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Sanctioning to change state behaviour

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Sanctioning to change state behaviour

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Sanctioning to change state behaviour

Niccolò Ridi and Veronika Fikfak*

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1 Introduction

It is often said that international law contains no generalised system of sanctions.¹ Although international lawyers' understanding of the concept has grown more sophisticated, and sanctioning is no longer perceived as either aimed at the enforcement of a legal norm² or as an inherently reactive tool,³ there remains some distrust towards it. Thus, the term 'sanction' is employed in its accepted jurisprudential usage, taken to mean that international law cannot be properly understood

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¹ W Michael Reisman, 'Sanctions and Enforcement', *Sanctions and Enforcement* (Princeton University Press 1971) 298 ('International doctrinal literature is rich in laments over the sanction problem').

² Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law*. (Cambridge University Press 2007) 6 (noting that the action commonly referred to as sanctions in the international sphere does not necessarily serve the purpose of enforcing a legal norm').

³ Tom Ruys and Cedric Ryngaert, 'Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Responses to, US Secondary Sanctions' [2020] *British Yearbook of International Law* 6 (defining economic sanctions as 'essentially a political tool').

by reference to the ability to enforce it through coercive action,⁴ and that international law really *is* law even in the absence of Austinian sanctions.⁵ International legal scholarship is replete with such discussions,⁶ which have proved largely successful in demonstrating that states do regard their international legal commitments as binding, irrespective of the absence of sanctions, and that, as the famous Henkin soundbite goes, ‘almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time’.⁷ Alternatively, the word ‘sanction’ is used as a shortcut for those instances of imposition by states—often through collective action—of penalties on other states. This latter category encompasses practices as diverse as the adoption of economic sanctions by states and the adoption of measures under Article 41 by the UN Security Council.

Yet, within the bounds of international law, or notwithstanding it, sanctioning remains pervasive. It does so in ways that do not necessarily conform to the typical use of the term sanction, but which are no less sanctioning in nature. One explanation for this approach is the extensive influence of the law of state responsibility, and the ILC Articles on State Responsibility in particular, which have ‘encoded’⁸ not only the way we think about the subject matter—including the related concept of ‘countermeasures’—but also our thinking about cognate areas and practices.⁹ More fundamentally, the problem has to do with the disconnect between the way sanctioning is conceptualised and the way it is performed.

Two examples will suffice: discussing suspension of concessions in the World Trade context, Steve Charnovitz observes that ‘even without the term “sanction,” that is what the WTO can impose’.¹⁰ Similarly, Shai Dothan has argued that the creation of an institutional website devoted to publishing reports of non-governmental organizations established the machinery necessary for the

⁴ Malcolm N Shaw, *International Law* (Cambridge University Press 2014) 5.

⁵ John Austin, *The Province of Jurisprudence Determined* (John Murray 1832) Lecture I *passim*. See also, on the law of nations, 132; Hans Kelsen, *General Theory of Law & State* (Transaction Publishers 1949) 19; An effective summary is offered in Anthony D’Amato, ‘A Few Steps toward an Explanatory Theory of International Law’ (2010) 7 *Santa Clara Journal of International Law* 1, 9 (‘A simple view of a rule of law is that it consists of a norm sitting on top of a sanction. The norm tells us what we must do; the sanction informs us of the physical disability that will befall us if we disobey the norm’). But see JL Brierly, ‘Sanction’ (1931) 17 *Transactions of the Grotius Society* 67 (arguing that the habitual observance of international law was suggestive of ‘what every international lawyer knows to be the case, that there do exist sanctions behind the law.’).

⁶ As a matter of resituating the topic within its intellectual history, it is worth recalling that a lively debate on sanctions in international relations and law ensued after the publication of Barkun’s *Law Without Sanctions: Order in Primitive Societies and the World Community* (Yale University Press 1968). The book was reviewed by Harold Laswell, who, *inter alia*, made the felicitous observation that those laws which were described as being without sanctions could be more accurately be seen as ‘[l]aws with [d]ispersed [sanctions]’: see ‘Review of Law Without Sanctions: Order in Primitive Societies and the World Community.’ (1969) 63 *The American Journal of International Law* 646; Consider, further, the earlier Richard Arens and Harold D Lasswell, ‘Toward a General Theory of Sanctions Sanctions Symposium’ (1963) 49 *Iowa Law Review* 233.

⁷ Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Council on Foreign Relations 1979) 47; For other accounts of compliance with rules perceived as powerless see Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard University Press 1995); Thomas M Franck, *Fairness in International Law and Institutions* (Oxford University Press 1998).

⁸ For the use of the expression see James Crawford SC, ‘The International Court of Justice and the Law of State Responsibility’, *The Development of International Law by the International Court of Justice* (Oxford University Press 2013) 81 <<https://oxford.universitypressscholarship.com/10.1093/acprof:oso/9780199653218.001.0001/acprof-9780199653218-chapter-5>> accessed 29 November 2021; See also Federica Paddeu, ‘Dithering, Trickling Down, and Encoding: Concluding Thoughts on the “ILC Articles at 20” Symposium’ (*EJIL: Talk!*, 9 August 2021) <<https://www.ejiltalk.org/dithering-trickling-down-and-encoding-concluding-thoughts-on-the-ilc-articles-at-20-symposium/>> accessed 3 February 2022. See also

⁹ To this effect, see Alain Pellet and Alina Miron, ‘Sanctions’, *Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012).

¹⁰ Steve Charnovitz, ‘Rethinking WTO Trade Sanctions’ (2001) 95 *The American Journal of International Law* 792, 793.

effective imposition of reputational sanctions, while the response of the governments demonstrated that the sanctions themselves mattered.¹¹

If these examples appear difficult to reconcile with each other—let alone with the usual understanding of sanctions—it is because one ultimately cannot. Already in 1932, Brierly observed that the problem was ‘not whether we should try to create sanctions for International Law, but whether we should try to organise them in a system’.¹² In the same guise, Reisman noted that ‘[s]eparating sanctions from their plenary social context is comparable to the quixotic attempt to separate law from its context’, resulting in a ‘disembodied notion, with scant similarity to actual processes of human interaction [...] and manipulatively useless’.¹³ Thus, not only do sanctions exist, but they must be understood as embedded in their operational context and intended goals.

This is what we address in this contribution. This article, which sits in the context of a wider project devoted to understanding how state behaviour may be changed,¹⁴ seeks to focus on the act of sanctioning, broadly construed, as functional to that goal. Freeing ourselves from the constraints of too narrow a definition of the term ‘sanction’, we consider a wider gamut of instances of penalties on target states which are intended to accomplish the goal of changing state behaviour. Our goal is threefold: first, we aim to stimulate a debate on the nature of the act of sanctioning, which, we argue, is more embedded within international law than generally conceded; second, by looking at different sanctioning practices, we aim to identify their common elements and offer a taxonomy of the *act of sanctioning* within international law; third, we aim to consider the implications of different sanctioning practices and, in particular, understanding how and when they can amount to effective and acceptable tools to change state behaviour.

2 What is a sanction: Definitions

For the purposes of our analysis, we deem it appropriate to begin by offering a definition of sanction, which we state as the imposition of a penalty of whatever kind, through whatever processes, with the intended aim of changing the behaviour of a target state or states. Our definition is purposive and assumes that the goal of behavioural change as the defining characteristic of any sanctioning behaviour. We accept, of course, that there may be other goals associated with a sanction, but we maintain that many of these can ultimately be considered intermediate steps into the goal of behavioural change of a target state or the members of the community of states within which the sanctioning process takes place.¹⁵

This definition is profoundly different from many that have been offered in international law, but the link between the act of sanctioning and the stated intention of changing state behaviour is not controversial. What *is* divisive is to stress the significance of these elements over the others. This is certainly the case in the field of international law. Consider, for example, Abi-Saab definition of sanctions as ‘coercive measures taken in execution of a decision of a competent social organ, i.e. an organ legally empowered to act in the name of the society or community that is governed by

¹¹ Shai Dothan, ‘A Virtual Wall of Shame: The New Way of Imposing Reputational Sanctions on Defiant States’ (2017) 27 *Duke Journal of Comparative & International Law* 141, 155.

¹² Brierly (n 5) 68.

¹³ Reisman, ‘Sanctions and Enforcement’ (n 1) 276.

¹⁴ See Veronika Fikfak, ‘Changing State Behaviour: Damages before the European Court of Human Rights’ (2018) 29 *European Journal of International Law* 1091; Veronika Fikfak, ‘Non-Pecuniary Damages before the European Court of Human Rights: Forget the Victim; It’s All about the State’ (2020) 33 (2) *Leiden Journal of International Law* 335-369.

