FIGHTING GOLIATH: RECONSIDERING THE EFFECT OF EXTRATERRITORIAL UNILATERAL SANCTIONS ON THE CONDUCT OF INTERNATIONAL ARBITRATION

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From ancient times to the present, sanctions have been part of international relations. Unlike universal sanctions adopted by the UN Security Council, unilateral sanctions are often used to impose one State's political will over another. In order to reinforce the effect of sanctions, certain States adopt sanctions instruments to be applied extraterritorially, i.e. beyond their actual borders. Following a critical approach, the authors intend to evaluate the impact of extraterritorial unilateral sanctions (hereinafter – EUS) on international arbitration through the prism of private international and public international law. The article analyzes the negative impact of EUS on arbitration, from filing a request for arbitration and until the award is rendered. The authors believe that the adverse effects of EUS need to be limited as they undermine such advantages of international arbitration as efficiency, availability, confidentiality, expedition and the principle of party autonomy. The authors conclude by laying the foundations for further discussions on how to enhance the attractiveness of arbitration as a method of resolving disputes affected by sanctions and to shield arbitration protagonists from the aftermath of EUS.

Keywords: international arbitration; sanctions; extraterritoriality; secondary sanctions; arbitrability; public international law; private international law; conflict of laws.

С давних пор и по сей день санкции являются неотъемлемой частью международных отношений. В отличие от универсальных санкций, налагаемых резолюциями СБ ООН, односторонние санкции зачастую используются для навязывания политической воли одного государства другому. Для усиления данного эффекта ряд государств придает своему санкционному законодательству экстратерриториальный характер, распространяя его действие за пределы своей юрисдикции. Авторы настоящей статьи критически оценивают влияние односторонних экстратерриториальных санкций (далее – ОЭС) на международный арбитраж с позиции международного частного и международного публичного права. В статье анализируется негативное воздействие ОЭС на арбитражный процесс начиная с момента подачи заявления и формирования состава третейского суда и до вынесения арбитражного решения. Авторы приходят к выводу о необходимости ограничения негативного воздействия ОЭС на арбитраж, ставящего под сомнение такие его преимущества, как эффективность, доступность, конфиденциальность, скорость разрешения спора и соблюдение принципа автономии воли сторон. В заключение авторами предлагается ряд мер, направленных на защиту участников арбитражного разбирательства от негативного влияния ОЭС, а также повышение привлекательности арбитража как способа разрешения споров в условиях санкций.

Ключевые слова: международный арбитраж; санкции; экстратерриториальность; вторичные санкции; международное публичное право; международное частное право.

...Sanctions should be narrowly targeted and we must carefully consider their impact on companies from third countries. Sanctions that are both unilateral and extraterritorial may often complicate our efforts to build the multilateral support that is so important if we are to be truly effective in influencing the policies and behavior of target states.
Treasury Deputy Secretary Stuart E. Eizenstat (7 October 2000)[1]

At the end of the 1930s one scholar remarked that "people have a very weak memory of History. <...> With respect, in particular, to the history of

[1] Remarks by Treasury Deputy Secretary Stuart E. Eizenstat Commerce Department Bureau of Export Administration Update 2000 (https://www.treasury.gov/press-center/press-releases/Pages/ls760.aspx).

social institutions of public law and of public international law, this ignorance results in either ribboning modern historical phenomena with usurped antiquity or, conversely, considering as the fruits of the cultural progress centuries-old, if not millennia-old, elements of civilizations"[1]. His statement was dedicated to the use of "arbitration" the genesis of which was for a long time attributed to the Western Middle Ages period, although it was used in its inter-state form since ancient times[2]. This remark stays true with respect to the use of sanctions, including in their extraterritorial shape. As way of introduction, two sets of examples illustrate resemblances with our times.

Before the Peloponnesian War between Athens and Sparta, Thucydides reports that Megara had its citizens excluded from the Athenian markets[3]. In fact, the three *Decrees of Megara* were adopted by Athens towards the prohibition for Megarian merchants to use market places and ports under domination of Athens. At that time, the whole Greek trade system was centered and dependent on the Aegean Sea. Hegemonic Athens sailed the most important fleet along with colonies and allied cities covering almost all shores around the sea, including what is now part of Turkey. The impact of this exclusion from a common Greek market thus embodied serious consequences for Megarian traders.

More recently, between the 13th and the 15th century, the Vatican and Venice designed and enforced a system of unilateral sanctions against rivals, *i.e.* Mamluks and Turks. Papal embargoes were "extraterritorial" in the strict sense, because they applied over the territorial boundaries of Vatican. But as canon law, they were spiritually and legally binding on Catholics, that is falling under the "jurisdiction" of the Vatican[4]. Sanctions were of spiritual

[1] "...Les peuples ont une très faible mémoire historique. <...> En ce qui concerne, en particulier l'histoire des institutions sociales de droit public et de droit international, cette ignorance consiste soit à attribuer à des phénomènes historiques récents une ancienneté qui ne leur appartient pas, soit, au contraire, à considérer comme fruits d'un progrès culturel moderne des éléments de civilisation vieux de plusieurs siècles, sinon de plusieurs milliers d'années" (*M. de Taube*, L'apport de Byzance au développement du droit international occidental, in: Recueil des cours de l'Académie de droit international de la Haye / Collected Courses of the Hague Academy of International Law, Vol. 67, Martinus Nijhoff Pub., 1939, p. 237).

[2] *W.L. Westermann*, Interstate Arbitration in Antiquity, The Classical Journal, Vol. 2 (1907), No. 5, p. 200 (available at: https://archive.org/details/jstor-3287241/page/n3).

[3] *Thucyd.* 1.67, 139.

[4] *St.K. Stantchev*, Embargo: The Origins of an Idea and the Implications of a Policy in Europe and the Mediterranean, ca. 1100 – ca. 1500: Ph.D. Thesis, University of Michigan, 2009, p. 82 (available at: https://deepblue.lib.umich.edu/bitstream/handle/2027.42/63734/stan?sequence=1).

(excommunication and eternal damnation), social (obligation of Princes to bring them to slavery or prison) and economic nature (confiscation of assets)[1]. Interestingly, the Vatican's complex system of licensing can be compared with a modern system of granting General Licenses.

The hegemonic Venice of the 15th century also presents features that can be found in modern sanctions. With focus on the means of transportation[2], Venice sought to limit large trade with Turks and to minimize risks arising in connection with an emerged naval power in the Mediterranean Sea. Although legally applicable only to persons under jurisdiction of Venice, trade restrictions were also applied through the use of force, to Florentine and Milanese vessels sailing to the Turks. Vessels were stopped and re-routed to Venice, cargo was confiscated and the crew was fined or placed in custody. The intrinsic illegality of those measures was undisputable, proved by the fact that Venetia had set up multiple sub-commissions to decide on the legality of the seizure[3]. As a result in most cases cargo and vessels were released. Yet a commercial loss had occurred and the objective of those unilateral sanctions was deemed achieved.

Closer to our time, the US Treasury Department had a long history of dealing with sanctions. Dating back prior to the War of 1812, Secretary of the Treasury Gallatin administered sanctions imposed against Great Britain for the harassment of American sailors. During the Civil War, Congress approved a law which prohibited transactions with the Confederacy and called for the forfeiture of goods involved in such transactions as well as provided a licensing regime under rules and regulations administered by the Treasury[4].

Throughout the 20th century, different sanctions regimes were imposed over other States, causing turmoil in many contractual relationships and ongoing disputes. Thus how is it different in modern times?

Modern sanctions encompass new features aiming to enhance their efficiency. First, they target not only foreign States, its officials and public entities but also individuals and private companies, who, according to the sanctioning State, are deemed to have a close link to a particular State's go-

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1 *St.K. Stantchev*, Op. cit., p. 37–38, 175 et seq.

