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Brussels' Sanctions Against Russia and Moscow's Retaliatory Measures Through the Eyes of the Arbitrator

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By Resolution of 27 March 2014, the United Nations (UN) General Assembly condemned the violation of Ukraine's territorial integrity (A/RES/68/262). The Security Council remained, however, powerless to impose against Russia economic sanctions which all UN member States would have had to implement. In the absence of such "multilateral" sanctions, the European Union (EU) and the United States have put in place the broadest spectrum of "unilateral" sanctions against the Big Bear since the end of the Cold War.

Since March 2014, the EU has steadily reinforced its sanctions program. Measures so far imposed encompass the freezing of assets of individuals and entities connected to Russia's executive, trade restrictions on military and dual-use equipment and technology, a limited access to European capital markets, a prohibition to grant certain categories of loans and credit, and a prohibition to supply services necessary for certain types of oil exploration and production. The EU sanctions program also prohibits the satisfaction of any claim arising out of a party's compliance with this program and ensuing non-performance of its contractual obligations.

As a measure of retaliation, Russia has, in turn, limited imports of food and agricultural products from Europe, and is now reported to be threatening to adopt new measures, including restrictions on Western car and textile imports.

These EU and Russian measures, which already affect the conclusion of new contracts and/or the performance of pre-existing ones – directly or indirectly, as in the case of France's suspension of the delivery of a Mistral warship to Russia – will likely give rise to a wave of new contractual disputes. In the absence of a resolution on multilateral sanctions passed by the Security Council, that is, of sanctions falling within the realm of transnational public policy, the question remains whether arbitrators may – perhaps even ought to consider themselves bound to – give effect to unilateral sanctions and reject a party's claim for compensation for the loss sustained as a result of its contractual partner's non-performance.

A distinctive feature of sanctions is that they prohibit the performance of all transactions falling within their scope, irrespective of the law governing these transactions. As such, they fall into the category of *lois de police*, namely rules that proclaim themselves applicable to all situations within their purview, outside the operation of rules of conflict of laws. This, however, is not to say that foreign courts and arbitral tribunals will necessarily endorse a sanction's claim that it is to be given effect irrespective of the applicable law.

Arbitrators may refuse to give effect to a statute that is part of the applicable law, if giving it effect would lead to an outcome that would be in conflict with principles of transnational public policy. Arguably, arbitrators may therefore refuse to give effect to a unilateral sanction – even a sanction imposed by the State of the applicable law – that was condemned by the UN General Assembly, as is the case of US sanctions against Cuba. Through a long series of resolutions, the most recent of which is Resolution 68/8 of 29 October 2013, the UN General Assembly has indeed called upon all States to refrain from promulgating and applying laws and regulations such as the Helms-Burton Act, *"the extraterritorial effects of which affect the sovereignty of other States, the legitimate interests of entities or persons under their jurisdiction and the freedom of trade and navigation."*

As to a *loi de police* that is external to the applicable law, arbitrators will refuse to give it effect if they consider that it does not serve interests commanding or crucial enough, if it is not sufficiently closely connected to the disputed contract, or if the benefits of giving it effect are outweighed by those of a decision to disregard it.

Since arbitrators have no forum and owe no allegiance to any State, it is conceivable that even in the absence of a UN General Assembly formal condemnation of a given unilateral sanctions program, an arbitral tribunal would refuse to give it effect if it is foreign to the applicable law and, for instance, its extraterritorial scope violates public international law. It is, for instance, plausible that if an arbitral tribunal had been called to rule on the well-known *Sensor* dispute, it would have ordered the performance of contractual obligations prohibited under US Export Administration Regulations, just as the President of the Arrondissementsrechtbank in The Hague did (*Compagnie Européenne des Pétroles SA v. Sensor Nederland BV*, 17 September 1982). An arbitral tribunal could indeed have resolved to disregard these Regulations – which prohibited exports to the Soviet Union of oil and gas equipment by all US companies, foreign subsidiaries of US companies, and foreign companies producing equipment under US license – on the ground that their extraterritorial reach was incompatible with international law.

It is also conceivable that arbitrators would refuse to give effect to counter-measures adopted to thwart the effects of a sanctions program backed by the international community. This was the case of Iraq's *Law for the Protection of Iraqi Property, Interests, and Rights in and outside Iraq*, which provided that any person or entity that would fail to perform its obligations as a result of UN sanctions against Iraq would be held liable. No arbitral tribunal could reasonably have applied this Law.

Thus, there are undeniably instances in which arbitrators may, even must, refuse to give effect to, hence grant a party exemption under, a unilateral sanctions program. But this does not imply that such sanctions must consistently and as a matter of principle be disregarded by arbitrators and that only sanctions originating in a Security Council resolution may be given effect by the latter.

The international community may well recognize that a given sanction, enacted by only one or a few States, serves a purpose worthy of protection, as other States may have refrained from imposing the same sanction for contingent reasons while being in agreement with its underlying purpose – for instance, on the ground that severing their economic relations with the target State would not actually serve the sanction's coercive purpose. Furthermore, unilateral measures may lead to the adoption of multilateral sanctions and the former's "international legitimacy" may thus be "validated" *a posteriori*, as in the case of measures decided following Iraq's invasion of Kuwait: France, the US, and the UK were the first to impose sanctions against these countries, and only subsequently did the UN Security Council pass Resolution 661. Finally, one must bear in mind that

a binding resolution of the Security Council is the outcome of an affirmative vote of nine members, including the concurring votes of the permanent members, each of which has its own concerns and interests to safeguard.

In other words, the absence of a General Assembly recommendation or of a Security Council resolution on sanctions cannot be deemed compelling evidence that a given unilateral sanction does not serve a purpose regarded as legitimate by the international community.

In the case of the Ukrainian crisis, multilateral sanctions against Russia could not be envisaged precisely because this country is one of the Security Council's permanent members invested with a veto right. EU sanctions nonetheless serve a coercive purpose: they are intended to bring Russia to comply with its international obligations. Furthermore, despite President Putin's broad accusation that EU sanctions violate international trade law, trade-related measures affecting Russia's military capabilities, for instance, appear to be in accord with the General Agreement on Tariffs and Trade (GATT), which governs trade relations among over 150 member States of the World Trade Organization (WTO), including Russia. Notwithstanding a "general elimination of quantitative restrictions" (Article XI), the GATT indeed allows, *inter alia*, the imposition of restrictive measures that are *"necessary* [, according to the enacting State,] *for the protection of its essential security interests […] relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment"* (Article XXI(b)(ii)). One can therefore not exclude that such trade-restrictive measures could be given effect by arbitrators and that claims arising out of the non-performance of transactions prohibited by such measures would accordingly be denied, despite the absence of a Security Council resolution.

The conformity of Russia's retaliatory measures with international law is more questionable. It is arguable that these measures, singularly punitive, were put in place in breach of Russia's obligations under WTO law. An arbitral tribunal that would give effect to such measures would take a bold stance, if only for taking the risk of issuing a decision that could be regarded as an encroachment on the neutrality of arbitration, perhaps even as an encouragement to use economic sanctions to achieve a goal departing from the coercive and symbolic purpose of this political tool.

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