



Swiss Federal Office for Foreign Economic Affairs  
Department of Economy

# **EXPERT SEMINAR ON TARGETING UN FINANCIAL SANCTIONS**

March 17-19, 1998  
Interlaken, Switzerland

## **I THE PROGRAMME**

|                                       |          |
|---------------------------------------|----------|
| <b>SEMINAR PROGRAMME</b>              | <b>5</b> |
| <b>INTRODUCTORY PAPER</b><br>J. Burri | <b>9</b> |

## **II THE FINDINGS**

|  |           |
|--|-----------|
| <b>CHAIRMAN'S CONCLUSIONS</b><br>Ambassador R. Jeker   | <b>25</b> |
| <b>CHAIRMAN'S REPORT</b><br>Ambassador R. Jeker  | <b>29</b> |
| <b>REPORT WORKING GROUP 1: PRECONDITIONS FOR SUCCESSFUL IMPLEMENTATION</b><br>Ambassador T. Eitel                | <b>39</b> |
| <b>REPORT WORKING GROUP 2: DEVELOPMENT OF SANCTION REGIMES</b><br>B. Doyle, R. Newcomb                           | <b>43</b> |
| <b>REPORT WORKING GROUP 3: MONITORING AND ADMINISTERING FINANCIAL SANCTIONS THROUGH UN BODIES</b><br>D. Galloway | <b>45</b> |

## **III THE BACKGROUND MATERIAL**

|  |           |
|--|-----------|
| <b>WELCOME ADDRESS</b><br>Ambassador R. Jeker  | <b>49</b> |
| <b>A BRIEF OVERVIEW OF UNITED NATIONS APPLIED SANCTIONS</b><br>J. Stephanides  | <b>53</b> |
| <b>LESSONS LEARNED AND DEFINITIONS</b><br>Ambassador R. Jeker  | <b>67</b> |
| <b>HOW CAN FINANCIAL ASSETS AND FINANCIAL TRANSACTIONS BE CONTROLLED?</b><br>Ambassador R. Jeker                                     | <b>75</b> |
| <b>HOW CAN FINANCIAL ASSETS AND FINANCIAL TRANSACTIONS BE CONTROLLED ?<br/>COMMENTS FROM A BANKERS' POINT OF VIEW</b><br>A. Cluckers | <b>81</b> |

## **PAPERS**

|  |            |
|--|------------|
| <b>MAKING FINANCIAL SANCTIONS WORK: PRECONDITIONS FOR SUCCESSFUL IMPLEMENTATION OF SANCTIONS BY THE IMPLEMENTING STATE</b> | <b>87</b>  |
| J. Carver  |            |
| <b>IMPLEMENTATION OF SANCTIONS IMPOSED BY THE UNITED NATIONS SECURITY COUNCIL -- JAPAN'S EXPERIENCE</b>                    | <b>105</b> |
| M. Yoshikawa   |            |
| <b>TARGETING FINANCIAL SANCTIONS</b>   | <b>113</b> |
| R. Newcomb   |            |
| <b>ADMINISTERING FINANCIAL SANCTIONS: PROBLEMS AND SOLUTIONS</b>   | <b>121</b> |
| Netherlands  |            |
| <b>EVASION AND CONTROL OF FINANCIAL SANCTIONS - PRACTICAL CONSIDERATIONS</b>   | <b>125</b> |
| Ch. Schönenberger  |            |
| <b>CARROT AND STICK APPROACH FOR THE IMPLEMENTATION OF FINANCIAL SANCTIONS</b>   | <b>127</b> |
| C. Brüderlein  |            |
| <b>FINANCIAL SANCTIONS: TOPICS FOR RESEARCH</b>  | <b>129</b> |
| M. Doxey   |            |
| <b>TENTATIVE FOLLOW-UP</b>   |            |
| <b>TENTATIVE PROGRAMME FOR A FOLLOW-UP EXPERT SEMINAR</b>  | <b>133</b> |
| <b>LIST OF PARTICIPANTS</b>  |            |
| <b>PARTICIPANTS</b>  | <b>137</b> |

# **The Programme**

**Programme for an Expert Seminar on Targeting Financial Sanctions**  
**March 17-19, 1998**  
**Interlaken, Switzerland**

**CHAIRMAN: ROLF M. JEKER, DELEGATE OF THE SWISS GOVERNMENT FOR  
INTERNATIONAL AGREEMENTS**

**March 17, 1998**

15.00-16.00 *Registration*

16.00-16.30  
*L'Orangerie*

Welcoming Address

**Defining the Agenda for the Seminar**  
***Ambassador R. Jeker (Switzerland)***

**"Policy Considerations of UN Applied Sanctions and the Need to Refine that Instrument"**  
***Mr. J. Stephanides (United Nations)***

16.30-18.30  
*L'Orangerie*

Lessons Learned and Definitions

- ◆ What are Financial Sanctions?
- ◆ Lessons Learned from Financial Sanctions?
- ◆ What does „Targeting“ Mean?

***Paper: Ambassador R. Jeker (Switzerland)***  
***Chairman: Mr T. Gammon (United Kingdom)***  
***Panelists: Mr. J. Stephanides (UN), Mr M. A. de Vries (EC Commission), Mr R. Newcomb (USA), Mr M. Yoshikawa (Japan), Mr S. Tschoumarev (Russia), Mr A. Manickam (India), Ms B. M. Doyle (Bahrain), Mr E. Staudt (Germany), Prof. M. Doxey (Canada)***

19.30 *Dinner*

**March 18, 1998**

09.30-11.30  
*L'Orangerie*

How Can Financial Transactions Be Controlled?

**Presentation on Financial Instruments and Transactions**

Which are the major financial instruments? How are the various financial instruments controllable? Which financial resources must be included in a sanctions regime? How are insurance policies, bonds, shares and social security to be treated? What are the costs of controlling financial transactions? Who will cover them?

***Paper: Ambassador R. Jeker***  
***Chairman: Mr M. I. Eweiss (Egypt)***  
***Panelists: Mr D. Newcomb (New York), Mr A. Cluckers (Brussels), Ms D. Galloway (London)***

11.30-12.30  
*L'Orangerie*

Making Financial Sanctions Work: Introduction to the Working Groups

***Introductory Remarks by Persons Presenting Papers in the 3 Working Groups***

12.30-14.00 *Lunch*

14.00-17.00  
Le Salon Rotary

## Working Group 1: Preconditions for Successful Implementation of Sanctions by the Implementing State

### **Primary and Secondary Legislation**

Which legal preparations have to be made on the national level to implement sanctions? How are sanction legislation and orders to be drafted? How can national legislations be harmonised?

### **Monitoring and Administering Financial Sanctions**

Which instruments are there to monitor financial sanctions on the national level? Which instruments are needed (mandatory notification to the national authority of accounts and assets by financial institutions)? Shall the administration of property be allowed, and if so, what are the implications for monitoring and administering?

**Paper: Mr J. Carver, Lawyer (London)**

**Paper from a national perspective: Mr M. Yoshikawa (Japan)**

**Chairman: Ambassador T. Eitel (Germany)**

**Assistant to the Chair: Ms. R. Lindsay (London)**

La Fontaine 1

## Working Group 2: Development of Sanction Regimes

### **Targeting Individuals, Groups and Companies**

How and by whom are lists identifying the targeted groups and persons drawn up? What are the difficulties individuals, groups, and companies? If states can contribute to the lists, what options are available for doing so (agreement by all states, no-objection procedure)? What principles can be applied to property registration? For which humanitarian reasons shall exemptions apply? Are there legal implications of targeting individuals, groups, and companies (right to appeal)? How can multiple types of assets be defined?

### **Criteria for the Use of Financial Sanctions?**

How does a target country's susceptibility to financial sanctions influence the effectiveness of financial sanctions? What incentives could be envisaged to motivate the targeted party to comply with international standards (e.g.: phasing of sanctions, proactive sanctions)? What are the conditions for lifting sanctions?

### **Difficulties in the Development of Sanction Regimes in the UN**

How can resolution texts be improved? How can the scope of the sanction measures be clearly defined? What are the difficulties in identifying groups and individuals? For which humanitarian reasons shall exemptions apply?

**Paper from a national perspective: Mr R. Newcomb (USA)**

**Paper from a multilateral perspective: Mr J. Stephanides (UN Secretariat)**

**Chairman: Ms . B. M. Doyle (Bahrain)**

**Assistant to Chair: Mr J. Burri (Switzerland)**

La Fontaine 2

## Working Group 3: Monitoring and Administering Financial Sanctions through UN Bodies

### **Necessary Instruments for Monitoring**

Shall financial sanctions be monitored? How could such a monitoring be implemented? What notification procedures shall apply in cases of humanitarian and other exceptions? How shall exemptions be monitored?

### **Institutional Requirements for the Administration**

What are the institutional requirements to effectively administer financial sanctions? Is there a need for a standing sanctions committee? How can procedures for requests by member states be improved? How can UN assistance to implementing states be improved?

**Paper from a national perspective: Mr E. van Andel (Netherlands)**

**Chairman: Ms Diana Galloway (London)**

**Assistant to Chair: Mr Ch. Schönenberger (Switzerland)**

19.30 *Dinner*

**March 19, 1998**

09.30-11.30  
Le Salon Rotary  
La Fontaine 1  
La Fontaine 2

Continuation of Working Groups

11.30-12.30  
L'Orangerie

Presentation by Chairmen of Working Groups

**Chairman: Ambassador R. Jeker (Switzerland)**

**Panelists: Chairmen of Working Groups**

L'Orangerie

Conclusions and Follow-Up

Concluding remarks on the assessment of the findings of the seminar, the follow-up, and the dissemination of the seminar results.

**Chairman: Ambassador R. Jeker (Switzerland)**





# **Introductory Paper for the Expert Seminar on Targeting United Nations Sanctions**

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Jürg Burri, Department of Foreign Affairs, Bern

## **SUMMARY**

### **PART I: GENERAL INTRODUCTION**

#### **1. Terms**

#### **2. Experience with sanctions with a special focus on targeted sanctions**

- 2.1. Types of sanctions-regimes adopted
- 2.2. Secondary effects
- 2.3. Cost of sanctions
- 2.4. Debate within the UN about the cost of sanctions
- 2.5. Humanitarian impact of sanctions
- 2.6. Debate within the UN about humanitarian impact
- 2.7. Administrative problems related to the implementation and to the monitoring of sanctions

#### **3. Conclusions Part I**

### **PART II: EXPERIENCE WITH FINANCIAL SANCTIONS**

1. Recent financial sanctions adopted
2. Problems encountered in implementing financial sanctions
3. Targeting financial sanctions
4. Conclusions Part II

### **PART III: THE PROPOSED SEMINAR**

1. Switzerland's motives in discussing financial sanctions
2. Outline of the planned seminar
3. First steps taken
4. Program of the seminar

### **REMARKS ABOUT THE POSSIBLE OUTCOME OF THE SEMINAR**

### **SOME SELECTED LITERATURE**

## INTRODUCTORY STATEMENT

**The Seminar:** From 17 to 19 March 1998, the Swiss Federal Office for Foreign Economic Affairs will convene an International Expert Seminar on the Targeting of United Nations sanctions. The event will take place in Interlaken, Switzerland (near Berne).

**The Participants:** Participants of the seminar are

- sanctions experts from the United Nations Secretariat,
- sanctions experts from national governments and from UN-Missions,
- experts from National Banks and Treasuries,
- private fund management experts from private banks,
- academics.

Experts from more than twenty governments representing all regions are invited.

**The Background of the Project:** Targeting sanctions on elites, governments and related entities has been frequently raised as an important principle, which, if applied, would strengthen the effectiveness of sanctions and reduce their unintended side-effects. Among the possibilities of targeting sanctions, targeting in the financial sector has found particular interest. It has the potential to be effective if treated in a uniform manner.

These issues have been raised at a time when the number of sanctions regimes mandated by the United Nations Security Council has increased and experience with sanctions regimes has revealed a number of problems, most notably humanitarian effects on the civilian population in the target country and economic effects on third states.

These experiences have focused attention on fine-tuning and better targeting of sanctions. The Security Council and various organs of the General Assembly, as well as Agency and Interagency Working Groups, Academics, NGOs and political bodies have discussed the issues.

**The Swiss Position:** Switzerland applies United Nations sanctions on an autonomous basis and thus supports the efforts of the UN to preserve and enhance peace and security. Aware of the undesirable impacts of the sanctions instrument, the Swiss government commits itself to its refinement.

- Switzerland has a long humanitarian tradition and strives for sanctions which cause minimal damage among the civilian population in the target country.
- The Swiss government believes in free trade and therefore supports all efforts to minimize negative side effects on third countries.

The Swiss Government believes that the targeting of United Nations sanctions can be a useful alternative to other measures that have been subject to criticism. As one of the world's leading financial centers, Switzerland can contribute her expertise and know-how to the discussion on targeting sanctions in the financial sector.

It is Switzerland's wish to comply with the goal of the Secretary General, mentioned in his latest report on the work of the Organization: "I shall encourage consideration (...) of possible ways to render sanctions a less blunt and more effective instrument."

**Paper's Purpose:** This paper is a brief introduction to the topics to be considered at the seminar. Its goal is to introduce the participants to the ideas and concepts on which the Swiss Seminar-Project is based. It should help to create a common base and understanding of the issues to be discussed and is the first and most general of a series of papers to be circulated before and at the seminar.

## PART I: GENERAL INTRODUCTION

### 1. Terms

- **Sanctions:** In the framework of the proposed seminar, the discussion will concentrate on sanctions by the United Nations Security Council with regard to the maintenance of international peace and security based on Chapter VII of the UN-Charter<sup>1</sup>. UN-sanctions are not meant as a punishment but as an instrument used by the international community to make a target country respect the international order. They are temporary and should be lifted if peace is no longer threatened, if the act of aggression ceases or if the international law is again respected.
- **Targeting sanctions:** For maximum impact, all sanctions should be designed so that they take account of the particular features of the target. However, in many cases the effectiveness of sanctions has been questioned. The fine-tuning of the sanction regimes as well as the direct targeting of elites are advocated as appropriate multilateral strategies to avoid undesirable impacts on civilian populations and third states. The concept of targeting includes a set of measures with the potential to hurt certain leaders or elites specifically. Margaret Doxey, an established Canadian sanctions-researcher, proposes different types of measures which can make sanctions targeted<sup>2</sup>. Measures 1) and 2) directly target a defined group of individuals while as measures 3) and 4) have effects that are quite focused on the elites of the target state:

1. **Personal travel restrictions** can be imposed on political leaders, members of target governments and senior officials, both civil and military. Restrictions can be extended to family members of the targeted persons. This measure has been used by the Security Council against UNITA/ Angola, Haiti Junta-, military- and police- forces and members of the Junta in Sierra Leone. Resolution 1137 (1997) contains travel restrictions against Iraqi officials interfering with the work of UNSCOM.
2. **The freeze of foreign funds and assets** of designated individuals or groups is a targeted means of hitting an elite group (see below).
3. **Restrictions on air links**, e.g. banning of commercial flights from and to the target country are likely to affect elites more heavily than civilian populations. This measure has been used by the Security Council against Libya, Iraq, UNITA/ Angola and Serbia-Montenegro and decided - but not imposed - against Sudan.
4. **Cultural and organizational restrictions** will impact more heavily on elites than on mass populations, for instance by banning ministers and officials from inter-governmental meetings. Such sanctions have been decided by the Security Council against Serbia-Montenegro.

- **Financial sanctions:** They include measures such as
  - blocking government assets held abroad
  - limiting access to financial markets and restricting loans and credits
  - restricting international transfer payments
  - restricting the sale and trade of property abroad.

Financial sanctions may also target government owned companies, and, potentially, all companies and nationals of a certain state. Such financial sanctions were decided by the Security Council against Serbia-Montenegro, the Bosnian Serbs, Libya and Iraq.

- **Targeted financial sanctions** would include measures such as the freeze of foreign assets of specially designated individuals, companies or governments that particularly contribute to the threat of peace and security. Only an elite group, determined by an official list, would fall within the scope of the measure. In 1994, the Security Council urged member states to freeze funds and assets of Haitian elites (described as military and police officials, those acting on their behalf, people involved in the coup d'état of 1991 and members of the illegal government as well as their immediate families;

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<sup>1</sup> The charter further provides for "*measures to be taken to maintain or restore international peace and security.*" (Article 39) "*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 UN to apply such measures. They may include complete or partial interruption of economic relations and of rail, sea air, postal, telegraphic radio and other means of communications, and the severance of diplomatic relations.*" (Article 41)

<sup>2</sup> Margaret Doxey, United Nations Sanction: Current Policy Issues, 1997, S. 21-17.

Res 917, OP3). The targeted individuals were designated by a list published by the Sanctions Committee for Haiti.

## 2. Experience with UN-sanctions with a special focus on targeted sanctions

### 2.1. Types of sanction-regimes adopted

The sanctions regimes adopted by the Security Council in past years can be categorized as follows:

- **Comprehensive sanctions:** With Iraq's invasion and annexation of Kuwait in 1990, the Security Council opened a new era in the use of sanctions. Resolution 661 (1990) decided full trade and financial sanctions against Iraq (and Kuwait till April 1991). Later resolutions strengthened this full blockade. Resolution 687 (1991), the "cease-fire resolution", declared that these measures would remain in place pending periodic reviews of Iraqi compliance with the obligations imposed. The Special Commission (UNSCOM) was created. Operational Paragraph (OP) 22 of the resolution provided for the lifting of the trade sanctions once Iraq had complied with the destruction and long-term monitoring of weapons of mass destruction. These resolutions included some humanitarian exemptions; subsequently the "Oil for food"-scheme (Res. 712/ 1991 and 986/ 1995) guaranteed large scale exemptions under tightly defined conditions. A sanctions package having a comparable economic impact on the target was decided in 1992/93 against Serbia Montenegro (Res. 757/ 1992 and 820/ 1993) and was also applied against Bosnian Serbs in 1994 (Res. 942/ 1994). Sanctions were suspended following the Dayton-Agreement (Res. 1022/ 1995) and terminated in Resolution 1074 (1996). *These sanctions can be considered as comprehensive sanctions in that they do not discriminate between sections of the population.*<sup>3</sup>
- **Arms trade sanctions:** Responding to a series of internal crises, the Security Council imposed several arms embargoes, first against Ex-Yugoslavia (all Republics, Res. 713/ 1991), then against Somalia (Res. 733/ 1992), Liberia (Res. 788/ 1992), and Rwanda (Res. 914/ 1994). *These resolutions were meant to control the damage caused by conflicts by depriving the rivals of the supply of weapons.*<sup>4</sup>
- **Combined sanctions:** This type of sanctions regime combines arms sanctions or comprehensive sanctions with a targeted element. As a reaction to Libya's refusal to extradite suspected terrorists, the Security Council adopted a ban on air links with Libya and diplomatic sanctions as targeted measures and an embargo on arms and some other commodities as comprehensive measures (Res. 748/ 1992). A freeze on government assets was added (Res. 883/ 1993). In the case of Haiti, the sanctions regime included an arms, oil and full trade embargo as well as a blockade of government funds (Res. 841/ 1993 & 917/ 1994) as a comprehensive component. A highly targeted component was added by imposing financial and visa restrictions for government-elites (ibid. Res. 917/ 1994). Against Sierra Leone a package comprising an arms and oil embargo (Res. 1032/ 1997) was imposed to which the Council added travel restrictions against the members of the Junta as a targeted measure. For Angola, the Council decided in 1997 - four years after the arms and oil embargo - restrictions in air travel and visa restrictions against UNITA-officials as well as the closure of foreign UNITA-offices as targeted measures (1127/ 1997). *These sanctions regimes - in their attempt to specifically hurt elites, to control damage and apply pressure through arms and/or economic embargoes - can be considered as combined sanctions.*

### 2.2. Secondary effects

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<sup>3</sup> The sanctions decided against Rhodesia after its white regimes illegal declaration of independence would belong in this category. In a first step in 1966 (Res. 232/ 1966) selective economic measures were taken. In 1968 (Res. 253/ 1968) comprehensive trade, financial and communications sanctions followed.

<sup>4</sup> The arms embargo against South Africa decided in 1977 (Res. 418/ 1977) was only the second sanctions regime of the Council. It belongs in this group, although it was obviously decided for other reasons. The embargoes against Armenia and Azerbaijan (Res. 853/ 1993) and Yemen (Res. 924/ 1994) were non-binding (SC "urges").

Sanctions as a powerful tool of the Security Council have been an subject of political debate on various occasions. The legitimacy of the instrument, however, has not been formally questioned. Their secondary effects have increasingly become an issue over the past years. Most frequently mentioned are:

- The cost for neighboring states of the target country and the international community in general.
- The unnecessary suffering of the civilian populations in the target state (humanitarian problems).

### 2.3. Cost of sanctions

Any coercive measure against a member of the world community will inevitably cause a loss in trade and business and distort bilateral relations. It will exact an indirect toll through undelivered imports and exports, loss of future imports and exports, suspended services and financial transactions or through the repatriation and the loss of income of migrant workers.

Article 50 of the UN-Charter gives states "confronted with special economic problems" the right to consult the Security Council "with regard to the solution of these problems".

Obviously, such problems depend mainly on two factors: the weight and international economic ties of the target state and the comprehensiveness of the decided sanctions. The comprehensive sanctions against Iraq and Serbia-Montenegro, both important regional actors with active economies, had strong repercussions on their trade partners, many of whom addressed their problems to the Council.<sup>5</sup>

- In the case of **Iraq** (and Kuwait) 21 states from the Middle East, Eastern Europe and as far as from Eastern Asia and Latin America applied for help to the Sanctions Committee of the Security Council. Assistance was made available to a certain extent, although not through the Council directly, but through the coalition of states engaged in the military operation. The "Oil for Food"-Program now provides for an official compensation fund, legally based in Resolution 986/1995), whose purpose is to cover for costs caused by the Iraqi attack.
- In the case of **Serbia-Montenegro** sanctions caused big losses for the neighboring economies through reduced trade and the blockade of the important transportation link between Central and South-Eastern Europe. Seven states, six from the region plus Uganda, addressed the Council's Yugoslavia Sanctions Committee. The UN gave some assistance through UNDP, but substantive help came through the Sanctions Assistance Missions, basically a tool of the European Union and the OSCE.

### 2.4. Debate within the UN about the cost of sanctions

In the light of these experiences, the General Assembly as well as the Secretary General have addressed the issue of compensation. The **General Assembly** took up the question at its 48th session. Since then, the Sixth Committee of the GA, the Special Committee on the Charter of the UN and on the Strengthening of the Role of the Organization (Charter-Committee), the Open-Ended Working Group on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Security Council (SC-Working-Group) as well as the Informal open ended Working Group of the GA on an Agenda for Peace (AfP-Working Group) annually report to the GA.<sup>6</sup> UN **Secretary General** Boutros Ghali addressed the problem in the Agenda for Peace (AfP, 1992) and its Supplement (1995). Some of the statements were taken up by Kofi Annan in his latest Report on the Work of the Organization.<sup>7</sup>

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<sup>5</sup> S/ 26705 contains detailed information about the requests to the Security Council and about actions taken. It treats also requests made in context with the sanctions against Southern Rhodesia.

<sup>6</sup> Their latest reports are to be found in document A/ Res. 52/ 162 (Sixth Committee) A/ 51/ 317 (Charter-Committee), A/ 51/ 47 (SC-Working Group) and in A/ 51/ 242 incl. Ann. I & II (AfP-Working Group) Especially on FRY see A/ 52/ 535 and A/ Res. 52/ 169 H.

<sup>7</sup> A/ 50/ 60, p.17. (AfP); A/ 51/ 1, Pt. 89 Report of the SG.

In substance, Boutros-Ghali stated that "sanctions are a measure taken collectively by the UN. (...) The costs involved in their application (...) should be borne equitably by all Member States and not exclusively by the few who have the misfortune to be neighbors or major economic partners of the target country". He recommended that the Security Council devise a set of measures that could address the problem. The AfP-Working Group urged the Security Council and the General Assembly to intensify their efforts to address the special economic problems of third states affected by sanctions regimes.<sup>8</sup> The Charter-Committee argued along the same lines, but it was mentioned that the notion of a right to compensation in favor of third states should not be introduced.<sup>9</sup> However, the Russian Federation made a point in its Working Paper about Conditions and Criteria for Imposing and Implementing Sanctions<sup>10</sup> which seemed to find much support. The paper finds it inadmissible to create "a situation in which the imposition of sanctions would cause significant material and financial damage to third states."<sup>11</sup> The question will be taken up in the first half of 1998 by an expert group meeting proposed by the Secretary General and endorsed by the General Assembly.<sup>12</sup>

## 2.5. Humanitarian impact of sanctions

Mainly the sanctions against Iraq, Serbia-Montenegro and Haiti have raised widespread concern among states about the hardship caused on civilian populations. Subsequently, political scientists, humanitarian organizations and other bodies have produced a number of studies assessing the humanitarian impacts of sanctions.<sup>13</sup> The Security Council has taken these concerns into account in providing mechanisms for humanitarian exemptions in its resolutions and in the guidelines of its Sanctions Committees. Currently, the UN-agencies are assessing systems to measure humanitarian impacts and to manage the exemptions.<sup>14</sup>

Concerns have been raised mainly about the effects of comprehensive sanctions which - through shortages in food and medication - tend to bring suffering to children, the elderly and the poor. As shown in the studies, even targeted sanctions can have undesirable effects which may make further fine-tuning necessary. The proposed flight ban on Sudan, for example, would have caused problems in providing foodstuffs and medicaments to remote regions, and would also cut the Sudanese off from crucial health services in Jordan.<sup>15</sup>

## 2.6. Debate within the UN about the humanitarian impact

The current sanctions debate within UN-bodies demonstrates a remarkable sensitivity to the topic of humanitarian impacts. The Secretary General and the General Assembly have made statements favoring a careful use of sanctions instruments, urging a careful pre-assessment of their undesirable impacts and asking for provisions to facilitate the work of the humanitarian agencies.<sup>16</sup> Members of the Security Council have voiced their determination to cause minimal collateral damage on numerous occasions. Humanitarian side-effects are discussed in many of the councils debates, most

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<sup>8</sup> A/ Res./ 51/ 242; Ann. II, Pt. 25. The Non Aligned Movement supported this position. See A/ 51/ 47; Annex XI Para. 34.

<sup>9</sup> A/ 51 /33; Pt. 23.

<sup>10</sup> A/ AC.182/ L.94.

<sup>11</sup> Ibid. Pt.8d).

<sup>12</sup> A/ Res. 52/ 162, OP4.

<sup>13</sup> Note among others UNICEF's Report: Eric Hoskins, A Study of UNICEF's Perspective on Sanctions, 1997; DHA's Report: Claudia von Braunmühl and Manfred Kulesa, The Impact of UN Sanctions on Humanitarian Assistance Activities, 1995; IASC's Study Larry Minear et al., Enhancing the Capacity of the United Nations System, 1997, David Cortright and George A Lopez, Economic Sanctions: Panacea or Peacebuilding in a Post-Cold War World, 1995. Thomas G. Weiss et al. Political Gain and Civilian Pain: Humanitarian Impacts of Economic Sanctions, 1997. International Task Force on the Enforcement of UN Security Council Resolutions, Words to Deeds: Strengthening the UN's Enforcement Capabilities, New York December 1997.

<sup>14</sup> IASC-Study, mentioned in Note 12.

<sup>15</sup> Note from DHA concerning the possible humanitarian impact of the international flight ban decided in SCR 1070 (1996)

<sup>16</sup> A/ 50/ 60; Pt. 72 (AfP), A/ 51 Res./ 242, Ann. II. Pt. 4 et al.(AfP) (Working Group); A/ 52/ 1, Pt. 89 (Secretary Generals Report on Work of the Organization). The issue was also discussed in the Security Council-Working Group meeting from 28 April to 9 May 1997 in New York.

recently in its General discussion on the issue of sanctions proposed by the Chilean presidency in October 1997.<sup>17</sup> The Ambassadors of the five permanent members even committed themselves to minimize such impacts in a common letter to the President of the Council.<sup>18</sup>

## 2.7. Administrative problems implementing and monitoring sanctions

The efficiency of the implementation of Security Council sanctions is not always satisfactory and some states haven't always taken all necessary measures to fully comply with the sanction regimes. This is reflected in the work of various analysts.<sup>19</sup> Some member states found problems in implementing sanctions properly due to ambiguities in the wording of resolutions or a lack of legal tools to translate them into their national legislation. Monitoring and support through the Secretariat has been incomplete due to a lack of resources and competencies. In the framework of the AfP-Working Group the Netherlands and Australia tried to address part of these problems in proposing a questionnaire assessing the shortcomings of the system.<sup>20</sup>

## 3. Conclusions Part I

Currently, the United Nations are intensively reviewing all aspects of its sanctions instruments. Future sanction regimes should avoid undesirable collateral damage in third states as well as serious humanitarian impact. Member States, reflecting in part public opinion, have become sensitive to these issues. The Security Council has taken these developments into account when designing the "Oil for Food"-Program (Res. 986/ 1995), when considering measures against Iraqi officials in resolution 1137 (1997) and when deciding on combined sanctions against the Juntas in Haiti and Sierra Leone and the UNITA-rebels in Angola. Among available targeted sanction measures financial sanctions, due to their focused impact, have the greatest potential to be effective. However, they have been so rarely implemented that experience is limited and the instrument clearly needs further study.

## PART II: EXPERIENCE WITH FINANCIAL SANCTIONS

### 1. Recent financial sanctions adopted

Financial sanctions or economic sanctions with strong financial content have so far been decided by the Security Council against Iraq, Serbia-Montenegro, Bosnian Serbs, Libya and Haiti. The target in all these cases was defined, in various words, as the government or any commercial, industrial or public utility owned or controlled by or operating from the target state. In the case of Iraq and Serbia-Montenegro personal accounts of the political elites, e.g. Presidents Hussein and Milosevic, remained untouched. In the resolutions treating Libya and the Bosnian Serbs it remains unclear to what extent accounts of political leaders should have been frozen as the resolution failed to provide a list.

In the case of Haiti a number of persons were explicitly included in the target definition. Member states were **urged** - the decision was therefore not binding - to freeze funds or payments belonging to about 800 persons comprising all Haitian military and police officers, those acting on their behalf, those involved in the coup d'état of 1991 and of the illegal government as well as all of their immediate families (Res. 917/ 1994). The list of targeted persons was published and kept up to date by the Haiti Sanctions Committee.

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<sup>17</sup> For published statements see the Report of the Security Council, mainly debates about Sierra Leone and Angola, contained in A/ 52/ 2.

<sup>18</sup> S/ 1995/ 300

<sup>19</sup> e.g. Margaret Doxey, United Nation Sanctions: Current Policy Issues, S.27-40; Paul Conlon, The UN's questionable Sanctions Practice, Zurich 1996; John Stremlau, Sharpening International Sanctions, S.46-69. International Task Force (see note 12), S. 26-28.

<sup>20</sup> A/ 50/ 322

These decisions allowed the Security Council and implementing states to achieve some experience with financial sanctions. Still, financial sanctions were individually targeted only on one occasion, in the case of Haiti when they weren't even legally binding.

In this context, it may be useful to carefully read the important passages on financial sanctions from the relevant Security Council resolutions:

#### **Iraq, Res. 661/ 1991**

- **OP 3b)** The Security Council decided "that all States shall prevent any activities by their nationals or in their territories which would promote or are calculated to promote the export or trans-shipment of any commodities or products from Iraq and Kuwait; and any dealings by their nationals or their flag vessels or in their territories in any commodities or products originating in Iraq or Kuwait and exported therefrom after the date of the present resolution, including in particular any transfer of funds to Iraq and Kuwait for the purpose of such activities or dealings."
- **OP 4)** The Security Council decided "that all States shall not make available to the Government of Iraq or to any commercial, industrial or public utility undertaking in Iraq or Kuwait, any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to that government or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within Iraq or Kuwait, except payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs."

#### **Former Republic of Yugoslavia, Res. 757/ 1992**

- **OP 4b)** The Security Council decided "that all States shall prevent any activities by their nationals or in their territories which would promote or are calculated to promote the export or trans-shipment of any commodities or products originating in the Former Republic of Yugoslavia (Serbia and Montenegro); and any dealings by their nationals or their flag vessels or aircraft or in their territories in any commodities or products originating in the FRY (S&M) and exported therefrom after the date of the present resolution, including in particular any transfer of funds to the FRY (S&M) for the purpose of such activities or dealings."
- **OP 5)** The Security Council decided "that all States shall not make available to the authorities in the FRY (S&M) or to any commercial, industrial or public utility undertaking in the FRY (S&M), any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to those authorities or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within the FRY (S&M), except payments exclusively for strictly medical or humanitarian purposes and foodstuffs."

#### **Res. 820/ 1993**

- **OP 21)** The Security Council decided "that States in which there are funds, including any funds derived from property, (a) of the authorities in the FRY (S&M), or (b) of commercial, industrial or public utility undertakings in the FRY (S&M), or (c) controlled directly or indirectly by such authorities or undertakings or by entities, wherever located or organized, owned or controlled by such authorities or undertakings, shall require all persons and entities within their own territories holding such funds to freeze them to ensure that they are not made available directly or indirectly to or for the benefit of the authorities in the FRY (S&M) or to any commercial, industrial or public utility undertaking in the FRY (S&M), and calls on all States to report to the Committee..."

#### **Bosnian Serbs, Res. 942/ 1994**

- **OP 7)** The Security Council decided "that States shall prevent (i) economic activities carried on ... within their territories by any entity, wherever incorporated or constituted, which is owned or controlled, directly or indirectly, by (a) any person in, or resident in, or any entity, including any commercial, industrial or public utility undertaking, in those areas of the Republic of Bosnia and



Herzegovina under the control of Bosnian Serb forces, or (b) any entity incorporated in or constituted under the law of those areas of the Republic of B&H under the control of Bosnian Serb forces, as well as (ii) economic activities carried on ... within their territories, by any person or entity, including those identified by States for the purpose of this resolution, found to be acting for or on behalf of and to the benefit of any entity, including any commercial, industrial or public utility undertaking, in those areas of the Republic of B&H under the control of Bosnian Serb forces, or any entity identified in subparagraph (i) above provided that (a) states may authorize such activities to be carried on within their territories, having satisfied themselves on a case-by-case basis that the activities do not result in the transfer of property or interests in property to any person or entity described in subparagraph (i), (a) or (b) above and ... (*humanitarian exemption on approval by Sanctions Committee*)."

**OP 8)** Decided that ... (*no further exemptions for those having violated the measures*).

**OP 9)** Decided "that all States shall consider the term "economic activities" ... to mean (a) all activities of an economic nature, including commercial, financial and industrial activities and transactions, in particular all activities of an economic nature involving the use of or dealing in, with or in connection with property or interests in property, (b) the exercise of rights relating to property or interests in property and (c) the establishment of any new entity or change in management of an existing entity."

**OP 10)** Decided "that States shall consider the term " property or interests in property" ... to mean funds, financial tangible and intangible assets, property rights, and publicly and privately traded securities and debt instruments, and any other financial and economic resources."

**OP 11)** Decided "that States in which there are funds or other assets or resources of (i) any entity, including any commercial or public utility undertaking in those areas of (B&H) under the control of Bosnian Serb forces or (ii) any entity ... (*definitions as in 7(i) and 7 (ii)*) ... shall require all persons and entities within their territories holding such funds or other financial assets or resources to freeze them to ensure that neither they nor any other funds or any other financial assets or resources are made available directly or indirectly to or for the benefit of any of the above-mentioned persons or entities except ... (*definition of exemptions*)."

**OP 12)** Decided "that States shall ensure that all payments of dividends, interest or other income on shares, interest, bonds or debt obligations or amounts derived from an interest in, or the sale or other disposal of, or any other dealing with, tangible and intangible assets and property rights accruing to ... (*definitions as in 11 (i) and (ii)*) ... are made only into frozen accounts."

**OP 13)** Decided "that the provision of services, both financial and non-financial, to any person or body for the purposes of any business carried on in those areas ... (*definition of area*) ... shall be prohibited ... (*definition of exemptions*)."

#### **Libya, Res. 883/ 1993**

- **OP 3)** The Security Council decided "that all States in which there are funds or other financial resources (including funds derived or generated from property) owned or controlled, directly or indirectly, by: (a) the Government or public authorities of Libya, or (b) any Libyan undertaking, shall freeze such funds and financial resources and ensure that neither they nor any other funds and financial resources are made available, by their nationals or by any other persons within their territory, directly or indirectly, to or for the benefit of the Government or public authorities of Libya or any Libyan undertaking, which for the purposes of this paragraph means any commercial industrial or public utility undertaking which is owned or controlled, directly or indirectly by (i) the Government or public authorities of Libya, (ii) any entity, wherever located or organized, owned or controlled by (i), or (iii) any person identified by States as acting on behalf of (i) or (ii) for the purposes of this resolution."

#### **Haiti**

#### **Res. 841/ 1993**

**OP 8)** The Security Council decided "that States in which there are funds, including any funds derived from property, (a) of the Government of Haiti or of de facto authorities in Haiti, or (b) controlled

directly or indirectly by such Government or authorities or by entities, wherever located or organized, owned or controlled by such Government or authorities, shall require all persons and entities within their own territories holding such funds to freeze them to ensure that they are not made available directly or indirectly to or for the benefit of the de facto authorities in Haiti."

#### **Res. 917/ 1994**

**OP 4)** The Security Council "strongly urged all States to freeze without delay the funds and resources of persons falling within paragraph 3 above (*military, police, participants in coup d'état and illegal governments and their immediate families*), to ensure that neither these nor any other funds and financial resources are made available by their nationals or by any persons within their territory, directly or indirectly, to or for the benefit of such persons or of the Haitian military, including the police."

## **2. Problems encountered in implementing financial sanctions**

In the last seven years the "Financial Sanctions Group", an informal body meeting on an irregular basis<sup>21</sup>, has discussed a substantial number of difficulties related to the administration of financial sanctions. These consultations have confirmed that states share similar problems of implementation but do not apply the same solutions:

- The language of the sanctions resolutions is often ambiguous. There is a lack of definitions and common terminology. The scope of the sanctions is not sufficiently defined and some issues are simply left unmentioned. This makes it difficult to translate sanction regulations into national legislation. More standardized wording of resolutions is a possible first step to facilitate implementation into national law.
- Due to wording leaving room for interpretation, identification of the entities or persons being targeted proves difficult.<sup>22</sup> Not all states have access to the same information which leads to discrepancies in the implementation of the resolutions. Lists of persons and companies being targeted - mainly companies not based in the target state, but entirely or partly owned by the target - might facilitate implementation. It is clear that these lists would have to be issued and kept up to date by the United Nations.
- Many questions remain open as to the scope of the sanctions. Financial transactions take so many forms and are being used in such a multitude of circumstances that resolutions can hardly cover all of them. When resolutions ask for the freeze of "funds", "financial" or "economic resources", does that include a ban on portfolio-management, insurance business etc.? And what can frozen accounts be used for? May debts of target states be paid, can they be used for clearances etc.?
- Offshore financial centers, due to their less demanding monitoring requirements, might weaken the effectiveness of sanctions. The existence of loopholes reduces the willingness of long established banks to cooperate in implementing sanctions.

