

## COMMENTS

### THE CHALLENGE OF THE “ECONOMIC INDEPENDENCE” AND THE “SOVEREIGNTY OF STATES”: A REVIEW OF THE PROBLEM OF LEGITIMACY OF ECONOMIC SANCTIONS IN THE REALITY OF THE INTERNATIONAL LEGAL ORDER

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*One of the problems faced by the international community is to find a basis for regulating economic relations between the states. While the third world states still emphasize their economic sovereignty to encounter and maintain their positions against the North States, the analysis of the international legal realities shows that merely relying on the “economic independence” and “permanent sovereignty over natural resources” cannot be a practical way to achieve the ideals of states known as the “South.” Like the Sword of Damocles, sovereignty can pave the way for maintaining the “status quo” or the domination of the premier economic powers in the international equation. Merely relying on international law as a branch based on the states’ sovereignty will be actually misleading to change the status quo. By a realistic analysis of the less positive role of sovereignty in the procedure of regulating the relations between the North and the South, this study seeks to focus on the fact that going out of the impasse of unjust economic relations between the North and the South will be possible only by creating a gap in the traditional concept of economic sovereignty in a sense that has been formed by the third world states in the 60s and 70s of the past century.*

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## Introduction

Today, we witness the development of the phenomenon of globalization around the globe. Globalization has affected widely all aspects of human life. Globalization of economy, science, technology, communications and transactions along with the globalization of the information world is only a part of this epidemic reality. This phenomenon has led to a process of "uniformity" in the international community.<sup>1</sup> However, it must be admitted that the emergence of the given phenomenon has not been without reaction. In fact, while we are moving towards uniformity in the international community, a vigorous process is trying to defend strictly its identity. This process attempts to save itself from being melted into a raging sea by returning to the past or by its local or regional compositions. What should be noted here is the paradoxical effect that the two phenomena have on our current world.<sup>2</sup> On the one hand, the world is moving towards "globalization," while on the other hand, the resistance of the process of "search for identity" has caused serious ruptures in the plan of "One World, One Order."<sup>3</sup>

Globalization and the expansion of foreign economic relations along with the intervention of each of the states through exercising their national economic policies within the framework of economic rules have led to serious complexities, both for states and the private sector involved in the international economic relations.<sup>4</sup> While

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<sup>1</sup> Mary Kaldor, *Nationalism and Globalization*, 10(1/2) Nations and Nationalism 161, 166 (2004).

<sup>2</sup> This contrast could be found also at the time of compilation of the UN Charter; the United Nations was among the proponents of universalism when the UN Charter was compiled, whereas United Kingdom, Latin America, Arab states as well as the member states of the Commonwealth Nations preferred regionalism and accordingly, different categories were formed and the only agreement was that the regional institutions should be subject to a global organization. Finally, the UN Charter was formulated in such a way that in addition to exercising a collective security system through the United Nations, the global character of the UN Charter was adjusted largely by inserting the concept of decentralization and regionalism in the Chapter VIII of the Charter and the concept of legitimate individual and collective defense in Art. 51 of its Chapter VII, then a mutual compromise was formed between globalists and regionalists at the time of the compilation of the UN Charter. See Borzu Sabahi, *The Role of Regional Organizations in the Implementation of Security Council Resolutions* 35–38 (Tehran: Ayneh Asar, 2000); see also for further study, Alvin LeRoy Bennett, *International Organizations: Principles and Issues* 218–220 (London: Prentice Hall, 1992).

<sup>3</sup> Davood Mirmohammadi, *Globalization: Dimensions and Approaches*, 11 National Studies Quarterly 72 (2002). See also for further study, Hamid Ahmadi, *Globalization: Ethnic Identity or National Identity*, 11 National Studies Quarterly 36 (2002).

<sup>4</sup> Mahmoud Bagheri, *The Rights of the National Economy in the International Legal Order*, 23 Public Law Research Quarterly 261 (2007).

attempt is made to form a united community by emphasizing the common human aspects, where humanity is one voice to fight common threats, the second process with an emphasis on areas of differentiation in many cases has even paved the way for the disintegration of the states, the stem cells of the international community. This is the recent process that tells us to what extent the concept of sovereignty is still of fundamental importance in the modern world. The truth is that the international community has now faced a paradox more than ever: while the components of the community see themselves as interdependent more than any time, world order continues to be settled in a decentralized way. What seems more interesting in this area is the economic order that has linked global units together. According to some of the lawyers, as the economic process of globalization has intensified, the economic sovereignty has also entered its devastating stages and it is expected that the battle is further intensified. Thus, we witness a sense of danger, or in other words, a sense of crisis felt by the developing countries: these countries are trying to prevent the dilution of what they call the wall of their economic sovereignty and to strengthen their measures.<sup>5</sup>

A notable point in the context of this process is that the economic independence of developing countries has been targeted. The procedures of the economic behaviors of third world states show that the states are trying to respond both individually and collectively to the governing political and economic domination. In this regard, the states are trying to account for a greater portion of the process of global economic decision-making. It is considered inevitable and essential by the states to keep the remainder of their economic sovereignty.<sup>6</sup> These efforts have shown at best their presence in the rules governing economic relations between the states. Several statements published by the legal institutions of the world on the principles governing economic relations between the states try to be an interpretation to keep the economic sovereignty of the developing states and what is called the economic self-determination of the states.<sup>7</sup>

This approach has been interpreted at the same time as a "return backwards." While the international community is striving to pass quickly all the boundaries built by itself and to achieve a kind of unity, we witness a kind of return backwards in terms of economy. The concern of the developing states in this regard has led the "economic independence and freedom of the states" to be established as a fundamental principle of the economic legal relations between the states. However, such a situation cannot be considered without its evil consequences: from

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<sup>5</sup> Wenhua Shan et al., *Redefining Sovereignty in International Economic Law* 140 (Oxford: Bloomsbury, 2010).

<sup>6</sup> *Id.*

<sup>7</sup> In this case, see, for example, the fifth section of the Declaration of International Rights Association in Seoul (1988). See also Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* 119 (Cambridge: Cambridge University Press, 2010).

the perspective of economic sanctions – which are mainly imposed economically by strong states on weak states – economic freedom of states can somehow be detrimental for the developing countries. In other words, when we emphasize the freedom and independence of the states in economic affairs, it is the developed countries that can take the initiative when necessary and put pressure on the developing countries, and with an emphasis on their economic sovereignty, they can stabilize somehow their economic sovereignty by refraining from economic exchange with the developing states.<sup>8</sup> Can such an understanding of freedom of sanctions be considered correct in the economic relations between the states?

