**DOI** 10.52468/2542-1514.2024.8(4).143-152



# "SANCTIONS LAW": PROBLEM STATEMENT**

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***Article info***
Received –
2024 May 10
Accepted –
2024 September 20
Available online –
2024 December 20

***Keywords***
Sanctions, sanctions policy, international law, international private law, national law, EU law, global competition, trade barriers, countermeasures, international competition law, Draft Articles on Responsibility of States for Internationally Wrongful Acts

The unilateral coercive measures of states also wrongly called sanctions have occupied a significant place in law; the current state of the latter is analyzed. The complex set of legal rules have appeared concerning sanctions exactly, countersanctions targeted against them and their legal consequences as well as restrictions, prohibitions and exemptions caused by the sanctions policy. Lawyers have to deal with numerous conflicts related to the implementation of prohibitions imposed on already highly complex structure of the foreign economic activity's regulation.

It impacted the perception of law from the point of view of systematic approach as soon as it needs to be determined what area of law the unilateral state restrictions belong to and what is the relationship between the national and the international legal regulation hereof from a formal legal point of view. The sanctions are considered by the author within the context of the correlation between legal systems and the logic of interaction between them. Nowadays the sanctions law is the combination of disparate legal provisions and practices allowing to use the sanctions as the instrument in the global competitive clash. Historical and comparative legal analysis methods enable to confirm that the terminological substitution happened at a certain historical point: the term "sanctions" began to be used in relation not only to measures taken by the Security Council under the UN Charter, but also to unilateral state acts. Dialectical and logical approaches allowed to trace the meaning and the purpose of the international legal regulation in the sphere of international trade and economic relations. It has always been aimed to remove any barriers and obstacles to the free movement of goods, services, capitals and labor. Therefore, an arbitrary and uncontrolled sanctions pressure contravenes the meaning and the purpose of the existing international law. The regulation of the unilateral state restrictions shall be interrelated at the level of legal systems and be based on the rules of the international law providing for the free trade and commercial exchange without trade barriers. The importance of the distinction between sanctions provided for by the international law and countermeasures as the means of states response to the violation of law committed by another state is emphasized. The author concludes that it is necessary to adopt the special international legal regulation regarding the conditions of imposing countermeasures, suggests to use the provisions of the Draft Articles on State Responsibility and substantiates the need for the establishment of the international competition law.

** The article was prepared at the State Academic University for the Humanities within the framework of the state assignment of the Ministry of Science and Higher Education of the Russian Federation (topic No. FZNF-2023-0004 "Digitalization and the formation of a modern information society: cognitive, economic, political and legal aspects").

ISSN 2542-1514 (Print)

## 1. Introduction

A new direction that might be called the "sanctions law" gains strength. Certainly, this phenomenon appeared and exists long enough, but the interest for the sanctions restrictions exactly in the present time has led to an appearance of wide range of legal questions related to the imposition of sanctions and counter-sanctions, their legal consequences as well as restrictions, prohibitions and exemptions caused by the sanctions policy. Lawyers have to deal with numerous conflicts related to the implementation of prohibitions imposed on already highly complex structure of the foreign economic activity's regulation.

The new direction in jurisprudence and positive law may be rightfully called the "sanctions law" in order to generalize the aforementioned range of legal questions. Naturally, this term is quite conditional but it gives the general idea on what sphere this phenomenon relates to and what it is about. Nevertheless, it can be stated that the "sanctions law" in its current state cannot be viewed as well-coordinated set of legal instruments as rules in the international, national law and law of integration systems exist separately and do not relate to each other. The basis of the research of the sanctions law phenomenon are the fundamental methods of dialectics, logic and systems analysis. The comparative-legal, dogmatic (formal-legal) and historical methods were used to address the raised issues.

## 2. Sanctions confrontation and the law

It needs to be clarified whether the issues related to the sanctions policy are so new. An example of a first known trade blockade when Athens issued the so-called Megarian Decree (decision) depriving the city-state Megara from performing trade operations in Athens and all cities of the Delian League in 432 BC is usually referred to so as to show that the economic sanctions are known to mankind since ancient times.

