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Economic sanctions within the European Union towards non-Member States

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Contents

Abbreviations	p 4
Summary	p 5
Sammanfattning	p 6
1. Introduction	p 8
1.1 Background	p 8
1.2 Purpose	p 8
1.3 Delimitations	p 9
1.4 Method and material	p 10
1.5 Terminology and definition	p 12
1.6 Disposition	p 15
2. Economic sanctions	p 17
2.1 Introduction to economic sanctions	
2.2 Effectiveness of economic sanctions	p 18
3. Public International Law	p 20
3.1 Retorsion and reprisals	p 20
3.1.1 Intervention and the principle of proportionality	p 21
3.2 UN procedures for the imposition of sanctions	p 22
3.3 World Trade Organization	p 24
3.4 Short summary on public international law	p 26
4. EU and trade policy	p 27
4.1 Instruments for trade policy	p 27
4.2 International agreements	p 27
4.3 Trade in the European Union	p 29
5. The EU and economic sanctions	p 31
5.1 Implementation of economic sanctions	p 31
5.2 Legal basis for sanctions applied by the EU	p 33

5.3 Procedure for the adoption of legal instruments implementing restrictive measures	p 35
5.4 EU and the WTO agreements	p 36
5.5 EU and UN sanctions	p 37
5.6 Examples of sanctions in force	p 38
5.7 Short summary on the EU and economic sanctions	p 40
6. The jurisprudence of economic sanctions	p 41
6.1 Economic sanctions in international law	p 41
6.2 The differences and resemblances of sanctions motivated by trade policy and sanctions motivated by security and related issues	p 45
7. Conclusion	p 49
7.1 Result	p 49
Bibliography	p 52
Internet sources	p 55
Legislation, speech etc	p 56
Cases	p 56
Interviews	p 56

Abbreviations

Coreper	Committee of Permanent Representatives
CFSP	Common Foreign and Security Policy
DPA	Department of Political Affairs
EBA	Everything But Arms
ECT	Treaty of the European Community
ECJ	European Court of Justice
EU	European Union
GATS	General Agreement on Trade and Services
GATT	General Agreement on Tariff and Trade
GSP	Generalised System of Preferences
ICJ	International Court of Justice
ILC	International Law Commission
ILO	International Labour Organization
LDC	Least Developed Country
SCAD	Security Councils Affairs Division
SCSOB	Security Councils Subsidiary Organs Branch
SPITS	Special Program of the Implementation of Targeted Sanctions
TDI	Trade Defence Instruments
TEU	Treaty on the European Union
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organisation

Summary

Sanctions can take many forms and is a complex area considering the purpose of the use. When discussing sanctions one of the main difficulties is that it has different definitions and include a variety of terms. Sanctions are often used when pressuring a country to change their behaviour or conduct. Sanctions can also be seen as restrictive measures or embargoes.

The United Nations applies sanctions in order to maintain international peace and security and the EU applies sanctions or restrictive measures in the framework of the Common Foreign and Security Policy (CFSP). Sanctions within the UN are meant to give effect to Security Councils decision in response to identified threats to the peace, breaches of the peace and acts of aggression without involving the use of armed forces. The European Union applies sanctions or restrictive measures to achieve the objectives of the CFSP to safeguard common values, independence and integrity; to strengthen the security of the Union; to preserve peace; to promote international cooperation and to develop and consolidate democracy etc.

The European Community however separates trade defence instruments and other restrictive measures as positive or negative sanctions. Trade Defence Instruments (TDI) for example is anti- dumping, anti- subsidy or safeguards instruments. The instruments may be used by states in harmony with a WTO agreement, to confront the import of goods where they are seen to be unfair foreign competition.

This essay is supposed to give a definition on sanctions in accordance with EC law and international law. The conclusion is that sanctions are a tool to force another country or to punish another country for their behaviour whilst measures under Article 133 EC Treaty are tools to protect the market. However the term sanctions are used when imposing both types of measures.

Keywords; EC law, sanctions, restrictive measures, embargoes and security policy

Sammanfattning

Sanktioner är ett mycket komplext område, då ordet i sig innebär ett antal användningsområden beroende på syftet med dem. När man talar om sanktioner och söker material uppstår ganska snart ett problem då ordet har flera definitioner eller innebörder och inkluderar mer än bara själva termen. Sanktioner används ofta som ett medel när ett land vill pressa ett annat land att ändra deras beteende eller uppförande. Restriktiva åtgärder eller embargo är andra termer som används istället för sanktioner.

FN använder sanktioner som ett medel för att upprätthålla den internationella freden och säkerheten medan EU använder sanktioner eller restriktiva åtgärder som ett medel för den Gemensamma Utrikes- och Säkerhetspolitiken (GUSP). Sanktioner inom FN är tänkt att vidmakthålla Säkerhetsrådets beslut om identifierade hot mot fred, överträdelser mot freden och aggressionsbrott, utan att för den skull blanda in väpnade styrkor. EU inför sanktioner inom GUSP för att säkerställa gemensamma förhållningssätt, oberoende och integritet, för att stärka säkerheten inom unionen, för att bevara freden, för att utveckla internationellt samarbete och för att utveckla och sammanföra demokrati.

Sanktioner kan innebära såväl handelsinstrument som medel för säkerhetspolitik. EU separerar termerna såsom skydd för handeln och de som skyddar säkerheten. De som skyddar handeln är till exempel anti-dumping, subventioner och garantier (safeguards). Dessa kan användas i harmoni med Världshandelsorganisationens överenskommelser, för att ta itu med till exempel import som anses stödja orättvis handel.

Denna uppsats har som syfte att ge en definition åt termen sanktioner i enlighet med eg-rätt och internationell rätt. Slutsatsen är att sanktioner är ett medel för att tvinga ett annat land att anta mer demokratiska principer eller liknande på grund av säkerhetsskäl eller liknande, medan åtgärder tagna under artikel 133 i EG-fördraget är tänkt att skydda den egna marknaden mot otillbörlig konkurrens och andra

orättvisa medel. Oavsett hur man använder termen sanktioner och på vilka grunder man fastställer dem, så används dock samma term nämligen sanktioner.

Nyckelord; EG- rätt, sanktioner, restriktiva åtgärder, embargon och säkerhetspolitik

1. Introduction

1.1 Background

In principle, states are free to shape their internal and external economic policy with no interference from the outside. The principle of non- intervention and sovereignty nourish this freedom. Despite their transnational character, the most economic relations are in the hands of private entities that tend to be characterized by domestic jurisdiction. However, other states internationally unlawful acts leave a response when exercising their freedom to outline their economic policy in such a way as to affect those states negatively. ¹

Sanctions are put to work in new situations where international peace and security are vital but there are other regimes as well. The World Trade Organization (WTO) has a mechanism of sanctions when upholding fair international practices. The UN and the EU also has a system of sanctions.²

The usage of economical sanctions are increasing and becoming a useful tool to create pressure instead of violence or disturbances.³ Due to the link between economic sanctions and economic enforcement, measures have emerged more clearly. The definition of economic sanctions has however not emerged in the same way.

1.2 Purpose

The main purpose of this essay is to investigate economic sanctions within the EU towards non- Member States and to define the jurisprudence of the term. In order to

¹ Economic sanctions in International law. Hauge Academy of International Law Centre for studies and research in International Law and International relations. Martinus Nijhoff Publishers. 2000. pages 129-131

² Wallensteen, Peter and Staibano, Carina (ed.). International Sanctions. Between words and wars in the global system. 2005. Cass. Page xv

³ Reisman, Michael W. and Douglas L. Stevick, The applicability of International Law Standards to United Nations Economic Sanctions Programmes. *European Journal of International Law*, The European University Institute, Florence, No 9, 1998, p. 95

understand the term sanctions, it is important to recognize sanctions in an international perspective. It is not until you are able to define the meaning of economic sanctions, that you can describe the use and justification.

The questions that need to be answered are; what are economic sanctions and what legal competence are they applied by in the European Union? What is the relation between sanctions motivated by trade and those motivated by security and foreign policy?

1.3 Delimitations

Sanctions are a wide concept and contain various interconnected issues. Economic sanctions within the EU have in different aspects to do with international concerns that make the area more complex. In order to explain the European Union system on sanctions, international law and especially the United Nations has to be explained thoroughly. Sanctions can take many forms so this essay will focus on economic sanctions or restrictive measures, rather than diplomatic sanctions. Economic sanctions are for example restrictive measures relating to trade policy and concerns among others termination on international agreements.

This essay will try to provide an in- depth analysis of what economic sanctions really means and how they are applied. This essay will not go beyond the definition; however some issues needs to be addressed in order to understand the system in which they are used.

Sanctions can be declared by either one state or a group of states. In this essay, I will focus on sanctions that are acknowledged by a group of states (EU, UN and WTO) and not bilateral agreements. National law is excluded from this essay due to the fact that this essay is supposed to concentrate on EC legislation.

Even though it might not be necessary for the purpose of this essay, some areas are vital to describe in order to understand the complexity about sanctions. The system of

the European Union and the applicable law for sanctions are examples that are essential to illustrate. The World Trade Organisation, WTO, is also unavoidable to mention even though it is difficult to limit the essay when discussing it. To facilitate the intricacy on sanctions and to understand the system, in which they are used, sanctions that are motivated by all reasons needs to be explained.

Financial sanctions are a crucial tool to meet the objectives of the Common Foreign and Security Policy, particularly to help prevent the financing of terrorism. The EU assigns responsibility to credit and financial institutions concerning the financial transfers and transactions. However, financial sanctions are not described in this essay only mentioned. Targeted sanctions on individuals are not dealt with; however it is vital to explain because of the increasing use. Countermeasures are excluded from this essay because there are discussions whether or not they are sanctions. To investigate countermeasures would be another essay because of the different approach and the materials. Due to the size of this essay and the time limits, most areas are only dealt with in general, not in detail.

