Guest editorial: Rethinking economic sanctions in a shifting global order: from theory to practice

The use of economic sanctions has significantly proliferated in recent years, making them a key tool in international diplomacy and conflict resolution. Governments, particularly in the West, have increasingly relied on sanctions to pressure states and non-state actors involved in conflicts, human rights violations or cyber operations. The present-day economic sanctions expand beyond much-discussed sanctions against the Russian Federation. For example, Israeli settlers in the West Bank have faced sanctions over violence against Palestinians (Council of the EU, 2024a), reflecting a growing trend of targeting non-state actors. Some States have also imposed sanctions on Hamas leadership (Foreign, Commonwealth and Development Office and The Rt Hon Lord Cameron, 2023) and sanctioned Iran for the military support provided to Russia (Council of the EU, 2024b).

This surge in economic sanctions is also accompanied by complex legal challenges, as affected individuals seek to defend their rights under international law and the domestic law of sanctioning states. One notable example is Russian oligarch Mikhail Fridman, who filed a $16bn claim against Luxembourg after his assets were frozen (Carlson, 2024). Fridman argues that the EU sanctions violated an investment treaty between Luxembourg and the Russian Federation (Belgium – Luxembourg – USSR BIT) and demands compensation. This legal case underscores the legal complexities related to the use of sanctions while respecting international law.

Economic coercion has always been a part and parcel of international relations. That said, international law has not defined distinctive criteria delineating instances of legally permissible economic coercion from those that should be outlawed. The much-cited dictum of the International Court of Justice (the *Nicaragua* case) [1] on economic coercion's relationship with non-intervention raises more questions than provides answers (Damrosch, 1989; Tzanakopoulos, 2015). Although not much has changed in the theory of international law since, the practice has undergone dramatic transformations.

Economic sanctions as one of the forms of economic coercion have gained prominence in the last three decades with the UN-authorized sanctions on Iraq, former Yugoslavia, and Haiti paving the way for increased use of sanctions by individual States and groups of States (e.g. EU). Thus, this transformation was evidenced, firstly, in the practice of the United Nations Security Council (UNSC) giving rise to a phenomenon called the "sanctions decade", and secondly, in the law and practice of individual States. The latter aspect is of particular interest since the legality of such unilateral economic sanctions – also called non-UN sanctions or autonomous sanctions – remains a point of contention, with the two unreconcilable views on the matter being supported by different groups of States. Whereas States imposing economic sanctions justify them as permissible countermeasures or third-party countermeasures, another group of States led by China, Russia and countries from the Global South denounce the legality of such measures irrespective of the objectives pursued by them. This rift between the States over the legality of such measures is sometimes labelled

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as a "developed/developing divide" (Hofer, 2017) or alternatively "the West versus the Rest" (Angela Stent, 2022).

The recent revival of the discussions on the legality of economic coercion in general (Milanovic, 2023), and legality of economic sanctions in particular (Bogdanova, 2022) is closely intertwined with the current state of global affairs. The present state of global affairs is characterized by the unprovoked Russian aggression against Ukraine and intensifying military confrontation between Israel and Palestine that involves other countries in the region as well. Both conflicts have inflicted immeasurable suffering on civilians, causing countless deaths, casualties and massive displacements, thus undermining trust in international law and institutions of global governance. Another simmering confrontation happening in parallel to the military tensions is geopolitical confrontation fuelled by a race for technological dominance, which results in widespread policies of economic resilience and self-sufficiency. Under the weight of these developments, the institutions of global economic governance are crumbling, thus paving the way for the almost unconstrained use of economic restrictions as an instrument of economic competition.

These events have only intensified two paradoxical trends of the last decade: on the one hand, an exponential growth of the instances when economic sanctions were used, and on the other, a growing opposition to such measures. To illustrate these developments, a few examples are worth mentioning: the updated version of the global sanctions database released in 2023 showcases a staggering growth in the number of sanctions from 1950 to 2022, with the obvious dominance of unilateral economic sanctions over multilateral measures (Syropoulos *et al.*, 2024). Adding to this, new sanctions regimes are also under consideration. In particular, European Commission President Ursula von der Leyen emphasized in her Political Guidelines 2024–2029 that EU sanctions (restrictive measures) will be increasingly used to address cyberattacks and other types of hybrid threats (von der Leyen, 2024). In line with this promise, the first of such a country-specific sanctions regime targeting "Russia's destabilizing actions abroad" was announced on October 8, 2024 (Council of the EU, 2024c).

