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Economic sanctions
– Interaction between the UN, the EU and
the Member States

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Summary

Economic sanctions – the exercise of pressure by one international actor to produce a change in the political behaviour of another international actor – are instruments used in the exercise of foreign policy. Due to the perceived ineffectiveness of traditional economic sanctions, such as trade embargoes, a new type of sanctions has emerged. Unlike economic sanctions in the traditional sense, these so-called targeted sanctions are directed against individuals or groups of individuals.

The UN Security Council is often the initiator when economic sanctions are imposed. It adopts resolutions under Article 39 and Article 41 of the UN Charter, which must be implemented in order to become effective. The EU is not a member of the UN, but is nevertheless firmly involved in the implementation process. The EU implements the UN sanctions by unanimous decisions under the CFSP, followed by the adoption of Council regulations under Articles 301 and /or 60 EC. The regulations are directly applicable in all Member States of the EU.

Being members of both the UN and the EU, the Member States have dual legal obligations. They are obliged to carry out decisions taken by the Security Council under Article 25 of the UN Charter. On the other hand, according to the jurisprudence of the Court, Community law takes precedence over national law. ECJ has stated in the *Centro-Com* case that if a conflict would occur between the Member States dual obligations, their responsibilities under the UN Charter prevail.

Due to practical reasons, the implementation of Security Council resolutions regarding economic sanctions have gradually been transferred from the national level to the EU level. This allows a swift and uniform implementation throughout the Union.

The question of interest is whether the role of the EU in this established interaction process can be upheld also in the field of targeted sanctions? The crux of the matter is the scope of Article 301 EC. According to a literal interpretation of Article 301 EC, sanctions can only be imposed against states, not individuals. However, one could argue that it also includes quasi-governmental entities, which control territory, or people closely linked to the decision-makers target governments. In my view, Article 301 should not be stretched too far. Case T-306/01 concerns exactly this question – the scope of Article 301 – and is now pending in the CFI. It is therefore impossible to draw any certain conclusions, but it is obvious that Article 301 EC was not designed for meeting the currently most important threat to international peace and security: non-nation bound terrorism.

Abbreviations

CFI	Court of First Instance
CFSP	Common Foreign and Security Policy
EC	Treaty of the European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950
ECJ	European Court of Justice
EPC	European Political Co-operation
EU	European Union
FYROM	Former Yugoslav Republic of Macedonia
PJCC	Police and Judicial Cooperation in Criminal Matters
SEA	Single European Act
TEU	Treaty on the European Union
UN	United Nations
UNITA	<i>União Nacional para Independência Total de Angola</i> (guerrilla in Angola)

1 Introduction

1.1 Background

The studying of economic sanctions reveals an interesting and complex interaction process between different international actors, involving the UN, the EU, and states.

Economic sanctions – the exercise of pressure by one international actor to produce a change in the political behaviour of another international actor – are instruments used in the exercise of foreign policy. Traditionally, the actors in the field of economic sanctions have been limited to states or coalition of states. However, *inter alia* due to the perceived ineffectiveness of traditional economic sanctions, such as trade embargoes, a new type of sanctions has emerged on the international arena. Unlike economic sanctions in the traditional sense, these so-called targeted sanctions are directed against individuals or groups of individuals.

The UN is often the initiator to impose economic sanctions. The UN Security Council adopts resolutions which the members of the UN are obliged to implement into their national legal order. The EU is not a member of the UN, but is nevertheless firmly involved in the implementation process of Security Council resolutions on economic sanctions. Every Member State of the EU is a member of the UN. Hence, the Member States have dual legal obligations – both towards the UN and towards the EU – which involves risks of conflicts. The Court has through its case law clarified which legal obligation that should prevail if a conflict arises. Over the years, a division of competence between the Member States and the EU regarding the implementation of UN sanctions has been established and consolidated.

The interaction between the UN, the EU and the Member States is therefore rather clear regarding traditional sanctions. However, the increasing use of targeted sanctions, especially sanctions intended to fight terrorism, may cause problems in this established interaction process.

1.2 Purpose and Delimitations

The main purpose of this thesis is to investigate the interaction process between the UN, the EU and the Member States of the EU in the field of economic sanctions in the traditional sense, and to determine whether this interaction process can be upheld also regarding targeted sanctions.

Both the EU and its Member States can enact economic sanctions unilaterally and independently from the UN. However, since economic

sanctions normally are initiated by the UN, only economic sanctions consequential to Security Council resolutions are dealt with in this thesis.

Further, sanctions may take many forms, but this thesis concentrates on sanctions with direct economic implications. Hence, sport and cultural embargoes, disruption of diplomatic relations, and other similar measures are outside the scope for this thesis.

1.3 Method and Material

This thesis is in part descriptive and in part analytical. The purpose, as stated above, is to make a descriptive overview of the established interaction process between UN, the EU, and the Member States of the EU in the field of economic sanctions, and then to assess whether this interaction process should be upheld also regarding targeted sanctions.

The basis of this thesis is the UN Charter and the Treaties of the EU, and the relevant articles thereof. Regarding the EU, I have used the versions of the TEU and the EC Treaty which followed the Nice Treaty, which entered into force in 2003. When relevant, I have also referred to the Draft Treaty establishing a Constitution for Europe, on which no binding decision has been taken so far.

The Treaty of Amsterdam, signed in 1997 and entered into force 1999, renumbered all the articles of the TEU and the EC Treaty. This renumbering cause some confusion, since the case law and legislation predating the entry into force of the new renumbering will refer to the old numbers, while subsequent Community measures will refer to new. The strategy chosen in this thesis is to only refer to the post-Amsterdam numbers, even when referring to case law predating the Treaty of Amsterdam.

In order to give a descriptive overview of the prevailing situation regarding the interaction between the EU, the UN and the Member States, I have used doctrinal texts, both articles and books. Since the focus of the thesis lies on the EU law aspect, I have made a thorough survey of the leading cases from the ECJ on the area. To a limited extent, I have also used material on the internet, but only to the extent that the websites are well-known and established.

The last part of the thesis contains an analysis, where I try to asses, from the descriptive overview in the first chapters, whether the described interaction process can be upheld also regarding targeted sanctions, especially sanctions directed against perceived terrorists.

1.4 Terminology

Economic sanctions in the traditional sense – *inter alia* trade embargoes – are referred to as economic sanctions or traditional economic sanctions in this thesis. The new types of sanctions, which are directed against individuals, are referred to as targeted sanctions.

I will refer to the term EU in general European contexts, but to the term Community when explicitly referring to the first pillar of the EU.

1.5 Outline

In Chapter 2, economic sanctions and targeted sanctions are presented and defined. Further, the effectiveness of the two different types of sanctions is discussed. The issue of effectiveness is a matter more closely related to political science than to law, but the concept of effectiveness is in my view important in order to understand the development of targeted sanctions. Chapter 2 is not intended to offer a comprehensive presentation neither on sanctions nor on their effectiveness, but to give a general background to the subject.

In Chapter 3 and 4, the procedures for the imposition of sanctions, both regarding the EU and the UN are presented.

In Chapter 5, the requirements and procedure for challenging economic sanctions before ECJ are presented.

In Chapter 6, the implementation of Security Council resolutions is investigated, in particular the interaction and the division of competence between the UN, the EU and its Member States.

Finally, in Chapter 7, I present, from my point of my view, the advantages and disadvantages of the self-imposed role of EU in the implementation process of UN resolutions on economic sanctions. I then turn to the concept of targeted sanctions, starting with a presentation of case T-306/01, which is pending in CFI. The case concerns *inter alia* the possibility to uphold the established interaction process between the EU, the UN and the Member States also regarding targeted sanctions. The case has not yet been decided on by the CFI and it is therefore impossible to draw any certain conclusions on what the situation will be in the future. However, I try to estimate the *pros* and *cons* regarding the legality of the EU implementing measures and to make an assessment of whether the established interaction should be upheld or not.

2 Economic Sanctions

2.1 Economic Sanctions in the Traditional Sense

2.1.1 Definition

Sanctions can be defined as a coercive foreign policy, in which an international actor, normally a state (or a group of states), the sender, disrupts its normal relations with another actor, the target, in order to achieve certain political objectives. The objectives for which the sender imposes sanctions on the target can be various: to persuade the target to change its behaviour, to weaken or to punish the target, etcetera. Sanctions can coerce either directly, by persuading the target government that the issues at stake are not worth the price, or indirectly, by inducing popular pressure to force the government to concede.¹

Sanctions are an essential alternative solution to military action. Hans Dahlgren, Sweden's State Secretary for Foreign Affairs, has described economic sanctions as a measure "between words and war".² Sanctions may take numerous forms: e.g. arms embargoes, foreign assistance reductions, export and import limitations, freezing of assets, tariff increases, import quota decreases, visa denials, cancellation of air links, and credit, financing, and investment prohibitions.³ For the purpose of this thesis, only *economic* sanctions are of interest. Koutrakos divides economic sanctions into three broad categories:

Trade sanctions, which involve the imposition of restrictions on imports from the target country and/or exports to the target state.

Financial sanctions, aiming to interrupt the flow of resources to the target state by banning lending and/or investment.

Sanctions on transport services, aiming at cutting off any transport communication between the sender state and the target state and, thus, deny the latter any benefit that communications with the former would normally bring.⁴

¹ Robert A. Pape, Jr.: "Why Economic Sanctions Do Not Work" in *International Security*, Vol. 22, No.2, fall 1997, pages 90-136 (p. 94).

² Final Report of the Stockholm Process on the Implementation of Targeted Sanctions, Preface, viii. <http://www.smartsanctions.se/reports/Final%20report%20complete.pdf> (p. 8), last visited on 6 December 2003 at 11.50 a.m.

³ Karin Ströberg: *Prospects for Success in International Interventions – the Examples of Economic Sanctions and Peace Enforcement* (2000) p. 27.

⁴ Panos Koutrakos: *Trade, Foreign Policy & Defence in EU Constitutional Law* (2001) p. 69.

2.1.2 Effectiveness of Economic Sanctions

There is an on-going debate about the effectiveness of economic sanctions. In order to evaluate the possible effectiveness of a sanction, the word “effectiveness” must first be defined. In the view of this thesis, the success of a sanction depends on the achievement of the political objective for which the measure was imposed.

In a study, performed by the Institution for International Economics (Washington, D.C.), 115 cases of economic sanctions, from 1914 to 1990, were reviewed. The study showed that the sanctions succeeded in 40 cases, i.e. 34 % of the cases.⁵ A later study on the same cases presented by Pape indicates that the success percentage might be significantly lower – according to his research only five cases out of 115 were successful.⁶ On the five occasions where the sanctions produced a successful outcome, according to the study, it mainly concerned minor issues, like the release of hostages. Hence, in the view of Pape, economic sanctions alone are not a suitable instrument to achieve ambitious foreign policy goals, like causing states to surrender large chunks of territory, stop a military offensive in progress or stop building weapons of mass destruction.⁷

However, other authors are not as negative. South Africa is often put forward as an example of where sanctions have actually worked. The sanctions imposed against the country is often said to have caused the overthrow of the apartheid-regime.⁸ Other scholars, like Prof. Peter Wallensteen (Department of Peace and Conflict Research, Uppsala), think that the embargo against South Africa had effect only because it was combined with other factors, such as domestic resistance to the system.⁹ Some are even of the opinion that sanctions may encourage the escalation of disputes and thus contribute to international instability.¹⁰ To conclude, even though opinions differ, the prevailing view seems to be that despite the recourse to economic sanctions as an instrument of conduct of foreign policy, they are rather ineffective in terms of the objectives they seek to achieve.¹¹

If empirical studies seem to show that sanctions are not as effective as one would wish - how come policymakers continue to use them? One reason could be, according to Baldwin, that policymakers feel the pressure from the

⁵ Gary Clyde Hufbauer and Jeffrey J. Schott, assisted by Kimberly Ann Elliot: *Economic Sanctions Reconsidered* (1990).

⁶ Pape, p. 99.

⁷ Pape, p. 109.

⁸ Kenneth Hermele: *Liten tuva: hur ekonomiska sanktioner bidrar till att störta apartheid i Sydafrika* (1990).

⁹ Mats Holmberg and Disa Håstad: ”Sanktioner ger sällan effekt” in *Dagens Nyheter*, 20 April 2002.

¹⁰ Malcolm D. Evans (ed.): *Aspects of Statehood and Institutionalism in Contemporary Europe*, (1997) p. 183.

¹¹ See e.g. Koutrakos, p. 50, Ströberg, p. 28.

domestic public, especially in urgent cases, to “do something”.¹² Baldwin also put forward the opinion that the use of sanctions might be reasonable when there is no other policy alternative available with a higher expectation of success.¹³

2.2 A New Approach: Targeted Sanctions

2.2.1 Definition

Traditionally, economic sanctions have been seen as more humane than military intervention. However, trade embargoes and other kinds of economic sanctions often inflict significant human costs on the population of the target states, including civilians who have little influence on their governments’ behaviour. Hence, apart from doubts on their effectiveness, there are also moral and humanitarian aspects of economic sanctions.¹⁴ Ströberg argues that the tendency to see economic sanctions as more “humane” must be revised, since sanctions can be a both powerful and deadly form of intervention.¹⁵ Another scholar even argues that a rapid military intervention – if to enforce legitimate international decisions – might be preferable to slow economic coercion.¹⁶

In order to overcome the humanitarian problems of economic sanctions, as described above, the concept of targeted sanctions has developed.¹⁷ The principle of this new approach is simple: instead of targeting a whole country, targeted sanctions are directed against significant national decision-makers (political leaders and key supporters of a particular regime). Targeted sanctions are designed to single out the groups and individuals responsible for the wrongdoing and pinpoint the needs and desires of this elite. Since targeted sanctions attempt to affect the wealthy and powerful, the hope is that the hardship on the civilians is minimised. Rather than traditional trade embargoes, targeted sanctions focus on financial measures, such as freezing of financial assets and banning of investment. They can also include restrictions on travel, commerce and communication, denial of visas and educational opportunities, cultural and sports boycotts etcetera. For the purpose of this thesis, only targeted sanctions with direct financial implications, like the freezing of assets, are of interest.