These experiences show that there is a need for further clarification of

- the wording and the scope of the resolutions.
- the target definition.
- the capacity of offshore financial centers to comply with sanctions.
- the translation of sanctions into national legislation as well as their uniform and efficient implementation.

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<sup>21</sup> It's regular participants are Bahrain, Belgium, Cyprus, Denmark, France, Germany, Greece, Italy, Malta, the Netherlands, Switzerland, the United Kingdom (who initiated the group) and the United States of America.

<sup>22</sup> It was e.g. difficult to define, which companies - especially among those outside of the country - were "owned or controlled directly or indirectly by the authorities or public and private undertakings of Yugoslavia" (Res. 820, Paragraph 21) The same resolution left it open, which areas of Bosnia Herzegovina were under Serbian control (Par. 12). In the case of Libya, it was difficult to define "any person (...) acting on behalf of the Government or public authorities" (Res. 883, Par. 3biii)

### 3. Targeting financial sanctions

Targeting financial sanctions will not help to resolve the problems of existing financial sanctions used so far. It might even make these problems more difficult. Targeted individuals may be able to move money faster and through less obvious channels than governments.

One must keep in mind that financial sanctions - especially targeted financial sanctions - require high standards in national jurisdiction and banking technology due to the numerous possibilities to shift and hide funds worldwide at an incredible speed. Electronic banking opens up many possibilities to hide money as well as to trace it.<sup>23</sup> The full cooperation of the private sector, banks, investment institutions, insurance companies and other financial institutions, is therefore a vital precondition for the successful implementation of financial sanctions - whether targeted or not.

A number of points have to be discussed when talking about targeting financial sanctions:

#### ***How can financial transactions be identified?***

- How are targeted funds and assets to be identified?
- How are forbidden financial transactions to be defined?
- How can transactions be traced?
- To what extent are the various financial instruments controllable?
- How can the cooperation of the private sector be assured?
- What is the cost of identifying targeted funds and assets?

#### ***What are the preconditions for successful implementation of targeted financial sanctions through states?***

- What are the legal requirements at the national level?
- How are sanctions legislations to be drafted and how can they be harmonized?
- Which instruments are needed to monitor financial sanctions at a national level?
- Are there legal implications when targeting individuals (right to appeal, claims against frozen funds etc.)?
- How shall frozen assets be administered?

#### ***How can the elaboration of sanction regimes contribute to a smooth implementation?***

- How can resolution texts be improved and the scope of sanction measures be clearly defined?
- How should lists of targeted persons be established? What are the problems in identifying groups and individuals?
- Do financial sanctions require a special decision-making process based on speed and secrecy?
- What incentives could be envisaged to motivate states and targets to comply with the resolutions?

#### ***How should targeted financial sanctions be monitored and administered?***

- How can financial sanctions be monitored? How should monitoring be implemented?
- Can targeted financial sanctions have undesirable secondary effects on third states and how could these be avoided?
- Can they cause humanitarian problems and how could these be avoided? How should exemptions be administered and monitored?
- What are the institutional requirements for these tasks? How can the UN assist implementing states most efficiently?

A series of more political questions have to be addressed when defining the criteria for the use of targeted financial sanctions: For instance, when are targeted financial sanctions to be used? Do they

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<sup>23</sup> It should be briefly mentioned that the USA - due to its active unilateral sanction practice - have acquired a wide experience in tracing private funds. The US treasury provides US-banks with computer-software to check all transactions made - an efficient way of catching targeted persons using the US banking system. However, these sanctions have been, like all unilateral sanctions, condemned by the General Assembly (A/ Res. 52/181)

have to be backed by other economic measures (as combined sanctions) or do they make sense without a "package"?

#### 4. Conclusions Part II

Targeting financial sanctions is one interesting option to make Security Council sanctions more efficient. NGOs, academics and politicians have already called for them on numerous occasions. The targeting of war criminals in Former Yugoslavia e.g. was discussed at the government level at least in European states. Security Council resolution 1027 (OP. 8) even mentions the possibility of targeted trade and financial sanctions against UNITA.

Experience with financial sanctions show a number of problems in the conception and implementation of the instrument. The identified problems can be taken as a starting point for careful discussion of the targeting of financial sanctions. Their in-depth study would allow the Security Council to make future decisions with an improved understanding of the complexities, opportunities and limitations of the instrument.

### PART III: THE PROPOSED SEMINAR

#### 1. Switzerland's motives in discussing financial sanctions

Switzerland is aware of the importance of sanctions instruments and subscribes to efforts that enhance their efficiency. At the same time she shares the concerns about undesirable secondary effects of Security Council sanctions on civilian populations.

As an important trading and financial center, Switzerland regrets secondary effects of sanctions on other nations. As one of the world's leading financial centers, Switzerland has a profound expertise in banking and private banking mechanisms and knows the importance of the optimal collaboration of states, UN-bodies and the private sector when studying the implications of financial sanctions.

#### 2. Outline of the planned seminar

Switzerland plans to organize an expert seminar in order to

- discuss the technical aspects of the targeting of financial sanctions.
- share experience with the implementation of financial sanctions.  
Given the complex structure of the topic, Switzerland plans to invite a broad range of specialists such as
- experts from the Security Council who will cover the intricacies involved in drafting the sanctions-decisions.
- sanctions and legal experts from capitals representing Ministries of Foreign Affairs, Treasuries or National Banks in order to cover the problems of the implementation of sanctions.
- experts from the UN-Secretariat to share their broad experiences and to assess the possible support the Secretariat might lend to the Security Council, other UN-bodies and to the implementing states.
- experts from banks and other financial institutions to examine the preconditions of a targeting-system and the cost of tracing and freezing (private) assets.  
Switzerland firmly believes that only the united expertise of all these groups of experts will give participants a full picture of the issues discussed.

Switzerland explicitly states that *the purpose* of the Seminar *is not* to

- duplicate the work of the "Financial Sanctions Group" and to open up another discussion about existing sanctions. Past experiences shall, as described, uniquely serve the purpose of making use of "lessons learned".

- lead a political discussion about the use of sanctions and financial sanctions as a policy instrument. Switzerland respects that the discussion of this question is within the authority of the Security Council and, to a certain extent, other UN-bodies.

### 3. First steps taken

After consultations with interested states, academics and sanctions experts, Switzerland convened an informal meeting on 29 October 1997 with a number of Security Council experts from member and non-member states in New York. This meeting was chaired by Ambassador Rolf Jeker, Delegate of the Swiss Federal Council for International Agreements. Its purpose was to examine the usefulness of the proposed seminar, to define the issues, to be discussed and to secure the participation of the relevant parties.

Ambassador Jeker made a presentation of the problems Switzerland had encountered in implementing sanctions. A private banking expert gave an overview of technical possibilities of shifting money. A United States sanctions expert presented his government's experiences in targeting sanctions with a special focus on the financial sector.

Participants at the meeting welcomed the Swiss initiative and assured the participation of their governments at the seminar. They underlined the need to discuss the issue and supported the proposal to organize a discussion among experts, bringing together national governments, the Security Council, the United Nations Secretariat and the private sector.

Several delegations urged the further study of the humanitarian impact of financial sanctions and their impact on third states. Several delegations encouraged Switzerland to focus on an expert seminar although it was flagged that the dividing line between technical and political issues was difficult to draw.

Some delegations asked for consideration of the cost of targeted financial sanctions for the private economy and for examination of legal implications. Ambassador Jeker concluded the meeting by announcing that the expert seminar would take place early in 1998.

### 4. Program of the seminar

In a brief introductory period in the afternoon of the first day, the chairman of the seminar and a UN-representative will set the framework of the seminar. An introduction on lessons and definitions will be given and views can be exchanged.

The morning of the second day will start with a presentation by experts from the banking sector discussing to what extent the various financial instruments are controllable. It will be followed by a panel with the Chairmen of the three Working Groups to be established in the afternoon discussing the preconditions for making financial sanctions work.

The afternoon of the second day will be dedicated to the work of the three groups.

- Working Group 1 is dedicated to *national administrations*. It will treat the preconditions for successful implementation of sanctions by implementing states. Experts from capitals will discuss primary and secondary legislation as well as the monitoring and the administration of financial sanctions.
- Working Group 2 focuses on the work of the *Security Council*. It will discuss the elaboration of sanctions regimes, the wording of resolutions and the special requirements of the targeting of individuals and groups. In this context it will also address the question of lists and definitions.
- Working Group 3 will treat the monitoring and administration of sanctions through *the Security Council's Sanctions Committees and the UN Secretariat*. It will also address the question of humanitarian exemptions and secondary effects on third states.

The seminar will end with a presentation of the conclusions of the Working Groups and a discussion of the eventual follow up to the seminar.

For all the seminar's elements, background-papers will be provided before or at the seminar. Several participants have already announced that they will submit expert papers to the proposed thematic clusters. All delegations are herewith invited to do the same on the thematic cluster of their choice. The organizers will also provide a report of the results of the seminar.

## Remarks about the Possible Outcome of the Seminar

The goal of the proposed seminar is to create an opportunity to discuss financial sanctions in general and targeted financial sanctions in particular. This should raise the awareness of participants regarding the complexity of the issue.

It is Switzerland's wish to comply with the goal of the Secretary General, mentioned in his latest report on the work of the Organization: "I shall encourage consideration (...) of possible ways to render sanctions a less blunt and more effective instrument."

## Some Selected Literature

Due to the big number of sources, it does not seem efficient to provide a complete list of UN-documents and other literature dealing with sanctions. Still, many key-references can be found in the notes of this text. It may as well be useful to list some recent writings of particular interest reflecting comprehensive approaches to the sanctions issue:

- Conlon Paul, *The UN's questionable Sanctions Practice*, Zürich 1996.
- Cortright David and Lopez George A., *Economic Sanctions: Panacea or Peacebuilding in a Post-Cold War World*, 1995.
- Doxey Margaret, *United Nations Sanction: Current Policy Issues*, 1997, S. 21-17.
- Haas Richard, *Sanction Madness*, *Foreign Affairs*, Nov/ Dec 1997.
- Hoskins Eric, *A Study of UNICEF's Perspective on Sanctions*, 1997.
- Hufbauer Gary Clyde et al., *US Economic Sanctions, Their Impact on Trade, Jobs and Wages*, *Institute for International Economics*, Washington DC, 1997.
- *International Task Force on the Enforcement of UN Security Council Resolutions, Words to Deeds: Strengthening the UN's Enforcement Capabilities*, New York December 1997.
- Minear Larry et al., *Enhancing the Capacity of the United Nations System*, 1997.
- Strelau John, *Sharpening International Sanctions*, New York November 1996.
- Weiss Thomas G. et al. *Political Gain and Civilian Pain: Humanitarian Impacts of Economic Sanctions*, 1997.

# **THE FINDINGS**





## **Chairman's Conclusions**

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*Ambassador R. Jeker, Delegate of the Swiss Government for International Agreements*

Ladies and Gentlemen,  
Colleagues and Friends,

We come to the conclusion of our Seminar. Allow me to make at this stage a few comments and to draw, as the Chairman of the meeting, a few preliminary and tentative conclusions on our deliberations over the last three days.

What have we achieved and what remains to be done? Where do we go from here?

We came here to discuss the possibility of refining the UN Financial Sanctions instrument with a view to enhancing its effectiveness while reducing undesired collateral damage on the civilian population and third countries. We tried to analyse whether this would be possible through targeting UN Financial Sanctions on specific groups. The purpose of the seminar was to make a first attempt at defining the basis for possible cooperation between the UN, national authorities from home and UN missions, governmental organisations, financial institutions and academics.

We did not set our ambition too high for a first meeting because we are all aware of the complexity of the issues but we nevertheless strove for some results.

I recall my introductory remarks on this point. I said my objective would be:

- to arrive at a clearer and perhaps more common understanding of the relevance of the UN financial sanctions instrument,
- to identify some measures for improvement, and
- to prepare the ground for developing clearer resolution texts combined with interpretative guidelines.

I hope you will agree with me when I say that we have achieved quite a bit in this short time, knowing quite well that a lot more needs to be done to further refine some of the ideas discussed here.

### **1. The Interlaken Process**

We started the Interlaken Process of bringing together different actors: Government representatives from their capitals as well as from New York, the UN, the banking community, academics and international organisations, particularly those dealing with humanitarian issues.

Building this bridge brought about an interesting exchange of views between people with different backgrounds, knowledge, experience and expertise to the mutual benefit of all.

I feel, that people in capitals now understand better what is happening in New York and vice versa and we all had an insight into the functioning of financial markets and financial institutions - a knowledge which is absolutely essential for all of us dealing with issues related to financial markets.

### **2. Financial Targeting**

We identified the preconditions necessary to make targeting of UN Financial Sanctions work better and achieved some preliminary, tentative conclusions which will need to be pursued further.

Among these requirements are

1. clear identification of the target,

2. the ability to identify and control financial flows,
3. strengthening of financial sanctions as such.

## **2.1. Identification of the Target**

Whether financial targeting works depends on particular characteristics of a target country such as

- the degree of economic and resource self-sufficiency,
- the range of trading partners,
- its financial resources,
- the nature of the political system,
- the size and complexity of its economy, and
- public attitudes.

These and other elements need to be specifically analysed when designing and targeting financial sanctions.

The identification of the target group might cause some difficulties but they do not seem insurmountable. Interesting discussions took place, for instance, on the establishment of lists.

## **2.2. Identification and Control of Financial Flows**

Regarding the identification and control of financial flows, solutions can be found, notwithstanding the complexity of the task and the obstacles that lie ahead. Valuable experience is available from the money laundering side with regard to customer satisfaction and record-keeping rules which are to enhance diligence of financial institutions. It is all about knowing your customer.

## **2.3. Strengthening the Financial Sanctions Instrument**

Targeting financial sanctions implies that the target is a smaller unit than a whole country. If you shoot at a big target, your weapon does not need to be very accurate - it can be a scatter gun like the comprehensive sanctions applied in the past. If the target is small, the weapon must be very accurate.

With regard to this question, namely how to improve the sanctions instrument itself, we made considerable progress in identifying weaknesses and potential solutions.

I will refer to a number of them:

- clarity of language in resolutions (use of common, agreed language, building blocks),
- help with interpretation through guidelines further explaining and defining the language of the resolution,
- strengthening the capacity of the UN Secretariat through access to financial expertise,
- information exchange among sanctioning states,
- assisting member states to improve implementation domestically, legally and administratively.

The last point acts as the weakest link in the chain which will govern success or failure of a given sanctions regime, if no improvement is made.

## **3. Research Agenda**

Very little research has been done in the area of financial sanctions. This calls for a research agenda to help us take our deliberations further.

## **4. Humanitarian Provisions**

A lot of importance has been attributed to humanitarian provisions. In fact it was the problem of collateral damage of sanctions which has led us to come here to analyze whether targeting of UN financial sanctions can, in fact, reduce these negative effects.

I felt that the answer is not yet conclusive and further work is needed. This is also true with regard to ideas that have been voiced regarding the use of positive action (positive sanctions) or regarding an incentives approach.

While underlining the importance of the humanitarian aspect there seems to be a somewhat common feeling that humanitarian exemptions should be based on certified needs.

## **5. Other Issues**

Of course, other interesting points were brought into the discussion which gave rise to different views and which need further discussion, such as

- the treatment of debt service,
- asset management, or
- the use of exit clauses

My conclusion is that we made some progress. Further progress is needed but it is comforting to know that it is not an impossible task that lies ahead of us. The issue is so important that our continued attention is justified.

## **6. Follow-up**

It is too early at this stage to decide on the follow-up or on the concrete use that should be made of the report.

We will make a preliminary information available to you soon including the Chairman's conclusions as well as succinct reports of the three Working Groups, whose oral reports you have just heard. Later, a full report of the discussions including the various papers distributed at the seminar will be sent to you.

As I mentioned in my introductory remarks, my Government will stay committed to the objective of improving the financial sanctions instrument. We will be prepared to carry on the Interlaken Process a step further but would also welcome any assistance in carrying on the process. I think we should make sure that we do not lose momentum. At our next meeting we should be able to analyse some specific issues in more detail to arrive at operational conclusions. This is only possible if detailed papers on some of these issues will be available prior to the next meeting and circulated to participants well in advance. I hope we can count on your continued support in providing your expertise for the issues at hand.

Before closing the workshop, I want to thank you once again and hope sincerely that you enjoyed your stay and will remember the Interlaken Meeting for its intellectual content as well as for its pleasant environment.



## Chairman's Report

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*Ambassador Rolf M. Jeker, Delegate of the Swiss Government for International Agreements*

### 1. Background and Goal of the Seminar

Over the past several years, the number of sanctions regimes mandated by the United Nations Security Council has increased significantly. Experience with sanctions has revealed a number of problems, most notably:

- ◆ Humanitarian effects on the civilian population in the target country;
- ◆ Economic effects on third countries.

These experiences have given rise to a call for more effective targeting of sanctions. The Security Council and various organs of the General Assembly as well as Inter-Agency Working Groups, academics, NGOs and political bodies have discussed the issue.

Targeting sanctions on elites, governments officials and selected entities has been frequently raised as an important objective, which, if correctly and uniformly applied, could enhance the effectiveness of sanctions and reduce their unintended side effects. Among the possibilities of targeting sanctions, targeting in the financial sector has found particular interest.

The success of targeted sanctions largely depends on the effective design of the measures as well as on their successful implementation. This implementation covers technical aspects like the formulation and phrasing of the resolutions, the willingness of states to enact legislation for adequate authority to enable speedy and comprehensive implementation, possible arrangements for monitoring and enforcement, and, crucially, cooperation among participating states. These aspects require in-depth discussion to explore the potential of targeting.

Switzerland applies United Nations sanctions on an autonomous basis and thus supports the efforts of the UN to preserve and enhance peace and security. After consultation with interested states, academics and sanction experts, Switzerland decided to organize a Seminar on the Targeting of Financial UN Sanctions.

The intent was to bring together representatives of the UN Secretariat and agencies, the Security Council, national governments and the private sector to discuss technical implications attached to financial sanctions with the intent to arrive at a clearer understanding of the relevancy of financial sanctions their potential for targeting.

The following briefs contain the consolidated results of the discussions on particular topics as they have been discussed during the three days of the Seminar both in the plenary and the working groups.

## 2. Targeting

The seminar participants agreed that when a sanctions regime is employed to alter the behaviour of a regime or an authority, efforts should be made to clearly identify the intended target of these sanctions. Sanctions regimes should be imposed in a way that bring the maximum amount of pressure on that target while minimising unintended consequential damage to others, in particular on the civilian population. Participants agreed that financial sanctions appeared to be a particularly promising vehicle to achieve that result.

1. A targeted financial sanctions regime should have certain commonly understood elements. These are:

- a) clear understanding of the targeted entities, assets, and transactions,
- b) a clear understanding of the extent of coverage of the program (i.e., exactly who and what are covered by the program),
- c) information on financial leverage that can be brought against the target,
- d) whether the multilateral enforcement regime is adequate to ensure the consistency of its application, and
- e) whether information gathering or sharing mechanisms are adequate to maintain a strong sanctions regime.

2. Uniformity in interpretation and enforcement are seen as necessary to avoid exploitation of ambiguities and forum shopping by the potential targets of sanctions regimes.

3. There was a recognition that implementing states need as much advance notice as possible to implement financial sanctions. It was, however, widely recognized that assets move quickly when public discussions begin and that both speed and discretion in application of these regimes are critical to their success.

4. Prior analysis of the vulnerability of targeted governments and elites are needed to ensure the efficiency of financial sanctions regimes. Among the elements to be considered are:

- a) the sophistication of the national economy
- b) description of the fortunes of the ruling class
- c) the tailoring of the sanctions to have the greatest effect on those to be targeted
- d) what positive elements can be built into the regime to motivate compliance by targeted individuals.

5. There was general agreement that states depend on lists containing the names of the targets in order to be in a position to implement targeted sanctions. Whenever possible, such lists should emanate from the UN Security Council.

### 3. Monitoring, Administration, Reporting

Much importance is attached to monitoring of the impact of sanctions regime, be it the positive impact on the targeted government or elite, or the negative impact on the civilian population or third parties. There was little general agreement on the need for efficient monitoring mechanisms as a prerequisite to the successful implementation of any type of sanctions regimes. Difficulties were identified in this context with regard to the capacity of implementing governments to adjust national legislation to facilitate the monitoring of financial sanctions.

1. Monitoring should fulfil the following criteria:

- a) Proper monitoring should cover humanitarian and socio-economic effects on the target and adversely affected third countries,
- b) Monitoring should also cover steps taken to implement and enforce sanctions,
- c) Administration in Member States should be as consistent as possible with practice in other Member States (see also Chapter on Information Exchange),
- d) The UN should, wherever possible, issue guidelines for implementation of Security Council resolutions.

2. There are already several provisions inscribed in many Security Council resolutions instructing the UN Secretariat to report on the implementation of UN sanctions. The content and the scope of the reports by States vary widely. Financial and other constraints limit the extent to which the UN is able to monitor the implementation of its sanctions and, at present, there is very little capacity to assess the relative performance of reporting States. Reporting should be detailed and contain:

- ◆ specific measures taken by the reporting State to implement and enforce sanctions;
- ◆ the identity of the competent national authority(ies); and
- ◆ the aggregate amount of funds frozen and target entities affected.

3. Technical assistance could be offered to individual States to assist them in their tasks of monitoring and administering sanctions regimes. It was also felt that frameworks or guidelines for implementation, produced at the UN, be it the Security Council, or, more likely, the Secretariat, would aid effective administration.

4. Some participants believed that specialised financial institutions and regional inter-governmental organisations might have a role to play in assisting States.

5. It must also be recognised that the implementation of the recommendations will pose a heavy burden on all concerned, UN Secretariat, Committees and Member States individually, alike. Resources should be made available to support these activities.

#### **4. Humanitarian Provisions**

The participants agreed that humanitarian issues should be addressed in the formulation of sanctions regimes.

The participants also agreed that humanitarian provisions of the sanctions regime should not be used as a method for the target to subvert or evade sanctions or to gain access to frozen bank accounts that would otherwise be unavailable.

1. The humanitarian licensing process could be improved by establishing a correlation between the licensing decision-making and humanitarian needs of the target.

2. A humanitarian needs assessments should be performed in these circumstances quickly, independently, and on a non-political basis. Monitoring should be employed to ensure that delivery is made quickly to the intended recipient and that the goods are not subverted for other purposes.

3. Debiting of blocked accounts to pay for purported humanitarian purchases is alleged to have been used as a method to free up blocked funds. When the goods are purchased they are then resold to gain hard currency.

4. A better understanding should be reached on the conditions allowing the debiting of blocked accounts to achieve the humanitarian objective and when such action is inimical to the goals of the sanctions regime.



## **5. Clarity of Resolution Texts and Guidelines**

The seminar participants agreed that the language of the sanctions regime should be clear and unambiguous as to the objectives of the sanctions and what specific actions States must take to be in compliance with Security Council demands.

The text should be in plain standard language with defined technical terms so that these are clearly by the implementing States.

1. Technical terms should have common definitions agreed prior to their use and understood by all implementing States so they can be used as “terms of art” whenever sanctions are applied.
2. Text and guidelines should address all issues relevant to the sanctions regime - purpose, operative language, lifting criteria, terms not previously defined, and any other special considerations.
3. Guidelines should be circulated more widely and be better understood by States at the initial stage of the sanctions regime.
4. Consideration should be given to the use of standard texts (building blocks) that have been tried in the past. Menus of sanctions options could also be developed over time so that each new regime is not a new invention. Due consideration must be given to the fact that each new sanctions regime needs to be tailored to suit the circumstances to which the sanctions shall apply.

## 6. Information Exchange

There was a broad general consensus that a regular exchange of information between States leads to more effective implementation of financial sanctions. Information should be collected and shared through the UN Security Council and its sanctions committees. It also recognised that a number of Member States might not be able to collect or share information on individual owners or assets. It was recognised that it was likely to be a complicated task to collect together the relevant information from all States.

1. More effective implementation means not just that sanctions are tighter but that authorized exemptions are more evenly applied, leading to better application of humanitarian provisions and to a reduction in collateral damage.

The connection between the exchange of information and efficient and uniform application merits further study. It is likely that there would be two benefits to improvements in this area: first, a generally tighter net would be thrown around the target leading perhaps to more effective and shorter sanctions; secondly and more importantly, a more even application of exemptions is likely to lessen the collateral damage on third parties, since these would be easier to anticipate.

2. Information should be centralised and shared through the UN Security Council and its sanction committees. The vertical provision of information from the Security Council down to Member States is vital to enable the implementing States not currently members of the Security Council to fully understand the requirements of sanction regimes. Without the provision of accurate information, it is hardly possible for States to take the necessary steps either to enact national legislation and to inform adequately the financial sector in their own country. Even after the passage of a UN Security Council resolution there is a continuing need to keep States informed of developments at UN level.

3. The exchange of information on an horizontal basis between States is equally important in furthering the benefits of consistent application of sanctions between States. These benefits are not related solely to a reduction in the size of loopholes but also in making as sure as possible that humanitarian exemptions operate properly.

Before an effective system could be devised, however, much more work remains to be done and this Seminar went only so far. It recognised many of the values in sharing information, notably in terms of efficiency and uniformity of application; it began to make the connection between these benefits and targeting, in its appreciation of the extreme difficulty in identifying targets without; and it noted, in very broad terms, some of the likely difficulties ahead.

4. It was also thought that there were sufficient parallels between anti-money laundering activities and financial sanctions to merit an exchange between the UN Secretariat and FATF (Financial Action Task Force) to explore to what extent these kinds of experiences be put at use in tracking financial assets under sanctions regimes.

## 7. Domestic Implementation / Model Law

Discussions of the legal aspects of implementing UN Security Council resolutions have identified a wide agreement on the desirability of uniform implementation in terms of outcome if not in terms of methods used. But it has also thrown into stark relief the difficulties faced by many States in achieving the desired standards with the legal tools at their disposal.

All States should have in place a law from which resolutions imposing financial sanctions can be implemented without delay. Such national laws should lead to sanctions being applied with uniform effect (when compared with other States) rather than to the application of sanctions through uniform ways and means.

There would be merit in offering for voluntary use by States, a model law or framework of legislation.

1. At the level of the Security Council, the participants noted the importance of understanding the purpose and effect of UN Security Council resolutions calling on States to impose sanctions; that sanctions are generally intended to be coercive rather than punitive; an interruption in the target's participation in the international community rather than excommunication.

2. The participants discussed the difficulties faced by many States in having to attempt implementation using legislative and administrative measures designed for another purpose or even in the absence of any national legislation. The deficiencies of many legal systems are incontrovertible: the need to enact new legislation causes significant delay; the use of laws enacted for other purposes poses problems, because the existing framework may not be capable of adapting to resolutions' requirements; and in States where there is no effective law at all, the consequences of legal challenge would or could cause severe embarrassment.

3. The view was put forward, but not generally accepted, that a model or framework law compatible with a range of legal systems would be of assistance to States in ensuring that activities incompatible with sanctions did not take place within their jurisdiction.

This model law could take whatever form suited a State's own system, be it decree, regulation, Order or other governmental instrument. Even though such instruments may be signed individually by Ministers, Presidents, or others (depending on the applicable legal regime), there need be no loss of control by legislatures since any such instrument could be subject to negative votes by them.

It is intended to offer for examination at the next Seminar a draft on these lines.

4. Some States may have concluded that, in the absence of any trading or other relationship with the target, it was unnecessary to take steps to implement UN Security Council resolutions. It was suggested that this was an unsafe assumption, since it allowed a target the option to exploit the loophole thus created by using the State concerned or its entities as an intermediary.

## **8. Asset Management**

Participants agreed that sanctions are not of a confiscatory nature. They also agreed that while some UN Resolutions explicitly allow asset management, they often do not define clearly the scope of asset management. The question, how asset management shall be dealt with by states, should be made clear through guidelines.

1. As UN Resolutions are sometimes vague about the extent to which asset management is allowed under a specific regime they give rise to different interpretations. In its most restrictive interpretation, it would mean that assets would remain unchanged in the form they were at the time of imposition of sanctions

In a less restrictive form, change in assets composition, possibly even across borders, would be possible provided, of course, that assets remained frozen.

2. There was considerable reluctance expressed by experts with regard to the extensive interpretation as it would not put the necessary pressure on the target country and open possibly loopholes if assets were transferred. If, however, additional income derived from asset management was to be put in a compensatory fund, the issue might appear in a somewhat different context.

3. The issue of asset management was also identified in support of the need for clearer guidelines accompanying resolution texts to ensure a more harmonised implementation.

## 9. Treatment of Debt and Debt Service

It was felt by the participants that the issue of how debt service was to be treated under sanctions resolutions needed to be further reviewed.

1. In his introductory statement, the Chairman pointed out that the imposition of sanctions had an effect similar to a debt moratorium, although the resolutions did not free target countries from their debt service obligations.

By failure to collect debt service payments the target country was offered substantial relief at the expense of sanctioning states and their economic entities.

Since debt service payments were legally binding obligations, means would have to be found in future sanctions resolutions to collect such payments.

2. Possible sources for payments to be enforced could be existing frozen accounts, income from asset management, or special mechanisms similar to "oil for food".

In order to avoid a one-sided treatment of creditors all payments would need to be deposited in an "escrow account" from which allocations would have to be made on an equal treatment basis.

As such mechanisms are already applied in traditional debt rescheduling operations there would be no insurmountable administrative obstacles to be overcome.

3. A priority ranking of debt service payments to multilateral and bilateral creditors on one hand and of debt service to official and private creditors on the other hand needs to be established. Traditionally multilateral organisations are treated as preferred creditors.

4. There was no discussion of the extent to which individual countries could draw on accounts in their territory to enforce debt service obligation of a sanctioned state.

## 10. Exit Clauses

The seminar participants agreed that more serious and specific consideration should be given when designing sanctions programs on how the programs will be terminated.

The participants also expressed interest in consideration of a “carrots and sticks” approach to sanctions initiatives whereby positive incentives to motivate changes in behaviour are built into the sanctions regime.

1. The targeted financial sanctions should have clearly stated and defined goals and objectives with specific criteria of the changes in behaviour that must be met by the target to effect a lifting of the sanctions.

2. Consideration should be given in each sanctions regime for automatic removal of sanctions when a finding is made that the specific stated goals of the sanctions regime have been achieved.

3. As a general rule, financial sanctions should not be suspended on the basis that they might be reimposed at a later time as it should be assumed that the target of the sanctions will move assets to escape the sanctions net before reimposition. Moreover, from the perspective of the sanctions administrators, such an action is extremely difficult to implement.

# Report Working Group 1: Preconditions for Successful Implementation

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Chair: Ambassador Tono Eitel, Germany

## The Working Group's Term of Reference

The Working Group was asked to consider the preconditions for the successful implementation of United Nations mandated financial sanctions by the implementing State. This was to include consideration of the need for appropriate primary and secondary legislation. What legal preparations have to be made on the national level to implement sanctions? How are the sanctions legislation and orders to be drafted? How can national legislative regimes be harmonised?

The Working Group was also asked to consider the issue of monitoring and administering financial sanctions. Which instruments are there to monitor financial sanctions on the national level? Which instruments are needed (for example, is there a need for mandatory notification to the national authority of accounts and assets held by financial institutions)? Is the administration of property to be allowed, and if so, what are the implications for monitoring and administering?

The Working Group had before it two papers: "Making Financial Sanctions Work" by Mr J. Carver of the United Kingdom; and "Implementation of Sanctions Imposed by the United Nations Security Council - Japan's Experience" by Mr M. Yoshikawa of Japan.

The Working Group met on the afternoon of Wednesday 18 March and the morning of Thursday 19 March 1998.

## Conclusions Reached by the Working Group

### A Primary and Secondary Legislation

1. All States should have a law in place from which decisions imposing financial sanctions can be implemented without delay (see paragraphs 5-8 of the Discussion section, below).
2. Such national laws should rather lead to sanctions being applied with uniform effect than to the application of sanctions through uniform ways and means (paragraphs 3-8).
3. There is merit in formulating a model or framework law available at the option of States to enable them to implement relevant decisions (paragraph 7).

### B Reporting

1. Reporting by States on financial sanctions should be more comprehensive and include at least the following elements:
  - identification of the legislative and other measures that have been adopted or are being applied to implement financial sanctions;
  - identification of the national or regional competent authorities;
  - effects achieved, possibly such as aggregate amounts and target entities affected.

### C Certain Concrete Issues

1. There is a need for clarification on the issues of debt moratoria and asset management; therefore further study is needed in the absence of precise decisions by the Security Council (paragraphs 13-16).

### D Follow-Up

1. Informal information exchange between competent authorities is highly desirable (paragraphs 11-12).
2. Members of the Group thanked the Chairman and the Swiss Government for their hospitality and expressed their appreciation for the organisation of this first round of informal consultations on the important subject of the targeting of financial sanctions.

### **The Working Group's Discussion**

1. The Group adopted a "cascade" approach; looking at the process of financial sanctions implementation from the level of the relevant UN Security Council Resolution, following the process down through the numerous descending steps involved nationally to interpret, apply and enforce sanctions; national primary and secondary legislation, administrative procedures and formal and informal mechanisms available to States.
2. At the level of the Security Council, it was important to understand the purpose and effect of Security Council Resolutions calling on States to impose sanctions: the object was to isolate the target by exclusion from the international community until compliance with the requirements of the Security Council was achieved. Sanctions are, therefore, an interruption of the target's participation in the international community, but not a permanent excommunication. Moreover, sanctions are generally used as a coercive tool, that is why participants agreed that they are not designed to punish the target.
3. It was also agreed that, whilst seeking to maximise the impact on the target, sanctions should be implemented in such a way as to minimise collateral damage to humanitarian interests and to third party States.
4. There was no consensus on the way in which States should interpret Security Council Resolutions imposing sanctions (restrictively or expansively). However, it was generally agreed that, having regard to each State's own constitutional, legislative and administrative order, uniform effect in the implementation of sanctions was a primary objective and that States would be assisted in achieving this aim if Resolutions were more clearly worded and if guidelines were available.
5. The view of many members of the Working Group was that, historically, sanctions have been implemented by many States on the basis of a pre-existing legislative and administrative framework, which may originally have been devised for a quite different purpose. Moreover, because of domestic constraints or a deficiency in their national legislation, many States have been unable to give full effect to the United Nations mandated sanctions.
6. It was proposed that States need to have in place primary legislation according very broad powers to those national entities entrusted with implementing sanctions, so that the State can react quickly to the Security Council's requirements. States in particular need to be able to cope with emergency situations. Flexibility is also required, if the Security Council's objectives on particular occasions are to be given proper effect. Each State needs to establish mechanisms to apply and implement resolutions: to answer questions from those required to observe them; and to enforce them. On the implementation side, it was recognised that there were bound to be differences between States in the ways and means applied to comply with UN Resolutions, given different legal traditions and cultures and the different levels of resources available.
7. It was proposed that a model or framework law, of optional nature, but compatible with a large number of legal systems, might assist States to ensure that sanctioned activities and transactions do not take place in their jurisdiction, or by those subject to their jurisdiction.
8. It was observed that some States may in the past have concluded that, because they have no formal trading relationship with a target, there is no need to take steps to implement applicable Security Council Resolutions in relation to it. It was suggested that no State can ever be sure that the target of sanctions has no contacts with persons or entities within its jurisdiction, and that targets are more likely to explore options to develop such contacts in the face of international sanctions, if any particular State has not taken positive steps to implement those sanctions domestically. States need to ensure that non-compliance with any relevant UN Resolution is not possible within their jurisdiction.



Loopholes in the implementation of sanctions would therefore be reduced if all States recognised this consideration and took steps to react to all sanctions Resolutions.

9. In order to monitor the situation, it was proposed that steps should be taken to make the reporting requirements of member States to the Secretariat more meaningful. Whilst there was general agreement that such reporting would usefully include identification of the legislative and other measures adopted or being applied by States to implement financial sanctions and the identification of competent national or regional authorities, there were differing views as to whether reporting on the effects of sanctions such as aggregate amounts and target entities was feasible. Some States lacked the internal power or resources to gather such information and/or to report it to the United Nations.

10. Concern was expressed about the level of expertise concerning sanctions that was sustained by many national administrations, given the recognised importance of having guidance available in connection with the implementation of sanctions. Insofar as possible in national administrations, existing expertise should be drawn upon (for example, that developed in connection with exchange control), as should developing areas of expertise (such as in the field of money laundering).

11. Since the objective of financial sanctions mandated by the United Nations is to regulate globally international financial transactions, there is much scope for the beneficial sharing of information, both to ease implementation and enforcement of sanctions but also to assess the uniformity of their application and their practical effectiveness. For example, how do States decide which entities are targeted by sanctions? Which authority is in charge in each State of enforcing and implementing sanctions, and granting licenses? Would there be benefits from the creation of international lists of targeted entities? What penalties are imposed for breaches of sanctions?

12. It was unclear what mechanism could realistically be established for co-operation and information sharing. Possibilities ranged from informal gatherings to the establishment of a global database. Moreover, before deciding what information could be shared, it was considered necessary to establish what information is available to national authorities. It seemed that, although States generally have taken steps to adopt effective measures to prevent asset transfers, very few States have detailed or comprehensive reporting requirements: to report the initial blocking of assets; the amounts blocked; the entities in whose names the assets are held. Moreover, some States do not have the domestic authority or the resources to collect such information.

13. The Group considered the questions of debt moratoria for the target of sanctions. There was general opposition to a debt moratorium as this would benefit the target, although it was appreciated that the effect of sanctions legislation may be itself to impose a de facto moratorium.

14. A further question focused on what States are entitled to do, once sanctions have been implemented and assets blocked, should active management of targets' assets be undertaken, or the usual accrual of interest commensurate with inflation? There was no consensus on the degree to which the targets' assets may be managed during the imposition of sanctions in a manner consistent with the concepts that (i) the impact of sanctions should be maximised; (ii) the target should not benefit from the imposition of sanctions; and (iii) collateral damage should be minimised. If there is to be active management, is that to include the possibility of conversion of assets into different forms and/or movement of assets between States? Are States entitled to permit the liquidation of assets to meet claims of creditors from blocked assets? If so, which creditors are to qualify and how are their claims to be assessed? Experience in certain States suggests that claims will always exceed the blocked assets. The discussion indicated that there may be substantial variance in the solutions currently adopted by different States concerning the approach to managing assets and the extent to which they might be attached, or creditors' claims paid, while sanctions are in place.

15. One suggestion was that an international system might be devised whereby the targets' assets would be gathered in and liquidated and made available on a pro rata basis to creditors of all nationalities; with the assets being administered by a form of executor. However, the general reaction to this proposal was that it would be administratively unworkable. An alternative proposal was a requirement that all frozen assets be reported to the United Nations Secretariat, with the option for the Security Council to determine that they be transferred during the pendency of sanctions to an escrow account; and the possibility that they then be applied for purposes approved by the Council.

16. It was agreed that, on the issues of debt moratoria and asset management, and in the absence of precise decisions by the Security Council clarifying the position in those issues, further study was required.



