Effectiveness as a constraint to international trade sanctions legality

1. Introduction

Growing awareness of risk of extinction of human kind due to technology advancements, unless lesson of peaceful cooperation was properly learned by all actors at the international stage, led gradually to imposition of legal restrictions upon the use of armed force. Therefore, deprived of an important foreign policy instrument, whereas international law lacks coercive implementation mechanisms, States were compelled to look for other self-help instruments. Economic coercion, subject to fewer legal restraints, seemed particularly apt to those ends.

XX century witnessed, however, an unprecedented expansion of international law. Most notably international human rights law developed dynamically. The shift from a State-centric perspective to an approach concerned rather with an individual human being further limited freedom of recourse to coercion in international relations. States are now legally responsible not only for direct effects of their conduct, but also for a collateral damage, not necessarily intended or foreseen. Humanitarian costs analysis became an indispensable part of sanctions planning, implementation, monitoring and adjustments. Therefore depending on a sort of sanctions, whether general or targeted, efficiency thereof may constitute a cost or an benefit in a proportionality test and thus possibly a constraint to sanctions legality.

In the paper I define first the notion of trade sanctions for the purposes of the paper, to avoid confusion inherent to a research on the edge of two legal areas (public international law and international economic law) both defining it differently. Subsequently I present a framework of a analysis of legality of trade sanctions use. I point out where and what sort of a proportionality test shall be applied; I also indicate where an efficiency factor shall be considered in the test. Finally I highlight some issues concerning trade sanctions economic analysis, which is indispensable for the purposes of proportionality tests.

2. Notion of trade sanction

For the purposes of the paper the notion of trade sanction denotes a coercive measure undertaken by a State, a group of States or an international organization, consisting of trade coercion. Trade sanction is adopted in response to an abuse of one’s interests, legally protected or not, in view of influencing unfriendly conduct of a targeted State.

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Trade sanctions may be implemented directly against a targeted State (or its institutions) or indirectly against its nationals. Sanctions may influence third subjects’ economic relations with the targeted State. Trade sanctions are not applied for economic profit – application thereof may induce significant costs for the sanctioning.

Trade sanctions may consist of unfriendly, yet legal actions. Where use of a particular sanction instrument is prohibited under international obligations of the sanctioning subject, sanctions may be only applied to extend in which wrongfulness of such actions is precluded under circumstances of the case; such sanctions may in particular take form of reprisals or countermeasures.

Trade sanctions may consist of positive actions against a sanctioned State (such as imposing trade controls) or negative (for instance denial of certain trade benefits).

The above understanding of the trade sanctions notion, increasingly shared by scholars\(^1\) and states’ organs applying trade sanctions\(^2\), raise twofold difficulties on the

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\(^2\) The US Department of the Treasury states that economic and trade (*sic!*) are based on US foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States (Office of Foreign Assets Control, *Mission*, [http://www.treas.gov/offices/enforcement/ofac/mission.shtml](http://www.treas.gov/offices/enforcement/ofac/mission.shtml)). Her Majesty's Treasury provides following examples of reasons for adoption of financial sanctions: encouraging a change in the behaviour of a target country or regime, applying pressure on a target country or regime to comply with set objectives, enforcement tool in case of threat to international peace and security where diplomatic efforts have failed, prevention and suppression of terrorism financing (HM Treasury, *Sanctions and the role of the Asset Freezing Unit*, [http://www.hm-treasury.gov.uk/fin_sanctions_role.htm](http://www.hm-treasury.gov.uk/fin_sanctions_role.htm)). Finally the French Direction générale du Trésor et de la politique économique laconically states that trade sanctions are “un instrument de la politique étrangère de la France” (Direction générale du Trésor et de la politique économique, *Sanctions financières internationales*, [http://www.minefe.gouv.fr/directions_services/dgtpe/sanctions/sanctions.php](http://www.minefe.gouv.fr/directions_services/dgtpe/sanctions/sanctions.php)).
international law grounds: in terms of relations between sanctions and other means of coercive dispute settlement (A), but also between sanctions and punitive measures (B).

