THE LEGALITY OF ECONOMIC SANCTIONS UNDER INTERNATIONAL LAW AND EU LAW: THE CASE OF IRAN

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ABSTRACT

The present article is devoted to the legal issues raised, in the field of international trade and foreign investment, by the imposition of economic sanctions on States, or legal or natural persons belonging to these States. The article is written in the context of the measures taken against the Islamic Republic of Iran ('Iran') during the last decade in light of the current nuclear crisis and the European Union response in particular. It traces the sanctions regime, its legality, implementation and impact and goes on to conclude that in light of the negative impact on trade and investment between Iran and its commercial partners caused by sanctions, investment opportunities in Iran, particularly in the energy sector, are likely to benefit those States that are more willing to preserve or even strengthen commercial ties with Iran and, thus, that are reluctant to accept new sanctions, or to apply in a drastic way existing measures.

I. INTRODUCTION

In a broad sense, international economic sanctions have been defined by Professor Abi-Saab as a coercive response to an internationally wrongful act authorised by a competent social

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organ.[2] Art. 301 of the Treaty on European Community manifests the concept in a narrower sense, defining it as "the interruption or reduction of economic relations with third countries" in order to cause that country to stop objectionable behavior or to act in a specific manner.[3] One of the main characteristics of contemporary State practice in the imposition of economic sanctions is that measures enacted during the past two decades have been designed as 'smart sanctions' or 'targeted sanctions'. States have, to a large extent, departed from the previous practice of 'indiscriminate' measures, with a view to minimizing "adverse consequences for those not responsible for such policies and actions".[4] This evolution was prompted mainly by the dramatic consequences for the civilian population of the sanctions regime imposed on Iraq (1990-2003), which had attracted widespread criticism that focussed on the need of compliance to international humanitarian law standards in the implementation of such measures.[5] 'Targeted sanctions' typically include "freezing of funds and economic resources, restrictions on admission, arms embargoes, embargoes on equipment that might be used for internal repression, other export restrictions, import restrictions, and flight bans".[6] Such measures raise important questions, most of them unresolved, regarding legal justification under international law and European Community law. In various official statements, the UN on the one hand, and the Council of the European Union on the other hand, have stressed the need for restrictive measures to be in accordance with international law, respect for human rights and fundamental freedoms, in particular due process and the right to an effective remedy, and adherence to the requirement of

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[2] G. Abi-Saab, *The Concept of Sanctions in International Law*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 29-41 (V. Gowland-Debbas ed., 2001).

[3] Council of the European Union, *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the Framework of the EU Common Foreign and Security Policy* ¶2 (8 December 2003).

[4] *See* Guidelines*, supra* note 4, ¶14; D. Cortright, G. A. Lopez and L. Gerber-Stellingwerf, *The Sanctions Era: Themes and Trends in UN Security Council Sanctions since 1990*, in THE UNITED NATIONS SECURITY COUNCIL AND WAR 205-225 (V. Lowe, A. Roberts, J. Welsh and D. Zaum eds., 2008).

[5] *See* M. Bossuyt, *The adverse consequences of economic sanctions on the enjoyment of human rights*, Working paper, UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/2000/33 (21 June 2000); M.-E. O'Connell, *Debating the Law of Sanctions*, 13 EUR. J. INT'L L. 1, 63-79 (2002).

[6] *See* Guidelines*, supra* note 4, ¶15.

proportionality.[7] Despite these commitments, hypothesis of conflict (at least potential) between restrictive measures and the international obligations of States enacting such measures are frequently met, as evidenced by various recent judicial proceedings in several countries, with challenging the legality of sanctions.

This article addresses the issue of economic sanctions through the angle of the measures taken during the last decade against the Islamic Republic of Iran ('Iran'), and more precisely against various Iranian natural and legal persons, entities or bodies, in the context of the current nuclear crisis. Section 2 gives an overview of the different formal sources of this sanctions regime, from United Nations Security Council Resolutions to national implementation legislations and regulations. Section 3 provides a concise summary of the restrictive measures in force and the related compliance obligations imposed on economic operators doing business with targeted Iranian counterparties. It takes into account the additional measures adopted by the UN Security Council through Resolution 1929 (2010), which have been implemented at EU/EC levels in late 2010. Section 4 is devoted to the examination of the impact of the sanctions on international contracts, through the issues of arbitrability of disputes arising out of such contracts, and of the excuses of non-performance provided to contracting parties by the sanctions. Section 5 then turns to the issue of the conformity of sanctions *vis-à-vis* other law norms, in particular general international law rules, international investment law rules, and international human rights law. The relevant case law of the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) is assessed, as evidence of the existence of an effective option open to affected

[7] For the UN, see the Global Counter-Terrorism adopted by the UN General Assembly, calling upon UN Member States to undertake measures against terrorism 'in accordance with the Charter of the UN and the relevant provisions of international law, including international standards of human rights' (Resolution adopted by the UN GA, *Measures to eliminate international terrorism*, A/RES/63/129, 15 January 2009). See also STRENGTHENING TARGETED SANCTIONS THROUGH FAIR AND CLEAR PROCEDURES (the so-called 'Watson Report'), *available at* http://www.watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf, made an official document of the UN General Assembly and the UN Security Council, as UN Doc. A/60/887-S/2006/331. As regards the EU, *see* Guidelines*, supra* note 4, ¶9.

individuals or entities to successfully challenge, under certain conditions, the legality of the sanctions measures before national and EU courts. Section 6 sets out the concluding remarks.

II. BACKGROUND: OVERVIEW OF ECONOMIC SANCTIONS AGAINST IRAN

2.1 UN SECURITY COUNCIL RESOLUTIONS

Since 2006, the UN Security Council has adopted numerous resolutions on the Iranian nuclear program, including four resolutions containing sanctions against Iran.[8] They appear as a reaction to the proliferation risks allegedly raised by that program, and, more precisely, to the inability of the International Atomic Energy Agency (IAEA), even after several years of investigations, to verify that there are no undeclared nuclear materials or activities in Iran.[9] The first resolution adopted in the context of the Iranian nuclear crisis was Resolution 1696 (2006) of 31 July 2006. It was adopted under Article 40 of Chapter VII of the UN Charter,[10] and demanded that "Iran shall suspend all enrichment-related and reprocessing activities, including research and development, to be verified by the IAEA".[11] It however contained no formal provisions on sanctions.[12] Half a year later, in view of the fact that Iran

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[8] *See* S.N. Kile, *Nuclear arms control and non-proliferation*, in SIPRI YEARBOOK 2009. ARMAMENTS, DISARMAMENT AND INTERNATIONAL SECURITY 387ff (2009); P.-E. Dupont,, *The EU-Iran dialogue in the context of the nuclear crisis*, 3 CENTRAL EUR J INT'L & SECURITY STUD. 97-112 (2009); N. Jansen Calamita, *Sanctions, Countermeasures, and the Iranian Nuclear Issue,* 42 VANDERBILDT J. TRANSNATIONAL L. 1393-1442 (2009).

[9] *See* the latest Report by the IAEA Director General on 'IMPLEMENTATION OF THE NPT SAFEGUARDS AGREEMENT AND RELEVANT PROVISIONS OF SECURITY COUNCIL RESOLUTIONS IN THE ISLAMIC REPUBLIC OF IRAN (2011), GOV/2011/29, *available at* www.iaea.org.

[10] Article 40 of the UN Charter provides that '[i]n order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures'. *See* E. DE WET, THE CHAPTER VII POWERS OF THE UN SECURITY COUNCIL (2004).

[11] S/RES/1696 (2006), ¶2.

[12] The Resolution '[c]alls upon all States, in accordance with their national legal authorities and legislation and consistent with international law, to exercise vigilance and prevent the transfer of any items, materials, goods

had not complied with the requirements set out in this Resolution, the Security Council, acting under Article 41 of Chapter VII of the UN Charter,[13] adopted Resolution 1737 (2006) on 23 December 2006. This Resolution imposed a embargo, i.e. the ban on export to and import from Iran of certain items and technologies relating to nuclear weapons and other technologies which can be used in both conventional and nuclear military applications (dual-use technologies), but also to missiles and related technologies insofar as they might be used to develop 'nuclear weapons delivery systems'. The Resolution introduced, *inter alia*, financial sanctions – including the freezing of funds and other financial assets – against those persons designated in the Annex to the Resolution, as well as by the competent UN Sanctions Committee[14] or by the Security Council, as persons who engage in, directly associate with or provide support for Iran's proliferation sensitive nuclear activities or the development of nuclear weapon delivery systems, or persons or entities acting on their behalf or at their direction, or entities owned or controlled by them, including through illicit means.[15] This Resolution has subsequently been extended, amended and modified by subsequent Resolutions 1747 (2006) and 1803 (2008). A fourth sanctions Resolution, strengthening and widening existing measures, was adopted on 9 June 2010.[16] The stated aim of the resolutions is to prevent Iran from developing a nuclear weapons capability, and influence its government to fulfil the requirements of the Security Council, in order to restore the

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and technology that could contribute to Iran's enrichment-related and reprocessing activities and ballistic missile programmes' (¶5).

[13] Article 41 of the UN Charter reads as follows: 'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the 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'. *See* J. Frowein and N. Krisch, *Article 41*, in, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 735-749 (B. Simma ed., 2002).

