fierce opposition to unilateral economic sanctions has traditionally come from the Russian Federation and the People’s Republic of China.396 Ironically, both of these states frequently rely upon unilateral coercive measures to advance their political agenda abroad. For example, the Russian Federation often imposes unilateral trade restrictions on neighbouring countries in pursuit of its foreign policy goals.397 Mergen Doraev provides the

394 Ruys (n 4) 23–24.
395 ibid 31–32.
397 Mergen Doraev provides an extensive analysis of the Russian practice in applying unilateral trade restrictions on neighbouring states in pursuit of its foreign policy agenda. Part 4.3 of the article is devoted to the examination of Russia’s trade wars with neighbouring countries. The general conclusion of this analysis is the following: “while on political and diplomatic levels the United States and Russia demonstrate opposing views toward the legality of unilateral economic sanctions, the actual activity of these powerful
following explanation for the discrepancy between the official position of the Russian Federation and its practice: “Russia's strong opposition to U.S. unilateral economic coercion measures is based on its desire (1) to increase the role of the U.N. Security Council and, thereby, the powers of its permanent members, (2) to maintain moral ascendancy over opponents, getting support of developing countries in debates on the legitimacy of unilateral sanctions, and (3) to keep strong legal arguments contesting potential economic sanctions against Russia and its allies.”

Regarding Chinese practice, James Reilly describes the increasing use of unilateral sanctions by China as follows: “Over the past few years, Chinese experts have begun to clear some of the legal, moral, ideological, and practical hurdles to Beijing's use of unilateral sanctions.” In their 2016 book *War by Other Means: Geoeconomics and Statecraft*, Robert Blackwill and Jennifer Harris provide a long list of the examples of how Chinese government relies upon the unilateral measures of economic coercion to advance its foreign policy agenda. It is worth quoting some of these examples: “China curtails the import of Japanese autos to signal its disapproval of Japan's security policies. It lets Philippine bananas rot on China’s wharfs because Manila opposes Chinese policies in the South China Sea. It rewards Taiwanese companies that march to Beijing's cadence, and punishes those that do not. It promises trade and business with South Korea in exchange for Seoul rejecting a U.S. bid to deploy the Terminal High-Altitude Area Defence (THAAD) missile defense system.”

The distinguishing characteristics of Chinese unilateral sanctions are an absence of official threats or public admissions of sanctions and their targeted nature (i.e. sanctions were frequently targeted at specific sectors, thus avoiding affecting broader patterns of trade and investment).

Other studies that have analysed China’s use of economic instruments, including unilateral economic sanctions, to pursue its national objectives abroad confirm the increasing use of economic coercion as a foreign-policy tool. For example, Cameron Rotblat not only emphasises that “over the

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398 Security Council permanent members in the international arena tends to make unilateral sanctions more recognizable as a part of customary international law.” Doraev (n 4).
399 ibid 358–359.
401 Blackwill and Harris (n 227) 4.
403 “[…] while opposition to sanctions has long been considered to be a core principle of Chinese foreign policy, since 2010, China has imposed unilateral sanctions more often than ever before.” Vida Macikenaite, ‘China's economic statecraft: the use of economic
past decade, China increasingly used narrowly targeted unilateral sanctions in order to advance its foreign policy interests,” but also analyses the writings of Chinese scholars to demonstrate that they endorse the legality of such unilateral economic sanctions.\textsuperscript{403}

This development has been further enhanced by recently enacted laws. To take one example, in October 2020, China enacted a new export control law.\textsuperscript{404} The law makes possible the introduction of export restrictions as a response to the policies of other states that have unilaterally restricted their strategic exports to China.\textsuperscript{405}

It is also worth mentioning numerous resolutions adopted by the UN General Assembly condemning unilateral coercive measures and their implications.\textsuperscript{406} The special rapporteur on the negative impact of the unilateral coercive measures Idriss Jazairy called into question the legality of unilateral coercive measures and even contended that a general prohibition on their use has emerged.\textsuperscript{407} Against this backdrop, Alexandra Hofer analysed the UN resolutions on the subject and deliberations between the UN Member States, as well as the opinions of legal scholars.\textsuperscript{408} Hofer concludes that such a general prohibition has not emerged.\textsuperscript{409} Similar conclusions have been reached by

\begin{itemize}
\item Rotblat (n 323).
\item Lester, ‘China adopts new export control law’ (n 231).
\item ibid.
\item There are two types of UN resolutions that condemn unilateral economic sanctions: (1) human rights and unilateral coercive measures and (2) unilateral economic measures as a means of political and economic coercion against developing countries. Resolutions on human rights and unilateral coercive measures have been adopted annually since 1996. Resolutions on economic measures as a means of political and economic coercion against developing countries were adopted annually from 1983 until 1987. Since 1987, these resolutions have been referred to as unilateral economic measures, representing a means of political and economic coercion against developing countries, and are adopted biannually. Hofer (n 22).
\item Hofer (n 22).
\item According to Alexandra Hofer, twenty-one resolutions condemning unilateral coercive measures for their negative impact on human rights have been adopted since 1996, and nineteen resolutions entitled ‘Unilateral economic measures as a means of political and economic coercion against developing countries’ have been adopted since 1993. In both resolutions, it was argued that unilateral coercive measures constitute a violation
\end{itemize}
other scholars. Thus, there is no general prohibition on employing coercive economic measures, even if they are imposed unilaterally.

2.1 Unilateral Economic Sanctions as a Use of Force under Article 2(4)

Prior to the twentieth century, states could freely rely upon the use of force without any legal constraints. The Drago-Porter Convention, which restricted the use of armed force for recovering contractual debts, was the first attempt to change the contemporary status quo. The next attempt to restrict the use of force in interstate relations was the Covenant of the League of Nations. However, the Covenant fell short of establishing an absolute prohibition on the use of force. Several years later, the Kellogg-Briand Pact introduced a general prohibition on the use of force. The further developments of the prohibition of the use of force culminated in the incorporation of Article 2(4) in the UN Charter. The ICJ acknowledged the
significance of this principle by calling it “a cornerstone of the United Nations Charter.”

The claim that unilateral economic sanctions fall under the prohibition of the use of force is not new. During the UN General Assembly meeting in 1970, the representative of Pakistan stated the following: “There had been some disagreement in the Special Committee as to whether the duty to refrain from the use of force included the duty to refrain from economic, political and other forms of pressure, and whether a definition of the term ‘force’ should be included in the statement of that principle.”

Elaborating further on this point, the Pakistani representative cited General Assembly resolution 2160 (XXI), which “had recognized that the term ‘force’ included not only armed attacks but also other forms of coercion contrary to international law.” Yet, a closer examination of the text of General Assembly resolution 2160 (XXI) reveals that the text as such does not provide any satisfactory definition of the exact scope of the term “force.”

The Arab oil embargo was the spark that lit the fuse: after oil-producing Arab countries temporary restricted oil shipments to several countries, including the United States, scholars started to vigorously argue that economic coercion is tantamount to the use of force prohibited under the UN Charter. In the following years, a long-lasting debate on the scope of the term “force” in Article 2(4) of the UN Charter was triggered by the claims made by the developing countries, together with the Soviet bloc states, and became the symbol of the lingering tensions between developed states and the developing world.

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419 ibid.
420 With respect to the prohibition of the use of force, the UN General Assembly Resolution reads as follows: “States shall strictly observe, in their international relations, the prohibition of the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations. Accordingly, armed attack by one State against another or the use of force in any other form contrary to the Charter of the United Nations constitutes a violation of international law giving rise to international responsibility.” UNGA Res 2160 (30 November 1966) UN Doc A/RES/2160 (XXI).
Writing on the subject in the wake of the notorious Arab oil embargo, James Delanis provided a comprehensive summary of the legal claims advanced by both sides of the debate.\footnote{ibid 103–114.} Delanis pointed out that the traditional view is reflected in a narrow definition of “force” as only military force, whereas the view favoured by developing countries expands the definition to include economic and political force.\footnote{ibid.}

More recent discussions on whether economic coercion violates the prohibition of the use of force reveal a diversity of opinions. The prevailing international sentiment in this regard can be framed as follows: “The term does not cover any possible kind of force, but is, according to the correct and prevailing view, limited to armed force.”\footnote{Simma and Wessendorf (n 88) 209; Omer Y Elagab, ‘Coercive Economic Measures Against Developing Countries’ (1992) 41 International and Comparative Law Quarterly 682, 688.} The rationale underlying this conclusion has been captured by the following counterfactual scenario: “were this provision to extend to other forms of force, States would be left with no means of exerting pressure on other States which act in violation of international law.”\footnote{Simma and Wessendorf (n 88) 209.} The negotiating history of the UN Charter buttresses this conclusion: the proposal submitted by the representative of Brazil to include a general prohibition on the use of economic force in interstate relations was dismissed during the San Francisco Conference.\footnote{“The Brazilian delegation proposed to extend the prohibition of article 2(4) to cover ‘the threat or use of economic measures in any manner inconsistent with the United Nations purposes. The amendment was rejected, but the reasons for its disapproval are not clear.” ‘The Use of Nonviolent Coercion: A Study in Legality under Article 2(4) of the Charter of the United Nations’ (1974) 122 University of Pennsylvania Law Review 983; The opposing view has gained some support as well. For example, as Maziar Jamnejad and Michael Wood have pointed out: “An argument is still occasionally heard that the reason for the rejection of the Brazilian proposal was that Art. 2(4) as it stands extends to economic force.” Maziar Jamnejad and Michael Wood, ‘The Principle of Non-Intervention’ (2009) 22 Leiden Journal of International Law 345, Footnote 12.} Furthermore, Nikolas Stürchler discussing the wording of Article 2(4) of the UN Charter has emphasised: “The new wording in the UN Charter was created to overcome the deficiency that governments could deny the existence of a state of war by simply omitting to attribute that word to their military actions. The terms ‘threat’ and ‘force’ were designed to describe a single wrong and put an end to self-declaratory formalism.”\footnote{Nikolas Stürchler, \textit{The Threat of Force in International Law} (1st publ., Cambridge University Press, 2007) 2.}
Yet, the contrary opinion on the subject is also defended. In his research, Mergen Doraev has analysed the views expressed by Soviet and Russian legal scholars. Some of these commentators argued that unilateral economic sanctions violate the prohibition of the use of force, while others viewed them as a violation of the principle of non-intervention. Additionally, several Russian scholars contend that unilateral economic sanctions are illegitimate, since they violate the principle of the sovereign equality of states.

Discussing the possibility that unilateral economic sanctions fall squarely within the prohibition of the use of force, Krista Schefer offers the most plausible explanation: “In the politicized context of the United Nations, it is unlikely that anything less than an armed blockade will be deemed to reach the severity of a ‘use of force’ deserving condemnation under Article 2(4) (and even that is likely to depend on the military enforcement of the blockade than the economic effects of it).”

While acknowledging that unilateral economic sanctions are most likely not covered by the prohibition of the use of force embedded in Article 2(4) of the UN Charter, such measures might violate the general principle of non-intervention. Thus, this matter is discussed in the subsequent part.

### 2.2 Unilateral Economic Sanctions as a Violation of the Principle of Non-intervention

Maziar Jamnejad and Michael Wood describe the principle of non-intervention as “[o] ne of the most potent and elusive of all international principles.” While the exact contours of the principle of non-intervention have not been determined with great precision in the UN Charter or any other international treaty, they have been moulded by international tribunals and legal scholars. The extensive literature on the subject deals mainly with the principle of non-intervention either in the context of Articles 1(2) and 55 of the UN Charter – the principle of friendly relations among nations and the principle of equal rights, or in the context of the use of force prohibited under Article 2(4) or

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429 Doraev (n 4) 388–393.
430 Reference to Grigori Tunkin, ibid 388–389.
431 ibid footnote 149.
432 ibid footnote 162.
434 Simma and Wessendorf (n 88) 209.
435 Jamnejad and Wood (n 427).
436 Elagab (n 425) 687.
alternatively Article 2(7) of the UN Charter,\(^\text{437}\) which reads: “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”

The UN General Assembly has adopted more than thirty-five resolutions specifically addressing the principle of non-intervention.\(^\text{438}\) While highlighting the existence of these resolutions, Maziar Jamnejad and Michael Wood contend that only a few of them have received broad support and are endowed with sufficient authority,\(^\text{439}\) namely the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty (1965),\(^\text{440}\) the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (1970),\(^\text{441}\) and the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (1981).\(^\text{442}\) The declarations adopted in 1965 and 1970 lay down a prohibition on “us[ing] or encourage[ing] the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.”\(^\text{443}\) The declaration of 1981 imposes the following duty on the states: “The duty of a State, in the conduct of its international relations in the economic, social, technical and trade fields, to refrain from measures which would constitute interference or intervention in the internal or external affairs of another State, thus preventing it from determining freely its political, economic and social development; this includes, inter alia, the duty of a State not to use its external economic assistance programme or adopt any multilateral or unilateral economic reprisal or blockade and to prevent the use of transnational and multinational corporations under its jurisdiction and

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\(^{437}\) Jamnejad and Wood (n 427) 357.
\(^{438}\) ibid 350–351.
\(^{442}\) UNGA Res 2131 para 2; UNGA Res 2625 the principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter.
control as instruments of political pressure or coercion against another State, in violation of the Charter of the United Nations.”

The ICJ made a number of influential assertions on the scope of the principle of non-intervention. It was confronted with the need to adjudicate the scope of the principle of non-intervention in its first dispute, Corfu Channel. At that time, the court denied restrictions on the principle of non-intervention, even when they were justified by the necessity of securing evidence. The next occasion upon which the court had to elaborate on this principle at length was the Military and Paramilitary Activities in and against Nicaragua dispute. The court not only acknowledged that the principle of non-intervention “is part and parcel of customary international law,” but also defined its contours. It is worth quoting the court at length on what constitutes a prohibited intervention under international law: “A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones.”

This observation is of particular interest for our discussion. Unilateral economic sanctions might be considered a form of coercion. Does this then imply that unilateral economic sanctions infringe the principle of non-intervention irrespective of their objectives and consequences?

It should be emphasised that coercion does not equal intervention. Only coercion that intervenes in the domaine réservé of a state, for example, by impeding that state’s freedom of choice of a political, economic, social and cultural system, can constitute a prohibited intervention. This conclusion echoes ICJ findings on whether a trade embargo imposed by the United States against Nicaragua violated the principle of non-intervention: “the Court

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444 UNGA Res 36/103 para. 2 11 (k).
446 The court declared: “Between independent States, respect for territorial sovereignty is an essential foundation of international relations. The Court recognizes that the Albanian Government’s complete failure to carry out its duties after the explosions, and the dilatory nature of its diplomatic notes, are extenuating circumstances for the action of the United Kingdom Government. But to ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty.” ibid 35.
447 Military and Paramilitary Activities in and against Nicaragua (n 116).
448 ibid [202].
449 ibid [205].
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has merely to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention."\textsuperscript{450}

The question of whether economic coercion constitutes a potential violation of the principle of non-intervention was debated at length. In this connection, Yehuda Blum noted that “while the meaning of the term ‘force’ seems to be controversial, it is possible to deduce the impermissibility of at least certain forms of economic pressure by reference to the doctrine of nonintervention, as elaborated in various international instruments in recent years.”\textsuperscript{451} A decade later, Omer Yousif Elagab contended that the principle of non-intervention “did not seem to have crystallized into a clear rule prohibiting economic coercion.”\textsuperscript{452} In 1993, the Secretary-General of the UN reiterated the following claim: “There is no clear consensus in international law as to when coercive economic measures are improper, despite relevant treaties, declarations and resolutions adopted in international organizations which try to develop norms limiting the use of such measures.”\textsuperscript{453}

More recent studies support the view that only extreme forms of economic coercion might infringe the principle of non-intervention. According to Hofer, the prevalent view among the academics is that economic sanctions exemplify illegal coercion only if they constitute an intervention in the domaine réservé of a targeted state.\textsuperscript{454} Antonios Tzanakopoulos puts forward the similar argument to the effect that economic coercion amounts to intervention only if it encroaches on a state’s sphere of freedom, which is defined by the fact that a state did not undertake any international obligations in this particular sphere.\textsuperscript{455}

\textsuperscript{450} ibid [245].
\textsuperscript{453} Note by the Secretary-General, 'Economic Measures as a Means of Political and Economic Coercion against Developing Countries.' (1993) UN Doc A/48/535.
\textsuperscript{454} Alexandra Hofer draws the following conclusion: “As we saw in Part 2 of this paper, the majority opinion in doctrine is that there is no autonomous norm prohibiting economic coercion. Such practice is considered permissible to the extent that it does not violate the principle of non-intervention or that it does not violate other rules of customary international law or applicable treaty rules.” Hofer (n 22) 192.
\textsuperscript{455} Antonios Tzanakopoulos distinguishes coercion from intervention in the following way: “Seeking to coerce a state within its sphere of freedom is wrongful; it constitutes intervention. Merely interfering with a state’s choices within its sphere of freedom and applying relevant pressure without breaching any obligations is lawful, as long as it does not amount to coercion and, thus, intervention.” Tzanakopoulos (n 369) 620.
Other actions irrespective of their coercive nature might be “mere pressure or interference.”

Notwithstanding the growing body of literature on relations between unilateral economic sanctions and the principle of non-intervention, the matter is far from settled. Indeed, it appears that the lengthy discussions merely serve a rhetorical purpose. In this regard, Tom Ruys observes: “In the end, it remains altogether unclear to what exact extent the principle of non-intervention prohibits certain economic sanctions.” Numerous international law scholars have echoed this view.

3 The Legality of Unilateral Economic Sanctions under the Draft Articles on Responsibility of States for Internationally Wrongful Acts

In this section, the legality of economic countermeasures is discussed. More specifically, our analysis touches upon economic countermeasures imposed by injured states, as well as non-injured states – third-party countermeasures – in the meaning of the Draft articles. This choice is not a coincidence: the rigid definition of an injured state contained in the Draft articles entails that the majority of the present-day unilateral economic sanctions fall under the definition of third-party countermeasures.

The earliest attempts to distinguish between violations of bilateral obligations and violations of rights owed to all nations in the context of state responsibility were made in the late seventeenth century. These discussions re-emerged in the nineteenth century. In this context, Robert Kolb refers to the work of A.G. Heffter, published in 1883. James Crawford references the original German edition of the Heffter’s book and asserts that: “it is not before the second half of the nineteenth century that a recognizably modern conception of responsibility appeared.” Along with Heffter, the Swiss jurist Johann Dawidowicz, “Public Law Enforcement without Public Law Safeguards?” (n 372).


Crawford (n 353) 4.
Caspar Bluntschli and the English lawyer William Edward Hall contributed to the debate on the rules of state responsibility.\textsuperscript{462}

The subsequent evolution of the law of state responsibility was substantially influenced by the dominance of legal positivism. The general theory of responsibility developed by Dionisio Anzilotti is of particular interest in this context. A prominent Italian lawyer and judge of the PCIJ, Anzilotti grounded his inferences on the nature and scope of the state’s responsibility in his firm belief in the bilateral nature of international law.\textsuperscript{463} Therefore, his attitude to state responsibility can be equated with the responsibility arising out of bilateral contractual relations between states.\textsuperscript{464} George Nolte advances various arguments to justify the views expressed by Anzilotti, including that he “wrote at a time when the use of force between states was not yet prohibited and in which community interests could lawfully be pursued by powerful states without having to invoke a specific right.”\textsuperscript{465}

The League of Nations undertook an attempt to codify international law on the responsibility of states.\textsuperscript{466} These first attempts at codification are broadly considered to have been unsuccessful.\textsuperscript{467} In the interwar period, several prominent legal scholars contributed to the debate on the international responsibility of states. According to James Crawford, Edwin Borchard and Clyde Eagleton were “two of the most significant systematizers” of the time.\textsuperscript{468} Nolte also points out the valuable contribution made by Hersch Lauterpacht to this discussion.\textsuperscript{469}

Those early endeavours revealed the pertinence of the rules for state responsibility, and, consequently, this matter was included in the ILC agenda following its establishment.\textsuperscript{470} In Robert Kolb’s view, the progressive development

\begin{itemize}
\item \textsuperscript{463} ibid.
\item \textsuperscript{464} “[... ] only the violation by a state of a true subjective right of another state can give rise to state responsibility and not the mere violation of general or more specific interests.” ibid 1087.
\item \textsuperscript{465} ibid.
\item \textsuperscript{466} Crawford (n 353) 28–32.
\item \textsuperscript{467} ibid 28–32.
\item \textsuperscript{468} ibid 24–28.
\item \textsuperscript{469} Nolte (n 462) 1091–1093.
\end{itemize}
of the law of state responsibility was closely intertwined with an attempt to outlaw the unilateral use of force and to promote the peaceful settlement of disputes.\textsuperscript{471} Extensive discussions of general international rules on state responsibility under the auspices of the ILC are associated with Roberto Ago. James Crawford referred to Ago’s contribution as “prodigious.”\textsuperscript{472} Overall, the codification process took more than half of a century, eventually culminating in the adoption of the Draft articles in 2001.\textsuperscript{473} The rules prescribed by the Draft articles were not codified in an international treaty. Despite this, international courts and tribunals frequently cite them as a reflection of customary international law.\textsuperscript{474}

3.1 Unilateral Economic Sanctions as Countermeasures

Unilateral economic sanctions can fall under the category of economic countermeasures, which are subject to the same preconditions and restrictions as any other type of countermeasures. There are two categories of such restrictions or preconditions: substantive and procedural. The substantive prerequisites are enumerated in Articles 49–51 of the Draft articles,\textsuperscript{475} while the procedural ones are listed in Article 52.\textsuperscript{476}

First and foremost, countermeasures can be imposed only as a response to a prior violation of an international obligation\textsuperscript{477} and “are limited to the