(A). In international law a sanction denotes a self-help coercive measure adopted by an international organisation. Sanctions are distinguished from individual self-help instruments: retorsion, reprisals and countermeasures. This distinction between institutional and


4 An unfriendly, yet legal action undertaken in response to a same sort of act or decision, for the purposes of compelling the other party to rescind such a conduct. Retorsion amounts to application of the reciprocity principle in a conflict situation, Lauterpacht H. (ed.), Oppenheim’s International Law. Volume II, Longmans, London 1948, p. 134, Ehrlich L., Prawo Międzynarodowe, Wydawnictwo Prawnicze, Warszawa 1958, p. 433. Use of retorsion is subject to limitations according to principles of necessity and proportionality, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 14. Adoption thereof must be in accordance with general principles of international law, such as non-intervention or respect for fundamental human rights. Retorsion may consist of: cease of economic assistance, suspension or reduction of trade or investments, or denying of trade benefits. Retorsions shall be suspended upon halt of an action, in response to which it was adopted, Lauterpa ch 1948, p. 136. Also: supra Cassese, 363.


6 Countermeasure consists of non-performance by a victim of an internationally wrongful act of a treaty obligation towards a State legally responsible for that wrong. It is undertaken to procure cessation of and reparation for the wrongful conduct (ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts 2001, articles 49 – 53 and commentary thereof). To be justifiable, countermeasure “must be taken in response to a previous international wrongful act of another State and must be directed against that State”, Gabcikovo-Nagymaros Project (Hungary vs. Slovakia), Judgment, I.C.J. Reports 1997, par. 83. Some scholars even state that countermeasures allow to disregard international obligations towards the wrongdoer, Cassese A., International Law, Oxford University Press, New York 2001, p. 234. Countermeasures must be adopted in accordance with general prohibition of the use of force under the UN Charter, fundamental human rights and freedoms, humanitarian law
individual measures reflects two tendencies of international law development. First, mentioned above, the gradual limitation upon the use of armed force for the common security reasons. Measures available to States acting individually not only are restricted in comparison to institutional instruments, available for instance at the United Nations plane, but also States bear the risk of international legal responsibility, if their assessment concerning wrongfulness of the other party’s previous conduct or the choice of self-help measures was mistaken or inadequate. Secondly, foundation of the United Nations, an organisation competent in international peace and security matters, evidences a move from a “primitive legal system” of international law, where a State-victim to an abuse was left on its own, towards a more developed system of centralised control of coercive measures.

Inception of institutional sanctions and individual countermeasures led some commentators to belief that those are the only coercive self-help measures of contemporary international law. Others distinguish coercive measures, depending on nature of a wrongful act in question and capacity States concerned to cooperate within an institutional framework. Notwithstanding importance of this debate, whether retorsion and reprisals still belong to international law aside countermeasures or not, each time situation falling outside the scope of legal regulation are to be found. For instance self-help measures adopted not only to halt a wrongful conduct but also for prevention purposes (general or individual) or to punish the wrongdoer do not meet requirements for any of those categories. Equally the so-called “hybrid cases” undermine a rigid distinction between individual countermeasures and institutional sanctions, sometimes countermeasures are applied within an international organisation framework, while on the occasions States enjoy considerable freedom in choice of means and methods of sanctions merely “authorized” by an international organizations.

Therefore neither the former nor the latter can be classified as individual or institutional and peremptory norms of international law. Countermeasures must be proportional, directed exclusively against the wrongdoer and shall end upon the cessation of the wrongful act, Arbitrage sentence Air Services Agreement of December 9, 1978 (in:) Harris D.J., Cases and Materials on International Law, Sweet & Maxwell, London 1991, p. 11.

7 Kelsen H., Czysta teoria prawa (Pure Theory of Law), Gazeta Administracji i Policji Państwowej, Warszawa 1934, p. 46.
8 Supra Czapliński, 2004, pp. 660-662. Similarly Cassese, 2006, p. 20. This is particularly doubtful in terms of retorsion, legal ex definition, which couldn’t have been proscribed due to creation of countermeasures, since it would amount to an unauthorized limitation upon States’ sovereignty, contrary to the very concept of international law.
11 For instance obligations of the WTO members under articles 22(1), 23 (2)(a) of the Dispute Settlement Understanding.
12 Most notably this is the case of sanctions applied at will on the basis of UN Security Council general resolutions, such as KFOR NATO mission in Kosovo authorized under SC Resolution 1244 (1999).
measures. This evidences inconsistency of international law terminology – some areas are not covered contained, whilst some notions overlap. Most importantly it seems that international law does not reflect manner in which States and international organizations apply coercive measures.