### **1. The Economic Independence of States and the Basics of Sovereignty in International Economic Law**

The logical consequence of the economic sovereignty of states in traditional international law has been the “freedom of national economies in the regulation of their trade relations.” It has been said that each state is free to establish trade and economic relations with other states, companies, and private individuals or arbitrarily interrupt these relations. In this situation, the only guide of the state is the desire of its people and its sublime political interests. Actually, in a system whose primary foundation has been formed based on “satisfaction,” such an understanding is not strange at all.<sup>9</sup> In fact, in traditional public international law, sanctions which are imposed in the form of refusing to do business with the other party are rooted in the doctrine of sovereign equality. Thus, regardless of the reasons behind this action, the economic boycott performed by a country seems legitimate. In other words, political reasons which lie behind such economic action are not basically related to the domination of international law. The study of the thoughts of ancient international law confirms this theory. For example, Grotius in his famous book “On the Law of War and Peace” stipulates that the states, like people, have no obligation to sell their goods, or in the same way, Christian Wolff adds that the states have no obligation to purchase goods or services and the nations can freely make their own decisions about doing business. In fact, according to Wolff, only the free will of the states can determine the direction of the regulation of the commercial affairs.<sup>10</sup>

<sup>8</sup> See more Andreas F. Lowenfeld, *International Economic Law* 733–741 (Oxford: Oxford University Press, 2002).

<sup>9</sup> John H. Jackson, *Constitutional Treaties: Institutional Necessity and Challenge to International Foundations in Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann* 194 (M. Cremona et al. (eds.), Leiden: Martinus Nijhoff, 2013).

<sup>10</sup> Mortimer N.S. Sellers, *Economic Sanctions against Human Rights Violations in Economic Sanctions in International Law* 483 (L. Picchio Forlati & L.-A. Sicilianos (eds.), Leiden: Martinus Nijhoff, 2004). For example, this author quotes de Vattel who is considered as one of the pioneers of the modern international law that: “So, no nation can be naturally entitled to selling a commodity to a party that does not want to buy it... and finally business consists of mutual buying and selling of all kinds of

However, analysis of the problem suggests that even in traditional international law, the economic freedom of states to impose economic sanctions is subject to three categories of rights: economic rights of citizens of a country to impose sanctions, economic rights of citizens of the targeted state and finally, the economic rights of the third states. These economic rights soon find their relationships with human rights and, thus, affect the economic freedom of the states as the basis of international economic law. In this regard, it is worth noting that the Universal Declaration of Human Rights has guaranteed the rights of all human beings, regardless of race, language or nationality, and accordingly, international responsibility of states towards the economic rights of the people in a country have been accepted so that the development and prosperity of the character of every human being can be achieved by it, the rights that include economically the minimum standards needed for health and welfare (Arts. 2, 22 and 25).<sup>11</sup> In this connection, the International Covenant on Economic, Social and Cultural Rights has also accepted the universal right to enjoy a minimum standard of living (para. 1 of Art. 11),<sup>12</sup> a standard whose minimum can be interpreted with respect to another article of the Covenant, "being free from hunger" (para. 2 of Art. 11).<sup>13</sup> Therefore, it has been said that if a country refuses to sell a particular commodity and this along with other conditions influences the

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commodities. It is clear that this depends on the will of any nation to do trade with the other party or refuse it." In this case, see Emer de Vattel, *Le droit des gens ou Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (Leiden: Aux depens de la Compagnie, 1758), Sec. 92, cited by *id.* at 483.

<sup>11</sup> "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty" (Art. 2). "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality" (Art. 22). "(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection" (Art. 25). UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

<sup>12</sup> "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."

<sup>13</sup> "The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation..." UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

survival of a nation, the human rights obligations should overshadow the principle of economic freedom of states.<sup>14</sup>

On the other hand, the economic freedom of a country's citizens to impose or not to impose sanctions for a specific purpose is another element that must be considered in relation to the freedom of states to impose sanctions. However, it has been claimed that this freedom has lost its reason for existence in the context of Western democratic countries and such countries as Japan. In fact, since people in these countries delegate their powers in this area to their states on the basis of a social contract, the problem is virtually "negative proposition because of its subject."<sup>15</sup> Nonetheless, such simplification of the issue is a kind of getting round the legal logic. Whether in democratic or non-democratic countries, the question of the balance between the purpose of sanction and the level of the state interference in the economic rights of the country's people should be considered. In many cases, this issue is analyzed as a civil issue rather than a matter of international law, which has been taken into consideration depending on the growth of the "fundamental rights" order in each country. But what should be considered in this regard is that the question of the economic rights of citizens of the state imposing sanctions is not merely a civil issue. The procedure of the formulation of UN Charter suggests that this question has been considered by the legislators at the time of the formulation of the Charter. Since it was clear that sanctions imposed by the Security Council could affect the economic rights of citizens of the state imposing sanctions, the UN Charter deemed it necessary to consider the question explicitly.<sup>16</sup>

In this connection, sometimes economic sanctions against a foreign state can impose an additional economic burden on the citizens of a third State. Imagine a country is economically dependent entirely on a foreign state and it is sanctioned because of its own specific behavior. In this case, should the rights of the citizens of the third state not be considered? It is clear that the legal logic dictates that a balance must be established between the interests of the international community and the economic interests of third parties, a balance which is rooted in the respect for the "proportionality principle."

However, the study of the public policy of the international community shows that the standards limiting economic sanctions are not so transparent and the doctrine of "economic independence" has predicted such a high threshold for intervention

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<sup>14</sup> Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* 87 (Princeton: Princeton University Press, 1996).

<sup>15</sup> Gregory H. Fox & Brad R. Roth, *Democratic Governance and International Law* 67 (Cambridge: Cambridge University Press, 2000).

<sup>16</sup> "If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems" (Art. 50). United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

that they should actually be forgotten against the will of states imposing sanctions. It is true that the International Covenant on Economic, Social and Cultural Rights “accepts the right of all nations to freely dispose of their natural resources,”<sup>17</sup> and only the strong economic effects such as famine and starvation can be a barrier to limit the primary right, which of course can be rarely observed and proved.<sup>18</sup> In other words, except in cases of serious humanitarian effects, the international policy does not tend to prefer “human rights” considerations over the “freedom of the states in the management of their economic and business affairs.”

The truth is that the right of freedom of individuals and states to manage their natural resources and wealth can affect the economic relations with third parties. These effects, which can play the role of “secondary sanctions,” have taken into consideration the question of the economic sovereignty of the states and their freedom to act. However, the established international policy shows that the right to suspend trade with a commercial party has been defined in the doctrine of the international economic law as a fundamental right so that it has been remembered as a civil issue in the “exclusive jurisdiction” of the states, which can be subject to the intervention of international law only with the signing of a treaty of friendship or business.<sup>19</sup>

Such treaties that are signed bilaterally or multilaterally to stabilize and promote friendship among states can predict concessions to the third parties to be able to claim compensation if the interruption of a business relationship harms these states. In such cases, the legitimacy of such compensation finds a treaty basis. However, the signing of the comprehensive agreements such as the GATT and the WTO in recent years has caused that the impact of sanctions on the member states of these treaties takes a form of common and complex problem. For example, in the case of sanctions against Libya and Iran, the question raised repeatedly by economic lawyers was whether the legal effects of the sanctions on the third member states of the GATT and the WTO can be justified within the framework of the provisions of these organizations.<sup>20</sup>

What can be said concisely as a permission of these measures is that a minor breach of the international norms can hardly be considered as a reason for the interruption of a business relationship when there is a treaty of friendship and trade. The explanation of this issue can be searched in the consensual structure of international law: as long

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<sup>17</sup> “All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence” (Art. 1, sec. 2 of the International Covenant on Economic, Social and Cultural Rights).