2 At this time, the technology of building carracks, the heaviest sea vessels was only mastered in Christian lands, with Venice as the strongest naval power. As a matter of illustration, biggest vessels were about 600–750 tons whereas a carrack was about 1,500 tons. See: *St.K. Stantchev*, Op. cit., p. 318–328.

3 *St.K. Stantchev*, Op. cit., p. 348 et seq.

4 OFAC FAQs: General Questions, Question No. 2 (https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#basic).

vernment. Second, the introduction of secondary sanctions designed to deter third-country actors from supporting a primary target of sanctions raises a serious concern as any foreign person could be punished for the violation of rules without being ever bound to abide by these rules. Authors admit that sanctions represent a reality of our world and therefore the question of their necessity and legitimacy was left beyond the scope of this article.

For the purpose of the present article, a distinction must be drawn between multilateral and unilateral sanctions as the binding effect of the UN Security Council resolutions[1] predetermines the mandatory application of multilateral sanctions and leaves little room for discussion[2]. Sanctions adopted by the European Union are also excluded from the scope of the article given their territorial effect. Instead, the article is focused on a particular type of sanction, adopted by one State with the intent to produce extraterritorial effect. The United States modern sanctions instruments, so infamous for their extraterritorial reach, are a good illustration of them. For the sake of convenience, the abbreviation "EUS" will be used to name extraterritorial unilateral sanctions.

The extraterritoriality of the US sanctions is of particular interest in respect of its impact on international arbitration. Numerous examples of disputes involving a sanctioned party or a matter affected by sanctions show that international arbitration, traditionally based on the parties' autonomy, nowadays becomes dependent on the permission of the United States to conduct arbitral proceedings. Arbitral institutions, arbitrators, legal counsels and banks are required to obtain a license from the US governmental agency. Some of them are reluctant to be involved in the resolution of a dispute falling within the scope of application of the US sanctions due to the possible refusal of banks to transfer arbitration and legal fees. Those are just a few examples to demonstrate how the extraterritorial US sanctions can potentially conflict with the principle of the parties' autonomy and undermine the most attractive aspects of arbitration – the so called "five Es" – efficiency, expedition, expertise, evenhandedness and enforceability[3].

In order to assess the impact of the EUS on arbitral proceedings, it is helpful to explore the US legal framework related to sanctions and different actors

[1] UN Charter, Arts. 2, 41 (http://www.un.org/en/sections/un-charter/un-charter-full-text/).

[2] *M. Azeredo da Silveira*, Trade Sanctions and International Sales: An Inquiry into International Arbitration and Commercial Litigation, Kluwer Law International, 2014, para. 240.

[3] *J. Greene*, From Hitchhiking Across Africa to International Arbitration Star: A Q&A with Wilmer's Gary Born (14 May 2018) (https://www.law.com/litigationdaily/2018/05/14/from-hitchhiking-across-africa-to-international-arbitration-star-a-qa-with-wilmers-gary-born/).

involved (Section 1). Given the characteristics of the EUS, they may produce effects pursuant to rules of private international law and arbitration theories (Section 2). However, as EUS affect both the inter-State order (public international law) and the State-persons order (private international law), the arbitral tribunal is entitled within its mandate to "cross the bridge" of public international law in order to assess the impact of EUS on the conduct and outcome of arbitration (Section 3). A last section will seek to summarize the position and explore potential solutions for arbitration to adapt to a situation which seems quite durable (Section 4).

1. Nature of EUS under US Laws and Their Impact on International Arbitration

1.1. What the United States Sanctions Are and Why They Are So Special

By way of preliminary remarks, we would like to draw attention to certain issues that are sometimes incorrectly interpreted by media and even by legal practitioners.

First of all, the US sanctions represent the implementation of multiple legal authorities, such as public laws (statutes) passed by Congress, executive orders issued by the President, and enforcement measures by US agencies. The Presidential statutory authority to impose sanctions derives from the International Emergency Economic Powers Act[1] (hereinafter – IEEPA) enacted as the locus of executive economic authority during national-emergency situations. At the same time, the President's authority under IEEPA is subject to procedural limitations designed to ensure the essential legislative superiority of Congress in the formulation of sanctions regimes created under the IEEPA's delegation of emergency power[2].

Unlike the President and the Congress, the Office of Foreign Assets Control of the US Department of the Treasury (hereinafter – OFAC) does not impose economic and trade sanctions but rather administers and enforces sanctions programs against certain countries, governments, entities and individuals[3]. As part of its enforcement efforts, OFAC publishes a list

[1] https://www.treasury.gov/resource-center/sanctions/Documents/ieepa.pdf

[2] Congress has an oversight role under IEEPA.

[3] OFAC FAQs: General Questions, Questions Nos. 1 & 2 (https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#basic). OFAC is the successor to the Office of Foreign Funds Control (FFC), which was established at the advent of World War II in order to prevent Nazi use of the occupied countries' holdings of foreign exchange and securities and to prevent forced repatriation of funds belonging to nationals of those countries.

of individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries[1]. It also lists individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country-specific. Collectively, such individuals and companies are called "Specially Designated Nationals" or "SDNs"[2]. OFAC is also authorized to bring administrative enforcement actions for violations of US sanctions, including imposition of civil monetary penalties and other administrative actions (*e.g.*, license denial, suspension, revocation as well as cease and desist orders)[3]. In appropriate circumstances, OFAC may refer the matter to competent law enforcement agencies for criminal investigation and / or prosecution[4].

Second, US laws, including sanctions, do not apply extraterritorially without express congressional authorization[5]. In this regard, the Congress shall clearly state that the laws are to be applied extraterritorially[6]. This is because the US statutes, including those imposing sanctions, are presumed to be territorial, and to overcome this presumption the Congress shall grant the executive authority with the powers to broaden the scope of the US jurisdiction and apply the sanctions extraterritorially[7]. According to the approach taken by the US courts[8], in order to confirm the extraterritorial

[1] OFAC – Sanctions Programs and Information (https://www.treasury.gov/resource-center/sanctions/Pages/default.aspx).

[2] Ibidem.

[3] The Economic Sanctions Enforcement Guidelines, Federal Register, Vol. 74 (2009), No. 215, p. 57602 (available at: https://www.treasury.gov/resource-center/sanctions/Documents/fr74_57593.pdf).

[4] Ibidem.

[5] *United States v. Hoskins*, No. 16-1010 (2d Cir. 2018) (https://cases.justia.com/federal/appellate-courts/ca2/16-1010/16-1010-2018-08-24.pdf?ts=1535121008).

[6] Ibidem.

[7] *RJR Nabisco, Inc. v. European Community*, 579 U.S. __ (2016) (https://www.supremecourt.gov/opinions/15pdf/15-138_5866.pdf); *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) (available at: https://corpgov.law.harvard.edu/wp-content/uploads/2014/08/Morrison-v-Natl-Austl-Bank-US-2010.pdf); *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007).

[8] See: *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010) (this case was referred to in the recent *United States v. Lawrence Hoskins* (No. 16-1010 (2d Cir. 2018)), where the US Court of Appeals for the Second Circuit refused to apply the sanctions under Foreign Corrupt Practices Act extraterritorially against Lawrence Hoskins, the UK citizen); *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. __ (2013) (https://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf).

application of a statute, the presumption against extraterritoriality has to be rebutted. In this regard, the US courts apply a two-step approach: (i) the court asks whether the statute gives a clear, affirmative indication that it applies extraterritorially; (ii) if, and only if, the statute is not found extraterritorial at step one, the court moves to step two, where it examines the statute's "focus" to determine whether the case involves a domestic application of the statute. If the conduct relevant to the statute's focus occurred in the US, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the relevant conduct occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of whether other conduct occurred in the US territory. In the event the statute is found to have a clear extraterritorial effect at step one, then the statute's scope turns on the limits Congress has or has not imposed on the statute's foreign application, and not on the statute's "focus". Thus, the extraterritorial reach of the US sanctions is an exception to the rule of the presumed territoriality of sanctions.