(B). Another ambiguity concerning use of the trade sanctions notion in international law relates to character of a wrongful act, which justifies undertaking those measures. A sanction in its narrow meaning denotes a punishment for non-obedience of law. In other word it is coercion exceeding a level necessary for cessation of the wrongful conduct. Sanctions in broader sense include all sorts of measures of coercive execution of international responsibility. In international law, however, they do not have this punitive connotation. For instance decisions of the UN Security Council are frequently referred to as sanction, just as were measures adopted under the Covenant of the League of Nations. This raises doubts, since the Security Council acts for the maintenance of international peace and security and not as a body competent to punish States for violations of international law, which is not necessarily the same. Aware of dissonance, some authors believe that the UN Security Council trade sanctions do not constitute a “direct” consequence to an international law violation, as they are adopted in response to a danger to international peace and security, whereas others do not address the problem directly, stating merely that the Security Council plays at once a role of gendarme et justiciers, responsible for peace and obedience to law, both functions being inseparable. Whereas for the purposes of the paper it is not necessary to enquire any further upon this matter, it shall be noted that a broad definition of trade sanctions encompassing reaction to unfriendly, yet legal conduct is not the most popular among scholars.

Finally certain remarks concerning notions of force and aggression seem indispensable. The distinction between individual and institutional coercive measures is closely related to limitations upon the right to use of armed force, generally enjoyed only to international organisations. All Member States of the United Nations are obliged to refrain

17 Supra Bennoua, 2002.
19 With an exception of the inherent right of individual or collective self-defense in response to an armed attack (UN Charter art. 51) and the use of force upon an authorization by the UN
from “the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”, the latter including cooperation in solving international problems of an economic character and in promoting and encouraging respect for human rights and fundamental freedoms. Accordingly a definition of an aggression, possibly including nowadays also economic coercion, and limitations upon the use thereof in accordance with international law of human rights, humanitarian law and principle of economic cooperation constitute a legal framework for recourse to trade sanctions. It is, however, difficult to fill those general notions with necessary legal precision.

While the UN General Assembly interprets broadly the notion of illicit recourse to force, stating that the scope of prohibition includes economic coercion, a possibility of widening interpretation of the prohibition seems to have been limited already during negotiations on the UN Charter, following rejection of a Brazilian initiative of proscribing recourse to economic coercion similarly to prohibition on the use of armed force. The Security Council continuously reinterprets those key notions following geo-political changes, from 1966 when an independence declaration of a racist government of Rhodesia was found to threaten international peace and security, until nineties when trade sanctions were adopted in response to gross human rights violations in Iraq, humanitarian crisis in Somalia, or obstruction of democratic election in Haiti and Sierra Leone.


20 UN Charter, articles 2(4) in relation to 1(3).
21 In Resolution 2625 (XXV), *Declaration on Principles of International Law Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations*, the General Assembly recalled that “the duty of States to refrain in their international relations from military, political, economic or any other form of coercion aimed against the political independence or territorial integrity of any State”, that “all forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law” and also that “no State may use or encourage the use of economic political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind”. The General Assembly presented similar approach on numerous occasions, such as Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 (GA Resolution 1904 (XVIII), Declaration on Permanent Sovereignty over Natural Resources (GA Resolution 1803 (XVII) or Charter of Economic Rights and Duties of States (UN Doc. A/RES/39/163).
While widening of definition of aggression and illegal coercion is a fact, opponents of this trend noticed that the prohibition of threat or use of force under article 2(4) of the Charter shall be read together with the inherent right of self-defence in case of an armed attack (UN Charter article 51). If the former was to encompass economic coercion, victims of such an aggression would be left without means of self-defence.\textsuperscript{24}

For all mentioned reasons it seems reasonable to adopt such an trade sanctions definition, that is they: (1) shall be distinguished from sanctions as an international law instrument, the latter being one of legal regimes under which they can be applied, (2) exceed the scope of coercive measures of dispute settlement under international law, (3) shall be distinguished from penal sanctions.\textsuperscript{25}

3. Application of trade sanctions in international law

Since the notion of trade sanctions, as defined for the purposes of the paper, is not to be found in international law, yet it reflects the actual practice of States and international organizations, subjects of international law are compelled to adjust international law measures for their purposes. In different circumstances same sanctions instruments may fall under different legal regimes, each time subject to different limitations of available methods and intensity thereof. Accordingly a legal analysis consists of a series of questions, which allow to identify a legal regime applicable and adequate legal instrument. Following bullet-points indicate, which elements shall be considered for the purposes of such an analysis.

