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國際學碩士學位論文

Legal Approach to the Effectiveness of Multilateral and Unilateral Economic Sanctions

경제제재의 국제법상 규제 효용성에 관한 연구

2015年 **2**月

서울大學校 國際大學院

國際學科 國際通商專攻

金 智 惠

Legal Approach to the Effectiveness of Multilateral and Unilateral Economic Sanctions

A thesis presented

by

Ji Hye Kim

A dissertation submitted in partial fulfillment
of the requirements for the degree of Master
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경제제재의 국제법상 규제 효용성에 관한 연구

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ABSTRACT

Legal Approach to the Effectiveness of Multilateral and Unilateral Economic Sanctions

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Economic sanctions are the measures of economic characteristics taken by states, whether be it collective or individual, against danger to international peace and security to express disapproval of the acts of the target state or to induce those states to change some policy or practice or even government structure.

Economic sanctions are rapidly becoming one of the major tools of international governance of the post-Cold War era and use of sanctions has increased substantially especially in the past decades. Economic sanctions have taken a variety of different forms by various organizations, entities or group of countries in the international Community against danger to international peace and security.

While most of the measures are on the basis of international agreements or international law, the unilateral actions are increasing in recent decades. However, the jurisdiction of economic sanctions by individual country or a group of countries is not always clear and sometimes the practices are arbitrary. It is presumed that, since international organizations have different motives and purposes of employing economic

sanctions, different economic sanctions may conflict or complement with each other. Therefore, this paper attempts to explain different forms of economic sanctions and provide the legal analysis on them. By focusing on legal aspect of multilateral or unilateral economic sanctions, this paper will address what kind of judicial schemes are in practice and how these affect countries' decision making in adopting sanction measures and what can be done to improve multilateral sanctions which should be strengthened as primary form of economic sanctions.

Key words : Economic Sanctions, Unilateral Sanctions, Multilateral Sanctions

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CHAPTER I. Introduction

State-sponsored terrorists and rogue dictators are the “bad guys” which are the leading threats to the international security. However, military force is an outdated way to deal with terrorism and is not even welcomed by countries that are within the influence of terrorism threat because of its destructive nature. Accordingly, international community is increasingly inclined to turn to a new weapon, economic sanctions. Economic sanctions are the measures of economic characteristics taken by states against danger to international peace and security to express disapproval of the acts of the target state or to induce the state to change some policy or practice or even government structure. Use of economic sanctions actually has a long history, but is rapidly becoming one of the major tools of international governance of the post-Cold War era and especially in the past two decades. And economic sanctions have taken a variety of different forms by various organizations, entities or group of countries in the international Community. What is noteworthy is that while most of the measures are on the basis of international agreements or international law, the unilateral actions are increasing in recent decades. Especially US is an active user of unilateral economic measures, regardless of opposition from its allies and trading partners.[1]

And the complex legal relationship between the collective security movements such as United Sanctions Resolutions and the rights of states to take unilateral countermeasures under the law of state responsibility is highlighted these days. The jurisdiction of economic sanctions by individual country or a group of countries is not always clear and sometimes the practices are arbitrary. Therefore, countries have

[1] National Security and International Trade Law: What the GATT Says and What the United States Does at 2

difficulty determining whether they have to comply with the sanctions enforced by international community or their allies and if they have to, then up to what extent. Economic sanctions have such a complex mechanism and the decisions of individual countries may also differ depending on the kind of perspective taken whether be it legal, political or economic. Considering the difficulty of taking all aspects of economic sanctions into account, this paper focuses on legal aspect and more specifically what kind of judicial schemes are in practice and how these affect countries' decision making in adopting sanction measures.

In this paper, I hope to address why multilateral approach to economic sanctions should be more strengthened than unilateral sanctions. Part II describes different forms of legal basis of economic sanctions. Part III addresses the legality of multilateral and unilateral economic sanctions and judicial problems and loopholes of unilateral sanctions. Part IV sets out what remains to be improved to strengthen multilateral economic sanctions.

CHAPTER II. Background

2.1 Multilateral Economic Sanctions

UN

1. Overview

The main aim of all UN sanctions and embargoes, as set out in the UN Charter, is to implement decisions by its Security Council to maintain or restore international peace and security. The Security Council sets up sanction systems by adopting a resolution (based on Chapter VII of the UN-Charter). In such a resolution, the type of sanction (e.g. embargoes, travel ban, freezing of assets) and the category of persons subject to ban are promulgated. Moreover, this resolution creates a Security Council Sanctions Committee in which all 15 of the member states have a seat. This Sanctions Committee has the authority to control the execution of the sanctions defined in the resolution.

The use of sanctions by the Security Council gained currency following the end of the Cold War and the continuing sanctions against Iraq for its invasion of Kuwait in 1990. As one of the major originations in United Nations, the Security Council possesses many tools to deal with threats to and breaches of international peace and security.