¹⁵ See Douglas D Heckathorn, ‘Collective Sanctions and Compliance Norms: A Formal Theory of Group-Mediated Social Control’ (1990) 55 *American Sociological Review* 366, 366 (‘Social sanctions can be arranged along a continuum from strictly individual sanctions that target a single individual to strictly collective sanctions that impact equally upon both the actor whose behavior triggered the sanction and the group of which that actor is a member’).

the legal system’,¹⁶ or Shaw’s view that ‘[t]o see the sanctions of international law in the states’ rights of self-defence and reprisals is to misunderstand the role of sanctions within a system because they are at the disposal of the states, not the system itself’.¹⁷ Such considerations are indicative of a further reflection on the concept of sanction,¹⁸ highlighting their most common characteristics—their coercive and afflictive nature and their source in a collective decision¹⁹—but also stressing the systemic function of sanctioning within the international legal system.

A cursory look at international affairs and some expressions of state practice, however, provides solid support for the view that the goal of behavioural change should be front and centre. Compared to the definitions listed above, the text of the explanatory memorandum to Australia’s Autonomous Sanctions Bill appears far less apologetic, stating that the three objectives of autonomous sanctions are ‘to limit the adverse consequences of the situation of international concern’, ‘to seek to influence those responsible for giving rise to the situation of international concern to modify their behaviour to remove the concern’, and ‘to penalise those responsible’.²⁰ A similar approach is offered in a recent contribution to a symposium by former US officials.²¹ According to Cohen and Goldman, ‘[s]anctions are a tool of foreign policy risk management, used both to address acute crises and to mitigate risk from long-term threats like terrorism and cyberattacks. They are used principally to shape behavior by influencing the incentives to which an adversary must respond, typically by raising the cost of certain undesirable behavior [...]’.²² Focusing on *economic* sanctions, these authors consider that qualifying sanctions in this sense has important implications for understanding how states behave: with some simplification, the end pursued will affect the choice of means, such as the choice between multilateral or unilateral sanctions,²³ or the specific type of sanction chosen. It is the goal of behavioural change that remains unchanged.

These examples, to be sure, do not exhaust the broad catalogue of definitions and understandings of sanction. Yet, they illustrate the significant rift between theory and the everyday practice of sanctioning. We submit here that understanding sanctioning as an activity aimed at prompting behavioural change has important conceptual and practical implications.

First, it allows us to sidestep much of the terminological and conceptual debate on the nature of the measures that amount to sanctions, thereby shining a light on the large array of means that states and multilateral institutions may resort to in order to induce behavioural change. It is well accepted that these means may include both countermeasures and acts of retorsion—that is to say, the type of unfriendly conduct that is not ‘inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act’,²⁴ but also

¹⁶ G Abi-Saab, ‘The Concept of Sanction in International Law’ in V Gowlland-Debbas, *United Nations Sanctions* (2001) 29, at 38.

¹⁷ Shaw (n 4) 11.

¹⁸ Georges Abi-Saab, ‘Cours Général de Droit International Public (Volume 207)’ [1987] *Collected Courses of the Hague Academy of International Law* 116–118 <https://referenceworks.brillonline.com/entries/the-hague-academy-collected-courses/*A9789041103178_01> accessed 24 October 2020.

¹⁹ Pellet and Miron, para 8.

²⁰ Autonomous Sanctions Bill 2010 (Australia), Replacement Explanatory Memorandum.

²¹ David S Cohen and Zachary K Goldman, ‘Like It or Not, Unilateral Sanctions Are Here to Stay’ (2019) 113 *AJIL Unbound* 146.

²² *ibid* 146–147.

²³ *ibid* 151.

²⁴ ARSIWA, Commentaries, para 3. This definition should be preferred insofar as it shows that the prior existence or absence of a wrongful act is simply immaterial to the act of retorsion. For earlier definitions see Lassa Oppenheim, *International Law: A Treatise*, vol 1 Peace (Longmans, Green 1905) 31–32 (stating that ‘retorsion has nothing to do with international delinquencies, as it is a means of compulsion not in the case of legal differences, but only in the case of certain political differences’).

a number of measures taken by (or through) an international organization. Thus, it allows us to simultaneously increase the breadth of the definition, thereby encompassing a number of measures taken through a variety of processes, and understand and appraise such measures on the basis of how well they accomplish the intended objective. This also raises the question of the identity of the sending entity and the potential layers of delegation that modify the degree of control on the use of sanctioning as a means to change behaviour—for example, in multilateral institutions or regimes, where measures that can be qualified as coercive or unfavourable can be adopted through adjudicatory or quasi-adjudicatory processes.²⁵

Second, and relatedly, it allows for better understanding of the dual role of international law in the sanctioning moment. On the one hand, international law provides the boundaries for the sanctioning activity, thereby setting out the limits (arguably ample) of what can be lawfully done to change state behaviour.²⁶ On the other hand, respect for international law may be seen as the objective that the sanction is intended to ensure. Thus, sanctioning may also be seen as an expression of the process by which states or other actors in the international community seek to induce compliance with norms and standards they perceive as important, including international law obligations.²⁷

3 The act of sanctioning: Unpacking the structure

Having discussed its nature, we proceed in this part to consider the structure of the act of sanctioning. We do so with a view to unpacking what is generally an extremely blurry notion and clarifying the structure of the process, thereby shedding light on the structural elements that make up this routine activity. We address them in order.

3.1 A trigger

The imposition of a sanction is generally triggered by some event. In law—and international law is no exception—the trigger for the imposition of a sanction is generally seen in the violation of an obligation arising under international law. This is not necessarily the case for at least two reasons: first, it is possible to identify sanctions that, while reactive and governed by international law, do not depend on the breach of an international law obligation. Second, it is similarly possible to conceive forms of sanctioning that simply amount to retorsion, acts that are unfriendly but not unlawful, and which have not been otherwise regulated. In this scenario, the identification of the trigger is a matter of discretion.

Examples are not hard to come by. Consider the archetypal international law sanction, the measures taken by the United Nations Security Council, operating under Chapter VII of the United Nations Charter, to restore international peace and security. Such measures are binding on all states, and yet their imposition does not necessarily depend on the existence of a breach of international law—in fact, while such a breach will often be integral to the conduct justifying the adoption of a measure, the Security Council is not to be considered as being entitled to pass judgment on the matter.²⁸ Consider, now, retaliation (‘suspension of concessions’ in WTO

²⁵ See eg Andrew T Guzman, ‘A Compliance-Based Theory of International Law’ (2002) 90 *California Law Review* 1823, 1829.

²⁶ We investigate these in **Fehler! Verweisquelle konnte nicht gefunden werden.**

²⁷ The argument is not made here that the possibility of sanction should be seen as the hallmark of a norm acquiring the character of international law. On this fallacy and its pitfalls, see Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006) 174; A different approach was famously put forward by Myres McDougal. See ‘The Hydrogen Bomb Tests and the International Law of the Sea’ (1955) 49 *American Journal of International Law* 356, 357.

²⁸ See Seventh Report of the Special Rapporteur, Mr. Gaetano Arangio-Ruiz (47th session of the ILC (1995)), UN Doc A/CN.4/469, paras 88-99 and further Gaetano Arangio-Ruiz, ‘On the Security Council’s Law Making’ (2015)

parlance) in the WTO context. While retaliation necessarily follows a number of procedural steps, until it is finally authorised as an *ultima ratio* of a failed dispute settlement process and the interested states can act to protect their interests, it is in principle possible for it to originate in a so-called non-violation complaint. This means that no violation of an international agreement is at the basis of the claim—and the target of the retaliation. Although *allowed by* international law, the sanction is not formally corrective of a breach of international law.

There is no way to catalogue all of the possible circumstances which may act as a trigger for the imposition of a sanction, and, at any rate, we do not mean to do so here. Rather, this brief excursus is meant to highlight the relative flexibility in threshold phase of the act of sanctioning. The identification of the trigger and the assessment of the consequences it requires are, however, liable of further proceduralization. This is examined in the following sections.

3.2 A process: The imposition of the sanction

3.2.1 *Autonomy*

In the context of interstate relations, it is up to the state to decide if they want to impose a sanction on another actor. Depending on the nature of the sanction, international law or other commitments may impose constraints on their discretion. The limits can take two overlapping shapes: first, the act amounting to a sanction can qualify as an illegal act under general international law or treaty law and, as such, it will only be lawful insofar as it can be validly qualified as a countermeasure—therefore, it will need to be imposed in response to an internationally wrongful act, with the goal of inducing compliance with an existing obligation, until non-compliance persists, et cetera. However, any state taking one such approach will do so at its own risk, since a countermeasure which is found to be illegal may in turn amount to an internationally wrongful act. In the alternative, the imposition of a sanction will take place through an act that is not, in and by itself, unlawful, but just unfriendly—an instance of ‘retorsion’. In this case, it is common courtesy or comity, but not general international law, that imposes limits on the ability of a state to adopt one such measure, and no specific requirements will exist under international law for its adoption, but the possibility cannot be discounted that a state might enter into treaty commitments that will render such acts of retorsion impermissible.

