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Building bridges: central banking law in an interconnected world

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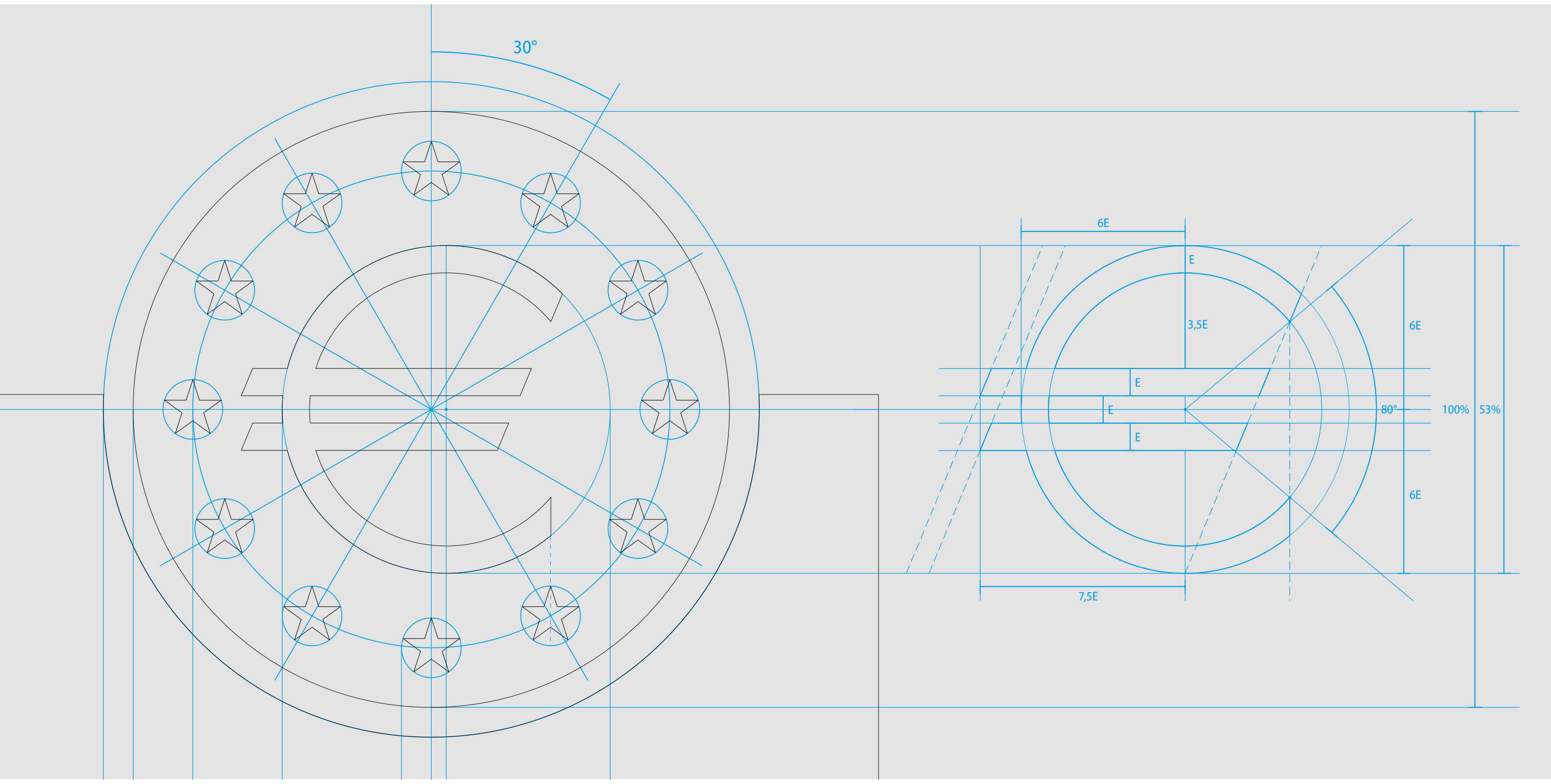

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Extraterritorial sanctions and international economic law

Annamaria Viterbo[1]

1 Introduction

For decades, international economic law was the most apolitical branch of international law. Since the 1990s, however, governments have increasingly adopted unilateral sanctions to pursue foreign policy objectives and nowadays security concerns are undermining multilateralism and international cooperation.[2] The UN General Assembly and the Human Rights Council have affirmed several times that unilateral sanctions breach international law.[3] More recently, the UN Special Rapporteur on the Negative Impact of Unilateral Coercive Measures on the Enjoyment of Human Rights, argued that "the resort by a major power of its dominant position in the international financial arena against its own allies to cause economic hardship to the economy of sovereign States is contrary to international law, and inevitably undermines the human rights of their citizens."[4] Particularly controversial is the extraterritorial reach of unilateral sanctions, which undermine core principles of international law such as the principles of sovereign equality of States, territorial integrity, the duty of non-interference in the domestic affairs of other States, and the duty to fulfil international law obligations in good faith. On top of that, extraterritorial sanctions are at odds with international law rules governing the exercise of jurisdiction by States.[5]

This research, along with assessing the lawfulness of extraterritorial sanctions under the specific standpoint of international economic law, aims at establishing whether

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2 See van der Herik, L. (2017); Happold, M. and Eden, P. (2016); Ronzitti, N. (2016), pp. 103-126; Malloy, P. (2015); Marossi, A. and Bassett, M. (2015); Pellet, A. and Miron, A. (2013); Carter, B. (2011); Hufbauer, G.C. et al. (2009); Kern, A. (2009).

3 See, for instance, UN Human Rights Council Resolution, "Human Rights and Unilateral Coercive Measures", A/HRC/RES/37/21, 23 March 2018 and UN GA Resolution, "Human Rights and Unilateral Coercive Measures", A/RES/73/167, 17 December 2018.

4 See UN Human Rights Office of the High Commissioner, "US Sanctions Violate Human Rights and International Code of Conduct, UN Expert Says", 6 May 2019, available at www.ohchr.org.