The most frequently applied measures are:[2]

- Embargoes on exporting or supplying arms and associated technical assistance, training and financing
- Ban on exporting equipment that might be used for internal repression
- Financial sanctions on individuals in government, government bodies and

2 https://www.gov.uk/sanctions-embargoes-and-restrictions

associated companies, or terrorist groups and individuals associated with those groups

- Travel bans on designated individuals
- Bans on imports of raw materials or goods from the sanctions target

Chapter VII of the UN Charter, which deals with threats to the peace, breaches of the peace and acts of aggression, forms the legal grounds for sanctions. The drafters of the United Nations Charter make provisions for economic sanctions based on Article 39[3] and 41[4] of the Charter. The UN Charter firmly states in Article 24[5] that the Security Council will be entrusted by members with full responsibility of maintaining international peace and security and members should authorize the Security Council to execute the decisions at their own discretion. And Article 41 refers to non military action, also dubbed as sanctions, whereas Article 42[6] deals with military action.

2. Scope of sanctions.

The scope of the collective security system established under the United

3 Charter of the United Nations Chapter VII Article 39 states;
The Security Council shall determine the existence of any threat to the peace, breach of the 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
4 Charter of the United Nations Chapter VII Article 41 states;
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. These 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.
5 Charter of the United Nations Chapter VII Article 24 states
In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.;
6 Charter of the United Nations Chapter VII Article 42 states
Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Nations Charter has expanded significantly since the end of the cold war to cover new fields. An increasing linkage between maintenance of peace and economic reconstruction has led the United Nations to play an unprecedented role in the economic realm. What triggers United Nations Sanctions have ranged from serious human rights violations, acts of terrorism, and changes of political regimes that had met the qualification of Article 39 in recent years. The spectrum of measures that may be taken to confront these threats is very broad, reaching from the use of force to non-military measures. As we are focusing on the non-military sanctions, that is economic sanctions, mandatory economic sanctions pursuant to decision of the Security Council have focused on four main areas : prohibition of imports from the target country; prohibition of transfer of funds to or for the benefit of the target country; prohibition of transport in vessels or aircraft registered in member states of cargoes originating in or destined for the target country; and prohibition of exports to the target country, in some instances all exports, in other arms and munitions, or petroleum and its products or both.[7]. The list includes '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' and is not exhaustive.

3. Enforcement of Sanctions

Aforementioned Article 42 entitles the Security Council to authorize individual member states to use force in order to maintain or restore international peace and security, including enforcing or economic sanctions approved by the Security Council. The Security Council may under this provision authorize individual states to use force in support of an approved program of sanctions.[8] A program of mandatory sanctions in

[7] SC Res. 253(29 Nov 1968)
[8] United Sanctions and Other Collective Sanctions, A. UN Sanctions and the legal framework

implementation of a resolution of the Security Council can be terminated only by another resolution adopted in accordance with the Security Council's voting procedures, including the possibility of veto. And if one or more of the permanent members of the Security Council declared that it would no longer implement the sanctions, the required consensus would be destroyed and sanctions would cease to be mandatory.

The Security Council cannot actually impose economic sanctions but only can urge member states to implement the sanctions set forth in its resolution, and it can require compliance pursuant to Article 25[9]. To fulfill the resolutions by Security Council taken upon the belief that they are the best resorts, UN members bear the duty to join in affording mutual assistance in carrying out the measures mandated in the resolutions. Compliance with a decision of the UN Security Council on sanctions pursuant to Articles 39 and 41 of the UN Charter is mandatory, and a failure to carry out the decision is a violation of Article 25 of the Charter. The fact that enforcement of sanctions would conflict with a requirement of domestic law is not valid as an excuse, therefore non-compliance with the decisions of the Security Council is not accepted pursuant to Article 25. Furthermore, Article 103 declares the priority of obligations under the UN in the event of a conflict between the obligations of the members of the UN under the Charter and their obligations under any other international agreement, the obligations under the UN shall prevail. [10] The Security Council Sanctions might well conflict with a bilateral trade or air services agreement, or with the most favored nation provision of the GATT,

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9 Charter of the United Nations Chapter VII Article 25 states
The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

10 Article 103 of the UN Charter provides:
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

yet UN sanctions should be implemented no matter what. To the question whether states implementing the Sanctions were authorized or obligated to control the actions of companies outside their national territories whose ownership is under parent companies organized in member states, the practice of UN sanctions has been based on the view that an obligation to enforce the sanctions is bound to the territory of each member state, and thus there is no need to trigger extraterritorial enforcement.

Non-Proliferation International Laws

1. Overview

Non-Proliferation International Laws with international authorization originated from U.S.'s collaboration with Western European nations to control trade in certain strategic goods[11] to the Soviet bloc in 1949. Confrontation of U.S. and Soviet bloc prompted nations to come together and coordinate control on WMD items and this movement later on led to counteract against Nuclear Tests by India, Iran Iraq War (use of Chemical Weapons), Use of Ballistic Missiles during Iran-Iraq War. Since then, non-proliferation effort expanded with establishment of Nuclear Suppliers Group (1975)[12], Australia Group(1985)[13], Missile Technology Control Regime(1987)[14], Wassenaar Arrangement(1995)[15]. Each regime/arrangement is informal effort of "like-minded

11 Strategic goods are military goods and so-called "dual-use" items. The latter being items that usually have civilian use but which can also be used for military purposes. Services related to strategic goods (intangible transfer of technology, technical assistance or brokering) are also subject to control.