As a model for the imposition of sanctions, autonomy has both advantages and disadvantages, which have been mostly investigated in the literature on economic sanctions. On the one hand, autonomy means that the sending state can determine its sanctioning policy without having to deal with ‘design by committee’ through multilateral institutions. On the other hand, the permissibility of autonomous sanctions or other unilateral enforcement measures remains, from a variety of standpoints,²⁹ controversial, and the handling of such a policy remains, in any event, costly. Furthermore, one such model lends itself to abuses due to the existing asymmetries in economic and political power—thus rendering only some states capable of making credible threats.³⁰

83 Rivista di diritto internazionale 609. This is not to say, however, that the Council is not entitled, as any political body is, to express its views on whether a particular act amounts to a wrongful act: see 53-54 Giorgio Gaja, ‘Comment: The Impact of Security Council Resolutions on State Responsibility’ in Georg Nolte (ed), *Peace through International Law* (Springer 2009), citing Resolution 138 (1960) relating to the abduction of Adolf Eichmann. The literature on the role of the Security Council in issues of state responsibility is abundant: see, for example, For an early example, inspired by the *Lockerbie* case, see Vera Gowlland-Debbas, ‘Security Council Enforcement Action and Issues of State Responsibility’ (1994) 43 *The International and Comparative Law Quarterly* 55.

²⁹ Devika Hovell, ‘Unfinished Business of International Law: The Questionable Legality of Autonomous Sanctions’ (2019) 113 *AJIL Unbound* 140; Ruys and Ryngaert (n 3).

³⁰ Joshua P Zoffer, ‘The Dollar and the United States’ Exorbitant Power to Sanction’ (2019) 113 *AJIL Unbound* 152.

3.2.2 Delegation

In light of these shortcomings, sanctioning power may be delegated. Delegation can take different forms depending on the goals to be accomplished: for example, economic sanctions imposed by the European Union are taken collectively—if enforced by each member state—so as to maintain a united front and avoid loopholes arising from the single market, and to leverage the economic and political power of the block. In this regard, the position of the EU is not much different from that of a single state. The situation differs when the sanctions in questions are to be directed to the members of the organization itself, in which case the centralization of the sanctioning power has important implications. We consider different models below.

Within the CoE system, one interesting example is provided by the Group of States Against Corruption (GRECO). Officially, GRECO does not rely on a system of sanctions properly so called, but rather relies on ‘a dynamic process of mutual evaluation and peer pressure’.³¹ Member States are subject to country-specific evaluations and must follow-up with a report that will be examined to determine whether or not compliance with the recommendation has been forthcoming. Compliance cannot be enforced, but a number of measures can be adopted in order to induce it. These measures, which are spelled out with some clarity on the GRECO website, may be triggered by a finding that the compliance satisfies the ‘globally unsatisfactory’ standard, and include, *inter alia*, ‘GRECO inviting the Secretary General of the CoE to send a letter to the Minister of Foreign Affairs of the member State concerned, drawing his/her attention to non-compliance with the relevant recommendations’,³² or simply adopt a summary of a country-specific evaluation or compliance report and make it public.³³

Delegation can also involve adjudicatory bodies. Again, the WTO dispute settlement process provides a good illustration. With some simplification,³⁴ where no mutually agreed solution is found and the recommendations of the Dispute Settlement Body (itself an incarnation of the WTO General Council) have not been implemented, WTO Members can be authorised to unilaterally and autonomously suspend their existing concessions with respect to the non-complying party. This is, effectively, a form of retorsion, which would be lawful absent WTO commitments. Members, however, do not get a hall pass: rather, the measure of retorsion needs to be equivalent to the to the level of nullification or impairment,³⁵ and, in case of disagreement, the matter can be subject to arbitration.³⁶

Another, more sophisticated example may be taken from the operation of the institutional machinery of the International Centre for the Settlement of Investment Dispute (ICSID). Where states parties to the ICSID Convention are found to breach the commitments that they entered into with an investor’s state of nationality in a bilateral investment treaty (BIT) by an arbitral tribunal constituted under the auspices of ICSID, they are be required to comply with the terms of the award and the remedies awarded therein. To the extent that this amounts to enforcing a pecuniary obligation, The ICSID Convention allows investors to seek enforcement of the award

³¹

³² GRECO, Rules of Procedure, Rule 32.

³³ *Ibid*, Rule 35.

³⁴ In particular, it is essential to mention the debate on the nature of WTO countermeasures as compliance-inducing or a means to re-balance the scales. See Judith Hippler Bello, ‘The WTO Dispute Settlement Understanding: Less Is More’ (1996) 90 *The American Journal of International Law* 416; Joost Pauwelyn, ‘Enforcement and Countermeasures in the WTO: Rules Are Rules-Toward a More Collective Approach’ (2000) 94 *The American Journal of International Law* 335; John H Jackson, ‘International Law Status of Wto Dispute Settlement Reports: Obligation to Comply or Option To “Buy Out”?’ (2004) 98 *American Journal of International Law* 109; Holger Spamann, ‘The Myth of “Rebalancing” Retaliation in WTO Dispute Settlement Practice’ (2006) 9 *Journal of International Economic Law* 31.

³⁵ Article 22.4 DSU.

³⁶ Article 22.7 DSU.

in the territories of the ICSID Contracting States.³⁷ However, more sophisticated mechanisms are at play. The example of Argentina's failure to comply with several ICSID awards, investigated in this symposium³⁸ and elsewhere,³⁹ reminds us of the gravity of the measures that can be potentially taken by other states and other international actors as a measure to induce compliance with their obligations. There is little question that the capital-exporting states involved in the disputes by the proxy of their investors leveraged their votes within the World Bank, of which the ICSID is one of five sub-organizations, as well as the IMF.⁴⁰ As Peat observes, the available evidence supports the proposition that the threat of credible deprivations was a significant factor in the decision of Argentina to comply with several awards against it.⁴¹ In other words, a meaningful sanction was associated with non-compliance, and its threat proved effective in securing the result.

Consider, further, the example of the judgment supervision process within the framework of the Council of Europe. The European Court of Human Rights, which is responsible for finding violations with the European Convention of Human Rights does not have the jurisdiction to decide on whether a state has complied with its judgments. Instead, it is the Committee of Ministers, the executive body of the Council of Europe, that is considered better placed to assess the specific measures to be taken to achieve *restitutio in integrum*. Given the variety of remedies states can choose to address their violations and the wide nature of human rights breaches, it was felt that state representatives sitting in the Committee of Ministers would be better suited to supervise state's actions and to, on the basis of the information provided by the respondent State and with due regard to the applicant's evolving situation, assess the adoption of such measures as feasible, timely, adequate and sufficient to ensure the maximum possible reparation for the violations found by the Court.⁴² The Committee's role is to provide support and guidance to States as well as encouragement to ensure compliance with ECtHR judgments. In this regard, the resolutions adopted by the Committee contain suggestions and comments, though for most part they seek not to interfere with state's choice as to the manner of compliance.

For states who refuse to abide by a final judgement, the Committee may – after serving formal notice on that Party and by a decision adopted by a majority vote of two thirds of the representatives, bring infringement proceedings against a state.⁴³ This is limited to only exceptional circumstances and has only ever been used twice.⁴⁴ The infringement procedure does not reopen the substantive question. Rather, the question before the Court is whether the state has failed to implement the Court's judgment. This decision is for the Court to make. Once it is reached (only in the case of *Mammadov*),⁴⁵ the case returns to the Committee of Ministers, which has different measures at its disposal, including the suspension of voting rights or even expulsion of the state from the Council of Europe. However, as the COE itself asserts, the hope is that the mere

³⁷ ICSID Convention, Article 54.

³⁸ Daniel Peat, 'Perception and Process: Towards a Behavioural Theory of Compliance' [2021] *Journal of International Dispute Settlement* idab030.

³⁹ Moshe Hirsch, 'Explaining Compliance and Non-Compliance with ICSID Awards: The Argentine Case Study and a Multiple Theoretical Approach' (2016) 19 *Journal of International Economic Law* 681.

⁴⁰ For some early discussions of the potential role of economic agencies see William M Reisman, 'The Role of the Economic Agencies in the Enforcement of International Judgments and Awards: A Functional Approach' (1965) 19 *International Organization* 929.

⁴¹ Peat (n 35) 23–24.

⁴² *Ilgar Mammadov v. Azerbaijan* [GC], 2019, § 155. See also Guide on Article 46 of the European Convention on Human Rights Binding force and execution of judgments, 31 August 2021, https://echr.coe.int/Documents/Guide_Art_46_ENG.pdf

⁴³ This is done on the basis of Article 46(4) as amended by the Protocol 14 of the ECtHR (2010).

⁴⁴ *Ibid.* and in the case of *Osman Kavala v Turkey*.