In chapter 2, I mention effectiveness of sanctions. When justifying sanctions is it necessary to know and to evaluate the effectiveness of them. However, effectiveness is not the purpose of this essay, why it is only mentioned.

Suspension or termination of bilateral agreements and suspension or termination of cooperation with third countries neither are nor explained in the essay because the list on sanctions or restrictive measures (Sanctions or restrictive measures in force, measures adopted in the framework of the CFSP)⁴ does not include them.

1.4 Method and material

The method for this essay is traditional legal method. The first part of the essay is descriptive and the second is more analytical. The studies contain legal sources as treaties, cases and doctrine. The doctrinal texts consist of both articles and books.

⁴ <http://europa.eu.int/eur-lex/lex/JOIndex.do?ihmlang=en>, 2006-05-15, 10:12

There has not been that much study on this subject so far, which results in some reliability according to the Internet.

The websites I have used are well known and established. The EU commission's and the Council's website has provided useful information as well as the Swedish website smartsanctions.se.⁵

Due to the fact that the essay is based on legal texts, it is rather technical in orientation on EC Law and in some occasion's also international law.

Some of the information in this essay is based on oral discussions with professors at universities located in Sweden. Professor Peter Wallensteen at Uppsala University has provided very constructive information and opinions, and also Professor Per Cramér at the Gothenburg University. Peter Wallensteen has helped with the disposition and purpose of the essay and information on the UN and sanctions. Per Cramér has helped with the understanding of the relations between The UN, EU and WTO.

The origin of this essay is the Treaties of the EU and the UN Charter, and the relevant articles thereof.

The essay consists of judicial, economical and political aspects, but since it is an essay in business law, the focus remains on the judicial aspects. The other aspects will be mentioned but not examined thoroughly.

Cases concerning this issue aren't that common due to the fact that sanctions reply to states outside the Union and because of the pillar structure. There are however a number of regulations on sanctions.

Some of the authors are critical to sanctions or has an opinion regarding the issue. When mentioned, I have tried to give the reader some knowledge of the background

⁵ Smartsanctions is a website of the Special Program of the Implementation of Targeted Sanctions (SPITS) and it is a part of The Stockholm Process on the Implementation of Targeted Sanctions, a project between the Swedish Ministry of Foreign Affairs and Uppsala University. The website presents recent news about UN sanctions and current research in SPITS. www.smartsanctions.se

by stating in a footnote where the author is established. This essay is meant to provide an objective view of sanctions.

Most authors has commented international sanctions, not exactly sanctions within the EU. According to this, I have to rely on the legislation in the EC law and discuss the views of economic sanctions in an international perspective.

1.5 Terminology and definitions

Sanctions can take many forms: e.g. foreign assistance reductions, arms embargoes, export and import limitations, tariff increases, visa denials, cancellation of air links, freezing of assets, and financing, credit and investment prohibitions.⁶ Sanctions can also be divided into two major groups, those that are motivated according to foreign and security policy and those that are motivated with trade policy. Commercial related sanctions are mainly tariffs, restrictive measures on trade and other measures to protect the trade. Security related sanctions are often motivated on decisions from the UN. Sanctions related to trade policy can also be motivated according to foreign and security reasons, depending on the purpose.

The two different groups separate trade sanctions from other kinds of sanctions and this essay will try to examine those definitions in order to make a thorough investigation of economical sanctions. However, the European Union only uses the term sanctions when connected to security or related principles. Other authorities as the Swedish National Board of Trade doesn't use the term sanctions when relating to tariffs or likewise.⁷ This different use of terminology creates a problem when trying to define the word sanctions. Other problems with definitions has occurred during the work on this essay and it seems like there is a lack of consensus in international law on sanctions and likewise.

⁶ Ströberg Karin. *Prospects for success in International Interventions- the Examples of Economic Sanctions and Peace Enforcement* (2000), p. 27

⁷ Ulf Eriksson, National Board of Trade. Correspondence on e-mail March 31, 2006.

Economic sanctions can be positive as well as negative. The term economic sanctions are normally seen as negative measures because of the preventions to act. Negative sanctions are those against Iraq, former Yugoslavia amongst others. Positive sanctions have been accomplished towards, for example, South Africa and the occupied areas in the West bank and Gaza.⁸ Negative sanctions are a kind of punishment and positive a category of reward that regulates conduct in conformity with social norms.⁹

When discussing economic sanctions, the word trade embargo is frequently used. Trade embargo is usually defined as a prohibition on trade with another state or group of states and can be declared either by one country or by a group of countries. The restriction can be on imports and/or exports, and it can be an entire ban on trade or be limited to particular products. The purpose can be to isolate it, pressure its government and cause it to reverse a specific policy. In the case of health-related embargos, the objective may only be to prevent the transmission of disease across national boundaries. In other cases, embargos are implemented against countries whose conduct has been condemned by the international community.¹⁰ EU insiders prefer to use the word restrictive measures rather than sanctions.¹¹

A great variety of restrictive measures that are being used within the EU, are conceivable in reaction to violations of international law or of human rights, and policies that do not respect democratic principles or the rule of law. They include:¹²

- Diplomatic sanctions (expulsion of diplomats, severing of diplomatic ties, suspension of official visits),
- Suspension of cooperation with a third country,
- Boycotts of sport or cultural events,

⁸ Kuyper Pieter J., Trade sanctions, Security and Human Rights and Commercial Policy. In Marc Maresceau (red.), *The European Coomunity's Commercial Policy after 1992: the Legal Dimension*, Martinus Nijhoff Publishers, Dordrecht, (1993), p. 389-390.

⁹ <http://www.britannica.com/eb/article-9065431>, 2006-05-18, 10:18

¹⁰ http://canadianeconomy.gc.ca/english/economy/trade_embargo.html

¹¹ Hazelzet, Hadewych and de Vries, Anthony W. The EU as a new actor on the sanctions scene. In Wallenstein, Peter and Staibano, Carina (ed.). *International Sanctions. Between words and wars in the global system*. 2005. Cass. Page 95

¹² http://europa.eu.int/comm/external_relations/cfsp/sanctions/index.htm, date 2006-03-15 time 15:24

- Trade sanctions (general or specific trade sanctions, arms embargoes)
- Financial sanctions (freezing of funds or economic resources, prohibition on financial transactions, restrictions on export credits or investment),
- Flight bans,
- Restrictions on admission.

Different restrictions and sanctions are however often combined.

There are several words that are used when discussing sanctions as an alternative for the term. Coercions, restrictive measures, countermeasures, embargoes etc. In this essay they are sometimes used, but refer to the same subject namely sanctions. The different words are meant to give a certain effect to the significance of sanctions. Comprehensive sanctions are general sanctions and most authors seem to agree that targeted sanctions are the most efficient.¹³ Targeted sanctions are more precise and are becoming more frequently used. The sender is the party that is trying to influence the other party or state, which is called the target.¹⁴

A common position is one kind of decision-making under the Common Foreign and Security Policy (CFSP). Common position is adopted under Article 15 of the Treaty on European Union (TEU) and they define the approach of the Union to a particular matter of geographical or thematic matter. The Member States shall ensure that their national policies are in conformity to the common positions. A common position means that the Member States agrees of the problem concerned that falls within the CFSP. A joint action goes further by detailing the actions that should be taken. Joint action is adopted under Article 14 TEU and stipulates the objectives and the means to be made available to the Union etc.

¹³ <http://www.colorado.edu/Economics/CEA/papers00/wp00-17.pdf>, 2006-05-18, 10:30

¹⁴ Miljkovic, Dragan. *Economic sanctions as the propositional satisfiability problem*. Policy sciences 35:1-15, 2002. Hufbauer, Schott and Elliott. *Economic Sanctions Reconsidered: History and Current Policy*. Washington DC: Institute for International Economics.

1.6 Disposition

The first part is as stated earlier a describing part, which changes into an analytical part. To understand sanctions and the legal system, the main part focuses on explanations. The first part also answers the first question on how economic sanctions are justified in terms of legal competence. The more analytical part will try to explain the definitions of the term and the difference between sanctions motivated by trade policy and sanctions motivated by security and related issues.

In chapter 2, economic sanctions are defined and described. It is an introducing chapter on the area of sanctions in order to explain the main parts of the term. Sanctions include a variety of aspects, why it is important to explain some areas. The chapter consists of some issues like effectiveness in order to explain the depth in sanctions. The effects of sanctions and the diplomatic relations may be a political as well as an economic problem that needs to be verified.

Chapter 3 focuses on public international law. Retorsion and reprisals are described in order to get the reader to understand the terms under which sanctions are justified. The chapter also describes the system of sanctions according to United Nations and the World Trade Organization. There are two chapters on WTO (3.3 and 5.3), and the first explains the relation between the UN and WTO. When this is explained it is easier for the reader to understand the complexity of sanctions and perhaps also the legislation. The chapter ends with a short summary.

In chapter 4, EU and trade policy are described. The chapter explains how trade is maintained and accomplished within the EU in order to give the reader an overview of the system. Trade related issues are vital to look into for the rest of the essay to make sense.

Next chapter, 5, explains the EU and economic sanctions. The legal basis for the EU and sanctions is described in legislation according to the EC and international law. The chapter contains of an account of what sanctions are within the EU and where they are being used. There are also a number of sanctions in force that are mentioned in order to get the viewer examples of sanctions. The chapter ends with a short summary on sanctions within the EU.

Chapter 6 tries to establish a definition on economic sanctions and is a part of the more analytical component. The jurisprudence and the justification according to

international law are described. The differences and the resemblances of sanctions within the European Union motivated by trade policy and sanctions motivated by security and related reasons are also described.

Chapter 7 illustrates the results of the essay and with the authors' own words giving a conclusion on the issue.