## Report Working Group 2: Development of Sanction Regimes

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*Chairs: Bernadette Doyle, Bahrain, and Richard Newcomb, USA*

### General Reflections about Sanctions Regimes

1. The uniformity of interpretation and enforcement of sanctions resolutions is a precondition to avoid the exploitation of ambiguities in the implementation.
2. Better information and better information sharing in both planning and implementation phases contribute to the efficiency of all sanctions.
3. Clearer resolutions in plain, operative language with common wording contribute to clarity when implementing resolutions.

### Targeting Individuals, Groups and Companies

1. Objectives of sanctions must be clear and meaningful, concise and unambiguous.
2. Individuals, groups or companies may be targets.
3. Each type of target brings its own, specific problems:
  - Individuals: A common understanding and acceptance of the "who" is needed.  
eg., status of dual passport-holders, if sanctions are based nationally.  
eg., definition of nationality, if sanctions are based nationally.
  - Groups: An understanding of how membership in the "group" is determined  
eg., does a group-member need to be registered, card-carrier, wear uniform?
  - Companies: How to determine company ownership and control.  
eg., are registration, incorporation, or ownership details available?  
eg., are details about the structure and the residency of the company available?  
eg., how can a distinction between public and private sector be made?
4. Definition standards must be clear in Resolutions and Guidelines/Subsidiary Notes of the Sanctions Committee. Expertise could be provided on Secretariat level through pre-drafting and assistance in implementation.
5. Lists of targets and members of the target-group are a precondition for equal international enforcement. They must emanate from the Security Council to be perceived as a legitimate tool.
6. The Sanctions Committee must, through the Secretariat, maintain, update and disseminate target-lists.
7. There should be an appeal mechanism at the Sanctions Committee level to get off the list in order to avoid multiple judicial procedures at the national level.
8. Domestic legislation must recognise the legitimacy of the UN lists.
9. A need-based exemption mechanism should be created for day to day operations.
10. A category of "Personal Exemptions" should be created for religious reasons, urgent medical care, repatriation of corpses, electorate reasons, etc.

### Criteria for the Use of Financial Sanctions

1. Speed and confidentiality are necessary preconditions for the effective implementation of financial sanctions.
2. The knowledge of anti-money-laundering procedures is a useful device for the enforcement of financial sanctions. The management and monitoring of sanctions is different though, since sanctioned money has no illegal status.
3. There are differences in the susceptibility of various targets to financial sanctions which may affect the appropriate mix of sanctions measures. Factors strengthening targeted financial sanctions are:
  - sophistication of the target's economy
  - foreign assets in hard currency

- fortunes of the elites
4. Clear exit clauses may motivate targets to comply with sanctions. The group found consensus on the positive potential of the “carrot and stick” approach.
    - the suspension of sanctions is not an appropriate carrot-tool. It creates confusion within the implementing financial industries.
    - sunset clauses indicating the requirements for the lifting/alleviating of the sanctions should be considered.
    - built-in incentives are an untested option in multilateral sanctions: positive incentives may contribute to compliance, e.g. reward for transferring targets money into escrow-system; penalty for blocked funds identified when trying to escape.
    - options include the management of blocked funds, compensation of affected states, etc.

## **Difficulties in the Development of Sanction Regimes**

1. Standards, definitions, and guidelines should be created in an open process on an expert level. Inputs should come from all states. No consensus was reached if standard texts are to be elaborated or if modular elements would be more useful.
2. Better, more technical resolutions would increase respect for the measures decided.
3. The identification of the target should be open and transparent. Target definitions based on secret information interfere with the sovereignty of the implementing states.
4. Humanitarian exemptions must be based on identifiable needs and on certainty of their delivery through a monitoring system. A needs assessment must move quickly and be non-political and independently formulated. It is intended to enhance, not slow down, the process. There is a need for an agreed-upon standard approval procedure with the possibility for emergency amendments. No consensus was reached on the legitimacy of debiting blocked accounts for the purchase of humanitarian goods, but should have similar standards to apply.

## **Report Working Group 3: Monitoring and Administering Financial Sanctions through UN Bodies**

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*Chair: Diana Galloway, United Kingdom*

Working Group 3 came to the following conclusions:

### **Administering of Financial Sanctions**

1. The Working Group considered that financial sanctions as applied so far had many shortcomings and undesirable side effects. These should be addressed in future sanctions resolutions.
2. The Working Group felt that the exchange of information between States relevant to the sanctions regimes is key to an effective administration of financial sanctions. It was felt that information should be centralised and shared through the UN Security Council and Sanctions Committees. The Working Group took note of the fact that at present a considerable number of States might not be in a position to collect or share information on individual owners and quantities of assets.
3. The Working Group felt that, upon request, States should be given assistance and guidance in implementing financial sanctions by being provided with 'frameworks for implementation'. Such frameworks (guidelines) would help Member States to improve their domestic legal or administrative set-up in view of applying sanctions resolutions effectively.
4. It was considered that relevant bodies should have access to financial expertise and that much expertise was already available in other fora.
5. The Working Group felt that Sanctions Committees should give speedy response to questions and request by States and agencies.

### **Monitoring of Financial Sanctions**

1. The Working Group considered monitoring a necessary prerequisite for the successful application of financial sanctions. Monitoring should include the humanitarian and socio-economic situation in the target country as well as third country damage.
2. Scrupulous implementation of sanctions regimes as well as complete reporting by States, which is in their responsibility, was felt to be crucial. Monitoring of sanction implementation by States, which is in the responsibility of the UN Security Council and relevant Sanction Committees, was thought to be equally relevant.
3. In-situ monitoring was felt to be important.
4. The Working Group felt that specialised financial institutions as well as regional intergovernmental organisations could play a role in assisting the administration and monitoring financial sanctions.

### **Wording of Sanctions Resolutions**

1. The Working Group was of the opinion that UN Security Council Resolutions had in the past used ambiguous language which lead to differences of interpretation and implementation and consequently reduced the effectiveness of financial sanctions. To the extent that such ambiguity was not of political but technical nature, the use of standardised wording or 'building blocks' would be helpful in drafting sanctions resolutions.

### **Lessons learned from Anti-Money-Laundering Activities**

1. Given the parallels between anti-money-laundering activities and financial sanctions, the Working Group considered that the work conducted in the framework of the Financial Action Task Force on Money Laundering (FATF / OECD) could provide useful input to the discussion of targeted financial sanctions. Specifically, the FATF recommendations concerning i.a. national legal and administrative set-ups, exchange of information, reviews etc. could be useful in the sanctions context as well. The UN Secretariat was encouraged to make a contact with FATF.

## **Humanitarian Issues**

1. The Working Group considered that the humanitarian situation in the target state should be monitored on a continuous basis. Care should be taken to distinguish effects due to the sanctions regime from effects due to other conditions (e.g. conflicts in the target state).

2. The relevant Sanctions Committees already receive information on the humanitarian situation by humanitarian agencies. It was felt that Sanctions Committees should take action more promptly on such reports.

3. It was also considered that relevant bodies should take a pro-active stance on the humanitarian issue.

4. UN Security Council Sanctions Resolutions should clearly address humanitarian issues so as to empower Sanctions Committees to take relevant action efficiently. Blanket exemptions for humanitarian goods or lists of goods might be an option.

## **Role of the UN Secretariat**

1. The Working Group considered that the UN Secretariat should continue to be in a position to administer sanction regimes. While resources were felt to be adequate for actual sanction regimes, future regimes might create the need for additional expertise (financial expertise) and possibly related resources in the Secretariat.

# **THE BACKGROUND MATERIAL**





## Welcome Address

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*Ambassador Rolf M. Jeker, Delegate of the Swiss Government for International Agreements*

Excellencies  
Colleagues  
Ladies and Gentlemen,

1. I am pleased to be able to welcome you here in Interlaken at the foot of the famous Jungfrau mountain, from which this beautiful hotel partly derives its name. I welcome you on behalf of the Swiss Government and the Swiss Federal Office for Foreign Economic Affairs.
2. We are proud and satisfied that we can play host to this meeting and make our modest support available to bring forward the question of international financial sanctions on the international scene. We have representatives here from 20 countries covering all five continents and representatives from four organisations. We regret, of course, that His Excellency Under-Secretary-General Prendergast who was very supportive of our efforts was called to travel to the Middle East with the Secretary General. We wish him all the best for this important mission.

Since the beginning of the 90ies, my Government has been very supportive of UN economic sanctions and international export control initiatives in the context of the various export control regimes and we have put in place over the last three years an impressive set of legislation to guarantee enforcement. This is also true for the aspects of money laundering, an issue that has some common features with implementing financial sanctions.

3. Having said that, we strongly believe in international harmonisation when it comes to the question of international economic sanctions and export controls which are put in place to avoid the production of weapons of mass destruction or to avoid an uncalled for arms-build up presenting a threat to world and regional security.

Only a joint, coordinated effort of all nations or at least a large majority of it can help to achieve the intended security policy goal. Moreover, only a harmonised approach can help to achieve this goal without creating undue obstacles to international trade and competitiveness. We, therefore, as a small country, intensely interwoven with the world economy, attach greatest importance to such harmonisation objectives.

It is for this reason that we have organised practically every year one or even two such seminars as this one today.

4. I am looking forward to working with you over the next three days on the topic of how to improve the financial sanctions instrument with a view to enhance its effectiveness while reducing unwarranted negative side effects on third countries and on the domestic population in the target country.
5. We hope that by choosing this picturesque location we have provided for a conducive environment to detach ourselves from our daily work and to stimulate a fruitful and largely informal discussion among ourselves.
6. At our first meeting in New York in October last year, we set the main thrust of today's agenda and we agreed on a few important preconditions
  - a) first, while all of us have certain fundamental questions with regard to the effectiveness of sanctions based on our previous experience and its potential negative effects on humanitarian grounds and on innocent third countries, we have agreed to avoid a general discussion of the instrument of sanctions and its pros and cons of applying them. We feel that the UN in New York is the appropriate place to do so in a political context.

- b) secondly, we will therefore also not talk about what these potentially negative impacts of sanctions have been on third countries or on local populations but we will exclusively focus on one element of the sanctions instrument, namely the financial sanction instrument
    - its characteristics,
    - its strength, and
    - its weaknesses
    - and its potential for improvement in further use, if such new measures should again become necessary.
7. Of course, even if our discussion does not analyse the negative side effects of sanctions as such in this meeting, we will be analysing how an improved instrument of financial sanctions could help to avoid some of these negative side effects in future.
  8. As I already pointed out in New York, what all of us would probably strive for is "to target a sick tree in a forest without having to burn down the whole forest". In my next presentation on "Lessons Learned" I will analyse and present this aspect in more detail.
  9. Allow me now to make a few comments on the proposed agenda of the seminar. We would like to follow the following line of reasoning; "le fil rouge" as our French speaking colleagues normally call it.
  10. We want to start
    - a) by introducing some definitions of what we are talking about when we refer to financial sanctions, targeted sanctions or even smart sanctions.

We then need

- b) to have a detailed look at the experience we have made with financial sanctions since the beginning of the 90ies and already draw a few conclusions on the lessons we have learned. From its first application in Iraq to Haiti at a later stage, for instance, the financial sanctions instrument has already evolved.

This session is chaired by Mr Gammon from the United Kingdom surrounded by a highly representative panel.

11. Further belonging to the - as I want to call it - **the introductory part of the seminar**, is the discussion on "How can financial transactions be controlled".

In order to be able to discuss intelligently measures on how to formulate resolutions and improve implementation we need to know more about **the assets and liabilities situation** of the target country. We need to know

- a) how to identify these assets
- b) how to avoid that these assets can be transferred and used, and
- c) how to avoid that new funds can be made available to the target country

Strengthening financial sanctions, maybe even as an alternative to accompanying trade sanctions, can only make sense if we come to the conclusion that there are efficient ways and means to detect and control these flows. The answer is far from being evident.

Mr Eweiss from the Central Bank of Egypt kindly agreed to chair that session after the introduction of a paper by myself and comments by Mr. Danforth Newcomb from the United States of America and Ms Galloway from the United Kingdom.

12. In three working groups we would then like to deepen further the various issues in an interactive way sharing our common experience and knowledge.

In a **first group** chaired by Ambassador Eitel with an introduction by Mr Carver from the United Kingdom and Mr Yoshikawa from Japan, we want to establish the preconditions necessary for a successful implementation of sanctions by the implementing (sender) state. We, therefore, look at the problem of implementation exclusively from a domestic point of view of the countries imposing sanctions.

In a **second group**, which will be chaired by Ms Doyle from Bahrain, we will look more closely at the content, the substance of the resolutions itself regarding such things as

- a) the possibility of targeting individuals, groups, or whole countries,
- b) the criteria in deciding when the application of targeting financial sanctions is particularly appropriate, and
- c) the interpretation and comprehensiveness of resolutions.

Mr. Richard Newcomb and Mr Stephanides will present an introductory paper.

The **third group** under the direction of Mrs. Diana Galloway and papers presented by the Netherlands and the UN Secretariat will focus on how financial sanctions need to be administered and monitored through UN bodies. Here, the work at the UN and the UN Sanctions Committee will figure prominently.

While trying to clearly structure the topics of the work-shops we are aware that a certain overlapping is inevitable and in part even necessary.

We have five hours at our disposal to formulate some tentative conclusions or recommendations. We will leave it up to the Chair of the group how to proceed in arriving at these results.

13. Of course, we do strive for results at the end of this meeting, but we should or need not to be too overly ambitious as the task is quite challenging in a two to three day meeting.

14. Yet my objective would be

- a) to arrive at a clearer and perhaps common understanding of the relevancy of the financial sanctions instrument in the overall tool kit of economic sanctions,
- b) to identify some measures for improvement, and
- c) to decide to develop guidelines which further explain the meaning of the resolutions texts and provide a common basis for implementation as well as some model (standard) language that could be used in future resolution texts.

15. In any case, we stand ready to continue the work further together with you and the research community in areas that we might identify during this seminar. We would of course be pleased if other countries would also be prepared to carry on the "Interlaken process"

In concluding I would like

- a) to thank all of you for having joined us here, and
- b) in particular also those among you that have volunteered to act as a chairperson, as a panellist or as a presentator.

Thank you.



# **A BRIEF OVERVIEW OF UNITED NATIONS APPLIED SANCTIONS**

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Informal Background Paper prepared by  
the United Nations Sanctions Secretariat

## **Executive Summary**

Sanctions should be resorted to under Chapter VII of the United Nations Charter when considered by the Security Council to be absolutely necessary. Once the Security Council has decided on a set of mandatory measures, all States should support the effective implementation of such measures and cooperate with the Sanctions Committee and its Secretariat. Ideally, when new sanctions regimes are established, they should be endowed with a credible monitoring arm and the Sanctions Secretariat should be equipped with the necessary resources and specialized expertise to enable it to effectively administer the sanctions regime. The Secretariat should be ready to undertake, at the request of the Security Council or of the respective Sanctions Committee, analysis and assessment of the effectiveness of the mandatory measures, their possible humanitarian impact on civilian Population as well as of the collateral effects they may have on third States. The sanctions instrument could be further enhanced and it should be applied in the future with more specificity and selectivity based on a careful analysis of the situation and taking into account the special characteristics of the targeted regime or group. In addition to being an effective means of conflict resolution, "smart" sanctions, including targeted financial sanctions, could be an important part of an overall strategy for preventive diplomacy.

## **1. BASIC INFORMATION ON UNITED SANCTIONS REGIMES**

### **A. Current Sanctions Regimes**

#### **IRAQ**

##### **Imposition of sanctions**

Following the invasion of Kuwait by the Iraqi forces on 2 August 1990, the Security Council, on 6 August, adopted resolution 661 (1990), imposing under Chapter VII of the Charter comprehensive and mandatory sanctions on Iraq and deciding not to recognize any regime set up in Kuwait by the occupying Power. The Council also established a committee (known informally as the Sanctions Committee) to monitor implementation of the sanctions, which prohibited the export of all commodities and products from Iraq, and the sale and supply of all products and commodities, including weapons and other military equipment, as well as the transfer of funds, to Iraq. Exceptions to the sanctions regime were made for supplies intended strictly for medical purposes and, in humanitarian circumstances, foodstuffs.

On 25 August 1990, in resolution 665 (1990), the Council called upon Member States co-operating with the Government of Kuwait which were deploying maritime forces to the area to use such measures as might be necessary "to halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990)." The Council also requested Member States to use, "as appropriate," the Council's Military Staff Committee to coordinate their actions.

The Security Council addressed the humanitarian situation in Iraq and Kuwait in its resolution 666 (1990), adopted on 13 September 1990, in which it instructed the Sanctions Committee to keep the situation regarding foodstuffs in Iraq and Kuwait under constant review, paying particular attention to children under 15 years of age, expectant mothers, maternity cases, the sick and the elderly.

On 25 September 1990, in its resolution 670 (1990), the Security Council explicitly confirmed that the sanctions against Iraq applied "to all means of transport, including aircraft" and elaborated further measures affecting shipping and air transport. Specifically, the Security Council decided that States would "deny permission to any aircraft to take off from their territory if the aircraft would carry any

cargo to or from Iraq or Kuwait other than food in humanitarian circumstances" and that States were to deny overflight permission to any aircraft destined to land in Iraq or Kuwait, and called upon States to detain any ships of Iraqi registry which entered their ports and were in violation of the sanctions resolution.

### **Sanctions regime after the liberation of Kuwait**

Following the successful liberation of Kuwait, the Security Council adopted, on 3 April 1991, resolution 687 (1991) which represented one of the most complex and far-reaching sets of decisions ever taken by the Council. The resolution sought to involve Iraq co-operatively in post-war measures to build lasting peace and stability in the region. At the same time, enforcement measures remained in effect, including the sanctions regime and the Council's authorization to Member States to use "all necessary means" to uphold Iraqi compliance.

The 34 operative paragraphs of the resolution were divided into nine parts and set out in great detail the terms for a formal cease-fire to end the conflict and restore security and stability to the area. Its major requirements included the boundary settlement, peacekeeping aspects, elimination of weapons of mass destruction, non-acquiring by Iraq of nuclear-weapons capability, the return of Kuwaiti property, creation of the Compensation Fund and repatriation issues. As far as the sanctions are concerned, the Security Council decided, under section F of the resolution, that the measures first imposed under resolution 661 (1990) against exports to Iraq would not apply to foodstuffs and to materials and supplies for essential civilian needs, and that it would review this part of the sanctions regime every 60 days, taking into account the policies and practices of the Government of Iraq, including the implementation of all relevant resolutions of the Council for the purpose of determining whether to reduce or lift the prohibitions. The Council also stated that the ban on Iraqi oil exports would be lifted once the Council approved the program for the Compensation Fund called for in section E, and once it agreed that Iraq had completed all the actions pertaining to the weapons provisions of resolution 687 (1991). In the mean time, exceptions to the oil embargo would be approved by the Sanctions Committee when needed to assure adequate financial resources to provide for essential civilian needs in Iraq. Also in section F, the Council specified the categories of weapons to which the arms embargo mandated by resolution 661 (1990) should continue to apply.

By resolution 700 (1991), the Council approved the guidelines, which itemized the types of arms, *matériel* and activities proscribed by the Council and defined the responsibilities of the Sanctions Committee to that effect. The provisions relating to both the oil and the arms embargoes would be reviewed by the Council every 120 days, taking into account Iraq's compliance with the resolution and the general progress towards the control of armaments in the region. By resolution 715 (1991), adopted on 11 October 1991, the Security Council, inter alia, requested the Sanctions Committee, the Special Commission and IAEA to develop in cooperation a mechanism for monitoring future sales or supplies by other countries to Iraq of items relevant to the implementation of section C of resolution 687 (1991) and other relevant resolutions.

By resolution 1051 (1996), adopted on 27 March 1996, the Security Council established an export/import monitoring mechanism for dual-use items (contained in Annex 1 of S/1995/1017). The mechanism was developed pursuant to paragraph 7 of resolution 715 (1991) by the Sanctions Committee together with the Special Commission and the Director-General of the IAEA. By the same resolution, the Security Council also approved the general principles to be followed in implementing the monitoring mechanism contained in the letter from the Chairman of the Special Commission to the Chairman of the Sanctions Committee which is contained in Annex of S/1995/1017.

By resolution 1115 (1997), adopted on 21 June 1997, the Security Council decided not to conduct the reviews provided for in paragraphs 21 and 28 of resolution 687 (1991) until after the next consolidated progress report of the Special Commission, due on 11 October 1997. After which time those reviews will resume in accordance with resolution 687 (1991).

By resolution 1134 (1997), adopted on 23 October 1997, the Security Council expressed the firm intention - if the Special Commission reports that Iraq is not in compliance with paragraphs 2 and 3 of resolution 1115, or if the Special Commission does not advise the Council in the report of the Executive Chairman due on 11 April 1998 that Iraq is in compliance with paragraphs 2 and 3 of resolution 1115 (1997) - to adopt measures which would oblige all States to prevent without delay the entry into or transit through their territories of all Iraqi officials and members of the Iraqi armed forces who are responsible for or participate in instances of non-compliance with paragraphs 2 and 3 of

resolution 1115 (1997). By the same resolution, the Council also decided not to conduct the reviews provided for in paragraphs 21 and 28 of resolution 687 (1991) until after the next consolidated progress report of the Special Commission, due on 11 April 1998, after which time those reviews will resume in accordance with resolution 687 (1991), beginning on 26 April 1998.

By resolution 1137 (1997), adopted on 12 November 1997, the Security Council decided, in accordance with paragraph 6 of resolution 1134 (1997), that States shall without delay prevent the entry into or transit through their territories of all Iraqi officials and members of the Iraqi armed forces who were responsible for or participated in instances of non-compliance detailed in paragraph 1 of the resolution, and requested the Sanctions Committee to develop guidelines and procedures as appropriate for the implementation of those measures. By the same resolution, the Council also decided that the reviews provided for in paragraphs 21 and 28 of resolution 687 (1991) shall resume in April 1998 in accordance with paragraph 8 of resolution 1134 (1997), provided that the Government of Iraq shall have complied with paragraph 2 of the resolution.

### **Oil-for-Food Arrangements**

In an effort to relieve the suffering of civilians in Iraq and in the Iraq/Turkey and Iraq/Iran border areas, the Security Council devised a scheme - the so-called "oil-for-food" formula - by which exports of Iraqi oil could be used to pay for the provision of foodstuffs and medicines as well as for the Compensation Commission, UNSCOM and other United Nations activities mandated by resolution 687 (1991).

On 15 August 1991, the Security Council adopted resolution 706 (1991), which set out the terms for the limited sale of Iraqi oil and oil products, during a period of six months, primarily to increase the level of funds available for humanitarian programs and for several of the operations mandated by resolution 687 (1991).

On 19 September 1991, the Security Council, in resolution 712 (1991), approved a basic structure for the implementation of resolution 706 (1991). The Council also confirmed that funds from other sources could be deposited in the escrow account as a sub-account and would become immediately available to meet Iraq's humanitarian needs without the deductions specified in the resolutions. By a decision of 15 October 1991 the Sanctions Committee set out a series of procedures to be employed in the proposed scheme of sales. By resolution 778 (1992), adopted on 2 October 1992, the Council decided, inter alia, that all States should transfer to the escrow account provided for in resolutions 706 (1991) and 712 (1991) those funds of Iraq representing the proceeds of sale of Iraqi petroleum or petroleum products. Resolutions 706 (1991) and 712 (1991) have not been implemented to date.

On 14 April 1995, acting under Chapter VII of the Charter, the Security Council adopted resolution 986 (1995), in which it provided Iraq with another opportunity to sell oil to finance the purchase of humanitarian goods and various mandated United Nations activities concerning Iraq. The new proposal permitted the sale of \$2 billion of Iraqi oil - \$1 billion in each of two 90-day periods - subject to certain conditions over resolutions 706 (1991) and 712 (1991) by reaffirming "the commitment of all Member States to the sovereignty and territorial integrity of Iraq" and describing the new exercise as "temporary".

On 20 May 1996, the Memorandum of Understanding (MOU) between the Secretariat of the United Nations and the Government of Iraq on the implementation of Security Council resolution 986 (1995) was concluded (S/1996/356\*). Subsequently, on 8 August 1996, the Sanctions Committee adopted the Procedures to be employed by it in the discharge of its responsibilities as required by paragraph 12 of Security Council resolution 986 (1995) (S/1996/636\*).

Paragraph 1 of resolution 986 (1995) which authorizes States to permit the Import of petroleum and petroleum products originating in Iraq came into force at 00.01 Eastern Standard Time on 10 December 1996 following the submission on 9 December 1996 of the Secretary-General's report to the President of the Security Council pursuant to paragraph 13 of that Resolution (S/1996/1015). By resolution 1111 (1997), adopted on 4 June 1997, the Security Council decided that the provisions of resolution 986 (1995), except those contained in paragraphs 4, 11 and 12, should remain in force for another period of 180 days beginning at 00.01 hours, Eastern Daylight Time, on 8 June 1997. By resolution 1129 (1997), adopted on 12 September 1997, the Security Council decided that the provisions of resolution 1111 (1997) shall remain in force, except that States are authorized to permit the import of petroleum and petroleum products originating in Iraq, including financial and other

essential transactions directly relating thereto, sufficient to produce a sum not exceeding a total of one billion United States dollars within a period of 120 days from 00.01. Eastern Daylight Time, on 8 June 1997 and, thereafter, a sum not exceeding a total of one billion United States dollars within a period of 60 days from 00.01 Eastern Daylight Time, on 4 October 1997. To facilitate and further expedite the processing of humanitarian supplies to Iraq under the oil-for-food Arrangement, the Committee has adopted a number of points of understanding in the discharge of its responsibilities in implementation of the oil-for-food program. The Council has recently adopted Resolution 1153 (1998) endorsing the recommendation of the Secretary-General for a considerable increase of allowable oil sales by Iraq (up to approximately 5.3 billion United States dollars) in order to meet the humanitarian needs of the people of Iraq.

### **Review of sanctions**

Pursuant to paragraph 21 of Resolution 687 (1991), the Security Council has so far 37 reviews of the sanctions regime established in paragraph 20 of that Resolution. 18 of these Council reviews were at the same time reviews of the sanctions regime established in paragraphs 22, 23, 24 and 25 of Resolution 687 (1991), as referred to in paragraph 28 of that resolution, and in paragraph 6 of Resolution 700 (1991). No modification of the sanctions regime resulted from these reviews. Since 21 June 1997, reviews of sanctions as provided for in paragraphs 21 and 28 of resolution 687 (1991) are suspended by resolutions 1115 (1997), 1134 (1997) and 1137(1997) respectively.

### **Reports of the Sanctions Committee**

In accordance with paragraph 6, subparagraph (f), of the guidelines (S/22660, Annex) to facilitate full international implementation of paragraphs 24, 25 and 27 of Security Council resolution 687 (1991), approved by Security Council resolution 700 (1991), the Committee reports at 90-day intervals to the Security Council on the implementation of the arms and related sanctions against Iraq contained in the relevant resolutions. The latest report, the twenty-fifth, was submitted to the Security Council on 12 August 1996.

Pursuant to the Note by the President of the Security Council of 29 March 1995 (S/1995/234), the Committee submitted on 26 August 1996 to the Security Council the first comprehensive report (S/1996/700) on its major activities in the past few years. The second annual report was submitted to the Security Council on 27 August 1997 (S/1997/672).

### **Article 50**

Under Article 50 of the Charter, countries which find themselves confronted with special economic problems arising from the carrying out of enforcement measures taken by the Security Council can consult with the Council about a solution to their problems. Eventually, 21 States addressed the Council on this basis - the first time in United Nations history that a large number of States had taken such a step. The 21 States were: Bangladesh, Bulgaria, Czechoslovakia, Djibouti, India, Jordan, Lebanon, Mauritania, Pakistan, the Philippines, Poland, Romania, Seychelles, Sri Lanka, the Sudan, Syrian Arab Republic, Tunisia, Uruguay, Viet Nam, Yemen and Yugoslavia.

Jordan, having had close economic relations with Iraq prior to the invasion, was particularly hard hit by the imposition of sanctions and was thus the first of the Article 50 applicants to have its case considered by the Sanctions Committee and acted upon by the Council. On 18 September 1990, the Committee appealed to States to provide immediate assistance and, on 24 September, based on the Committee's recommendation, the Security Council asked the Secretary-General to undertake an immediate assessment of Jordan's problems, which he did by dispatching a special representative to visit Jordan from 10 to 15 October (S/21938). With regard to the other States experiencing difficulties, the Security Council, in its resolution 669 (1990), adopted on 24 September 1990, entrusted the Sanctions Committee with the task of examining requests for assistance and making recommendations to the Council for appropriate action.

### **LIBYAN ARAB JAMAHIRIYA**



The adoption and imposition of sanctions measures against the Libyan Arab Jamahiriya by the Security Council is a special case which does not imply an internal situation of a country or aggression against another State, but rather its non compliance with a specific demand of the Council, which had determined that terrorist activity against international aviation constituted a threat to international peace and security. The Security Council determined that the Government of the Libyan Arab Jamahiriya had failed to comply with its demand for handing over two of its nationals suspected of Terrorist activity against international aviation and acting under Chapter VII of the Charter of the United Nations, by resolution 748 (1992), adopted on 31 March 1992, imposed a regime of mandatory sanctions relating to various aspects of air links with, the supply of arms and military weapons to, reduction and restriction of the activities of the diplomatic and consular missions of and restrictions on the known or suspected Terrorist nationals of the Libyan Arab Jamahiriya.

Before adopting resolution 748 (1992), the Security Council, in its resolution 731 (1992) on 21 January 1992, condemned the destruction of Pan American flight 103 and Union de Transports Aériens 772 and strongly deplored the fact that the Libyan Government had not responded effectively to the requests to cooperate fully in establishing responsibility for the terrorist acts referred to above against the above mentioned planes. By resolution 883 (1993), adopted on 11 November 1993, the Security Council, acting under Chapter VII of the Charter of the United Nations, expanded the sanctions against the Libyan Arab Jamahiriya to a freeze on some Libyan assets abroad, tightening of the aerial embargo and banning of certain types of equipment used at oil transportation terminals and refineries.

### **Review by the Security Council**

On 12 August and 9 December 1991, the Security Council held informal consultations pursuant to paragraph 13 of resolution 748 (1992), by which the Council decided to review every 120 days or sooner, should the situation so require, the measures imposed by paragraphs 3 to 7 against the Libyan Arab Jamahiriya in the light of the compliance by the Libyan Government with paragraphs 1 and 2 of the resolution, taking into account as appropriate, any reports provided by the Secretary-General in his role as set out in paragraph 4 of resolution 731 (1992). So far, the Security Council has undertaken 17 such reviews.

On those occasions, the members found that conditions did not exist for modifying the regime of sanctions established by the Council in paragraphs 3 to 7 of resolution 748 (1992). On 6 March 1998, the Council conducted, in informal consultations, the 18th review of the sanctions regime and again decided that conditions did not exist for modifying the measures imposed by the Council. It was, however, also agreed to hold a formal meeting of the Council on 20 July 1998 in order to allow for a public debate on Libya.

### **SOMALIA**

The sanctions against Somalia were imposed by the Security Council on 23 January 1992 as a response of the international community to the rapid deterioration of the situation in that country involving bloody factional fighting resulting in heavy loss of human life and widespread material damage and a consequent refugee crisis. The Council determined that such a situation constituted a threat to international peace and security, and acting under Chapter VII of the Charter of the United Nations, by resolution 751 (1992) imposed a general and complete embargo on all deliveries of weapons and military equipment to Somalia. The engagement of the Organization of the Islamic Conference, the Organization of African Unity and the League of Arab States in national reconciliation, unity and political settlement in Somalia was strongly encouraged by Security Council resolution 746 (1992) adopted on 17 March 1992.

By resolution 767 (1992), adopted on 27 July 1992, the Security Council stressed the need for the observance and strict monitoring of the general and complete embargo on all deliveries of weapons and military equipment to Somalia. By resolution 794 (1992), adopted on 3 December 1992, the Security Council, acting under Chapter VII and VIII of the Charter called upon States, nationally or through regional agencies or arrangements, to use such measures as may be necessary to ensure strict implementation of resolution 751 (1992). The same appeal was reiterated in resolution 775 (1992), adopted 28 August 1992 and in subsequent resolutions 814 (1993), 886 (1993), adopted on 26 March 1993 and 18 November 1993, respectively. The Council also reaffirmed this request to States

in its resolutions 897 (1994) and 923 (1994), 954 (1994) adopted on 4 February 1994, 31 May 1994, 4 November 1994, respectively.

## **LIBERIA**

The sanctions against Liberia were imposed by the Security Council as a response of the international community to the serious deterioration of the internal situation in the country. By resolution 788 (1992), adopted on 19 November 1992, the Security Council, acting under Chapter VII of the Charter of the United Nations, imposed a general and complete embargo on all deliveries of weapons and military equipment to Liberia.

By resolution 813 (1993), adopted on 26 March 1993, the Security Council called upon all States strictly to abide by and comply with the general and complete embargo on all deliveries of weapons and military equipment to Liberia imposed by resolution 788 (1992) and reiterated its call on member States to exercise self-restraint in their relations with all parties to the Liberian conflict, in particular to refrain from providing any military assistance to any of the parties and also to refrain from taking any action that would be inimical to the peace process. By the same resolution, the Security Council welcomed the continued efforts of the Economic Community of West African States (ECOWAS) and the Organization of African Unity towards a peaceful resolution of the Liberian conflict. By resolution 866 (1993), adopted on 22 September 1993, the Security Council decided to establish the United Nations Observer Mission in Liberia (UNOMIL). UNOMIL is the first peace-keeping mission undertaken by the United Nations in Cooperation with another organization, in this case ECOWAS. By resolution 950 (1994), adopted by the Security Council on 21 October 1994, the Security Council called on all Liberians to seek political accommodation and national reconciliation and called once again upon all States strictly to abide by and comply with the general and complete arms embargo imposed by resolution 788 (1992). By resolution 1001 (1995), adopted on 30 June 1995, the Security Council reminded all States of their obligations in this regard, and to bring all instances of violations of the arms embargo before the Committee established pursuant to resolution 985 (1995) of 13 April 1995. The same appeal was reiterated by the Security Council in its resolutions 1014 (1995), 1020 (1995), 1041 (1996) and 1059 (1996), adopted on 15 September, 10 November 1995 and 29 January and 31 May 1996, respectively.

By resolution 1071 (1996) adopted on 30 August 1996, the Security Council stressed the obligation of all States to comply strictly with the embargo on all deliveries of weapons and military equipment to Liberia imposed by resolution 788 (1992) of 19 November 1992, to take all actions necessary to ensure strict implementation of the embargo, and to bring all instances of violations of the embargo before the Committee established pursuant to resolution 985 (1995) of 13 April 1995. The same appeal was reiterated by the Security Council in its resolutions 1071 (1996), 1083 (1996), 1100 (1997) and 1116 (1997) adopted on 30 August and 27 November 1996, 27 March and 27 June 1997 respectively.

## **ANGOLA**

It should be noted that the Security Council sanctions imposed by resolution 864 (1993), on 15 September 1993, were targeted only at the National Union for the Total Independence of Angola (UNITA) which disputed the results of the United Nations supervised elections in 1991. The regime of mandatory sanctions against UNITA comprises the sale or supply to UNITA of arms and related matériel of all types, including weapons and ammunition, military vehicles and equipment and spare parts for the afore-mentioned, as well as of petroleum and petroleum products. The Security Council has monitored the situation in Angola closely and by the resolutions listed below, inter alia, encourages the Government of Angola and UNITA to consolidate the peace process at a faster pace on the basis of the "Acordos de paz", the Lusaka Protocol and relevant Security Council resolutions.

By its resolutions 890 (1993) adopted on 15 December 1993, 903 (1994) adopted 16 March 1994, 922 (1994) adopted 1 May 1994, 932 (1994) adopted 30 June 1994, 945 (1994), adopted 29 September 1994, 976 (1995) adopted 8 February 1995, 1045 (1996) adopted 8 February 1996, 1055 (1996) adopted 8 May 1996 and resolution 1064 (1996) adopted on 11 July 1996, 1075 (1996) adopted on 11 October and 1087 (1996) adopted on 11 December 1996, the Security Council reaffirmed the obligation of all States to implement fully the sanctions provisions of resolution 864 (1993). The Council also decided, in view of the direct negotiations continuing between the parties involved, not to impose the additional measures against UNITA contained in paragraph 26 of resolution 864 (1993). In

resolutions 1055 (1996), 1064 (1996), 1075 (1996) and 1087 (1996), the Council reiterated that continuing acquisition and delivery of weapons to Angola would be contrary to paragraph 12 of resolution 976 (1995) and would undermine confidence in the peace process. In resolutions 1075 (1996) of 11 October 1996, 1098 (1997), and 1102 (1997) of 27 February and 31 March 1997 the Security Council expressed its readiness to consider the imposition of additional measures against UNITA, including, inter alia, those specifically mentioned in paragraph 26 of resolution 864 (1993).

On 28 August 1997, the Security Council, acting under Chapter VII of the Charter of the United Nations, by resolution 1127 (1997), imposed additional measures against UNITA such as restrictions on the travel of senior members of UNITA and adult members of their immediate families, the closing of UNITA offices, the prohibition of flights of aircraft by or for UNITA and the supply of any aircraft or aircraft components to UNITA and the insurance, engineering and servicing of UNITA aircraft. The foregoing measures do not apply to cases of medical emergency or to flights or aircraft carrying food, medicine, or supplies for essential humanitarian needs, as approved in advance by the Security Council Committee established pursuant to resolution 864 (1993) concerning the Situation in Angola. By paragraph 2 of resolution 1130 (1997) and paragraph 6 of resolution 1135 (1997) of 29 September and 29 October 1997 respectively, the foregoing measures came into force on 30 October 1997.

## **RWANDA**

The Security Council adopted the sanctions measures in the case of Rwanda as a response of the international community to the internal situation in that country resulting in the death of many thousands of innocent civilians, the internal displacement of a significant percentage of the Rwandan population, and the massive exodus of refugees to neighboring countries. The Security Council, disturbed by the magnitude of the human suffering caused by the conflict in Rwanda and concerned that the continuation of the situation in that country constituted a threat to peace and security in the region, and acting under Chapter VII of the Charter of the United Nations, by resolution 918 (1994), adopted on 17 May 1994, imposed a regime of mandatory sanctions against Rwanda relating to the sale or supply to Rwanda of arms and related matériel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary police equipment and spare parts. The support by the Security Council for the efforts of the Organization of African Unity (OAU) and its organs, as well as the efforts of the Tanzanian Facilitator, in providing diplomatic, political, and humanitarian support for the implementation of the relevant resolution of the Council, should be noted.

