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SANCTIONS AS A TOOL TO ACHIEVE COMPLIANCE WITH INTERNATIONAL LAW: SOME ISSUES OF NATIONAL IMPLEMENTATION AND ENFORCEMENT

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The article is dedicated to sanctions as a tool for enforcing international legal obligations. In particular, some issues of their implementation at the national level are considered. The author analyzes the recent practice and legislation of the US, the EU, Canada and Ukraine. The choice of these actors is explained by their active participation in sanctions imposed on the Russian Federation in relation to its invasion of Ukraine. The main purpose of the study is to make a comparative analysis of national regulations in order to make recommendations for the improvement of the Law of Ukraine «On Sanctions» under which the sanctions on the Russian Federation and their residents are imposed. The publication considers such questions as the definition of sanctions or restrictive measures as they are often named, the grounds of their adoption, their types and enforcement. The last aspect is of great importance due to the fact that private companies often try to evade sanctions because for them sanctions mean restriction of their economic activities and, consequently, financial loss. In this regard the enforcement practice of the US is very useful and can be considered to be an example to follow for Ukraine and even for the EU. At the same time a very broad basis for US sanction imposition poses the question of their lawfulness both through the prism of international economic law and international human rights law. In this connection it is suggested that Ukraine should have a reasonable and more logical approach to the formulation of grounds for sanctions adoption that would be more consistent with the legal positions of other states applying sanctions in order to enforce international law.

Key words: *sanctions, restrictive measures, enforcement, sanctions implementation, types of sanctions, sanctions evasion, Russian invasion of Ukraine.*

Нігреєва О. О. Санкції як інструмент примушення до дотримання міжнародного права: деякі питання національної імплементації та забезпечення виконання

Статтю присвячено санкціям як інструменту забезпечення виконання міжнародно-правових зобов'язань. Зокрема, розглянуто окремі питання їх імплементації на національному рівні. Авторка аналізує сучасну практику та законодавство США, ЄС, Канади та України. Вибір цих акторів пояснюється їхньою активною участю у санкціях, запроваджених проти Російської Федерації у зв'язку з її вторгненням в Україну. Основною метою дослідження є порівняльний аналіз національних нормативно-правових актів із метою вироблення рекомендацій щодо вдосконалення Закону України «Про санкції», згідно з яким запроваджено санкції щодо Російської Федерації та її резидентів. Розглянуто такі питання, як визначення санкцій чи обмежувальних заходів, як їх часто називають, підстави їх запровадження, види та порядок забезпечення дотримання на національному рівні. Останній аспект має велике значення у зв'язку з тим, що приватні компанії часто намагаються уникнути санкцій, оскільки для них санкції означають обмеження економічної діяльності і, як наслідок, фінансові втрати. У цьому плані правозабезпечувальна практика США є дуже корисною і може розглядатися як приклад для наслідування в Україні і навіть у ЄС. Водночас дуже широке підґрунтя для застосування санкцій у США викликає питання щодо їх правомірності як у контексті міжнародного економічного права, так і міжнародного права прав людини. У зв'язку із цим пропонується, щоб Україна мала виважений та більш логічний підхід до формулювання підстав для застосування санкцій, який би більш корелював із правовими позиціями інших держав, які застосовують санкції з метою забезпечення дотримання міжнародного права.

Ключові слова: *санкції, обмежувальні заходи, забезпечення дотримання, імплементація санкцій, види санкцій, ухилення від санкцій, російське вторгнення в Україну.*

Introduction. One of the well-known problems of international law is the lack of a uniformed and centralized enforcement system that would guarantee the compliance with it similarly to national law. Even though in the 20th century the elements of a centralized enforcement appeared within the UN system, it still remains undeveloped. In these conditions states continue to turn to self-help measures in order to protect their interests and rights and achieve compliance with international law by other states. The above measures can have different names and characteristics, but the term "sanctions" are probably the most popular and broadly used.

Recently their application has extremely increased in the context of confronting the aggression of the Russian Federation against Ukraine. Indeed, in the situation where the UN Security Council remains blocked by Russia's veto, states are compelled to impose unilateral sanctions for the enforcement of the obligations under the UN Charter. In fact, such sanctions are not homogeneous in terms of their legal nature and international legal

regulation. Actually, the above term is often used both to the sanctions authorized by international organizations, e.g. the Security Council of the UN, and those applied by states unilaterally, though the legality of the latter sometimes is questionable. Within the last group countermeasures imposed by an injured state and autonomous sanctions applied by a third state should be distinguished as well. If the first remedy is considered lawful, surely provided that material and procedural conditions of their application are met, the legality of the second group is not so obvious, first of all, because these sanctions are often of economic character and, thus, may be considered to be violations of states' international trade obligations. In the same vein some of them can constitute breaches of international human rights law.

