

Max Planck Encyclopedia of Public International Law



Economic Sanctions

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Content type:

Encyclopedia entries

Article last updated: April

2011

Product: Max Planck

Encyclopedia of Public

International Law [MPEIL]

Subject(s):

Economic sanctions — Coercion & harassment — Most-favoured-nation treatment (MFN) — Customary international law

Published under the auspices of the Max Planck Foundation for International Peace and the Rule of Law under the direction of Rüdiger Wolfrum.

A. Notion and Types of Economic Sanctions

1. Definition

1 Economic sanctions can be defined broadly to include ‘measures of an economic—as contrasted with diplomatic or military—character taken to express disapproval of the acts of the target or to induce that [target] to change some policy or practices or even its governmental structure’ (Lowenfeld [2002] 698). This definition in its original form used ‘States’ as the actors or senders of the sanctions, and ‘State’ as the target. Those are deleted here because, as discussed below, economic sanctions have become increasingly employed by international and regional organizations as well as by States, and to be directed not only at States, but also at non-governmental entities and individuals. The organization(s) or State(s) that engage in these activities are sometimes termed the sender(s), and the object of the sanction is sometimes called the target(s).

2 An alternative definition that is consistent with Lowenfeld’s definition is: ‘the deliberate withdrawal, or threat of withdrawal, of customary trade or financial relations’. This definition appears in an exhaustive and impressive analysis of economic sanctions, with the focus on the period after World War I (Hufbauer and others 10).

3 In general, economic sanctions might be used to force or at least influence a country, entity, or individual to change policies (or even its government), or at least to demonstrate the sender’s opinion about the other’s policies. More specifically, these sanctions might be employed in an attempt to stop a State’s military adventure, to destabilize its government, or to influence or express disapproval about a range of other foreign policy considerations involving human rights, terrorism, weapons proliferation, or drug trafficking. Most scholars and other commentators agree, however, with Lowenfeld that, ‘While the line of demarcation is not always sharp and sometimes motives are mixed, economic sanctions generally are measures taken not for economic gain, and often at commercial sacrifice’ on the part of the sender (Lowenfeld [2002] 698). Hence, while the use or threat to use economic measures against another State is sometimes employed to obtain the normal economic objectives in trade, financial, and other commercial negotiations, this is generally viewed as part of the bargaining and is not categorized as an economic sanction. Most observers, however, seem to consider that economic measures taken to protest against another country’s expropriation(s) of foreign-owned property qualify as an economic sanction. On the other hand, most observers have not categorized the use of economic measures for environmental objectives (eg endangered species or the ozone layer) as economic sanctions, though this might well change as economic measures, such as import tariffs, are being considered to further climate change policies.

4 The term ‘economic sanctions’ overlaps with terms such as → *boycott* and *embargo*. Economic sanctions are sometimes referred to in the context of → *blockade* and → *economic warfare*. Economic sanctions, however, are generally viewed as being milder than blockades or economic warfare because they are generally used in peacetime and are an attempt to settle differences without recourse to war, while economic warfare usually accompanies traditional warfare.

2. Forms of Economic Sanctions

5 Economic sanctions can be distinguished in different ways and they can take many forms. Lowenfeld characterizes sanctions, in part, as a spectrum ranging from mild economic activity, such as failure to renew some benefits, to more comprehensive measures such as a trade embargo or seizure of assets (at 699).

6 Sharper and more useful distinctions can usually be obtained by categorizing the type of economic activity that is the subject of a sanction. These activities can be grouped roughly into

five major categories, as uses of or limits on a) bilateral government programmes, such as foreign assistance, fishing rights, and aircraft landing rights; b) exports from the sender State(s); c) imports from the target country or other target entity; d) private financial transactions, such as bank deposits and loans; and e) the economic activities of international financial institutions ('IFIs'; → *Financial Institutions, International*), such as the World Bank (→ *International Bank for Reconstruction and Development [IBRD]*) or the → *International Monetary Fund (IMF)* (Carter 2). There are miscellaneous economic sanctions that do not easily fall into any of these five principal categories. For example, some sanctions span several types of economic activity—the anti-boycott laws in the United States and other countries might limit a variety of business relationships that a business entity can have with foreign entities.

3. Brief History of the Use of Sanctions

7 Economic sanctions have had a long and controversial history. They were employed in early Greece. The best-known example was Pericles' decree of 432 BC limiting the entry of products from Megara into the markets of Athens in response to Megara's territorial expansion and its kidnapping of three women (ibid 8 n 2).