References to numerous examples of sanction collisions when one state imposes trade embargo, blockades and measures restricting or prohibiting export, import and so on against another state throughout human history are to confirm that sanctions have been known to mankind long enough and are supplemented by the long-term practice of application hereof. In the meantime it is difficult to agree with such argumentation. Firstly, the application of sanctions *de facto* never legalizes them in a legal sense. The existence of such custom shall be proved, but such evidence have still not been provided particularly regarding the existence of *opinio juris*. Secondly, an unprecedented spread that the sanctions policy has gained in the second half of the XX c. and at the beginning of the XXI c. is not comparable to the legal substantiation hereof.

Research of sanctions policy phenomenon is carried out by a wide range of specialists in such spheres as philosophy, economics, sociology, political science, international relations, law, as well as representatives of business entities in the field of finance, investments, cross-border payments, transport of goods, logistics etc.

This process has affected the legal practice as well. The lawyers specializing in matters of evasion of sanctions restrictions, looking for safe logistic schemes and settlement transactions have appeared to be in demand. Law offices offer services related to building cross-border business, searching for reliable partners and loyal jurisdictions. In fact the specialists in sanctions restrictions has appeared as a new legal specialization. The special professional training and new special courses are being introduced in law schools.

Nowadays it is very difficult to predict for how long the current sanctions mess will last and what configuration the sanctions law will obtain in future. It obviously got its spread due to the legal vacuum in international and national law. We suppose that a legal framework for the introduction of sanctions and adequate response hereto will be developed in the foreseeing future.

It is clear that the term sanctions law term might be used only conditionally, as it points out in the most general way on relevance hereof to the law. At the same time it is quite obvious that this term does not correspond to the generally accepted division of law into branches, sub-branches, legal institutes and so on which are usually distinguished according to the subject and methods of the legal regulation. In the extensive literature dedicated to

the sanctions a question on what branch of law sanctions regulations belong to is sometimes not even mentioned.

The existing exemptions from that rule are interesting for us. The monograph dedicated to the economic sanctions in the international private law of the EU was published in 2019. Its author Tamash Szabados (Hungary) starts form the general postulate that the economic sanctions are the foreign policy's and international public law's instruments. Consideration of sanctions as political instruments if often followed by highly frank statement of their purpose: "the idea to inflict misery on people of the countries targeted by the sanctions in order to make them affect on their government is a basis for the concept of sanctions" [3, P. 346-347]. Thereby as the flip side of sanctions appears namely their harmful impact on the legal relations between subjects of private law. Precisely the influence of sanctions on private persons became subjected to scrutiny in the T. Szabados's monography. Our attention was drawn to the questions the author raised.

T. Szabados goes against the prevailing in the law doctrine concept of civil law interpretation of the international private law under which the rules regulating the transnational relations might belong only to the national law and have nothing to do with the international law.

According to this idea, in each state there is its own international private law, and we shall talk about the French international private law, the Japanese international private law, the Argentinian international private law, etc. In fact there is one exception to this rule that is the European Union's international private law. A.-L. Calvo Caravaca and J.C. Carrascosa González support this approach pointing out that "the European Union although not being a state has its own system of the international private law called the international private law of the European Union" [4, P. 4]. This is actually a statement, albeit necessary, of an undisputed fact that the regulation of transnational civil relations may be not only introduced by a state, but also have its source in the international public law and the integration law (in other words, law of such integration systems as the EU) [5, P. 160-161].

Therefore, it is time to reject the idea that the international private law is the specific part of the civil law. Precisely sanctions themselves demonstrate the close interrelationship between the international law and national law regarding the regulation of the transnational civil relations. The questions of sanctions and consequences hereof will obviously affect such spheres as the international economics, financial, transport and investment law as well as matters of cultural and scientific cooperation and humanitarian exchanges etc. The impact of the sanctions confrontation on the international civil process, namely matters of judicial and arbitral dispute resolution, jurisdiction as well as enforcement of judgments and awards is undoubted. Some specialist even talk about the shaping of new instruments of judicial remedies for private business interests [6, P. 126-131]. The sanctions issue will surely be a part of the integration law.