¹² David A. Baldwin: “The Sanctions Debate and the Logic of Choice” in *International Security*, winter 1999/2000, Vol. 24, No.3, pages 80-107 (p.102).

¹³ Baldwin, p. 80.

¹⁴ Ströberg, pp. 29.

¹⁵ Ströberg, p. 41.

¹⁶ Thomas G. Weiss: “Sanctions as a Foreign Policy Tool: Weighing Humanitarian Impulses” in *Journal of Peace Research*, Vol. 36, No.5, 1999, pages 499-509 (p. 507).

¹⁷ Targeted sanctions are also referred to as smart sanctions.

2.2.2 Effectiveness of Targeted Sanctions

Targeted sanctions, at least restrictions on travel, communications, and commerce, have been criticised for being too mild and thereby hardly hurt the targets enough to alter their behaviour.¹⁸ Financial sanctions, like the freezing of assets, are recognised as being more effective in the regard of making the target change conduct.

Due to the on-going struggle against terrorism in the aftermath of September 11th, targeted financial sanctions have become increasingly popular since they can be directed not only against states but also against individuals. The Stockholm Process is the third step in an international process aiming to enhance the effectiveness of sanctions.¹⁹ The Stockholm Process focuses on how targeted sanctions can be implemented and monitored optimally. The Stockholm Process underlines that, *inter alia*, sanctions must involve all levels of decision making, and that measures taken must be monitored and followed up throughout the sanctions regime. The final result of the process, the Stockholm Report, was presented to the Security Council of the UN in February 2003.

¹⁸ Weiss, p. 504.

¹⁹ <http://www.smartsanctions.se>, last visited on 7 December 2003 at 4.22 p.m. The previous steps have focused on drawing up models for financial sanctions, arms embargoes and travel and aviation related sanctions. (The Inter-Laken process and the Bonn-Berlin Process.)

3 The UN: Procedure for the Imposition of Sanctions

3.1 Introduction

The UN is entitled to take enforcement actions – both non-military and military – in order to restore the peace, according to Chapter VII of the UN Charter. The sequence of necessary steps for the adoption of economic sanctions under the UN Charter can be summarised as follows:

The first step is that the members of the Security Council, in particular the five permanent member states, officially start to discuss a matter of concern.

Second, the Security Council has to determine whether the perceived crisis fulfils the criteria of Article 39 of the UN Charter. In particular, the Security Council has to conclude whether the situation constitutes a “threat to the peace, breach of the peace or act of aggression” which warrants enforcement actions.

Third, if the Security Council comes to the conclusion that the situation meets the criteria of Article 39 of the UN Charter, it can take non-military actions, such as economic sanctions, under Article 41 of the UN Charter in order to restore international peace.

3.2 The Security Council

The UN was created in 1945 in the aftermath of World War II, with the main purpose to maintain peace by a system of collective security. The UN has the monopoly in enforcement power, subject only to two exceptions: the unilateral or collective right of self-defence under Article 51 and, second, enforcement measures by regional organisations authorised by the Security Council under Article 53 of the UN Charter.

The most important political organ of the UN is the Security Council. The Security Council consists of fifteen member states, of which five are permanent members: China, France, the United Kingdom, the United States and Russia. The other ten members are non-permanent, elected for two years by the General Assembly. The composition of the Security Council has been criticised for being anachronistic and unrepresentative of today’s geopolitical realities.²⁰

²⁰ See e.g. “Binding the Colossus” in *The Economist*, 22 November 22 2003, p. 26.

Each permanent member has a veto on non-procedural questions. The veto has been criticised, at least in the past and in particular during the Cold War, as preventing the Security Council from acting in conflicts in which the permanent members are indirectly involved or have an interest.²¹ For example, the Vietnam War did not involve any activities on the part of the Security Council. Actually, up to 1990, there was not much enforcement activity at all by the Security Council. From 1946 to 1986, economic non-military sanctions were only adopted twice: the economic blockade of Southern Rhodesia (1966-1979) and the arms embargo imposed upon South Africa (1977-1994). After the ending of the Cold War, the activity of the Security Council increased. Only between 1990 and 1995, binding sanctions under Article 41 were taken in eight cases: concerning Iraq, Liberia, former Yugoslavia, Somalia, Libya, Angola, Haiti and Rwanda.

The main purpose of the UN is, as stated above, to maintain international peace and security. The Security Council has the chief responsibility for the realisation of this objective. This task has been conferred to the Security Council from the member states of the UN, according to Article 24(1) of the UN Charter:

In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

However, the mandate of the Security Council is not unlimited. According to Article 24(2) of the UN Charter, the actions of the Security Council must be in accordance with the purposes and principles of the UN. These are the only express limits to the power of the Security Council.²² An international organisation acts illegally if it acts for purposes other than those for which it was created – it is then said to act *ultra vires* which makes the act in question legally void. The purposes of the United Nations are stated in rather wide terms in Article 1 of the UN Charter.²³ In short, the purposes concern the maintenance of international peace and security and peaceful settlements of disputes, the right to self-determination, and the respect for human rights and fundamental freedoms.

Hence, when performing one of the fundamental purposes of the UN – to maintain international peace and security – the Security Council must take due regard to the other essential objectives, as stated in Article 1 of the UN Charter. Concerning non-military enforcement actions, the most important limitation on the actions of the Security Council is the obligation to respect human rights and fundamental freedoms. Opinions differ on to what extent the Security Council must regard human rights when acting. Some argue

²¹ Peter Malanczuk: *Akehurst's Modern Introduction to International Law* (1997), p. 375 and p. 390.

²² Inger Österdahl: *Threat to the Peace: the Interpretation by the Security Council of Article 39 of the UN Charter* (1998) p. 24.

²³ Malanczuk, p. 368.

that the stated aim to maintain international peace and security is superior to all other objectives, including human rights.²⁴ However, the prevailing view seems to be that the Security Council must take due regard to human rights when acting and must weigh the interest of imposing economic sanctions against the interest and rights of the peoples the sanctions hit, but that it is not legally bound to respect human rights in a strict sense.

3.3 Article 39 of the UN Charter

In order to take enforcement actions, the Security Council must, according to Article 39 of the UN Charter, determine whether there is either a threat to the peace, a breach of the peace or an act of aggression:

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

In spite of the word “shall”, the Security Council is never obliged to make a determination under Article 39. However, such a determination is mandatory in order to take enforcement measures, irrespective of whether such measures involve non-military action under Article 41 or military action under Article 42 of the UN Charter. UN sanctions were imposed against Haiti for failure to comply with election results, but not against Myanmar; against Iraq for its invasion and occupation of Kuwait, but not against Indonesia for its similar actions in East Timor. Thus, the action or non-action of the Security Council is not always easy to predict.

The word “peace” refers exclusively to international peace. Strictly interpreted, this would preclude the Security Council to act in cases which do not concern interstate relations. However, the Security Council has a wide discretionary power to determine what may constitute a threat to the peace. Through its practice the Security Council has shown that it takes into consideration as a “threat to the peace” also situations emanating from within one country only. Even a situation which is essentially internal may have or threaten to have international implications. An illustrating example is the case of Rhodesia. The white population of the British colony of Rhodesia unilaterally declared Rhodesia independent in November 1965. This happened without consent granted by the United Kingdom and without reference to the Africans of Rhodesia, who at the time made up 94 % of the population. The Security Council stated that the situation in Rhodesia constituted a threat to international peace. It deemed the situation to fulfil the criteria of Article 39 even though the situation was internal. The purpose of the declaration of independence was to safeguard the dominance – both regarding economical and political matters – of the white minority of the population. There was, in the opinion of the Security Council, a risk that the

²⁴ Jean-Pierre Cot : *La Charte des Nations unies : commentaire article par article* (1991), p. 463.

Rhodesian Africans would react violently, and also a risk that a presumptive fight would spill over into the territory of neighbouring states. If a situation is likely to lead to such results – which also happened in this case – it is not unreasonable to describe it as a threat to international peace. Since World War II, the most common kind of armed conflict has by far been civil war.

A “threat to the peace” is interpreted widely by the Security Council. A threat to the peace includes not only military factors but also non-military factors such as social, political, humanitarian issues.²⁵ Especially gross violations of human rights may constitute violations of the international peace and security in the view of the Security Council.²⁶

When using Article 39, the Security Council has mostly referred to “threat to the peace” whereas the passage “breach of the peace” only has been used rarely.²⁷ The borderline between a “breach to the peace” and an “act of aggression” is difficult to define. The preparatory work of the UN Charter is not very informative. The General Assembly has tried to clarify the meaning of an act of aggression with Resolution 3314 (XXIX), “Definition of Aggression”, of December 14th 1974. It defines aggression as:

(...) the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.

Article 3 of the Resolution enumerates various acts that shall constitute acts of aggression. However, the list is not exhaustive. The Resolution is not binding on the Security Council but may however constitute an important indication on what an act of aggression entails. The passage “act of aggression” has rarely been used to justify enforcement actions.

In order to take enforcement actions, the Security Council is obliged to make a determination under Article 39 of the UN Charter. However, it is free to choose among the different qualifications. Since the question of imposing sanctions is highly political, it is not surprising that the Security Council most commonly has had recourse to the “least” controversial term in Article 39: “threat to the peace.”²⁸

3.4 Article 41 of the UN Charter

Enforcement actions – namely to deal with a threat to the peace, breach of the peace, or act of aggression – can take two forms. Article 41 of the UN Charter provides for non-military enforcement action and Article 42 of the UN Charter provides for military enforcement action. Since the focus of this thesis lies on economic sanctions, only Article 41 is of interest:

²⁵ Österdahl, p. 18.

²⁶ Malanczuk, p. 426.

²⁷ Cot, p. 658.

²⁸ Cot, p. 662.

The Security Council may decide what measures not involving the use of armed forces are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Enforcement measures under Article 41 most often take the form of economic sanctions, which are binding on the member states called upon.²⁹ Actions taken under Article 41 are binding not only on the member states called upon but also on the target state. This means that the target state is precluded from invoking other grounds of international law for the illegality of the economic sanctions.³⁰

²⁹ Malanczuk, p. 389.

³⁰ Malanczuk, p. 390.

4 The EU: Procedure for the Imposition of Sanctions

4.1 Introduction

The imposition of economic sanctions under the law of the EU entails a unique combination of Community and non-Community measures. Two different types of decisions are 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. This inter-pillar structure signals that the imposition of economic sanctions not only is a trade measure but also, to a great extent, a political decision.³¹

The practice regarding the imposition of economic sanctions changed after the introduction of the TEU in the beginning of the 90's. Since 1992, the sequence of necessary steps for the adoption of economic sanctions can be summarised as follows:

The first step consists of the EU, acting through its Council and thereby the Member States, addressing a matter of concern. The EU has on several occasions adopted economic sanctions with the aim to implement, in the Community territory, resolutions previously adopted by the Security Council of the UN.

Second, the Council must reach a common position or agree on a joint action relating to the addressed situation under the second pillar, the CFSP.

Third, 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 Article 60 of the EC Treaty.

³¹ According to Article 6 of the Draft Treaty establishing a Constitution for Europe (*Official Journal C 169, 18/07/2003 P. 0001 – 0105*) the Union shall in the future have one single legal personality. Today, it is mainly the European Community, the first pillar, which possesses the supranational features like law-making power while the other two pillars, CFSP and PJCC, are based on intergovernmental cooperation. The whole so-called pillar structure will be abolished and be replaced by one Union as such. However, no binding decisions regarding the proposals have been taken so far.

4.2 Practice Prior to the Maastricht Treaty

The very nature of sanctions against third countries as trade measures raised at an early stage the question whether their imposition should be regulated within the framework of the common commercial policy or not. The main provision of the common commercial policy is Article 133 EC, which forms part of the exclusive competence of the Community. When the imposition of sanctions first raised the issue of the relevance of the common commercial policy, the Member States strongly rejected any such claim. The Member States held that economic sanctions could not be defined as trade measures under Article 133 EC and that they therefore were free to implement UN resolutions on economic sanctions by national rules according to Article 297 EC.³² This Article states that Member States may take measures in order to carry out obligations it has accepted for the purpose of maintaining peace and security. When using Article 297, the Member States shall consult each other in order to minimise disturbances on the functioning of the common market. This initial national approach was put into practice when the Security Council called for economic sanctions to be imposed against Rhodesia in the middle of the 1960s.³³ The application of the approach gave rise to practical problems since the Member States did not have a coherent approach, and implemented the resolutions by national measures of differing content and at different times.³⁴

In the early 1980s, the initial attitude of the Member States changed and a second pattern emerged. The procedure for the imposition of sanctions changed into the predecessor of the two-stage inter-pillar structure of today. The new procedure consisted of the adoption of a Council regulation under Article 133 EC prior to a decision, by consensus, reached in the framework of the EPC. The EPC was the precursor to the CFSP, which was introduced by the Maastricht Treaty.³⁵ Foreign policy was not formally on the agenda of European integration until the 1970s. During the first two decades of European integration, the Communities primarily focused on internal economic matters. Later, an informal co-operation in foreign and security policy matters, the EPC, gradually developed. The EPC consisted of a framework of objectives and procedures aiming at co-ordinating the foreign policies of the Member States and thereby enhance their influence on the international arena. An intergovernmental agreement was reached on the EPC in the beginning of the 1970s, but the EPC was not formally recognised until 1986, with the passage of the Single European Act. Finally, the joint involvement of the Member States in international affairs was formalised in the second pillar of the EU, the CFSP, by the Maastricht Treaty in 1992.

³² Koutrakos, p. 58.

³³ Security Council Resolution 216 (1965), Security Council Resolution 217 (1965), Security Council Resolution 232 (1966) and Security Council Resolution 253 (1968).

³⁴ Koutrakos, p. 58.

³⁵ The CFSP forms the second of the three pillars the EU is built upon. The other two pillars are the Community pillar and Police and Judicial Co-operation in Criminal Matters, PJCC.