8 In later centuries, up until World War I, many of the uses of economic sanctions 'foreshadowed or accompanied warfare. Only after World War I was extensive attention given to the notion that economic sanctions might substitute for armed hostilities as a stand-alone policy. Nonetheless, through World War II, the objectives sought with the use of sanctions retained a distinctly martial flavour—for example, to disrupt military adventures or to complement a broader war effort. In the post-World War II period, other foreign policy objectives became increasingly common, though sanctions were sometimes still used to try to force a target country to withdraw its troops from border disputes or not to engage in other military actions (Hufbauer and others 10. This study analysed 174 cases that started at some point between World War I through to 2000, and it also provides substantial information on 13 cases from 2001–06).

9 The other foreign policy objectives since World War II have been to change a country's regime (eg Fidel Castro in Cuba); to stop or slow a target country's efforts to develop → *weapons of mass destruction*, especially nuclear ones (→ *Weapons of Mass Destruction, Counter-Proliferation; → Arms, Traffic in*); to encourage improvement in the protection of human rights; to settle expropriation claims (→ *Nationalization*); to counter drug trafficking; and, of growing importance, to combat international → *terrorism* (ibid 10–17).

10 Among countries and international organizations imposing sanctions, the United States has resorted to economic sanctions most frequently since World War I, acting either alone or with allies. Other significant users have included the UN, the United Kingdom, the European Community/European Union, the Soviet Union (→ *Russia* since 1991), and the → *League of Arab States (LAS)* and its members (ibid 17).

11 The targets of economic sanctions include States, non-governmental entities, and individuals. States have been the usual target until recently. Starting in the 1990s, the rise of non-State terrorist entities, such as Al Qaeda, led to more targeted sanctions against terrorist groups and individuals associated with them, and also more specific limits on the economic activities involved. These entities and people were hit with travel restrictions, freezing of assets where the sender had jurisdiction, and prohibitions on financial transactions. The use of these targeted sanctions, which are often labelled 'smart sanctions', also began to be employed against entities and people involved in drug trafficking or furthering the proliferation of weapons of mass destruction. Many observers also see smart sanctions as a more focused effort to impose economic costs than country-wide sanctions which might adversely impact on the general civilian population. This apparently occurred with the UN sanctions against Yugoslavia, Haiti, and Iraq—at least in part in Iraq because the government there directed the impact of the sanctions against its citizens.

B. Historical Evolution of Legal Rules

12 Although economic sanctions have been employed for centuries, efforts to provide legal norms for sanctions primarily began after World War I (note that there were earlier efforts to develop legal rules with regard to related, though different, concepts such as → *reprisals*, blockades, or neutrality (→ *Neutrality, Concept and General Rules*). In the Covenant of the League of Nations ([signed 28 June 1919, entered into force 10 January 1920] [1919] 225 CTS 195), Art. 16 provided the legal norm for a positive use of economic sanctions—ie that all League members were to cease all economic intercourse with any other member that resorted to war in disregard of other articles of the Charter. Two early successes by the League against smaller powers (Yugoslavia and Greece) in the 1920s encouraged supporters of sanctions. However, the League itself and hopes for the effectiveness of its sanctions were severely hurt by the League's weakness in response to Italy's invasion of Ethiopia in October 1935 (Carter 11–12; Hufbauer and others 10).

13 Since World War II, there have been a number of international agreements that contained general limitations on non-forcible intervention or specific limits on the use of coercive economic measures. Most of these agreements are confined in their coverage to only two or a few States, or their provisions are vague, or effective enforcement mechanisms are lacking (a few major exceptions are discussed in the subsections below). As a result, these agreements might be used as evidence of customary international law, but they do not provide much legal basis in the foreseeable future for limiting the use of economic sanctions. For example, Art. 19 of the 1948 Charter of the Organization of American States ('OAS') reads: 'No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.' This under-utilized article appears to have had little practical effect.