1. The question of the analysis concerns legal character of an unfriendly conduct justifying recourse to trade sanctions. Did such an hostile act constitute a violation of international obligations of the wrongdoer. Legal nature of the abuse and legal nature of a victim – a State, an international organisation, international community as a whole or population of a sanctioned State – together enable to determine an applicable legal regime.

2. If an abuse was committed against an international organisation or its member, it may adopt (institutional) sanctions, according to its procedural rules and within the scope of its competences.

3. If it was a State to fall victim to an abuse, where no international law norm was breached, a victim may only retaliate in accordance with international obligations binding upon it. Towards extends in which trade sanctions, adopted in view of compelling the other party to cease unfriendly acts, are proportionate to prior


unfriendly conduct, they may be qualified as a retorsion\textsuperscript{26}. A disproportionate, undertaken for other purposes or not limited to wrongdoer action does not constitute a retaliation and as such justifies a counter-action. In case of subsequent counter-retaliation an aggregate of one party’s acts may amount to a breach of law, even though each single act was in compliance with international obligations of the party.

4. Selection of lawful trade sanctions consists of measures stemming from freedom of trade and financial relations. Those primarily include negative sanctions (denying benefits, enjoyed previously, to which the beneficiary State is not legally entitled). They may also include non-alleviating of obligations upon a sanctioned State – for instance halt to negotiations concerning debt restructuring or withdrawal of customs benefits. Finally this sort of sanctions may take form of a hostile conduct in exercise of discretionary powers of public authorities; in the latter case those are primarily citizens of the sanctioned State most exposed to such sanctions, such as meticulous customs controls.

5. Freedom of undertaking positive sanctions (consisting of particular conduct and not of an omission) is usually restricted by economic agreements, binding both parties, providing for a particular treatment or economic cooperation, such as Bilateral Investment Treaties, free trade areas or commercial unions arrangements and in particular the WTO agreements\textsuperscript{27}.

6. If States or its citizens’ rights were violated, the former may, under certain conditions, retaliate through means of coercive execution of international responsibility - most certainly applying countermeasures. It is not clear, if the inception of countermeasures resulted in substitution of reprisals, or whether States may still have recourse to the latter. Wrongfulness of trade sanction adopted within the scope of countermeasures (reprisals) is precluded. Freedom of their adoption may be limited, however, by an agreement; for example the WTO Member States shall adopt sanctions in compliance with obligations resulting from membership as far as possible, hence trade sanctions shall be used only as a last resort. Still, there are situations of implementation of trade sanctions not covered by scope of measures of execution of international responsibility, such as measures adopted in response to human rights violations within the sanctioned States, where a sanctioned State did not abuse rights of a sanctioning State’s or its citizens. Also

\textsuperscript{26} Even if one was to accept doubtful arguments concerning substitution of retorsion by countermeasures, actions in accordance to law can be undertaken at any time, hence this does not alter outcomes of the analysis.

trade sanctions adopted for the purposes of punishment or prevention pose difficulties in legal analysis. It may be generally assumed that the use of coercive trade sanctions is acceptable to the extend in which their wrongfulness is precluded by nature and gravity of a previous international law violation.

7. Whether prohibition of use of force under the UN Charter includes economic coercion or not, trade sanctions are subject to particular restrictions, when the coercion level justifies legal qualification thereof under use of armed force legal regime: international humanitarian law and international law of human rights. The lesser invasive sanctions are, the lesser intensity of use thereof and the fewer commercial agreements binding parties to a dispute, the greater is discretionary freedom to apply them.

8. States shall adopt trade sanctions in good faith. This obligation, which constitutes a counter-balance for subjectivism of assessment of circumstances allegedly justifying retaliatory action, limits risk of an arbitrary judgement.

9. Another factor under consideration is the legal character of breached legal norm\(^{28}\). The greater importance of the violated norm and the grosser violation, the broader is the choice of proportionate retaliatory measures available to a victim. In case of an unlawful use of armed force a victim may apply, in compliance with international law principles, any trade sanctions instrument.