The Member States performed a volte-face compared to their initial approach since they now regarded economic sanctions as within the framework of the common commercial policy. In the view of Koutrakos, the choice of Article 133 EC was underpinned by reasons of practical considerations and political expediency rather than a coherent conception of the ambit of the common commercial policy.³⁶

The intergovernmental procedure regarding the imposition of economic sanctions was, as stated above, formalised by the adoption of the Maastricht Treaty in 1992. This procedure will be investigated in details in the following chapters.

4.3 Joint Action or Common Position

The second pillar of the EU has some distinct intergovernmental features: the Council of Ministers is the dominant institution,³⁷ decisions are as the main rule taken by unanimity,³⁸ the jurisdiction of the European Court of Justice is very limited,³⁹ and the European Parliament have no decision-making power.⁴⁰

The Council is to take the decisions necessary for the implementation of the CFSP. There are different kinds of decisions: common positions or joint actions. Common positions are adopted under Article 15 TEU. They define the approach of the Union to a particular matter of a geographical or thematic matter. Member States shall ensure that their national policies conform to the common positions. The formulation of a common position means that the Member States agree that there is a problem of concern, which falls within the CFSP, and stipulate how they plan to respond to the problem.

The Council is also responsible for the adoption of joint actions under Article 14 TEU. Compared to a common position, a joint action goes further by mapping out in detail – in the form of a binding legal act – the actions that should be taken to resolve a problem. Decisions under Article 14 TEU can therefore be said to form a “harder” form of commitment.⁴¹ Joint actions address specific situations where operational action by the Union is deemed to be required. They lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation. Joint actions commit the Member States in the positions they adopt and in the conduct of their activity.

³⁶ Koutrakos, p. 64.

³⁷ Article 13 TEU.

³⁸ Article 23 TEU.

³⁹ Article 46 TEU.

⁴⁰ Article 21 TEU.

⁴¹ Martti Koskenniemi (ed.): *International Law Aspects of the European Union* (1998), p. 33.

Due to the fact that the CFSP involves delicate political choices, unanimity is the general rule for the adoption of both common positions and joint actions, according to Article 23 TEU. However, the Amsterdam Treaty, which entered into force in 1999, introduced some important exceptions to the general rule of unanimity, which has rendered the decision-making process rather complex. Article 23(1) TEU states the concept of so-called constructive abstention. This means that the Council does not need to be numerically complete in order to take a decision under the CFSP. Each member of the Council has the possibility to abstain from a vote and to make a formal declaration. The declaration ensures that the Member State in question is not obliged to apply the decision even while accepting that it commits the EU, and that the State must not obstruct Union action based on the decision. Further, if the number of abstentions amounts to over one third of the votes, the decision will not be adopted at all. The Council shall act, according to Article 23(2) TEU, by qualified majority when joint actions, common positions, or any other decision based on an already agreed common strategy are being adopted, or when a joint action or common position is being implemented. The interests of the Member States are safeguarded by the same article, which provides that if a member of the Council declares that for “important and stated reasons of national policy”, it intends to oppose the adoption of a qualified majority decision, a vote will not be taken. However, the Council may vote, by qualified majority, to refer the matter to the European Council for decision by unanimity.⁴²

4.4 Community Measures

After the adoption of a common position or a joint action under the CFSP, Community measures need to be taken. The primary requirement for the legality of Community legislation is that it must be properly based upon some specific Treaty article. As described in Chapter 4.2, prior to 1992 and prior to TEU, the Council used Article 133 EC as the legal basis for the imposition of economic sanctions. Economic sanctions were regarded as a kind of trade measure, covered by the common commercial policy and the exclusive competence of the Community. The Maastricht Treaty inserted two new articles in the field of trade embargoes into the EC Treaty: Article 301 and Article 60.

Article 301 EC constitutes an autonomous legal basis for the imposition of economic sanctions. It reads as follows:

⁴² The European Council consists of the Heads of State or Government of the Member States, plus the President of the Commission. They are assisted by the foreign ministers of the Member States and another member of the Commission. The Council of Ministers consists of representatives of each Member State at ministerial level. It is common for the meetings of the Council to be organised by subject-matter and thus different ministers attending.

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

The scope of Article 301 EC is significantly wider than Article 133 EC. For example, transports and development aid to a third country would fall outside the scope of the common commercial policy but are covered by Article 301 EC. Sanctions imposed under Article 301 EC have in most cases concerned the prohibition of imports to and exports from a target country.⁴³ The scope of the trade sanctions varies – in many cases the sanctions have been restricted to very specific products. Exceptions on humanitarian reasons are often provided for in the regulation.

Article 60(1) EC expressly extends the provision of Article 301 EC to the field of financial sanctions:

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 the necessary urgent measures on the movement of capital and on payments as regards the third countries concerned.

The EU has on several occasions issued financial sanctions.⁴⁴ The scope of such regulations can be very wide. Council Regulation 1607/98, adopted under Article 60 and 301 EC, concerning the prohibition of new investment in Serbia provides an illustrating example. Article 1 of the Regulation prohibits the transfer of “cash, liquid, assets, dividends, interest or other income on shares, bonds, debt obligations and any other securities, or amounts derived from an interest in, or the sale or other disposal of, or any other dealing with tangible and intangible assets, including property rights.” A special kind of financial sanctions is the freezing of the target’s assets. As in the case of trade sanctions, also financial sanctions usually provides for exceptions on humanitarian grounds.

Capital can be moved very swiftly. In order to prevent the transfer of capital before a regulation has been adopted, Article 60(2) EC provides for unilateral urgency measures. The Article states that 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. However, the Council may decide that the Member State concerned shall amend or abolish such measures. In any case, both the Commission and the other Member States shall be informed of such unilateral measures at latest by the date of their entry into force.

⁴³ Koutrakos, p. 69.

⁴⁴ Koutrakos, p. 70.

In contrast to common positions and joint actions adopted under the CFSP, the Council adopts regulations under Articles 301 and 60 EC with qualified majority.

5 The Review of Legality of Economic Sanctions under Community Law

5.1 Article 230 EC

5.1.1 *Locus Standi*

According to Article 230 EC, the ECJ has the authority to review the legality of acts adopted by the Community institutions, other than recommendations or opinions. Reviewable acts are not confined to regulations, directives or decisions, defined in Article 249 EC, but all measures taken by the Community institutions designed to have a legal effect, whatever their nature or form.⁴⁵ As stated in the fifth sub-paragraph, Article 230 EC is subject to a strict two-month time limit within which the challenge must be brought in order to be admissible.

Regarding the *locus standi* – namely who is entitled to challenge acts under Article 230 – Member States, the Council and the Commission are privileged applicants. They are allowed to challenge any binding act under Article 230 EC, regardless of whom the addressee of the act is. Since the Nice Treaty, the European Parliament is also included in this group of privileged applicants. According to the pre-Nice wording of the Article, the European Parliament had only *locus standi* if to protect its prerogatives.

Compared with Member States and Community institutions, the *locus standi* of individuals is much more limited. According to the fourth sub-paragraph, review proceedings can be brought only in three types of cases. A natural or legal person has, obviously, standing to challenge a decision addressed to him. The second and third type of cases concern a decision, either in the form of a regulation or a decision addressed to another person, which is of direct and individual concern to the individual. The objective of the provision is to prevent the Community institutions the possibility to exclude an application by an individual against a decision that concerns him directly and individually, merely by choosing the form of a regulation. The choice of form does not change the nature of the measure. In other words, it is the substance and not the label which is important.

Regarding decision addressed to another person, the most important case regarding standing rules for non-privileged applicants is the *Plaumann* case.⁴⁶ The case concerned a decision by the Commission, addressed to the

⁴⁵ Case 22/70 *Commission v. Council* [1971], ECR 263, paragraph 42.

⁴⁶ Case 25/62, *Plaumann & Co. v. Commission* [1963] ECR 95.

German Government, where the Commission denied Germany to suspend the collection of duties on clementines imported from non-member countries. The applicant in the case was an importer of clementines, who sought to contest the legality of the Commission's decision. An important conclusion to be drawn from the case is that the phrase "another person" can include a Member State. The Court stated that "persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed." This is often referred to as the *Plaumann* test.⁴⁷ The applicant in the *Plaumann* case failed the test because he, according to the Court, practised a commercial activity, which could be carried out by any person at any time. The test has been criticised for being unduly restrictive.⁴⁸ The applicant was denied being individually concerned since he operated in a trade that could be engaged in by any other person. This interpretation of the *Plaumann* test makes it virtually impossible for most applicants to succeed. The existence of a particular factual injury to the applicant will usually not be regarded as relevant.⁴⁹

Many of the Community's policies, not only economic sanctions, are implemented by directly applicable regulations, which may have wide-ranging and adverse effects on individuals. Non-privileged applicants who have tried to challenge regulations have not been very successful.⁵⁰ There is said to be two tests to determine whether a non-privileged applicant is allowed to challenge a regulation: the closed category test and the abstract terminology test. The abstract terminology test is stricter than the closed category test. This stricter test has, until recently, been the general rule applied by the Court.

In order to decide whether an applicant has standing to challenge a regulation, the Court first determines whether the regulation in question is "true" or not. A "true" regulation, defined in Article 249 EC, is a measure of general application, i.e. normative. It is intended to apply to objectively determined situations and to produce legal effects on categories of persons viewed abstractly and in their entirety. Hence, a "true" regulation is the opposite of a decision, which is of individual concern.

The abstract terminology test was put into practice in the *Calpac* case.⁵¹ The case concerned production aid granted to producers of pears. According to a previous regulation, production aid was calculated on the basis of the

⁴⁷ See e.g. Ulf Bernitz and Anders Kjellgren: *Europarättens grunder* (2002) p. 143.

⁴⁸ Paul Craig and Gráinne de Búrca: *EU Law, Text, Cases and Materials* (2003), pp. 489-492.

⁴⁹ Craig and de Búrca, p. 503.

⁵⁰ Craig and de Búrca, p. 493.

⁵¹ Cases 789 and 790/79, *Calpac SpA and Società Emiliana Lavorazione Frutta SpA v. Commission* [1980] ECR 1949.

average production over the three latest years. The applicants, i.e. the producers, challenged the new type of calculation used by the Commission. The Commission had based its calculation on one marketing year, in which production was atypically low. The applicants held themselves to be a very closed and definable group, who were known to, or identifiable by, the Commission. However, the Court held that the measure applied to objectively determined situations and produced legal effects with regard to categories of person described in a generalised and abstract manner. According to the Court, a regulation can be “true” even though it is possible to determine the number or even the identity of the persons that are affected by it.⁵² The abstract terminology test is criticised by Craig and de Búrca. They mean that it is always possible to draft norms in a general and abstract manner, which precludes individuals affected by it to challenge the norm. They also underline that many “true” regulations may be applicable only a short period of time and applicable only to a very limited group, which differ them from ordinary legislative measures.⁵³

The closed category test applies only in cases that deal with a completed set of past events, and where the regulation in question is related to a fixed and closed category of traders. The word “closed” implies that the disputed regulation applies only to past events, and do not have any future impact.⁵⁴

To summarise earlier case law, the Court has been very reluctant to accord natural or legal persons the right to challenge regulations. However, there are indications that the ECJ and CFI are starting to view matters differently. According to later case law, a regulation might be “true” but still of individual concern to certain applicants. Under the earlier approach, the finding that a norm was a true regulation effectively ruled out standing for all applicants. However, even according to the new approach, the applicant must show both individual and direct concern, as stated in Article 230, fourth sub-paragraph.

In the view of the Court, a measure is of direct concern to an applicant where it directly affects the legal situation of him and leaves no discretion to the addressees of the measure, who are entrusted with its implementation.⁵⁵ The implementation must be automatic and result from Community rules without the application of other intermediate rules.

In order to show individual concern, the Court uses the criteria set out in the *Plaumann* case. The applicant must show that he has attributes or characteristics which distinguish him from all other persons and mark him out.

⁵² Cases 789 and 790/79, *Calpac SpA and Società Emiliana Lavorazione Frutta SpA v. Commission* [1980] ECR 1949, paragraph 9.

⁵³ Craig and de Búrca, p. 494.

⁵⁴ Cases 41-44/70, *International Fruit Company BV v. Commission* [1971] ECR 411.

⁵⁵ Craig and de Búrca, p. 518.

Advocate General Jacobs has argued for a new kind of *Plaumann* test in his Opinion in the *UPA* case.⁵⁶ The case concerned an association of farmers, UPA, which sought the annulment of a regulation. The CFI dismissed the application because the members of the association were not individually concerned. The applicants appealed to the ECJ, arguing *inter alia* that they were denied effective judicial protection since they could not readily attack the measure via Article 234 EC. Advocate General Jacobs argued in his Opinion for a new way of proofing individual concern, according to which an applicant would have standing if the measure had, or was liable to have, a substantial adverse affect on his or her interests.⁵⁷ However, the Court did not choose to follow his approach in its final findings, and dismissed the appeal. The Court held that an interpretation in the light of the principle of effective judicial interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Courts. The ECJ held that it is indeed possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty. However, in that case the Court held it would be necessary for the Member States, in accordance with Article 48 TEU, to reform the system currently in force. The Court found that the CFI did not err in law when it declared the appellant's application inadmissible without examining whether, in the particular case, there was a remedy before a national court enabling the validity of the contested regulation to be examined.⁵⁸

Economic sanctions in the traditional sense are normally directed against states. According to the case law of the Court, states, which are not Member States of the EU, are regarded as legal persons, when determining possible *locus standi*.⁵⁹ This means that a state against which sanctions are directed can challenge the measures under Article 230, but only if it can show that the regulation in question is of direct and individual concern to the state. Theoretically, a target state could challenge an economic sanction imposed against it, but this has never occurred so far. It is noteworthy that the target state in any case cannot challenge the Security Council resolution on which the regulation is based. The UN Charter does not provide any possibilities for review of UN acts.

Targeted sanctions are directed against individuals. It follows that the individuals in question must be identified in some way. This can, for example, be done by an annexed list, based on the judgements of the UN, as in Case T-306/01, referred to in Chapter 7.3. Individuals against whom sanctions are directed have *locus standi* to challenge the same under

⁵⁶ Case C-50/00, *Unión de Pequeños Agricultores v. Council* [2002].

⁵⁷ Case C-50/00, Opinion of Mr Advocate General Jacobs delivered on 21 March 2002, paragraph 102(4).