1. Actions under the UN Charter and by Regional Entities and States

14 The principal exception to the lack of international legal norms is the → *United Nations Charter*. The Charter does not provide any clear legal norm against a State's use of economic sanctions, though some → *developing countries* have argued unsuccessfully that the Art. 2 (4) prohibition of the 'threat or use of force' encompassed economic sanctions. However, this argument has not been supported by the International Court of Justice ('ICJ') or the UN Secretary-General (see also → *Economic Coercion*). On the other hand, the UN Charter is significant for establishing a unique mechanism for collectively imposing sanctions against a country. In Chapter VII of the Charter, Art. 39 provides that: 'The Security Council shall determine the existence of any threat to the peace, breach of peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'. Article 41 then provides that: 'The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. They may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations'.

15 These articles give broad powers to the UN Security Council to impose economic sanctions. While the text of Arts 39 and 41 refer to 'measures', the United Nations has demonstrated in its practice, and most observers agree, that 'measures' include the full range of economic sanctions, such as limits on trade and limits on financial transactions. 'Measures' also includes, in Art. 41, the severance of diplomatic relations, which is not generally viewed as an economic sanction.

16 These Art. 41 sanctions are mandatory on Member States under Art. 25 UN Charter if the Security Council resolution designates them as mandatory, rather than recommended. And, if the sanctions are mandatory, Art. 103 provides that: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any

other international agreement, their obligations under the present Charter shall prevail’.

17 The Security Council has increasingly decided to employ economic sanctions pursuant to Art. 41. The first episode was the progressive implementation of sanctions against South Africa from 1962 to 1994, aimed at ending → *apartheid* and granting independence to Namibia. Another early use of Security Council sanctions was against Southern Rhodesia (now called Zimbabwe) from 1965 to 1979 to obtain majority rule by black Africans. Both episodes were generally considered effective. Especially after the end of the Cold War, the United Nations has applied economic sanctions, with varying success, at various times against, for example, Somalia, Iraq, Yugoslavia, Haiti, Liberia, Cambodia, Libya, North Korea, Rwanda, Sierra Leone, Afghanistan, Iran, and the Democratic Republic of Congo (eg Hufbauer et al 23–38).

18 When the Security Council decides on economic sanctions, the principal responsibility for actually implementing the sanctions is on the Member States. However, to help ensure that the States implement the sanctions and that the Council is kept informed, the Security Council has assigned responsibilities to the UN Secretary-General and a variety of subsidiary actors, including sanctions committees, bodies of experts, and monitoring mechanisms (see Farrall 146–80). The sanctions committees often come to be known by the number of the Security Council resolution that created them.

19 One of the most active sanctions committees in recent years has been the sanctions committee established pursuant to Resolution 1267 (1999), which the UN website indicates is also known as ‘the Al-Qaida and Taliban Sanctions Committee’ (→ *Taliban*). This sanctions regime has been modified and strengthened by subsequent resolutions. Measures taken with regard to any designated individuals or entities include assets freezes, arms embargoes, and travel bans. In 2009, the Security Council established the Office of the → *Ombudsperson* to assist the committee in considering requests for de-listings. The committee is one of three subsidiary bodies that the Security Council established to deal with terrorism related issues.

20 Among the most comprehensive recent UN sanctions are those against Iran for its failure to adhere to its obligations under the → *Non-Proliferation Treaty (1968)*, for its continuing construction and operation of uranium-enrichment facilities, and for its ballistic missile activities. The Security Council passed a series of increasingly detailed and stringent resolutions from 2006 to 2010. The Security Council was relying on reports from the → *International Atomic Energy Agency (IAEA)* and from a working Committee and a Panel of Experts that the Security Council had created. The sanctions themselves progressively included specific measures (eg travel bans or asset freezes) against organizations and individuals (eg UNSC Res 1747 [24 March 2007]; UNSC Res 1929 [9 June 2010]).

21 Besides these resolutions against Iran being mandatory on UN Member States under Art. 25 UN Charter, the European Union, the United States, Japan, and other countries have chosen to enact their own legislation that implements the Security Council resolutions and also imposes even more comprehensive sanctions against Iran. For example, in 2010, both the EU and the United States enacted their most sweeping sanctions against Iran, including efforts to limit Iran’s development of its energy sector.

22 In imposing the new sanctions against Iran, the EU needed to design carefully the part of the EU Council’s Decision and Regulation that implemented the UN Security Council’s June resolution (Council Regulation [EC] 668/2010 of 26 July 2010 on the Implementation of Art. 8 (2) of Regulation [EC] No 423/2007 concerning Restrictive Measures against Iran [2010] OJ L195/25). The European Court of Justice (‘ECJ’) had decided in 2008 that a EU Council regulation that attempted to implement a UN Security Council resolution seeking to impose targeted sanctions (including an asset freeze and travel ban) against designated alleged terrorists violated the fundamental rights of two individuals. In the → *Kadi Case*, the ECJ held that, because of the procedure followed by the EU Council, the regulation violated the individuals’ rights to defence, to an effective legal remedy, to

effective judicial protection, and to property (Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008]).

