2

'Secondary Sanctions'

What's in a Name?

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2.1 INTRODUCTION

The challenge of defining what secondary sanctions actually are is paradoxically both very simple and overwhelmingly complex. Simple, from the perspective of the political goal of these instruments, to isolate a particular target from a maximum of its international (business) relations. Complex, both from the perspective of the great controversy over their lawfulness itself under public international law and from the standpoint of their legal engineering, which involves the adoption of specific legislation, potential firewall mechanisms by third countries and eventual litigation.

As illustrated by Figure 2.1, secondary sanctions have both an inter-state and a business practice dimension. On the one hand, they can be analysed from the perspective of a state's own sanction policy and practice, against the binding framework imposed by public international law. On the other hand, as instruments designed to shape business networks, secondary sanctions also call for detailed analysis from an international private law perspective.[1] Hence, the actors involved in the design, implementation and monitoring of secondary sanctions come from various backgrounds, both public and private and both domestic and international.

This state of affairs makes it all the more important to start this chapter with common core concepts aimed at explaining the very raison d'être of secondary sanctions (Section 2.2). Proceeding from these foundations, I will tackle the issue of the apparent coexistence of two definitions of secondary sanctions in contemporary sanctions literature, a confusing situation arguably caused by the underlying focus of some of these definitions, aimed at denouncing the extensive and illegitimate extraterritoriality of unilateral sanctions as a whole (Section 2.3). I will then turn to highlighting, from the perspectives of both public and private practice, some of the main areas in need of effective legal answers to the specific issues raised by the contemporary practice of secondary sanctions (Section 2.4). On a

[1] See Chapters 4, 15 and 16.

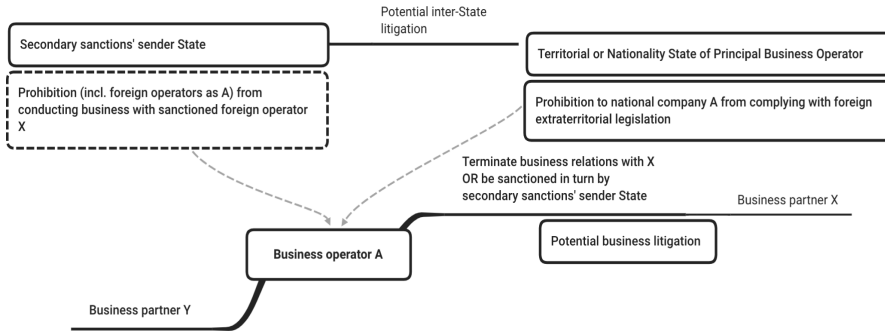

FIGURE 2.1 Overview of secondary sanctions underlying legal relations

final note, I conclude the chapter by identifying avenues for further academic research and practical innovation in the field (Section 2.5).

2.2 CORE CONCEPTS

As defined by the author in previous works, international sanctions generally refer to 'the non-armed coercive measures adopted by a state or organisation to put pressure on and ultimately induce a change in behaviour of another state, group of states, or non-state target'.[2] Given the current state of globalisation and interdependence in international relations,[3] international sanctions depend on their broad application for their effectiveness – hence raising what I name here the 'reach dilemma'. This phenomenon triggers, first, a necessary clarification on the reach of international sanctions against the backdrop of state jurisdiction theory and a key distinction between UN collective sanctions on the one hand and unilateral sanctions on the other hand (Section 2.2.1). Second, our examination turns to various legal techniques that have been developed to maximise the reach of international unilateral sanctions, including the imposition of secondary sanctions (Section 2.2.2).

2.2.1 *The Reach Dilemma and State Jurisdiction*

It is crucial to clarify that what I will name here the reach dilemma is raised only in relation to unilateral sanctions, which are defined in opposition to the multilateral sanctions adopted collectively by the United Nations Security Council (hereafter the UNSC). Governing collective security, Chapter VII of the Charter

[2] C. Beaucillon, 'An Introduction to Unilateral and Extraterritorial Sanctions: Definitions, State of Practice and Contemporary Challenges', in C. Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar Publishing, 2021), p. 1.

[3] D. Drezner, H. Farrell and A. L. Newman, *The Uses and Abuses of Weaponized Interdependence* (Brookings Institution, 2021).

of the United Nations (UN Charter) vests in the UNSC extraordinary powers to react to 'a threat to peace, breach of the peace, or act of aggression',[4] including the adoption of non-armed coercive measures.[5] In the exercise of its powers aimed at assuming a primary responsibility to maintain international peace and security,[6] the UNSC adopts resolutions which not only bind all UN Member states but also prevail over their other potentially conflicting international obligations.[7] With 193 UN Member states, the multilateral sanctions adopted by the UNSC therefore theoretically benefit from a quasi-universal reach.

In contradistinction, unilateral sanctions are adopted by single states or groups of states on their own initiative. They can be adopted either in addition to UNSC multilateral measures, as in the case of the US and EU sanctions targeting Iran in 2010,[8] or in the absence of any UNSC resolution. In the latter case, two situations can be further distinguished. On the one hand, unilateral sanctions may not be linked to the UN collective security mechanism, as in the case of US sanctions imposed on Cuba in reaction to the Castro regime.[9] On the other hand, unilateral sanctions may be adopted in the absence of a UNSC resolution in situations where international security is at stake but where a permanent member blocks the decision-making process by using its veto power, as it is the case of US, EU and other aligned sanctions against Russia after the invasion of Crimea in 2014 and the rest of Ukraine in 2022.[10]

As such, unilateral sanctions are theoretically weak in nature, because of their intrinsically limited geographical reach. Indeed, they are only binding vis-à-vis the persons and activities under the sanctioning state's jurisdiction, which is generally defined in relation to the territorial or personal link between the sanctioning state and the activity it aims to regulate through the adoption of sanctions. On the grounds of the territorial link, a state can impose on private persons who conduct their activities on its territory the obligation to abide by the unilateral sanctions it has decided to adopt. These sanctions are therefore both unilateral and territorial as regards their application. On the grounds of the personal link, a state can impose on private persons holding its nationality the obligation to abide by the unilateral sanctions it has

[4] Article 39 of the Charter of the United Nations, 26 June 1945, in force 24 October 1945, 1 UNTS XVI.
[5] Ibid., Article 41.
[6] Ibid., Article 24.
[7] Ibid., Articles 25 and 103.
[8] Indeed, 2010 marked the hardening of Western unilateral measures against Iran, in addition to those adopted by the UNSC on the basis of Article 41 of the UN Charter. The US adopted the Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010, further complementing the application of the D'Amato Kennedy Act (Iran and Libya Sanctions Act) of 1996. The EU changed its previous practice and adopted its first complementary measures in 2010, with Council Decision 2010/413/CFSP of 29 July 2010.
[9] United States, Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (also known as the Helms–Burton Act), Pub. L. No. 104-114, 110 Stat. 785 (1996), codified at 22 USC §§ 6021-91 (1995).
[10] J. M. Thouvenin, 'Articulating UN Sanctions with Unilateral Restrictive Measures', in C. Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar Publishing, 2021), pp. 148–164.

adopted, although they may conduct their activities outside the national territory. These sanctions are therefore both unilateral and extraterritorial, in so far as they bind the sanctioning state's nationals abroad – a limited form of extraterritoriality of foreign legislation deriving from the nationality link between the legislating state and its nationals abroad that is generally considered consistent with the theory of state jurisdiction under contemporary international law.[11] Given the need to ensure the broadest possible application of sanctions in order to maximise their practical impact, and the limitations arising from the very nature of unilateral sanctions, various techniques have been developed to solve the reach dilemma.

2.2.2 *Legal Techniques Aimed at Maximising the Reach of Unilateral Sanctions*

Two main legal techniques have been used to date in an effort to maximise the territorial reach of unilateral sanctions. The first rests on the extension of primary sanctions (Section 2.2.2.1), while the second consists in imposing secondary sanctions (Section 2.2.2.2).