By resolution 872 (1993) of 5 October 1993, the Security Council established the United Nations Assistance Mission for Rwanda (UNAMIR). By resolution 997 (1995), adopted on 9 June 1995, the Security Council affirmed that the restrictions imposed under Chapter VII of the Charter of the United Nations by resolutions 918 (1994) applied to the sale or supply of arms and matériel specified therein to persons in the States neighboring Rwanda, if that sale or supply was for the purpose of the use of such arms or matériel within Rwanda. In the same resolution, the Council called upon the States neighboring Rwanda to take steps, with the aim of putting an end to factors contributing to the destabilization of Rwanda, to ensure that such arms and matériel were not transferred to Rwandan camps within their territories. By resolution 1005 (1995), adopted on 17 July 1995, the Security Council, notwithstanding the restrictions imposed in paragraph 13 of resolution 918 (1994), approved the supply of appropriate amounts of explosives intended exclusively for use in established humanitarian demining programs. By resolution 1011 (1995) of 16 August 1995, the Rwanda Sanctions Committee is required to report to the Council on notifications received from States on the export of arms and related matériel to Rwanda as well as notifications of imports of arms and related matériel made by the Government of Rwanda. Accordingly, four notifications received by the Committee were reported to the Security Council (S/1996/329/Rev.1, S/1996/3967Rev.1, S/1996/407/Rev.1 and S/1996/697). Also, the Secretary-General was requested to report to the Council within 6 months of the date of adoption of the resolution, and again within 12 months, regarding, in particular, the export of arms and related matériel to the Government of Rwanda, on the basis of reports submitted by the Committee. The reports are contained in documents S/1996/202, S/1996/663/Rev.1 and S/1996/663/Rev.1/Add.I. In accordance with paragraph 8 of the resolution, the restrictions imposed by paragraph 13 of resolution 918 (1994) on the sale or supply of arms and related matériel to the Government of Rwanda were terminated on 1 September 1996, following consideration of the second report of the Secretary-General, and subsequently no notifications are required to be submitted by States of exports from their territories of arms or related matériel to the Government of Rwanda or by the Government of Rwanda of imports of arms and related matériel. However, the above restrictions remain in effect against Rwanda, with a view to prohibiting the sale

and supply of arms and related matériel to non-governmental forces for use in Rwanda, and all States shall continue to prevent the sale or supply, by their nationals or from their territories or using their flag vessels or aircraft, of arms and related matériel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary police equipment and spare parts, to Rwanda, or to persons in the States neighboring Rwanda, if such sale or supply is for the purpose of the use of such arms or matériel within Rwanda. By resolution 1013 (1995) of 7 September 1995, the Committee is required to collate and provide to the International Commission of Inquiry information in its possession relating to the mandate of the Commission, i.e., on the sale or supply of arms and related matériel to former Rwanda government forces in the Great Lakes Region in violation of resolutions 918 (1994), 997 (1995) and 1011 (1995). Accordingly, the Committee provided the Commission with relevant information, as required, on 24 November and 4 December 1995. By resolution 1053 (1996), adopted on 23 April 1996, the Security Council expressing its determination that the prohibition on the sale or supply of arms and related matériel to non-governmental forces for use in Rwanda should be implemented fully in accordance with resolution 1011 (1995) called upon all States, in particular in the region, to prevent military training and the sale or supply of weapons to militia groups or former Rwandan government forces, and to take the necessary steps to ensure the effective implementation of the arms embargo, including by creation of all necessary national mechanisms for its implementation.

## **SUDAN**

The Security Council has adopted certain measures against the Sudan but has not established a sanctions committee. The Council determined that the Government of the Sudan had not complied with its request set out in paragraph 4 of resolution 1044 (1996), of 1 January 1996, in which it condemned the terrorist assassination attempt on the life of the President of the Arab Republic of Egypt, in Addis Ababa, Ethiopia, on 26 June 1995, and called upon the Government of the Sudan to comply with the requests of the Organization of African Unity without further delay, to undertake immediate action to extradite to Ethiopia for prosecution the three suspects sheltering in the Sudan and wanted in connection with the above mentioned assassination attempt. The Government of the Sudan claims that its investigations in respect of two of the suspects have produced no trace of their presence in the Sudan and that the identity of the third suspect is unknown.

On 26 April 1996, the Security Council adopted, on the basis of the report of the Secretary-General of 11 March 1996 (S/1996/179), resolution 1054 (1996) by which the Council, acting under Chapter VII of the Charter of the United Nations, adopted measures against the Sudan consisting of significant diplomatic reductions in the number and the level of the staff at Sudanese diplomatic missions and consular posts and restriction or control of the movement of all such staff who remained in the territory of other States, para 3 (a). Further, the Council imposed restrictions on the entry into or transit through the territory of other States members of the Government of the Sudan, officials of that Government and members of the Sudanese armed forces, para 3 (b). In this regard States were requested to report to the Secretary-General on the steps they had taken to implement these measures. This request was reiterated in resolution 1070 (1996), adopted by the Council on 16 August 1996. To date, 66 replies have been received from States. These replies have been initially published as documents of the Security Council and later reflected in the reports of the Secretary-General and its addenda (S/1996/541 and Add. 1-3, S/1996/940 and Add. 1). The Council also called on all international and regional organizations not to convene any conferences in the Sudan.

By resolution 1070 (1996), adopted on 16 August 1996, the Security Council decided that all States should deny aircraft permission to take off from, land in, or overfly their territories if the aircraft was registered in the Sudan, or owned, leased or operated or substantially owned or controlled by the Government or public authorities of the Sudan. However, the adopted sanctions measures were to enter into force pending a decision by the Council, within 90 days after the date of the adoption of resolution 1070, unless the Council decides before on the basis of a report by the Secretary-General (S/1996/940 of 14 November 1996). The aforementioned measures were not imposed against the Sudan.

## **SIERRA LEONE**

The Security Council, gravely concerned at the continued violence following the military coup of 25 May 1997, determining that the situation in Sierra Leone constitutes a threat to international peace and security in the region and deploring the fact that the military junta had not taken steps to allow the

restoration of the democratically-elected Government and a return to constitutional order, imposed sanctions against Sierra Leone by resolution 1132 (1997) adopted on 8 October 1997.

Acting under Chapter VII of the Charter of the United Nations, the Security Council imposed an oil and arms embargo, as well as restrictions on the travel of members of the military junta of Sierra Leone and adult members of their families. It also established a Security Council Sanctions Committee to monitor the implementation of the sanctions. The Committee is also authorized to approve applications, on a case-by-case basis, by the democratically elected Government of Sierra Leone for the importation into Sierra Leone of Petroleum and Petroleum products as well as applications by any other government or by United Nations Agencies for the importation of petroleum or petroleum products into Sierra Leone for verified humanitarian purposes, or for the needs of the Military Observer Group of ECOWAS (ECOMOG). This resolution also authorizes ECOWAS, under Chapter VIII of the Charter of the United Nations, to ensure strict implementation of the arms embargo and the supply of petroleum and petroleum products, which would involve inspection of incoming ships where necessary, and in conformity with applicable international standards. ECOWAS is also required to report every 30 days to the Committee on all activities undertaken in this regard.

Following the return of the democratically elected President of Sierra Leone to Freetown, the Security Council is expected to meet shortly in order to consider terminating, with immediate effect, the prohibitions of the sale and supply to Sierra Leone of Petroleum and Petroleum products referred to in paragraph 6 of resolution 1132 (1997). However, the other prohibitions referred to in the same resolution would remain in effect and would be the subject of a further review by the Council.

## **B. Terminated Sanctions Regimes**

### **SOUTHERN RHODESIA**

The sanctions against Southern Rhodesia were the first comprehensive mandatory sanctions in the history of the United Nations, imposed by the Security Council under Chapter VII of the United Nations Charter, as a response of the international community to the declaration of the independence of Southern Rhodesia in 1965 by its racist minority regime. Although no State recognized the self declared independence of Southern Rhodesia, there was a permanent lack of willingness to enforce the sanctions adopted by the Security Council by a number of States, especially by the apartheid regime of South Africa.

In resolution 221 (1966) of 9 April 1966, the Security Council, recalling its resolutions 216 (1965) of 12 November 1965 and 217 (1965) of 20 November 1965 and in particular its call upon all States to do their utmost to break off economic relations with Southern Rhodesia, including an embargo on oil and petroleum products, called upon the Government of the United Kingdom to prevent by the use of force if necessary, the arrival at Beira of vessels reasonably believed to be carrying oil destined for Southern Rhodesia. Resolution 232 of 16 December 1966 imposed sanctions on commodities in addition to oil; Resolution 253 of 29 May 1968 set up a sanctions committee. The sanctions were lifted by Resolution 460 of 21 December 1979.

### **SOUTH AFRICA**

The apartheid racist system in South Africa was imposed in 1948. The first two Security Council resolutions 181 (1963) and 182 (1963) introducing sanctions against South Africa were not adopted under Chapter VII of the United Nations and were only voluntary. It was not until 4 November 1977, that the Security Council, determined that the policies and acts of the South African Government, the acquisition by South Africa of arms and related matériel constituted a threat to the maintenance of international peace and security, and acting under Chapter VII of the Charter, adopted resolution 418 (1977), by which it imposed mandatory measures on arms and other military supplies to South Africa. However, the Security Council never imposed comprehensive economic sanctions against South Africa. The Security Council decided that all States should cease forthwith any provision to South Africa of arms and related matériel of all types, including the sale or transfer of weapons and ammunition, military vehicles and equipment, paramilitary police equipment, and spare parts for the aforementioned, and should cease as well the provision of all types of equipment and supplies, and grants of licensing arrangements, for the manufacture or maintenance of the aforementioned. Operative paragraph 3 of the same resolution, called on all States to review, all existing contractual arrangements with and licenses granted to South Africa relating to the manufacture and maintenance

of arms, ammunition of all types and military equipment and vehicles, with a view to their termination. Operative paragraph 4 of the same resolution further decided that all States shall refrain from any cooperation with South Africa in the manufacture and development of nuclear weapons.

By resolution 473 (1980) the Security Council called on the Sanctions Committee to redouble its efforts to secure full implementation of the arms embargo against South Africa by recommending measures to close all loopholes in the arms embargo, reinforce and make it more comprehensive. By resolution 558 (1994) adopted 13 December 1984, the Security Council requested States to refrain from importing arms, ammunition of all types and military vehicles produced in South Africa. By resolution 591 (1986) adopted on 28 November 1986, the Security Council adopted comprehensive measures recommended by the Committee to close loopholes in the arms embargo, reinforce it and make it more comprehensive. The Security Council, acting under Chapter VII of the Charter of the United Nations, terminated the sanctions against South Africa on 25 May 1994, by its resolution 919 (1994), after the first democratically elected government was formed in South Africa.

## **HAITI**

After the military coup d'état in 1991, the international community worked actively to achieve the recovery of the legitimate institutions in Haiti, in particular the return, from exile of the democratically elected President Jean-Bertrand Aristide. In vigorous activity and actions by the Organization of American States, the General Assembly and the Secretary-General of the United Nations, the sanctions adopted by the Security Council and implemented by Member States played a supportive role in this regard.

On 16 June 1993, by resolution 841 (1993), the Security Council imposed a regime of mandatory sanctions against Haiti as a response of the international community to the crisis in that country. After the legitimate Government of President Jean-Bertrand Aristide was removed a climate of fear of persecution and economic dislocation of a great number of Haitians seeking refuge in neighboring countries was causing negative repercussions in the region. The Security Council determined that the situation in Haiti was caused by illegitimacy of the military government and by its human rights violations against the Haitian people. The sanctions were imposed on the sale or supply of arms and related matériel of all types, including weapons and ammunition, petroleum and petroleum products and the freezing of funds to ensure that they were not made available directly or indirectly to or for the benefit of the de facto authorities in Haiti.

By resolution 861(1993), adopted on 27 August 1993, the Security Council suspended the sanctions measures against Haiti as a reaction to the conclusion of the Government Island Agreement between the President of the Republic of Haiti and the Commander-in-Chief of the Armed Forces of Haiti and reimposed them by resolution 873 (1993) on 13 October 1993 after determining that the military authorities of Haiti, including the police, had not complied in good faith with the Governors Island Agreement. By its resolution 917 (1994), adopted on 6 May 1994, the Security Council imposed additional sanctions measures, including freezing the funds and financial resources of all officers of the Haitian military and their immediate families and those employed by or acting on behalf of them. By resolution 940 (1994), adopted 31 July 1994, the Council authorized the establishment of the multinational force, mainly to facilitate the departure from Haiti of the military leadership. By resolution 944 (1994), adopted on 29 September 1994, the Security Council decided to terminate all sanctions against Haiti, on the day after the return to Haiti of President Jean-Bertrand Aristide and by resolution 948 (1994), adopted 15 October 1994, the Council welcomed the return of President Aristide to Haiti on the same day and expressed full support for the efforts of the legitimate Government of Haiti in bringing the country out of crisis and returning it to the democratic community of nations.

## **FORMER YUGOSLAVIA**

### **Arms embargo**

As part of an effort by the United Nations, the European Community and the Conference on Security and Cooperation in Europe to restore peace and dialogue in the then Yugoslavia (former Socialist Federal Republic of Yugoslavia), the Security Council unanimously adopted, during its meeting at the ministerial level on 25 September 1991, resolution 713 (1991) imposing a general and complete embargo on all deliveries of weapons and military equipment to the country. On 15 December 1991,

the Security Council established a Committee to undertake a number of tasks related to the implementation by States of the arms embargo (resolution 724 (1991)). By resolution 727 (1992), adopted on 8 January 1992, the Council decided that the arms embargo applied in accordance with paragraph 33 of the Secretary-General's report S/23363 (i.e. to all areas that had been part of Yugoslavia, any decisions on the question of the recognition of the independence of certain republics notwithstanding).

Following the initialling of the Dayton Peace Agreement, the Council set out in resolution 1021(1995), adopted on 22 November 1995, the terms and timing of the termination of the arms embargo. On 14 December 1995, the Secretary-General informed the Security Council that the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia and other parties thereto had formally signed the Peace Agreement on that day in Paris. Accordingly, 13 March 1996 was determined to be the date of termination of the arms embargo, with the exception of heavy weapons (as defined in the Peace Agreement), ammunition, mines, military aircraft and helicopters. Following the receipt by members of the Security Council of the reports dated 13 June and 17 June 1996 (documents S/1996/433 and S/1996/442, respectively) by the Secretary-General on the implementation of Annex 1-B (Agreement on Regional Stabilization) of the Dayton Peace Agreement, the Chairman of the Committee informed all States by a note verbale dated 18 June 1996 (SCA/96(4)), that all provisions of the arms embargo had been terminated. The President of the Security Council made a similar statement to the press.

### **Sanctions against the Federal Republic of Yugoslavia and the Bosnian Serb Party**

Following the eruption of a military conflict in Bosnia and Herzegovina, the Security Council imposed, under resolution 757 (1992), adopted on 30 May 1992, a wide range of economic, trade, cultural and other sanctions on the Federal Republic of Yugoslavia (Serbia and Montenegro). In taking the decision, the Council deplored, *inter alia*, the fact that its earlier demands, in particular, immediate cessation of fighting in Bosnia and Herzegovina, immediate cessation of all forms of interference from outside Bosnia and Herzegovina and action regarding units of the Yugoslav People's Army (JNA) in Bosnia and Herzegovina, had not been complied with.

Subsequently, the Council addressed the issue of the supply to the FRY of commodities and products for essential humanitarian need (resolution 760 (1992) of 18 June 1992) and, by resolution 787 (1992) of 16 November 1992, prohibited the transshipment through the FRY of certain products unless authorized by the Sanctions Committee, called upon States to use necessary measures to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions of resolutions 713 (1991) and 757 (1992), and reaffirmed the responsibility of riparian States to take necessary measures to ensure that shipping on the Danube was in accordance with the resolutions of the Security Council. In January and February 1993, the Council was seized of the sanctions violations on the Danube (Presidential Statements S/25190 of 28 January 1993 re: Yugoslav vessels carrying oil from Ukraine and S/25270 of 10 February 1993: the detention of Romanian vessels on the Danube by the authorities of the FRY).

Reacting to the unabated conflict in Bosnia and Herzegovina and to the non-acceptance by the Bosnian Serb party of the peace plan (S/25479), the Council adopted, on 17 April 1993, a ground-breaking resolution 820 (1993), making sanctions against the FRY virtually comprehensive and simultaneously strengthening their implementation. In addition, the Council put in place certain requirements regulating the shipments to and through areas in Croatia and Bosnia and Herzegovina, controlled by the local Serb authorities.

In October 1993, the Council considered, under the item "Navigation on the Danube," the blockade of foreign vessels in the portion of the Danube flowing through the FRY, as well as the imposition of tolls on such vessels by the authorities of the FRY (Presidential Statement S/26572 of 1 October 1993). In March 1994, the Council was seized of the sanctions violation on the Danube by the Bulgarian convoy "Han Kubrat," which delivered a shipment of 6,000 tons of diesel oil to the FRY (Presidential Statement PRST/10 of 14 March 1994).

Facing the refusal of the Bosnian Serb party to accept the territorial settlement proposed by the "contact group" countries, the Security Council adopted, on 23 September 1994, resolution 942 (1994), reinforcing and extending the measures with regard to those areas of the Republic of Bosnia and Herzegovina under the control of Bosnian Serb forces. (The Council reviewed these measures, without change, on four occasions, in January, May and September 1995, and in January 1996.)

On the same day, welcoming the decision by the authorities of the FRY to support the proposed territorial settlement and the decision to close the international border between the FRY and the Republic of Bosnia and Herzegovina with respect to all goods except certain humanitarian items, the Council adopted resolution 943 (1994), by which it suspended, for an initial period of 100 days, certain prohibitions against the Federal Republic of Yugoslavia including the ones relating, *inter alia*, to civilian passenger flights to and from Belgrade. By resolutions 970 (1995) of 12 January 1995, 988 (1995) of 21 April 1995, 1003 (1995) of 5 July 1995 and 1015 (1995) of 15 September 1995, the Council consecutively extended the suspension of these measures on the basis of reports by the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia, certifying that the authorities of the FRY were effectively implementing their decision to close the above border.

Following an appeal from UNICEF and on the recommendation of the Yugoslav Sanctions Committee, the Security Council authorized, by adopting on 14 December 1994 resolution 967 (1994), the export of 12,000 vials of diphtheria anti-serum from the Federal Republic of Yugoslavia (Serbia and Montenegro), which were urgently needed in certain Eastern European countries.

On the recommendation of the Yugoslav Sanctions Committee, which had been approached by Romania, supported by other riparian States and the Danube Commission, the Security Council adopted on 11 May 1995 resolution 992 (1995), which came into force on 23 June 1995, allowing vessels of the Federal Republic of Yugoslavia (Serbia and Montenegro) to use the Romanian locks of the Iron Gates 1 system, on the left bank of the Danube, while repairs were carried out to the locks on the right hand bank. The resolution remained in force until the sanctions were suspended under resolution 1022 (1995).

Following the initialling of the Dayton Peace Agreement, the Security Council adopted on 22 November 1995 resolution 1022 (1995), by which it decided a) to suspend indefinitely with immediate effect most of the sanctions against the Federal Republic of Yugoslavia and stipulated the terms of the re-imposition of the sanctions as well as of their termination; b) that the above suspension should not apply to the measures against the Bosnian Serb party until the latter met certain obligations, c) that all funds and assets previously frozen or impounded pursuant to resolutions 757 (1992) and 820 (1993) would be released by States, provided certain conditions were met.

The measures imposed on the Bosnian Serb party were suspended indefinitely starting on 27 February 1996, after the Security Council was informed, through the appropriate political authorities, that, in the assessment of the commander of the Implementation Force in Bosnia and Herzegovina, Bosnian Serb forces had withdrawn behind the zones of separation established in the Peace Agreement.

According to paragraph 4 of resolution 1022 (1995), the Council decided to terminate the sanctions against the FRY and the Bosnian Serb party on the tenth day following the occurrence of the first free and fair elections provided for in the Dayton Peace Agreement (House of Representatives of Bosnia and Herzegovina, Presidency of Bosnia and Herzegovina, House of Representatives of the Federation of Bosnia and Herzegovina, National Assembly and the Presidency of the Republica Srpska, and, if feasible, for cantonal legislatures and municipal governing authorities).

At its 142nd meeting, on 19 September 1996, the Committee considered a report of the Copenhagen round table on the United Nations sanctions in the case of the former Yugoslavia, which was hosted by Denmark and held under the auspices of the Organization for Security and Cooperation in Europe (OSCE) on 24 and 25 June 1996. At the round table, representatives and experts from 29 countries, as well as from the Secretariat of the United Nations, humanitarian agencies, the European Union, OSCE, North Atlantic Treaty Organization, Western European Union and the Danube Commission, directly involved in various aspects of the implementation of the sanctions, had expressed their views on lessons learned from the Yugoslav sanctions experience. The Committee decided to transmit the report to the President of the Security Council. to be brought to the attention of the members of the Council (S/1996/776).

Noting with satisfaction that the elections called for in Annex 3 to the Peace Agreement had taken place on 14 September 1996 in Bosnia and Herzegovina, the Security Council decided by resolution 1074 (1996), adopted on 1 October 1996, *inter alia*, to terminate, with immediate effect, the measures referred to in paragraph 1 of resolution 1022 (1995). The Council thus ended sanctions imposed on the Federal Republic of Yugoslavia and the Bosnian Serb party under the previous relevant



resolutions. By resolution 1074 (1996), the Council also decided to dissolve the Committee upon finalisation of its report.

On 15 November 1996, the Committee adopted its final report, which was transmitted to the President of the Security Council on the same day (S/1996/946). The final report of the Committee presents a concise account of its work since 1993 and until the termination of sanctions, in discharging the mandate entrusted to it by the Security Council. This mandate included assistance to States and international organizations in applying the comprehensive sanctions on the Federal Republic of Yugoslavia and the Bosnian Serb party, and the general and complete embargo on all deliveries of weapons and military equipment to the countries of the former Yugoslavia. The mandate also encompassed monitoring and the implementation of these measures in all its aspects.

## **Article 50**

Following the receipt of several applications from States under Article 50 of the Charter, the Council adopted, on 18 June 1993, resolution 843 (1993), in which it, *inter alia*, invited the Yugoslav Sanctions Committee, upon completion of the examination of each request, to make recommendations to the President of the Council for appropriate action. Overall, eight countries, namely, Albania, Bulgaria, Hungary, Romania, the former Yugoslav Republic of Macedonia, Slovakia, Ukraine and Uganda submitted such applications. The Committee examined the applications and presented its recommendations (S/26040, S/26040/Add. 1 and S/26040/Add.2) to the Security Council. Under each recommendation, the Committee recognized the urgent need to assist the affected country in coping with its special problems and, *inter alia*, appealed to all States to provide immediate technical, financial and material assistance to the countries in question. By letters dated 6 July, 9 August and 20 December 1993 (S/26056, S/26282 and S/26905, respectively), the President of the Security Council informed the Secretary-General, by agreement of all the members of the Council, of the Committee's recommendations and requested him to implement the actions contained therein as appropriate. The subsequent action taken by the international community has been reflected in a number of reports by the Secretary-General to the General Assembly (A/48/573, A/49/356 and A/50/423). Two reports on the subject matter, submitted to the General Assembly, are contained in documents A/51/317 and A/52/308.

## **2. Lessons learned in the implementation of United Nations Sanctions including financial sanctions**

The discretionary powers of the Security Council to take action under Chapter VII, including the imposition of sanctions, made it incumbent upon the Council to pay close attention to the issue of ensuring that sanctions were effective in order to induce a conduct deemed necessary by the Council for the maintenance of international peace and security, while inflicting minimum suffering on innocent people and on neighboring States. In that respect, sanctions should be used not as a tool for collective punishment but as a device aimed at facilitating the solution of a particular crisis. All political measures should be exhausted before sanctions were imposed and, when imposed, their implementation should be closely linked to a continuous political process to resolve the problem. A sanctions regime should be determined in clear terms and in accordance with strict criteria so as to avoid any possibility of a broad interpretation which could extend their scope and duration.

On the question of effectiveness of sanctions, it would be desirable for the Council to ensure that the envisaged sanctions, particularly in the case of an arms embargo, be enforceable. It should be noted that, sometimes, the threat of sanctions could even be more effective than the actual imposition of sanctions and that "conditional" or "deferred" sanctions should be considered when possible.

States are obliged to introduce legislation for implementing the mandatory decisions of the Security Council, but may need assistance in enacting such legislation. Development of more uniform enacting procedures would certainly enhance compliance with Council decisions. International cooperation and consultation in order to harmonize domestic legislation, for example by drafting a model law or an international convention, could have an important impetus to that effect.

Once a sanctions regime has been established, it should be endowed by the Security Council with a credible monitoring and enforcement arm and the Secretariat should be equipped with adequate resources and specialized expertise to enable it to administer effectively the sanctions regime.

More rigorous reporting to the sanctions committees by Member States on measures taken domestically to implement the sanctions, as required by the resolutions imposing the sanctions, would enhance the ability of the sanctions committees to monitor the implementation of sanctions.

One of the ways to minimize the adverse humanitarian impact of sanctions is to direct them at specific targets, something that the Council is doing more often in recent times. It should also be borne in mind that broad economic sanctions might not be effective in non-democratic states or in intra-state conflicts where the population has no power to induce a change of conduct on the part of the Government or faction leaders. In this connection, the question may be raised as to how possible it might be to gain the degree of international cooperation necessary to make targeted measures effective and what legal and administrative reforms would be needed on the international level to enhance the feasibility of financial sanctions.

It would also be necessary to look into what countervailing strategies are available to potential targets and whether targeted elites could shelter their financial assets and thus avoid the sting of financial sanctions. Could sanctioning authorities develop their own strategies to defeat such tactics of potential targets?

Regarding the need to minimize the negative humanitarian effects of sanctions, humanitarian exemptions should be provided for in the relevant Council resolutions. Furthermore, in the course of the implementation of sanctions, an appropriate mechanism could be put in place to provide the Council with periodic evaluations of the effectiveness of the sanctions as well as their humanitarian, socio-economic and political impact. The issue of the impact of sanctions on third states should be looked at, in keeping with Article 50 of the Charter.

Lastly, there is a need to further improve the efficiency of the respective sanctions committees. In that connection, attention may be drawn to the work of the Open-Ended Working Group on an Agenda for Peace and, more specifically, on its recommendations which had been adopted by the General Assembly on the issue of sanctions (GA Resolution 51/242).

## Lessons Learned and Definitions

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Ambassador Rolf M. Jeker, Delegate of the Swiss Government for International Agreements

In my introduction to the discussion I want to focus on the following issues:

- a) how to define financial sanctions,
- b) to establish the linkages and relationships between comprehensive sanctions, trade sanctions and financial sanctions,
- c) what was the experience we have acquired over the years in the application of financial sanctions and what are the lessons we have learned?

We divide this analysis into three parts, namely, lessons learned with regard to

- a) the instrument of financial sanctions,
- b) the implementation procedures in New York, and
- c) the implementation procedures in the member states.

This also corresponds to the structure chosen for our working groups. I will end by addressing the issue of targeting and our experience made so far.

### A What are Financial Sanctions and what do we want to achieve by imposing them on target countries?

By the term financial sanctions I understand a comprehensive set of measures which aim

- a) at **freezing** or immobilising all financial resources at the disposal of a target country that could be used to finance or fund cross-border activities,<sup>24</sup> and
- b) at preventing that **additional** financial resources being made available to a target country during the period for which sanctions apply

It implies, of course, that **frozen** resources remain blocked during the period of sanctions.

This definition also implies that financial sanctions are an instrument to impose restrictions over a **limited period of time** to change the behaviour of the target country and should not be considered or devised as a permanent feature.

For this reason, financial sanctions are not intended to be **confiscatory**.

All funds and investments remain the property of the target country. The owner must be allowed to earn interest on these assets or have a right to claim insurance payments under existing insurance policies, provided, of course, that all these payments are made to frozen accounts.

With this definition we have accepted that "asset management" must be permitted under a financial sanctions regime. There might, however, be differences regarding the extent to which such asset management should be allowed:

- would the asset composition have to remain unchanged and the benefits accruing simply added?, or
- would there also be a possibility of switching assets to higher yield or higher security instruments during the freeze as long as the complete control over the blocked funds remained guaranteed? Could these funds even leave the national boundaries to be invested elsewhere where higher yields were possible?

In previous resolutions, financial sanctions have been described as follows:

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<sup>24</sup> I will analyse the various assets and liabilities in detail when discussing how financial transactions can be controlled.

- "that all States should not make available any funds or any other financial or economic resources and should prevent from removing from their territories or otherwise making available any such funds or resources and from remitting any other funds..." (Iraq Res. 661, 1991), or
- "that States in which there are funds, including any funds derived from property, should freeze them to ensure that they are not made available directly or indirectly" (Serbia & Montenegro Res. 820, 1993), or
- "that States should ensure that all payments of dividends, interest or other income on shares, interest, bonds or debt obligations or amounts derived from an interest in, or the sale or other disposal of, or any other dealing with, tangible and intangible assets and property rights accruing to... are made only into frozen accounts" (Bosnian Serbs Res. 942, 1994)

Up to now, the liability side of a target country has been completely neglected in sanctions resolutions which has certainly been one reason why member countries are sometimes reluctant to adopt such measures and why the target countries might not have been affected as quickly and effectively as would have been necessary.

What I mean is that in fact financial sanctions imposition has at the same time provided a **debt moratorium** on the target country.

While under the resolutions the target country continues to be obliged to meet debt service obligations, in practice nobody any longer expects to be paid, be it on credits extended to or on investments made (direct or indirect) in the target country. The resolutions do not provide for these repayments to be made from blocked accounts or assets management benefits, unless the target country explicitly authorised such payments.

This aspect might deserve some attention in our discussion and lead to some recommendations. A mechanism would, of course, need to be put in place so that such repayments occurred in a transparent manner and on the basis of equal treatment. Since such debt service payments arise from international legally binding obligations, an obligation to pay during the sanctions regime would not be of a confiscatory nature.

Negligence in dealing with this issue has helped target countries to save on debt service payments in the order of billions of dollars.

## **B Relationship between Comprehensive Sanctions (CS), Trade Sanctions (TS) and Financial Sanctions (FS)**

There is a variety of sanctions measures that can be applied in a sanctions regime. Financial sanctions are only one of them. We usually talk about *Comprehensive sanctions* which may include arms embargoes, flight bans, trade sanctions and financial sanctions. Within these comprehensive sanctions trade sanctions and financial sanctions form the *Economic sanctions* Instrument. *Financial sanctions* focus on the monetary aspects of economics and can thus be distinguished from trade sanctions. Mathematically, we might express it in an equation:

$$\text{CS} = \text{TS} + \text{FS}$$

However, the distinction is not so clear-cut. Imposing financial sanctions and trade sanctions at the same time might appear to be an unnecessary duplication: if you freeze all financial means, how could trade go on? Or if you forbid any trade, why do we need to freeze funds? Some overlap exists, especially in trade financing issues.

Trade and financial sanctions can sometimes also work at cross purposes, for example where the target is allowed to use blocked assets to purchase goods. This may be so in the case of humanitarian exemptions for which the target may be allowed

- a) to pay with assets held within its territory,
- b) with revenues obtained from exports not forbidden by the sanction regime, or
- c) with assets from blocked accounts.

This complex interrelationship between financial and trade sanctions make it necessary to define clearly the scope as well as the exemptions from the financial sanctions in a resolution.

Due to the fact that trade sanctions and financial sanctions overlap or are partially a duplication of efforts in trying to achieve the same objective but approaching it from different angles we must address the question of

- a) whether we can achieve the same goal with less of an administrative burden, or
- b) whether we need to continue to apply the whole instrument of comprehensive sanctions

Which part of the comprehensive sanctions instrument should we choose? In my view the choice should be made by analysing which measures would achieve the desired impact with least cost to human suffering and innocent third countries.

## C Lessons Learned from Financial Sanctions

Since the beginning of the 90s, economic sanctions have become a more widely used policy instrument in international security policy. On several occasions the UN has imposed such sanctions, including financial sanctions. We have, therefore, a body of experience on which to draw when trying to devise an improved sanctions instrument.

In fact, the financial sanctions instrument has already evolved over time. Some of its initial weaknesses have been corrected in further resolutions. In particular, the creation of an informal financial sanctions expert group outside the UN context has helped to gradually come to a more common understanding regarding implementation.

I briefly want to touch now on some of the lessons learned, without trying to imply that this list is comprehensive.

### UN Security Council Financial Sanctions

1. Financial sanctions (and economic sanctions in general) have not proven to be a **panacea** for peaceful conflict resolution. The results achieved are not free of doubt as to the effectiveness of the instrument itself. This is true of practically all target countries, the situation of which was quite different at the outset with regard to size, economic importance, geographical location and availability of foreign assets.
2. **Speed and confidentiality** in the decision making process leading up to the introduction of a resolution are crucial for their ultimate effectiveness. A slow decision making process in the Security Council and/or the choice of gradual reinforcement allowed targeted states to adapt to the new situation.

Examples:

- A gradual stepping up of financial sanctions measures could be observed in the case of the Former Republic of Yugoslavia (Serbia and Montenegro).
  - In the case of Libya, the Security Council adopted in 1992 Resolutions 731 and 748 which instituted both an arms and an air embargo against Libya. Through Resolution 883, 1993, sanctions were tightened to include the freezing of Libyan assets abroad (but with exceptions for revenues accrued from the sale of oil, natural gas and agricultural products). However, the tightening of sanctions had been threatened many months before adoption by the Security Council which allowed ample time to move foreign assets to safer destinations.
3. **The duration of a sanctions regime.** The effectiveness of sanctions in reaching its political objective seems to diminish over time while the undesirable negative side effects seem to increase.

This situation arises particularly in cases where the target country is allowed to generate new financial assets through the export of goods not covered by the sanctions.

4. **Humanitarian provisions.** Humanitarian concerns dictate that a certain amount of trade must go on to prevent adverse effects on the civilian population.

Provision may therefore have to be made for **exemptions**, for humanitarian reasons or for other well defined purposes. If the Security Council decides on exemptions and since any exemptions structure weakens the sanctions regime to some extent, the criteria for accessing blocked accounts must be well specified. The use of escrow accounts of the type established in the Oil for Food Programme has proved to be rather effective. The use of escrow accounts as a tool to control financial flows allowed under a sanctions regime might be an instrument that could be applied not just within the context of humanitarian exemptions but for controlling permitted financial flows under a sanctions regime in general. This may include payments out of blocked accounts by the target state to pay for UN approved humanitarian imports, to pay compensation to negatively affected third countries or to make debt service payments falling due during the period of sanctions.

5. Sanctions resolutions often **lack clarity** both in terms of terminology and in terms of the scope of particular measures. Resolutions should ensure clarity so that the sanctioning states know how to implement the sanctions. Clarity will increase sanctions effectiveness through the uniform implementation.

Current sanctions regimes posed questions with regard to:

- **Free funds.** It has been unclear whether funds derived from investments with free funds remain free or need to be blocked.
- **Frozen accounts.** Many financial resolutions contain a provision to freeze the foreign funds of the target. However, the sanction regimes did not or do not specify how frozen accounts are to be handled by states. There are not sufficient indications of what the exemptions are.
- **Bank guarantees.** Sanction regimes usually contain a provision that „no claim should lie at the instance of the“ target „in connection with any contract or other transaction where its performance was affected by reason of the measures taken by the SC.“ The action taken internationally in the sanction regimes for Iraq, Libya and Serbia has been to prevent payments of claims in connection with bank guarantees (bonds). However, banks remain fearful of their liability and wish to protect themselves against potential seizure of their assets in the target country.
- **Diplomatic missions** pose a particular problem in the use of frozen accounts. It soon became apparent that missions needed to have access to at least part of their funds to pay their bills and to keep their missions running.

**Summary:**

***Financial sanctions are a policy instrument and not a replacement for a clear policy and a coordinated diplomatic strategy.***

***Financial sanctions will be more effective and the leverage greater when the target country has substantial external assets.***

***Speed and discretion in the UN Security Council decision making process is crucial to the effectiveness of financial sanctions.***

***The effectiveness of financial sanctions can decrease with the duration of their existence if there are opportunities for evasion.***

***The more exemptions a financial sanctions regime allows, the more loopholes there will be for evading the sanctions.***

***Resolution clarity in terms of terminology and scope of measures is a prerequisite for uniform application by states and thus increases overall sanctions effectiveness.***

***Resolutions, whether they establish partial or comprehensive financial sanctions, must clearly define the cases and purposes for which blocked assets might be used.***

## **UN Implementation of UN Security Council Resolutions**

1. **Workload.** Implementing a sanctions regime with a fixed licensing structure as in the case of Iraq puts a heavy workload on the Sanctions Committee. Current sanctions committees, however, are understaffed with the result that decisions on export applications take up to three months. Sometimes, states have to intervene on behalf of the company that filed the application in order to speed up the process.

2. **Decision making process.** The decision making process in the Sanctions Committees is not suited to deal with a large number of applications by companies and requests by states. The consensus principle slows down the process. Often, consensus cannot be reached and decisions are delayed or not made at all for that reason. Moreover, the consensus principle makes it easy to block an export for political reasons rather than on the merit of the application itself.

3. **Transparency.** Consultations within the Sanctions Committees take place behind closed doors. For non-participating states, it is therefore not always easy to understand which principles guide the Sanctions Committee in their decisions. These principles should be made public for scrutiny. In addition and for the sake of transparency and information, Sanctions Committee decisions should not just be distributed to members of the Security Council but be published and distributed to all states implementing the sanctions.

4. **Sanctions Committee rulings.** If the principles of and the rulings by the Sanctions Committees were to be published they would be a great assistance to the implementing states. Publication of the decisions and rulings would not only reduce the workload of the Sanctions Committees but also enhance uniformity in the implementation of the sanctions and so increase overall sanctions effectiveness.

5. **Sanctions Committee monitoring.** The Sanctions Committee should actively monitor implementation by member states which are requested to inform the UN on the measures they have taken to fulfil the requirements of the resolution. There should be a procedure by which the sanctions committees can inform states that their practise is too strict or too lenient? The question also arises whether the Security Council should have enforcement capabilities in cases of non-compliance by member states?

## **Member State Implementation of UN Security Council**

1. Sanctions work best when states view the threat as serious and are **committed** to absorbing the economic and political costs. There has to be a convincing case at the outset that sanctions will be effective. Otherwise the commitment is lacking and countries as well as companies will try to hedge potential losses. It is difficult to assess the economic costs of financial sanctions. However, it can be assumed that banks and financial institutions may suffer damage not only in monetary terms but also in terms of damage to their reputation for reliability and discretion.

2. UN member states that apply sanctions are at the same time **negatively affected themselves** through the loss of export revenues, debt service payments etc. The **lack of compensatory mechanisms** may make sanctions implementation politically difficult.

3. UN sanctions have been weakened by inadequate **monitoring and enforcement capabilities** in sanctioning states. Particularly, member states that do not have the **necessary legal coverage** have problems complying fully with the sanctions. This makes uniform implementation and application of sanctions measures difficult if not impossible.

4. **Offshore financial centres** may become a major avenue to circumvent sanctions. It is necessary to ensure that they, too, comply with the resolutions adopted by the Security Council.

5. **Monitoring of financial sanctions.** The fungible nature of assets, the speed with which funds can be transferred, and the ease with which the target can cover up its identity in financial transactions poses a major challenge to states and banks alike to implement financial sanctions. It is not always easy to identify the holder of a particular account nor the source from which the funds stem. In targeted financial sanctions identifying the names of the targets is one thing, to identify their assets quite another. There is, therefore, also a need for better information exchange among member states as is the case in export control regimes.