5 In particular, although their customary law nature is debatable, the protective principle and the effects doctrine are often resorted to in order to justify an otherwise unlawful exercise of extraterritorial jurisdiction. For a different view, see Meyer, J. (2009), pp. 905-967: the author contends that a wide range of secondary sanctions are permissible if tailored to regulate activities exclusively on the combined grounds of territoriality and nationality.

legal remedies are available to countries or entities affected by these measures.[6] The article draws mainly from examples of US sanctions and it is structured in four parts. Part I outlines the key concepts behind primary and secondary sanctions and analyses the scope and nature of the extraterritorial sanctions imposed by the United States: while the scope of US extraterritorial sanctions is crucial to establish who is entitled to seek remedies under international economic law, the nature of the restrictions defines the set of applicable rules. Part II turns to international monetary law, Part III focusses on international trade law, and Part IV assesses the relevance of international investment law. The issues raised by the extraterritorial application of anti-money laundering measures are outside the scope of this research paper.[7]

2 Pushing the limits of jurisdiction: US primary and secondary sanctions and their extraterritorial application

The current US administration has aggressively taken recourse to unilateral sanctions. They range from targeted asset freezing, comprehensive trade embargoes, travel bans and a variety of other measures, touching upon all the pillars of international economic law. US sanctions are imposed by US Statutes and Executive Orders,[8] and they are generally implemented through regulations. Their application is the primary responsibility of the Office of Foreign Assets Control (OFAC) of the US Department of the Treasury, sometimes in consultation with the US Department of State or other federal agencies. Especially when designed to have an extraterritorial reach, unilateral sanctions open up a number of questions regarding their legitimacy with respect to international economic law. However, in order to better understand their operation, it is necessary to describe at the outset the difference between primary and secondary sanctions. In fact, although secondary sanctions are all extraterritorial, extraterritorial sanctions are not necessarily only secondary.[9]

6 Countries primarily targeted by sanctions can more easily initiate proceedings. See, for instance, the case pending between Iran and the United States before the International Court of Justice (ICJ) on the alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights. Iran instituted proceedings in July 2018 following the re-imposition of sanctions by the United States, claiming the violation of the provisions on fair and equitable treatment, the free transfer of funds, the most-favoured nation and national treatment principles as well as of the provision on freedom of commerce and navigation.

7 On this subject, see Bismuth, R. (2016), pp. 37-64.

8 The International Emergency Economic Powers Act (IEEPA) of 28 October 1977 (50 USC §§ 1701-1706) is the primary legal authority for the adoption of economic sanctions by the US executive branch. The IEEPA authorises the US President to issue Executive Orders imposing broad economic sanctions in response to a “national emergency” with respect to an unusual and extraordinary foreign policy or national security threat, which originates in whole or substantial part outside the United States (§ 1701). The Trading with the Enemy Act of 1917 (TWEA) gives the President the authority to regulate or to prohibit transactions involving property in which a foreign country or their nationals have an interest only in times of a declared state of war. Currently, Cuban sanctions are the only ones still governed by the TWEA.

9 Bechky, P. (2018), p. 11. See also Forrer, J. (2018).

2.1 Primary sanctions

Primary sanctions prohibit individuals and companies in the sanctioning State from carrying out business with the sanctioned country. These measures cause the interruption of almost all trade, financial and investment flows towards the targeted country, with the exception of humanitarian goods.

US primary sanctions apply to US persons, US-origin goods and transactions taking place within the US territory. The term "US persons" includes: i) US citizens and permanent resident aliens (regardless of where they are staying or are employed and, therefore, even when they are abroad); ii) any person or entity physically situated within the United States (and, therefore, also foreigners temporarily visiting the United States); iii) all US incorporated entities and their foreign branches. As a consequence, for example, a US national employed abroad by a foreign enterprise is prohibited from working on Iran-related projects. Similarly, a foreign branch of a US bank is prohibited from conducting business with North Korea.

US primary sanctions have a clear extraterritorial reach in three cases.

a) Usually, primary sanctions apply also to "non-US persons" when they cause US persons to infringe sanctions or when they facilitate transactions (including deceptive or structured transactions) for, or on behalf of, any person subject to sanctions or, more in general, when they cause actions to occur in the territory of the United States in furtherance of prohibited transactions and activities. These provisions prevent the by-passing of sanctions and allow the exercise of US jurisdiction even when US persons are not directly involved.

b) A number of programmes require foreign persons possessing items of US origin or content to comply with US sanctions and export controls. In particular, these programmes prohibit the export, re-export or transfer of goods, software and technology that are subject to US export controls even if they are manufactured abroad, when they contain components of US origin exceeding a *de minimis* threshold or when they incorporate specific US technology.

Foreign companies procuring items from a US supplier to re-sell them, or to incorporate them into a product manufactured outside the United States, have to comply with US sanctions and export controls. Failure to do so entails hefty fines and can lead to the company being blacklisted.

For instance, in May 2019 the US Commerce Department's Bureau of Industry and Security (BIS) amended the Export Administration Regulations (EAR)[10] adding Huawei Technologies Ltd. and 68 of its non-US affiliates to the Entity List, claiming that the Chinese electronic appliances manufacturer was involved in activities contravening US national security and foreign policy (notably, for exporting, re-

[10] The Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) are two important United States export control laws governing the export, re-export or transfer of commodities, software and technology. They contain a list of names of foreign persons – including individuals, businesses, research institutions, government and private organisations, and other types of juridical persons – that are subject to specific license requirements for the export, re-export or transfer of specific items.

exporting and selling to Iran items subject to US jurisdiction in violation of US sanctions).

c) Certain sanctions programmes are addressed not only to US persons but also to foreign entities owned or controlled by US persons.[11] The latter are prohibited from directly or indirectly engaging in business activities in targeted countries or with targeted counterparties.

This kind of sanction was already applied in the 1960s, when the United States restricted trade with the People's Republic of China. At that time, in application of the sanctions regime, the US Ministry of the Treasury ordered the French corporation Fruehauf, which was two-thirds owned and controlled by its US parent company Fruehauf International, to rescind a contract it had entered into with China. The United States argued that their jurisdiction derived from the fact that a US corporation held the majority of the shares of the company.[12]

Later, in 1982, the United States imposed sanctions on the Soviet Union and prohibited foreign subsidiaries of US companies from supplying parts and services for the construction of a natural gas pipeline running from Siberia to Europe. Concurrently, non-US firms, which were using US-licensed technology, were prohibited from exporting equipment or technologies to the Soviet Union. After vehement protests of European countries and of the Commission of the (then) European Communities,[13] US extraterritorial sanctions and re-export controls were eventually lifted.[14]

Similar extraterritorial sanctions were later deployed against Iran[15] and Cuba[16] and are still enforced today. In March 2019, for instance, Stanley Black & Decker Inc., an American manufacturer of industrial tools and household hardware, and its Chinese subsidiary, Jiangsu Guoqiang Tools co., accepted a USD 1.9 million settlement agreement with the OFAC for having exported power tools and spare parts to Iran. The items were shipped to Iran either directly from China or through third countries.[17]

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11 Prohibitions extend to foreign subsidiaries of US parent companies when: (i) a US person holds a 50 percent or greater equity interest by voting rights or value in the entity; (ii) a US person holds a majority on the Board of Directors; or (iii) a US person directs the operations of the subsidiary.

12 See Court of Appeal of Paris, *Société Fruehauf Corp. v. Massardy*, 22 May 1965, in ASIL (1966), *International Legal Materials*, p. 476, on which Craig, W.F. (1970), pp. 579-601.

13 Comments of the European Community on the Amendments of 22 June 1982 to the US Export Regulations, Presented to the United States Department of State on 12 August 1982, in ASIL (1982), *International Legal Materials*, pp. 891 ff. See also District Court at the Hague, *Compagnie Européenne des Pétroles S.A. v. Sensor Nederland B.V.*, judgment of 17 September 1982, in ASIL (1983), *International Legal Materials,* pp. 66-74, para. 7.3.2.

