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SANCTIONING RUSSIA: QUESTIONS ON THE LEGALITY
AND THE LEGITIMACY OF THE MEASURES
IMPOSED AGAINST THE INVASION OF UKRAINE

ABSTRACT. Since the invasion of Ukraine in February 2022, an unprecedented level of cooperation has been achieved among a group of like-minded States – encompassing G7 members as well as Australia, Switzerland, and South Korea – in imposing sanctions against the Russian Federation. In particular, the European Union has taken various rounds of restrictive measures against Russia: a combination of targeted sanctions against government élites and a more comprehensive package of measures of commercial and financial character. A key issue is that of their legality under international law. In the view of the EU, its restrictive measures are fully compliant with international obligations. They are in any event justified as a response to the Russia's aggression, one of the most serious breaches of the fundamental rules of the international community. But other States disagree: they claim that the only legitimate sanctions are those adopted by the UN Security Council and unilateral measures are always an unlawful intervention in the internal affairs of the targeted State.

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1. *Introduction*

The armed aggression perpetrated against Ukraine since 24 February 2022 has led both the USA and the European Union (hereinafter EU) to impose various rounds of sanctions against the Russian Federation. This type of response is not at all new; rather, it is built upon a solid framework of measures that have been already adopted in connection with the annexation of Crimea of March 2014¹. However, the current complex framework of measures has been described as unexpectedly robust and severe, being capable of permanently reshaping the global economy: a combination of ‘targeted sanctions’ against government élites and a more comprehensive package of measures of commercial and financial character, affecting Russia as a whole, as well as its principal ally, Belarus². Although the EU and the USA have certainly sought to coordinate their reaction with respect to the design and the content of their ‘sanctions’, along with other countries – Australia, Canada, Japan, South Korea, Switzerland and the United Kingdom – it is important to note that they have adopted such measures in an individual and unilateral manner. Still, they are putting considerable pressure on other States to adopt similar actions against Russia, although there is widespread skepticism concerning their legality and legitimacy.

2. *The EU Restrictive Measures against Russia: Some Distinctive Features*

The analysis of the sanctioning activity of both the EU and the USA has so far sought to determine the impact of these measures, essentially with respect to the

¹ See A. BULTRINI, *EU “Sanctions” and Russian Manoeuvring: Why Brussels Needs to Stay its Course while Shifting Gears*, in »IAI Commentaries 20/46«, June 2020, <<https://www.iai.it/en/pubblicazioni/eu-sanctions-and-russian-manoeuving-why-brussels-needs-to-stay-its-course-while-shifting-gears>>.

² An overview of the packages of restrictive measures so far adopted by the EU is available at <<https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/>>, 2022. See C. PORTELA, *Sanctions, Conflict and Democratic Backsliding: A User’s Manual*, EUISS, May 2022, <<https://www.iss.europa.eu/content/sanctions-conflict-and-democratic-backsliding>>.

contribution to foreign policy objectives³. Other issues have been left in the background, including elements that remain crucial in the debate among diplomats and legal experts. For instance, questions concerning the legality and legitimacy of the imposed measures have been mostly neglected.

In international law, the term ‘sanction’ usually identifies measures taken in accordance with the constituent instrument of an international organization, in particular those taken by the United Nations Security Council (hereinafter UNSC) under article 41 of the United Nations (UN) Charter⁴. Contrariwise, decentralized reactions to the commission of an internationally wrongful act are justified either as retorsions or as countermeasures, depending on their characteristics. It follows that the reason why some States have a skeptical reaction to the adoption of ‘sanctions’ against the Russian Federation is not only political but also legal: they doubt or even sometimes openly contest the legality of the autonomous adoption of coercive measures (i.e., outside of the UN collective security framework) thus violating the sovereignty of the targeted States, even if such measures are adopted to preserve the peace and to protect general interests of the international community as a whole. During the last years, however, both the USA and the EU have largely resorted to this method of ‘coercive diplomacy’⁵, by applying their own measures when UN collective action was blocked or even in parallel with UN sanctions⁶.

