REPORT

REGARDING

INTERNATIONAL FINANCIAL SANCTIONS

APRIL 2013

This report has been prepared at the request of Dansif by Ole Spiermann, a partner in the dispute resolution and public law groups of Bruun & Hjejle Law Firm in Copenhagen and once professor in international law at the University of Copenhagen. Investors should not act on the basis of this report in specific cases, but take appropriate advice.

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1. EXECUTIVE SUMMARY

This report is concerned with sanctions adopted by the United Nations ("collective" or "universal" sanctions) as well as by the European Union (an instance of "multilateral" or "regional" sanctions). Focus is on economic sanctions other than trade sanctions, i.e. financial sanctions, and their application in law to investors and others. Key conclusions are summarised in this executive summary.

1.1 Sanctions apply to private parties only through EU and national laws

Sanctions adopted by the UN are binding upon UN member states. UN sanctions are not binding upon private parties, such as investors and others. On the other hand, part of member states' obligations towards the UN is to implement sanctions in order to make them applicable to private parties in their own systems of law. This member states can do separately (in their own national legal system) or jointly (e.g., through EU restrictive measures).

In practice, implementation in EU member states takes place through EU measures. Occasionally, the EU adopts measures more restrictive than the UN sanctions, which the EU is free to do, at least prima facie. Penalties and other legal consequences of a breach of sanctions are normally set out in national law. This also applies to the EU. In consequence, UN and EU measures are instrumental in defining the content of sanctions while national law is critical in defining legal responsibility for a breach of sanctions.

Importantly, cross-border investments touch more than one system of national law. This means that, in specific cases, private parties need to take a broad approach. National legal systems of all states, countries and territories upon which an investment touches must be taken into account when assessing effects of sanctions and consequences of their breach.

1.2 Sanctions apply to investors and investment managers as well

A breach of sanctions may be committed not only by investors, but also by those assisting investors, such as investment managers. To a large extent, this depends on relevant systems of national law. Normally, it is for national law to define what it takes to constitute complicity.

1.3 Content of sanctions

Not two sanctions regimes have been identical, and one will always have to consult the specific measures as well as their implementation to determine the content of sanctions and consequences of their breach.

A number of countries are subject to severe and thorough sanctions that are general in scope applying to the relevant country at large. Most sanctions today, however, are

tailored as closely as possible to target the specific individuals and entities found to be responsible. In many cases, this suggests that investments should be similarly tailored or targeted in order to be affected by sanctions.

1.4 Obligation of due diligence

Investors and others should implement appropriate means of control and procedures to prevent breach of sanctions.

On the other hand, it is normally a defence in law for the provider of funds or economic resources not to have known or have had reasonable cause to suspect that sanctions were being breached.

1.5 Right of consultation

Investors and others may be encouraged to consult with competent authorities in seeking additional information to assist them in avoiding breach of sanctions. Effective guidance and assistance on the part of public authorities towards investors and others are to be expected. Such guidance and assistance constitute integral parts of effective compliance on the part of states with their obligations under relevant UN and EU measures.

In Denmark, the Danish Business Authority (Erhvervsstyrelsen) is responsible for financial sanctions.

1.6 Standard tailored sanctions

Certain standards for sanctions regime have materialised. In the field of tailored sanctions, key financial sanctions concern the freezing of funds.

Such sanctions normally apply not only to what a person, entity or body subject to sanctions "owns" or "holds"; factual "control" is normally sufficient to trigger a sanction.

Standard sanctions include funds and economic resources made available "indirectly" to or "for the benefit of" a person, entity or body subject to sanctions. An "indirect" payment would be one that is made to someone acting on behalf of the sanctions target. A payment "for the benefit" of such person would be one made to a third party with the intention to satisfy an obligation of the sanctions target.

Normally, competent authorities at nationally level may grant exemptions from sanctions. In addition to ordinary expenses for basic needs, legal representation and services and fund management, exemption may also be granted for purposes of covering extraordinary expenses.

1.7 Sovereign bonds

As regards the few countries that are subject to severe and thorough sanctions applying to the individual country at large, sanctions often involve a ban on all sale and purchase of sovereign bonds, also on a secondary market. This applies or has applied recently to Côte d'Ivoire, Iran, North Korea and Syria.