⁵⁸ Case C-50/00, *Unión de Pequeños Agricultores v. Council*, paragraph 45.

⁵⁹ Case C-298/89, *Gibraltar v. Council* [1993] ECR I-3605.

Community law, since they are without doubt both individually and directly concerned.

5.1.2 Grounds of Review

Once the Court has determined a claim admissible, the case will be decided on the merits. Article 230 EC provides four grounds for annulment:

- Lack of competence
- Infringement of an essential procedural requirement
- Infringement of the Treaty or any rule of law relating to its application
- Misuse of power

Lack of competence is equivalent to the concept of *ultra vires*. The Community institutions must be able to point to a power within the Treaty that authorises their action. This ground for review has been used rarely.⁶⁰ This is due, *inter alia*, to the fact the Court allows the institutions some latitude in their choice of legal base and their scope for action under that base.

Institutions must follow the correct procedures when enacting binding measures. Rules on procedures are found in the EC Treaty as well as in secondary legislation. However, not all failures to comply with procedural requirements are regarded as grounds for annulment. Only the infringements of essential requirements are taken into consideration. The Court determines which requirements that should be deemed essential. For example, according to Article 253 EC, all secondary legislation must state the reasons on which they are based. The Court has held Article 253 EC to be essential.⁶¹

The third ground for review – infringement of the Treaty or of any rule of law relating to its application – has been used in several cases.⁶² Because of the breadth of the concept of “any rule of law relating to the [treaty’s] application” and hence the vulnerability of the institutions on this matter, the ECJ has held that where the Community legislature has a discretion to act in a complex situation, the Court in reviewing the exercise of such a power, must confine itself to examining whether it contains a manifest error or constitutes a misuse of power.⁶³

The third ground of review covers not only explicit provisions but also general principles of Community law, e.g. equality and proportionality. Human rights as expressed in the ECHR are also part of the general

⁶⁰ Craig and de Búrca, p. 533.

⁶¹ See Case 24/62, *Germany v. Commission* [1963] ECR 63.

⁶² Craig and de Búrca, p. 504.

⁶³ See case 138/79, *Roquette Frères v. Council* [1980] ECR 3333, paragraph 25 and case C-122/94, *Commission v. Council* [1996] ECR I-881, paragraph 18.

principles of Community law and can hence form a ground for annulment. The status of human rights in Community law has developed over the years. Since the EU originally focused on economic co-operation and collaboration, the ECJ was initially very reluctant to recognise human rights as a part of Community law.⁶⁴ However, this view has changed – partly as a result of the challenge to the supremacy of Community law from some Member States. Especially Germany and Italy – countries with strong constitutional protection for fundamental rights - were not prepared to accept that infringements of human rights could be justified under Community law.⁶⁵ The turning point came in the case *Stauder* where the Court stated that fundamental human rights were enshrined in the general principles of Community law and protected by the Court.⁶⁶ The concept of fundamental rights was further developed in the *Internationale Handelsgesellschaft* case where the Court stated that rights “are inspired by the constitutional traditions common to the Member States.”⁶⁷ In a later case, *Nold*, the Court not only recognized the influence of the Member States’ constitutions but also the influence of international treaties on human rights.⁶⁸ The Court has expressively investigated some of the Member States’ constitutions as well as the ECHR.⁶⁹ It is still rather uncertain how many Member States that must have constitutions protecting a particular fundamental right in order to make the Court regard it as a general principle of law common to the Member States. Craig and de Búrca are of the opinion that the Court cannot derive a specific fundamental principle if it is only recognised by very few Member States.⁷⁰

The jurisprudence concerning fundamental rights, as developed over the years, is summarised in Article 6 TEU.⁷¹ Article 6(2) TEU states that the EU shall respect fundamental rights as general principles of Community law, as they are guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States. Article 6(1) TEU explicitly states that human rights and fundamental freedoms belong to founding principles of the Union. A State which wants to become a Member of the EU must respect these principles according to Article 49 TEU.

As shown above, the most important of the treaties on human rights that the Court uses as an inspiration, is the ECHR, to which all the Member States are signatories. The Court has previously stated that the Community itself

⁶⁴ See Case 1/58, *Friedrich Stork & Cie v. High Authority of the European Coal and Steel Community* [1959] ECR 17, Cases 36, 37, 38 and 40/59, *Geitling v. High Authority* [1960] ECR 423 for illustrating examples.

⁶⁵ Concerning Germany, see Craig and de Búrca pp. 289. Concerning Italy, see Craig and de Búrca pp. 298.

⁶⁶ Case 29/69, *Stauder v. City of Ulm* [1969] ECR 419.

⁶⁷ Case 11/70, *Internationale Handelsgesellschaft GmbH v. Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125.

⁶⁸ Case 4/73, *Nold v. Commission* [1974] ECR 491.

⁶⁹ Case 44/79, *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727.

⁷⁰ Craig and de Búrca, p. 328.

⁷¹ Craig and de Búrca, p. 318.

cannot accede the ECHR due to lack of competence.⁷² However, this may change in the future. According to Article 7(2) of the Draft Treaty establishing a Constitution for Europe, the Union shall seek accession to the ECHR.⁷³ The Draft Treaty does also provide a Charter of Fundamental Rights. However, no agreement on the Draft Treaty has been made so far.

Thus, at this moment, the provisions of the ECHR do not directly bind the Community. The general principles and rights of the Community are of an autonomous nature – the constitutions of the Member States and the ECHR are merely regarded as sources of inspiration. Fundamental human rights have been invoked in numerous cases to challenge the validity of Community legislation, but the applicants have rarely succeeded.⁷⁴ To summarise, due to the lack of a determined status for the Charter, the base for the protection of human rights within the European Union is the case law of the Court and Article 6 TEU.

The concept of misuse of powers is equivalent to the French *détournement de pouvoir*. This ground for annulment has been invoked rarely.⁷⁵

To summarise, four broad conditions must be satisfied before an act can successfully be challenged. The act has to be of a kind which is open to challenge at all; the institution or person making the challenge must have standing to do so; there must be a ground for review; and the challenge must be brought within the time limit indicated in Article 230(5) EC.

If an annulment action is successful, the act in question is declared void under Article 231 EC. A measure may be declared void in part only. If an annulment action is successful, the plaintiff can seek compensation under Article 288 EC.

5.2 Indirect Review under Article 234 EC

Preliminary rulings can be used as a method of indirect challenge to the legality of Community acts. Article 234(1) EC allows national courts to refer to the ECJ questions concerning the validity and interpretation of acts of the institutions of the Community. The Article facilitates the situation for non-privileged applicants, not only since it makes it possible to circumvent the strict *locus standi* rules under Article 230 EC but also since there is no strict time limit, as in Article 230 EC.

⁷² Opinion 2/94 on Accession of the European Communities to the European Human Rights Convention [1996] ECR I-1759.

⁷³ Draft Treaty establishing a Constitution for Europe, *Official Journal C 169*, 18/07/2003 p. 0001 – 0105.

⁷⁴ Stephen Wetherill and Paul Beaumont: *EC Law – the essential guide to the legal workings of the European Community*, (1995) p. 256.

⁷⁵ Craig and de Búrca, pp. 536-537.

It is for the national court to decide whether to refer the matter to the ECJ. The national court has no jurisdiction to invalidate a Community norm.⁷⁶ According to Article 234(3), a court against whose decision there is no judicial remedy under national law shall bring the matter before the ECJ. For other courts referral is discretionary.

There are no need to refer a question to the ECJ where

- a) the question of EC law is irrelevant; or
- b) the provision has already been interpreted by the ECJ; or
- c) the correct application is so obvious as to leave no scope for reasonable doubt. This matter must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise, and the risk of divergences in judicial decisions within the Community.⁷⁷

5.3 Interpretation of EC Sanctions Consequential to UN Resolutions

Economic sanctions, implemented by measures taken under Articles 301 and 60 EC, are Community measures designed to have legal effects and are hence reviewable under Article 230 EC. The Community forms the first pillar of the EU. The Community pillar generally concerns economic issues and co-operation in the economic field. Economic sanctions are unique in that matter that they are founded on common positions or joint actions, taken by unanimity, under the second intergovernmental pillar, the CFSP. In ordinary cases, the ECJ has no jurisdiction over measures taken under the framework of the CFSP. However, in the case of economic sanctions, the ECJ is entitled to indirectly review such measures since they are implemented in the legal order by Community measures. In most cases, economic sanctions are implemented by the Community as a mere consequence of measures taken by the Security Council. Hence, the Court is also, indirectly, given the capacity to review Security Council resolutions. To summarise, the reliance of Community instruments on political decisions adopted beyond the Community legal framework by no means undermines its status as a Community act, and hence the judicial control to be exercised by the ECJ. However, it can be asked whether the interpretation method of the Court changes when reviewing these kinds of acts.

Clearly, the application of the Treaty and Community acts depends to a large extent on the interpretation which is given to them. The Court is the only interpreter of Community law. The Court has not one consistent theory of interpretation, but rather uses a combination of different methods when interpreting. Usually, the Court starts off with a linguistic or literal interpretation, taking due regard to both the language and grammar. It then

⁷⁶ Case 314/85, *Foto-Frost (Firma) v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199, paragraph 20.

⁷⁷ Josephine Steiner and Lorna Woods: *Textbook on EC Law* (1996), p. 476.

continues with a systematic or contextual interpretation.⁷⁸ This means that the provisions in question are interpreted in relation to the context, i.e. in relation to their placing in the Treaty and in accordance with the Community law in general. The contextual approach is often used together with the teleological method of interpretation.⁷⁹ When using this method, the Court focuses on the purpose and aim of the provision.

In the *Bosphorus* case, the interpretation of a Community regulation implementing Security Council measures was addressed.⁸⁰ The Security Council had adopted several resolutions which had been implemented in the Community legal order by Regulation 990/1993.⁸¹ The measures had been taken in order to respond to the conflict in former Yugoslavia. Article 8 of Regulation 990 provided for the impoundment of certain means of transport, e.g. aircraft, if under Yugoslavian ownership. This Article corresponded to paragraph 24 of the Security Council Resolution 820 (1993). The interpretative issue at stake, brought to the Court by the Supreme Court of Ireland under Article 234 EC, was the meaning to be given to the notion “majority or controlling interest” of an aircraft.

The aircraft in question remained in the hands of a Yugoslav airline’s ownership but the complete control of the management was transferred, by a lease agreement, to a Turkish company, Bosphorus Airways. The lease agreement had been entered into before the entry into force of the Regulation in good faith and with no intentions to circumvent the sanctions.

The Court took a purposive approach to the interpretation of the Regulation, considering the significance of the goal (international peace and security), and came to the conclusion that the impounding of the aircraft was lawful. The aim of the contested provision of the Regulation was, according to the Court, to give effect “to the decision of the Community and its Member States, meeting within the framework of political co-operation, to have recourse to a Community instrument to implement in the Community certain aspects of sanctions taken against the Federal Republic of Yugoslavia by the Security Council of the United Nations ...”.⁸² Hence, when interpreting, the Court took due regard to the Security Council Resolution on which the Community measure was based.

However, not everyone agree on the conclusions of the Court in the *Bosphorus* case, even though the Court paid attention to the aims of the underlying Security Council Resolution. Canor believes that the Court should have come to the conclusion that Regulation 990/1993, and hence

⁷⁸ Bernitz and Kjellgren p. 46.

⁷⁹ Telos: greek for purpose, aim.

⁸⁰ Case C-84/95, *Bosphorus Hava Yollari ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland and the Attorney General*, [1996] ECR I-3953.

⁸¹ Security Council Resolution 713 (1991), Security Council Resolution 752 (1992), Security Council Resolution 787 (1992) and Security Council Resolution 820 (1993).

⁸² Case C-84/95, *Bosphorus Hava Yollari ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland and the Attorney General*, [1996] ECR I-3953, paragraph 13.

also Resolution 820(1993), violated the property rights of the Bosphorus Airways protected in the Community legal order and that the ECJ should have declared the Regulation void.

According to Canor, the reading of the underlying Resolution gives that it did not intend to harm third parties' right where it was possible to avoid such consequences without impairing the aim of the sanctions. The lease of the aircraft neither strengthened Yugoslavia nor harmed the application of the sanctions. The only interest which the Yugoslav national airline had during the continuance of the term granted by the lease agreement was the right to receive the monthly rental payable by Bosphorus. However, given the fact that in the application of the sanctions this rent due under the lease was paid into blocked accounts, and thus not to the Yugoslav airline, no Yugoslav nationals had any opportunity to receive any income from it. Canor is of the opinion that the interpretation by the Court does not advance the purpose of the sanctions, and hence that the Resolution, and thereby also the Regulation, did not intend to cover the factual circumstances in the *Bosphorus* case.⁸³ Thus, even though the Court arguably should take – and takes – account of Security Council resolutions when interpreting Community measures implementing them, it is possible to come to different conclusions when reading the text.

Another question of interest regarding the interpretation of sanctions implemented in the Community order by regulations, are the impact on the interpretation by UN Sanctions Committees. In sanctions cases, the UN usually sets up a committee, consisting of representatives of all the members of the Security Council and charged with the supervision of the enforcement of the sanctions.⁸⁴ Practice has developed in such a way that States often seek the Committee's opinion of the consistency with the UN resolutions of controversial aspects of their domestic measures. This happened for example in the *Bosphorus* case where the Yugoslav Sanctions Committee⁸⁵ held that, pursuant to a specific request of the Irish Minister for Transport, that the decision to impound an aircraft owned by a Yugoslav undertaking, but leased to a Turkish one, was compatible with the provisions of the Security Council Resolution 820 (1993). But do the Committee's rulings have any binding legal force? According to Advocate General Jacob's opinion, due regard should be given to the opinion of the Committee. However, he questions that the Committee's opinion could be regarded as binding since it is not a judicial body. The effectiveness of the decisions of

⁸³ Iris Canor: "Can two walk together except they be agreed? The relationship between international law and European law: The incorporation of United Nations Sanctions against Yugoslavia into European community law through the perspective of the European court of justice", in *Common Market Law Review*, Vol. 35, 1998, pages 137-187 (pp. 159-161).