### **Summary:**

***Financial sanctions will be more effective when the member states are committed to absorbing the political and economic costs or when compensatory mechanisms exist to reduce such costs.***

***Sanctions effectiveness would be enhanced in many states by improved domestic legislation and enforcement.***

## **D Targeting**

1. **Targeting sanctions:** For maximum impact, all sanctions should be designed so that they take account of the particular features of the target. However, in many cases the effectiveness of sanctions has been questioned. Fine-tuning of sanctions regimes and direct targeting of elites are advocated as appropriate multilateral strategies to avoid undesirable impact on civilian populations and third states. The concept of targeting includes a set of measures with the potential to hurt certain leaders or elites specifically. The following four measures can be envisaged: Measures 1) and 2) directly target a defined group of individuals while measures 3) and 4) have effects that are quite focused on the elites of the target state:

- **Personal travel restrictions** can be imposed on political leaders, members of target governments and senior officials, both civil and military. Restrictions can be extended to family members of the targeted persons. This measure has been used by the Security Council against UNITA/Angola, Haiti Junta, military and police forces and members of the Junta in Sierra Leone. Resolution 1137 (1997) contains travel restrictions against Iraqi officials interfering with the work of UNSCOM.
- A **freeze on foreign funds** and assets of designated individuals or groups is a targeted means of hitting an elite group (see below).
- **Restrictions on air links**, e.g. banning commercial flights from and to the target country are likely to affect elites more heavily than civilian populations. This measure has been used by the Security Council against Libya, Iraq, UNITA/ Angola and Serbia-Montenegro and decided - but not imposed - against Sudan.
- **Cultural and organisational restrictions** will impact more heavily on elites than on mass populations, for instance by banning ministers and officials from inter-governmental meetings. Such sanctions have been decided by the Security Council against Serbia-Montenegro.

2. Financial sanctions: They include measures such as

- blocking government assets held abroad
- limiting access to financial markets and restricting loans and credits
- restricting international transfer payments
- restricting the sale and trade of property abroad.

Financial sanctions may also target government owned companies, and, potentially, all companies and nationals of a certain state. Such financial sanctions were decided by the Security Council against Serbia-Montenegro, the Bosnian Serbs, Libya and Iraq.

3. Targeted financial sanctions would include measures such as a freeze on foreign assets of specially designated individuals, companies or governments that particularly contribute to the threat of peace and security. Only an elite group, determined by an official list, would fall within the scope of the measure. In 1994, the Security Council urged member states to freeze funds and assets of Haitian elites (described as military and police officials, those acting on their behalf, people involved in the coup d'état of 1991 and members of the illegal government as well as their immediate families; Res. 917, OP3). The targeted individuals were designated by a list published by the Sanctions Committee for Haiti.

## **Experiences with the Targeting of Financial Sanctions**

1. Financial Sanctions have often been **used as a non-targeted measure**. In fact, most sanctions do not discriminate within the target country. There is a rationale for this. Funds and goods can easily be moved around, and in those states most likely to be subjected to sanctions, the public and private spheres are blurred which makes it difficult to target the government.



2. **Lists** of targeted entities were not issued by the UN. The one list that did exist was of a non-binding nature. It is evident that states can only accept a list which has been approved and adopted by the Security Council.

3. Identification also poses problems where the targets are not individuals but **governments and government related entities**. Government and government related entities are not a very good definition for describing the target because it implies that a fine line can be drawn between the public and the private sector.

Resolution 820 (1993) on Yugoslavia created comparable problems when it called on states to freeze all funds of undertakings controlled directly or indirectly by the authorities and undertakings in the Former Republic of Yugoslavia, "*wherever located or organised*". This included undertakings outside of the Former Republic of Yugoslavia. However, undertakings outside of the target state but owned or controlled by it were hard to identify and it was particularly difficult to decide what "control" meant in this context? If we look at limited companies, does an entity control the company when it owns 25% of all shares?

4. Identification causes similar problems where the target is defined by **geographical criteria**. Resolution 942 (1994) on Bosnia and Herzegovina targeted those areas of Bosnia and Herzegovina which were under Bosnian Serb control. In a war where warring parties fight over the control of **territory**, it is hard to identify the delineation of territories. In the Yugoslavia war, delineation of territories was changing almost on a daily basis. How could a state which had no troops nor personnel on the ground get accurate information on the current state? Such provisions only make sense if the Security Council or the Sanctions Committee is prepared and able to issue a list of cities and villages to which the sanctions apply. In general, identifying the target as accurately as possible must be the task of the Security Council. It cannot be left to the implementing states which may simply not have the necessary information. Sometimes for practical reasons, state authorities had to rely on information of the Bosnia authorities to get at least some information.

## E Does it Work?

Even if in our discussion we are not **exclusively** focusing on targeting, the question: "Does targeting work and how?" is a central element in our seminar.

The answer will most likely not be a **categoric yes or no**. We might be dealing with squaring a circle as sanctions are by their nature created to inflict pain. Yet, we would like to insulate some specific areas from these negative effects without, of course, taking away the overall pressure needed to achieve policy changes in the target country.

In Quantum Physics, the uncertainty principle states that one cannot at the same time and in a precise manner identify the position and the momentum of a particle.

Likewise, in the realm of financial sanctions one might not be able to design a sanctions regime both targeted and effective.

- Sanctions can be targeted but may not be very effective if as a result the range of actors or the financial instruments covered by the sanctions are reduced, thus opening ways for circumventing the sanctions.
- Or, if sanctions are comprehensive and cover a wide range of actors and financial instruments and therefore limit the possibilities for the target to evade the sanctions, then, to a certain extent, the advantages of targeting might get lost due to the broad scope affecting the whole target country as well as friend and foe indiscriminately.

In both cases, there are questions of cost, of efficacy and of compliance.

As in Quantum Physics, we might not be able to find the "great theory" which defines the answers to all our question. However, in physics, we have made remarkable progress in describing structures, measuring speeds of particles and finding a correlation between different factors. When talking about targeting financial sanctions, we may have to choose a similar approach.

We will not be able to design the "ultimate targeted sanctions regime". But through analysing Financial Sanctions as we know them, analysing political procedures, implementation procedures and

in carefully examining the structure of the financial markets we will learn a lot about how to more efficiently target financial sanctions in the future.

This complex relationship and trade off between targeting by reducing the scope of sanctions on the one hand and the effectiveness with less harmful side effects on the other might lead us also to the final conclusion that in future sanctions might have to include or to be combined with positive sanctions such as the creation of earmarked escrow accounts or international humanitarian assistance to protect innocent by-standers.

When choosing this approach, targeting financial sanctions will not fail due to a lack of methodology. Better co-ordination and fine tuning of the action and implementation procedures of different players such as States, the Security Council, the UN-Secretariat, and the private economy will bring us much closer to the results we all wish to reach. This result is, as the Secretary General stated it in his last report about the work of the organisation, to make sanctions "a less blunt and more effective instrument".

## How can financial assets and financial transactions be controlled?

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Ambassador Rolf M. Jeker, Delegate of the Swiss Government for International Agreements

1. If we want to evaluate the possible impact of financial sanctions in general and targeted financial sanctions in particular we have to ask ourselves first
  - a) which are these assets, and
  - b) which are the financial transactions

that we need to control and **what are the requirements to be able to control them effectively.**

The answer to this question is absolutely essential to the basic question of whether targeted sanctions are a real alternative.

If potential loopholes are too manifold or the requirements to close these loopholes too onerously (politically and economically) or too costly in its implementation, targeted financial sanctions would continue to remain the exception rather than become a real alternative to full fledged sanctions.

Targeting requires that the target itself is clearly identifiable and visible. If financial assets and financial flows do not fulfil these two criteria, they will not be sufficiently effective by itself and a bundle of further measures might be required.

2. When dealing with this issue we have to realise that we live in a world of **globalised financial flows**: money flows freely around the globe; not yet with the speed of sound but electronic money and its management allows movements within minutes if not seconds.

For economic reasons the liberalisation of financial flows continues. We have just concluded negotiations to liberalise financial services further.

The liberalisation of financial flows has also led to the proliferation of new off-shore financial centres widening the scope of players.

Moreover, general economic adjustment in many countries is accompanied by the introduction of stable convertible currencies, thus also widening the scope for holding assets in many more currencies.

All these elements make targeting and control more difficult and complicated. Yet, the need for more accurate control arises also, and maybe even more importantly so than for the imposition of financial sanctions, from another problem, namely the control of money laundering.

When it comes to addressing our problem in the context of economic sanctions, the experience and recommendations made to combat money laundering will become relevant. I will come back to this issue.

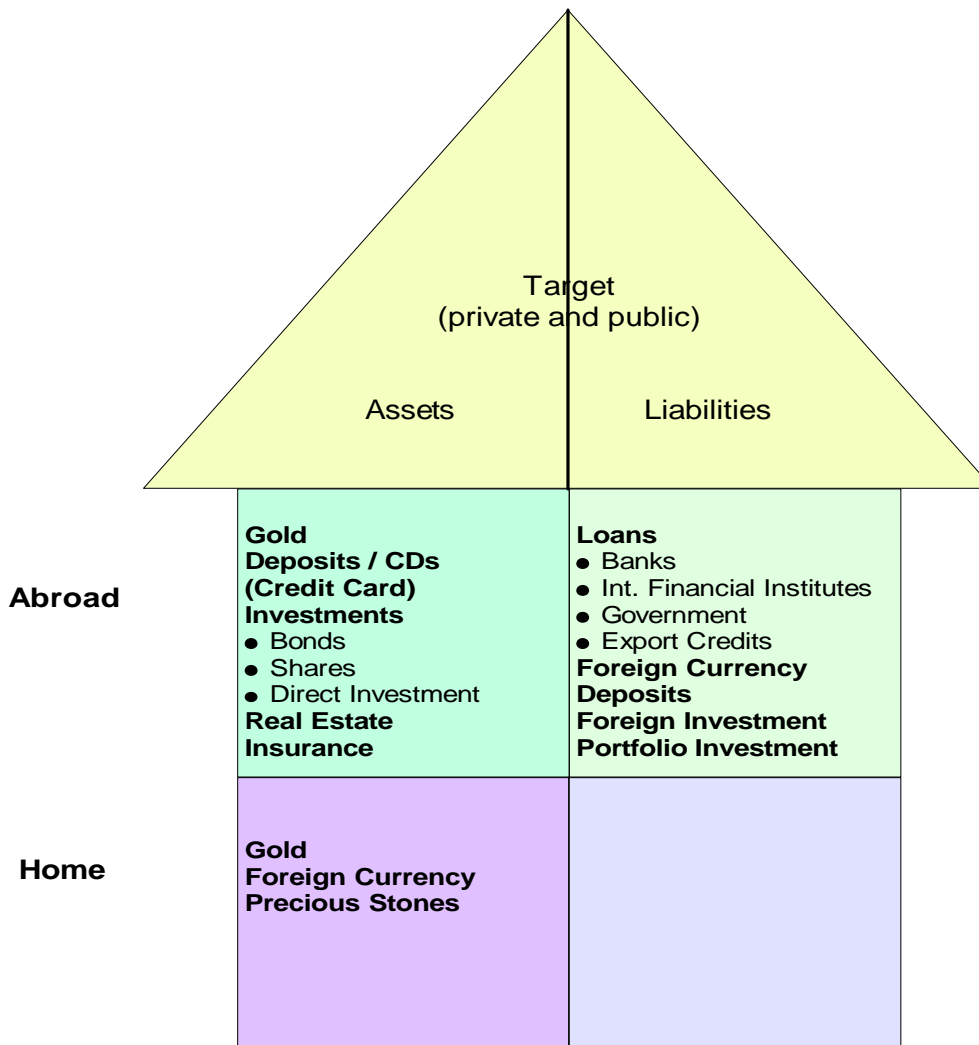
3. Let me now focus on the balance sheet of **assets** and **liabilities** of a target country. A fairly good knowledge of this situation should be available to the UN-members before deciding on the imposition of financial sanctions.

Only this knowledge will allow an assessment of the potential impact and the chance of targeting.

The general **availability of assets** and the **degree of interdependence** with the international economy will be a measure to assess the chance of success of financial sanctions.

A largely autonomous economy with a relatively **small percentage share of export and imports in GDP** will be largely immune to external sanctions, while a smaller economy with a high integration into the world economy will be much more vulnerable.

4. A country's assets and liabilities



In its decision to impose sanctions the UN Security Council will have to take into account both sides of the balance sheet.

#### 5. Liabilities

Sanctioning the target will bring about losses for the sender as far as the liability side is concerned. Thus, outstanding loans will not be repaid; deposits might be frozen or confiscated and foreign investment in direct or indirect form might be threatened.

We might be confronted with a similar situation as during the debt crises. The sanctioning state is so heavily involved that he becomes hostage to the target as losses imposed through sanctions would affect its own well-being significantly; be it as a country as a whole or individual economic units within the country.

One way to overcome this problem could be to institute a "compensation fund" where permitted revenues from export sales are used to compensate lenders.

#### 6. Assets (stock approach)

The relevant question for targeting assets to freeze them is → whether it is possible to identify the owner of the asset

In that context we also have to address the question of whether it is easier for financial institutions to identify assets by the holders name (individuals/persons) or by nationality.

The answer to this question might have some bearing on whether full fledged financial sanctions are needed or whether a targeting of a few persons might be sufficient.

## 7. Domestic Assets

A country has the possibility to keep assets stored in its own territory such as

- gold
- foreign currency notes
- precious stones
- titles to (bearer) shares and bonds

Obviously, no freeze of these assets is possible. (Regarding the question of transferring and use of these assets, we will come back to it, when we discuss the flow of funds)

## 8. Foreign Assets

In a normal situation only limited amounts of assets that can be used in international transactions are being kept at home.

Of course, the behaviour of potential target countries might have changed in this respect after the use of international sanctions has become more widespread.

Let us look at the various assets under the assumption that the depositor/investor acts in good faith.

### a) Gold

Gold as monetary reserves are often held abroad, be it at the Federal Reserve in New York or at the BIS in Basle. Such gold holdings by Central Banks can be easily identified and frozen. Holdings of private individuals, particularly if stored in safes are much more difficult to target.

### b) Deposits

If no specific attempts have been made (see below: evasion possibilities) deposits can be easily identified, be it in the case of individual or company accounts. In most countries detailed requirements on the identification of the account holders are required; this requirement, again, is very much related to the problem of money laundering (knowing your customer). These widespread requirements can have a useful effect in case financial sanctions are imposed.

### c) Investments

Investments by the target country can take the form of direct investment or portfolio investment including stocks and bonds. The main element for identification depends on whether these financial instruments need to be registered with a name or whether they are available in bearer form without the need to indicate the name of the owner. Thus, bearer bonds are quite common in many countries while the requirements to register direct investment differ.

Where investments in bearer form exist, tracing them becomes almost impossible, especially if they are held in safes. Bearer bonds have an enormous potential to offer anonymity. Bearer bonds may absorb one billion dollars in a single hour.

### d) Holdings of real estate

Ownership registration is required in most countries so that its control is feasible in a normal situation.

## 9. Flow of funds

In order to use funds to finance its external operations, a target country has two options

- a) to use its existing assets, or
- b) to obtain new flows through credits

### a) Use of existing assets

It is obvious that all assets that are **clearly identifiable** and have been frozen at the outset stay out of reach unless there is illegal collusion by entities or the Government itself .

Yet, assets like gold, precious stones or bearer bonds and stocks might change hands if the target country tries to monetise them to finance transactions. Since these assets are not readily identifiable there is, indeed, a higher danger that the target country can still make use of these assets.

Yet, even in these easier circumstances, there are some obstacles to overcome. Thus, for reaping the benefits from bonds, the interest normally has to be cashed in through a bank while sales of bonds in normal circumstances pass through financial intermediaries. It might, therefore, still not be all that easy as it looks to dispose of large quantities of bearer bonds. Gold bars also carry an identification stamp, so that its sale requires, too, overcoming existing obstacles in the market.

### b) Obtain new financial resources through credits

It appears much more easy to make sure that no new funds are made available to a target country.

International financial institutions normally stop lending even prior to the imposition of sanctions and banks will not be willing to lend. As a rule they scrutinise the borrower very carefully before lending. Thus, it is almost certain that they could establish the true identity of the borrower or derive from the circumstances that the borrower might not be genuine. Banks as a rule are quite risk averse; they will try to protect themselves from losses.

## 10. Possibilities for evasion

The previous analysis was based on the assumption that the asset holder did not try deliberately to hide his identity.

In the real world, however, the financial and non-financial institutions will have to deal with a lot of customers that want to achieve anonymity, be it for tax purposes or to be prepared in case of future sanctions.

It must almost be assumed that countries feeling a potential threat of being sanctioned have changed investment behaviour after the experience of the 90ies when sanctions have become almost fashionable.

If the experience in the export control field is anything to go by, we must assume that target countries operate through front companies or regime friendly entities or Governments abroad in violation of their own UN obligations.

Offshore centres are likely spots where financial transactions become anonymous and are reinvested in major markets under companies incorporated in the offshore centre. Transfers between offshore centres also remain largely unidentified. It is, however, not quite clear how significant such evasion measures are or could be.

Implementing financial sanctions is primarily a matter of identification: knowing your customer. If the sanctions provisions define the target only in general terms, financial institutions do not know exactly what to do and might be inclined to give their clients the benefit of the doubt. If a list of

names is provided then any transaction ordered by an individual not contained on the list but belonging to the target may not be discovered.

When targeting natural persons the financially inept will more likely be caught as they will not dispose of the necessary means to move their assets while the real target may be able to put its stock into safety on time.

It is to be expected that potential targets will shift to more complex forms of placements to make it more difficult to identify them as owners. The task of sanctioning authorities will correspondingly become more complex.

#### 11. Relations to anti-money laundering measures

Many problems encountered in connection with financial sanctions also appear in the context of money laundering (e.g. identification of beneficial owner of assets, problems of loopholes - non-banks, offshore centres etc. - tracing of suspicious transactions, creation and implementation of a legal and regulating framework, organisation of international administrative co-operation etc.).

The experience gathered by the international community in the area of preventing and combating money laundering, especially in the Financial Action Task Force on Money Laundering (FAFF/OECD) may be useful in finding and discussing ways to implement financial sanctions.

#### 12. "Transitional" period of sanctions

Provisions have to be made in sanctions policy for the question "How to deal with transactions that are in transit at the time when sanctions are imposed?" For this situation, the resolution must provide for the obligation of payment by the target, otherwise the economic unit in the member state becomes the victim. Escrow accounts may need to be created to provide for compensation.

#### 13. Hypotheses and questions

- ***The fungibility of financial transactions makes it relatively easy for the target to evade the sanctions partially by hiding and moving assets.***
- ***Targets adapt to financial sanctions. There must be a follow-up to toughen sanctions or to maintain the same level of pressure.***
- ***It is easier to target countries than individuals as those individuals holding large amounts of assets abroad are sophisticated enough or have the means to find ways for evasion.***
- ***What are the legal implications of targeting individuals? Can individuals be targeted at all because targeting implies a verdict of guilt of an individual which may be challenged in court by the target?***
- ***If identification is the key issue, information gathering becomes the most important task when planning for sanctions which underlines the importance of an information exchange between sanctioning states.***





## **HOW CAN FINANCIAL ASSETS AND FINANCIAL TRANSACTIONS BE CONTROLLED ? Comments from a bankers' point of view on the speech of Ambassador Jeker**

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Albert Cluckers, senior manager Internal Audit Department, Bank Brussels Lambert

1. "If we want to evaluate the possible impact of financial sanctions we have to ask ourselves
  - a) which are the assets
  - b) which are the financial transactions"

It should be kept in mind that not all assets are kept under their real names with financial institutions. In fact the government or the individual wanting to hide and escape with their fortunes can set up complicated structures in order to hide their true identity.

Trust companies can be created in financial paradises. These trusts on their turn will be the owners of other companies which will invest or utilise the money of the sanctioned country or individual. The real owners of the basic trust company, i.e. the targets of the financial sanctions, will never be known as they hide behind the trustees who are appointed by them.

The utilisation of sanctioned money lies very closely near the systems used to launder criminal money. The origin of the funds is different but the concern is the same: HIDE THE TRUE ORIGIN OF THE FUNDS SO THAT THEY CAN BE USED IN THE NORMAL ECONOMIC CIRCUIT.

2. " we live in a world of globalised financial flows"

- ◆ Exchange controls have been abolished everywhere.
- ◆ money can move in a few seconds around the world through electronic payment systems (e.g. SWIFT). The carriage of banknotes has since long been replaced by electronic systems which allow bank customers to initiate payment orders from their office desk, channel the operation on line through the bank Computers till the account of the final beneficiary. There is no human intervention in these payment systems so that banks are not able to control the operations anymore (straight through operations).
- ◆ Banks can only control movements into and from accounts in their books. As set out in point 1 the accounts are not always kept under the names of the targeted persons or entities which makes the control about the application of financial sanctions utmost difficult.
- ◆ Moreover, international payments require the intervention of several banks, besides the paying and receiving bank, in order to make the necessary cover in the currency concerned. This means that besides the paying and receiving bank, which can only watch movements from and into accounts, other banks will intervene in order to make cover for the payment order concerned, without knowing the whereabouts of the underlying order and hence without any possibility of control.
- ◆ One should also bear in mind that there is a difference in the flow of goods and the flow of money. Goods travelling from Germany to Jordan may be destined to Iraq while the payment will come from Cyprus to France. Moreover it is classic that goods shipped for a Destination A, change course when shipped. Even ships will change names and nationality in the middle of the ocean in order to hide their real Destination.
- ◆ As embargoes decided against countries or particular persons need some time before being effective (discussions about the principle, practical features, enforcing by national laws for each country following the embargo rules) its is obvious that the targeted countries or individuals can use all existing legal and operational techniques in order to prevent their assets being embargoed.
- ◆ It is also important to make a difference , speaking about embargoes, between operations related to import from embargoed countries or export to embargoed countries. Import is easier to control as goods need to come out of the target countries and will, mainly by their nature, be submitted to specific custom formalities. Export towards target countries is much more difficult to follow as these countries will use all means to have the goods they need and because the financial flow will not follow the flow of goods.

### 3. "assets and liabilities of a target country"

A difference has to be made between the assets officially kept with banks or other institutions and the assets which fled the country and will be kept undercover in various forms. Countries or individuals which feel a coming embargo will of course try to hide as much as possible of their assets under various forms, difficult to track.

### 4. "liabilities"

Financial sanctions against a country or an individual will also affect the reimbursement of outstanding loans. The first victims of the embargo will be the honest companies and businessmen having contracted with the country concerned. They might have delivered goods and will not be paid for them. Banks as well will be victims as the commercial loans they granted to the sanctioned country will not be reimbursed and hence also the insurance companies will fall as victims as they covered the credit risks on these countries. Iraq received a tremendous commercial reward when the embargo was installed against it. The imported goods and contracted financing agreements for billions of USD will never have to be reimbursed.

### 5. "assets (stock approach)"

It should be kept in mind that stocks and bonds do not often circulate physically. Most stocks and bonds are kept in a portfolio which is managed either under the true name of the owner but can and will very often be kept under the name of a trust or any other person entitled to keep the portfolio. Moreover, stocks and bonds will be managed in portfolio by banks which will entrust other banks, according to the nationality of the stocks and bonds, to manage certain parts of the portfolio (custody accounts). In the latter case banks will not know the real identity of the basic owner as they just manage portfolios by order of other banks.

### 6. "domestic assets"

Assets which are liable to be sanctioned can, for a big portion, be kept in precious stones. The special economic sector which is dealing with stones will very easily enable to transform these stones into cash without any severe control about the true origin.

### 7. "foreign assets"

Lessons learned from Iran will have the sanctioned countries keep their assets in safe countries. It is not necessary to keep USD assets in the USA. One can easily keep them in another country. Investments or holding real estate can easily be used to evade any control or any sanction. Just as for criminal money laundering it is easy to bring sanctioned money into circulation through real estate operations. One buys a real estate for a certain amount and sells it after a while, if necessary with a large profit, to a third party. The money so received is honestly earned. It should however be known that the buyer of the real estate buys with money he received from the seller and hence is laundering the seller's money. Laundering is always operated through third parties which apparently have no relation with the launderer and hence are difficult to trace.

Although new direct lending is not always possible, due to sanctions, countries concerned will try to obtain financing through third parties or through hidden schemes (e.g. trusts, real estate, art, etc.). Moreover, if loans for commercial purposes are not available anymore, it is always possible to use techniques of barter trading. If used in triangular or multi-angular schemes it will not be easy to trace the exact co-ordinates of the parties concerned.

### 8. "possibilities for evasion"

Possibilities for evasion are more frequent than possibilities of control. As the entering into forcing of sanctions is subject to a very slow procedure, the countries or the individuals to be sanctioned can

easily set up evasive systems. On the other hand the first victims will be the ordinary people of the country concerned, not receiving normal supplies anymore, and certainly the normal suppliers of the country. These businessmen will not be paid anymore for the supplies they delivered and will be cut from new business opportunities. The corporates, banks and insurance companies from the countries issuing an embargo will be victims of these measures with consequences for employment, foreign trade, financing, etc.

#### 9. "relations to anti-laundering measures"

As already explained above, escaping financial sanctions and money-laundering are very likely the same. Both are systems which should enable the owners of funds, which were not earned in a lawful way, to use this money officially as resulting from normal income.

Although banks all over the world endeavour to track this money and to prevent this kind of financial trivial systems one always will find financial institutions, lawyers, accountants willing to enter and to assist people in setting up "special systems". The rewards indeed can be very high for those people setting up "financial engineering" in order to escape legal procedures. Moreover one will find all over the world many new banks (Far East, Eastern Europe) which do not have the skills nor the experience to cope with the inventive laundering actions. Moreover these institutions will also more be attracted to large and easy profits than larger banks with well known reputation.

Financial institutions should be encouraged to focus on techniques of laundering and at the same time this will cover a large part of the controls on follow up of financial sanctions.

Of course financial institutions will not be able to tackle the problem on their own. The authorities, the police forces, the legal systems need more awareness about the problem. They need to be adapted and in the first place need skilled staff to deal with the problem.

Finally, offences should be sanctioned more seriously. Although many countries already installed severe sanctions against those whose launder money or try to escape embargoes, many other countries do not sanction these offences in a dissuasive way. This will always attract those who want to commit "financial crimes".

## Conclusion

- ◆ the important financial institutions all over the world already carry an important attention towards controls and investigations in the field of laundering of money and evasion of embargoes. This is a very expensive action which is a heavy burden on the profitability of the sector and which might ultimately be paid by the customers. Nevertheless, the financial sector, more than ever, is convinced that all means should be mobilised to fight against fraud, laundering and all other types of "financial crime", including the evasion of financial sanctions. The big theme is "know your customer and understand the operations he proposes.
- ◆ One should not forget that those who want to escape are always one step ahead and are very inventive. There is an important difference between theory and by the books and reality. Large amounts may be "smurfed" into small portions which go through the financial systems without any suspicion. There is no name on money.
- ◆ Before entering into financial sanctions a serious study should be made about there whereabouts of the situation of the particular country or individual. It should be avoided that the sanctions in the first place harm the innocent population or the honest business system rather than the target aimed. One should also consider to cover the "innocent" victims for the loss suffered. A financial embargo may not become a reward for the "evil".  
Why should bodies such as the UN not outsource some parts of the practical set up of embargoes to specialised people ? Why not set up, when an embargo has been decided, a team of specialists, e.g. bankers, who can prescribe the real financial measures to be set in place ?
- ◆ It should be taken into consideration to centralise all information about the actions against an embargo in one central place. Today each financial institution has the same research and control to execute about the same topic- the financial sanctions and the people trying to avoid it. People wanting to escape from financial sanctions will try to find their way out in several countries,

through various institutions. If information and experience gathered by institutions were centralised it would become very much efficient and time saving for other institutions to use the already existing information in order to react on a particular situation. We refer to similar centralised databases such as the Commercial Crime Bureau and the International Maritime Bureau (part of the International Chamber of Commerce) in London.

# PAPERS



# **Making Financial Sanctions work: Preconditions for successful implementation of sanctions by the implementing state**

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Jeremy P Carver, Clifford Chance, London

## **Introduction**

International sanctions serve a complex purpose in an even more complex world system. They are exceptional, in the sense that they form no part of the way in which society is normally organised, nor of the usual application of the legal systems designed to serve society. They are a product of exceptional circumstances: a crisis precipitated by a threat to international peace and security. Prompted by extreme events, sanctions have unintended, unexpected, and sometimes brutal effects.

Although international sanctions have become an object of intense interest, and controversy, for less than 10 years - from the date of 2 August 1990 when Iraqi forces brutally invaded Kuwait - their roots lie in former age. They are in fact manifestations of *war* - a development of the long-established practice of "blockade": traditionally an act of war.

International sanctions have an impact on the full range of societal organisations. Decisions of the United Nations Security Council bind all UN Member States to implement specific sanctions regimes - often with immediate effect. Yet, if sanctions were left at this lofty plane of international politics, they would achieve nothing. The entire object of sanctions is to operate at a very different level: to cut across private law transactions between individuals and companies who, as such, may have little connection with the target of sanctions. They become involved because of a trade or service which would infringe the purpose declared in the Security Council's decision. The distance between the 15 Security Council Members meeting in New York and the individual trader or banker is far greater than the physical mileage separating them. A complicated process - political, legal and functional - is involved. It is that process which my remarks at this Seminar are intended to explore; and this paper to introduce.

## Article 41 of the UN Charter: excommunication not retribution

International sanctions derive, primarily from the United Nations, and in particular from Article 41 of the Charter, which is to be found in Chapter VII, which sets out the powers of the Security Council when confronted by threats to the peace, breaches of the peace, or acts of aggression:

*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 measures may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communications, and the severance of diplomatic relations."*

The sanctions which are available to the Security Council are, thus, exclusively international measures. Although the Charter looks back to find means to save us from the scourge of recent wars, the sanctions contemplated by Article 41 are of *increasing* relevance in an increasingly international world. In today's global society, the boundaries of the State are permeable to trade, movement of people and, above all, to ideas, information and flows of money which are now part of that same free flow of digital data.

In this world of ever-growing social, economic and financial interdependence, it becomes even more shocking when a State, such as Iraq or the rump Yugoslav Republic, engages in conduct which has been long outlawed (if not entirely absent). Is it not the appropriate response to such a breach of the social contract between States to isolate the offending State from all or much of the community with the rest of the global village until it has taken the remedial action required to resume its membership of the international community? In an interdependent world, the international excommunication which Article 41 contemplates has been shown to be a potent incentive to reform. Arguably, no States which actively participate in the international community can maintain their national output and standard of living without access to international trade and finance. Where States, such as Iraq, have chosen not to comply with the UN imposed conditions for readmittance into the international community, the price has been a heavy one.

The purpose of Article 41 is not to exact retribution, but to provide for the international excommunication of a delinquent State as an incentive to reform. The Security Council thus seeks to cut out a - temporarily - cancerous cell from the global body. So long as our world order is still based on States, with fundamental respect for territorial integrity and non-interference with the internal affairs of a State, neither the UN nor any other external Power may lawfully try to interfere within a State. This rule is plainly at risk in many of the countries where sanctions have been applied; but we have yet to develop an alternative to it.

Many commentators, however, continue to criticise sanctions as punitive, as inflicting unacceptable hardship on the innocent victims of some undesirable regime, whose leaders are the last to suffer. True, perhaps; but this is an inevitable consequence of the present rules. How much worse hardship and insecurity would result from a selective, sometimes unilateral, decision to dispose of other people's unwanted dictators.

## The binding nature of Security Council Resolutions

There is no voluntary elements to the sanctions regimes under discussion: such measures adopted by resolution of the Security Council are mandatory and bind all UN Members. Under Article 25 of the Charter, Members of the United Nations "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."<sup>25</sup> Sanctions imposed pursuant to Security Council Resolutions are, therefore, by their nature collective measures. A failure to implement a Security Council resolution incurs State responsibility, with the prospect of having the same measures being imposed against the defaulting State. Because they constitute an act of an independent body, the UN, States incur no criticism for implementing sanctions. This is marked contrast to the measures often linked and confused with international sanctions, namely: unilateral trade sanctions taken by an individual State.

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<sup>25</sup> Provisions of the UN Charter which are of particular note, include Article 23 which specifies the composition of the Security Council, Article 24 which lays down its functions and powers and Article 27 which deals with the voting procedure of the Security Council. It is also clear that Security Council Resolutions may be (and have been) directed to non-Members of the United Nations. Article 2(6) of the UN Charter provides that "[t]he Organisation shall ensure that States which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security". Whether non-Members are bound to comply with the UN Principles is, however, a different question.



## Unilateral sanctions distinguished

It is essential to draw a distinction between UN sanctions as collective measures to restore international peace and stability and unilateral measures applied as an instrument of foreign policy by one State against another for some perceived national interest. The United States is the most frequent employer of economic sanctions as instruments of foreign policy; and its experience in applying and enforcing its regulations has made its agencies respected far beyond the United States. However, the United States practice, particularly since the Congress started to echo it with its more political motivation, has led to increasing international confusion; and, in turn, to a weakening of the international resolve. There is no doubt that the effect of US sanctions on US based companies is very disruptive, particularly if such companies are players in complex global financial markets. In one important sense, these measures are anti-competitive, because non-US companies have a "free-run" at contracts in certain countries.

In addition, sanctions imposed unilaterally at a national level ought to be confined in their territorial effect to avoid inevitable conflicts of legislation and the possibility of double jeopardy. It is entirely predictable that attempts by Washington to extend the reach of US sanctions laws have been fiercely resisted by other countries and, most visibly, the European Union and Canada.<sup>26</sup>

Given the increasingly global nature of financial and other markets in goods and services, and in particular the almost universal use of the US Dollar, US trade measures effectively applied are bound to have widespread effects, often beyond the strict reach of the President's intention. Thus encouraged, the US Congress has asserted a domestic right to punish, not merely the governments who are the overt target, but many foreigners who deal with those governments in perfect conformity with the law. The fact that such measures are having a discouraging impact on trade with those governments is seen, inevitably, as providing further justification for the extra-territoriality of the original measures. Measures which were seen up to 1992 as being in the exclusive competence of the President, are now being adopted by State legislatures, and even smaller American municipalities. The almost total irrelevance of such measures does nothing to curb the enthusiasm of the local politicians. It matters not at all to them that the reputation of international sanctions suffers from such confusion.

All these unilateral measures derive from that older source, *ie* blockade, an act of war. They are intended to punish. The bulk of the measures in place against Cuba derive from the US Trading with the Enemy Act, leaving in no doubt that the Cuban State is the "enemy", at war with the USA. The measures are aggressive, causing the seizure of "enemy" property within the USA. This has virtually no parallel in the legal systems of other States; and serves merely to widen the gulf of misunderstanding between the USA and many of its trading partners. For them, there are such obvious advantages to using collective economic sanctions, implemented multilaterally and enforced more or less uniformly by every State. But it is also clear that the realisation of these advantages and, therefore, the effectiveness of the collective sanctions depends on the extent to which the actions of individual Member States can be coordinated and harmonised. Unfortunately, the whole process by which UN sanctions have in the past been translated into the domestic law and administered by the domestic agencies of individual States does not guarantee international conformity.

## Translation of international law to the domestic plane

Implementation of sanctions is extraordinarily difficult, mainly because of weaknesses at the national level. In order to understand the practical problems associated with the implementation and administration of UN sanctions, we need to examine the process by which States translate international law to the domestic plane.

In most States, an undertaking made by a State at the international law level, such as that contained in Article 25, will not be translated into that State's domestic law without national legislation.<sup>27</sup> The imposition

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<sup>26</sup> In November 1996, the European Union introduced blocking legislation in the form of Council Regulation (EC) No. 2271/96 making it illegal for European companies and persons to comply with the extra-territorial provisions of the Helms-Burton Act or the Iran and Libya Sanctions Act. Under the recent EU/US Agreement of 18 May 1998, designed to resolve trans-Atlantic differences, the US Government has agreed to consult with Congress in order to amend the waiver provisions of Titles III and IV of the Helms-Burton Act and to provide certain assurances that waivers are likely to be granted to EU companies under ILSA in the future (if certain conditions are met).

<sup>27</sup> The basic distinction is between monist and dualist systems. According to the monist doctrine, international law and the domestic law of States are part of one legal structure and the various national systems of law are derived by way of delegation from the international legal system. In a monist system, international law is regarded as both superior to and incorporated in municipal law. In such a system there is obviously no need for national legislation to implement Security Council Resolutions. On the other hand, the

of mandatory collective sanctions necessitates the enforcement of such measures at the national level. National law enforcement machinery must be brought to bear pursuant to some national power. Moreover, the language of Security Council Resolutions are of necessity pitched at a level of generality intended to express a purpose, not to specify the precise means whereby individual States achieve that purpose. Thus, most States will be compelled to fall back upon whatever legislation - if any - it may have which empowers the government to give effect in national law to sanctions.

While a few states have domestic enabling legislation or domestic constitutional provisions which empower them as a matter of subordinate legislation to give effect to Security Council Resolutions, such enabling legislation and constitutional provisions are by no means uniform in their effect. Each constitutional system contains qualifications and reservations with regard to the type of Security Council decision that can be enacted in this way. In the overwhelming majority of Member States, however, no such enabling legislation or constitutional provision exists and implementation requires Member States to have recourse to the more cumbersome method of amending existing trade or financial legislation or, in a limited number of cases, enacting new legislation. Thus, in response to what is clearly a crisis - a threat to international peace and security requiring urgent action - most States have to contemplate drawing on the primary legislative processes in order to formulate and adopt laws to implement their international obligations. The result of these differing legislative bases for the implementation of sanctions may be a maze of inconsistent national laws and regulations.

This was amply demonstrated by the initial response of UN Member States to the Iraqi invasion of Kuwait and the sanctions imposed on Iraq by Security Council Resolution 661 (1990). The effect of the legislation introduced by various States was varied and it applied differently to different sectors of the economy. The result was a patchwork quilt of enormous complexity which had a chaotic impact on markets, especially financial markets as banks struggled to work out what they could or could not do. The terms of Resolution 661 required States to regulate activities "by their nationals or in their territories" with inevitably overlapping and extraterritorial results. Anyone contemplating a transaction which may or may not have been caught by sanctions had to consider the precise effects on his part of the transaction of the differing legislation of: his State of nationality; his State of residence; the States of any of his counterparts including bankers, shippers, agents, brokers, insurers and other intermediaries. If any of those States was a member of the European Community (as it then was), he also had to consider the impact of EEC regulations. This diversity of potentially applicable national legislation unquestionably complicated the task of the international banking community in implementing sanctions against Iraq.

In contrast, a few States appeared to be convinced that they did not need to do anything to implement UN sanctions regimes because UN Security Council Resolutions have direct effect as national law. There are at least four mechanisms by which the UN Charter and Security Council Resolutions made pursuant to it could be "self-executing" to varying degrees.