[14] A Sanctions Commitee was set up, as a subsidiary organ of the Security Council, pursuant to resolution 1737 (2006) on 23 December 2006 to oversee States' efforts to implement the sanctions imposed and to undertake the tasks set out in paragraph 18 of the resolution. The mandate of the Committee was subsequently expanded by resolution 1803 (2008), to also include the measures imposed in resolutions 1747 (2007) and 1803 (2008).

[15] S/RES/1737/2006.

[16] S/RES/1929/ 2010.

international community's confidence that its nuclear activities have exclusively civilian purposes.[17]

2.2 EU/EC MEASURES

The sanctions decided by the Security Council are binding on UN Member States,[18] and prevail upon any other obligation under any other international commitment.[19] In the EU, they have been implemented through Common Positions taken by the Council of the European Union in the framework of the Common Foreign and Security Policy (CFSP), as well as through Council regulations adopted on the basis of Articles 60 and 301 EC Treaty.[20] The first EU decision related to the Iranian nuclear program was Common Position

[17] It is to be noted that the official stance of the Iranian governement is that '[t]he Islamic Republic of Iran […] is against production, stockpiling, development and proliferation of nuclear weapons, and considers that production of new generations of these weapons would particularly inhibit constructive efforts towards disarmament, and rejects production of any and all nuclear, biological and chemical weapons'. *See* Letter dated 11 October 2006 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General (A/61/514–S/2006/806). Also STATEMENT OF IRAN'S PRESIDENT MAHMOUD AHMADINEJAD BEFORE THE 2010 REVIEW CONFERENCE OF THE PARTIES TO THE TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS (NPT) (2010), *available at* www.pmiran.at/.

[18] *See* UN Charter, Art. 25. Moreover, it is generally agreed that non-compliance with UN Security Council resolutions would entail State responsibility. *See* V. Gowlland-Debbas, *Sanctions Regimes under Article 41 of the UN Charter*, in NATIONAL IMPLEMENTATION OF UNITED NATIONS SANCTIONS: A COMPARATIVE STUDY 19-20 (V. Gowlland-Debbas ed., 2004).

[19] UN Charter, Art. 103.

[20] The relationship between EU and EC competences as regards sanctions is well explained in P. KOUTRAKOS, TRADE, FOREIGN POLICY AND DEFENCE IN EU CONSTITUTIONAL LAW. THE LEGAL REGULATION OF SANCTIONS, EXPORTS OF DUAL-USE GOODS AND ARMAMENTS (2001). *See also* P. Mariani, *The Implementation of UN Security Council Resolutions Imposing Economic Sanctions in the EU/EC Legal System: Interpillar Issues and Judicial Review*, Bocconi Legal Studies Research Paper No. 1354568 (2009); G. Zagel, ECONOMIC SANCTIONS OF THE EUROPEAN COMMUNITY: A COMMENTARY ON ART. 301 TEC*, available at* http://ssrn.com/abstract=862024.

2007/140/CFSP.[21] As regards the Council of the European Union, restrictive measures were first enacted through Regulation (EC) No 423/2007, adopted on 19 April 2007.[22]

Following adoption of SC Resolution 1929 (2010) on 9 June 2010, the EU for its part announced 'massive sanctions' against Iran, going beyond those just decided by the UN Security Council.[23] This move materialized in a 'Declaration on Iran' issued by the European Council at the conclusion of its 17 June 2010 meeting.[24] It contained the following statement:

> '[N]ew restrictive measures have become inevitable. The European Council, recalling its declaration of 11 December 2009 and in the light of the work undertaken by the Foreign Affairs Council thereafter, invites the Foreign Affairs Council to adopt at its next session measures implementing those contained in the UN Security Council Resolution 1929 as well as accompanying measures, with a view to supporting the resolution of all outstanding concerns regarding Iran's development of sensitive technologies in support of its nuclear and missile

[21] OJ L 61, 28.2.2007, 49. It has been amended by Common Position 2007/246/CFSP (OJ L 106, 24.4.2007, 67), Common Position 2008/479/CFSP (OJ L 163, 24.6.2008, 43), Common Position 2008/652/CFSP OJ L 213, 8.8.2008, 58, and *corrigendum* at OJ L 285, 29.10.2008, 22), Council Decision 2008/842/CFSP (OJ L 300, 11.11.2008, 46) and Council Decision 2009/480/CFSP (OJ L 303, 18.11.2009, 64), and then repealed by Council Decision 2010/413/CFSP (OJ L 195, 27.7.2010, 39).

[22] OJ L 103, 20.4.2007, 1. This Regulation was amended by Council Regulation (EC) No 618/2007 (OJ L 143, 6.6.2007, 1), Commission Regulation (EC) No 116/2008 (OJ L 35, 9.2.2008, 1), Commission Regulation (EC) No 219/2008 (OJ L 68, 12.3.2008, 5), Council Regulation (EC) No 1110/2008 (OJ L 300, 11.11.2008, 1), Council Regulation (EC) No 680/2009 (OJ L 197, 29.7.2009, 17), Council Regulation (EC) No 1100/2009 (OJ L 303, 18.11.2009, 31), Council Regulation (EU) No 1228/2009 (OJ L 330, 16.12.2009, 48), and, lastly, Commission Regulation (EU) No 532/2010 of 18 June 2010 (OJ L 154, 19 06 2010, 5). It was repealed and replaced by Council Regulation (EU) No 961/2010 (OJ L 281, 27.10.2010, 81) 'for the sake of clarity'.

[23] A Reuters report on 23 February 2010 asserted that '[f]or the first time, the E.U. is envisaging a program that targets the entire Iranian economy. In order to maximize the impact, the experts are recommending measures to hit the energy and financial sectors, where the regime is particularly vulnerable'. The same report alleges that '[t]he E.U. could, for example, obstruct Tehran's access to Iranian currency reserves located abroad. And one could banish the Iranian central bank from the international circulation of money and credit. Cross-border money transfers would be made virtually impossible and Iran would have huge problems paying for imports - that would hurt the supply of products needed for its nuclear program'. See EU PLANS MASSIVE SANCTIONS AGAINST IRAN (2010), *available at* www.spiegel.de.; Also FACTBOX: WEST PUSHES FOR NEW SANCTIONS AGAINST IRAN (2010), *available at* www.reuters.com.

[24] *See* European Council, 'Declaration on Iran', Annex II to the Conclusions of the 17 June 2010 European Council (EUCO 13/10).

> programmes, through negotiation. These should focus on the areas of trade, especially dual use goods and further restrictions on trade insurance; the financial sector, including freeze of additional Iranian banks and restrictions on banking and insurance; the Iranian transport sector, in particular the Islamic Republic of Iran Shipping Line (IRISL) and its subsidiaries and air cargo; key sectors of the gas and oil industry with prohibition of new investment, technical assistance and transfers of technologies, equipment and services related to these areas, in particular related to refining, liquefaction and LNG technology; and new visa bans and asset freezes especially on the Islamic Revolutionary Guard Corps (IRGC)'. [25]

These new implementation measures took the form of EU Council Regulation 961/2010,[26] as well as Council Decision 2010/413/CFSP.[27] It is also to be noted, even if it is not the focus of the present article, that in April 2011, the EU Council issued a Decision freezing economic resources of persons responsible on the ground for human rights violations in Iran.[28]

2.3 MEASURES IN DOMESTIC LEGISLATIONS

Whereas the EC Regulations mentioned earlier are directly applicable in the legal order of EU Member States, several of them have adopted national implementation measures. For instance, in the United Kingdom, the embargo is regulated through the provisions of the *Iran (Financial Sanctions) Order 2007*;[29] and in France, the provisions of the *Financial and Monetary Code* apply.[30] Outside the EU, many States have also implemented Security Council Resolutions through restrictive measures. As is well known, the United States have

[25] *See* European Council, 'Declaration on Iran', *id.,* at ¶4.
[26] Council Regulation (EU) No 961/2010 (OJ L 281, 27.10.2010, 81)..
[27] Council Decision 2010/413/CFSP (OJ L 195, 27.7.2010, 39).
[28] *See* Decision 2011/235/CFSP (OJ L 100, 14.4.2011, 51).
[29] The Iran (Financial Sanctions) Order 2007 (SI 2007/281), entered into force on 9 February 2007.
[30] French *Code Monétaire et Financier*, Art. L. 562-2.

enacted, independently from the UN Security Council Resolutions, an economic sanctions regime against Iran, administered by the *Office of Foreign Assets Control* (OFAC), a subsidiary agency within the U.S. Treasury Department.[31] On 1 July 2010, US President Obama signed into law H.R. 2194, the *Comprehensive Iran Sanctions, Accountability, and Divestment Act 2010*, expanding significantly restrictions contained in previous Acts, and targeting in particular Iran's petroleum and natural gas sector. It also establishes a framework for US States to pass divestment laws that prohibit the investment of public funds in companies that invest in Iran. The US sanctions regime raises specific issues due to its exterritorial effect; indeed, it targets non-US companies engaging in certain types of business with Iran.[32]

III. DESCRIPTION OF THE SANCTIONS

This Section contains a short summary of the measures currently in force – as of July 2010, i.e. after the adoption of SC Resolution 1929 (2010) on 9 June 2010 – focuses on measures applicable in the EU, directly affecting international trade and investment and does not deal

[31] The measures currently applicable include Presidential Executive Order 12957 (1995) prohibiting U.S. involvement with petroleum development in Iran, Executive Order 12959 (1995), and the 'Iran Libya Sanctions Act' (1996), which has become the 'Iran Sanctions Act' since Libya is no more considered as supporting international terrorism.