2. Economic sanctions

Economical sanctions can be incorporated by international organisations, a group of states or by a single state. Sanctions or restrictive measures decided within the UN Security Council are somewhat different than others. That is mainly due to the circumstances where all members has signed the UN Statute and given their approval for becoming a target state for sanctions when breaching the Statute. Sanctions are often used in foreign or security political conflicts concerning human rights or democracy principles.¹⁵

2.1 Introduction to economic sanctions

As mentioned above, sanctions can be defined as a coercive foreign policy or trade policy. Foreign policy sanctions are used to achieve certain political objectives when disrupting its normal relations with another actor or target. Sanctions can either coerce directly, by negotiations or persuasions, or indirectly, by pressuring the government to concede.¹⁶

In the framework of the CFSP, the EU Common Foreign and Security Policy, sanctions have become a frequently used policy instrument. They are either used in form of sovereign EU sanctions or as sanctions implementing certain Resolutions of the Security Council of the United Nations. Sanctions are in general used to react to violations of international law, policies that doesn't respect the rule of law or democratic principles or violations of human rights. Restrictive measures or sanctions according to the CFSP as set out in the Treaty of the European Union are applied to bring a change in such activities or policies. The Treaty does not however give a definition on sanctions.¹⁷ Sanctions can also be authorised with respect to financial obligations of the participants in the International Monetary Fund (IMF) when

¹⁵ Kuyper Pieter J., Trade sanctions, Security and Human Rights and Commercial Policy. In Marc Maresceau (red.), *The European Coomunity's Commercial Policy after 1992: the Legal Dimension*, Martinus Nijhoff Publishers, Dordrecht, (1993) p. 389

¹⁶ Robert A. Pape, Jr. *Why Economic sanctions Do Not Work in International security*, vol. 22, No. 2, fall 1997, pages 93-94

¹⁷ http://europa.eu.int/comm/external_relations/cfsp/sanctions/index.htm, date 2006-03-15 time 15:24

changing the par value of its currency without respecting the rules of the Bretton Woods Agreement (Article IV (6)).¹⁸ When sanctioning because of trade protection the WTO agreements needs to be respected (see chapter 3.3)

In article 301 of the Treaty establishing the European Community it is stated that interruption or reduction of economic relations with one or more third countries calls for actions by the Community. The UN Charter refers in chapter VII to “measures not involving the use of force that can be employed to give effect to Security Council decisions in response to identified threats to the peace, breaches of the peace and acts of aggression”.¹⁹ Article 41 of the UN Charter states that such measures may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Sanctions or restrictive measures are applied within the European Union in recreation of the specific objectives of the CFSP as laid down in Article 11 of the Treaty on European Union (see chapter 5).

2.2 Effectiveness of economic sanctions

The usage of economical sanctions are increasing and becoming a useful tool to create pressure instead of violence or disturbances.²⁰

There is a debate going on about the effectiveness of economic sanctions. Some authors in the subject are negative and some are positive towards the effects of sanctions. Robert Pape²¹ is of a negative opinion and considers sanctions as a not

¹⁸ *Encyclopedia of Public International Law*, Vol IV. Quirin, ex parte to zones of peace. Page 313

¹⁹ http://europa.eu.int/comm/external_relations/cfsp/sanctions/index.htm, date 2006-03-15 time 15:24.

²⁰ Reisman, Michael W. and Douglas L. Stevick, The applicability of International Law Standards to United Nations Economic Sanctions Programmes. *European Journal of International Law*, The European University Institute, Florence, No 9, 1998, p. 95

²¹ Professor of Political Science at the University of Chicago

suitable instrument to achieve ambitious foreign policy goals.²² Pape's opinion is highly criticized.

For Pape, "economic sanctions should be credited with success if they meet three criteria:

- 1) the target state conceded to a significant part of the coercer's demands;
- 2) economic sanctions were threatened or actually applied before the target changed its behaviour; and
- 3) no more credible explanation exists for the target's change of behaviour."²³

Patrick C. Bratton²⁴ criticizes Pape and states that he confuses effectiveness with utility and that "he holds punishment strategies to a higher standard of success than denial strategies".²⁵

To determine whether a sanction has been effective, one has to define the meaning of effectiveness. Effect is relative to the objectives, which the measure was imposed for. When defining the meaning of the effect, it is vital to understand the definition on sanctions.

²² Robert A. Pape, Jr. *Why Economic sanctions Do Not Work in International security*, vol. 22, No. 2, fall 1997, p. 109

²³ Robert A. Pape, Jr. *Why Economic sanctions Do Not Work in International security*, vol. 22, No. 2, fall 1997, p. 97

²⁴ At the Catholic University of America, Washington, D.C.

²⁵ Bratton Patrick, A Coherent Theory of Coercion? The writings of Robert Pape. <http://80-elin.lub.lu.se.ludwig.lub.lu.se/elin?func=record&resid=31edfb7c6346f8429ed6056ee8dad0c7&lang=se&query=all%3A%22Robert%20Pape%22&start=2&sessionId=45D0141FA970FD7AE9CE694ECF8D186F&orgFunc=basicSearch&ftxtOnly=&sdi=> *Comparative Strategy* (2003) Vol. 22 No 4. Pages 355-372, MetaPress

3. Public International Law

The foundation for international sanctions is different from national because in an international perspective sovereign states act against each other instead of state acting on its own citizens. Public International law regulates obligations when states are acting against one another and if they are not respected a violation of international law has occurred.²⁶

3.1 Retorsion and reprisals

There are three grounds of justification in international law when applying sanctions; retorsion, reprisals and self-defence.²⁷ Retorsion is a way of showing dissatisfaction without crossing the boundaries of legitimacy. Retorsion is the adoption by one state of an act that doesn't involve the suspension of international obligations owed by the injured state to the responsible state. Retorsion can also be used to enclose the instance of a lawful act committed in retaliation to a preceding unlawful activity.²⁸

Reprisals are different from retorsion because they are illegal and have been adopted by one state in retaliations for the task of a previous illegal act by another state. When involving armed force reprisals may be lawful if remediate in conformity with the right of self-defence.

The right of self-defence has currently been discussed because of the attack 11 September 2001. However, that discussion cannot be accessible here why the normal standards of self-defence is presented. Self-defence can only be resorted if an armed attack occurs in accordance with Article 51 of the UN Charter:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to

²⁶ Doxey, Margaret. *International sanctions in Contemporary Perspective*, 2nd ed. MacMillan Press Ltd., London. 1996. pages 7-8

²⁷ As to the use of force by the UN, UN Charter

²⁸ Shaw, Malcolm. *International law*. 5th ed. Cambridge University Press. Pages 1022-1023

maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

In the case *Nicaragua*, the International Court of Justice established that the right of self-defence exists as under customary law as well as under the UN Charter:

Article 51 of the Charter is only meaningful on the basis that there is “natural” or “inherent” right of self-defence and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter...It cannot, therefore, be held that article 51 is a provision which “subsumes and supervenes” customary international law.²⁹

3.1.1 Intervention and the principle of proportionality

Malcolm Shaw³⁰ writes in his book *International Law* that “the principle of non-intervention is part of customary international law and founded upon the concept of respect for the territorial sovereignty of states”.³¹ Article 2(7) in the UN Charter states that not even the UN has the right to intervene in other states internal affairs with the exception of Chapter VII.

Proportionality is a criterion when retaliating and can be used in different aspects when sanctioning. For example, there has to be a sense of proportion between the offence and reprisal, use of force has to be proportionate under the law of self-defence and the response to a breach of one treaty can be action taken regarded another treaty, provided that the requirements of necessity and proportionality is respected.³²

²⁹ ICJ Reports, 1986, pp.14, 94;76 ILR, pp.349, 428

³⁰ Malcolm Shaw is the Sir Robert Jennings Professor of International Law at the University of Leicester and also a practising barrister.

³¹ Shaw, Malcolm. *International law*. 5th ed. Cambridge University Press. Page 1039. See also the Corfu Channel case, ICJ Reports, 1949, pp.4,35;16 AD,pp.155,167 and the Nicaragua case ICJ Reports, 1986, pp.14, 106;76 ILR, pp.349, 440

³² Shaw, Malcolm. *International law*. 5th ed. Cambridge University Press. Pages 709, 1023 and 1031

3.2 UN procedures for the imposition of sanctions

Decisions on enforcement actions in the UN can be made in either the Security Council or the General Assembly. Non-military and military actions can be entitled in order to restore the peace, according to Chapter VII of the UN Charter. Resolutions from the Security Council can either be binding or a recommendation, but resolutions from the General Assembly can only be a recommendation. Before decisions can be made, the Security Council has to decide whether the perceived emergency fulfils the criteria of Article 39 of the UN Charter. The Security Council needs to “determine the existence of any threat to the peace, breach of the peace or act of aggression”.³³ Article 2 (7) in the UN Charter states that the UN is not authorised to intervene in such matters which are essentially within the domestic jurisdiction of any state, so the adoption of Chapter VII enforcement actions constitute an exception to the principle.³⁴

Article 39 of the UN Charter:

The Security Council shall determine the existence of any threat to the peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.³⁵

If the Security Council comes to the conclusion that the situation threatens the peace or other criteria in Article 39 of the UN Charter, it can take non-military actions, such as economic sanctions according to Article 41 of the UN Charter in order to restore international peace. A decision made under this article is binding.