⁴⁵ *Ilgar Mammadov v. Azerbaijan* [GC], 2019, § 155.

existence of the infringement proceedings ‘and the threat of using it, should act as an effective new incentive to execute the Court’s judgments.’⁴⁶

3.3 A target (and collateral damage)

Any act of sanctioning requires a target—an expression that has become a term of art in the debate on economic sanctions. In that parlance, the term is employed to simply denote the entity which is on the receiving end of the sanction, but without much precision. At the theoretical level, the difficulty arises because the identity between the target of a sanction and the entity the behaviour of which the sanction itself seeks to modify is not necessarily a given. Notably, this has been the case of the so-called targeted sanctions, which, while still generally aimed at changing the behaviour of a state, do so not by targeting governments, but rather entities or individuals who may be deemed responsible for the policy against which the sanction is imposed.⁴⁷ The rationale for this type of targeted sanctions is that imposing a sanction against an entire country is pointless,⁴⁸ as well as dangerous for their civilian populations,⁴⁹ and ultimately counterproductive as it allows the target to leverage the sanction to change the narrative by ‘turning the stigma into an emblem of pride’.⁵⁰

While the two scenarios are seldom considered together, it is fitting to observe that other scenarios exist where entities other than the target are affected by a sanction: this is the case of the so-called secondary sanctions, which are measures that target the economic relations between a target state and third states.⁵¹ Their intended aim is to cut off the former not just from interactions with the sender, but from interactions from third states and their economic operators in order to maximise the effect of the measure and avoid backfilling.⁵² More comprehensive studies have examined the permissibility under international law of secondary sanctions, in particular under the international

⁴⁶ Council of Europe Treaty Series - No. 194 to Protocol No. 14 to the Convention for the Protection of Human Rights and Explanatory Report Fundamental Freedoms, amending the control system of the Convention, para 100; <https://rm.coe.int/16800d380f>.

⁴⁷ Among the number of studies arguing that targeted sanctions share a number of similar problems with their predecessors see Arne Tostensen and Beate Bull, ‘Are Smart Sanctions Feasible?’ (2002) 54 *World Politics* 373; Daniel W Drezner, ‘Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice’ (2011) 13 *International Studies Review* 96.

⁴⁸ Francesco Giumelli, ‘Understanding United Nations Targeted Sanctions: An Empirical Analysis’ (2015) 91 *International Affairs* 1351, 1352 (arguing that ‘[t]oday, most sanctions are targeted, and their logic is to maximize the impact on the responsible individuals [in other words, the elite] in the country concerned, while minimizing humanitarian consequences for the innocent population’).

⁴⁹ On the legacy of the UN sanctions regime in Iraq see Andrew K Fishman, ‘Between Iraq and a Hard Place: The Use of Economic Sanctions and Threats to International Peace and Security Comment’ (1999) 13 *Emory International Law Review* 687; G Simons, *The Scourging of Iraq: Sanctions, Law and Natural Justice* (Springer 2016); On the case of Haiti, see W Michael Reisman, ‘Assessing the Lawfulness of Nonmilitary Enforcement: The Case of Economic Sanctions’ (1995) 89 *Proceedings of the ASIL Annual Meeting* 350; For a review of the debate on the legal aspects of such policies see Mary Ellen O’Connell, ‘Debating the Law of Sanctions’ (2002) 13 *European Journal of International Law* 63; For a grounded argument on the humanitarian impact of sanctions against Afghanistan in the wake of the 2021 Taliban takeover see Graeme Smith, ‘Stop Starving Afghanistan’ <<https://www.foreignaffairs.com/articles/afghanistan/2021-12-29/stop-starving-afghanistan>> accessed 15 January 2022.

⁵⁰ Rebecca Adler-Nissen, ‘Stigma Management in International Relations: Transgressive Identities, Norms, and Order in International Society’ (2014) 68 *International Organization* 143, 155.

⁵¹ Ruys and Ryngaert (n 3); Baran Han, ‘Secondary Sanctions Mechanism Revisited: The Case of US Sanctions against North Korea’ [2021] *Research Handbook on Economic Sanctions* <<https://www.elgaronline.com/view/edcoll/9781839102714/9781839102714.00018.xml>> accessed 31 January 2022.

⁵² Meredith Rathbone, Peter Jeydel and Amy Lentz, ‘Sanctions, Sanctions Everywhere: Forging a Path through Complex Transnational Sanctions Laws Symposium Article’ (2012) 44 *Georgetown Journal of International Law* 1055, 1083–1085; Ruys and Ryngaert (n 3) 6–9; On moral justifications for secondary sanctions see Cécile Fabre, ‘Secondary Economic Sanctions’ (2016) 69 *Current Legal Problems* 259.

law of jurisdiction,⁵³ as well as the reaction mechanism taken by the states or entities that have been on the receiving end of such measures.⁵⁴ For our purposes, the example only serves to highlight that it is not inconceivable for an act of sanctioning to involve a multiplicity of players, which can be involved as either collateral damage or reluctant (though to a varying degree) collaborators in an instance of coercion.⁵⁵

3.4 A strategy

It has been suggested in the literature on compliance that the primary drivers for a state to observe its commitments are to be found in three main mechanisms: reciprocity, retaliation, and reputation.⁵⁶ Generally speaking, any sanctioning activity will leverage one of these.

Reciprocity has been defined as a strategy involving the returning of like behavior,⁵⁷ therefore admitting the returning of ‘ill for ill as well as good for good’,⁵⁸ contingent on previous behaviour and the roughly equivalent utility of the exchanges.⁵⁹ From a sanctioning perspective, reciprocity may lead a state to adopt measures that re-adjust a balance that has been tipped off by a violation, thereby discouraging further violations by making them costly—thereby making further breaches inefficient.⁶⁰ The problem is that, while reciprocity has long been hailed as an efficient driver of compliance⁶¹ and remains an important one in many areas, it is not suitable for others. Thus, for example, while reciprocity and reciprocal sanctions have a place in the international trade regime,⁶² or in private international law,⁶³ they do not work as well international humanitarian law⁶⁴ and human rights law.⁶⁵

⁵³ Ruys and Ryngaert (n 3).

⁵⁴ Council Regulation (EC) No 2271/96 of 22 November 1996 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); Jurgen Huber, ‘The Helms-Burton Blocking Statute of the European Union Essay’ (1996) 20 *Fordham International Law Journal* 699.

⁵⁵ See for example Baran Han, ‘The Role and Welfare Rationale of Secondary Sanctions: A Theory and a Case Study of the US Sanctions Targeting Iran’ (2018) 35 *Conflict Management and Peace Science* 474 (arguing that secondary sanctions are particularly effective when third parties are interested in having the target of the sanction comply, but would not adopt measures on their own as they perceive them as too costly).

⁵⁶ Andrew T Guzman, *How International Law Works: A Rational Choice Theory* (Oxford University Press 2008) 33.

⁵⁷ Francesco Parisi and Nita Ghei, ‘The Role of Reciprocity in International Law’ (2003) 36 *Cornell Int’l LJ* 93, 94.

⁵⁸ Robert O Keohane, ‘Reciprocity in International Relations’ (1986) 40 *International Organization* 1, 6.

⁵⁹ *ibid* 8.

⁶⁰ Guzman (n 53) 44.

⁶¹ See in particular Robert Axelrod, *The Evolution Of Cooperation* (Basic Books 1984) 131.

⁶² Kyle Bagwell and Robert W Staiger, *The Economics of the World Trading System* (MIT Press 2002); Alan O Sykes and Petros C Mavroidis, ‘Optimal Sanctions in the WTO: The Case for Decoupling (and the Uneasy Case for the Status Quo)’ in Chad P Bown and Joost Pauwelyn (eds), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (Cambridge University Press 2010) <<https://www.cambridge.org/core/books/law-economics-and-politics-of-retaliation-in-wto-dispute-settlement/optimal-sanctions-in-the-wto-the-case-for-decoupling-and-the-uneasy-case-for-the-status-quo/B2960EE5A2C23AC678DA8ACC7DE25886>> accessed 3 February 2022.

⁶³ In American law, the principle was established in *Hilton v. Guyot*, 159 US 113 (1895). See, however, Louise Weinberg, ‘Against Comity’ (1991) 80 *Geo. LJ* 53; Joel R Paul, ‘Transformation of International Comity, The’ (2008) 71 *Law and Contemporary Problems* 19; Christopher R Drahozal, ‘Some Observations on the Economics of Comity’ in Eger Travemünder Symposium zur Ökonomischen Analyse des Rechts Thomas, Stefan Oeter and Stefan Voigt (eds), *Economic analysis of international law: contributions to the XIIIth Travemünde Symposium on the Economic Analysis of Law (March 29-31, 2012)* (Mohr Siebeck 2014); William S Dodge, ‘International Comity in American Law’ (2015) 115 *Columbia Law Review* 2071; Thomas Schultz and Niccolo Ridi, ‘Comity in US Courts’ (2018) 10 *Northeastern University Law Review* 280.