<sup>18</sup> Hadewych Hazelzet, *Assessing the Suffering from “Successful” Sanctions: An Ethical Approach in United Nations Sanctions: Effectiveness and Effects Especially in the Field of Human Rights: A Multidisciplinary Approach* 71 (W.J.M. van Genugten & G.A. de Groot (eds.), Antwerpen: Interseta, 1999).

<sup>19</sup> Sellers 2004, at 483.

<sup>20</sup> In this case, see specially Andrea Giardina, *The Economic Sanctions of the United States against Iran and Libya and the GATT Security Exception in Liber Amicorum Professor Ignaz Seidl-Hohenveldern: In Honour of His 80<sup>th</sup> Birthday* 863–865 (G. Hafner (ed.), The Hague: Kluwer Law International, 1998).

as the state itself does not limit its will by an international treaty, the sovereignty principle which expresses economically its freedom to create or interrupt economic relations requires the state to act autonomously and free from any external factor when it imposes economic sanctions. Only a severe and exceptional breach, like famine conditions, which can be regarded as a humanitarian situation, can be considered an obstacle to the freedom. But when the state itself changes this situation by signing an economic agreement in the form of a brotherhood or friendship treaty, the conditions change completely and it is the state imposing sanctions that not only should be responsive to imposing sanctions, but also should account for the effects of these sanctions on third parties which are a party of the country's treaty.<sup>21</sup>

However, do these understandings seem too traditional? Whether we must continue in the twenty-first century to abide by the ancestors of international law such as de Vattel and Grotius and accept only "in exceptional cases" the right to limit the free will of the states to regulate their commercial relations. It seems that the results of the change in the approach to the concept of sovereignty, which has been raised in recent years as the responsible sovereignty on the world stage, can help us to regulate legally the economic relations. In fact, if we accept that economic sovereignty over natural resources is not only an advantage but rather a responsibility, we can use the results of this approach in the management of the state's will to regulate economic relations.

### **1.1. The Theory of Responsible Sovereignty and the Problem of Organizing International Economic Order**

The truth is that the responsible approach to the states' sovereignty in economic international law has a much longer history than the concept which was raised in the past decade as "the responsibility to protect." In fact, from the very beginning of the signing of the UN Charter, it has been accepted that the exercise of the economic sovereignty of states should not conflict with the independence of other states. In other words, any economic pressure imposed, which can be interpreted as an abuse of the right, should not affect survival or independence of other countries.<sup>22</sup> This restriction has always been interpreted in some way with the restrictions included in para. 4 of Art. 2 of the UN Charter, according to which any threat or aggression against the territorial integrity of a country is contrary to the principles and purposes of the United Nations.<sup>23</sup> Thus, an economically responsible sovereignty cannot use

<sup>21</sup> Sellers 2004, at 486. Of course, this is on condition that the basic treaty on friendship or trade is still in force.

<sup>22</sup> In this case, see specially Leland M. Goodrich & et al., *Charter of the United Nations: Commentary and Documents* 48 (New York: Columbia University Press, 1979).

<sup>23</sup> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations" (Art. 2, para. 4 of the UN Charter).

its economic potential to harm “political independence” of another state. In fact, this part of the obligations contained in the Charter constitutes a part of negative economic obligations of any sovereignty.

Nevertheless, the responsive obligations of an economic sovereignty are not limited only to these negative obligations. Existing Treaty Law has put the states in charge of some positive obligations which can be interpreted as the positive economic obligations of the states. Supreme examples of these obligations can be found in Arts. 55 and 56 of the UN Charter. In these articles, the UN member states have pledged to take joint and separate action in co-operation with the Organization for the achievement of such purposes as the promotion of solutions to the international economic problems and the improvement of economic conditions and the social and economic development.<sup>24</sup> Of course, in this case, the provisions of the UN Charter suffer from a serious flaw: lack of a serious mechanism for bringing these positive obligations from potentiality to actuality. However, it is undeniable that with the adoption of the UN Charter, the economic sovereignty mechanism has moved towards a kind of “responsible cooperation” instead of being merely profit-oriented. The states’ obligation to responsible cooperation can be in fact considered as a result of the interpretation of the provisions of the UN Charter on the basis of the principle of good faith. However, there is no doubt that the states are observed sometimes in the condition of violating these fundamental obligations, but such cases should not be interpreted as the undermining of this basic principle.

At the regional levels, this interpretation of the responsible approach to the economic sovereignty can be seen frequently. The Organization of American States is an example of these approaches. In the statute of this regional organization, not only the use of military force against the territorial integrity or political independence of another member state has been prohibited, but also the use of economic or cultural elements has been clearly considered as an act inconsistent with the responsible obligations of a state.<sup>25</sup>

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<sup>24</sup> “With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion” (Art. 55). “All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55” (Art. 56).

<sup>25</sup> “The right of each State to protect itself and to live its own life does not authorize it to commit unjust acts against another State” (Art. 15). “No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind” (Art. 20). “The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof” (Art. 22). Organization of American States (OAS), Charter of the Organisation of American States, 30 April 1948.

Perhaps a full manifestation of the responsible approach to economic sovereignty can be seen in the famous Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States. In this Declaration which has been compiled by the General Assembly of the United Nations, both negative and positive aspects of a responsible economic sovereignty is visible: In fact, the states have committed not to use the economic means to impose pressure on each other, in addition, they have accepted to use positively the economic means for peaceful coexistence.<sup>26</sup>

Since then, the UN General Assembly has repeatedly emphasized this responsible approach. In 1996, by adopting the Resolution 51/22, the UN General Assembly emphasized on the elimination of unilateral economic coercive measures as a means of political and economic pressure against developing countries.<sup>27</sup> Two years later, on 26 October 1998, by adopting a similar resolution, the UN General Assembly considered the economic pressures on the developing states as a breach of the rules of peaceful coexistence between states.<sup>28</sup> Such an approach to understanding the dimensions of economic sovereignty and its change from the time of the founding ancestors of this branch have been very important. It is clear that this approach can be useful to some extent in the understanding of the unilateral economic sanctions.

One of the important aspects of international economic law has been the regulation of the treatment of the states with foreigners. A state cannot exercise its economic sovereignty without attention to the established rights of the foreigners in its civil law. This has had many instances in nationalizing the foreigners' property and taxation for them.<sup>29</sup> However, no doubt it also applies to the issue of sanctions and economic pressures. In fact, it has been accepted that foreigners may be subject to less favorable treatment than the citizens of a state. Nonetheless, a foreigner should not be subject to a taxation which is not in proportion to his activity. Undoubtedly, when a state tries to affect the situation of another state by putting pressure on the

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<sup>26</sup> UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24 October 1970, A/RES/2625(XXV).

<sup>27</sup> UN General Assembly, Elimination of Coercive Economic Measures as a Means of Political and Economic Compulsion, 27 November 1996, A/RES/51/22.