14 Recently, the United States has threatened to impose sanctions on foreign companies participating in the Nordstream 2 project, the construction of a gas pipeline between Russia and Germany.

15 See, for instance, § 560.215 of the Iranian Transactions and Sanctions Regulations, 31 C.F.R. Part 560.

16 Consistent with the Cuban Democracy Act of 1992 (CDA) and § 515.559 of the Cuban Assets Control Regulations (31 CFR Part 515), US owned or controlled entities in a third country are prohibited from engaging in transactions involving the direct or indirect import or export of goods or services (financial services included) with Cuba.

17 See US OFAC Settlement Agreement with Stanley Black & Decker, Inc. and its Chinese subsidiary Jiangsu Guoqiang Tools co., 14 March 2019, available at www.treasury.gov

2.2 Secondary sanctions

Secondary sanctions apply to foreign persons and to activities taking place entirely outside the jurisdiction of the sanctioning State. They are specifically designed to discourage foreign persons from engaging in certain economic activities with countries or entities targeted by primary sanctions, even if these activities cannot be directly linked to the jurisdiction of the sanctioning State.

Notably, US secondary sanctions impel foreign entities to withdraw from activities in targeted countries or cease transactions with targeted subjects, even when their home country does not prevent them from doing so and even when it prohibits compliance with US sanctions (e.g. when blocking legislation is adopted[18]). Basically, secondary sanctions force foreign entities to choose between preserving their access to US markets or keeping doing business with the targets of US sanctions.

While a violation of US primary sanctions entails fines and even criminal proceedings, the infringement of US secondary sanctions triggers measures that limit the possibility to operate in the United States. In fact, a prohibited conduct will trigger measures aimed at foreign persons, which may prevent US financial institutions from extending loans in excess of USD ten million, prohibit the US Export-Import Bank from issuing loans, credits or credit guarantees on exports of goods or services to the sanctioned person and restrict participation in US government tenders for procurement. Furthermore, any specific export licence or permission may be denied or withdrawn, and the foreign party may even be included in the Specially Designated Nationals List (SDNs List)[19] and have its assets frozen or be subjected to financial or property-based sanctions similar to those deriving from being blacklisted.

Other measures are specifically envisaged for foreign financial institutions knowingly providing significant financial services to any person targeted by sanctions. These measures include: the blocking of property and interests in property situated in the United States or in the possession or control of US persons, with restrictions covering also any related transaction; prohibitions or stricter conditions on the opening or keeping of correspondent and payable-through accounts in the United

[18] A blocking statute is a piece of legislation aimed at nullifying the effects of the extraterritorial application of laws of foreign countries. See, for instance, Council Regulation (EC) No 2271/96 of 22 November 1996 (the so-called ‘EU Blocking Statute’), as lastly amended in 2018, protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom (OJ L 309, 29.11.1996, p. 1). Article 6 of the EU Blocking Statute contains a *clawback provision*, enabling EU operators to recover all damages, including legal costs, from the natural or legal person who caused them as a consequence of the application of US sanctions.

[19] The SDNs List, which is administered by OFAC, indicates individuals and companies owned or controlled by, or acting for or on behalf of, sanctioned countries. The SDNs List also includes individuals, groups and entities designated under US sanctions programmes that are not country-specific, such as those against terrorism or narcotics trafficking. Notably, even foreign individuals and companies found not complying with extraterritorial sanctions might be designated in the SDN List or in another restricted parties list (e.g. the Foreign Sanctions Evaders List or the Entity List).

States, with termination or suspension of existing ones;[20] as well as prohibitions on acting as primary dealer in US government bonds or as repository for US government funds.

In their practical effects, these measures deny foreign financial institutions access to US financial markets and are far more detrimental than monetary fines, having a wide-ranging deterrent effect. For fear of being excluded from the US market, foreign entities are unwilling to entertain any economic relations with targeted entities. In particular, due to the unpredictability of an ever-changing legislation and to its lack of clarity, business operators tend to over-comply with secondary sanctions in order to avoid incurring any risk.[21]

To date, the United States have adopted secondary sanctions targeting foreign companies or individuals doing business with Burma, Cuba, Iran,[22] Libya, North Korea, Russia,[23] Syria, Zimbabwe and, as recently as the 5th of August 2019, with Venezuela.[24]

The most notorious secondary sanction programme is, however, the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (usually referred to as the Helms-Burton Act).[25] In 1996, when the Act was adopted, the embargo against Cuba was broadened to include foreign corporations with no connection to US ownership which were either trading or investing in the country.[26] The provisions contained in Title III of the Act are the most controversial. They create a private cause of action authorising former US owners of property confiscated in Cuba as a consequence of the 1959 Cuban revolution to sue for damages foreign individuals or entities "trafficking" in such property. Title III purports to protect the rights of US nationals, while at the same time discouraging foreign investments in Cuba. Traffickers would be denied "any profits from economically exploiting Castro's wrongful seizures"

[20] See, for example, US Executive Order No 13810 of 20 September 2017, "Imposing Additional Sanctions With Respect to North Korea", which empowers the US Secretary of the Treasury to prohibit maintaining or opening a correspondent bank-account as well as to block their property in the United States to "foreign financial institutions" conducting or facilitating any significant commercial transaction with North Korea either directly or on behalf of any person whose assets have been frozen pursuant to previous Presidential Executive Orders (Section 4).

[21] Geranmayeh, E. and Lafont Rapnouil, M. (2019), p. 65.

[22] In November 2018, after its withdrawal from the Joint Comprehensive Plan of Action (JCPOA), the United States reintroduced all sanctions against Iran and Iranian entities – as well as the related secondary sanctions – that had been previously lifted. Some of these secondary sanctions aim at isolating Iran's banking sector from global finance and are directed to specialised financial messaging operators providing their services to the Central Bank of Iran and Iranian financial institutions. These sanctions have been specifically conceived for the Society of Worldwide Interbank Financial Telecommunications (SWIFT), a Belgian company that, by connecting thousands of banks all over the world, allows them to share critical information on financial transactions through secure standardised messages. In November 2018, SWIFT announced it would comply with US sanctions, suspending access to its messaging system for certain Iranian banks.

[23] In 2017, the Countering America's Adversaries Through Sanctions Act (CAATSA) was adopted by Congress to tighten sanctions on Iran, Russia and North Korea. Notably, it was the first time that the United States adopted secondary sanctions related to Russia.

[24] US President, Executive Order No 13884 of 5 August 2019, "Blocking Property of the Government of Venezuela." See, in particular, Section 1.

[25] The Cuban Liberty and Democratic Solidarity (Libertad) Act was signed into law by President Clinton on 12 March 1996, 22 USC §§ 6021-6091.

[26] According to Section 4 (8) of the Helms-Burton Act, foreign nationals means an alien, or any corporation, trust, partnership, or other juridical entity not organized under the laws of the United States.