Third, the US sanctions programs do not regulate the conduct of the targeted nations, persons, and organizations. Rather, they are addressed to US persons, namely, all US citizens and permanent resident aliens regardless of where they are located; all persons and entities within the United States; all US incorporated entities and their foreign branches[1]. In the cases of certain programs, foreign subsidiaries owned or controlled by US companies also must comply[2]. Certain programs also require foreign persons in possession of US-origin goods to comply[3]. As can be seen, the term "United States person" is extremely wide and even includes foreign subsidiaries of US-companies.

Fourth, the US sanctions can be either comprehensive or selective (the so-called "smart" sanctions). The traditional type of US sanctions is comprehensive country-based sanctions, which prohibit virtually all activities and transactions involving a certain country[4]. Recently, the US has begun to use other kinds of sanctions, so-called "smart" or list-based sanctions

[1] OFAC FAQs: General Questions, Question No. 11 (https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#basic).

[2] Ibidem.

[3] Ibidem.

[4] For example, Cuban sanctions, Iranian Sanctions; more information on US Treasury Sanctions Programs and Country see: Active Sanctions Programs (https://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx).

targeting particular persons, entities, and organizations, rather than an entire nation or regime[1].

Fifth, the extraterritorial application of each sanctions program varies according to the specific regulations governing that particular sanction's regime. What makes the US sanctions so special is that the US not only imposes primary sanctions to restrict US persons from dealing with a targeted person, but also applies secondary sanctions designed to inhibit non-US persons from doing business, with a target of primary sanctions[2]. Secondary sanctions have proven highly controversial as unduly extending the territorial jurisdiction of the United States[3].

In the context of arbitration, the mere threat of secondary sanctions may affect a smooth-running conduct of arbitral proceedings as legal counsels, arbitrators and banks may refuse to deal with a situation involving a targeted person. Likewise, the majority of arbitral institutions have to adopt special compliance policy in order to meet the sanctions requirement. The impact of the US sanctions on arbitration will be further analyzed in detail.

1.2. Practical Impact of EUS on Arbitration Protagonists

As mentioned above, the US sanctions apply to all US persons. Their involvement in arbitral proceedings as counsel, arbitrator, secretary or administrator of the case will almost certainly trigger the application of the US sanctions regulation based on the nationality principle. As a result, US persons resign from the positions or refuse to participate in arbitration with a sanctioned party or over the subject matter of the dispute involving sanctions unless they receive a special permission (license) from OFAC.

In respect of non-US persons, the greatest threat is posed by the extraterritorial reach of sanctions implemented in secondary sanctions, which apply to any person regardless of their nationality. In this context and given the

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1 Other OFAC Sanctions Lists (https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/Other-OFAC-Sanctions-Lists.aspx).

2 For example, according to Sec. 104(b)(1) of the Countering America's Adversaries Through Sanctions Act (https://www.congress.gov/115/plaws/publ44/PLAW-115publ44.pdf) (hereinafter – CAATSA) the US President is entrusted with ample powers to take measures against "any person that... knowingly engages in any activity that materially contributes to the activities of the Government of Iran with respect to its ballistic missile program, or any other program in Iran for developing, deploying, or maintaining systems capable of delivering weapons of mass destruction...".

3 Report of the International Law Commission, U.N. GAOR, 58th Sess., Supp. No. 10, at 529–530, U.N. Doc. A/61/10 (2006) (available at: http://legal.un.org/ilc/documentation/english/reports/a_61_10.pdf).

vague wording used in the US sanctions regulation, non-US actors of arbitration process can be deemed rendering a "technical assistance" qualifying as a financial transaction to a designated person that entails the imposition of civil or criminal penalties[1].

The risk of secondary sanctions being imposed has a paralyzing effect over arbitration protagonists at the stage of initiating an arbitration process. This equally applies to arbitrators, legal counsels, arbitral institutions, banks, let alone the sanctioned persons.

Regarding arbitrators and legal counsels, there are two main concerns: (i) a fear of secondary sanctions; (ii) payment of arbitration (legal) fees. The former has been already discussed. In this regard, however, the risk of exposure to secondary sanctions exists not only in relation to arbitrators or lawyers as individuals, but also in relation to law firms. Existence of US subsidiaries or a parent company in the US territory increases the risk of being sanctioned[2]. The second concern is attributable to the risk of non-payment due to the possible banks' refusal to process a payment from the sanctioned person to an arbitrator (arbitral tribunal) or counsel. Indeed, the vast majority of financial institutions adopted special compliance polices to meet the requirements of OFAC regulation prescribing to block transactions of sanctioned persons. In this case, banks refuse to remit payments from the sanctioned persons to counsels or arbitrators (arbitral institutions) out of fear of being sanctioned themselves. As a result, arbitrators and counsels are unable to receive arbitration (legal) fees and are forced to seek guidance from OFAC. Some choose to resign or refuse to accept such clients that, in turn, entails another problem – denial of access of the sanctioned persons to the most basic and necessary services, such as legal representation.

By way of example, a survey conducted in 2016 reveals the impact of sanctions on arbitrators regarding their refusals or resignations (8% and 7%, with respectively 15% and 20% refusing to answer), and the experienced difficulties with the payment of arbitration fees (23%)[3]. Though the survey demonstrates insignificant percentage of refusals or resignations attributable to sanctions, one should bear in mind that (i) 15 to 20% of respondents refused to answer

[1] OFAC FAQs: General Questions, Question No. 12 (https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#basic).

[2] OFAC FAQs: General Questions, Question No. 11 (https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx#basic).

[3] 2016 Russian Arbitration Association Survey: The Impact of Sanctions on Commercial Arbitration (http://arbitrationsweden.com/upload/medialibrary/e1e/2016-raa-survey-on-sanctions-and-arbitration.pdf), p. 16.

this question; and (ii) the survey was conducted in 2016 and does not reflect the modern circumstances after the adoption of new sets of anti-Russian and anti-Iranian sanctions.

Arbitral institutions are also considered at risk in this context. In a joint publication of 2015, in the wake of the EU sanctions against Russia, the heads of the ICC International Court of Arbitration, the London Court of International Arbitration (LCIA) and the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) addressed certain concerns of the Russian community. The view expressed was that "nothing has changed. With the exception of compliance measures"[1]. Speaking about both the US and EU sanctions, the Director General of the LCIA noted in 2015 that very few cases were impacted and that "the LCIA will assess whether the services provided by the LCIA fall within the scope of the sanction" and if it was the case would "liaise with the relevant domestic body responsible for the implementation and administration of international financial sanctions"[2]. One year later in 2016, the ICC wrote that "[s]anctions regulations may be applicable to DRS [Dispute Resolution Services] activities"[3].

Pursuant to the compliance polices, the ICC International Court of Arbitration maintains a dialogue with French authorities, likewise the LCIA notifies the UK authorities in respect of the disputes involving sanctioned parties or matters, and both notify OFAC and seek its guidance. Nonetheless, the ICC International Court of Arbitration mentions that, should the administration of a case trigger a requirement to notify the US authorities, they will communicate the relevant information, including concerning the content of the award[4]. Therein, Swiss, Canadian or Australian sanctions regimes are nowhere mentioned, which apparently shows a different standard of appreciation.

Digging further, however, it becomes evident that arbitral institutions, along with arbitrators and counsels, are not to be blamed for this state of

[1] The potential impact of the EU sanctions against Russia on international arbitration administered by EU-based institutions (17 June 2015) (https://sccinstitute.com/media/80988/legal-insight-icc_lcia_scc-on-sanctions_17-june-2015.pdf), p. 5.

[2] *J.J. van Haersolte-van Hof*, London Court of International Arbitration: Current Challenges and Opportunities, in: A.V. Asoskov, A.I. Muranov & R.M. Khodykin (eds.), New Horizons of International Arbitration, Issue 3, Association of Private International and Comparative Law Studies, 2015, p. 36 (para. 79).

