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die Europäische Gemeinschaft**

Summary

The Implementation of UN Economic Sanctions by the European Community

The UN Security Council's authorisation to impose mandatory sanctions under Chapter VII UNC on a UN Member State in case of a peace-threatening situation gives rise to a complex relationship between the UN organs, the UN Member States and the target State. The situation became even more intricate when in the 1990th the European Community appeared as an international actor in the field of economic sanction regimes. The main purpose of this study has been to examine the general conditions of international and European law, under which the European Community may participate in the implementation process of UN sanctions, as well as the practice of the EC concerning the implementation of UN economic sanctions into the European legal order. The findings of the study can be summarised as follows:

The Imposing of Economic Sanctions by the United Nations

- 1 Chapter VII UNC authorises the Security Council to impose mandatory peaceful or military sanctions on a Member State (Arts. 41, 42 UNC) whenever the legal preconditions of Article 39 UNC are met. Sanctions taken by the Security Council aim at coercing the target state into ceasing a peace-threatening situation and conforming with international law. Mandatory sanctions applied by the Security Council to a UN Member State according to Chapter VII UNC play an eminent role within the international system of collective security. They are the most important example for centralised coercive measures in international law. These centralised coercive measures which are decided upon by a authorised organ of an international organisation against a Member State, are to be distinguished from unilateral coercive measures carried out by an individual State or an international organisation against a non-member.
- 2 The Security Council disposes of wide political discretionary powers in

determining whether the preconditions of Art. 39 UNC are met and which sanction measures are to be taken by the UN members to restore peace; it can act within the wide range set by *ius cogens*.

- 3 Mandatory sanctions imposed under Art. 41 UNC are binding upon UN Member States. Therefore UN members are legally obliged to comply with a UN resolution by implementing its regulations in the national legal order. Likewise the target State has recognised, by entering into UN membership, the binding force of Security Council decisions according to Chapter VII UNC. Consequently it must not object to the legality of the implementation of a Security Council resolution; even breaches of international law resulting from the implementation of a UN resolution by UN Member States are justified by the binding character of the underlying Security Council resolution.
- 4 Economic sanctions play an eminent role within the practice of the UN Security Council when acting according to Chapter VII UNC. In most cases economic sanctions ordered by the Security Council are imposed as an embargo, i.e. as the legal prohibition or restriction of commerce for foreign policy reasons being directed at the individuals and the legal entities of the State imposing it. An embargo can be realised as an embargo on trade of goods, a capital embargo, a transportation embargo, an embargo concerning services or by a combination of these measures. In addition the sanctioning of treaties violating an embargo's restrictions is of substantial relevance within the framework of UN economic sanctions to guarantee the effectiveness of embargo restrictions in civil law.

The Right of the European Community to Implement Economic Coercive Measures in the European Legal Order – Requirements under International Law

- 5 The UN Member States are authorised to implement Security Council resolutions within an appropriate international agency (Art. 48 II UNC) like the European Community; hence the EU Member States meet the requirements of Arts. 25, 48 UNC by implementing mandatory UN sanctions into the European legal order. Thus the European Community is entitled towards the United Nations to participate in the implementation process; due to the justifying character of the underlying mandatory UN resolution the target State must not object to the legality of the EU implementation act.

- 6 When implementing a Security Council resolution, the European Community is entitled to issue additional regulations, e.g. to put a UN decision into concrete terms, to ensure the controlling of the trade restrictions or for administrative reasons. However, these regulations must not change the content of the underlying resolution in a substantial manner.
- 7 In case the European Community should enact embargo measures that go beyond a Security Council resolution in a substantial manner, these measures would not be justified by the underlying UN sanction regime. Instead they would have to be considered as unilateral coercive measures which would have to comply with the requirements under international law. Generally, respective economic coercive measures are to be considered as mere unfriendly acts (retorsions) covered by the common rules of international law; above all, respective economic coercive measures have to meet the requirements of the prohibition of the use of force and of the principle of non-discrimination. In rare cases economic coercive measures might violate the principle of non-intervention, basic human rights, or specific obligations resulting either from a multilateral treaty such as GATT or from a bilateral treaty. In these cases justification may possibly be provided by the law of reprisals, the *exceptio non adimpleti contractus* or the right of collective self-defence. In case the UN Security Council should already have imposed specific economic sanctions, more extensive unilateral coercive measures would have to be in line with the aims of the UN sanction regime to be lawful.