(Section 301(11)) and would be held liable to pay statutory damages equal to the market value of the property which, in certain cases, may be even trebled.[27] A person is considered trafficking in confiscated property if, among other things, knowingly and intentionally purchases, receives, controls, transfers, invests, manages or engages in a commercial activity using or otherwise benefitting from confiscated property.[28] The pejorative term *trafficking* is deliberately chosen to stigmatise activities which, for foreign businesses, are regular investment opportunities.[29] In fact, persons investing in former US property in Cuba perform business transactions under the exclusive jurisdiction of the Cuban State and in accordance with its domestic law.

The Helms-Burton Act was met with vocal protests from the European Communities, which viewed the sanctions as illegal and lodged a complaint before the WTO dispute settlement body (on which see *infra*). In 1996, to settle the case, the United States agreed to suspend the implementation of Title III and since then every US administration periodically and repeatedly renewed it. However, in a turn of events, in May 2019, President Trump officially lifted the suspension, allowing US nationals to commence civil proceedings against foreign individuals and entities whose business activities concern assets that had been confiscated from them by the Cuban government. As it did in 1996, the international community and, in particular, the European Union, protested vigorously. In April 2019, in a joint statement, the High Representative of the EU for Foreign Affairs and Security Policy and the EU Trade Commissioner condemned the US decision to reactivate Title III of the Helms-Burton Act. They warned the United States that “the EU will consider all options at its disposal to protect its legitimate interests, including in relation to its WTO rights and through the use of the EU Blocking Statute”.[30]

3 International monetary law

From an international monetary law standpoint, asset freezing is the most interesting type of sanction. The blocking or freezing of assets is an important tool of US foreign policy. Sanctions, in fact, often consist in the freezing of funds and domestic bank accounts denominated in either US dollars or foreign currencies that have been opened i) either by nationals (natural and juridical persons) of countries targeted by primary sanctions or ii) by nationals of foreign countries blacklisted as a result of secondary sanctions.[31] In particular, when assets are frozen, listed persons are prevented from using their bank accounts for payments or transfers for current

27 Damages in a private Helms-Burton Act lawsuit will be the greater of (i) fair market value at the time of taking plus interest; (ii) current market value; or (iii) the amount certified by the US Foreign Claims Settlement Commission (FCSC) (on those cases where that body has adjudicated).

28 See the definition of “traffics”, provided by Section 4(13) of the Helms-Burton Act.

29 Rodman, K.A. (2001), p. 172.

30 See Joint Statement by Federica Mogherini and Cecilia Malmström on the decision of the United States to further activate Title III of the Helms-Burton (Libertad) Act, 17 April 2019, available at www.eeas.europa.eu

31 In the case of Iran (1979) and Libya (1986), the US sanctions contained a blocking order extending to Iranian and Libyan governments’ dollar-denominated deposits held in foreign branches and subsidiaries of US commercial banks.

international transactions. In parallel, banks are prohibited from releasing deposits or operate accounts for the benefit of listed subjects.

Unless they are approved by the IMF, similar restrictions represent a violation of Article VIII, Section 2(a) of the Articles of Agreement of the IMF (IMF Articles) on current account convertibility.[32] Almost all the IMF members have accepted the obligations arising from Article VIII, Sections 2(a) of the IMF Articles.[33] They are therefore prohibited from imposing restrictions on payments and transfers for current international transactions, and may not engage in discriminatory currency arrangements, without IMF approval. Exceptions to this rule are envisaged only in three cases: i) when a member is availing itself of the transitional regime to which it is entitled by Article XIV; ii) when restrictions are introduced for balance of payments reasons; and iii) when restrictions are introduced, with the Fund's approval, to preserve national or international security.[34] The third exception is particularly relevant for the purposes of this research.

Under the original IMF Articles, no importance was given to the circumstances leading to restrictions. Article VIII did not even make explicit reference to balance of payments problems. In 1952, however, as a result of US pressure[35] and despite acknowledging that the Fund was not the suitable forum to discuss political or military measures, the Executive Board decided to introduce a "security exception." In fact, IMF Executive Board Decision No 144(52/51) sets forth a simplified procedure for the tacit approval of exchange restrictions adopted for national or international security reasons. A member is required to notify in advance the Fund of its intention to impose such restrictions. If urgency and secrecy prevent the member from doing so, the Fund should in any case be informed as soon as possible. Once received, the notification is immediately forwarded to the IMF Executive Board. If the Fund believes that the restrictions are not justified by security reasons, it must inform the member concerned within 30 days. If called to a vote, any proposal to challenge the measures is adopted with an ordinary majority of the weighted votes cast. However, in the absence of an explicit objection by the Executive Board, the restrictions are considered retroactively approved. This tacit approval does not expire, nor does it require renewals or reviews.

To the knowledge of the author, the Fund has never objected to restrictions introduced on national security grounds, basically adopting a passive stance towards the issue.[36] Over the years, IMF members have relied on Decision No 144(52/51) both when adopting sanctions in accordance with UN Security Council resolutions and when introducing primary or secondary unilateral sanctions to combat the financing of terrorism or targeting certain governments, entities, and individuals. For

[32] Under the Articles of Agreement of the IMF, countries are free to introduce restrictions on capital transactions.

[33] Only 17 countries have not accepted yet the obligations arising from Article VIII.

[34] A fourth exception, applying when a currency is previously declared *scarce* by the Fund, has never been used.

[35] In 1951, during the Korean conflict, the United States informed the Executive Board of their decision to impose restrictions on payments and transfers to the People's Republic of China and North Korea.

[36] Gianviti, F. (1992), pp. 1-13.

instance, the United States invoked the security exception in 1979, when assets of the Iranian government were blocked in response to the takeover of the US embassy in Tehran.[37] Since then, the United States have requested the application of Decision No 144(52/51) numerous times and their current list of exchange measures is extremely lengthy.[38]

Approved security restrictions are also covered by Article VIII, Section 2(b) of the IMF Articles, which applies to controversies between private parties whose legal relationship is affected by exchange controls imposed by an IMF member. This provision defines whether and to what extent IMF members have to recognise exchange controls introduced in compliance with the IMF Articles by another member.[39] In particular, pursuant to the authoritative interpretation of Article VIII, Section 2(b) adopted by the Executive Board in 1949,[40] judicial or administrative authorities of an IMF member may not disregard another member's exchange controls as a result of conflict-of-laws rules or refuse to enforce them within their domestic legal system on the grounds that they are contrary to the public policy (*ordre public*) of the forum. Therefore, as a consequence of the special status granted to exchange controls regulations by Article VIII, Section 2(b), when the Fund gives its tacit approval to unilateral security restrictions, it significantly boosts their effectiveness and reach. Originally, the purpose of Article VIII, Section 2(b) was to create a cooperative framework among IMF members only in balance of payments matters.[41] The application of such cooperative and non-conflictual framework to national security restrictions is much more controversial as it leads to unreasonable outcomes. In fact, it forces also countries which do not agree with unilateral sanctions to apply them. Furthermore, the courts of an IMF member at the receiving end of such restrictions would be required to acknowledge and enforce them even when they are against the essential interests or fundamental values of their country.

