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ECONOMIC SANCTIONS AND WTO LAW

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The subject. Restrictive measures have become one of the prevailing methods of foreign policy of particular states. Their main objectives are to change the political course of target states, to exert economic pressure on specific governments, companies or individuals. Traditionally, the majority of such measures are referred to the concept of "economic sanctions". Despite the widespread use of the term, the international practice of challenging economic sanctions is not characterized by uniformity of approaches. The subject of this study is to analyze the existing WTO practice on disputes arising from the imposition of economic sanctions. Particular attention is paid to disputes where national security exceptions have been used as a defense argument. The hypothesis of the possibility of challenging economic sanctions through WTO mechanisms is investigated.

Purpose of the study. The article represents an attempt to verify possible options for challenging economic sanctions in the WTO framework. The objective of this study is to analyze the existing practice of consideration of disputes arising from the imposition of economic sanctions at the WTO level in order to identify prospects for their resolution.

Methodology. The research was conducted using general scientific methods – systematicity and logical analysis, which allowed to identify the main regularities of the studied object. Also, in this work were used special scientific methods of cognition, such as formal-dogmatic, historical, generalization method and method of hermeneutics.

The main results. The practice of dispute settlement on the legality of economic sanctions is not fully developed. In the past, economic sanctions have only exceptionally been the subject of WTO proceedings. There have been cases in WTO practice where attempts by states to challenge unilateral restrictive measures have failed not as a result of dispute settlement, but because the parties were able to reach an agreement. Until 2019, Panels practically did not use Article XXI (b) (iii) of the GATT as an argument to justify economic sanctions for fear that it might cause an abuse of right. Recently, the invocation of this Article has become more common.

Conclusions. Article XXI (b) (iii) of the GATT can be used as a basis for challenging economic sanctions imposed against the Russian Federation by certain states that are not in a state of armed conflict with it.

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1. The term of economic sanctions

The use of the term "sanctions" to designate unilateral restrictive measures of an economic nature (e.g., trade embargoes) that are enacted by states in the absence of authorization by the UN Security Council is controversial.

In the national legal literature, the prevailing opinion is that sanctions, from the point of view of international law, are coercive measures that are applied by decision of the Security Council on the basis of Article 41 of the UN Charter. With regard to the so-called sanctions imposed by states independently, i.e. without obtaining a resolution from the UN Security Council, it is more correct to use the term "unilateral restrictive measures" [1, p.172; 2 p.128].

Some western legal scholars also adhere to a similar position. For example, A. Pellet in his early publications argues that the term "sanctions" should be used only in regard to measures taken by the Security Council under Ch. VII of the UN Charter [3, p.11].

The practice of applying this term is not consistent across states: the United States explicitly refers to its unilateral restrictive measures as "economic sanctions"[1], the European Union uses the term "restrictive measures"[2] and Canada refers to such restrictions as "special economic measures"[3].

It seems possible to use the term "economic sanctions" in this article, understanding them as unilateral restrictive measures of an economic nature imposed on the basis of the provisions of national legislation by one state against another state, as well as its entities and individuals.

The legality of economic sanctions is analyzed from different perspectives [4, p. 95; 5 p. 3; 6 p. 59; 7 p. 724]. One such aspect is their compliance with the UN Charter.

In discussions on the UN platforms, it has been repeatedly stated that unilateral sanctions contradict international law, international humanitarian law, the Charter, as well as the rules and principles governing peaceful relations between states[4]. In 2014, the mandate of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights was established.

In practical terms, the debate on the legality of economic sanctions revolves around the possibility of challenging such measures and getting them revoked [8, p. 72; 9 p. 173]. In this context, the question of the consistency of economic sanctions with international investment law is often examined in the literature [10, p. 208; 11] и праву ВТО [12, p.165; 13, p.237].