⁶⁴ But see Eric A Posner, ‘Human Rights, the Laws of War, and Reciprocity’ (2013) 6 *The Law & Ethics of Human Rights* 147.

⁶⁵ Bruno Simma, ‘International Human Rights and General International Law: A Comparative Analysis’ 181; Matthew Craven, ‘Legal Differentiation and the Concept of the Human Rights Treaty in International Law’ (2000) 11 *European Journal of International Law* 489; Frederic Megret, ‘The Nature of International Human Rights Obligations’ (Social Science Research Network 2009) SSRN Scholarly Paper ID 1472196 <<https://papers.ssrn.com/abstract=1472196>>

The notion of retaliation, instead, is generally used to identify measures that simply react to a violation and are meant to encourage a return to compliance. However, retaliation is not so much a means to rebalance the scales (in which case reciprocity would be at play)⁶⁶ as it is a way to either punish a wrongdoer or signal those violations have consequences.⁶⁷ Rather, retaliatory actions and sanctions are costly and also highly dependent on the type of relationship between the sender and target state and the institutional framework in which it is imposed, which may affect both the permissibility of the action and the potential for free-riding by states that do not wish to bear the cost of the measure.⁶⁸

The third mechanism, reputation, has started receiving more recently ‘received top billing’⁶⁹ as a driver for compliance and as a target for potential sanctions.⁷⁰ While the concept remains nebulous and comparatively little attention has been devoted to unpacking the concept of state reputation,⁷¹ the notion has maintained a certain attraction as a lens for explaining compliance in those scenarios where reciprocity of fear or retaliation would not, alone, suffice and thereby lending itself to rationalizing cooperation models,⁷² even outside of full-fledged treaty frameworks.⁷³

Reputation has been defined as ‘judgments about an actor’s past behavior used to predict future behavior’,⁷⁴ thereby driving compliance on the basis of an actor’s fear that unreliability will damage their chances of entering in new, fruitful cooperative relationships.⁷⁵ On the basis of this assessment, reputation is a valuable commodity which may be targeted by sanctions. Thus, a ‘reputational sanction’ may follow automatically from non-compliance, amounting to the cost of being seen as an untrustworthy partner.⁷⁶ However, the reverse is also true insofar as most sanctions have a reputational component, even when reputation is not the main objective.⁷⁷

accessed 3 February 2022; See also, specifically on denunciation, Eckart Klein, ‘Denunciation of Human Rights Treaties and the Principle of Reciprocity’, *From Bilateralism to Community Interest* (Oxford University Press 2011) <<https://oxford.universitypressscholarship.com/10.1093/acprof:oso/9780199588817.001.0001/acprof-9780199588817-chapter-32>> accessed 3 February 2022.

⁶⁶ Guzman (n 53) 47 (‘Actions that are not costly and that are taken in response to an ongoing violation are forms of reciprocal non-compliance rather than retaliation.’).

⁶⁷ *ibid* 46.

⁶⁸ Anne van Aaken and Betül Simsek, ‘Rewarding in International Law’ (2021) 115 *American Journal of International Law* 195, 201; See also Anne van Aaken, ‘Behavioral International Law and Economics’ (2014) 55 *Harv. Int’l LJ* 421, 473.

⁶⁹ The felicitous expression is borrowed from Alexander Thompson, ‘The Rational Enforcement of International Law: Solving the Sanctioners’ Dilemma’ (2009) 1 *International Theory* 307, 308.

⁷⁰ The best-known example is Guzman (n 53) 33.

⁷¹ For some exceptions see George W Downs and Michael A Jones, ‘Reputation, Compliance, and International Law’ (2002) 31 *The Journal of Legal Studies* S95; Rachel Brewster, ‘Unpacking the State’s Reputation’ (2009) 50 *Harvard International Law Journal* 231; Rachel Brewster, ‘Reputation in International Relations and International Law Theory’ in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (Cambridge University Press 2012).

⁷² Thus, for example, Chayes and Chayes (n 7) 18 (‘When a member of an organization goes back on a commitment, it compromises in some degree its reputation as a reliable partner and jeopardizes its ability to continue to reap organizational benefits’); Keohane (n 55) 94 (‘a government’s reputation therefore becomes an important asset in persuading others to enter into agreements with it’).

⁷³ Downs and Jones (n 68) 96; see also Anne E Sartori, ‘The Might of the Pen: A Reputational Theory of Communication in International Disputes’ (2002) 56 *International Organization* 121.

⁷⁴ Guzman (n 53) 33.

⁷⁵ Downs and Jones (n 68) S96.

⁷⁶ Guzman (n 53) 33.

⁷⁷ Francesco Giumelli, ‘The Purposes of Targeted Sanctions’ in Marcos Tourinho, Sue E Eckert and Thomas J Biersteker (eds), *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action* (Cambridge University Press 2016) 46.

There are several issues with the current model of reputation. First, it is generally based on a rational choice model which is grounded in the expectation that states will not want to lose future cooperation opportunities, which is not necessarily apt at explaining the behaviour of states. In particular, this is the case for those model of reputation that neither account for the multiple reputations that a state may have,⁷⁸ nor for specific experiences that are increasingly relevant.⁷⁹ Moreover, in the context of international law reputation is severely undertheorized with regards to actors other than states,⁸⁰ such as for example, international organizations⁸¹—a glaring omission if one accounts for the role that institutional reputational capital may have in the imposition of reputational sanctions on members.⁸²

From the perspective of sanctioning, reputation is an attractive, but problematic target. On the one hand, as the literature on stigmatization shows, any reputational loss, shaming, or outcasting unfolds in its own context and before an audience: as demonstrated by Adler-Nissen, there is no shortage of cases where the target of one such exercise in stigmatization has managed to challenge the narrative and leverage it to its advantage.⁸³ ‘Stigma-management’ can indeed work towards the intended goals of the sanctions, driving the target state to fall back in line and strengthening the cohesion of the relevant community, but can as easily be questioned and—in extreme cases—worn as a badge of honour to question or further divide the community itself.⁸⁴

On the other hand, a state may have more than one reputation in different issue areas,⁸⁵ and loss in one domain may be offset by a gain in standing in the other.⁸⁶ Moreover, even within the same domain, multilateral frameworks and the multiplicity of actors involved in the sanctioning process may result in a flattening of the reputations of states performing very differently. A demonstration of the phenomenon may be also seen in the current practice of NGO involvement in the post-judgment phase in the ECHR context. According to Dothan, who examined the issue in 2017, ‘states that have built a high reputation through years of good behavior are shamed more often than regularly misbehaving states’, because ‘states which acquired a good reputation have more to lose from accusations of inadequate behavior’.⁸⁷ A larger dataset suggests that NGOs intervene most frequently against states that violate human rights most frequently, while countries who are better at complying with decisions of the ECtHR are less likely to generate an intervention from the NGO. In turn, most interventions occur in the most serious of cases, involving torture, disappearance and detention.⁸⁸ These two narratives need not be at odds with each other: in fact, they show that depending on the circumstances, a diverse range of actors may be prompted to

⁷⁸ For an exception Downs and Jones (n 68) S95; See also Guzman’s defence of a ‘compartmentalization’ of reputation in (n 53) 100.

⁷⁹ For an exception see Roda Mushkat, ‘State Reputation and Compliance with International Law: Looking through a Chinese Lens’ (2011) 10 Chinese Journal of International Law 703.

⁸⁰ The exception to the rule is the attention devoted to judicial reputation Tom Ginsburg, ‘Bounded Discretion in International Judicial Lawmaking’ (2004) 45 Va. J. Int’l L. 631; Shai Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (Cambridge University Press 2014).

⁸¹ Ian Johnstone, ‘Do International Organizations Have Reputations Editorial’ (2010) 7 International Organizations Law Review 235.

⁸² K Daugirdas, ‘Reputation and the Responsibility of International Organizations’ (2014) 25 European Journal of International Law 991; Kristina Daugirdas, ‘Reputation as a Disciplinarian of International Organizations’ (2019) 113 American Journal of International Law 221.

⁸³ Adler-Nissen (n 47).

⁸⁴ *ibid* 155.

⁸⁵ Downs and Jones (n 68) S109.

⁸⁶ Brewster, ‘Unpacking the State’s Reputation’ (n 68) 240 (arguing that the NATO intervention in Serbia to stop the ethnic cleansing was a violation of international law on the use of force and yet improved the international standing of the member states).

⁸⁷ Dothan (n 11) 144.

⁸⁸ Veronika Fikfak, ‘Mapping NGO Behaviour before the European Court of Human Rights, forthcoming.

shame, stigmatise, or otherwise sanction different targets in different ways. In other words, a study of reputational sanctions is inextricably connected to the backdrop against which they unfold.