12 Nuclear Suppliers Group (NSG) is a multinational body concerned with reducing nuclear proliferation by controlling the export and re-transfer of materials that may be applicable to nuclear weapon development and by improving safeguards and protection on existing materials.

13 The Australia Group (AG) is an informal forum of countries which, through the harmonisation of export controls, seeks to ensure that exports do not contribute to the development of chemical or biological weapons.

14 The Missile Technology Control Regime (MTCR) is an informal and voluntary partnership between 34 countries to prevent the proliferation of missile and unmanned aerial vehicle technology capable of carrying a 500 kg payload at least 300 km.

15 The Wassenaar Arrangement (full name: The Wassenaar Arrangement on Export Controls for

suppliers" of WMD-relevant items, who want to coordinate their export policies in order to prevent WMD-proliferation. While these agreements represent multilateral coordination of anti terrorism effort based on consensus principle, these still have nature of informal political agreement. These agreements issue common guidelines for exports of WMD-relevant items and lists of controlled items, yet allow national discretion in implementation. Main criticism that non-proliferation regimes are weak in its enforcement arises from the fact that there's no means of identifying violation by a member and, even though such a violation is found, there's no institutionalized means of sanctions for such violations.

WTO

1. Overview

The exception to GATT obligations for national security reasons is set forth in Article XXI of GATT. Unlike UN Security Council and multilateral sanctions regimes, Article XXI is not purported to prevent threats to international/national peace as GATT itself was established to essentially promote free trade, but it rather provides a room for imperative trade restrictions which could be contradictive to the spirit of free trade.

GATT Article XXI[16] establishes a broad framework for imposing international

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Conventional Arms and Dual-Use Goods and Technologies) is a multilateral export control regime (MECR) with 41 participating states including many former COMECON (Warsaw Pact) countries

16 Article XXI of GATT : Security Exceptions

Nothing in this Agreement shall be construed
(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
(i) relating to fissionable materials or the materials from which they are derived;
(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
(iii) taken in time of war or other emergency in international relations; or
(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United

trade measures for national security purposes. Since GATT was enacted in 1947, countries have occasionally implemented trade sanctions, sometimes invoking Article XXI as a justification for such action. Especially United States has relied on Article XXI to support the unilateral enactment of highly controversial sanctions legislations. The rationale behind such legislation is “national security”, but there have been quite a few controversial cases where the rationale behind such an action could have been viewed as national interest rather than national security. And controversies over the action taken under the umbrella of GATT article XXI brought those involved to the Dispute Settlement Body.

2. The Security Exception Article

Article XXI provides the basis in **GATT** for unilateral national security measures. Article XXI was invoked only in the context of measures that fit within the definition of sanctions, i.e. measures taken for reasons of foreign policy, not to gain commercial benefit. And what’s noteworthy about GATT Article XXI is that it is an all-embracing exception to GATT obligations. This point is evident from the first word of the Article, "nothing." Once a WTO Member adopts Article XXI to implement a measure against another Member, there is no GATT obligation to which the sanctioning member must adhere with respect to the target member.[17] Secondly, one of the most important and controversial part of GATT Article XXI is Article XXI(b). In this provision, the word "it" allows the WTO Member taking sanction measures sole discretion to determine whether an action complies with the requirements set forth in Article XXI(b). Thus, the word "it" indicates that neither WTO Member nor group of Members, and no WTO panel or other adjudicatory body, has any right to determine whether a measure taken by a

Nations Charter for the maintenance of international peace and security.
17 National Security and International Trade Law, What GATT says and What United States Does.

sanctioning member satisfies the requirements. It, however, doesn't mean that Article XXI(b) is a license for a sanctioning member to act arbitrarily. It is evident that in the introductory part of Article XXI(b), **a** sanctioning member is supposed to make sure that its measures are "necessary" for the "protection" of that member's "essential security interests". For the most part, GATT Contracting Parties exercised restraint in interpreting these terms, and most WTO Members have also been cautious.

2.2. Unilateral Economic Sanction

US's unilateral sanctions varies in times, targets and measures and specifically it involves a cut off of exports, imports, financial transactions, and travel which was imposed by US against in 1950 China, NK, North Vietnam, Cambodia pursuant to the US Trading with the Enemy Act and a Presidential Proclamation of National Emergency and now to NK, Cuba in 1963, Iran in 1979 to today pursuant to Foreign Assets Control Regulations by Treasury. The US's comprehensive sanctioning actions have become a model for the UN sanctions taken as a precedent to US's or in aftermath. Fortunately so far, the model has not been followed by other states without a UN mandate[18]. One of the most comprehensive trade sanctions enacted by US is The Iran-Libya Sanctions Act. The Act ("ILSA") which supplemented existing measures with additional restrictions on foreign companies that undertake new oil field investments in Iran. When terminated with respect to Libya, the act was renamed the Iran Sanctions Act, and extended until December 31, 2011.2 However, sanctions have not successfully frustrated Iranian determination to develop nuclear weapons and fund terrorists.[19]