10. Whereas any abuse of one’s own rights constitutes a sufficient legal basis for adoption of trade sanctions, possibility of recourse to such measures for the benefit of a third subject, whose rights were violated, depends on the nature of the violated norm. If sanctions are not adopted upon authorisation of a competent international organisation (i.e. individually), the character of the right in question must justify exception from the fundamental principle of international law of inviolability of State sovereignty, which is not contested only in case of gross human rights violations. While scope of sanctions available to a victim of an abuse is usually proportionate to the gravity of the abuse in question, this is not necessarily true in case of a violation of an obligation *erga omnes*. In the latter situation States are bound by a particularly high standard of due diligence in choice of instruments and implementation thereof, notably by the international humanitarian and international human rights laws.

\(^{28}\) Even though also an abuse of interests not legally protected justifies use of trade sanctions, as there is only one legal regime of retaliation in such hypothesis (retorsion), there is no need for double analysis of that matter.
11. Identification of an appropriate legal regime under which trade sanctions are applied allows to proceed to subsequent phase of analysis – a procedure. Decision on use of trade sanctions is to be adopted in accordance with domestic or organization laws of the subject concerned. When such a decision is adopted by an international organisation, it is usually implemented on the domestic law grounds, each time subject to appropriate formal requirements. Implementation of trade sanctions may also involve meeting procedural requirements flowing from international organisation law, to which both the sanctioning and the sanctioned States are members, such as denouncement terms.

12. While applying sanctions, subjects concerned are obliged to control consequences of their actions, whether results are in conformity with international law. Notwithstanding possible international responsibility in case a breach, if results of a control indicate that a violation occurred, the sanctioning subject must adjust means or methods applied. This is particularly important in case of sanctions that are applied for a prolonged period of time, as trade sanctions usually are, where legal environment may change over time. To those ends creation of control and reporting mechanisms may be necessary. Adequate control procedures are crucial, when the sanctioning State or international organisation did not foresee all consequences of applied measures. Collateral damage may significantly alter proportionality test results, while comparing rising actual costs with envisaged goals.

13. From the stage of planning and deciding on use of trade sanctions until their implementation and control, states and international organisations are bound by fundamental norms of international humanitarian law and international law of human rights. Even though direct application of human rights norms to trade sanctions poses numerous practical difficulties, due to different beneficiaries of the protection and perils they are exposed to, it may be assumed that at least

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proportionality and discrimination standards apply to any subject applying trade sanctions.

14. The proportionality principle, present at different stages of the analysis, shall be understood broadly as: 1) adequacy of measures to circumstances justifying the use thereof, 2) accordance of instruments and methods with changing condition of their application, 3) proportionality of instruments and methods applied to envisaged goals, 4) relation between necessary and collateral consequences of undertaken actions. Factors under consideration may vary over time; they may include: desired and realised targets, on the one hand, and expected and real costs of sanctions on the other. Analysis shall reflect nature of a danger to which the sanctioning subject was exposed to (harm reversible or not) as well as available alternative measures. Ideally the basis of comparison broadens, encompassing new circumstances, during the process of sanctioning, while subsequent facts appear.

15. Certain doubts may arise in terms of legal qualification, for the purposes of the proportionality test, of particular facts to benefits or costs of sanctions. On the one hand, this raises a risk of arbitrary broadening of one’s freedom of recourse to sanctions, on the other hand, a risk of diminishing of importance of factors limiting this right.

16. The proportionality requirement applies only indirectly in case of implementation by States of an international organisation’s decision on adoption of trade sanctions. Even though such a decision usually follows a violation of international law, the latter does not constitute a basis for States’ actions and therefore may only serve as a point of reference for interpretation of international organization’s decision.

17. Use of trade sanctions may not lead to a violation of protection under diplomatic and consular law – including personal inviolability and inviolability of documents and archives premises. Violation of those principles may be qualified as an act of aggression.

18. Even though there is no single legally binding standard of proportionality, this does not mean that some postulates shouldn’t be formulated. As believe disciples of the New Haven School of law, axiological choices are inevitable in application

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33 Zajadło J., *Dylematy humanitarnej interwencji*, Arche, Gdańsk 2005, p. 294. As stated, representing Russian Federation, Gatilov at the 4128 meeting of the Security Council: “It is important that the restrictions established be commensurate with the magnitude of the threat or the breach of international security”, UN Doc. S/PV.4128, p. 25.

34 A recourse to international humanitarian law principles of use of armed force during an armed conflict (*ius in bello*) is particularly justified here.


of law, therefore their exposure is desirable as it enables public control of the process.