[3] Note to Parties and Arbitral Tribunals on ICC Compliance (June 2016) (http://library.iccwbo.org/content/dr/PRACTICE_NOTES/SNFC_0019.htm?l1=Practice+Notes&l2=).

[4] Ibidem.

affairs because they are trapped in a situation of total dependence on the financial system of a certain country – the United States. Indeed, it seems that the cornerstone of the problem lays with the ability to process payment by the banks. In all disputes, either arbitration or litigation, there are several banks involved: to pay and to receive fees, to pay and to receive awarded sums etc. In an inter-connected banking system, banks, including foreign banks, are connected to the US and are therefore vulnerable to heavy fines in case of non-compliance with sanctions regulations[1]. And often, they overreact to this risk. As noted in a report released in 2014, the ICC Banking Commission noticed the generalization of "sanctions clauses" in trade finance-related instruments with broad application, sometimes even beyond what would be applicable and required from the bank[2]. General and Particular Terms of Conditions of major banks also contain broad "sanctions clauses", which may entitle them to appreciate the economic risk over the legal risk that a particular sanctions regime applies or not. In particular, certain clauses include the UN, EU and US sanctions, irrespective of the nationality of a client, location of the bank or type of services rendered. In this sense, banks have become real vectors of the US sanctions in territories where US law is not considered applicable. This situation highly affects the possibility of conducting arbitration. Reportedly, certain resignations from lawyers or arbitration institutions were directly linked with their banks' unwillingness to process transactions on the grounds of foreign sanctions.

Thus, even regardless of the extraterritorial reach of sanctions, one cannot deny their impact on arbitration, starting from its earliest stage (instructing counsels, approaching arbitral institutions and nominating arbitrators). All this deprives sanctioned persons from those advantages of international arbitration that make this method of dispute resolution so attractive for cross-border business relations. Indeed, due to compliance policies adopted by banks and arbitral institutions, which include notification of OFAC, obtaining of licenses, clearance of transactions, arbitration becomes less expeditious and less efficient, not to mention unavailability of its emergency proceedings

[1] Section 226 of CAATSA amended Sec. 5 the Ukraine Freedom Support Act of 2014 (https://www.law.cornell.edu/uscode/text/22/8924) by mandating that the President impose sanctions *on any foreign financial institution* determined to knowingly engage in a significant financial transaction on behalf of any Russian person included on OFAC's SDN List pursuant to E.O. 13661 and E.O. 13662.

[2] Guidance Paper on the Use of Sanctions Clauses in Trade Finance-Related Instruments Subject to ICC Rules (Document No. 470/1238), para. 3.1 (https://iccwbo.org/publication/guidance-paper-on-the-use-of-sanctions-clauses-2014/).

for sanctioned persons[1]. Numerous refusals and resignations of arbitrators and counsels narrow down the market of dispute resolution services, thereby increasing the competitive advantages of those who are willing to accept the risks attributable to sanctions. As such, a sanctioned person pays a higher price for dispute resolution services, re-evaluated so as to include a margin for sanctions risks. Likewise, EUS directly affect confidentiality of arbitral proceedings due to the arbitral institutions' duty to notify the US authorities of payments and rendered awards. In this context, the concept of the "5 Es" in arbitration proposed by Professor Gary Born seems seriously crippled.

2. Impact of the EUS in the Conduct of the Arbitration

In the previous section, we referred to the effect EUS have on the initial stage of arbitration. It is genuine to question, therefore, whether such impediment exists in the course of other stages of arbitral proceedings and to answer the following questions: (i) to what extent EUS have an impact on the conduct of arbitral proceedings and (ii) on the outcome of the dispute.

2.1. Validity and Capacity to Enter into Arbitration Agreement

At the stage of commencement of arbitral proceedings, an arbitral tribunal might face a question of applicability of EUS to the validity of arbitration agreement and the possibility to arbitrate the dispute (or arbitrability).

First of all, the arbitration clause is severable from the contract, which means that in case the contract is found unlawful the arbitration clause will remain in force[2]. This principle of autonomy of the arbitration agreement is a substantive rule of international arbitration and was not only considered by scholars[3] and domestic courts[4], but also integrated in arbitration rules[5].

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[1] Emergency arbitration procedure requires the petitioner to make a payment at the very beginning, condition for which an emergency arbitrator will be appointed and accomplish its duties. These "premium" arbitration services are reportedly closed to sanctioned persons.

[2] *H. Arfazadeh*, Ordre public et arbitrage international à l'épreuve de mondialisation, LGDJ, 2005. p. 45.

[3] *E. Gaillard*, Legal Theory of International Arbitration, Martinus Nijhoff Publishers, 2010, p. 50 (para. 56).

[4] Cass. 1e civ., 20 décembre 1993, pourvoi no 91-16.828, Bull. civ. I, no 372, JDI 1994, 432, note Gaillard; BGer 4A_438/2013 vom 27.02.2014 (http://www.servat.unibe.ch/dfr/bger/140227_4A_438-2013.html; in English: http://www.swissarbitrationdecisions.com/sites/default/files/27%20f%C3%A9vrier%202014%204A%20438%202013.pdf).

[5] See, *e.g.*: ICC Arbitration Rules (2017), Art. 6(9); LCIA Rules (2014), Art. 23.2; UNCITRAL Rules (as revised in 2010), Art. 23(1); UNCITRAL Model Law (with amendments as adopted in 2006), Art. 16(1).

The principle of separability of arbitration agreement has a close link with the principle of party autonomy, pursuant to which parties agreeing on an arbitration clause virtually enter into a separate agreement. As far as we know none of the existing sanctions regimes does expressly forbid private persons to conclude an arbitration agreement. One could see from this reluctance that a right of access to arbitral justice is so fundamental in international commercial relationships that one could consider it a universal principle[1].

Secondly, if it does not affect the validity of the arbitration agreement, the question of whether the subject matter is suitable for arbitration could arise before both an arbitral tribunal and national courts at the enforcement level. Amongst scholars[2] and courts[3] it seems acknowledged that the existence of a sanction regime against a State (encompassing here UN and EU sanctions) does not affect the arbitrability of a claim nor the validity of the arbitration clause.

Furthermore, arbitral tribunals, by reference to the *lex arbitri*, or to principles of international arbitration, must ensure that their awards will be effective[4]. Thus, the relevant sub-question is whether or not the *lex arbitri* would incorporate EUS as part of "its" transnational public order, so that it would have an impact on the arbitrability of the dispute. Given the different grounds on which they are adopted, we do not see a common denominator in the rationale for the EUS and this *ab initio* constitutes a great difficulty for including them in any transnational public order.

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1 *H. Arfazadeh*, Op. cit., p. 60.

2 See, *e.g.*: *T. Szabados*, EU Economic Sanctions in Arbitration, Journal of International Arbitration, Vol. 35 (2018), Issue 4, p. 445; *I.M. Moutaye & E.V. Billebro*, Vybor arbitrazhnogo foruma razresheniya sporov v svete sanktsiy protiv Rossii [Choice of Arbitration Venue in Light of Sanctions Against Russia], in: A.V. Asoskov, A.I. Muranov & R.M. Khodikin (eds.), New Horizons in International Arbitration, Issue 3, p. 57–59.