2.2.2.1 Extending the Reach of Primary Sanctions

In practice, the vast majority of international sanctions meet the definition of primary sanctions. Primary sanctions can be defined as measures prohibiting persons and entities under sanctioning state A's jurisdiction – via a national/territorial link – from entering a certain type of relation with sanctioned state B. It is worth recalling here that in the era of so-called targeted or intelligent sanctions, the practice of global sanctions against state B has evolved in favour of the approximation of certain economic sectors or persons identified with state B, leading to a complex network of interactions potentially prohibited to persons under state A's jurisdiction. As shown by Figure 2.2, the maximisation of the reach of primary sanctions can take the form of two options. The first one, privileged by the EU, consists in multilateralising its unilateral sanctions through the voluntary or negotiated alignment of other states and the duplication of primary sanctions in various national legislations around the world (Option 1, Figure 2.2). The second one, privileged by the US, consists in extending the reach of domestic legislation through a broad interpretation of the nexus between the US and the persons and situations under its jurisdiction. This mechanism of (contested) extensive extraterritoriality operates at a transnational level (Option 2, Figure 2.2).

[11] For a detailed analysis of the theory of jurisdiction as applied to unilateral sanctions, see. C. Beaucillon, 'Practice Makes Perfect, Eventually? Unilateral State Sanctions and the Extraterritorial Effects of National Legislation', in N. Ronzitti (ed.), *Coercive Diplomacy, Sanctions and International Law* (Brill Nijhoff, 2016), pp. 103–126; Y. Kerbrat, 'Unilateral Extraterritorial Sanctions as a Challenge to the Theory of Jurisdiction?', in C. Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar Publishing, 2021), pp. 165–185.

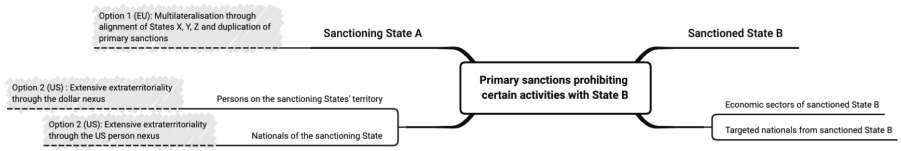

FIGURE 2.2 Two privileged options for extending the reach of primary sanctions in EU and US practice: multilateralisation versus extensive extraterritoriality

It stems from the foregoing discussion that the main cursor to extend the reach of a primary sanction is the *degree* of its extraterritoriality. As anticipated, the EU and US positions and practices differ patently.

On the one hand, the EU has long taken a stance against an extensive approach of extraterritoriality and upholds the view, which is largely majoritarian on the international scene, that only limited extraterritoriality is acceptable and lawful under public international law.[12] This limited extraterritoriality is contained in the strict approach to the territorial/personal nexus with the state adopting sanctions, flowing from the theory of state jurisdiction. As has been exposed in previous related works,[13] the EU and its Member states have constantly expressed this position on various occasions over the last decades, in reaction to extensive and contested US practice – most notably, during the Euro-Siberian pipeline crisis in 1982,[14] at the adoption of the Helms–Burton and D'Amato Kennedy Acts in 1996,[15] or in reaction to US sanctions on Cuba. The EU has also engaged in a similar limitation in its own unilateral

[12] For detailed case studies of different states' positions and practices regarding extraterritorial sanctions, see Part I, Contemporary State Practice (Chapters 2–8), of C. Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar Publishing, 2021), pp. 19–147. However, also see Chapter 19.

[13] See, especially, Beaucillon (n. 11); C. Beaucillon, 'Panorama de la pratique contemporaine des sanctions internationales', in A. Miron and B. Taxil (eds.), *Extraterritorialités et droit international: Colloque d'Angers* (Pedone, 2020), pp. 75–91.

[14] These US measures triggered the strongest reactions from the Member states of the European Communities that prohibited European companies engaged in the pipeline's construction from abiding by US legislation. See B. Audit, 'Extraterritorialité et Droit International. L'affaire du Gazoduc Sibérien' (1983) 72 Revue Critique du Droit International Privé 404. See also the corresponding (unsuccessful) litigation in the US, District Court for the District of Columbia, *Dresser Industries Inc. and Dresser (France) S.A.* v. *Baldridge*, 13 September 1982, 549 F. Supp. 108 (1982); and in the EU, The Netherlands, District Court of The Hague, *Compagnie Européenne des Pétroles s.a.* v. *Sensor Nederland B.V.*, 17 September 1982, 22 ILM 66. See also the memorandum addressed by the European Economic Community to the US referring to the decision of the International Court of Justice in the *Barcelona Traction Case*, Commission of the European Communities, Comments on the U.S. Regulations concerning Trade with the U.S.S.R. (1982) 21 ILM 891, 894.

[15] Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, [1996] OJ L 309/1 (hereinafter EU Blocking Statute); Joint Action 96/668/CFSP of 22 November 1996 adopted by the Council on the basis of Articles J.3 and K.3 of the Treaty on European Union concerning measures protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, [1996] OJ L 309/7.

sanctions practice, as illustrated by its Guidelines, whereby it commits not to resort to extensive extraterritoriality but rather to limit its practice to a clear territorial/personal link with the activities regulated by EU sanctions (restrictive measures).[16] To address the reach dilemma, the EU has therefore developed an alternative process to the recourse to extensive extraterritoriality: the multilateralisation of its unilateral sanctions. Multilateralisation is a process whereby the EU seeks to extend the application of its unilaterally decided sanctions, through the voluntary adhesion of third states and organisations to its practice. As demonstrated elsewhere, this adhesion may be more or less formalised, either through a twofold process comprising an express EU invitation to align and a corresponding alignment on EU sanctions or thanks to the conclusion of formal agreements constraining EU partners to abide by EU restrictive measures when using EU-provided funds for instance.[17]

On the other hand, the US has developed the most extensive practice of extraterritoriality, through its broad interpretation of the territorial and personal nexus of the persons and situations accordingly governed by US extraterritorial legislation imposing unilateral sanctions. Its broad appreciation of the territorial nexus can interestingly be illustrated by the Helms–Burton Act of 1996, whose Title III was activated for the first time on 2 May 2019.[18] Specifically, it allows US persons to sue, in US courts, foreign companies making profits in Cuba as a result of their economic activities related to the exploitation of assets nationalised after Fidel Castro came to power in 1959. These commercial activities are considered as traffic having a 'substantial effect' on the US territory,[19] and therefore they fall within the territorial nexus according to US national authorities.[20] Despite the

[16] Council of the European Union, General Secretariat of the Council of the European Union, 'Guidelines on Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy', Doc. No 5664/18, 4 May 2018. See, especially, Section J on 'Jurisdiction':

> 51. EU restrictive measures should only apply in situations where links exist with the EU. Those situations […] cover the territory of the European Union, aircrafts or vessels of Member states, nationals of Member states, companies and other entities incorporated or constituted under Member states' law or any business done in whole or in part within the European Union. 52. The EU will refrain from adopting legislative instruments having extra-territorial application in breach of international law. The EU has condemned the extra-territorial application of third country's legislation imposing restrictive measures which purports to regulate the activities of natural and legal persons under the jurisdiction of the Member states of the European Union, as being in violation of international law.

[17] For a detailed analysis of the elements presented in this paragraph, see: C. Beaucillon, 'The European Union's Position and Practice with Regard to Unilateral and Extraterritorial Sanctions', in C. Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar Publishing, 2021), pp. 110–129.

[18] Helms–Burton Act (n. 9), Title III.

[19] Ibid., Section 301 § 9 of Title III.