The first and most direct method would be to pass domestic legislation incorporating the UN Charter into national law. This is an approach which has been adopted by various States on numerous occasions, for example, the United Kingdom has taken this approach in implementing many conventions<sup>28</sup>; and numerous European States have used similar means to give effect to the European Convention on Human Rights. In relation to the UN Charter, Brazil appears to have incorporated at least Article 25 of the UN Charter into domestic law by way of Presidential Decree No. 19841 of 22 October 1946. In response to Resolution 661 (1990), Presidential Decree No. 99.441 was proclaimed on 7 August 1990 requiring the Brazilian authorities to comply in respect of their competencies with the provisions of Resolution 661.<sup>29</sup>

A second method is by way of a Model Law on the implementation of sanctions which States could be encouraged to adopt. An example of this approach is the UNCITRAL Model Law on International Commercial Arbitration which was adopted by the United Nations Commission of International Trade Law ("**UNCITRAL**") on 21 June 1991. On 11 December 1985, the UN General Assembly adopted without a vote Resolution 40/72 recommending that "all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice". The "desirability of uniformity of the law" is particularly obvious in relation to sanctions laws. The fact is, however, we are no nearer the establishment

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dualist school of thought holds that international law and the domestic law of States are totally separate legal systems. In a dualist system, international law applies within the State only to the extent that it is adopted by the municipal law of the State. In such a system, international law applies as part of such municipal law, rather than as international law. In order to implement Security Council Resolutions in a dualist system, national legislation is required.

<sup>28</sup> For example, the Vienna Convention on Diplomatic Relations 1961, by the Diplomatic Privileges Act 1964.

<sup>29</sup> Note Verbale from the Permanent Representative of Brazil to the United Nations addressed to the Secretary General, 14 November 1990 as reprinted in *Cambridge International Documents Series*, Vol. 2, Part 1 p.530-532.

of such a Model Law in relation to the implementation of sanctions as we were when I first proposed it in Autumn 1990.

A third approach would be the creation of an international "Sanctions Code". If the US Uniform Commercial Code (the "**UCC**") is taken as model for such an instrument, it depends critically on being applied as a matter of choice, rather than compulsion. Although not all states in the US have adopted all of the provisions of the UCC, the UCC has been effective to ensure that commercial law is harmonised to a significant extent across the United States. This has been reinforced by the duty of US courts to have reference to its terms, and by the willingness of US Judges to apply its provisions in a consistent manner.

An alternative model might be the Uniform Customs and Practice for Documentary Credits (the "**UCP**") which has been continuously developed by the International Chamber of Commerce since 1933. The UCP's strength lies in the fact that it was created by bankers, to achieve uniform results beyond national controls, in the provision of trade finance. Although its adoption is a matter of choice for the parties to the transaction, the UCP has been far and away one of the most effective means of ensuring that the rules in relation to documentary credits are uniform. Again, tempting as a Uniform Sanctions Code might be, based on experience of the UCC and UCP, they would inevitably founder when confronted by the need strictly to observe contractual obligations which ante-dated sanctions.

It is arguable that the simpler the transformation procedures used by States to incorporate Security Council Resolutions into national law, the more likely there is to be national compliance with such measures and the greater is likely to be the co-ordination between States. However, the need for international conformity has to be balanced against the need to ensure that sanctions laws are both compatible with local conditions and are effective by law to cancel pre-existing obligations. As the domestic agencies and courts of States will be charged with administering and enforcing sanctions legislation, it is arguable that the more complete the transformation into domestic law, the faster and more effectively sanctions can be imposed and modified as circumstances may dictate. Thus, if sanctions are to be directly effective there is a need to ensure that the mechanism giving rise to this direct effect is adequately sophisticated. As will be discussed below this is something which cannot be said of some of the means employed by certain States.

## Primary national legislation

### (a) Standing legislation

Turning now to concrete examples of the various transformation procedures discussed above, there are a number of member states such as Canada,<sup>30</sup> Denmark, Finland,<sup>31</sup> Greece,<sup>32</sup> the Netherlands,<sup>33</sup> New Zealand, Norway,<sup>34</sup> Sweden,<sup>35</sup> the United Kingdom, the United States and, since 1993, Australia<sup>36</sup> which have specific enabling legislation allowing the state concerned to give effect to decisions of the Security Council by means of secondary legislation. The scope and effectiveness of this legislation varies widely. Even where enabling legislation exists, the effectiveness of this legislation is often constrained by the pre-existing administrative traditions of industrial and financial regulation in the relevant State.

### United Kingdom primary legislation

The UK regime for the implementation of UN sanctions is illustrative of this point. UK practice in implementing UN sanction regimes has been to pass secondary legislation under three enabling statutes:

- (i) the Import Export and Customers Powers (Defence) Act 1939 (the "**1939 Act**");
- (ii) the United Nations Act 1946 (the "**1946 Act**"); and,
- (iii) the Emergency Laws (Re-enactment and Repeals) Act 1964 (the "**1964 Act**").

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<sup>30</sup> The United Nations Act, R.S.C. 1985, c.U-2.

<sup>31</sup> Act No. 659/67 concerning the Implementation of Certain Obligations incumbent upon Finland as a Member of the United Nations.

<sup>32</sup> Law 92 of 10 August 1967.

<sup>33</sup> Sanctiewt 1977 (Sanctions Act 1977) and In-en uitvoerwet (Import and Export Act).

<sup>34</sup> Act No. 4 of 7 June 1968 relating to the implementation of mandatory decisions of the United Nations Security Council.

<sup>35</sup> Act (1971:176) on Certain International Sanctions.

<sup>36</sup> The Charter of the United Nations Act 1993.

The most appropriate primary legislation to give effect to UN sanctions is the 1946 Act, which provides that if under Article 41 of the Charter the Security Council calls upon the British Government to apply any measures to give effect to any decision of the Security Council, the Queen may by Order in Council make such provision as appears necessary or expedient for enabling those measure to be effectively applied. However, by its very nature, the 1946 Act is relevant only where the Security Council has passed a resolution requiring States to impose sanctions.

In contrast, the 1964 Act is narrower in scope in the sense that it empowers the Treasury to freeze a country's financial assets and dealings in gold in the UK where it is satisfied that action to the detriment of the United Kingdom is being or is likely to be taken by the government or persons resident in the country. Similarly, the 1939 Act is also narrower in scope than the 1946 Act as it empowers the Secretary of State for Trade and Industry by order to prohibit or regulate as he considers expedient, the import into or export from the UK of all or any goods. The 1939 Act is a relic of the Second World War enacted to deal with the wartime emergency. While it was intended to expire at the end of the war it was never withdrawn and is now exercisable on a permanent basis and is also the basis of the UK controls on the export of arms. Imports are regulated under The Import of Goods (Control) Order 1954<sup>37</sup> which was made under the 1939 Act and provides that the import of all goods from any State to the UK is prohibited unless the Secretary of State for Trade and Industry has issued a licence (whether in general or individual form) allowing that import, such licences being subject to modification or revocation at any time by the Secretary of State. Both the 1964 and the 1939 Acts are in one sense broader in scope than the 1946 Act as the former allow the UK government to impose a limited range of sanctions unilaterally and without reference to any Security Council Resolutions.

Thus, despite the range of enabling legislation which might have been available immediately following the Iraqi invasion of Kuwait in the early hours of 2 August 1990, considerable difficulties were initially encountered by the UK Government in trying to impose sanctions. As the Security Council had not yet passed a resolution calling for sanctions, the only legislation in place which empowered the UK Government to impose the freeze on Kuwaiti assets (which had been agreed between the UK, US and France) was the 1964 Act. This Act was duly employed and the Treasury issued directions on 2 August (with effect from 3.30 pm GMT) freezing Kuwaiti financial assets (the "**Kuwait Directions**"),<sup>38</sup> followed on 4 August by the freezing of Iraqi financial assets (the "**Iraq Directions**").<sup>39</sup> The inherent difficulty in using the 1964 Act to implement the assets freeze, particularly in relation to Kuwaiti assets, is clear from the necessary preamble to the Kuwait Directions which notes that the Treasury were satisfied that action detrimental to the *United Kingdom's* economic position was being, or was likely to be, taken by the Government of or persons resident in *Kuwait*. Clearly, however, this was not the case as the Government of Kuwait maintained close relations with the UK Government throughout the crisis. It was only after the Security Council adopted Resolution 661 (1990)<sup>40</sup> on 6 August 1990, imposing comprehensive and mandatory economic sanctions on Iraq (and, as a protective measure, on Kuwait), that it was possible to adopt the range of measures under the 1946 Act which we recognise today.

The Kuwait Directions and Iraq Directions (together the "**Directions**") prohibit the carrying out of any order of the government or any person resident in Kuwait or Iraq for payment of gold or securities or of any change in the persons to whose credit gold or securities stand, except with permission granted by or on behalf of the Treasury. The Bank of England, which was designated the administering authority in respect of financial sanctions, issued an explanatory Notice in respect of the Directions on 7 August 1990, which it supplemented three times.<sup>41</sup> The mechanism of issuing Notices by the Bank of England enabled rapid fine tuning to be made to the financial sanctions regime. For instance, supplements to the Notices were used by the Bank of England to lift restrictions on the operation of UK accounts of UK nationals returning from Iraq and Kuwait, or of former residents of Iraq and Kuwait living outside of Iraq or Kuwait. UK branches of the National Bank of Kuwait were also later designated UK residents, thereby lifting operating restrictions over these accounts. Expecting a host of questions and applications for permission to complete transactions, which duly arrived in ever greater volume, the Bank of England established an enquiry room with direct inward telephone lines and a permanent staff (where possible, with experience of previous UK exchange control or the previous Argentine sanctions regimes).

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<sup>37</sup> SI 1954 No 23.

<sup>38</sup> SI 1990 No 1591.

<sup>39</sup> SI 1990 No 1616.

<sup>40</sup> Proposed by the United States, Canada, Colombia, Côte d'Ivoire, Ethiopia, Finland, France, Malaysia, the United Kingdom and Zaire. Adopted 13:0, with Cuba and Yemen abstaining. *Cambridge International Documents Series*, Vol. 2, Part I, p. xxxiv.

<sup>41</sup> Supplement No 1, 25 August 1990; Supplement No 2, 3 September 1990; Supplement No 3, 13 September 1990.

The controversial aspect of the Directions was their extraterritorial effect. The Directions apply to all persons in the UK, including the Channel Islands and the Isle of Man, and to all other persons wherever they may be, who are ordinarily resident in the UK and who are citizens of the United Kingdom and Colonies (which included Hong Kong and the Cayman Islands) or British protected persons. They apply, therefore, to all banks carrying on business in the UK, including the London branches of foreign banks and branches of British banks outside the UK.

The economic sanctions imposed by Resolution 661 covered the sale and supply of all products and commodities, including weapons and other military equipment, as well as the transfer of funds. Exceptions were made for supplies intended strictly for medical purposes and, in humanitarian circumstances, foodstuffs. In implementing Resolution 661's embargo on goods other difficulties were encountered. It was initially thought that making Orders in Council (*ie* secondary legislation) under the 1946 Act might lead to delays (principally because the consent of the Queen would be required), and hence orders were first made and powers exercised under 1939 Act by the Secretary Of State. Under the Export of Goods (Control) (Iraq and Kuwait Sanctions) Order 1990 (the "**First Order**"), which came into force on 8 August 1990,<sup>42</sup> exports from the United Kingdom without a licence of all goods (no mention was made of services) to Iraq or Kuwait or to any destination in any other country for delivery to a person for the purposes of any business carried on in or operated from Iraq or Kuwait were prohibited. The First Order is notable for its brevity and shows signs of the fact that it was drafted to meet an emergency situation. The initial embargo was therefore erected on the basis of, and took on the character of, the existing import and export licensing regime.

Although a delay had been expected in issuing Orders in Council under the 1946 Act, it transpired that initial Orders in Council were also issued under this Act on the same date as the First Order, that is, on 8 August 1990 (albeit from the royal yacht *Britannia*). The Iraq and Kuwait (United Nations Sanctions) Order 1990<sup>43</sup> (the "**Second Order**") prohibits the following activities except where the Secretary of State for Trade and Industry grant a licence under this or any previous orders:

- (1) the making or performance of any contract for the export of goods from Iraq or Kuwait or any act calculated to promote such export of goods;
- (2) dealing with goods exported from Iraq after 6 August 1990;
- (3) supplying or delivering to or to the order of any person in either Iraq or Kuwait any goods that are not in either country or doing any act calculated to promote the supply or delivery of such goods;
- (4) the carriage by ship, aircraft or land transport vehicle of any goods exported from Iraq or Kuwait or of any goods to any destination therein or to any person for the purposes of any business carried on in or operated from Iraq or Kuwait.

The Iraq and Kuwait (United Nations Sanctions) (Amendment) Order 1990 of 29 August 1991<sup>44</sup> extended the prohibited activities to any processing of goods exported from the two countries and created further offenses in relation to the carriage of goods and the powers of authorised enforcement officers. A second amending order of 31 October<sup>45</sup> increased the maximum term of imprisonment for an offence against the order from two to five years. A second order<sup>46</sup> under the 1946 Act - The Iraq and Kuwait (United Nations Sanctions) (No 2) Order 1990 of 5 October 1990 (the "**Third Order**") - implemented the enforcement measures in relation to aircraft imposed in respect of the trade embargo by Resolution 670.<sup>47</sup>

In its attempt to implement the trade embargo, the United Kingdom had, therefore, by 31 October 1990, promulgated three primary Orders in Council (*ie* the First, Second and Third Orders), as well as two amending orders (in relation to the Second Order). Two pieces of enabling legislation had been used, and the Department of Trade and Industry had been designated the administering authority. However, none of the legislation was directed towards services other than the prohibition on acts calculated to promote the supply or delivery of any goods.

The United Kingdom's implementation of the Security Council's sanctions regime over Serbia and Montenegro shares similarities with implementation of the Iraq scheme. Resolution 757 (1992), which was

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<sup>42</sup> SI 1990 No 1640.

<sup>43</sup> SI 1990 No 1651.

<sup>44</sup> SI 1990 No 1768.

<sup>45</sup> The Iraq and Kuwait (United Nations Sanctions) (Second Amendment) Order 1990.

<sup>46</sup> The Iraq and Kuwait (United Nations Sanctions) (No.2) Order 1990.

<sup>47</sup> In Resolution 670 (1990), adopted 25 September 1990, the Security Council decided that States should take steps to prevent air shipment of goods to or from Iraq or Kuwait other than in humanitarian circumstances. It also called upon States to detain any ships of Iraqi registration which entered their ports and were violating sanctions.

passed on 30 May 1992, imposed both a financial assets and trade embargo on Serbia and Montenegro. Initially, the assets freeze and suspension of all financial dealings with Serbia and Montenegro were effected by Treasury directions under the 1964 Act,<sup>48</sup> made on 31 May (a Sunday) and coming into effect on 1 June 1992. A rudimentary trade embargo was imposed in relation to exports by the making of the Export of Goods (Control) (Serbia and Montenegro Sanctions) Order 1992 under the 1939 Act with immediate effect from 11.30 am on 31 May 1992.<sup>49</sup> In relation to imports, the Secretary of State, using his powers derived from the 1939 Act, amended the existing open general licence on 31 May 1992 to exclude the importation of goods from Serbia and Montenegro. Pre-existing individual import licences were also modified to exclude the importation of goods from Serbia and Montenegro after the deadline of 11.30 am on 31 May 1992. These measures were all later revoked and superseded by more detailed Orders in Council made under the 1946 Act in respect of both the asset freeze and the trade embargo.

There exists obvious duplications between measures enacted under the 1939 Act and the 1946 Act, and, indeed, in some cases, export and import controls are implemented by the Department of Trade and Industry under two Orders. The 1946 Act, however, empowers the UK Government to take a wider range of measures both in terms of the types of transactions which may be covered - the 1946 Act is clearly wide enough to cover an embargo on financial services and other non-financial services<sup>50</sup> - and also in terms of the geographic scope of the measures - it may be used to make orders extending to the Isle of Man, the Channel Islands and the UK dependent territories (including the Cayman Islands and (prior to 1998) Hong Kong).

Interestingly, in 1997, nearly a decade after sanctions were first imposed on Iraq, the same range of enabling legislation was still required to impose limited sanctions on Sierra Leone pursuant to Security Council Resolution 1132 (1997) adopted on 8 October 1997. An initial prohibition on the export from the United Kingdom to any destination in Sierra Leone of petroleum and petroleum products was implemented pursuant to the Export of Goods (United Nations) (Sierra Leone) Order 1997, which came into force on 15 October 1997 under the 1939 Act.<sup>51</sup> Some two weeks later, on 1 November 1997, the export of petroleum and petroleum products, and of arms and related material, was further prohibited, with ancillary provisions, pursuant to the Sierra Leone (United Nations Sanctions) Order 1997,<sup>52</sup> which was enacted under the 1946 Act.<sup>53</sup>

## U.S. primary legislation

In the United States, the mechanism by which sanctions are implemented is also determined according to both political and administrative factors. The legal basis for the implementation of sanctions in the US is a myriad of statutes and portions of statutes enacted by Congress over the past 50 years and accompanying regulations promulgated by various executive branch agencies. Currently, most of the economic sanctions levied by the United States are based on one or more of the following statutes: the International Emergency Economic Powers Act<sup>54</sup> (the "IEEPA"), the Trading with the Enemy Act,<sup>55</sup> the International Security and Development Cooperation Act,<sup>56</sup> the National Emergencies Act<sup>57</sup> and the United Nations Participation Act.<sup>58</sup> The most important of these from the perspective of the implementation of UN Sanctions is the IEEPA, which permits presidential action when there occurs "any unusual and extraordinary threat, which has its source in whole or in substantial part outside the United States." If the President makes a declaration of national emergency, he is then permitted to take a variety of different actions, including the prohibition of exports or imports, or the cessation of financial transactions involving the target country or countries.

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<sup>48</sup> The Control of Gold, Securities, Payments and Credits (Serbia and Montenegro) Direction 1992.

<sup>49</sup> SI 1992 No 1272.

<sup>50</sup> It is however not clear whether Resolution 661 did in fact impose such an embargo on services and different States have adopted different interpretations of the Resolution in this respect.

<sup>51</sup> SI 1997 No 2464 as amended by The Export of Goods (United Nations Sanctions) (Sierra Leone) (Amendment) Order (SI 1997 No 3033).

<sup>52</sup> SI 1997 No 2592.

<sup>53</sup> In addition, the DTI initially implemented the arms embargoes in respect of Yugoslavia and Somalia by revoking and modifying the licensing system established under the 1939 Act, but subsequently the UN Arms Embargoes (Liberia, Somalia and the Former Yugoslavia) Order 1993 has been made under the 1946 Act. The oil embargo against Haiti was initially enacted by the Secretary of State for Trade and Industry by an Order under the 1939 Act - the Export of Goods (Control) (Haiti) Order 1993.

<sup>54</sup> 50 USC §§ 1701 et seq. §

<sup>55</sup> 50 USC App 1 et seq.

<sup>56</sup> 22 USC §§ 2349aa-8 & 9.

<sup>57</sup> 50 USC §1621

<sup>58</sup> 22 USC §287c.

Other legislative bases for sanctions legislation in the United States include non-emergency legislation such as the Export Administration Act,<sup>59</sup> the Atomic Energy Act<sup>60</sup> and the Arms Export Control Act.<sup>61</sup> In the wake of recent nuclear tests by India and Pakistan, the US President relied on section 102 of the Arms Export Control Act (the so-called Glenn Amendment) to impose a variety of unilateral financial sanctions against India and Pakistan including: terminating government assistance, military financing, and export credit guarantees to India and Pakistan, promising to oppose all loans or financial or technical assistance to India and Pakistan by the World Bank and IMF and prohibiting all US banks from making loans or providing any credit to the Indian and Pakistani Governments. Although section 102 of the Arms Export Control Act has been in force since 1994, the powers necessary to implement and enforce these sanctions are not yet in place. The precise impact of the ban on commercial loans is very far from clear. Additional legislation currently in effect gives the President certain authority over the importation of goods into the United States, such as '232 of the Trade Expansion Act,<sup>62</sup> which permits the President to prohibit imports of foreign oil in certain circumstances when the President determines that the national security of the United States will be adversely affected.

As passing legislation in a timely fashion in the United States is so difficult, existing laws strongly influence the President's choice of sanctions. Where the President is able to make a declaration of national emergency, the IEEPA grants him wide discretion. However, where the President is unable to make a declaration of national emergency, current laws encourage the President to resort to measures, such as export controls, where he has relatively unfettered authority, rather than import controls or restrictions on bank lending where his powers are limited.

The choice of enabling legislation also has concrete implications for those subject to US law as it affects the criminal and civil penalties which can be imposed. For example, the IEEPA provides for criminal fines of US\$50,000, civil penalties of US\$11,000 and 10 years imprisonment whereas the United Nations Participation Act provides for criminal fines of US\$10,000 and 10 years imprisonment. In contrast, the Trading with the Enemy Act provides for criminal fines of US\$1,000,000 for corporations and US\$100,000 for individuals, 10 years imprisonment as well as forfeiture of funds or other property involved in violation. In relation to the sanctions imposed against Iraq, additional penalties were imposed under Iraq Sanctions Act<sup>63</sup> which provides for 12 years imprisonment, criminal fines of US \$1,000,000 for corporations or individuals and civil fines of US\$275,000.<sup>64</sup>

However, while this array of primary enabling legislation is astounding and extremely difficult for both lawyers and laymen alike to understand, it provides Washington with extremely effective means of applying sanctions both unilaterally and collectively as part of a UN initiated sanctions regime. Washington was therefore able to respond rapidly to the unfolding crisis in the Gulf. On 2 August 1990, upon Iraq's invasion of Kuwait, former US President Bush issued Executive Order No. 12722 declaring a national emergency with respect to Iraq. The order, issued under IEEPA, the National Emergencies Act, and section 301 of title 3 of the US Code, imposed economic sanctions, including a complete trade embargo and an assets freeze, against Iraq.<sup>65</sup> Following Resolution 661, the President also issued Executive Order 12724 on 9 August 1990 pursuant to the United Nations Participation Act which imposed additional restrictions. Similar sanctions were imposed on Kuwait to ensure that no benefit from the United States flowed to the Government of Iraq in military-occupied Kuwait, though (as noted above) these were later lifted.

In addition, as I will discuss later, in contrast to the UK, the complex scheme of US primary legislation is implemented and enforced by an administrative regime which is relatively simple and straightforward. Those subject to US sanctions regimes are faced with a clear set of rules (implemented as secondary legislation) and a single administrative agency, in the form of the Office of Foreign Assets Control, responsible for both financial and trade sanctions which is well resourced and prepared to take decisions.

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<sup>59</sup> 50 USC App §2405.

<sup>60</sup> 42 USC §§ 2011-2296 as amended by the Nuclear Non-Proliferation Act, 22 USC §§ 3201-3282.

<sup>61</sup> Pub L No 94-329, 90 Stat 729, codified in scattered portions of 22 USC.

<sup>62</sup> 19 USC §§1862.

<sup>63</sup> PL 101-513, 104 Stat. 2047-55.

<sup>64</sup> See OFAC Note, "Foreign Assets Control Regulations for the Financial Community", 15 December 1997.

<sup>65</sup> Indeed, Resolution 661, issued 4 days later by the Security Council, was arguably needed to overcome difficulties between the US and a number of its trading partners who were reluctant to legitimise the US practice of imposing unilateral sanctions with extra-territorial effect.

## **(b) Special legislation**

Another approach to implementing sanctions at a national level, which has been adopted by a large number of countries such as Australia (prior to 1993), Austria, France, Germany, Hungary, Japan, the Republic of Korea and Poland is to amend existing general purpose trade and financial legislation. In most cases the existing legislation is implemented via secondary legislation and is therefore able to be amended by the enactment of further secondary legislation.

In relation to the implementation of Resolution 661, neither France, Germany nor Japan submitted legislation to their respective Parliaments. Instead, existing financial and commercial regulations were amended by secondary legislation. For instance, Japanese financial markets and foreign trade are relatively heavily regulated and Japan has implemented Resolutions 661 (1990) (Iraq/Kuwait) and 1132 (1997) (Sierra Leone) under the aegis of the Foreign Exchange and Foreign Trade Control Law (the "FEL"). In relation to Resolution 661, the freeze of Iraqi and Kuwaiti assets was achieved by amending the Foreign Exchange Control Regulations (issued under the FEL), whereas the trade embargo was implemented by amending the Export Trade Control Regulations (also issued under the FEL).<sup>66</sup> In Germany, amendments were made to the Foreign Trade and Payments Regulations issued under the Foreign Trade and Payments Act.<sup>67</sup>

I am not aware of any country which passed specific primary legislation, in the sense of legislation which is passed by the parliament of the State.<sup>68</sup> Obviously, faced with the difficulties of enacting primary legislation in order to respond to the international crisis which confronted them, countries without enabling legislation, were usually able to devise some means of implementing the desired measures.

While there are number of important drawbacks attendant to this approach, it is therefore not necessarily true that it rules out a rapid response to an international crises. Indeed, countries such as France were able to respond quickly and effectively to the crisis in Kuwait. France initially acted by Decree No. 90-681 signed on 2 August 1990 by the Minister of the Economy, Finance and Budget. Reciting a number of powers, it was decreed that all financial operations between France and abroad by or on behalf of Kuwaiti or Iraqi nations were subject to prior authorisation by the Minister. Similarly controlled were Kuwaiti or Iraqi investments in France.

The most obvious disadvantage to this approach is that it presupposes that a detailed legislative system is in place in relation to financial, foreign exchange and commercial transactions. While historically, such systems have been developed by countries such as Japan and France, there is a general trend towards free trade and deregulation of financial and foreign exchange transactions. As countries such as Japan dismantle their regulatory frameworks, they will face the need to erect an alternative implementation mechanism in respect of sanctions.

## **(c) Constitutional provisions**

In addition to specific enabling legislation, a number of states have domestic constitutional provisions which empower the implementation of sanctions measures. For example, the Iranian government considered that Resolution 661 could be implemented by executive order without the need for primary legislation on the basis that the Constitution of the Islamic Republic of Iran rejects aggression committed by any country against another.<sup>69</sup> In Brazil, secondary legislation was enacted to implement Resolution 661 pursuant to Article 84 of the Federal Constitution and Article 25 of the UN Charter which was proclaimed by Decree 19.841 on 22 October 1946.<sup>70</sup>

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<sup>66</sup> Note verbale from the Permanent Representative of Japan to the United Nations addressed to the Secretary-General dated 31 October 1990, as reprinted in *Cambridge International Documents Series*, Vol. 2, Part 1 p.570-574.

<sup>67</sup> Note Verbale from the Permanent Mission of Germany to the United Nations addressed to the Secretary General, 31 October 1990 as reprinted in *Cambridge International Documents Series*, Vol. 2, Part 1 p.551-553.

<sup>68</sup> Italy passed a number of Decree-Laws which were issued by the Executive and then submitted to the Chambers for conversion into Law. In addition, as outlined above, in the United States, special legislation was enacted by the United States Congress on 5 November 1990 in the form of the Iraq Sanctions Act which was designed to improve enforcement of the sanctions regime by enhancing the penalties for violation of the executive orders implementing Resolution 661. The offences themselves were created under the enabling legislation discussed earlier.

<sup>69</sup> Letter from the Chargé d'Affaires a.i. of the Permanent Mission of the Islamic Republic of Iran to the United Nations addressed to the Secretary General, 12 November 1990 as reprinted in *Cambridge International Documents Series*, Vol. 2, Part 1 p.562-563.

<sup>70</sup> Note Verbale from the Permanent Mission of Brazil to the United Nations addressed to the Secretary General, 14 November 1990 as reprinted in *Cambridge International Documents Series*, Vol. 2, Part 1 p.530-531.



#### (d) Absence of legislation

In a small number of states, such as Peru,<sup>71</sup> Tunisia,<sup>72</sup> Uruguay<sup>73</sup> and Surinam<sup>74</sup>, Security Council resolutions are considered to be "directly applicable" within the domestic jurisdiction concerned. The Peruvian Government considers that the UN Charter to be "an integral part of the internal legal system applicable throughout the Republic of Peru." However, the Peruvian Government also considered that Peru had no commercial trade of any type or of any amount with Iraq or Kuwait and no air or sea links with those two countries. The question of how to impose sanctions on Iraq and Kuwait does not appear to be one which the Peruvian Government felt that there was any pressing need to address. It is not surprising that it contented itself with what appears to be a relatively unsophisticated transformation method. In Uruguay's case the Resolution was considered to have "binding force" and be "directly enforceable in Uruguay on the strength of the country's membership of the United Nations." However, a Presidential Decree was issued on 22 August 1990 ordering the competent authorities to take appropriate measures to ensure the effective implementation of Resolution 661 and stating that the activities referred to in the Resolution were prohibited under Uruguayan law for as long as the resolution remained in force.

The disadvantage inherent in such apparently unsophisticated implementing procedures is that they are arguably inappropriate to ensure that a full range of measures is taken by all of the relevant agencies of the State. There is arguably a danger that implementation may proceed in a piecemeal fashion as each relevant agency acts independently to take the appropriate actions.

### Secondary national legislation

The nature of the secondary national legislation which States use to implement sanctions regimes is conditioned to a very large extent by the primary legislation under which such secondary legislation is enacted. This is equally true of States which have specific enabling legislation in place and those which implement sanctions by a process of amending existing trade legislation.

As discussed above, although the UK has specific enabling legislation, it has continued to rely on its wartime system of export and import controls and the system of financial regulation (until recently) supervised by the Bank of England in order to impose economic sanctions in the initial stages of a sanctions regime. This has raised a number of problems in relation to the sanctions imposed on Iraq both in terms of duplicate regulations (as discussed earlier) and also because the extent to which the secondary legislation dealt with services. In particular, the Iraq and Kuwait (United Nations Sanctions) Order 1990 (the Second Order which I discussed earlier) was phrased almost completely in terms of a ban on the import and export of goods reflecting the history of export/import controls in the UK. A prohibition was imposed on acts "calculated to promote the supply or delivery of any goods" which would cover certain services, such as the provision of a letter of credit, which are provided for the purpose of facilitating trade. To a certain extent, the Bank of England stepped in to fill the breach in respect of financial services. Under the assets freeze, the Bank of England issued Notices which prohibited the making of new loans, credits, bills of exchange or the parting with any securities to any residents of Iraq.<sup>75</sup>

In contrast, in Japan where the FEL has traditionally provided a basic legal framework for the regulation of both foreign exchange flows and foreign trade in both goods and services, the FEL provided a legal framework which allowed the Japanese Government to effectively prohibit all payments involving Iraq or Kuwait, new loans involving Iraq or Kuwait, direct investment in Iraq or Kuwait and all service and intermediary transactions with Iraq or Kuwait. Similarly, the Swiss Federal Council issued a decree which not only prohibited all commercial activity with Iraq or Kuwait and all financial transactions with the Iraqi Government or commercial or industrial enterprises, the public sector or individual in Iraq or Kuwait, it also made all operations and negotiations in connection therewith subject to a mandatory declaration to the Federal Department of Public Economy.

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<sup>71</sup> Note Verbale from the Permanent Mission of Peru to the United Nations addressed to the Secretary General, 15 November 1990 as reprinted in *Cambridge International Documents Series*, Vol. 2, Part 1 p. 602-603.

<sup>72</sup> Note Verbale from the Permanent Mission of Tunisia to the United Nations addressed to the Secretary General, 14 January 1991 as reprinted in *Cambridge International Documents Series*, Vol. 2, Part 1 p.623-625.

<sup>73</sup> Note Verbale from the Permanent Mission of Uruguay to the United Nations addressed to the Secretary General, 30 October 1990 as reprinted in *Cambridge International Documents Series*, Vol. 2, Part 1 p.635-634.

<sup>74</sup> Note Verbale from the Permanent Mission of Surinam to the United Nations addressed to the Secretary General, 4 December 1990 as reprinted in *Cambridge International Documents Series*, Vol. 2, Part 1 p.618-619.

<sup>75</sup> Similar restrictions were also initially imposed transactions involving residents of Kuwait.

Another factor conditioning the secondary legislation imposed by States is the existing system for administering sanctions in that State. In most States there is no dedicated agency for enforcing all types of economic sanctions. Instead States adapt the existing bureaucratic framework to achieve the ends required. In many cases this will result in a number of different agencies being responsible for implementing different aspects of the sanctions regime resulting in a bureaucratic maze which is difficult to navigate.

As I discussed earlier, in the UK, for example, trade embargoes are administered through the existing system of export and import licences by the Department of Trade and Industry Sanctions Unit which is tellingly located within the Export Control & Non-proliferation Directorate. The secondary legislation enacted in the form of export and import licences reflects this fact. So, for example, licences exempting a transaction from such secondary legislation are granted by the Department of Trade and Industry. Asset freezes, on the other hand, have (up till now) been administered by the Bank of England as part of its overall supervisory role over the UK banking system.<sup>76</sup> Again this is reflected by the Treasury Directions and Bank of England Notices which are enacted as secondary legislation and applications for permissions were required to be made to the Bank of England. However, certain financial transactions such as the granting of a letter of credit would infringe both the assets freeze and also the prohibition on doing anything to promote the supply or delivery of any goods. An individual involved in such a transaction at the time the sanctions were imposed would have found himself facing two completely separate regulatory regimes and would have been forced to try to obtain dispensations from both the Bank of England and the Department of Trade and Industry in order to complete the transaction.

By way of contrast in the US, the primary body responsible for administering and enforcing sanctions regimes is the Office of Foreign Assets Control ("**OFAC**") a component of the US Department of Treasury.<sup>77</sup> Comprehensive regulations implementing the executive orders issued by the President are issued and administered by OFAC. OFAC may issue regulations both to freeze the assets of the delinquent State and also to impose a trade embargo. Because of the way in which sanctions are administered in the US, OFAC is able to impose uniform record-keeping and reporting requirements across all of its sanctions programs and a more coherent set of regulations.

It is also clear that secondary implementing legislation is conditioned by national enforcement machinery. The heavy reliance on export/import licences and the concentration on goods rather than services in the UK is arguably a reflection of the way in which such measures are enforced by HM Customs.

### **The need for consistency**

The need for sanctions to be applied consistently is so obvious as barely to require elaboration. When the Security Council has decided on a specific set of measures, designed to have the effect of encouraging the target State to eliminate the threat to international peace and security, it needs to be able to ensure that the numerous national agencies responsible for their enforcement work together with that aim. The opposite is of course the case. And, given the wide variation of response, the Security Council will adopt broad measures - sometimes more pervasive or damaging than they might prefer.

Inconsistency inevitably leads to confusion. Amidst confusion, those who wish to flout the measures may more easily do so. And for many with no such intention, there will be delays and collateral loss by reason of the very different treatment applied by national authorities.

## **International solutions**

### **(a) UNSC Special Committees**

The first "Sanctions Committee" was set up in May 1968 to monitor sanctions against Rhodesia. This early institutional innovation has been developed over time in response to more recent international crises.<sup>78</sup> The rules of procedure of the Security Council allow the Security Council to establish a committee of the Security Council consisting of all the members of the Security Council. The Security Council established an Iraq Sanctions Committee under Resolution 661 to undertake the following tasks and to report on its work to the Security Council with its observations and recommendations:

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<sup>76</sup> This is likely to change to reflect the recent changes to the framework of financial regulation in the UK.

<sup>77</sup> OFAC is supervised by the Assistant Secretary of the Treasury for Environment.

<sup>78</sup> See M Doxey "United Nations Sanctions: Current Policy Issues" Dalhousie University, Centre for Foreign Policy Studies (1997)

- (i) to examine the reports on the progress of the implementation of Resolution 661 submitted by the Secretary-General; and
- (ii) to seek from all States further information regarding the action taken by them concerning the effective implementation of the provisions laid down in Resolution 661.

The scope of the Iraq Sanctions Committee has since expanded and it is now also required to approve all petroleum exports by Iraq and humanitarian imports which are sent to Iraq under the 'oil-for-food' plan; to provide guidelines for the operation of this program; and also to play a central role in planning and administering the program. The Iraq Sanctions Committee also publishes a list of the procedures which it employs in so doing.

The Yugoslav Sanctions Committee, which was established pursuant to Resolution 724 (1991) concerning sanctions on Serbia and Montenegro, was expressed to also assume power to consider any information brought to its attention by States concerning violations of the embargo and in that context to make recommendations to the Security Council on ways of increasing the effectiveness of the embargo and also to recommend appropriate measures in response to the arms embargo.

There are also currently Sanctions Committees concerning Libya, Somalia, Angola, Rwanda, Liberia and Sierra Leone.<sup>79</sup>

The importance of these Committees in achieving a large degree of uniformity in the sanctions regimes for which each is responsible cannot be over-stated. The existence of a virtually permanent body in New York, comprising officials under the rank of Permanent Representative, and served by a Secretariat with considerable experience of sanctions issues, has been very useful. They bring to bear an almost professional and objective perspective on the difficulties which arise. Where each sanction regime is subject to wide exceptions in respect of humanitarian supplies, there is not only significant scope for abuse, but genuine confusion and delay which is precisely not what the Security Council intend. The record of the Iraq and Yugoslav Committees is very impressive.

#### **(b) Scope and impact of guidelines**

One of the major functions of the Sanctions Committees is to produce guidelines to aid States in implementing a particular UN sanctions regime. The guidelines which I have seen provide substantially more detailed provisions than the associated Resolutions. For example, guidelines produced by the Yugoslavia Sanctions Committee<sup>80</sup> established pursuant to Resolution 724 (1991) included: a requirement on Member States to provide the Sanction Committee with information on the implementation measures which had been taken; a requirement to give prior notification to and obtain the consent of the Sanctions Committee in relation to all humanitarian supplies (including both goods and services) bound for Serbia and Montenegro and a requirement on Member States to notify the Sanctions Committee of any violations or alleged violations of the sanctions regime.

#### **(c) Informal rulings**

The brutality of the particular sanctions regime manifests itself in producing hardship not only in the target country but among neighbouring states and beyond. The Security Council cannot be expected to act other than by formal act in accordance with their rules of procedure. The Sanctions Committees are invariably caught within bureaucratic toils. Many national authorities are equally inflexible - the scope for discretion is almost non-existent. Yet national experience has shown that the exercise of intelligent and sympathetic discretion in cases of absurdity or pointless hardship can actually reinforce compliance. The Bank of England demonstrated this many times during Iraq's occupation of Kuwait in 1990-91.

#### **(d) Lessons from "oil-for-food"**

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<sup>79</sup> Security Council Committee established pursuant to resolution 748 (1992) concerning Libya; Security Council Committee established pursuant to resolution 751 (1992) concerning Somalia; Security Council Committee established pursuant to resolution 864 (1993) concerning Angola; Security Council Committee established pursuant to resolution 918 (1994) concerning Rwanda; Security Council Committee established pursuant to resolution 985 (1995) concerning Liberia; and Security Council Committee established pursuant to resolution 1132 (1997) concerning Sierra Leone.

<sup>80</sup> S/AC.27/1993/CRP.3/Rev.2 of 26 April 1993.

Security Council Resolution 986 (1995), which was implemented on 10 December 1996, authorised the sale of \$1 billion (now raised to \$5.2 billion) of Iraqi petroleum and petroleum products every 180 days for an initial period of 180 days. The revenue generated from these sales is paid into a Special Escrow Account at the Banque Nationale de Paris in New York. Some of the funds in this account are available for the purchase by Iraq of goods but these funds can only be released with the approval of the Iraq Sanctions Committee. Payment for the goods is effected by a letter of credit issued by Banque Nationale de Paris which can be drawn only once the goods have arrived at one of the UN inspection checkpoints in Iraq and have been checked against the UN approval. By Resolutions 1111(1997), 1143(1997) and 1153(1998), the "oil-for-food" programme was extended for further periods of 180 days.

