

## NAVIGATING THE LEGAL GRAY ZONE: THE DILEMMA OF UNILATERAL SANCTIONS IN GLOBAL DIPLOMACY

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**Abstract:** In the contemporary global landscape, the unilateral imposition of sanctions by sovereign states, without the endorsement of international organizations or established international law, has become increasingly prevalent. This trend, characterized by excessive proliferation, presents a complex challenge to the international community. The primary enforcers of such sanctions are the United States and the European Union, with the latter having listed 34 international entities as subjects of sanctions. The Office of Foreign Assets Control (OFAC) within the U.S. Department of the Treasury, in 2022 alone, has initiated 100 sanction actions encompassing 82 countries and regions, targeting 2204 individuals and entities. Additionally, countries like the United Kingdom, Canada, and Australia have also resorted to unilateral sanctions as a tool for implementing their foreign policies. This growing reliance on sanctions raises significant concerns, given the lack of clear legal boundaries for unilateral sanctions in international law. Unilateral sanctions do not fit within the well-defined framework of international law and have not been precisely defined by any authoritative document. Consequently, the inherent ambiguity in this legal realm poses a substantial threat to international peace and security. This article, in response to this critical issue, adopts a methodical approach to assess the legality of unilateral sanctions. It initiates the analysis from the vantage point of United Nations Security Council sanctions resolutions, subsequently delving into the examination of unilateral sanctions in the context of international treaties and customary international law. The objective is to establish well-defined legal parameters for unilateral sanctions within contemporary international law.

**Keywords:** Unilateral Sanctions, International Law, United Nations Security Council, Legal Boundaries, Global Governance

### Introduction

Currently, it has become increasingly common for sovereign states to unilaterally impose sanctions without authorization from the United Nations or other international organizations and relevant international law, and there is a growing trend of excessive proliferation. The United States and the European Union are the main enforcers of sanctions in today's international system. As of the writing of this article, there are 34 international entities that have been included in the sanctions list by the European Union. The Office of Foreign Assets Control (OFAC) under the U.S. Department of the Treasury alone has taken 100 sanction actions in 2022, involving 82 countries and regions, and targeting 2204 individuals and entities. Countries such as the United Kingdom, Canada, and Australia have also adopted unilateral

sanction measures, frequently using them as a means to implement their foreign policies. [1] While sanctions are frequently employed, the lack of clear legal boundaries for unilateral sanctions in international law has become increasingly apparent, making the situation more complex. Until today, sanctions do not fall within the strict definition of international law and have not been given a precise definition by any authoritative document. Therefore, some scholars point out that the extreme ambiguity in this legal field poses a serious threat to international peace and security. [2]

In light of this, this article will start from the perspective of United Nations Security Council sanctions resolutions and then systematically examine the legality of unilateral sanctions from the perspectives of international treaties and customary

international law. The aim is to define the legal boundaries of unilateral sanctions in contemporary international law.

### **1. Differentiating between Multilateral Sanctions and Unilateral Sanctions and Analyzing their Legality.**

The issue of the legality of sanctions starts with whether the sanctioning action is implemented under the auspices of the United Nations or carried out autonomously by a single country or group of countries.

[3]

According to its international legal nature, sanctions implemented by a country or group of countries can be divided into "multilateral sanctions" authorized by the United Nations and "unilateral sanctions". [4]

In order to address acts of threat, disruption of peace, or aggression, Chapter VII of the United Nations Charter grants the Security Council the authority to take non-military "measures" to maintain or restore international peace and security when such acts are determined to exist. Article 41 of the Charter is widely regarded as the legal basis for Security Council sanctions. Although the Charter itself does not use the term "sanctions" but opts for the more neutral expression of "measures," these measures are universally understood to be sanctions. Security Council resolutions have also directly referred to these measures as "sanctions." In Resolution 661 (1990), the Security Council explicitly stated that it decided to impose economic sanctions in accordance with Chapter VII of the UN Charter. Furthermore, in Resolution 1929, it made it clear that it did not intend to compel any country to take actions beyond the scope of the resolution. Therefore, multilateral sanctions are non-military coercive measures taken by a country or group of countries within the explicit authorization of the United Nations, limited to the scope of the relevant sanction resolutions, to compel a member state to change its policies. On the other hand, unilateral sanctions, also known as "autonomous sanctions," are non-military coercive measures taken .[5]

In contemporary international legal mechanisms, the legal basis of multilateral sanctions is Security Council resolutions, and due to the reflection of the autonomous will of both the imposing and targeted countries, their overall legality is generally undisputed. However, when it comes to unilateral

sanctions frequently adopted by sovereign states, their legality remains highly debated, and the boundaries of their legitimacy are relatively ambiguous.

