Secondary Sanctions: A Weapon out of Control? Part III: Looking beyond the WTO – possible avenues to raise a Judicial Challenge against Secondary Sanctions

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Judicial remedies at the domestic and international level

In our two previous posts we examined the legality of secondary sanctions in light of customary law on the exercise of State jurisdiction, on the one end (here), and conventional law, specifically the IMF Articles of Agreement, on the other hand (here). Having established that, depending on their nature and implications, secondary sanctions may indeed be contrary to international law, the next question is what affected third States can do in response. As is well-known, States have begun exploring a range of measures in response to US secondary sanctions, such as the re-activation of the EU Blocking Statute or the creation of the INSTEX mechanism to facilitate trade with Iran, although none have been very successful so far. Leaving aside these *non-judicial* remedies (on which see e.g. here), one may also wonder what *judicial* remedies are available.

Some authors have suggested that the most promising route to challenge US secondary sanctions would be to bring the matter before US domestic courts (see here), including by relying on the 'presumption against extraterritoriality' developed in the case-law of the US Supreme Court (see e.g. here). On closer scrutiny, however, it is doubtful such demarche would be successful. Recall, for instance, that the presumption is of no avail where the extraterritorial scope of the sanctions is clear from the instruments' text (as is often the case), or that, according to the last-in-time rule, in the US domestic legal order a later Statute will override conflicting provisions in an earlier treaty. Attempts to directly challenge the legality of US sanctions before domestic courts in third countries would presumably run aground once State immunity is considered.

Turning to the international level, the most obvious forum would be the WTO Dispute Settlement Body, which is also where the then EC initiated proceedings following the adoption of the 1996 Helms-Burton Act – at least until it agreed to terminate that procedure following a diplomatic agreement with the US. Another option would be to trigger the dispute settlement procedures included in applicable BITs or FCN treaties concluded by the US. Both options nonetheless come with important limitations. First, the claimant party would have to explain why secondary sanctions entail a breach of the treaty invoked – which is far from obvious and requires a case-by-case assessment of the measures at stake, as explained in our previous blog post (here). A broader

appraisal of the legality of the sanctions, e.g., under the customary rules on jurisdiction, would be excluded. Second, the 'security exception' traditionally found in these BIT/FCN treaties, as well as in the WTO agreements, poses an important – though not necessarily insurmountable – obstacle. From an EU perspective, lodging a WTO claim would have the benefit of acting *en bloc*, whereas employing the dispute settlement of provisions under existing FCN or BIT treaties would require a single claimant State (or foreign investor) to take the lead and potentially face the full wrath of the US government's discontent. On the other hand, the current paralysis of the WTO Appellate Body may counsel States not to further test the resilience of the WTO dispute settlement system by bringing such politically sensitive claim.

Circumventing the security exception?

An alternative approach to challenge US secondary sanctions would be to have the UN General Assembly request an advisory opinion from the ICJ pursuant to article 96 of the UN Charter and article 65 of the ICJ Statute. Such approach would make it possible to 'circumvent' conventional security exceptions and to obtain a broader assessment of the legality secondary sanctions under general international law (not confined to their compatibility with specific treaty clauses).

Given the broad opposition to US secondary sanctions throughout the international community, an attempt to trigger the advisory procedure before the ICJ is likely to muster the necessary votes among UN General Assembly members (a single majority would do the trick). The Court's track record further makes it extremely unlikely that it would decline to answer a request for an opinion from the UNGA (consider e.g. the following blog post).