When it comes to tailored sanctions, a more nuanced assessment is needed. Payment made in connection with issuance of sovereign bonds is in breach of sanctions if, as a matter of fact, funds are thereby made available directly or indirectly to, or for the benefit of, a sanctions target. Trading sovereign bonds and similar instruments on a secondary market does not in itself constitute a breach of sanctions, unless as a matter of fact funds can reasonably be said thereby to be made available directly or indirectly to or for the benefit of the sanctions target.

1.8 Protection of existing investments against sanctions

New sanctions applying to existing investments are likely to inflict losses upon investors. Possible remedies for the investor may be found in contracts pertaining to the investment or national or EU law applicable, just as claims for expropriation under international law cannot be ruled out.

2. SANCTIONS DEFINED

In the international sphere, sanctions are an instrument imposed for purposes of achieving a change in activities or policies. Sanctions are hardly ever given an economic motivation. The objective is not necessarily law enforcement. The Security Council of the United Nations has been vested with the power to impose binding, mandatory sanctions to secure the broad policy objective of international peace and security. Similarly, the European Union has been given a broad mandate to adopt sanctions, often referred to as "restrictive" measures.

Not two sanctions regimes have been identical, and the specific sanctions imposed may be divided into different categories. Sanctions may target states or governments, just as non-state entities, such as terrorist groups. Sanctions may be confined to individuals or specific entities (such as specific members of a government or specific terrorists); these are sometimes referred to as "smart" or "tailored" sanctions. There has been a move towards such sanctions, tailored as closely as possible to target the specific individuals and entities found to be responsible (to the exclusion of other specific individuals and entities, at least prima facie). Still, a number of countries remain subject to severe and thorough sanctions that are general in scope applying to the country at large.

Sanctions may comprise arms embargoes, other specific or general trade restrictions (import and export bans), financial restrictions, restrictions on admission (visa and travel bans), or other measures, as appropriate.

2.1 Economic sanctions

Economic sanctions have trade sanctions and financial sanctions as the two main examples.

Trade sanctions have to do with the exchange of commodities and products. Some sanction regimes, especially in the past, have included comprehensive economic sanctions targeting exchanges of all commodities and products. Such comprehensive sanctions come with humanitarian and other exemptions, which in turn give rise to questions of interpretation. Particular economic sanctions involve more specific categories of commodities and products, such as arms, weapons of mass destruction, natural resources, forms of transport, diamonds, etc.

Financial sanctions may be defined as sanctions (other than trade sanctions) seeking to restrict those subject to sanctions from engaging in financial relations with the outside world. Types of investments may also be prohibited. Again, financial sanctions can be comprehensive, as they often were in the past, requiring freeze of all economic resources and assets and prohibiting transfer of any economic resources or assets, including investments, payments and capital movements. They can also be more par-

ticular, concerning separate entities or individuals. A number of humanitarian and other exemptions normally apply.

In the context of the UN, funds and other financial assets are taken to include, see *Assets Freeze: Explanation of terms posted by the Al-Qaida and Taliban Sanctions Committee on 11 September 2009*, as amended:

- cash, cheques, claims on money, drafts, money orders, bearer instruments, and other payment instruments;
- deposits with financial institutions or other entities and balances on accounts, including but not limited to: (1) fixed or term deposit accounts, (2) balances on share trading accounts with banks, brokerage firms or other investment trading accounts;
- debts and debt obligations, including trade debts, other accounts receivable, notes receivable, and other claims of money on others;
- equity and other financial interest in a sole trader or partnership;
- publicly and privately traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivatives contracts;
- interest, dividends or other income on or value accruing from or generated by assets;
- credit, right of set-off, guarantees, performance bonds or other financial commitments;
- letters of credit, bills of lading, bills of sale; notes receivable and other documents evidencing an interest in funds or financial resources and any other instruments of export-financing;
- insurance and reinsurance.

Similarly, economic resources are taken to include assets of every kind, whether movable or immovable, tangible or intangible, actual or potential, which are not funds but may potentially be used to obtain funds, goods or services, such as:

- land, buildings or other real estate;
- equipment, including computers, computer software, tools and machinery;
- office furniture, fittings and fixtures and other items of a fixed nature;
- vessels, aircraft and motor vehicles;
- inventories of goods;
- works of art, precious stones, jewellery or gold;
- commodities, including oil, minerals, or timber;
- arms and related materiel;
- patents, trademarks, copyrights, trade names, franchises, goodwill, and other forms of intellectual property;

- internet hosting or related services;
- any other assets, whether tangible or intangible, actual or potential.