Increasingly widespread unilateral sanctions demonstrate that the IMF Executive Board is unwilling, rather than unable, to discuss whether notified restrictions are indeed necessary to protect essential national security interests. In the author's view, the IMF framework on security restrictions should be critically reviewed and updated. In the first place, the IMF could benefit from distinguishing more thoroughly between multilateral and unilateral sanctions. Already in 1981, a proposal was made to amend the IMF framework on security restrictions to remove the tacit approval procedure and admit only measures in line with UN Security Council resolutions.[42] The matter, however, has never been debated at the Executive Board.

An alternative approach consists in reviewing the 1949 IMF authoritative interpretation of Article VIII, Section 2(b) to exclude unilateral sanctions from the

[37] See Edwards, R. (1981), pp. 870-902. See also Boughton, J. (2001), p. 120.

[38] See IMF (2018), p. 3455. Compare with the list of exchange measures maintained, for instance, by Germany in accordance with EU regulations and UN Security Council resolutions.

[39] Ebke, W. (2012), p. 19.

[40] The IMF Executive Board Decision No 446-4 (1949) provides the Executive Board's authoritative interpretation of Article VIII, Section 2(b).

[41] Pursuant to IMF Article VIII, Section 2(b), in fact, a member requiring temporary exchange restrictions to protect its balance of payments was to be assisted by all other members.

[42] Edwards, R. (1981), pp. 897 ff. See also Lichtenstein, C. (1986), pp. 981-992.

scope of application of the provision. Article XXIX of the IMF Articles sets forth the procedure. Upon request of a member country, a decision on authoritative interpretations is first adopted by the Executive Board, but it may be appealed by referring it to the Board of Governors. In this case, the question will be considered by the Committee on Interpretation of the Board of Governors. Remarkably, each member of the Committee will have one vote and its decisions will be final unless the Board of Governors rules otherwise (with an eighty-five percent majority of total voting power). This procedure represents the only exception to the IMF weighted voting system and, despite not having been applied since the end of the 1950s, it might be reactivated to increase the chances of reaching consensus on the contentious issue of unilateral sanctions.

4 International trade law

The WTO is the only multilateral instrument available for countries whose entities are targeted by extraterritorial sanctions, even if neither the General Agreement on Tariffs and Trade (GATT) or the General Agreement on Trade in Services (GATS) regulate the extraterritorial application of trade restrictive measures as such. Trade sanctions have very rarely been challenged before the WTO and in most cases the applicant was the State directly targeted by sanctions, on the grounds that these would breach the most-favoured nation (GATT Article I(1)) and the national treatment principles (GATT Article III(4)).[43] Conversely, the violation of the non-discrimination principle cannot be readily claimed by countries targeted by secondary sanctions. The latter do not infringe the most-favoured nation principle as all countries other than the one directly targeted are treated alike. As for the national treatment, domestic and imported products are subject to the same sanctions.

So far, the only dispute on extraterritorial sanctions was lodged in 1996 by the European Communities (EC) over the Helms-Burton Act.[44] The EC requested consultations and then the establishment of a panel, claiming that the extraterritorial application of the US embargo on trade with Cuba was inconsistent with the obligations arising from the United States' membership in the WTO. In April 1997, the European Communities and the United States announced they had settled the dispute by signing a Memorandum of Understanding, with the United States committing to a continued suspension of the most controversial parts of the Act.[45] However, as a consequence of the reactivation of the Helms-Burton Act in May 2019, it is likely that a new request for consultations will soon be filed before the WTO by

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43 See, for instance, the Panel Report in the case *United States – Trade Measures Affecting Nicaragua*, 13 October 1986 (L/6053), unadopted. The Panel was established under request of Nicaragua to review the 1985 US embargo prohibiting all trade with Nicaragua. For other sanctions-related disputes raised in the pre-WTO era, see Hahn, M.J. (1991), p. 559; Schloemann, H. and Ohlhoff, S. (1999), pp. 432 ff.; Goodman, R. (2001), p. 104; Mavroidis, P. (2012), pp. 370 ff.

44 *United States – The Cuban Liberty and Democratic Solidarity Act*, Request for the establishment of a Panel by the European Communities, WT/DS38/1, 13 May 1996 (G/L/71). In particular, the European Communities alleged violations of GATT Articles I, III, V, XI and XIII, and GATS Articles I, III, VI, XVI and XVII.

45 See European Union-United States, Memorandum of Understanding Concerning the US Helms-Burton Act and the US Iran and Libya Sanctions Act, 11 April 1997, in ASIL (1997), *International Legal Materials,* Vol. 36, pp. 529-530.

the European Union. Leaving aside the merits of the dispute (that is, whether the measures at stake are inconsistent with GATT or GATS provisions), this section will focus on the line of defence the United States will most likely adopt in the dispute: the GATT security exception. The aim is to assess whether this defence is available to countries adopting unilateral sanctions with extraterritorial reach.[46]

GATT Article XXI – mirrored by GATS Article XIV bis – allows members to derogate from the obligations imposed by other provisions of the GATT to protect essential national security interests or to fulfil the obligations arising from the Charter of the United Nations.[47] Many scholars have long considered this exception capable of jeopardising the multilateral trade system, a loophole that entitles any country to defend its unilateral trade barriers dodging the WTO jurisdictional oversight.[48]

It is worth noting though that, in April 2019, in the case *Russia – Measures Concerning Traffic in Transit*, a Panel applied the GATT security exception for the very first time.[49] The Panel Report was adopted by the Dispute Settlement Body without being appealed. Many commentators have defined this landmark decision a "constitutional moment" for the WTO system, since the Panel was able to create a well-defined legal space to operate in a highly political context as well as to provide a "flexible and politically sensitive framework" to treat the trade vs. security issue.[50] The dispute revolved around the economic sanctions adopted by Russia against Ukraine and, in particular, on the consistency with WTO rules of restrictions introduced on the transit through Russia of Ukrainian goods directed to Asian countries. Although concerning primary sanctions, the case certainly helps to assess whether the security exception can be successfully relied upon to justify extraterritorial sanctions.

Before considering the Panel Report, it is worth reproducing the text of GATT Article XXI(b):

"Nothing in this Agreement shall be construed:

[…]

[46] Multilateral sanctions, authorised by the UN Security Council pursuant to Chapter VII of the UN Charter, fall within the scope of GATT Article XXI(c), according to which nothing in the agreement shall be construed "to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."

[47] On the negotiating history of GATT Article XXI and on instances in which the provision was invoked under the GATT 1947 framework, see: *Multilateral Trade Negotiations – The Uruguay Round*, Negotiating Group on GATT Articles, Note by the Secretariat, Article XXI, MTN.GNG/NG7/W/16, 18 August 1987, available at www.docs.wto.org. See also the Appendix of the Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019. On the GATT security exception see Bhala, R. (1998), pp. 263-317; Alford, R.P. (2011), pp. 697-759; Balan, G.D. (2012), pp. 365-393; Neuwirth, R. and Svetlicinii, A. (2015), pp. 891-914; Akande, D. and Williams, S. (2003), pp. 365-404; Schill, S. and Briese, R. (2009), pp. 61-140; Hestermeyer, H.P. (2011), pp. 569 ff.; Voon, T. (2019), pp. 45-50; Delimatsis, P. and Cottier, T. (2008), pp. 329-48.