[32] In particular, the *Comprehensive Iran Sanctions, Accountability, and Divestment Act* may collide with the so-called 'EU Blocking Regulation', i.e. the Council Regulation (EC) No 2271/96 of 22 November 1996 'protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom' (OJ L 309 , 29/11/1996, 1). This Regulation prohibits certain legal persons incorporated within the Community, from complying with certain US sanctions regimes, including the 'Iran and Libya Sanctions Act of 1996', and is likely to apply to the 2010 *Act*. *See* H. L. Clark, *Dealing with U.S. extraterritorial sanctions and foreign countermeasures*, 20 U. PENN. J. INT'L EC. L. 1, 61 (1999).

with measures such as travel restrictions[33] or restrictions on specialised teaching and training.[34] The sanctions are comprehensive and include the following restrictive measures.

The sanctions regime has implications across a range of business sectors as it raises compliance risks and provides for heavy penalties. Therefore, companies as well as individuals engaged in trade activities with Iranian or Iranian-controlled counterparties should be aware of the existence and the extent of these measures. For instance, under the terms of Council Regulation (EC) No 961/2010, "Member States shall lay down the rules on penalties applicable to infringements of this Regulation and shall take all measures necessary to ensures that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive."[35] As a matter of fact, in many jurisdictions it is a criminal offence to contravene sanctions and related prohibitions. For instance, in the UK, the Iran (European Community Financial Sanctions) Regulations 2007 (SI 2007/1374) designates breaches of prohibitions which relate to certain financial sanctions in Council Regulation (EC) No 423/2007 of 19 April 2007 and certain other acts and omissions as criminal offences. Similarly, the Iran (Financial Sanctions) Order 2007 of February 2007, contains provisions making it a criminal offence to contravene, circumvent or facilitate, knowingly and intentionally, the commission of an offence relating to the freezing of funds.[36]

3.1 RESTRICTIONS ON INVESTMENT AND TRADE RELATED TO DUAL-USE PRODUCTS

[33] Within the EU, travel restrictions against certain Iranian officials are provided for in Council Common Position 2007/140/CFSP, as amended by Council Common Position 2008/652/CFSP

[34] Article 6 of Council Common Position 2007/140/CFSP, derived from a provision contained in UN Security Council Resolution 1747, provides that Member States 'shall, in accordance with their national legislation, take the necessary measures to prevent specialised teaching or training of Iranian nationals, within their territories or by their nationals, of disciplines which would contribute to Iran's proliferation sensitive nuclear activities'.

[35] Council Regulation (EC) No 961/2010, Art. 37(1).

[36] Iran (Financial Sanctions) Order 2007 (No. 281), Art. 6, 7 and 9.

The prohibition on the supply, sale or transfer of dual-use products, equipment and technology (including software) which can contribute to nuclear activities or development of delivery vehicles for nuclear weapons systems, which is found in SC Resolution 1737, is reflected in Article 2 of Council Regulation (EC) No 423/2007 (now replaced by Article 2 of Regulation No. 961/2010), as extended by Council Regulation (EC) No 1110/2008.[37] The products concerned are those mentioned on lists established within the framework of the *Nuclear Suppliers Group* (NSG)[38] and the *Missile Technology Control Regime* (MTCR)[39] export control regimes. In the same way, it is also prohibited to purchase, import or transport dual-use products from Iran, "whether the item concerned originates in Iran or not".[40] Such items are listed in Annex I and Annex II of Council Regulation (EC) No 961/2010.

Under Council Regulation (EC) No 961/2010, it is prohibited to directly or indirectly provide Iran with technical and financial assistance related to products, equipment and technology

[37] Council Regulation (EC) No 1110/2008 added to the list of items under embargo, *inter alia*, 'certain other goods and technology that could contribute to […] the development of nuclear weapon delivery systems, or to the pursuit of activities related to other topics about which the IAEA has expressed concerns or identified as outstanding'. This provision aims at taking into account the conclusion of the International Atomic Energy Agency report, 'Implementation of the NPT Safeguards Agreement and Relevant Provisions of Security Council Resolutions 1737 (2006) and 1747 (2007) in the Islamic Republic of Iran: Report by the Director General', GOV/2008/4, 22 February 2008. This document contained the following conclusions: (i) due to the implementation of the Work Plan agreed between Iran and the IAEA in August 2007 and the clarifications provided by Iran in that context, several issues of concern were 'no longer outstanding at this stage' (¶53), and (ii) 'one major remaining issue relevant to the nature of Iran's nuclear programme is the alleged studies on the green salt project, high explosives testing and the missile re-entry vehicle' (¶54).

[38] The Nuclear Suppliers Group (NSG), also known as the 'London Club', is a group of nuclear supplier countries which seeks to prevent the proliferation of nuclear weapons through the implementation of Guidelines for nuclear exports and nuclear-related exports. See Anthony, Bauer & Wetter, *Controls on security-related international transfers*, in SIPRI YEARBOOK 2008. ARMAMENTS, DISARMAMENT AND INTERNATIONAL SECURITY 495-498 (2008).

[39] The Missile Technology Control Regime (MTCR) is an informal arrangement, established in 1987, 'in which countries that share the goal of non-proliferation of unmanned delivery systems for nuclear, biological or chemical weapons cooperate to exchange information and coordinate their national export licensing processes'. Anthony, Bauer & Wetter, *Controls on security-related international transfers*, in SIPRI YEARBOOK 2008*, supra* note 41, at 500.

[40] See Council Regulation (EC) No 961/2010, Art. 4.

listed in Annexes I and II to the Regulation.[41] Further, it is prohibited to invest in, or create joint ventures with, companies in Iran that manufacture such products.[42]

A prior authorisation is required for "the sale, supply, transfer or export, directly or indirectly", to Iran of some dual-use products, equipment and technology not included in above-mentioned Annexes I or II to the Regulation, but which "could contribute to enrichment-related, reprocessing or heavy water-related activities, to the development of nuclear weapon delivery systems, or to the pursuit of activities related to other topics about which the International Atomic Energy Agency (IAEA) has expressed concerns or identified as outstanding". [43] Article 11 of Council Regulation (EC) No 961/2010, going far beyond the previous sanctions regime, prohibits the granting of any financial loan or credit to any Iranian entity engaged, not only in the manufacture of dual-use goods or equipment, but also "in the exploration or production of crude oil and natural gas, the refining of fuels or the liquefaction of natural gas".

Article 8 of Council Regulation (EC) No 961/2010 is also likely to have a significant impact on trade and investment in Iran, in that it prohibits the supply to Iran of key equipment and technology (listed in Annex VI to the Regulation) related to (a) exploration of crude oil and natural gas, (b) production of crude oil and natural gas, (c) refining, and (d) liquefaction of natural gas.[44]

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[41] Council Regulation (EC) No 961/2010, Art. 5.

[42] Council Regulation (EC) No 961/2010, Art. 11.

[43] Council Regulation (EC) No 423/2007, as amended by Council Regulation (EC) No 1110/2008, Art. 3(2).

[44] Council Regulation (EC) No 961/2010, Art. 8(2). It is to be noted that Article 9 of the same Regulation provides that it 'shall be prohibited: (a) to provide, directly or indirectly, technical assistance or brokering services related to the key equipment and technology listed in Annex VI, or related to the provision, manufacture, maintenance and use of goods listed in Annex VI, to any Iranian person, entity or body or for use in Iran. (b) to provide, directly or indirectly, financing or financial assistance related to the key equipment and technology listed in Annex VI, to any Iranian person, entity or body or for use in Iran. (c) to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the prohibitions referred to in points (a) and (b)'.

3.2 FREEZING OF FUNDS AND PROHIBITION AGAINST PROVIDING FUNDS

Funds and economic resources belonging to, owned, held or controlled by persons, entities or bodies listed by the Security Council or the Sanctions Committee, or that the EU considers to have a particular connection to Iran's proliferation-sensitive activities are being frozen. This measure is found to date in Article 16 of Council Regulation (EC) No 961/2010. The persons and companies covered by these sanctions are listed in Annexes VII and VIII of the Regulation. Furthermore, no funds or economic resources shall be made available, directly or indirectly, to or for the benefit of the persons, entities or bodies so listed. [45]

3.3 BAN ON GOVERNMENT GRANTS, FINANCIAL ASSISTANCE AND CONCESSIONAL LOANS, AND RESTRAINTS ON EXPORT SUPPORT

UN Security Council Resolution 1747 (2007) calls upon all States and international financial institutions "not to enter into new commitments for grants, financial assistance, and concessional loans, to the government of the Islamic Republic of Iran, except for humanitarian and developmental purposes".[46] Common Position 2007/246/CFSP, amended by Common Position 2008/652/CFSP, now replaced by Council Decision 2010/413/CFSP, has transposed this measure in EU law.[47] Furthermore, Council Decision 2010/413/CFSP instructs Member States to "exercise restraint in entering into new commitments for public provided financial support for trade with Iran, including the granting of export credits, guarantees or insurance", for trade related to "proliferation sensitive nuclear activities or to the

[45] Council Regulation (EC) No 961/2010, Art. 16(3).
[46] SC Res. 1747 (2007), ¶7.
[47] See Council Common Position 2007/140/CFSP, art. 3a, 1, as amended by Common Position 2008/652/CFSP.

development of nuclear weapon delivery systems".[48] Council Decision 2010/413/CFSP, through Article 6, has signigicantly expanded the prohibition, which now covers the following activities:

> (a) the granting of any financial loan or credit to enterprises in Iran that are engaged in the sectors of the Iranian oil and gas industry […] or to Iranian or Iranian-owned enterprises engaged in those sectors outside Iran;
>
> (b) the acquisition or extension of a participation in enterprises in Iran that are engaged in the sectors of the Iranian oil and gas industry […], or to Iranian or Iranian-owned enterprises engaged in those sectors outside Iran, including the acquisition in full of such enterprises and the acquisition of shares and securities of a participating nature;
>
> (c) the creation of any joint venture with enterprises in Iran that are engaged in the industries in the oil and gas sectors […] and with any subsidiary or affiliate under their control.