³ See PORTELA *European Union Sanctions and Foreign Policy: When and Why do They Work?*, Milton Park, Routledge, 2010; F. GIUMELLI, F. HOFFMANN, & A. KSIĄŻCZAKOVÁ. *The When, What, Where and Why of European Union Sanctions*, in «European Security», 2021, 30:1, 1-23.

⁴ ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, in *Yearbook of the International Law Commission 2001*, vol. II, 2001, p. 75; see ILA, *Study Group on UN Sanctions and International Law. The Design and Interpretation of UN Security Council Sanction Resolutions*, Final Report, 2019; J.M. FARRELL, *United Nations Sanction and the Rule of Law*, Cambridge University Press, Cambridge, 2007; L. VAN DEN HERIK, *The Individualization and Formalization of UN Sanctions*, in L. van den Herik (ed.), *Research Handbook on UN Sanctions and International Law*, Edward Elgar Publishing, Cheltenham, 2017, pp. 1-16.

⁵ See N. RONZITTI, *Sanctions as Instruments of Coercive Diplomacy: An International Law Perspective*, in Ronzitti (ed.), *Coercive Diplomacy, Sanctions and International Law*, Brill, Leiden, 2016, pp. 1-32.

⁶ On the US practice, see R. NEPHEW, *The Art of Sanctions: A View from the Field*, Columbia University Press, New York, 2017; M. RATHBONE, P. JEYDEL & A. LENTZ, *Sanctions, Sanctions Everywhere: Forging Path through Complex Transnational Sanctions Laws* in *Georgetown Journal of International Law*, 44(3), 2013, pp. 1055-1126; on EU autonomous measures, see S. POLI, *Le misure restrittive autonome dell’Unione europea*, Editoriale Scientifica, Napoli,

From a legal perspective, restrictive measures adopted by the EU share some distinctive features. For instance, they require a unanimous decision by its members within the Council of the EU, as they fall within the framework of the Common Foreign and Security Policy (CFSP): the unanimity requirement could result in tensions, delays and even stalemates, as shown by the difficulties in reaching a compromise towards the approval of the sixth package of measures against the Russian Federation⁷. Yet, the defining feature of the EU action is the existence of a full and effective judicial review: indeed, since 2014, a significant number of targeted persons have challenged the validity of the restrictive measures before the Court of Justice of the EU, mostly in the framework of actions for annulment. It follows that the Court has already developed a conspicuous case-law on ‘sanctions’ against the Russian Federation, that has contributed to elucidate the principles underpinning the exercise of this power by the EU, including the nature of the measures, the motivation and the criteria for designation of targeted persons⁸.

At the time of writing, the list of targeted persons, that has been constantly updated since 2014, includes more than 1,000 physical and legal persons, including members of the Russian government, members of the State Duma and of the National Security Council, high-ranking State officials, but also prominent businesspeople: therefore, it is to be expected that several of them will challenge the restrictive measures before the Court of Justice of the EU⁹. One must recall that the listed persons and entities are targeted by ‘individual’ measures, i.e. measures that cause the freezing of their assets and impose a travel ban, preventing them from travel to and to transit through the territory of the EU, as they are deemed to be responsible for actions that directly or indirectly affected the territorial integrity, the sovereignty and the

2019.

⁷ EU agrees Russia oil embargo, gives Hungary exemptions; Zelenskiy vows more sanctions, <<https://www.reuters.com/world/europe/best-we-could-get-eu-bows-hungarian-demands-agree-russian-oil-ban-2022-05-31/>>.

⁸ See C. BEAUCILLON, *Opening Up the Horizon: The ECJ's New Take on Country Sanctions*, in «*Common Market Law Review*», 55:2, 2018, pp. 387-415.

⁹ See, for instance, *Usmanov v. Council of the European Union*, Case T-237/22, Order of the President of the General Court of 27 June 2022, in which the General Court dismissed an application from sanctioned Russian billionaire Alisher Usmanov for interim measures.

independence of Ukraine. As to the asset freeze in particular, it is noteworthy that the Court of Justice of the EU made it clear that «those measures are by nature temporary and reversible and do not therefore infringe the ‘essential content’ of the right to property»¹⁰. ‘Sanctions’ do not entail, in other terms, the seizure of property, although it remains debated whether it would be possible to use financial resources owned by sanctioned oligarchs to rebuild Ukraine¹¹.