\textsuperscript{471} Kolb (n 460) 8–9.
\textsuperscript{472} Crawford (n 353) footnote 187.
\textsuperscript{473} ILC, ‘Draft articles’ (n 90).
\textsuperscript{475} Among the most important restrictions are: countermeasures can be taken only against a state which is responsible for an internationally wrongful act (Article 49), there is a defined group of international obligations that cannot be affected by countermeasures (Article 50), and countermeasures must be proportional (Article 51). ILC, ‘Draft articles’ (n 90).
\textsuperscript{476} Procedural preconditions include: a duty to call upon the responsible state to fulfil its obligations, a duty to notify the responsible state of a decision to take countermeasures, a duty to suspend countermeasures either if the wrongful act has ceased or if there is a pending dispute before the tribunal. ibid.
\textsuperscript{477} The commentary to the Draft articles clarifies this prerequisite as follows: “A fundamental prerequisite for any lawful countermeasure is the existence of an internationally wrong
ful act which injured the State taking the countermeasure. This point was clearly made by ICJ in the Gabčíkovo–Nagymaros Project case, in the following passage: In order to be justifiable, a countermeasure must meet certain conditions […] In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State.” ibid 130.
non-performance for the time being of international obligation of the State taking the measures towards the responsible State.\textsuperscript{478} It ought to be noted that there is no requirement that the countermeasures and the initial obligation, the breach of which provided the justification for imposing such countermeasures, should be of the same or of a closely related nature.\textsuperscript{479} Second, countermeasures can be directed only against a state responsible for an internationally wrongful act.\textsuperscript{480} Third, countermeasures should be temporary in character\textsuperscript{481} and proportionate to the initial violation of the international obligation.\textsuperscript{482} The prerequisite of proportionality has been formulated as follows: "Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question."\textsuperscript{483} Thomas Cottier and others emphasise that the principle of proportionality applicable to countermeasures “first entered international law by the application of the principle of equity by international tribunals” and quoted the pertinent discussion in Naulilaa Arbitration between Portugal and Germany (1928).\textsuperscript{484}

Article 50 of the Draft articles places further constraints on the types of obligations that might be impacted by countermeasures. More specifically, this article enumerates the international obligations of states that shall not be affected by countermeasures. Accordingly, countermeasures shall not affect: “(a) the obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations; (b) obligations for the protection of fundamental human rights; (c) obligations of a humanitarian character prohibiting reprisals; (d) other obligations under peremptory norms of general international law.”\textsuperscript{485} Moreover, a state relying upon such measures is not relieved from fulfilling the following obligations: “(a) under any dispute settlement procedure applicable between it and the responsible State; (b) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.”\textsuperscript{486}

\textsuperscript{478} Article 49(2) ILC, ‘Draft articles’ (n 90).
\textsuperscript{479} ibid 129.
\textsuperscript{480} Article 49(1) ILC, ‘Draft articles’ (n 90).
\textsuperscript{481} Articles 49 and 53 ibid.
\textsuperscript{482} Article 51 ibid.
\textsuperscript{483} Article 51 ibid.
\textsuperscript{485} Article 50(1) ILC, ‘Draft articles’ (n 90).
\textsuperscript{486} Article 50(2) ibid.
A number of procedural preconditions apply to countermeasures, such as the requirement to call on the responsible state to fulfil its obligations,487 the requirement to notify the responsible state of a decision to take countermeasures and offer to negotiate,488 and a prohibition on imposing countermeasures if an internationally wrongful act has ceased489 or if there is a pending dispute before a court or tribunal which is authorised to issue a binding decision.490 Additionally, a state that has imposed countermeasures is obliged to terminate them as soon as the responsible state has complied with its obligations.491

Unilateral economic sanctions often do not fall under the definition of legitimate countermeasures. This is due, first of all, to the rigid definition of an injured state492 and, second, to the fact that the illegality of the prior conduct that served to justify the countermeasures and the proportionality of the imposed countermeasures are often called into question.493

3.2 Unilateral Economic Sanctions as Third-Party Countermeasures

The final text of the Draft articles entitles an injured state to rely upon countermeasures, including economic countermeasures.494 Article 42 stipulates under what conditions a state might be considered as an injured state. A state may qualify as an injured state if a breached obligation is owed either to this state or to a group of states (which includes this state), or even to the international community as a whole.495 Despite the explicit right to invoke the responsibility of a state that violated obligations owed to a group of states or the international community as a whole, the application of this right is permitted only if the breach either affects the state or is of such a character as to be able to radically change the position of all the other states to which the obligation is owed with respect to the further performance of the obligation.496

When it comes to the rights of a non-injured state, Article 48 of the Draft articles is a reference point. Article 48 prescribes the rules for invocation of state responsibility by a state other than an injured state.497 According to this

487 Article 52(1)(a) ibid.
488 Article 52(1)(b) ibid.
489 Article 52(3)(a) ibid.
490 Article 52(3)(b) ibid.
491 Article 53 ibid.
492 For more, see footnote 365.
493 Ruys (n 4) 35.
494 Article 49 ILC, 'Draft articles' (n 90).
495 Article 42 ibid.
496 ibid.
497 Article 48 ibid.
article, state responsibility can be invoked by a non-injured state only in relation to certain obligations, namely obligations for the protection of community interests.\textsuperscript{498} What is even more pivotal is that the remedies offered to a non-injured state are confined to claims of cessation, assurances and guarantees of non-repetition, or reparations in the interests of an injured state.\textsuperscript{499} Thus, the right of a non-injured state to impose countermeasures is not explicitly enshrined in the Draft articles.\textsuperscript{500}

The commentary to the Draft articles provides the following explanation for this outcome: “Occasions have arisen in practice of countermeasures being taken by other States, in particular, those identified in Article 48, where no State is injured or else on behalf of and at the request of an injured State. Such cases are controversial and the practice is embryonic.”\textsuperscript{501} The conclusion that the practice is embryonic has been questioned by legal scholars.\textsuperscript{502} I discuss some of these studies below.

Article 54 of the Draft articles makes matters even more complicated, particularly when it states: “This chapter does not prejudice the right of any State, entitled under Article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.” The article does not refer to countermeasures, yet it explicitly mentions “lawful measures.” Christian Hillgruber points out: “As shown by the official commentaries, this provision is seen as a safeguard clause designed to leave the issue of whether and how third States may have recourse to ‘countermeasures’ (which presumably primarily means ‘reprisals’) to be decided in the course of further developments in international law.”\textsuperscript{503}

Before the Draft articles were adopted, the ICJ categorically objected to the possibility of acknowledging the legality of third-party countermeasures: “The

\begin{footnotes}
\textsuperscript{498} The relevant section, reads as follows: “1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole.” ibid.

\textsuperscript{499} Article 48 ibid.

\textsuperscript{500} For a similar conclusion, see Dawidowicz, ‘Third-Party Countermeasures’ (n 372).

\textsuperscript{501} ILC, ‘Draft articles’ (n 90) 129.

\textsuperscript{502} Dawidowicz, \textit{Third-Party Countermeasures in International Law} (n 372); Dawidowicz, ‘Third-Party Countermeasures’ (n 372); Dawidowicz, ‘Public Law Enforcement without Public Law Safeguards?’ (n 372); Katselli Proukaki (n 372).

\end{footnotes}
acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.”

A significant share of unilateral economic sanctions imposed by individual states fall under the category of third-party countermeasures, since states that impose such measures are not always injured states in the sense laid out in the Draft articles. This discrepancy between state practice and the existing legal rules has received sufficient attention in the literature. International law scholars provide numerous accounts of state practice when countermeasures were relied upon by non-injured states, thus making them third-party countermeasures.

Martin Dawidowicz examined the state practice of imposing unilateral countermeasures to establish whether international law recognises a system of public law enforcement for the most serious breaches of international law. After analysing twenty-two instances of coercive measures imposed by non-injured states, Dawidowicz concluded that all of these measures are third-party countermeasures. On this basis, Dawidowicz criticises the view expressed by the ILC concerning third-party countermeasures, arguing that “international practice could thus hardly be described as still being in a formative stage of development.” Moreover, Dawidowicz challenges the premise that western states dominate the state practice, declaring that “as many as 108 states, from all but the Latin American region, have adopted third-party countermeasures at any one time since 1950.”

Elena Katselli has made a list with numerous examples of third-party countermeasures, containing more than thirty instances. Overall, Katselli’s research buttresses the conclusions reached by Dawidowicz.

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504 Military and Paramilitary Activities in and against Nicaragua (n 116) [249].
505 Dawidowicz, Third-Party Countermeasures in International Law (n 372); Dawidowicz, ‘Third-Party Countermeasures’ (n 372); Dawidowicz, ‘Public Law Enforcement without Public Law Safeguards?’ (n 372); Katselli Proukaki (n 372); Christian J Tams, Enforcing Obligations ‘Erga Omnes’ in International Law (Cambridge University Press 2005).
506 Dawidowicz, ‘Public Law Enforcement without Public Law Safeguards?’ (n 372).
507 ibid.
508 ibid 410.
509 ibid 411.
510 Katselli Proukaki (n 372).
511 ibid Chapter 3.
512 ibid.
A study prepared at the request of the European Parliament's Committee on International Trade in 2020 emphasises that sanctions imposed against a state responsible for a violation of international law might be justified under the emerging customary international law on state responsibility. That being said, the study highlights that it is doubtful whether a general right to impose sanctions exists. In a similar vein, Chinese scholars argue that sanctions imposed in response to a previous violation of international law may be permitted, thus legitimising third-party countermeasures.

To conclude our discussion on the legality of third-party countermeasures, the suggestion put forward by Tom Ruys should be quoted: “the time may ultimately be ripe to shift the debate from the binary question whether third-party countermeasures are permissible or not, to defining the possible boundaries to their use.” In light of this proposition, in chapter 4 of this book, I analyse whether unilateral economic sanctions imposed on human rights grounds constitute permissible countermeasures in the sense outlined in the Draft articles. Subsequently, in chapter 5, the possible preconditions for recognition the legality of unilateral economic sanctions imposed on human rights grounds are defined.

4 Unilateral Economic Sanctions and Established Principles of Jurisdiction in International Law

The extraterritorial application of unilateral economic sanctions faces a barrage of criticism from the affected states, practitioners and international legal scholars. From the perspective of public international law, such an...
extraterritorial application may contradict established principles of jurisdiction developed in international law.\textsuperscript{520}

Thus, it is warranted to discuss the relationship between jurisdiction and unilateral economic sanctions, as well as to examine what types of unilateral economic sanctions might be unlawfully extraterritorial. This section starts with a brief review of the principles on the basis of which states are allowed to ascertain jurisdiction. I then proceed with a discussion of secondary sanctions, which have attracted mounting criticism for their alleged inconsistency with the principles on ascertaining jurisdiction, before briefly considering what strategies states implement to offset the negative implications of extraterritorial economic sanctions. Finally, the analysis focuses on defining the types of economic sanctions that run the risk of being classified as unlawfully extraterritorial.

4.1 \textit{Jurisdiction in International Law}

Despite being one of the essential building blocks of international law, the doctrine of jurisdiction remains conceptually blurry and, in practice, often illusory. Yet it is of the utmost importance for states, since, as Cedric Ryngaert points out: “Jurisdiction becomes a concern of international law when a State, in its eagerness to promote its sovereign interests abroad, adopts laws that govern matters of not purely domestic concern.”\textsuperscript{521} This observation explains why jurisdiction is closely related to the principles of non-intervention and of the sovereign equality of states.\textsuperscript{522}

The term “jurisdiction” denotes three competences exercised by a state: prescriptive jurisdiction, adjudicative jurisdiction and enforcement jurisdiction. The most authoritative pronouncements on the doctrine of jurisdiction date back to the judgement in the \textit{Lotus case},\textsuperscript{523} where the PCIJ observed that

\begin{footnotesize}
\begin{enumerate}
\item{\textit{Journée de droit International privé du 23 juin 2017}, vol 85 (Schulthess Verlag 2018); Susan Emmenegger, ‘Extraterritorial Economic Sanctions and Their Foundation in International Law’ (2016) 33 Arizona Journal of International and Comparative Law 631.}
\item{Emmenegger and Döbeli (n 519); Charlotte Beaucillon, ‘Practice Makes Perfect, Eventually? Unilateral State Sanctions and the Extraterritorial Effects of National Legislation’ in Natalino Ronzitti (ed), \textit{Coercive Diplomacy, Sanctions and International Law} (Brill Nijhoff 2016); Emmenegger (n 519); Cedric Ryngaert, ‘Extraterritorial Export Controls (Secondary Boycotts)’ (2008) 7 Chinese Journal of International Law 625.}
\item{Cedric Ryngaert, \textit{Jurisdiction in International Law} (Second edition, Oxford University Press 2015) 5.}
\item{ibid 6.}
\item{\textit{The case of the SS Lotus (France v. Turkey) (Merits) PCIJ (1927) Rep Series A No 10.}}
\end{enumerate}
\end{footnotesize}
prescriptive jurisdiction is not restricted unless there is a prohibitive rule. Notwithstanding the court’s pronouncements, customary international law has taken the opposite stand on the issue of prescriptive jurisdiction. The majority of states favour the permissive principle of ascertaining jurisdiction, which entails that states are required to justify their jurisdictional assertions. Yet, this permissive principle has been formulated rather broadly: “States are generally considered to be authorized to exercise jurisdiction if they can advance a legitimate interest based on personal or territorial connections of the matter to be regulated.”

Discussing the relevance of both approaches for jurisdiction over economic matters, one conclusion deserves particular attention. As Ryngaert has emphasised: “States – in particular the United States and the European Union and its Member States – have never primarily substantiated their claims of economic jurisdiction in Lotus terms. Instead, they relied upon the classical principles of jurisdiction, although such required stretching them at times.” In other words, in economic matters states favour the principle of permissive jurisdiction over an idea of unrestricted jurisdiction unless there is a prohibitive rule.

The territoriality principle is one of the most authoritative grounds for establishing a state’s jurisdiction over a particular matter. Brownlie distinguishes between subjective and objective territorial jurisdiction – while the former relates to the conduct that materialised in a state’s territory, the latter concerns

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524 Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules; as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.” ibid 19.

525 Ryngaert (n 521) 29. In the similar vein, Susan Emmenegger points out: “Today’s conventional view is more restrictive: states are required to justify their jurisdictional assertion under generally accepted rules or principles of international law (permissive principles approach),” Emmenegger (n 519) 644.

526 Ryngaert (n 521) 30.

527 ibid 38.

528 Bruno Simma and Andreas Th Müller, ‘Exercise and Limits of Jurisdiction’ in James Crawford and Martti Koskenniemi (eds.), The Cambridge Companion to International Law (Cambridge University Press 2012) 137; Cedric Ryngaert asserts that: “The primacy of territorial jurisdiction is usually premised on the principle of sovereign equality of States and the principle of non-intervention (or non-interference).” Ryngaert (n 521) 36.
the results.\textsuperscript{529} The effects doctrine, which evolved in US antitrust law, is considered as a variation of objective territorial jurisdiction.\textsuperscript{530} The International Bar Association has acknowledged that “virtually all jurisdictions apply some form of an ‘effects’ test.”\textsuperscript{531} Thus, states recognise objective territorial jurisdiction in one way or another. However, the effects doctrine should not be conflated with jurisdiction as a territorial extension of domestic law. Jurisdiction as a territorial extension can be defined in the following way: “Jurisdiction via territorial extension is typically exercised by conditioning access to domestic territory and markets, on an economic operator satisfying certain standards also when it operates outside the domestic sphere, and by including performance abroad in assessing whether the operator meets domestic regulatory targets.”\textsuperscript{532}

The personality or nationality principle endows a state with jurisdiction over its nationals, and a distinction is made between active and passive embodiments of this principle.\textsuperscript{533} The active personality principle entitles a state to exercise jurisdiction over its nationals abroad, including having jurisdiction over crimes committed by its nationals abroad.\textsuperscript{534} The passive personality principle, the existence of which is often questioned, is triggered when a national of a given state is the victim of a crime.\textsuperscript{535}

In addition to these principles, the protective principle has also been fully acknowledged.\textsuperscript{536} The rationale underlying the need for such a principle has been expressed as follows: “acts that severely jeopardise a state’s government functions are considered a sufficient basis for jurisdiction.”\textsuperscript{537} While the exact contours of this principle have not been determined with great precision, numerous measures might be justified on the basis of it. Bruno Simma and Andreas Müller have identified the following tendency: “In the post-2001 atmosphere where ‘security’ appears to have become to some a catch-all concept, a sweeping application of the protective principle may present itself as highly opportune, but this is far from being a commonly accepted position.”\textsuperscript{538}

\textsuperscript{530} Simma and Müller (n 528) 143.
\textsuperscript{531} Ryngaert (n 521) 84.
\textsuperscript{532} ibid 94.
\textsuperscript{533} Simma and Müller (n 528) 142.
\textsuperscript{534} ibid.
\textsuperscript{535} ibid.
\textsuperscript{536} ibid 143.
\textsuperscript{537} ibid 144.
\textsuperscript{538} ibid.
The universality principle, commonly known as universal jurisdiction, authorises a state to assert jurisdiction over a crime irrespective of the existence of any other grounds for jurisdiction.\footnote{ibid.} This broad discretion is warranted by the unique nature of the crimes that are of concern to the international community.\footnote{ibid.} This principle has been embedded in numerous international conventions, mainly in the fields of international humanitarian law and international human rights law.\footnote{ibid 145.}

4.2 Secondary Sanctions and Their Extraterritorial Reach

In this book, secondary sanctions are defined as "economic restriction imposed by a sanctioning or sending state (e.g., the United States) that is intended to deter a third-party country or its citizens and companies (e.g., France, the French people and French companies) from transacting with a sanctions target (e.g., a rogue regime, its high government officials)."\footnote{Jeffrey A Meyer, ‘Second Thoughts on Secondary Sanctions’ (2009) 30 University of Pennsylvania Journal of International Law 905, 926. Other scholars define secondary sanctions as “extraterritorial sanctions, also called secondary sanctions, that subject foreign persons to sanctions for actions that they take wholly outside the sanctioning state.” Rathbone, Jeydel and Lentz (n 518) 1070; or as “a ‘secondary sanction,’ adapting Lowenfeld’s definition of an economic sanction to this context, is an economic measure taken for the political end of inducing third states or non-state actors in third states to change their policies or practices concerning economic dealings with the target of the sending state’s ‘primary sanctions.’” Bechky (n 337) 10.}

Perry Bechky quotes Senator Alfonse D’Amato to illustrate the rationale behind secondary sanctions: “Now the nations of the world will know they can trade with them [i.e. Iran and Libya] or trade with us. They have to choose.”\footnote{Bechky (n 337) 10–11.} Notorious historical examples of secondary sanctions include the Arab League Boycott against Israel,\footnote{Nancy Turck, ‘The Arab Boycott of Israel’ (1977) 55 Foreign Affairs 472.} the United States sanctions against the Soviet Union imposed in relation to the construction of the pipeline in 1982\footnote{Perlow (n 110).} and the Helms-Burton Act of 1996.\footnote{Robert L Muse, ‘A Public Internation Law Critique of the Extraterritorial Jurisdiction of the Helms-Burton Act (Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996)’ (1996) 30 The George Washington Journal of International Law and Economics 207.}

The United States is known for implementing unilateral economic restrictions with broad extraterritorial reach. An example that has received
considerable critical attention is the Helms-Burton Act, which was discussed under the auspices of the WTO. The European Communities formally initiated a dispute at the WTO. Furthermore, Canada and Mexico engaged in a dispute under the NAFTA. For more details, see Harvey Oyer, ‘The Extraterritorial Effects of U.S. Unilateral Trade Sanctions and Their Impact on U.S. Obligations under NAFTA’ (1997) in Florida Journal of International Law 429.

547 The European Communities formally initiated a dispute at the WTO. Furthermore, Canada and Mexico engaged in a dispute under the NAFTA. For more details, see Harvey Oyer, ‘The Extraterritorial Effects of U.S. Unilateral Trade Sanctions and Their Impact on U.S. Obligations under NAFTA’ (1997) in Florida Journal of International Law 429.

548 Among recent sanctioning programmes, the secondary financial sanctions imposed on Iran by the United States are vehemently condemned as extraterritorial. Even China and its financial institutions had to comply with the US secondary sanctions against Iran, despite China’s close economic cooperation with Iran.

Secondary sanctions are frequently criticized for overstepping jurisdictional boundaries. In particular, it is argued that secondary sanctions “impinge on the rights of neutral states to regulate their own citizens and companies.” The literature abounds in claims that secondary sanctions are illegal. In this regard, Sarah Cleveland notes: “The use of trade sanctions or foreign assistance limitations to impose secondary boycotts has been criticized for violating international law principles regarding state jurisdiction.” Cedric Ryngaert contends that secondary sanctions, or secondary boycotts as he calls them, “raise serious public international law concerns.” Ryngaert emphasizes that such measures “subject corporations that are not incorporated in the boycotting State to the latter’s regulations in the absence of a direct and clearly discernable effect on that State.” In their most recent study, Tom Ruys and Cedric Ryngaert argue that secondary sanctions limit the sovereignty of third states by curtailing their right to freely conduct external economic relations with other states.

A study prepared at the request of the European Parliament’s Committee on International Trade reveals the following negative repercussions of secondary
sanctions: “The extraterritorial reach of sanctions does not only affect EU businesses but also puts into question the political independence and ultimately the sovereignty of the EU and its Member States.”

However, other scholars evince little sympathy for these arguments. Jeffrey Meyer argues that a distinction must be drawn between various types of secondary sanctions. Following Meyer’s line of reasoning, the prohibition on conducting business with third-country nationals or entities that do business with the sanctioned state or its enterprises is a legitimate exercise of the “territorial jurisdiction” – a combination of territorial and nationality principles. Other types of secondary sanctions that directly target foreign nationals or legal enterprises, in Meyer’s view, are more susceptible to jurisdictional challenges. Hence, Meyer contends that narrowly defined secondary sanctions – i.e. those that are connected either with a territory or with a nationality – are legal and should not be conflated with other secondary sanctions.

States have invoked various justifications for their extraterritorial sanctions. On some occasions, the classical territorial or nationality principles of jurisdiction were extended. On others, the protective jurisdiction or effects doctrine were relied upon. Hence, Meyer contends that narrowly defined secondary sanctions – i.e. those that are connected either with a territory or with a nationality – are legal and should not be conflated with other secondary sanctions.