Nowadays, the topic under consideration is characterized by a significant number of academic works of various levels. However, it is not yet possible to state that the relevant issues

[1] Countering America's Adversaries Through Sanctions Act (CAATSA), Pub. L. No. 115–144, 131 Stat. 886 (2018). - URL: https://ofac.treasury.gov/sanctions-programs-and-country-information/countering-americas-adversaries-through-sanctions-act-related-sanctions (accessed 08.02.2024)

[2] Restrictive measures (sanctions). - URL: https://eur-lex.europa.eu/EN/legal-content/glossary/restrictive-measures-sanctions.html (accessed 08.02.2024)

[3] Special Economic Measures Act, S.C. 1992, p. 17. - URL: https://laws-lois.justice.gc.ca/eng/acts/s-14.5/page-1.html (accessed 08.02.2024)

[4] A/HRC/48/59: Report on the notion, characteristics, legal status and targets of unilateral sanctions. - URL: https://www.ohchr.org/ru/special-procedures/sr-unilateral-coercive-measures (accessed 09.02.2024)

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have been comprehensively or adequately covered and the topic has been exhausted.

In particular, the practice under the GATT and WTO dispute settlement system is of interest. In view of the political component of the issue, as a hypothesis, it can be assumed that some disputes can be settled before being considered on the merits.

2. WTO practice

Economic sanctions are incompatible with the WTO, which is based on the principle of multilateralism and its corollary principles of consensus and cooperation. Furthermore, economic sanctions violate the free trade regime and contravene the principle of non-discrimination [14, p. 33]. The foundation of the multilateral trading system lies in member states' commitment to international rules, including those under the GATT (Geneva, 1947, Marrakech, 1994)[5] and dispute settlement procedures. Disputes should be resolved through available procedures and not by unilateral measures.

In reaffirmation of these principles, in Clause 7 (iii) of the 1982 Ministerial Declaration, GATT Members committed themselves to refrain from using restrictive measures in international trade for non-economic reasons contrary to the GATT[6].

In the past, economic sanctions have only exceptionally been the subject of WTO proceedings. The most prominent of these are a few cases.

In 1983, the United States - Imports of Sugar from Nicaragua (GD/142) case challenged the legality of the imposition of U.S. economic sanctions for the purpose of a coup d'état and change of power[7].

Nicaragua's objections were based on the non-discrimination provisions of Article XIII (2) of the GATT, as well as Articles II, XI and Part IV of the GATT. Nicaragua claimed that, based on past export figures, it should have been allocated a quota of 2.1% of total U.S. sugar imports, or 61,95 thousand tons. In fact, Nicaragua was allocated 6,000 tons, i.e., less than 10% of the quota to which the state was entitled.

Nicaragua won this dispute, which nevertheless had no effect on the lifting of U.S. sanctions. Moreover, in 1985, the U.S. imposed a total embargo on trade with Nicaragua, which provoked the filing of another complaint by Nicaragua, the United States - Trade Measures Affecting Nicaragua (GD/158) case.[8].

In the process of consideration of this dispute, the U.S. used Article XXI(b)(iii) on the threat to national security as the basis for the imposition of restrictive measures. The representative of Nicaragua argued that his state was not a threat to the U.S. and that the measures imposed were nothing more than coercion. As a result, the panel ruled that the U.S. embargo was contrary to the basic objectives of the GATT.

Another WTO-level proceeding on economic sanctions was the 1996 United States - The Cuban Liberty and Democratic Solidarity Act (DS38) case, in which the European Communities attempted to challenge the U.S. Cuban Liberty and Democratic Solidarity Act, better known as the Helms-Burton Act, which allowed extraterritorial economic sanctions against Cuba[9].

Despite the obvious unilateral nature of the measures, Section I of the Act states that it was aimed at strengthening "international

[5] General Agreement on Tariffs and Trade 1994. - URL: https://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm (accessed 10.02.2024)

[6] Ministerial Declaration 29.11.1982. - L/5424, L/5426 (30.11.1982), BISD 29th Suppl. 9. P. 11 (1983).

[7] GATT/L/5607, 1984, 2 March

[8] GATT/L/6053, 1986, 13 October

[9] WT/DS38/5, 1997, 25 April

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sanctions" against the Castro government. The main purpose of the Act was to deter trade between businessmen from other countries (other than the U.S.) and Cuba. If they illegally exported from Cuba property seized from U.S. citizens as a result of the revolution, the businessmen faced a fine[10]. Among other things, the U.S. Cuban Liberty and Democratic Solidarity Act provided for amendments to the U.S. Cuban Democracy Act[11] to include sanctions against a state that assists Cuba, including as part of such assistance any exchange, reduction or forgiveness of Cuban debt to the state in exchange for an interest in Cuban state property.