18 United Sanctions and Other Collective Sanctions,, Economic Sanctions without benefit of treaty

19 Foreword of economic sanctions reconsidered

ILSA tries to encourage foreign nations to impose economic sanctions on the targeted countries by operation of an executive clause. ILSA requires to apply at least two of seven possible sanctions against foreign interests investing either more than $40 million in one year (or projects of at least $10 million that exceed $40 million in the aggregate in one year) in Libya or more than $20 million in Iran that "directly and significantly" contribute to petroleum developments in these countries. The sanctions include: refusal of insurance, guarantee, or extension of credit to a sanctioned person by the Export-Import Bank of the United States; restriction of export of goods or technology from the United States to any sanctioned person; prohibition of imports to the United States which are produced by any sanctioned person; prohibition of U.S. financial institutions from extending loans or credit in excess of $10 million to any sanctioned person in a twelve-month period; revocation of the status of primary dealer of U.S. debt instruments for any sanctioned financial institution;' prohibition of a sanctioned financial institution from acting as an agent of the U.S. government or serving as a repository of government funds; and prohibition of government contracts with a sanctioned party. Yet, the Sanctions Act suggests that it may only waive sanctions if the nations' restrictions on development of Iran's energy sector have similar effects.[20]

20 Iran and Libya Sanctions Act S 4(a), 5(a), (b)(2). 8(c)

CHAPTER III. Legal Analysis of Economic Sanctions

3.1 Problems of Unilateral Sanctions

1) WTO disputes

Economic sanctions, by definition, are against the very basic rule of the GATT-non-discrimination and most favored nation treatment. Article I of the GATT applies not only to restraints on imports, but to restraints on exports as well. Article XXI of the Agreement cannot be construed broadly; such an interpretation would render the Agreement and the WTO impotent by seriously undermining their ability to bind member nations to dispute settlement decisions.[21]. Since Article XXI does not require notice, approval, or ratification, it would seem to follow that it creates no right for a non sanctioning member to sue a sanctioning member. However, a non-sanctioning member has a right to bring an Article XXIII action and invoke the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Dispute[22] against a sanctioning member. This action could be brought on the ground that a particular national security sanction nullifies or harms benefits under the GATT that otherwise would accrue to the non-sanctioning member. The action may involve nullification or impairment that results restricting sanctioning countries action because the disputed sanction is an obvious violation of a GATT obligation. Indeed, in virtually every case, a non-violation nullification or impairment claim is likely to be credible because if the disputed sanction is at all effective, the existence of trade damage would not be in doubt.[23]

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21 ILSA 27 page
22 Id. at 607
23 National Security and International Trade Law

Most of the WTO's dispute settlement case on national security involves US's sanctions Acts against several target countries, yet none of them successfully barred US's action. The Helms-Burton Act targeting Cuba, and ILSA targeting Iran and Libya, both included provisions to inflict sanctions against foreign companies doing business with the target countries. The US's Sanctions Act uses secondary sanctions affecting individuals and corporations that are not direct threat to U.S. national security. These acts spark a serious controversy in the European Union, the United Kingdom, and Canada, all of which have commercial interests in the target countries. Some of the objecting countries enacted their own laws to counteract the effect of US's measures, and they threatened to bring a case in the World Trade Organization ("WTO"). But Presidents Clinton and Bush both used their waiver authority to avert an eruption of trade disputes.

2) Extraterritoriality

The trade boycott is a subcategory of economic sanctions, broadly composed of primary and secondary boycotts.[24] A nation imposing a primary boycott will restrain its citizens and corporations from trading with a state or group of states. Although certainly coercive, international law permits primary boycotts to achieve foreign policy goals unless they are unreasonable.[25] Difficulties with such boycotts arise, however, when they include a broad definition of nationality. The United States considers persons under its territorial jurisdiction to include not only its citizens and corporations organized under U.S. laws, but also corporations owned or controlled by such citizens or

24 Henry J. Steiner,International
Boycotts and Domestic Order: American Involvement in the Arab-Israeli
Conflict, 54 TEX. L. REV. 1355, 1367-70 (1976)
25 Carter, supra note 11, at 1167 n.12.(Problems of extraterritoriality with the ILSA)

corporations, which include corporations organized under the laws of a foreign country.[26] If country A employs a boycott against country B, country A may attempt to levy sanctions against corporation X, organized under the laws of C and a subsidiary of corporation Y incorporated in country A, for failure to comply with the conditions of the boycott even though X's activities are legal in country C. The secondary boycott seeks to halt third-party nations from trading with the target country.[27] This essentially amounts to an infringement on foreign policy making in third-party countries where trading with the target nation is not prohibited. These countries, not surprisingly, resist such application of another nation's foreign policy.[28] Secondary boycotts technically do not contravene customary international law, because sanctions generally apply only to parties having contacts with the sanctioning country.[29] Therefore, secondary boycotts may simply be an application of territorial authority.