⁸⁴ R. Pavoni, "UN Sanctions in EU and National Law: The Centro-Com Case" in *International and Comparative Law Quarterly* (1999), pages 582-612 (p. 604).

⁸⁵ Established by Security Council Resolution 724 (1991).

Committees depends in large part on the willingness of the members of the UN to accept them.⁸⁶

⁸⁶ Case C-84/95, *Bosphorus Hava Yollari ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland and the Attorney General*, Opinion of Mr Advocate General Jacobs delivered on 30 April 1996, paragraph 46.

6 Implementation and Interaction

6.1 Implementation of Security Council Resolutions

The Security Council takes the political decision to impose economic sanctions, but the further implementation measures are necessary. Decisions on the imposition of economic sanctions are binding on the members of the UN. The binding character of Security Council decisions is stated in Article 25 of the UN Charter, which is regarded as one of the most important Articles of the UN Charter⁸⁷. Article 25 reads:

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

UN sanctions resolutions are acknowledged as non self-executing international rules. This implies that specific legislation must be enacted which aim at provide the legal order with the necessary norms, since non self-executing rules do not automatically become part of municipal law.⁸⁸ The main reason why sanctions resolutions are regarded as non self-executing is because criminal provisions must be established for the prosecution and punishment of infringements of the sanctions. Some also underline the vagueness and indeterminacy of the sanctions and that they, by themselves, cannot give rise to rights directly enforceable by individuals before domestic courts.⁸⁹

6.1.1 The National Level

Member states of the UN implements resolutions by enacting national laws or decrees. When issuing economic sanctions, the UN usually sets up a committee, consisting of representatives of all the members of the Security Council. The Committee is charged with the supervision of the enforcement of the sanctions.⁹⁰ Practice has developed in such a way that States often seek the Committee's opinion of the consistency with the UN resolutions of controversial aspects of their domestic measures.

Since sanctions are regarded as non self-executive measures and hence must be implemented into national law in order to get effect, the traditional difference between monist and dualist systems is not of relevance in this

⁸⁷ Cot, p. 471.

⁸⁸ Pavoni, p. 584.

⁸⁹ Pavoni, p. 584.

⁹⁰ Pavoni, p. 604

case. Different countries show different attitudes with respect to the implementation of international law in their municipal law. Traditionally, these attitudes have been expressed as either monist or dualist systems. According to the dualist idea, international norms have no legal effect and are unenforceable without their incorporation into national law. The United Kingdom and Italy are considered to be two of the most notable examples of dualist legal systems. However, in the case of sanctions – due to their non self-executing nature – also states generally regarded as monist-inclined, e.g. France, must enact specific and detailed legislation in order to give effect to the sanctions.

6.1.2 The Community Level

Economic sanctions, adopted under Article 301 and Article 60 EC, are in most cases issued in the form of regulations. According to Article 254 EC, regulations must be published in the Official Journal of the European Community. They come into force on the date specified in the particular regulation or, if no such date is specified, on the twentieth date following the publication. Regulations are binding upon all Member States.

In general, the normal procedure for norms made by an international body is that they must enter a national legal system. This can be accomplished either by the national system transforming the measure into national law, or by a shorter national act which adopts the relevant international act. However, Community regulations are directly applicable. This signifies that regulations form part of the national legal systems of the Member States automatically, without the need for separate national legal measures. In fact, the Member States are prohibited to pass any measure that alleges to transform a Community regulation into national law.⁹¹ However, the sanctions regulations leave the Member States free to determine the penalties for any breach.

6.2 The Role of the EU in the Implementation Phase

According to Article 25 of the UN Charter, the members of the UN are bound to carry out decisions on the imposition of economic sanctions taken by the Security Council. The states implement the resolutions by the adoption of national law. The EU has on several occasions implemented Security Council resolutions, even though the Union is not a member of the UN. Is also the EU under a legal obligation to implement Security Council resolutions?

According to Article 281 EC, the EC has legal personality. It is generally acknowledged that this article intends to confer international legal

⁹¹ Case C-34/73, *Variola v. Amministrazione delle Finanze* [1973] ECR 981, paragraph 15.

personality as well as international capacity, even though it does not expressly refer to legal personality on the international plane.⁹² A subject of international law is able to avail itself of all means of international action: e.g. the right to conclude treaties. The possible international legal personality of the EU has been more controversial. According to Article 6 of the Draft Treaty establishing a Constitution for Europe, the Union shall in the future have one single legal personality.⁹³ The European Convention believes that the explicit conferral of legal personality on the Union will heighten its profile on the world stage. However, no binding decisions regarding the proposals have been taken so far.

However, even though at least the Community enjoys legal personality, the Union cannot join the UN. The UN is only open to nation-states according to Article 4 of the UN Charter, and the Union is hence precluded from membership. According to Article 25 of the UN Charter, only members are obligated to implement Security Council decisions. Consequently, the EU is not legally bound by Security Council resolutions on economic sanctions. Nonetheless, several Security Council resolutions have called upon non-member states and even international organisations to implement them.⁹⁴ This might perhaps be interpreted as a tacit acceptance that also the Community is considered as an appropriate addressee of the resolutions. Koutrakos even argues that the Community might be under an indirect legal duty to implement Security Council resolutions in so far as they cover areas which give rise to exclusive Community competence.⁹⁵ Anyhow, legally bound or not, it is a fact that the EU has – in particular since the beginning of the 1990s – implemented Security Council resolutions. The Community measures have been merely consequential to those of the Security Council.⁹⁶ The EU is firmly involved in the implementation procedure of Security Council resolutions even though the Union is not a member of the UN and hence not legally bound by the decisions of the Security Council.

6.3 Interaction between the UN, the EU and its Member States

Security Council resolutions are binding upon the states which are members of the UN. They must implement the resolutions into their national legal order. Normally, this procedure would be described as a dual legal interaction between international law (the Security Council resolution) and domestic law (national implementation measures). However, when the states involved not only are members of the UN but also members of the

⁹² Vincent Kronenberger (ed.): *The European Union and the International Legal Order: Discord or Harmony* (2001), p. 10.

⁹³ Draft Treaty establishing a Constitution for Europe, Official Journal C 169, 18/07/2003 p. 0001 – 0105.

⁹⁴ See for example: Security Council Resolution 687 (1991), Security Council Resolution 1199 (1998), and Security Council Resolution 1244 (1999).

⁹⁵ Koutrakos, pp. 84-85.

⁹⁶ Pavoni, pp. 586-587.

EU, a third legal layer, Community law, is added. According to Article 25 of the UN Charter, the members of the UN are bound to carry out decisions on the imposition of economic sanctions taken by the Security Council. On the other hand, the principle of the supremacy of Community law over national law is a fundamental and long-established principle in the legal order of the EU.⁹⁷ How are clashes between international law and Community law solved?

National courts have made preliminary references to the ECJ on several occasions concerning aspects of domestic rules implementing embargo decision taken by the UN. One of the first cases was the *Ebony Maritime* case.⁹⁸ In an effort to restrict the hostilities in the former Yugoslavia in the beginning of the 90s, the Security Council adopted several resolutions, imposing economic sanctions. The UN Resolution 820 (1993) was implemented both by a Community measure, Regulation 990/93, and by means of national law.

The case concerned a decision taken by Italian authorities regarding the forfeiture of a ship together with its cargo. The vessel in question was forfeited since it was found to be in violation of the Yugoslav embargo. The company owning the cargo contested the legality of the decision of the Italian authorities, arguing that the relevant Regulation implementing the Security Council Resolution did only provide for the forfeiture of means of transport, not the freight. Such a power was however granted by Italian law, Article 2 of Decree-Law no. 144/93, pursuant to a similar provision in paragraph 25 of Resolution 820. The Italian court decided to ask the ECJ whether the Italian rule was compatible with Community law. However, it appeared that the Italian language version of Regulation 990/93 was affected by a material error – the other language versions mentioned the possibility to forfeit both the means of transport and cargoes. Thus, ECJ simply declared the Italian rule to be compatible with the relevant regulation in accordance with the principle of uniform interpretation. Community instruments shall be interpreted and applied in the light of the versions existing in all official languages. Hence, direct discussions on the EC embargo legislation and its relationship with international and national law was avoided.

The issue of interaction was investigated in another dispute, the *Centro-Com* case, which is so far the principal case concerning a clash between different implementation measures.⁹⁹ As both the *Ebony Maritime* case and the *Bosphorus* case referred to earlier, also this dispute had its roots in the

⁹⁷ See Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR I, Case 6/64 *Flaminio Costa v. ENEL* [1964] ECR 585.

⁹⁸ Case C-177/95, *Ebony Maritime SA and Loten Navigation Co. Ltd v. Prefetto della Provincia di Brindisi and Others* [1997] ECR I-1111.

⁹⁹ Case C-124/95 *The Queen, ex parte Centro-Com Srl v. HM Treasury and Bank of England*, [1997] ECR I-81.

conflict in the former Yugoslavia.¹⁰⁰ The Security Council had adopted Resolution 757 (1992), which prohibited almost all exports to Serbia and Montenegro, with the exception of certain essential goods such as food and medical supplies. Such food and medical supplies had to be notified to a Sanctions Committee established by a previous Resolution.¹⁰¹ The Community implemented the Resolution by Council Regulation 1432/92, which prohibited trade between the Community and the Republics of Serbia and Montenegro. Also the Regulation contained an exception clause on humanitarian grounds, subject to a prior authorisation issued by the competent authorities of the Member States. United Kingdom implemented Resolution 757 by Order 1992.¹⁰² Article 10 of the Order provided that payments to Serbia or Montenegro were forbidden, except with permission granted by or on the behalf of the Treasury. The British legislature interpreted the humanitarian exceptions clause of the Security Council Resolution as being merely optional, not compulsory.¹⁰³

Centro-Com, an Italian company, had obtained both the approval of the UN Sanctions Committee and the authorisation of Italian authorities to export pharmaceutical goods from Italy to Montenegro, in accordance with the humanitarian exception clauses. Payment for the medical goods was to be debited to a bank account held by the National Bank of Yugoslavia with Barclays Bank, London. In accordance with Order 1992, Barclays Bank applied for permission to debit the account. The application was made to the Bank of England, which acted on behalf of the Treasury.

After several approvals of requests from Barclays Bank, a change of policy occurred. Pursuant to reports of abuse of the authorisation procedure followed by the Sanctions Committee, such as false description of goods, the Treasury decided to allow payment from Serbian and Montenegrin funds held in United Kingdom only in cases where the exports actually were made from United Kingdom. The main reason for the new policy was to enable the United Kingdom authorities to exercise effective control so as to ensure that the goods exported actually matched their description and that no accounts were debited for payments for non-medical or non-humanitarian purposes. Centro-Com challenged the refusal to transfer funds from the Yugoslav account since it claimed that its request to Barclays Bank was perfectly lawful under international law, since Resolution 757 explicitly exempted from the trade embargo supplies and payments intended strictly for medical purposes

The Court of Appeal referred two questions to the ECJ:

¹⁰⁰ Case C-177/95, *Ebony Maritime SA and Loten Navigation Co. Ltd v. Prefetto della Provincia di Brindisi and Others* [1997] ECR I-1111 and case C-84/95, *Bosphorus Hava Yollari ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland and the Attorney General*

¹⁰¹ Security Council Resolution 724 (1991).

¹⁰² The Serbia and Montenegro (United Nations Sanctions) Order 1992, adopted on 4 June 1992.

¹⁰³ Pavoni, p. 602.

Whether the British measures were compatible with the common commercial policy and in particular Article 133 EC and Regulation 1432/92

Whether the answer to the first question was affected by Article 307 EC

Regarding the first question, the Court stated that Member States cannot treat national measures whose effect is to prevent or restrict the export of certain products as falling outside the scope of the common commercial policy on the ground that they have foreign and security objectives. Measures of foreign and security policy, adopted in the exercise of the Member States national competence, must respect the provisions adopted by the Community in the field of the common commercial policy, under Article 133 EC. The Court further held that the British measures were equivalent to a quantitative restriction since exports were prevented.

The United Kingdom tried to justify the measures on grounds of public security. The British authorities held that the requirement was necessary in order to ensure that the sanctions imposed by the Security Council were applied effectively. The ECJ held that the effective application of sanctions could be ensured by other Member States' authorisation procedures. It concluded that the Member States must place trust in each other as far as concerns checks made by the competent authorities of the Member State from which the products in questions are exported. The Court also held that a Member State can secure the protection of its interests by measures less restrictive than a requirement that all goods should be exported from its territory and that Member States should take resort to collaboration procedures, established under Community law, between national administrative authorities.

The second question was whether national measures which proved to be contrary to the common commercial policy nevertheless would be justified under Article 307, which reads:

The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the Member States.

The ECJ held that such measures could be justified only in so far as they were necessary in order to perform the obligations imposed by the UN Charter and the Security Council Resolution. The Court ruled that it was for the national court to determine whether the national measure proved to be necessary or not. However, the Court underlined that “when an international agreement allows, but does not require, a Member State to adopt a measure which appears to be contrary to Community law, the Member State must refrain from adopting such a measure.”¹⁰⁴ Due to the bankruptcy of Centro-Com, the case was never reintroduced before the national court. Hence, we are, as Pavoni puts it, “unfortunately deprived of judicial epilogue of the Centro-Com affair”.¹⁰⁵

To summarise: ECJ did not see the *Centro-Com* case as forming a conflict between international law and the obligations under Article 25 of the UN Charter on one hand and the Community law on the other hand. However, it can be concluded from the case that if a conflict would occur, the Member States’ obligations under the UN Charter would prevail over Community law in accordance with Article 307 EC.

¹⁰⁴ Case C-124/95 *The Queen, ex parte Centro-Com Srl v. HM Treasury and Bank of England*, [1997] ECR I-81, paragraph 60.

¹⁰⁵ Pavoni, p. 611, note 88.