The application of the nationality principle might be particularly burdensome if a multinational legal entity is involved. For example, the United States was known for extending the reach of its unilateral sanctions to any legal entity “controlled” by US nationals. These legal entities were required

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556 Stoll and others (n 232) 9.
557 Meyer (n 542).
558 “[...] the fact that the United States may lack a proper prescriptive jurisdictional basis to regulate business deals between China and Sudan does not dispel U.S. authority to regulate the conduct of U.S. companies in U.S. territory to prohibit them from doing business with Sudan's Chinese business partners.” ibid 957.
559 Meyer (n 542).
560 ibid.
561 Ryngaert (n 520).
562 Meyer (n 542) 909. Regarding the possibility of justifying secondary sanctions under the protective principle, Susan Emmenegger emphasises that there is a lack of unanimity on this issue among the legal scholars. Emmenegger (n 519) 651–652.
563 “In the field of economic law, additional difficulties surrounding the application of the nationality principle may arise, since the nationality of a corporation may not always be readily established. Corporations could have different nationalities, as their nationality could be based on the State of incorporation, shareholder nationality or other corporate links to the forum.” Ryngaert (n 520) 627.
564 In this vein, Cedric Ryngaert provides the following examples: “In the 1960s, it [the United States] attempted to prohibit Fruehauf, a French corporation under U.S. control, from exporting to China under the U.S. Trading with the Enemy Act. In the 1980s then, it
to comply with unilateral US sanctions even though they might have been incorporated under the laws of another state. The predominant international sentiment in this regard is that this practice oversteps the limits of the principle of nationality used for ascertaining jurisdiction.\footnote{\pagebreak[0]Susan Emmenegger discussed this issue and concluded as follows: “Moreover, a state cannot premise nationality jurisdiction on control of a foreign corporation by its citizens. The US practice of exercising jurisdiction over companies that are incorporated outside the United States but are owned by a US parent corporation is not legal under international law.” Emmenegger (n 519) 650; Ryngaert (n 521) 110.}

States that suffer from the negative consequences of secondary sanctions may implement blocking statutes to hinder domestic legal entities or individuals from complying with these secondary sanctions.\footnote{\pagebreak[0]Other available responses to unilateral economic sanctions include: challenging the legality of such measures before international and national courts, issuing diplomatic statements condemning such sanctions, taking countermeasures, implementing measures with the objective of reducing the economic vulnerability of the economy and businesses to such measures. Stoll and others (n 232) 51.} The history of blocking statutes goes back to the Arab Oil Embargo, when the United States prohibited its nationals from complying with the secondary embargo against Israel.\footnote{\pagebreak[0]For a detailed discussion of the United States blocking statutes and the several court cases which were initiated by the US government to reinforce these blocking statutes, see Ryngaert (n 520) 641.} Later the enactment of the Helms-Burton Act resulted in the adoption of the blocking statute by the European Union.\footnote{\pagebreak[0]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 from 1996 (OJ L).} Businesses from both sides of the Atlantic were confronted with a dilemma – what set of rules should they comply with and at what cost?\footnote{\pagebreak[0]Rathbone, Jeydel and Lentz (n 518) 1072–1074.} Fortunately, this tension was resolved by diplomatic means.\footnote{\pagebreak[0]In 2015, Iran, the five permanent members of the UN Security Council, Germany and the European Union reached a landmark decision on Iran’s nuclear programme (the Joint
updated blocking statute in support of Iran’s nuclear deal entered into force on 7 August 2018.\textsuperscript{572} Despite these laudable efforts, practitioners are sceptical of the ability of blocking statutes to impact the decisions of private entities to comply with the reinstated unilateral US sanctions.\textsuperscript{573} Confirming this view, the devastating effects of these sanctions on the EU-Iran bilateral trade have been reported: “imports from Iran to the EU dropped 92.8% in 2019, while exports to Iran dropped nearly 50%.”\textsuperscript{574}

History provides successful examples of blocking statutes, including the Canadian blocking statute, which prohibited companies incorporated in Canada from complying with the unilateral economic sanctions imposed on Cuba by the United States.\textsuperscript{575} In 1997, the Canadian subsidiary of the US parent company Walmart put pyjamas made in Cuba on sale. This minor action triggered a forceful response from both the US and Canadian sides. The US OFAC claimed that the Canadian subsidiary was subject to US economic sanctions

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\textsuperscript{573} In recent cases involving US sanctions violations by European companies, Ms Bradshaw says compliance with the EU blocking regulation even seems to have been treated as an aggravating factor, justifying greater punishment. ‘Evidence of steps taken to follow the EU regime could be invoked as proof of how a company is violating the US regulations,’ she says.” Bruce Love, ‘Companies Caught in EU-US Sanctions Crossfire’ Financial Times (30 January 2020) <https://www.ft.com/content/97a75318-16a8-11ea-b869-9971b9fca199>.

\textsuperscript{574} Stoll and others (n 232) 31.

against Cuba and should comply with them by sending the pyjamas back to Cuba.\textsuperscript{576} By contrast, Canada asserted that the Canadian subsidiary was subject to the blocking statutes introduced against Cuban extraterritorial sanctions.\textsuperscript{577} After evaluating the relevant risks and losses, the Canadian subsidiary of Walmart complied with the Canadian laws, while the parent company was forced to pay fines in the United States.\textsuperscript{578}

### 4.3 Types of Primary and Secondary Unilateral Sanctions That Face a Significant Risk of Being Classed as Extraterritorial

The categories of measures described below have been chosen due to a significant risk of their being found inconsistent with the established principles of jurisdiction. One more clarification is warranted here. The examples mostly represent the unilateral economic sanctions imposed by the United States, and thus we analyse them in light of the jurisdictional justifications invoked by the United States, namely the effects doctrine and protective jurisdiction.

#### 4.3.1 Restrictions Imposed on Foreign Persons

Unilateral economic sanctions may prescribe restrictions applicable to foreign persons or foreign legal entities. One such example is the Iran and Libya Sanctions Act of 1996 (\textit{ISA}),\textsuperscript{579} as amended by certain provisions of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (\textit{CISADA})\textsuperscript{580} and the Iran Threat Reduction and Syria Human Rights Act (\textit{ITRA}).\textsuperscript{581}

Initially, the \textit{ISA} required the president to impose at least two out of a menu of six sanctions on foreign companies, entities and persons that made an investment in Iran's energy sector of more than $40 million in one year.\textsuperscript{582} This act explicitly stipulated that it applies to “any person the President determines

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\textsuperscript{576} H Scott Fairley, ‘Between Scylla and Charybdis: The U.S. Embargo of Cuba and Canadian Extraterritorial Measures Against It’ (2010) 44 The International Lawyer 887.

\textsuperscript{577} ibid.


\textsuperscript{582} Iran and Libya Sanctions Act of 1996 Section 5 (a) Sanctions With Respect to Iran.
has carried out the activities described” or its successor, subsidiary or affiliate if they engaged in such activities with the actual knowledge.\textsuperscript{583} The sanctions menu included: (1) denial of Export-Import Bank loans, credits or credit guarantees for US exports to the sanctioned entity; (2) denial of licenses for the US export of military or militarily useful technology to the entity; (3) denial of US bank loans exceeding $10 million in one year to the entity; (4) if the entity is a financial institution, a prohibition on its service as a primary dealer in US government bonds and/or a prohibition on its serving as a repository for US government funds (each counts as one sanction); (5) prohibition on US government procurement from the entity; and (6) restriction on imports from the entity, in accordance with the International Emergency Economic Powers Act.\textsuperscript{584}

Regarding the imposition of unilateral economic sanctions of this kind on foreign persons, the Act prescribes that the president should engage in consultations with “the government with primary jurisdiction over that foreign person with respect to the imposition of sanctions under this Act.”\textsuperscript{585} Following such consultations, the president should impose sanctions “unless the President determines and certifies to the Congress that the government has taken specific and effective actions, including, as appropriate, the imposition of appropriate penalties, to terminate the involvement of the foreign person in the activities” which triggered the imposition of sanctions.\textsuperscript{586}

After the \textit{ISA} was amended by the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (\textit{CISADA}), the president was required to impose at least three out of six possible sanctions on any person investing $20 million in one year, if this investment “is an investment that directly and significantly contributes to the enhancement of Iran's ability to develop petroleum resources.”\textsuperscript{587} The application of these economic sanctions to subsidiaries and affiliates was replaced by the application to the persons who own or control or are owned and controlled by the person that engaged in sanctioned conduct.\textsuperscript{588}

The Iran Threat Reduction and Syria Human Rights Act (\textit{ITRA}), which amended the \textit{ISA}, significantly tightened sanctions by expanding their

\textsuperscript{583} ibid Section 5 (c) Persons Against Which the Sanctions Are To Be Imposed.
\textsuperscript{584} ibid Section 6. Description of Sanctions.
\textsuperscript{585} ibid Section 9. Duration of Sanctions; Presidential Waiver; (a) Delay of Sanctions.
\textsuperscript{586} ibid.
\textsuperscript{587} Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 Section 102. Expansion of sanctions under the Iran Sanctions Act of 1996.
\textsuperscript{588} ibid Section 102. Expansion of sanctions under the Iran Sanctions Act of 1996.
application to other activities, as well as by requiring that the president impose five possible sanctions from a list against anyone engaged in sanctionable activities.\textsuperscript{589} 

The expansive extraterritorial reach of these sanctions was strongly opposed by the European Union, and the United States agreed to a partially diplomatic solution with respect to EU-incorporated entities that continued doing business with Iran.\textsuperscript{590} Yet these acts were not repealed, and their application to other foreign individuals or foreign-based entities is permitted.

These prohibitions serve as a good example of the sanctions that require justification under the existing principles for ascertaining jurisdiction, in order not to be considered unlawfully extraterritorial. These restrictions could be potentially justified under the effects doctrine or the protective principle of jurisdiction. The effects doctrine emerged in the context of applying antitrust law extraterritorially.\textsuperscript{591} In order to be able to rely upon the effects doctrine to ascertain jurisdiction over foreign nationals, the state must prove that the conduct of the foreign nationals in question has a direct, substantial and reasonably predictable effect on the state invoking the effects doctrine.\textsuperscript{592} The unilateral economic sanctions described above pursue the objective of

\textsuperscript{589} Iran Threat Reduction and Syria Human Rights Rights Act of 2012.

\textsuperscript{590} “Traditionally skeptical of imposing economic sanctions, European Union states opposed ISA as an extraterritorial application of U.S. law and threatened counter-action in the World Trade Organization (WTO). In April 1997, the United States and the EU agreed to avoid a trade confrontation over it (and a separate ‘Helms-Burton’ Cuba sanctions law, P.L. 104–114). This agreement contributed to a May 18, 1998, decision by the Clinton Administration to waive ILSA sanctions (‘national interest’ grounds – Section 9[c]) on the first project determined to be in violation: a $2 billion contract, signed in September 1997, for Total SA of France and its partners, Gazprom of Russia and Petronas of Malaysia to develop phases 2 and 3 of the 25-phase South Pars gas field. In exchange, the EU pledged to increase cooperation with the United States on non-proliferation and counter-terrorism, and the Administration indicated that EU firms would likely receive waivers for future similar investments in Iran.” Kenneth Katzman, ‘The Iran Sanctions Act (ISA)’ (2007) CRS Report for Congress RS20871.

\textsuperscript{591} “It is settled law […] that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the State reprehends; and these liabilities other States will ordinarily recognise.” United States v. Aluminum Co of America 148 F2d 416 (1945) (Circuit Court of Appeals, 2nd Cir).

\textsuperscript{592} “[…] the US Department of Justice (‘DOJ’) prosecutes ‘foreign conduct that was meant to produce, and did produce some substantial effect in the United States,’ while the European Commission extends extraterritorial jurisdiction to cartel cases where the economic effects in the European Union are ‘direct, immediate, reasonably foreseeable and substantial.’” International Bar Association, ‘Report of the IBA Task Force on Extraterritorial Jurisdiction’ (2009) 12.
reinforcing the effectiveness of such restrictions by expanding their application extraterritorially. It appears though that non-compliance on the part of foreign nationals with such sanctions cannot produce the direct, substantial and reasonably predictable effect required to justify their extraterritorial application under the effects doctrine.

By contrast, the boundaries of protective jurisdiction are not well defined. Thus, the United States might argue that Iran is engaged in the development of the nuclear weapons and thus that sanctions that undermine the economic viability of Iran’s industries aim to cut the financial support for nuclear weapons development. However, the validity of this argument can be challenged: it is debatable whether extraterritorial unilateral economic sanctions can be justified under the principle of protective jurisdiction, if the potential threat does not emanate from the conduct of particular economic operators abroad, but rather from their partners in third countries.

4.3.2 Restrictions Imposed on Domestic Legal Entities and Individuals to Penalise Third-Country Nationals That Do Not Comply with a State’s Unilateral Sanctions

Early examples of this type of restrictions include the prohibition on trading with the enemy and third parties engaged in such trade.593 The existing sanctions regimes may urge third-country nationals to comply with unilateral sanctions, either by conditioning market access or by penalising domestic constituencies for dealing with the non-compliant third parties. Examples of both types of restrictions are provided below.

The Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (CISADA) includes several provisions that restrict access to the US financial market for foreign-based financial institutions that fail to comply with the US financial sanctions against Iran.594 This Act followed the unprecedented (and futile) efforts on the part of President Obama and his administration to improve relations between the two countries.595 It was adopted as a means of enforcing the provisions of the Iran Sanctions Act of 1996 by imposing additional restrictions.596 For example, CISADA enlists a number of prohibited financial transactions and prohibits the US-based financial institutions.

593 Alexander (n 19) 14–20.
from opening or maintaining a correspondent account or a payable-through account for a foreign-based financial institution that “knowingly” engages in prohibited transactions.\textsuperscript{597} In fact, a correspondent account or payable-through account in a US-incorporated bank is the only possible way in which foreign financial institutions can maintain access to the US financial market, without incorporating their branch or subsidiary in the United States. Thus, all financial institutions irrespective of the country in which they are incorporated are bound by these unilateral financial sanctions, if they are interested in preserving market access to the US financial market.

The regulation that was adopted to implement \textit{CISADA} authorises the secretary of the treasury either to impose strict restrictions on opening and maintaining a correspondent or a payable-through account for a foreign-based financial institution or to prohibit domestic financial institutions from opening such an account.\textsuperscript{598} Furthermore, the regulation stipulates that a special list of the financial institutions to which the aforesaid restrictions apply shall be maintained and made publicly accessible.\textsuperscript{599} These restrictions demonstrate how compliance with unilateral economic sanctions can be leveraged as a precondition for market access.

The relationship between unilateral financial sanctions and jurisdiction is discussed in detail in the next part of this chapter. However, one observation is warranted here. Conditioning market access on compliance with unilateral economic sanctions does not pose a significant risk of being extraterritorial, if it is channelled through the regulation of the conduct of domestically incorporated companies.\textsuperscript{600} Yet, it might be extremely expansive if the state that imposes such restrictions has dominant market power.\textsuperscript{601}

Other potentially extraterritorial unilateral economic sanctions are restrictions imposed on domestic persons for dealing with foreign third parties that

\begin{footnotesize}
\begin{enumerate}
\item \textit{ibid} Sec. 104. Mandatory sanctions with respect to financial institutions that engage in certain transactions.
\item \textit{The Iranian Financial Sanctions Regulations 31 CFR part 561.}
\item \textit{ibid.}
\item Tom Ruys and Cedric Ryngaert reached a similar conclusion: “It is argued that sanctions which limit foreign persons’ access to the targeting state’s economic or financial system fall within that state’s territorial sovereignty, and in principle do not raise concerns under the law of jurisdiction.” Ruys and Ryngaert (n 555) 9.
\item Chinese scholars discussing this type of unilateral US sanction emphasise its extraterritorial reach: “While admitting that the actual implementation of the sanctions is done by regulating the actions of financial institutions under the jurisdiction of the United States, ‘the effect, purpose, and implementation, is to sanction legal foreign exchange in the energy and financial sectors.” Rotblat (n 323) 350.
\end{enumerate}
\end{footnotesize}
fail to comply with a state’s unilateral sanctions. One such example is the extremely expansive interpretation of the prohibition to “facilitate” business transactions with the sanctioned entities adopted by the Office of Foreign Assets Control (OFAC), a US agency responsible for administering US sanctions. The prohibition on “facilitating” transactions between the sanctioned entities and third parties outside of the US jurisdiction has been incorporated in a number of economic sanctions regimes administered by the OFAC. Legal commentators have emphasised that “[b]y virtue of OFAC’s prohibitions on facilitation, a U.S. company may be exposed to sanctions risks when dealing with a completely legitimate non-U.S. business partner if that foreign entity in turn does business with a sanctioned destination.”

The prohibition on a US person’s “approval” or “facilitation” of conduct by a foreign subsidiary might have the same effect as the application of sanctions on companies incorporated abroad. The complexity of this prohibition is further exacerbated by the different definitions of what constitutes “facilitation” under numerous US sanctions regimes. In light of this issue, practising lawyers observe that “it is the concept of prohibited ‘facilitation’ of transactions by non-U.S. persons that is most apt to keep compliance counsel up at night.”

The conditioning of market access and the prohibition on “facilitating” business transactions between sanctioned entities and third parties imposed on domestic constituencies appear to be a purely territorial exercise of jurisdiction. However, the situation is more complex than it seems. Prohibitions of this kind, reinforced by severe civil penalties or even criminal prosecution, may lay the foundations for risk-based compliance, and, as a result, extend the reach of unilateral economic sanctions far beyond the territorial borders of a state.

The effect of such regulations is that legal entities or individuals with respect to whom the United States has no right to either prescribe rules of

602 Rathbone, Jeydel and Lentz (n 518).
603 ibid 1102.
605 Rathbone, Jeydel and Lentz (n 518) 1102–1103.
606 ibid 1102.
607 Discussing unilateral US sanctions that restrict market access, Tom Ruys and Cedric Ryngaert note: “As international law does not entitle foreign persons to financial, economic, or physical access to the US, such measures do not, in principle, raise jurisdictional problems.” Ruys and Ryngaert (n 555) 12.
conduct or enforce them are, in reality, bound by them. In this regard, Suzanne Katzenstein has accurately pointed out that “even when the U.S. lacks adjudicative jurisdiction over a foreign party, the government is able to penalize the foreign party through directing U.S. companies to refrain from engaging in business with it.”

4.3.3 Restrictions Imposed on Foreign Subsidiaries “Controlled” by the State’s Nationals

Unilateral economic sanctions could apply to foreign subsidiaries of domestically incorporated entities or foreign legal entities over which the national of a given state exercises control. The following examples illustrate these restrictions.

The first example is the unilateral economic sanctions imposed on Cuba by the US. According to the regulations, these sanctions apply to “persons subject to the jurisdiction of the United States,” which includes “(a) Any individual, wherever located, who is a citizen or resident of the United States; (b) Any person within the United States as defined in § 515.330; (c) Any corporation, partnership, association, or other organization organized under the laws of the United States or of any State, territory, possession, or district of the United States; and (d) Any corporation, partnership, association, or other organization, wherever organized or doing business, that is owned or controlled by persons specified in paragraphs (a) or (c) of this section.”

This definition of “persons subject to the jurisdiction of the United States” covers any legal entity, regardless of where it is established, that is owned or controlled by US citizens, residents or legal entities. Legal commentators have emphasised that the meaning of the terms “owned” and “controlled” has been interpreted differently in various sanctions regimes, thus contributing to the uncertainty regarding the exact scope of such ownership or control.

The second example is provided by the unilateral economic sanctions imposed on Iran that apply to the entities “controlled” by US persons. For instance, the pertinent regulation stipulates: “An entity that is owned or controlled by a United States person and established or maintained outside the United States is prohibited from knowingly engaging in any transaction, directly or indirectly, with the Government of Iran or any person subject to the jurisdiction of the Government of Iran that would be prohibited pursuant to

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608 Katzenstein (n 324) 315.
609 Cuban Assets Control Regulations 31 CFR Part 515 §515.329 – Person subject to the jurisdiction of the United States; person subject to U.S. jurisdiction.
610 Rathbone, Jeydel and Lentz (n 518).
this part if engaged in by a United States person or in the United States.”\textsuperscript{611} In this particular example, an entity should not only be “owned” or “controlled” by a US person, but also engage in a certain conduct “knowingly.”

These examples should be distinguished from the anti-circumvention provisions incorporated into primary sanctions. For example, the EU Guidelines on the Implementation and Evaluation of Restrictive Measures (Sanctions) prescribe the following rule: “An entity incorporated in an EU Member State may not, inter alia, use a company that it controls as a tool to circumvent a prohibition, including where that company is not incorporated in the EU, nor may this entity give instructions to such effect.”\textsuperscript{612} The difference between this rule and the previous examples is that the former curtails evasion practices by prohibiting certain behaviour on the part of domestically incorporated entities, while the latter expands the prescriptive jurisdiction of a state enacting such unilateral sanctions.

Unilateral economic sanctions, compliance with which was mandatory for foreign-based entities if they were controlled by US persons, came in for stinging criticism. A number of states, including the European Union and Canada, expressed their opposition to such measures, arguing that these restrictions deprive them of their legitimate right to regulate the conduct of the entities established in their respective territories.\textsuperscript{613} Indeed, this extraterritorial expansion of the prescriptive jurisdiction deprives the states under whose laws legal entities are established of their legitimate right to prescribe norms of conduct. Whether such extraterritorial expansion can be permitted under the effects doctrine or the protective principle of jurisdiction is doubtful. The adverse impact of non-compliance with unilateral economic sanctions by foreign-based entities may be too insignificant to be justified under the effects doctrine. The protective principle of jurisdiction is related to the state's national security. Thus, it is necessary for sanctions that are enforced via such expansive extraterritorial restrictions to be imposed on a state that represents a genuine threat to the sanctioning state. This is a high threshold that can be met only by a subset of existing sanctions.