The potential impact of such boycotts within the territory of third-party nations, however, poses an extraterritoriality problem.[30] Resorting to a secondary boycott partly represents the lack of international agreement. Such economic sanctions will influence business decisions within third-party nations and create the potential for inefficient, non-optimal choices by economic actors. Further, the transaction costs of conducting multinational business activities may rise due to the delay and expense of investigating the potential impact of the boycott, the laws of the business' third-party country of origin.

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26 Cf 50 U.S.C. S 2405(a)(1) (1994) (extending broad foreign policy control to the President).
27 See Steiner, supra note 60, at 1368-69. (ILSA problem)
28 See, e.g., id. at 1374-84 (discussing the U.S. reaction to the Arab League secondary boycott) (ILSA problem)
29 See, e.g., Clagett, supra note 5, at 436; Lowenfeld, supra note 5, at 429-30.(ILSA problem)
30 See Lowenfeld, supra note 5, at. 430.(ILSA problem)

The stakes in such a transaction, of course, depend upon the relative power and economic importance of the enacting nation and of the targeted nation. [31]

The United States is waging a war on terrorism. The weapon is the Iran and Libya Sanctions Act of 1996 ("ILSA" or "Sanctions Act"),' the primary target of which is neither terrorism nor its sponsors. The unfortunate reality of ILSA simply is that it unilaterally allocates the burden of paying for the enforcement of U.S. foreign policy by means of a boycott leveled against foreign countries and companies otherwise beyond the jurisdiction of the United States. The U.S. Congress has demonstrated eagerness to oblige other nations and their business interests to carry out its foreign policy goals. Legislation like ILSA and the similarly contentious Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 ("Solidarity Act") represent such a will. When UNSC adopted series of sanctions against Iran, while US 'welcomed the Security Council's unanimous decision', it said: 'We want the international community to take further action, and we're certainly not going to put all our eggs in the UN basket.[32] And the United States increasingly has broadened the definition of nationality of corporations to establish prescriptive jurisdiction over entities organized under the laws of other nations whether they are subsidiaries of U.S. corporations, parent companies of subsidiaries within the United States, or corporations otherwise under control of U.S. citizens through investment ownership. Such expansive jurisdictional doctrine necessarily will produce more opportunities for international conflicts. And on July 1, 2010, President Obama signed the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010. The act was designed to increase pressure on Iran to cease their nuclear program by targeting companies selling, transporting, or insuring gasoline

31 See id. at 1391.
32 Statement of UN Under Secretary of State R.Nicholas Burns, 23 Dec 2006

originating from the country. Indeed, the sanctions levied by the legislation ratcheted up those already in place in an attempt to escalate the dispute and demonstrate the United States resolve and capability. The US deprived those corporations of the opportunity to engage in trade with the US, on the ground that it re-exported a US-origin product in contravention to US regulations though in compliance with their own national laws. Using banking restrictions, the United States has tried to interrupt Iran's access to normal financial channels in ways that might support nuclear and terrorist activities. The U.S. government has persuaded some foreign governments as well as individual foreign firms to cooperate with these efforts. The active engagement of the Treasury Department has improved intelligence about global financial transactions. As a result, financial sanctions are better able to target specific individuals, firms or governmental agencies that might be engaged in misdeeds.[33]

The problem of extraterritoriality is not simple; rather, it is a pervasive issue for international law continually amplified by the inevitable and increasing interdependence of national economies. [34] Difficulties arise when excessive extraterritoriality affects policy making and the economic sovereignty of other nations. The international economy thus faces the daunting task of weathering legislative battles among nations, which often may only be restrained by the participants themselves. Legislative battles fought in the arena of world trade will be costly to the entire trading system and to its participants. Economic sanctions increasingly limit the principle of sovereignty.[35]

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33 Foreword of economic sanctions reconsidered
34 Steven P. Croley & John H. Jackson, WTO Dispute Procedures, Standard of Review, and Deference to National Governments, 90 AM. J. INT'L L. 193, 193 (1996)
35 Barry E. Carter, International Economic Sanctions: Improving the Haphazard U.S. Legal Regime, 75 CAL. L. REV. 1162, 1167 n.12 (1987)

Secondary sanctions imposed by state and city governments have raised concerns not only about international legal issues but also about the possible infringement of federal authority.[36]

The European Union drafted legislation protecting its corporations from judgments levied under the Solidarity Act; this countermeasure has been drafted sufficiently broad to mitigate the effects of ILSA as well.[37] Great Britain likely will employ the Protection of Trading Interests Act of 1980 to protect its corporations and subsidiaries organized under British law from ILSA.[38] Canada and France have also prepared blocking legislation should ILSA have effects within those countries.[39] Unilateral sanctions probably do not violate any technical norms of international law (all WTO considerations aside), because it simply provides foreign entities with a choice between trade with the U.S. and trade with Iran. However, this simplistic view of the legislation ignores its potential impact. And this legislative trend indicates a U.S. willingness to sacrifice world trade liberalization to achieve its foreign policy goals. It is arguable that trade liberalization should be the ultimate goal of U.S. foreign policy. Yet, its offensive nature may produce adverse, indirect economic effects in third party countries. Further, foreign policy is as interdependent as world economies have become, and any attempt to impose foreign policy on other nations will destabilize recent efforts to liberalize trade.[40]