3 See, *e.g.*: *Fincantieri v. Ministry of Defense of Iraq*, ICC Award No. 6719 (25 November 1991) (Interim Award), Journal du droit international (Clunet), 1994, p. 1071; *Air France v. Libyan Airlines*, CA Québec, 31 March 2003, ASA Bulletin, Vol. 21 (2003), Issue 3, p. 630; *Legal Department of the Ministry of Justice of the Republic of Iraq v. Fincantieri-Cantieri Navali Italiani*, CA Paris, 15 June 2006, Revue de l'arbitrage: Bulletin du Comité français de l'arbitrage, 2007, n° 1, p. 87; *contra*: *Fincantieri – Cantieri Navali Italiani SpA and Oto Melara SpA v. Ministry of Defence and Armament, Supply, Directorate of Iraq and Republic of Iraq*, Yearbook Commercial Arbitration, Vol. XXI (1996), p. 594 (reported in: *E. de Brabandere & D. Holloway*, Sanctions and International Arbitration (Grotius Centre Working Paper 2016/058-IEL) (https://core.ac.uk/download/pdf/151302825.pdf), p. 4–5); *Government and Ministries of the Republic of Iraq v. Armamenti e Aerospazio SpA, in liquidation et al.*, Corte di Cassazione, Plenary Session, 24 November 2015, no. 23893, Yearbook of Commercial Arbitration, Vol. XLI (2016), p. 503.

4 *M. Azeredo da Silveira*, Op. cit., para. 137 et seq.

Therefore, the existence of foreign mandatory norms affects rather the merits of a case than the validity of the arbitration clause or the arbitrability of the dispute. There may be no discussion if the US law governs the contract, but the answer is not as evident when the US law does not apply. In this case, arbitral tribunals shall decide whether EUS produce effects on the contractual relations of the parties.

2.2. Appreciation of the Nature of EUS by Arbitrators in the Context of Conflict of Laws Assessment

In this section, we will seek to assess the place of EUS in the law governing the contract. For this purpose, it is assumed that parties failed to choose the applicable law and an arbitral tribunal will have to decide on the application of EUS to the merits of the dispute.

Legal doctrine debated whether foreign law not governing the contract should be considered as a fact or as a law[1]. Pursuant to the first approach, foreign sanctions would become relevant as a *datum*, *i.e.* in order to understand the factual background of the dispute and to assess the right to terminate a contract, referring either to force majeure or hardship event through the prism of the law applicable to the merits[2]. The second approach, on the contrary, characterizes sanctions as a law, thus susceptible to producing effects on the validity of the contract subject to the resolution of conflict of laws by private international law mechanisms[3]. The third approach seeks to reconcile the two previous approaches and to permit both the consideration of foreign sanctions as overriding mandatory rules and as a factual element justifying the non-performance of the contract[4].

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1 *M. Azeredo da Silveira*, Op. cit., paras. 56–94.

2 See, *e.g.*: *G. van Hecke*, The Effect of Economic Coercion on Private Relationships, Revue belge du droit international (RBDI), Vol. 18 (1984–1985), n° 1, p. 116 (available at: http://rbdi.bruylant.be/public/index.php?module_id=00000000009&rec_id=00000025242_00000011782); *H. van Houtte*, Trade Sanctions and Arbitration, International Business Lawyer, Vol. 25 (1997), p. 166–167.

3 This approach is represented in the private international law instruments, such as the Swiss Private International Law Act or the Rome I Regulation.

4 *Chr. Brunner*, Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration, Kluwer Law International, 2009, p. 272–273; *T. Ahn*, The Applicability of Economic Sanctions to the Merits in International Arbitration Proceedings: With a Focus on the Dynamics between Public International Law Principles, Private International Law Rules and International Arbitration Theories, Pepperdine Dispute Resolution Law Journal, Vol. 18 (2018), No. 2, p. 302–303 (available at: https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1401&context=drlj).

In our view, it is unreasonable to disregard the legal nature of a foreign law validly adopted at the domestic level. Moreover, whether or not it can serve to justify the non-performance of the contractual obligations is a matter for the governing law to decide. For instance, in a contractual dispute between an Iranian party and a French company, subsidiary of a US company, French courts considered that US sanctions did not apply to the dispute as they did not qualify as overriding mandatory rules in accordance with the Rome I Regulation. Hence, the court granted a claim against the French company which had terminated the contracts[1]. Examples provided by domestic litigation are somehow limited because of the absence of codified rules of private international law to use for classification and application of foreign laws in the context of a particular dispute. By analogy, arbitral tribunals can use the same approach as provided under the Rome I Regulation that, in the context of arbitration, there is a distinction between mandatory and overriding mandatory provisions[2].

Overriding mandatory provisions have the characteristic of being directly applicable irrespective of the parties' choice of law. Hence, they "have the characteristic to force in the jurisdiction of the legal order to which they belong by impinging on the legal order designated by the conflict of laws rule"[3]. They belong to a certain category of norms which legitimacy to be directly applicable derives from their purpose or scope of application[4]. As defined in the Rome I Regulation such overriding mandatory provisions are "crucial by a country for safeguarding its public interests, such as its political, social or economic organization"[5]. Under this legal instrument, not all provisions considered "crucial" are applicable, but only those of

[1] CA Paris, 25 février 2015, n° 12/23757 (https://www.lynxlex.com/fr/text/rome-i-r%C3%A8gl-5932008/ca-paris-25-f%C3%A9vr-2015-n%C2%B0-1223757/3137).

[2] Award of 11 January 1982, Yearbook of Commercial Arbitration, Vol. VIII (1983), p. 160 (reported in: *M. Azeredo da Silveira*, Op. cit., p. 115 (para. 179)).

[3] "...Ont pour caractéristique de forcer la compétence de l'ordre juridique auquel elles appartiennent, en empiétant sur la compétence normale de l'ordre juridique étranger désigné par la règle de conflit de lois" (*P. Mayer*, Les lois de police étrangères, Journal du droit international (Clunet), 1981, p. 297 (reprinted in: Choix d'articles de Pierre Mayer. LGDJ, 2015 (available at: https://edisciplinas.usp.br/pluginfile.php/3661920/mod_resource/content/1/MAYER.pdf))).

[4] *M. Azeredo da Silveira*, Op. cit., p. 54 (para. 89).

[5] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Art. 9(1), OJ, 2008, L 177, p. 13. Under Art. 9(3), not all provisions considered "crucial" are applicable, only those of the *lex fori* and of the place where the contract have or is to be performed.

the *lex fori* and the law of the place where the contract is to be performed. Here, the Rome I Regulation provides a non-exhaustive ("such as") list of features of an overriding mandatory provision. This list shall be assessed by the court when it considers a dispute involving mandatory provisions of foreign law.

Some authors suggested that arbitrators need a proper method to decide on the applicability of mandatory rules, to balance the principle of party autonomy with mandatory rules of another legal system. For certain authors, arbitrators should observe a balancing test, encompassing the totality of relevant facts, in order to decide whether to apply the foreign mandatory provisions to the case[1]. Scholars have proposed various criteria to be taken into account. The "close connection" test would mean to observe the mandatory rules of the seat of arbitration and of the places the award is likely to be enforced[2]. The "application-worthiness" test enables to rely on different class of norms in support or against the application of the mandatory laws. In this respect, two categories of interests are presented. The first category appeals to consider objective norms: transnational public order[3], "universally recognized legally protected interests"[4], or strong public interest of concerned states or supranational entities[5]. The second one narrows down this test to the intent of the parties and to the identification by an arbitrator of their legitimate expectations[6].

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1 See, *e.g.*: *P. Mayer*, Mandatory Rules of Law in International Arbitration, Arbitration International, Vol. 2 (1986), Issue 4, p. 274–293 https://doi.org/10.1093/arbitration/2.4.274; *M. Blessing*, Mandatory Rules of Law versus Party Autonomy in International Arbitration, Journal of International Arbitration, Vol. 14 (1997), Issue 4, p. 27–34.

2 *A. Barraclough & J. Waincymer*, Mandatory Rules of Law in International Commercial Arbitration, Melbourne Journal of International Law, Vol. 6 (2005), Issue 2, p. 25.

3 E. Gaillard & J. Savage (eds.), Fouchard, Gaillard, Goldman on International Commercial Arbitration, Kluwer Law International, 1999, p. 851.