To avoid the sanctions legality problem states have to be very careful with their correct application, which in its turn should be based on a clear and effective national legislation. The latter is important for the solution of another problem related to sanctions, namely their enforcement at the national level. In fact, sanctions effectiveness is frequently undermined by private persons and companies evasion. So, in order to combat it national law should contain measures to provide compliance by them. Unfortunately, for the moment national law of many states shows the scarcity of sanctions legal regulation. Distinct approaches to sanctions implementation and enforcement can be met as well. In this regard the Law of Ukraine "On Sanctions" significatively amended in 2022[1] deserves special consideration. It seems that some of its provisions should be more developed and coordinated with relative acts of other states imposing sanctions on Russia. It is necessary for at least two purposes. Firstly, it will make it easier to collaborate internationally within the post-war settlement arrangements. As it is proposed by Sara Elizabeth Dill and Layla Abi-Falah in "*Sanctions in the Ukraine–Russian War. Proposed Solutions for the Peace Process and War Crimes Prosecution"*, taking into consideration differences in procedures, legal standards, and opportunity for relief between various countries "a uniform agreed standard and process that will be applied by the parties involved in any decisions or procedures involving sanctions, reparations, forfeitures, or the return of assets in this conflict" should be created [1]. Secondly, possible inconsistency of some national law provisions with international rules on sanctions can potentially lead to their judicial revision both at national and international level. So, for the Ukrainian authorities it is very important to act within a legal framework and be sure of the legality of their decisions. Thus, in the article some main characteristics and novels in the sphere of sanctions national implementation and enforcement will be discovered. In particular, it will dwell upon their national definitions, imposition grounds and enforcement. Emphasis will be placed on the relevant practice of the US, the EU and Canada, the study of which in our opinion is absolutely needed for the improvement of the legal regulation of sanctions in Ukraine.

Materials and methods. Sanctions issues have attracted a lot of attention within the science of national and international law. Among the authors that have recently dedicated their research to this topic Tom Ruys, Larissa van den Herik, Craig Martin, Iryna Bogdanova, Andrew Mitchell, Mirco Sossai, Nadia Zelyova, Matyas Mytro must be mentioned. Special attention is to be paid to the doctoral dissertation of Iryna Bogdanova "Unilateral Sanctions in International Law and the Enforcement of Human Rights: The Impact of the Principle of Common Concern of Humankind" published in 2022 [2]. The current research is based on the conclusions made by the above-mentioned authors and the comparative study of relative national legislation of the EU, the US and Canada, which gives the possibility of making recommendations and proposals for the future amendment of the Law of Ukraine "On Sanctions". The choice of the above states is explained by a significant contribution made by them in the sanctions imposed on the Russian Federation from 2014.

Discussion. First of all, it should be noted that restrictive measures considered in the article appear in the national and international discourse under different names. For instance, the US and Ukraine use the term "sanctions". In the US economic sanctions are imposed mostly under the International Emergency Economic Powers Act and the National Emergencies Act, even though the term itself is not mentioned and not defined in these acts [3, 4]. At the same time it is broadly used on the site of the Office of Foreign Assets Control, which is responsible for their administration and enforcement.

Canada prefers the term of "special economic measures", which according to Art. 3.1 of the Special Economic Measures Act of 1992 are measures approved: 1) where an international organization of states or association of states of which Canada is a member calls on its members to do so, 2) a grave breach of international peace and security has occurred, 3) gross and systematic human rights violations have been committed in a foreign state or 4) acts of significant corruption involving a national of a foreign state have been committed [5].

The EU prefers the term "restrictive measures" even though the term "sanctions" is used in parallel. Article 29 of the Treaty on European Union and Art. 215 of the Treaty on the Functioning of the European Union constitute the legal basis for their imposition. According to Art. 29 *"*the Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that

[1] On 12 May 2022 the Law of Ukraine "On the Main Principles of Forced Seizure of Property of the Russian Federation and Its Residents in Ukraine " was adopted, which gave to the Ukrainian authorities a right not only to freeze, but also to confiscate the named property under certain conditions.

their national policies conform to the Union positions" [6]. These provisions are detailed by Art. 215, which sets out that where such a decision is adopted providing for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures [7]. The Council may also adopt restrictive measures against natural or legal persons and groups or non-State entities.

