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ESTABLISHMENT OF THE INSTITUTE OF ECONOMIC COERCION IN INTERNATIONAL LEGAL SYSTEM

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The norms of international law in the field of responsibility of States and international organizations for internationally wrongful acts are analyzed. The existing and new features of the economic coercion instruments are developed and complemented for the purpose of their distinguishing and generally accepted interpretation. The measures necessary for the establishment of the institute of economic coercion in the system of international law are suggested.
Key words: economic contradictions, institute of economic coercion, sanctions, countermeasures, United Nations Organization, World Trade Organization.

INTRODUCTION

Institute of economic coercion in the international legal system is an essential and integral part of the mechanism of restoration and ensuring of the international legal order. In case of refusal of the wrongdoing State to cease the wrongful act and to realize responsibility in a conciliatory way, the norms of international law allow to apply coercive measures against such State to restore the status quo. This is a manifestation of the legal principle *ubi jus ibi remedium* (Latin: where there is a right, there is a remedy).

In scientific community and political circles are widely used terms “coercive measures”, “sanctions” and “countermeasures”, denoting pressure instruments which can be used against the wrongdoing State in order to stop wrongful act and bring the wrongdoer to justice. The problem of terminology and other aspects of the institute of economic coercion are disclosed in scientific works of V. A. Vasilenko, Y. N. Zhdanov, M. V. Keshner, K. L. Sazonova, A. Segal, P. Wallensteen, B. Kondock, G. Hufbauer et al. Despite the fairly extensive coverage of the institute of coercion in international legal system both in foreign and domestic literature, there is still no agreement on the uniform interpretation of these terms in framework of scientific doctrine. This problem is more widely disclosed by Y. V. Malysheva and K. L. Sazonova [1; 2]. The ambiguity of terminology causes questions about the legitimacy of the use of instruments of economic coercion by the states individually, as well as the uniformity of this practice.

Contemporary reality, developing in the background of a number of international conflicts (in Ukraine, Near and Middle East and others), clearly demonstrates the imperfection and low efficiency of the existing mechanism of restoration of the international legal order, ensuring national security and economic interests of states and business on the world stage. Participation in the geopolitical conflict of both small and major economies, confrontation of their interests and the employment of economic coercion instruments by the parties bring a threat not only to their national economies and business, but also to the international business and economies of third countries which are not directly involved in the conflict.

Purpose of the article. Under these circumstances it is necessary to analyze norms of international law in the area of States and international organizations responsibility for its internationally wrongful acts in order to identify necessary steps for the definitive establishment of an effective and universally recognized institute of economic coercion in international legal system. The subjects of research are economic sanctions and countermeasures. Before proceeding to the analysis of international legal norms, it should be noted that in practice distinguish two ways of forcing States to stop wrongful or illegal activity: using military measures; through measures of a non-military nature. In this article we are talking only about the second group of measures.

1. INSTITUTE OF ECONOMIC COERCION IN THE LEGAL SYSTEM OF THE UNITED NATIONS

With globalization participants of the international conflict cease to be the only participants of economic coercion mechanism. Moreover, under the influence of internationalization and transnationalization processes the geopolitical and geoeconomic disagreements are closely intertwined, affecting the interests of both national and international business represented by large corporations. In this regard a new model of organizational-economic mechanism of regulation is forming, focused mainly on the external economic sector and based on the forms and methods of State, intergovernmental and supranational regulation which get the appropriate institutional and legal registration [3].

One of the basic sources of international law, legitimizing the use of economic coercive measures in the case of occurrence of the situation that threatens international peace and security, is the United Nations Charter. Nevertheless, the UN Charter does not contain the concepts of "sanctions" or "countermeasures". In Article 39 of the Chapter VII determined 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 … to maintain or restore international peace and security" [4]. In Article 41 of this Chapter are listed non-military measures that should be employed to give effect to UN SC decisions and which it may call upon the Members of the United Nations to apply. Such measures 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. Thus, based on the provisions of mentioned articles, it can be concluded that only the UN SC is empowered to take decisions on the use of certain coercive measures, including economic measures, in the face of existing threat to peace and security.