4 *N. Vosel*, Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration, American Review of International Arbitration (ARIA), Vol. 7 (1996), No. 3-4, p. 351 (with the proposed definition as: "[t]he enactment of similar laws and/or the adherence to international conventions to strengthen the protection of these values [being] indicators for this common concern").

5 *M. Giuliano & P. Lagarde*, Report on the Convention on the law applicable to contractual obligations, OJ, 1980, C 282, p. 26 (regarding Art. 7).

6 As proponents of this view, amongst others: *Y. Derains*, Public Policy and the Law Applicable to the Dispute in International Arbitration, in: P. Sanders (ed.), Comparative Arbitration Practice and Public Policy in Arbitration (= International Council for Commercial Arbitration Congress Series. No. 3), Kluwer Law and Taxation Pub., 1987, p. 233.

Over-resorting to transnational public order or other universally recognized norm may progressively diminish its exceptionality. Whilst arbitrators are bound by the parties' choice of law, they have at their disposal special tools to appreciate the effect of EUS on the contractual relationships. It has been proposed that "[e]ven in the context of purely private commercial disputes, an arbitral tribunal has a public role and function to perform, and cannot remain categorically deaf to the values underlying truly mandatory rules of law, whatever their source or origin may be"[1]. This statement contains, in our opinion, two important aspects. First, it emphasizes the "public role" of an arbitral tribunal. Although operated by private parties, arbitration performs a mission of public service for peaceful resolution of commercial disputes. Secondly, it reinforces the premise that foreign law provisions shall not be considered "overriding" because of their *modus operandi*, but shall rather be considered in light of the values they intend to protect.

It falls within the terms of the arbitral tribunal's mission to apply the law chosen by the parties and, if relevant, to decide on the applicability of mandatory provisions of foreign law. Given the peculiar nature, features and objectives of EUS (achieving political goals), they exist and are capable of producing effects both in public international law and private international law[2]. Standing on both legal orders, characterizing them as overriding must be done by resorting to means of interpretation and principles belonging to these legal orders. In this respect, arbitral tribunals shall resort to the methodology of public international law in order decide whether particular EUS shall be granted effect in a particular case.

3. The Appreciation of EUS under Public International Law

In order to maintain international peace and security and to develop peaceful cooperation between States, international law sets up certain boundaries for States to exercise their power and sovereign rights. Such boundaries are embodied in the universally recognized principles of sovereign equality of States and non-intervention, which are binding on all States as a matter

[1] *G.A. Bermann*, Introduction. The Origin and Operation of Mandatory Rules, in: G.A. Bermann & L.A. Mistelis (ed.), Mandatory Rules of Law in International Arbitration, Juris Pub., 2007, p. 8; see also: *O. Lando*, The Law Applicable to the Merits of the Dispute, in: P. Šarčević (ed.), Essays on International Commercial Arbitration, Graham & Trotman; Martinus Nijhoff Pub., 1989, p. 158.

[2] *M. Azeredo da Silveira*, Op. cit., para. 98.

of treaty law[1] and of customary international law[2]. The authors of the present article believe that both principles restrict the extraterritorial exercise of State powers and thus render EUS unlawful.

3.1. Principle of Sovereign Equality of States

The principle of sovereign equality of States, enshrined in the UN Charter, derives from the concept of sovereignty, which, in turn, has a strong link with the notions of jurisdiction and territoriality[3].

The interplay of the notions was considered in detail in the Case of the S.S. "Lotus" handled by the Permanent Court of International Justice. One of the principles established by the Court was that the jurisdiction of a State is territorial in nature and that a State cannot exercise its jurisdiction outside its territory unless an international treaty or customary law permits it to do so:

"Now the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates

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[1] UN Charter, Art. 2; Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, Annex, U.N. Doc. A/5217 (1970) (http://www.un-documents.net/a25r2625.htm).

[2] Military and Paramilitary Activities (*Nicar. v. U.S.*), 1986 I.C.J. 14 (Judgment of 27 June 1986), ¶ 185 (available at: https://www.icj-cij.org/files/case-related/70/070-19860627-JUD-01-00-EN.pdf).
Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, U.N. GAOR, Human Rights Council, 36th Sess., Agenda item 3: Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development, U.N. Doc. A/HRC/36/44 (2017), para. 22 (https://digitallibrary.un.org/record/1315418/files/A_HRC_36_44-EN.pdf).

[3] See: Island of Palmas case (Netherlands, USA), Award of the Tribunal (4 April 1928), Reports of International Arbitral Awards / Recueil des sentences arbitrales, Vol. II, p. 838 (available at: http://legal.un.org/riaa/cases/vol_II/829-871.pdf) ("Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations").

to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. <...>.

<...>

In these circumstances, all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty"[1].

The *Lotus* case provided an important dictum on the territorial limits of a State's jurisdiction that was subsequently reaffirmed in several ICJ decisions on the merits[2].

The Court also emphasized the distinction between enforcement jurisdiction (*i.e.* the capacity of a State to ensure compliance with the law) and prescriptive jurisdiction (*i.e.* the law-making capacity of a State)[3]. If the former is strictly territorial, the latter can be extraterritorial provided that it complies with the boundaries set forth by international law. Conversely, "if the substantive [prescriptive] jurisdiction is beyond lawful limits, then any consequent enforcement jurisdiction is unlawful"[4]. This distinction formed

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[1] The Case of the S.S. "Lotus" (*Fr. v. Turk.*), 1927 P.C.I.J. (ser. A) No. 10 (7 September), p. 18–19 (available at: https://www.icj-cij.org/files/permanent-court-of-international-justice/serie_A/A_10/30_Lotus_Arret.pdf). This case involved the exercise of adjudicative jurisdiction by Turkey with respect to the criminal responsibility of a French national on a French vessel for the deaths of Turkish nationals on a Turkish vessel resulting from a collision of the two vessels on the high seas after the French vessel had arrived at Istanbul.

[2] North Sea Continental Shelf Cases (*F.R.G. v. Den.*; *F.R.G. v. Neth.*), 1969 I.C.J. 3 (Judgment of 20 February 1969) (available at: https://www.icj-cij.org/files/case-related/51/051-19690220-JUD-01-00-EN.pdf); Military and Paramilitary Activities (*Nicar. v. U.S.*), 1986 I.C.J. 14 (Judgment of 27 June 1986); Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (Advisory Opinion of 8 July 1996) (available at: https://www.icj-cij.org/files/case-related/95/095-19960708-ADV-01-00-EN.pdf). Yet, the *Lotus* case remains a cornerstone of the public international law of jurisdiction, its dictum on the territorial nature of jurisdiction was further reconsidered and developed in respect of the extraterritorial extension of a State jurisdiction.

[3] *B. Stern*, Can the United States Set Rules for the World? A French View, Journal of World Trade, Vol. 31 (1997), Issue 4, p. 10.

[4] *I. Brownlie*, Principles of Public International Law, 6th ed., Oxford University Press, 2003, p. 308; *B.H. Oxman*, Jurisdiction of States, in: R. Bernhardt & P. Macalister-Smith (eds.), Encyclopedia of Public International Law, 2th ed., Vol. 3, North-Holland, 1997, p. 55.

the basis for the further development of the principles of extraterritorial jurisdiction and for the justification of legitimacy of extraterritorial reach of domestic laws, including unilateral sanctions. In this regard, the rules of jurisdiction do not prevent the US from extending its national laws to conduct of foreign nationals in foreign countries. The US, however, cannot enforce such laws outside its own territory.

3.2. Principle of Non-Intervention

The principle of non-intervention[1] is in line with the principle of sovereign equality of States in the sense that it restricts the extraterritorial exercise of state powers and prohibits the interference of one State in the domestic or external affairs of another State without the latter's consent[2]. In addition to UN General Assembly resolutions[3], this principle is also developed in such legal instruments as the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States (hereinafter – 1970 Declaration)[4] and the Final Act of the Conference on Security and Co-Operation in Europe in 1975 (Art. IV)[5] (hereinafter – Helsinki Final Act).