[48] For instance, John H. Jackson and Andreas F. Lowenfeld maintained that "These exceptions, however, if given a broad interpretation could undermine the whole WTO treaty and impair the security and stability of the world trading system for which the WTO has been created" (Jackson, J.H and Lowenfeld, A.F. (1997), p. 2). See also, Mavroidis, P.C., (2012), p. 367.

[49] Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019. The Panel was chaired by prof. Georges Abi-Saab.

[50] See Benton Heath, J. (2019); Desierto, D. (2019); Bogdanova, I. (2019b); Vidigal, G. (2019), pp. 203–224.

(b) to prevent any Member from taking any action which *it considers necessary* for the protection of *its essential security interests*

(iii) relating to fissionable materials or the materials from which they are derived;

(iv) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(v) *taken in time* of war or other *emergency in international relations*" [emphasis added].

In *Russia – Measures Concerning Traffic in Transit*, Russia's main argument was that the security exception was self-judging and, therefore, the Panel lacked jurisdiction on the matter.[51] This position was supported in their third-party submission by the United States,[52] which also contended that issues related to a State's essential security are non-justiciable. Ukraine, instead, argued that the security exception is an affirmative defence and that therefore panels have jurisdiction to review its invocation. The Panel rejected the self-judging argument and affirmed its jurisdiction, but it also found that Russian measures fell within the scope of the exception as they met the requirements set forth by GATT Article XXI(b).

First of all, the Panel pointed out that Article XXI(b)(iii) implicitly acknowledges that wars or other emergencies in international relations entail a fundamental change of circumstances, which radically alters the parameters to assess consistency with WTO rules. Therefore, unlike in the case of measures covered by the exceptions set forth by GATT Article XX, there is no need to preliminarily establish whether measures taken during a war or other international crises would breach WTO rules if they had been taken in normal times.

The Panel then turned to GATT Article XXI(b) to consider the self-judging nature of the security exception holding that, while the determination of the terms "essential security interest"[53] and "necessary"[54] falls within the discretion of WTO members, it is the panels that have the power to objectively assess the existence of one of the three situations listed in subparagraphs (i) to (iii) of the provision: the handling of nuclear materials, arm trafficking and war or other emergencies in international relations. As such, the three subparagraphs operate "as limitative qualifying clauses"

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[51] On the difference between the jurisdiction of the panel and the justiciability of the security exception, see Bogdanova, I. (2019a), p. 13.

[52] See Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R/Add.1, 5 April 2019, Annex D-10, Executive Summary of the arguments of the United States, p. 106. The same position is adopted by the United Arab Emirates in the pending case *United Arab Emirates – Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, WT/DS526.

[53] On this point, the Panel first pointed out that *essential security interests* "may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally" (para. 7.130). This notwithstanding, such interests "will depend on the particular situation" and "can be expected to vary with changing circumstances." For these reasons, it is left, in general, to every Member to define what it considers to be its essential security interests (para. 7.131).

[54] Recognising the members' discretion to assess the necessity of the measures means that WTO panels will not evaluate whether there are "reasonably available alternative measures" to achieve the protection of the State's legitimate interests which are less trade-restrictive (para. 7.108).

intended to narrow the margin of discretion granted to member States by the provision (para. 7.65). Consequently, the Panel rejected the argument that the whole security clause is self-judging (paras. 7.102-7.104). More importantly, the panel established three legal tests that can be used to assess whether the security exception may be successfully relied upon to justify the adoption of extraterritorial sanctions.

(a) First, not each and every situation that may lead to extraterritorial sanctions falls within the interpretation of “emergency in international relations” provided by the Panel. The Panel affirmed that “emergency” means “a situation of armed conflict, or of a latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a State” giving rise to “defence of military interests, or maintenance of law and public order interests” (paras. 7.76 and 7.111).[55] On the contrary, political or economic conflicts between States, even when urgent or serious in a political sense, do not classify as emergencies unless they trigger “defence and military interests, or maintenance of law and public order interests” (para. 7.75). This is probably one of the more significant aspects of the decision, as it prevents WTO members from indiscriminately qualifying any conceivable security threat as an emergency.

Moreover, the Panel implicitly considered that for an emergency to exist, it must directly involve the complainant, which is the country primarily targeted by sanctions (para. 7.119).[56] This requirement could per se be sufficient to exclude secondary sanctions from the scope of GATT Article XXI(b). The Panel, however, did not clarify this aspect, possibly not grasping its importance in the context of secondary sanctions.

Taking the Helms-Burton Act as an example, even assuming that at the time of its introduction the situation might have qualified as an emergency (the Act was passed by Congress in February 1996 after two civilian aircrafts were shot down by the Cuban air force in international air space, killing three US citizens and a US resident), it is disputable that such emergency still exists today or that, after more than two decades, it requires urgent action.

(b) Second, a correlation must be proven between the emergency, the measures adopted and their plausibility to protect the State’s security interests. In order to assess the correlation between the emergency and the restrictions, the Panel considered the timing of events and the objective fact that the measures were taken during the emergency (para.

[55] The Panel took into consideration also the fact that the UN General Assembly had recognised the situation between Ukraine and Russia as involving armed conflict (para. 7.122). See UN GA Resolution, “Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)”, A/RES/71/205, 19 December 2016.

[56] On the other hand, the Panel was careful not to require the sanctioning State to be specifically affected by the invoked emergency as this would have contradicted the wording of the provision. On this point, Vidigal, G. (2019), p. 212.

7.70 and 7.124-7.125). The Panel also addressed the causal nexus issue, maintaining that measures cannot be remote or unrelated to an emergency or to the security interests of a State (para. 7.145).

In this regard, it is easy to see how far extraterritorial sanctions are from the alleged emergency. Trading counterparts of a country targeted by primary sanctions – potentially situated anywhere in the world – can in fact only pose a very indirect and remote threat to the sanctioning State.[57]

Moreover, the plausibility of extraterritorial sanctions as measures capable and necessary to protect the essential security interests of the sanctioning State is highly debatable. On this point, the Panel argued that not all security interests fall within the scope of the provision but only those related to "quintessential functions of the State, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally" (para. 7.130).

The author contends that, while a plausible nexus can be established for secondary restrictions concerning arm trafficking or the handling of nuclear materials, it is far more questionable to maintain that the trading of power tools, hardware and utensils may threaten the national security of a faraway country.

Reference should also be made to the 1982 Decision Concerning Article XXI of the General Agreement,[58] which implies that contracting parties should refrain from taking action against members that are not directly involved in a war or other international relations emergency. The preamble of the Decision, in fact, recognises that the "Contracting Parties should take into consideration the interests of third parties which may be affected".