The question of the eligibility of the application of sanctions by the integration groups, such as the EU, is not useless. This union established for the purpose of the economic integration has its own economic interests. That raises a question whether the sanctions are just a pretext for reformatting the situation in its own favor. The matter of using the sanctions restrictions against competitors cannot be ignored since there is a lot of economic blocks in the modern world. We are often faced with the situations when the sanctions are used as an instrument of weakening the economic potential of some states or groups hereof [7, P. 15]. Would the world be divided into the local economic units entered into the irreconcilable confrontation with each other?

When we talk about the sanctions, a question of relation between rules of the international, integration and national law becomes crucial. Discrepancies in the rules of legal systems allow to evade sanctions or ignore them at all in many cases. But it always becomes quite difficult legal task to correlate the regulations in accordance with their legal nature and degree of obligation. Shall we obtain as a result a legal mess that will be impossible for economic entities to deal with?

It is regrettable that the research of the sanctions phenomenon is not well-coordinated in the legal doctrine. In fact, the examination of

ISSN 2542-1514 (Print)

sanctions is separated from the point of view of different legal disciplines and moreover legal systems. As a result, the subject matter appears to be in the "gray zone", that is at the crossroads of the international, integration and national law. Such situation leads to the fact that the specialists' conclusions often turn out to be in the "parallel universes", they do not correspond with one another. Such situation is unacceptable, it is quite obvious that the necessity of a wide interdisciplinary research of economic sanctions is long overdue. One cannot but admit no significant step was made in this respect, and the sanctions law continues being t*erra incognita*.

**3. Sanctions and the global competition**

In the modern world we deal with two multi-directional tendencies. The speculations around whether the state's participation in the regulation of market processes and civil law relations shall be kept to a minimum have become common. According to the globalization and liberal world order paradigm a state must leave the economy so far as private parties could organize their interrelations more effectively and a state shall never interfere into the regulations of those relations.

According to J. Basedow (Germany), the change of priorities in regulation of transnational private connections is predicted by the transformation of international economic relations under the influence of wide penetrability of national borders, interdependence of national economies and internationalization of an individual's life. The free movement of people, goods, services, capitals and information creates open societies implying the freedom of choice of rules regulating such connections [8].

On the other side, we deal with the fully opposite tendency that is the growing participation of a state in carrying out the transnational private business. We can see not only the extension of states' impact on economic interests, but also how a state turns into an active player advocating the interests of its economic entities [9, P. 24-53].

Albeit a number of reservations, J. Basedow nevertheless admits that there are areas of social-economic activity a state leaves beyond its control but he does not even mention the economic sanctions. Meanwhile, the economic sanctions precisely became the most important instrument in a competitive clash nowadays [10, P. 107-111]

The importance of sanctions as an instrument of an economic policy is almost not investigated by lawyers, but it is thoroughly analyzed in the economic literature. The global competition is one of the central terms being researched. Economists carefully monitor what technologies and instruments states use in order to receive unilateral advantage in a clash for the economic dominance.

An array of means involved in this clash is quite wide: extraterritorial application of domestic law, appropriation of jurisdiction; establishment of closed economic groups; creating of supranational structures arrogating to themselves the right to adopt binding decisions without the consent of states hereto; shaping of supranational law or law based on rules. All these are the links of a chain covering the entire globe and called the global competition.

Economists look at what role sanctions play in this process. It is emphasized that sanctions are a threat emanating from outside to competitiveness of the particular state, industrial complex, industry, campaign in order to cause them the most damage. Sanctions are aimed to isolate its destination that is "an effective way to remove a competitor from the market, weaken it, destroy its competitive advantages and conditions of activity" [11, P. 29].