Still, caution is warranted. First, while many states have denounced secondary sanctions as contrary to customary rules on jurisdiction, the reality may be more complex in that—as explained in our first blog post —depending on the underlying jurisdictional nexus (use of the US dollar, trade in US-origin goods, etc) and the consequences attached to the specific secondary sanctions (criminal prosecution, exclusion from the US financial market, etc), certain measures will breach customary international law while others will not. The implication is that the precise phrasing of a possible request for an advisory opinion should be considered carefully if one wishes to avoid ending up with an opinion that actually legitimates far-reaching secondary sanctions. Second, it is no secret that many countries in the Global South are opposed not only to *secondary* sanctions, but also to non-UN *primary* sanctions more generally, as debates within the UN General Assembly amply demonstrate (see here). Such countries might be inclined to broaden the scope of the question to be put before the Court so as to invite more a general scrutiny of the legality of non-UN sanctions. This may not be in the interest of many western countries that have becoming active 'sanctions senders' in recent years (and in particular the EU). It follows that, while the advisory procedure offers a potentially useful instrument, it may also be a 'blunt' instrument, and one which may take a life of its own in light of the divergent legal convictions and political agendas of UN members. A potential solution to find a middle

ground between the competing views on the legality of economic coercion in the Global South and the West could be to confine the scope of the procedure to the legality, under international law, of the Helms-Burton Act; an act with obvious extraterritorial features and which is condemned on a near-universal basis by the UN General Assembly year after year (see, for instance, here).

For those that question the relevance or wisdom of a non-legally binding opinion – even one emanating from the highest judicial organ of the UN – one might wonder, by way of further thought experiment, whether there are any other treaties containing a broadly framed compromissory clause and that do not contain a security exception. A little-known, yet intriguing category of treaties in this context are the post-WWII 'Economic Cooperation Agreements' concluded between the US and around a dozen of Western European countries (see here). These treaties, which technically remain in force today (see here), relate to relief operations and economic assistance to post-WWII Europe. Interestingly, while the substantive rights and obligations are different from those ordinarily found in FCN treaties and BITs and ostensibly have no relevance in a sanctions context, the treaties also contain complex compromissory clauses, which potentially provides for access to ICJ dispute settlement.

In essence, these clauses enable each State party to initiate contentious proceedings before the ICJ, as part of its right to exercise diplomatic protection, when one of its nationals suffers damage as a result of a governmental measure of the other party. The type of 'governmental measures' is not circumscribed, and could potentially encompass a range of secondary sanctions instruments. Prior exhaustion of local remedies is a prerequisite. A critical observer might object that recourse to the ICJ is excluded due to the fact that the clauses concerned refer to the extent to which the parties have accepted the compulsory jurisdiction of the ICJ under article 36 of the ICJ Statute, and that—as is well-known—the US revoked its declaration accepting compulsory jurisdiction in 1985 (here). This would indeed be the end of the road under some agreements, such as the US-UK Economic Cooperation Agreement (see here), where the compromissory clause can be invoked only 'for such period as the declarations … are in effect' (Art. X). At least in some agreements, however, the clause refers to the 'recognition … heretofore given to the compulsory jurisdiction' of the ICJ (see e.g., Article X of the 1948 US-Belgium Agreement or Article X of the 1948 US-France Agreement – see here). In theory at least, the word 'heretofore' could be read as referring to the extent to which the respective parties agreed to ICJ compulsory jurisdiction *at the time of* adoption of the Economic Cooperation Agreement. If (!) this interpretation is adopted, it would in principle be possible to invoke the 1946 US declaration recognizing compulsory jurisdiction (in combination with the original parallel declaration of the other party – say, Belgium or France) to trigger ICJ proceedings, notwithstanding the US (or France) having subsequently revoked this declaration.

In any case, it must be recalled that even if one adopts this interpretation, recourse to the ICJ still presupposes that e.g. a Belgian or French company suffers damage pursuant to US secondary sanctions, and that it first tries its luck before the US courts.

In addition, subsequent ICJ proceedings would be limited to alleged internationally wrongful conduct vis-à-vis the company concerned, albeit the outcome of such proceedings could, of course, set an important precedent and provide useful guidance on the outer limits of the exercise of jurisdiction by states in the sanctions context. Two big 'ifs' remain of course: first, that a broad interpretation of the compromissory clauses be adopted, and second, that the US government does not suddenly get the idea of formally terminating the treaties concerned (which would hardly be a surprising move, given the current administration's hostile attitude towards international dispute settlement).