[20] Diverging from the criterion officially stated by the US regarding the effect of acts on its territory, the extension of the US nexus grounding extensive extraterritorial legislation on Cuba has been explored from the perspective of 'passive personality'. See T. Ruys and C. Ryngaert, 'Secondary

fact that the transposition of the competition law-originated effects theory to the sanctions domain is highly debatable under positive international law,[21] and notwithstanding the European Commission's efforts to support the arguments based on the requirements of the EU Blocking Regulation,[22] invoked by EU companies being sued in US courts, several 'Title III' lawsuits are now pending in the US, as will be explored in Section 2.4.2. Similarly, US authorities broadly interpret the notion of a 'US person' – who, as a consequence, is bound to abide by US legislation – thereby extending the personal nexus of US extraterritorial legislation. An established US practice consists of including foreign entities controlled by persons under US jurisdiction. Such an extension of the personal link to US jurisdiction was illustrated in the Euro-Siberian pipeline crisis of 1982 and also more recently in the Venezuela Defense of Human Rights and Civil Society Act of 2014.[23] As in the latter example, the extension of personal nexus is now generally combined in US practice with the extension of territorial nexus.

2.2.2.2 Imposing Secondary Sanctions

An alternative answer to the reach dilemma can be found in the imposition of secondary sanctions, which rest on radically different legal mechanisms than the primary sanctions analysed earlier, even when the latter are extensively extraterritorial. To date, the US is the only state to have openly taken recourse to such intrinsically extensive extraterritorial instruments.

The operation of secondary sanctions is well exemplified by the US sanctions against Iran. According to Section 2(a) of Executive Order 13902 of 10 January 2020:

> The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorised to impose on a *foreign financial institution* the sanctions described in subsection (b) of this section upon determining that the foreign financial institution has, on or after the date of this order, knowingly conducted or facilitated any *significant financial transaction*:
>
> (i) for the sale, supply, or transfer to or from Iran of significant goods or services used in connection with a sector of the Iranian economy specified in, or determined by the Secretary of the Treasury, in consultation with the Secretary of State, pursuant to, section 1(a)(i) of this order; or

Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions' (2020) 90 *The British Yearbook of International Law* 1, 23.

[21] See Beaucillon (n. 11).

[22] EU Blocking Statute (n. 15), last amended by Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No. 2271/96 protecting against the effects of extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, [2018] OJ L199I, 7 August 2018 (hereinafter EU Blocking Statute 2018 Amendment).

[23] United States, Venezuela Defense of Human Rights and Civil Society Act of 2014, Pub. L. No. 113–278, 128 Stat. 3011 (2014). For a detailed analysis of the territorial and personal nexus grounding US extensive extraterritorial primary sanctions, see Beaucillon (n. 11 and n. 13).

(ii) for or on behalf of any person whose property and interests in property are blocked pursuant to section 1 of this order.[24]

The secondary sanction at stake here is defined in Section 2(b) of the executive order: 'The Secretary of the Treasury may prohibit the opening, and prohibit or impose strict conditions on the maintaining, in the United States of a *correspondent account or a payable-through account* by such foreign financial institution.'[25]

As a result, a non-US bank operating outside the US territory with non-US clients can be subjected to US secondary sanctions in the following two cases: because its activity may be 'significantly linked', first, to the activity that the US targets through its primary sanctions (here, the sectors of Iranian economy as defined in Section 1 of the executive order) and/or, second, to a person who is targeted by US primary sanctions (again, as defined in Section 1 of the executive order). In those cases, the non-US bank risks losing, as a result of the application of Section 2(b) of the executive order, its corresponding account in the US – a commercial death sentence for most businesses in the context of today's dollar-dominated world economy. A number of other restrictions may also be applied to the secondary-sanctioned foreign entity, such as the refusal of export licences by US authorities or of payment facilities by US financial institutions. In turn, the entity subjected to secondary sanctions may also be listed as a target of primary US sanctions in application of Section 1 of the executive order, whose wording partially mirrors the provisions of Section 2 quoted earlier. In this case, the business partners of the foreign entity already targeted by primary sanctions may now well be targeted by secondary sanctions, and so on. As clearly shown by this example, the secondary sanction does not build on a (potentially extensive) primary territorial/personal link with the US, as is the case of US extensive extraterritorial primary sanctions that target dollar-denominated transactions (extended territorial nexus) or aim at regulating operations involving an entity controlled by a US person (extended personal nexus) as already explained. Rather, they rest on a secondary link with the economic sectors or entities targeted by US primary sanctions, with which all relations must be terminated so as not to risk being sanctioned in turn. In other words, secondary sanctions build on pre-existing primary sanctions. Secondary sanctions can therefore be defined as measures aimed at deterring third-party persons or entities from entering a certain type of relation with the targets – approximated in sectors, activities, persons and/or entities – of state A's primary sanctions on state B.

As they create great uncertainties for business operators, secondary sanctions trigger de-risking decisions which factually isolate the primary sanctions' targets. Indeed, private entities are often advised to terminate all their activities with a newly designated target of primary sanctions, so as to avoid any risk of secondary

[24] United States, Executive Order 13902, 'Imposing Sanctions with Respect to Additional Sectors of Iran', 85 FR 2003, Section 2(a), 10 January 2020.

[25] Ibid., Section 2(b) (emphasis added).

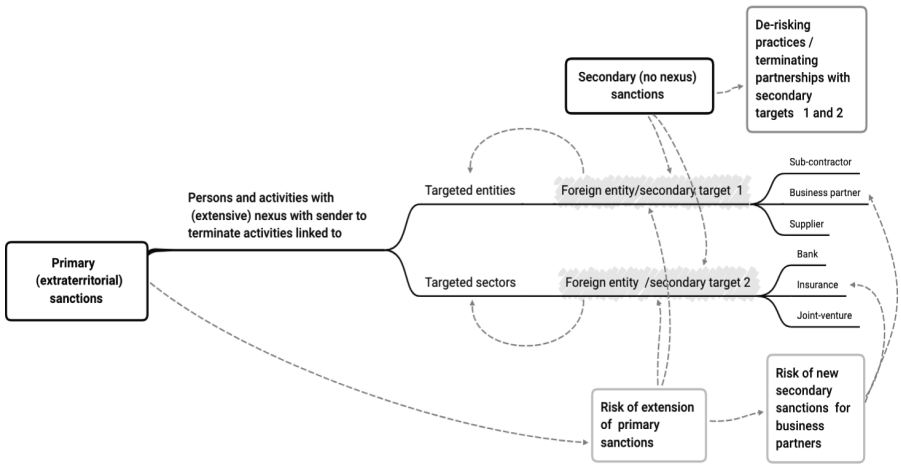

FIGURE 2.3 Secondary sanctions, with spillover and wind-down effects

sanctions spillover. To that effect, the Office of Foreign Assets Control (OFAC) of the US Department of the Treasury issues general licences authorising the wind-down of transactions with a newly designated entity or sector, granting foreign entities a window of opportunity to wrap up operations linked to newly designated persons or sectors, in order not to be secondarily sanctioned at the end of the wind-down period.[26] As illustrated by Figure 2.3, secondary sanctions logics aim at the isolation of primarily targeted entities or sectors from all their business partners, including foreign persons and entities.

2.3 DEFINITIONAL HAZARDS

Secondary sanctions, as distinguished from primary sanctions with an extensive extraterritorial reach, rest on specific legal techniques. However, a close examination of the contemporary use of these concepts in the sanctions literature suggests the existence of two competing definitions of secondary sanctions – a state of affairs that contributes to the difficulty of grasping the unilateral sanctions phenomenon in its full complexity (Section 2.3.1). Conversely to the expectation

[26] See, for instance, General Licence 38 (United States, Department of the Treasury, Office of Foreign Assets Control, Frequently Asked Questions, 'Venezuela Sanctions. 854. What does General Licence 38 authorise?', https://ofac.treasury.gov/faqs/854), issued after the OFAC designated the China National Electronics Import & Export Corporation (CEIEC) pursuant to United States, Executive Order 13692, 'Blocking Property and Suspending Entry of Certain Persons Contributing to the Situation in Venezuela', 80 FR 12747, 8 March 2015, imposing sanctions on Maduro's regime in Venezuela, the Chinese company having been found to support the regime with cyber technologies and training. See United States, Department of the Treasury, 'Treasury Sanctions CEIEC for Supporting the Illegitimate Maduro Regime's Efforts to Undermine Venezuelan Democracy', 30 November 2020, https://home.treasury.gov/news/press-releases/sm1194.

that the notion of secondary sanctions might be ill-defined or blurry under international law, I will show that the apparent definitional variations of secondary sanctions are due to their assimilation to the broader concept of extraterritorial sanctions (Section 2.3.2).