### **No objection procedure**

One aspect of the operation of the Iraq Sanctions Committee which has been particularly effective is the approval of contracts on a "no objection basis". The approval process currently operates on the basis that each application is circulated to the offices of the 15 member countries of the Iraq Sanctions Committee and the member countries have 2 days to register their objections in respect of contracts for the supply of foods and medicines and 7 days for other goods including those not listed in the distribution plan prepared by the Iraqi Government. If no objections are received by the end of this time, the application is considered approved.<sup>81</sup> In addition, the Iraq Sanctions Committee has recently decided that when an application is put on hold or blocked, a written notification, including a detailed explanation should be issued within 24 hours by the Secretariat to the relevant permanent mission.<sup>82</sup>

A major source of delay in the approval procedure has been the practice of not circulating applications for approval by the Sanctions Committee unless sufficient funds exist in the Special Escrow Account.<sup>83</sup> The Sanctions Committee also recently decided that it will commence the approval process without regard to the actual existence of funds thereby speeding up the process of granting approval letters once funds become available.

In February 1998, the Secretary-General made a number of recommendations to expedite the approval process, including the suggestion that the Sanctions Committee should consider applications on a priority basis using required delivery dates rather than the present "first-come, first-served basis". He has also recommended that the Sanctions Committee delegate approval authority to the UN Secretariat for items such as food and routine medicine and health supplies.<sup>84</sup>

### **Institutional Innovation**

The oil-for-food programme is a case in which the UN has developed an extensive ad hoc mechanism of its own for administering and monitoring the effectiveness of the collective measures. On the monitoring side, the institutional arrangements are numerous, ranging from the independent oil experts appointed as overseers of the program by the Secretary General, the independent inspection agents monitoring the export of petroleum and petroleum products and the import of humanitarian goods approved by the Sanctions Committee, the Secretariat experts monitoring the type of goods to be imported under the plan and the UN Office of the Humanitarian Coordinator in Iraq, the UN Department of Humanitarian Affairs and numerous UN agencies monitoring the equitable distribution of supplies imported under the plan.

The administration of the plan requires coordination between the Iraq Sanctions Committee, the monitoring entities, the national governments of Member States, the Government of Iraq, Banque Nationale de Paris, the Central Bank of Iraq, the Iraqi State Oil Marketing Organisation. The response of the UN has been to create new institutional arrangements to deal with this need. For example, the Office of the Iraq Programme was established in 15 October 1997 to consolidate and manage the activities of the Secretariat in relation to the embargo and food-for-oil program. The Office provides the Iraq Sanctions Committee with information on interrelated and time-sensitive applications, potential dual-usage items and other relevant matters, and also serves as a focal point for activities related to distribution, revenue generation and allocation, procurement, delivery and monitoring.

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<sup>81</sup> Letter dated 8 August 1996 from the Chairman of the Security Council Committee established by Resolution 661 (1990) concerning the situation between Iraq and Kuwait addressed to the President of the Security Council (S/1996/636); DTI Guidance Note - UN Sanctions against Iraq, 5th edition, 1 October 1997.

<sup>82</sup> UN Security Council Press Release SC/6478, 20 February 1998

<sup>83</sup> See Letter dated 11 March 1997 from the Chairman of the Security Council Committee established by Resolution 661 (1990) concerning the situation between Iraq and Kuwait addressed to the President of the Security Council (S/1997/213)

<sup>84</sup> Report of the Secretary-General pursuant to Paragraph 7 of Resolution 1143 (1997) (S/1998/90), 1 February 1998.

## The requirement to review

Another element of the oil-for-food program which is of interest is the ongoing requirement to assess and review the effectiveness of the program which is in-built in the Resolutions which created it.

## Regional solutions

### (e) European Union

While the European Union is not bound by resolutions of the Security Council (as no succession by the European Union in the position of its member states has taken place), sanctions which are based on Security Council Resolutions can and have been implemented by the European Union. The European Union's competence to adopt sanctions is based on its exclusive responsibility for common commercial policy under Article 113 of the Treaty of Rome, and, in relation to any particular sanctions program, the agreement of EU members to adopt a common foreign relations position.

Although these powers initially extended only to trade sanctions, under recently introduced Articles 228a and 73g of the Treaty of Rome, the European Union was given the power to impose financial sanctions in certain circumstances.<sup>85</sup> The European Council may, provided that the EU members have adopted a common foreign and security policy position, take "the necessary urgent measures on the movement of capital and on payments" as regards the State concerned. An EU member may take unilateral measures only if the Council has not taken such financial measures. However, the European Council has the power, acting by a qualified majority on a proposal from the European Commission, to amend or abolish such national measures.<sup>86</sup>

The initial response of the EU to Resolution 661 was for the Council of Ministers on 8 August 1990 to adopt Regulation 2340/90 banning trade by the European Union with Iraq and Kuwait. This prohibition was later extended to all kinds of services (with the exception of financial services in respect of which the European Union did not have competence at that time).<sup>87</sup> Interestingly, the preamble to the Regulation expressly states that resort was made to an EU instrument in the form of the Regulation in order to ensure uniform implementation throughout the EU of the measures concerning trade with Iraq and Kuwait decided upon by the Security Council. Following the ratification of the Maastricht Treaty, the Council of Ministers used its expanded powers to repeal the existing Regulation 2340/90 (as amended) and adopt a consolidating Regulation which not only restates the trade embargo, it goes further in imposing a prohibition on "financial and other essential transactions directly related to import into the [EU]" of the products included in the trade embargo.<sup>88</sup>

The EU has used its new expanded powers to impose a financial embargo on the Bosnian Serbs. In response to Security Council Resolution 942 of 23 September 1994 which imposed various sanctions on the Bosnian Serbs, including a freeze on Bosnian Serb financial assets held abroad, the Council of Ministers adopted Regulation 2471/94 on 10 October 1994. The assets freeze imposed by this Regulation, although couched in convoluted language, is much broader than that imposed by EU legislation in respect of Iraq. It requires all funds or other financial assets or resources belonging to any person in, or resident in, or any body in, or any body incorporated in or constituted under the law of, or any person or body found to be acting for or on behalf of or to the benefit of any body in the Bosnian Serb controlled areas to be frozen. In addition, neither the funds or other financial assets or resources which were frozen pursuant to the Regulation nor any other funds or financial assets or resources could be made available directly or indirectly to, or for the benefit of, any of the designated persons or bodies as outlined previously or any body in the areas concerned. These sanctions have, of course, been terminated, however they illustrate the scope of the power which the EU may now wield.<sup>89</sup>

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<sup>85</sup> Articles 228a and 73g were introduced by the Treaty on European Union (the so-called Maastricht Treaty) which was signed on 7 February 1992.

<sup>86</sup> Article 73g of the Treaty of Rome as amended by the Treaty on European Union.

<sup>87</sup> Regulation 3155/90 of 29 October 1990 extending and amending Regulation 2340/90; Regulation 1194/91 of 7 May 1991 amending Regulation 2340/90 and Regulation 3155/90.

<sup>88</sup> Regulation 2365/96 of 17 December 1996.

<sup>89</sup> European Council Regulations have also been adopted to implement, *inter alia*, UN sanctions in respect of Libya (Regulation 945/92), Serbia and Montenegro (now suspended) and Sierra Leone (Regulation 2465/97 of 8 December 1997) although none of these involve (or involved) a similar level of financial sanctions.

Certain problems have arisen as a result of inconsistencies between EU legislation and the implementing legislation of EU member states. For example, there are certain inconsistencies between the legislation adopted by the EU and the UK for the purpose of implementing UN sanctions against Iraq and Kuwait. First the UK legislation prohibits trade in "goods" whereas the EU legislation refers to "commodities or products". Second there is no express prohibition in the UK legislation in relation to the supply of non-financial services, although at least some services would be caught by the UK prohibition of acts calculated to promote the import, export or supply of goods to or from Iraq.

The advantage of implementation by the EU, however, is that a mechanism exists to resolve such inconsistencies between EU and national law via the European Court of Justice. In the recent case of *R v Treasury and the Bank of England, ex parte Centro-Com* the European Court of Justice rejected the UK's argument that "public security" allowed it to apply its regime on the export of medical goods to Yugoslavia more strictly than other member states of the EU on the basis that adequate enforcement provisions were in place at the European level.<sup>90</sup> In the 1996 case of *Bosphorus Hava Yollari Turizm ve Ticaret AS v Minister for Transport* the ECJ also held that the requirement to impound aircraft owed by an undertaking based in Serbia and Montenegro imposed by Regulation 990/93 also applied to an aircraft which had been leased by a Yugoslav airline to a Turkish airline for four years.<sup>91</sup>

#### **(f) Other trading blocs and international groups**

Other trading blocs have also played a role in trying to ensure that sanctions are effectively enforced. In relation to the sanctions currently imposed on Sierra Leone pursuant to Resolution 1132 (1997), the Economic Community of West African States (ECOWAS) has played a role in co-ordinating and effecting the enforcement of both UN and ECOWAS sanctions. Cooperation in implementing and monitoring sanctions has in the past been provided by the Organisation of American States (OAS) in Haiti, and the European Union and Organisation for Security and Cooperation in Europe (OSCE) in the former Yugoslavia.

Recently, the six-nation Contact Group (comprising United States, United Kingdom, Germany, Italy, France and Russia) formed during the Bosnian conflict, has provided the impetus for multilateral sanctions against the Federal Republic of Yugoslavia (FRY) over the crisis in Kosovo. On 9 March 1998, the Contact Group unanimously agreed to press for Security Council consideration of a comprehensive arms embargo against the FRY, including Kosovo, and also agreed to refuse to supply equipment which might be used for internal repression or terrorism. With the exception of Russia, Contact Group countries also agreed to impose a moratorium on government-financed export credit support for trade and finance, including government financing for Serbian privatisations, and to deny visas to senior FRY and Serbian representatives responsible for repression by FRY security forces in Kosovo.

Following the Contact Group lead, the Security Council adopted Resolution 1160 (1998) on 31 March 1998 imposing an arms embargo on the Federal Republic of Serbia (including Kosovo). A further meeting of the Contact Group was held in Rome on 29 April 1998, at which time all Contact Group countries (with the exception of Russia) agreed to impose a freeze on the assets of the FRY and Serbian governments held abroad (although no actual legislation has been implemented in the European Union or United States by June 1998 - see below). The Contact Group also threatened to impose a ban on new investment in Serbia, if Belgrade refused to enter into talks over Kosovo. This threat was lifted at a Contact Group meeting in Birmingham on 16 May, following the start of dialogue between Yugoslav President Slobodan Milosevic and Kosovo Albanian leader, Ibrahim Rugova.

The Contact Group initiative is an interesting example of a situation in which the locus of sanctions-making power has shifted from the Security Council to an international forum created in order to respond to a particular crisis. The Contact Group, which includes all of the G8 powers other than Japan and Canada (which has expressed a desire to join), includes most of the major world financial centres, and it is little surprise that the sanctions which they have chosen to implement have been largely financial in nature. By contrast, the trade sanctions which the Contact Group has sought to impose have been implemented by way of Security Council Resolution 1160 (1998).

While at the international level action has been taken by the Contact Group, four members of which are also EU Member States, within Europe the EU has taken the lead in imposing sanctions against the FRY. On 19 March 1998, the EU Council of Ministers adopted Common Position 98/240/CFSP confirming the

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<sup>90</sup> Case C-124/95, 14 January 1997.

<sup>91</sup> Case C-84/95.

existing embargo on arms exports to the former Yugoslavia imposed on 13 March 1996 and requiring EU Member States not to supply the FRY with equipment which might be used for internal repression. The Common Position also requires EU Member States to implement a moratorium on government-financed export credit support for trade and investment in Serbia (including privatisations). The Council also issued a list of senior FRY and Serbian representatives which will not be allowed entry into the European Union. This Common Position was enacted into EU law by Council Regulation 926/98 of 27 April 1998. On 7 May 1998, the Council adopted Common Position 98/326/CFSP which provides for funds held abroad by the FRY and Serbian Governments to be frozen. A draft EU Regulation imposing the asset freeze is currently before the Council of Ministers, although its adoption has been delayed pending the outcome of talks between Belgrade and Pristina. The use of EU legislation to implement Contact Group's decisions obviates the need for EU Member States, such as the UK, to pass primary national legislation or to rely on the limited existing primary legislation authorising the use of sanctions in the absence of a Security Council Resolution (such as the Emergency Laws (Re-enactment and Repeals) Act 1964). Once EU legislation is in place, it is a simple matter for the UK Government to adopt secondary legislation to implement its terms under domestic law.

The United States has yet to impose the assets freeze against the FRY and Serbian Governments. An Executive Order is currently under review; but a decision as to whether it will be issued is not expected until after the next Contact Group meeting.

#### **(g) Market solutions**

Today, the markets themselves are becoming increasingly aware of their own responsibility to regulate their affairs. National regulation barely impinges on international defaults. Yet these failures are very expensive to other market participants. These thoughts have led to interesting conclusions from the "Group of 30" financial institutions, with proposals for introducing compliance standards, policed by the markets, and enforced by pricing mechanisms. Thus, a failure by a bank to observe the verifiable and audited market standards will result in that bank incurring greater costs when it tries to operate in the inter-bank market or participate in international transactions.

A key feature of such means makes them largely ineffective for our purposes. There is no reason why the markets should not develop practical codes for applying sanctions measures in a particular way in the financial markets. On the contrary, national authorities and the relevant UN Sanctions Committee ought to welcome such an initiative from the financial community. Yet unless such codes have the force of law, the banker or trader will remain bound by his contractual obligation, despite the sanction being applied. That obligation must be annulled or suspended by an equally powerful law if the banker is to be persuaded that he must not perform the earlier agreement.

#### **(h) The role of central banks**

There is an inevitable logic in asking the authority with greatest familiarity, even sympathy, with the market affected by sanctions to police it. In the financial community, it is usually the Central Bank which plays a key role in supervising financial institutions. Thus, quite apart from their macro-economic responsibilities, a Central Bank is well placed to ensure consistent compliance in the financial markets. Moreover, some Central Banks have long and comfortable relations with other Central Banking authorities, with secondment and active exchange and training programmes. This provides an excellent working means of building common application of sanctions rules.

### **Conclusions**

The most difficult problem for financial institutions struggling to comply with international sanctions is the lack of consistency across the national schemes which implement the measures decided at the international level. This is the inevitable result of a system whereby measures intended to have international effect on a truly international market for financial services, must first be translated into domestic legislation confined within a territorial jurisdiction. The result is that, instead of a uniform application, financial sanctions take the form of a partial and inconsistent "patchwork quilt". It is therefore very difficult to achieve the purposes for which sanctions have been imposed; and unintended collateral losses and damage are inevitable. Innovation in the international mechanisms used to impose collective sanctions, such as the Contact Group, will not and cannot address these

issues; the problems remain, as sanctions must still be implemented at the national level. The United Nations has taken a number of institutional measures, such as the Sanctions Committees and Office of the Iraq Programme, which are to be welcomed, but there is a limit to the extent to which the UN Secretariat can resolve what is essentially a domestic problem for UN Member States. It is for States to address this problem, preferably by collective action, such by the adoption of simple laws whereby sanctions can be implemented uniformly through Central Bank coordination or regional solutions. It is clearly in the interest of States to reform their systems, because the cost of complying with a host of national legislative schemes is ultimately borne by their economies. In addition, to ensure that international financial sanctions impose as small a cost on the economies of the States which implement them as is possible, States must recognise that input from the financial community is not desirable, but an international objective which must be actively pursued in compliance with the obligations of UN membership.



# Implementation of Sanctions Imposed by the United Nations Security Council -- Japan's Experience

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Motohide Yoshikawa, Minister, Permanent Mission of Japan in New York

## 1. Introduction\*

The Charter of the United Nations (Chapter VII) provides that "the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of Aggression [Art. 39] ... and may...decide what measures not involving the use of armed force are to be employed to give effect to its decisions [Art. 4 1 ] to maintain or restore international peace and security. Among such measures is the imposition of sanctions.

During the first forty-five years of its existence, the Security Council availed itself of this important tool only in the cases of Rhodesia (resolution 232 of 16 December 1996 and others) and South Africa (resolution 418 of 4 November 1977). With the end of the Cold War, however, the picture- changed dramatically, Indeed, since 1990 the Security Council has responded to threats to international peace and security by imposing sanctions under Chapter VII against such countries as Angola (UNITA), Former Yugoslavia, Haiti, Iraq, Liberia, Libya, Rwanda, the military junta in Sierra Leone, Somalia and Sudan.

The United Nations has examined the questions surrounding sanctions on several occasions, most notably in the "Supplement to An Agenda for Peace," presented by the Secretary-General of the UN on the occasion of the fiftieth anniversary of the Organization (3 January 1995),<sup>1</sup> and in the informal Open-ended Working Group on An Agenda for Peace. One concrete result of the efforts of this Working Group is General Assembly resolution A/FES/51/242, adopted on 26 September 1997, whose Annex 11 is devoted to the question of sanctions. In particular, it addresses the issue of how possible negative impacts upon the population of the target country might be alleviated as well as the issue of providing assistance to third countries affected by the application of sanctions (the "question of Article 50 of the Charter"). It also points out the importance of implementing sanctions, and recommends that "States should be encouraged to cooperate in exchanging information about the legislative, administrative and practical implementation of sanctions" (para. 13 of Annex II, A/RES/51/242).

The aim of this paper is to explore the question of implementation of sanctions through domestic Legislation, with particular reference to the experience of Japan.

## 2. Different approaches to the implementation of sanctions

According to Article 25 of the Charter, Member States of the United Nations have the obligation to "accept and carry out the decisions of the Security Council." Sanctions decided by the Security Council clearly fall under the category of the "decisions" mentioned in that Article.

There are basically two approaches which a State can take to the question of how to implement sanctions imposed by the Security Council.

The first approach is to respond by enacting "comprehensive Legislation" authorising the government to issue an appropriate order to implement the decision of the Security Council. This is the approach taken by, for example, the United Kingdom, with its "United Nations Act, 1946,"<sup>2</sup> as well as by such countries as Australia, Canada, Denmark, Finland, Norway and Sweden. The advantages of this approach are that it i) enables domestic measures to be taken very rapidly, and ii) allows for flexibility in responding to various Security Council decisions.

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The second is a "case-by-case" approach where a government responds in an ad hoc manner to each Security Council decision to impose sanctions. A great majority of United Nations Member States, including Japan, take this approach. And long as Member States can fulfill their obligation to fully implement the sanctions, it should not pose any problems. However, questions can be raised as to whether this approach allows a Member State to respond quickly and fully to a decision of the Security Council. We shall consider these questions by examining the experience of Japan.

### 3. Japan's legal framework for the implementation of sanctions

Japan has taken the second, or a case-by-case, approach. That is, Japan has not enacted comprehensive Legislation to implement sanctions resolutions, but rather takes measures necessary for the implementation of sanctions by invoking various domestic laws that are already in place.

The following is a brief outline of Japan's legal framework, under which it implements sanctions. As will be seen, the main legal tool is the "Foreign Exchange and Foreign Trade Control Law" (hereafter referred to as "Foreign Exchange Law").<sup>3</sup>

#### (1) Financial sanctions

- a) Prohibition of transfer of funds (eg., Iraq, Former Yugoslavia)  
The Minister of Finance is authorized to control capital transactions (Art. 23(2) of the Foreign Exchange Law).<sup>4</sup> The Minister can declare that certain transactions are subject to his approval and can deny approval of any application for a transaction.
- b) Freezing of funds (e.g., Haiti)  
The Minister of Finance or the Minister of International Trade and Industry can exercise his authority to freeze funds and thus control payments or receipts (Art. 16(2) of the Foreign Exchange Law).<sup>5</sup>

#### (2) Export controls

- a) Arms embargo (e.g., Haiti, Iraq, Sierra Leone)  
As a matter of its standing policy, Japan strictly and without exception prohibits the export of arms and related materiel.
- b) Total or partial trade embargo (e.g., Former Yugoslavia, Haiti)  
The Minister of International Trade and Industry has the authority to require that application be made to obtain permission to export certain goods to certain destinations (Art. 48(3) of the Foreign Exchange Law).<sup>6</sup> The Minister can exercise this authority to impose a total or partial trade embargo against a target country following a sanctions decision by the Security Council.

#### (3) Import control--total or partial ban (e.g., Former Yugoslavia)

The Minister of International Trade and Industry has the authority to require that application be made to obtain permission to import certain goods from a certain place of origin (Art. 52 of the Foreign Exchange Law).<sup>7</sup> The Minister can exercise this authority to impose a total or partial ban on imports from a target country.

#### (4) Reduction of diplomatic missions (e.g., Libya)

The Minister of Foreign Affairs has the authority to (determine the size of Japanese missions overseas, according to the "Law of Establishment of Ministry of Foreign Affairs."<sup>8</sup>

#### (5) Prohibition of flights (e.g., Angola (UNITA), Libya)

The Minister of Transportation is authorized by the "Aviation Law"<sup>9</sup> to deny permission to any aircraft to take off from, land in, or fly over Japanese territory, and can use this authority to ensure compliance with a sanctions resolution.

### 4. Some observations concerning Japan's past practice

Japan takes its obligations under Article 25 of the Charter very seriously. Since joining the United Nations in 1956, it has taken necessary measures, in accordance with existing domestic law, to ensure the effectiveness of the sanctions imposed by the Security Council. It has taken these measures promptly and enforced them rigorously.

Two points can be made in this regard. First, Japan has never failed to report to the United Nations (through the relevant Sanctions Committees) the specific measures it has taken to implement the sanctions. Second, the manner in which Japan informs the United Nations of the measures taken is both comprehensive and specific. A recent report by Japan submitted to the United Nations in November 1997 on its implementation of sanctions against the National Union for the Total Independence of Angola (UNITA) (resolution 1127), is attached to this paper as an Annex for reference.

The significance of the above becomes obvious where one considers that many governments either do not report at all on the measures they have taken, or, when they do report, do so in a vague and General manner (such as "all necessary measures have been taken").<sup>10</sup> It should be recalled that included in every Security Council resolution imposing sanctions is a request that Member States provide the sanctions committee with information on the measures they have adopted to implement the sanctions. It would seem appropriate therefore if each sanctions committee called upon those Member States that have failed to do so to report on their compliance efforts in a comprehensive and detailed manner.

What has been Japan's experience with regard to financial sanctions? As has been explained above, Japan implements financial sanctions through its Foreign Exchange Law. This practice has proved to be satisfactory to the Japanese authorities, but has been the subject of criticism by some Japanese academics.

Professor Terami Furukawa (Hosei University), for example, while conceding that Japan is fulfilling its obligations under the UN Charter in this manner, argues that as financial sanctions become more specific and carefully targeted, it may find it difficult to do so simply by invoking the Foreign Exchange Law, since the implementation of Security Council resolutions is not its main objective. She therefore recommends that new and comprehensive Legislation be considered to address this situation.<sup>11</sup>

Similarly, Professor Masato Dogauchi (University of Tokyo) points out that there are gaps between what the Security Council requires and what Japan can do, and takes resolution 661 (Iraq) as an example. His argument is as follows:

In paragraph 4 of resolution 661, the Security Council declares that all States "shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to that Government or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within Iraq or Kuwait, except payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs" (emphasis added by the author). However, the Foreign Exchange Law can prohibit the financial transactions only of "residents" of Japan, regardless of their nationality; it cannot prohibit transactions by Japanese nationals and Japanese corporations residing or registered in foreign territories. Professor Dogauchi argues that since the Japanese Government cannot exercise jurisdiction over its nationals in foreign territories, a gap exists between what the Security Council requires and what Japan is in fact able to do.<sup>12</sup>

Professor Dogauchi is correct in pointing out that the Foreign Exchange Law basically prohibits the transactions of residents in Japan. (The Japanese Government can control the transfer of funds from the branch of a Japanese bank in a foreign country to a target country if such a transfer goes through the bank's headquarters in Japan, either for bookkeeping purposes or for internal administrative reasons.) However, is it possible for the Japanese Government to prohibit its nationals living outside of Japan from transferring funds to a target country by amending the Foreign Exchange Law or by enacting comprehensive Legislation? It appears that such an amendment or new Legislation would require the Japanese Government to exercise extraterritorial jurisdiction over its nationals in foreign territories, And since the extraterritorial application of Legislation concerning foreign exchange controls, even if successfully adopted, may not be justified under international law, it may be unenforceable.

The problem seems to lie with the content of resolution 661, which demands that Member States take certain measures on which it may well prove difficult for them to follow through.

It is perhaps appropriate to consider here the issue of comprehensive legislation, mentioned earlier. Academics such as Professor Furukawa as well as some Japanese politicians have pointed to the need for Japan to enact a law to enable the Government to swiftly implement sanctions which the Security Council may decide to impose. As a matter of fact, the Government itself has recognized the need to examine this issue.<sup>13</sup>

It does not appear likely, however, that new Legislation similar to the United Nations Act of the United Kingdom will be enacted in the near future. This is because, as indicated above, Japan has been able to fulfill its obligations under the Charter through existing legal instruments, and therefore may not be convinced of the need to take a new approach at this time.

If sanctions, especially financial sanctions, were to be imposed in areas in which they had not been imposed previously, cases might arise where Japan would find it difficult on the basis of existing legal instruments to fulfill its obligations. In such cases, it is conceivable that Japan could seek to modify the scope of the sanctions without altering or diluting their main objective when a relevant resolution was discussed by the Security Council. Alternatively, it could decide to amend its domestic law, although this approach might require more time.

## **5. Some suggestions for the Security Council**

I should like to make the following observations and suggestions as the Security Council continues to explore ways of enhancing compliance with its sanctions decisions.

First, the Security Council should examine more closely how sanctions are implemented by monitoring the reports submitted by Member States to the respective sanctions committees. After all, even if the sanctions it imposes are very well designed, they will not achieve their original objective unless they are faithfully implemented by all Member States. A common loophole is the transfer of funds to the target country through a third country.

Second, the Security Council should be fully aware of the difficulties which some Member States may experience in implementing sanctions. These difficulties may be brought to light through discussions not only among the members of the Council but also with those countries that would bear the major responsibility for their implementation. In the case of financial sanctions, prior consultation with countries in which international financial centers are located is of vital importance; without the full cooperation of these countries, sanctions will not be effective.

## **6. Conclusion**

Japan has been fulfilling its obligations under the Charter of the United Nations to implement sanctions decided by the Security Council on a case-by-case basis by utilizing its existing legal instruments. It has fulfilled its obligations promptly and rigorously, implementing sanctions in financial areas under the provisions of its Foreign Exchange Law.

The Security Council for its part should examine more closely how sanctions are implemented by monitoring the reports submitted by Member States to the Sanctions Committees. It is also important for the Council to understand the difficulty that some countries may experience in working to effect implementation. In particular, prior to taking a decision to impose financial sanctions, it should consult with those countries in which major international financial centers are located.

## Notes

1. "Supplement to an Agenda for Peace," A/50/60-S/1995/1, 3 January 1995, para. s 66-76@ The Secretary-General identifies as difficulties surrounding sanctions 1) the objectives of sanctions, 2) the monitoring of their application and impact, and 3) their unintended effects.

2. Formally titled "An Act to Enable Effect to be Given to Certain Provisions of the Charter of 15 April 1946. According to this Act, "His Majesty may by order in Council make such provision as appears to Him necessary or expedient for enabling those measures [i.e., measures taken under Art. 41 of the Charter] to be effectively applied..."

3. "Gaikoku-kawase oyobi gaikoku-boeki kanri ho" (Foreign Exchange and Foreign Trade Control Law), Law 228, 1 December 1949, amended several times.

4. Article 23, para. 2, of the Foreign Exchange Law is as follows (unofficial English translation):

Only in such an event as when the Minister of Finance deems that if any capital transaction covered by the notice given in the preceding Paragraph were executed it might result in one of the below-mentioned consequences and the achievement of the objective of this Law might become difficult, he may recommend, as a Cabinet Order provides for, the person who gave the notice either to alter the particulars of that capital transaction or to suspend the execution thereof, provided that such recommendation is given within a period of twenty (20) days, counting from the day of his receipt of the notice;

(1) It might adversely affect the international money market or derogate from the international reputation of our country;

(2) It might adversely affect our money or capital market;

(3) It might adversely affect the business activities of a certain sector of our industries or the smooth performance of our national economy; or

(4) It might disturb the faithful performance of treaties or other international agreements concluded by our country, or imperil the international peace and security, or disturb the maintenance of public order. [Author's note. the expression "treaties and other international agreements" is interpreted as including Security Council resolutions.]

5. Article 16, para. 2, of the Foreign Exchange Law is as follows:

Besides those cases mentioned in the preceding Paragraph, when the competent Minister deems it necessary for the faithful performance of treaties or other international agreements concluded by our country, he may obligate, as a Cabinet Order provides for, any resident or non-resident who is to make a payment from Japan to abroad, or any resident who is to make a payment, etc., to or from a non-resident, to obtain a license therefor, except for such payments, etc., as resulting from those transactions or acts on which he is empowered, from the same standpoint mentioned above, to impose an obligation to obtain a license or approval therefor, or to give a notice thereof

6. Art. 48, para. 3, of the Foreign Exchange Law is as follows:

In addition to those provided in each of the preceding two Paragraphs, the Minister of International Trade and Industry may obligate, as a Cabinet Order provides for, any person who is to export specific kinds of goods or to a specified Destination, or under a specific way of transaction or settlement to obtain an approval, within the limits of necessity for the maintenance of the balanced balance of payments and for the sound development of foreign trade and national economy. [Authors note: implementation of a Security Council decision is deemed necessary "for the maintenance of foreign trade and national economy."]

7. Art. 52 of the Foreign Exchange Law is as follows:

For the purpose of sound development of foreign trade and the national economy, a person who is to import goods might be obligated, as a Cabinet Order provides for, to obtain approval therefor. [Author's note: implementation of a Security Council decision is deemed necessary "for the purpose of sound development of foreign trade and the national economy."]

8. "Gaimusho secchi ho" (Law of Establishment of Ministry of Foreign Affairs), Law 283, 1 December 1951, amended several times.

9. "Kökü ho" (Aviation Law), Law 231, 15 July 1952, amended several times.

10. According to information available to the United Nations Secretariat.

11. Terumi Furukawa, "Anzenhosho rijikai ketsugi no kinoteki henka to kokunai hosei" (Functional Changes in Security Council Resolutions and Domestic Legislation), Hogaku kyoshitsu (Legal Seminar), No. 161, February 1994, pp. 10-15.

To clarify the point Professor Furukawa makes, it may be useful to reproduce Art. 1 (Objective) of the Foreign Exchange Law:

The objective of this Law shall be, on the basis of the freedom of foreign exchange, foreign trade, and other external transactions, with necessary but minimum control or adjustment, to enable proper expansion of our external transactions, and thereby to facilitate the equilibrium of our balance of international payments and the stability of our currency, as well as to contribute towards the sound development of our national economy.

12. Masato Dogauchi, "Nihon no hôteki taiö" (Japan's Legal Response), Anzen hoshö to enerugii torihiki (National Security and Energy Transaction), published by Japan Energy Law Institute, 1994, pp. 45-61,

13. Deliberations of the Japanese Diet Budget Committee of the House of Representatives, In a response to Mr. T. Matsuura, Foreign Minister M. Watanabe recognized the need to examine the issue of comprehensive legislation. 15 February 1993.

## Annex

Notification of the Government of Japan to the United Nations concerning Security Council resolution 1127: Sanctions against UNITA (National Union for the Total Independence of Angola)

Resolution 1127--adopted 28 August 1997

Notification by Japan to the United Nations--26 November 1997

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The Government of Japan has taken the following measures to implement the obligations set out in paragraph 4 of Security Council resolution 1127.

1. Measures taken with regard to the prevention of entry into the territory of Japan.

To prevent the entry into or transit through Japanese territory of all senior officials of UNITA or of adult members of their immediate families, all visa applications submitted to Japanese overseas establishments by any Angolan nationals will be reviewed by the Ministry of Foreign Affairs in Japan and no visas for entry into Japan will be issued for any person designated in the list supplied to Member States by the Committee as stipulated in paragraph 11(a).

The Government of Japan has also distributed the above list to each port in Japanese territory to prevent entry into Japan of such persons.

No residence permit is now or will be issued to UNITA-related Angolan nationals in Japan.

2. With regard to the immediate and complete closure of all UN.ITA offices, there is no such office in Japan.

3. Measures taken with a view to prohibiting flights by or for UNITA, the supply of any aircraft or aircraft components to UNITA and insurance, engineering and servicing of UNITA aircraft:

(1) The Government of Japan has issued bulletins to entities related to air transportation requiring them to abide by the measures provided in Paragraph 4 (d) (i) to deny permission to any aircraft to take off from, land in, or fly over Japanese territory if it has taken off from or is destined to land at a place in the territory of Angola other than those on the list referred to in the above paragraph.

(2) The existing Foreign Exchange Control Order and Foreign Export Control Order have been amended so that the supply of, or making available in any form, any aircraft or aircraft components to the territory of Angola other than through named points of entry on the list referred to in paragraph 4 (d) (ii) are all subject to license or approval by the Government of Japan.

(3) Furthermore, the Foreign Exchange Control Order has been amended so that the provision of engineering and maintenance servicing or the provision or renewal of direct insurance with respect to any aircraft registered in Angola other than those on the list referred to in paragraph 4 (d) (iii) and with respect to any aircraft which entered the territory of Angola other than through a point of entry in the list referred to in paragraph 4 (d) (i) will be subject to license or approval by the Government of Japan. The Government of Japan has also issued bulletins to entities related to air transportation requiring them not to provide certification of airworthiness to any such aircraft.





## TARGETING FINANCIAL SANCTIONS

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R. Richard Newcomb, Director, Office of Foreign Assets Control, U.S. Treasury Department

Today, I will make some general remarks about economic sanctions, trace what I believe to be some of the more significant changes in U.N. financial sanctions as they have evolved in recent years, and then describe what I believe are the basic considerations for a targeted financial sanctions regime using the approach we have taken in the U.S. to target financial sanctions as a model. I will also have some concluding comments about the areas that I believe should receive further exploration in this seminar.

### General Remarks

I will focus first on the technical question of how we can improve the targeting of future multilateral financial sanctions. The difficulty we face in this discussion is determining what problems can be addressed as technical issues and what problems must be left to others to be addressed as political questions. Frequently in discussions about sanctions, people will jump between the technical and political aspects of an issue. I will try to pinpoint these problems as specifically as possible and identify to what extent they can be addressed through technical changes or improvements, leaving the political problems to others.

As you all know, those of us who administer economic sanctions have definite views on how they should be imposed and administered. My views obviously spring from the historical experience of my office in the U.S. Treasury, the Office of Foreign Assets Control (also known as "OFAC"), which has administered some form of asset blocking or other financial controls in the U.S. more or less continuously since 1940. Most of these controls were imposed unilaterally, until the 1990 Iraqi invasion of Kuwait.

### Sanctions Against Iraq

From my administrator's perspective, the nature and complexity of economic sanctions changed dramatically with the passage of Security Council Resolution 661 ("Resolution 661 ") in August 1990 in response to the Iraqi invasion of Kuwait. For the first time there was a truly coordinated and comprehensive U.N. sanctions effort in pursuit of common goals -- in this case, protecting Kuwait's assets and bringing home to Iraq the cost of its actions. This world-wide embrace of economic sanctions as a response to Iraq's action provided a new environment in which the international community could act in a coordinated way to bring economic pressure against states who engage in such behaviour. In the U.S., this added a new international dynamic and a coordination requirement to the administration of the sanctions program we had imposed unilaterally on the morning following the Iraqi invasion of Kuwait.

Resolution 661, passed on August 6, 1990, four days after Iraq's invasion of Kuwait, imposed sweeping economic sanctions against Iraq and occupied Kuwait. Paragraph 4 of the resolution provided, in relevant part:

"that all states shall not make available to the Government of Iraq or to any commercial, industrial, or public utility undertaking in Iraq or Kuwait, any funds or any other financial or economic resources and shall prevent their nationals from removing from their territories or otherwise making available to that government or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within Iraq or Kuwait....."

This language expressed well the broad concept behind the comprehensive embargo -- to protect Kuwait's external investments while denying Iraq access to its offshore holdings. Unfortunately the broadly written language provided nothing in terms of specificity concerning the scope of the assets freeze to be applied against Iraq. This lack of specificity which invited different interpretations by U.N. member states is understandable, of course, given the circumstances that existed -- the worldwide

uncertainty over control of Kuwait's large overseas holdings, the need to achieve consensus, and the overarching requirement to act quickly and decisively.

To us, the differing national interpretations of the term "economic resources" and the universe of entities to be included in the definition of the Government of Iraq were two of the more notable ambiguities resulting from this language. This left sanctions administrators in many countries, particularly those without strong national implementing Legislation, with authority to accept only the most minimally restrictive interpretations of these terms. This did not rise to become a significant issue in the Iraq program, however, because of the strong international resolve, the high level of coordination that took place within the international community, the relatively short time frames involved between the Invasion of Kuwait and the adoption of Resolution 661, and the intensity of the international enforcement effort that was underway from the outset. But over time and under different circumstances this broadly conceived U.N. language would prove to be inadequate for other applications.

In the U.S., we imposed the Iraq sanctions under the combined authority of the International Emergency Economic Powers Act of 1977 ("IEEPA") and the United Nations Participation Act of 1945. Under IEEPA, when there is a threat to the U.S. national security, foreign policy, or economy from outside the U.S., the President has very broad powers to declare a national emergency and construct a program to regulate any or all economic activity by U.S. persons with the target foreign government or group. As with all sanctions programs in the U.S. that have been imposed under IEEPA, we have interpreted the term "economic resources" in it's broadest sense to include all forms of property and obligations and have interpreted the phrase "prevent their nationals from removing from their territories or otherwise making available any such funds or resources" to mean block, or freeze, in place. We also used IEEPA authority to include in the definition of the Government of Iraq any entity or individual owned or controlled by, or acting for or on behalf of, the Government of Iraq. I will describe this targeting approach, known as our Specially Designated Nationals (or "SDN") program, in more detail in a moment. But for now, let me say that this has enabled us to more fully define by name the individuals and companies that also comprise the target of the sanctions.

## **Sanctions against the Federal Republic of Yugoslavia (Serbia & Montenegro)**

Security Council Resolution 757, which targeted Yugoslavia, was passed on May 30, 1992. The financial sanctions provisions in this Resolution were worded nearly identical to those in Resolution 661, particularly paragraph 4, which was beginning to serve as the basic assets blocking provision. But this language had problems, largely because of its breadth and the different interpretations and applications and for the other reasons described above.

By early 1993 it became apparent that paragraph 4 was not adequate authority for a number of states to effectively immobilize certain assets that were enabling the continuation of the war effort, such as the quasi-private Yugoslav trading companies and financial institutions which by continuing to operate outside the territory of the FRY were providing the Milosevic regime access to hard foreign currency.

