Defeating Economic Sanctions in the EU: A Strategic Analysis of Litigation Options

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Economic sanctions; European Union; International Court of Justice; International trade

Abstract

Sanctions are part of the UN toolbox to secure international peace and security. States are also increasingly relying on sanctions to pursue foreign policy objectives. It is noteworthy that both the UN and the EU have been gradually shifting from sanctions against states to sanctions targeting specific individuals and entities. However, targeted sanctions follow highly politicised procedures with little transparency; the criteria on which targeted sanctions are based risk either not being provided, or being too broadly and ambiguously phrased. This article reviews the mechanisms available to targeted individuals and entities to challenge the legality of sanctions. It starts with the experience that has matured before the EU courts to assess the current state of affairs and the limits this litigation may encounter. It then identifies alternative strategies to litigate sanctions, including by raising new claims based on criminal practice and using different legal fora such as the ICJ.

Introduction

Sanctions of an economic nature are deemed to entail "the deliberate, government-inspired withdrawal, or threat of withdrawal, of customary trade or financial relations".[1] As such, sanctions are primary instruments for deterring behaviour that is perceived as inconsistent with the international legal order, and have long played a key role in securing peace and order internationally.[2] States

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The authors thank Jacques Bourgeois and Bregt Natens for their useful comments on an earlier version of this article. Any errors or omissions are the authors' own. The views expressed in this article are exclusively those of the authors. The article has been prepared for academic purposes only and does not constitute legal advice.

[1] G.C. Hufbauer et al., *Economic Sanctions Reconsidered*, 3rd edn (Washington, DC: Peterson Institute for International Economics, 2007), p.3. See also A.F. Lowenfeld, *International Economic Law* (Oxford: Oxford University Press, 2008), p.850.

[2] See C. Hotton, "Targeted Sanctions: Providing a Solution to the Issue of General Sanctions" (2016) 7 *Creighton International & Comparative Law Journal* 86.

and international organisations increasingly rely on these instruments to pursue foreign policy objectives.[3]

Sanctions are part of the UN toolbox to secure international peace and security. The UN Security Council,[4] upon determining the existence of a threat to peace, breach of peace or act of aggression, can decide whether and which sanctions should be adopted to remedy such unsettling situations.[5] The Security Council may impose economic sanctions in the form of trade and financial restrictions. The Security Council has so far adopted economic sanctions in pursuit of a variety of purposes, including support for the political settlement of conflicts, counterterrorism and the prevention of nuclear proliferation.[6]

Next to the implementation of UN sanctions, states impose their own sanctions. The EU seems particularly inclined to impose sanctions for foreign policy purposes. Sanctions fall within the Common Foreign and Security Policy (CFSP) of the EU and appear consistent with the EU's willingness to "assert its interests and values on the international scene".[7] EU sanctions are of two kinds. On the one hand, as mentioned, the EU implements UN sanctions, thereby complying with Security Council's resolutions.[8] With this, the EU may choose to apply sanctions that are more restrictive than those at UN level.[9] On the other hand, the EU also imposes autonomous sanctions, independently of any Security Council's resolution.[10] The Council is the institution to decide on the imposition of sanctions[11] and adopt the necessary measures to implement sanctions of an economic nature.[12]

Sanctions are generally addressed to states. Yet, in more recent times both the Security Council and the EU have increasingly resorted to so-called targeted sanctions. These address specifically identified individuals and respond to the critique that sanctions against states risk harming a population without successfully affecting those actually involved in the sanctioned aggression or oppression.[13] By constraining individuals' access to economic resources and broadly impeding their business activities, targeted sanctions aim at coercing a change in behaviour by targeted individuals and at making them lose power in their respective states.[14] To better their effectiveness, targeted sanctions tend to be imposed against entities and associations of individuals too.

[3] This article addresses sanctions strictly speaking, to be distinguished from countermeasures and retorsions. For a brief discussion, see section "Identifying alternative strategies to litigate sanctions" below.

[4] The Security Council is the executive organ of the UN, composed of five permanent members (i.e. China, France, the Russian Federation, the United Kingdom, the United States) and 10 non-permanent members elected for two-year terms.

[5] See Ch.VII of the Charter of the United Nations 1945, 1 U.N.T.S. XVI (UN Charter). See esp. UN Charter arts 39, 41.

[6] Since 1966, the Security Council has established 30 sanctions regimes, 14 of which are currently in place.

[7] Treaty on European Union [2016] OJ C202/17 (consolidated) (TEU) art.32.

[8] Pursuant to art.48 UN Charter, the Security Council's resolutions are binding upon states, which are requested to take action directly and within international organisations of which they are members (i.e. the EU).

[9] Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy, Doc. 5664/18 of 4 May 2018, para.3.

[10] *Basic Principles on the Use of Restrictive Measures (Sanctions)*, Doc. 10198/1/04 of 7 June 2004, para.3.

[11] TEU arts 29 and following.

[12] Treaty on the Functioning of the European Union [2016] OJ C202/1 (consolidated) (TFEU) art.215.

[13] J. Klabbers, *International Law* (Cambridge: Cambridge University Press, 2013), p.179.

[14] See T. Biersteker et al., *The Effectiveness of United Nations Targeted Sanctions* (Geneva: Graduate Institute of International and Development Studies, 2013), p.12.

Individuals and entities subject to targeted sanctions are included in so-called "sanctions lists". These lists can be established by the UN or the EU[15] and follow highly politicised procedures lacking sufficient transparency. Especially, the criteria on which sanctions lists are based risk either not being provided or being too broadly and ambiguously phrased. That is why it is crucial to identify the mechanisms available to persons affected by sanctions to challenge their listing and the legality of sanctions. This article aims at detecting and investigating such mechanisms, pointing to potential successful litigation strategies. To this end, it will focus on the experience matured before the EU General Court (at first instance), and the EU Court of Justice (on appeal), together referred to as EU courts,[16] as a key case study. This article starts by analysing existing case law before the EU courts, assessing the current state of affairs and the limits that litigating sanctions in the EU is encountering. Given the difficulties in successfully challenging sanctions before the courts of the EU, this work then looks at alternative ways for a more effective strategy to litigate sanctions, including possible new claims and new fora where to challenge sanctions acts. The last section provides the conclusion. The focus will be primarily on targeted sanctions of an economic nature.

Litigating sanctions in the European Union

States implement sanctions adopted by the UN and they also impose autonomous sanctions to pursue national foreign policy objectives. In both instances, states adopt national acts that can be challenged before national courts.[17] With respect to the EU, as mentioned, sanctions fall under the CFSP framework and are adopted and implemented primarily by the EU institutions. EU sanctions acts, as legislative acts of the EU, are subject to judicial review by the EU courts.[18] As the subsections below will show, however, the EU courts enjoy limited jurisdiction over sanctions acts. Also, the EU courts have so far adopted a highly restrictive approach when asked to assess the legality of sanctions. This undermines the possibility of successfully challenging sanctions in the EU forum.