2.3.1 *An Apparent Definitional Schism*

As shown earlier, the reach dilemma of unilateral sanctions is addressed in contemporary practice by various strategies, consisting in extending the reach of primary sanctions (multilateralisation or extensive extraterritoriality to maximise the persons that are bound to implement the primary sanctions) and/or in adopting secondary sanctions (extended sanctions that target through a link with a primarily targeted person or activity). Despite this clear difference between secondary and primary sanctions, two competing approaches to secondary sanctions apparently coexist in the sanctions literature.

A narrow approach, explained in Section 2.2.2.2, consists in labelling as secondary sanctions only the measures that are adopted in connection to primary sanctions. From this perspective, a secondary sanction is some form of (internationally contested) measure that has been adopted in relation to already imposed primary sanctions to constrain a third-party entity with no jurisdictional nexus whatsoever – be it strict or extensive – with the sanctioning state. Alternatively, a broad approach consists, instead, in assimilating the secondary sanctions with any primary sanctions with a contested extensive extraterritorial reach. From this perspective, a secondary sanction is understood to be any measure with an internationally contested extraterritorial reach aimed at unduly targeting third-party entities.

To tackle this apparent definitional schism, a three-step comparative analysis is necessary, examining in turn sample definitions, argumentative orientations and underlying stakes.

First, the broad definition of secondary sanctions can, on the one hand, often be found in non-US or European literature: 'We consider the term "secondary sanctions" to be largely interchangeable with "extraterritorial sanctions".'[27] On the other hand, the narrow definition seems to be more present in US literature: 'Secondary sanctions are extraterritorial, though extraterritorial sanctions need not be secondary.'[28] It is clear from these examples that the actual divide between the broad and narrow definitions of secondary sanctions rests on the author's approach and definition of extraterritoriality.

Second, the broad definition of secondary sanctions is generally oriented towards the denunciation of the extensive extraterritoriality of unilateral sanctions, whose aim is to sway the behaviour of foreign states or entities through an extended nexus

[27] Ruys and Ryngaert (n. 20), 8.

[28] P. S. Bechky, 'Sanctions and the Blurred Boundaries of International Economic Law' (2018) 83 *Missouri Law Review* 1, 11.

with the sanctioning state. The narrow definition, in contrast, is activity-oriented and focuses on the prohibition against the connection of any actor, irrespective of jurisdictional issues, with a primary-targeted person or economic sector.

Third, the aforementioned points reveal significantly different underlying stakes of both definitional approaches. By assimilating secondary sanctions to extensively extraterritorial primary sanctions, the broad definition of secondary sanctions focuses on contested extraterritoriality under international law and, ultimately, flags their impact on sovereignty. Meanwhile, the narrow definition of secondary sanctions focuses on the aim of the measures, which is to isolate a targeted person or economic sector from the rest of the world economy, and, ultimately, flags the targeting techniques that underpin effect-driven strategies in the context of globalised interdependence.

2.3.2 *Purposes and Limits of Demonstration-Oriented Definitions*

Our findings are confirmed by an examination of the following sample of think tanks' analyses on US secondary sanctions. The Center for New American Security (CNAS) is an American think tank in Washington, DC, focusing on security studies. It monitors international sanctions through the programme Sanctions by the Numbers.[29] In its 2021 report on US secondary sanctions,[30] the CNAS adopted a definition of secondary sanctions that corresponds to the narrow definition stated earlier, to screen US Specially Designated Nationals (SDNs) lists.[31] In a first analysis of (secondary) SDN designations by (primary) sanctions regimes, the CNAS results show a strong focus on Iran (68 per cent), North Korea (22 per cent), Russia (5 per cent), Hezbollah (3 per cent) and China (2 per cent). This approach puts an emphasis on the policy targets of US measures and clearly points to a rise in US unilateral sanctions in the context of the withdrawal from the Joint Comprehensive Plan of Action (JCPOA) that was concluded with Iran and the EU under the Obama administration. This approach arguably focuses on the US capacity to be decisive

[29] Amongst numerous donations, the CNAS reports to have received funding from the US Department of Defense, the Canadian Department of National Defence and the embassies of Japan, Latvia and the UK in the US. See further www.cnas.org/support-cnas/cnas-supporters.

[30] J. Bartlett and M. Ophel, 'Sanctions by the Numbers: US Secondary Sanctions', Center for a New American Security, 26 August 2021, www.cnas.org/publications/reports/sanctions-by-the-numbers-u-s-secondary-sanctions.

[31] Ibid., para. 1.

> Primary sanctions target entities or individuals involved in activities that have a U.S. nexus and are thus subject to U.S. jurisdiction, with the effect of rendering transactions with persons subject to primary sanctions illegal under U.S. law. In contrast, secondary sanctions target normal arms-length commercial activity that does not involve a U.S. nexus and may be legal in the jurisdictions of the transacting parties. While U.S. individuals and entities must adhere to primary sanctions as a matter of U.S. law or face potential criminal/civil penalties, secondary sanctions present non-U.S. targets with a choice: do business with the United States or with the sanctioned target, but not both.

in tackling the global crises that are on its political agenda. In another analysis of SDN inscriptions by nationality, the CNAS results instead focus on the designations of foreign nationals from China (48), Iran (27), Russia (18), Syria (16), United Arab Emirates (9), Turkey (5) and Singapore (4). This second approach sheds light on the nationalities of the persons subjected to US secondary sanctions, which do not necessarily correspond to the countries targeted by the primary sanctions regimes listed under the first approach. With the predominance of Chinese nationals, these results highlight the power issues at stake in the secondary sanctions practice of 2021, which places the US and China in clear opposition after what was called the US–China economic war of 2018–2020.[32]

On the other end of the spectrum, the Russian International Affairs Council (RIAC) is a Russian think tank in Moscow, focusing on foreign policy and conflict situations. It monitors international sanctions through a programme unequivocally entitled 'The Sanctions against Russia: Areas of Escalation and Counteraction Policies', launched before the 2022 invasion of Ukraine and still active, with a now clearly stated proximity to the Russian government.[33] In a 2019 study (selected here because it was conducted between the annexation of Crimea in 2014 and the invasion of Ukraine in 2022, both triggering Western and allied unilateral sanctions against Russia), the RIAC focuses on the impact of US secondary sanctions on Europe, privileging an approach that corresponds to a broad definition of the latter, as mixing secondary and extensively extraterritorial primary sanctions.[34] Focus is placed on the impact of US extraterritorial sanctions on third countries, so as to shed light on the affected European entities, which are prevented from doing

[32] C. Cai, 'China's Position and Practice concerning Unilateral Sanctions', in C. Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar Publishing, 2021), pp. 70–89.

[33] Signalled by both the description of the project https://russiancouncil.ru/en/projects/functional/sanktsii-protiv-rossii-napravleniya-eskalatsii-i-politika-protivodeystviya/ and the composition of the RIAC Board of Trustees, which includes the current Minister of Foreign Affairs Sergei Lavrov and the Chairman of the Board of Sberbank Russia, amongst others, https://russiancouncil.ru/en/management/board-trustees/.

[34] I. Timofeev, 'Europe under Fire from US Secondary Sanctions', Russian International Affairs Council, 7 June 2019, https://russiancouncil.ru/en/analytics-and-comments/analytics/europe-under-fire-from-us-secondary-sanctions/, para. 3.