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36 Foreword of economic sanctions reconsidered
37 John Roberts, Europe-Trade: Europe Plans Tough Response to U.S. Sanctions, Inter Press Service, Aug. 7, 1996, available in LEXIS, News Library, Inpres File(ILSA)
38 Protection of Trading Interests Act, 1980, ch. 11, S 6 (Eng.)see also supra notes 36, 39 and accompanying text(ILSA)
39 See id. (reporting on French legislation intended to block the negative effects of ILSA); see also US Over-reaches, PRESS (London), Sept. 4, 1996(ILSA)
40 ILSA 31

3.2 Characteristics of Multilateral Sanctions

1) Collective Sanctions

The distinctions between jurisdiction of unilateral sanctions or regional arrangements and the United Nations sanctions have become blurred when the objectives of the organizations coincide or overlap. While 'enforcement action' is still committed to the Security Council alone, sanctions designed to change the will of those in control of a state are permitted to the regional organization at least if actual use of force is not contemplated. However still, the sanctions gain in legal authority from being decided upon collectively. The concerted international effort to eliminate apartheid in South Africa demonstrates the powerful capability of multilateral efforts to effectuate reform in troublesome nations.

The frequent use of sanctions by the US and many other countries constitutes persuasive evidence that no clear norm exists in customary law against the use of unilateral or regional sanctions. Nevertheless, legal considerations do play a significant role in regard to economic measures taken by states for political purposes and in the response of other states, private persons and courts. Sanctions are inevitably more powerful when they reflect the decisions of more than a single state, both in respect of the economic pain that they inflict and in respect of their symbolic value in characterizing the target state as an outcast.[41]. And it's obvious that collective sanctions may generate less conflict among nations as it involves multiple parties and have better excuse, at least not considered as choice of unilateral interest, for their actions.

2) Legality and Justification

Vested with the primary responsibility for the maintenance of international

41 United Sanctions and Other Collective Sanctions,, Economic Sanctions without benefit of treaty

peace and security, the collective sanctions may adopt decisions that are binding on all Member States of the organization. By exercising its powers, the collective actions are taken in the name of the Member States. Such an integrated decision and agreement contribute to enhance the legitimacy, stability, and predictability, since the promotion of the rule of law at the national and international levels has been hailed as one of the key objectives. At lease collective actions are more conscious of the international norms such as fair competition, non-discrimination or transparency. If the UN and Members States are to uphold the rule of law and ensure respect for international norms, it implies to go beyond the adherence to the UN Charter by the promotion and integration of principles such as fair competition, non-discrimination or transparency. And this enhances stability within the countries or areas where the collective actions have an impact. Such a framework is necessary not only in order to specifically identify the impact of sanctions measures but also to assess the activities with more objectivity.

3.3 Limitations of Multilateral Sanctions

1) Weak Imposition Power

Jurisdiction to enforce refers to the authority of a state to induce or compel compliance, or to punish non compliance with its laws or regulations, whether through its courts or by use of executive, administrative, police, or other non-judicial action. No treaty or convention governs jurisdiction to prescribe or to enforce. It is generally agreed that international law does set limits on the application by a state of its law. It is also generally agreed that the principal bases of jurisdiction are territoriality and nationality.

The scope of the collective security system established under the United Nations Charter has expanded significantly since the end of the cold war to cover new fields. An increasing linkage between maintenance of peace and economic reconstruction has lead the United Nations to play an unprecedented role within the

economic realm, be it by the widening of the range of measures adopted by the Security Council under Chapter VII of the Charter with economic consequences or through the direct management of economies in post-conflict situations as part of a global strategy to restore peace in war-torn territories. This evolution has brought to light the limits of the existing UN collective security system as a framework to deal with sanctions. UN Security Council cannot actually impose economic sanctions: rather it can call on member states to implement particular sanctions set forth in its resolution pursuant to Article 25. Instead it created a committee to monitor implementation of sanctions.

Also the GATT has had very little impact on economic sanctions, and the efforts by some Contracting parties to use the GATT as a forum to pretest or to secure relief from the imposition of sanctions have all been unsuccessful. Two principal reasons may be adduced for the relative insignificance of WTO to the subject of sanctions. For one thing, many of the targets of sanctions applied by the Western industrial states were not Contracting parties to the GATT-notably the Soviet Union and the People's Republic of China; also North Korea, Vietnam, and Cambodia; Libya, Iran, and Iraq etc. For another, the consensus among the officials and delegates has been that the GATT was always a quite fragile organization, with more than it could handle in disputes about steel and wheat and meat, about subsidies and dumping and safeguards. If it became embroiled in political controversies where it was apparent that the state imposing the sanctions was not acting to secure an illicit economic gain, the GATT would lose its focus, and might well see its most important member-notably the United States-turn its back on the organization.