Similar definitions are found within the EU, see *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*, dated 2 December 2005.

2.2 Non-economic sanctions

Sanctions targeting areas other than basic trade and finance may be referred to as "non-economic" sanctions. They include diplomatic and representative sanctions, transportation sanctions, admission and travel sanctions, aviation sanctions, sporting and cultural sanctions, etc.

2.3 Sanctions currently in force

Consolidated lists of UN sanctions in force are provided on the website of the UN Security Council (http://www.un.org/sc/committees/index.shtml). No general list is provided, but consolidated lists can be found for each of the country-specific or terrorism-related sanctions committees.

A consolidated list of restrictive measures (sanctions) adopted by the European Union can be found on the website of the European External Action Service (http://eeas.europa.eu/cfsp/sanctions/consol-list_en.htm).

These websites are not easily accessible, and investors may want to seek additional guidance in specific cases.

3. UN SANCTIONS: LEGAL BASIS AND INTERPRETATION

The United Nations was established in the aftermath of the Second World War, with novel competences in the field of international peace and security in response to recent events. The Security Council, one of six principal organs of the UN, is given primary responsibility for the maintenance of international peace and security. Under Chapter VII of the United Nations Charter, the Security Council is empowered to issue binding resolutions.

During the Cold War, sanctions were imposed by the Security Council only twice. In 1966, the Security Council imposed sanctions against Southern Rhodesia and, in 1977, it applied sanctions against South Africa. In comparison, the post-Cold War period has witnessed an increase in sanctions. Since 1990, the Security Council has initiated no fewer than twenty-six additional UN sanctions regimes. UN sanctions have become a noteworthy aspect of international relations. Most often, sanctions are non-military. They form a practical response to threats to international peace and security, without the costs and effects of using force.

In UN practice, sanctions come in different forms. They range from comprehensive measures preventing exchanges with the subject of sanctions of virtually all products and commodities to focused measures confined to specific items such as arms, timber or diamonds, or particular activities such as diplomatic relations or travel. Subjects of sanctions have been states and governments, rebel groups and terrorist organisations. There has been increased recognition in the practice of the Security Council of the desirability of impacting decisions-makers within a more general group against which sanctions are imposed. Tailored measures, e.g. asset freezes or travel bans, have become the Security Council's sanctions tool of choice. The objectives underlying sanctions have included ending military occupation, preventing development or acquisition of weapons of mass destruction, countering international terrorism or human rights violations, etc.

The legal basis for the Security Council's sanctions powers is found in Chapter VII of the United Nations Charter. The opening provision is Article 39, which defines the threshold in open-ended language:

> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

The Security Council exercises a wide margin of discretion in fleshing out what constitutes a "threat to the peace", a "breach of the peace", and an "act of aggression". In

practice, the threshold has become whether a situation involves a threat to international peace and security. Such threat may stem from an internal crisis in a state.

Article 41 of the United Nations Charter reads:

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

This is not an exhaustive list. Quite to the contrary, the Security Council is provided with flexibility and broad discretion in determining which measures to be appropriate in the circumstances.

While Article 41 is concerned with non-military sanctions, Article 42 has to do with military measures.

It is for the Security Council to decide, when adopting a specific resolution, whether it is binding upon member states consequent to Article 25 of the UN Charter. Ultimately, this is a question of interpretation, which has been presented in the following terms by the International Court of Justice, see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports [1971] 15, para 114:

> "The language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. In view of the nature of the powers under Article 25, the question whether they have been in fact exercised is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council."

To the extent a resolution is binding, member states of the UN are under an obligation to take the necessary steps to implement sanctions adopted by the Security Council. Sanctions are not self-implementing. They turn ineffective if states fail to observe their obligations under Article 25. In practice, the Security Council has delegated the administration of sanctions regimes to a subsidiary organ, most often a so-called sanctions committee. These committees are involved in reporting activities, administration of exemptions and sanctions monitoring more generally.

Sanctions today tend to be couched in language much more specific than in the past, yet questions of interpretation, and ensuing disputes over effects of sanctions, are inevitable. Some guidance was given by the International Court of Justice in 2010, see *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Reports [2010] 403, para. 94:

> "While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also requires that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States, irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions."