The EU courts' limited jurisdiction on sanctions

The first obstacles that individuals and entities willing to challenge sanctions in the EU encounter are the limits that curtail the possibility to act before the EU courts, and the type of judicial review that the EU courts may conduct over sanctions acts.

[15] The EU establishes sanctions lists exclusively in respect of its autonomous sanctions or where Security Council's resolutions expressly refer the listing to UN members.

[16] See TEU art.19.

[17] Individuals and entities may also challenge the legality of sanctions before the European Court of Human Rights (ECtHR), claiming breaches of certain rights and freedoms provided for in the European Convention on Human Rights 1950, 87 U.N.T.S. 103 (ECHR). The ECtHR had the opportunity to resolve upon few cases relating to sanctions, mainly finding breaches of procedural rights such as the right to a fair trial (art.6) and the right to an effective remedy (art.13): see ECtHR, *Nada v Switzerland*, Appl. No.10593/08, Judgment of 12 September 2012; ECtHR, *Al-Dulimi and Montana Management Inc v Switzerland*, Appl. No.5809/08, Judgment of 21 June 2016.

[18] TFEU art.295(2) provides for an exception to the otherwise limited jurisdiction of the EU courts on CFSP measures.

Acting before the EU courts

The EU courts are competent to review the legality of EU legislative acts and order compensation for damages and interim measures; the Court of Justice can also issue preliminary rulings following questions raised by Member States' courts on the legality or interpretation of EU law.[19] The possibility for natural and legal persons affected by sanctions to have recourse to the named judicial actions is nonetheless subject to cogent conditions.

For instance, the action of annulment under art.263(4) TFEU would allow individuals and entities affected by EU sanctions to claim the illegality of sanctions and obtain their annulment. However, it is conditional on strict standing requirements. Individuals and entities may initiate a proceeding before the EU courts exclusively regarding acts that (1) are addressed to them; (2) are of direct and individual concern to them; or (3) are of a regulatory nature and of direct concern to them and do not entail implementing measures.[20] Individuals and entities should also show interest in bringing action at the stage of lodging it and continuously until the final judgment; namely, the action (if successful) must be liable to procure them an advantage.[21] On the one hand, it is settled case law that individuals and entities on EU sanctions lists have standing to initiate an action for annulment against the EU listing decisions. It is also uncontroversial that they maintain their interest in pursuing the annulment action even if they are de-listed before the conclusion of the proceeding, in light of the substantive negative consequences (at least of a reputational nature) potentially suffered because of the disputed sanctions.[22] On the other hand, applicants regularly fail to satisfy the standing requirements.

Also the preliminary ruling procedure under art.267 TFEU (to which persons lacking standing under art.263(4) TFEU could resort to) may be of limited help. The preliminary ruling procedure allows national courts to pose questions on the interpretation and legality of EU sanctions acts to the Court of Justice. Through the preliminary ruling procedure, private parties lacking standing under art.263(4) TFEU can obtain a Court of Justice's decision clarifying the exact meaning and scope of EU sanctions[23] and even the invalidation of illegal sanctions,[24] it being understood that only the EU courts have power to invalidate EU legislative acts (including sanctions acts). However, national courts have a margin of discretion in deciding whether to initiate a preliminary ruling procedure,[25] which undermines a claimant's chances to obtain the invalidation of challenged EU sanctions acts.

[19] TFEU arts 251 and following.

[20] TFEU art.263(4).

[21] See, e.g., *Wunenburger v Commission* (C-362/05) EU:C:2007:322; [2019] C.M.L.R.10 at [42].

[22] See *Abdulrahim v Council and Commission* (C-239/12) EU:C:2013:331; [2013] 3 C.M.L.R 41 at [61] and following; *National Iranian Tanker Co v Council* (C-600/16) EU:C:2018:966; [2019] 4 W.L.R. 58 at [32]–[35].

[23] See *M et al.* (C-340/08) EU:C:2010:232; [2010] 3 C.M.L.R. 31; *Afrasiabi et al.* (C-72/11) EU:C:2011:874; *Rosneft* (C-72/15) EU:C:2017:236; *SH* (C-168/17) EU:C:2019:36; [2017] 3 C.M.L.R. 23.

[24] See *E and F* (C-550/09) EU:C:2010:382; [2011] All E.R. (EC) 127.

[25] See S. Weatherill, *Cases and Materials on EU Law* (Oxford: Oxford University Press, 2014), pp.173 and following. Courts of last instance would lack such discretion, even though they may not refer questions on EU law matters to the EU courts on the basis of the *acte clair* doctrine: see *E and F* (C-550/09) EU:C:2010:382; [2011] All E.R. (EC) 127.

Defining the jurisdiction of the EU courts

As noted, the EU courts are competent to decide on the legality of EU legislative acts. Relevant EU legislative acts include decisions and regulations with which the EU institutions impose and implement restrictive measures against individuals and entities (i.e. targeted sanctions).[26] The EU courts are given full judicial review of EU autonomous sanctions. By contrast, the EU courts' jurisdiction over EU sanctions acts implementing Security Council's resolutions is controversial, and generally results in a curtailed assessment of the legality of sanctions.

Traditionally, the EU courts were reluctant to scrutinise EU sanctions acts implementing Security Council's resolutions. Up to 2008, the EU courts would acknowledge the primacy of UN legal sources in the international law framework.[27] They determined the legality of EU acts under not only the EU legal order, but also given rules of international law (encompassing UN law).[28] The EU courts would thus not resolve upon the legality of UN-derived sanctions: such scrutiny would amount to an indirect review of Security Council's acts, which lay outside their jurisdiction.[29]

Following the *Kadi* case in 2008,[30] the EU courts have appeared willing to review EU sanctions acts implementing Security Council's resolutions—yet, only in exceptional circumstances. It is true that the Court of Justice has shifted to a dualistic approach,[31] emphasising the autonomy of the EU legal order and the necessity to assess EU legislative acts under the principles governing the EU legal order specifically.[32] It stressed how the legality of EU legislative acts is a matter of EU law and that such legality is conditional on compliance with the constitutional principles of the EU[33]; all the more since the UN sanctions system lacks sufficient judicial guarantees.[34] However, the judicial review advocated by the Court of Justice is in essence limited to cases where UN sanctions or EU acts implementing

[26] TFEU art.275.

[27] See UN Charter art.103; Vienna Convention on the Law of Treaties 1980, 1155 U.N.T.S. 331 (VCLT) art.27; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Jurisdiction and Admissibility, 26 November 1984, ICJ Reports (1984), p.392 at [107].

[28] See *International Fruit Co. v Produktschapp voor Groenten en Fruit* (C-21/72 to C-24/72) EU:C:1972:115 at [6]; (C-162/96) *Racke v Hauptzollamt Main* EU:C:1998:293; [1998] 3 C.M.L.R. 219 at [2]–[27].