(c) Third, for what concerns the burden of proof, the Panel established that it is on the respondent to provide details about the essential security interests it deems affected by the emergency, producing sufficient evidence of the risks detected and demonstrating that the trade restrictions actually protect the interests at stake (paras. 7.136-7.137). Only in a situation of armed conflict, or of breakdown of law and public order, the requirements to satisfy the burden of proof are minimal (paras. 7.134-7.135). Therefore, it will be far more difficult for a sanctioning State to demonstrate that nationals from third countries are playing an active role in the emergency and that extraterritorial sanctions – with regard to their content, structure and expected operation – are capable of protecting its essential security interests.

[57] Of this opinion also Mitchell, A. (2017), p. 300.

[58] The Decision Concerning Article XXI of the General Agreement was adopted by the GATT Contracting Parties on 30 November 1982 (L/5426). According to the Decision, GATT Contracting Part should be informed to the fullest extent possible of trade measures taken under Article XXI, and all Contracting Parties affected by actions taken under Article XXI retain their full rights under the GATT.

In brief, a sanctioning country should: a) demonstrate the existence of a war or other emergency in international relations; b) explain what fundamental functions of the State the restrictive measures are seeking to protect; c) and illustrate the sufficient and plausible connection of secondary sanctions with the security interests to be protected. It is therefore very unlikely that extraterritorial sanctions can be found to fall within the scope of the security exception and withstand the scrutiny of a panel.

This notwithstanding, the fact that the WTO dispute settlement mechanism, once the crown jewel of the multilateral trade system, has plunged into a deep crisis cannot be underestimated. Over the last years, the United States have regularly criticised the judicial overreach of the WTO Appellate Body and expressed their discontent over the WTO Dispute Settlement Understanding's procedural rules. For this and for other reasons, they have consistently blocked the approval of Appellate Body appointments. Unless the current impasse is quickly overcome, by the end of 2019 the Appellate Body will not have enough members to review appeals. Unfortunately, the Panel Report in Russia – Measures Concerning Traffic in Transit might further estrange the United States from the WTO. Actually, the United Stated were extremely dissatisfied with this ground-breaking decision,[59] as the interpretation of the security exception provided in the Panel Report will certainly influence the outcome of pending disputes, among which those where the United States – standing as respondent – have invoked GATT Article XXI to justify their tariffs on steel and aluminium.[60]

5 International investment law

In 1996, the Helms-Burton Act already showed that extraterritorial sanctions could be used against established foreign investments and hamper the liberalisation of investment flows. The Act was introduced during the negotiations of the Multilateral Agreement on Investment (MAI),[61] which as a consequence suffered a polarisation of positions. While the United States argued that legal acts adopted to pursue essential security interests fall within the scope of the MAI general exceptions,[62] Canada presented a proposal to prohibit secondary boycotts that would affect foreigners investing in sanctioned countries.[63] The debate over the MAI was also

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59 Miles, T. (2019).

60 See, for instance, the dispute raised by China: *United States – Certain Measures on Steel and Aluminium Products* (DS544). Other disputes against the United States have been filed by the European Union, Turkey, Switzerland, Russia, Norway, Mexico, Canada and India, claiming that there is no legitimate or plausible national security rationale for the tariffs.

61 On the MAI see: Kobrin, S.J. (1998), pp. 97-109; Muchlinski, P.T. (2000), pp. 1033-1053; Whiterell, W.H. (1995), pp. 1-14.

62 Devereaux, C., Lawrence, R.Z. and Watkins, M.D. (2006), p. 159.

63 Canadian Statement on the Helms-Burton Act to the Negotiating Group of the MAI, 14 and 15 March 1996, p. 3 as reported by Chapman, A. (1997), p. 22.

influenced by the agreement reached between the European Union and the United States to settle their WTO dispute. In exchange for a continued suspension of Title III of the Helms-Burton Act, the European Union had in fact agreed to support the US proposal to include in the text of the MAI language intended to deter any investment or transaction in property illegally expropriated pursuant to international law.[64] The latest version of the MAI, adopted in April 1998 just a few days before the negotiations were formally abandoned, included a general exceptions provision as well as two country-specific draft text proposals: one prohibiting secondary investment boycotts and the other on conflicting requirements.[65] In the end, lack of consensus on investment-related aspects of extraterritorial sanctions and on the breadth of the national security exception contributed to the failure of the MAI project.

Without a multilateral treaty promoting and protecting investments, foreign entities affected by extraterritorial sanctions will struggle to identify an appropriate legal basis to challenge the measures. This is because investments affected by extraterritorial sanctions are usually made in the country directly targeted by sanctions (e.g. investments made by a Swiss corporation in Iran) and, as such, they are not protected by an international investment agreement (IIA)[66] hypothetically concluded between the sanctioning country and the investor's country (in this example, a US-Switzerland bilateral investment treaty (BIT)). Notably, there are no IIAs between the United States and industrialised countries or emerging economies, the majority of the US IIAs currently in force being with developing countries.

Only in a limited number of cases will investors protected by an IIA concluded between the United States and their home country be able to bring claims before an investor-State arbitral tribunal.

First, this might happen when, as a consequence of secondary sanctions, a foreign party is blacklisted (e.g. in the SDNs List) and, as a consequence, its assets are frozen. If this measure concerns an investment made in the United States (as defined in the relevant IIA), the blacklisted foreign party may claim a violation of the principle of fair and equitable treatment or indirect expropriation as the State, by freezing its assets, is interfering with the use, enjoyment or benefit of its investment. In addition, an assets freeze may also entail a restriction on payments and capital movements, resulting therefore in a violation of the free transfer clause.

In IIAs, a key standard of protection is the free transfer clause, which grants the right to repatriate the investment and all related proceeds without restrictions and the right

[64] European Union-United States: Memorandum of Understanding concerning the US Helms-Burton Act and the Iran & Libya Sanctions Act, 11 April 1997, in ASIL (1997) *International Legal Materials*, Vol. 36, pp. 529-530. For an analysis of the Understanding, see Smis, S. and van der Borght, K. (1999), pp. 227-236.

[65] See Negotiating Group of the MAI, "The Multilateral Agreement on Investment", Draft Consolidated Text, 22 April 1998, DAFFE/MAI(98)7/REV1, p. 76 and Annex 1, pp. 121-126.

[66] The notion of IIAs usually includes bilateral investment treaties (BITs) and broader economic cooperation agreements – like free trade agreements (FTAs), economic partnership agreements (EPAs), preferential trade and investment agreements (PTIAs) and regional integration agreements (RIAs) – aimed at protecting, promoting and liberalising foreign investments.

to make any transfer required to develop and maintain an existing investment.[67] The rights arising from the free transfer provision though are usually subject to certain requirements. In particular, some treaties condition the free transfer of funds to compliance with judicial or administrative orders and judgments and with the laws and regulations of the host State on bankruptcy and insolvency as well as on criminal and penal offences.[68] Consequently, the host country is practically allowed to unilaterally revise the level of protection whenever it deems it appropriate. Whether the terms "criminal or penal offences" include infringements to sanctions regimes remains an unsettled question in international investment law.