<sup>28</sup> For example, we read in this resolution that: "The General Assembly calls upon all States not to recognize extra-territorial coercive economic unilateral measures or legislative acts imposed by any State." See UN General Assembly, Elimination of Coercive Economic Measures as a Means of Political and Economic Compulsion, 26 October 1998, A/RES/53/10.

<sup>29</sup> 1929 Harvard draft plan on the responsibility of the states for the damages in their territory to the foreigners and their property is one of the first conditions proposed concerning the responsibility of states, which is still a modest realm in this regard. See Milka Dimitrovska, *The Concept of International Responsibility of State in the International Public Law System*, 1(2) Journal of Liberty and International Affairs 8 (2015).

citizens of that country and refers to economic sovereignty to justify its action, the subtleties of the above-mentioned argument should be considered.

After all, the question of responsible economic sovereignty is linked with the implementation of extraterritorial economic rights. This question arises when the state attempts to induce the economic entities outside its territorial jurisdiction, which have extensive economic relationships with it, to act in accordance with its political criteria; otherwise, this state will use the means of its economic power to influence those entities or individuals. The use of the responsible sovereignty approach that moves in the direction of the states' economic coexistence can be an answer to this question. By the responsible sovereignty approach that we face today, the states try to use economic incentives instead of sanctions in their positive and negative sense to stimulate an economic entity, which sometimes its dimensions go beyond their sovereignty. This especially happens when a group of states has come close to each other within the framework of a market economy. Meantime, we will see that the economic aspects of their sovereignty are divided among them in a spreading form and a state can use the means of sanction – of course, positive sanction<sup>30</sup> – to stimulate the private economic sectors of another state. Some examples of such an approach can now be seen in the dimensions of the European Union and the International Monetary Fund.<sup>31</sup>

In this regard, one of the issues which can be referred to as a function of responsible economic sovereignty in the context of imposing sanctions is the subject of "state's obligation to due diligence" to not damage the economy of the other states.<sup>32</sup> This issue and its relationship with economic sanctions will be discussed at below.

### **1.2. An Obligation to the Due Diligence and Economic Restrictive Measures**

The basis of a state's obligation to due diligence before taking any economic restrictive measures should be searched in the traditional rules of international law. However, the content of this rule should be considered with regard to the developments in the international community and its necessities. From this perspective, each state

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<sup>30</sup> The term of positive sanctions was described by David A. Baldwin, professor at Princeton University, in an article entitled "The Power of Positive Sanctions," which include the economic sovereignty and the soft market power in the form of foreign aids, investment, trade and technology transfers; accordingly, positive sanctions mean the use of positive measures including the above-mentioned ones to achieve the same goals intended by the negative sanctions. For more information, see David A. Baldwin, *The Power of Positive Sanctions*, 24(1) *World Politics* 19 (1971).

<sup>31</sup> Laura Picchio Forlati, *The Legal Core of International Economic Sanctions in Economic Sanctions in International Law*, at 169.

<sup>32</sup> The Charter of Economic Rights and Duties of States containing this obligation emphasizes in its different articles on the economic obligations of states to the economic assistance and providing the fields of economic development and balance and equilibrium in the global economy and avoidance of discrimination and barriers to free trade, see Charter of Economic Rights and Duties of States, GA Res. 3281, UN GAOR, 29<sup>th</sup> Sess., Supp. No. 31, UN Doc. A/9631 (1974) 50.

is pledged to refrain from any action that could harm the rights of other states.<sup>33</sup> Initially, this rule was formed in relation to questions concerned with the neutrality in international law of hostilities and gradually the scope of its implementation was expanded over time and it entered into the area of the states' responsibility law. At first, this principle was considered in relation to measures which were done by the people of a country against the foreigners and then the scope of its implementation included environmental damages that could occur to the environment by the private companies. Now, in many contemporary legal systems, this principle has been accepted in civil, environmental law and through it, many responsibilities have been imposed on the shoulders of the states.

In the evaluation of the effects of economic sanctions, this principle should also be considered as a fundamental principle. The basis of this obligation is that the effects of economic sanctions, especially their economic effects on the environment, and even their extraterritorial effects on the other countries should be considered primarily when any kind of economic sanctions is imposed. This obligation applies not only to the states, but also should be considered in the performance of the Security Council. In fact, this obligation of the Security Council is rooted in the responsibility of this Council to maintain international peace and security. The states that entrusted the authority of imposing sanctions to the Security Council on the issues related to the international peace and security, in return they are entitled to be safe from any possible damage caused by the measures of the Council on their economies. The non-compliance with this rule can be considered as a breach of the purpose of the Council to maintain international peace and security.<sup>34</sup>

In practice, both the states and the Security Council should predict economic and non-economic effects of such measures before proceeding to any economic sanction. Such an obligation is the result of exclusive jurisdiction of the states over their territories. In fact, if we accept that any right in the juridical world is associated with a duty, we must accept that the exclusive rights of the states' sovereignty over their territory involve the obligation to "protect the sovereign rights of other states," which can be manifested in the form of the principle of obligation to due diligence.<sup>35</sup>

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<sup>33</sup> Horst Blomeyer-Bartenstein, *Due Diligence in Encyclopedia of Public International Law Vol. 10* 138–140 (R. Bernhardt (ed.), Amsterdam: North Holland, 1987).

<sup>34</sup> "If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems" (Art. 50 of the UN Charter).

<sup>35</sup> This point can be deduced from the famous decision of Max Huber in the *Island of Palmas* case. In this decision, we read: "Territorial sovereignty... involves the exclusive right to display the activity of a State. The right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory." See *Island of Palmas Case*, Scott, Hague Court Reports 2d 83 (1932), (Perm. Ct. Arb. 1928), 2 U.N. Rep. Intl. Arb. Awards 829.

However, the content of this obligation is not so clear. Professor Pierre-Marie Dupuy believes that this principle is a kind of obligation to the means and mere effort by a state makes it innocent of the remaining results.<sup>36</sup> However, it does not seem such a conclusion to be consistent with what has been seen in the performance of some international judicial institutions. For example, in the *Velásquez Rodríguez* case, the American Court of Human Rights has held the states liable for want of reasonable care on the behavior of private individuals. Actually, the style of the expression of this regional Court shows that since the states have all decision-making and implementation means and resources in their possession, they are responsible in the event of damage to the interests of the states or private parties; unless they prove that they have taken all necessary measures to prevent this damage.<sup>37</sup>

This approach to the question of responsible sovereignty over the exercise of sanctions should be considered in economic international law. In fact, it is true that the decision of the American Court of Human Rights has been issued in the style of the human rights issues, but it should be noted that the question of obligation to due diligence is not only dedicated to the human rights issues and can be considered much more in the economic subjects of sanctions. In this regard, some of the lawyers have paid attention to the customary character of this rule and have been announced that if the exercise of sanctions deprives the citizens of a third state(s) of their commercial rights or harms their interests, this principle which is a customary rule has been violated.<sup>38</sup>

Nevertheless, the main difficulty should be sought in the way this principle is implemented. In this regard, it has been said that there is no single standard for the implementation of this principle and there is not also much sensitivity to the strict implementation of this principle in the economic issues.<sup>39</sup> However, the lack of sensitivity in this area should not be taken as the unimportance of this principle in the economic affairs. The principle of due diligence in the economic activities and the performance of such organizations as the WTO have repeatedly been considered. Any extraterritorial commercial action in the arena of the WTO should consider this principle. But the question that has strongly attracted the attention of lawyers in recent decades in the so-called relations between North and South Poles is the use of an economic weapon to influence political or social decisions of the states. Much has been said about the political or the social legitimacy of such measure;

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<sup>36</sup> Djacoba Liva Tehindrazanarivelo, *Le Droit des Nations Unies et les Limites au Pouvoir de Sanction du Conseil de Sécurité* in *Economic Sanctions in International Law*, at 252.