Article 41 of the UN Charter states:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the

³³ Article 39, UN Charter, Charter of the United Nations. San Francisco, 26 June 1945. UNTS. <http://untreaty.un.org>

³⁴ Shaw, N. Malcolm. *International Law*. Fifth ed. Cambridge. 2003. page 1120

³⁵ UN Charter, Charter of the United Nations. San Francisco, 26 June 1945. UNTS. <http://untreaty.un.org>

Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.³⁶

Sanctions imposed by the Security Council under Article 41 of the UN Charter are generally economic sanctions because they often contain full or partial trade, commercial, financial and arms embargo.³⁷

UN sanctions are applied in a specific organization consisting of the Security Council and a Secretariat. The latter has three divisions including Department of Political Affairs (DPA), Security Council Affairs Division (SCAD) and the Security Council Subsidiary Organs Branch (SCSOB). The purpose of the DPA is to supply advice and support on all political matters to the Secretary- General. This is required in order to exercise global responsibilities under the Charter in relation to maintenance and restoration of peace and security. SCAD supports and services the work of the Security Council and consists of four units; the Security Council Practices and Charter Research Branch, the Security Council Secretariat Branch, the Military Staff Committee secretariat and the Security Council Subsidiary Organs Branch (SCSOB). The latter works directly with the sanctions regimes.³⁸

United Nations Security Council Resolutions imposing sanctions in the years 1990-2004 were mainly due to arms embargoes and targeted financial sanctions.³⁹ The only restrictions on trade were limited restrictions on strategic commodities; lucrative diamond exports, oil embargo and restrictions on timber exports.⁴⁰

Within the new reform of UN, sanctions will get a different approach. Four methods will be distinguished; responsibility to protect, peace- keeping, sanctions and specific

³⁶ UN Charter, Charter of the United Nations. San Francisco, 26 June 1945. UNTS. <http://untreaty.un.org>

³⁷ Evans, Malcolm D. *International law*. First edition. Oxford. 2003. Page 523

³⁸ www.smartsanctions.se, 2006-05-05, 20:02

³⁹ Biersteker, Thomas J and several. Consensus from the bottom up? Assessing the influence of the sanctions reform process. Page 20

⁴⁰ Elliott Ann Kimberly, *Trends in economic sanctions policy, challenges to conventional wisdom*. Page 10

mediators. Targeted sanctions will be more common, who doesn't affect the civilians in the same ways as peace-keeping operations by military means.⁴¹

3.3 World Trade Organization

The idea of that an international organization has a fulfilment mechanism that includes the possibility to use economic sanctions against a country judged to be in violation of international rules originated in the International Labour Organization (ILO).⁴² However, they chose not to use them. The possibility of a multilateral agreed trade sanction now exists in the World Trade Organization.⁴³

The WTO judicial system is based on those member governments have agreed on compulsory jurisdiction. The WTO Understanding on Rules and Procedures Governing the Settlements of Disputes (DSU) states that all member government can complain against any other and secure an independent panel to deem the complaint and provide a judgement. When a final decision is determined it is automatically adopted by the Dispute Settlement Body (DSB). "A reasonable period of time" is given to the government found to be in default to come into compliance. The complaining governments can ask for authority to "suspend concessions or other obligations". These suspensions are debated to be sanctions but in other words.⁴⁴

When applying economic sanctions the consequence can entail breaches of an agreement. When they do, a violation of international law has occurred. If the sanctions has the UN Security Councils approval, problems most often doesn't arise.⁴⁵

General Agreement on Tariff and Trade (GATT) has a huge impact on economic relations because of the number of Member States. In the agreement an exemption has been made applicable on economic sanctions. The rules in the article can be

⁴¹ Wallensteen, Peter at a meeting at the University of Lund with doctorate students of political science. 2006-04-04

⁴² Treaty of Versailles, 28 June 1919, art. 414, <http://lib.byu.edu/~rdh/wwi/versailles.html>

⁴³ Charnovitz, Steve. The World Trade Organization. Sanctions for non-compliance. In Wallensteen and Staibano(ed.) . *International sanctions. Between Words and Wars in the Global system*. 2005. Frank Cass. Page 159

⁴⁴ Ibid. page 159

⁴⁵ Kuyper, Pieter J., International Legal aspects of Economic sanctions. In Petar Sarcevic and Hans van Houtte (red.) *Legal Issues in International Trade*. Martinus Nijhoff Publishers, Dordrecht, 1990, page 148

used when the UN Security Council establishes sanctions, but a member state may as well use article 103 in the UN Charter with the intention of letting obligations under the UN Charter go before other international agreements. Article 103 states that:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.⁴⁶

When the European Union applies sanctions towards another state, a breach of an agreement with the GATT/WTO can occur. Article XXI in the GATT agreement state that:

Article XXI: Security Exceptions

Nothing in this Agreement shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

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

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

(ii) 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;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.⁴⁷

⁴⁶ UN Charter, Charter of the United Nations. San Francisco, 26 June 1945. UNTS. <http://untreaty.un.org>

⁴⁷ http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_08_e.htm#article21A, 2006-05-16, 15:31

No jurisprudence or decisions has been made so far of a component WTO body (such as Dispute Settlement Body).⁴⁸

More information on the European Union and the WTO agreements are described in chapter 5.3.

3.4 Short summary on public international law

The UN Charter provides for three grounds of justification in international law when applying sanctions; retorsion, reprisals and self-defence. Before determining on sanctions the existence of threats to the peace and breach of peace needs to be established. Consequently sanctions according to the Security Council are motivated by security reasons. However, most sanctions imposed by the Security Council under Article 41 are generally economic sanctions.

Restrictive measures can be made an exemption according to the GATT Article XXI when it concerns the protection of essential security interests, war or arms.

There is no definition on sanctions (in consensus) that applies to both sanctions motivated by trade policy and those that are motivated on security aspects. The European Union is a member of both WTO and the UN and for that reason needs to respect both agreements. A general principle of international law however, is that measures must be proportionate in view of their objective.⁴⁹

To understand the system of sanctions in EC law it is vital to recognize European trade policy.

⁴⁸ http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_08_e.htm#article21A, 2006-05-16, 15:31

⁴⁹ http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_07_e.htm#article20 and http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_06_e.htm#article14, 2006-05-16, 16:05

4. EU and trade policy

Member states within the EU have a common trade policy towards states outside of the EU. According to articles 131- 134 of the Treaty establishing the European Union, Member States enter agreements on common grounds with other states and regulate import and export to and from the EU. Among these instruments, there are common taxes, product safety and subventions. The Treaty, though, doesn't give a definition of trade policy. Important nevertheless, is that the EU and its Member States are all members of the World Trade Organisation, WTO, and consequently needs to follow their regulations in several international trade agreements.⁵⁰

4.1 Instruments for trade policy

The main rule within the EU for export to other countries is that it doesn't comprehend obstacles for trade. However there are occasions when a member state can use restrictions when necessary and the Commission then needs to be informed. One example on limitations of export is the dual-used technology concerning arms embargo. Restrictive measures on import cannot be implemented on developing countries that are members of the World Trade Organisation and export only a small quantity of the merchandise.⁵¹

4.2 International agreements

Within the trade policy the European Union has exclusive authority. Member States cannot sign their own agreements with third countries on some areas of trade. The

⁵⁰ http://www.eu-upplysningen.se/templates/EUU/standardRightMenuTemplate____2541.aspx, 2006-03-31, 18:21

⁵¹ Ibid.

Council comes to an agreement but the Commission negotiates with third countries. The common commercial policy includes trade but the agreements can also concern cooperation- and association agreements.

European Court of Justice has stated the limits for the European Unions authority in opinion of the Court of 15 November 1994. The question is about the competence of the Community to conclude international agreements concerning services and the protection of intellectual property (Article 228 (6) of the EC Treaty). The case started as a dispute between the Commission and the Member States about EU: s authority. The difference of opinion was that both parts agreed that the General Agreement on Tariffs and Trade was included in the exclusive authority, but couldn't agree on other areas within the Uruguay- round. According to the statement of the Court, the authority within service trade includes transboundary services that supplies directly across nation borders.⁵²

The European Union and the Member States share the authority on the areas that falls outside Article 133. On these areas, the Member States as well as the EU can establish mixed agreements and they are signed by the Council and ratified by the Member States Parliament. The European treaties give the European Union the opportunity to sign three different kinds of agreements with other countries or organisations. The different agreements are trade-, cooperation- and association agreement, but they are often combined.⁵³

Trade agreements focus mainly on the free trade between the European Union and third countries. On the Commissions proposal trade agreements are closed by the Council according to Article 133 of the Treaty establishing European Union, with qualified majority. Examples of agreements are the EU Generalised system of Preferences and bilateral free trade agreements with Chile, South Africa and Mexico.⁵⁴

⁵²

http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=61994V0001&model=guichett&lg=en

⁵³ http://www.eu-upplysningen.se/templates/EUU/standardRightMenuTemplate____2545.aspx, 2006-03-31, 19:31

⁵⁴ Ibid.