The growth in the number of sanctions is accompanied by the growth of the opposition towards such measures. Traditionally, the United Nations General Assembly (UNGA) has provided a forum for the vocal opponents of unilateral economic sanctions, which have been termed as "unilateral coercive measures" in the numerous UNGA Resolutions (Barber, 2021). Since 2014, the mandate of the Special Rapporteur on unilateral coercive measures has been created with the sole task of denouncing the legality of unilateral economic sanctions [2]. Some of the criticism expressed in the UNGA Resolutions and reports of the Special Rapporteur induced the UNSC to adopt Resolution 2664, which provides a standing humanitarian exemption to the asset freezes imposed by UN sanctions [3]. Recently, members of the BRICS criticized unilateral economic sanctions even after one of its members – the Russian Federation – committed and is still committing an act of aggression (Haidar, 2022).

States' increased tendency to rely on economic sanctions to address traditional and novel foreign policy concerns, while their legality remains ambiguous, is a significant unresolved challenge. It is further amplified by the global governance institutions' inability to offer attainable solutions for regulating such measures. The burden therefore upon the academic community to initiate such a discussion. Whilst legal scholarship has proven dynamic and covered some of the most recent debates around the legality of economic sanctions, there are still a number of gaps in the academic literature in terms of the analysis of extraterritorial economic sanctions, sanctions targeting central banks and relationships between economic

sanctions and international investment law. The objective of this Special Issue is to fill these gaps in an interdisciplinary fashion.

The articles selected for this Special Issue reflect the diversity of the legal questions that the use of economic sanctions engenders. Furthermore, as the scholars contributing to this issue masterfully demonstrated, there is hardly any simple solution to these problems that are woven into the fabric of broader political considerations.

This Special Issue presents four papers briefly summarized below:

Johannes Schäffer in *Economic Sanctions in the Twilight of Retorsions and Countermeasures: Beaten Tracks or Untrodden Paths?* discusses the lack of a definition of economic sanctions under international law and the resulting unsettled legality of such measures. Indeed, there is no universally accepted definition of economic sanctions. The term sanction is not a legal term. Making things even more complicated, economic sanctions do not fall squarely within a single existing legal category in international law. Thus it does not come as a surprise that other scholars such as Tom Ruys find this area "plagued by a variety of delicate controversies and grey areas" (Ruys, 2017). In line with this statement, Devika Hovell labelled that debate over the legality of unilateral economic sanctions as "unfinished business of international law" (Hovell, 2019).

While economic sanctions, particularly unilateral ones, are increasingly prevalent in global affairs, Johannes Schäffer in his contribution aims to present the current legal landscape regulating such measures, explores justifications for economic sanctions, and advocates for reform. The introduction sets the stage by highlighting that economic sanctions, particularly unilateral ones, do not fit neatly into established legal categories. Schäffer later discusses when economic sanctions could be defined as retorsions, countermeasures, and third-party countermeasures and reflects upon the use of the term sanctions to denote economic restrictions authorized by the UNSC and individual states or groups of states (e.g. EU). The recently adopted EU Anti-Coercion Instrument is also examined. The conclusion emphasizes that the current international legal framework is insufficient to address the complexities of unilateral sanctions. It calls for the development of new rules and greater judicial involvement to ensure a disciplined and coherent approach to economic sanctions.

Daniel Franchini in *When Finance Becomes a Weapon: The Challenge of Central Bank Sanctions Under International Law* explores a particular type of financial sanctions that is increasingly used – economic sanctions targeting central banks – and their legality under international law.

In the last two decades, we have observed the exponentially growing use of financial sanctions by the UNSC, regional organizations and individual States. This tendency has been described as "a new era of financial warfare" (Zarate, 2013) or "weaponization of finance" (Caytas, 2017). The leading role of the USA in this process has given rise to a phenomenon called "dollar unilateralism", implying the uses of "the unique status of the U.S. dollar in global financial markets to pursue policy goals" (Katzenstein, 2015). Since the Russian invasion of Ukraine, these developments have only amplified, partly due to economic sanctions imposed, and partly because of the events that followed including the discussion of the central bank assets confiscation. This state of affairs prompted not only debate on the need to de-dollarize the global economy but also actions aimed at this.

Against this background, Daniel Franchini explores economic sanctions targeting central banks and their legality under international law. He argues that while we observe a growing trend to enact economic sanctions targeting central banks, the legality of such measures under international law has not been comprehensively studied. In an attempt to bridge this gap, Franchini first describes the relevant state practice before moving to an in-depth analysis

of the legality of central bank sanctions and the possible defences available to the states imposing them. Franchini's study of the pertinent state practice results in a somewhat unexpected conclusion: while the UN move towards targeted sanctions led to "a near-disappearance of central bank sanctions in UN practice", the opposite is true for economic sanctions imposed by individual states or groups of states, especially since 2010. Turning to the legality of central bank sanctions, the author asserts that "the legal boundaries of permissible central bank sanctions remain a point of contention". Starting from this premise, Franchini analyses the relationship between central bank sanctions and various principles and norms of international law, such as the principle of non-intervention, state jurisdiction and immunity guarantees, human rights obligations and commitments under international economic treaties. Demonstrating that in some instances central bank sanctions might violate international law, Franchini examines possible defences justifying States' resort to such measures, e.g. self-defence and countermeasures. As a concluding remark, Daniel Franchini calls for more cautious use of central bank sanctions due to their detrimental effect on the population in the targeted States, potential inconsistency with diverse principles and rules of international law, and stringent conditions compliance with which might justify their legality.