3.5 The aftermath of the sanctioning process

Finally, sanctioning ends. It may do so for different reasons, at different times, and through different processes, and it may yield reverberations that were not properly accounted for. Simple examples may include the reinstatement of the full rights of a state within an international organization, or the end of a suspension of concessions in the WTO context, as soon as compliance is reached with the obligation whose breach triggered the sanction. But things are rarely so simple. Especially where multilateral diplomacy provides the procedural channel for such decisions, a sanction—or part of it—can remain in place so long as votes so allow. Consider, for example, the case of the sanctions against Libya in the aftermath of the Lockerbie air disaster: while UN sanctions were *suspended* upon the arrival in the Netherlands of the two suspected perpetrators, they were not *lifted* until years later—Security Council procedure made this virtually impossible.⁸⁹ And indeed, much of Libya’s reluctance in complying with the extradition request had to do with the suspicion that nothing could be gained by complying, as a US veto could not be overcome.⁹⁰ Similarly, divergences on whether a sanction should be lifted can prompt division among sender states and communities.⁹¹ Thus, the reinstatement of Russia’s voting rights in the Council of Europe, originally imposed in the aftermath of the annexation of Crimea,⁹² played into existing rifts, as the United Kingdom overwhelmingly sided with Ukraine and against France and Germany.

These cursory examples support the evidence arising from the investigation of economic sanction cases, which demonstrates that especially—though not uniquely—within multilateral processes, initiating a sanctioning process is much easier than bringing it to an end,⁹³ though instruments exist to streamline the process.⁹⁴ Contestation may occur due to disagreement as to whether the objectives were reached. At the same time, the sanctioner may need to determine whether lifting sanctions will translate into not being taken seriously or amount to a ‘carrot’ capable of further inducing compliance.⁹⁵

3.6 Interim conclusion

The foregoing sections show, however cursorily, that the sanctioning phenomenon is a complex and multifaceted one, which needs to be unpacked to be properly understood its rationales and effects. It is to the latter that we now turn.

⁸⁹ The sanctions were finally lifted with SC Res. 1506 (2003).

⁹⁰ Jon Hovi, Robert Huseby and Detlef F Sprinz, ‘When Do (Imposed) Economic Sanctions Work?’ (2005) 57 *World Politics* 479, 489; This argument may be distinguished from those concerning inherently counterproductive sanctions. One such argument is made, for example, by Jon Elster on the basis of a comment in the *Wall Street Journal* on how sanctions against Iran may have unwittingly become part of the regime’s toolbox of pre-commitment devices, ‘limiting the occasions for value-corroding interactions with the West’ and thus contributing to realising Iran’s goal of isolation. See Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge University Press 2000) 58.

⁹¹ See on this point Adler-Nissen’s account of Cuba’s approach to stigma management Adler-Nissen (n 47) 167–169.

⁹² Reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation, PACE Resolution Resolution 1990 (2014).

⁹³ Hana Attia and Julia Grauvogel, ‘Easier In Than Out: The Protracted Process of Ending Sanctions’.

⁹⁴ See eg on sunset clauses Kristen E Boon, ‘Timing Matters: Termination Policies for UN Sanctions’ [2017] *Research Handbook on UN Sanctions and International Law* <<https://www.elgaronline.com/view/edcoll/9781784713027/9781784713027.00018.xml>> accessed 2 February 2022.

⁹⁵ José Luengo-Cabrera and Clara Portela, ‘EU Sanctions: Exit Strategies’ [2015] Paris: European Union Institute for Security Studies.

4 Sanctions and their outcomes: Is state behaviour the key after all?

Having considered the structure of the act of sanctioning as the potential operational models and targets, we turn now to the question of the effects of sanctioning with regard, in particular, to changing state behaviour towards the goal of compliance. Up until recently, this question has been greatly undertheorized in international law on account of two different factors. First, a very doctrinal understanding of the notion, which has left the debate on the topic mired in a terminological conundrum, coupled with the stress on the permissibility, rather than the utility of the tool; second, the insight, borrowed from historical and international relations research, that ‘sanctions’ are an ineffective tool.⁹⁶ In this section, we posit in turn that the sanctioning moment has still something to offer at both the pragmatic and analytical level. By starting from the notion of sanction effectiveness and reviewing different analytical approaches to the problem we aim to set out a research agenda which may guide future analysis of the concept of sanction within international law.

4.1 Sanction effectiveness and its metrics

As correctly put by Hofer, to understand whether sanctions *do* work, one must first understand how they *can* work.⁹⁷ The issue has been discussed somewhat in the literature on economic sanctions and, in particular, in the context of the creation of large datasets, where establishing consistent metrics to be able to distinguish successes of sanctioning policies from failures consistently proved a delicate exercise.⁹⁸ In fact, depending on the definition of ‘success’ one adopts, the rates of success of existing sanction policies vary dramatically, ranging from roughly 10% to well over 30%.⁹⁹

Naturally, the problem is more complex than that: modern literature on the topic, for example, suggests that the process by which behavioural change is eventually accomplished might be a multi-step and multi-target one, and that the function of sanctions might be one of deterrence.¹⁰⁰ Others yet have argued that sanctions are just about signalling.¹⁰¹ Examples of this approach purportedly abound: in a recent, unpublished editorial, Ben Saul wrote: ‘we know that China will not stop its repression of Uighurs just because Australia doesn’t send officials to watch the Olympics, but we boycott anyway, to stigmatize terrible behaviour’.¹⁰² Yet, it has been recognised that the dichotomy

⁹⁶ Within the very abundant literature see Robert A Pape, ‘Why Economic Sanctions Do Not Work’ (1997) 22 *International Security* 90; Robert A Pape, ‘Why Economic Sanctions Still Do Not Work’ (1998) 23 *International Security* 66; Gary Clyde Hufbauer and others, *Economic Sanctions Reconsidered* (Columbia University Press 2008).

⁹⁷ Alexandra Hofer, ‘The Efficacy of Targeted Sanctions in Enforcing Compliance with International Law’ (2019) 113 *AJIL Unbound* 163.

⁹⁸ Hufbauer and others (n 96); T Clifton Morgan, Navin Bapat and Yoshiharu Kobayashi, ‘Threat and Imposition of Economic Sanctions 1945–2005: Updating the TIES Dataset’ (2014) 31 *Conflict Management and Peace Science* 541.

⁹⁹ Dursun Peksen, ‘When Do Imposed Economic Sanctions Work? A Critical Review of the Sanctions Effectiveness Literature’ (2019) 30 *Defence and Peace Economics* 635; (applying Pape [n 96]).

¹⁰⁰ Patrick M Morgan, ‘The State of Deterrence in International Politics Today’ (2012) 33 *Contemporary Security Policy* 85; Francesco Giumelli, ‘Targeted Sanctions and Deterrence in the Twenty-First Century’ in Frans Osinga and Tim Sweijts (eds), *NL ARMS Netherlands Annual Review of Military Studies 2020: Deterrence in the 21st Century—Insights from Theory and Practice* (TMC Asser Press 2021) <https://doi.org/10.1007/978-94-6265-419-8_18> accessed 15 January 2022. See also Reisman, ‘Sanctions and Enforcement’ (n 1) (arguing that the crux of the matter was not so much sanctions as sanction expectations underpinning the fabric of prescriptions inherent to the international order).

¹⁰¹ Francesco Giumelli, *Coercing, Constraining and Signalling: Explaining UN and EU Sanctions After the Cold War* (ECPR Press 2011); Michael Brzoska and others, ‘Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions’: <<http://digitallibrary.un.org/record/801765>> accessed 20 January 2021.

¹⁰² Prof Ben Saul, ‘I Tried for 2 Weeks to Publish an Op-Ed on the pro-Palestine Boycott of the Sydney Festival. I’ve Published 100s of Op-Eds over 20 Years, Including in the NY Times, but This Is the First Time I Was Unable to Publish ANYWHERE. So Here’s to Self-Publishing by a Wannabe Author! <https://t.co/66T1HHPXSR>’ (@profbensaul, 3 February 2022) <<https://twitter.com/profbensaul/status/1489031066845270018>> accessed 3 February 2022.

between instrumental and symbolic uses of sanctions is a false one,¹⁰³ for even what appears to be a merely symbolic gesture does in fact articulate and reinforcement global norms.¹⁰⁴ Finally, some have proposed that sanctions may be considered to simply amount to a form of punishment, disconnected from specific end goals.¹⁰⁵

With no claim of exhaustiveness, this cursory overview shows that it is impossible to treat sanction effectiveness as a binary classification problem. While the literature on economic sanctions has grappled with this problem,¹⁰⁶ this does not appear to be entirely the case when it comes to other forms of sanctioning unfolding within the bounds of international law. In particular, on the basis of the understanding set forward in the foregoing sections, we submit that a more nuanced reflection on the effectiveness of sanctions should inform the debate on compliance of international law.¹⁰⁷

4.2 Compliance and remedies

One area where such type of analysis has been carried out is that of the evolution of the law of remedies for non-compliance with norms of international law. In particular, the law of state responsibility and its encoding of the *Chorzów Factory* principle as a general obligation of the responsible State following the commission of an internationally wrongful act, has pushed towards the idea that giving ‘teeth’ to enforcement processes—and adjudication in particular—might yield better compliance rate. More effective remedies and enforcement processes, in other words, would render sanctions unnecessary. In spite of its attraction, one such approach brings its own challenges.