> Secondary sanctions target companies, states, or individuals that do business with sanctioned countries, organizations, or individuals. "Sanctions for violating sanctions" are used against US citizens and companies, as US laws are applicable only within US jurisdiction. During the past three decades, however, such sanctions are increasingly exterritorial in application, hitting companies and organizations from numerous other countries. The fact that exterritorial sanctions are possible at all is due to the dominant position of the US financial system in the context of international financial transactions and the close links that many major companies have with the US market. All foreign players who have some degree of relationship with US financial institutions, companies, or markets come under US national law. Apart from purely economic benefits, this global economic role gives the Americans powerful political leverage.

business in Russia as a result of US extraterritorial sanctions and related fines. Through the denunciation of the impact of broadly defined US secondary sanctions upon third-country entities – in this case, European companies – the report supports the official Russian position against any extensive form of extraterritoriality in the context of the imposition of unilateral sanctions.

It follows from the foregoing that two different approaches to secondary sanctions – broad and narrow – are used in political science studies on secondary sanctions and that they serve the same demonstration-oriented purposes as those identified here: a denunciation of extensive extraterritoriality for the broad approach to secondary sanctions and a focus on the targeting strategy and effectiveness of secondary sanctions for the narrow approach.

A significant methodological difference should however be underlined at this stage between the two social sciences in question, political science and legal studies. The political science studies quoted earlier are based on quantitative and qualitative data analyses, where the functional definition – broad or narrow – of secondary sanctions serves the modulation of data for a specific demonstration purpose. Meanwhile, legal studies rely on conceptual and objective definitions, which ground the qualification of the legal nature and the legal regime applicable to and binding on specific conducts. This basis of legal studies consequently renders the use of functional definitions in this field problematic for at least two reasons. The first, touched upon in the introduction of this section, is that a variable definition of a legal concept is simply puzzling, as if the discipline lacked the conceptual tools to grasp the phenomenon, which is certainly not the case of secondary sanctions as demonstrated earlier (see Section 2.2). The second is that a blurry state of legal affairs does not allow for a full legal analysis of the secondary sanctions phenomenon. At most, the apparent definitional schism discussed earlier can to a certain extent serve a clearly determined legal policy argumentation, here specifically on the (un)lawfulness of extensive extraterritoriality under public international law. It could nevertheless have the long-term drawback of masking the diversity and complexity of legal questions that arise from the contemporary practice of secondary sanctions in the narrow sense, which pressingly call for precise and tailored legal answers.

2.4 TOWARDS TAILORED LEGAL ANSWERS

The great diversity in practical effects arising from (US) secondary sanctions arguably derives from the articulation of the two logics that govern their adoption: the controversial extensive extraterritoriality of the primary sanctions on which they are built aims at multiplying the addressees of the prohibitions they impose, while their nexus with primarily sanctioned activities, sectors, persons or entities extends the reach of foreign extraterritorial deterrence up to persons and entities with no link to the sanctioning state jurisdiction. From this perspective, each train of secondary

sanctions calls for a tailored and ad hoc legal analysis, depending on the legal context in which they are studied and on the legal issues arising from practice. The purpose of this chapter is to explore the main legal issues at play when considering secondary sanctions in legal practice, so as to pave the way for the emergence of effective reactions and solutions, based on the protean international legal toolbox at disposal. To that end, public (Section 2.4.1) and private (Section 2.4.2) practice will be examined in turn.

2.4.1 *Public Practice*

The use of unilateral extraterritorial secondary sanctions in international relations is highly controversial under public international law, as it is generally considered as being in breach of the theory of jurisdiction.[35] In other terms, extensively extraterritorial primary sanctions and secondary sanctions are considered by most states to be adopted and implemented in breach of a third state's sovereignty. Regarding secondary sanctions in the narrow sense, US practice is in clear opposition with non-US positions, as exemplified by the various diplomatic protests that have accompanied the imposition of extensively extraterritorial US primary and secondary sanctions.[36]

Beyond international politics and diplomatic strategies, it is worth recalling here that the protection of sovereignty lies solely in the competence of states themselves, who are therefore the only legal subjects in a position to uphold and defend their legal interests for third states to respect their sovereignty. In other – more practical – words, private persons affected by secondary sanctions are not in a position to rely on this intrinsically inter-state argument in Court, as the sovereign rights at stake are the states' and not theirs. At most, they can invite the relevant jurisdiction to take due account of the case at hand and its implications on foreign relations.[37] This sheds light on two complementary effects of public practice: its direct contribution to the evolution of public international law applicable to secondary sanctions on the one hand (Section 2.4.1.1) and its shaping of transnational relationships potentially affected by secondary sanctions on the other hand (Section 2.4.1.2).

[35] Kerbrat (n. 11); Ruys and Ryngaert (n. 20).

[36] See Section 2.2.2.

[37] For US practice, see the rule of reason described in the American Law Institute, *Restatement of the Law (Fourth), Foreign Relations Law of the United States* (American Law Institute Publishers, 2018), § 405; The American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (American Law Institute Publishers, 1987), §403. Regarding the evolution of the presumption against extraterritoriality in US case law, see C. Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2008); W. S. Dodge, 'Jurisdictional Reasonableness under Customary International Law: The Approach of the Restatement (Fourth) of US Foreign Relations Law' (2019) 62 *Questions of International Law, Zoom-in* 5.

2.4.1.1 An Evolutive International Legal Policy?

States, when imposing and reacting to unilateral sanctions, alone or through their common action within competent international organisations such as the EU, contribute to the progressive development of public international law and the shaping of the legal regime applicable to secondary sanctions. Long-term variations in international practice are therefore worth considering here, with the distinction of three different situations: first, the unilateral secondary sanctions adopted with no connection to the international security system set up by the UN Charter; second, the unilateral secondary sanctions adopted in addition to UNSC sanctions supporting collective security; and third, the unilateral secondary sanctions adopted as a substitute for UN measures in the context of a stalemate at the UNSC.

First, one of the oldest examples of US unilateral secondary sanctions with no connection to UNSC sanctions, and that are still in force, can be drawn from the US sanctions on Cuba. They rest on the 1996 Helms–Burton Act, whose Title III provides for the imposition of secondary sanctions on the companies of third countries doing business in Cuba. If their business activities are linked to previously US-owned assets nationalised by Castro's regime in 1959, for which US unilateral primary sanctions have been imposed on the country, foreign companies are considered to be trafficking in these nationalised assets and are then subject to US secondary sanctions. After the official protests of the then European Communities and the opening of a case at the World Trade Organization (WTO),[38] the Clinton administration decided to suspend the application of Title III, which in practice mainly affected European (tourism) companies. Since 1996, the United Nations General Assembly has adopted a yearly resolution expressing its general disapproval of such unilateral sanctions on Cuba,[39] a practice that is considered a landmark for the expression of global disagreement on the use of extensively extraterritorial primary and secondary sanctions. It is noteworthy that the 2019 decision of the Trump administration to start implementing Title III of the Helms–Burton Act has

[38] See WTO, Dispute Settlement Body, United States – The Cuban Liberty and Democratic Solidarity Act, Request for Consultations by the European Communities, WT/DS38/1, 3 May 1996; WTO, Dispute Settlement Body, United States – The Cuban Liberty and Democratic Solidarity Act, Request for the Establishment of a Panel by the European Communities, WT/DS38/2, 8 October 1996; WTO, Dispute Settlement Body, United States – The Cuban Liberty and Democratic Solidarity Act, Communication from the Chairman of the Panel, WT/DS38/5, 25 April 1997 ('In the context of the negotiations for a mutually agreed solution to the present dispute, the European Communities have requested the Panel to suspend the panel proceedings in accordance with Article 12.12 of the DSU.'); WTO, Dispute Settlement Body, United States – The Cuban Liberty and Democratic Solidarity Act, Lapse of the Authority for Establishment of the Panel, WT/DS38/6 ('Since the Panel was not requested to resume its work, pursuant to Article 12.12 of the DSU, the authority for establishment of the Panel lapsed as of 22 April 1998.').