The distinction between multilateral sanctions and unilateral sanctions is not based on the literal number of countries involved in the sanctioning action but rather on whether they have received explicit authorization from the Security Council. Even if implemented by a group of countries or a country coalition without authorization, such measures are considered unilateral actions in nature. They are fundamentally different from multilateral sanctions implemented by the Security Council on behalf of the international community, and their legitimacy may be significantly diminished. [6]

### **2. Analysis of the International Legality of Unilateral Sanctions**

Given that unilateral sanctions cannot gain legality from Security Council resolutions, the issue of their legality needs further review and analysis. International law does not generally prohibit unilateral sanctions.

Currently, there are no explicit provisions in the codified international legal documents that prohibit unilateral sanctions, and no international customary law prohibiting unilateral sanctions has yet been formed. [7]This provides a certain basis for the legality of unilateral sanctions under international law. Article 2, paragraph 4 of the United Nations Charter prohibits its member states from using "threat or force" in international relations. "Force" can be understood as "military force", but it can also be interpreted as "coercion", which can easily cause controversy. In 1945, the Brazilian representative suggested at the United Nations Charter conference that "economic coercion" be explicitly included in the scope of the United Nations Charter's prohibition, but this proposal was rejected. [8]

Translation to English: Since then, this legal provision has been explicitly interpreted as prohibiting states from using threats or force, but it does not include sanctions. In 1970, the Special Committee on the Declaration of Principles of International Law encountered the issue of whether "economic coercion" should be prohibited when drafting legal principles. Some representatives suggested that "economic coercion" should be included in the first principle of prohibition of force, but the committee did not include it in the scope of the prohibition of legal principles.

[9]From this, it can be seen that both the United Nations Charter and the Declaration of Principles of International Law only prohibit "military force", and do not prohibit "economic coercion". The WTO adopts a restrictive rather than prohibitive attitude towards unilateral sanctions. The exceptions under the WTO rules reserve certain legal space for unilateral sanctions. In a sense, it seems to have become an international consensus that unilateral sanctions are not prohibited.

The International Court of Justice explicitly pointed out in its judgment in the "Lotus case": "...a wide measure of discretion, which is only limited in certain circumstances by prohibitive rules; as regards other cases, every state remains free to adopt the principles which it regards as best and most suitable...". The "Lotus case" established the so-called principle of international law "what is not prohibited is allowed", which has had a profound impact on the evolution of international law. Therefore, in the absence of prohibition by international treaties and customary international law, states have the right to exercise any sovereign power. [10] The International Court of Justice also demonstrated a similar attitude in its judgment in the "Military and Paramilitary Activities case": "...In the absence of treaty commitments or other specific legal obligations, a state is not obliged to continue a particular trade relationship beyond the time it deems appropriate;...The cessation of economic aid is more unilateral and voluntary in nature, and can only be seen as a violation under special circumstances". Under general international law, a country indeed has no obligation to maintain economic relations with other countries. In other words, when unilateral sanctions are not within the scope of international law prohibition, a country does theoretically have the right to impose sanctions against other countries and entities based on its domestic law, and to use this as a diplomatic tool to achieve policy objectives. [11]

Translation to English: In conclusion, unilateral sanctions have a certain legitimacy under international law, but this does not mean that every unilateral sanction necessarily conforms to existing principles of international law and international treaties. Whether they are legal requires further exploration.

### 3. Legality Analysis Based on International Treaties

"Treaties must be obeyed" is an important principle recognized by the international community. This principle is also the cornerstone of credit in international cooperation between nations. Treaties stipulate the rights and obligations of the contracting parties, thereby restricting the sovereignty of the contracting parties and their exercise of sovereignty, as well as narrowing the free space for national action. This may call into question the legality of unilateral sanctions under the treaty framework.