It follows that the determination of the content and scope of specific sanctions may be fraught with some difficulties and uncertainties. A practice for interpretation will often materialise, which in turn will be critical for relevant actors to be informed about.

4. EU SANCTIONS: LEGAL BASIS AND INTERPRETATION

Within the framework of the Common Foreign and Security Policy (CFSP), the European Union applies sanctions, in EU terminology referred to as "restrictive measures", with a view to specific CFSP objectives set out in the Treaty on European Union. Article 29 is concerned with "decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature". In some cases, such as arms embargoes and restrictions on admission, EU decisions on sanctions have been implemented by the EU member states (which are bound under EU law to do so). Other sanctions have been implemented by means of EU regulations, which themselves are directly applicable in the member states. Today, Article 215 of the Treaty on the Functioning of the European Union provides:

> "Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.
>
> 2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.
>
> 3. The acts referred to in this Article shall include necessary provisions on legal safeguards."

Sanctions have been frequently imposed by the EU, either on an autonomous EU basis or through the implementation of resolutions adopted by the Security Council. As of 2013, thirty-three restrictive measures regimes were in force within the EU.

To the extent based on resolutions adopted by the Security Council of the UN, the European Court of Justice has been clear that when interpreting EU sanctions "account must be taken of the wording and the purpose" of the resolution adopted by the Security Council to the extent that EU sanctions may not "be interpreted in a manner that is contrary to" the resolution, see Case C-371/03, *Siegfried Aulinger v Bundesrepublik Deutschland*, ECJ Reports [2006] Page I-02207, para 30, and to some extent Case C-84/95, *Bosphorus*, ECJ Reports [1996] Page I-3953, paras 13 and 14.

In its 2004 Basic Principles on the use of Restrictive Measures (Council document 10198/1/04), para 2, the Council of the European Union has furthermore stated that:

> “We will ensure full, effective and timely implementation by the European Union of measures agreed by the UN Security Council”.

This strict implementation method should be seen in conjunction with the fact that “the purpose of the regulation is, inter alia, to ensure a uniform implementation throughout the Community of certain of the measures” in the UN resolutions, see Case C-371/03, *Siegfried Aulinger v Bundesrepublik Deutschland*, ECJ Reports [2006] Page I-02207, para 30.

5. NATIONAL IMPLEMENTATION

5.1 General observations

International sanctions adopted by the Security Council are binding upon member states. They are not, however, directly binding upon private entities and individuals (other than the subjects of sanctions). In order to apply to individuals directly, sanctions must be implemented into national legal systems. Cross-border transactions touch more than one national legal system, all of which must be taken into account when assessing the effects of sanctions.

As with resolutions adopted by the Security Council, some sanctions provided for by the EU have been implemented by member states. Often, however, this is not required. EU is a "supra-national" organisation. Regulations adopted by the EU are directly applicable, creating obligations and rights in the member states for individuals and others as defined in the specific regulation. From the perspective of the EU, regulations override all incompatible national law as well as contractual arrangements. In turn, EU regulations have become the standard method for implementing Security Council resolutions in the member states of the EU.

Effective guidance and assistance on the part of public authorities towards investors and others constitute integral parts of effective compliance on the part of states with their obligations under sanction regimes.

Penalties and other legal consequences for a breach of sanctions (including breach of EU regulations) are normally set out in the relevant national law instrument. These include penalties for complicity. It is normally a defence for the provider of funds or economic resources not to have known or have had reasonable cause to suspect that sanctions were being breached.

5.2 Danish law

In Denmark, resolutions adopted by the Security Council used to be implemented pursuant to Act No 156 of 10 May 1967 (as subsequently amended). Fifteen Security Council resolutions have been implemented on this basis. However, following the entry into force of the Maastricht Treaty, Denmark has increasingly relied on the direct applicability of EU regulations in implementing sanctions.

Breach of sanctions is criminalised, not least in section 110 c of the Danish Criminal Code. Danish authorities can freeze and confiscate economic resources and assets pursuant to the Danish Administration of Justice Act and the Danish Sentencing Act.

Guidance for affected persons and companies is available. The Danish Business Authority (Erhvervsstyrelsen) is responsible for financial sanctions in Denmark, see

www.erhvervsstyrelsen.dk/sanctions_guidelines. Reference can also be made to the website of the Danish FSA: www.finanstilsynet.dk/finanstilsynet/temaer/hvidvask).