19. The discrimination principle obliges States to avoid or at least to minimize damage inflicted to people not participating in a process of political decision-making, which induced imposition of sanctions. Protection standard may vary depending on situation, which, however, shall not be used as an excuse for discrimination or disguised barriers to trade.\(^{37}\)

20. Accordingly basic methods of humanisation of trade sanctions include: (1) limitation of personal scope of sanctions to persons directly responsible for the wrongful acts (the so-called: smart sanctions)\(^{38}\), (2) limitation of sanctions object to goods necessary for realisation of sanctioned policy or to goods used only by those responsible for such policy, (3) applying humanitarian exceptions.

21. The twofold relation between trade sanctions and human rights – violation of the latter constituting basis for adoption of trade sanction, but also a legal framework for application thereof – is inseparable in case of negative sanctions, such as suspension or limitation of preferential treatment. Under those circumstances human rights constitute at once a basis for adoption of trade sanctions, as well as a point of reference for evaluation of situation within the sanctioned State, which may demand to reinforce or alleviate the former.

22. Other factors under scrutiny include: (1) political and economic systems of the sanctioned State and (2) importance of economic ties between the sanctioning and the sanctioned States in light of all external economic relations of the latter – crucial not only for assessment of participation, and therefore responsibility, of the sanctioned State’s population in formulation of a sanctioned policy, but also for the purposes of evaluation of sanctions humanitarian costs.

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\(^{38}\) Some believe that the discussion on smart sanctions leads to their legitimization instead of, desired, limitation (Craven M., *Humanitarianism and the Quest for Smarter Sanctions*, EJIL (2002) vol. 13, no. 1, pp. 43 – 61). Since limitation of trade sanctions use seems rather like a wishful thinking with little chance of realization, it is hardly understandable how such an approach could contribute towards development of international peace and legal security.
Discrimination and proportionality tests require evaluation of policy-making procedures as well as assessment of sanctions economic impact, for which purpose a recourse to economic analysis tools seem indispensable.

4. Factors under economic analysis

Economic analysis of trade sanctions in particular focuses upon political considerations of decision-makers:\(^{39}\):

- It is more possible that sanctions will achieve their goal, if sanctions (threats) costs are relatively low compared to expected benefits of success for a sanctioning State, whereas they are relatively high compared to change of behaviour costs for a targeted State:\(^{40}\).
- Transaction costs for the sanctioning State include a direct cost of mobilisation and organisation of assets necessary for sanctions programme and an alternative costs of their use.
- The targeted State compares costs of accepting sanctions consequences with costs of access to substitute goods or other markets. Choice of reaction strategy depends on costs of change of production structure, domestic market size and price elasticity of global markets for the sanctioned State’s export.
- The party not acting under time pressure is more likely to be successful:\(^{41}\).

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The fact of implementation of trade sanctions is a proof of an information asymmetry – either the sanctioning State underestimated sanctions adoption costs (unsuccessful sanctions) or the other party was not aware of determination of the former. Where both parties act reasonably, sanctions are adequate to envisaged targets and the thread is credible, implementation is not necessary.

Political decisions on the use of trade sanctions are taken on the basis of cost-benefit analysis and not the proportionality principle. In particular it is easier to justify to public opinion use of trade sanctions, when burden of their adoption is placed upon third parties, than to convince it to contribute towards such costs.

Due to direct and irreversible character of military sanctions, a thread of use thereof is more likely to be successful than a thread of trade sanctions, effects of which are time released. Whereas threatened with military sanctions a rational State does not await implementation thereof, high costs of reaction strategy in case of trade sanctions favour adoption of “wait and see”, which allows assessing sanctioning State determination – cost of meeting demands usually does not increase upon adoption of trade sanctions. Intangible costs (for instance in case of psychological warfare) are more difficult to evaluate and to justify in eyes of general public.

Political costs, for a State using trade sanctions, limited to particular economy sector(s) are lower than costs related to victims of an armed conflict. Those costs rise, however, in time.

Sanctions may still be politically beneficial, even if their implementation costs exceed costs for the sanctioned State, if the contribute towards strengthening of the rule of law and civil obedience. Recourse to trade sanctions is often related to social conviction of one’s own moral superiority over the sanctioned State and believe in superiority of such instruments over armed force measures.