The EU Generalised System of Preferences (GSP) is a system under which industrialised countries grant trade preferences to all developing countries. This system is originally based on the United Nations Conference on Trade and Development (UNCTAD) 1968. The European Community was the first to implement the scheme in 1971. The EU either grants duty- free access or a tariff reduction to GSP beneficiary countries. There is a special arrangement for the least- developed countries (LCD: s) known as the “Everything But Arms” (EBA) initiative.⁵⁵

The European Community separates trade defence instruments and other restrictive measures as positive or negative sanctions. Trade Defence Instruments (TDI) is anti-dumping, anti- subsidy or safeguards instruments. The instruments may be used by states in harmony with a WTO agreement, to confront the import of goods where they are seen to be unfair foreign competition.⁵⁶ The legal basis for example anti-dumping in the EC is Article 133 of the EC Treaty

4.3 Trade in the European Union

The EU 's 25 Member States represents 7 % of the worlds' population, but account for more than a fifth of the global imports and exports. The European Union believes in an open market where obstacles are removed gradually at a pace which the EU and others can sustain. Internationally agreed rules are to be building up that guard against discrimination, and increasing transparency and public scrutiny. However, liberalised and merging markets enlarge the pressure of competition on all economic actors.⁵⁷

The European Commission's Directorate- General for Trade (DG Trade) is an organization that secures prosperity, solidarity and security in Europe and around the globe in matters of trade policy. DG Trade negotiates on bilateral and multilateral trade agreements, ensures what the rules agreed are actually applied, works close to

⁵⁵ http://europa.eu.int/comm/trade/issues/global/gsp/index_en.htm, 2006-03-15 time 15:27

⁵⁶ http://europa.eu.int/comm/trade/issues/respectrules/tpi_en.htm, 2006-04-25, 11:08

⁵⁷ http://europa.eu.int/comm/trade/whatwedo/beginners/index_en.htm, 2006-05-05, 20:27

the WTO and deals with issues on Trade Defence Instruments. They ensure that business within the EU can operate fairly in the EU and the world and uses all powers to tackle unfair competition and dumping. DG Trade implements international agreements by using the WTO dispute settlement system and the instruments for trade defence or promotion adopted by the Community. This means that they operate within the framework of the first pillar in accordance with Article 133 of the EC Treaty.⁵⁸

⁵⁸ http://europa.eu.int/comm/trade/whatwedo/work/index_en.htm, 2006-05-05, 20:51

5. The EU and economic sanctions

The European Union applies sanctions in order to achieve the specific objectives of the Common Foreign and Security Policy according to Article 11 of the Treaty on European Union;⁵⁹

- to safeguard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the United Nations Charter;
- to strengthen the security of the Union in all ways;
- to preserve peace and strengthen international security, in accordance with the principles of the United Nations Charter and the Helsinki Final Act, and the objectives of the Paris Charter, including those on external borders;
- to promote international cooperation;
- to develop and consolidate democracy and the rule of law and respect for human rights and fundamental freedoms.⁶⁰

5.1 Implementation of economic sanctions

The EU applies sanctions or restrictive measures either in implementation of sanctions adopted by the UN Security Council in accordance with Chapter VII of the UN Charter (in particular art 41) or as autonomous sanctions. The European Union common market is based on free movement of capital liberalisation in accordance

⁵⁹ Council of the European Union, Brussels 3 December 2003. *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*. Page 5

⁶⁰ http://europa.eu.int/comm/external_relations/cfsp/sanctions/index.htm, date 2006-03-15 time 15:24

with the WTO agreements.⁶¹ WTO contains of a prohibition against discriminatory trade measures. This makes it difficult for other institutions and states to impose sanctions. The UN Security Council, however, overrides all other commitments. The sanctions within the EU have to be carried out within the WTO rules and have received a record for having sanctions for the protection and promotion of human rights and democracy. This is a new issue area for sanctions.⁶²

Economic and financial sanctions are used very cautiously as a foreign policy instrument as they constitute exceptions to the very principle of the common market. Compatibility of the restrictive measures with existing obligations under international law and the principles of democracy, liberty, respect for human rights and fundamental freedoms, and the rule of law are other key considerations in the process of deciding and drafting EU sanctions. In some cases, suspension clauses in existing agreements with third countries may have to be invoked before sanctions can be enforced. The restrictive measures will include a ban on exports of certain equipment that could be used for internal repression if a strategy of internal repression is at the foundation of the burden of sanctions.⁶³

Arms embargoes are useful to stop the flow of military and arms equipment to areas of conflict or to regimes that are likely to use them for repression or aggression against a foreign country or internal. The Common Foreign and Security Policy have legal instruments striking on arms embargo. The embargoes consist of prohibitions to sell, supply, export or transfer arms or related material and prohibitions to provide financing and financial assistance. The EU Member States has agreed on a “Code of conduct on arms export” which defines export control policy.⁶⁴

Economic and financial sanctions may apply to exports and/or imports, flight bans, restrictions on investment, payments and capital movements, freezing of assets and economic resources or the withdrawal of tariff preferences. Due to risk involving high economic costs, the EU often narrows the use to financial restrictions that applies to targeted persons, groups or entities. Economic and financial restrictions are normally

⁶¹ Ibid.

⁶² Wallensteen, Peter and Staibano, Carina (ed.). *International Sanctions. Between words and wars in the global system*. 2005. Cass. Page xv

⁶³ http://europa.eu.int/comm/external_relations/cfsp/sanctions/index.htm, date 2006-03-15 time 15:24

⁶⁴ Ibid.

based on a specific Regulation. The withdrawal of tariff preferences is based and regulated by Article 26 of Council Regulation (EC) No 2501/2001 on the General system of Trade Preferences, which sets out procedures and justification for the denial of preferences to specific sectors or countries.⁶⁵

5.2 Legal basis for sanctions applied by the EU

Whilst introducing and implementing restrictive measures there is one important matter of concern that has to be of consideration. They always have to be in accordance with international law and the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law. Legal context should be set out which can include references to any relevant UN Security Council resolution, or other applicable provisions of international law.⁶⁶

When a specific Regulation is used to impose restrictive measures according to CFSP, it requires the adoption of a Common Position under Article 15 of the Treaty establishing the European Union. The imposition of economic sanctions under EU law entails a combination of Community and non- Community measures. This requires two kinds of decisions; one Community decision, by qualified majority under the supranational framework of the EC Treaty and one unanimous decision under the intergovernmental framework of the second pillar, the CFSP. Three steps lead to adoption of economic sanctions:

- EU acting through its Council and thereby the Member States. Occasionally economic sanctions are adopted with the aim to implement, in the Community territory, resolutions previously adopted by the Security Council of the UN (see chapter 4).
- The Council must reach a common position or agree on a joint action relating to the addressed situation under the second pillar, the CFSP.

⁶⁵ http://europa.eu.int/comm/external_relations/cfsp/sanctions/index.htm, date 2006-03-15 time 15:24

⁶⁶ Council of the European Union, Brussels 3 December 2003. *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*. Page 6

- The Member States meeting in the Council, within the framework of the first Community pillar, must take the appropriate legal measures, normally regulations, on the basis of Article 301 or 60 of the EC Treaty.⁶⁷

Article 60 of the EC Treaty establishes:

1. If, in the cases envisaged in Article 301, action by the Community is deemed necessary, the Council may, in accordance with the procedure provided for in Article 301, take necessary urgent measures on the movement of capital and on payments as regards the third countries concerned.

2, Without prejudice to Article 297 and as long as the Council has not taken measures pursuant to paragraph 1, a Member State may, for serious political reasons and on grounds of urgency, take unilateral measures against a third country with regard to capital movements and payments. The Commission and the other Member States shall be informed of such measures by the date of their entry into force at the latest.

The Council may, acting by a qualified majority on a proposal from the Commission, decide that the Member State concerned shall amend or abolish such measures. The President of the Council shall inform the European Parliament of any such decisions taken by the Council.⁶⁸

The Article is a counterpart to Article 301 and is used when measures needs to be launched against a third countries financial issues and therefore financial sanctions.⁶⁹

Article 301 states:

Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third

⁶⁷ Berntsson, Tove. *Economic sanctions- Interaction between the UN, the EU and the Member States*. 2003, page 15

⁶⁸ Article 60 of the Treaty establishing the European Community

⁶⁹ Cramér, Per. *Neutralitet och Europeisk integration*. Norstedts Juridik AB, Stockholm. 1998. pages 515 and 533

countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.⁷⁰

The Council Regulations imposing sanctions and the implementing Commission Regulations are part of Community law. It is eminence case law that Community law takes superiority over conflicting legislation of the Member States. Such Council and Commission Regulations are directly applicable and have direct effect in the Member States.⁷¹ Their request and enforcement is a chore attributed to the skilled authorities of the Member States and the Commission. Arms embargoes constitute a different approach. Article 296 of the Treaty establishing the European Community allows arms embargo relating to military goods to be implemented by Member States using national measures. Embargoes are imposed by a Common Position and enforced on the basis of export control legislation of Member States.⁷²

5.3 Procedure for the adoption of legal instruments implementing restrictive measures

Restrictive measures require sufficient grounds in the framework of CFSP, the Presidency or one of the Member States and usually assisted by the Council Secretariat or the Commission prepares a proposal for a Common Position. The Foreign Relations Counsellors Working Party and the Committee of Permanent Representatives (Coreper)⁷³ and in most cases the Council group responsible for relations with the third country concerned, meet and discuss the proposal. The Council then publishes the text in the Official Journal of the European Union when adopting the Common Position. If it leads to implementing some or all of the restrictive measures, the Commission has to present a proposal for a Council Regulation to Council in accordance with Articles 60 and 301 of the Treaty establishing the European Community. Normally, the discussions are parallel to achieve effectiveness.⁷⁴

⁷⁰ Article 301 of the Treaty establishing the European Community

⁷¹ Cramér, Per. *Neutralitet och Europeisk integration*. Norstedts Juridik AB, Stockholm, 1998, page 546

⁷² http://europa.eu.int/comm/external_relations/cfsp/sanctions/index.htm, date 2006-03-15 time 15:24

⁷³ Coreper is the Committee of Permanent Representatives in the European Union, made up of the head or deputy head of mission from the EU member states in Brussels. Article 207 of the EC Treaty lays down the legal basis.