Actions of Members of the United Nations required to carry out the decisions of the Security Council are also regulated by the Security Council on the basis of paragraph 1 of the Article 48. Consequently, employment of coercive measures in the absence of the relevant decision of the Security Council by individual states unilaterally, in addition to the measures of the UN SC or pursuant to decisions of the UN SC, but in excess of their granted competences by volume, is precluded [5]. Moreover, taking into account that the employment of coercive measures against any State can cause a "special economic

problems" in any other State, regardless of whether a Member of the United Nations or not, in Article 50 determined "the right to consult the Security Council with regard to a solution of those problems" [4]. At the same time any compensation mechanism in favor of these countries is provided by the Charter.

The UN Charter also explicitly prohibits the use of any coercive measures under regional agreements or by regional bodies without the direct or special decision of the UN SC [8]. Consequently, regional economic associations along with individual States deprived of the opportunity to employ the institute of economic coercion arbitrarily, citing the existence of a threat to peace or act of aggression.

Thus, the UN Charter does not give a clear answer to the question of which exactly tool of economic coercion shall be entitled to use the Security Council to fulfill its functions: sanctions or countermeasures. However, its decisions are mandatory, and the failure of their performance is unlawful for any State. Any attempts to implement the functions entrusted to the UN SC, by a State or group of States individually are also unlawful.

Resolution 56/83 with the Annex thereto adopted by the General Assembly of the United Nations on 12 December 2001 also constitutes a basis of international law in this area. The articles of this Annex extend to violation by the State its international legal obligations and does not relate to the actions of the State, carrying a threat to international peace and security, as it does not affect the UN Charter. In this regard, the injured State shall have the right to take countermeasures against the State responsible for an internationally wrongful act individually. Thus, the term "countermeasures" used in the Annex is the prerogative of the State, not an international organization.

The document does not contain a laconic definition of the term "countermeasures" due to the presence of a number of characteristics that define the very essence of this instrument. So according to Article 22 of Chapter V of Part One of the Annex countermeasure is an act of the State not in conformity with an international obligation towards another State, the wrongfulness of which is precluded by the following conditions [6]:

1) to employ countermeasures against the State responsible for an internationally wrongful act shall only injured State (the employment of coercive measures against the third party or by the third party is excluded);
2) the employment of countermeasures is permitted only in order to induce the responsible State to fulfill its obligations (the punitive function of countermeasures, as well as the possibility to coerce the responsible State to fulfill the requirements, lying beyond taken obligations are excluded);
3) temporary nature of countermeasures associated with the termination of any internationally wrongful act, or with the submission of the dispute to a court or tribunal competent to make mandatory decisions for the parties (unwarranted employment of countermeasures is excluded);
4) "countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question" (aspiration of the injured party to restore the status quo is fixed);

5) proportionality of employed countermeasures and the suffered injury according to the severity of the internationally wrongful act (arbitrary estimation of the countermeasures' volume and the possibility to abuse of this instrument of coercion are excluded);
6) countermeasures shall not affect the number of obligations listed in paragraph 1 of the Article 50 of Chapter II of Part Three of the Annex;
7) the State taking countermeasures is not relieved from fulfilling its obligations listed to in paragraph 2 of the Article 50 of Chapter II of Part Three of the Annex.

In contrast to the UN Charter this document does not reveal the content of countermeasures. However, according to the paragraph 5, it becomes clear that coercion can have inter alia also economic nature. The injured party independently determines the tools of coercion. At the same time only a clear conformity of coercive measures to the listed conditions allows to determine them as countermeasures and assert the legitimacy of their employment against the responsible State.

Moreover, the Annex sets the obligation of the responsible State to provide full compensation for suffered injury caused by the internationally wrongful act in the form of restitution, compensation, satisfaction or interest.

It should be noted that the Annex also determines the right of States other than the injured State to invoke the responsibility of another State and to take lawful measures against that State in cases when [6]:
1) "the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group"; or
2) "the obligation breached is owed to the international community as a whole".

Thus, the formulation containing the term "lawful measures" excludes the possibility of applying countermeasures by the third party for the purpose of invoking the responsibility of any wrongdoing State. Understanding of this fact is reflected in the comments to the draft articles on responsibility of States for internationally wrongful acts. According to the Article 48 of Chapter I of Part Three of the Annex any State has the right to claim from the responsible State cessation of the internationally wrongful act, assurances and guarantees of non-repetition, as well as the fulfillment of the obligation of reparation in the interest of the injured State or the beneficiaries of the breached obligation. At the same time the employment of countermeasures by a State other than the injured State is unwarranted and unlawful in terms set out in the Annex.