<sup>37</sup> *Unity and Diversity of International Law: Essays in Honour of Professor Pierre-Marie Dupuy* 125–126 (D. Alland et al. (eds.), Leiden: Martinus Nijhoff, 2014).

<sup>38</sup> *Sanctions, Accountability and Governance in a Globalised World* 180 (J. Farrall & K. Rubenstein (eds.), Cambridge: Cambridge University Press, 2009).

<sup>39</sup> *Id.*

however, this question remains that how this phenomenon can be described in the current international legal order and the question of the states' sovereignty. In the next section, we will try to analysis a reality called economic sanctions from the perspective of the economic sovereignty of states and the positions of the North and the South to this political-legal concept.

## **2. Economic Sovereignty of the States and the Question of Extra-Territorial Sanctions: The Clash of Legal Realities with Political Ideals**

Each state can embark on drawing up legislations to set up arrangements to have reasonable territorial or personal relationship with another country. In other words, every state can embark on legislation about what happens in its territory. In this regard, the existence of the "extraterritoriality" aspect of the law is not necessarily a breach of the rules of international law. For example, each state can enact some laws in connection with its citizens and these laws can find consequently "extraterritorial" dimensions. It is fully consistent with international law. In this connection, some of the lawyers consider the basics of the possibility of extraterritoriality of the laws as quite consistent with the reality of "globalization" of the world of economy.<sup>40</sup> Although many questions have been raised about the dimensions of this right, the lawyers' community continues to face with this fundamental question that can a state, under the pretext of some activities which are carried out outside its territory and affect its country, enact some laws that are related to activities outside the territory of the state?<sup>41</sup> It has been said that the principle of territorial jurisdiction in international law has originated from the decision of the Permanent Court of International Justice in the famous *Lotus* case in 1927. According to this decision, the principle of sovereignty expresses more than anything "the exclusiveness of the right to intervene" in the coercive means of a sovereign state.<sup>42</sup> Pierre-Emmanuel Dupont says:

The most important objection to unilateral sanctions from the perspective of international law is related to the system of collective security. When a situation

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<sup>40</sup> Seyed Yaser Ziaee, *Extraterritorial Jurisdiction in International Investment Law*, 22 *Law of Nations Quarterly* 160 (2016).

<sup>41</sup> Regulations related to foreign trade are indeed a part of the civil economic law that enables the state to restrict the freedom of its inhabitants. Exchange control regulations and import and export regulations for political purposes are the most important examples of the national economy that are focused on international economic relations. For example, the law of the United States allows the president to limit the exports of this country by referring to the protection of national security, achieving foreign policy objectives, compliance with United States international obligations or maintaining scarce resources. See Mahmoud Bagheri, *A Market-Based Economy and Private Law Shortcomings*, 19 *Journal of Law and Politics Research* 74 (2006).

<sup>42</sup> *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7). See also Alexander Marie Stuyt, *The General Principles of Law as Applied by International Tribunals to Disputes on Attribution and Exercise of State Jurisdiction* (Dordrecht: Springer, 1946).

is on the agenda of the Security Council and the Council decides personally on the situation, the member states of the United Nations cannot, whether individually or collectively, attempt to impose a sanction on that situation.<sup>43</sup>

The states imposing unilateral sanctions resort principally to the principle of countermeasures contained in the plan of the international responsibility of states to justify their measures. To reject this justification, Alain Pellet, a leading international lawyer, believes that

if the Security Council decides to impose sanctions in response to an internationally wrongful act, the right of states to adopt unilateral countermeasures will end.

In this regard, he refers to Art. 51 of the Charter, which stipulates:

The right of self-defense in response to an armed attack is not destroyed until the Security Council takes necessary measures to protect international peace and security.

He argues that “this issue applies to countermeasures when the Security Council takes measures in accordance with Articles 41 and 42 of the Charter.”<sup>44</sup> Even if according to some of the lawyers, Security Council sanctions cannot make an obstacle to the adoption of countermeasures, resorting to countermeasures requires compliance with certain conditions ordained in the plan of the International Law Commission on the international responsibility of states in 2001, which seems that the exercise of unilateral economic sanctions requires deliberation.<sup>45</sup> In this part, after explaining the probable basis of a sovereign state’s intervention within the scope of its economic borders, we will explain the challenges of imposing extraterritorial

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<sup>43</sup> Pierre-Emmanuel Dupont, *Countermeasures and Collective Security: The Case of the EU Sanctions against Iran*, 17 *Journal of Conflict & Security Law* 301 (2012).

<sup>44</sup> *Id.*

<sup>45</sup> For example, we can refer to the economic sanctions imposed by the United States of America and Europe Union beyond the resolutions of the Security Council, in which these conditions have not been met (Art. 52 of the Plan of International Responsibility) and the initial breach of the obligation and non-compliance with the provisions of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) by Iran are disputed and still no reliable document on the breach of these regulations by Iran has been provided by the states and organizations claiming the breach. For further study, see International Law Commission, *International Responsibility of the State, the Text and Description of the Articles of the International Law Commission* 310–306 (Ali Ibrahim Gul (trans.), Tehran: Institute of Legal Studies and Research in Science, 2009); Seyed Ghasem Zamani & Jamshid Mazaheri, *Smart Sanctions of the Security Council in the Light of Resolution 1029: Protecting or Threatening Peace*, 44 *Journal of International Law* 145 (2010); Seyed Yaser Ziaee & Mahnaz Rashidi, *Sanctions against Islamic Republic of Iran’s Shipping from the Perspective of International Law*, 54 *Journal of International Law* 91 (2016).

economic sanctions and the dimensions of its acceptance in the current international community.

### **2.1. Territorial Sovereignty: Searching a Basis for the Regulation of the Inter-governmental Economic Relations**

As it was said, the principle of territorial jurisdiction in international law has originated from the decision of the Permanent Court of International Justice in the famous *Lotus* case in 1927. According to this decision, the principle of sovereignty expresses more than anything “the exclusiveness of the right to intervene” in the coercive means of a sovereign state.<sup>46</sup> Although the solution proposed in the *Lotus* case has been repeatedly criticized by the doctrine since then, any international judicial authority has not yet found an opportunity to revise generally this principle. The general international policy has also been always looked with suspicion on the uncontrolled expansion of the extraterritorial jurisdiction.