⁷⁴ http://europa.eu.int/comm/external_relations/cfsp/sanctions/index.htm, date 2006-03-15 time 15:24

The Commission has to ensure that all Member States implement the Regulations imposing restrictive measures (sanctions) in an appropriate and well-timed manner and take action to apply and enforce them. When failing to adopt necessary implementing rules, the Commission can start an infringement procedure against that Member State according to Articles 227 and 228 of the Treaty establishing the European Community.⁷⁵

5.4 EU and the WTO agreements

When imposing restrictive measures or sanctions, international obligations of the European Community and its Member States should be respected in particular the WTO agreements. When restrictive measures affect trade in goods or services with third countries, the General Agreement on Tariff and Trade (GATT) and on Trade in Services (GATS) are applicable. “Article XXI of GATT allows for import and export restrictions which are either applicable to arms and military equipment or imposed in pursuance of obligations under the United Nations Charter for the maintenance of international peace and security”.⁷⁶ A similar exception is provided in article XIV bis of GATS. Restrictive measures that don't fall under these categories have to meet circumstances laid down in Article XX of GATT and Article XIV of GATS and can in some cases be irreconcilable with WTO rules.⁷⁷

Article XX of GATT consists of general exceptions as when it is necessary to protect public morals, protect human, animal life or health etc. The agreement shall not prevent the adoption or enforcement of measures that can discriminate when article XX is applicable. Article XIV consists of exceptions to the Rule of Non-discrimination.⁷⁸

Council Regulation (EC) No 3286/94 lays down Community procedures in the field of the common commercial policy in order to ensure the existence of the Community's

⁷⁵ http://europa.eu.int/comm/external_relations/cfsp/sanctions/index.htm, date 2006-03-15 time 15:24

⁷⁶ Council of the European Union, Brussels 3 December 2003. *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*. Page 6

⁷⁷ Ibid.

⁷⁸ http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_07_e.htm#article20 and http://www.wto.org/english/res_e/booksp_e/analytic_index_e/gatt1994_06_e.htm#article14, 2006-05-16, 16:05

rights under international trade rules, especially World Trade Organization.⁷⁹ In particular Article 133 of the Treaty establishing the European Union is regarded when issuing this Regulation. Obstacles to trade are defined in Article 2 (1) in the Regulation;

“obstacles to trade` shall be any trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action. Such a right of action exists when international trade rules either prohibit a practice outright, or give another party affected by the practice a right to seek elimination of the effect of the practice in question.”⁸⁰

Regulation No 3286/94 is meant to help investigate problems that occur when a third country applies trade obstacles that violates the WTO agreements. For example these obstacles that violate the agreements can be export restrictions and prohibitions, tariffs that penalize imported products, anti-dumping and subventions etc.⁸¹

5.5 EU and UN sanctions

The decisions on sanctions that are taken by the UN Security Council under Chapter VII of the UN Charter are not directly applicable and binding within the EU or any of its Member States. Legislation is required that enables implementation according to EC Law. The different kinds of sanctions necessitate different implementation and not all will be discussed here. Trade and financial sanctions are somewhat different from others because the Member States has as mentioned earlier extended their

⁷⁹ Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization
Official Journal L 349, 31/12/1994 P. 0071 – 0078

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31994R3286:EN:HTML>, 2006-05-17, 19:18

⁸⁰ Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization
Official Journal L 349, 31/12/1994 P. 0071 – 0078

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31994R3286:EN:HTML>, 2006-05-17, 19:18

⁸¹ www.kommers.se/templates/Standard2_552.aspx, 2006-05-17, 19:30

competence on international trade to the EU. This does not however apply to trade sanctions imposed by the UN Security Council.⁸²

Sanctions that are imposed by the UN Security Council under Chapter VII UN Charter can not take them in view of protection of labor rights or democracy. The Member States can though as long as they don't affect obligations under international law such as the WTO.⁸³

5.6 Examples of sanctions in force

There is a current conflict between the USA and the EU called the FSC-ETI dispute. The conflict started when the WTO Dispute Settlement Body in May 2003 authorised the EU to establish countermeasures in form of tariffs on certain products with the origin of the USA. Council Regulation No 2193/2003 was founded in order to put these tariffs in force.⁸⁴ The US Foreign Sales Corporation and Extraterritorial Income and their grandfathering provisions were recently acknowledged to be irreconcilable with the WTO. The tariffs are mentioned as sanctions according to the national Board of Trade.⁸⁵ The sanction is motivated by trade policy.

Council Regulation (EC) No 2271/1996 established protection against certain effects of sanctions applied by the USA.⁸⁶ This is particularly in regard of Articles 57, 133 and 308 thereof in the Treaty establishing the European Union. The Regulation is meant to protect natural and legal persons against and counteracts the effects of the extra-territorial application where they affect persons engaged in international trade and/or the movement of capital and related commercial activities between the Community and third countries.⁸⁷ The Regulation is presented at the European

⁸² Hazelzet, Hadewych and de Vries, Anthony W. The EU as a new actor on the sanctions scene. In Wallenstein, Peter and Staibano, Carina (ed.). *International Sanctions. Between words and wars in the global system*. 2005. Cass. Page 96-97

⁸³ Hazelzet, Hadewych and de Vries, Anthony W. The EU as a new actor on the sanctions scene. In Wallenstein, Peter and Staibano, Carina (ed.). *International Sanctions. Between words and wars in the global system*. 2005. Cass. Page 98

⁸⁴ EOJ, European Official Journal, 328, 17.12.2003, p. 3, The Regulation was changed in No 171/2005 (EOJ 28, 1.2.2005, p. 31)

⁸⁵ http://www.kommers.se/templates/Standard2___971.aspx, 2006-05-17, 20:30

⁸⁶ <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31996R2271:EN:HTML>, *Official Journal L 309*, 29/11/1996 P. 0001 – 0006 2006-05-17, 20:35

⁸⁷ 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

Commissions website on the list on sanctions or restrictive measures in force (measures adopted in the framework of the CFSP).⁸⁸

The declaration of European Council, Madrid, 27.6.1989, impose an embargo on arms towards China. The European Council strongly condemns the brutal repression that takes place in China. Chinese authorities are requested “to stop the executions and to put an end to the repressive actions against those who legitimately claim their democratic rights”. The European Council thinks it is necessary to adopt some measures because of the present circumstances; interruption by the Member States of the Community of military cooperation and an embargo on trade in arms with China and get admittance of independent observers to attend trials and visit prisoners etc.⁸⁹ the declaration is presented as sanctions in force motivated by the CFSP.

The suspension on aid to the Palestinian Authority government is not mentioned in sanctions in force by CFSP, but includes the same purpose as sanctions motivated by security reasons. In a speech held by Benita Ferrero-Waldner, European Commissioner for External Relations and European Neighbourhood Policy, it is stated that members of an organisation included in the EU terrorist list lead the government of Palestine. The cooperation with Palestine is supported with commitment to work for peace by peaceful means but this cannot continue. The Commission has put on hold assistance to the Palestinian governments and its ministries, but not suspended aid to the Palestinian people.⁹⁰

Official Journal L 309, 29/11/1996 P. 0001 – 0006, <http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31996R2271:EN:HTML>, 2006-05-17, 20:50

⁸⁸ http://ec.europa.eu/comm/external_relations/cfsp/sanctions/measures.htm, 2006-05-17, 20:50

⁸⁹ http://ec.europa.eu/comm/external_relations/cfsp/sanctions/measures.htm, 2006-05-18, 14:05

⁹⁰ Speech/06/260 Benita Ferrero-Waldner. Suspension of aid to the Palestinian Authority government. European Parliament Plenary. Brussels, 26 April 2006, <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/260&format=HTML&aged=0&language=EN&guiLanguage=en>, 2006-05-18, 13:53

5.7 Short summary on the EU and economic sanctions

The EU applies sanctions or restrictive measures either in implementation of sanctions adopted by the UN Security Council in accordance with Chapter VII of the UN Charter (in particular art 41) or as autonomous sanctions.

The European Union common market is based on free movement of capital liberalisation in accordance with the WTO agreements. WTO contains of a prohibition against discriminatory trade measures as explained in chapter 3.3 and 5.3. This makes it difficult for other institutions and states to impose sanctions motivated by trade. The UN Security Council, however, overrides all other commitments. The sanctions within the EU have to be carried out within the WTO rules and have received a record for having sanctions for the protection and promotion of human rights and democracy.

Still, there are no exact definition on the differences between sanctions motivated by trade and those motivated by security. This can be observed from the examples in chapter 5.4.

6. Jurisprudence of the term economic sanctions

The word sanction is vaguely described and defined in international law. The International Law Commission rejected the use of the word when discussing draft article 30.⁹¹ As stated earlier, some identifies sanctions only in acts of reprisals or war or something referred to the multilateral framework of the United Nations.⁹²

6.1 Economic sanctions in international law

Some sees sanctions as an issue of enforcement by means of non-forcible measures taken by international organisations. In public international law there are three terms that are used relating to sanctions; retorsion, reprisals and countermeasure.

Countermeasures are mainly used when discussing state responsibility according to ILC Draft.⁹³ Measures taken to punish are best seen as sanctions and also those measures designed to enforce the law. Sanctions have to be pursued by international organisations, representing the centralized mechanisms to be lawful.⁹⁴ Sanctions are a coercive measure “taken in execution of a decision of a competent social organ i.e. an organ legally empowered to act in the name of the society or community that is governed by the legal system”.⁹⁵

Economic sanctions, or coercions as some intend, are actions initiated by one or several international actors (senders) against one or several others (targets) with either or both of two purposes. These purposes are to punish the targeted state by depriving them of some value and/or to make them meet the terms with certain

⁹¹ ILC Draft Articles establishes responsibilities of states for internationally wrongful acts.