Pursuant to Section 7 of the Danish Public Administration Act and general principles of administrative law, the relevant administrative authority is required to "give guidance and assistance to any person who enquires of them in matters within their purview". The general scope of such obligations on the part of administrative authorities under national law is less relevant. This is because in the specific context of sanctions, such obligations go further. As stated above, effective guidance and assistance on the part of public authorities constitute integral parts of effective compliance on the part of states with their obligations under sanction regimes. Standards under Danish law are to be applied accordingly.

6. APPLICATION OF STANDARDS

6.1 EU standard for tailored sanctions

A standard wording within the EU for tailored sanctions has had to do with the freezing of funds, see *Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy*, dated 2 December 2005:

> "All funds and economic resources belonging to, owned, held or controlled by [individual members of the Government of (country) and] any natural or legal person, entity or body [associated with them] as listed in Annex (X) shall be frozen.
>
> No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of natural or legal persons, entities or bodies listed in Annex (X)."

A caveat applies to the last paragraph:

> "2. Article .. (the prohibition against making funds or economic resources available) shall not apply to the addition to frozen accounts of:
>
> (a) interest or other earnings on those accounts; or
> (b) payments due under contracts, agreements or obligations that were concluded or arose prior to the date on which those accounts became subject to the provisions of this Common Position/Regulation and
>
> provided that any such interest, other earnings and payments continue to be subject to Article .. (freezing of funds and economic resources of listed persons and entities)."

The EU standard tailors sanctions to specific persons, entities and bodies listed in an annex. This suggests that funds and economic resources should be similarly tailored or targeted in order to come within the sanctions. To the extent that a person, entity or body to which sanctions apply benefits from funds and economic resources together with others not subject to sanctions, and they do so on an equal footing, this would often form a strong argument why sanctions do not apply.

Lack of evidence as to the facts may disturb an analysis at any given time, something that may have an influence in determining legal consequences if later a breach of sanctions is established.

6.2 Assets owned, held or controlled

Ownership of funds and economic resources depends on the relevant applicable law, i.e. some system of national law. This legal analysis is not, however, solely determinative. It is sufficient that funds and economic resources are "controlled" by a person, entity or body to which sanctions apply.

What is determinative is an overall analysis of all facts taking the situation as a whole and having regard to the objectives of the specific sanctions in place. Sanctions target, at least prima facie, all funds and economic resources needed to satisfy the objectives.

6.3 Direct and indirect payments

Similarly, relevant applicable law also contributes in determining when funds and resources are made available, but again the threshold is lower and not strictly legal. Sanctions include funds and resources made available "indirectly" or "for the benefit of" a person, entity or body subject to sanctions.

Normally, an "indirect" payment is one that is made to someone acting on behalf of the sanctions target.

A payment "for the benefit" of such person is one made to a third party with the intention to satisfy an obligation of the sanctions target.

Again, an overall analysis of all facts taking situation as a whole and having regard to the objectives of the specific sanctions in place is determinative.

6.4 Making funds and resources available

A breach of sanctions, by making funds and economic resources available to or for the benefit of a sanctions target, may be committed not only by investors, but also by those assisting investors, such as investment managers.

6.5 Exemptions

The EU standard also involves a provision on exemptions:

> "1. The competent authority may authorise the release of certain frozen funds or economic resources or the making available of certain funds or economic resources, under such conditions as it deems appropriate, after having determined that the funds or economic resources concerned are:
>
> (a) Necessary to satisfy the basic needs of persons listed in Annex (X) and their dependent family members, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges,

(b) intended exclusively for payment of reasonable professional fees and reimbursement of incurred expenses associated with the provision of legal services,

(c) intended exclusively for payment of fees or service charges for routine holding or maintenance of frozen funds or economic resources,

(d) necessary for extraordinary expenses, provided that (competent authority) has notified the grounds on which it considers that a specific authorisation should be granted, to (the other competent authorities and the Commission) at least two weeks prior to the authorisation.

The competent authority shall inform the competent authorities of the other Member States and the Commission of any authorisation granted under this article."

Exemptions are managed by competent authorities at national level with which applications must be filed. In addition to ordinary expenses for (a) basic needs, (b) legal representation and services and (c) fund management, exemption may also be granted for purposes of covering "extraordinary expenses".