3.4 ARMS EMBARGO

Under Article 1(1)(c) of Council Decision 2010/413/CFSP, it is prohibited to directly or indirectly supply, sell or transfer arms and related material of all types to Iran, or for use in, or for the benefit of, Iran, including "equipment which might be used for internal repression". This prohibition does not include certain vehicles intended for the protection of personnel of the EU and its Member States in Iran. It is to be noted that even before the beginning of the nuclear controversy, the EU had adopted an arms embargo on Iran, restated in a declaration by the Council in April 1997.

[48] See Council Common Position 2007/140/CFSP, art. 3a, 2, as amended by Common Position 2008/652/CFSP.

It is also prohibited to directly or indirectly supply Iran with technical and financial assistance regarding arms and related material. This prohibition is found in Article 5(1) of Council Regulation (EC) No 961/2010.

UN Security Council Resolution 1747 (2007) requires Member States to impose a prohibition against purchasing, importing or transporting arms and related material of all types from Iran[49]. At the EU level, the prohibition is reflected in Article 1(4) of Council Decision 2010/413/CFSP.

3.5 MONITORING OF CERTAIN IRANIAN TRANSPORT COMPANIES

Council Decision 2010/413/CFSP and Council Regulation (EC) No 961/2010 contain provisions intended to prevent the transfer of goods and technologies under embargo through a system of monitoring transports by merchant vessels and aircraft owned or controlled by Iran (including the Islamic Republic of Iran Shipping Line), which are *inter alia* required to submit "pre-arrival or pre-departure information for all goods brought into or out of a Member State",[50] and may be subject to inspection "consistent with international law, in particular the law of the sea and relevant international civil aviation agreements".

3.6 MONITORING OF TRANSACTIONS WITH IRANIAN BANKS

[49] S/RES/1747/2007, ¶5 : 'Iran shall not supply, sell or transfer directly or indirectly from its territory or by its nationals or using its flag vessels or aircraft any arms or related material, and […] all States shall prohibit the procurement of such items from Iran by their nationals, or using their flag vessels or aircraft, and whether or not originating in the territory of Iran'.

[50] See Council Decision 2010/413/CFSP, Art. 15.

Increased monitoring of transactions with Iranian banks was introduced in 2008, with a view to prevent transactions that might contribute to Iran's proliferation sensitive activities.[51] Banks and financial institutions under EU jurisdiction are required to exercise special vigilance over transactions conducted with banks domiciled in Iran, in particular the Central Bank of Iran, or their branches and subsidiaries in the EU and other countries. If suspicions arise of funds being linked to the financing of proliferation sensitive activities or to the development of nuclear weapon delivery systems, a report is to be made to the *Financial Intelligence Unit* (FIU) or to another competent authority designated by the Member State concerned.[52] In particular, money transfers to and from Iran above € 40,000 shall require a prior authorization from the competent authority of the Member State concerned.[53] Branches and subsidiaries of Iranian banks operating in the EU are to provide detailed reports of all transfers they send or receive.[54]

IV. Impact of Economic Sanctions on International Contracts

4.1 Justiciability and/or Arbitrability of Disputes arising of International Contracts affected by Economic Sanctions

From a private international law perspective, economic sanctions pertain to the sub-category of 'international public policy' rules,[55] itself part of the category of 'mandatory rules of law', i.e. rules "which claim or demand to be respected or to be applied directly, irrespective of

[51] See Council Common Position 2007/140/CFSP, Art. 3(b), introduced through Council Common Position 2008/652/CFSP, and Council Regulation (EC) No 423/2007, Arts. 11(a) and 11(b), introduced through Council Regulation (EC) No 1110/2008.
[52] Council Decision 2010/413/CFSP, Art. 10.
[53] Council Decision 2010/413/CFSP, Art. 10(3).
[54] Council Decision 2010/413/CFSP, Art. 10(4).
[55] M. Blessing, Impact of the Extraterritorial Application of Mandatory Rules of Law on International Contracts 14 (1999).

any law or rules of law chosen by the parties or determined by the arbitral tribunal".[56] As such, it is evident that they cannot be ignored by judicial or arbitral tribunals. In this context, an important question is whether an arbitral tribunal should decline its arbitral jurisdiction on the ground of non-arbitrability because a restrictive measure of a supra-national nature (imposed at the UN or EU level) might provide for the non-arbitrability of the dispute.[57] The answer to this question may vary depending upon the country concerned.

In Switzerland, the Swiss Federal Supreme Court answered the same in the negative in *Fincantieri-Cantieri SpA and Oto Melara SpA v. M. and Arbitral Tribunal*. In that case, two Italian companies engaged the services of an intermediary for the sale of military warships to Iraq. Difficulties arose in 1987 when Iraq ceased its payments. The agent instituted arbitral proceedings against the two Italian companies, which in turn invoked as a defence the Resolutions of the UN Security Council adopted in 1991 prohibiting any commercial activity with Iraq which were followed by national implementation measures in Italy as well as in other European countries. The Swiss Federal Supreme Court affirmed the arbitrability of the dispute.[58] Commenting on this ruling, an author observed that:

> "Thus, interfering (foreign) mandatory rules of law (in the above example a sanction expressed by the UN Security Council) are not as such a barrier to affirm

[56] *Id.*, at 5.

[57] *Id.*, at 57.

[58] See Decision of the 1st Civil Court of 23 June 1992 in the case *Fincantieri-Cantieri Navali Italiani S.p.A. et Oto Melara S.p.A. contre M. et Tribunal arbitral* (recours de droit public), *BGE* 118 II 353 ; *Revue de l'Arbitrage*, 1993, 691. The Court noted that: 'Les mesures commerciales prises à l'encontre de la République d'Irak soulèvent certes la question de la validité des contrats conclus avant leur adoption, voire celle de l'impossibilité subséquente d'exécution desdits contrats; mais il n'apparaît pas - et les recourantes ne le démontrent en tout cas pas - que cet état de choses doive déboucher sur la constatation de l'inarbitrabilité des prétentions déduites de ces contrats, et à plus forte raison de celles issues de contrats connexes comme le contrat d'agence sur lequel l'intimé assoit ses prétentions. On ne voit pas, en particulier, quels principes juridiques fondamentaux (ATF 116 II 636) établiraient un monopole de la juridiction étatique pour régler les différends portant sur des prétentions de nature civile influencées par des règles de droit international public. En pareille hypothèse, c'est en effet l'existence matérielle de la prétention litigieuse, et non pas son arbitrabilité, qui est mise en cause par ce type de règles. Dans ces conditions, il n'est pas nécessaire de rechercher si les mesures d'embargo s'appliquent rétroactivement aux contrats considérés et si, étant donné leur caractère universel, elles entrent dans la notion de l'ordre public, international ou autre'.

> arbitrability. Thereafter, it will be the duty of the arbitral tribunal to determine in its decision on the merits whether the mandatory rule (or e.g. UN sanction) will affect the claim. In regard of an UN sanction, there is no doubt that an arbitral tribunal sitting in Switzerland will apply the same faithfully."[59]

It is however to be noted that another judicial proceeding linked to the same case, instituted in Italy,[60] led to an opposite conclusion. In spite of the ICC arbitration clause contained in the contracts, the Italian shipbuilding companies commenced proceedings against Iraq before Italian courts. The Italian parties contended that only arbitrable matters may be referred to arbitration and that in the case at hand the dispute concerned matters which were no more arbitrable since the adoption of the embargo legislation. The Court of Appeal of Genoa held that the dispute was not arbitrable due to Italian domestic measures implementing UN sanctions resolutions.

4.2. ECONOMIC SANCTIONS AS JUSTIFICATION OF THE NONPERFORMANCE OF INTERNATIONAL CONTRACTS

It is quite undisputed in doctrine[61] as well as in judicial and arbitral case law that governmental interference in international business relations under the form of an embargo may justify grant of the *force majeure* defence to a debtor.[62] In the context of investment

[59] *See* Blessing, *supra* note 58, at 59.

[60] Fincantieri-Cantieri Navali Italiani SPA (Italy) v. Ministry of Defense, Armament and Suppply Directorate of Iraq, Republic of Iraq, (1996) XXI Yearbook of Commercial Arbitration 594.

[61] *See* C. BRUNNER, FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES (2008).