[29] See *Kadi v Council and Commission* (T-315/01) EU:T:2010:418; [2011] 1 C.M.L.R 24 at [176] and following; *Yusuf v Council and Commission* (T-306/01) EU:T:2005:331, [2005] 3 C.M.L.R. 49 at [226] and following; *Hassan v Council and Commission* (T-49/04) EU:T:2006:201 at [91] and following.

[30] See *Kadi* (C-402/05) EU:C:2008:461; [2008] 3 C.M.L.R. 41.

[31] Some have criticised this approach. They see this as undermining the unity and harmony of the international legal order and suggest that the EU courts should rely on systemic interpretation as other regional courts do. See S. Guggisberg, "The Nada Case Before the ECtHR: A New Milestone in the European Debate on Security Council Targeted Sanctions and Human Rights Obligations" (2012) 8 *Croatian Yearbook of European Law and Policy* 411; I.L. Vlad, "Targeted Sanctions, Judicial Antagonism or Legal Dialogue" (2015) *Revista de Drept Public* 114. See esp. ECtHR, *Al Jedda v United Kingdom*, Appl. No.27021/08, Judgment of 7 July 2011; ECtHR, *Nada v Switzerland*, Appl. No.10593/08, Judgment of 12 September 2012.

[32] See *Kadi v Council and Commission* (C-402/05) EU:C:2008:461; [2008] 3 C.M.L.R. 41; *Kadi v Commission* (T-85/09) EU:T:2010:418; [2011] 1 C.M.L.R. 24; *Commission v Kadi* (C-584/10) EU:C:2013:518, [2014] 1 C.M.L.R. 24. For a comment, see C.H.R. Eckes, "Trapped between Courts or how Terrorist Suspects Lost their Right to a Remedy" in A. Follesdal et al. (eds), *Multilevel Regulation and the EU* (Leiden/Boston: Martinus Nijhoff Publishers, 2008), pp.261–299.

[33] *Kadi v Council and Commission* (C-402/05) EU:C:2008:461; [2008] 3 C.M.L.R. 41 esp. at [281], [284]. On legality being a matter of EU law, see also *Haegeman v Belgian State* (C-181/73) EU:C:1974:41; *Bosphorus v Minister for Transport, Energy and Communications* (C-84/95) EU:C:1996:312; [1996] 3 C.M.L.R. 257.

[34] *Kadi v Council and Commission* (C-402/05) EU:C:2008:461; [2008] 3 C.M.L.R. 41, esp. at [256]. On the EU courts' emphasis on the relevance of fundamental rights in the context of sanctions, see M. Payabde and H. Sauer, "European Union: UN Sanctions and EU Fundamental Rights" (2009) 7(2) *International Journal of Consitutional Law* 306.

the same breach well-established fundamental rights, part of EU primary law. This is on the understanding that international law obligations (including UN obligations) cannot prejudice or allow any derogation from fundamental rights such as a person's rights to be heard and to obtain an effective judicial remedy.[35]

In sum, the EU courts seem willing to affirm their competence to review not only EU autonomous sanctions but also EU sanction acts implementing Security Council's resolutions, in instances of material breach of fundamental rights only. Also, as the subsections below will suggest, the judicial review exercised by the EU courts on EU sanctions acts implementing Security Council's resolutions (as well as EU autonomous sanctions) is limited to verify compliance with procedural rights, while the EU courts do not judge the merits of decisions to impose sanctions.

The EU courts' restrictive approach on the illegality of sanctions

Besides the constraints for a full judicial review of CFSP measures, the possibility for persons affected by sanctions to challenge relevant sanctions acts is affected by the restrictive approach adopted by the EU courts when both considering claims on the illegality of sanctions, and ruling on requests for damages and interim measures.

Actions for annulment

The EU courts display significant deference to the actions of the EU institutions in the CFSP field, while strictly assessing claims on the illegality of sanctions acts (and listing decisions specifically). The restrictive approach adopted by the EU courts is evident in the case law concerning some of the most recurrent illegality pleas, including the following arguments:

1. The EU institutions fail to state reasons and breach their right of defence by failing to support factual and legal allegations with adequate evidence;
2. The EU institutions make manifest errors of assessment in determining whether listing criteria are satisfied;
3. The EU institutions disproportionately restrict fundamental rights, including rights to property and reputation and the freedom to conduct a business; and
4. The EU institutions breach their right to an effective remedy.

The EU courts tend to welcome the (recurring) argument on the inadequacy and insufficiency of the evidence supporting listing decisions; yet decisions have not always been consistent. This argument underlies both claims that the lack of clear allegations for listing prevents listed individuals and entities from properly exercising their right of defence (point 1 above), and claims that the EU institutions make manifest errors in assessing whether the listing criteria are satisfied (point 2 above). According to the EU courts, evidence needs to be precise, concrete and

[35] *Kadi v Council and Commission* (C-402/05) EU:C:2008:461; [2008] 3 C.M.L.R. 41 esp. at [282]–[283], [303].

individualised[36]; confidentiality is no excuse for lack of evidence.[37] In numerous cases, listed individuals and entities have successfully challenged the lack of sufficient, adequate evidence.[38] However, the EU courts have not consistently carried out the mentioned rigorous review; sometimes they have accepted listings based on assumptions and common experience in light of specific factual circumstances.[39]

The EU courts usually reject claims on unjustified, disproportionate restrictions to the rights to property and reputation along with freedom to conduct a business (point 3 above). The EU courts consider that the mentioned rights and freedoms, far from being unfettered prerogatives,[40] can indeed be restricted for reasons of public interest, provided they are not disproportionately or intolerably interfered with. In the context of CFSP measures, the EU courts are particularly keen on finding that the legitimate objectives pursued by sanctions are of paramount importance and thus justify restrictive measures on listed individuals and entities.[41]

Lastly, the EU courts approach restrictively claims on breach of the right to an effective remedy on the part of listed individuals and entities (point 4 above). This claim is especially relied upon in connection with re-listings; when the EU institutions reinstate an individual or entity on sanctions lists after the annulment of their original listing for failure to provide sufficient evidence. With re-listings, the claim of breach of the right to an effective remedy is usually put forth together with alleged breaches of the principles of res judicata and protection of legitimate expectations. This is particularly true if re-listings are based on the same factual allegations and on evidence predating and accessible at the time of the original listing. However, the EU courts tend to reject such arguments, stressing the following[42]:

1. The right to an effective remedy exclusively aims to ensure that an act adversely affecting an individual or entity can be challenged before judicial authorities. It does not prevent adoption of new restrictive measures following a re-examination of facts;
2. The principle of res judicata extends to matters of fact and law actually or necessarily settled by judicial decisions. It does not prevent re-listings based on information and listing criteria not considered at the time of the annulment of the original listing. Hence, it is irrelevant that the evidence the EU institutions relied on to re-list existed and was publicly available at the time of the original listing; and

[36] *Tay Za v Council* (C-376/10) EU:C:2012:138; [2012] 2 C.M.L.R. 27 at [70].