2) Ambiguity and Discretion Problem

Sanctions often fail to achieve policy goals because they are non-committal signs of weakness. It also raises a number of important questions about the discretion

afforded to states in the interpretation and implementation of Security Council resolutions, the availability of countermeasures for the violation of multilateral obligations, and the exclusivity of the Chapter VII framework for collective security.

As for WTO, Article XXI(b) indicates that invocation of the national security exception is a matter left to the discretion of a sanctioning member. The problem is that, because of this, WTO panel or appellate body is not likely to adjudicate the merits of a non-sanctioning member's attack on the invocation of Article XXI. Moreover, realpolitik demands that Members retain this sovereign prerogative even if additional multilateral checks against abuse are adopted in the future. Therefore, it is likely that a WTO panel, like the **GATT** panel in the United States-Nicaragua case, would interpret its terms of reference narrowly to exclude a ruling on the substantive Article XXI arguments. And in Article XXI, the suggestion that ‘essential security interests’ might be given an objective definition or be subjected to some kind of collective decision-making, was never adopted. One observer suggests the risk for abuses of Article XXI(b) cannot be hedged, writing that "there may be little that can be done about" the "dangerous loophole to the obligations of GATT."[42]

42 JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 748 (1969). But see id. at 752 (referring to GATT loopholes found throughout Article XXI exceptions).

CHAPTER IV. Future Agendas for Multilateral Economic Sanctions

4.1 Reinforcement of Legal Principle

The UN Charter preserved the primacy of the UN Security Council in matters of international peace and security, but said that nothing in the Charter precludes the existence of unilateral sanctions or regional arrangements relating to international peace and security (Art. 52), except that only the Security Council could authorize 'enforcement action', a critical but undefined term in the UN Charter (Art. 53) . It was contended that any measures taken by a state for purposes of foreign policy or national security were contrary to international law. As Professor Barry Carter has written, the frequent use of sanctions by the United States and many other countries constitutes persuasive evidence that no clear norm exists in customary law against the use of economic sanctions. Nevertheless, legal considerations do play a significant role in regard to economic measures taken by states for political purposes and in the response of other states, private persons, and courts.

Efforts to liberalize world trade and the increasing economic interdependence of nation-states necessarily lead to such legislative confrontations. A solution to the problem of extraterritoriality is not a quixotic wind mill campaign. Rather, acceptance of the unique structure of international law that operates without binding force should implicate the need for a regime of comity instead of combat, which threatens to undermine a comity regime already in operation by agreement under the GATT-WTO system.

4.2 Reinforcement of Institutional Framework

1) UN

This growing practice calls for a fundamental change in current analyses of Security Council decision-making. The increasing interaction with the economic field raises difficult questions in terms of the body of principles and rules of international law that are applicable in the collective security context. In that respect, one may ask to what extent the traditional paradigm relying on the UN Charter is sufficient to address the issue of devising a normative framework to encompass that evolution. There is no coherent legal framework to address the economic component of the collective security system. Such a framework is necessary not only in order to specifically identify the economic impact of specific measures but also to assess the activities of the Security Council in the maintenance of international peace and security, particularly in light of principles and rules of international economic and trade law. This would allow collective security actions to be situated within a broader 'economic' framework and enhance respect for the international rule of law by the UN and by all States, be they developed countries or developing countries, strong or weak, big, or small.

Economic sanctions are certainly a favorite collective security tool, but they have serious shortcomings in an increasingly interdependent economic environment. Difficulties related to the indirect effect of economic sanctions have sometimes led affected third States to dismiss the Council's prescriptions due to the inadequacy of compensation mechanisms. Sanctions often impose very high economic costs on economic partners of the target State. Appeals have often been made to have these costs equitably redistributed, but they have rarely been heard. The weaknesses in the provision of assistance to disadvantaged States have often been perceived by these States as unfair. In cases where assistance is non-existent or inadequate, the disadvantaged third State may disregard the sanctions altogether. This attitude seems reinforced when sanction

policies are not revised through a comprehensive approach that includes a consideration of specific international economic relations beyond limited collective security concerns.

2) WTO

To ensure the proper use of Article XXI(b) the WTO and the United Nations Security Council may attempt to increase coordination.[43] For example, a joint WTO-Security Council Committee on National Security Sanctions could be established to render at least a nonbinding, non-precedential opinion in each case that addresses two questions: (1) Does the use of such sanctions comport with the terms of Article XXI(b)?; (2) Are the sanctions reasonable in relation to the threat or actual danger posed? Another, more ambitious, step would be to encourage the use of national security sanctions only after an appropriate Security Council resolution has been adopted. In addition, if the answer to either of the above two questions is negative, then the joint Committee could render an advisory opinion on the use of counter-retaliatory measures by the sanctioned and adversely affected third countries. In sum, it does not seem impossible, and indeed may be necessary, to develop checks that preserve the sovereign national security prerogative of individual WTO Members, while simultaneously highlighting threats to the multilateral trading system posed by abusive assertions of this prerogative.