⁹² *Encyclopedia of Public International Law*, Vol IV. Quirin, ex parte to zones of peace. Page 311

⁹³ ILC Draft, Draft articles on Responsibility of States for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session (2001), Official Records of the General Assembly, fifty-sixth session, Supplement No. 10 (A/56/10), chp.IV.E.1)

⁹⁴ Gowlland-Debbas, V (ed.), *United Nations sanctions and International law*. 2001. The Hague:Kluwer, page 6

⁹⁵ Abi-Saab, G. The concept of sanctions in International Law, in Gowlland-Debbas (ed.), *United Nations Sanctions*. 2001. page 32

norms the senders consider important.⁹⁶ When discussing law enforcement, sanctions can be divided into two groups; those that are intended to prevent actions and those that are designed as reactions to such behaviour. The last group is applied when an illegal act has been performed or a wrongful act committed. There is a causal link between the failure to respect an obligation and the ratification of the outcome, which the legal rule demands. Concerning the violations of law, there must be a distinction between sanctions *strictu sensu* and other means like “civil sanctions”.⁹⁷

The political exercise of economic authority can be negative- as in the blocking of admission to financing, raw material and medical supplies; or positive- as in the acquisition of labour and other market resources. Generally, a sanction is intended to serve as a form of punishment in order to get the targeted state to abandon its ethical or legal behaviour.⁹⁸ Economic coercions or sanctions occupy the middle grounds between words and war.⁹⁹ They are often used when words are not enough and the use of force is undesirable.¹⁰⁰

Whatever the legal content may be, the measure of sanctioning is always seen as an alteration of the preceding situation of the State. The word sanction entails retribution for conduct measured against conformity and non-conformity with a certain rule. The legal grounds are founded on the previous conduct of the State concerned. Chapter VII of the UN Charter predicts the application of Articles 41 and 42, *inter alia*, against a State whose conduct not necessarily was unlawful by the Charter. Nevertheless, every time a UN organ has used sanctions it has taken the safety measure of an *a priori* categorization of the act against which it was reacting as a violation of international law.¹⁰¹

⁹⁶ Hufbauer, Gary Clyde, Schott, Jeffrey J and Elliott Kimberly Ann. Economic sanctions Reconsidered, Vol I, History and current policy; II, Supplemental Case Histories, Institute for International Economics, Washington D.C., 1990

⁹⁷ *Strictu sensu*, Latin; means in a strict sense

⁹⁸ Simons Geoff. Imposing economic sanctions. Legal remedy or Genocidal tool? 1999. Pluto Press. Pages 7-10

⁹⁹ Marinov, Nikolay, Do Economic Sanctions Destabilize Country Leaders? *American Journal of Political Science*, Vol. 49, No. 3, July 2005, page 564. And Wallensteen, Peter. Positive sanctions. on the potential of rewards and target differentiation. In Wallensteen and Staibano(ed.) . *International sanctions. Between Words and Wars in the Global system*. 2005. Frank Cass, page 229

¹⁰⁰ Marinov, Nikolay, Do Economic Sanctions Destabilize Country Leaders? *American Journal of Political Science*, Vol. 49, No. 3, July 2005, page 566

¹⁰¹ *Encyclopedia of Public International Law*, Vol IV. Quirin, ex parte to zones of peace. Page 313-314

Margaret Doxey¹⁰² has made a division or schedule on non- military sanctions where she divides them into three groups. There are diplomatic and political measures, for example official protests or condemnations on states behaviour. The second group is distinguished by cultural and communicational measures, like restrictions for different kinds of transports. The third group; economical measures are divided into two subgroups; financial (for example reduced economical aid) and commercial and technical (like import quotations, tariffs and notice of termination on contracts).¹⁰³

Koutrakos¹⁰⁴ also divides economic sanctions into three sections but in a different way than Doxey:

- I) Trade sanctions, like restrictions on import and/or export
- II) Financial sanctions, banning lending and/or investment
- III) Sanctions on transport services, cutting of transport communications¹⁰⁵

Baldwin established a list on positive sanctions, which included mostly economic measures and David Cortright,¹⁰⁶ added a number of sanctions to it. In the field of economics they list sanctions like extended most favoured nation status, tariff reductions, direct purchases, extending subsidies to exports and imports, providing export or import licenses etc. These categories are work that the Swedish National Board of Trade deals with even though they don't want to use the term sanctions. However the Swedish law applicable on sanctions is used when dealing with these areas.¹⁰⁷ Guaranteeing investments, encouraging capital imports or exports, extending favourable taxation, granting access to advanced technology, giving debt

¹⁰² Margaret Doxey was a professor in the Department of Political Studies at Trent University from 1967-1991. She has studied problems of collective sanctions and international enforcement, and has published widely on the subject of international political studies.

¹⁰³ Doxey Margaret, *International Sanctions in Contemporary Perspective*. 2nd ed. MacMillan Press Ltd., London, (1996), p. 14-15

¹⁰⁴ Panos Koutrakos is a professor in the Department of Law at Durham University, LLB, LLM, PhD and Advocate at the Athens Bar

¹⁰⁵ Koutrakos, Panos *The European Union and the International Order: Discord or harmony?*, The Hague, T.M.C Asser Press (2001) p. 69

¹⁰⁶ Cortright is President of the Forth Freedom Forum in Goshen, Indiana and a research Fellow at the Joan B. Kroc Institute for International Peace and Studies at the University of Notre Dame, USA.

¹⁰⁷ The Swedish law on sanctions (Lag (1996:95) om vissa internationella sanktioner) is used when export- and import licenses are established according to exemptions on prohibitions from export and import to certain countries. Other licenses are established according to "förordning (1997:969 om import- och exportreglering. Ulf Eriksson, National Board of Trade.

relief and granting access to international economic organizations are also within the economic field. In the field of international security there is extending diplomatic and political support, initiating military cooperation, pushing for membership in military organizations (alliance), intensifying cultural exchanges, giving support for citizen diplomacy and opening for membership in democratic international organizations.¹⁰⁸

Geoff Simons distinguishes sanctions in; diplomatic and political measures; cultural and communications measures; economic measures and measures relating to status in international organisations. Economic sanctions falls within the scope of economic measures and are divided into two groups; financial; Commercial and technical. Simons has the same division as Margaret Doxey. Financial measures can for example involve the suspension, reduction or cancellation of aid in various fields. The donation of aid to countries desperate for assistance can, in this sense, correspond to the purchase of immense political power.¹⁰⁹ An example is the reduction of aid to the Palestinians in order to coerce the Hamas to change their objectives.

Commercial and technical measures can be applied in the same way in order to force it into a preferred mode of behaviour or to punish a targeted state. Simons means that imports and exports can be reduced or completely blocked “by means of Quota specifications, licensing mechanisms and other means”. Most favoured nation status can be withdrawn despite the demands of free trade protected in the World Trade Organization and other international organizations or agreements.¹¹⁰

Most authors distinguishes economic sanctions from other kinds of sanctions and in that field include sanctions like tariff reductions and other areas that are applicable to Article 133 of the Treaty establishing the European Union. Interruption or reduction of economic relations with one or more third countries was however governed by Article 133 (pre-TEU decisions on sanctions were based on Article 113 EC, now Article

¹⁰⁸ Building on work by D. Cortright, “Positive Inducements in International Statecraft”, speech to the June 200 Fraser Forum; and Baldwin, 1985. Wallenstein Peter. Positive sanctions, on the potential of rewards and target differentiation. In Peter Wallenstein and Carina Staibano (ed.) *International sanctions, Between words and wars in the Global System*. Page 233

¹⁰⁹ Simons Geoff. *Imposing economic sanctions. Legal remedy or Genocidal tool?* 1999. Pluto Press. Pages 118-119

¹¹⁰ Simons Geoff. *Imposing economic sanctions. Legal remedy or Genocidal tool?* 1999. Pluto Press.. page 119

133), which is now governed by Article 301 of the Treaty establishing the European Union.¹¹¹

6.2 The differences and resemblances of sanctions motivated by trade policy and sanctions motivated by security and related issues

In the Treaty of the European Community (ECT) the possibility to enhance economic sanctions existed but was divided into sanctions motivated by trade and those motivated by security policy reasons. The motive decided whether they were determined within the Community or not. Those sanctions that were motivated by security policy was a tool to try to get a state that had acted wrongfully to change their conduct and was therefore outside the Community's competence and range according to Article 2 ECT.¹¹² The perspective of the purpose was dominant until the beginning of 1980's when another view took over. Instead of motive, the Community concentrated on the different measures content. All restrictions in trade with non-Member States were thereby determined under Article 133 despite the motive of trade policy.¹¹³ The effect of this change was that all sanctions that affected trade were determined according to Article 133 TEU.¹¹⁴ When the Treaty of establishing the European Union was founded the Common Foreign and Security Policy was set up. Article 301 and Article 60 of the TEU came to be the new foundation of sanctions motivated by security policy when sanctions motivated by trade stayed under Article 133 TEU.¹¹⁵ The most important difference between Article 133 and Article 301 is that the later is much wider to cover as many situations of sanctions as possible with the purpose of creating uniformity. The Article 301 therefore covers all economic sanctions towards a non- Member State, not just those who falls outside the common trade policy.¹¹⁶

¹¹¹ O'Keefe, David and Emiliou, Nicholas (ed.). *The European Union and World Trade Law, after the GATT Uruguay round*. United Kingdom Association for Contemporary European Studies. Page 73

¹¹² Cramér, Per. *Neutralitet och Europeisk integration*. Norstedts Juridik AB, Stockholm. 1998. page 515

¹¹³ Ibid. page 121

¹¹⁴ Ibid, page 527

¹¹⁵ Ibid. page 532

¹¹⁶ Ibid. page 533

Restrictive measures are imposed by the European Union in order to change the policy or activity by the target country, part of country, government, individuals or entities. The objective of these measures should be clearly stated and consistent with the general strategy of the Union in the area concerned. The restrictive measures, however, does not have an economic motivation.¹¹⁷

The Council of the European Union has created some guidelines on implementation and evaluation of sanctions where they define some standard wording for legal instruments concerning sanctions. For example the freezing of economic resources has become an issue and therefore needs a definition:¹¹⁸

“economic resources” means assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but can be used to obtain funds, goods or services.