For a second scenario, reference can be made to the reactivation of Title III of the Helms-Burton Act. In fact, since May 2019, US nationals holding claims to property confiscated in Cuba may file lawsuits to demand monetary damages from foreign investors "trafficking and profiteering" from such property. Clearly, Title III does not provide a direct remedy against the allegedly unlawful expropriation of US property that occurred in Cuba. Rather it provides US nationals with an alternative remedy, in the form of compensation from those considered by the US government as "aiding and abetting" the Cuban government.[69] As a result, foreign nationals profiting from property confiscated in Cuba might be ordered to pay the damages allegedly suffered by the plaintiffs. A judgment rendered pursuant to Title III is enforceable over the assets of a foreign entity that are situated in the United States. In this case, the foreign investor may claim that the implementation of the decision amounts to an indirect expropriation of its investment or to a breach of its legitimate expectations under the fair and equitable treatment provision. This would be the case of, for instance, a European hotel chain with premises all over the world which is ordered to compensate for the damages arising from its investment in expropriated US property in Cuba and, as a result, has its assets in New York seized in favour of the plaintiff.

Third, extraterritorial sanctions could amount to a breach of an investor's legitimate expectations under the fair and equitable treatment provisions, if the possibility of trading with a country that, at a later stage, is targeted by sanctions was the reason behind an investment made in the United States. Assuming that a Moroccan investor opened a US clothing company to manufacture T-shirts using exclusively Egyptian raw cotton and Egypt is subsequently targeted by US sanctions, the foreign investor may invoke the Morocco-United States BIT, which has been in force since 1991.

Besides, recent US IIAs include a denial of benefits clause[70] by which a country may deny protection to an investor of the other country if two cumulative conditions are met: the enterprise is owned or controlled by nationals of a third country and the country denying protection does not maintain diplomatic relations with that third

[67] On free transfer of funds provisions, see Viterbo, A. (2012), pp. 243 ff.; Bishop, D.R., Crawford, J.R. and Reisman, W.M. (2005), pp. 165-171; Dolzer, R. (2010), pp. 533-544; Newcombe, A. and Paradell, L. (2009), pp. 399-416; Turyn, A. and Facundo Perez, A. (2010), pp. 51-78; UNCTAD (2000), pp. 28 ff.; UNCTAD (2007), pp. 56-63; Waibel, M. (2009), pp. 497-518.

[68] See for instance Article 7 of the US Model BIT 2012.

[69] See Reinisch, A. (1996), p. 557.

[70] A denial of benefits clause is contained also in Article 1113 of the NAFTA and in Article 14.14 of the United States-Mexico-Canada Agreement. On denial of benefits clauses, see in particular, Mistelis, L.A. and Baltag, C. (2018).

country.[71] This provision would therefore allow the United States to deny investment protection to a company of the other country operating on US soil, when this is owned or controlled by nationals of, for example, North Korea. Interestingly, while there is no explicit reference to economic sanctions in the denial of benefits clause of US IIAs,[72] Article 8.16 of the EU-Canada Comprehensive Economic and Trade Agreement (CETA) mentions measures related "to the maintenance of *international* peace and security", hinting at the fact that the provision only covers multilateral sanctions, thus excluding unilateral measures introduced for national security purposes. Case law has not assessed whether the clause also covers extraterritorial sanctions.

In any case, the United States can always argue that freezing measures are being adopted to protect their essential security interests. Notably, all investment treaties entered into by the United States contain security exceptions. For instance, Article 18 of the 2012 US Model BIT expressly safeguards each party's ability to apply "measures that *it considers necessary* for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the *protection of its own essential security interests*" [emphasis added].[73] The wording of the clause – which differs from GATT Article XXI – is deliberately designed to allow a flexible interpretation of "essential security", leaving ample room for manoeuvre to the party proclaiming that a measure is necessary for the protection of its security interests. Moreover, the issue of the self-judging nature of the national security exception contained in US IIAs is still unsettled. It is therefore unclear whether the United States should be discretionally entitled to define the existence of a threat to their essential security interests and consequently decide the course of action to be adopted.[74] The WTO case might influence future arbitral tribunals through a process of cross-fertilisation.

71 In addition, the denial of benefits clause usually allows a State party to deny benefits to an enterprise which has no substantial business activities in the territory of the Contracting Party under whose domestic law it is constituted or organised. The purpose of the *denial of benefits* clause is to exclude protection to investments and investors which, although formally satisfying the definition of the applicable IIA, do not have a real economic connection with the home State.

72 The denial of benefits clause was first included in the 1994 US Model BIT and it is now envisioned by Article 17(1) of the 2012 US Model BIT. See also Article 1113 NAFTA and Article 17 of the Energy Charter Treaty.

73 See also Article 2102 of the NAFTA and, with the same wording adopted by Article 18 of the 2012 US Model BIT, Article 32.2 of the USCMA. During the negotiation of NAFTA Article 2102, the United States made it clear that, if necessary, they would invoke the article to prevent any circumvention of the Cuban sanctions programme.

74 See, Permanent Court of Arbitration, *CC/Devas (Mauritius) Ltd. et al. v. The Republic of India* (Case No. 2013-09), Award on Jurisdiction and Merits, 25 July 2016, para. 213 ff.; ICSID, *Continental Casualty Company v. Argentine Republic*, Award of 6 September 2008, ARB/03/09, paras. 174-178 On the self-judging nature of essential security clauses see Mola, L. (2010), UNCTAD (2009), pp. 94-95; Burke-White, W.W. and von Staden, A. (2008), pp. 307-410. Many authors acknowledge that in this field of international investment law States should be entitled to a wide margin of appreciation.

6 Conclusions

From all of the above, it is possible to conclude that there is no international economic law mechanism that can effectively contrast the adoption of unilateral sanctions that have an extraterritorial application.

The IMF weighted voting system makes it extremely difficult to modify consolidated rules that would allow the introduction of exchange restrictions for national security reasons. In addition, no dispute settlement mechanism is envisaged under international monetary law.

Investments affected by extraterritorial sanctions are usually made in the country directly targeted by sanctions and, as such, they are not protected by bilateral investment agreements. Only in a limited number of cases will investors be able to file a claim before an investor-State arbitral tribunal and, in those cases, the sanctioning State will likely invoke the security exception contained in the applicable IIA.

As for extraterritorial trade sanctions, while the WTO dispute settlement mechanism might in principle provide an effective legal remedy, it appears doomed to become incapable of functioning very soon. As argued cogently by Simma and Pulkowski, this opens up the possibility for affected countries to resort to countermeasures: "If states create new substantive obligations along with special enforcement mechanisms, they merely relinquish their *facultés* under general international law in favour of a special regime's procedures to the extent that and as long as those procedures prove efficacious. When such procedures fail, enforcement through countermeasures under general international law becomes an option".[75]

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[75] Simma, B. and Pulkowki D. (2006), pp. 508-509.

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