[37] Particular rules of procedure apply in case of confidential information, so as to enable a full judicial review: see Rules of Procedure of the General Court [2015] OJ L105/1 (as amended).

[38] See *Bank Mellat v Council* (T-496/10) EU:T:2013:39; *National Iranian Tanker Co v Council* (T-565/12) EU:T:2014:608; *Abdulrahim v Council and Commission* (T-127/09) EU:T:2015:4.

[39] See *Gossio v Council* (T-130/11) EU:T:2013:217 at [45]–[52]; *Makhlouf v Council* (T-509/11) EU:T:2015:33 at [59]; *Anbouba v Council* (C-605/13) EU:C:2015:248 at [18]–[21].

[40] See *Mabrouk v Council* (T-216/17) EU:T:2018:779 at [115] and following; *Mubarak v Council* (T-358/17) EU:T:2018:905 at [166] and following.

[41] See *National Iranian Tanker Co v Council* (C-600/16) EU:C:2018:966 at [82] and following.

[42] See *Al-Faqih et al. v Commission* (C-19/16) EU:C:2017:466; *BelTechExport v Council* (T-765/15) EU:T:2017:669; *Kaddour v Council* (T-461/16) EU:T:2018:316; *National Iranian Tanker Co v Council*; (C-600/16) EU:C:2018:966; *Bank Tejarat v Council* (C-248/17) EU:C:2018:967.

3. The principle of legitimate expectations is similarly inapplicable to the majority of re-listing cases. It is limited to cases where an individual or entity receives precise assurances from the acting EU institution.

Re-listings could clash with re-listed individuals' and entities' right to an effective remedy in respect of former judgments annulling their original listings, especially if the underlying factual circumstances are unchanged.[43] Specifically, the EU institutions should not be given a "second chance" to re-examine legal issues decided by the EU courts in earlier judgments.[44] This notwithstanding, the EU courts seem to accept re-listings based on new listing criteria and evidence not addressed during the original listings, even if the underlying facts are substantially the same. Therefore, even where listed individuals and entities succeed in defeating their original listing on grounds of insufficient, inadequate evidence, they are susceptible to subsequent re-listing.[45] The restrictive approach adopted by the European judiciary is even more problematic given the absence, in the EU, of any mechanism to request de-listing other than through judicial action—differently from jurisdictions like the United States where affected persons may address a competent administrative authority and agree on remedial actions to be de-listed.[46]

Damages and interim measures

The deference of the European judiciary to the EU institutions' CFSP action is also evident in the regular rejection of requests for damages and interim measures.[47] The EU courts could order compensation if sanctioned individuals and entities suffer(ed) actual damage causally linked to an unlawful conduct by the EU institutions.[48] To date, the EU courts have found three instances of a "sufficiently serious breach of a rule of law" that justified compensation for non-material damage suffered by a listed entity.[49] Specifically, the EU institutions were found not to have acted as an administrative authority, exercising ordinary care and diligence in similar circumstances; indeed, they listed the target entity on a Member State's proposal and kept that entity listed for over three years without ever verifying the accuracy of the factual allegations grounding the listing request.[50] Barring such exceptional circumstances, the EU courts tend to dismiss claims for damages, primarily for lack of evidence showing actual damage.[51]

[43] See Opinion of A.G. Tanchev in *National Iranian Tanker Co v Council* (C-600/16) EU:C:2018:227.

[44] Opinion of A.G. Tanchev in *National Iranian Tanker Co v Council* (C-600/16) EU:C:2018:227 at [119].

[45] The limited relief sanctioned private parties may receive could be even more seriously affected where the EU courts took advantage of their discretionary power under art.264(2) TFEU, according to which they may derogate from the *ex tunc* effect of annulment. So far, the EU courts have not relied on art.264(2) TFEU in the context of sanctions; case law in other fields include, e.g., *Commission v. Council* (C-389/15) EU:C:2017:798 at [78]–[84] (on external relations).

[46] See US Department of the Treasury, *Filing a Petition for Removal from an OFAC List*, *https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/petitions.aspx*. For an example of "negotiated" remedies leading to de-listing, see US Department of the Treasury, *OFAC Delists En+, Rusal, and EuroSibEnergo* (2019), *https://home.treasury.gov/news/press-releases/sm592* [Both accessed 6 November 2019].

[47] See L. Di Masi et al., "An Overview of EU Sanctions Case Law" (2015) 10(7/8) *Global Trade and Customs Journal* 250.

[48] See art.268 TFEU in conjunction with art.340(2) TFEU.

[49] See, e.g.*Safa Nicu Sepahan v Council* (T-384/11) EU:T:2014:986 at [50], [69], as upheld in *Safa Nicu Sepahan v Council* (C-45/15) EU:C:2017:402. See also *Fulmen v Council* (T-405/15) EU:T:2019:469; *Mahmoudian v Council* (T-406/15) EU:T:2019:468.

[50] *Safa Nicu Sepahan v Council* (T-384/11) EU:T:2014:986 esp. at [54], [68].

[51] See *Hassan v Council* (T-572/11) EU:T:2014:682 at [102] and following.

The EU courts are reluctant to order interim measures too. Interim measures require the fulfilment of two cumulative requirements.[52] First, there must be factual and legal grounds establishing a prima facie justification for granting the measures. Second, there must be urgency to avoid serious and irreparable damage. The EU courts systematically reject requests for interim measures based on lack of urgency. The EU courts find that evidence cannot support the existence of serious and irreparable damage:[53] in particular, pecuniary damages deriving from imposed sanctions can always be compensated,[54] except if causing the exit of a business from the market (which is found to hardly ever occur).[55]

Identifying alternative strategies to litigate sanctions

The section above shows that claiming the illegality of EU sanctions acts before the EU courts is rarely, if ever, effective, both for the EU courts' reluctance to annul acts adopted by the EU institutions and for the small chance to recover damages. Therefore, listed individuals and entities may avail themselves of alternative strategies to challenge their listing and the legality of sanctions. They could strengthen their claims before the EU courts by suggesting that sanctions have a criminal nature and that the rights affected qualify as peremptory norms of *jus cogens*. They could especially take advantage of alternative fora, such as national courts, the de-listing mechanisms existing within the UN and, to a certain extent, the International Court of Justice (ICJ).

Claiming the criminal nature of sanctions and violations of jus cogens

A first option would be for listed individuals and entities to strengthen their claims before the EU courts by arguing that sanctions are of a criminal nature. Alternatively, they could argue that sanctions violate certain rights of a peremptory nature. While such qualifications would offer stronger judicial guarantees, it is true that these claims may have little chance of resulting in more effective litigation since the EU courts prefer to deny the criminal or peremptory nature of, respectively, sanctions and affected rights.