Additionally, the possibility of justifying such extraterritorial sanctions by an expansive interpretation of the nationality principle is doubtful. In this

\textsuperscript{611} Iranian Transactions and Sanctions Regulations 31 CFR Part 560 § 560.215 – Prohibitions on foreign entities owned or controlled by U.S. persons.


\textsuperscript{613} Muse (n 546).
regard, Tom Ruys and Cedric Ryngaert observe: “From a jurisdictional perspective, this ‘control theory’ appears to be an improper application of the nationality principle, as in international law the nationality of a corporation is based on its place of incorporation rather than the nationality of its shareholders.”

4.3.4 Restrictions on Exports of Goods, Services and Technology That Incorporate Components or Technology Originated in a State, If Such Exports Are Destined to Designated Entities

Since May 2019, the United States has been imposing various restrictions on the Chinese-based technology companies, mainly Huawei and its affiliates incorporated globally. As a result, US exports, reexports and in-country transfers to Huawei and its affiliates are subject to a compulsory export license requirement, which is issued under the presumption of denial (i.e. it is assumed that the majority of license requests will be denied). These restrictions have been tightened several times: the number of entities to which export licensing requirement applies, as well as categories of goods, were expanded.

In May 2020, the application of the export licensing requirement was expanded to include foreign-produced goods, if these goods were produced using US technology (Foreign-Produced Direct Product Rule) and if they are destined for Huawei and its non-US affiliates. These restrictions that inter alia completely prevent Huawei from obtaining foreign-produced chips.

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614 Ruys and Ryngaert (n 555) 18.
615 On 16 May 2019, the US Bureau of Industry and Security (BIS) included Huawei and sixty-eight non-U.S. affiliates of Huawei in twenty-six locations on the so-called Entity List. This listing entails the imposition of additional license requirements on the listed entities for exports, reexports and in-country transfers, as well as exclusion from most license exceptions. U.S. Department of Commerce, Bureau of Industry and Security, 15 C.F.R. § 744 Addition of Entities to the Entity List, Final Rule (16 May 2019).
616 ibid.
developed or produced from the US software or technology were revised and further tightened in August 2020.\textsuperscript{619}

The latter restrictions are of particular interest for our discussion. In particular, the relevant rules stipulate that certain categories of foreign-produced goods can be subject to the US Export Administration Regulation (\textsc{e}ar).\textsuperscript{620} The foreign-produced goods that fall into this category are: (1) goods that contain a certain percentage of controlled US-origin content which is more than the \textit{de minimis} amount\textsuperscript{621} and (2) foreign-produced goods that are subject to §736.2(b)(3) of the \textsc{e}ar (the foreign-produced direct product rule).\textsuperscript{622} The foreign-produced direct product rule applies to two types of goods: (1) foreign-made items that are direct products of “controlled” technology or software\textsuperscript{623} and (2) foreign-made items that are direct products of a complete plant or any major component of a plant, if this plant or component is the direct product of “controlled” technology.\textsuperscript{624} These rules imply that legal entities incorporated in other jurisdictions may be obligated to comply with unilateral US sanctions, even if they produce goods abroad, and, as a result of these unilateral sanctions, are prohibited from exporting goods that are considered to be subject to the \textsc{e}ar and are destined for sanctioned states and/or legal entities.

The reasons lying behind these severe restrictions are formulated as follows: “they [Huawei Technologies Co., Ltd. and its affiliates] pose a significant risk of involvement in activities contrary to the national security or foreign policy interests of the United States.”\textsuperscript{625} Notably, tightening of the restrictions was justified on the following grounds: “These revisions promote U.S. national security by limiting access to, and use of, U.S. technology to design and produce items outside the United States by entities that pose a significant risk

\begin{enumerate}
\item U.S. Department of Commerce, Bureau of Industry and Security, 15 C.F.R. § 736, 744 and 762 (n 617).
\item The rules on the \textit{de minimis} content are prescribed by 15 C.F.R. § 734.4 – De minimis U.S. content.
\item General Prohibition Three – Foreign-produced direct product of specified “technology” and “software” (Foreign-Produced Direct Product Rule), 15 C.F.R. § 736.2 General prohibitions and determination of applicability.
\item (A) Conditions defining direct product of technology. 15 C.F.R. § 736.2 General prohibitions and determination of applicability.
\item (B) Conditions defining direct product of a plant. 15 C.F.R. § 736.2 General prohibitions and determination of applicability.
\end{enumerate}
of involvement in activities contrary to the national security or foreign policy interests of the United States.”

In light of this, it is clear that the protective principle on ascertaining jurisdiction may be invoked to justify unilateral sanctions that prescribe rules of conduct for foreign-based legal entities, provided that they use US-origin technology and/or software. In the present case, the threat that Huawei and its affiliates pose to the US national security is ambiguous and revolves around the potential threat that may emanate from the alleged close links between Huawei and the Chinese military. Such an all-embracing use of the protective principle would probably be opposed by other countries and would not justify these unilateral sanctions, which are unlawfully extraterritorial.

4.3.5 Restrictions on the Re-export of Goods, Services and Technology That Originated in a State

Export control laws are common for many jurisdictions. For instance, the US Export Control Act laid the foundation for the GATT 1947 dispute between Czechoslovakia and the United States, in which the latter relied upon the national security exception embedded in the GATT 1947.

Unilateral economic sanctions may be framed as restrictions on the re-export of goods and services. Indeed, such restrictions are entrenched in the US sanctions regimes against Cuba, Iran, Sudan and Syria. Foreign entities are prohibited from exporting goods, services, software and technology that are of US origin or that contain more than a de minimis amount of the US content from third countries to the sanctioned states.

These prohibitions on re-export may raise concerns regarding their extraterritorial application. The prohibition on re-export entails that the government must regulate the conduct of foreign-based entities, entities that potentially

629 “OFAC’s sanctions regimes broadly prohibit the export of goods, services, software, and technology from the United States or by U.S. persons to Cuba, Iran, Sudan, and Syria, including exports that are ‘transshipped’ through third countries,” Rathbone, Jeydel and Lentz (n 518) 1107.
630 ibid.
have no connection to that particular state, by requiring them to refrain from engaging in certain business transactions. In other words, the government of one state prescribes and enforces rules with respect to subjects over which it has no jurisdiction.

The extraterritorial reach of these sanctions explains why enforcement agencies, while enforcing such prohibitions, allege that the violators were involved in unlawful indirect export from the United States instead of claiming a violation of re-export rules. In this regard, commentators have pointed out: “The fact patterns in these cases suggest that OFAC could have alleged ‘reexport’ violations [...] , but instead chose to allege unlawful indirect export ‘from the United States’ [...] . Presumably, this is because the extraterritorial application of the sanctions regulations is less controversial when the relevant activity is alleged to have occurred ‘from the United States,’ rather than entirely overseas.”

The penalties for violations of sanctions of this kind can be severe. For instance, in 2018 Ericsson Inc (located in Texas) and Ericsson AB (located in Sweden), both subsidiaries of Telefonaktiebolaget LM Ericsson, agreed to pay a $145,893 settlement for violations of the economic sanctions against Sudan. In 2018, the Chinese corporation ZTE (Zhongxing Telecommunications Equipment Corporation) and ZTE Kangxun Telecommunications Ltd pled guilty to violating US re-export sanctions against Iran. The initial ban which was imposed against the corporation was lifted by the United States only after the company agreed to a number of penalties, including a $1 billion fine. This fine, along with other restrictions wilfully undertaken by the corporation, might be considered as the most severe punishment for violation of the prohibition to re-export US-origin goods and technologies.

5 Jurisdiction and the Imposition of Unilateral Financial Sanctions

The recent proliferation of unilateral financial sanctions has resulted in a number of ongoing disputes before US domestic courts, in which foreign nationals
have been charged with violating these restrictions. In light of these developments, this section is devoted to the discussion of unilateral financial sanctions, their extraterritorial application and public international law principles on establishing jurisdiction.

5.1 The Era of Financial Warfare

In his book *Treasury’s War: The Unleashing of a New Era of Financial Warfare*, Juan Zarate posits: “We are now living in a new era of financial warfare.” He explains that: “This new warfare is defined by the use of financial tools, pressure, and market forces to isolate rogue actors from the international financial and commercial systems and gain leverage over our enemies.” This new financial warfare, in Zarate’s view, has been channelled in three directions: the expansion of the international anti-money-laundering regime, the development of financial tools and intelligence geared to national security and a new understanding of the role of the international financial system, as well as the private sector, for national security.

One of the outcomes of this new era of financial warfare is the ever expanding role of financial sanctions in international relations. The development of the instruments of financial warfare was instigated by the 9/11 attacks in the United States and the subsequent warfare against terrorism financing. Consequently, the United States and the European Union, as well as the

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635 Zarate (n 83) 2. Suzanne Katzenstein defines this development as “dollar unilateralism.” Katzenstein (n 324); Tom Lin describes it as “financial weapons of war.” Tom CW Lin, ‘Financial Weapons of War’ (2016) 100 Minnesota Law Review 1377.

636 Zarate (n 83) 2–3.

637 ibid 8.

638 The Security Council has been playing an active role in demonstrating the potential of financial sanctions. In particular, it has authorised mandatory, collective economic sanctions for UN Member States, in order to pursue objectives as diverse as countering terrorism, preventing conflicts, promoting peace, protecting the civilian population, supporting democracy, improving resource governance and preventing the proliferation of nuclear weapons. Biersteker and others (n 157) 12.

639 Zarate (n 83).

640 The United States frequently relies upon unilateral financial sanctions. For more, see Katzenstein (n 324); Sue E Eckert, ‘The Use of Financial Measures to Promote Security’ (2008) 62 Journal of International Affairs 103;

641 For more details on the use of financial sanctions by the European Union, see Caytas (n 328).
United Kingdom, Canada, Australia, Japan and Switzerland,\textsuperscript{642} all became aware of a significant potential of financial restrictions.

Explaining the efficiency of financial sanctions, Zarate points out that “the policy decisions of governments are not nearly as persuasive as the risk-based compliance calculus of financial institutions.”\textsuperscript{643} Indeed, he highlights the necessity to comply with the United States' unilateral financial sanctions: “If you want to be a serious international institution with the ability to work globally, you have to access New York and the American banking system.”\textsuperscript{644} This assertion ought to be considered in the context of the international financial system in its current form.

The modern international financial system is described as “a globalized, high-tech, American-centric system.”\textsuperscript{645} Two peculiarities of this system – its globalized and American-centric nature – play a particular role in the increased use of financial sanctions and will be discussed in more detail.

Over the last few decades, the world has witnessed significantly increased interdependence between financial markets.\textsuperscript{646} Thus, sovereign states and their financial institutions find it beneficial to integrate into this system. This integration necessarily implies that the financial institution’s ability to operate effectively within the broader system hinges on its access to the US financial market and to the US dollar as a currency.

The special status of the US dollar as a reserve currency and as the currency of international trade, including commodity trade, provides the US Department of the Treasury with a valuable policy instrument.\textsuperscript{647} In his book

\textsuperscript{642} Sanctions imposed by all these states on the Russian Federation following its annexation of Crimea and involvement in destabilising the situation in Ukraine bear witness to the accuracy of this assertion.

\textsuperscript{643} Zarate (n 83) 8. The advantage of such measures has been well articulated by Suzanne Katzenstein: “In theory at least, a Russian or Chinese veto of U.N. sanctions is a moot point if foreign banks – including those in Russia and China – are implementing U.S. policy.” Katzenstein (n 324) 311. Political scientists also emphasize the tendency of private entities to comply with complex sanctions. In particular, it is highlighted that: “In fact, overcompliance is a typical phenomenon for companies that hesitate ‘to invest in the complex due diligence required to ensure that their [...] counterparts are not linked to sanctioned entities.’” Patrick Maximilian Weber and Beata Stepień (n 334) 3008.

\textsuperscript{644} Zarate (n 83) 25.

\textsuperscript{645} Lin (n 635) 1379–1388.

\textsuperscript{646} ibid.

\textsuperscript{647} “Its [the United States] most important weapon is one available to no other state – the dollar’s status as the global reserve currency. The rationale rests on the premise that foreigners often use the American financial system and so become vulnerable to prosecution under US law. Concomitantly the US can threaten foreign companies and individuals with financial sanctions, wherever they are.” Stoll and others (n 232) 19.
*Exorbitant Privilege*, Barry Eichengreen, an eminent economist, has emphasised the unique role of the US currency as follows: “For more than half a century the dollar has been the world’s monetary lingua franca.”\(^{648}\) Indeed, the preeminent role of the US dollar as a currency cannot be overestimated or exaggerated, as a few examples show. To start with, oil and other commodities are priced in dollars, which “require[es] countries that are oil consumers to accumulate dollars to pay for oil – mostly by exporting their goods and services to receive dollars as payment.”\(^{649}\) The majority of transactions between the states involved in international trade is invoiced in dollars, even if the United States is neither the country of origin nor the destination country.\(^{650}\) The US dollar is also the currency of international debt securities.\(^{651}\) Finally, the US dollar is an international reserve currency, even though the US dollar has not been convertible into gold since 1971, when the United States unilaterally ended previous arrangements on dollar-gold convertibility.\(^{652}\) According to Barry Eichengreen, the US dollar “is the form in which central banks hold more than 60 percent of their foreign currency reserves.”\(^{653}\) Notwithstanding critiques of the dominance of the US dollar\(^{654}\) and potential threats of currency erosion,\(^{655}\) the dollar-based system is today’s reality.

Legal scholars acknowledge the far-reaching implications of the current international financial system on the use of financial restrictions. In this regard, Zarate has perceptively pointed out: “The reach of this kind of US financial power derives as well from the predominance of the US dollar as the principal reserve and trading currency around the world. [...] Countries, companies, and individuals keep dollars or accounts in dollars as security against the uncertainties of other currencies.”\(^{656}\) In a similar vein, Suzanne Katzenstein, in


\(^{650}\) ibid.; “Eighty-one percent of the global trade financing is conducted using the American dollar.” Lin (n 635) 1387.

\(^{651}\) “Half of international debt securities are in dollars.” Cao (n 649) 58.

\(^{652}\) Eichengreen (n 648).

\(^{653}\) ibid 2.

\(^{654}\) Eichengreen (n 648); Cao (n 649) 60–61.

\(^{655}\) Other countries have undertaken attempts to destabilise and erode the preeminent role of the US currency. Cao (n 649) 64–67. Cameron Rotblat has described Chinese efforts to internationalise the yuan. Among the factors that contributed to this decision he emphasised that: “[...] US financial sanctions on Iran (as well as those against Russia, Zimbabwe, and Belarus) have pushed sanctioned nations towards using the yuan as a partial replacement for hard-to-access US dollars.” Rotblat (n 323) 339.

\(^{656}\) Zarate (n 83) 25–26.
her discussion of the unique efficacy of US financial restrictions, defines this development as a “dollar unilateralism,”657 arguing that unilateral US financial sanctions are effective due to industry structure, policy acceptability and bargaining asymmetry.658 Joanna Diane Caytas highlights the increased reliance upon financial sanctions, emphasising that: “For reasons that include critical mass and size, global interconnectedness, and a lack of comparable reserve currency options, coercive financial measures have thus far proved to be a near-monopoly of the United States, the EU, and their allies, which serve their policy objectives extraterritorially.”659

5.2 Unilateral Financial Sanctions and Jurisdiction

The expanded use of unilateral financial sanctions raises a number of vexed questions concerning their relationship with the established principles for ascertaining jurisdiction. As has been mentioned before, access to the US financial market is so vital for any financial institution worldwide that even the theoretical possibility of being denied such access encourages compliance with sanctions.660 The risk-based compliance introduced by private financial institutions is at the core of compliance with financial sanctions. For instance, the recent historical record demonstrates that financial institutions are willing to pay exorbitant financial penalties for sanctions violations simply in order to avoid potential losses stemming from loss of access to the US financial market. Thus, BNP Paribas agreed to pay a record $8.9 billion in penalties in 2014 for conspiring to violate US sanctions,661 while in 2015, OFAC settled with the UBS on the allegations of sanctions violations with the payment of $1.7 million.662 That same year, Deutsche Bank AG paid a $258 million penalty for

657 “Dollar unilateralism occurs when the government uses the unique status of the U.S. dollar in global financial markets to pursue policy goals independently, rather than work through traditional inter-governmental and multilateral channels.” Katzenstein (n 324) 294–295.
658 “The dominance of U.S. currency gives the U.S. government ‘the power to persuade and coerce.’ At any moment, the government can choose to cut off a foreign bank’s access to U.S. financial markets and thus push it to the periphery of global trade and finance.” ibid 314.
659 Caytas (n 328) 442–443.
660 “Regardless of a bank’s capitalization and financial soundness, it would be fatal for any financial institution involved in international payments to lose access to dollars.” ibid 454.
661 Emmenegger (n 519) 632.
doing business on behalf of entities in countries subject to US sanctions. The most recent examples include Standard Chartered’s settlement of $1 billion and the French Société Générale’s global settlement agreement to the tune of $1.34 billion. Additionally, several settlement agreements went so far as to demand the appointment of an independent compliance monitor to improve the financial institution’s compliance with the US sanctions, as was the case with the Standard Chartered PLC in 2012.

The incentives to comply with US financial sanctions are so high that European banks are willing to withhold their services from sanctioned individuals. The recent attempts of the Russian billionaire Boris Rotenberg to file a suit against several European banks that complied with US financial sanctions against him illustrate this. Despite being a Finnish citizen and arguing that he faced discrimination owing to the financial institutions’ refusal to process his payments, he lost the case. In its last decision, issued in January 2020, the court ruled against him: “Helsinki District Court has rejected Boris Rotenberg’s complaint over the right to banking services and damages for discrimination.” What is noteworthy here is that the court argued that “the banks were entitled to refuse him banking services given the risk of violating US sanctions.”

The intricate question concerning the relationship between such unilateral financial sanctions and the law of jurisdiction has been well formulated by Susan Emmenegger: “The common denominator between these cases is the US assertion of domestic authority over conduct that occurred abroad: banks outside the US providing banking services to entities outside the US.”

In justifying its extraterritorial sanctions, the United States traditionally relies upon the effects doctrine or, alternatively, the principle of protective jurisdiction. Yet such invocations might be without merit. Emmenegger contends that the effects doctrine cannot serve as a jurisdictional ground for unilateral financial sanctions. In her view, the application of the effects doctrine to conduct that is legal in the state where a financial institution is incorporated is highly controversial. Furthermore, the effects doctrine implies that the conduct that gives rise to ascertaining jurisdiction should have a direct, substantial and foreseeable effect on the state invoking it. The majority of financial institutions proven to have violated US financial sanctions were providing payment services to sanctioned clients. The clearing of the prohibited transaction by a US-based bank does not, according to Emmenegger, constitute a substantial effect on the US payment system. Thus, Emmenegger is sceptical of the possibility to justify unlawfully extraterritorial financial sanctions as legal under the effects doctrine.

Concerning the possibility of justifying extraterritorial financial sanctions under the principle of protective jurisdiction, it must be noted that legal scholars favour the narrow interpretation of the concept of national threat under the protective principle. For example, as Cedric Ryngaert has noted with respect to the possibility of justifying the Helms-Burton Act under the principle of protective jurisdiction: “It is difficult to sustain that a vaguely defined threat to the political independence or territorial integrity of the United States falls within the scope of the protective principle.” Emmenegger expressed similar doubts about the application of the protective principle: “For activities not directly linked to the cause of the national security threat, the protective

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671 Emmenegger (n 519) 632.
672 Emmenegger (n 519).
673 ibid 656–657.
674 International Bar Association (n 592).
675 Lange and Torbati (n 662); Barlyn (n 663); Johnson, Freifeld and Landauro (n 665).
676 Emmenegger (n 519).
677 ibid.
678 ibid.; Ryngaert (n 520).
679 Ryngaert (n 520) 642.
principle does not provide a sufficient basis for jurisdiction.” Thus, both principles – the effects doctrine and the protective jurisdiction – fail to provide sufficient grounds for justifying extraterritorial financial sanctions.

5.3  **Correspondent Account-Based Jurisdiction: A New Rule for Ascertaining Jurisdiction**

In the previous subsection, it was shown that unilateral financial sanctions face a significant risk of being unlawfully extraterritorial and could violate the principles for ascertaining jurisdiction developed in international law. Against this backdrop, the United States invokes correspondent account-based jurisdiction to establish its jurisdiction over the conduct of the foreign-based financial institutions. US authorities have been invoking correspondent account-based jurisdiction for at least a decade. Notwithstanding its questionable legality, private actors, mainly financial institutions, have opted for settlement agreements with the US Department of the Treasury instead of bringing legal challenges before US courts.

The court case discussed below deviates from previous practice in two respects. First and foremost, this is a case in which non-US residents faced criminal charges for violating unilateral US sanctions by engaging in conduct that occurred outside the territory of the United States. Second, this case provided an opportunity for a US domestic court to examine the legality of the correspondent account-based jurisdiction.

For this reason, the arrest and detention of the Turkey-based businessman Reza Zarrab and of another Turkish national Mehmet Atilla on the charges of violating the US unilateral financial sanctions against Iran are of the utmost importance for our discussion. Indeed, these two arrests demonstrate that sanctions may apply not only to foreign corporations, but also to foreign natural persons who are neither US nationals nor reside in the United States. Additionally, these proceedings have revealed the stance of the US courts on the jurisdictional reach of the US unilateral financial sanctions, which seems to be extremely far-reaching.