3. *The Challenge of the Full Implementation at the Domestic Level*

The full implementation of the EU restrictive measures against the Russian Federation at the domestic level is fundamental for the purpose of their effectiveness. EU Member States are bound to take all necessary measures to correctly implement them, not only by designating the competent national authorities that are engaged with ‘sanctions’ issues, but also by laying down rules on penalties applicable to infringements of the restrictive measures under their administrative and/or criminal law. Significantly, the EU Commission recently proposed to add the violation of restrictive measures to the list of EU crimes, with the purpose of setting a common basic standard on criminal offences and penalties across the Union¹².

Given the multi-sectoral nature of restrictive measures, various Italian authorities are involved in the implementation process, including the Financial Security Committee at the Ministry of Economy and Finance and Ministry of Foreign Affairs and International Cooperation. Moreover, Italy has entrusted the National Public Property Agency (the *Agenzia del demanio*) with the task of ensuring the storage, administration and management of frozen economic assets¹³. The Agency reportedly

¹⁰ *Mykola Yanovych Azarov v Council of the European Union*, Case T-215/15, Judgement of 7 July 2017, para. 85

¹¹ EU should seize Russian reserves to rebuild Ukraine, Borrell tells Financial Times. *Reuters* (9 May 2022).

¹² Proposal for a Council Decision on adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union, COM/2022/247 final (25 May 2022).

¹³ See Decreto legislativo 25 maggio 2017, n. 90, Art. 12.

expressed concern over the enforcement of the targeted measures against oligarchs and other businesspeople, in consideration of the volume of frozen assets and their nature: for instance, they have included luxury yachts, which do not ordinarily fall into the Agency's mandate¹⁴.

As above mentioned, the new rounds expand the existing measures that have been applied since 2014, following the annexation of Crimea and the non-implementation of the Minsk agreements. The packages adopted since March 2022 include a significant element of novelty: i.e. the imposition of financial restrictions, whose design was inspired by the measures that both the EU and the USA had previously approved against Iran with respect to its nuclear program. Indeed, the Council of the EU decided to disconnect several Russian and Belarusian banks from the SWIFT messaging services, which facilitate information exchange between financial institutions, and constitute nowadays an essential tool in ensuring international payments. Moreover, the Union introduced a ban on «transactions related to the management of reserves as well as of assets of the Central Bank of Russia, including transactions with any legal person, entity or body acting on behalf of, at the direction of, the Central Bank of Russia»¹⁵. Due to the ban on transactions from the EU and other countries, the central bank can no longer access the assets: it is estimated that more than half of Russian reserves are frozen. These measures complement other typical trade sanctions, like import and export restrictions of certain goods and technology. As for the energy sector, the sixth package of EU measures introduced a gradual restriction in the import of crude oil and refined petroleum products, with temporary exception for those member States that suffered from a specific dependence on Russian supplies and have no viable alternative options¹⁶.

¹⁴ Ucraina, Agenzia Demanio: "Yacht congelati oligarchi? Sono tre, siamo molto preoccupati", <https://www.adnkronos.com/ucraina-agenzia-demanio-yacht-congelati-oligarchi-sono-tre-siamo-molto-preoccupati_Fec2Osm6JQWBvP0NUXM0>.

¹⁵ Council Regulation (EU) 2022/334 of 28 February 2022 amending Council Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 57 (28 February 2022) 1-3.

¹⁶ Council Regulation (EU) 2022/879 of 3 June 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 153 (3 June 2022) 53-74.