In Denmark, applications for permission to lift a freezing of funds must be submitted to the Danish Business Authority (Erhvervsstyrelsen). Guidelines regarding such applications can be found on the website of the Danish Business Authority (http://www.erhvervsstyrelsen.dk/sanctions_guidelines).

6.6 Penalties

The EU standard also has the following wording:

"1. The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided must be effective, proportionate and dissuasive.

2. The Member States shall notify these rules to the Commission without delay after entry into force of the Regulation and shall notify it of any subsequent amendment."

7. THE CASE OF SOVEREIGN BONDS

As regards the few countries that are subject to severe and thorough sanctions applying to the country at large, sanctions often involve ban on any sale and purchase of sovereign bonds. In 2013, this applies to Côte d'Ivoire, Iran, North Korea and Syria.

7.1 Côte d'Ivoire

Council Regulation 330/2011 of 6 April 2011 inserted Articles 9a and 9b into Regulation 560/2005 imposing certain specific restrictive measures directed against certain persons and entities in view of the situation in Côte d'Ivoire:

> *"Article 9a*
> It shall be prohibited:
> (a) to purchase, broker or assist in the issue of bonds or securities issued or guaranteed after the date of entry into force of this Regulation by the illegitimate government of Mr Laurent GBAGBO, as well as by persons or entities acting on its behalf or under its authority, or by entities owned or controlled by it. By way of exception, financial institutions shall be authorised to purchase such bonds or securities of corresponding value to bonds and securities already held by them and which are due to mature;
> (b) to provide loans, in any form, to the illegitimate government of Mr Laurent GBAGBO, as well as to persons or entities acting on its behalf or under its authority, or to entities that it owns or controls.
>
> *Article 9b*
> The prohibitions set out in Article 2(2) and in Article 9a shall not give rise to any liability of any kind on the part of the natural and legal persons, entities and bodies which made funds or economic resources available if they did not know, and had no reasonable cause to suspect, that their actions would infringe the prohibitions in question."

Council Regulation 330/2011 entered into force on 7 April 2011.

7.2 Iran

Article 34 of Council Regulation 267/2012 of 23 March 2012 concerning restrictive measures against Iran reads as follows:

> "It shall be prohibited:
> (a) to sell or purchase public or public-guaranteed bonds issued after 26 July 2010, directly or indirectly, to or from any of the following:
>> (i) Iran or its Government, and its public bodies, corporations and agencies;

(ii) a credit or financial institution domiciled in Iran or any credit or financial institution referred to in Article 32(2);
(iii) a natural person or a legal person, entity or body acting on behalf or at the direction of a legal person, entity or body referred to in (i) or (ii);
(iv) a legal person, entity or body owned or controlled by a person, entity or body referred to in (i), (ii) or (iii);
(b) to provide brokering services with regard to public or public-guaranteed bonds issued after 26 July 2010 to a person, entity or body referred to in point (a);
(c) to assist a person, entity or body referred to in point (a) in order to issue public or public-guaranteed bonds, by providing brokering services, advertising or any other service with regard to such bonds."

Article 38(1) of Council Regulation 267/2012 provides:

"1. No claims in connection with any contract or transaction the performance of which has been affected, directly or indirectly, in whole or in part, by the measures imposed under this Regulation, including claims for indemnity or any other claim of this type, such as a claim for compensation or a claim under a guarantee, notably a claim for extension or payment of a bond, guarantee or indemnity, particularly a financial guarantee or financial indemnity, of whatever form, shall be satisfied, if they are made by:
(a) designated persons, entities or bodies listed in Annexes VIII and IX;
(b) any other Iranian person, entity or body, including the Iranian government;
(c) any person, entity or body acting through or on behalf of one of the persons, entities or bodies referred to in points (a) and (b)."

Council Regulation 267/2012 entered into force on 24 March 2012.