Sanctions are thoroughly considered from the point of view of implementation sequence: firstly the direct damage is caused to a state of destination, then a zone of increased uncertainty and heightened risks is formed that is an indirect damage to a business climate and investments and finally the domino effect starts for the industrial competition and interrelated supplies throughout the whole change of external economic relations [12, P. 70]. This has a "cumulative effect", namely an attack is implied on cooperative models, economic development, financial and credit system, investment links, wellness of national currency etc.

Tracking the way the sanctions clash is developing and the results it is leading to, economists emphasize that consequences of

ISSN 2658-4050 (Online)

restrictions affect not only a state of destination, but also global economy as a whole. Its economic entities as well as counterparties, suppliers, subcontractors etc. suffer. Sanctions violate the normal course of business and lead to the fact that it operates in mode of economic and technical collapse.

**4. Sanctions and the international law**

Now it is time to look at aforementioned situation from the angle of international law, since the described situation contradicts not only its rules, but also its very meaning and purpose. For a long time efforts of international community were aimed at building legal regulation that would ensure favorable conditions for international trade and financial cooperation, division of labor and mutually beneficial exchange of goods, finance, services and factors of production.

Shaping the foundations of the current system of international law started in 1945 with the signing of the UN Charter. It provides for fundamental tenets of the world order, namely the basic principles of the international law among which there are the principle of non-use of force or threat of use of force (including the economic pressure), cooperation, non-interference into internal affairs (including a state's economy), protection of human rights, etc. The whole building of the international law is built on this basis.

But this is not enough. As soon as the UN was established right after the unprecedented military-political conflict – World War Two – an aim to prevent a recurrence of similar struggle was originally set; that is why questions of military-political security was laid in the basis of the establishing organization, and the organization was meant to be called the International Organization on Security. However, it was subsequently decided to supplement questions of the military security with question of the economic security since in most cases economic disagreements lead to a conflict. The organization has been called the United Nations, and Economic and Social Council was established as one of its most important body intended to secure the effective and mutually beneficial cooperation in economic sphere.

But it was not all, organizations aimed to facilitate cooperation in all areas of economy, finance and business were brought into relationship with the UN as well. These are the so-called UN specialized agencies, which purpose of activity is predetermined by the UN common goal namely to secure the cooperation of states. Each of them is responsible for facilitation of development of particular sphere of economic, technological and social links. All this has to function as the single mechanism in order to secure seamless cohabitation of states on our planet.

The creation of a special institute was initially planned, precisely the World Trade Organization, but its establishment faced an array of serious interstate discrepancies. However, in 1947 the unique treaty was signed named the General Agreement on Tariffs and Trade of October 30, 1947 (GATT-1947). For nearly half a century this treaty (an eponymous international organization appeared on its basis) carried out the functions of coordination in the sphere of international trade policy. In 1994 the World Trade Organization was established as a result of GATT's transformation. Its scope was expanded and services, trade aspects of investments, intellectual property, trade barriers, goods origination, sanitary and phyto-sanitary measures and agriculture, etc. were added in its remit.

What was the purpose of GATT and then of the WTO? It is quite simple – to remove any barriers and obstacles to the international trade. We shall not discuss how effective was the activity of WTO in this direction, but it was its very purpose.

Meanwhile, efforts to stimulate the establishment of favorable conditions for the international cooperation were not limited that. Hundreds of international institutions are involved in providing business with a comfortable environment. In fact any sphere where obstacles for the economic activity could appear were a subject of the special regulation. The set of treaties aimed at unification of custom procedures and transportation of goods so as to accelerate the movement of goods flows can hardly be overestimated.

We could further continue the listing we began, but it is not necessary, since we should unlikely prove that the international law and institutions created on its basis always had an aim to

ISSN 2542-1514 (Print)

remove any obstacles for the economic cooperation of states. These purposes were unequivocally provided for in numerous documents of the UN [13, P. 166-169].

The sanctions policy not only contradicts the international law, but also directly goes against it. Trade embargoes, blockades, bans on the export and import, financial restrictions and so on are exactly those very barriers that must be whether eliminated or introduced into the legal framework. The international law of cooperation and interaction between the states must not become the international law of confrontation and clash.