The truth is that the position of some influential states such as the United States in the economic sphere is significantly different from the position of other states in terms of the jurisdiction of the extraterritorial legislation and this has affected the exercise of extraterritorial economic sanctions. From the perspective of the United States, any behavior, regardless of the location of its formation, that affects the territory of the United States, or at least is intended to affect the country, can cause the United States authorities embark on the legislation in connection with that behavior; this broad interpretation in relation to the territorial jurisdiction of the United States has been referred in para. 402 of the third document governing the America’s foreign policy called “Restatement of the Law Third.” This interpretation is based on this philosophy that such an interpretation should be accepted with regard to the very close interaction of the world economies in the context of globalization. Therefore, with such an interpretation, it should be admitted that there is no constraint in relation to limiting the legislative jurisdiction of the United States. But the truth is that the United States itself has put a restriction on the extraterritorial legislation in para. 403 of the above-mentioned document that is worthy of reflection.<sup>47</sup> In this paragraph, we read that

even when there is a basis for jurisdiction in accordance with paragraph 402, if the exercise of this jurisdiction is unreasonable, a state cannot use its jurisdiction to legislate about individuals or actions related to another state.<sup>48</sup>

However, because of both the base and the content of this criterion, there is no consensus among international lawyers and some explicitly claim that the criterion

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<sup>46</sup> *S.S. Lotus*, *supra* note 42. See also Stuyt 1946, at 127.

<sup>47</sup> *Restatement of the Law, the Foreign Relations Law of the United States Vol. 1* 238 (St. Paul: American Law Institute, 1987).

<sup>48</sup> *Id.*

of reasonableness cannot be a basis for legislation to regulate legal relationships outside the territory of a state.<sup>49</sup>

However, the performance of other countries, including the European Union, has been different in relation to this subject and some lawyers have spoken a “reasonable procedure” in this regard. While these states have embarked on drawing up extraterritorial legislations in some cases, it must be admitted that the difference between the approach of these states and the approach of the United States is quite remarkable: in the case of such countries as the members of the European Union, the purpose of the extraterritorial legislation, especially in the field of competition law, is to prevent a crime that affects the inside of the country, while in accordance with the United States law, even if a crime occurs which its all effects of the crime take place outside of the United States, this country simply embarks on the legislation from a superior position and influences foreign policy of the targeted country. The European Union position seems completely transparent in this case. For example, in the *Gazodok* case, European Union officials addressed bluntly the United States that “the theory of effects does not enjoy much acceptance in international law.”<sup>50</sup>

With regard to what has been said, it should be acknowledged that in relation to the extraterritorial legislation, “the theory of effects” has been strongly criticized by an important part of the international law doctrine. But even if we respect the basics of “the theory of effects” for the extraterritorial legislation, it must be recognized that very rare lawyers approve the position of the United States of America on the broad interpretation of extraterritorial legislation. For example, we can refer to the opinion of the committee of the Organization of American States, which looks at the theory of effects to find a basis for the territorial legislation. In a report, this committee interprets the principles governing the territoriality principle as follows:

In the exercise of its territorial jurisdiction, a state can apply its own laws with regard to an action which its constituent elements affect partly the territory of the legislating state; namely, when an action begins outside the territory of a state and ends finally within the state or vice versa an action exits the territory of the state, and finally reaches its end result abroad, a state can partly justify the exercise of its territorial law [in relation to the abroad] in this way that the act committed outside the territory has a direct, basic and predictable effect on the country so that the exercise of the extraterritorial jurisdiction of the state is considered reasonable.<sup>51</sup>

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<sup>49</sup> John H. Knox, *A Presumption against Extrajurisdictionality*, 104(3) *American Journal of International Law* 351, 352 (2010).

<sup>50</sup> *Coercive Diplomacy, Sanctions and International Law* 115 (N. Ronzitti (ed.), Leiden: Martinus Nijhoff, 2016).

<sup>51</sup> Joaquin Roy, *Cuba, the United States, and the Helms-Burton Doctrine: International Reactions* 95 (Gainesville: University Press of Florida, 2000).

This principle has also been emphasized in the decisions of GATT.<sup>52</sup>

This approach has led to the reaction of the European Union against the United States in the 80s and 90s of the last century. Historically, the first confrontation between the European Union and the United States on the extraterritorial sanctions dates back to the 80s of the last century. At the beginning of this decade, the construction of gas pipelines to connect Siberia in the Soviet Union of the time to the Western Europe caused a deep rift between the NATO partners. At that time, in response to this project, the United States not only banned the participation of American companies in this project, but also imposed some restrictions on the contribution of the branches of the companies which were formed in accordance with the laws of the country where they were admitted and not the America law and their headquarters were mainly in Western European countries. This measure of the United States encountered with a strong reaction of other state members of NATO, such as Germany, Belgium, Canada, France, Finland, Mexico, the Netherlands and Sweden. Some of these countries decided by legislation to not recognize the judicial decisions of the United States of America in this context and banned information exchange in this field with the United States. The law doctrine of the European Union considered firmly the measures of the United States in this field as a breach of international law.<sup>53</sup> The Commission of the European Community announced in the framework of international law that the measures imposed by the Reagan administration are considered as a breach of the sovereignty of states that America laws affect them. As a result of the measures of the United States, European companies were placed in a delicate situation: on one hand, these companies had to surrender raw materials to the Soviet state under the contracts signed, and on the other hand, if they did their obligations, these companies faced with the risk of being blacklisted by the United States. In these contracts, the failure to perform the contract was associated with a very heavy damage. In legal terms, resorting to force majeure could not be referred with certainty. In fact, an arbitration court was predicted for this problem and it was not clear that the presence of the law of a third country could be interpreted as force majeure in the arbitration court.

However, in this case, it was not legal arguments that forced the United States to withdraw at that time. In fact, in the case of legal chaos governing the exercise of extraterritorial jurisdiction, "countermeasures" of European states to disarm the opposite party in a real "economic war" prepared the way for a return to the former situation. It also prepared the way for the withdrawal of the America state. In fact, the measures of the Reagan administration at the time did not enjoy the full internal support and were also criticized in the House of Representatives. Given the resistance

<sup>52</sup> *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12 October 1998, para. 133.

<sup>53</sup> It is argued that since each country is a part of the international community, the rules that specify the jurisdiction of the country should be resulted from taking into account the needs of the community and especially the need for non-aggression by the members; see Bagheri 2007, at 273.

of the European parties, the sanctions imposed by the United States, instead of affecting the Soviet Union, had largely turned into a measure against America's allies in the North Atlantic Treaty. With regard to all these considerations, referring to the changed political situation in Poland and the release of the leader of the opponents in this country, Lech Walesa, the Reagan administration announced the abolition of its extraterritorial sanctions on 13 November 1982.

The case of the gas pipeline between Siberia and Western Europe showed for the first time the incompetency of legal procedural solutions in the equation of economic relations between Europe and the United States. However, it also revealed explicitly that a state, no matter how big and economically strong, cannot alone propel its extraterritorial sanctions. In this equation, the European Economic Community of the time proposed itself as an essential link to implement such sanctions. With the failure of the sanction program of the United States, the gas pipeline project between Siberia and Western Europe was completed in 1984 and the plan of transporting gas to Europe was conducted successfully.<sup>54</sup>

Nonetheless, the fundamental question was the relationship between the facts and legal considerations. In the disputes between the economic realities and the law, is it the economic realities that can take an upper hand? And will international law as a branch based on the sovereign will of the states affirm this supremacy as a procedural tool?