Thus paragraph 21 of Security Council Resolution 820 which was adopted on April 17, 1993. It contained an explicit requirement to freeze funds of authorities of the FRY, or of commercial, industrial or public utility undertakings in the FRY, or funds controlled directly or indirectly by them, or by entities, wherever located, owned or controlled by such authorities or undertakings. This was intended to provide sanctions administrators with more explicit and direct authority to freeze funds and deal with the subsidiaries and trading companies directly or indirectly controlled by FRY interests. Resolution 820 also contained a requirement for states to impound FRY vessels, freight vehicles, rolling stock and aircraft and permission for these conveyances to be forfeited to the seizing state if they had been used in violation of the sanctions.

The impact of Resolutions 757 and 820 on the FRY was significant, particularly the financial provisions, and they appear to have been a significant incentive causing the FRY to agree to participate in the Dayton negotiations. They effectively prevented the financing or refinancing of any significant project in the FRY, a fact well understood by, and of immense importance to, President Milosevic, a former banker.

Despite the success of the sanctions resulting in a more conciliatory posture by the Milosevic regime, important differences were still evident in the national implementations of Resolutions 757 and 820. In

the United States, we applied the freeze orders in Resolution 820 literally and directly against all the financial resources of FRY-controlled firms in the U.S., thereby putting out of business over a dozen FRY-controlled subsidiary companies and the two principal Belgrade-controlled banks in New York -- Beogradska Banka and Jugobanka. In many other countries, the freeze provisions were applied in a manner designed to prevent only direct repatriation of funds to the FRY or FRY entities, but without forcing the shutdown of subsidiary firms and entities. Transfers to third countries by these companies were often permitted and by so doing they were often able to escape the sanctions net, a process known as triangulation. We traveled to many countries where FRY-owned banks and trading companies operated and appealed to national authorities to take action to stop this evasion through triangulation. We believe the decisive action of shutting down the banks and firms added to the impact of the sanctions and decreased sanctions-busting activities.

Another significant implementation problem emerged where a broad embargo on the export of all goods to Serbia was imposed along with a broadly defined procedure for allowing the shipment of a range of consumer goods under a liberally applied exemption for humanitarian goods. Shipment of such goods was often paid for by the debiting of blocked accounts with U.N. permission, usually in the country from where the goods were sold. In this fashion, Milosevic could use blocked Serbian funds to pay for goods at a time when there was opportunity for profit from the inflationary commercial environment that existed in Serbia. Embargoes have historically created opportunities for profit for those who will break them. This point was not lost on Milosevic.

## **Sanctions against Libya**

The U.S. unilaterally imposed a comprehensive assets freeze and trade embargo on Libya in January 1986. These actions were taken in response to Libyan-sponsored Terrorist activities against American citizens, primarily in Europe and the Middle East. These sanctions have immobilized or restricted access by Libya to approximately \$1 billion in funds over the past twelve years.

On December 1, 1993, paragraphs 3 and 4 of Security Council Resolution 883 went into effect, after a long public debate and a lengthy grace period before taking effect. These paragraphs required states to freeze Libyan funds and financial resources, but exempted funds or other financial resources derived from the export of Libyan petroleum or agricultural products after December 1, 1993. The Resolution also imposed a ban on the provision of certain oil refining and oil field transportation items and amplified the ban on commercial aviation imposed earlier against Libya under Security Council Resolution 748. Both Resolutions 748 and 883 were in response to Libya's continued refusal to cooperate in the investigation of the downing of Pan Am Flight 103 and UTA Flight 772 as called for Security Council Resolution 731.

Implementing the partial sanctions mandated by Resolution 883 has been a complicated affair for many countries -- a problem we don't face in the U.S. as our unilateral sanctions contain no exemptions from the trade embargo or assets freeze, although we have had similar experiences with other partial unilateral embargoes in the past.

The U.N. embargo on Libya was difficult from the outset in that certain measures that may have been the most effective in targeting Libya were eliminated from consideration. In effect, partial sanctions in this context provided an avenue of evasion from the outset. Libya could continue its economic activities, especially trade in oil, it was now just more difficult for them. Perhaps more significant, given the public manner of the discussion and the long delay between its consideration, adoption, and effective date, Libya had ample opportunity to take the money and run, which it did. Targeting is difficult when there is nothing to target. The prolonged debate in the U.N. about an assets freeze removed whatever leverage that may have existed and gave Libya advance notice to take evasive action.

Moreover, partial sanctions require making numerous hair-splitting determinations in the implementation stage concerning the difference between frozen and "free" funds, what kinds of payments to allow or prohibit, how to settle pre-sanctions obligations, etc. We know these are very "fact specific" determinations and can easily be misunderstood or misinterpreted, or given different meanings by different states, particularly in a politically charged atmosphere.

While the effects of these measures on the Libyan regime of Moamar Ghaddafi have been significant, it is difficult to make a definitive assessment of their impact since the drama is still

unfolding. Clearly though, from a sanctions perspective, a complete assets freeze would yield far more pressure by in effect allowing Libya to continue to sell its oil but with payments made into blocked accounts. However, because the distinction between government and private assets is in effect nonexistent -- Ghaddafi controls the oil fields, the only source of foreign exchange - the possibility for targeting only the government is minimized.

## **Targeting Financial Sanctions -- The SDN Program**

Precise targeting of U.N. financial sanctions presents an enormous challenge given the political complexity of the U.N. and the differing bank regulatory and law enforcement environments in each member state.

Targeting of financial sanctions requires focusing on several aspects of a sanctions program - first on clear and commonly understood definitions of the breadth and scope of the program, *i.e.*, what type of financial activities are to be covered. Said another way, is there a commonly understood approach and application of resources to the problem?

Does it mean a blocking of assets? If so, does that permit the targeted state to access them for any purpose, for only certain purposes, or for no purpose?

How will movements of these blocked assets to third countries be monitored or even permitted at all and, if so, for what purposes? Commercial? Humanitarian?

How broadly should the term "assets" be construed? Does it mean only liquid assets, such as bank deposits, or does it also include trade financing arrangements? Does it include both sides of the balance sheet, liabilities as well as assets? Does a blocking of property include tangible property? Real property?

On what basis can or should funds be unblocked for the purchase of humanitarian goods? If so, how broadly should this term be defined? If it is so broad as to include all consumer goods, then how does this affect a decision to embargo such goods in the first instance?

A second important issue to be addressed is coverage. Who and what are to be covered by the program? The answer to this question may depend on the nature of the target and its Makeup.

Does it apply to the Government and its agencies, instrumentalities, controlled entities, and top government officials only or should it be more broadly defined to cover individuals and entities in third countries that may be acting for or on their behalf or that they own or control? In many instances these individuals or organizations may be as important or even more important than government officials themselves.

Does it apply to the entire population or can nationals of the target country who are not themselves to be targeted to be carved out of the scope of the program so that a humanitarian situation does not develop?

A third issue is leverage. Do we have it and if so, where? How can it best be brought to bear on the target government?

A fourth issue is enforcement. Is an enforcement regime in place adequate to insure that all states, especially those where the target has the most business and banking contacts, enforcing the program in the same way as others. How are violations treated under the laws of the various states?

A fifth issue is research, information development and sharing. Are there hidden accounts, front companies, or other schemes to avoid or evade? Do sanctions authorities actively research and seek out this kind of information? Do they have an active program to coordinate their activities and share information with other banking regulators and foreign sanctions authorities?

A sixth issue is monitoring compliance with the sanctions. Do sanctions authorities know who is holding blocked funds, how much they have blocked, and who the account parties are? Successful targeting requires a periodic check on the results. In our experience, requiring banks and other

institutions to periodically submit reports concerning blocked property, certified as accurate by a responsible corporate official, provides both quantitative and qualitative feedback.

In addition to knowing how much is blocked and who it belongs to, we receive information and leads about relevant collateral issues, such as claims by third parties against the funds, how the targeted state typically conducts business, and who might be involved with the target state as joint partners or in similar arrangements.

Periodic reporting requirements also underscore to the public the importance attached to the sanctions, discourage institutions from gouging hostage deposits through excessive service fees or underpayment of interest, and result in a heightened sanctions awareness and compliance within the financial community.

Now, I will describe in more detail the targeting approach we have used in the U.S. in recent years, with some degree of success. We have employed this approach in virtually all of the programs we administer, both multilateral and unilateral.

Indeed, this approach has become the centerpiece of a number of new unilateral programs we have instituted in recent years in the U.S. against Terrorist fund raising activities and against narcotics traffickers. One example of this is the program announced by President Clinton in an address to the U.N. General Assembly in October 1995, on the 50th anniversary of the U.N., in which he said that the growing danger of international organized crime and narcotics trafficking constituted not only a law enforcement problem but also a national security threat to the United States and described several new countermeasures, including the imposition of IEEPA sanctions specifically against the Colombian drug traffickers known as the Cali Cartel. This is an excellent example of an effective use of targeted financial sanctions with clarity of scope and coverage, significant leverage on the target, continuing coordinated efforts for research and information sharing, and with a strong enforcement component.

The Specially Designated Narcotics Traffickers ("SDNT") program has been crafted to target not the country of Colombia but the narcotics trafficking cartels that are centered in Colombia. The SDNT program's objective is to identify, expose, isolate, and incapacitate the businesses and operatives of Colombia's drug cartels, denying them access to the U.S. financial system and to the benefits of trade and transactions involving United States businesses and individuals. This program in particular is intended to focus its impact on the cartels by concentrating on the so-called "legitimate" commercial and financial infrastructure into which cartel leaders have poured so much of their illicitly acquired wealth. We are identifying and exposing these firms and the key individuals who own, direct or operate them on behalf of the drug kingpins. Through cooperative work with the U.S. and Colombian business and financial communities, OFAC has made the SDNT list a significant problem of concern for the cartel leaders and a mechanism to which the honest bankers, businessmen and government officials of Colombia can turn to justify excluding the SDNTs from legitimate financial and commercial markets in Colombia.

In addition to our usual standards of ownership, control, or acting on behalf of the principal target of the sanctions program, the SDNT program has the additional designation criteria of providing material assistance or financial or technological support to the narcotics trafficking activities of the cartels and their entities and agents on the SDNT list. This additional standard broadens the impact of the SDNT program, emphasizing that neither the cartels themselves nor those who would accept their blood money under the guise of "legitimate business" should consider themselves free of the reach of these targeted sanctions.

The impact of this targeted SDNT program on the drug traffickers of Colombia has been extraordinary. Of the 133 businesses listed to date as SDNTS, nearly a third (41) have been identified as having gone into Liquidation. Those 41 companies have a combined net worth of more than \$45 million and a combined annual income of over \$200 million. In addition, as a direct result of the SDNT program, Colombian banks have been closing SDNT accounts in large numbers. Documentation from only three Colombian banks reveals that they have closed almost 200 accounts affecting nearly 100 SDNTS. Other SDNT companies have been forced into operating on a cash basis. These effects are in addition to the as yet unquantified, but very real, costs to the SDNT companies and individuals of denying them access to the U.S. financial and commercial systems.

In its most simple form, the SDN program is a dynamic and ongoing effort to more clearly and specifically define the target of sanctions. We are all familiar with the process of taking care to define

who is not covered by sanctions. This is the other side of that coin -- who is or should be covered. In today's complex commercial and political environment, it is often possible for the target governments and dangerous organizations against whom the sanctions are aimed to camouflage themselves and act through agents, foreign investors, middlemen, or other seemingly unconnected third parties. Once identified, sanctions targets have great incentive to transmute. Often they are moving targets. To ensure the sanctions keep up with these targets and their less apparent agents and front organizations, we have developed our Specially Designated Nationals, or "SDN," program. There now well over 3000 such names on the list. I have brought copies. It is updated frequently, with the revisions published in our Federal Register, which provides legal public notice. We also disseminate the revisions in a wide variety of electronic formats to the public, particularly the financial and import/export community.

The SDN program, in concept and practice, dates back to the successful tactic developed by OFAC's World War II predecessor agency within the U.S. Treasury Department, of publicly identifying enemy agents and front companies. In the more traditional sanctions programs targeted at countries or governments, these entities are known as Specially Designated Nationals, or SDNs, of the target country or government. In our sanctions programs against terrorist groups, these entities are known as Specially Designated Terrorists, or "SDTs." Similarly, in our sanctions program against narcotics traffickers, these entities are known as Specially Designated Narcotics Traffickers, or "SDNTs."

In all cases, this means is that the restrictions in place with respect to economic interaction with the target country or organization, including asset blockings, apply equally to the designated entities. It means that OFAC has reasonable cause to believe that these entities are owned or controlled by, or are proxies for the target country, government, or organization.

The effect of being named a SDN is significant. For example, the SDN is exposed internationally as an agent, whether acting overtly or covertly for the target Government. The prohibitions of the embargo apply with equal force to all property of an SDN. Persons within U.S. jurisdiction are prohibited from engaging in any transaction involving property in which the SDN has an interest. This means that U.S. companies are prevented from doing business with target Government organizations, no matter where they are located and no matter how innocuous they appear. This SDN technique is used in all our programs that involve blocking assets.

## Comments

Drawing on this discussion and other observations from our sanctions experience I would like to make the following concluding comments. Some of these may seem obvious, others not so.

First, a multilateral and comprehensive sanctions program yields the most pressure on the target. The more partial a sanctions program is, the more difficult it becomes to administer and to assess for effectiveness in terms of economic pressure.

Second, a sanctions fence is only as strong as it's weakest link. The state which makes the least vigorous enforcement effort will eventually become the conduit for the smuggling of goods or evasion of the funds freeze provisions of the sanctions. Sanctions work best when they are applied uniformly by all countries.

Third, if money is available, we know goods will be smuggled. This suggests to me that we may get far more impact by concentrating resources on the money sources with tighter controls. As I described above, they can work in conflict unless very carefully developed and coordinated. This is a very important point. As the use of sanctions develops, the enforcement of the financial aspects of sanctions is likely to assume more and more importance compared to border-based and more costly interdiction of consumer goods where the results can be disappointing.

Fourth, we believe sanctions effectiveness would be enhanced by a stronger legal foundation for domestic enforcement in most countries. This means enacting laws specifically designed for sanctions, like IEEPA in the U.S., so that sanctions can be applied effectively and in a more coordinated manner.

Fifth, sanctions work better when a professional sanctions apparatus is available to implement them. This means devoting sufficient administrative resources to implement, enforce, and actively coordinate compliance activities with banking regulators and foreign sanctions authorities.

Last, the asset freeze and financial sanctions provisions in Resolution 820 seem to have been the most effective thus far. But we can improve on that. The effectiveness of provisions in subsequent resolutions are difficult to assess since they have been partial (Resolution 883 involving Libya) or proved to be misdirected (Resolution 984 involving the Bosnian Serbs). Perhaps this is the right Departure point to begin improving the sanctions targeting process.

In summary, to target sanctions more effectively it seems to me that we need to: examine if U.N. mandates can be improved to more precisely target economic elites; develop uniform definitions of key terms and concepts; clarify the scope of property and types of activities that can be covered by sanctions measures (we should have a clear common understanding of the goals of the program so that we know if we have been successful); recommend the enactment of Legislation in states to more effectively implement sanctions; and determine if there are better ways to coordinate our efforts. A technical sanctions experts group meets two to four times per year as the need requires. This dialogue needs to continue. The goal is to make financial sanctions both more effective and administrable. If we can identify some lessons learned, or at least more clearly pinpoint sources of confusion or national differences in interpretation and implementation, we will have moved the process forward.





# Administering Financial Sanctions: Problems and Solutions

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Non-paper by The Netherlands

## 1. Introduction

Several years of experience with the implementation of United Nations Security Council (UNSC) Resolutions by many countries have shown that an effective working of sanctions requires unambiguous, uniform and clear language of sanctions resolutions - including consistency with earlier sanctions - and a well developed system of information exchange and cooperation between all relevant parties concerned with- the implementation of sanctions. Without these elements - as has been the case for Libya - an effective sanction regime is probably difficult to achieve. As a UN member the Netherlands is bound to UNSC Resolutions and is therefore in favour of finding solutions to problems that inhibit effective implementation.

This technical paper will briefly go into both aforementioned elements of language and information exchange and the Dutch experience with them and some suggestions for possible solutions are made.

## 2. Language of UN sanction resolutions

Since the entry into force of the Maastricht Treaty on European Union, the European Community has assumed the powers of the Member States concerning external capital transactions, as - before - it was already competent in trade matters and current financial transactions. Thus, since November 1993, UNSC Resolutions are implemented through regulations adopted by the EU Council on the basis of Articles 73 G (financial sanctions) and 228 A (other economic sanctions). This requires that the European Community adopt a single interpretation of the wording of the UNSC Resolution and may lead to a common interpretation of this interpretation for the 15 Member States by the European Court of Justice.<sup>92</sup> The financial sanctions are enforced by the Member States, which will have to provide for penal sanctions in case of violations and which are competent to authorise individual transactions, within the limits of the UNSC Resolutions. This enforcement at decentralised, national level requires co-ordination among the Member States. In the following, the co-ordination required in consequence of the assumption of competences by the Community is not further discussed. This aspect highlights the general need for clarity of texts and co-ordination.

The language of UNSC Resolutions is often ambiguous and unclear due to their understandable character of political compromise. Because of this, problems arise in the translation of these texts into legally enforceable national sanctions regimes. The Netherlands has experienced several examples of this ambiguity:

- ◆ in the case of Libya (Resolution 883 of 1993), where many forms of trade are not forbidden and are thus allowed, but where many forms of financial transactions are forbidden. This ambiguity raised several questions. For instance the question whether in several cases an exemption is needed and, equally important, whether there is ground such an exemption (see also attached chart). This question was raised in the case of cross-border funding by non-Libyan entities related to investments in Libya, in the case of cross-border payments related to trade activities, in the case of payments to Libya for Libyan exports and in the case of services by non-Libyan financial institutions. These questions have been discussed during several international meetings of financial experts where countries held divergent views;
- ◆ Resolution 883 states that " ... the [sanctions] measures ... do not apply to funds or other financial resources derived from the sale or supply of any petroleum or Petroleum products..... On several occasions financial experts have raised the question whether Resolution 883 does apply to proceeds from investments generated with the funds referred to in Resolution 883 and if so, if these proceeds are free or blocked. Views diverged on this;

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<sup>92</sup> Reference to the 2 ECJ cases: UK (Bank of England), Yugoslav Air Transport.

- ◆ more recently, resolutions in connection with Angola (Resolution 1127) and Sierra Leone (Resolution 1132) are ambiguous in our view in relation to the scope of the resolutions: do they contain financial sanctions or not.
- ◆ The aforementioned examples make it clear that - in whatever way - unclear phrased resolutions give rise to interpretation problems and lead to divergent interpretations of resolutions between countries. This may - and probably does - lead to loopholes and thus to a less effective world-wide working of a UNSC Resolution.

Several solutions are feasible. For instance - in addition to the resolution itself - the drafting of Guidelines or explanatory memoranda by the UN could be envisaged. Another option for improving the clarity of UN resolutions is the usage of a minimum of same wording, terminology, common definitions or common set of terms in UN sanction resolutions. One step further is the development of complete texts ("building blocks") to be used in all UN sanctions resolutions. Another option is to strive for more consistency between economic and financial sanctions. For instance no economic sanctions without sanctions on the trade related financial transaction and no financial sanctions that inhibit trade if there are no economic sanctions.

### **3. Information exchange**

An essential prerequisite for a consistent implementation and subsequent enforcement process is that all national authorities in the different UN Member States need to be informed about new measures. This relates not only to the interpretation of the meaning and the scope of the resolution as far as the drafting of sanction measures is concerned but also to the subsequent enforcement of these measures. In this respect a vertical and a horizontal element can be identified.

#### **Vertical approach**

It can be stated that a vertical "top-down" approach, that is to say the Provision of information through the official UN authorities will indefinitely improve the mutual understanding amongst all Members of the international community as to the exact scope and implications of the different Resolutions. Moreover, this information is necessary for the authorities responsible for the enforcement of the sanctions in order to be able, in their turn, to adequately inform the financial sector. This sector although not itself the focus of financial sanctions is a channel through which the sanctions are applied. As it is the responsibility and the obligation of banks and other financial institutions to comply with the different financial sanction regimes, for instance to freeze assets, held in their accounts and belonging to states, persons or institutions that are targeted by financial sanctions, it is of great importance that the banking sector be informed in a timely and adequate manner. This could be achieved through, for instance, the drafting of Guidelines or explanatory memoranda by the United Nations. The Guidelines of the Sanctions Committee, in particular on Resolution 986 concerning Food for Oil have proven very valuable in learning to understand the operational mechanisms.

After the entry into force of sanctions, the Provision of information remains of great importance. The decisions taken by the UN Sanctions Committee, in relation to individual cases are important to be known by national authorities. In particular as these national authorities are responsible for granting exemptions in respect of national Legislation to the sanctions for instance on humanitarian grounds. In order to provide equal treatment for all institutions, companies and individuals concerned it seems necessary to align opinions on legal and policy grounds to the extent possible.

An example concerning the financial sanctions against Iraq prior to Resolution 986 may illustrate the necessity for this alignment. Companies which were granted exemption from the UN Sanctions Committee for export of humanitarian goods to Iraq saw themselves confronted with the limitations to receive payment for the delivery of the goods as the authorities responsible for financial sanctions were bound by Resolution 778 which prohibits, among other things, the unfreezing of Iraqi assets for other purposes than a transfer to the special escrow account or directly to the United Nations for humanitarian aid in Iraq.

#### **Horizontal approach**

Financial transactions are likely to have international cross-border dimensions. Therefore, in most cases there will be a need not only for exchange of information between the national authorities responsible for the correct implementation of financial sanctions in one country but also with the authorities of other countries involved. This close cooperation and mutual exchange of information is needed to ensure a uniform implementation of the sanctions. Efficient administration and equality of administration across the national boundaries lead to a more consistent application of the humanitarian exemptions.

Provisions of law relating to secrecy may block an exchange of information. Under the Netherlands' General Act on administrative law, any person concerned with the implementation of the sanctions and possessing confidential information is required to observe secrecy. This information may only be divulged if necessary for the execution of the statutory task of implementing sanctions or if prescribed by statutory Provision

Such a need for mutual exchange of information about the implementation has been recognised in recent EC Regulations relating to sanctions. For instance Article 13 of EC Regulation No 2471/94 (in respect of Bosnia-Herzegovina) stated that Member States shall inform each other and the Commission of the measures taken and of other relevant information at their disposal in connection with this Regulation. In this context, it may be noted that, pursuant to Article J.5 (4) of the Treaty on European Union, "...Member States represented in international organisations or international references where not all Member States participate shall keep the latter informed of any matter of common interest." More specifically, "Member States which are also members of the UNSC ... keep the other Member States fully informed." Thus, the recognition at the level of the law of the need to inform States not represented in the UNSC should only have to be translated into practice. Of course this would only be helpful for the EU States which are not members of the UNSC.

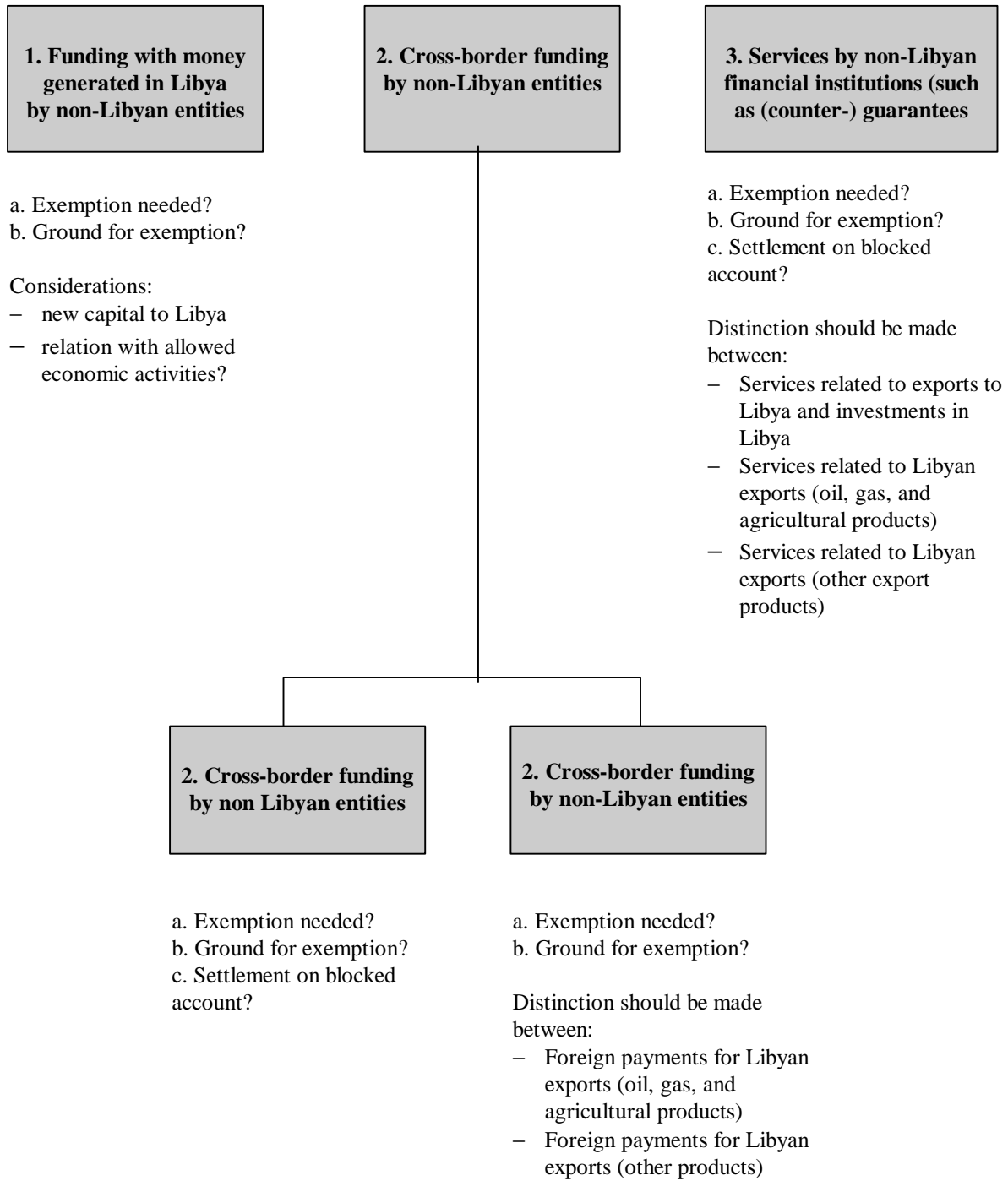
In case sanctions are targeted towards specific groups or individuals this sharing of information may become all the more useful if kept up to date.

#### **4. Summary**

In this paper the necessity for unambiguous, uniform and clear language of sanctions resolutions and a well developed system of information exchange and cooperation between all relevant parties concerned with the implementation of sanctions for the effective working of UN sanctions resolutions was shown. In order to improve this, several possible solutions were given:

- ◆ use of a minimum of same wording, terminology, common definitions or common set of terms in UN sanction resolutions; possibly development of complete texts ("building blocks") to be used in all UN sanctions resolutions;
- ◆ more consistency between economic and financial sanctions. For instance no economic sanctions without sanctions on the trade related financial transaction and no financial sanctions that inhibit trade if there are no economic sanctions;
- ◆ drafting of Guidelines or explanatory memoranda by the UN;
- ◆ implementing the exchange of information in national regulations.

Financial sanctions against Libya  
*The relation between economic and financial sanctions*



# Evasion and Control of Financial Sanctions - Practical Considerations

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## Possibilities for Evasion

### Identification Issues

- The **link** between a **financial transaction** and an underlying **trade transaction** is often virtually impossible to establish. A payment made between banks located in countries A and B may refer to a shipment of merchandise between countries C and D. For instance, banks may pay under a letter of credit upon receipt of the bill of lading. They have no means to establish if the goods specified on the bill (e.g. agricultural machines) correspond to the real goods (e.g. weapons). Also **re-invoicing companies** make it difficult to trace a transaction. A bank may only 'see' an invoice from a company in country A. The underlying transaction, which may not at all involve country A, is not known to the bank.
- The **real purpose** of a loan extended to an entity is not easy to establish or to trace.
- **Shell and front companies** offer ample possibility to hide the real (beneficiary) ownership of assets. Often, these companies are not more than a 'copper plate on a building' on an offshore centre. Authorities there will not know anything about the company. Similarly, cargo ships may change identity on their way.
- If **barter trade** involves third (or further) parties it becomes difficult to track.
- Transactions involving **real estate** can be difficult to identify. The real estate may e.g. be owned by a trust. Behind the trust there may be a lawyer XY. The beneficial owner of the real estate may be very difficult to identify. (Actually, real estate transactions are notorious in money laundering. By buying his *own* property at too high a price, a money launderer can make dirty money 'official'. The same holds true for art trade.)
- **Precious stones** are a wide-spread means to hold assets worth billions of \$ in an anonymous form. They can be sold on specialised markets without leaving any trace. Again, such transactions are notorious among money launderers.
- Portfolio management is another area which allows owners of assets to hide their identity. The beneficial owner of a **custody account** is difficult to establish. A bank may hold a custody account in the name of another bank in another country. Behind the latter account, there may be a trust or ultimately some lawyers located in third countries, acting for the real parties behind, which remain unknown.
- Entities who fear to be targets of financial sanctions will preventively spread their assets and use all means to hide identity as owners of assets.

### Regulatory Issues

- **Capital movements** and payments have been liberalised to a very large degree; **exchange controls** have been mostly abandoned. Transactions can therefore not be controlled *directly* anymore. They can be traced indirectly only by the looking at changes on accounts.
- Accounts in a given currency can be held outside the jurisdiction of such currency (e.g. **\$ accounts outside the US**). A transaction in \$ between banks in countries A and B may involve two or more correspondent banks in the USA or abroad. However, the latter will not know the underlying transaction.

- **Supervisory and anti-money-laundering legislation** requests banks to adopt sound banking practices. Specifically, banks have to establish the identity of the beneficial owner of assets deposited ('know the customer') and to understand the transactions they are asked to do. However, some financial centres do not have strict legislation or do not enforce such legislation. Sometimes enforcement authorities, typically in emerging markets or offshore centres, may lack the necessary skills or information. And then, some financial institutions specialise in shady deals as they offer high returns. Money launderers are not very demanding clients as access, not financial performance, is their concern.

### Banking Technology Issues

- **Money transfers** can be effected in **seconds**. They basically correspond to an exchange of data between computers. The speed of transfers is not matched by the sanction decision making and implementation process. Money has time to move.
- **Electronic banking** (home banking via e.g. the Internet) allows an individual to effect money transfers at any moment. The bank only intervenes to cover but not to analyse a given transaction.
- If access to electronic banking systems (**SWIFT**) is granted to non-bank companies control of transactions between companies becomes virtually impossible to control.

### Possibilities for Control

- **Fraud control** is the key to make targeted financial sanctions work. An enhanced **exchange of information** seems of paramount importance; information should be centralised and shared. In this context, the International Crime Bureau in London might serve as a model.
- Given the parallels between **anti-money-laundering activities** and financial sanctions, the work conducted in the framework of the Financial Action Task Force on Money Laundering (FATF / OECD) could provide useful input to the discussion of targeted financial sanctions. Specifically, the **FATF recommendations** concerning i.a. national legal and administrative set-ups, international exchange of information between authorities, country reviews etc. could be useful in the sanctions context as well.
- **Support by the private sector**, especially the entire banking sector, is a prerequisite for an effective control system.

## **Carrot and Stick Approach for the Implementation of Financial Sanctions**

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### **What measures could be imagined to motivate targeted governments and individuals to comply with the sanctions requirements?**

Financial sanctions are imposed on targeted governments and the country's leadership (hereafter "the targeted entities") to force them to comply with specific requests made by the UN Security Council under its mandate to maintain international peace and security. By freezing the financial assets and by blocking financial transactions of the targeted entities, the UN Security Council aims at increasing the economic cost of defiant conduct of the targeted entities.

Financial sanctions do not aim at confiscating the property rights on financial assets but rather to limit the ability of the owner of these assets to use them under the sanctions regime. To do so, the sanctions authorities must locate these assets and impound them under the national laws regulating them. Sanctions authorities must also prevent the payment or the transfer of assets for the benefit of the targeted entities as counter value for the trade of goods and services on the international market.

However, considering the versatility of financial assets, and the complexity of financial transactions, serious doubts have been expressed on the capacity of sanctions authorities, at the multilateral level, such as the UN Security Council, and at national level to locate the targeted entities' assets and track down their international financial transactions. The speed of financial transactions and the existing methods preventing the identification of the ultimate owners of financial assets question the extent under which economic pressure can be exerted against the targeted entities.

One could argue that the solution to this problem lies not so much with the ability of sanctions authorities to control and monitor substantially the international financial system, but rather on its strategy toward the targeted entities. Like any law enforcement agencies, sanctions authorities must develop measures aimed at inducing targeted entities in complying with the sanctions requirements and discouraging their eventual deviant behavior ("carrot and stick" approach).

### **Incitement Policy**

The primary objective of the sanctions authorities is not so much to locate the targeted entities' assets, as it is to *deter* them from using their assets on the international market for the duration of the sanctions regime. One could imagine the sanctions authorities offering to the targeted entities the possibility of complying with the sanctions regime by transferring, as an *INCITEMENT POLICY*, financial assets under the temporary control of the sanctions authorities. Failure to do so and the continued use of concealed assets would incur a heavy penalty if discovered.

Voluntary accounts could be opened to allow the transfer by the targeted entities of funds under the control of the sanctions authorities for the duration of the regime. Directories of non-movable assets, such as real estate, could be established to allow the uncovering by the targeted entities of their property rights in non-movable assets, offering to sanctions authorities the opportunity of impounding them for the duration of the sanctions. As these assets were voluntarily transferred or uncovered, they could be allowed to earn competitive interest rate or produce income, profits in both cases would be blocked for the duration of the sanctions. In return for this voluntary compliance, sanctions authorities could offer some flexibility in the use of These frozen assets for various purposes authorized by the UN Security Council, such as the maintenance of diplomatic missions, or the funding of public interest exchange programs, such as training in air traffic control, vaccination programs, etc.

### **Deterrence Policy**

The period for the transfer of funds to these voluntary accounts or the registration of non-movable assets in the sanctions authorities' directories should be limited. The failure to comply with the *incitement policy* will cause the imposition of a *deterrence policy*. This policy implies that severe penalties will be imposed on the targeted entities, not because of the character of the assets' ownership or the origins of the funds, but because of the failure of the targeted entities to respond to the administrative measures ordered by the Security Council. Sanctions authorities and UN member States should invest the appropriate means and establish specialized investigation units in the major financial centers to locate concealed assets and track down prohibited transactions, under civil and criminal procedure of the countries where these assets are located. Once discovered, a substantial fine could be imposed on the targeted entity concerned, and if negligence is proven, on its financial agents. Funds discovered by the sanctions authorities should be seized and transferred to blocked accounts. Non-movable assets discovered by the sanctions authorities should be liquidated at the expense of the owner and the product of the sale be transferred to the blocked accounts. These accounts, to be distinguished from the voluntary accounts, should not offer any flexibility in the use of the funds. Moreover, the funds could be allowed to bear interest for the benefit of the enforcement of the financial sanctions regime.

These two policies differ from a blanket freeze of assets as they incur a cost for non-compliance with an administrative regime under which targeted entities assets are blocked for the duration of the sanctions. The benefit for the targeted entities is that they may spare their assets from a costly freeze in non-interest accounts, and the cost of Liquidation of their non-movable assets. This benefit is offered at no cost for the sanctions authorities since the authorities cannot presently confiscate the funds they locate, and must admit that these funds may bear an interest. The additional cost of the deterrence policy may incite some of the targeted entities to consider "clearing" their assets with the sanctions authorities, especially if the investigation units get closer to their investments abroad. Ultimately, the determining elements of their response will be probably linked not so much with the Potential cost of concealing assets, but with the political cost, domestically and international of uncovering previously concealed assets.



## **Financial sanctions: Topics for research**

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Prof. Margaret Doxey, Department of Political Studies, Trent University, Ontario

### **Types of financial sanctions**

Analysis of the full range of measures including those discussed at the seminar and others e.g. controls on concessionary funds from unilateral and multilateral sources and controls on investment. Experience with multilateral and unilateral sanctions is relevant.

### **Costs**

- a) Analysis of the costs to senders (major financial centres and others) to include the possibilities of counter-measures by the target.
- b) Analysis of the impact on targets both short and long term:
  - (i) general economic;
  - (ii) personal where sanctions are so designated;
  - (iii) transmission effects from (ii) to (i).
- c) Analysis of likely system or network costs (including regional effects).

### **Anti-money laundering programmes**

Analysis of relevant aspects of these programmes with a view to improving sanctions regimes.

### **Asset management**

Further investigation of asset management techniques in the context of technical and legal problems.

### **Incentives**

Exploration of possible financial incentives (general and personal) to achieve compliance. Such incentives can be linked to sanctions or offer alternatives.

### **Terminology**

Development of accepted, standardised, technically accurate phraseology to be used in sanctions resolutions and in accompanying guidelines and directives.

### **Cooperative structures**

Exploration of effective mechanisms to collect, store and share information between senders (public and private sectors) and to facilitate improved enforcement. Can United States' expertise be generalised to make targeting more effective?

Sundry reports (e.g. Carnegie, UN-USA) have made general proposals in this regard, but detailed work needs to be done in a realistic political context. For instance the proposal in the 1997 Carnegie study (Sharpening International Sanctions) for a revival of the UN General Assembly's Collective Measures Committee seems unlikely to be productive of results.



# **TENTATIVE FOLLOW-UP**



## Tentative Programme for a Follow-up Expert Seminar

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1. We have, generally speaking, identified the following issues for further work in Interlaken:
  - targeting
  - strengthening the financial sanctions instrument in general
2. We suggest to use the same approach as for the first meeting:
  - introductory segment in the plenary with papers and comments by panelists
  - three topical working groups (possibly with subgroups)

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| <b>WG 1</b><br><b>Identification of accounts, assets and their holders</b> | This group will deal with the issue of targeting. The issue of how account holders can be identified and how the financial flows can be controlled needs to be analysed in more detail. The recommendation of GAF I to combat money laundering regarding due diligence ("know your customer") needs to be taken into account. A number of papers dealing in detail with the identification of customers and accounts in general as well as identification of accounts and names of targeted officials in particular will serve as a basis for discussions. Two to three hypothetical case studies will be presented to further study the requirements for successful targeting and subsequently to establish a plan of action on how to act in particular circumstances. |
| <b>WG 2</b><br><b>Improving domestic legislation and implementation</b>    | The main elements of domestic legislation necessary to put UN Sanctions into force will be discussed. The participants will have the opportunity to discuss the major element of a draft model-law worked out before the seminar.  |
| <b>WG 3</b><br><b>Wording of resolutions and guidelines</b>                | The wording of UN Resolutions with regard to the financial sanctions instrument needs to be improved and interpretative guidelines need to be worked out. These two elements will best be treated in two separate sub-groups, for which draft guidelines will be available <ul style="list-style-type: none"><li>• Subgroup 3a: Formulation of resolution texts (by lawyers and financial experts)</li><li>• Subgroup 3b: Interpretative guidelines (by financial experts)</li></ul>   |



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