5.3.1  **Factual Background**

The name “Reza Zarrab” became known to the media during the Turkish corruption scandal, which unfolded when the Turkish customs officials

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680 Emmenegger (n 519) 658.
681 ibid 655.
682 For examples, see above: subsection 5.2 Unilateral financial sanctions and jurisdiction.
Legality of Sanctions

accidentally found three thousand pounds of gold bars in a cargo plane.\textsuperscript{683} The notorious investigation unveiled extensive corruption among the high-ranking government officials in Turkey.\textsuperscript{684} According to the investigators, Reza Zarrab masterminded a scheme to undermine US sanctions against Iran by exchanging Iranian gas and oil for gold.\textsuperscript{685} Consequently, Zarrab was arrested and charged.\textsuperscript{686} In spite of the laudable efforts of Turkish investigators, the charges against Zarrab were dropped, and the "gas for gold" scandal, as it was dubbed by the media, lost most of its steam.\textsuperscript{687}

Yet the matter was not laid to rest. In 2016, Reza Zarrab was arrested in the United States and charged with violating US unilateral financial sanctions against Iran.\textsuperscript{688} In a nutshell, Zarrab had ordered several payments to be processed on behalf of Iranian legal entities, and since these payments were denominated in US dollars, they were cleared through US banks.\textsuperscript{689} US prosecutors initially charged Zarrab with four counts: conspiracy to defraud the United States, conspiracy to violate the International Emergency Economic Powers Act, conspiracy to commit bank fraud and conspiracy to commit money laundering.\textsuperscript{690} In the most recent superseding indictment, Reza Zarrab and other defendants were charged with six counts:\textsuperscript{691} conspiracy to defraud the United States, conspiracy to violate the International Emergency Economic Powers Act, bank fraud, conspiracy to commit bank fraud, money laundering and conspiracy to commit money laundering.\textsuperscript{692} The charges brought by the prosecutors placed the discussion of the extraterritorial reach of US financial sanctions at the forefront of international law.\textsuperscript{693}

\begin{itemize}
  \item \textsuperscript{683} Dexter Filkins, 'A Mysterious Case Involving Turkey, Iran, and Rudy Giuliani' \textit{The New Yorker} (14 April 2017) <https://www.newyorker.com/news/news-desk/a-mysterious-case-involving-turkey-iran-and-rudy-giuliani>.
  \item \textsuperscript{684} ibid.
  \item \textsuperscript{685} ibid.
  \item \textsuperscript{686} ibid.
  \item \textsuperscript{687} ibid.
  \item \textsuperscript{688} ‘United States of America, Government v. Reza Zarrab, et al., Defendant No. S1 15 Cr. 867 (RMB) Sealed Indictment, December 15, 2015.’
  \item \textsuperscript{689} ibid.
  \item \textsuperscript{690} ibid.; ‘United States of America, Government v. Reza Zarrab, et al., Defendant No. S2 15 Cr. 867 (RMB) Superseding Indictment, November 7, 2016; ‘United States of America, Government v. Reza Zarrab, et al., Defendant No. S3 15 Cr. 867 (RMB) Superseding Indictment, April 7, 2017.’
  \item \textsuperscript{691} ‘United States of America, Government v. Reza Zarrab, et al., Defendant No. S4 15 Cr. 867 (RMB) Superseding Indictment, September 6, 2017.’
  \item \textsuperscript{692} ibid.
  \item \textsuperscript{693} Emmenegger and Döbeli (n 519); Scott M Flicker, Jason Fiebig and Kwame Manley, ‘United States of America v. Reza Zarrab: The Long Reach of U.S. Sanctions May Have Just
5.3.2 The Findings of the Court on the Extraterritorial Application of US Financial Sanctions

The charges deriving from the violation of US sanctions laws have proved to be highly controversial. In the motion to dismiss the indictment, Reza Zarrab’s lawyers emphasised the extraterritoriality of US unilateral sanctions as follows: “Zarrab stands accused of violating U.S. law for agreeing with foreign persons in foreign countries to direct foreign banks to send funds transfers from foreign companies to other foreign banks for foreign companies.”694 Such extraterritoriality has far-reaching implications, which are elucidated in the motion to dismiss: “It is as unprecedented as it is problematic. These transactions are fundamentally foreign, and they are entirely legal under the foreign law that directly governs foreign persons and foreign transactions.”695

Furthermore, the motion to dismiss the indictment alludes to the only connection that exists between Zarrab’s actions and the United States. This connection originates “out of the incidental involvement of a U.S. bank at some mid-point in the payment chain of a transaction that originated from a foreign country and occurred between two foreign entities.”696 This argument was advanced by the defence team to contend that the mere fact that all payments in US dollars are cleared via US-based banks do not constitute “export from the United States” for the purposes of the sanctions regulation.697

The government filed its opposition to the Zarrab’s motion to dismiss, underlining that the defendant used the US financial system to process US-dollar transactions and thus helped a nation that presents “a significant threat to this country’s national security.”698

Judge Richard Berman reached several conclusions that have a bearing on the extraterritorial application of US unilateral financial sanctions. Discussing the allegations of conspiracy to defraud the United States, Judge Berman entertained the defendant’s arguments that the law, on which allegations of

695 ibid.
696 ibid 5.
697 ibid.
conspiracy were grounded, does not apply to foreign conduct. The judge took previous case law into account to substantiate his findings. In particular, two cases were referenced – United States v. Budovsky and Licci v. Lebanese Canadian Bank, SAL. In United States v. Budovsky district judge found that a sufficient nexus existed between a foreigner operating an online currency exchange incorporated in Costa Rica and the territory of the United States. This sufficient nexus was established, among other factors, based on the fact that the defendant moved 13.5 million US dollars from a Costa Rican account through a correspondent bank account in the Southern District of New York. In an even more controversial court case, Licci v. Lebanese Canadian Bank, SAL, the judge accepted the plaintiffs’ argument that the conduct of the foreign-incorporated bank – which did not operate in the United States, yet conducted payments through a New York bank account – was “both specific and domestic.” Thus, the judge found a justification for displacing the presumption against extraterritoriality. In the present case, Judge Berman found the defendant’s argument that his conduct is foreign since it involved only transfers through the US banks en route to other banks as unpersuasive.

Regarding violations of the Iran sanctions regulation, the defendant claimed that his actions – i.e. the transfer of payments denominated in US dollars from one foreign bank to another, cleared through the US correspondent bank account – did not constitute exports “from the United States, or by a United States person, wherever located” as was stipulated in the pertinent

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700 ibid.
701 ibid.
703 ibid.
705 The court observed: “Unlike the Kiobel plaintiffs, who only alleged extraterritorial conduct, Plaintiffs allege, inter alia, that LCB used its correspondent banking account in New York to facilitate dozens of international wire transfers for the Shahid, an entity alleged to be an ‘integral part’ of Hezbollah. Thus, Plaintiffs allege sufficient connections with the United States to require ‘further analysis.’” Upon further analysis, the court dismissed the presumption against extraterritoriality. ibid.
sanctions regulations. Against this, the US government argued that financial transactions performed by a US bank are a “service” that is exported or supplied from the United States or by a US person. The court sided with the US government and found the defendant’s claims unpersuasive. Judge Berman relied upon previous case law in which the court ruled that “the execution of money transfers from the United States to Iran on behalf of another, whether or not performed for a fee, constitutes the exportation of a service.” Further support for this argument was found in United States v. Homa International Trading Corp., where the court, in interpreting the same Iranian sanctions statutes, declared that “the execution on behalf of others of money transfers from the United States to Iran is a ‘service’ under the terms of the Embargo.”

In the course of discussing this particular argument, the court considered the question of extraterritoriality. Despite acknowledging that there is a sufficient nexus between the defendant’s conduct and the United States, the court proceeded with the discussion of the extraterritoriality on arguendo basis. Before delving into the analysis of the relevant jurisprudence, the court preliminarily concluded that “any presumption against extraterritoriality would be overcome by the United States’ interest in defending itself.” The court went on to say that the criminal liability for the violation of the Iranian sanctions “is not limited to individuals who are subject to the jurisdiction of the United States” and that “Congress intended the statute to be applied extraterritorially.” Buttressing its preliminary conclusions, the court rejected the arguments about the applicability of the case law presented by the defendant and concluded that the defendant could be charged under the Iranian sanctions

707 ‘United States of America, Government v. Reza Zarrab, et al., Defendant No. Si 15 Cr. 867 (RMB) Memorandum of Law in Support of Defendant Reza Zarrab’s Motion to Dismiss the Superseding Indictment, July 19, 2016’ (n 694).
708 ‘United States of America, Government v. Reza Zarrab, et al., Defendant No. Si 15 Cr. 867 (RMB) Government’s Memorandum of Law in Opposition to Defendant Reza Zarrab’s Motions to Dismiss the Indictment and to Suppress Evidence, August 8, 2016.’ (n 698).
713 ibid.
714 ibid.
715 ibid.
statutes “which encompass conduct emanating ‘from the United States’ and/or involves ‘property […] subject to the jurisdiction of the United States.’”\(^{716}\)

These findings are of the utmost importance for the present discussion. The court asserted that unilateral financial sanctions imposed by the United States have extraterritorial reach. More specifically, the court ruled that the execution of a money transfer constitutes the exportation or supply of services. This determination holds even if the payment originated from abroad and was made by a foreign national, with the only link to US territory being that the clearing operation was conducted in the United States. The other justification for the extraterritorial application of US domestic law is the motivation for imposing sanctions against Iran, which was described as “reflect[ing] the United States’ interest in protecting and defending itself against, among other things, Iran’s sponsorship of international terrorism, Iran’s frustration of the Middle East peace process, and Iran’s pursuit of weapons of mass destruction, which implicate the national security, foreign policy, and the economy of the United States.”\(^{717}\)

Put differently, the court relied upon the protective principle of jurisdiction, the contours of which remain elusive not only in law, but also in state practice.

### 5.3.3 Subsequent Developments of the Case

The case took an unprecedented turn after the Turkish banker Mehmet Hakan Atilla was arrested while in transit in the United States.\(^{718}\) He was charged with the same offences as Reza Zarrab and, in fact, was accused of conspiring with Zarrab.\(^{719}\)

Facing criminal charges for violating US sanctions against Iran, Atilla and his defence team fruitlessly attempted to have the indictment dismissed.\(^{720}\)

\(^{716}\) ibid.

\(^{717}\) ibid 19.


\(^{720}\) The defence team filed a motion to dismiss the indictment; after the superseding indictment was issued a new motion to dismiss was filed before the court. The defence team argued in the memorandum of law in support of this motion that if their client were to be prosecuted “it would be an unprecedented exercise of authority by the US.” ‘United States of America, Government v. Reza Zarrab, et al., Defendant No. S4 15 Cr. 867 (RMB) Memorandum of Law in Support of Defendant Mehmet Hakan Atilla’s Motion to Dismiss Superseding Indictment S4, or Alternatively for Severance, October 9, 2017.’
The essence of the defendant’s arguments was the lack of a sufficient nexus between Atilla’s conduct – i.e. the facilitation of the financial transactions for the sanctioned Iranian enterprises – and the territory of the United States.\textsuperscript{721} The defendant submitted that “the Sanctions Regime [meaning the Iranian Sanctions Regime] has never authorized the prosecution of a foreigner for entirely foreign activity that does not involve or affect a US person or entity, even when that activity displeases the US and is otherwise subject to sanctions under the statutory/regulatory scheme.”\textsuperscript{722} Another argument advanced by Atilla’s defence team was that the sanctions regime does not prescribe criminal penalties applicable to the conduct of a foreigner.\textsuperscript{723} Emphasising the findings of the US Supreme Court in \textit{Morrison v. National Australian Bank, Ltd.}\textsuperscript{724} and the presumption against the extraterritorial application of the US law, which can only be overturned by Congress, the defendant contended that: “The Sanctions Regime generally does not express an intention to apply its criminal reach to foreigners conducting their activity abroad.”\textsuperscript{725}

In response to the defendant’s motion to dismiss, the US government submitted a memorandum of law, notably highlighting that Mehmet Hakan Atilla “personally was warned about the United States’ concerns about what appeared to be happening at Halk Bank and nonetheless misled U.S. regulators about the sanctions evasion activity occurring at his bank.”\textsuperscript{726} The government once again emphasised that the existing Iranian sanctions regime reflects the United States’ interest in protecting and defending itself.\textsuperscript{727} Furthermore, it was submitted that the International Emergency Economic Powers Act, which is the core legal basis for the economic sanctions against Iran, applies extraterritorially.\textsuperscript{728}

\textsuperscript{721} ibid.
\textsuperscript{722} ibid 3.
\textsuperscript{723} ibid.
\textsuperscript{724} “It is a long-standing principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” \textit{Morrison v. National Australia Bank Ltd} 561 US 247 [2010] Supreme Court of the United States No. 08–1191.
\textsuperscript{725} ‘United States of America, Government v. Reza Zarrab, et al., Defendant No. S4 15 Cr. 867 (RMB) Memorandum of Law in Support of Defendant Mehmet Hakan Atilla’s Motion to Dismiss Superseding Indictment S4, or Alternatively for Severance, October 9, 2017’ (n 720) 9.
\textsuperscript{726} ‘United States of America, Government v. Mehmet Hakan Atilla, Defendant No. S4 15 Cr. 867 (RMB) Government’s Memorandum of Law in Opposition to Defendant Mehmet Hakan Atilla’s Motions to Dismiss the Superseding Indictment and for Severance, October 16, 2017’ 3.
\textsuperscript{727} ibid 6.
\textsuperscript{728} ibid 9–10.
Despite the dedicated efforts of the defence team to prove the lack of a sufficient nexus to ascertain US jurisdiction over Mehmet Hakan Atilla’s conduct, the case proceeded to jury trial. In 2018, Atilla was found guilty and sentenced to 32 months in prison. Atilla’s subsequent efforts to challenge the legality of this ruling did not bring any results. In July 2020, a US court of appeals upheld his convictions.

5.3.4 The Views of Legal Scholars and Practitioners on the Correspondent Account-Based Jurisdiction

Susan Emmenegger published an article before the US court made its pronouncements on whether correspondent account relations constitute a substantial threshold for ascertaining jurisdiction, concluding that: “Indeed, it would not satisfy the conditions set by the subjective territoriality principle, as this principle requires that a substantial part of the conduct takes place within the territory. Here, two entities outside of the United States contract for banking services that include payment services. The fact that the dollar portion of such payments (e.g. from an Iranian entity to a Swedish entity) passes through US territory via the clearing system does not meet the ‘substantial part’ threshold.” Furthermore, the effects doctrine cannot justify such extraterritorial sanctions and criminal responsibility applicable to foreign nationals. In particular, the clearing of transactions denominated in US dollars does not have a substantial effect on the US payment system, as is required under the effects doctrine. Whether it is possible to justify this new correspondent account-based jurisdiction under the protective principle of jurisdiction is also questionable. More specifically, the payments that were cleared in this case were commercial transactions, and these payments as such did not pose any threat to the US payment system or to the United States.


732 Emmenegger (n 519).

733 ibid.

734 ibid.
In a similar vein, Tom Ruys and Cedric Ryngaert observe that “grounding jurisdiction on the mere routing of (financial) messages via US servers without any other link with the US whatsoever, cannot be considered to be compatible with the international law of jurisdiction.”\textsuperscript{735}

Practising lawyers have also expressed their views on the outcome of the case. Some commentators, discussing the court’s finding that the transfer of funds through a US-based bank counts as the exportation of services from the United States, note: “This sets the bar to establishing a domestic nexus in a case against a foreign national as low as it has ever been.”\textsuperscript{736} The general conclusion was that “the reach of U.S. sanctions law has never extended so far.”\textsuperscript{737}

5.3.5 The Arrest of the Huawei’s CFO Meng Wanzhou for an Alleged Violation of US Financial Sanctions: A New Instance of Correspondent Account-Based Jurisdiction?

A similar case, which recently became prominent, is the arrest of the Huawei’s Chief Financial Officer Meng Wanzhou for alleged violations of the unilateral US sanctions against Iran. Meng was arrested in December 2018, while in transit in Canada.\textsuperscript{738} Canadian authorities arrested her based on an extradition request issued by the United States,\textsuperscript{739} where an eleven-count indictment against Huawei, its Iran-based subsidiary Skycom and Meng, Huawei’s Chief Financial Officer, was filed in August 2018.\textsuperscript{740}

According to the indictment, in her capacity as Chief Financial Officer of Huawei, as well as an alleged member of the board of directors of Skycom, a company that functioned as a Huawei’s Iran-based subsidiary, Meng deceived financial institutions and thus, enabled the clearing of financial transactions worth millions of US dollars, which would otherwise have been impossible as a consequence of the US sanctions against Iran.\textsuperscript{741} More specifically, the indictment describes occasions on which Meng misrepresented the nature of the relationship between Huawei and Skycom, convincing financial institutions

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\textsuperscript{735} Ruys and Ryngaert (n 555) 22.
\textsuperscript{736} Flicker, Fiebig and Manley (n 693).
\textsuperscript{737} ibid.
\textsuperscript{741} ibid.
that there was no relationship of “control” between the two, a claim that contradicts the findings presented by US investigators.\footnote{742}{ibid.} After Meng’s arrest, a superseding indictment was filed in January 2019.\footnote{743}{‘United States of America v. Huawei Technologies Co., LTD, Huawei Device USA Inc., Skycom Tech Co. LTD., Wanzhou Meng, No 1:18-cr-00457, Superseding Indictment, January 24, 2019.’} Similar to the previous indictment, the document lists occasions on which financial institutions cleared financial transactions that violated US financial sanctions against Iran.\footnote{744}{ibid.} According to the indictment, these transactions were cleared as a result of the false statements and misrepresentations made \textit{inter alia} by Meng to the financial institutions involved.\footnote{745}{ibid.}

Meng fought in Canadian court against extradition to the United States and a potential criminal trial there.\footnote{746}{‘Canada Judge Delays Extradition Hearings in Win for Huawei Executive,’ The Guardian (21 April 2020) https://www.theguardian.com/world/2021/apr/21/meng-wanzhou-extradition-hearings-huawei-cfo.} If Meng had faced a criminal trial in the United States, she would have been accused of violating the US unilateral financial sanctions against Iran by enabling the clearance of financial transactions, with the involvement of the Iran-based company Skycom. In September 2021, Meng entered into a deferred prosecution agreement to resolve charges of conspiracy to commit bank fraud and conspiracy to commit wire fraud, bank fraud and wire fraud.\footnote{747}{‘Huawei CFO Wanzhou Meng Admits to Misleading Global Financial Institution’ (The United States Department of Justice, 24 September 2021) https://www.justice.gov/opa/pr/huawei-cfo-wanzhou-meng-admits-misleading-global-financial-institution.} As a result, the US government agreed to withdraw its extradition request.\footnote{748}{ibid.}

6 Unilateral Economic Sanctions and the Immunities of States and State Officials

As we saw in chapter 1, since the late 1990s, both collective and unilateral sanctions have become targeted.\footnote{749}{For more details, see chapter 1, subsection 1.4. The “sanctions decade” and the quest for “smart” sanctions.} This shift serves the dual purposes of avoiding the detrimental negative effect on the civilian population and of increasing the effectiveness of sanctions. The rationale behind targeted sanctions is to ratchet up pressure on groups or individuals in a position of power.
From the perspective of public international law, unilateral targeted sanctions may encroach on the immunities of states and of high-ranking government officials. Thus, the discussion will now turn to an analysis of whether this type of sanction is compatible with the immunities that international law accords to states and state officials.

Legal scholars emphasize that the immunity of states should be carefully distinguished from diplomatic immunity and the immunity of heads of states. Thus, I provide separate analyses of unilateral economic sanctions imposed on central banks and state-owned enterprises and unilateral economic sanctions imposed on high-ranking government officials.

6.1 **Blocking the Property of Central Banks and State-Owned Enterprises**

In recent years, states have increasingly imposed sanctions on the central banks and state-owned enterprises of other states. For example, the European Union and the United States introduced unilateral sanctions against the Central Bank of Iran and the Central Bank of Syria. The Central Bank of Venezuela (Banco Central de Venezuela) has been targeted by the unilateral US sanctions, as a result of which all its assets and other property on the territory of the United States, as well as under the control of the United States persons, are “blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.” Additionally, the state-owned Venezuelan oil company (Petróleos de Venezuela, S.A.) has been sanctioned. In addition to these restrictions,

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751 For example, the EU froze the assets of the central banks of Iran and Syria. The Central Bank of Syria was included in the list of sanctioned enterprises for “providing financial support to the regime.” Council Regulation (EU) No 168/2012 of 27 February 2012 amending Regulation (EU) No 36/2012 concerning restrictive measures in view of the situation in Syria 2012 (OJ L); The restrictive measures against the Central Bank of Iran were justified by “involvement in activities to circumvent sanctions.” Council Decision 2012/35/CFSP of 23 January 2012 amending Decision 2010/413/CFSP concerning restrictive measures against Iran 2012 (OJ L). In the ICJ dispute – Certain Iranian Assets (Islamic Republic of Iran v. United States of America) – Iran questions the legality of the various US legislative acts that allowed blocking of the assets of the Iranian Central Bank (Bank Markazi) and the use of these assets to pay compensations to the alleged victims of the terrorist acts. Certain Iranian Assets (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, ICJ Reports 2019, p 7.


753 “In January 2019, the United States recognized Juan Guaidó, president of the democratically elected, opposition-led National Assembly, as interim president. The Trump
sanctions that undermine the state-owned sectors of the economy are also frequent.⁷⁵⁴

There is no unanimity among the legal scholars as to whether these restrictions violate state immunity. Pierre-Emmanuel Dupont argues that this type of unilateral economic sanction violates state immunity,⁷⁵⁵ while Tom Ruys challenges this conventional account.⁷⁵⁶ Given that economic sanctions of this kind are becoming more common, this discussion is very timely.

To start with, it is necessary to clarify a few points. The starting point of our inquiry is whether central banks and state-owned enterprises are entitled to the immunities guaranteed under international law. If the answer is affirmative, the scope of this immunity ought to be defined. These preliminary enquiries will allow us to establish whether unilateral economic sanctions imposed against the central banks and/or state-owned enterprises encroach on state immunity.