The adoption of this law caused a wave of outrage outside the United States and provoked the European Communities to file a complaint alleging violations of Articles I, III, V, XI and XIII of the GATT, as well as Articles I, III, VI, XVI and XVII of the GATS [15, p. 509]. The case did not proceed because, after the establishment of the Panel, the parties signed a Memorandum of Understanding[12], under the terms of which the United States undertook to waive Section III of the Helms-Burton Act (the section on property liability for trade in property confiscated by the Cuban government after the 1959 revolution) and the European Communities suspended the WTO case.

In recent years, there has been an increasing trend in the number of WTO cases involving challenges of economic sanctions. Most of such disputes ended at the stage of establishment of the Panel, without consideration of the dispute on the merits due to its settlement.

One example is the case of Japan - Measures Related to the Exportation of Products and Technology to Korea (DS590)[13].

In September 2019, the Republic of Korea requested consultations to review Japan's export restrictions for compliance with WTO rules. The restrictions came into effect amid growing political tensions between the two countries. Japan has imposed export restrictions on chemicals and other materials that the Republic of Korea needs to produce semiconductors and smartphone screens [16, p. 376]. Japanese officials said the materials were illegally shipped to North Korea, where they could be used to make weapons.

In addition, Japan declared that the Republic of Korea had been removed from the list of reliable trading partners, which resulted in the impossibility of trade between states. In its request for consultations, the Republic of Korea noted that these restrictions are "politically motivated, disguised restrictions on trade". Taiwan and the EU also joined the consultations.

The Panel was established in July 2020, and in March 2023, the Republic of Korea decided to withdraw its request as the parties were able to reach an agreement to partially lift export restrictions.

Another example in which a dispute was not resolved through consultations but eventually resulted in the signing of an agreement during the arbitration panel process is the case of the United States - Measures relating to trade in goods and services (DS574)

[10] Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996. – URL: https://www.congress.gov/bill/104th-congress/house-bill/927 (accessed 12.02.2024)

[11] Cuban Democracy Act of 1992. – URL: https://www.congress.gov/bill/102nd-congress/house-bill/5323#:~:text=Cuban%20Democracy%20Act%20of%201992%20%2D%20Sets%20forth%20U.S.%20policy%20with,manner%20consistent%20with%20this%20Act. (accessed 12.02.2024)

[12] European Union-United States: Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act. – URL: doi:10.1017/S0020782900016132 (accessed 12.02.2024)

[13] WT/DS590/1, G/L/1325, G/TFA/D3/1, G/TRIMS/D/45, S/L/431, IP/D/42. 2019, 16 September.

case[14].

In late December 2018. Venezuela requested consultations regarding the measures imposed by the United States on: goods of Venezuelan origin, imports of gold from Venezuela, Venezuelan public debt liquidity, transactions with Venezuelan digital currency, among others. In their request, Venezuelan representatives claimed that the U.S. has imposed coercive measures and trade restrictions in order to economically isolate Venezuela. The U.S. ignored the request and refused to hold consultations, which it formally notified the Venezuelan government in February 2019. In March 2019 and again in March 2021, Venezuela applied to form a Panel and requested that the matter be placed on the agenda for the next meeting of the Dispute Settlement Body, but the U.S. refused to approve the agenda. The meeting was canceled and the request for the establishment of the Panel was never considered. As a result, Venezuela was forced to withdraw its request.

Ignoring due process in dispute settlement, turning in some cases into opposition, has become a common practice for U.S. representatives.

Since 2017, the U.S. has consistently failed to agree to replace members of the Appellate Body. In December 2019, when the number of previously appointed members fell below three, the Body ceased to operate. This is the first time since the WTO was established in 1995 that the Appellate Body cannot accept new appeals, and it has an indirect impact on the entire global trade dispute settlement system. The absence of an Appellate Body means that WTO members can now effectively block dispute settlement through so-called "nowhere" appeals [17, p. 239].