The Right of the European Community to Implement Economic Coercive Measures in the European Legal Order — Requirements under European Law

- 8 Before the Treaty on European Union came into effect, the European Community was entitled to enact embargoes on trade of goods (including weapons, coal and steel), embargoes concerning the cross-border supply of services and embargoes concerning connected payments and transportation services according to Art. 113 EEC Treaty; in addition transportation embargoes could be imposed according to Art. 75 I EEC Treaty, and the sanctioning of treaties could be implemented according to Art. 235 EEC Treaty. The practice of a two-stage procedure with a preceding decision of the Member States within the EPC was not required under EC law. This practice nevertheless was politically useful to help

establish a uniform embargo regime at community level. Arts. 223, 224 EEC Treaty could be used by the EC Member States to deviate from such an embargo in the national legal order.

- 9 Arts. 301, 60 EC Treaty [ex-Arts. 228 a, 73 g EC Treaty] constitute an exclusive Community power to implement the whole range of economic coercive measures as imposed by the UN Security Council against a EU non-member State. This power, however, is subject to the necessary precondition that provision for the adoption of such measures must have been made in a common position or in a decision for joint action taken within the framework of the CFSP. This CFSP decision of the EC Member States should lay down the scope, the objectives and the means of an embargo. Upon such CFSP decision the Commission as well as the Council are under obligation to implement an embargo into the European legal order unless the CFSP decision refers to a capital embargo (Art. 60 EC Treaty) or has to be considered as a violation of European or international law.
- 10 Although Art. 301 EC Treaty stipulates a common position or action within the CFSP, without such a decision an economic coercive measure can still be imposed based on Arts. 133, 71, 308 EC Treaty [ex-Arts. 113, 75 I, 235 EC Treaty].
- 11 As soon as the EC Member States decide to take a joint action or to assume a common position concerning economic coercive measures, they will have to translate this into a Community act; they may rely only on the exception clauses of Art. 296, 297 EC [ex-Arts. 223, 224 EC] if they plead that the relevant circumstances have changed after their agreement within the CFSP. A co-ordinated intergovernmental implementation, however, is excluded.

The Duty of the European Community to Implement UN Economic Sanctions into the European Legal Order – Requirements under International Law

- 12 The European Community, the Member States of which are subject to the UN Charter, is obliged to act in conformity with mandatory UN law and to implement Security Council sanctions into the Community framework.