The two international legal bodies that represent, respectively, the collective security regime and the law of economic relations have almost never been considered in conjunction. Some elements of the international legal system reinforce this disconnect. On one hand, the UN Charter itself is often conceived through a derogatory angle with regard to its Article 103 that establishes the primacy of the Charter over other international treaties in the event of a conflict between Member States' obligations under

43 WORLD TRADE ORGANIZATION, GUIDE TO GATT LAW AND PRACTICE 609-10 10 (6th ed. 1995)

the Charter and their obligations under any other international agreement. On the other hand, collective security may be treated in exceptional terms such as under the GATT/WTO framework: WTO Member States are exempted from the principles and rules of international trade law when they are applying measures taken under Chapter VII of the UN Charter. This approach has been maintained even though the Security Council's scope of activities has gone well beyond traditional economic sanctions to include the adoption of reconstruction measures and transitional administration mandates. Compliance with the UN Charter is not sufficient when dealing with economic issues. Therefore, WTO encompassing UN's guidance will establish more consensus and legitimacy on its decision-making. What emerges from the analysis of current practice is that this integration occurs in an ad hoc manner, and benefits from grey areas and exceptional regimes granted by instruments of international economic law.

CHAPTER V. Conclusions

5.1. Summary

Sanctions continue to be a hotly debated topic in public policy and international relations. The exercise of jurisdiction to prescribe and to enforce economic sanctions remains controversial, with the United States the most assertive, other states resistant to varying degrees. In some instances other industrial states, particularly in Europe but also in Canada and Japan, have been content to have the United States take the lead, but to cooperate in accepting, and even in enforcing, restraints on re-exports intended for states deemed dangerous, even when they have not imposed or enforced their own prohibitions. The more the perceptions concerning the merits of sanctions have differed, the more jurisdictional objections have been raised in formal protests, counter orders, and litigation. Until now, there is no absolute rule that prohibits a state from making economic sanctions effective only in its own territory. Furthermore, when a state attempts to apply its sanctions beyond its own territory, namely extraterritorial implementation of economic sanctions, it triggers tremendous confusion and challenge in an arena where political, economic, and legal considerations interact and overlap. Although multilateral efforts through international organizations such as UN and WTO have their own defects, weak imposition power or ambiguity, these are undoubtedly better resort for sanctions. And we expect that a more elaborate normative framework integrating international economic law and UN should, however, be considered. In this sense, guidance by UN to WTO's decision making on issues including security exception dispute may provide a complementary and appropriate tool to encompass

these concerns.[44]

5.2. Limitations

Choosing ‘economic sanctions’ as a point of functional differentiation has specific consequences and numerous limitations when considering diversities that may arise from different specific treaties. And among all the others parties practicing sanctions, only focusing on UN and WTO may provide constrained scope of discussion on how to improve legal and practical framework for effective sanctions.

[44] See Secretary-General’s address to the General Assembly, 21 September 2004, 59th Session of the General Assembly, New York, available at http://www.un.org/apps/sg/ sgstats.asp?nid¼1088 (visited 28 November 2006)

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국문초록

경제제재의 국제법상 규제 효용성에 관한 연구

경제제재는 국제평화와 안보에 위협이 되는 국가 및 단체에 대해 경제적 수단을 이용한 제재 조치로, 해당 국가의 위협행위에 대한 국제사회의 불만을 드러내고 궁극적으로는 이에 대한 시정조치를 이끌어 내고자 하는 것이다. 냉전 이후 경제제재의 형태와 그 사용이 더욱 빈번해지고 있는데, 특히 UN을 중심으로 한 국제사회뿐 아니라, 국가그룹이나 개인 국가 단위로도 이행되고 있다는 점에 주목할 필요가 있다. 특히나 미국이 주도하여 이란, 시리아, 북한 등 국가들을 적성국으로 지정하고, 이들에게 대한 대(對)테러 조치로써 강력한 경제제재를 시행하고 있다.

그러나 경제제재가 국가간의 경제행위를 제한하는 조치라는 점에서 UN과 같은 국제적 단위 조치의 경우 회원국에 대한 동의를 기반으로 하고 있기에 국가간의 충돌이나 경제, 무역 분쟁의 소지가 최소화 되는 반면, 미국과 같이 개별 국가가 단독 제재를 시행할 경우 이에 직간접적인 영향을 받게 되는 국가들에 대한 어떠한 합의나 보상조치가 없어 분쟁의 소지가 다분하다.

이 논문에서는 빈번해지고 있는 경제제재 조치에 따라, 이와 같이 다양해지고 있는 경제재재 형태를 소개하고, 다양한 경제제재 형태 특히 개별국가의 단독경제제재와 국제적 경제제재에 대한 법적 효용성에 대해 분석하고자 한다. 주요하게는 국제적 경제제재가 다양한 한계를 드러내고 있음에도 불구하고 단독경제제재가 안고 있는 더 큰 문제점으로 인해 결국은 국제적 경제제재 강화되는 방향으로 나아갈 수 밖에 없음을 시사하고, 이에 국제적 경제제재가 그 한계점을 극복하기 위해 어떤 개선방안이 있을지 모색해보고자 한다.