In these two instruments, the principle of non-intervention encompasses "all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements" and frames this intervention as seeking to secure an advantage of any kind[6].

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1 UN Charter, Arts. 2(4), 2(7).

2 *H. Ascensio*, Extraterritoriality as an instrument: Contribution to the work of the UN Secretary-General's Special Representative on human rights and transnational corporations and other businesses, para. 7 (https://www.business-humanrights.org/sites/default/files/media/documents/ruggie/extraterritoriality-as-instrument-ascensio-for-ruggie-dec-2010.pdf).

3 Non-Interference in the Internal Affairs of States, G.A. Res. 31/91, U.N. GAOR, 31st Sess., U.N. Doc. A/RES/31/91 (1976); Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. 36/103, U.N. GAOR, 36th Sess., U.N. Doc. A/RES36/103 (1981).

4 G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, Annex, U.N. Doc. A/5217 (1970).

5 https://www.osce.org/helsinki-final-act?download=true

6 In the 1970 Declaration, continuing the quotation: "No State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind"; Helsinki Final Act, Art. VI: "[States] will likewise in all circumstances refrain from any other *act of* military, or of political, *economic or other coercion* designed to subordinate to their own interest the exercise by another participating State of the rights inherent in its sovereignty and thus to secure advantages of any kind" (emphasis added).

The International Court of Justice endeavored to define the scope of the principle of non-intervention in the famous *Nicaragua* case: "<...> As regards the first problem – that of the content of the principle of non-intervention – the Court will define only those aspects of the principle which appear to be relevant to the resolution of the dispute. In this respect it notes that, in view of the generally accepted formulations, the principle forbids al1 States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones. <...>"[1]

The *Nicaragua* case is a crucial decision as it inferred that the 1970 Declaration, adopted unanimously, contained principles bearing a customary value[2]. The association between EUS and the principle of non-intervention has since been made in UN resolutions[3]. The Court's 1986 analysis not only remains relevant today, but also serves as a valid ground for the restriction of extraterritorial reach of the United States sanctions.

3.3. Recent Developments of International Law on Extraterritorial Jurisdiction

Both principles of sovereign equality of States and non-intervention have been subsequently developed in contemporary international law and form the basis of public international law rules on State jurisdiction. However, if historically the exercise of prescriptive jurisdiction[4] by a State had territorial

[1] Military and Paramilitary Activities (*Nicar. v. U.S.*), ¶ 205.

[2] Ibid., ¶ 188.

[3] Human Rights and Unilateral Coercive Measures, G.A. Res. 71/193, U.N. GAOR, 71st Sess., U.N. Doc. A/RES/71/193 (2016) (http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/193).

[4] The authors of the present article are of a view that the extraterritorial assertion of enforcement jurisdiction of one State without the consent of the other State is prohibited under international law. Such consent can be given by way of conclusion of international bilateral or multilateral agreements, which is the case in the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters as amended (between EC member States) Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (between EC and EFTA member States). In another continent, Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards (among OAS members).

boundaries, *i.e.* was mainly limited to persons and assets within its territory, nowadays, these boundaries become more flexible and lose their initial connection with the concept of territoriality.

Indeed, one cannot deny the necessity of extending the limits of a State's jurisdiction beyond its territorial boundaries in certain circumstances attributable, for example, to the globalization of the world economy or to the threats posed to the international community (*e.g.*, transnational crimes, including money laundering, international terrorism, drug trafficking, *etc.*)[1].

In response to these new challenges, a number of principles of jurisdiction have been developed and invoked under contemporary international law[2] in order to justify the extraterritorial exercise of prescriptive jurisdiction of a State, in particular: (a) the "objective" territoriality principle; (b) the "effects doctrine"; (c) the protective principle; (d) the nationality principle, and (e) the passive personality principle.

Nevertheless, the common point for all those principles is that international law permits the extraterritorial exercise of prescriptive jurisdiction only if there is a genuine connection ("reasonable link") between the subject of the regulation and the state seeking to regulate (*e.g.*, territory, effects, protection, nationality, passive personality)[3].

Failure to follow any of the said principles renders the extraterritorial reach of the sanctions unlawful[4]. As explained in the Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, "most extraterritorial sanctions cannot invoke any of the above-mentioned criteria"[5].

For the purpose of this article, of particular interest is the "effects doctrine" as frequently invoked by the United States to justify the extraterritorial reach of the sanctions[6].

The *effects doctrine* is generally understood as referring to jurisdiction of a State to regulate conduct of a foreign national outside the territory of the State provided that there is a direct, foreseeable and substantial effect

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1 Report of the International Law Commission, p. 516.

2 Ibid., p. 521.

3 *B. Stern*, Op. cit., p. 11–12.

4 Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, para. 24.

5 Ibidem.

6 See: *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155, 124 S. Ct. 2359 (2004).

within its territory[1]. The doctrine has proven particularly controversial and is widely criticized by international legal circles due to its broad interpretation by the United States[2].

In 1982, the United States sought to prohibit the export to the USSR of equipment by foreign subsidiary of US companies and therefore stop the construction of the Siberian-European pipeline. The European Community along with its Member States made strong protest against the US extraterritorial reach of the sanctions. First, such regulations infringed upon the EC's (and its Member States') own territoriality jurisdiction (linking with the principle of non-intervention), *i.e.* in the organization of social and economic activity[3]. Secondly, the nationality principle was not relevant since the nationality of a company is determined by its place of incorporation or registered office[4] and that goods and technology have no "nationality"[5]. Protective and effects doctrines would be over-stretched if they were to mean that development of projects between other States entailed threats to and effects on the US.

It is no surprise that the later attempts of the United States to enforce economic sanctions against Cuba (Helms-Burton Act) and Libya (D'Amato-Kennedy Act) through extraterritorial sanctions also provoked diplomatic protests and the adoption of blocking statutes[6]. In both cases, the enforcement of the extraterritorial provisions of these laws was suspended.

As stated in the Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, "the effects doctrine, sometimes invoked by the United States as a justification for the implementation of extraterritorial measures, could be potentially legally warranted in only a very limited number of cases, given the cumula-

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1 Report of the International Law Commission, p. 522; Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, para. 23; see also: *Ascensio*, Op. cit., para 9.

2 *B. Stern*, Op. cit., p. 12–13.

3 Comments of the European Community on the Amendments of 22 June 1982 to the U.S. Export Regulations (12 August 1982) (http://aei.pitt.edu/1768/1/US_dispute_comments_1982.pdf), p. 4 (para. 5).

4 Barcelona Traction, Light and Power Company Ltd. (*Belg. v. Spain*), 1970 I.C.J. 3 (Judgment of 5 February 1970), ¶ 70 (available at: https://www.icj-cij.org/files/case-related/50/050-19700205-JUD-01-00-EN.pdf).

5 Comments of the European Community on the Amendments of 22 June 1982 to the U.S. Export Regulations (12 August 1982), p. 5–6 (paras. 7–8).

6 Report of the International Law Commission, p. 528.

tive requirements that the said effects (of the situation that has triggered the decision to impose sanctions) on the territory of the targeting State be direct, foreseeable and substantial"[1].

Regarding the excessive jurisdiction of the United States to adopt extraterritorial sanctions, and particularly, in respect of the negative impact of the sanctions on the enjoyment of human rights, the United Nations organs, other international organizations and certain States expressed their negative reaction.

Since 1992 the General Assembly has annually voiced its condemnation of the extraterritorial reach of the embargo imposed on Cuba by the United States[2]. In Resolution of the General Assembly dated 19 December 2016, it was specifically emphasized that "unilateral coercive measures and legislation are contrary to international law, international humanitarian law, the Charter of the United Nations and the norms and principles governing peaceful relations among States"[3] and that "no State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind"[4].