#### 3.1 *Treaties Possibly Violated by Unilateral Sanctions*

The main sanction measures currently implemented by a country or group of countries include trade sanctions, asset freezes, financial transaction restrictions, etc. The rules that may be violated can be divided into treatment clauses that indirectly grant rights to contracting parties, such as most-favored-nation treatment; and right clauses that directly grant specific rights to other contracting parties, such as the obligation for all countries to eliminate quantity restrictions on import and export goods.

The World Trade Organization ("WTO") is one of the most important international economic organizations today, with its members accounting for 98% of global trade. The multilateral constraint mechanism centered on the WTO system provides important legal protection for economic globalization and aims to protect free trade. Thus, WTO trade rules can be said to be the international treaties most closely related to unilateral sanctions and most likely to impose limitations or even prohibitions on them. This is especially evident in the field of trade sanctions.

The field of trade sanctions often involves many WTO trade rules. Considering the diverse international trade situations in reality and the differences in the sanction policies implemented by various countries, it is difficult to fully list the WTO rules that trade sanctions may violate. The WTO rules that are easily violated in the trade field include the elimination of quantity restrictions, most-favored-nation treatment, non-discriminatory treatment, and market access, among others.

According to Article XI:1 of the General Agreement on Tariffs and Trade ("GATT"), WTO member countries are prohibited from imposing quantity restrictions on the import and export of products

through "quotas, import or export licenses, or other measures", i.e., each member country has a general obligation to eliminate quantity restrictions on imports and exports.

This obligation includes all measures that prohibit or restrict the import and export of goods. When the sanctioning country refuses to export goods to the sanctioned country or prohibits the import of any goods related to the sanctioned country, the sanction restricts the free flow of goods between countries, constituting a quantity restriction, thereby violating Article XI of the GATT. Under the General Agreement on Trade in Services ("GATS"), member countries have an obligation to open market access. Sanctions that render the goods of the sanctioned country nearly "zero quota" in the sanctioning country should be regarded as violating the market access commitment, constituting a violation of Article XVI of the GATS.

Agreements such as the GATT and GATS also stipulate most-favored-nation treatment. According to the agreement, member countries should unconditionally give all contracting parties the most-favored-nation treatment for the import and export of "like goods and services". The traditional method for determining "like products" is based on (1) the characteristics, nature, and quality of the product; (2) the end use of the product; (3) consumer tastes and preferences; and (4) the tariff classification of the product. However, once there is discrimination based on origin or a situation where comparison of like products is impossible, such as when imports are prohibited, it is assumed to meet the product similarity hypothesis. Trade sanctions usually target only the sanctioned country without imposing similar restrictions on other countries. In this case, the products or services of the sanctioned country are discriminated against and treated differently, which often constitutes a violation of the requirement for most-favored-nation treatment.

Besides, asset freeze measures can easily constitute illegal expropriation and violate the private property rights of the nationals of the other country, unless they meet specific conditions such as consideration for public interest. Transportation restrictions may also likely violate Article 5 of the GATT, which guarantees transit transportation. In short, whether a violation of the relevant agreement rules has occurred can only be analyzed and judged after comparing the

specific sanctions implemented by the sanctioning country with the treaty obligations or commitments it has undertaken.

### 3.2 *The defenses that the sanctioning country may invoke — exceptions to the treaty*

The core of unilateral sanctions is trade and economic sanctions, and most of the economic and trade treaties that might impose constraints or limitations on the sanctioning country are based on the WTO agreement, or the sanctioning and sanctioned countries themselves are members of the WTO. Therefore, this article focuses on examining the WTO clauses. As mentioned earlier, the WTO only takes a restrictive attitude towards unilateral sanctions, and the WTO rules allow member countries to take unilateral measures when exceptional circumstances are met. These rules are referred to as exception clauses, divided into "general exceptions" and "security exceptions," providing possible defenses that the sanctioning country could invoke.