7 Analysis

7.1 Introduction

In the previous Chapters, I have investigated and presented the interaction between the UN, the EU, and the Member States regarding the impositions of economic sanctions. In this Chapter, I first analyse the possible advantages and disadvantages of the self-imposed involvement of the EU in the implementation of Security Council resolutions. After that, I turn to the question whether the established model of interaction and co-operation between the UN, the EU and the Member States is applicable also when it comes to targeted sanctions, and I make an assessment of the scope of Article 301 EC. The discussion on targeted sanctions starts with the presentation of case T-306/01 which deals with exactly these problems and which is now pending in the CFI. Finally, in Chapter 7.4, I summarise the thesis and my conclusions.

7.2 Economic Sanctions

7.2.1 The EU Involvement in the Implementation of UN Sanctions

Through the establishment of the CFSP in 1992, the Member States have enhanced the coordination of their actions in international organisations, in order to give them a greater impact. The Member States, together with the Commission, regularly coordinate their actions at the UN. The Union has stated that working through the UN is an EU priority.¹⁰⁶

The implementation of Security Council resolutions regarding economic sanctions have gradually been transferred from the national level to the EU level. For example, in Sweden, implementation of international sanctions is by means of the International Sanctions Act (SFS 1996:95). In accordance with the rules on delegation of legislative power in Chapter 8 of the Instrument of Government, the government may pass ordinances implementing these sanctions, with the subsequent approval of the parliament. However, in accordance with the *Variola* case (see Chapter 6.1), there are no implementing Swedish rules as far as the material content of directly effective EC regulations are concerned.¹⁰⁷ Section 8 of the International Sanctions Act criminalises violations of these regulations.

¹⁰⁶ Website: European Union @ United Nations. <http://www.europa-eu-un.org/index.asp?lg=5>, last visited on 7 December 2003 at 4.22 p.m.

¹⁰⁷ Case 34/73, *Variola v. Amministrazione delle Finanze* [1973] ECR 981.

7.2.1.1 Advantages

The implementation process, either by national measures or by Community regulations, entails a transformation act, where international law changes into binding and enforceable law. “Weak” international law converts into “solid” law, either national or Community law. Are there any advantages of implementing sanctions by means of Community law compared to national law?

In most Member States, Security Council resolutions would be implemented by national law, which have a rank below the constitution. The implementation into national law can also take place through the adoption of a national ordinance, whose ranking not only is below the constitution but also below other national laws. By contrast, if the Security Council resolution is implemented by a Community regulation, the economic sanctions enjoy an even higher ranking than the constitution according to the principle of supremacy of Community law. According to this well established principle, developed through the case-law by the ECJ, Community law always enjoys a higher ranking than national law.¹⁰⁸ Any conflicting national law, including constitutional law, must be set aside in order to give the EC regulation full effect. In the case of economic sanctions, the principle of supremacy implies that the legal effectiveness of Security Council resolutions is enhanced. When transformed into Community law, the “weak” international law converts into “extra-solid” law.

Another advantage of EC regulations compared to national law is their direct applicability. Direct applicability means that the regulations form part of the national legal systems automatically without the need for separate national legal measures. This enables the implementation process to be very swift. A uniform application of the Security Council resolution in all Member States is ensured, since regulations are binding upon all Member States. Otherwise, Security Council resolutions would be implemented on different times in the Community area.

To summarise, the main advantage of the involvement of the EU is that the implementation is swift and that the design of the sanctions is uniform throughout the Community.

7.2.1.2 Disadvantages

The possible overlapping of implementation measures taken by both the Community and national legislators may create problems of co-ordination and legal uncertainty. As the *Centro-Com*¹⁰⁹ case illustrated, there have

¹⁰⁸ See *inter alia* Case 6/64, *Flaminio Costa v. ENEL* [1964] ECR 585. The principle of supremacy is explicitly referred to in Article 10 of the Draft Treaty establishing a Constitution for Europe, *Official Journal C 169, 18/07/2003 P. 0001 - 0105*.

¹⁰⁹ Case C-124/95 *The Queen, ex parte Centro-Com Srl v. HM Treasury and Bank of England*, [1997] ECR I-81.

been controversies between the Member States and the Union regarding the division of competences. Further, not all tasks regarding the implementation of Security Council resolutions can be transferred to the EU level. Certain important issues must remain at the national level. For instance, measures defining the penalties for violating Security Council sanctions must be taken by the Member States themselves since the EU has no competence in that area. Thus, some kind of national implementing measures must always be taken by the Member States.

The required interaction between intergovernmental and Community measures – first a common position or joint action and then a Council regulation – may be cumbersome. Different Member States may have different opinions on the design of the economic sanctions. Since decisions in the CFSP are taken by unanimity, this may delay the implementation of the Security Council resolutions in the Member States.

When interpreting a Council regulation which is merely consequential to a Security Council resolution, due regard should be given to the wording and aim of the UN act. However, even if scholars agree on the importance of the underlying UN measure, opinions differ on what is a proper interpretation. This was illustrated in Chapter 5.3 and the *Bosphorus* case.¹¹⁰ The Court considered the UN Resolution on which the Council Regulation was based. Considering the significance of the goal of maintaining international peace and security for which the UN sanctions were taken, it took a purposive approach and came to the conclusion that the impoundment of the aircraft was lawful. However, Canor came to a total different opinion when interpreting the same underlying Resolution. Canor read the Resolution as paying due regard to human rights and that it did not intend to harm third parties' rights. Differing opinions on this matter may cause legal uncertainty.

Another crucial issue is that the EU is not, and cannot become, a member of the UN. It is not legally bound by Security Council regulations and, therefore, only States can be internationally liable for violation of the embargo regimes.

To summarise, a uniform implementation of Security Council resolutions in the EU requires a high degree of co-operation between the Member States, including the fact of putting aside their own national interests for the sake of a European approach, something at which the Member States are not always very good. The European Council meeting of 12 and 13 December 2003 in Brussels is an illustrating example. Also, there is no consensus on how to interpret the underlying instruments which form the base of the Community measures.

¹¹⁰ Case C-84/95, *Bosphorus Hava Yollari ve Ticcaret AS v. Minister for Transport, Energy and Communications, Ireland and the Attorney General* [1996] ECR I-3953.

7.2.2 The UN Charter Prevails in Case of Conflict

In the *Centro-Com case*, the key argument of the UK government was that the decision to allow the unfreezing of the embargoed fund only with respect to exports made from UK territory was necessary in order to guarantee the effective enforcement of the UN Resolution.¹¹¹ This argument was evidently based on the UN Charter and in particular Article 25 thereof, which obligates the member states to faithfully carry out all Security Council decisions on economic sanctions. According to the UK, Article 25 included an obligation to adopt all necessary means aiming at ensuring the effectiveness of the sanctions. At least in the view of the UK, the disputed decision was to be considered as one of those means. It was an attempt to deal with the abuses of the humanitarian exceptions and thereby ensuring the effectiveness of the sanction in question. The British Government claimed that such national measures, adopted in order to ensure the effective application of sanctions, were covered by national competence in the field of foreign and security policy and in relation to the performance of national obligations under the UN Charter.

The underpinning argument of the judgement of the ECJ seems to be that the CFSP is the only appropriate forum where a Member State is allowed to give relevance to its national competence. Once an agreement in the CFSP leads to the adoption of an EC Regulation, a Member State cannot itself step back and claim to adopt its own domestic rules derogating from the EC regime.

According to the Court's reasoning, Resolution 757 (1992) merely allowed, but did not oblige, the UK Government to grant the humanitarian exception. However, the Regulation, which implemented the Security Council Resolution, provided for a humanitarian exception clause. The Regulation had been adopted pursuant to an unanimous decision. Hence, after the adoption of Regulation 1432/92, the British Authorities were not allowed to derogate from the humanitarian exception clause provided for therein. UK could have prevented the adoption and design of the exception clause at the time for the adoption of the unanimous decision, but not thereafter. At the time for the judgement, all decisions under the then EPC and the later CFSP were taken by unanimity. Since the introduction of the Amsterdam Treaty, which came into force in 1999, there are now exceptions to the general rule of unanimity of decisions taken in framework of the CFSP. It is therefore possible that the opinion of the ECJ would have been different today.

The ECJ held that the Community had implemented the Security Council Resolution correctly. The Court merely compared the provisions of Security Council Resolution 757 with those of Regulation 1432/92 and concluded that they were perfectly consistent with each other. Hence, there was no conflict between international law and Community law.

¹¹¹ Case C-124/95 *The Queen, ex parte Centro-Com Srl v. HM Treasury and Bank of England*, [1997] ECR I-81.

If a Community regulation actually would implement an economic sanction wrongfully, the conflict between EC and national norms would be balanced in favour of the latter in accordance with Article 307 EC. The ECJ held that it was for the national court to determine which obligations are imposed by an earlier agreement and to determine the extent to which they prevent application of Community law.

An interesting feature is that Article 307 EC can never be invoked by Germany, since the Article explicitly states that the agreements, to which it refers, must have been concluded before 1 January 1958, with an exception for acceding states. Germany was not admitted membership in the UN until 1973, which precludes it from using Article 307 EC according to the wording of the Article.¹¹² However, Article 307 EC corresponds to Article 103 of the UN Charter which reads:

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.

Thus, the UN Charter has precedence to Community law in case of conflicts.

7.3 Targeted Sanctions

As described in Chapter 2.2, targeted sanctions are a new form of economic sanctions. The last years, targeted sanctions have been used more frequently. The increasing popularity of targeted sanctions is due to the perceived flaws of traditional trade embargoes: ineffectiveness and extremely harsh effects on the civilian population. Targeted sanctions are designed to single out the groups and individuals responsible for the unlawful activity the sender wants to suppress. The measures shall only strike the responsible group's needs, and thereby spare innocent civilians from suffering.

7.3.1 Case T-306/01

Since the terror attacks against USA on September 11, the Security Council has extended its battle against international terrorism, and also the concept of targeted sanctions. The Security Council has adopted resolutions on targeted sanctions against individuals placed subject of connections with terrorist activities. The EU has implemented these sanctions in the Community area by Council regulations and Common Positions.

¹¹² The Federal Republic of Germany and the German Democratic Republic were admitted membership in the United Nations on 18 September 1973. Through the accession of the German Democratic Republic to the Federal Republic of Germany, effective from 3 October 1990, the two German States have united to form one sovereign State.

The Security Council decided in October 1999 to adopt a Resolution regarding the situation in Afghanistan.¹¹³ The Resolution was directed against the Taliban regime, primarily because it was considered to encourage the production of opium and its refusal to turn over Usama bin Laden, suspected of having masterminded the bombings of the American embassies in Nairobi, Kenya and Dar es Salaam, Tanzania, to USA. The Resolution froze the funds and other financial resources, including funds derived from property owned or controlled directly or indirectly by the Taliban, or by any undertaking owned or controlled by the Taliban.¹¹⁴ The same Resolution established a Committee (“the Taliban Sanctions Committee”), consisting of all the members of the Security Council, to ensure the proper implementation of the sanctions.¹¹⁵

The sanctions against the Taliban were strengthened in December 2000 by Security Council Resolution 1333.¹¹⁶ The Taliban Sanctions Committee was *inter alia* charged with the task to establish and maintain updated lists, based on information provided by states and regional organizations, of individuals and entities designated as being associated with Usama bin Laden, against whom targeted sanctions would be taken.¹¹⁷ A decision to amend the list of the Taliban Sanctions Committee was to be taken by so-called silent procedure. This implied that the proposal of amendment was sent to the representatives of the states of Committee. If no representative protested within 48 hours, a decision could be taken to amend the list.¹¹⁸

The list held by the Taliban Sanctions Committee was revised in the aftermath of September 11, after the presentation of a list of persons and organisations by the USA. Three Somalian-Swedish citizens and the Al Barakaat International Foundation were amended to the list.

Resolution 1267 was implemented by the EU in 1999 and 2000.¹¹⁹ In 2001, following the adoption of Resolution 1333, the former implementation measures were replaced with new Community measures: Common Positions 2001/56 and 2001/154 and Council Regulation 467/2001. The list of names established by the Taliban Sanctions Committee was annexed to Regulation 467. Regulation 467 stated that all funds and other financial resources belonging to any natural or legal person, entity or body designated by the Taliban Sanctions Committee and listed in the Annex I of the Regulation should be frozen.¹²⁰

¹¹³ Security Council Resolution 1267 (1999) on the situation in Afghanistan.

¹¹⁴ Resolution 1267 (1999), paragraph 4.

¹¹⁵ Resolution 1267 (1999) paragraph 6.

¹¹⁶ Security Council Resolution 1333 (2000) on the situation in Afghanistan.

¹¹⁷ Security Council Resolution, 1333(2000), paragraph 16(b).

¹¹⁸ See ”Skriftligt svar på fråga av Johan Pehrson om rättsäkerhet för svenska medborgare”. Question no. 2001/02:561.

¹¹⁹ Common Position 99/7272/CFSP and Council Regulation 337/2000.

¹²⁰ Article 2(1), Resolution 467/2001.

The Commission was empowered to amend the list in Annex I of Regulation 467 on the basis of determinations made by either the Security Council or the Taliban Sanctions Committee.¹²¹ Thus, the Commission was not entitled to change the list of names by its own will. As a result of the amendments to the list made by the Taliban Sanctions Committee, the Commission decided to add a number of other persons and bodies, including the three Somalian-Swedish citizens and the Al Barakaat International Foundation, which had their assets frozen.

In 2002, Regulation 467 was replaced with Council Regulation 881/2002. The annexed list was transferred to the new regulation. Regulation 881 is based not only on Articles 301 and 60 EC but also on Article 308 EC.

The Somalian-Swedes whose assets were frozen by the Community measures have challenged the Community implementation measures under Article 230 EC.¹²² The CFI has not yet decided on the case, but rejected the request for interim measures in May 2002.

The main argument put forward by the plaintiffs is, as stated in Official Journal, C 44/27, 16/2/2002:

The applicants submit that Council Regulation (EC) No 476/2001 – which provides that the applicants' funds are to be frozen and that resources are not to be made available to them – exceeds the powers which the Council has under Article 60 and 301 EC and is in breach of Article 249. The Council does not have the power to adopt sanctions against individuals and organisations and has misused its powers. Moreover, in practice, the Council and Commission have delegated decisions as to which persons or organisations should be included in Annex I to the Taliban Sanctions Committee.