First, listed individuals and entities could submit that sanctions (e.g. asset freezing and business restrictions) have a punitive aim and effect and thus a criminal nature. Sanctions are eventually often connected with domestic proceedings relating to offences with a clear criminal classification.[56] The recognition of sanctions' criminal nature would trigger additional judicial guarantees provided for in criminal proceedings, including the presumption of innocence and the right to legal assistance.[57] The intertwined principles of res judicata and *ne bis in idem* (i.e. not twice for the same offence) would cogently apply, preventing any re-examination

[52] See TFEU arts 278–279.
[53] See *António Conde & Companhia v Commission* (T-443/17) EU:T:2017:671 at [31].
[54] See *Safa Nicu Sepahan v Council* (T-384/11) EU:T:2011:545) at [21]; *Klyuyev v Council* (T-305/18) EU:T:2018:849) at [76].
[55] *Qualitest v Council* (T-421/11) EU:T:2011:557 at [20] and following.
[56] See, e.g., *Mabrouk v Council* (T-175/15) EU:T:2017:694.
[57] See art.6(2)–(3) ECHR; arts 47–48 of the Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (EU Charter).

of the same factual circumstances regardless of their legal classification.[58] Furthermore, evidence should support allegations according to the high threshold of "beyond any reasonable doubt".

However, one cannot avoid noticing that the EU legal order lacks a criminal side,[59] and especially that the EU courts have already expressed their reluctance to accept the above arguments. The criminal nature of sanctions would need to stem not only from their effects, but also (and primarily) from their subjective goal to penalise the conduct of the targeted person.[60] Sanctions adopted within the CFSP framework are instead seen as of a purely precautionary nature, being aimed at encouraging a change in conduct by the sanctioned individual or entity.[61] It is worth noting how, by contrast, other international courts adopt a more flexible approach to the criminal classification of sanctions.[62]

Second, listed individuals and entities could argue that sanctions entail violations of certain rights that qualify as peremptory norms of *jus cogens*. Peremptory norms can never be opted out of, objected to or derogated from,[63] so that conflicting measures are inherently illegal. Most of the rights that are affected by sanctions (including the right of defence, the right to property and the right to an effective remedy, discussed above) are contemplated in some of the principal conventions and charters, considered as having universal value.[64] This notwithstanding, it is debatable which norms are *jus cogens*. In the well-known case of *Yusuf*, for instance, the European judiciary stressed that neither the right to property, nor the right to be heard, nor even the right to access to courts could be read as cogent, absolute prerogatives in situations of public emergency like those addressed in sanctions regimes.[65] Hence, the EU courts for now appear keen on denying that rights affected by sanctions may qualify as *jus cogens*.

Litigating sanctions before national courts

National courts of EU Member States are increasingly an interesting avenue to litigate sanctions.[66] Besides remedying the EU courts' resistance to question the legality of EU sanctions acts, national courts may offer additional advantages. National courts have greater familiarity with non-contractual liability and tend to grant interim measures and compensation for material and non-material damages

[58] See, e.g., *Kraaijenbrink* (C-367/05) EU:C:2007:444; [2007] 3 C.M.L.R. 44.

[59] The EU lacks a (general) competence in criminal matters, but retains a more limited role in judicial co-operation in criminal matters (see TFEU art.82 and following). This may also explain the EU courts' reluctance to accept a criminal qualification of sanctions.

[60] See *Mabrouk v Council* (T-216/17) EU:T:2018:779 at [62]. See also *Lux v Court of Auditors* (C-69/83) EU:C:1984:225 at [31].

[61] See *Sison v Council* (T-47/03) EU:T:2007:207; [2007] 3 C.M.L.R. 39 at [101]; *Fahas v Council* (T-49/07) EU:T:2010:499 at [67]; *Peftiev v Council* (T-441/11) EU:T:2014:1041 at [87]–[89]; *Mabrouk v Council* (T-216/17) EU:T:2018:779 at [57] and following.

[62] See, e.g., ECtHR, *Case of Grande Stevens v Italy*, Appl. No.18640/10, Judgment of 4 March 2014.

[63] *Brierly's Law of Nations*: 7th edn, edited by A. Clapham (Oxford: Oxford University Press, 2012), p.6.

[64] With particular regard to the rights to defence, property and effective remedy, see arts 6 and 13 of Protocol 1 to the ECHR; EU Charter arts 17, 47–48; Universal Declaration of Human Rights, GA Res. 217A (III, (10 December 1948) arts 8, 10–11, 17; International Covenant on Civil and Political Rights, GA Res. 2200 (XXI) (16 December 1966) arts 2, 14.

[65] See esp. *Yusuf v Council and Commission* (T-306/01) EU:T:2005:331 at [293]–[303], [308]–[316], [340]–[341].

[66] See M. Lester and B. Kennelly, "Judicial Review of Sanctions Decisions: The Wrong Point in the Wrong Court with the Wrong Defendant?" (2013) 18(2) *Judicial Review* 206.

more easily. National courts may also offer "creative" remedies other than the mere annulment of the contested acts and compensation of damages.[67]

National courts are bound to the so-called *Foto-Frost* principle,[68] according to which exclusively the EU courts retain power to declare an EU act illegal. National courts can rule upon the legality of Member States' acts, including acts aimed at making EU sanctions operative domestically, but not on EU sanctions acts per se. National courts' jurisdiction would be also barred when the claimant's submission refers to domestic acts but substantially attacks EU acts.[69]

However, the *Foto-Frost* principle does not stretch indefinitely. National courts appear willing to find jurisdiction over Member States' refusals to request de-listing, as well as on listing proposals attributable to specific Member States.[70] Refusals to request de-listing are pure national acts that conflict with Member States' duty to assist individuals or entities in obtaining de-listing.[71] Listing proposals could also qualify as decisions attributable to domestic authorities. This is true when listing proposals relate to UN sanctions lists, as, within the Security Council, Member States of the EU act in their own capacity. By contrast, such a qualification appears more controversial in respect of EU sanctions lists. As already noted, at the EU level, listing decisions are taken by the Council, a collegiate body composed of Member States' officials who act in unity and whose positions should not be severable.[72]

Therefore, listed individuals and entities could act before national courts challenging Member States' listing proposals (especially in connection with UN sanctions lists) or their refusals to request de-listing (regarding both UN sanctions and EU autonomous sanctions). These procedures would also enable recovery of damages.

Relying on the de-listing mechanisms of the United Nations

A third avenue to challenge sanctions (primarily, Security Council's listing decisions) could be the recourse mechanisms internal to the UN. Sanctions fall among the prerogatives of the Security Council under Ch.VII of the UN Charter and are operatively managed by sanctions committees appointed by the Security Council. Individuals and entities on UN sanctions lists may resort to two "independent" bodies to request de-listing: the Focal Point and the Office of the Ombudsperson. Although it needs to be acknowledged that these de-listing

[67] cf. L. Pantaleo, "Sanctions Cases in the European Courts" in M. Happold and P. Eden (eds), *Economic Sanctions and International Law* (Oxford: Hart Publishing, 2016), pp.171 and following.