In terms of restrictions, the security exception can only be invoked if the measure is 'necessary' to maintain 'essential security interests'. This involves interpreting the meaning of 'essential security interests' and determining who and how 'necessary' is determined. According to a WTO panel report, 'essential security interests' can be interpreted as defense or military interests and interests in maintaining law and public order. The interpretation of 'it considers' is highly controversial. The International Court of Justice once indicated in the 'Nicaragua case' that the Court has jurisdiction to determine whether the measures taken by one party fall within the scope of the security exception, on the grounds that the text of the clause involved in the case does not use 'it considers'. This suggests that the security exception under the WTO Agreement seems to grant states ample self-judging rights. But can self-judging exclude the review and intervention of the court?

The relationship between unilateral measures and the essential national security interests should at least meet the minimum requirement of plausibility; otherwise, many countries may use this to evade their trade obligations, and even reject third-party reviews, leading to the abuse of discretionary powers.

Therefore, when unilateral sanctions have a strong relevance to security exceptions and meet the

necessary restrictions, the sanctioning country can invoke the security exceptions as its defense. Although the security exceptions clause is seldom successfully invoked in practice, it doesn't prevent the sanctioning country from having the right to use it as a defense.

#### **4. Elimination of the Illegality of Unilateral Sanctions: Countermeasures.**

At the international law level, a state harmed by an internationally wrongful act can resort to proportionate, temporary, and reversible countermeasures against the wrongful act. In this case, countermeasures are a right of self-protection for the victim state, and the illegality of the action can be excluded. The 'Articles on State Responsibility' stipulate a series of substantive and procedural requirements for countermeasures.

##### **4.1 Substantive Requirements for Countermeasures**

From a substantive perspective, countermeasures should satisfy the following conditions: (1) the implementing country is a victimized nation whose legitimate rights have been infringed upon by the illegal actions of another country; (2) the measure is only implemented against the country responsible for the international unlawful act; (3) the effect of the countermeasures should be proportional to the damage suffered by the state; (4) the purpose of the countermeasures is to induce the wrong-doing country to comply with its obligations, therefore, such measures should be temporary and reversible.

The damage suffered by a country includes any material or mental harm caused by the international unlawful acts of another country. The determination and attribution of international unlawful acts have been detailed in the second chapter of the "Draft Articles on State Responsibility", which will not be elaborated further here. The proportionality and reversibility requirements of countermeasures are difficult to judge as there are currently no clear unified standards. According to the arbitration of the "Air Services Agreement" case, countermeasures must have a certain degree of equivalence to the alleged breach of contract, determined through approximate judgment. In disputes between countries, not only should the damage suffered by the relevant countries be taken into account, but also the importance of the principle issues raised by the alleged breach of conduct. Despite the ambiguous standards, the arbitral

tribunal believes that the requirement of proportionality is violated only in cases of obvious disproportion, suggesting that the determination of proportionality is relatively lenient. It is because of the requirement of proportionality that countermeasures are not punitive measures and do not grant a country the right to impose punishment on another. As the European Community once emphasized, "It should be clear that the arbitrator cannot increase the amount of countermeasures to make them punitive." Despite this, unilateral sanctions that exceed a certain extent can still constitute countermeasures, but the implementing country must bear the corresponding legal responsibility for the excess part.

According to Article 49 of the "Draft Articles on State Responsibility", the purpose of countermeasures is to induce the state engaging in unlawful actions to stop its illegal activities and to continue to fulfill its international obligations. Therefore, the state implementing the countermeasures is only allowed to temporarily suspend its international obligations, and should adopt measures that could lead to the resumption of relevant obligations by the state committing the unlawful act, as far as possible. It should be noted that only the measures must be reversible, not necessarily the effects. This is because it is impossible to guarantee that all effects of the countermeasures can be reversed after stopping the countermeasures. The phrase "as far as possible" in paragraph 3 indicates that if the victimized state can choose among several lawful and effective countermeasures, it should select the one that allows the obligation, which has been suspended due to the countermeasures, to be resumed.

#### **5. Conclusion**

As can be seen from the above, the legality of unilateral sanctions leaves a large room for dispute. The specific contents of sanctions in reality vary greatly, and cannot be directly adjudged as legal or illegal. Rather, they should be systematically and progressively analyzed and explored as outlined above.

Clarifying the legal boundaries of unilateral sanctions not only provides a legal basis for dealing with the unilateral sanctions of other countries, but also contributes to taking legal and effective countermeasures at the level of international rule of law.

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