- 13 The mere existence of a Community competence for subjects covered by UN economic sanctions (Arts. 133, 301, 60 EC Treaty) does not bind the Community to Security Council decisions: The legal prerequisites for a succession of the European Community to rights and duties of its Member States cannot convincingly be deduced from analogies to the law of treaty succession applicable to States, nor does the "Hypothekentheorie" appear to provide equitable solutions; Art. 307 EC Treaty [ex-Art. 234 EC Treaty] does not bind the Community in regards to non-member-countries.
- 14 The European Court of Justice established in its "Third International Fruit Company" judgement that the GATT has become legally binding on the European Community, notwithstanding the lack of its formal accession to the GATT. The Court's finding is based on the following rationale: The EC Member States had explicitly conferred powers onto the Community in the field of commercial policy; these powers had actually been exercised by the Community within the GATT; the EC has shown its willingness to be bound by the GATT provisions, and the transfer of powers as well as the exercise of these powers by the Community had been recognised by the other contracting parties to the GATT. These criteria as developed by the Court offer equitable solutions to determine the status of the European Community within other international organisations. Yet, in case of the United Nations these criteria are not fulfilled. During the last 10 years the EC has been active within the framework of the UN, but at the same time the EC Member States still took part in sessions of the UN organs in a very active manner. The EC Member States are not replaced by the EC for the fulfilment of their duties under the UN Charter.
- 15 The European Community is bound to the UN Charter due to the supremacy of Charter obligations over all other treaty obligations. Although the Charter cannot be qualified in its entirety as principles of *ius cogens*, as rules *erga omnes* nor as "constitution of the world community", between the UN Member States the Charter is the supreme legal authority with constitutional character prevailing over all other rules of international law except of principles of *ius cogens*. This is affirmed by Art. 103 UNC which lays down the supremacy of Charter obligations over all other treaty obligations. UN Member States cannot circumvent the obligations of the UN Charter by establishing an international organisation. Thus the European Community as such, the members of which were formal members of the UNO (or, in case of Germany, a *de-facto*-member) when the Treaty establishing the EEC came into force, is bound by the

UN Charter as well as by the decisions of the UN Security Council; the obligations created by the Charter or mandatory Security Council decisions prevail over all primary or secondary Community law.

- 16 The European Community and its Member States each are obliged to take the necessary measures to fulfil their duties under the UN Charter. In case of mandatory economic sanctions, it is for the EU Member States and the European Community to decide whether to implement the resolution in the national or in the European legal order.

The Duty of the European Community to Implement UN Economic Sanctions in the European Legal Order – Requirements under European Law

- 17 Provided the European Community has competence to act in relation to its members, it has to take into account its members' international obligations (Arts. 307, 10 EC Treaty [ex-Arts. 234, 5]). Before the Treaty on European Union became effective, the EC organs therefore were obliged in respect of the EU Member States to take the necessary measures to implement binding UN resolutions according to Art. 113 EEC Treaty as soon as a fundamental decision of the Member States within the EPC was made.
- 18 Art. 301 EC Treaty contains the obligation of the EC organs to implement economic coercive measures as decided upon in a CFSP decision regardless whether or not the CFSP decision itself is based on a mandatory UN resolution. An internal obligation to implement economic coercive measures based on Arts. 307, 10 EC Treaty therefore at present is of practical relevance only in cases of capital embargoes according to Art. 60 EC Treaty.

Practice of the European Community

- 19 Since 1990 binding economic sanctions decided upon by the Security Council are implemented for the largest part by the European Community. Before the Treaty on European Union became effective, the European Community had implemented above all embargoes on trade of

goods including connected payments and transportation services on the basis of Art. 113 EEC Treaty; arms embargoes and embargoes concerning coal and steel were implemented on a national level. When the European Community implemented independent transportation embargoes or embargoes concerning services on the basis of Art. 113 EEC Treaty, the legality of such regulations was doubtful. The sanctioning of treaties violating the embargo's restrictions was implemented in the European legal order on the basis of Art. 235 EEC Treaty. Since the Treaty on European Union's entry into force, the European Community had implemented embargoes on trade of goods, capital embargoes, transportation embargoes, embargoes concerning services and regulations sanctioning treaties violating the embargo's restrictions on the basis of Arts. 228 a / 301, 73 g / 60 EEC. Solely arms embargoes still are implemented by the Member States even if a decision taken within the CFSP entitles the EC to do so.

- 20 For the most part, embargo regulations of European Community comply with the underlying UN resolutions. In rare cases the European Community enacted embargo measures going beyond Security Council resolutions substantially (e.g. a general embargo concerning services against the Federal Republic of Yugoslavia); these measures met the requirements of international law. Several times the European Community did not implement Security Council sanctions into the community framework (e.g. arms embargoes, several transportation embargoes and capital embargoes) in spite of a Community power. Nowadays, Security Council sanctions are implemented without restrictions into the Community framework; only arms embargoes still are implemented by the EU Member States.