[68] *Foto-Frost v Hauptzollamt Lübeck-Ost* (314/85) EU:C:1987:452; [1988] 3 C.M.L.R. 57. See also *Gaston Schul Douane-expediteur* (C-461/03) EU:C:2005:742.

[69] See *R. (Melli Bank Plc) v Her Majesty's Treasury, Foreign and Commonwealth Office* [2008] EWHC 1661 (Admin.); *R. (El-Maghraby and El-Gazaerly) v Her Majesty's Treasury, Foreign and Commonwealth Office* [2012] EWHC 674 (Admin.)

[70] See Tribunal de Première Instance de Bruxelles (quatrième section), *Nabil Sayadi and Patricia Vink v Belgium*, Order of 11 February 2005 (unreported), as confirmed in UN Human Rights Committee, Comm. no. 1472/2006, Decision of 22 October 2008, esp. at [12]; *Her Majesty's Treasury v Mohammed Jabar Ahmer* [2010] UKSC 2; *R. (Bredenkamp) v Secretary of State for Foreign and Commonwealth Affairs* [2012] EWHC 3297 (Admin.); *R .(Azizi and Sedghi) v Secretary of State for Foreign and Commonwealth Affairs* and *R.(Meskarian and Zavvar) v Secretary of State for Foreign and Commonwealth Affairs* (settled in 2012).

[71] See *Ayadi v Council* (T-253/02) EU:T:2006:200; UN Human Rights Committee, Comm. no.1472/2006, Decision of 22 October 2008.

[72] L. Pantaleo, "Sanctions Cases in the European Courts" in M. Happold and P. Eden (eds), *Economic Sanctions and International Law* (Oxford: Hart Publishing, 2016), p.191.

procedures are highly politicised (the above-mentioned sanctions committees eventually retaining full decision-making power on de-listing), they represent interesting alternatives to contentious litigation.

Individuals and entities[73] on any UN sanctions list (other than the ISIL (Da'esh) & Al-Qaida Sanctions List) may request de-listing to the Focal Point. The Focal Point was established in 2006 in an attempt to ensure a fair and clear procedure for removing individuals and entities from UN sanctions lists[74]; yet it has been proving of limited efficacy, conducting administrative tasks for the most part. The Focal Point fosters consultations among reviewing governments (i.e. the state of residence and that of citizenship and the state that first requested listing), or members of the sanctions committee in case of inactivity of the former. Upon any such government or member recommending de-listing, it is up to the competent sanctions committee to decide on de-listing, while the Focal Point informs the requesting individual or entity of the outcome of the de-listing procedure. The Focal Point is also competent to receive travel ban and assets freeze exemption requests from individuals and entities on the ISIL (Da'esh) & Al-Qaida Sanction List[75] and on the 1988 Sanctions List designating individuals and entities associated with the Taliban.[76] Also in this context, the primary role of the Focal Point is to transmit requests to the competent sanctions committee and convey responses to petitioning individuals and entities.

To request de-listing, individuals and entities on the ISIL (Da'esh) & Al-Qaida Sanctions List may instead address the Office of the Ombudsperson, an independent body established in 2009.[77] Although it enjoys a more prominent role than the Focal Point, also the Ombudsperson lacks actual decision-making power. It gathers information relevant to assess whether the listing criterion of being associated with ISIL or Al-Qaida[78] is fulfilled in relation to any received de-listing request. Based on the information so retrieved, it submits a recommendation on de-listing to the competent sanctions committee. The Ombudsperson recommends de-listing depending on whether there is *sufficient* information to provide a *reasonable* and *credible* basis for listing.[79] Such a standard is applied having regard to the international framework and to the preventive but significant nature of sanctions. Consistently, the Ombudsperson does not rely on national precepts and requires

[73] Individuals and entities can submit their de-listing requests either directly to the Focal Point or through their state of residence or citizenship. A state can decide, by means of a declaration that, as a rule, its citizens or residents should address their de-listing requests directly to the Focal Point: see fn.1 to SC Res. 1730, 19 December 2006.

[74] See Preamble to SC Res. 1730, 19 December 2006; see also GA Res. 60/1, 24 October 2005, para.109. The de-listing procedure involving the Focal Point is laid out in the Annex to SC Res. 1730, 19 December 2006.

[75] See SC Res. 2253, 17 December 2015, at para.76, as then confirmed in SC Res. 2368, 20 July 2017, at para.82. The Focal Point is also competent to receive communications from individuals de-listed from the ISIL (Da'esh) & Al-Qaida Sanction List and from individuals claiming to have been subject to such sanctions mistakenly: see SC Res. 2253, 17 December 2015, at para.77, as then confirmed in SC Res. 2368, 20 July 2017, at para.83.

[76] See SC Res. 2255, 22 December 2015, at paras 17, 22.

[77] See SC Res. 1904, 17 December 2009, at paras 20 and following. The procedure to be followed by the Ombudsperson was set out in Annex II of such Resolution and is currently described in Annex II to SC Res. 2368, 20 July 2017.

[78] Sanctions are applied to ISIL, Al-Qaida and associated individuals and entities. SC Res. 2368, 20 July 2017, at para.2, currently sets when such "association" is deemed existent.

[79] Office of the Ombudsperson, *Historical Guide of the Ombudsperson Process through Security Council Resolutions and Reports of the Office of the Ombudsperson to the Security Council* (2018), p.69, *https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/historical_guide_ombudsperson_process_march_2018.pdf* [Accessed 6 November 2019].

substance and reliability to the information underlying listing.[80] Based on such a recommendation, the competent sanctions committee resolves upon the de-listing request.

These procedures are not free from criticism. Many have stressed how both the Focal Point and the Ombudsperson lack any decision-making power, the ultimate determination on de-listing resting with the various sanctions committees.[81] The fact that information in assessing a de-listing request might be confidential or classified further adds to the risk of non-transparent, non-well-informed decision-making.[82] The highly politicised decision-making, together with the absence of independent bodies actually competent to review sanctions, have triggered proposals for reforming the UN de-listing mechanisms and, inter alia, granting the Focal Point and the Ombudsperson powers to conduct a full review of listing decisions and adopt final decisions.[83] Awaiting any such reform for more effective listing reviews within the UN, depending on factual circumstances listed individuals and entities may still consider resorting to the existing de-listing mechanisms to complement contentious actions before EU and national courts. These mechanisms allow affected persons to interact directly with UN bodies responsible for listing and possibly obtain a revision of listing decisions, ending sanctions, by those same UN bodies.[84] Where reached, the political consensus underlying de-listing decisions also minimises the risk for de-listed individuals and entities to be reinstated in UN sanctions lists.