[39] The last to date being UNGA Res. 77/7, Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba, UN Doc. A/RES/77/7, 3 November 2022 (adopted with 185 votes in favour, 2 against and 2 abstentions).

triggered much fewer formal European reactions than in the 1990s, presumably given the reliance upon the EU Blocking Regulation that was still in force since its adoption in 1996,[40] but especially with no general move at the WTO level.[41] On the side of countries that are targeted by such fully unilateral sanctions, however, new litigation avenues are being explored, as exemplified by the situation in Venezuela brought before the International Criminal Court (ICC). While the country situation had been referred to the ICC by a group of states Parties to the Rome Statute in 2018 (Venezuela I),[42] Venezuela also referred its own country situation to the ICC in 2020 (Venezuela II), to point to the potential responsibility of US officials for crimes against humanity in connection with the unilateral sanctions – including secondary sanctions – imposed on the country since 2015.[43]

Second, other evolutions are worth considering here, as they consist in using unilateral secondary sanctions in addition to less stringent collective sanctions decided by the UNSC. As US practice shows, secondary sanctions are presented in this context as tools aimed at enhancing the effectiveness of UNSC-decided primary sanctions. This was especially the case of the US sanctions imposed on Iran before the termination of UN measures in 2015 as a result of the JCPOA,[44] and it is still the case of North Korea sanctions, which triggered 22 per cent of secondary sanction designations in 2021.[45] Both of these examples are related to nuclear non-proliferation. The lawfulness of the use of unilateral sanctions in conjunction with UN collective sanctions has been discussed elsewhere,[46] and it is worth noting that the EU has progressively joined the US in this line of practice – though only through the imposition of additional primary sanctions. This is particularly well illustrated in the case of Iran, on which the EU imposed unilateral primary sanctions from 2010 in addition to the implementation of UNSC collective sanctions and where the waiver of Western unilateral sanctions has been used as a key

[40] EU Blocking Statute (n. 15).

[41] L. Chercheneff, 'Challenging Unilateral and Extraterritorial Sanctions under International Economic Law: Exploring Leads at the WTO and the OECD', in C. Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar Publishing, 2021), pp. 239–254.

[42] On 3 November 2021, the ICC Prosecutor opened the investigation into the Venezuela I Situation (Case ICC-02/18), further to a referral submitted by a group of states Parties on 27 September 2018 (namely the Argentine Republic, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru). On 27 June 2023, the Pre-trial Chamber I issued its decision authorising the ICC Prosecutor to resume its investigation in the Venezuela I situation. ICC, PTC I, Decision authorising the resumption of the investigation pursuant to article 18(2) of the Statute (Situation in the Bolivarian Republic of Venezuela I), ICC-02/18-45, 23 June 2023.

[43] On 13 February 2020, the Office of the Prosecutor of the ICC received a referral from the government of the Bolivarian Republic of Venezuela concerning the situation in its own territory (Situation in the Bolivarian Republic of Venezuela II, Case ICC-01/20). See also: D. Akande, P. Akhavan and E. Bjorge, 'Economic Sanctions, International Law, and Crimes against Humanity: Venezuela's ICC Referral' (2021) 115 *American Journal of International Law* 493.

[44] UNSC Res. 2231, UN Doc. S/RES/2231, 20 July 2015.

[45] Bartlett and Ophel (n. 30).

[46] Thouvenin (n. 10).

lever in the negotiation of the JCPOA.[47] Coming back to our focus on secondary sanctions, the use of such controversial instruments in conjunction with legitimate UN collective measures seems to trigger much fewer diplomatic reactions and diplomatic démarches contesting the use of secondary sanctions than in the previously examined case of unilateral sanctions adopted independently of any UNSC sanctions. On the side of targeted countries, however, inter-state litigation avenues prove helpful – when available – to clarify the regime of unilateral sanctions, including secondary sanctions, under international law. In this way, in the case *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America)*, still pending on the merits at the time of writing, the International Court of Justice ordered provisional measures to request that the US ensure its unilateral sanctions on Iran do not affect the exportation to this country of food, medicine and equipment linked to civil aviation.[48]

Third, most recent practice concerns situations linked to international peace and security in which the UNSC is impeded from acting because of the veto of one of its permanent members. Two major examples can be taken from the last decade: the annexation of Crimea by Russia in March 2014 and the further invasion of Ukraine in February 2022. Both situations correspond to a serious breach of the prohibition against the use of force in international relations set up by Article 2 (4) of the UN Charter.[49] They also amount to serious breaches of obligations under peremptory norms of general international law in the sense of international law governing state responsibility,[50] which triggers an obligation for all states to cooperate to bring this serious breach to an end and not to recognise the lawfulness of a situation created by this breach.[51] From this specific perspective, the international unilateral sanctions adopted against Russia in 2014 and 2022 can be considered as part of the measures designed to fulfil these cooperation and non-recognition obligations.[52] In 2023, Russia has often been considered the most sanctioned country in the world.[53]

[47] C. Beaucillon, 'La Sanction des "Etats proliférants", remarques sur l'interaction entre mesures collectives et mesures unilatérales dans le cas iranien' (2015) 16 *Annuaire Français de Relations Internationales* 593.

[48] *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America)* (Order on the Request for Indication of Provisional Measures) [2018] ICJ Rep 2018, 623.

[49] Territorial integrity of Ukraine, UNGA Res. 68/262, UN Doc. A/RES/68/262, 1 April 2014; Aggression against Ukraine, UNGA Res. ES-11/1, UN Doc. A/RES/ES-11/1, 2 March 2022.

[50] Article 40 of the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), Annex to UNGA Res. A/56/83, UN Doc. A/RES/56/83, 12 December 2001.

[51] Article 41 of the ARSIWA (n. 50).

[52] See Chapter 10.

[53] M. Bergmann, I. Toygür and O. Svendsen, 'A Continent Forged in Crisis: Assessing Europe One Year into the War', Centre for Strategic & International Studies, 16 February 2023, www.csis.org/analysis/continent-forged-crisis-assessing-europe-one-year-war; C. Mills, 'Sanctions against Russia', United Kingdom House of Commons Library Research Briefing, 5 July 2023, https://researchbriefings.files.parliament.uk/documents/CBP-9481/CBP-9481.pdf.

In this context, recourse to secondary sanctions is reported to have spread beyond US practice.[54] On the one hand, pressure has indeed been placed on countries liable to play a specific role in support of Russia's invasion: Belarus, Iran and Syria.[55] Hence, in relation specifically to the involvement of Iranian-origin unmanned aerial vehicles/drones on the battlefield, secondary sanctions are reported to have been adopted not only by the US but also by Australia, Canada and New-Zealand.[56] On the other hand, the will to strengthen the effectiveness of unilateral sanctions against Russia has led to the progressive widening of the targeting criteria. At EU level,[57] sanctions against Russia were amended in October 2022 in order to freeze the assets of those 'facilitating infringements of the prohibition against circumvention' contained in the main EU Council Regulations and Decisions establishing sanctions against Russia.[58] This textual evolution, which considerably widens the listing criteria in order to focus on third parties helping to circumvent EU sanctions, has been assimilated by some commentators,[59] as well as law firms, as a way to target 'individuals/entities in a secondary sanctions manner',[60] and this has been flagged as such in a 2023 European Parliament's Briefing on US sanctions.[61]

The aforementioned developments suggest that the invasion of Ukraine by Russia could lead to a shift in international sanctions practice, whereby the use of secondary sanctions would be perceived as a (legitimate) means to ensure the effectiveness of some specific sanctions regimes. If repeated and confirmed in the future, such an evolution would be a major shift in EU practice. This hypothetical evolution towards a broader use of secondary sanctions should also be examined against a now settled evolution in sanctions practice: the widening of unilateral primary sanctions senders. A member of the Non-Aligned Movement (NAM), Russia had indeed long opposed the use of unilateral sanctions but blatantly engaged in this practice in 2014 through the adoption of so-called

[54] On the US readiness to take recourse to secondary sanctions when necessary, see: United States, The White House, 'Press Gaggle by Principal Deputy Press Secretary Karine Jean-Pierre and National Security Advisor Jake Sullivan', 25 March 2022, www.whitehouse.gov/briefing-room/press-briefings/2022/03/25/press-gaggle-by-principal-deputy-press-secretary-karine-jean-pierre-and-national-security-advisor-jake-sullivan-en-route-rzeszow-poland/.