Discussing the beneficiaries of state immunity, Peter-Tobias Stoll has observed: “State immunity protects the State as an international legal personality as well as its organs, components, entities, and representatives.”⁷⁵⁷ Stoll has buttressed this conclusion with reference to the relevant provisions of the

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⁷⁵ “As of January 2020, OFAC has placed 13 Russian companies and their subsidiaries and affiliates on the ssi List. The ssi List includes major state-owned companies in the financial, energy, and defense sectors; it does not include all companies in those sectors. The parent entities on the ssi List, under their respective directives, consist of the following: i. Four large state-owned banks (Sberbank, vTB Bank, Gazprombank, Rosselkhozbank) and vEB (rebranded vEB RF in 2018), which ‘acts as a development bank and payment agent for the Russian government’; ii. State-owned oil companies Rosneft and Gazpromneft, pipeline company Transneft, and private gas producer Novatek; iii. State-owned defense and hi-tech conglomerate Rostec; and iv. For restrictions on transactions related to deepwater, Arctic offshore, or shale oil projects, Rosneft and Gazpromneft, private companies Lukoil and Surgutneftegaz, and state-owned energy company Gazprom (Gazpromneft’s parent company).” Welt and others (n 178).


⁷⁷ Ruys (n 11).

⁷⁷ Stoll (n 750).
UN Convention on Jurisdictional Immunities of States and Their Property (UN Convention).\textsuperscript{758}

According to Stoll, central banks enjoy general immunity.\textsuperscript{759} Furthermore, he argues that “the protection of the property of central banks from execution appears to be stronger than that afforded to other entities.”\textsuperscript{760} This conclusion is grounded on the textual interpretation of the UN Convention, which explicitly exempts “(c) property of the central bank or other monetary authority of the State” from post-judgement measures of constraint.\textsuperscript{761} Notwithstanding this explicit recognition of the central banks’ entitlement, commentators are sceptical of its universality, asserting that: “there is seemingly no general acceptance in State practice for the higher degree of immunity” granted to the central banks.\textsuperscript{762} Indeed, upon closer examination, the unconstrained entitlement to state immunity granted to central banks might seem controversial in light of recent developments. In this connection, Ingrid Wuerth has observed: “During the middle of the 20th century, central banks became more independent from the state, making it more difficult to characterize central banks as foreign states or other entities entitled to immunity. Although that issue has largely been resolved in favour of immunity, central banks today conduct many of their operations on the open market, for example by purchasing government debt from commercial banks or by purchasing foreign currency. As mentioned above, they may also administer sovereign wealth funds. In these contexts, the actions of central banks are identical to those of private commercial actors, though the purpose may differ. This raises doctrinal and policy questions as to the optimal scope of central bank immunity.”\textsuperscript{763}

\textsuperscript{758} Stoll refers to Article 2 (1)(b) of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which provides the definition of “state” and Article 6 (2)(b), which reads as follows: “A proceeding before a court of a State shall be considered to have been instituted against another State if that other State: (b) is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other State.” ibid.

\textsuperscript{759} ibid.

\textsuperscript{760} ibid.


The question of the immunity of state-owned enterprises is less controversial, since the latter do not benefit from state immunity. Thus, we may conclude that the central banks benefit from state immunity, while state-owned enterprises are not entitled to immunity guarantees.

State immunity originates in customary international law. The efforts to codify rules on state immunity have not yet borne fruit: the UN Convention has not entered into force. Nonetheless, the convention is widely acknowledged to represent an accurate reflection of the field and is used as a basis for scholarly deliberation. State immunity embodies jurisdictional immunity as well as enforcement immunity, while other commentators distinguish between immunity from adjudication and immunity from enforcement.

Unilateral economic sanctions that entail the blocking of the central bank's property are imposed by the legislative or executive branches of government. In other words, these restrictions are not adopted in the course of judicial proceedings. Hence, jurisdictional immunity – immunity from adjudication – cannot be triggered. However, such unilateral restrictive measures may conflict with enforcement immunity (i.e. immunity from enforcement). It is, however, debatable whether unilateral sanctions can be classified as measures of constraint in order to benefit from enforcement immunity.

764 True, many financial sanctions are targeted against State-owned companies that engage in commercial activities of a jure gestionis nature. 'Popular' targets include, for instance, companies that are active in the oil and gas sectors, or national airlines (think, e.g. of the Syrian Arab Airlines or the Syrian Petroleum Company). Inasmuch as the property, including the bank accounts, of these entities is not ‘specifically in use or intended for use by the State for other than government non-commercial purposes’ (in the sense of Article 19[c] of the 2004 UN Convention on State Immunity), it does not enjoy immunity from execution under customary international law. Ruys (n 11) 671.

765 Stoll (n 750).
766 United Nations Convention on Jurisdictional Immunities of States and Their Property was adopted during the 65th plenary meeting of the General Assembly on 2 December 2004. As of today, the convention has 22 parties, and according to Article 30 of the convention, it will enter into force after thirty states ratify it. Thus, the convention is not yet in force.

767 Stoll (n 750).
768 ibid.
769 Fox and Webb (n 762) chapters 13–17.
770 For a similar view, see Ronzitti (n 11); Ruys (n 11).
771 The question of whether the freezing of the central bank's assets is covered by enforcement immunity under customary international law remains controversial. In the same volume, Jean-Marc Thouvenin and Victor Grandaubert argue in the affirmative – see Jean-Marc Thouvenin and Victor Grandaubert, 'The Material Scope of State Immunity from Execution' in Tom Ruys and Nicolas Angelet (eds.), The Cambridge Handbook of
Pierre-Emmanuel Dupont has argued that the unilateral restrictive measures taken against the Central Bank of Iran infringe upon the rules governing the immunities and privileges of foreign states under international law.\textsuperscript{772} Other scholars are sceptical of such a conclusion. Natalino Ronzitti analysed the relations between unilateral sanctions and the entitlements granted under jurisdictional immunity and enforcement immunity.\textsuperscript{773} Ronzitti has contended that jurisdictional immunity is a procedural norm, while asset freezing is a restrictive measure imposed either by executive or legislative order and, as such, is not subject of court proceedings.\textsuperscript{774} Thus, in Ronzitti’s view, restrictive measures against central banks and jurisdictional immunity are not commensurable.\textsuperscript{775} Moreover, elaborating on the relations between unilateral sanctions and enforcement immunity, Ronzitti has gone as far as to suggest that enforcement immunity might cover “not only acts of constraints that are the continuation of a judgment, but also measures autonomously dictated by the legislative or the executive branch” and, as a result, unilateral economic sanctions may encroach on the principle of sovereign immunity.\textsuperscript{776} Despite this, he concludes that even this violation might be justified, since these restrictions may constitute countermeasures.\textsuperscript{777} In this regard, it is crucial to note that it is questionable whether the state that denied the protection granted under the customary international law of state immunity may invoke its right to rely upon countermeasures as a justification.\textsuperscript{778}

Tom Ruys argues that unilateral sanctions – and more precisely asset freezes – do not give rise to a breach of immunities.\textsuperscript{779} In support of this

\textsuperscript{772} “In addition, as regards the measures taken against the Iranian Central Bank, they may be deemed to conflict with rules governing immunities and privileges of foreign States under international law, and in particular of the 2004 UN Convention on Jurisdictional Immunities of States and their Property, which is widely considered as reflecting customary international law, and provides for immunity of property of a central bank or other monetary authority from execution.” Dupont (n 755) 314.

\textsuperscript{773} Ronzitti (n 11).

\textsuperscript{774} ibid 22.

\textsuperscript{775} ibid.

\textsuperscript{776} ibid.

\textsuperscript{777} Ronzitti (n 11).

\textsuperscript{778} Fox and Webb (n 762) 16.

conclusion, he argues that even though asset freezes are “measures of constraint” for the purposes of immunity from execution, the imposition of restrictive measures of this kind on a state or its central banks does not suffice to trigger the application of immunity.\textsuperscript{780} Ruys claims that court proceedings serve as a necessary prerequisite for the application of state-immunity rules.\textsuperscript{781} Thus, unilateral economic sanctions – in this instance, asset freezes – cannot trigger the application of state immunity rules, since they are either legislative or executive measures.\textsuperscript{782} Ruys further discusses the interrelation between the concept of inviolability and unilateral economic sanctions, concluding that the latter does not interfere with the rules of inviolability.\textsuperscript{783}

The argument that the central banks’ assets cannot benefit from state immunity entitlements if they are targeted by unilateral sanctions is particularly interesting in light of the recent trends. Ingrid Wuerth has analysed domestic regulations and court practice in several states, concluding that the majority of jurisdictions afford protection from execution to the central bank assets of other states, if such assets are located within their territory.\textsuperscript{784} Thus, it seems that private individuals or legal entities seeking to enforce a decision against the state might be denied this opportunity owing to the enforcement immunity provided for central bank assets, while unilateral sanctions, such as the freezing of the central bank’s assets, do not fall squarely within the scope of the immunities accorded to states under international law. The paradoxical conclusion of this analysis has been well captured by Timor-Leste in a contrario argument before the ICJ: “State property would be in the absurdly paradoxical position of being inviolable and immune from judicial measures, but at the mercy of administrative or executive actions.”\textsuperscript{785}

Our analysis reveals that the scholarly debate does not provide an unequivocal answer whether unilateral sanctions imposed against central banks impede state immunity. ICJ jurisprudence does not shed much light on the

\textsuperscript{780} Ruys (n 11) 5–18.
\textsuperscript{781} Ruys distinguishes between the immunity from jurisdiction and immunity from execution, yet argues that both types of immunity apply only in the context of the court proceedings. ibid 7–10.
\textsuperscript{782} ibid.
\textsuperscript{783} ibid.
\textsuperscript{784} “The general development in state practice is towards greater and greater protection of foreign central bank assets.” The only exception to this general tendency is the decision of the United States to allow the execution of terrorism-related judgements against the assets of the Central Bank of Iran. Wuerth (n 763).
In its further analysis, the ICJ emphasised that different rules apply to state property which is used for governmental non-commercial purposes and property which is used for other purposes.\textsuperscript{788}

In the \textit{Certain Iranian Assets} dispute, Iran claims that the freezing of the assets of the Central Bank of Iran (Bank Markazi),\textsuperscript{789} along with the decision of US domestic courts to use these assets as compensation for victims of terrorism,\textsuperscript{790} infringes upon customary international law of immunity.\textsuperscript{791} Iran asserted the court’s jurisdiction based on the relevant provisions of the Treaty of Amity, Economic Relations, and Consular Rights 1955.\textsuperscript{792} The United States raised several preliminary objections to the court’s jurisdiction, as well as to the admissibility of the claims.\textsuperscript{793} Among the three preliminary objections

\begin{itemize}
  \item \textsuperscript{786} Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, ICJ Reports 2012, p. 99 [113].
  \item \textsuperscript{787} ibid.
  \item \textsuperscript{788} ibid [116]–[118].
  \item \textsuperscript{789} The immunity of the assets of the Central Bank of Iran was recognised until 2012. Executive Order 13599 blocked property, as well as interests in property, of the Central Bank. In addition, The Iran Threat Reduction and Syria Human Rights Act of 2012 expanded the scope of assets that can be used to satisfy judgements against Iran. Iran Threat Reduction and Syria Human Rights Act of 2012.
  \item \textsuperscript{790} The Iran Threat Reduction and Syria Human Rights Act enacted in 2012 abrogated the immunity from execution of the assets of the Central Bank of Iran. These amendments coincided temporally with the court proceedings initiated by the victims of the 1983 bombing of the US Marine barracks in Beirut, Lebanon, which sought to satisfy their damage claims via the blocked assets of the Central Bank of Iran. Deborah D Peterson, et al., Plaintiffs-Appellees, v. Islamic Republic of Iran, et al., Defendants-Appellants, 758 F3d 185 [2014] United States Court of Appeals, Second Circuit No. 13-2952-CV.
  \item \textsuperscript{791} The main thrust of Iran’s legal claims rests on the alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights. Yet Iran argued that the relevant obligations under this treaty should be interpreted as incorporating, both explicitly and implicitly, customary international law of state immunity. ‘International Court of Justice. Certain Iranian Assets (Islamic Republic of Iran v. United States of America). Application Instituting Proceedings.’
  \item \textsuperscript{792} ibid.
  \item \textsuperscript{793} ‘International Court of Justice. Certain Iranian Assets (Islamic Republic of Iran v. United States of America). Preliminary Objections Submitted by the United States of America.’
\end{itemize}
to the court’s jurisdiction, the second objection relates to the possibility of distilling customary international law of state immunity from the relevant provisions of the Treaty of Amity, Economic Relations, and Consular Rights.\textsuperscript{794} The ICJ analysed the provisions of the treaty invoked, only to conclude that the preliminary objection should be upheld.\textsuperscript{795} Hence, the court unfortunately abstained from examining the legal claim that freezing of the central bank’s assets infringes state immunity. As a result, the nature of the relationship between unilateral economic sanctions that target the property of central banks and state immunity remains open.

### 6.2 Blocking of Property and Travel Restrictions Applicable to Heads of States and Other High-Ranking Government Officials

Heads of states and other senior government officials are increasingly being targeted by unilateral economic sanctions, such as asset freezes and travel bans. For instance, the restrictive measures put in place by the EU against then-acting heads of states include restrictions imposed on the president of Syria and president of Zimbabwe.\textsuperscript{796} US sanctions against Iran obligate the president to freeze the assets of individuals who meet the criteria laid down by the International Emergency Economic Powers Act.\textsuperscript{797} This rule applies to any person “including an Iranian diplomat or representative of another government or military or quasi-governmental institution of Iran.”\textsuperscript{798} Current US sanctions against the Russian Federation cover many high-ranking government officials, who are targets of various restrictions.\textsuperscript{799} The new wave of sanctions imposed by Ukraine against the Russian Federation target senior government officials.\textsuperscript{800}

\textsuperscript{794} Certain Iranian Assets, Preliminary Objections, Judgment (n 751).
\textsuperscript{795} ibid.
\textsuperscript{797} Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 Section 103. Economic sanctions relating to Iran.
\textsuperscript{798} ibid.
\textsuperscript{799} President of the United States of America. Executive Order 13660 of March 6, 2014. (n 2); President of the United States of America. Executive Order 13661 of March 16, 2014. (n 2).
\textsuperscript{800} On 15 May 2017, the president of Ukraine enacted the decision of the National Security and Defence Council of Ukraine (NSDC) of 28 April 2017 “On the Application of Personal Special Economic and Other Restrictive Measures (Sanctions).” President of Ukraine by His Decree Put into Effect the Decision of the National Security and Defense Council of Ukraine “On the Imposition of Personal Special Economic and Other Restrictive
The immunity of the head of state is primarily regulated by customary international law. This immunity derives both from international rights and duties of states, as well as from the head of state’s personal entitlements. However, the scope of this immunity remains contestable.

A number of principles, which constitute such immunity, can be distilled from the ICJ judgements in Arrest Warrant of 11 April 2000 and Certain Questions of Mutual Assistance in Criminal Matters. To start with, the ICJ observed that: “certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal.” Furthermore, the court decided that an arrest warrant infringes on the inviolability of the minister of foreign affairs and that the same level of protection is guaranteed to...
a head of state.\textsuperscript{807} This finding implies that the acting head of state should be entitled to an exemption from criminal prosecution during his time in office. Moreover, the court's pronouncement that an arrest warrant hinders the ability of the minister of foreign affairs to perform his functions implies that travel bans that prohibit the minister of foreign affairs, as well as acting head of state, from entering a territory of any other state, violate immunities guaranteed under international law.

Another well-established principle is the inviolability of a head of state's person, residence and property in a visited state. In the words of Arthur Watts, such inviolability implies that “officials of that State may not inspect his [the head of state's] person or property or enter upon the premises occupied by him.”\textsuperscript{808} It remains unclear how the principle of inviolability constrains states from imposing unilateral economic sanctions, in particular asset freezes, on a foreign head of state. In this regard, Tom Ruys contends that asset freezes do not encroach upon the inviolability conferred upon states or their officials under international law.\textsuperscript{809}

When it comes to the immunity of other high-ranking government officials, the problem of determining its scope is even more intricate. To begin with, there is no clear rule about who is entitled to be called "high-ranking government official."\textsuperscript{810} The analysis of the ICJ jurisprudence demonstrates that ministers can be considered as “holders of high-ranking office.”\textsuperscript{811}

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\textsuperscript{807} Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France), Judgment (n 804) [170].
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\textsuperscript{808} Watts (n 801).
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\textsuperscript{809} “Inviolability of residence and property during a (senior) State official’s visit to a third country is ultimately of little relevance in the context of the adoption of targeted financial sanctions, for the simple reason that non-UN sanctions, such as those against President al-Assad of Syria, are normally adopted while the senior official concerned is in his/her home State. It follows that an inviolability of residence and property that is analogous to that of ‘special missions’ offers no meaningful protection whatsoever (from the perspective of the targeted official) and constitutes no significant obstacle (from the perspective of the sanctioning State) preventing the adoption of such sanctions.” Ruys (n 11) 25.
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\textsuperscript{810} Sir Arthur Watts, ‘Heads of Governments and Other Senior Officials,’ Max Planck Encyclopedia of Public International Law [MPEPIL] <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1417>; “Ministers of central government other than the Head of State or government and the Minister for Foreign Affairs when performing official functions enjoy immunities as individuals acting as representatives of the State. The extent to which they enjoy additional immunities by reason of their membership of central government is not clear.” Fox and Webb (n 762) 565.
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\textsuperscript{811} Watts (n 810); “The tendency in practice has, however, been to expand the categories of high-ranking officials benefiting from immunity ratione personae. The ICJ in Congo v.
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The extent of the immunity enjoyed by senior government officials is similar to that accorded to a head of state, at least with respect to their property.\textsuperscript{812} Concerning the property of a head of state, Arthur Watts has asserted the following: “A Head of State probably enjoys extensive immunity in relation to property owned or held by him in a foreign State for private or non-official purposes, particularly in so far as measures of execution against such property are prohibited when he is in the foreign State in the exercise of his official functions.”\textsuperscript{813}

This rule applies only to the measures of execution, which should be related to the court proceedings, as described above. Whether asset freezes are measures of constraint for the purposes of enforcement immunity is debatable, and thus it is unclear how this rule can protect holders of high-ranking office from unilateral financial sanctions, such as asset freezes.

Tom Ruys contends that the immunity of the foreign officials cannot be broader in scope than state immunity and argues that this immunity arises only with a nexus to particular court proceedings.\textsuperscript{814} In light of the ICJ findings in \textit{Arrest Warrant of 11 April 2000}, Ruys argues that performance of the duties of the senior government officials might be hindered if travel bans were to prevent these officials from performing their functions, and thus such bans might be considered illegal.\textsuperscript{815} For this reason, countries that frequently impose restrictions like travel bans introduce exemptions to allow even targeted senior officials to participate in international events and meetings.\textsuperscript{816}

Our analysis demonstrates that the relationship between unilateral economic sanctions and immunities that international law accords to states, as

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\textsuperscript{812} Watts (n 810).

\textsuperscript{813} ibid.

\textsuperscript{814} “While the scope (rather than substance) of ‘individual’ immunities accorded to specific persons (such as diplomats, visiting forces, special missions, or, more generally, State officials) has so far not been addressed in any detail, there is a priori no reason why the required nexus to court proceedings would not apply in this context as well.” Ruys (n 11) 16.

\textsuperscript{815} ibid 26–27.

\textsuperscript{816} ibid. Tom Ruys provides as an example the practice of the European Union in this regard. Yet other states, like the United States, have also introduced similar exemptions.
well as to state officials, raise many intricate questions for which there are not yet definitive answers.

7 Unilateral Economic Sanctions and WTO Law

The renowned international lawyer Hersch Lauterpacht, writing in 1933 about the legality of economic boycott under international law, reached the following conclusion: “In the absence of explicit conventional obligations, particularly those laid down in commercial treaties, a state is entitled to prevent altogether goods from a foreign state from coming into its territory. It may – and frequently does – do so under the guise of a protective tariff or of sanitary precautions or in some other manner. The foreign state may treat such an attitude as an unfriendly act and retort accordingly. But it cannot legitimately regard it as a breach of international law.”

International law has changed drastically since 1933. International trade law has evolved to a level where international trade commitments are enforced through the institutionalised system of dispute settlement. Moreover, states are allowed to retaliate against a state that fails to abide by a decision of the adjudicators. Thus, it should come as no surprise that economic sanctions are frequently considered as inconsistent with WTO law and WTO Members attempt to challenge them.

I analyse various types of unilateral economic sanctions and their potential inconsistency with WTO law below. The possibility of justifying such restrictive measures under the exceptions embedded in the WTO Agreements is discussed in chapter 4 (illustrated by the example of human rights economic sanctions).

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817 Hersch Lauterpacht, ‘Boycott in International Relations’ (1933) 14 British Yearbook of International Law 125, 130.
819 Article 22.6 ibid.
820 As a result of the military tension between Ukraine and Russia, several states imposed unilateral economic sanctions against Russia. Russia retaliated by implementing its restrictive measures, including a food embargo. These restrictions revived the debate on the consistency of such measures with the WTO law, in particular, the possibility to justify them under the national security exception. Neuwirth and Svetlicinii, ‘The Economic Sanctions over the Ukraine Conflict and the WTO’ (n 6); Neuwirth and Svetlicinii, ‘The Current EU/US–Russia Conflict over Ukraine and the WTO’ (n 6); Ji Yeong Yoo and Dukgeun Ahn, ‘Security Exceptions in the WTO System: Bridge or Bottle-Neck for Trade and Security?’ (2016) 19 Journal of International Economic Law 417.
7.1 Import Restrictions

7.1.1 Import Restrictions on Goods

Import restrictions are one of the most frequently deployed instruments of economic coercion. These restrictions can take various forms, such as a complete or partial import ban. The scope of the products covered by the ban is, as a rule, determined by the goals pursued by economic sanctions. For instance, a sanctioning state may decide to target a product that is of crucial importance for the targeted state's revenues or it may restrict the importation of the product for which its own market is the main importing market.

The principal objective of the multilateral trading system is to promote trade liberalisation by removing trade barriers. Thus, since the early days of the GATT 1947, the core principles have been the most-favoured-nation principle (MFN principle) and the prohibition of quantitative restrictions. Import restrictions run counter to both of these principles.

7.1.1.1 Potential Violation of the MFN Principle

The MFN principle is set out in Article I:1 of the GATT 1994 and reads as follows: “With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in the territory of any country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.”