At the same time on the official website of the European Council sanctions are defined as preventive measures which allow the EU to respond swiftly to political challenges and developments that go against its objectives and values. For example, sanctions can target terrorism, nuclear proliferation activities, human rights violations, annexation of foreign territory, deliberate destabilization of a sovereign country, cyber-attacks [8]. They are also defined as an essential tool of the EU's Common Foreign and Security Policy that seek to bring about a change in the policy or conduct of those targeted, with a view to promoting the objectives of the EU policy [9].

Concerning Ukraine, in Art. 1 of the Law of Ukraine "On Sanctions" they are defined as "special economic and other restrictive measures" that can be applied in relation to a foreign state, a foreign legal person, a legal person that is under the control of a foreign legal person or a non-resident natural person, foreigners, stateless persons, as well as persons that carry out terrorist activities for the purpose of protecting national interests, national security, sovereignty and territorial integrity of Ukraine, countering terrorist activities, as well as preventing violations and restoring violated rights, freedoms and legitimate interests of citizens of Ukraine, society and the state [10].

For the sake of completeness, it should be mentioned that in international practice other terms are also used. For instance, the term "unilateral coercive measures" can be found in the documents of the UN bodies [11]. The discrepancy in terminology is related to the different understanding of the term "sanctions" in international legal science and practice: in a broad sense, it is used to denote any coercive measures taken by states or other international law subjects, in a narrow sense the term "sanctions" relates only to state countermeasures or exclusively to measures taken within the framework of international organizations, e.g. the UN Security Council sanctions [12].

So, the above definitions comparative analysis gives us reasons to think that in the issue of terminology Ukraine has tried to follow the EU approach. At the same time the purposes of sanctions imposition are different. Actually their formulation in the Ukrainian law seems more the enumeration of situations in which sanctions application can be needed. Before dwelling upon this issue, we proceed with the analysis of a legal approach to it in domestic law of other subjects under consideration.

Regarding the situations that can constitute grounds to approve sanctions according to the US regulation, they are specified by § 1701(a) of the International Emergency Economic Powers Act, according to which relative authorities granted to the President may be used to deal with an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat" [3]. Among such threats armed hostilities in which the United States are engaged or attacks realized by a foreign country or foreign nationals against the US give to the President an extraordinary power to confiscate property of the person under sanctions (§ 1702(c) [3]. So, in comparison with a quite broad Ukrainian approach to designate the list of grounds, the US applies sanctions mostly as a reaction to national security threats.

Instead the list of the grounds or circumstances mentioned in Art. 4.1 (1) of the Canada Special Economic Measures Act of 1992 is longer and more detailed. Among them are: (a) a decision or a recommendation of an international organization of states or association of states, of which Canada is a member, to take economic measures against a foreign state; (b) a grave breach of international peace and security … that has resulted in or is likely to result in a serious international crisis; (c) gross and systematic human rights violations (that) have been committed in a foreign state; or (d) acts of significant corruption, including bribery, the misappropriation of private or public assets for personal gain, the transfer of the proceeds of corruption to foreign states or any act of corruption related to expropriation, government contracts or the extraction of natural resources, committed by a national of a foreign state who is either a foreign public official or an associate of such an official [5]. Apart from the Special Economic Measures Act, in Canada sanctions can be imposed under the United Nations Act of 1985 and the Justice for Victims of Corrupt Foreign Officials Act of 2017 (the Sergei Magnitsky Law) [13, p. 42].

As we can see, the Canadian approach to sanctions impositions is quite broad, since they can be applied to enforce not only mandatory decisions of international organizations, but their recommendations as well. Canada can impose sanctions as a reaction to human rights violations, but only in the situations when they are of gross and systematic character that seems logical, since individual human rights violations are a part of everyday life of each state and they can be addressed through other means. Instead the Law of Canada does not mention national security threats among the circumstances in which sanction imposition is possible. This gives us reasons to suppose that a possible scope of their application is much narrower than in the US where the state of national emergency can be easily declared and prolonged by the President in very different situations. For example, on 9 September 2022,

consistent with section 202(d) of the National Emergencies Act, 50 U.S.C. 1622(d), President Biden once again continued for 1 year the national emergency previously declared on 14 September 2001 with respect to the terrorist attacks of 11 September 2001 and the continuing and immediate threat of further attacks on the United States [14]. So, this emergency has been already lasting for more than 22 years.