[55] Mills (n. 53).

[56] Ibid.

[57] See Chapter 19.

[58] Article 3(1) of Council Regulation (EU) 2022/1905 of 6 October 2022 amending Regulation (EU) No. 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, [2022] OJ L 259I.

[59] See Chapters 11 and 19.

[60] 'Keeping You up to Speed, Russian and Belarus Sanctions Update', Eversheds Sutherland, 11 October 2022, www.eversheds-sutherland.com/documents/services/litigation/Russian%20and%20Belarusian%20sanctions%20update%20-%2011%20October%202022%20-%20Eversheds%20Sutherland(205725201.2).pdf, 7.

[61] European Parliament, European Parliamentary Research Service (EPRS), 'Russia's War on Ukraine: US Sanctions', 17 February 2023, www.europarl.europa.eu/RegData/etudes/BRIE/2023/739358/EPRS_BRI(2023)739358_EN.pdf, 8, endnote 1.

counter-sanctions against the US and the EU.[62] Triggering a first shift in international practice towards a broader use of unilateral sanctions, Russia has been joined by China,[63] yet another member of the NAM, which officially adopted in 2019 its first unilateral sanctions legislation.[64] While too early to draw definitive conclusions on the use of secondary sanctions in the future, contemporary developments in the field indicate that state practice might be at a turning point, with on the one hand a generally less controversial recourse to unilateral sanctions by traditionally opposed states such as Russia and China and on the other hand an apparent Western ease in using secondary sanctions (US practice) or like mechanisms (EU practice) to ensure respect for unilateral sanctions aimed at backing up core international law rules.

2.4.1.2 Perfectible Tools to Shape Transnational Relations Affected by Secondary Sanctions

It follows from the foregoing discussion that secondary sanctions may be used in three highly different settings with wide variations in legitimacy: fully unilateral sanctions such as those imposed on Cuba, and which enjoy very little international legitimacy; unilateral sanctions complementing UN sanctions such as those imposed on Iran and North Korea, and which benefit from a temporary status quo; and unilateral sanctions compensating for the UNSC's failure to act such as those currently imposed on Russia, which benefit from the fullest possible legitimacy under *jus cogens* and the international law of state responsibility.

This variability in turn implies that flexible legal tools are needed at the public law level in order to adequately shape the transnational relations that are affected by secondary sanctions, depending on their degree of perceived lawfulness and legitimacy. Beyond the diplomatic positions and international legal strategies exposed here, public practice can effectively oppose secondary sanctions by limiting their effects on a state's territory and on a state's nationals.

This is the primary purpose of so-called blocking statutes, whose aim is to prohibit the persons under the legislating state's jurisdiction – personal or territorial – from abiding by foreign secondary sanctions.[65] These mechanisms aim at placing private persons in between two contradictory obligations, a situation that can

[62] I. Timofeev, 'Unilateral and Extraterritorial Sanctions Policy: The Russian Dimension', in C. Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar Publishing, 2021), pp. 90–109.

[63] See Chapter 17.

[64] Cai (n. 32).

[65] D. Ventura, 'Contemporary Blocking Statutes and Regulations in the Face of Unilateral and Extraterritorial Sanctions', in C. Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar Publishing, 2021), pp. 221–238.

be taken into consideration in private practice litigation as will be developed in Section 2.4.2. However, the success of such blocking legislation essentially depends on the political determination of the blocking states, which have to make the decision to keep their legislation up to date with legislation related to foreign secondary sanctions and to potentially act in relation to private litigation procedures to support the position of their national companies in court. To take only one example in relation to the cases discussed earlier, while the EU adopted the so-called Blocking Regulation in 1996 in reaction to US secondary sanctions, this text has been updated only a few times since its adoption and it fails to cover all secondary sanctions currently in place.[66] Due to the political situation linked to the invasion of Ukraine and the need to strengthen the transatlantic partnership, the revision of the Blocking Regulation, which was proposed in 2021 by the European Commission to strengthen the EU's economic and financial resilience,[67] has been delayed. Meanwhile, China is continuing to adapt its legal order to the international practice of secondary sanctions and reportedly adopted in 2021 its first blocking statute to counter US secondary sanctions,[68] which affect an important number of Chinese entities (see Section 2.3).[69]

Other instruments have recently appeared in public practice in order to counter the extraterritorial impacts of foreign legislation and to strengthen domestic resilience. This is the case of the EU Anti-Coercion Instrument (ACI), which aims to react to situations where a third country

> interferes in the legitimate sovereign choices of the Union or a Member state by seeking to prevent or obtain the cessation, modification or adoption of a particular act by the Union or a Member state, – by applying or threatening to apply measures affecting trade or investment. For the purposes of this Regulation, such third-country actions shall be referred to as measures of economic coercion.[70]

These situations clearly include – but are not limited to – secondary sanctions, and further EU institutional practice shall be determining in this respect.[71]

[66] EU Blocking Statute (n. 15); EU Blocking Statute 2018 Amendment (n. 22).

[67] European Commission, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, 'The European Economic and Financial System: Fostering Openness, Strength and Resilience', COM/2021/32 final, 19 January 2021.

[68] China, Ministry of Commerce, Order No. 1 of 2021 on Rules on Counteracting Unjustified Extra-Territorial Application of Foreign Legislation and Other Measures, 9 January 2021, http://english.mofcom.gov.cn/article/policyrelease/announcement/202101/20210103029708.shtml#:~:text=Article%201%20These%20Rules%20are,and%20other%20measures%2C%20safeguarding%20national.

[69] See Chapter 17.

[70] Article 2 of the European Commission, Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union and Its Member states from Economic Coercion by Third Countries, COM(2021) 775 final, 8 December 2021, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021PC0775, 15.

[71] See Chapter 9.

2.4.2 *Private Practice*

When exposed to secondary sanctions, private practice faces the challenge of risk evaluation. Usually, this evaluation is conducted from the perspective of a potentially affected private activity, be it a money transfer, an insurance contract or a complex international industrial consortium. Schematically, three keys of risk analysis are privileged in private practice. The first rests on the analysis of the material aspects of the activity at stake and their relation to a primary-sanctioned sector. The second rests on the persons involved in the execution of the examined activity and their possible nationality link with a sanctioning state or, on the contrary, with a sanctioned state. The third rests on the verification of where the activity is to take place and its potential link to existing primary sanctions. Through a refined and ad hoc risk-mapping, private persons are able to determine the degree of risk of a specific activity and make their business choices accordingly.[72]

Thus, it is clear that the implementation of secondary sanctions rests on two main complementary levers: choice and repression. As already explained, foreign companies that operate in connection with US primary sanctions may be subjected to US secondary sanctions. Thereby, they may not only be cut off from the US market but also be directly subjected to US primary sanctions and then prosecuted for the violation of those sanctions in the US. In this light, many foreign companies prefer to cut off the business relations that may lead to their being caught in a secondary sanctions spiral. This choice is clearly encouraged, as shown by the systematic provision of a wind-down period when new secondary sanctions are imposed, expressly allowing businesses to clear their risky operations by a specific date so as not to risk the introduction of proceedings by the sanctioning authorities (Section 2.2.2 and Figure 2.3).

