CHAPTER 2

Compatibility and Legitimacy of Sanctions Regimes

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Abstract

For the purpose of this paper, ‘sanction’ is defined as a measure taken by one international actor (the sanctioner) against another subject of international law (the sanctionee) in order to make the sanctionee desist from a behaviour considered by the sanctioner to be politically unacceptable or illegal. These measures usually consist of withholding or withdrawing certain advantages the sanctionee would otherwise enjoy.

Sanctions in this sense are legally unproblematic where the sanctionee is not legally entitled to the advantage in question (retorsion). Examples are the severance of diplomatic relations, the interruption of transport (air and sea) communications or travel restrictions for individuals unless there is a treaty right covering these communications.

Among members of the WTO, restrictions in trade of commodities or services may only be imposed to the extent permitted by the exception clauses of Art. XXI GATT or Art. XIV-bis GATS. Advantages covered by treaties may, as a matter of principle, only be withheld or withdrawn by relying on treaty exception clauses or on countermeasures. If private persons are affected by sanctions, their fundamental rights must be respected.

Keywords


1 Introduction

Sanctions are measures taken by an international actor (the sanctioner, a State or an international organization) in reaction to an undesirable, most often allegedly illegal behaviour of another actor (the sanctionee) for the purpose of making the sanctionee desist from that behaviour. Usually, such measures consist of a value deprivation, i.e. the denial or withdrawal of certain advantages which the sanctionee would otherwise expect or claims to be entitled to.
There are two types of ‘sanctions’ which follow completely different rules: enforcement measures imposed by the Security Council and so-called autonomous sanctions, \textit{i.e.} measures unilaterally decided by individual States, groups of States or regional organizations.\footnote{For the historic development, see B.E. Carter, ‘Economic Sanctions’, \textit{Max Planck Encyclopedia of Public International Law} (2012), para. 8 \textit{et seq.}} The former category is based on Articles 39, 41, 25 \textit{UN Charter}. It raises questions of the interpretation of these provisions, of the scope of discretion which the Security Council possesses, and of the limitation of its powers, in particular those based on human rights law. The Security Council may use these powers by authorizing States, groups of States or regional organizations to adopt certain sanctions.\footnote{A. Pellet and A. Miron, ‘Sanctions’, \textit{Max Planck Encyclopedia of Public International Law} (2013), para. 10 \textit{et seq.}; on “autonomous sanctions”, \textit{ibid.}, para. 62 \textit{et seq.}} As the case of Iran shows, both types of sanctions may exist side by side.\footnote{The Security Council decided on sanctions against Iran in Resolutions 1737 (2006), 1747 (2007), 1803 (2008), 1929 (2010), 2049 (2012). For U.S. sanctions see the Iran Sanctions Act 1996, as amended, 50 \textit{U.S.C.}, para. 1701; for \textit{EU} sanctions see Council decision 2010/413/CFSP, 26 July 2010. The \textit{EU} Council decision clearly distinguishes between measures which implement the sanctions decided by the Security Council and those which go beyond them.}

\section{Specific Legal Yardsticks}

This paper concentrates on the latter category, autonomous sanctions. The first question concerning the compatibility or legitimacy of autonomous sanctions is whether the sanctionee has political or similar reasons to expect such advantages or is legally entitled to receive them. The rules concerning legitimacy of sanctions differ in these two cases. If the sanctionee is legally entitled to the advantage withdrawn or withheld, the ensuing question is whether there is any rule allowing for exceptions to such entitlement. The rules on state responsibility\footnote{Formulated by the International Law Commission in the Articles on the Responsibility of States for internationally wrongful acts (\textit{ARS}), Annex to General Assembly Resolution 56/83 of 12 December 2001.} concerning reprisals (in traditional terminology) or countermeasures (modern terminology) are only one possibility among others for such exception. If advantages to which the sanctionee has no legal right are withdrawn or withheld, the sanction might constitute an unfriendly act, but it is not unlawful (retorsion).\footnote{T. Giegerich, ‘Retorsion’, \textit{Max Planck Encyclopedia of Public International Law} (2011).}