Do Sanctions Violate International Law?

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The use of force is prohibited under Article 2(4) of the United Nations Charter but there is no general prohibition on coercive economic sanctions under international law. However, sanctions do, in certain circumstances, violate international law and attract international responsibility.

On 7 August 2018, the United States’ (US) decision to reimpose sanctions on Iran, lifted under the Joint Comprehensive Plan of Action (JCPOA), led to Iran filing a claim before the International Court of Justice (ICJ) that the US’ actions violate provisions under the Treaty of Amity, 1955. The ICJ held that the US shall, in accordance with 1955 Treaty of Amity, remove any impediments of free exportation to Iran of medicines and medical devices, foodstuffs and agriculture commodities, and spare parts, equipment, and associated services necessary for the safety of civil aviation.

The US has been an ardent and frequent user of sanctions, albeit unsuccessful in many cases. The US’ decision to cut all economic and trade relations with Cuba ultimately failed, given Cuba’s relation with the Russian federation, as well as its proximity to the American mainland. Such bilateral issues also affect countries via secondary sanctions. For instance, sanctions imposed on Central Bank of Iran affect other countries and foreign companies that conduct business with this bank. Although there is no authoritative definition of sanctions under international law, the term commonly refers to the “deliberate, government inspired
withdrawal or threat of withdrawal of customary trade or financial relations” (Hufbauer et al 1990).

While sanctions may seem like an attractive foreign policy tool, their legality has raised concerns within the ambit of international law. While Article 2(4) of the United Nations Charter clearly prohibits the use of force, there is no provision which clearly prohibits coercive economic measures under the UN Charter scheme.

UN Sanctions

UN sanctions are adopted by the UN Security Council (UNSC) to pass resolutions short of war. The legal basis for such sanctions is often cited as Chapter VII of the UN Charter. Article 39 and 41 are key provisions governing the sanctions by the UNSC. Article 39 states that:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 41 further formulates a non-exhaustive list of measures, short of war, which may be adopted by the Security Council in response to a breach of the UN Charter.

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

The UN Charter, however, does not give the UNSC unfettered power with regards to coercive economic measures. Limitations come from both the charter itself as well as from customary international law. Article 25, which states that the UN member states agree to carry out the decisions of the UNSC in accordance with the charter, can be interpreted to mean that states are obliged to carry out those decisions of UNSC which are in conformity with the charter. Article 24(2) obliges the UNSC to act “in accordance with the purposes and principles of United Nations.” These two provisions clearly demonstrate that the power of UNSC needs to be exercised in conformity with the purposes and principles of the UN, not devoid of it.

The ICJ has noted that the presumption should be that UNSC is working within its mandate
unless proven otherwise. Another limitation comes from the “Jus Cogen” norms—universally recognised principles of international law that render any conflicting treaty void (Oppenheim et al 1992). For instance, a treaty supporting piracy, slavery, genocide, or torture is void for being contrary to "universally recognised principles" of international law. Thus, these norms are superior and no derogation is allowed from them under any circumstance. The UNSC is obliged to pass resolutions in conformity with these peremptory norms, else they do not have any legal standing.

In the Kadi case, the Court of Justice of the European Union (CJEU) indirectly supported the view that if the UNSC resolutions failed to observe fundamental rights, they would not bind UN member states. Yassin Abdullah Kadi was identified as a possible supporter of Al Qaida by the UNSC and singled out for sanctions, particularly an asset freeze. The European Union (EU) adopted a regulation to give effect to the UNSC resolution, which was challenged by Kadi in the EU courts. In its judgment on Kadi’s appeal, the CJEU reviewed the EU regulation transposing the resolution, holding that the protection of fundamental rights form a part of very foundations of the EU legal order. The CJEU held that the claimant had not been informed of the grounds on which he was subjected to sanctions, and, thererfore, his right to be heard as well as right to an effective judicial and right to property have been infringed. Thus, in effect, the UN sanctions resolution passed by the UNSC dose have the potential to violate, as provided in various UN Charter provisions and case laws, international law.