4. *Are EU Measures in Accordance with International Law?*

The EU has consistently maintained that «the introduction and implementation of restrictive measures must always be in accordance with international law»¹⁷. As for the effects on third countries, the EU commits itself to abstain from adopting legislative instruments having extra-territorial application, on the consideration that they would be in breach of international law. Indeed, the EU understands its restrictive measures to be applicable only in situations in which a link exists: the standard clause setting out to what extent an EU regulation concerning restrictive measures should apply covers the territory of the EU, including its airspace; aircrafts or vessels of Member States; nationals of Member States, inside or outside the territory of the EU; companies and other entities incorporated or constituted under Member States' law; or any business done in whole or in part within the EU. Contrarywise, the USA applies 'secondary sanctions', having an extraterritorial application, against Iran and North Korea: a practice that the EU has strongly condemned¹⁸. Significantly, the USA has so far refrained from attributing 'secondary' effects to the sanctions against the Russian Federation and Belarus, as their enforcement in relation to the ban on crude oil purchase would be considered very controversial.

As for the Russian Federation, in the view of the EU, its restrictive measures do not amount to a wrongful act against that country. Indeed, some of them are to be qualified as retorsions, i.e. reactions that do not interfere with the target State's rights under international law but merely amount to unfriendly acts. Yet, it is significant that Moscow reiterated that some 'sanctions' are against the rules of the World Trade Organization (WTO): in this respect, the EU affirmed that its measures would be allowed as exceptions under article XXI(b) GATT, whereby member States may adopt

¹⁷ Council of the European Union, *Sanctions Guidelines – update*, Doc. 5664/18, 2018, para. 9.

¹⁸ See generally T. RUYSS, T. & C. RYNGAERT, *Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions*, in *British Yearbook of International Law*, 2020; Z. GOLDMAN & A. LINDBLOM, *The US Position and Practice with regards to Unilateral and Extraterritorial Sanctions: Reimagining the US Sanctions Regime in a World of Advanced Technology*, in C. Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions*. Edward Elgar Publishing, Cheltenham, pp. 130-147.

actions which it considers necessary for the protection of its essential security interests, in particular in time of armed conflict or in the event of serious international crises.

Moreover, the Russian Federation has condemned US and EU ‘sanctions’ as infringements of the customary principle of State sovereignty. However, the main justification that has been advanced is that the EU restrictive measures are to be qualified as countermeasures in reaction to serious breach of *erga omnes* obligations, i.e. obligations owed to the international community as a whole, including the prohibition of aggression¹⁹. The distinction between sanctions *stricto sensu*, a category including only measures decided by the UNSC, and countermeasures, a category referring to decentralized reactions by individual States or regional organizations with the purpose of protecting general interests of the international community, has gained acceptance in the ‘Western’ literature. In order to be legal, countermeasures must respect the principle of proportionality and shall not entail the use of armed force. It shall be underlined that the aim underlying the adoption of countermeasures is not that of inflicting a punishment; rather, to put pressure on the targeted State, with the aim of inducing it to take responsibility, and hence to re-establish a situation of adherence to international law.

5. *Legitimate Sanctions or Unilateral Coercive Measures?*

After the Russian invasion of Ukraine, an unprecedented level of sanctions cooperation was achieved among a group of ‘like-minded’ States, encompassing G7 members as well as Australia, Switzerland, and South Korea. It has been argued that the EU, by forging a link between its economic strength and its foreign policy through the adoption of restrictive measures, has also sought to establish itself as a regional and even as a global leader in ‘sanctions’²⁰. As part of this leadership at the European level, the

¹⁹ See M. GESTRI (2016), *Sanctions Imposed by the European Union: Legal and Institutional Aspects*. In Ronzitti (ed.), *Coercive Diplomacy, Sanctions and International Law*, Brill, Leiden, The Netherlands, pp. 70-102.

²⁰ P. J. CARDWELL, & E. MORET (2022). *The EU, Sanctions and Regional Leadership*. *European Security*. See e.g. European Council (2022). *Conclusions on the Russian military aggression against Ukraine (24 March 2022)*: «The

EU has invited selected third countries in the EU neighborhood to align with its measures²¹: whereas the Union was successful in gaining that result in relation to other ‘sanctions’ regimes (i.e. those against African countries), fewer decided to align themselves with respect to the measures taken against the Russian Federation, irrespective of the strong political pressure²².