The above-mentioned cases illustrate the growing tendency of states to use unilateral restrictive measures to achieve geopolitical goals, as well as the desire of parties to challenge them through WTO mechanisms. However, none of these cases have reached the Appellate Body, and most of them have resulted in the signing of agreements.

3. National Security Exceptions

Even the classics of political economy have pointed out that trade must sometimes be restricted, not least because "protection is far more important than wealth. There is no point in being wealthy if you are not free. So security threats are good reasons to give up economic opportunities. It was perfectly justifiable to impose tariffs on foreign traders if it was necessary for national defense. [18, p.107].

Some of these ideas formed the basis of GATT provisions. Thus, for example, Article XXI (b) (iii) provides that nothing shall be construed to prevent any contracting party from taking such action as it considers necessary to protect its essential security interests, if taken in time of war or other extraordinary circumstances in international relations.

Similar provisions are found in other WTO agreements, namely Article XIV bis of the General Agreement on Trade in Services (Marrakech, 1994)[15] (hereinafter referred to as GATS) and Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights[16] (hereinafter referred to as TRIPS).

Previously, the provisions of Article XXI of the GATT regarding state actions to protect national security have not been the subject of disputes. The reasons for such caution are quite understandable - active application of this

[14] WT/DS574/2/Rev.1, 2021, 16 March

[15] General Agreement on Trade in Services. - URL: https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm (accessed 16.02.2024)

[16] Agreement on Trade-Related Aspects of Intellectual Property Rights. - URL: https://www.wto.org/english/docs_e/legal_e/31bis_trips_01_e.htm (accessed 16.02.2024)

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article without sufficient grounds could become an abuse of law and endanger the entire world trade system [19, p.122].

The period of absence of WTO proceedings under Article XXI of the GATT appears to have come to an end. One of the disputes important from the point of view of interpretation of this article was initiated by Ukraine after the imposition of economic sanctions by the Russian Federation and Ukraine against each other.

In 2016, Ukraine appealed to the WTO Dispute Settlement Body to challenge restrictions on transit transportation from Ukraine through Russia to third countries[17].

In Russia - Measures Concerning Traffic in Transit (DS512 case), Ukraine argued that Russia's actions were inconsistent with its obligations under Article V of the GATT, which requires freedom of transit for trade in goods. In addition, it was argued that Russia's measures were inconsistent with Article X of the GATT, which requires transparency of rules and regulations; as well as a number of provisions of Russia's WTO accession agreement.

Russia, in turn, invoked exceptions based on the provisions of Art. XXI (b) (iii) and related to state action to protect national security.

In April 2019, a Panel report was published recognizing Russia's right to national security protection due to the facts of the case [18].

It follows from clause 8.1 of the Report on Russia - Measures Concerning Traffic in Transit (DS512) case that the Panel reached, inter alia, the following conclusions:

(a) On the question of whether or not it is authorized to hear the dispute under Article XXI (b) (iii) of the GATT, the Panel considers that it is competent to resolve the dispute in this part of the claims;

(b) On the issue of whether Russia has complied with all requirements for recourse under Article XXI (b) (iii) of the GATT, the Panel considers that:

i. since 2014, a situation existed between the Russian Federation and Ukraine which constitutes an emergency in international relations within the meaning of Article XXI (b) (iii) of the GATT;

ii. each of the measures at issue was taken during this emergency situation in international relations within the meaning of Article XXI (b) (iii) of the GATT;

iii. The Russian Federation has complied with the conditions of the preface of Article XXI (b) (iii) of the GATT.

Thus, Russia has met the requirements necessary under Article XXI (b) (iii) of the GATT with respect to the measures in question.

As a result of consideration of this dispute, the Panel, for the first time in the history of the WTO, provided an expanded interpretation of Article XXI of the GATT [20, p. 9]. Perhaps the most important issue decided in this case was the threshold question of whether the Panel had the legal authority to hear the dispute and to assess the situation as to whether or not there was a threat to national security. Russia argued during the proceedings that the Panel had no authority to resolve the dispute in question and that the national security exception was applied by a party based on its own assessment of the situation, and the Panel had no right to question a WTO Member when it claimed to be acting in defense of its national security.