The main problem of the implementation of the norms of the Annex is that it has advisory nature that is a source of "soft law". Submitted on 12 December, 2001 by the International Law Commission draft articles on responsibility of States for internationally wrongful acts is still not fixed in the relevant international convention and has not been ratified by all Member States of the UN. Consequently, the most powerful States are able to resist the political significance of this document and to approach selectively to the implementation of its legal provisions that does not contribute to the early resolution of international disputes, and carries risks of economic confrontation development under economic sanctions regimes and even economic war.

On 9 December 2011 the UN General Assembly adopted Resolution 66/100 with the Annex thereto, containing the draft articles on responsibility of international organizations. The Draft Articles on Responsibility of States for Internationally Wrongful

Act discussed above was taken as the basis of this document. Both Annexes have similar structure and mostly verbatim formulation of articles [7].

Countermeasures, according to the provisions contained in Annex, can be employed in the directions shown in Table 1.

Table 1

Directions of employment of countermeasures according to provisions of the Annex "Responsibility of international organizations"

№	The injured party	The responsible party
1	International Organization	International Organization
2	State	International Organization
3	International Organization	State
4	International Organization	Member State
5	International Organization	Member International Organization
6	Member State	International Organization
7	Member International Organization	International Organization

Source: compiled by the author.

While the first three directions of countermeasures' employment do not cause any questions, the other four directions are controversial. So the provisions of this Annex provide the possibility of an international organization to employ countermeasures against its members in response to a breach of an international obligation arising from the rules of this organization, unless such measures are not covered by these rules. However, in the comments to the text of the Draft Articles on Responsibility of International Organizations questioned the identification of countermeasures as the coercive measures employed by the international organization against its members. An argument here is the fact that the existence of the relevant norm in the rules of the injured organization, allowing employing coercive measures against its members, makes such measures legitimate by themselves. Agreeing with this point of view, it should also be noted, that universal and special types of international organizations which do not represent any forms of economic integration and do not have their own economic interests, but also serve the interests of the international community as a whole, should have a more flexible and at the same time an effective instrument of coercion. In our view, the category of "sanctions" is the most appropriate for such instrument. The main characteristics of the sanctions that distinguish them from countermeasures should be:

1) to employ sanctions against its members (whether a separate State, a group of States or international organization which represents any form of economic integration association), responsible for an internationally wrongful act should only international organization which do not represent any forms of economic integration and do not have their own economic interests (the possibility of employing the coercive measures by one or more Member States individually, as well as by the third countries pursuing their own interests is excluded);

2) the rules (Charter) of such an international organization shall contain a provision allowing employing sanctions against its own members who are responsible for an internationally wrongful act (the wrongfulness of sanctions is excluded; the existence of such a rule in the Charter of the international organization indicates the voluntary consent of all members of this organization on the potential employment of economic sanctions against them);
3) the employment of sanctions is only allowed to induce a responsible Member to fulfill its international commitments taken in framework of membership in this international organization (the punitive function of economic sanctions and the possibility to coerce responsible Member to fulfill the requirements, lying beyond taken obligations are excluded);
4) the purpose of imposing the sanctions regime should pursue the interests of the whole international community (international security, environmental protection, etc.) and facilitate the performance of the international organization's functions (the possibility of the individual state interests implementation to the detriment of the interests of international community is excluded).

Characteristics of countermeasures listed in paragraphs 3-5 are also mandatory for the sanctions. In our opinion, this mechanism of coercion is organically entered into the concept of the UN Security Council and brings clarity concerning the authority of this institute of international peace and security protection. Do not consider it is expedient to establish the possibility of countermeasures' employment by the Members against the universal international organizations of non-integration type (whether by an individual State, group of States or international organization which represents any form of economic integration association). A real necessity is the more detailed elaboration of decision-making mechanism in the framework of such an international organization that excludes all doubts about their impartiality and multiple interpretations.