[62] See e.g. the *obiter dictum* of the Tribunal in ICC Arbitration Case No. 9978 of March 1999, reprinted in (2000) 11 ICC International Court of Arbitration Bulletin 2 (Fall), 117-121. The award refers to 'the constant practice of ICC arbitrators who grant *force majeure* defences only in extreme cases such as war, strikes, riots, embargoes or other incidences listed in the force majeure clause of the contract'. *See* J. O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 472-495 (1999); also J. Rimke, FORCE MAJEURE AND HARDSHIP: APPLICATION IN INTERNATIONAL TRADE PRACTICE WITH SPECIFIC REGARD TO THE

disputes arising between States and foreign investors, Prof. Karl-Heinz Böckstiegel, writing on the question of whether State enterprises may excuse non-fulfilment of contractual obligations by claiming *force majeure* due to acts of public authority by their own State, stated that, provided that "the separation between the state enterprise and the state is respected", then "normally acts of public authority by the state have to be accepted as an excusing case of force majeure".[63] That solution can *a fortiori* easily be extended to the far less controversial situation of a private company.

On the basis of sanctions measures, courts and tribunals, whether judicial or arbitral, may thus nullify or terminate contracts, or justify their non-performance. In the context of international commercial arbitration, Profs. Fouchard, Gaillard and Goldman observed that "resolutions of sufficiently representative international organizations can certainly lead to the creation of new general principles. For example, it is not surprising that, on the basis of the measures taken by the United Nations and the European Communities during the Gulf crisis, an arbitral tribunal identified and applied principles which effectively justify the non-performance of certain contracts signed with Iraqi parties'.[64]

V. CHALLENGING THE SANCTIONS

CISG AND THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2001), *available at* www.cisg.law.pace.edu/cisg/biblio/rimke.html.

[63] Quoted by R. D. BISHOP, J. CRAWFORD AND W. M. REISMAN, FOREIGN INVESTMENT DISPUTES : CASES, MATERIALS, AND COMMENTARY 283 (2005).

[64] *See* FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 816-817 (E. Gaillard and J. Savage eds., 1999). The authors referred inter alia to the following sources: THE IMPACT OF THE FREEZE OF KUWAITI AND IRAQI ASSETS ON FINANCIAL INSTITUTIONS AND FINANCIAL TRANSACTIONS (B.R. Campbell & D. Newcomb eds., 1990) ; THE KUWAIT CRISIS AND THEIR ECONOMIC CONSEQUENCES (D.L. Bethlehem ed., 1991) ; Y. Derains, **L'impact des crises politiques internationales sur les contrats internationaux et l'arbitrage commercial international/The Impact of International Political Crises on International Contracts and International Commercial Arbitration**, (1992) INT'L BUS. L. J. 151; L. Matray, **Embargo and Prohibition of Performance**, in ACTS OF STATE AND ARBITRATION 69 (K.-H. Böckstiegel ed., 1997).

Which opportunities for judicial review, or, in other words, which fora are available to persons or entities somehow affected by the sanctions? As is well known, direct judicial action against the United Nations before a national court cannot be considered. It is indeed uncontroversial that the United Nations "enjoys absolute immunity from every form of legal proceedings before national courts and authorities", as provided for in Article 105, para. 1, of the UN Charter, the General Convention on the Privileges and Immunities of the United Nations[65] and other agreements.[66] The possibility of review of Security Council Resolutions by other bodies, such as the International Court of Justice (ICJ), envisioned by some authors, appears highly controversial.[67] But it remains that national courts or tribunals, including arbitral tribunals[68], may have to deal with objections to the application of the sanctions regime, and as a matter of fact already do so. Two different bodies of norms may be invoked before them: first, international agreements in the field of trade liberalization or investment protection, and second, rules of international human rights law.

5.1 SANCTIONS AND INTERNATIONAL COMMITMENTS OF STATES

[65] General Convention on the Privileges and Immunities of the United Nations (General Assembly Resolution 1/22A of 13 February 1946).

[66] *See* M. Gerster & D. Rotenberg, *Commentary on Art. 105 of the UN Charter*, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY1314-1324, 1318 (B. Simma *et al.* eds., 2002).

[67] *See* A. Orakhelashvili, *The Acts of the Security Council: Meaning and Standards of Review*, 11 MAX PLANCK Y.B. U. N. L., 143-195 (1997); K Doehring, *Unlawful Resolutions of the Security Council and their Legal Consequences* 1 MAX PLANCK Y.B. U. N. L. 91 (1997); B. Fassbender, *Quis judicabit? The Security Council, Its Powers and Its Legal Control*, 11 EUR. J. INT'L L., 219-232 (2000); M. J. Matheson, *ICJ Review of Security Council Decisions*, 36 GEORGE WASHINGTON INT'L L. REV., 615-622 (2004).

[68] *See* Compagnie Nationale Air France v. Lybian Arab Airlines, Court of Appeal of Montreal (Quebec), decision of 31 March 2003. Lybian Arab Airlines had instituted arbitration proceedings against Air France pursuant to UNCITRAL rules, following termination by the latter of a commercial agreement between them, affected by the embargo declared by the UN Security Council upon Lybia in 1992. Air France pleaded that the UN measure would entail inarbitrability of the dispute, and deprive the arbitral tribunal of the power to decide upon the dispute. This plea was rejected by the arbitral tribunal, approved by the Court of Appeal of Quebec.

At first glance, it appears that the sanctions regime is unlikely to be successfully challenged on the ground of disregard vis-à-vis rules found in general international law, international investment law (which includes EU rules on the free movement of persons, goods, or capital), and international trade law.[69] The reason is that the relevant treaty commitments[70] very often contain provisions related to security exceptions (sometimes referred to as 'public order' or 'national security') to their free-trade and/or investment protection provisions.[71] This exception provides that treaty commitments do not prevent contracting States from taking measures (called by some 'non-precluded measures' or NPM) departing from such commitments, in order to protect their 'essential security interests'.[72] Such a concept obviously includes, even if it is not always clearly stated, the case of economic sanctions decided at the UN level.[73]

WTO Agreements include such exceptions. For instance, article XXI of the GATT 1947 provides that:

> Nothing in this Agreement shall be construed […]

[69] Iran is to date not a member of the WTO, nor is it signatory of the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). But it is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, having accessed the New York Convention on 15 October 2001 and ratified it so that it entered into force as regards Iran on 13 January 2002.

[70] We will not deal specifically in the present article with the customary international law standart on the protection of foreign property. On the topic, *see* R. DOLZER AND C. SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 11-17 (2008).

[71] *See* OECD (Investment Division, Directorate for Financial and Enterprise Affairs), SECURITY-RELATED TERMS IN INTERNATIONAL INVESTMENT LAW AND IN NATIONAL SECURITY STRATEGIES (2009), *available at* www.oecd.org/dataoecd/50/33/42701587.pdf.

[72] *See* OECD, INTERNATIONAL INVESTMENT PERSPECTIVES: FREEDOM OF INVESMENT IN A CHANGING WORLD 93 (2007).

[73] *See* W. W. Burke-White and A. Von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VIRGINIA J. INT'L L. 307 (2007).

> (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.[74]

Many bilateral investment treaties (BITs) also contain provisions making the protection of essential security interests of the State a defence to justify an action of the State otherwise prohibited.[75] For instance, the 2004 US Model BIT contains an NPM provision reading:

> "Nothing in this Treaty shall be construed: […] to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interest."[76]

As regards such provisions it has been observed that,

> '[t]his provision is generally understood to allow states to take actions mandated by the UN Security Council in furtherance of its "primary responsibility for the maintenance of international peace and security." As UN member states are required to "accept and carry out the decisions of the Security Council," the provision ensures that states parties will not be held in breach of their obligations under a BIT if they are acting in furtherance of a Security Council resolution. In so doing, this permissible objective shifts the risks of state action in pursuance of UN mandates from states to investors'. [77]

Most (if not all) BITs entered into by Iran that do not contain such clauses. Nevertheless, apart from treaty law, States, in order to preclude the wrongfulness of their actions and avoid

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[74] Similarly, article XIV bis of the GATS 1994 provides that:
1. Nothing in this Agreement shall be construed: […]
(c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

[75] *See* A. NEWCOMBE AND L. PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 487 ff (2009).

[76] 2004 US Model BIT, art. 18(2). *See* W. W. Burke-White and A. Von Staden, *supra* note 73, at 327.

[77] *See* W. W. Burke-White and A. Von Staden, *supra* note 73, at 355.

liability, can invoke a state of necessity as recognized under customary international law, i.e., a situation when the State has no other means available to safeguard an essential security interest and can do so without harming an essential interest of another State.[78]

Apart from the presence of security exceptions clauses or the application of the customary defence of necessity, another reason why sanctions are unlikely to be challenged is that Article 103 of the UN Charter gives precedence to obligations arising from UN Security Council Resolutions in the event of contradiction with treaty obligations. Moreover, some authors argue that even breaches of international law resulting from the implementation by UN Member States are justified by the binding character of the underlying Security Council Resolution.[79]

The application of these principles leaves little room for involved parties to challenge the application of the sanctions. For instance, let us assume that an Iranian company having made an investment in a country party to a BIT with Iran, suffers damages (e.g. unilateral termination of a contract entered into with a company of the host State) as a result of the implementation of sanctions. The applicable BIT contains a dispute settlement clause allowing the Iranian investor to submit disputes arising between it and the host State to an *ad hoc* arbitral tribunal, in compliance with the arbitration rules of the UN Commission on

[78] Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001), Report of the International Law Commission on the work of its Fifty-third session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), art. 25(1): 'Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
(a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
(b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole'.
On the relationship between security exceptions in international treaties and the excuse of necessity in customary international law, *see* A. NEWCOMBE AND L. PARADELL, *supra* note 78, at 494-496.