The same perception of the illegality of EUS in the absence of jurisdictional basis is shared in the legal doctrine. As pointed out by professor Brigitte Stern, "the United States, in adopting the Helms-Burton Act, passed a law to bind the rights of any person in the world, in complete contradiction with the most elementary principles of international law, mainly

[1] Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, para. 24.

[2] Ibid., para. 25. In addition to the various resolutions of the General Assembly and the Human Rights Council condemning the use of extraterritorial sanctions, the countries of the Non-Aligned Movement have firmly rejected this practice (see, for instance, Asian-African Legal Consultative Organization resolution RES/51/S 6). See also: 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, 1996, L 309, p. 1–6. Other countries, *i.e.* Canada and Japan, appear to share the same views.

[3] Human Rights and Unilateral Coercive Measures, G.A. Res. 71/193, U.N. GAOR, 71st Sess., U.N. Doc. A/RES/71/193 (2016); see also: Necessity of Ending the Economic, Commercial and Financial Embargo Imposed by the United States of America against Cuba, G.A. Res. 47/19, U.N. GAOR, 47th Sess., U.N. Doc. A/RES/47/19 (1992).

[4] Human Rights and Unilateral Coercive Measures, G.A. Res. 71/193, U.N. GAOR, 71st Sess., U.N. Doc. A/RES/71/193 (2016), para. 11 (based on: Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms: Report of the Third Committee, U.N. GAOR, 71st Sess., Agenda item 68(b), U.N. Doc. A/71/484/Add.2 (2016)).

but not exclusively because of its extraterritorial reach, and moreover that such illegal action can be justified by no reason whatsoever"[1].

To conclude, given the effects EUS produce on international public relations, an arbitral tribunal shall assess the legitimacy of EUS in light of the principles and rules of public international law. In this regard, it is commonly accepted[2] that EUS adopted without jurisdictional basis devalue the sacrosanct principles of public international law, namely, the principles of sovereign equality of States and non-intervention.

4. Conclusions

With their extraterritorial reach, modern unilateral sanctions are capable of producing the same effect as the United Nations Security Council sanctions. It does not matter whether they are comprehensive, targeting an entire country, or "smart", *i.e.* targeting an individual or a legal entity, the targets become "toxic" for the rest of the world.

Unlike universal sanctions adopted by the UN Security Council, EUS are widely condemned by the international community as violating such fundamental principles of public international law as the principles of sovereign equality of states and of non-intervention. By interpreting its jurisdictional authority more widely than other States, the US unilaterally extends its jurisdiction beyond the territorial boundaries making third State parties subject to the United States sanctions regimes.

This "toxic" effect is achieved through a highly developed system of penalties and secondary sanctions imposed by the targeting State. In this regard, the mere fear of being penalized or being exposed to secondary sanctions is sufficient to adjust the conduct of individuals and businesses to the political objectives of the targeting State.

The same is relevant in the context of international arbitration. The targeted persons become dangerously "toxic" for arbitrators, counsels, arbitral institutions and financial institutions that have to follow compliance policy to meet the requirements of the US sanctions regulation. In this respect, EUS

[1] *B. Stern*, Op. cit., p. 10.

[2] Human Rights and Unilateral Coercive Measures, G.A. Res. 71/193, U.N. GAOR, 71st Sess., U.N. Doc. A/RES/71/193 (2016); Report of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, para. 22 (citing: *M. Cosnard*, Les lois Helms-Burton et d'Amato-Kennedy, interdiction de commercer avec et d'investir dans certains pays, Annuaire Français de Droit International (AFDI), Vol. XLII (1996), p. 36–50 (available at: https://www.persee.fr/doc/afdi_0066-3085_1996_num_42_1_3370)); see also: *B. Stern*, Op. cit., p. 10.

affect the right of the sanctioned person to enjoy such advantages of arbitration as efficiency, expedition, confidentiality, and party autonomy.

Challenges and questions posed by EUS need to be studied from different angles. Since they simultaneously affect inter-state, public-private and inter-private relationships, a complex transdisciplinary study of the EUS effects on arbitration is required.

Particular attention should be drawn to equating legal representation to "economic services". This trend is not limited to the US. An increasing number of States consider law firms as economic actors under the prism of competition law. Given the diversified range of services they render, lawyers undisputedly create economic value. However, dispute resolution representation, be it before courts or arbitral tribunals, merits reinforced protection. Unrestricted access to it is a fundamental element of international peace and security.

In a broader sense, in our multilateral and polarized world, international arbitration aims at preserving the balance of interests, either public or private, by allowing the peaceful resolution of complex cross-border disputes. That is why legal representation services should be distinguished from other economic services rendered by law firms.

In order to adapt to the situation, as EUS are not predicted to disappear any time soon, there may be solutions to explore in order to minimize the risk of exposure to the extraterritorial reach of sanctions for dispute resolution practitioners.

Certain solutions may be implemented at the stage of drafting a contract by analyzing the possible risks of (i) linking the contract to the US jurisdiction (*e.g.*, to avoid the US dollar currency or the US clearing systems), and (ii) interference of US law on the merits (*e.g.*, to adopt a restricted wording of force majeure clause or to draft a clause on shared liability in case of the termination due to the foreign sanctions regulations).

Second, facing issues pertaining to the applicability of EUS as mandatory law external to the applicable law, arbitral tribunals should consider the objectives and purposes of EUS. Facing complex problems arising out of the hybrid nature and effects of EUS, even commercial arbitration could and should "cross the bridge" towards public international law to achieve this purpose. In this regard, given the persuasive role of legal doctrine in the system of sources and references used by arbitrators, this could take the form of inviting prominent arbitration practitioners to share their views on this correlation.

Third, a class of solutions could be reached through the adoption of blocking or claw-back legislation intended to prohibit the application of EUS of a third State or, alternatively, of certain EUS, by national courts and arbitral tribunals with a seat of arbitration within their territory. The authors are aware

that different States or entities have already tried to think of a comprehensive system of protection against EUS. This exercise, however, seems quite difficult if it seeks comprehensiveness. Rather, particular law seeking to shield dispute resolution practitioners (including in arbitration) could be an easier approach to reduce a negative impact of EUS on the right of a targeted or otherwise affected person to be heard and to present its case.

Finally, a class of structural solutions is required to ensure the effectiveness of transactions, which are crucial to the resolution of disputes. This class of solutions is based on the rationale that access to justice, be it arbitration or litigation, fundamentally requires enhanced protection. It could help the arbitration world not only to become more resistant to external influence but also strive for the permanence of its functions. By way of example, the *Caisse des règlements pécuniaires des avocats* (CARPA) is a French public fund, neither a bank nor a financial institution, created for payments between attorneys, which receives the flows of funds handled by lawyers in their (professional bank) accounts labeled CARPA accounts. One of the goals is to adapt to the peculiarities of transactions linked with legal or judicial services and to ensure compliance with anti-money laundering regulation. Adjusted to the needs of international arbitration, a State agency (public entity) would be set up with the sole mission of monitoring financial flows arising out of dispute resolution "services" and ensuring the permanence of access to justice. Unlike different types of bank accounts, these accounts could be held in private banks but operated by way of the Special Terms and Conditions adopted by a State agency (public entity). In this context, law firms and arbitral institutions could open special accounts within the same "special rules" accounts. This solution virtually presents the advantage of proposing a "public" screen, immune from EUS, and positioning the respective State as an attractive forum for arbitration. An alternative structural solution, believed to require more public investment than the previous one, would be to establish such "public entity" with the only purpose of maintaining and operating accounts opened in the name of law firms and arbitral institutions and through which the purpose of the transactions would be verified and processed.

To all ends, the underlying rationale is to strengthen arbitral institutions, counsels and banks assisting in dispute resolution and make them less vulnerable to political vicissitudes and uncertainties originating from one State. This may go through a legal debate not obfuscating the legitimacy and foundations of EUS as well as through vehicles aimed at affording a structural protection to arbitration which pursues, before a mere economic purpose, a mission of peaceful resolution of disputes.