As for international organizations which represent any form of economic integration association, it is necessary to empower the arbitral institutions, operating under these associations and competent to consider arisen within such economic unions disputes, to authorize the employment of countermeasures by the injured party-member against the responsible party-member. Those cases, when a Member State is an injured party and the international organization which represent any form of economic integration association is the responsible party, should also be considered by the authorized arbitration institution. Decisions taken by this arbitral institution in favor of the injured Member State shall be mandatory for such international organization and its political and economic bodies.

Provisions of the Annex "Responsibility of International Organizations" also have advisory nature and only political significance, but no legal power. Without any doubt, the codification of international law in the area of responsibility of States and international organizations for an internationally wrongful act is of great importance, but the modern reality demonstrates that it is not enough for the maintenance fair and transparent implementation of its' obligations by the subjects of international law.

2. THE INSTITUTE OF ECONOMIC COERCION IN THE WTO SYSTEM

We shouldn't get around the problem of implementation of the mechanism of economic coercion in terms of international trade law. The undisputed authority in this area has the World Trade Organization. As international economic institution the WTO does not have a centralized system of economic coercion. International legal system of WTO's multilateral agreements do not contain the category of "sanction", as well as the authority on the employment of any measures of economic coercion by the supreme bodies of the WTO [9].

Nevertheless, in a view of the international character of the organization in which framework its members have certain obligations in front of each other (but not in front of the WTO or the international community as a whole), the multilateral agreements' rules establish the possibility of the economic coercion tools employment by the parties of these multilateral agreements whose economic interests have been violated.

The mechanism of economic coercion in the WTO is closely associated with the activity of its structural element - the Dispute Settlement Body (DSB). The DSB has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations in respect of those countries which violate the terms of the covered agreements, as well as the rights and obligations of other Members States [8].

First thing it is necessary to pay attention to that the suspension of concessions and other obligations under covered agreements represents a mechanism of economic coercion under the WTO, which in this case refers to the category of "countermeasures".

Second - in contrast to the provisions of the Annex "Responsibility of States for Internationally Wrongful Acts" providing the employment of countermeasures by the injured States individually, the WTO rules require from Member States to apply to the DSB, which is competent to authorize the employment of such measures. The norms of different legal systems working at the same time on the territory of the State come into conflict [10]. In this regard, a norm collision may occur, which solution by consensus and in a short time is unlikely to be possible.

The aim of the WTO's dispute settlement mechanism is to secure a positive solution to a dispute based on a mutually acceptable to the parties to a dispute and consistent with the covered agreements decision. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.

In the case where the immediate withdrawal of the adopted measure, which is inconsistent with a covered agreement, is not feasible or the respondent Member State does not follow the DSB's recommendations and decisions within a reasonable period of time, the claimant Member State may apply to the compensation mechanism. Compensation under the Annex 2 of the WTO Agreement "Understanding on rules and procedures governing the settlement of disputes" is a voluntary and mutually acceptable measure which, shall comply with the covered agreements [8].

Voluntary and mutually acceptable basis of the compensation on the one hand protects the sovereignty of the multilateral agreements parties, but at the same time is

contrary to Article 36 of Chapter II of Part Two of the Annex "Responsibility of States for internationally wrongful acts", according to which the responsible State is obliged to compensate damage suffered by the internationally wrongful act.

Moreover, the WTO's current compensation mechanism does not provide the reimbursement for the damage suffered by the respondent Member State and incurred by the claimant Member State before the announcement of the DSB's decision, as well as during the period given to the respondent Member State for the implementation of this decision, thereby excluding the retrospective effect. In addition, the prevailing party is not entitled to claim any reimbursement for the court costs from the respondent Member State [9].

The last opportunity, which is entitled to use the claimant Member State resorting to the dispute settlement procedures - a suspension of concessions or other obligations under the covered agreements on a discriminatory basis in respect to another Member State on the condition that such measures allowed by the DSB [6]. The mechanism of suspension of concessions should be used only when the responsible State abstain from implementation of the DSB's decision, as well as in the case of failure to reach consensus in the negotiations for compensation.