Looking at the International Court of Justice as a new way forward?

The ICJ has been rarely considered as a viable avenue to litigate sanctions, possibly owing to its limited jurisdiction and to the controversial nature of sanctions in the international framework. Yet the ICJ could function as an effective forum for questioning the legality of sanctions, not only for its authority in deciding matters of international law, but also for the many arguments supporting the illegality of (especially, autonomous) sanctions.

Jurisdiction of the International Court of Justice

The ICJ's jurisdiction to decide on matters of international law is twofold—contentious and advisory. In the field of sanctions, the ICJ's advisory jurisdiction appears particularly appealing for obtaining an authoritative declaration of illegality of sanctions regimes.

[80] See Office of the Ombudsperson, *Approach and Standard*, *https://www.un.org/securitycouncil/ombudsperson/approach-and-standard* [Accessed 6 November 2019].

[81] See I.L. Vlad, "Targeted Sanctions, Judicial Antagonism or Legal Dialogue" (2015) *Revista de Drept Public* 114; R.A. Wessel, "The Rule of Law and the Security Council: The New Procedures for the Legal Protection of Individuals in the Fight against Terrorism", Paper prepared for the CONNEX & Ius Commune Workshop on Accountability and the Rule of Law at the International Level, University of Amsterdam (2008).

[82] *Historical Guide of the Ombudsperson Process* (2018), pp.77–81.

[83] See, e.g., J. Cockayne et al., *Fairly Clear Risks: Protecting UN Sanctions' Legitimacy and Effectiveness Through Fair and Clear Procedures* (2018), esp. at pp.43 and following.

[84] So far, 58 out of 77 concluded cases before the Ombudsperson led to de-listing; an overview of cases completed by the Ombudsperson is available at *https://www.un.org/securitycouncil/sc/ombudsperson/status-of-cases*. Statistics relating to the Focal Point's de-listing procedure are available at *https://www.un.org/securitycouncil/sanctions/delisting/de-listing-request-stats* [Both accessed 6 November 2019].

Contentious disputes may be initiated only exceptionally when sanctions are at stake.[85] In the context of such disputes, the ICJ is competent to resolve disputes between states on legal questions relating to international law, deciding the merits and ordering compensation.[86] However, first, only states have standing before the ICJ.[87] Although states could probably take action as sanctions (also of a targeted nature) often affect key national interests, listed individuals and entities would need to advocate for their state of citizenship or residence to exercise diplomatic protection and bring their case before the ICJ. The fact that standing is curtailed to states also means that action cannot be taken directly against the UN, as it is an international organisation. Second, the ICJ's contentious jurisdiction is further restricted to matters that states parties to a dispute agree to refer to it, or in respect of which have recognised the ICJ's compulsory jurisdiction, or matters provided in treaties and conventions.[88] Therefore, it may be challenging to litigate sanctions adopted by states that, not having recognised the ICJ's compulsory jurisdiction, are unlikely to agree to refer to the ICJ a question on the legality of sanctions they imposed.[89]

The many restrictions to the ICJ's contentious jurisdiction entail that actions can be brought in limited circumstances. As a result, the second limb of the ICJ's jurisdiction may prove more effective regarding sanctions. The ICJ gives advisory opinions on legal questions requested by the UN General Assembly or the Security Council or by other UN organs and agencies provided the requested questions fall within the scope of their activities.[90] Although advisory opinions are not binding, they remain highly authoritative. Consequently, states aiming at contending the illegality of sanctions could "sponsor" a UN General Assembly's resolution requesting an ICJ advisory opinion on the validity of certain sanctions regimes—especially where adopted outside of the UN system[91]—under international law. Alternatively, they could persuade a UN organ or agency to seek such advisory opinion.[92] This would also require persons affected by sanctions to engage in advocacy efforts to persuade states to prompt the request for an advisory ruling by the ICJ. Certain states have already expressed political appetite to oppose far-reaching sanctions regimes.[93]

[85] The first contentious case has been recently launched by Iran against US sanctions: see fn.101.

[86] See ICJ Statute arts 34 and following.

[87] See ICJ Statute arts 34–35; UN Charter art.93.

[88] ICJ Statute art.36.

[89] For instance, the United States and Russia have not recognised the ICJ's compulsory jurisdiction. The EU is an international organisation and hence is not party to the ICJ Statute; certain EU Member States (e.g. France) have also failed to recognise the ICJ's compulsory jurisdiction.

[90] See ICJ Statute arts 65 and following; UN Charter art.96.

[91] See section "Legal arguments on the illegality of sanctions under international law" below.

[92] Like the UN Economic and Social Council, which has a very broad mandate (see UN Charter arts 61 and following) and has already requested two advisory opinions successfully: see *https://www.icj-cij.org/en/organs-agencies-authorized* [Accessed 6 November 2019]. The UN Economic and Social Council decides by simple majority of members present and voting, so that it could be feasible to obtain sufficient consensus to support a request for an ICJ's advisory opinion.

[93] See, e.g., Russia, which has repeatedly criticised Western sanctions inter alia targeting companies of national interest. See Russia Beyond, "Western Sanctions Against Russia Breach International Law, Says Lavrov" (December 2014), *https://www.rbth.com/news/2014/12/25/western_sanctions_against_russia_breach_international_law_says_lavrov_42528.html*; Mälksoo, "Russia, Sanctions, and the Future of International Law" (2017), *https://blog.oup.com/2017/09/russia-sanctions-international-law/* [Both accessed 6 November 2019].

Legal arguments on the illegality of sanctions under international law

Individuals and entities could rely on various arguments in support of the illegality of sanctions under international law, to trigger a contentious or advisory proceeding as described above. Relevant arguments would vary depending on whether sanctions are imposed with a Security Council's resolution or autonomously by states, the illegality of the latter being more likely to be established.

UN sanctions and national (or regional) implementing measures may be tricky to challenge. Pursuant to art.103 of the UN Charter, the provisions of the UN Charter and, for sake of consistency, decisions or acts adopted under and in accordance with the UN Charter prevail on any conflicting obligations under international law.[94] This provision encompasses Security Council's resolutions imposing sanctions within the terms of Ch.VII of the UN Charter.

Therefore, UN sanctions and national (or regional) implementing measures could be arguably held illegal exclusively where found in conflict with norms of *jus cogens*, which, as already noted, provide no possibility for any subject of international law to opt out, object or derogate.[95] In the absence of a codified list, it is debatable which norms qualify as *jus cogens* and are thus peremptory in nature.[96] Therefore, UN sanctions might violate peremptory norms in extreme cases only.