**5. Sanctions and the UN Charter**

In spite of this we might face with the statements that the international law allegedly legalizes sanctions themselves. They refer to the provisions of the UN Charter providing for the application of sanctions by the UN Security Council in accordance with the Chapter VII regulating actions regarding threats to the peace, breaches of the peace and acts of aggression. The UN Security Council is indeed authorized to decide whether such threat exists and apply measures to maintain peace and security under Art. 41 and 42 of the UN Charter. Albeit the term “sanctions” is not used, under the tradition established in the worldwide doctrine they were always called sanctions so as to avoid using of the UN Charter’s large wordings.

This had been going on for a while until a substitution of terms happened at some point and sanctions became known as not only measures adopted by the UN but also as restrictions of states introduced hereby unilaterally. E.T. Usenko and V.A. Vasilenko admitted that the substitution has happened since the USA adopted measures restriction trade operations with the USSR in 1980 referring to the participation of the USSR in the conflict in Afghanistan. As E.T. Usenko and V.A. Vasilenko stated (and this is of crucial importance) the term “sanctions” with respect to unilateral measures of the USA became widespread through the Eastern mass media [14 P. 35].

Unfortunately, this terminological substitution was not challenged in any way or at least questioned in the doctrine, though there is a huge difference between measures adopted by the UN and those adopted unilaterally by states. What is this difference?

Firstly, measures adopted by the UN Security Council are provided for in the UN Charter, this means that they are based on the international law rules. Unilateral measures of a state are adopted by the state itself in its own national law at its own discretion.

Secondly, the measures of the UN Security Council are mandatory for all states, since in accordance with Art. 103 of the UN Charter if obligation of a UN member under the UN Charter contradicted its obligations under some other treaty, the obligations under the UN Charter shall prevail. Regarding the unilateral sanctions, they are adopted unilaterally and voluntarily. Moreover, a state introducing sanctions claims to apply its domestic law extraterritorially.

Thirdly, measures adopted by the UN Security Council are discussed collectively and are guaranteed against prejudiced and one-sided assessments of a situation serving as a reason for adoption of such measures. In this case the collective control is envisaged to ensure that such measures are appropriate to the situation.

With respect to unilateral measures there is quite a paradoxical situation. A state initiating sanctions adopts itself provisions regarding the possibility of adopting sanctions in its national law, states the fact of breach hereof, decides whether an other state is guilty, ensures introducing of sanctions and monitors their implementation. From the legal point of view this situation is absurd: the same person simultaneously acts as a legislator, an investigator, a prosecutor, a judge and a bailiff. Sanctioned state does not even have a possibility to present arguments in its defense. Who would listen to it if a verdict had already been given and besides for an unlimited period.

**6. Countermeasures under the Draft Articles adopted by the UN International Law Commission**

Therefore we can state that sanctions adopted unilaterally are illegitimate according to the current international law. They cannot be called sanctions since the sanctions themselves have

nothing to do with them. It was confirmed by the UN International Law Commission while developing the Draft Articles on responsibility of states for internationally wrongful acts (the Draft Articles). In this document the international law responsibility is understood as the one applying to internationally wrongful act and institutionally resulting from the provisions of the UN Charter. An existing mechanism of application of international sanctions (coercive measures) was confirmed.

With respect to unilateral acts of states, the term "countermeasures" was used in the Draft Articles instead of "sanctions". The term "countermeasures" in the international law doctrine is construed as a response to a wrongdoing not connected with the use of force. Countermeasures are actions that would be illegal by themselves if there were no illegal actions of another states breaching their obligations and that shall encourage the state to fulfill its obligations.

The essence is not in the terminology, but in the fact that an attempt to legalize such measures was made in the Draft Articles. In our opinion, this provisions are of fundamental importance.

Firstly, an injured state may adopt countermeasures against another state just to make it fulfill its breached obligation.

Secondly, countermeasures shall be limited for a period of non-performance of international law obligations by an obliged state.