[79] *See* K. Osteneck, *Die Umsetzung vor UNWirtschaftsanktionen durch die Europäische Gemeinschaft*, 168 BEITRÄGE ZUM AUSLÄNDISCHEN ÖFFENTLICHEN RECHT UND VÖLKERRECHT, Band 168, 480 (2004).

International Trade Law (UNCITRAL).[80] The Iranian company may institute arbitration proceedings against the host State, contending that the latter, in implementing the restrictive measures directed at the investor, breached some substantive standards of investment protection contained in the BIT. But the host State, even if it is not in a position to invoke a security exception clause insofar as it is not found in the applicable BIT, will most probably argue that it is bound, under Article 103 of the UN Charter, to carry out the decisions of the Security Council and is therefore compelled to disregard treaty obligations (as well as customary obligations) towards foreign investors of the targeted country.

Would an arbitral tribunal proceed with a review of the legality or applicability of the sanctions measures deemed to be applicable in a particular case? As exposed earlier, insofar as, sanctions pertain to the category of 'mandatory rules of law', the tribunal will most probably determine whether the sanctions measures are indeed applicable to the contract at hand, and if it concludes the same in the affirmative, it will refrain from reviewing the legality of the measures involved and simply apply them, except if it appears that they violate *jus cogens* norms, which is unlikely to be adjudicated.

As regards judicial review of the sanctions measures, the situation may be somehow different in the European context, at least in the case of autonomous EC measures, i.e. enacted independently from UN Security Council resolutions. The EC regime on capital movements not only establishes the fundamental principle of freedom of transactions and related payments within the Community, including to and from third countries,[81] but also provides for the right of Member States and the EC to maintain or introduce specific restrictions, in particular vis-à-vis third countries.

[80] See eg Agreement on Reciprocal Promotion and Protection of Investments between the Government of the Republic of Austria and the Government of the Islamic Republic of Iran, signed on 15 February 2001, art. 11.
[81] See Consolidated version of the Treaty on the Functioning of the European Union (thereafter TFEU), Articles 63 to 66 (ex Articles 56 to 60 TEC).

In the context of the common foreign and security policy of the European Union, Article 75 Treaty on the Functioning of the European Union (ex Article 60 Treaty establishing the European Community) provides for Community sanctions against specific third countries, through freezing of bank accounts or a ban on foreign direct investment in targeted countries. In another context, the ECJ was given the occasion to review the legality of a Council Regulation suspending a preferential trade agreement on a third country (Yugoslavia). In the *Racke* case[82], the applicant challenged the validity, under rules of customary international law, of a Council Regulation[83] suspending the trade concessions provided for by the Cooperation Agreement between the European Economic Community and the Former Republic of Yugoslavia, in the context of the crisis in Yugoslavia. The Council argued that :

> "the pursuit of hostilities and their consequences on economic and trade relations, both between the Republics of Yugoslavia and with the Community, constitute a *radical change* in the conditions under which the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia and its Protocols […] were concluded."[84]

The claimant relied on the *pacta sunt servanda* principle, termed by the Court as "a fundamental principle of any legal order and, in particular, the international legal order", requiring "that every treaty be binding upon the parties to it and be performed by them in good faith (see Article 26 of the Vienna Convention)".[85] The Court found that the European

[82] A. Racke GmbH & Co. v Hauptzollamt Mainz, ECR (1998) I-3688.
[83] Council Regulation (EEC) No 3300/91 of 11 November 1991 suspending the trade concessions provided for by the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia (OJ 1991 L 315, p. 1).
[84] Decision 91/586/ECSC, EEC of 11 November 1991.
[85] A. Racke GmbH & Co. v Hauptzollamt Mainz, ECR (1998) I-3688, ¶49. The Court held that 'the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a

Community "must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country".[86] Invoking this principle, Racke incidentally challenged the validity of the EC regulation.[87]

In this respect, the Court admitted that:

> "an individual relying in legal proceedings on rights which he derives directly from an agreement with a non-member country *may not be denied the possibility of challenging the validity of a regulation* which, by suspending the trade concessions granted by that agreement, prevents him from relying on it, and of invoking, in order to challenge the validity of the suspending regulation, obligations deriving from rules of customary international law which govern the termination and suspension of treaty relations."[88]

However, the judicial review admitted by the Court was strictly limited:

> "because of the complexity of the rules in question and the imprecision of some of the concepts to which they refer, judicial review must necessarily, and in particular in the context of a preliminary reference for an assessment of validity, be limited to the question whether, by adopting the suspending regulation, the Council made manifest errors of assessment concerning the conditions for applying those rules."[89]

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fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order'.

[86] A. Racke GmbH & Co. v Hauptzollamt Mainz, ECR (1998) I-3688, ¶45. In this finding, the Court referred to its previous judgment in Poulsen and Diva Navigation [1992] ECR I-6019, ¶9.

[87] A. Racke GmbH & Co. v Hauptzollamt Mainz, ECR (1998) I-3688, ¶46.

[88] A. Racke GmbH & Co. v Hauptzollamt Mainz, ECR (1998) I-3688,¶51 (emphasis added).

[89] A. Racke GmbH & Co. v Hauptzollamt Mainz, ECR (1998) I-3688, ¶52.

In the case at hand, the Court found that the conditions under customary international law, as codified in Article 62(1) of the Vienna Convention, for termination or suspension of an agreement by reason of a fundamental change of circumstances were met in the context of the Yugoslav crisis, and that it did not appear that the Council made a manifest error of assessment, so that "no factor of such a kind as to affect the validity of the suspending regulation" was present.[90] It remains nonetheless that the ECJ made it clear in its judgment that a possibility of judicial review of a sanctions measure, even if limited, exists, at least in favour of "an individual relying in legal proceedings on rights which he derives directly from an agreement with a non-member country'.

5.2 SANCTIONS AND HUMAN RIGHTS LAW

The question has arisen whether the Security Council and, at their respective level, the EU Council and national authorities implementing the sanctions regime, have to respect certain human rights standards, such as the right of due process (or judicial review), the right to be heard and the right to property[91]. Judicial review of UN sanctions resolutions and EU measures (either implementation measures of UN sanctions, or autonomous sanctions) by national courts appears to be possible in certain circumstances. In this respect, the case law of the ECJ on human rights protection originating from lawsuits filed by individuals and entities targeted by sanctions imposed by EU and EC institutions themselves implementing UN sanctions, is of particular interest. We will briefly examine a few leading relevant cases,

[90] A. Racke GmbH & Co. v Hauptzollamt Mainz, ECR (1998) I-3688, ¶53 sq.

[91] Among the recent literature on the subject, *see* D. WEISSBRODT, THE RIGHT TO A FAIR TRIAL UNDER THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (2001); D. SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (1999); Z. Stavrinides, *Human Rights Obligations under the United Nations Charter*, 3 INT'L J. HUM. RTS. 38 (1999); C. TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM (2003); S. TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS (2005); H. Hannum, *Human Rights*, in UNITED NATIONS LEGAL ORDER 319-348 (O. Schachter and C. Joyner eds., 1995); C. Harlow, *Access to Justice as a Human Right: The European Convention and the European Union* in THE EUROPEAN UNION AND HUMAN RIGHTS 187-213 (P. Alston ed., 1999).

adjudicated respectively in the contexts of the crisis in the former Yugoslavia, the so-called 'fight against terrorism', and then the Iranian nuclear controversy itself. As a comprehensive assessment of these cases and their implications would far exceed the size of this article, interested persons and counsel shall refer to the vast amount of legal commentary published so far on these judicial decisions.[92]

5.2.1 THE *BOSPHORUS* CASE

In the *Bosphorus* case (1996)[93] the ECJ dealt with the issue of the legality of sanctions imposed in the context of the implementation at the EC level of UN sanctions adopted against the former Federal Republic of Yugoslavia (FRY). Bosphorus Airways was a Turkish company which had leased a Yugoslav State-owned aircraft. The aircraft was subsequently seized by the Irish authorities under the sanctions regime decided by the UN Security

[92] On the ECJ *Kadi* decision, in particular, *see* P. De Sena and M. C. Vitucci, *The European Courts and the Security Council: Between Dédoublement fonctionnel and Balancing of Values*, 20 EUR. J. INT'L L. 193 (2009); A. Nollkaemper, *The European Courts and the Security Council: Between Dédoublement Fonctionnel and Balancing of Values: A Reply to De Sena and Vitucci*, 20 EUR. J. INT'L L. 862 (2009); G. de Burca, *The EU, the European Court of Justice and the International Legal Order after Kadi*, 1 HARVARD INT'L L. J. 51 (2009) ; M. Cremona, *EC Competences, 'Smart Sanctions', and the Kadi Case*, 28 Y.B. EUR. L. 559-592 (2009); E. Cannizzaro, *Security Council Resolutions and EC Fundamental Rights: Some Remarks on the ECJ Decision in the Kadi Case*, 28 Y.B. EUR. L. 593-600 (2009); A. Ciampi, *The Potentially Competing Jurisdiction of the European Court of Human Rights and the European Court of Justice*, 28 Y.B. EUR. L. 601-609 (2009); G. Gaja, *Are the Effects of the UN Charter under EC Law Governed by Article 307 of the EC Treaty?*, (28 Y.B. EUR. L. 610-615 (2009); N. Lavranos, *The Impact of the Kadi Judgement on the International Obligations of the EC Member States and the EC,* 28 Y.B. EUR. L. 616-625 (2009); R. Pavoni, *Freedom to Choose the Legal Means for Implementing UN Security Council Resolutions and the ECJ Kadi Judgement: A Misplaced*, (28 Y.B. EUR. L. 626-636 (2009); M. Scheinin, *Is the ECJ Ruling in Kadi Incompatible with International Law?*, 28 Y.B. EUR. L. 637-653 (2009); C. Tomuschat, *The Kadi Case: What Relationship is there between the Universal Legal Order under the Auspices of the United Nations and the EU Legal Order?*, 28 Y.B. EUR. L. 654-663 (2009); F. Fabbrini, *The Role of the Judiciary in Times of Emergency: Judicial Review of the Counter-Terrorism Measures in the United States Supreme Court and the European Court of Justice*, 28 Y.B. EUR. L. 664-700 (2009). It is to be noted that the papers published in the *Yearbook of European Law* (2009) are also published as CHALLENGING EU COUNTER-TERRORISM MEASURES THROUGH THE COURTS: EUI WORKING PAPERS (M. Cremona, F. Francioni and S. Poli eds., 2009).