“freezing of economic resources” means preventing their use to obtain funds, goods or services in any way, including, but not limited to, by selling, hiring or mortgaging them.”¹¹⁹

A ban on exports of certain equipment can be required if a policy of internal repression is at the basis of the imposition of restrictive measures. When deciding embargoes on exports of items that could be used for internal repression, EU legal instruments could refer to (or) use an agreed list. These lists can constitute a useful reference for specific export or import bans when defining the scope of specific export or import control regimes. This is possible when “considered necessary to ban all trade of the specific, controlled category in relation to a particular country, in order

¹¹⁷ Council of the European Union, Brussels 3 December 2003. *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*. Page 5.

¹¹⁸ See Regulations (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban (OJ L 139, 29.5.2002, p.9) and (EC) No 1210/2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation (EC) No 2465/96 (OJ L 169, 8.7.2003, p. 6)

¹¹⁹ Council of the European Union, Brussels 3 December 2003. *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*. Page 16

to achieve the objectives of the CFSP". Humanitarian action can be allowed where appropriate as an exemption from such measures.¹²⁰

There are further work to be done as continue examine the definitions of sanctions, further explorations of feasibility of financial measures, implementation issues between Member States and examinations on "to what extent the expiration or repeal of restrictive measures continues to have an impact on e.g. contracts whose performance was prohibited by the measures".¹²¹

As mentioned, sanctions can take many forms, which contribute, to the different kinds of definitions. Just separating sanctions motivated by trade and those motivated by security and foreign policy, doesn't make the term easier to apply. There is a huge difference though in legislation, trade related measures are mostly motivated according to Article 133 of the TEU, where foreign policy related sanctions are applied according to Article 60 or 301 of the Treaty on European Union.

Another important practical effect is the competence of the European Court of Justice (ECJ). The jurisdiction of the ECJ varies from the first pillar to the second. In the first pillar the ECJ has the highest authority where it has jurisdiction. In the second pillar it is only possible to interpret the legislation of the Treaty.¹²²

The Court of Justice of the European Communities has jurisdiction in various categories of proceedings. These are references for preliminary rulings, actions for failure to fulfil obligations, actions for annulment, actions for failure to act, appeals and reviews. These are separated in references for preliminary rulings and direct action. The purpose of the Court of Justice is to ensure a uniform interpretation and application of Community Law. This can be maintained by recognising breaches of Community Law by the Member States.¹²³

The Court of Justice (hereby the Court) can only deal with issues it has been called upon like any other court. According to the Maastricht Treaty (TEU), all provisions on

¹²⁰ Council of the European Union, Brussels 3 December 2003. Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy. . pages 20-21

¹²¹ Ibid. page 29

¹²² http://www.eu-upplysningen.se/upload/Dokument/Trycksaker-pdf/euu_faktablad_3.pdf, 2006-06-09, 11:24

¹²³ http://www.curia.europa.eu/en/instit/presentationfr/index_cje.htm, 2006-06-11, 9:31

foreign and security policy and practically all those on justice and home affairs were excluded from the Courts jurisdiction. The Nice Treaty focused on enabling a judicial system for the Courts to cope with. In order to maintain this, the Council had extensive powers to modify the judicial architecture of the European Union.¹²⁴ The second pillar has a structure of “high politics” and they generate normally little public interest. Accountability in the second pillar is in general upheld by the national parliaments and electorates through Member States acting in the framework of the European Council. The European Parliaments role is limited where in extension the Community method in the second pillar can be seen as deteriorating the accountability in the CFSP to national governments.¹²⁵ Two areas are identified by the Court of Justice where the European Community has exclusive powers; the common commercial policy according to Article 133 (pre-Nice version) and the protection of biological resources of the sea.¹²⁶

Where the Community has exclusive powers the national parliament has transferred its power to make decisions to the Community and the regulatory has direct effect. The Commission supervises that the Member States pursues EC Law and the Commission can complain if they don't. If the Member State and the Commission does not agree, the Member State can face charges in the European Court of Justice.¹²⁷ This can only be maintained in the first pillar.

In addition to Article 301, Article 308 can be used. Article 308 states that Community measures proved necessary to attain in accordance with the common market and the objectives of the Community on the basis of unanimous decision is acceptable.¹²⁸ Article 308 allows the Community to operate where no other specific powers can be used.¹²⁹

¹²⁴ Arnall Anthony. The rule of law in the European Union. In Arnall and Wilcott, Daniel (ed.) *Accountability and Legitimacy in the European Union*. 2005. Oxford studies in European Law. Page 242 and 244

¹²⁵ Hyde- Price, Adrian. Decision-Making under the second pillar. In Arnall and Wilcott, Daniel (ed.) *Accountability and Legitimacy in the European Union*. 2005. Oxford studies in European Law. Pages 55-56

¹²⁶ de Búrca Gráinne and de Witte, Bruno. The delimitation of powers between the EU and its Member States. In Arnall and Wilcott, Daniel (ed.) *Accountability and Legitimacy in the European Union*. 2005. Oxford studies in European Law. Page 209

¹²⁷ http://www.eu-upplysningen.se/upload/Dokument/Trycksaker-pdf/euu_faktablad_3.pdf, 2006-06-09, 12:06

¹²⁸ Article 308 of the Treaty establishing the European Community.

¹²⁹ de Búrca Gráinne and de Witte, Bruno. The delimitation of powers between the EU and its Member States. In Arnall and Wilcott, Daniel (ed.) *Accountability and Legitimacy in the European Union*. 2005. Oxford studies in European Law. Page 216

7. Conclusions

Most authors seem to distinguish economic sanctions from other kinds of sanctions and in that field include sanctions like tariff reductions and other areas that are applicable to Article 133 of the Treaty establishing the European Union. Sanctions are a word that is frequently used when imposing restrictions, bans or likewise to a target for non-compliance, wrongful acts, terrorist acts, etc. The motive of the sanctions is what determines the use and the legislation. Sanctions are too complex, however, to say that sanctions motivated by trade issues needs to be in conformity with the WTO agreements and sanctions motivated by foreign and security policy in conformity with UN and that this is what separates them.

7.1 Result

The European Community separates trade defence instruments and other restrictive measures as positive or negative sanctions. Trade Defence Instruments (TDI) is anti-dumping, anti- subsidy or safeguards instruments. The instruments may be used by states in harmony with a WTO agreement, to confront the import of goods where they are seen to be unfair foreign competition. The legal basis for example anti-dumping in the EC is Article 133 of the EC Treaty, which provides that it shall be based on uniform principle particularly regarding tariffs and trade agreements.

Measures taken under Article 133 of the EC Treaty may be exposed to WTO agreements and can be a part of dispute settlements. The European Union applies sanctions in order to achieve the specific objectives of the Common Foreign and Security Policy according to Article 11 of the Treaty on European Union. The EU applies sanctions or restrictive measures either in implementation of sanctions adopted by the UN Security Council in accordance with Chapter VII of the UN Charter (in particular art 41) or as autonomous sanctions. Sanctions imposed by the European Union are supposed to safeguard common values, strengthen the security and preserve peace.

Sanctions are a tool to force another country or to punish another country for their behaviour whilst measures under Article 133 EC Treaty are tools to protect the

market. The legal aims of the different Articles are not the same; however they can produce the same effect. Trade defence instruments are applied in order to protect trade within the European Union as stated earlier.

When the European Council states that restrictive measures do not have an economic motive (see chapter 6.1), it is not easy to understand what the intentions are of the statement. This could mean that restrictive measures concerning trade therefore are motivated by security reasons and that Articles 60 and 301 of the Treaty on the European Union are never used when imposing sanctions for economic reasons. Theoretically they can be applied for economic reasons, but the European Council states that they shall not. All sanctions or measures that are motivated by trade and therefore under the obligation of the World Trade Organization is applied by Article 133 of the Treaty on European Union.

Before, when Article 133 TEU applied sanctions, sanctions motivated by security reasons were outside the Community's competence and establishment according to Article 2 ECT. These were instead left for the Member States to decide on national level in accordance with Article 224 ECT (Article 297 TEU). The decisions made under this Article could however constitute problem because of Article 133 TEU and the undertakings thereof. The European Union has exclusive authority within the trade policy since the Treaty establishing the EU. Member States cannot sign their own agreements with third countries on some areas of trade. The European Union and the Member States share the authority on the areas that falls outside Article 133. On these areas, the Member States as well as the EU can establish mixed agreements and they are signed by the Council and ratified by the Member States Parliament.

A unique combination of Community and non-Community measures is entailed under the laws of the EU when imposing economic sanctions. There are two kinds of decisions required; one unanimous decision under the intergovernmental framework of the second pillar (the CFSP), and one Community decision by qualified majority under the supranational framework of the EC Treaty. Economic sanctions is more than a trade measure, it is to a great extent a political decision. When the Council used Article 133 TEU as the legal basis for the imposition of economic sanctions, they were regarded as a trade measure, covered by the common policy and the

exclusive competence of the Community. However, sanctions imposed under Article 301 TEU have in most cases concerned the prohibition of exports and imports to and from a targeted country.

The interaction between intergovernmental and Community measures can create obstacles when first deciding on joint actions or common positions and then a Council Regulation. Member States may not have the same opinion on economic sanctions and this can delay the process when for example implementing the Security Council resolutions in the Member States. Member States can hardly impose unilateral sanctions towards third countries. In the Treaty of Nice it is stated that Member States will not “impede, or otherwise undermine” the Common Foreign and Security Policy of the Union. The Member States are required to support it “actively and unreservedly in a spirit of loyalty and mutual solidarity”. The Member States has however great influence because of the unanimity over when and if sanctions are imposed.

An important difference between trade related sanctions and security related, are the jurisdiction of the European Court of Justice. In the first pillar, the Member States has a court to turn to which has authority to determine whether the decision is accordingly. Common positions are not subject to review of the Court. The European Community has exclusive powers when applying trade related sanctions according to Article 133, but not when imposing sanctions under Article 60 and 301.

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