Autonomous sanctions adopted by states without any UN authorisation could be more readily held illegal, with some stating that the "question of their illegality is quite clear".[97] First, autonomous sanctions appear inconsistent with key objectives and principles embedded in the UN Charter. They run contrary to the objective to establish conditions for justice and respect of all obligations under international law[98] and to the principle of sovereign equality.[99] Autonomous sanctions seem to conflict with other major principles of international law too, such as the prohibition to interfere in internal matters of other states, freedom of trade and navigation, good faith, non-arbitrariness and the principle of *pacta sunt servanda*. These arguments find confirmation in numerous collective declarations that point to autonomous sanctions as illegal acts.[100]

Second, autonomous sanctions may, in certain circumstances, breach specific provisions of international agreements entered into by the sanctioning state. *Iran v United States* is a promising precedent pending before the ICJ.[101] There, the ICJ

[94] On the primacy of UN legal sources, see VCLT art.27; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Jurisdiction and Admissibility, 26 November 1984, ICJ Reports (1984) 392, at para.107.

[95] *Brierly's Law of Nations* (2012), p.6.

[96] See International Law Commission, "Drafted Articles on Responsibility of States for Internationally Wrongful Acts" (2001) 2(2) *ILC Yearbook* 26, commentary to art.26, at p.85, para.5; commentary to art.40, at pp.112–113, paras 3–5. See also American Law Institute, "Customary International Law of Human Rights", *Third Restatement of the Foreign Relations Law of the United States* (1987).

[97] T. Kaiser, "Unilateral Sanctions Violate International Treaties: Interview with Professor A. de Zayas" (2015), *https://www.zeit-fragen.ch/en/numbers/2015/no-910-16-april-2015/unilateral-sanctions-violate-international-treaties.html* [Accessed 6 November 2019].

[98] See UN Charter, Preamble and art.1. See also GA Res. 2625, 24 October 1970, on principles concerning friendly relations co-operation among states.

[99] See UN Charter art.2.

[100] See, e.g., GA Res. 69/5, 29 October 2014.

[101] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States)*, Order, 3 October 2018, General List no.175.

has already had the occasion to find a prima facie case of breach of certain obligations set out in the Iran-United States Treaty of Amity Economic Relations and Consular Rights[102] and to stress how breaches that affect humanitarian needs do not fall within that Treaty's security exceptions.[103] This reasoning would primarily apply to sanctions against entire economic sectors of a state (i.e. sectorial sanctions as opposed to targeted sanctions). Yet, depending on the kind of treaty obligations and on the scope of targeted sanctions, the foregoing may also concern targeted sanctions: these often damage key exponents of a state's essential industries, thereby impacting on national interests similarly to sectorial sanctions regimes. Hence, autonomous sanctions also of a targeted nature may breach a broad range of sources, going beyond general principles of international law and the superior UN Charter, but including bilateral and plurilateral obligations.

Third, autonomous sanctions appear incapable of any legal justification under international law.[104] Treaty law enables breaches of international agreements under the exception of non-performance (i.e. the *inadimplenti non est adimplendum* principle). Yet such a principle hardly applies to autonomous sanctions, which rarely relate to the performance of reciprocal obligations. Retorsions and countermeasures are other two major justifications for measures in apparent conflict with international law. However, autonomous sanctions do not seem to share the unfriendly nature of retorsions, limited to a political or moral wrongfulness.[105] Autonomous sanctions do not seem to fit in the category of countermeasures either, owing both to their unclear nature of foreign policy tools and to the controversy around their adoption in the presence of *erga omnes* obligations.[106]

Some have also stressed how sanctions of the kind discussed here would inherently imply the existence of a centralised system (i.e. the UN), with an organ competent to find a breach of a norm and to impose coercive measures to induce legality (i.e. the Security Council).[107] States and international organisations, such as the EU, would thus have no competence to adopt sanctions outside the framework of such a centralised system. And this strict division of competence and tasks would derive from the deliberate agreement between sovereign states to set up the UN to secure international peace and security in the aftermath of the Second World War.[108]

In conclusion, listed individuals and entities could rely on their state of citizenship or residence to initiate a contentious or advisory proceeding before the ICJ to claim the illegality of sanctions. Whereas the illegality of UN sanctions and related national (or regional) implementing measures may be challenging to prove, many are the arguments that could be relied upon to support the illegality of

[102] Treaty of Amity Economic Relations and Consular Rights between the United States and Iran 1955, 284 U.N.T.S. 93.

[103] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States)*, Order, 3 October 2018, General List no.175, esp. at para.69.

[104] cf. M. Gestri, "Sanctions Imposed by the European Union: Legal and Institutional Aspect" in N. Ronzitti (ed.), *Coercive Diplomacy, Sanctions and International Law* (Leiden: Brill/Nijhoff, 2016), pp.70–102.

[105] See T. Giegerich, "Retorsions" (2011), paras 8–9, *https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e983* [Accessed 6 November 2019].

[106] See UN Charter art.5; cf. P.E. Dupont, "Countermeasures and Collective Security: The Case of the EU Sanctions against Iran" (2012) 17 *Journal of Conflict Security Law* 301, 320–321.

[107] A. Pellet and A. Miron, "Sanctions" (2013), paras 8–9, 64–65, *https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e984* [Accessed 6 November 2019].

[108] See J.A. Burke, "Economic Sanctions against the Russian Federation are Illegal under Public International Law" (2015) 3(3) *Russian Law Journal* 126.

autonomous sanctions. In essence, autonomous sanctions appear to conflict with a variety of international law sources, while lacking any solid legal justification. The ICJ thus represents an interesting avenue to challenge the compatibility of at least certain categories of sanctions under international law.

Conclusion

This article aims to detect and investigate effective mechanisms for individuals and entities on EU and UN sanctions lists to challenge sanctions, and listing decisions specifically.

The article provides an overview of the experience of litigating sanctions in the EU. It shows how, on the one hand, the EU courts seem willing to secure respect of primary EU constitutional principles and fundamental rights, recognising jurisdiction over not only EU autonomous sanctions but also EU sanctions acts implementing Security Council's resolutions. On the other hand, however, the EU courts appear reluctant to annul sanctions acts, as well as to grant damages and interim measures. The one claim that has been proving successful before the European judiciary concerns the lack of sufficient, adequate evidence supporting listings; yet it is showing a much limited efficacy, as EU institutions are not prevented from re-listing individuals and entities, provided they collect satisfying evidence the second time around.

Consequently, the article identifies alternative claims and avenues for a more effective strategy to litigate sanctions. These alternatives include claims before the EU courts supporting the criminal nature of sanctions or their critical impact on peremptory norms of *jus cogens*. They encompass promising avenues, including national courts, UN de-listing mechanisms and the ICJ. Especially the latter appears a strategic forum to finally address one of the foreign policy issues subject to heated debate, namely the illegality of sanctions autonomously imposed by states without the authorisation of the UN. If the ICJ were to affirm such illegality, it could have the effect of recentralising the power to impose sanctions within the UN, in accordance with the UN Charter. It is therefore waiting for the first state to raise a case.