WTO adjudicators elucidated the sequence of the analysis under Article I:1. In particular, the AB explains that: “Based on the text of Article I:1, the following elements must be demonstrated to establish an inconsistency with that provision: (i) that the measure at issue falls within the scope of application of Article I:1; (ii) that the imported products at issue are ‘like’ products within the meaning of Article I:1; (iii) that the measure at issue confers an ‘advantage, favour, privilege, or immunity’ on a product originating in the territory of any country; and (iv) that the advantage so accorded is not extended ‘immediately’ and ‘unconditionally’ to ‘like’ products originating in the territory of

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all Members. Thus, if a Member grants any advantage to any product originating in the territory of any other country, such advantage must be accorded ‘immediately and unconditionally’ to like products originating from all other Members.”

A prohibition on the importation of goods that applies only to one WTO Member, while exempting other Members, faces a significant risk of being inconsistent with the MFN obligation. The MFN obligation applies to “all rules and formalities in connection with importation.” What is more, under such circumstances, the “likeness” of the goods can be presumed. Seen in this way, an import prohibition of this type grants an ‘advantage, favour, privilege, or immunity’ to WTO Members that can export goods and deprives goods from a sanctioned WTO Member of this opportunity. Furthermore, the finding that Article 1:1 is violated does not require any actual trade effect to take place.

Import restrictions discriminate against goods that originated in a particular country by granting market access to goods from other countries. The panel in EC – Seal Products explicitly pronounced that “the advantage granted by the EU Seal Regime is in the form of market access; it is granted to seal products that meet the conditions under the IC exception.” On the basis of the further finding that this advantage in the form of market access was not extended “immediately and unconditionally” to the other WTO Members, the panel concluded that the measure is inconsistent with the obligation under Article 1:1 of the GATT 1994.

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824 The AB explained that “Article 1:1 protects expectations of equal competitive opportunities for like imported products from all Members. ... it is for this reason that an inconsistency with Article 1:1 is not contingent upon the actual trade effects of a measure.” Appellate Body Reports, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products (n 822) [5.87].
826 ibid [7.600].
In light of the above, unilateral economic sanctions in the form of import restrictions are inconsistent with Article 1:1.

7.1.1.2 Potential Violation of the Prohibition on Quantitative Restrictions

The general prohibition on quantitative restrictions is embedded in Article XI:1 of the GATT 1994: “No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.”

In several disputes, the WTO adjudicators discussed import prohibitions and their compatibility with Article XI. A brief recapitulation of the tribunals’ conclusions is warranted here. The panel in Canada – Periodicals concluded that a complete ban on imports of certain magazines was inconsistent with Article XI:1 of GATT. The panel pointed out that: “Since the importation of certain foreign products into Canada is completely denied under Tariff Code 9958, it appears that this provision by its terms is inconsistent with Article XI:1 of GATT 1994.” The US import ban on shrimp and shrimp products harvested in a way that endangers sea turtles and causes their incidental killing sowed the seeds for one of the most oft-quoted WTO disputes, namely US – Shrimp. In the context of this dispute, the panel considered the terms “prohibitions or restrictions” entrenched in Article XI:1 and concluded as follows: “the United States bans imports of shrimp or shrimp products from any country not meeting certain policy conditions. We finally note that previous panels have considered similar measures restricting imports to be ‘prohibitions or restrictions’ within the meaning of Article XI.” Later the panel in Brazil – Retreaded Tyres emphasised that: “There is no ambiguity as to what ‘prohibitions’ on importation means: Members shall not forbid the importation of any product of any other Member into their markets.”

828 ibid [5.5].
In light of the previous jurisprudence on the ambit of the prohibition on quantitative restrictions, there is no doubt that economic sanctions in the form of import restrictions on goods violate Article XI:1 of the GATT 1994.

7.1.2 Import Restrictions on Services

Restrictions on the importation of services have emerged as part of a broader effort to make sanctions more efficient. Given that international trade in services plays an increasingly important role, such prohibitions have significant potential to inflict economic grief on a targeted state. There are myriad ways in which this endeavour might be undertaken. Hence, restrictions on the importation of services might fall into all four modes of supply, as they are inscribed in the GATS.831

To illustrate this possibility, we compiled a table with the examples relevant for each mode of supply (Table 1).

The ultimate objective of the GATS is the liberalisation of trade in services. Against this backdrop, during the Uruguay Round negotiators agreed to a number of principles concerning the liberalisation of trade in services. These fundamental principles are conceptually distinct from the similar precepts of the GATT 1994. Since unilateral economic sanctions may encroach upon these fundamental principles, we examine below the consistency of import restrictions on services with the relevant disciplines of the GATS.

7.1.2.1 Potential Violation of the MFN Principle

Notwithstanding the significant flexibility granted to WTO Members with respect to their commitments on trade in services, the general MFN clause was embedded in Article II of the GATS. Article II:1 reads as follows: “With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.” This MFN obligation is an umbrella clause that guarantees that the commitments undertaken by any WTO Member

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831 Article 1, in the relevant part, reads as follows: “supply of a service: (a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.” GATS: General Agreement on Trade in Services, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183 (GATS).
**TABLE 1** Types of import restrictions and modes of supply under the GATS

<table>
<thead>
<tr>
<th>Modes of supply</th>
<th>Types of import restrictions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cross-border trade</td>
<td>Prohibition on buying services that originated in a particular (sanctioned) state or from service suppliers incorporated under the laws of the sanctioned state</td>
</tr>
<tr>
<td>Consumption abroad</td>
<td>Prohibition on travel by nationals of a sanctioning state to a sanctioned state – for instance, the United States’ unilateral economic sanctions against Cuba include such a travel prohibition (Cuban Assets Control Regulations 31 CFR Part 515)(^a)</td>
</tr>
<tr>
<td>Commercial presence</td>
<td>Prohibition on the right of establishment that applies to foreign entities that are incorporated under the laws of a sanctioned state</td>
</tr>
<tr>
<td>Presence of natural persons</td>
<td>Prohibition on the nationals of a sanctioned state providing services on a territory of a sanctioning state, either as an individual supplier or as an employee of a foreign-incorporated legal entity</td>
</tr>
</tbody>
</table>

\(^a\) “The prohibition on dealing in property in which Cuba or a Cuban national has an interest set forth in §515.201(b)(1) includes a prohibition on the receipt of goods or services in Cuba, even if provided free-of-charge by the Government of Cuba or a national of Cuba or paid for by a third-country national who is not subject to U.S. jurisdiction. The prohibition set forth in §515.201(b)(1) also prohibits payment for air travel by a person subject to U.S. jurisdiction to Cuba on a third-country carrier unless the travel is pursuant to an OFAC general or specific license.” Cuban Assets Control Regulations 31 CFR Part 515 §515.420 Travel to Cuba.

are extended to the whole membership, irrespective of the Member’s market size and other considerations.

The bulk of unilateral economic sanctions against foreign services or service suppliers are implemented in the form of discriminatory restrictions based exclusively on their origin. This peculiarity might enable a complainant to rely upon the presumption of “likeness” as developed in WTO jurisprudence. The AB explains the presumption of “likeness” in the context of trade in services as follows: “In our view, where a measure provides for a distinction based exclusively on origin, there will or can be services and service suppliers that are the same in all respects except for origin and, accordingly, ‘likeness’ can be presumed and the complainant is not required to establish ‘likeness’ on the basis
of the relevant criteria set out above. Accordingly, we consider that, under Articles II:1 and XVII:1 of the GATS, a complainant is not required in all cases to establish 'likeness' of services and service suppliers on the basis of the relevant criteria for establishing 'likeness.' Rather, in principle, a complainant may establish 'likeness' by demonstrating that the measure at issue makes a distinction between services and service suppliers based exclusively on origin."

As a result, if a WTO Member inserted a commitment for a specific sector and mode of supply into its schedule of concessions under the GATS and subsequently introduced economic sanctions in the form of import restrictions on services, which are exclusively based on the origin of the services or service supplier, these restrictions would be inconsistent with Article II:1 of the GATS.

7.1.2.2 Potential Violation of Market Access Commitments

Article XVI of the GATS prescribes a general obligation for a WTO Member to abide by the market access commitments it has inscribed for each services sector and mode of supply. Paragraph 1 of Article XVI reads as follows: “With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.” Thus, if a WTO Member has liberalised a certain sector and mode of supply and subsequently imposes import restrictions on services and service suppliers that discriminate against a particular WTO Member, this Member thereby accords the services and service suppliers of another Member less favourable treatment. Consequently, import restrictions on services violate Article XVI of the GATS, provided a WTO Member has undertaken relevant commitments.

7.2 Export Restrictions

7.2.1 Export Restrictions on Goods

Restrictions on the export of goods are frequently used to advance foreign-policy objectives. These restrictions may take different forms and pursue

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832 Appellate Body Report, Argentina – Measures Relating to Trade in Goods and Services, WT/DS453/AB/R and Add1, adopted 9 May 2016, DSRR 2016:II, p 431 [6.38]. In the subsequent paragraphs of the report, the AB discusses the differences between the presumption of "likeness" in the context of trade in goods and trade in services. The AB points out the peculiarities of applying this presumption to the trade in services (paras. 6.38–6.40) and thus its limited applicability in the context of trade in services (para. 6.40), yet it did not disregard it as such and confirmed its applicability.

833 Barry Carter described in his book how the export controls were framed as a part of a broader effort to restrict trade with the communist bloc countries and their allies during
diverse objectives. Traditionally, dual-use goods are subject to elaborate export requirements.\textsuperscript{834} Other forms of export restrictions include prohibitions on the export of goods, materials or services which are in high demand in a targeted state.\textsuperscript{835}

The term “export restrictions” is broad enough to cover a range of measures. For example, quantitative export restrictions, such as quotas, export duties (export taxes)\textsuperscript{836} and export licensing requirements, represent the diversity of export restrictions. While the WTO Members frequently rely upon these measures,\textsuperscript{837} this study focuses on unilateral economic sanctions which take the form of export bans. Export bans might be complete or partial – yet irrespective of their form, they fall under the definition of quantitative restrictions and thus become subject to the disciplines contained in Article XI:1 of the GATT 1994. Furthermore, the imposition of such export restrictions against a particular WTO Member or a group of Members runs the risk of being inconsistent with the MFN principle embedded in Article I:1 of the GATT 1994.

Various forms of export restrictions might fall foul of the WTO Members’ commitments, as embedded in WTO Agreements and the Members’ Protocols of Accession.\textsuperscript{838} For the subsequent analysis, I focus on the relevant provisions the Cold War. In fact, at the end of World War II, the US president was granted extensive power over export controls. Barry E Carter, \textit{International Economic Sanctions: Improving the Haphazard U.S. Legal Regime} (Cambridge University Press 1988).

\textsuperscript{834} Many countries have implemented internal control regimes to deal with the exports of dual-use goods. For instance, the European Union had such a regime in place and the EU Council has recently modernised the current regime. Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast) 2021 (OJ L). https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32021R0821.

\textsuperscript{835} Mina Pollmann, ‘What’s Driving Japan’s Trade Restrictions on South Korea?’ \textit{The Diplomat} (29 July 2019) <https://thediplomat.com/2019/07/whats-driving-japans-trade-restrictions-on-south-korea/>.

\textsuperscript{836} As Gabrielle Marceau has mentioned, both terms are used interchangeably in the literature. Gabrielle Marceau, ‘WTO and Export Restrictions’ (2016) 50 Journal of World Trade 563, Footnote 1.

\textsuperscript{837} Ilaria Espa, \textit{Export Restrictions on Critical Minerals and Metals: Testing the Adequacy of WTO Disciplines} (Cambridge University Press 2015); Marceau (n 836).

\textsuperscript{838} Some WTO Members that joined the organisation after 1995 have incorporated commitments to eliminate or phase out export restrictions. In fact, WTO disputes brought against China were based on the allegations of the inconsistency of export restrictions with China’s commitments contained in its Protocol of Accession. \textit{Appellate Body Reports, China – Measures Related to the Exportation of Various Raw Materials, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R}, adopted 22 February 2012, DSU 2012:VIII, p 3295; \textit{Appellate Body Reports, China – Measures Related to the Exportation of Rare Earths,}
of the WTO Agreements and examine the consistency of export bans with these provisions, drawing on WTO jurisprudence, as developed by the panels and the AB.

7.2.1.1 *Potential Violation of the MFN Principle*
An export ban on any category of goods has a high chance of running afoul of the MFN obligation contained in Article I:1 of the GATT 1994. The MFN treatment guarantees that “any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.” Thus, the MFN obligation is formulated broadly enough to cover any discrimination between the exports destined for different WTO Members, and thus any export ban inevitably falls foul of this commitment.

7.2.1.2 *Potential Violation of the Prohibition on Quantitative Restrictions*
The general prohibition on quantitative export restrictions is contained in Article XI:1 of the GATT 1994. The text of Article XI:1 outlaws “prohibitions or restrictions” on exportation or sale for export. The AB interpreted this prohibition as follows: “Article XI of the GATT 1994 covers those prohibitions or restrictions that have a limiting effect on the quantity or amount of a product being imported or exported.”839 Thus, an export ban, whether complete or partial, falls under this definition of “prohibition or restriction” on exportation and impedes compliance with the obligations under Article XI:1 of the GATT 1994.

In light of the above, it is evident that export bans on goods are inconsistent with Articles I:1 and XI:1 of the GATT 1994.

7.2.2 *Export Restrictions on Services*
While the relations between export restrictions and the disciplines contained in the GATT 1994 have been explored in the literature,840 no similar analysis for the export restrictions on services and their compatibility with the GATS...
The focus of the GATS disciplines is on granting market access for foreign services and service providers, as well as on securing national treatment for foreign services and service providers. In other words, disciplines on the export of services have attracted little attention from negotiators. Nonetheless, a plethora of economic sanctions may take the form of export restrictions on services. What is noteworthy is that some of these restrictions are extremely effective. For instance, the United States’ prohibitions on the export of financial services, which also include the clearing of transactions denominated in US dollars, are so efficient that they are sometimes called "dollar unilateralism."  

In Table 2, I provide examples of export restrictions on services under the four modes of supply.

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In Table 2, I provide examples of export restrictions on services under the four modes of supply.
A few observations on the consistency of export restrictions on services with the relevant provisions of the GATS are warranted here. First and foremost, the GATS does not prescribe a general prohibition on quantitative restrictions similar to Article XI:1 of the GATT 1994. Second, the wording of the MFN obligation under the GATS suggests that export restrictions on services fall outside the scope of this commitment. More specifically, Article II:1 of the GATS stipulates that “each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.” A textual interpretation favoured by WTO adjudicators843 entails that the MFN obligation applies only to foreign services or service suppliers, and not to foreign service recipients. Hence, prohibitions on the export of services do not breach the MFN obligation under the GATS.

However, export restrictions on services may be inconsistent with WTO commitments. More specifically, an analysis of WTO jurisprudence demonstrates that GATS commitments under mode 3 (commercial presence) also include the ability to export services from the territory of a WTO Member that has inscribed such commitments into its schedule. The WTO panel in Mexico – Telecoms had to decide whether Mexico’s commitments under the GATS mode 3 (commercial presence) extend “to international services from Mexico to the United States supplied through commercial agencies commercially present in Mexico.”844 Following an examination of the definition of mode 3 and the term “commercial presence,” the panel concluded as follows: “The definition of services supplied through a commercial presence makes explicit the location of the service supplier. It provides that a service supplier has a commercial presence – any type of business or professional establishment – in the territory of any other Member. The definition is silent with respect to any other territorial requirement (as in cross-border supply under mode 1) or nationality of the service consumer (as in consumption abroad under mode 2). Supply of a service through commercial presence would therefore not exclude a service that originates in the territory in which a commercial presence is established.

843 In its early case law, the AB reiterated the approach established by the ICJ and declared its preference for the textual interpretation, stating: “Article 31 of the VCLT provides that the words of the treaty form the foundation for the interpretive process: ‘interpretation must be based above all upon the text of the treaty.’” Appellate Body Report, Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:i, p 97 lx. In subsequent disputes both the panels and the AB followed this approach.

(such as Mexico), but is delivered into the territory of any other Member (such as the United States)." 845

In *China – Electronic Payment Services*, the panel concluded that if a WTO Member had undertaken market access commitments under mode 3 (commercial presence), these commitments imply the export of services from that Member’s territory. In particular, the panel observed: “The definition of services supplied through commercial presence addresses only the location of the foreign service supplier, not that of the recipient of the relevant service, nor the nationality of the recipient. It indicates that for purposes of the GATS a service is supplied through mode 3 if a service supplier of a Member supplies its service through commercial presence in the territory of another Member. The definition does not state that a foreign service supplier may supply its services only to recipients that are in the territory of the Member in which the service supplier has established a commercial presence and are nationals of that Member. Nor does the definition state that a foreign service supplier may not supply its services to recipients that are outside the territory of the Member in which the service supplier has established a commercial presence.” 846

These observations are particularly important when it comes to determining the legality of export restrictions on services under the GATS. Indeed, they entail that if a WTO Member imposes an export ban on services, any other Member can challenge this measure if the former Member undertook market access commitments for a particular services sector in mode 3 (commercial presence). Yet this proposition must be qualified in several ways. In this regard, Adlung emphasises that: “Members remain free to impose export restrictions (a) on their own services or service suppliers – even in the event of full commitments under Article XVI – as well as (b) on any services or service suppliers, whether foreign or national, in sectors not subject to specific commitments.” 847

Our analysis reveals that export restrictions on services might be WTO consistent, with the exception of restrictions that apply to liberalised services sectors and that impede the right of service suppliers to export their services through a commercial presence to other WTO Members.

### 7.3 Restrictions on Traffic in Transit and Goods in Transit

In their efforts to inflict economic pain on sanctioned states and their entities, states can impose restrictions on traffic and goods in transit, in addition

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845 ibid [7.375].
847 Adlung (n 841) 498.
to more conventional import and export restrictions. To take one example, US economic sanctions against Cuba prohibit ships trading with Cuba from docking at US ports for six months after the ship has left a Cuban port. Furthermore, the sanctions prohibit entry onto US territory of goods that were transported from or through Cuba. These ambiguously formulated restrictions may violate Article V of the GATT 1994 that protects the freedom of transit. More specifically, there may be a breach of obligations prescribed by Article V:2 and Article V:6.

Freedom of transit entails that “goods in international transit from any Member must be allowed entry whenever destined for the territory of a third country.” WTO adjudicators distinguish obligations under the first and the second sentences of Article V:2. In particular, the following observation describes their scope and their interrelations: “the first sentence in Article V:2 addresses freedom of transit for goods in international transit. As a complement to this protection, the panel considers that Article V:2, second sentence further prohibits Members from making distinctions in the treatment of goods, based on their origin or trajectory prior to arriving in their territory, based on their ownership, or based on the transport or vessel of the goods. Accordingly, the panel concludes that Article V:2, second sentence requires that goods from all Members must be ensured an identical level of access and equal conditions when proceeding in international transit.”

849 ibid § 6040.
850 Article V:2 reads as follows: “There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.”
851 The relevant part of Article V:6 reads as follows: “Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party.”
853 ibid [7.402].
The scope of the obligation stipulated in Article V:2 first sentence was further clarified by the panel in *Russia – Traffic in Transit* as follows: “under the first sentence of Article V:2: a. Each Member is required to guarantee freedom of transit through its territory for any traffic in transit entering from any other Member, and b. Each Member is required to guarantee freedom of transit through its territory for traffic in transit to exit to any other Member.”\(^{854}\) For this reason, in order to conclude that a particular regulation is inconsistent with the first sentence of Article V:2 of the *GATT* 1994, it is sufficient to establish “that a Member has precluded transit through its territory for traffic in transit entering its territory from any other Member.”\(^{855}\)

Regarding the obligation under Article V:6 of the *GATT* 1994, the panel in *Colombia – Ports of Entry* noted that “Article V:6 generally extends MFN protection to Members’ goods which ‘have been in transit.’”\(^{856}\) Furthermore, the panel concluded that this obligation applies to foreign goods whose final destination is a concerned WTO Member.\(^{857}\) In particular, the panel observed: "Article V:2 extends MFN protection to goods in transit through Member countries, while Article V:6 extends MFN protection from discrimination based on the geographic course of goods in transit upon reaching their final destination.”\(^{858}\) In other words, “products that are transported from their place of origin which pass through any other Member country on the route to their final destination must be treated no less favourably than had those same products been transported from their place of origin to their final destination without ever passing through that other Member’s territory.”\(^{859}\)

The aforementioned US sanctions that prohibit vessels leaving a Cuban port from using a US port as a transit stop violate US commitments under Article V:2 of the *GATT* 1994. As has been pointed out, the first sentence of Article V:2 guarantees freedom of transit for traffic in transit from the territory of other WTO Members. In other words, this commitment entitles any vessel from other WTO Members to enter any US port, if the vessel is “in transit” in the meaning of Article V:1 of the *GATT* 1994\(^{860}\) and irrespective of the previous route taken by the vessel. The second sentence of Article V:2 forbids any

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855. ibid [7.173].
856. *Panel Report, Colombia – Indicative Prices and Restrictions on Ports of Entry*, (n 852) [7.443].
857. ibid [7.466].
858. ibid [7.467].
859. ibid [7.478].
860. Article V:1, in the relevant part, reads as follows: “[…] vessels […] shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of
distinction between vessels in international transit based on different criteria, including place of departure. The US prohibition against vessels departing from Cuban ports represents a straightforward violation of the second sentence of Article V:2 of the GATT 1994.

Similarly, the US sanctions that prohibit entry onto US territory of goods that have been transported from or through Cuba infringe Article V:6 of the GATT 1994, which according to the established case law "extends MFN protection from discrimination based on the geographic course of goods in transit upon reaching their final destination."\(^{861}\) Indeed, such a blatant prohibition on all goods that were not only transported, but also transited through Cuba would represent a violation of the WTO commitment embedded in Article V:6 of the GATT 1994. Both scholarly analysis\(^{862}\) and the EU’s attempt to challenge the WTO consistency of unilateral US sanctions against Cuba\(^{863}\) attest to the correctness of this conclusion.