23 As illustrated by the EU sanctions against Iran, some regional organizations have relied on their charters or other legal instruments to impose or call upon members to impose economic sanctions. For other examples, the former Organization of African Unity (along with the UN) brought economic pressure against Portugal to free its African colonies during 1963–74, and the Arab League has used sanctions on occasions against various countries regarding issues involving Israel. The → *Economic Community of West African States (ECOWAS)* used measures seeking to stop internal fighting against Liberia during 1992–98 and 2000–06, against Sierra Leone in 1997–2003, and the Ivory Coast in 2010–11. The OAS co-operated with the United States and the UN to restore democracy to Haiti during 1991–94. The most frequent regional entity to invoke economic sanctions, especially in recent years, has been the European Union (formerly Economic Community). It has imposed economic sanctions of one type or another on over 20 occasions. These include, for example, against Turkey to restore democracy (1981–86), Yugoslavia (1991–2001 and 1998–2001), the USSR to block a coup (1991), Algeria, Nigeria, Ivory Coast, Haiti, Zimbabwe, and the Central African Republic. More recently, in addition to the Iran case, the EU imposed sanctions against Guinea (2005), Uzbekistan (2005), Belarus (2006), and the Hamas-led Palestinian Authority (2006).

2. GATT/WTO and Regional or Bilateral Trade Agreements

24 The → *General Agreement on Tariffs and Trade (1947 and 1994)* ('GATT'), which came into force in 1947 and has been amended, and the more comprehensive agreements under the → *World Trade Organization (WTO)*, which came into effect in 1995 and include the amended GATT, provide the most clear legal limits on the use of these economic sanctions. The several WTO agreements, which number hundreds of pages, include provisions that limit when a Member may, for example, impose new burdens or prohibitions on imports from another Member; change domestic laws regarding intellectual property; or, in a few situations, impose new limits on foreign investment. (The WTO had 153 Members as of March 2011. These included all major industrialized countries, except for Russia. All the Members were States, except for the European Union; Hong Kong, China; Macao, China; and Chinese Taipei or Taiwan.)

25 On imports of goods, for instance, a key provision of the GATT is Art. I, which provides that a Member shall accord *all other Members* the same favourable terms on imports—commonly known as the → *most-favoured-nation clause* ('MFN'). There are exceptions for developing countries. Also, additional tariffs on imports might sometimes be allowed against another Member if that Member has engaged in certain types of inappropriate economic conduct. These additional tariffs must be authorized through the WTO's strong dispute resolution system (→ *World Trade Organization, Dispute Settlement*). The GATT also includes several exceptions in Art. XXI. Two exceptions might arise most often in cases of economic sanctions for foreign policy reasons. There is, first, an exception for 'war or other emergency in international relations', but that national security exception has rarely been invoked. Article XXI also has an exception for a Member taking 'any action' in pursuance of an economic sanction mandated by the UN Security Council. In other situations, however, the GATT does not allow tariffs or other measures that would discriminate against a Member on foreign policy grounds, such as human rights, the form of government, or proliferation policies. Thus, a Member cannot use limits on imports as an economic sanction in these cases against another Member, thus blocking a common type of economic sanction often used in the past.

26 One specialized issue that has arisen under the GATT and the MFN provision is the allowable conditions for granting tariff preferences to developing countries. The generalized system of preferences ('GSP') allows developed countries to grant preferential tariff treatment to products

from developing countries. A so-called 'enabling clause' in 1979 authorized this departure from MFN treatment (GATT Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries ['Enabling Clause'], in GATT (ed), *The Texts of Tokyo Round Agreements* [GATT Geneva 1994] 191). As the GSP evolved over the years, developed countries added various conditions that developing countries needed to meet to receive the special tariff treatment. Those conditions were usually economic ones, such as a country's per capita income. However, sometimes foreign-policy conditions were added. For example, the European Community provided additional tariff preferences if a developing country took steps to combat illegal drug production or trafficking or if the country adhered to specified environmental and labour standards. India challenged the EC's drug conditions in the WTO. The WTO Appellate Body held that developed countries did not have to treat all developing countries in the same way when granting preferential tariffs. Rather, developed countries could distinguish between GSP beneficiaries based on the beneficiaries' differences in 'development, financial and trade needs', though 'similarly-situated' GSP beneficiaries should be provided the same treatment (WTO *European Communities: Conditions for the Grant of Tariff Preferences to Developing Countries—Report of the Appellate Board* [7 April 2004]).