The EU approach to sanctions adoption is based on the objectives of the Common Foreign and Security Policy, one of the EU pillars. These objectives are enumerated in Par. 2 of Art. 21 of the Treaty on the European Union. In brief they are promoting international peace and security, preventing conflicts, supporting democracy, the rule of law and human rights and defending the principles of international law [6]. In more details the aims are specified on the site of the Council of the EU, where next policies are mentioned: terrorism, nuclear proliferation activities, human rights violations, annexation of foreign territory, deliberate destabilization of a sovereign country, cyber-attacks [8]. As we can see the grounds for sanctions imposition within the EU framework are closely related to values promoted at the international level, such as peace and security and human rights. Such a broad formulation significatively extends restrictive measures scope.

Article 3 of the Law of Ukraine is of great importance since in Par. 1 it concretizes the bases or grounds for sanctions imposition. Among them are: 1) actions of a foreign state, a foreign legal or physical person, other subjects that create real and/or potential threats to national interests, national security, sovereignty and territorial integrity of Ukraine, promote terrorist activities and/or violate the rights and freedoms of man and the citizen, the interests of society and the state, lead to the occupation of the territory, expropriation or limitation of property rights, causing property losses, creating obstacles to sustainable economic development, full exercise of rights and freedoms by citizens of Ukraine; 2) resolutions of the General Assembly and the Security Council of the United Nations; 3) decisions and regulations of the Council of the European Union; 4) facts of violations of the Universal Declaration of Human Rights, the Charter of the United Nations [10].

Another basis for the application of sanctions is also the commission by a foreign state, a foreign legal person, a legal person that is under the control of a foreign legal person or a non-resident natural person, a foreigner, a stateless person, as well as subjects who carry out terrorist activities, of the above actions in relation to another foreign state, citizens or legal persons of the latter [10].

Thus, the Ukrainian law establishes different grounds for sanctions imposition, among which threats to national security dominate. At the same time human rights protection also occupies an important place. Meanwhile, the possibility of adopting sanctions as a reaction to situations in other countries is provided as well. Given the fact that this option is mentioned in separate Par. 3 of Art. 1, the conclusion about an autonomous character of such measures can be drawn.

The above brief overview of national legal approaches to the sanctions imposition let us make some suggestions about the relevant provisions of the Law of Ukraine. Firstly, they seem too broadly formulated due to the fact that situations falling under Par.1 (a) regulation are almost unlimited. Secondly, the resolutions of the General Assembly are mentioned among the legal acts that justify sanctions imposition, even though its decisions are of a recommendatory nature. Thirdly, the choice of international legal instruments mentioned in Par. 1 (4) surprises given the fact that these two acts have a different legal nature. Their mentioning as a basis for sanctions application can be possibly explained by the fact that the provisions of both can be considered as universally binding. Actually being initially recommendatory, the Universal Declaration of Human Rights is now considered by many scholars as containing customary norms, even though this status is not established for all its provisions [15, p. 526–527]. Lastly, single facts of violations of the Universal Declaration of Human Rights, in our viewpoint, can not constitute sufficient grounds for sanctions imposition. So, this condition must be specified.

Due to a big difference between the forms of government and organization of the subjects under consideration, there is no sense to make a comparison in terms of the effectiveness of sanctions imposition procedure and relative authorities' powers distribution. For the sake of completeness it should be mentioned that in Canada sanctions imposition is within the competence of the government (the Governor in Council), in the US – within the President's competence. In the EU sanctions are adopted by the Council of the EU decisions according to a proposal made by the High Representative of the Union for Foreign Affairs and Security Policy. Based on the above decision, the High Representative and the European Commission present a joint proposal for a Council regulation on the adoption of which the European Parliament is later informed. In Ukraine most sanctions can be imposed by a decree of the President of Ukraine approved on the basis of the decision of the National Security and Defense Council of Ukraine acting under the authority of the President of Ukraine. But a decree on sectoral sanctions imposition requires a further approval by the Parliament of Ukraine within 48 hours. Finally, the decision on property confiscation set out in Par. 1 (1 *prim*) of Art. 4 of the Law "On Sanctions" can be taken exclusively by national courts (Par. 3 (2) of Art. 5) [10].