To summarise, the main argument by the plaintiffs is that the Community lacks competence to adopt targeted sanctions against EC citizens under Article 301 EC. The final outcome of the case might alter the established interaction process between the EU, its Member States and the UN.

7.3.2 Arguments *Pro* and *Con* Legality of the Community Measures under Article 301 EC

The wording of Article 301 EC appears to exclude that sanctions adopted under it may be directed against individuals resident in EU states. According to Article 301 EC, the Council is allowed to interrupt or to reduce economic relations with one or more *countries*.

Targeted sanctions directed against non-state entities are nevertheless not a new phenomenon in the Community.¹²³ Such sanctions have been adopted

¹²¹ Article 10(1).

¹²² Case T-306/01, *Aden and others v. EU Council and EC Commission*.

¹²³ For example, Regulation 1705/1998 directed against UNITA in Angola, Regulation 1081/2000 freezing assets of certain people connected to the government of

under Article 301 EC even though they were not directed against countries in a strict sense. However, previous regulations have focused on government-like entities, or people closely linked to the decision-makers.

How far can the concept of third countries be extended? Andersson, Cameron and Nordback think that the phrase “third countries” might include quasi-governmental entities such as UNITA, which controlled territory. They also believe that people closely linked to the decision-makers in a target government or quasi-governmental entity might be included. However, where no such link exist, it is hard to include EU nationals. They underline that the Al-Qaeda network is both “open-ended” and not in control over territory. Literally anybody, they say, can be regarded as part of this network.¹²⁴

Thus, a strictly literal interpretation would not include EU citizens in the range of legal targets under Article 301 EC. However, as shown above, the interpretation has been extended in previous cases and the interpretation is not limited to what one normally would understand as a country. The *Bosphorus* case, presented in Chapter 5.3, concerned the issue of permitted subjects of sanctions under Article 301 EC and the interpretation of the same Article.¹²⁵ However, little help can be derived from this case since the sanctions clearly were directed against a third country.

It is obvious that Article 301 EC was designed and drafted in the light of the at that time prevailing perception of the greatest threat to the world peace: conflicts between states. Today, the most significant menace to international security is without doubt terrorism. Terrorism is not by necessity connected to any country in particular, but is a cross-bordering phenomenon, which makes Article 301 EC a rather blunt instrument.

As mentioned in Chapter 6.1, all Member States of the EU, as members of the UN, are bound to implement Security Council resolutions. If every Member State is obliged to implement the resolutions: what difference would it make if the Member States worked jointly within the framework of the EC Treaty? Andersson, Cameron and Nordback point to the fact that even though the EU states’ governments would be able to bind their states in controversial foreign policy matters by means of qualified majority voting, there is a safeguard in that the necessary first step, the common position or joint action under the CFSP, requires unanimity.¹²⁶ A counter argument to this, presented by the same scholars, is that the EC Treaty deals mainly with economic matters concerning the four freedoms and the

Burma/Myanmar and Regulation 2488/2000 directed against Slobodan Milosevic and associated persons.

¹²⁴ Torbjörn Andersson, Iain Cameron and Kenneth Nordback: “EU Blacklisting: The Renaissance of Imperial Power, but on a Global Scale” in *European Business Law Review* (2003), pages 111-141 (p. 122).

¹²⁵ Case C-84/95, *Bosphorus Hava Yollari ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland and the Attorney General*, [1996] ECR I-3953.

¹²⁶ Andersson, Cameron and Nordback, p. 120.

common market. Security and foreign policy are not mentioned. Article 301 EC shall, according to Andersson, Cameron and Nordback, be regarded as an exemption from the considerations underlying the EC Treaty. CFSP policy goals cannot be regarded as EC Treaty objectives in their own right. Article 5 EC states the requirement to act within the powers granted by the treaty. Andersson, Cameron and Nordback are of the opinion that Community competence should not automatically grow as a result of the practice of another international body, the Security Council. The mere fact that Member States have obligations under the UN Charter cannot give the Community competence it does not have. If Community competence is to grow in such way as to allow the Community to impose sanctions on EU citizens, this competence should grow, they say, as the result of explicit changes, agreed on by governments, to the constitutional treaties.¹²⁷

Some are of the opinion that the black-listing and freezing of assets of EU citizens are quasi-criminal administrative sanctions, and that such measures rather belong in the third pillar PJCC, subject to intergovernmental cooperation. This is an interesting idea, but falls outside the scope of this thesis and will therefore not be investigated further.¹²⁸

7.3.3 Article 308 EC as a Base for Targeted Sanctions?

The Regulation challenged in Case T-306/01, Regulation 467, was in 2002 replaced with Council Regulation 881/2002. The new Regulation is basically identical to the former. The difference lies in the legal bases used by the Council. Regulation 881 is based not only on Articles 301 and 60 EC but also on Article 308 EC. This might be interpreted as if the Council itself is hesitant about the scope of Article 301, and whether this Article really covers targeted sanctions against EU individuals, and wants to use an alternative legal basis as a lifeline.

Can really Article 308 EC serve as an alternative legal base for targeted sanctions? The Article reads:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

The provision gives the Council a wide, but not unlimited competence.¹²⁹ The Article requires that the power should be used to attain one of the objectives of the Community, and that attainment of this objective must take

¹²⁷ Andersson, Cameron and Nordback, pp. 120-121.

¹²⁸ For an overview of the arguments for this idea, see Andersson, Cameron and Nordback, p. 121. See also Linda Thydén: "*Ekonomiska sanktioner och svartlisting i EU:s regi*", thesis, Lund University, Faculty of Law (2003).

¹²⁹ Mats Melin and Göran Schäder: *EU: s konstitution: maktfördelningen mellan den Europeiska Unionen, medlemsstaterna och medborgarna*, (2001), p. 51.

place in the course of the operation of the common market. However, given the breadth of the Treaty objectives and given also the Court's purposive mode of interpreting broad Community aims, the conditions for the exercise of Article 308 EC do not place a severe constraint on the Council. Nevertheless, the Court has stated that Article 308 EC cannot serve as the basis for widening the scope of Community powers beyond the framework created by the EC Treaty taken as a whole, nor can it be used to adopt provisions which would, in substance amend the Treaty.¹³⁰ In such a case, the formal amendment procedure under Article 48 TEU must take place.

Article 308 EC is subordinated to other articles in the Treaty, since it can only be used where the Treaty has not provided the necessary powers. In some cases, Article 308 EC can still be used, if the given competence is regarded as insufficient.¹³¹

The determining factor on whether Article 308 EC can be used for a supportive view of a wide interpretation of the term "third countries" is whether the EC Treaty is only seen as regulating the common market or if the fight against terrorism also is regarded as goal in the interest of the Community.

7.3.4 Article 297 EC?

If the Court decides that targeted sanctions, at least those directed against EU individuals, fall outside the scope of the Community pillar, could the Member States use Article 297 EC as a base for intergovernmental co-operation when implementing the UN resolutions? Article 297 of the EC Treaty states:

Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.

As highlighted in Chapter 4.2, during the 1970's, national measures implementing sanctions imposed under a Security Council resolution were justified under this article. This was primarily based on the assumption that the Member States' obligations to implement sanctions imposed by the Security Council were independent of their Treaty obligations. Koutrakos holds that this view has become obsolete since subsequent implementation seek to ensure the effectiveness of sanctions through uniform implementation and therefore have recourse to a Community instrument,

¹³⁰ Opinion 2/94, *Re the Accession of the Community to the European Human Rights Convention* [1996] ECR I-1759.

¹³¹ Case 8/73, *Hauptzollamt Bremerhaven v. Massey Ferguson* [1973] ECR 897.

first under Article 133 EC and then under the legal basis provided for in Article 301 EC.¹³²

The inapplicability of Article 297 EC regarding the implementation of Security Council resolutions does not render it without significance, according to Koutrakos. In his view, it remains directly relevant in cases of resolutions which give rise to obligations excluded from the scope of the Treaty, e.g. with security or defence implications. Thus, if the CFI would be of the opinion that targeted sanctions fall outside the scope of Article 301 EC, the Member States could probably use Article 297 to fulfil their obligations towards UN.

In order to avoid an excessive use of Article 297 EC, three safeguards are provided for:

- 1) The Member States are obliged to consult each other in relation to the measures to be taken.
- 2) Under Article 298 EC, if the measures taken distort the conditions of the competition in the common market, the Commission shall, together with the State concerned, examine how these measures can be adjusted to the Treaty rules.
- 3) Finally Article 298(2) EC provides for judicial control in cases of improper use of the powers provided for in Article 297 EC.

Member States have relied on Article 297 EC in order to impose unilateral sanctions against third countries. In the *FYROM* case, Greece imposed sanctions against the Former Yugoslav Republic of Macedonia.¹³³ The Commission brought action against Greece under Article 298 EC since it claimed that Article 297 EC had been used improperly. An agreement was reached between Greece and FYROM before the Court had decided on the case. However, the Advocate General Jacobs delivered an opinion, in which he claimed that Article 297 EC does cover such sanctions in so far as the conditions set therein are met.¹³⁴

7.4 Concluding Remarks

The interaction process between the UN, the EU and the Member States regarding economic sanctions has developed over the years, and has become rather well-established. The Security Council is empowered to take actions under Article 39 and Article 41 of the UN Charter in order to restrain disturbances to international peace and security. Such non-military measures may take the form of economic sanctions. Security Council resolutions must be implemented, either by national law or by Community law, in order to become effective. The Member States have enhanced the

¹³² Koutrakos, p. 84.

¹³³ Case C-120/94, *Commission of the European Communities v. Hellenic Republic* [1996] ECR I-1513.

¹³⁴ Case C-120/94, Opinion of Mr Advocate General Jacobs delivered on 6 April 1995.

co-ordination of their actions on the international arena. The implementation of Security Council resolutions regarding economic sanctions have gradually been transferred from the national level to the EU.

The EU implements the UN sanctions by unanimous decisions under the CFSP, followed by the adoption of Council regulations under Articles 301 and /or 60 EC. Regulations are directly applicable in all Member States of the EU. The accomplishment of the aim for which the UN sanctions are adopted is without doubt enhanced through a uniform application and implementation.

Being members not only of the EU but also of the UN, the Member States have dual legal obligations. They are obliged to carry out decisions taken by the Security Council under Article 25 of the UN Charter. On the other hand, according to the jurisprudence of the Court, Community law takes precedence over national law. However, the Court has stated in the *Centro-Com* case that if a conflict would occur between the Member States dual obligations, their responsibilities under the UN Charter prevail.¹³⁵ This is clear from Article 307 EC and Article 103 of the UN Charter. As stated in the *Centro-Com* case, the Member States remain the right to “veto” Community measures that do not, in their view, implement the UN sanctions correctly. This assessment is made by the national courts of the Member States. However, so far, no national court has taken such a decision.

Thus, in the field of economic sanctions, the international interaction and the division of competence between the UN, the EU and the Member States are rather solid. However, it is possible that this established model will change due to a new concept of targeted sanctions. The effectiveness of traditional economic sanctions, such as trade embargoes, has repeatedly been questioned, and is in my view very doubtful. Empirical studies indicate that trade embargoes and other traditional sanctions very rarely achieve the objectives for which they are adopted. Another drawback of economic sanctions is that they in many cases hit the vulnerable, and often innocent, civilians of the target state instead of the leaders responsible for the wrongdoing. In order to overcome the perceived flaws of economic sanctions, targeted sanctions have become an important instrument of foreign policy. They attempt to strike only against the persons or organisations responsible for the wrongdoing. In my opinion, targeted sanctions are a vital attempt of trying to solve conflicts peacefully, but without unnecessary harm suffered by innocent. There are on-going international efforts, *inter alia* the Stockholm Process, aiming to enhance the effectiveness of targeted sanctions.

¹³⁵ Case C-124/95 *The Queen, ex parte Centro-Com Srl v. HM Treasury and Bank of England*, [1997] ECR I-81.

The question of interest is whether the interaction process regarding economic sanctions can be upheld also for targeted sanctions? The crux of the matter is Article 301 EC: how much can the term “third countries” arguably be held to include?

In case T-306/01, which is now pending in CFI, sanctions have been directed against EU citizens. The persons are accused of having supported terrorism, and have had their assets frozen in accordance with the Security Council resolutions, and the Community measures implementing them. Terrorism is not by necessity connected to any country in particular, but is rather a cross-bordering phenomenon. Security Council Resolution 1333, on which the now challenged Community measures are based, explicitly states that the funds and other financial assets of Usama bin Laden and individuals and entities associated with him as, including those in the Al-Qaeda organisation shall be frozen. Sanctions are also directed against the Taliban regime in Afghanistan. The Resolution was implemented in the Community legal order by Regulation 467/2001.

According a literal interpretation of Article 301 EC, sanctions can only be imposed against states. In my view, a literal interpretation would be too rigid. I agree with Andersson, Cameron and Nordback who are of the opinion that sanctions directed against quasi-governmental entities, and people closely linked to the decision-makers in a target government or quasi-governmental entities, might be justified under Article 301 EC. At the time for the adoption of Resolution 1333/2000 and Regulation 467/2001, the Taliban controlled parts of Afghanistan. The Taliban could be compared with a quasi-governmental entity, like the Angolan guerrilla UNITA against which Regulation 1705/1998 was directed. The part of Regulation 467/2001 which is directed against the Taliban regime is hence, in my view, lawful under Article 301 EC, even though the Taliban regime is not a country.

However, the Al-Qaeda network is “open-ended” and is not in control over territory. Al-Qaeda cannot be regarded as a quasi-governmental entity. Hence, the Somalian-Swedish citizens cannot be seen as people closely linked to the decision-makers in a target government or quasi-governmental entity. In my view, to include EU citizens, rightly or wrongfully accused for supporting terrorism, in the term “third countries” is beyond the limits of Article 301 EC. It is obvious that Article 301 EC was not designed for meeting the currently most important threat to international peace and security: non-nation bound terrorism.

An interesting matter occurs if CFI actually will be of the opinion that targeted sanctions, at least against EU citizens, fall outside the scope of Article 301 EC. In that case, the Member States are nevertheless obliged to implement the sanctions according to Article 25 of the UN Charter. It is possible that the Member States could co-operate under Article 297 EC, if the Community sanctions would be found illegal. This would imply a return to how sanctions were originally dealt with in the Community legal order (see Chapter 4.2).