One example has been flagged by Brewster with reference to dispute resolution, and, in particular, WTO adjudication: the problem, as elucidated by the author, is that effective dispute resolution mechanisms can normalise non-compliance by providing an alternative to it,¹⁰⁸ thereby serving as a species in the wider genus of mechanisms allowing for efficient breach.¹⁰⁹ The WTO remedies system ostensibly addresses one such problem, labelling the provision of compensation as a temporary and, in any event, extraordinary solution.¹¹⁰ Yet, examples exist where the parties to a dispute ultimately resorted to compensatory measures as a mutually agreed solution, at the same time leaving the WTO-illegal measures in place and legitimising the violation through the process. Within a multilateral trading system, the ability to replace compliance with a commitment in one

¹⁰³ David A Baldwin, ‘The Sanctions Debate and the Logic of Choice’ (1999) 24 *International Security* 80, 102.

¹⁰⁴ Thomas J Biersteker and Peter AG van Bergeijk (eds), *How and When Do Sanctions Work? The Evidence*, p 19.

¹⁰⁵ Kim Richard Nossal, ‘International Sanctions as International Punishment’ (1989) 43 *International Organization* 301.

¹⁰⁶ See eg Peksen (n 99); Giumelli, ‘The Purposes of Targeted Sanctions’ (n 74); Navin A Bapat and others, ‘Determinants of Sanctions Effectiveness: Sensitivity Analysis Using New Data’ (2013) 39 *International Interactions* 79.

¹⁰⁷ For a notable example of this trend see van Aaken and Simsek (n 65).

¹⁰⁸ Rachel Brewster, ‘Pricing Compliance: When Formal Remedies Displace Reputational Sanctions’ (2013) 54 *Harvard International Law Journal* 259; Warren F Schwartz and Alan O Sykes, ‘The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization’ (2002) 31 *The Journal of Legal Studies* S179, 197. On the operation of the Dispute Settlement Body in this sense see Cosette D Creamer and Zuzanna Godzimirska, ‘Deliberative Engagement within the World Trade Organization: A Functional Substitute for Authoritative Interpretations’ (2015) 48 *New York University Journal of International Law and Politics* 413; Cosette D Creamer and Zuzanna Godzimirska, ‘(De)Legitimation at the WTO Dispute Settlement Mechanism’ (10000) 49 *Vanderbilt Journal of Transnational Law*.

¹⁰⁹ The argument has been made in Schwartz and Sykes (n 108) 192 (‘We believe that the explanation for these provisions lies in the desire of signatories to facilitate efficient breach and in the relative superiority of a liability rule approach to that task’); It has been further generalised in Eric Posner and Alan Sykes, ‘Efficient Breach of International Law: Optimal Remedies, “Legalized Noncompliance,” and Related Issues’ (2011) 110 *Michigan Law Review* 243.

¹¹⁰ DSU, Article 3.7.

area with additional concessions in another raises some questions (both of principle and technical), irrespective of the view one takes on the nature of WTO obligations.¹¹¹

The problem is even more evident elsewhere, where any sense of reciprocity of obligations cannot be envisaged. In the case of the obligations arising under the European Convention of Human Rights, the institutionalisation of remedies practices may result in norm-breachers pursuing whatever policies they envisage and simply paying damages. The new, mandatory friendly settlement procedure, for example, allows states to settle cases by solely making an *ex gratia payment* without providing for any follow up in relation to the underlying problem.¹¹² Since settlement is usually used for repetitive claims arising from structural violations, the advantage arising from the pursuit of such settlement practice offsets the cost associated with traditional litigation and subsequent need for enforcement. As a consequence, more and more frequently states opt for the former and the situation may continue indefinitely. To be sure, the normalization of non-compliance is not so clear-cut, due to both the availability of other more meaningful remedies and procedures¹¹³ and the fact that, as the data concerning non-pecuniary damages shows, variables concerning the circumstances of the respondent state best contribute to explain variation in the quantum awarded.¹¹⁴

The existence of an institutional alternative to compliance resituates a breach within the system. The moment a state has complied with the obligation to make reparation, it has, in principle, paid its debt. Naturally, a state's reputation might be damaged by the instance of non-compliance in the sense that judgments about its past behaviour will inform other states' calculations concerning future cooperation—an assessment that a centralized dispute settlement mechanism will indubitably render easier.¹¹⁵ However, further reputational sanctions will generally be inapposite.¹¹⁶ On the other hand, situations which have been remedied by this type of redress may be either one-shot violations, and thus an unlikely target for a reputational sanction, or measures that are divisive and polarising enough to hinder the use of reputational sanctions: in the *Hormones* dispute, it would have been difficult to shame the European Communities into compliance by pitting a violation of a market access rule against food safety standards and the precautionary principle.¹¹⁷ The result, which led to compensation to the complainants through increased market access for products which met the respondent's safety requirements, was perhaps the best solution that could be accomplished.¹¹⁸

4.3 The interaction between legal and non-legal sanctions

In the foregoing sections, we have discussed legal and reputational sanctions, discussing the potential displacement effect that the former might have on the latter, as well as the potential

¹¹¹ Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?' (2003) 14 *European Journal of International Law* 907.

¹¹² Veronika Fikfak, 'Against Settlement before the European Court of Human Rights', iCourts Working papers 247, <http://dx.doi.org/10.2139/ssrn.3847608>.

¹¹³ *Supra* ###.

¹¹⁴ Veronika Fikfak, 'Non-Pecuniary Damages before the European Court of Human Rights' (n 14) 360–362.

¹¹⁵ Schwartz and Sykes (n 108) S197 ('central dispute resolution enhances the reputational costs of cheating.'). Stefan Voigt, 'The Independence of International Courts – Making Reputation Work?' (2017) 24 *Maastricht Journal of European and Comparative Law* 511; Law and economics scholarship also reflects this type of considerations. See Bruno Deffains and Claude Fluét, 'Social Norms and Legal Design' (2020) 36 *The Journal of Law, Economics, and Organization* 139, 140 (arguing that 'convictions or even mere prosecution may provide socially valuable information to third parties. By this we mean information that is useful for productive or allocative decisions shaping future relationships between agents').

¹¹⁶ Of course, we do not question that the general law of state responsibility includes, first and foremost, obligations of cessation and, where circumstances so require, guarantees of non-repetition (ARSIWA, Article 30).

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reputational effect of purely legal sanctions that convey information, as well as blame, which will change other players' assessment of the target. The interaction between these different types of sanctions is an important question to consider in order to understand which types of sanctions might be effective in accomplishing the intended goal.

While these questions have not been investigated at length in international law scholarship, they are not novel, and scholars in law and economics in particular have paid significant attention to the problem, showing how any sanctioning phenomenon should take this interaction into account.¹¹⁹ Although the theoretical models constructed in this literature are mostly designed with corporate actors in mind, they are relevant for the purposes of understanding state compliance and behavioural change insofar as they show that legal sanctions produce reputational effects, thereby making an actor's history of violations count for future interactions with its peers—for example, being taken as proxies for its trustworthiness or reliability.¹²⁰ At the same time, however, the application of such models to state behaviour poses unique challenges. For example, the existing asymmetries and power imbalances between states entail that the cost of facing a sanction will differ significantly among different potential targets, with the consequence that an 'efficient breach' will be an option for some, but not all. Similarly, it was only comparatively recently that the literature has taken stock of the cost of litigation and legal remedies as a relevant consideration.¹²¹

At the international level, the interaction between legal and reputational sanctions is, with few exceptions,¹²² severely underresearched. Yet, we submit that this nexus is worth exploring. Although we have no shortage of anecdotal evidence on some of the ways in which legal and reputational sanctions interact, the mechanics and consequences of this interaction are still largely unaccounted for. Filling this gap could provide extremely valuable insights on the way forward, allowing for the design or imposition of sanctions informed by an assessment of the comparative cost and effectiveness of legal and reputational penalties,¹²³ as well as shed light on the potential of the former to crowd out the latter.¹²⁴

4.4 Going behavioural: Cooperation theory and altruistic punishment

Moreover, since there is broad agreement that sanctions—or, at any rate, many types of sanction—are all but ineffective in securing the goal of behavioural change, why states and institutions should keep using them remains a fundamentally unresolved question. We argue that the question is worth investigating and that psychological and behavioural approaches could provide important insights into the reasons and incentives that states have for adopting these strategies.