7.3 North Korea

Council Decision 2013/88/CFSP of 18 February 2013 inserted Article 2a into Decision 2010/800/CFSP concerning restrictive measures against the Democratic People's Republic of Korea:

"*Article 2a*
The direct or indirect sale or purchase of, or brokering or assistance in the issuance of DPRK public or public-guaranteed bonds issued after the entry into force of this Decision to and from the Government of the DPRK, its public bodies, corporations and agencies, the Central Bank of the DPRK, or banks domiciled in the DPRK, or branches and subsidiaries within and outside the jurisdiction of Member States of banks domiciled in the DPRK, or financial entities that are neither

> domiciled in the DPRK nor within the jurisdiction of the Member States, but are controlled by persons and entities domiciled in the DPRK as well as any persons and entities acting on their behalf or at their direction, or entities owned or controlled by them, shall be prohibited."

Council Decision 2013/88/CFSP entered into force on 19 February 2013. An implementing regulation directly applicable to private parties had not yet materialised in March 2013.

7.4 Syria

Article 24 of Council Regulation 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria is as follows:

> "It shall be prohibited:
> (a) to sell or purchase Syrian public or public-guaranteed bonds issued after 19 January 2012, directly or indirectly, to or from any of the following:
> (i) the State of Syria or its Government, and its public bodies, corporations and agencies;
> (ii) any Syrian credit or financial institution;
> (iii) a natural person or a legal person, entity or body acting on behalf or at the direction of a legal person, entity or body referred to in (i) or (ii);
> (iv) a legal person, entity or body owned or controlled by a person, entity or body referred to in (i), (ii) or (iii);
> (b) to provide brokering services with regard to Syrian public or public-guaranteed bonds issued after 19 January 2012, to a person, entity or body referred to in point (a);
> (c) to assist a person, entity or body referred to in point (a) in order to issue Syrian public or public-guaranteed bonds, by providing brokering services, advertising or any other service with regard to such bonds."

Article 27 provides:

> "No claims, including for compensation or indemnification or any other claim of this kind, such as a claim of set-off, fines or claims under a guarantee, claims for extension or payment of a bond, financial guarantee, including claims arising from letters of credit and similar instruments in connection with any contract or transaction the performance of which was affected, directly or indirectly, in whole or in part, by the measures imposed by this Regulation, should be granted to the Government of Syria, its public bodies, corporations and agencies, or to any person or entity claiming through it or for its benefit."

Council Regulation 36/2012 entered into force on 19 January 2012.

7.5 Tailored sanctions

When it comes to tailored sanctions modelled on the standard analysed in Section 6 above, a more nuanced assessment is needed.

Payment made in connection with issuance of sovereign bonds is in breach of sanctions if, as a matter of fact, funds are thereby made available directly or indirectly to or for the benefit of a sanctions target.

Trading sovereign bonds and similar instruments on a secondary market does not in itself constitute a breach of sanctions, unless as a matter of fact funds can reasonably be said thereby to be made available directly or indirectly to or for the benefit of the sanctions target.

8. PROTECTION OF EXISTING INVESTMENTS

Sanctions often apply to investments made before sanctions were adopted, resulting in losses on the part of investors complying with sanctions. Remedies may be found, such as contracts pertaining to the investment or EU or national law of the host state in which the investment is held.

In the EU, a leading case is found in Case C-84/95, *Bosphorus*, ECJ Reports [1996] Page I-3953, paras 21 and 23, in which the European Court of Justice pronounced guiding principles:

- It is settled case-law that the fundamental rights are not absolute and their exercise may be subject to restrictions justified by objectives of general interest pursued by the Community.

- Any measure imposing sanctions has, by definition, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions.

- The importance of the aims pursued by the regulation at issue is such as to justify negative consequences, even of a substantial nature, for some operators.

Still, it is to be decided on a case-by-case basis whether compensation can be claimed on the basis of the right to property guaranteed under Article 1 of Protocol 1 to the European Convention on Human Rights and Article 17 of the EU Charter of Fundamental Rights.

Claims for expropriation under general international law cannot be ruled out either, even though also here the rationale underlying specific sanctions will in most cases leave states with a wide margin of discretion in adopting and implementing UN sanctions and also EU measures. Relevant standards are found in general international law, often supplemented by investment protection treaties. Denmark has more than forty bilateral investment protection treaties (BITs), and more are likely to come in the future at the initiative of the EU. The standard on expropriation reads as follows in the Danish Model BIT:

> "Investments of investors of each Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for expropriations made in the public interest, on a basis of nondiscrimination, carried out under due process of law, and against prompt, adequate and effective compensation."

For further details, see "National Report on Denmark" by Ole Spiermann in ICCA International Handbook on Commercial Arbitration Suppl. 57.