Companies are all the more prompted to do so, as the repression of sanctions violations in the US is very strong. Violating businesses certainly face high economic and reputation losses if cut off from the US market by way of secondary sanctions, which can sometimes lead to their complete disappearance as was the case of the Latvian ABLV Bank.[73] Repression in the US can also include the payment of high civil and criminal penalties, as exemplified by the well-known French BNP Paribas case,[74] and might ultimately lead to the individual criminal prosecution of top foreign company leaders, as illustrated by the Chinese Huawei case.[75]

[72] See Chapters 3, 4 and 15.

[73] I. Znotiņa and P. Iļjenkovs, 'Using Extraterritorial Sanctions in the Fight against Financial Crime in Latvia: From Silver Lining to Over Compliance', in C. Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar Publishing, 2021), pp. 288–305.

[74] J. Ax and A. Viswanatha, 'France's BNP to Pay $9 Billion in U.S. Sanctions Case, Face Dollar-Clearing Ban', Reuters, 30 June 2014, www.reuters.com/article/us-bnp-paribas-settlement-idUSKBN0F52HA20140630.

[75] K. Freifeld and J. Stempel, 'U.S. Judge Dismisses Indictment against Huawei CFO That Strained U.S.-China Relations', Reuters, 2 December 2022, www.reuters.com/legal/us-judge-dismisses-indictment-against-huawei-cfo-that-strained-us-china-2022-12-02/.

The legal consequences of the wind-down effect of secondary sanctions are protean and can sometimes be similar to those of unilateral primary extraterritorial sanctions. Those have been explored elsewhere from the perspective of their impact on human rights,[76] as well as from the standpoint of their specific impact on private litigation in national and arbitral courts.[77]

A specific legal issue arises in the case of secondary sanctions, and deserves explicit development here. What protection can foreign companies expect from their national governments when targeted by national private proceedings grounded on secondary sanctions? Indeed, besides prosecution by US authorities for the violation of secondary sanctions, foreign companies can face private litigation stemming directly from secondary sanctions. This is the case of the US secondary sanctions targeting foreign companies operating in Cuba, with Title III of the Helms–Burton Act of 1996 allowing US citizens to sue in US courts the persons and entities that can be considered as trafficking in US property confiscated by the Castro regime.

Various lawsuits have been introduced on these grounds, against US, Cuban and European companies. Amongst these, two are of specific interest to this chapter. In December 2022, the US District Court of Florida ruled in favour of the heirs of the Havana Docks Corporation and against four US and European cruising companies – the Royal Caribbean Cruises, MSC Cruises, Carnival Corporation and Norwegian Cruise Line – for their use of the port of Havana between 2015 and 2019, with a total amount of around 440 million dollars in damages dispatched between the four defendants, who lodged an appeal against the decision.[78] With this first major condemnation of European companies under Title III of the Helms–Burton Act, the issue of the protection that foreign companies can expect from their national governments is all the more pressing. In this respect, the case *Maria Dolores Canto Marti* v. *Iberostar Hoteles y Apartamentos S.L.*[79] introduced in January 2020 by a US citizen against a Spanish company, is quite telling. In a nutshell, Iberostar requested a motion to stay, on the grounds of the prohibition made by the EU Blocking Regulation to EU companies against participating in US proceedings linked to Title III of the Helms–Burton Act without an express authorisation from the EU Commission. Iberostar argued that a breach of the EU Blocking

[76] See especially Chapters 22–25 in Part IV: Impact on Human Rights, in C. Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar Publishing, 2021), pp. 366–457.

[77] See especially Chapters 18–20 in Part III: Impact on Economic Operators, in C. Beaucillon (ed.), *Research Handbook on Unilateral and Extraterritorial Sanctions* (Edward Elgar Publishing, 2021), pp. 306–364.

[78] United States, District Court for the Southern District of Florida, *Havana Docks Corp.* v. *Carnival Corp.* (No. 19-cv-21724), v. *MSC Cruises SA CO et al.* (No. 19-cv-23588), v. *Royal Caribbean Cruises, Ltd.* (No. 19-cv-23590), v. *Norwegian Cruise Line Holdings, Ltd.* (No. 19-cv-23591), 592 F.Supp.3d 1088 (2022).

[79] United States, District Court for the Southern District of Florida, *Maria Dolores Canto Marti* v. *Iberostar Hoteles y Apartamentos S.L.*, Civil Action No. 20-20078-Civ-Scola (S.D. Fla. 16 September 2020).

Regulation would expose the company to a 600,000 euro fine according to Spanish law. In the interests of international comity, and in order to give the European Commission time to authorise – or not – Iberostar to participate in the proceedings, the court granted Iberostar a motion to stay, with an obligation to report on the situation every thirty days. After three years of stay, and with no final decision from the European Commission in the end, the Eleventh Circuit Court reversed the motion to stay in November 2022 and remanded the case.[80] Two contrasting conclusions stem from this US case law. First, the EU Blocking Statute proves an efficient tool to use in US courts to obtain a stay in proceedings, provided that its implementation by national authorities is effective and sufficiently deterrent – which in turn calls for concrete public action to ensure appropriate legislation is adopted in this respect. Second, the European Commission seems to either grant or withhold its authorisation to EU companies to appear in US Courts depending on the case at hand and, presumably, in consultation with the company in question and its national government. Arguably, the solution to be found in cases against non-US companies will set an important precedent in this respect and should eventually guide the adaptation of blocking statutes and other relevant instruments designed to protect third countries' interests and companies from the impact of foreign secondary sanctions.

2.5 CONCLUSIONS

With the benefit of hindsight, there is no denying the fact that the clearer the definition of secondary sanctions, the better our theoretical and practical knowledge of them will be. Taking the analysis a step further, the various questions raised in this chapter enable the identification of three main avenues of academic research, in areas that will certainly call for innovations in future legal practice.

Firstly, this chapter has shown that the current international practice of secondary sanctions might be at a turning point. This derives, firstly, from the shift among major NAM powers towards an open practice of unilateral primary sanctions, to which they were traditionally opposed. The change also flows, secondly, from the apparent Western ease in taking recourse to secondary sanctions or like mechanisms in reaction to the Russian invasion of Ukraine. On this last point, it remains to be seen, though, whether it is merely a one-off Western reaction to a blatant breach of international law or if it is actually the tipping point in a long-lasting evolution of EU positions on extensive extraterritoriality in the field of sanctions.

Secondly, it is certain, though, that global knowledge of the exact impact of secondary sanctions on national companies and transnational relationships is lacking. This information is instead fragmented amongst the national authorities on which

[80] United States, Court of Appeals, *Maria Dolores Canto Marti* v. *Iberostar Hoteles y Apartamentos S.L.*, 54 F.4th 641 (11th Cir. 2022).

the affected companies depend and to which they may report. In turn, the sharing of this sensitive information – even in an inter-state diplomatic context – remains, at most, occasional. However, this information is crucial for a better understanding of the systemic and combined effects of secondary sanctions, which, by nature, aim at optimising and shaping transnational (business) nexuses.

Thirdly, this chapter has also shown how secondary sanctions help to build better knowledge on the articulation of public and private practice, ranging from the legislative and diplomatic strategies developed by numerous states down to private litigation in commercial matters at the transnational level. Public and private practice nevertheless often operate autonomously from one another, with their respective daily actors at times ignorant of each other's activity. The combination of public and private practice is therefore certainly a path to follow in the field of secondary sanctions, as clearly illustrated by the use of blocking statutes in foreign courts. Other avenues should be explored in this direction, such as courts' interpretations of international public order applicable to litigation related to secondary sanctions, so as to excuse or refuse specific transnational behaviour adopted in a business situation affected by unilateral sanctions with contested international lawfulness and variable legitimacy.[81]

As the need arises to consider these technical issues in the more general context of intense development of lawfare in international relations, it is clear that it is high time better knowledge and more refined legal tools are developed to tackle the secondary sanctions phenomenon and its worldwide consequences.

[81] See Chapters 3, 15 and 16.