¹¹⁹ Eric Rasmusen, 'Stigma and Self-Fulfilling Expectations of Criminality' (1996) 39 *The Journal of Law and Economics* 519; Edward M Iacobucci, 'On the Interaction between Legal and Reputational Sanctions' (2014) 43 *The Journal of Legal Studies* 189; Murat C Mungan, 'A Generalized Model for Reputational Sanctions and the (Ir)Relevance of the Interactions between Legal and Reputational Sanctions' (2016) 46 *International Review of Law and Economics* 86.

¹²⁰ Mungan (n 119) 87.

¹²¹ James Crawford and Jeremy Watkins, 'International Responsibility'; Martins Paparinskis, 'A Case Against Crippling Compensation in International Law of State Responsibility' (2020) 83 *The Modern Law Review* 1246.

¹²² Daugirdas, 'Reputation as a Disciplinarian of International Organizations' (n 79) 225.

¹²³ Scott Baker and Albert H Choi, 'Reputation and Litigation: Why Costly Legal Sanctions Can Work Better than Reputational Sanctions' (2018) 47 *The Journal of Legal Studies* 45.

¹²⁴ Alon Harel and Alon Klement, 'The Economics of Stigma: Why More Detection of Crime May Result in Less Stigmatization' (2007) 36 *The Journal of Legal Studies* 355, 356 (arguing that 'argued that wide-ranging use of stigma may erode its effectiveness and that the extensive use of stigma as a substitute for traditional sanctions—for example, in the context of shaming penalties—may undermine its deterrent effects').

In this connection, important insights might be taken from the scholarship on cooperation.¹²⁵ While this strand of research has been picked up in international law scholarship,¹²⁶ the connection between cooperation and sanctions has only been made occasionally.¹²⁷ Models developed in this field, however, hold significant promise in explaining why sanctioning does happen and in providing insights as to what shape it may take in the future. In particular, this is the case of the notion of ‘altruistic punishment’. Thus, on the basis of empirical evidence,¹²⁸ it has been observed that there is a general willingness in many actors to engage in costly punishment of free riders even lacking any direct advantage or reputational effects for either the sender or the target of the sanction,¹²⁹ and experimental studies have found this behaviour to be widespread across a wide variety of populations.¹³⁰ The notion, therefore, provides a framework to explain cooperation among members of a group;¹³¹ to demonstrate that institutions that do include a sanctioning system have a comparative edge over those that do not;¹³² and to find that cooperation is best enforced where the ideal conditions for altruistic punishment are favourable, meaning that the cost for the punisher is low and impact for the punished is high.¹³³

There are inevitable difficulties in the application of models of this kind to state actors, especially insofar no real agreement appears to have been reached as to the underlying motives for altruistic punishment.¹³⁴ Either way, we submit that this approach has the capacity to explain sanctioning where the no reciprocal, retaliatory, or reputational reasons can easily provide a justification. By shifting the focus on cooperation and the need to achieve it in the most efficient manner, it also provides important insights into the outsourcing and centralization of sanctioning power through the creation of enforcement machineries within specific regimes or international organizations. In turn, from the perspective of sanction-design, altruistic sanctioning is inextricably linked with the notion of cooperation in pursuit of a public good, and is therefore well-suited for the development of sanctioning strategies that are geared to attain those goals, rather than to realise partisan interests.

¹²⁵ The key example is Robert Axelrod and William D Hamilton, ‘The Evolution of Cooperation’ [1981] *Science* <<https://www.science.org/doi/abs/10.1126/science.7466396>> accessed 23 January 2022; See also Martin A Nowak, ‘Five Rules for the Evolution of Cooperation’ [2006] *Science* <<https://www.science.org/doi/abs/10.1126/science.1133755>> accessed 23 January 2022.

¹²⁶ Harold Hongju Koh, ‘Transnational Legal Process The 1994 Roscoe Pound Lecture’ (1996) 75 *Nebraska Law Review* 181; See, inter alia, George W Downs, ‘Enforcement and the Evolution of Cooperation’ (1997) 19 *Mich. J. Int’l L.* 319; Anne van Aaken, ‘Experimental Insights for International Legal Theory’ (2019) 30 *European Journal of International Law* 1237.

¹²⁷ van Aaken (n 126) 1256.

¹²⁸ Ernst Fehr and Simon Gächter, ‘Altruistic Punishment in Humans’ (2002) 415 *Nature* 137.

¹²⁹ JH Fowler, ‘Altruistic Punishment and the Origin of Cooperation’ (2005) 102 *Proceedings of the National Academy of Sciences* 7047, 7047.

¹³⁰ Joseph Henrich and others, ‘Costly Punishment Across Human Societies’ [2006] *Science* <<https://www.science.org/doi/abs/10.1126/science.1127333>> accessed 23 January 2022.

¹³¹ Fehr and Gächter (n 128); Ernst Fehr and Urs Fischbacher, ‘The Nature of Human Altruism’ (2003) 425 *Nature* 785; Dominique JF de Quervain and others, ‘The Neural Basis of Altruistic Punishment’ (2004) 305 *Science* (New York, N.Y.) 1254; Mayuko Nakamaru and Yoh Iwasa, ‘The Coevolution of Altruism and Punishment: Role of the Selfish Punisher’ (2006) 240 *Journal of Theoretical Biology* 475; Henrich and others (n 130).

¹³² Özgür Gürerker, Bernd Irlenbusch and Bettina Rockenbach, ‘The Competitive Advantage of Sanctioning Institutions’ [2006] *Science* <<https://www.science.org/doi/abs/10.1126/science.1123633>> accessed 17 January 2022; For earlier research on this point see Toshio Yamagishi, ‘The Provision of a Sanctioning System as a Public Good.’ (1986) 51 *Journal of Personality and Social Psychology* 110.

¹³³ Martijn Egas and Arno Riedl, ‘The Economics of Altruistic Punishment and the Maintenance of Cooperation’ (2008) 275 *Proceedings. Biological Sciences* 871.

¹³⁴ For example, Fehr and Gächter argue that punishment is motivated by ‘negative emotions’ towards non cooperators. See (n 128); In turn, Fowler et al. argue that egalitarian motives constitute a more satisfactory explanation. See (n 129).

4.5 Removing the penalty altogether? Rewarding

More recently, in light of the perceived problems with sanctioning, Anne van Aaken and Betül Simšek have made the case for more attention being devoted to *rewarding*, defined as ‘improvements in a target's value position relative to its baseline of expectations’ (including the removal of an existing penalty).¹³⁵ These authors challenge the equivalence between rewards and penalties, arguing that rewards ultimately represent a potentially superior mechanism to motivate State compliance from a traditional economic, rationalist perspective, underscoring that ‘compliance can be achieved if a reward outweighs the benefits from breaching international law.’¹³⁶ But both authors also consider how the behavioural, psychological impact of ‘rewards’ may be different and how rewards are perceived by States more favourably, thus provoking a different response than sanctions. The authors note that whilst penalties are more likely to cause resistance or counter-threats and lead to an increase in conflicts, rewards are likely to be reciprocated and thus decrease tensions. As psychologists put it, rewarding is ‘an alternative without the major disadvantages of threat with its potential implications for instability, distrust, and mutual dislike.’¹³⁷ Even more crucially, in terms of response that they trigger, rewards can show better results than sanctions. Whilst ‘[t]hreats trigger negative emotions such as fear, anxiety, or anger, and cause a subject to feel stress’ and could be perceived as hostile, rewards ‘produce a more neutral setting’ bringing to front the reciprocity and cooperation between different actors.¹³⁸ From a behavioural perspective, therefore rewarding is not only more likely to prompt compliance, but also lead to a different attitude and cooperation between states.

5 Conclusion: A new research agenda

In this article we have sought to address sanctioning not just as a notion, but as a complex and multifaceted phenomenon which, rather than being a mere predicate of international law, unfolds within or notwithstanding it. We have done so with a view to unpacking the phenomenon at a structural level and showing the promise of the notion of sanctioning for the purpose of understanding the dynamics of state behaviour and compliance with international law obligations—and beyond. By employing a high-level, conceptual approach, we have sought to argue that, even within international law, a legalistic approach to the sanctioning phenomenon is inevitably reductive. Moreover, we submit that the concept maintains its utility and explanatory power as a lens through which several types of international interactions may be examined, and suggest that future research will develop and test the hypotheses set out in our contribution.

¹³⁵ van Aaken and Simsek (n 65).

¹³⁶ Ibid, 197

¹³⁷ Ibid, Thomas W. Milburn & Daniel J. Christie, *Rewarding in International Politics*, 10 *POL. PSYCH.* 625 (1989), 625.

¹³⁸ Ibid, 232.