27 MFN clauses similar to Art. I GATT are in other WTO agreements, such as Art. II *General Agreement on Trade in Services* (1994) and Art. 4 → *Agreement on Trade-Related Aspects of Intellectual Property Rights* (1994). Again, if a Member does impose limits contrary to those provisions against another Member, the aggrieved Member can seek a remedy, usually equivalent trade sanctions, against the first Member in the WTO's dispute resolution system.

28 Because many of the recent targets of sanctions are not WTO members (eg Iran, Libya, Iraq, terrorist organizations) and because of the exceptions in the GATT agreement mentioned above, the vast majority of the 100-plus uses of economic sanctions in the last three decades have clearly not violated these treaties, and other cases are unclear. Moreover, few, if any, of these sanctions arguably violate any bilateral treaty, and the questionable cases require further investigation of the facts and the specific treaties.

3. Customary International Law

29 A clear rule of → *customary international law* has not developed regarding the use of economic sanctions. Many developing and non-aligned States have tried, especially in the 1960s to 1980s, to develop a rule against international economic sanctions and even the broader concepts of economic coercion or non-forcible threats or interventions. These States and their supporters passed declarations and resolutions in the UN General Assembly and other organizations and inserted broad and unenforceable language in some treaties and agreements.

30 In spite of these efforts, it is generally accepted that a customary rule of international law against economic sanctions does not exist. For example, in 1986, the ICJ issued a decision in the → *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)*. Nicaragua claimed that the United States had violated the principle of non-intervention with economic sanctions that included a cut-off of economic aid, a 90% reduction in Nicaragua's valuable sugar quota for imports into the United States, and then a comprehensive trade embargo. Although the ICJ ruled that the United States violated customary international law by training and arming the contras, the majority opinion nevertheless concluded (without much explanation) regarding the economic sanctions, '[T]he Court has merely to say that it is unable to regard such action on the economic plane as a breach of the customary-law principle of non-intervention' ([*Judgment of 27 June 1986*] [*Merits*] 126). And, in 1993, the UN Secretary-General concluded that

there is no clear consensus in international law as to when coercive measures are improper, despite relevant treaties, declarations, and resolutions adopted in international organizations which try to develop norms limiting the use of these measures. (UNGA,

'Economic Measures as a Means of Political and Economic Coercion against Developing Countries: Note by the Secretary-General' [25 October 1993] UN Doc A/48/535, Agenda Item 91 (a), at 1)

31 Some scholars have proposed that economic sanctions might be evaluated under various customary international law rules or other international law standards, such as the law of armed conflict (eg Reisman and Stevick). These proposals, however, have yet to be adopted by the UN Security Council or by international tribunals.

32 Some scholars have occasionally viewed → *countermeasures* as overlapping with economic sanctions. Countermeasures have been defined as measures, otherwise unlawful, taken against another State by way of response to an unlawful act by the State (→ *State Responsibility*). Economic sanctions, however, as defined here and widely accepted, do not depend on an unlawful act by another State. In fact, sanctions are sometimes triggered by acts or policies by another entity that are lawful. Moreover, as discussed above, economic sanctions themselves are rarely, if ever, unlawful. Another distinction between economic sanctions and countermeasures is that the discussion of countermeasures has often arisen in international arbitrations that involve trade agreements and commercial interests, not the foreign policy or national security objectives that characterize economic sanctions.

C. Assessment

33 Economic sanctions have become a fact of international life and a tool of international diplomacy. Especially since World War II, they have been used for a variety of purposes with varying degrees of effectiveness by a range of international institutions, regional organizations, and States—such as the United Nations, EU, United States, and Japan. Efforts by some developing countries during the 1960s to 1980s to somehow limit these sanctions under the UN Charter or customary international law made little headway. Limits that might exist today on international economic sanctions are found in provisions in the WTO agreements and in bilateral or regional trade and investment agreements.

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