What emerges from a wider perspective is that a large number of States, including China, South-East Asia States and the member States of the African Union²³, disagree with the abovementioned concerning the legality of EU and US measures against the Russian Federation. These States support the position whereby the only legitimate sanctions are those adopted by the UNSC and unilateral coercive measures are always in violation of the principle of sovereign equality of States and an unlawful intervention in the internal affairs of the targeted State.

On various occasions China manifested its opposition *vis-à-vis* unilateral sanctions, as «a concrete manifestation of hegemonism and power politics», that «created and aggravating humanitarian crises, violated the basic rights of civilians, including women and children, and caused great damage to the harmony and stability of international relations»²⁴. As for the measures taken against Russia for the invasion of Ukraine, the Chinese Foreign Ministry Spokesperson stressed that «[w]e oppose unilateral sanctions and long-arm jurisdiction without basis in international law and UN Security Council mandate as well as undue prohibition or restriction on normal economic and trade activities between Chinese and foreign companies»²⁵.

European Council calls on all countries to align with those sanctions. Any attempts to circumvent sanctions or to aid Russia by other means must be stopped».

²¹ See C. ECKES, *The Law and Practice of EU Sanctions*, in S. Blockmans & P. Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy*, Edward Elgar Publishing, Cheltenham, 2018, pp. 206-229.

²² See e.g. German, Serbian Leaders Clash over Kosovo, Russia Sanctions. *Politico* (11 June 2022), <<https://www.politico.eu/article/olaf-scholz-aleksandar-vucic-germany-serbia-kosovo-russia/>>.

²³ African Union (2022). Resolution on the Impact of Sanctions and Unilateral Coercive Measures on African Union Member States, AU Doc. Assembly/AU/Res. 1(XXXV).

²⁴ UN Security Council (2022). *General issues relating to sanctions*, UN Doc. S/PV.8962 (7 February 2022), 11.

²⁵ Foreign Ministry Spokesperson Wang Wenbin's Regular Press Conference (21 April 2022), <https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/202204/t20220421_10671466.html>.

This is not only a political stance: indeed, the Chinese Ministry of Foreign Affairs also expresses a different vision of the international legal order, which puts at the center the principles of coexistence and sovereign equality. Undoubtedly, sovereignty occupies the conceptual heart of the Chinese Communist Party's vision of international relations, and it is not by chance that China has become one of the world's strongest supporters of the principle of non-intervention in the internal affairs of other countries²⁶: so it comes as no surprise that unilateral sanctions have been seen as a violation of this principle, as they are «are exactly intended to stigmatize other States under the pretext of democracy and human rights in a bid to incite color revolutions and regime change, hence a blatant violation of basic norms governing international relations»²⁷.

For their part, in June 2022, G7 leaders referred to the principle of sovereignty too, although with a completely different emphasis, when they reaffirmed the condemnation of «Russia's illegal and unjustifiable war of aggression against Ukraine», and their readiness to provide «the needed financial, humanitarian, military, and diplomatic support» to Kiev «in its courageous defence of its sovereignty and territorial integrity»²⁸. Moreover, the G7 countries stressed their commitment to «unprecedented coordination on sanctions for as long as necessary, acting in unison at every stage»²⁹, also through the establishment of a multilateral task force known as REPO (Russian Elites, Proxies, and Oligarchs) to facilitate the sharing of information and reciprocal assistance in the freezing of assets³⁰.

²⁶ See M.A. CARRAI, *Sovereignty in China: A Genealogy of a Concept since 1840*, Cambridge University Press, Cambridge, 2019.

²⁷ Say No to Unilateral Sanctions and Jointly Uphold the International Rule of Law: Keynote Speech by H.E. Mr. Xie Feng, Commissioner of the Ministry of Foreign Affairs of China in the Hong Kong Special Administrative Region at the Opening Ceremony of 2020 Colloquium on International Law (3 December 2020), <<https://www.mfa.gov.cn/ce/cohk/eng/qwsy/t1838003.htm>>.

²⁸ G7 Leaders' Communiqué - Executive summary (29 June 2022).

²⁹ *Ibid.*

³⁰ G7, Russian Elites, Proxies, and Oligarchs Task Force Ministerial Joint Statement (29 June 2022).