Patrick Abel and Carsten Bormann in *Countering Extraterritorial Sanctions* explore the legality of extraterritorial sanctions, the European Union's actions taken to counter US extraterritorial sanctions against Cuba and Iran, as well as their legality and effectiveness.

Economic sanctions might have an extraterritorial reach, thus overstepping the boundaries of the principles of jurisdiction developed in international law. In particular, the USA is known for implementing such measures. In the past decade, this extraterritorial reach of economic sanctions has faced a barrage of criticism from the other States (Stoll *et al.*, 2020), legal practitioners (Rathbone *et al.*, 2013) and international legal scholars (Emmenegger, 2016).

The paper written by Patrick Abel and Carsten Bormann contributes to the debate on extraterritorial sanctions by defining such measures, discussing their legality under international law and analysing the European Union's strategy taken to counter extraterritorial sanctions. Their contribution starts with the general outline of the concept of sanctions and the definition of what might constitute extraterritorial sanctions. Following this, the legality of extraterritorial sanctions is reviewed against the background of the principles of sovereignty, non-intervention and other international treaty obligations, e.g. WTO law. Setting this as a background, the article proceeds with a discussion of the European Union's actions taken to counter extraterritorial sanctions of other states. Specifically, the EU Blocking Statute and the use of countermeasures, including the EU Anti-Coercion Instrument, are examined and compared. Also, the authors emphasize the limitations inherent in the legal instruments used to address the extraterritorial effects of economic sanctions and conclude by underlining the importance of economic security and resilience.

Alexandros Bakos in *Testing the EU's Blocking Statute in Investment Arbitration: Failure to Protect the Investor against Secondary Sanctions as a Violation of Legitimate Expectations?* discusses whether the inability of the EU to protect foreign investors from the US extraterritorial secondary sanctions through the effective implementation of the EU Blocking Statute could violate the Union's or its Member States' obligations.

Pursuing the goal of protecting its investors abroad and attracting foreign investments, the EU as well as individual EU Member States have entered into a myriad of Bilateral Investment Treaties (BITs) with other States. These BITs have standards of protection commonly included in investment treaties, both substantive and procedural. Substantive standards include, among others, national treatment, most favoured nation treatment, fair and equitable treatment, full protection and security, and protection against illegal expropriation. Procedural standards

include the possibility of bringing claims against the host States using investor-state dispute settlement.

In this context, Alexandros Bakos explores the inability of the EU to protect foreign investors from the US extraterritorial secondary sanctions and their detrimental effects on their investments inside the EU and whether this could provide legal grounds for bringing a successful claim before an investor-state tribunal. Bakos presumes that the EU Blocking Statute adopted to counter US extraterritorial secondary sanctions "can create certain expectations for foreign investors" regarding its application, thus giving them the right to initiate an investor-state dispute if such expectations are not met. Alexandros Bakos structured his contribution as follows: he starts with the analysis of the EU Blocking statute and identification of the foreign investors that might benefit from it. Next, he highlights the complexities of identifying the appropriate respondent in such cases, given the shared enforcement responsibilities between the EU and its Member States. Subsequently, the paper discusses the fair and equitable treatment (FET) standard, which includes the protection of legitimate expectations, and how systematic non-enforcement of the EU Blocking Statute could breach this standard. Bakos argues that the preference for private enforcement of the EU Blocking Statute over public enforcement by the EU authorities undermines the protection granted to foreign investors under this statute. This potentially amounts to a repudiation of the statute and a violation of the FET standard enshrined in applicable investment treaties. The conclusion emphasizes that while private enforcement is not inherently problematic, it may not be adequate in this context.

The articles of the Special Issue present the legal complexities surrounding economic sanctions, with a focus on both theoretical frameworks and practical cases. The diversity of topics reflects the evolving nature of economic sanctions, their potential extraterritorial reach and challenges to their legality under international law.

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Notes

1. The ICJ held: "the Court has merely to say that it is unable to regard such action on the economic plane as is here complained of as a breach of the customary-law principle of non-intervention." Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits Judgment, I.C.J. Reports 1986, p. 14, at para. 245.
2. Human Rights Council, Resolution 27/21 Human Rights and Unilateral Coercive Measures, UN Doc. A/HRC/RES/27/21, 3 October 2014.
3. UNSC, Resolution 2664 (2022) [on humanitarian exemptions to asset freeze measures imposed by UN sanctions regimes], adopted by the Security Council at its 9214th meeting, on 9 December 2022.

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