Based on the text of Article XXI (b) (iii) of the GATT, the Panel in Russia - Measures Concerning Traffic in Transit (DS512) case concluded that the phrase in subpar. "b" "action it considers necessary" confirms that a WTO Member has exclusive discretion to "take any measures ... to protect national security

[17] WT/DS512/7/ 2016, 14 Sept.
[18] WT/DS512/R, 2019, 5 April

interests". However, this exclusive discretion does not extend to the determination of the circumstances in subp. "iii" as to whether such a measure is "taken in time of war or other emergency in international relations". This is a matter for legal assessment by the Panel when it is raised as part of a dispute settlement.

Thus, the Panel in the present case concluded that the Russian measures were justified under Article XXI(b)(iii) of the GATT because they were "taken during an emergency in international relations between Ukraine and Russia"[19].

Obviously, this approach would not be applicable in disputes between states that impose economic sanctions but are not a party to a military conflict or other extraordinary circumstances.

At the same time, the Panel disagreed with the arguments of the Russian Federation and the United States that it had no authority to consider the dispute. Recognizing that WTO Members have a very wide discretion in applying Article XXI, the Panel ruled that such issues are within its competence. Otherwise, the balance established in the text of Article XXI may be disturbed, which in the future does not exclude the abuse of law by states in terms of the use of these exceptions.

Thus, the burden of proving the existence of a threat to national security in war or other extraordinary circumstances lies on the party that invokes the exceptions set forth in Article XXI (b) (iii) of the GATT in its legal position.

The Panel's decision in Russia - Measures Concerning Traffic in Transit (DS512 case) did not technically set a precedent; such a decision is not considered a source of law by the WTO. Nevertheless, in accordance with the WTO's dispute settlement obligation to ensure "the security and predictability of the multilateral trading system", Panels usually try to maintain consistency in the clarification of certain legal provisions. Otherwise, uncertainty about the meaning of trade rules or conflicting interpretations would hinder the development of world trade.

Conclusion

Clear trade rules, the existence and functioning of the Appellate Body, and its consistency in decision-making are the main reasons for Members to join the WTO. The WTO Forum, despite the crises associated with the suspension of the Appellate Body, remains a suitable forum for scrutinizing and challenging the legality of economic sanctions. At the same time, the WTO dispute settlement system has prospects for reform in the near future, as most members are interested in using it.

It seems that the direction of international relations, which has recently shifted towards economic nationalism and anti-globalization unilateralism, will retain its course.

Many WTO members have taken and continue to take trade restrictive measures that they attempt to justify on national security grounds. The practice of resolving such disputes has not been uniform. Panels were quite cautious in their formulations when it came to using Article XXI (b) (iii) of the GATT as an argument to justify economic sanctions, fearing that an expansive interpretation could lead to abuse of the law by states. However, after 70 years of restraint, invoking the Article is becoming more common.

A turning point was the Panel's decision on Russia - Measures Concerning Traffic in Transit (DS512) case, which for the first time in the history of the multilateral trading system provided a detailed interpretation of Article XXI (b) (iii) of the GATT. In addition, the Panel

[19] Clause 8.1 REPORT OF THE PANEL «Russia — Measures Concerning Traffic in Transit». - URL: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/512R.pdf&Open=True (accessed 01.02.2024)

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separately emphasized that it had the authority to consider the dispute and assess the situation in terms of the presence or absence of a threat to national security.

The validity of the imposition of unilateral sanctions by a state invoking the provisions of Article XXI(b)(iii) of the GATT can be considered only if the measures are applied to protect essential national security interests in conditions of war or other extraordinary circumstances in international relations.

States imposing economic sanctions against another state, but not being a party to a military conflict or other emergency situation, cannot invoke Article XXI (b) (iii) of the GATT as an argument to justify such restrictive measures.

It seems advisable to consider the possibility of using this article in cases challenging the legality of economic sanctions imposed against the Russian Federation by certain states that are not in a state of armed conflict with it.

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