Non-UN Sanctions

Non-UN sanctions, or countermeasures or unilateral sanctions (Kelsen 1951), imply that an individual state has imposed sanctions unilaterally without the authorisation of UNSC resolution. Such sanctions are not without their criticisms; developing countries have argued that unilateral sanctions should be eliminated, as it infringes upon their right to economic and social development. To this effect, The UN General Assembly has passed a resolution which calls upon all states not to recognise unilateral extraterritorial coercive economic measures or legislative acts imposed by any state. The Asian-African Legal Consultative Organisation (AALCO) has also suggested that unilateral coercive economic measures constitute extraterritorial sanctions and, therefore, violate international law.

The International Law Commission (ILC) calls these unilateral sanctions “countermeasures” (ILC 2001). The ILC details circumstances to allow such countermeasures, which would otherwise not be in conformity with international obligation of the state concerned. Chapter V of the Articles on Responsibility of State for Internationally Wrongful Act (ARSIWA), 2001, provides a shield against a claim of breach of an international obligation. It resembles the notion of self-defence under Article 51 of UN Charter where initial wrongfulness (use of force) justifies the act of response (self-defence). However, these countermeasures imply non-armed measures such as coercive economic measures.
Article 49(1) of ARSIWA states that an injured state may only take countermeasures against a state which is responsible for an internationally wrongful act. These countermeasures, however, are not without restrictions. Article 29(2) of ARSIWA uses the phrase “for the time being” which means that countermeasures must end once the erring state has complied with its obligations under international law. The IC recognised this condition in the Gabcikovo-Nagyamaros case, saying that the purpose of countermeasures is to induce the wrongdoing state to comply with its obligation under international law, and that the countermeasures must therefore be reversible in nature. In the joint construction and operation of the Gabcikovo-Nagyamaros project by Czechoslovakia and Hungary, the question was whether the diversion of the Danube carried out by Czechoslovakia was a lawful countermeasure. The court found that it was not lawful because it was not proportionate. Countermeasures are only lawful if the response is proportional to the initial wrong. The ICJ did not invoke reversibility requirement but acknowledged this requirement for lawfulness of countermeasures.\cite{5}

Additionally, Article 50 of ARSIWA talks about the “obligations not affected by the countermeasures”. It says countermeasures shall not affect obligations to refrain from the use of force, to the protection of fundamental human rights, obligation of humanitarian character prohibiting reprisals, and other obligations under the peremptory norms of international law. For instance, if an injured state imposes sanctions on civilian goods or medical devices, it might affect international human rights obligation. In turn, this prohibits an injured state to impose countermeasures lawfully even if the initial wrong has been done by the responsible state. In other words, the above-mentioned limitations leave very little scope for any states to practically apply lawful countermeasures.

It is left to states to decide whether initial wrong was done by the other state so as to adopt countermeasures. The lack of any judicial scrutiny of these sanctions and countermeasures makes it an arbitrary exercise of power on the part of the states. Countermeasures may be unlawful if a state has failed to observe the above-mentioned conditions as well as limitations. While they are an attractive tool of foreign policy, they fail to pass the test of legal requirements under international law and end up, in certain circumstances, violating them. The use of coercive economic measures are a double-edged sword, with the potential both to resolve disputes and to trigger war (Farall 2007).

**Concluding Remarks**

In sum, economic sanctions may not have been prohibited by the UN Charter, UNSC sanctions and resolutions are not immune from review and judicial scrutiny. Checks and balances must be observed while adopting sanctions resolution in order to comply with the letter and spirit of the UN Charter. Although most non-UN economic sanctions serve to further a state’s foreign policy objectives, the legal scrutiny of such economic sanctions is desirable. The UN General Assembly resolutions have called all states not to recognise unilateral extraterritorial coercive economic measures.
Similarly AALCO, in its report "Unilateral and Secondary Sanctions: An International Law Perspective," has concluded that unilateral sanctions violate various international law obligation. It represents the strong discontent on unilateral sanctions from this part of the world. In the recent Iran-US sanctions case, ICJ has found prima facie jurisdiction over US reimposition of sanctions against Iran. The court has also indicated provisional measures in favour of Iran. This case, perhaps the first of its kind, will put the act of coercive economic sanctions to judicial scrutiny. Currently in the merit stage, this case could possibly throw some light on the current practices of non-UN sanctions and their legal consequences under international law.

End Notes:


References:


Part three, chapter II.


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