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

Council against the FRY, and implemented through an EC Regulation.[94] Bosphorus Airways challenged the seizure before the Irish courts, arguing that the EC sanctions were not susceptible to being applied against an undertaking not incorporated (and not operating) in the FRY. The Irish Supreme Court eventually referred the case to the ECJ for a preliminary ruling (under Art. 234 of the EC Treaty) given that Ireland was enforcing the EC sanctions adopted to implement, in turn, the UN-mandated economic sanctions. The ECJ stated that the aim to stop the armed conflict in the FRY had to be given precedence over the rights invoked by Bosphorus Airways; the latter, according to the Court, are not absolute rights and may thus be sacrificed for the objectives of general interest pursued by the Community, namely, ending the conflict. Thus, the seizure of the aircraft as required by the EC regulation did not constitute a violation of the property rights of Bosphorus. The applicant then decided to institute proceedings before the ECHR. The ECHR's ruling in *Bosphorus* has been interpreted as requiring a minimum standard with respect to human rights protection in the context of international cooperation.[95]

5.2.2 THE *OMPI* CASES

5.2.2.1 THE JUDGMENT OF 12 DECEMBER 2006

The OMPI (*Organisation des Modjahedines du peuple d'Iran* or *People's Mujahidin of Iran*) brought an action before the Court of First Instance of the EC (CFI) seeking annulment of several common positions and decisions of the Council which included, since 2002, the OMPI on a list of persons and entities whose funds were to be frozen as part of the fight

[94] Council Regulation No 990/93 of 26 April 1993, concerning trade between the EC and the Federal Republic of Yugoslavia (Serbia and Montenegro), [1993] OJ L 102/14.

[95] Bosphorus v Ireland, Application No. 45036/98, 30 June 2005. See C. Costello, *The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe*, 6 HUM. RTS L. REV. 1, 87-130 (2006). Aust, *Between Self-Assertion and Deference: European Courts and their Assessment of UN Security Council Resolutions*, 8 ANUARIO MEXICANO DE DERECHO INTERNACIONAL 56 (2008).

against terrorism. These measures, adopted pursuant to the framework established by a Common Position[96] and the EC Regulation of 27 December 2001,[97] themselves implementing UN Security Council Resolution 1373 (2001) of 28 September 2001 on the fight against terrorism, were found by the Court to infringe several fundamental rights and safeguards, i.e. the right to a fair hearing, the obligation to state reasons and the right to effective judicial protection.[98]

The Court held that these rights are, as a matter of principle, fully applicable in the context of the adoption of a Community decision to freeze funds. The reasoning followed by the Court in reaching this position, apparently hardly reconcilable with the rulings of the CFI in *Yusuf* and *Kadi*,[99] can be summarized as follows. While in the two latter judgments, ruling on applications for annulment of decisions ordering the freezing of funds of persons linked to Osama bin Laden, Al-Qaeda and the Taliban, it was held that the Community institutions were not required to hear the parties concerned in the context of the adoption and implementation of a similar measure freezing the funds, insofar as the Council and the Commission had merely transposed at Community level resolutions of the Security Council and decisions of its Sanctions Committee which identified the persons concerned by name, by contrast UN Security Council Resolution of 28 September 2001 left it to the discretion of States to carry out the identification of the persons and entities whose funds are to be frozen.[100]

That identification thus involves the exercise of the EC's powers:

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[96] Common Position 2001/931/CFSP on the application of specific measures to combat terrorism (OJ 2001 L 344, p. 93).

[97] Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (OJ 2001 L 344, p. 70).

[98] Organisation des Modjahedines du peuple d'Iran v Council of the European Union, Case T-228/02.

[99] Discussed below at 5.2.3.

[100] Organisation des Modjahedines du peuple d'Iran v Council of the European Union, Case T-228/02, ¶101.

> "Since the identification of the persons, groups and entities contemplated in Security Council Resolution 1373 (2001), and the adoption of the ensuing measure of freezing funds, involve the exercise of the Community's own powers, entailing a discretionary appreciation by the Community, the Community institutions concerned, in this case the Council, are in principle bound to observe the right to a fair hearing of the parties concerned when they act with a view to giving effect to that resolution."[101]

In those circumstances, the ECJ emphasized that the Council is in principle bound to observe the fundamental rights guaranteed by the Community legal order. The Court then defined the scope of those rights and safeguards, as well as the restrictions which may be imposed on them through EC restrictive measures.

5.2.2.2 THE JUDGMENT OF 4 DECEMBER 2008

The OMPI later brought another action against the Council, claiming that the CFI should annul, insofar as it applies to the OMPI, Council Decision 2008/583 (implementing Article 2(3) of Regulation No 2580/2001), which maintained the OMPI on a list of persons, groups and bodies whose funds had to be frozen. The disputed Council Decision was enacted without first informing the OMPI of the new information or new material justifying its inclusion in the list, nor did it enable the OMPI to effectively make known its view of the matter, prior to the adoption of that decision.

The CFI held that "the continued freezing of the interested party's funds by Decision 2008/583 was the result of a procedure during which that party's rights were not respected. That finding cannot but lead to the annulment of the contested decision, in so far as it

[101] Organisation des Modjahedines du peuple d'Iran v Council of the European Union, Case T-228/02, ¶103.

concerns the interested party'.[102] As regards the extent of judicial review of the restrictive measures, the Court emphasized that:

> "The Council has broad discretion as to what to take into consideration for the purpose of adopting economic and financial sanctions on the basis of Articles 60 EC, 301 EC and 308 EC, consistent with a common position adopted on the basis of the common foreign and security policy. This discretion concerns, in particular, the assessment of the considerations of appropriateness on which such decisions are based.
>
> However, although the Court acknowledges that the Council possesses broad discretion in that sphere, that does not mean that the Court is not to review the interpretation made by the Council of the relevant facts. The Community judicature must not only establish whether the evidence relied on is factually accurate, reliable and consistent, but must also ascertain whether that evidence contains all the relevant information to be taken into account in order to assess the situation and whether it is capable of substantiating the conclusions drawn from it. However, when conducting such a review, it must not substitute its own assessment of what is appropriate for that of the Council." [103]

5.2.3 The *Yusuf* and *Kadi* cases

Strong, if not decisive, legal arguments for challenging restrictive measures, in situations when the latter have been adopted without providing targeted entities with certain procedural as well as substantial guarantees, can be drawn for the recent ECJ *Kadi* decision.[104] Actions had been brought before the CFI by several persons and entities blacklisted under a

[102] People's Mojahedin Organization of Iran v Council of the European Union, Case T-284/08, ¶¶36, 40-41, 47.
[103] People's Mojahedin Organization of Iran v Council of the European Union, Case T-284/08, ¶55.
[104] Joined Cases C-402/05P and 415/05P, Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission.

2002 'Al-Qaeda-Taliban' EC Council Regulation.[105] The claimants argued that the EC Council was not competent to adopt the regulation, and that it infringed several of their fundamental rights, in particular, the right to property and the rights of the defence. In its judgments of 21 September 2005 the CFI rejected, in law, all the pleas raised, and confirmed the validity of the regulation.[106] It ruled, *inter alia*, that the Community Courts had, in principle, no jurisdiction to review the validity of the Regulation at issue given that the Member States are bound by the resolutions of the Security Council according to the terms of the UN Charter which prevails over EC law. The CFI took the view that it may review the legality of the Regulation at issue only in the hypothesis of a conflict between a UN Security Council resolution and peremptory provisions of *jus cogens* – which was not found in this case.[107]

On appeal, the Court set aside the judgments of the CFI. The Court confirmed that the Council was competent to adopt the regulation on the basis of the articles of the EC Treaty,

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[105] Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation (EC) No 467/2001 (OJ 2002 L 139, p. 9). Such measure implemented several UN Security Council Resolutions, including Resolution 1390 (2002), Resolution 1267 (1999) and Resolution 1333 (2000), calling upon States to freeze the funds and other financial assets controlled directly or indirectly by individuals or entities designated by the sanctions committee of the Security Council as being associated with Usama bin Laden, Al-Qaeda or the Taliban.