Thirdly, countermeasures shall be reversible, i.e. they must allow to resume the execution of relevant obligations.

Fourthly, countermeasures cannot affect an array of state's international law obligations: to refrain from the use of force or threat of use of force; to protect human rights and fulfill obligations of a humanitarian character, as well as obligations emanating from peremptory norms of general international law.

Fifthly, a state introducing countermeasures shall not be released from an obligation to attempt any procedure of peaceful dispute resolution.

In the sixth, countermeasures shall be commensurate with the injury suffered taking into account the gravity of the internationally wrongful act.

Apart from the above-mentioned, an array of procedural conditions regarding the application of countermeasures is provided for in the Art. 52 of the Draft Articles.

We shall pay attention at thoughtful and consistent nature of provisions of the Draft Articles with respect to countermeasures. They enshrine the minimum guarantees against the usage of countermeasures as a mean of pressure towards other states and transformation into an instrument of a competitive clash.

In fact there is a question that should be given special consideration in course of application of countermeasures. It is a question of impact on human rights of consequences of applying countermeasures having a widespread and cumulative effect. In the context of protection of human rights, most often these are consequences that citizens of a targeted state face: rising of consumer prices, falling of living standards, decrease in travels abroad, recession of small business, etc. [15, P. 40-60]. The detailed analysis of consequences of sanctions policy is needed in a widely understood humanitarian context of trade, economic, scientific, cultural and humanitarian cooperation.

Obviously, the Draft Articles are just a suggestion for the content of a future treaty on the liability of states. But taking into account the status of the UN Commission, extensive discussions around the document by the international community and its conformity with the goals and principles of the UN, states should be guided by its provisions.

It is regretful that in contrast to the aforementioned approach an idea is sometimes advanced that the coercion of other states is an inherent right of a state and it is in no way restricted. It is hard to imagine a situation in which all states having claims to other states would start indiscriminately applying sanctions to everyone who does not duly behave itself at the behest of an offended soul. Current sanctions wars have already shown where such interpretation of the international law rules can lead.

## 7. Conclusions

Obviously, the current sanctions mess will

ISSN 2542-1514 (Print)

sooner or later come to an end, and the states will have to return to the situation where cooperation and interactions are built on mutual trust and respect of each other's interests. Meanwhile, overcoming the effects of the current sanctions war will be as well undoubtedly difficult.

That requires establishing an array of solid legal guarantees. Nowadays their shape has been already seen. Overcoming the current crisis is impossible beyond the institutional framework of the UN. The WTO remains to be seriously reformed as this organization in its current form did not manage to become a center for mitigation or elimination of trade and economical contradictions. We consider it unjustified that the WTO stands beyond the shapes of the UN system, which allows it to pursue a policy quite far from the principles of equality and mutual benefits of participating states.

But obviously arraying of the relevant legal fundamentals is a task of paramount importance. In fact the sanctions law does not exist now, it is only to be created. Meanwhile we should address a wide range of important issues at the level of the international law doctrine.

First of all, we suppose that the first cornerstone has been laid in the building of the future sanctions law, that are the fundamental provisions of the Draft Articles on state responsibility. Most likely they will become the starting point for development and supplement of conditions and procedure of introducing the countermeasures. At the doctrinal level an issue on correlation of provisions regarding countermeasures in international and domestic law shall be addressed, also the question on order and limits of the extraterritorial application of national law is to be resolved.

But there is one more crucial matter. On the agenda there is clearly a task to establish the "international law of competition". It is quite obvious that the competition was, is and will be a constant companion of cohabitation of states. However, it is actually carried out beyond any legal framework. No matter how difficult are these efforts, they have to be done right now, since without the legal regulation the competition will acquire the shapes of war of all against all.

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### BIBLIOGRAPHIC DESCRIPTION

Bakhin S.V. "Sanctions law": problem statement. *Pravoprimenenie = Law Enforcement Review*, 2024, vol. 8, no. 4, pp. 143–152. DOI: 10.52468/2542-1514.2024.8(4).143-152. (In Russ.).