The Helms–Burton and D'Amato laws should be considered as the second confrontation between the Europe and the United States on the extraterritorial sanctions, which show better the nature of this confrontation. The Helms–Burton law adopted in the first place against Cuba. This law which was signed actually on 12 March 1996 by Bill Clinton banned the conduction of business activities by individuals and companies in Cuba, and the D'Amato law which was signed a few months after the Helms–Burton law on 5 August 1996 in the presence of the victims of Pan Am flight 103 imposed trade restrictions against Iran and Libya. It was announced that the purpose of the D'Amato law was primarily to deprive Iran and Libya of access to financial resources and to prevent the political pursuit by these states which "threatened national security and foreign policy interests of the United States of America." In fact, in those years, both Iran and the Libya had been accused by the state of the United States of America to acquire weapons of mass destruction and to support the international terrorism. This law targeted directly Europe and the companies operating in the European Union because it prohibited the investment of more than forty million dollars in the oil and gas industry in the two countries to any natural or legal person in the world.<sup>55</sup>

Legally, the conflict of extraterritorial laws with the traditional approaches to international law seemed completely evident. At the time of the legal review of the

<sup>54</sup> Pieter Jan Kuijper, *The European Community and the U.S. Pipeline Embargo: Comments on Comment*, 27 *German Yearbook of International Law* 72 (1984).

<sup>55</sup> Brigitte Stern, *Striving for Universalizing the Law: Helms–Burton and D'Amato–Kennedy Law*, 20 *International Journal of Law* 46 (1996).

Libertad Act in the Congress of the country, the United States Department of State declared explicitly by sending a memo that

the solutions foreseen by the Libertad (Helms–Burton) Act are considered as the unprecedented extraterritorial implementation of the law of America. Although the United States are facing the property which is in a foreign country and has been confiscated by a breach of international law, but the conditions stipulated in international law to enact this law have not been met, because it is hard to imagine how trade with this property can have a substantial effect on the United States... The principles of the third part of the law are inconsistent with the traditions of the international legal order and no state has not passed the laws similar to this law...<sup>56</sup>

However, the law and the similar approaches could open their way to economic realities. Nuclear, human rights and terrorist sanctions of the United States and Europe against Iran are a good example of the prevailing reality in international politics. In this context, how can we provide an analysis of the resultant law and economics in today's world?

## **2.2. Efforts to Organize the International Economic Order and Rein in Dominant Economic Power: Challenges and Gaps**

The consideration of traditional international law and the famous decision of the International Court of Justice in the *Nicaragua* case can provide a strong basis for us to condemn this policy of the United States. The study of traditional law can lead us to the point that the recent changes can be considered in some way as ignoring the principles of sovereignty and non-interference in the internal affairs of other countries. The International Court of Justice in the *Nicaragua* case has mentioned this principle as follows:

...In accordance with generally accepted frameworks, this principle (non-interference) prohibits a state or group of states from interfering directly or indirectly in the internal or external affairs of another state. Thus, the indirect intervention should focus on the issues that the principle of the states' sovereignty allows them to freely decide on them. Some of these issues are the free choice of political, economic, social and cultural system as well as the structuring of the foreign relations. When the means of pressure are used in relation to the issues about which there should be primarily the right to free choice, intervention is illegitimate.<sup>57</sup>

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<sup>56</sup> Roy 2000, at 76.

<sup>57</sup> *Case Concerning the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, I.C.J. Rep. 1986, p. 14.

However, it is not all description of the story. It seems clear that at this point, the United States seeks to pass the existing international law and enact extralegal norms in interaction with other trade partners, including the European Union. But the European Union has not also given up the fight and confronts the positions of the United States when they do not match the interests of the country.

The European Union announced the enactment of such a law as a violation of the WTO trade rules and GATT rules and attempted to lay a legal complaint against the Organization. At the same time, the European Union did not satisfy by the complaint and embarked on a countermeasure by enacting regulations regarding such extraterritorial measures: the Council of the European Union adopted regulations on 22 November 1996 in support of the effects of extraterritorial laws. In practice, the French oil company Total signed also a contract on 28 September 1997, namely one year after the adoption and signing of the D'Amato law, with the National Iranian Oil Company on the development of the South Pars gas field. In this area, Total replaced American company Conoco that had been abandoned actually the work in this gas field with the enactment of the aforementioned law.<sup>58</sup>

The review of this case illustrates perfectly the economic competition of two sides of the Atlantic.<sup>59</sup> This case is a perfect example of the further failure of the unilateral attempt of the United States to impose extraterritorial economic sanctions without the participation of its European allies. With the practical pressures imposed by the European Union, finally the United States of America and Europe reached a compromise agreement in May 1998: in front of the European Union obligation to try to persuade Iran to abandon the access to weapons of mass destruction, the United States also canceled economic sanctions imposed in the form of the D'Amato law against European companies. This is the second example of the unsuccessful attempt of the United States to unilaterally impose its will on its partners across the Atlantic, which failed with the resistance from the European side.

As can be seen, the lack of political convergence between the two sides of the Atlantic in the late 80s and early 90s led eventually to the failure of effective sanctions of the United States against a number of countries, including Iran. However, the increased convergence in the past decade has increased practically the capacity of the effectiveness of the secondary sanctions from the United States and has led to creating a new process in the international economic relations.<sup>60</sup>

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<sup>58</sup> Francesco Giumelli, *The Success of Sanctions: Lessons Learned from the EU Experience* 69 (Farnham: Ashgate, 2013).

<sup>59</sup> The inclusion of acts performed outside the country indicates the widespread extent of internal rules of competition law which even includes the behavior of all foreigners. The United States is not the only country that seeks to exercise extraterritorially its competition law. It seems that the European Union is also moving towards the acceptance of a hypothesis near to the "theory of effect" as a basis for extraterritorial exercise of its competition law. For further study, see Bagheri 2007, at 279–285.

<sup>60</sup> Anyway, for many years, the performance of the United States has been a clear example of the exercise of jurisdiction on this basis. The United States has exercised its laws to be used in the fields of

In this regard, it should be noted that a kind of hierarchy can be seen in the policy of the WTO and the countermeasures that can be exercised by the states.<sup>61</sup> The countermeasures by the states and what is exercised by the private companies in the territory of the states should not affect the peremptory norms of international law such as the global environment and climate change. Any lack of attention of the states to these norms cannot be justified in any way and the states cannot escape the burden of this responsibility under their internal sovereignty.<sup>62</sup>

According to Art. 11 of these Regulations, "all legal entities established in the [European] community" have been subject to protection. What is remarkable in this respect is the mere attention to the criterion of being established in the territory of the European Union and disregarding the criteria that can be taken into consideration in the judicial precedent of many member states in the framework of the "control criterion." There is no doubt that such an extended criterion should be described as a function of the political circumstances of the 90s; however, it is evident that the historical tendency of the European Union and the legal structure of this regional organization will finally consider in the same conditions the maximum protection of European trading companies under the legal title of "European legal entities," although the insertion of some rigors in this area will be possible depending on the time bucket.