The mechanism of concessions or other obligations' suspension under the covered agreements, alike with the compensation mechanism has temporary nature and is valid until cancelation the employed measures inconsistent with a covered agreement by the responsible party, or until reaching mutually satisfactory solution. The volume of suspension of concessions or other obligations authorized by the DSB should be equivalent to the nullification or impairment the benefits accruing to any Member under those agreements, as well as comply with norms defined in Article 22 paragraph 3 of the Annex 2 of the WTO Agreement "Understanding on rules and procedures governing the settlement of disputes" [9].

With globalization, a situation occurs when political sovereignty does not coincide with the economic [10]. The DSB is not authorized to deal with disputes of a political nature, but some multilateral agreements of the WTO system suggests the possibility of employing economic coercive measures, based on a political motive. So the Article XXI of the GATT and the Article XIV bis of the GATS provide security exceptions out of the prohibition of international trade restrictive measures, in particular if they are taken in time of war or other emergency in international relations [11; 12]. This formulation makes it possible to speculate by politically motivated Member States on international trade relations and to derive additional benefit by subjecting their trade partners to discrimination.

However, these articles also allow the employment of discriminatory measures and any other actions pursuant to the obligations under the UN Charter to preserve international peace and security. Consequently, the UN Security Council is of paramount importance in comparison with the obligations taken by countries in the framework of international trade law [8].

Of course, this article does not contain the full range of problems associated with the use of instruments of economic coercion, but allows developing specific steps aimed at the

lasting establishment of the institute of economic coercion in international legal system as the fundamental basis of transparent, conscientious and protected international relations.

CONCLUSION

The functioning of the economic coercion mechanism in the context of globalization does not take place in isolation among wrongdoing State and law enforcing State, leaving the third countries behind the framework, but covers all the subjects of international law including international organizations which represent any form of economic integration association, as well as international and national business. However, the institute of economic coercion is far from final and universally recognized establishment in international law by virtue of the reasons mentioned above. In this regard, we consider the following steps in this direction of highest priority and urgency:

1. establishment of a clear distinction between such tools of economic coercion as economic sanctions and countermeasures based on the reviewed basic conditions of their employment by inclusion of the relevant provisions in the sources of international law (the employment of economic sanctions regime - in the UN Charter, the employment of the countermeasures' mechanism - in the relevant UN Convention developed on the basis of the draft articles on responsibility of States and international organizations for internationally wrongful act);
2. fixation of an obligation of the law enforcing State or international organization to elaborate specific criteria for the termination of the force of the countermeasures' mechanism or economic sanctions regime employed against the wrongdoing State or international organization in the relevant sources of international law;
3. fixation of the wrongdoing party's right to challenge the economic coercive measures employed against this party in the International Court of Justice or the WTO's DSB, or any other arbitration institution selected by mutual agreement of the parties of international conflict, provided that such measures are inconsistent with the basic conditions of their employment established in paragraph 1;
4. convergence of the provisions of the draft articles on responsibility of States and international organizations for internationally wrongful act and the WTO rules in the sphere of countermeasures employment by the Member States of both organizations, including the abolition of the consensual nature of the WTO's compensation mechanism;
5. an advance of initiative within the UN General Assembly on giving binding legal force to the provisions of the relevant sources of international law in the sphere of responsibility of States and international organizations for internationally wrongful act by their signature and ratification by all Member states of the United Nations;
6. an advance of initiative within the UN General Assembly, UNCTAD and the WTO on the development of the draft articles and provisions in the area of responsibility of transnational corporations for internationally wrongful act and the further consolidation of these provisions in the relevant sources of international law (UN Convention), followed by giving it binding legal force.

Such radical steps require strong political will of national governments of each country without exception especially that of developed countries. Establishment of transparent, clear, generally accepted and mandatory rules and norms of conduct of the

subjects of international law in the sphere of international economic relations, as well as understanding and employment of the instruments of restoration and maintenance the international order and the implementation of responsibility for internationally wrongful acts, without any doubts, is the most important necessity in a globalized world and the political obligation of each State.

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Проведен анализ норм международного права в сфере ответственности государств и международных организаций за международно-противоправные деяния. Дополнены существующие и даны новые характеристики инструментам экономического принуждения с целью их различия и общепринятой трактовки. Предложены меры по становлению института экономического принуждения в системе международного права.

Ключевые слова: экономические противоречия, институт экономического принуждения, экономические санкции, контрмеры, ООН, ВТО

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