[106] Case T-306/01 Yusuf and Al Barakaat International Foundation v Council and Case T-315/01 Kadi v Council and Commission.

[107] In ¶¶227-231 of *Kadi*, drawn up in terms identical to those of ¶¶278-282 of *Yusuf and Al Barakaat*, the Court of First Instance held as follows: 'International law thus permits the inference that there exists one limit to the principle that resolutions of the Security Council have binding effect: namely, that they must observe the fundamental peremptory provisions of jus cogens. If they fail to do so, however improbable that may be, they would bind neither the Member States of the United Nations nor, in consequence, the Community. The indirect judicial review carried out by the Court in connection with an action for annulment of a Community act adopted, where no discretion whatsoever may be exercised, with a view to putting into effect a resolution of the Security Council may therefore, highly exceptionally, extend to determining whether the superior rules of international law falling within the ambit of jus cogens have been observed, in particular, the mandatory provisions concerning the universal protection of human rights, from which neither the Member States nor the bodies of the United Nations may derogate because they constitute "intransgressible principles of international customary law" (Advisory Opinion of the International Court of Justice of 8 July 1996, The Legality of the Threat or Use of Nuclear Weapons, Reports 1996, p. 226, ¶79; see also, to that effect, Advocate General Jacobs's Opinion in Bosphorus [1996] ECR I-3953, ¶65).'

but found that the CFI erred in law in ruling that the Community Courts had, in principle, no jurisdiction to review the internal lawfulness of the contested regulation. It held that:

> "the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement." [108]

The Court emphasized that the review of lawfulness ensured by the Community Courts applies to the Community Act intended to give effect to the international agreement at issue, and not to the international agreement itself. A judgment given by the Community Courts deciding that a Community measure intended to give effect to a resolution of the Security Council is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law.

The Court concluded that:

> "the Community judicature must, in accordance with the powers conferred on it by the EC Treaty, ensure the review, in principle the full review, of the lawfulness of all Community acts in the light of the fundamental rights forming an integral part of the general principles of Community law, including review of Community measures which, like the contested regulation, are designed to give effect to the resolutions adopted by the Security Council under Chapter VII of the Charter of the United Nations." [109]

Ruling on the actions for annulment brought by the claimants, the Court further concluded that, in the light of the actual circumstances surrounding the inclusion of the appellants'

[108] C-402/05P and 415/05P, Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission, ¶316.
[109] C-402/05P and 415/05P, Yassin Abdullah Kadi, Al Barakaat International Foundation v. Council and Commission, ¶326.

names in the list of persons and entities whose funds are to be frozen, it must be held that the rights of the defence, in particular the right to be heard, and the right to effective judicial review, were patently not respected. The CFI was therefore prompted to annul Regulation 881/2002 to the extent that it concerned Mr Kadi and Al Barakaat.

5.2.4 THE *BANK MELLI* CASES

Restrictive measures including the freezing of assets have been adopted by the Council in respect of the Iranian bank, Bank Melli Iran and its London subsidiary Melli Bank.[110] Both entities instituted separate applications for annulment before the CFI. In its judgments of 9 July 2009 and 14 October 2009 the Court has in regard to the rights of defence, adopted an approach which is very similar to its jurisprudence in regard to the terrorism cases, in particular the *OMPI* cases, especially for questions relating to the statement of reasons, communication and individual notification of grounds for listing, the right to a fair hearing and the right to judicial review.

The General Court explicitly dismissed the argument that the due process jurisprudence developed for terrorism-related cases should not be applied *mutatis mutandis* to persons or entities listed in the framework of other sanctions regimes adopted by the EU. Both judgments have been upheld by the ECJ, which has considered inter alia that 'given the prime importance of the preservation of international peace and security, the restrictions on the freedom to carry on economic activity and the right to property of a bank occasioned by the fund-freezing measures were not disproportionate to the ends sought'.[111]

[110] Melli Iran v Council, Case T-390/08.

[111] See Judgment of the Court (Grand Chamber) of 16 November 2011, Bank Melli Iran v Council of the European Union (Case C-548/09 P); Judgment of the Court (Grand Chamber) of 13 March 2012, Melli Bank plc v Council of the European Union (Case C-380/09 P).

5.2.5 The *Bank Mellat* case

Another Iranian bank, *Bank Mellat*, recently challenged (ultimately unsuccessfully) in the High Court and the Court of Appeal a UK Treasury order[112] adopted against it, designed 'to hamper Iran's nuclear and ballistic missile programmes'. The Court of Appeal ruled that the measures adopted pursuant to the Order, excluding Bank Melli from access to the UK financial market, did not breach common law nor the European Convention of Human Rights (ECHR) principles. While the majority ruled that Bank Melli's designation was not unfair nor disproportionate when balanced against the legitimate aims of the government in preventing access of the bank to the financial markets (i.e. the protection of the national security of the UK, allegedly imperiled by the Iranian nuclear program), it is interesting to note that one judge, Elias LJ, dissented, stating that the Treasury had failed to comply with common law procedural fairness as well as with the procedural rights implied by Article 1 Protocol 1 and Article 6 of the ECHR.[113]

5.2.6 The *IRISL* case

In October 2010, the Islamic Republic of Iran Shipping Lines (IRISL) and various other shipping companies targeted under EU sanctions regulations brought an action before the CFI against the EU Council, seeking partial annulment of Council Decision implementing Regulation No 668/2010 and of Council Decision 2010/413/CFSP "in so far as they are included on the list of natural and legal persons, entities and bodies whose funds and economic resources are frozen in accordance with this provision".[114]

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[112] The Financial Restrictions (Iran) Order 2009, entered into force on 12 October 2009.

[113] See Bank Mellat v HM Treasury [2011] EWCA Civ 1.

[114] See OJ C 30, 29.1.2011, 40.

The applicants put forward four pleas in law,[115] following closely the line of the *Yusuf* and *Kadi* cases. They first argue that the contested measures were adopted in violation of the applicants' rights of defence and their right to effective judicial protection since they provide no procedure for communicating to the applicant the evidence on which the decision to freeze their assets was based, or for enabling them to comment meaningfully on that evidence. Furthermore, the applicants submit that the reasons contained in the sanctions measures "contain general, unsupported, vague allegations of conduct". In the applicants' view, the Council "has not given sufficient information to enable them effectively to make known their views in response, which does not permit a Court to assess whether the Council's decision and assessment was well founded and based on compelling evidence". Second, the applicants contend that the Council failed to provide sufficient reasons for their inclusion in the contested measures, in violation of its obligation to give a clear statement of actual and specific reasons justifying its decision, including the specific individual reasons that led it to consider that the applicants provided support for nuclear proliferation. Third, the applicants claim that the contested measures constitute an unjustified and disproportionate restriction on the applicants' right to property and freedom to conduct their business. They submit that their inclusion is "not rationally connected with the objective of the contested regulation and decision, since the allegations against the applicants do not relate to nuclear proliferation". Fourth, the applicants argue that "the Council committed a manifest error of assessment in determining that the designation criteria in the contested regulation and the contested decision were satisfied in relation to the applicants", in that "[n]one of the allegations against any of the applicants relates to nuclear proliferation or weaponry".

At the time of writing, the matter is still pending for adjudication before the EU General Court. But it is noteworthy that a closely related case, brought by a company named HTTS Hanseatic Trade Trust & Shipping GmbH, established in Hamburg (Germany), which acted

[115] OJ C 30, 29.1.2011, 40.

as broker and manager providing services to IRISL, and as such targeted by EU measures, has recently been adjudicated in favor of the claimant. The Court ruled that the Council had 'infringed the obligation to state reasons laid down in the second paragraph of Article 296 TFEU and Article 36(3) of Regulation No 961/2010'. The contested Regulation 'must therefore be annulled in so far as it concerns the applicant without it being necessary to consider the other pleas'. However, it is to be noted that the Court acted quite cautiously, considering that 'it cannot be excluded that, as regards the substance, the imposition of restrictive measures on the applicant could none the less be justified'. Thus, insofar as the annulment of the regulation 'might do serious and irreparable harm to the effectiveness of the restrictive measures imposed by that regulation since, in the interval preceding its possible replacement by a new measure, the applicant could engage in conduct intended to circumvent the effect of later restrictive measures', the Court maintained the effects of the regulation in so far as it concerned the applicant 'for a period of no more than two months' from the date of delivery of the judgment, obviously in order to allow the Council to enact in the meantime new measures targeting the company.[116]

VI. Conclusion

Even if opportunities of challenge of the international sanctions exist before national or international courts or tribunals, it is obvious that the various sanctions regimes may in many cases nullify or terminate contracts involving targeted Iranian parties, and therefore have a negative impact on trade and investment between Iran and its commercial partners. In this context, it is to be noted that investment opportunities in Iran, particularly in the energy sector, are likely to benefit those States (e.g. India, China and Russia), that are more

[116] See Judgment of the General Court (Fourth Chamber) of 7 December 2011, HTTS Hanseatic Trade Trust & Shipping GmbH, v Council of the European Union (Case T-562/10).

willing to preserve or even strengthen commercial ties with Iran and, thus, that are reluctant to accept new sanctions, or to apply in a drastic way existing measures.[117]

[117] *See* Shayan Ghajar, SANCTIONS OPEN IRAN TO RUSSIAN, CHINESE FIRMS (2010), *available at* http://www.insideiran.org/critical-comments/sanctions-open-iran-to-russian-chinese-firms/.