Special attention should be paid to the types of sanctions that can be imposed under different jurisdictions. This issue deserves a separate study that can embrace and analyze a huge bunch of existing restrictive measures not only for the purpose of their enumeration and classification, but, first of all, for the purpose of their legality

testing both at the national and international law levels. In this regard it is worth mentioning that Art. 4 of the Law of Ukraine enumerates more than 25 types of sanctions that can be distinguished on the basis of their content and this list is not exhaustive. Under such regulation Ukrainian authorities are granted quite broad powers to adopt new sanctions that can be potentially unlawful from the international law perspective, e.g. in the WTO or international human rights law framework. At the same time they can be contested within the national legal system, in particular, concerning the possibility of sanctions imposing on the nationals of Ukraine involved in terrorism[2]. As it has been already stressed in experts' publications the imposition can be legally doubtful before the guilt of these persons is established in court [16]. It seems that the same reasoning concerns foreigners and stateless persons as well.

The above mentioned characteristics are not the only differences between states applying sanctions. One can easily find different approaches to enforcement as well. Actually the last aspect is the most important for the effectiveness of sanctions. It can be explained by the unwillingness of private actors, first of all multinational companies, to follow them. So, states should elaborate effective legal framework for sanctions evasion prevention, detection and combating. In this regard the national enforcement measures are of great significance.

Unfortunately many states have not established and implemented them yet. In this regard the US experience can be considered one of the most advanced. In the US a special authority for sanctions control is created. The Office of Foreign Assets Control (hereinafter – OFAC) of the US Department of the Treasury administers and enforces over 35 different sanctions programs. For this purpose the OFAC's Specially Designated Nationals and Blocked Persons List is maintained. Moreover, on October 15, 2021 OFAC issued "Sanctions Compliance Guidance for the Virtual Currency Industry" to prevent evasion through the cryptoassets industry often used for it recently. At the same time the extraterritorial effect of US secondary sanctions that makes them so effective deserves special attention under the prism of its lawfulness.

Meanwhile, in our opinion, the sanctions enforcement in the EU is much weaker due to the fact that the implementation and enforcement of EU sanctions is primarily the responsibility of the EU member states. Thus, national practice is very different. But the urgency of the present situation has stimulated its developments. On 2 December 2022 the European Commission presented a proposal to introduce a new directive which will harmonize the way member states investigate, prosecute and penalize individuals and entities for sanctions violations [17].

Actually civil or criminal penalties imposed for sanctions regime violations prove to be very effective in the US. The OFAC imposes a civil monetary penalty, whilst the US Department of Justice handles criminal violations of sanctions [18, c. 10]. The latter can include fines of up to $1 million and prison terms of up to 20 years per violation. For example, in 2021 the Department ended a criminal case against "Societe Generale SA" related to violations of U.S. sanctions, only after the French bank agreed to pay $1.34 billion and met the terms of a three-year deferred prosecution agreement [19].

In this regard it is to underline that the Law of Ukraine contains no provisions on monitoring, verification and enforcement of imposed sanctions that seriously undermines their effectiveness.

Results. The above analysis has shown that notwithstanding the great importance that sanctions have for the maintenance of international peace and security and the enforcement of international law both at the national and international levels their regulation is not homogeneous. In the context of the Russian invasion of Ukraine, economic sanctions have proved to be almost the only means to force Russia to return to compliance with its international obligations. Meanwhile, the Law of Ukraine "On Sanctions" still requires some modifications that would make it more effective and at the same less vulnerable to questions about their legality. In particular, 1) the grounds for sanctions imposition are to be better specified. It concerns both violations that give rise to sanctions and international legal acts that justify their imposition; 2) regarding human rights violations, it should be defined that only gross and systematic violations can constitute a legal basis for sanctions application; 3) in the matter of international legal acts, which adoption can activate sanctions regime, the approach chosen by the drafters of the Ukrainian law suggests that Ukraine can impose sanctions to enforce not only internationally binding acts, but not binding ones as well. In the last case the Ukrainian authorities should take into account that such sanctions could be contested through, for instance, the WTO Dispute Settlement Body; 4) in order to increase sanctions effectiveness the provisions on sanctions compliance monitoring, control and enforcement are to be adopted. It is extremely important given close contacts that national business groups have traditionally maintained with Russian economic actors.

Being in fact countermeasures, sanctions imposed by Ukraine on the Russian Federations and natural and legal persons affiliated with it and involved in its peace breaking policy can be easily justified through the prism of state responsibility legal regime. But it should be recalled that their legality still can be questioned under international and national human rights law. In this regard a better consistency of the Ukrainian law with the relative acts of other states would serve its improvement in terms of lawfulness and effectiveness.

[2] In Art. 1 of the Law of Ukraine "On Sanctions" it is set out that sanctions can be applied in relation to "persons that carry out terrorist activities". This term supposedly embraces not only foreigners, but also Ukrainian nationals.

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