Analysis of trade sanctions efficiency shall include factors such as:

- Degree of dependency of the sanctioned State economy upon external exchange;
- Domestic economy potential;
- Diversification and number of trade partners of the sanctioned State;
- Scope and control of trade sanctions by the international community;

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Third States assistance to the sanctioned State;
Availability of sanctioned goods substitutes and alternative supply markets;
Amount of foreign exchange reserves of the sanctioned State;
Economic model of the sanctioned State;
Economic burden upon the society of the sanctioning State.

Economic approach reveals a major weakness of legal analysis of trade sanctions, which does not reflect causation chain between use of sanctions in unrelated situation. Even though different motives for adoption of trade sanctions were indicated above, such as punishment or coercive execution of international responsibility, from the legal point of view authentication of one’s status at the international stage as a motive of the sanctioning State seem irrelevant or difficult to trace. For instance sanctions may be used for confirmation of one’s dominant position at international stage or one’s human rights defender status, despite the fact that in particular case they cannot succeed. In other words, benefits of credibility in eyes of current or prospective enemies may outweigh failure costs on that occasion.

Also political motives behind adoption of trade sanctions may relate rather to domestic a situation, like appeasement of political tensions, than to the sanctioned policy as such, as it happened with regards to reactions to situation in Afghanistan and Iran, to the massacre at the Tiananmen Square or in relation to the Helms-Burton act against Cuba. Finally while considering efficiency of trade sanctions one shall scrutinize: (1) adequacy of applied measures to intended aims, (2) economic potential of the sanctioned State’s allies and (3) possible consolidation of the sanctioned State population against the sanctioning subject, (4) a risk of schism among sanctioning State’s allies and (5) domestic public opinion.

5. Conclusions

XX century witnessed an unprecedented development of international law, in particular principles on use of force and coercive execution of legal responsibility, which led

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to a discussion concerning its possible fragmentation. Perhaps most important consequences of that development were: widening of the scope of the legal responsibility for the use of force, on the one hand, and deprivation of States of a major tool of coercive execution of that responsibility, on the other.

Changes within the international law reflected social and technology changes brought with the globalization process. Financial and trade inter-dependence of states set grounds both for sustainable development and for more efficient economic coercion. However, since (1) economic relations became growingly regulated by international treaties, which restrict states’ freedom to harness or abstain from such relations, (2) unknown before economic interdependence of states together with a greater effectiveness of trade coercion may call for legal qualification of trade sanctions as an armed force, whereas (3) States were subjected to new rules due to dynamic development of international human rights after the II World War, different aspects of the use of economic coercion are currently regulated under international law.

Development of new technologies, driving force behind the globalization process, further contributes towards broader public control of States’ actions. If under classical international law State were (mainly) responsible for acts of State, this was partly due to the fact that other situations could pass unnoticed, while States had greater capacity to prevent spread of unwanted news. This is hardly imaginable now, as proves an example of Iranian authorities hopelessly struggling against Twitter-coverage of political crisis. Policy-makers became more than ever politically accountable for results of their actions. Along with democratization of politics spread human rights ideals, which further enhance the popular control.

History turns full circle. Together with greater civil participation in government came reticence towards human costs of armed conflicts. Humanitarian motivation led to a gradual limitation upon, first, choice of means and methods of warfare (ius in bello), and subsequently upon availability of war “as a prolongation of diplomacy” (ius ad bellum). Together with greater knowledge and access to information in a globalized world came even greater responsibility. States cannot deny consequences of more “humanitarian” trade sanctions. Even though such measures do not result in imminent casualties, contrary to a situation of an armed conflict, their nutritional, hygienic, educational and humanitarian impact can prove to be even more terrible. Accordingly a classical international law proportionality test, a principal condition of use of any coercive measure, acquired a new meaning. It is no longer perceived as a relation between measures and goals, but broader as a relation between measures applied and their goals on the one hand and consequences of their use on the other. This resulted in development of smart sanctions, whose effects are limited to persons directly responsible for

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choice of sanctioned policy or to groups having an influence upon them. Classical, non-
discriminatory trade sanctions, in terms of their legality, are to be found somewhere in
between those new instruments and mostly illegal armed force, thus the greater efficiency of
such sanctions, the more they resemble to an illicit use of force. Greater effectiveness of non-
discriminate trade sanctions restrains their legality thereof, limiting availability and possible
modes of use.