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## **SECONDARY SANCTIONS AS AN EFFECTIVE MEANS TO ENFORCE PRIMARY SANCTIONS PROGRAMS: THE CASE OF THE US**

Russia's invasion of Ukraine in February 2022 undoubtedly brought about a change in global sanctions regimes. It marked the beginning of a “sanctions revolution” with the adoption of a set of measures

unprecedented in their scale and scope. These developments have posed new challenges, especially when it comes to the enforcement of sanctions imposed. However, it should be noted that little attention has been paid to this matter in the academic debate. This holds true for secondary sanctions, which are widely recognized as enforcement tools for primary sanctions programs. As a classic example of this approach serves the United States of America (US), a State with one of the most developed sanctions enforcement systems in the world. Against this backdrop, the present study has two objectives: (1) to provide insight into the concept of secondary sanctions in contemporary international practice, (2) to analyze the US application practice of secondary sanctions by examining the factors contributing to their effectiveness as a means of enforcing primary sanctions.

In her various reports, the United Nations Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights consistently observes the expansion of new forms and types of sanctions [1, p. 2; 2, p. 2]. In this study, the main differentiation that must be made among all existing categories of sanctions is between the primary and secondary sanctions.

According to established practice, primary sanctions are measures that either “...prohibit or condition economic relations between the territory of the targeting State (including economic agents who find themselves in that territory) and the state targeted by the sanctions, or between nationals of the targeting state and the target state” [3, art. 49]. Secondary sanctions, as their name suggests, serve as a supplement to primary sanctions [4, p. 926]. These measures are applied when primary sanctions prove ineffective with respect to the desired changes in the allegedly unlawful behavior of the target State. This occurs when third parties still have the opportunities to continue their economic activities with the primary sanctions targets [5, p. 8]. Thus, the application of secondary sanctions is conditioned by the fact that these third parties are either neutral or an ally of the initial targets and that similar sanctions applied by third countries are not in place [4, p. 926]. In turn, secondary sanctions are expected to act as anti-circumvention measures, which amplify the primary sanctions effectiveness “by imposing restrictions intended to deter third parties from entering into, or maintaining relations with, the targets of the primary sanctions” [6, p. 371].

As for the US, it has a long tradition of using sanctions, especially secondary ones, to achieve its foreign policy objectives. The specificity of such measures is that they are aimed at heightening targeted States' economic isolation by interfering in economic transactions between persons not subject to US jurisdiction [7, p. 64].

Secondary sanctions, in particular, are viewed as a means of restricting the access of foreign companies to the US markets if their operations are deemed harmful to the US foreign policy goals [8, p. 1112–1113]. In this regard, some authors draw a clear distinction between US primary and secondary sanctions. It is suggested that primary sanctions concern US persons and, as a rule, are associated with civil fines and(or) criminal prosecution. In contrast, secondary sanctions are directed primarily at foreign individuals and legal entities and involve economic measures seeking to exclude them from the US [9, p. 104–105].

T. Ruys, on the contrary, argues that a more extensive definition of US secondary sanctions should be embraced. In line with his definition, secondary sanctions shall include any measures aimed at managing economic transactions between foreign actors, including measures such as imposing civil fines, for instance. The scholar justifies this approach by arguing that, in US legal doctrine, such sanctions might be categorized as primary, as they are supposedly activated by the presence of a US connection. The latter portrays the relations governed by sanctions as ones that exist solely between the US and target States. Nonetheless, such a link is often quite dubious, which leads to the fact that in practice these sanctions actually regulate the conduct of foreign persons [5, p. 7–8], which is a characteristic of secondary sanctions.

Another distinction emerging in legal discourse has to do with generations of US secondary sanctions. According to the study conducted by M. Sossai, the first generation of secondary sanctions appeared in the 1980s–1990s and was characterized by a relatively clearly delineated scope and enforcement measures. The secondary boycotts and export bans imposed by, among others, the Helms–Burton Act of 1996 are prime examples. Specifically, the mentioned act grants US citizens the right to bring civil suits against any individual or entity engaged in the “trafficking” of property confiscated by the Cuban government in the course of the 1959 revolution. In addition, a separate provision of this law obliges the US Secretary of State to refuse visas to corporate

executives or majority shareholders of companies involved in the trade in confiscated property [7, p. 64].

The second generation, on the other hand, is described as measures with “the focus on the financial sector” [10, p. 903]. These measures encompass not only limitations on exports or imports but also “the blocking of assets and interest in assets subject to US jurisdiction; limits on access to the US financial system, including limiting or prohibiting transactions involving US individuals and businesses; and restrictions on private and government loans, investments, insurance, and underwriting” [11, p. 721].

A vibrant example of this development is the sanctions imposed by the US on Iran. Particularly, the Iran Comprehensive Sanctions, Accountability, and Divestment Act of 2010, apart from constraints on the supply by individuals and entities, both foreign and domestic, of petroleum products, additionally restricts the access of foreign financial institutions to the US financial sector if they were involved in certain transactions with Iran [12, p. 1250].

The aforementioned secondary sanctions programs are managed by multiple US agencies, where the Office of Foreign Assets Control (OFAC) plays a main role. OFAC is entitled to use a wide range of measures to enforce secondary sanctions, from placing individuals on the Specially Designated Nationals and Blocked Persons list, which leads to asset freezes and restrictions on physical and financial mobility, to bans on accessing funding from US financial institutions. Given the ambiguous legal framework within which OFAC operates and its authority to restrict access to US markets, this policy effectively places foreign persons under the agency’s jurisdiction [13, p. 1005–1006].

As D. Meagher emphasizes, this result is a consequence of the key role that the US plays in the global economy. Unquestionably, US financial institutions and the US dollar occupy a uniquely dominant position in worldwide financial markets. This, combined with the threat of OFAC sanctions, stimulates many international businesses to over-comply with established sanctions regimes [13, p. 1007].

To conclude, secondary sanctions can be defined as enforcement mechanisms accompanying primary sanctions that are applied to foreign entities and individuals allegedly associated with the initial sanctions targets. In the case of US, secondary sanctions comprise restrictions

on entry to the US and its markets, as well as civil and criminal penalties. These measures, often applied by the US, have evolved significantly and are now represented predominantly by sanctions directed at the financial sector. As real-life experience shows, the subjects of secondary sanctions often tend not only to comply with the existing restrictions but also to over-comply with them. This tendency is a peculiar feature of the application of US secondary sanctions, due to this State's principal standing in the global market and the strength of its currency, which makes third-party operators wary of entering the US market in case of non-compliance.

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