Another example relevant for our discussion are the restrictions enacted by the Russian Federation against the traffic in transit entering into its territory from Ukraine. These additional prohibitions, which were enacted against the backdrop of deteriorating trade relations between the countries and were fuelled by Ukraine’s closer economic integration with the European Union,\(^{864}\) became the subject matter of a dispute before the WTO.\(^{865}\) In this dispute, the Russian Federation invoked the national security exception enshrined in the GATT 1994, and thus the panel started its analysis from an examination of whether the preconditions stipulated by the national security clause were met.\(^{866}\) After arriving at an affirmative conclusion, the panel proceeded on the

\(^{861}\) Panel Report, Colombia – Indicative Prices and Restrictions on Ports of Entry, (n 852) [7.467].


\(^{863}\) The European Union (back then the European Communities) in its request to establish a panel contended that US sanctions against Cuba that prohibit “vessels which have entered a Cuban port for trade in goods or services from loading or unloading freight in US ports within 180 days after having departed from the Cuban port” are inconsistent with Article V of GATT 1994. WTO, ‘United States – The Cuban Liberty and Democratic Solidarity Act. Request for the Establishment of a Panel by the European Communities. WTO Doc WT/DS38/2, 8 October 1996.’


\(^{865}\) Panel Report, Russia – Measures Concerning Traffic in Transit, (n 7) [7.3 Factual background].

\(^{866}\) ibid.
arguendo basis and examined Ukraine’s claims that the restrictions on the traffic in transit coming from Ukraine were inconsistent with various obligations under Article V of the GATT 1994. After scrutinising obligations under different parts of Article V, the panel determined that restrictions on the traffic in transit were inconsistent with the first sentence of Article V:2 and the second sentence of Article V:2 of the GATT 1994.

In light of earlier WTO jurisprudence, it is evident that unilateral economic sanctions that restrain the WTO Members’ freedom of transit, covering both traffic and shipments of goods in transit, would breach the WTO obligations of the state enacting them.

7.4 The Freezing of Assets and Restrictions on Financial Transactions

States habitually freeze assets or prohibit financial transactions with targeted states, entities and individuals. For example, the unilateral US sanctions that target perpetrators of cyberattacks prohibit any payments to the blacklisted individuals, entities and government bodies. Unilateral EU sanctions punish actors responsible for cyberattacks that threaten the EU or its Member States and lay out prohibitions similar to the US cyber sanctions: “All funds and economic resources belonging to, owned, held or controlled by any natural or legal person, entity or body listed in Annex I shall be frozen.” In addition to the freezing of funds and economic resources, the EU sanctions stipulate that: “No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural or legal persons, entities or bodies listed in Annex I.” Annex I contains a list of sanctioned natural and legal persons, entities and bodies.

867 “[…] the Panel is mindful that, should its findings on Russia’s invocation of Article XXI(b) (iii) be reversed in the event of an appeal, it may be necessary for the Appellate Body to complete the analysis. Accordingly, in Section 7.6.2, the Panel proceeds to analyse those aspects of Ukraine’s claims which, were it not for the fact that the measures were taken in time of an ‘emergency in international relations’ (and met the other conditions of Article XXI(b)), would enable the Appellate Body to complete the legal analysis.” ibid [7.154].
868 ibid [7.183].
869 ibid [7.196].
870 “Travel bans and assets freezes are the two most common types of sanctions imposed by the EU, making up 75 per cent and 62 per cent of the episodes respectively.” Francesco Giumelli, Fabian Hoffmann and Anna Książczaková, ‘The when, what, where and why of European Union sanctions’ (2021) 30(1) European Security 1, 10.
871 President of the United States of America. Executive Order 13694 of April 1, 2015 (n 203); President of the United States of America. Executive Order 13757 of December 28, 2016 (n 204).
873 Art. 3(2), ibid.
The EU prohibition on making funds available is interpreted broadly. In particular, it has been explained that “[m]aking funds available to a designated person or entity, be it by way of payment for goods and services, […] is generally prohibited.”\(^{874}\) Although the EU cyber sanctions allow exceptions to these prohibitions, these exceptions do not cover regular business transactions and are, to a large extent, established on humanitarian grounds.\(^{875}\)

The above-mentioned examples of unilateral sanctions imposed by the European Union and the United States would at least be incompatible with the obligation under Article XI:1 of the GATT 1994. As demonstrated in the previous sections, where conventional import and export restrictions on trade in goods were analysed against the background of the WTO obligations, the scope of Article XI:1 of the GATT 1994 is comprehensive.\(^{876}\) More precisely, obligations under this article are invoked when prohibitions or restrictions “have a limiting effect on the quantity or amount of a product being imported or exported.”\(^{877}\) All-encompassing restrictions on financial transactions with the targeted individuals and entities result in indirect restrictions on imports from and exports to the targeted states. This conjecture is borne out by the *de facto* impossibility of engaging in import and export transactions with sanctioned persons without violating the restriction on “making funds available.” Thus, unilateral sanctions that prevent anyone under the jurisdiction of a sanctioning state from providing funds and making any other payments to the sanctioned persons may violate Article XI:1 of the GATT 1994.

Apart from this, asset freezes and prohibitions on financial transactions could potentially breach commitments under Article X:2 of the GATT 1994. This article requires that any measure of general application that imposes restriction or prohibition “on imports, or on the transfer of payments therefor” shall not be enforced before it has been officially published. In previous WTO disputes, adjudicators explained the meaning of the term “measure of general application,” such that a measure “affects an unidentified number of economic operators, including domestic and foreign producers” and does not exclusively

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875 For example, Article 4 provides a list of circumstances that entitle the competent authorities of the EU Member States to make funds or economic resources available. Council Regulation (EU) 2019/796 of 17 May 2019 (n 205).
876 See chapter 2, subsections 7.1 Import restrictions and 7.2 Export restrictions.
877 *Appellate Body Reports, China – Measures Related to the Exportation of Various Raw Materials* (n 838) [320].
apply to “a specific company” or “a specific shipment.”

Unilateral economic sanctions discussed above fall under this definition. Despite being targeted, they usually concern a number of entities and individuals in a particular state, including entities owned by the targeted individuals, as well as their family members. Furthermore, they forbid domestic entities in a sanctioning state from dealing with the sanctioned persons. In other words, they prohibit domestic constituencies from engaging in transactions with the targeted entities.

One more clarification is warranted in this regard. The panel in *US – Countervailing and Anti-Dumping Measures (China)* distinguished “measure of general application” from other measures in the following way: “The fact that a relevant measure has a narrow regulatory scope does not demonstrate that this measure is not generally applicable. [...] a relevant measure that applies to a class or category of people, entities, situations, or cases, that have some attribute in common would, in principle, constitute a measure of general application. In contrast, a relevant measure that applies to named or otherwise specifically identified persons, entities, situations, or cases would not be a measure of general application, but one of particular application.” The majority of regulations on the basis of which unilateral sanctions are introduced prescribe reasons for the sanctions, the scope of the established prohibitions, listing criteria and other relevant details. The list of the sanctioned states, bodies, legal entities and individuals is either attached as an annex to a general sanctions regulation or mentioned at the end of the regulation. Thus, it can be argued that unilateral

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879 For example, unilateral US sanctions imposed on human rights grounds, as well as sanctions against perpetrators of cyber-enabled malicious activities, prohibit not only dealing with sanctioned persons, but also with the legal entities owned by them. For more, see Bogdanova, ‘Targeted Economic Sanctions and WTO Law’ (n 230).

880 For example, one of the sisters of Syria’s president Bashar al-Assad, along with the other family members, has been added to the sanctioned persons’ list for the following reasons: “Bushra was one of 12 Assad family members added to an EU sanctions list in 2012 on the grounds that she was ‘benefiting from and associated with’ her brother’s dictatorship because of her ‘close personal relationship and intrinsic financial relationship’ to him and ‘other core Syrian regime figures.’ A travel ban and asset-freezing were imposed as a result.” Martin Bentham and Benedict Moore-Bridger, ‘Assad family cash frozen after dictator’s niece found living in London,’ *Evening Standard* (18 April 2019) [https://www.standard.co.uk/news/crime/assad-family-cash-frozen-after-dictator-s-niece-found-living-in-london-a4121211.html](https://www.standard.co.uk/news/crime/assad-family-cash-frozen-after-dictator-s-niece-found-living-in-london-a4121211.html).
economic sanctions, even when they are targeted, constitute a “measure of general application” and hence are subject to the obligation under Article X:2.

A complaining party may argue that unilateral economic sanctions of a responding party are in breach of Article X:2 of the GATT 1994 in virtue of the fact that there was no reasonable period of time between the publication of regulations imposing sanctions and its effective date, i.e. implementation. Indeed, as the practice demonstrates, sanctioning states announce restrictions such as asset freezes and prohibitions on financial transactions and then immediately implement them.881 The WTO Members’ attempts to question the WTO-consistency of other Members’ unilateral sanctions bolster the viability of this argument.882

This brings us to potential breaches of trade in services rules. Since restrictions on financial transactions, including restrictions on payments and other money transfers, may have negative repercussions for the supply of services by foreign service suppliers, the transparency obligation under Article III:1 of the GATS, which stipulates a duty comparable to Article X:2 of the GATT 1994, may also be infringed.883

Furthermore, prohibitions on financial transactions with sanctioned persons inevitably entail restrictions on international transfers and payments for

881 “I therefore determine that for these measures to be effective in addressing the national emergency declared in Executive Order 13692, there need be no prior notice of a listing or determination made pursuant to section 1 of this order.” President of the United States. Executive Order 13850 of November 1, 2018. Blocking Property of Additional Persons Contributing to the Situation in Venezuela. In one of the recent disputes before the US domestic court, the plaintiffs even argued that the practice of designating an entity under US sanctions regulations without providing prior notice or an opportunity to be heard prior to the designation breach the due process rights guaranteed under the US Constitution. Fulmen Company v. Office of Foreign Assets Control, ‘United States District Court for the District of Columbia, Case No. 18–2949, Memorandum Opinion, Mar. 31, 2020.’

882 In several requests for consultations filed before the WTO to challenge unilateral sanctions, complaining parties contended that such measures violate obligations under Article X:2 of the GATT 1994. WTO, ‘Ukraine – Measures Relating to Trade in Goods and Services, Request for Consultations by the Russian Federation, WTO Doc WT/DS525/1, G/L/1179 S/L/414, G/TBT/D/50 G/LC/D/52, G/SPS/GEN/1549, 1 June 2017’; WTO, ‘Russia – Measures Concerning the Importation and Transit of Certain Ukrainian Products. Request for Consultations by Ukraine, WTO Doc WT/DS532/1, G/L/1189 G/TFA/D1/1, G/SPS/GEN/1582, 19 October 2017.’

883 Article III:1 of the GATS reads as follows: “Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.”
various transactions, involving transactions that could be related to trade in services. This outcome contradicts Article XI:1 of the GATS, which stipulates that: “Except under the circumstances envisaged in Article XII, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.”

Scholars who have examined the compatibility of asset freezes and prohibitions on financial transactions with WTO commitments, also concur that such restrictions may conflict with the WTO Members’ commitments under the GATS. Peter-Tobias Stoll and others contend that “under Art. XI GATS, a Member shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments in the areas of trade in services. The freezing of assets and the blocking of financial transactions are likely to be in conflict with this obligation.”

Tom Ruys and Cedric Ryngaert have observed that secondary sanctions implying restrictions on international transfers and payments and impeding trade in services thereby, face a significant risk of being inconsistent with Article XI:1 of the GATS. However, they point out that the reference to the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the Fund in Article XI:2 of the GATS may prevent some secondary sanctions from being incompatible with Article XI:1 of the GATS.

7.5 Visa Restrictions

Visa restrictions, i.e. restrictions on the issuance of new visas and revocation of the already-issued visas, are frequently used. These bans can apply to specific individuals, to employees of the targeted legal entities and even to all nationals of a sanctioned state. For example, in summer 2020, the United States introduced visa restrictions against employees of the Chinese technology company Huawei for their alleged involvement in human rights abuses.

Visa restrictions may infringe obligations under the GATS, as well as the GATS Annex on Movement of Natural Persons. In support of this claim, we can cite the following example. In 1996, the EU (at that time the EC), in its attempt to question the legality of the US unilateral sanctions against Cuba,

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884 Stoll and others (n 232) 56.
885 Ruys and Ryngaert (n 555).
886 ibid.
argued that visa denials and exclusions on the part of the United States, prescribed under the relevant laws and regulations, are inconsistent with Articles II, III, VI, XVI and XVII of GATS, as well as with paragraphs 3 and 4 of the GATS Annex on the Movement of Natural Persons.\footnote{WTO, ‘United States – The Cuban Liberty and Democratic Solidarity Act,’ (n 863).} Similarly, Qatar – in its 2017 request for consultations with the UAE – maintained that “prohibiting Qatari persons [...] from crossing maritime borders with the UAE, or entering the UAE via airspace, to supply services” is a violation of Article II:1 of the GATS.\footnote{WTO, ‘United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights. Request for Consultations by Qatar. WTO Doc WT/DS526/1, G/L/1180 S/L/415, IP/D/35, 4 August 2017.’} Furthermore, Qatar submitted that transparency obligations under Article III of the GATS were infringed and market access was unduly restricted in violation of Article XVI of the GATS by various sanctions, which \textit{inter alia} include travel bans.\footnote{Ibid.}

The following obligations under the GATS might be breached by a WTO Member that implements visa restrictions:

- Most-Favoured-Nation treatment of Article II:1 – if a WTO Member has undertaken commitment to allow movement of natural persons in a specific service sector and visa restrictions undermine that commitment with respect to only some service suppliers
- Transparency obligations under Article III – if sanctions entailing visa restrictions were implemented before they were published or if there was no reasonable grace period between the publication of regulations imposing the sanctions and their effective date, i.e. implementation
- The obligation to administer measures of general application affecting trade in services “in a reasonable, objective and impartial manner” embedded in Article VI:1 – if a WTO Member imposes economic sanctions in the form of visa restrictions against designated actors from some WTO Members but not against others, even if the latter formally meet the criteria for being designated
- Market access obligations stipulated in Article XVI and the Members’ schedules of commitments – if particular obligations were inscribed in the schedule of commitments and then breached by the Member enacting sanctions
- National treatment obligations under Article XVII – if the relevant commitments were undertaken and no qualifications were set, which could allow visa restrictions to be enacted
Annex on Movement of Natural Persons Supplying Services under the Agreement, in particular the obligation under paragraph 4 of this Annex

7.6 Secondary Sanctions and Their Compatibility with WTO Law

In the previous section of the book, secondary sanctions and their compatibility with the principles for ascertaining jurisdiction in international law were discussed. However, secondary sanctions, i.e. sanctions that regulate the conduct of third states and their legal entities and prevent them from engaging in business transactions with the sanctioned states, their nationals and entities, may be incompatible not only with the principles establishing jurisdiction, but also with WTO commitments. The analysis below provides examples of secondary sanctions that are at risk of being found inconsistent with the obligations under WTO law, and it discusses the WTO compatibility of secondary sanctions.

The unilateral US economic sanctions against Cuba include a prohibition on ships trading with Cuba docking at US ports for six months (“for a period of 180 days”) after leaving a Cuban port. The potential of this prohibition to violate the relevant WTO commitments can be easily illustrated by the following example. Let us imagine a situation in which goods originating in the European Union are to be transported to Cuba, yet the vessel that is to transport them is traveling to the United States. After making a stop in Cuba, the vessel would be prohibited from entering US ports for 180 days. As a result, a shipping company may refuse to transport the EU goods, and hence this restriction may entail financial losses for the European Union’s exporters if their goods are destined for the Cuban market.

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891 Para. 4 of the Annex on Movement of Natural Persons Supplying Services under the Agreement reads as follows: “The Agreement shall not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders, provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment.”

892 See chapter 2, section 4. Unilateral economic sanctions and established principles of jurisdiction in international law.


894 Cuban Assets Control Regulations 31 CFR § 515.207 Entry of vessels engaged in trade with Cuba (n 848).
Another example of secondary sanctions are the recently announced restrictions on certain sectors of the Iranian economy introduced unilaterally by the United States. These sanctions target not only US-incorporated entities and individuals for their involvement in business transactions in the identified sectors of the Iranian economy – the construction, mining, manufacturing or textiles sectors and other sectors as may be determined by the Secretary of the Treasury – but also any non-US person engaged in the same conduct. The precondition for the application of these sanctions is that a non-US entity or a foreign national have “knowingly engaged” in the prohibited conduct. The all-encompassing formulation and the severe penalties employed to enforce the prescribed restrictions make the reach of these sanctions extremely broad. In other words, legal entities incorporated anywhere in the world are obligated to comply with the sanctions or risk having their assets in the United States frozen and being deprived of access to the US market.

Given this, the question that should be considered is whether US secondary sanctions intended to compel US trading partners to comply with them breach WTO obligations? If yes, then what obligations?

There is no unanimity among legal scholars about whether secondary sanctions are ipso facto inconsistent with WTO law. For example, there is certain scepticism in academic literature concerning the possibility of declaring secondary sanctions to be inconsistent with MFN and national treatment obligations. In particular, Tom Ruys and Cedric Ryngaert have examined the

896 ibid, Section 1. (a)(i) and Section 1. (a)(ii).
897 ibid, Section 1. (a)(ii).
898 The following penalties apply to non-US persons who have “knowingly engaged” in transactions with Iran and Iranian entities in the construction, mining, manufacturing, or textiles sectors and other sectors, as may be determined by the Secretary of the Treasury: all property and interests in property should be blocked and “may not be transferred, paid, exported, withdrawn, or otherwise dealt in.” Furthermore, the following prohibitions apply to the non-US persons who do not comply with the sanctions: “(a) the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order; and (b) the receipt of any contribution or provision of funds, goods, or services from any such person.” ibid.
899 ibid.
900 “Overall, it seems unlikely that secondary sanctions seeking to restrict trade between the country that is the primary sanctions target and third states would contravene the national treatment or MFN principles.” However, it should be noted that the authors have also provided examples of academic studies arguing for the opposite point of view. Ruys and Ryngaert (n 555) 42.
consistency of secondary sanctions with the various obligations under WTO law.\textsuperscript{901} According to their analysis, the third states that might be de facto prohibited from trading with the targeted state and/or its entities cannot argue, with few exceptions, that their entitlements under the MFN and national treatment provisions have been breached.\textsuperscript{902} However, in their view, the violation of the obligation under Article XI:1 of the GATT 1994,\textsuperscript{903} as well as potential violations of other obligations, such as commitments under the Government Procurement Agreement could be established.\textsuperscript{904} By contrast, Andrew Mitchell, discussing the EU’s efforts to question the WTO-compatibility of the US secondary sanctions targeting Cuba, observes that “[t]he ‘consensus’ among commentators was that the panel would likely have struck down the secondary sanctions.”\textsuperscript{905}

It is hard to agree with the view that the MFN obligation under the GATT 1994 is not breached by secondary sanctions, which discriminate against goods based not on their characteristics, but on the basis of compliance with the foreign policy preferences of a particular state. It should be recalled that in order to find a violation under the MFN clause of the GATT 1994, the following prerequisites should be met: “(i) that the measure at issue falls within the scope of application of Article I:1; (ii) that the imported products at issue are ‘like’ products within the meaning of Article I:1; (iii) that the measure at issue confers an ‘advantage, favour, privilege, or immunity’ on a product originating in the territory of any country; and (iv) that the advantage so accorded is not extended ‘immediately’ and ‘unconditionally’ to ‘like’ products originating in the territory of all Members. Thus, if a Member grants any advantage to any product originating in the territory of any other country, such advantage must be accorded ‘immediately and unconditionally’ to like products originating from all other Members.”\textsuperscript{906} If, as a result of secondary sanctions, import or export restrictions are imposed on a third state or its legal entities solely for the reason of non-compliance with these secondary sanctions, these restrictions may be challenged before the WTO. A complaining state may argue that the goods thus targeted are “like” the goods imported from any other WTO Member

\textsuperscript{901} Ibid.
\textsuperscript{902} Ibid 39–43.
\textsuperscript{903} Ibid 43–46.
\textsuperscript{904} Ibid 46–51.
\textsuperscript{906} Appellate Body Reports, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, (n 822) [5.86].
and thus, an “advantage, favour, privilege, or immunity” in the form of market access, if it is a question of import prohibitions, or an “advantage, favour, privilege, or immunity” in the form of access to exported goods, if it is a question of export prohibitions, was not granted to the goods originating in a state that is targeted for its non-adherence to secondary sanctions. Furthermore, bearing in mind the comprehensive nature of the obligation not to introduce quantitative restrictions, which is enshrined in Article XI:1 of the GATT 1994, this obligation would be breached by the secondary sanctions that punish third states and their entities for non-compliance.

8 Conclusion

A detailed analysis of the legality of unilateral economic sanctions has demonstrated the lack of any certainty in this area. The discussion of whether unilateral economic sanctions encroach on the principles embedded in the UN Charter started in the 1960s and is still ongoing. The ILC codification of the customary international law on state responsibility also sheds little light on the legal status of third-party countermeasures. To further complicate the matter, states design their sanctioning programmes in such a way as to give them extraterritorial effect, thus sowing the seeds of the subsequent deliberations on the consistency of their sanctions with the principles on ascertaining jurisdiction in international law. Moreover, the recent trend towards the imposition of targeted sanctions against central banks, heads of state and senior government officials raises the question of their relations with state immunity and immunities guaranteed to senior government officials.

WTO law stands as an exception. More specifically, various forms of unilateral economic sanctions face a significant risk of being found inconsistent with the relevant disciplines of the WTO Agreements. Moreover, the obligations under WTO law are protected by the dispute settlement system. Thus, it is no coincidence that when states are willing to question the legality of unilateral economic sanctions, they are most likely to initiate a dispute before the WTO.

Despite recent developments, both in law and in practice, two main deficiencies inherent in economic coercion have still not been resolved, namely that reliance on economic pressure can be politically motivated on some occasions, while on other occasions states might be reluctant to employ economic sanctions, even if there is a pressing need for such measures.