In Art. 2 of the Regulations, the conditions of protecting European trading companies against the extraterritorial measures of the United States have been considered in detail:

When economic interests and/or the property of any person [legal or natural] [...] are affected directly or indirectly [...], the [legal] person should notify it to the Commission of European Union within thirty days of being informed.

In the case of trading companies, this task has specifically assigned to the directors, managers and other members of the Board of Directors.

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competition, exports control, income taxes and provisions related to the securities exchange outside the territory of the country. Recently, the European community has decided based on the theory of effects and consequences to exercise the rules of its public law outside its territory. See Alan V. Lowe, *Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials* 1–4 (Cambridge: Grotius, 1983).

<sup>61</sup> The Director-General of the GATT, even before the adoption of Helms–Burton and D’Amato–Kennedy laws, had warned against the tendency of the United States of America towards unilateral acts, which is opposed to the multilateral system that the GATT and then the WTO are trying to encourage and stimulate it. These warnings were against retaliation unilateral and discriminatory measures that the United States of America had adopted according to sec. 301 of the Commercial Code (1974) or Art. 1302 of America’s new law on trade (23 August 1988), which have been called sometimes "Cloud 301." We know that the rules of the international trade are moving towards the creation of a globally liberal and open system; a system which is based on the principles of freedom of trade, non-discrimination and reciprocity and therefore condemns any restrictions on the freedom of trade. The Helms–Burton law is clearly in conflict with these principles. See Stern 1996, at 71–72.

<sup>62</sup> Rüdiger Wolfrum et al., *WTO: Trade in Services* 327–328 (Leiden; Boston: Brill, 2008).

However, it should be noted that the European Union support for trading companies referred to in the Regulations has not been a passive support. The Commission may obtain spontaneously information from the companies about the rate of the effect of the above-mentioned extraterritorial measures and in this case, the company is obliged to notify (para. 2 of Art. 2).

According to Art. 6 of the Regulations, each of the legal and natural persons – including trading companies established in the territory of the European Union – are entitled to receive compensation and even can claim their legal costs. The notable point is that in these Regulations, the practical way is to receive compensation without getting into difficulties of jurisdictional immunity: according to these Regulations, in the case of enforcement of extraterritorial laws, American companies affecting the sanctions and even their agents and mediators as the cause of damages are bound to compensate them. This solution, although seems at first glance certain of these Regulations, in fact, is a general solution and is applicable in the same conditions, regardless of the presence of the executive regulations on the part of the European Union. In this case, any European company can initiate proceedings in the courts of any of the EU member states base on the general rules of civil liability against a US company or its agents and mediators which have caused damage or harm to the company as a result of the implementation of the secondary sanctions of the United States.

The Brussels Convention<sup>63</sup> should be considered as the basis of the effectiveness of the decisions of the judicial authorities of the European Union, which has been adopted in connection with jurisdiction and enforcement of civil and commercial decisions. Accordingly, each of the American companies or their agents which caused losses to European companies can be prosecuted according to the second to sixth sections of the Title II of the Convention and each of the courts of the EU member states will be competent to handle and possibly seize and sell the property of the companies.

The above-mentioned solution seems remarkable in several respects:

Firstly in respect of the compensation for the damages to the European companies, which has been justified on the basis of the general rules of civil liability for the damages caused by the American operating companies; secondly, the elegance of getting round the jurisdictional immunities of US officials who don't actually help to compensate the damages to the European private parties unless they complicate a legal dispute and finally, documented use of the judicial capacities of the courts of the EU member states, which can find practically an operational and administrative form under the 1968 Brussels Convention and high volume of the trade between the European Union and the United States of America.

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<sup>63</sup> Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 September 1968, 15 J.O. Comm. Eur. (No. L 299) 32 (1972).

However, the measures of the European Union to support European companies are not only limited to the judicial capacity of the courts of the member states: two political actions have been anticipated according to Arts. 8 and 9 of these Regulations.

According to Art. 8, a committee composed of the representatives of the EU member states in Europe and a representative of the Commission will be formed. Based on the advisory opinion of the Committee, which is adopted by a majority of votes, the Commission takes some measures and suggests as a proposal to the Council. It should be noted that the Commission is not required to accept the opinion of the committee and can offer another opinion to the Council. Finally, the Council will comment with a specific majority on the Commission's proposal.

According to Art. 9, each member state can also embark on countermeasures to defend their economic interests against the given extraterritorial laws. Under this Article, the given measures must be effective, proportionate and dissuasive.

Although the above-mentioned Regulations has limited themselves only to the laws of the United States in 1996 about Iran, Cuba, Libya, it should not be doubted that the above model can be considered in similar situations in the future economic conflicts between two sides of the Atlantic.

### **Conclusion**

As a result, we should acknowledge that the flexible and soft legal space which governs international economic law has inevitably caused the mere resorting to the general legal rules and regulations on the sovereignty of states to act less on behalf of victims of extraterritorial sanctions. Securities provided by the traditional implementation of international law and relying on the international public opinion had also not been able to change the status quo. Meantime, what is important is the attention to the delicacies of the socio-political realities of the today's world. If the mere legal weapon has clearly demonstrated its inefficiency to stop the economic invasion of powerful actors of the international community, a set of political, economic and legal approaches should be used to stop this process and emerging attacks, an approach which is doomed to failure without attention to the legal-economic means of the actors of the economy of today's world.

It seems that the only way to deal with this broad approach to sovereignty, which is applied by the United States in economics, is a careful attention to the balance of economic power in today's world. The observation of the delicate relations between the two sides of the Atlantic and the use of legal capacities of the European Union can be the most effective solution for the extraterritorial and sovereignty-escaping approach of the United States. For more explanation, the model of the performance of the European Union against the Helms-Burton law can be expressed. In 1996, following the enactment of the extraterritorial laws of the United States, which had imposed secondary sanctions against Cuba, Iran and Libya, the Council of the

European Union adopted a joint action base on the sec. V of the Treaty of European Union at the time,<sup>64</sup> which contained important considerations about the right of member states to adopt protecting measures to protect “the interests of natural and legal persons” – under the exceptional conditions. In addition, the Council adopted at the same time Regulations that are very important in terms of attention of the European Union Commission to the interests of the European trading companies.<sup>65</sup> In addition to the historical considerations, this importance is due to a pattern that is likely to be prosecuted in similar events by the European institutions.

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<sup>64</sup> Joint Action 96/668/CFSP of 22 November 1996 adopted by the Council on the basis of Articles J.3 and K.3 of the Treaty on European Union concerning measures 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 November 1996, p. 7. See also Bernardo Cortese, *International Economic Sanctions as a Component of Public Policy for Conflict-of-Laws Purposes in Economic Sanctions in International Law*, at 720.

<sup>65</sup> 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 November 1996, p. 1–6.

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