In my opinion, neither Article 308 EC is suitable to serve as a legal basis for sanctions directed against EU citizens and/or terrorists not associated with a third country or quasi-governmental entity. One could argue that the fight against terrorism is a goal in the interest of the Community since unhindered worldwide terrorism definitely would hamper the functioning of the common market. However, there are already two explicit legal bases for the imposition of economic sanctions – Articles 301 and 60 EC. It seems difficult to argue for the use of Article 308 EC since the Court has previously stated that Article 308 EC cannot serve as the basis for widening the scope of Community powers beyond the framework created by the EC Treaty taken as a whole, nor can it be used to adopt provisions which would, in substance amend the Treaty.¹³⁶

Another interesting factor, even though outside the main scope of this thesis, is the compatibility of sanctions with human rights. When assessing the compatibility of targeted sanctions with Community law, due regard must also be taken to human rights, which form part of the general principles of the Community, and is thus a ground for review. The targeted sanctions in Regulation 467/2001, like the freezing of assets of persons, have been criticised for infringing basic human rights, such as the right to judicial determination¹³⁷ or the right to property. These rights are not absolute and can be restricted, but only in certain cases and in a proportionate way. The sanctions directed against the EU citizens have been criticised as not fulfilling the requirements for justified limitations.¹³⁸ Interestingly, the Security Council, at least according to some scholars (see Chapter 3.2), is not bound by human rights to the same extent as the EU. If the Court would reject the legality of sanctions on grounds of their incompatibility with basic human rights, it would also, since the Community measures are merely consequential to Security Council resolutions, indirectly disapprove the actions of the most important organ of the UN.

All Member States are signatories to the ECHR and are thereby bound to uphold human rights. However, according to Article 103 of the UN Charter, the UN Charter prevails over the obligations under any other international agreement, including the ECHR. Thus, the ECJ can, in theory, reject the legality on economic sanctions on grounds of human rights, since the EU is not a member of the UN, but the national courts of the Member States are precluded from doing the same.

However, the main focus for this thesis is not the compatibility of sanctions with human rights, but the interaction between the EU, the UN and the Member States, and whether the established pattern of interaction can be

¹³⁶ Opinion 2/94, *Re the Accession of the Community to the European Human Rights Convention* [1996] ECR I-1759.

¹³⁷ Article 6 ECHR.

¹³⁸ See further Thydén, Chapter 5.

upheld also regarding targeted sanctions. The main issue is the scope of Article 301 EC. The fight against terrorism is important and requires a great amount of international co-operation. However, the rule of law must be respected. Article 301 EC cannot be stretched too far, and the Community should not act outside its competence, which is given to it by the Treaties. Case T-306/01 is currently to be decided by the CFI and it is therefore impossible to draw any certain conclusions. At least in the past, ECJ has been rather reluctant to repeal Community acts. The grounds of review are sufficiently flexible to give the Court a wide measure of discretion. As Hartley writes: “The way it [the Court] exercises that discretion will depend to a large degree on judicial policy. For this reason, a purely legal analysis will not necessarily enable one to predict the outcome of a case.”¹³⁹

¹³⁹ Trevor C. Hartley: *The Foundations of European Community Law* (1998), p. 429.

Bibliography

Literature

- Bernitz, Ulf
Kjellgren, Anders *Europarättens grunder*, 2nd rev. ed.,
Stockholm, Norstedts Juridik, 2002
- Cot, Jean-Pierre *La Charte des Nations Unies: commentaire
article par article*, 2nd rev. ed., Paris, Économica,
1991
- Craig, Paul
De Búrca, Grainne *EU Law: Text, Cases and Materials*, 3rd rev. ed.,
Oxford, Oxford University Press, 2003
- Evans, Malcolm D. (ed.) *Aspects of Statehood and Institutionalism in
Contemporary Europe*, Aldershot, Dartmouth
Publishing Company, 1997
- Hartley, Trevor C. *The Foundations of European Community Law:
an Introduction to the Constitutional and
Administrative Law of the European Community*,
4th rev. ed., Oxford, Oxford University Press,
1998
- Hermele, Kenneth *Liten tuva: hur ekonomiska sanktioner bidrar till
att störta apartheid i Sydafrika*, Stockholm,
Afrikagrupperna, 1990
- Hufbauer, Gary Clyde
Schott, Jeffrey J. *Economic Sanctions Reconsidered: History and
Current Policy*, 2nd ed., Washington, D.C.,
Institute for International Economics, 1990
- Koskenniemi, Martti
(ed.) *International Law Aspects of the European
Union*, The Hague, Kluwer Law, 1998

- Koutrakos, Panos *Trade, Foreign Policy & Defence in EU Constitutional Law*, Oxford, Hart Publishing, 2001
- Kronenberger, Vincent (ed.) *The European Union and the International Order: Discord or Harmony?*, The Hague, T.M.C Asser Press, 2001
- Malanczuk, Peter *Akehurst's Modern Introduction to International Law*, 7th rev. ed., London, Routledge, 1997
- Melin, Mats
Schäder, Göran *EU: s konstitution: maktfördelningen mellan den Europeiska Unionen, medlemsstaterna och medborgarna*, 5th rev. ed., Stockholm, Norstedts Juridik, 2001
- Steiner, Josephine
Woods, Lorna *Textbook on EC Law*, 5th rev. ed., London, Blackstone, 1996
- Ströberg, Karin *Prospects for Success in International Interventions – the Examples of Economic Sanctions and Peace Enforcement*, Stockholm, Division of Defence Analysis, Defence Research Establishment, 2000
- Weatherill, Stephen
Beaumont, Paul *EC Law – the essential guide to the legal workings of the European Community*, 2nd edition, Penguin Books, London, 1995
- Österdahl, Inger *Threat to the Peace: the Interpretation by the Security Council of Article 39 of the UN Charter*, Uppsala, Iustus förlag, 1998

Articles

- Andersson, Torbjörn
Cameron, Iain
Nordback, Kenneth
- “EU Blacklisting: The Renaissance of Imperial Power, but on a Global Scale” in *European Business Law Review*, 2003, pages 111-141
- Baldwin, David A.
- “The sanctions Debate and the Logic of Choice” in *International Security*, winter 1999/2000, Vol. 24, No. 3, pages 80-107
- Canor, Iris
- “Can two walk together except they be agreed? The relationship between international law and European law: The incorporation of United Nations Sanctions against Yugoslavia into European community law through the perspective of the European court of justice”, in *Common Market Law Review*, Vol. 35, 1998, pages 137-187
- Holmberg, Mats
Håstad, Disa
- “Ekonomiska sanktioner ger sällan effekt” in *Dagens Nyheter*, April 20th 2002
- Pape, Robert A. Jr.
- “Why Economic Sanctions Do Not Work” in *International Security*, Vol. 22, No.2, fall 1997, pages 90-136
- Pavoni, R.
- “UN Sanctions in EU and National Law: The Centro-Com Case” in *International and Comparative Law Quarterly*, Vol. 48, 1999, pages 582-612
- Weiss, Thomas G.
- “Sanctions as a Foreign Policy Tool: Weighing Humanitarian Impulses” in *Journal of Peace Research*, Vol. 36, No.5, 1999, pages 499-509
- “Binding the Colossus” in *The Economist*, November 22nd 2003, p.26.

Electronic Resources

Making Targeted Sanctions Effective, Guidelines for the implementation of UN Policy Options, February 14, 2003, available at www.smartsanctions.se/reports/Final%20report%20complete.pdf, last visited on 6 December 2003, at 11.50 a.m.

The Stockholm Process on the Implementation of Targeted Sanctions, available at www.smartsanctions.se, last visited on 7 December 2003, at 3.00 p.m.

European Union @ United Nations, available at www.europa-eu-un.org/index.asp?lg=5, last visited on 7 December 2003, at 4.22 p.m.

Ekonomiska sanktioner och svartlisting i EU:s regi by Linda Thydén. Thesis, Lund University, Faculty of Law, 2003, available at <http://www.jur.lu.se/internet/biblioteket/examensarbeten.nsf>, last visited on 8 December 2003, at 1.35 p.m.

Security Council resolutions

(Available at the UN server: <http://www.un.org/documents>)

Security Council Resolution 216 (1965) Question concerning the situation in Southern Rhodesia (12 November)

Security Council Resolution 217 (1965) Question concerning the situation in Southern Rhodesia (20 November)

Security Council Resolution 232 (1966) Question concerning the situation in Southern Rhodesia

Security Council Resolution 253 (1968) Question concerning the Situation in Southern Rhodesia

Security Council Resolution 687 (1991) Iraq-Kuwait

Security Council Resolution 713 (1991) Socialist Federal Rep. of Yugoslavia

Security Council Resolution 724 (1991) Socialist Federal Rep. of Yugoslavia

Security Council Resolution 752 (1992) Bosnia and Herzegovina

Security Council Resolution 757 (1992) Bosnia and Herzegovina

Security Council Resolution 787 (1992) Bosnia and Herzegovina

Security Council Resolution 820 (1993) Bosnia and Herzegovina

Security Council Resolution 1199 (1998) on the situation in Kosovo (FRY)

Security Council Resolution 1244 (1999) on the situation relating Kosovo

Security Council Resolution 1267 (1999) on the situation in Afghanistan

Security Council Resolution 1333 (2000) on the situation in Afghanistan

General Assembly Resolutions

General Assembly Resolution 3314 (XXIX), "Definition of Aggression" of December 14th 1974

The Council of the European Union

A) Regulations

Council Regulation (EEC) No 1432/92 of 1 June 1992 prohibiting trade between the European Economic Community and the Republics of Serbia and Montenegro, *Official Journal L 151, 03/06/1992 p. 0004*

Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro), *Official Journal L 102 , 28/04/1993 p. 0014*

Council Regulation (EC) No 1607/98 of 24 July 1998 concerning the prohibition of new investment in the Republic of Serbia, *Official Journal L 209, 25/07/1998 p. 0016 – 0017*

Council Regulation (EC) No 1705/98 of 28 July 1998 concerning the interruption of certain economic relations with Angola in order to induce the "União Nacional para a Independência Total de Angola" (UNITA) to fulfil its obligations in the peace process, and repealing Council Regulation (EC) No 2229/97, *Official Journal L 215, 01/08/1998 p. 0001 – 0011*

Council Regulation (EC) No 337/2000 of 14 February 2000 concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan, *Official Journal L 043 , 16/02/2000 p. 0001 - 0011*

Council Regulation (EC) No 1081/2000 of 22 May 2000 prohibiting the sale, supply and export to Burma/Myanmar of equipment which might be used for internal repression or terrorism, and freezing the funds of certain persons related to important governmental functions in that country, *Official Journal L 122, 24/05/2000 p. 0029 – 0038*

Council Regulation (EC) No 2488/2000 of 10 November 2000 maintaining a freeze of funds in relation to Mr Milosevic and those persons associated with him and repealing Regulations (EC) Nos 1294/1999 and 607/2000 and Article 2 of Regulation (EC) No 926/98, *Official Journal L 287, 14/11/2000 p. 0019 – 0037*

Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000, *Official Journal L 067, 09/03/2001 p. 0001 – 0023*

Commission Regulation (EC) No 2199/2001 of 12 November 2001 amending, for the fourth time, Council Regulation (EC) No 467/2001

prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan and repealing Regulation (EC) No 337/2000, *Official Journal L 295, 13/11/2001 p. 0016 – 0018*

B) Common Positions

Common Position 99/7272/CFSP

Common Position 2001/56/CFSP

Common Position 2001/154/CFSP

Miscellaneous

Draft Treaty establishing a Constitution for Europe, *Official Journal C 169*,
18/07/2003 P. 0001 – 0105

Skriftligt svar på fråga av Johan Pehrson om rättsäkerhet för svenska
medborgare”. Question No. 2001/02:561.

Table of Cases

Case 1/58, *Friedrich Stork & Cie v. High Authority of the European Coal and Steel Community* [1959] ECR 17

Cases 36, 37, 38 and 40/59, *Geitling v. High Authority* [1960] ECR 423

Case 24/62, *Germany v. Commission* [1963] ECR 63

Case 25/62, *Plaumann & Co. v. Commission* [1963] ECR 95

Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1

Case 6/64, *Flaminio Costa v. ENEL* [1964] ECR 585

Case 29/69, *Stauder v. City of Ulm* [1969] ECR 419

Case 11/70, *Internationale Handelsgesellschaft GmbH v. Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125

Case 22/70 *Commission v. Council* [1971] ECR 263

Case 4/73, *Nold v. Commission* [1974] ECR 491

Case 8/73, *Hauptzollamt Bremerhaven v. Massey Ferguson* [1973] ECR 897

Case 34/73, *Variola v. Amministrazione delle Finanze* [1973] ECR 981

Case 44/79, *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727

Case 138/79, *Roquette Frères v. Council* [1980] ECR 3333

Case 789 and 790/79, *Calpak SpA and Società Emiliana Lavorazione Frutta SpA v. Commission* [1980] ECR 1949

Case 314/85, *Foto-Frost (Firma) v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199

Case C-298/89, *Gibraltar v. Council* [1993] ECR I-3605

Opinion 2/94 *on Accession of the European Communities to the European Human Rights Convention* [1996] ECR I-1759

Case C-120/94, *Commission of the European Communities v. Hellenic Republic* [1996] ECR I-1513

Case C-122/94 *Commission v. Council* [1996] ECR I-881

Case C- 84/95, *Bosphorus Hava Yollari ve Ticcaret AS v. Minister for Transport, Energy and Communications, Ireland and the Attorney General*

Case C-124/95, *The Queen, ex parte Centro-Com Srl v. HM Treasury and Bank of England*, [1997] ECR I-81

Case C-177/95, *Ebony Maritime SA and Loten Navigation Co. Ltd v. Prefetto della Provincia di Brindisi and Others* [1997] ECR I-1111

Case C-50/00, *Unión de Pequeños Agricultores v. Council* [2002]

Case T-306/01, *Aden and others v. EU Council and EC Commission* (Not yet decided)