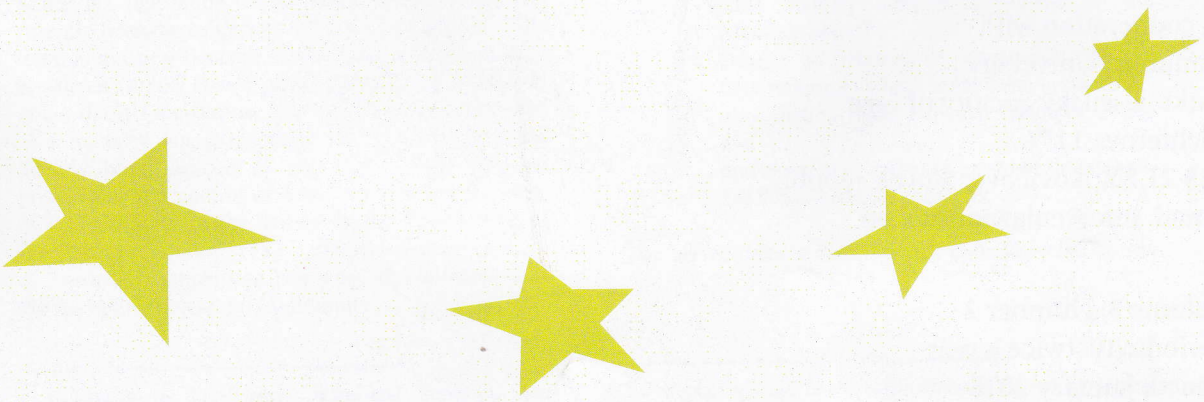
ISSN 2453-7098

# EU Law Journal

Volume 3, Number 2

www.eulawjournal.eu



2018

# EU Law Journal

The scientific peer-reviewed EU Law Journal is focused on academic texts, original studies of Slovak as well as foreign authors regarding the EU and EU law. Besides research studies it includes contributions to the discussion on current topics about the EU and EU law as well as book reviews of domestic and foreign authors. Contributions are reviewed by an anonymous reviewing procedure. Further information for authors are available online at www.eulawjournal.eu





Published by
**IRIS – Vydavateľstvo a tlač, s. r. o.**
Žitavská 14, 821 07 Bratislava, Slovak republic
**IČO 35926376**

in cooperation with
Danubius University
Janko Jesenský Faculty of Law
Richterova 1171
925 21 Sládkovičovo, Slovak republic
Email: info@eulawjournal.eu

Volume 3, Number 2
Periodicity: twice a year
Issued: January 2018





**EV 5318/16**
**ISSN 2453-7098**

# Content of Issue 2/2018

# Diverging narratives of economic sanctions – some observations on the EU sanctions against Russia

*Balazs Horvathy*

**Abstract**

The economic sanctions can be approached from two different perspectives. In the narrative of the international law and international economic law the economic sanctions are legal instruments applied exceptionally with the aim of implementing objectives of foreign and security policy. The legality of the measures requires here the justification of legal concepts (e.g. the essential security of the sanctioning country). From the perspective of the international relations and foreign policy, however, the legality of the measure plays no significant role. The justification of the sanction is based on the pure interest of the country, therefore the legality is only a formal question of how to adopt and implement the measures and not a prerequisite for the justification itself. The paper intends to examine the legal narrative of economic sanctions in order to establish the criteria of their legality and to apply this concept to the sanctions imposed by the European Union on the Russian Federation. The paper will argue, however, that the economic sanctions are Janus-faced instruments of international relations: even though it can be interpreted by way of external trade policy and law considerations, in practical terms, their fundamental objectives unavoidably stretch beyond the legal narrative and may appear to merely serve the foreign policy of the country.

**Keywords**

Economic sanctions, EU law, International economic law, WTO law, Russia, Ukraine

## 1. Introduction

The economic sanctions are Janus-faced instruments of international relations. On the one hand, the legal basis of economic sanctions is well anchored in international law and international economic law that lay down the framework of application of sanctions in a collective way under the umbrella of the United Nations or in a unilateral manner without specific mandate of the international community. In this narrative, the economic sanctions are legal instruments that are to be applied exceptionally in order to implement objectives of foreign and security policy. These instruments are logically similar concepts to the public policy exceptions of international economic law, where the legality of the exceptional measures always requires justification on specific policy (moral, public policy, environmental etc.) grounds.

On the other hand, the economic sanctions are also interpreted as instruments of foreign policy, which implies the second face of these restrictive measures. From this point of view, the legality of the measure plays no significant role. The justification for the sanction is here not based on legal concepts, but only on the pure interest – or in terms of the dominant realist paradigm: the national interest[1] – of the country, therefore the legality is only a formal question (e.g. in which form the sanction could be implemented), but not a prerequisite for the justification.

Taking the perspective of the first face of the economic sanctions and examining these measures as legal instruments, the main objective of the paper is to establish the criteria of their legality and to apply this concept to the sanctions imposed by the European Union on the Russian Federation after the annexation of Crimea and escalation of crisis in Ukraine in 2014. Forasmuch as the EU measures are considered unilateral economic sanctions, the analysis restricts its scope to the context of the international economic law and pay less attention to the whole international law complexity of sanctions. [2]

After a short introductory analysis on the 'EU-Russia sanctions war' (*II.*), the paper places conceptually the economic sanctions into the context of the international economic law (*III.*); then the criteria of legality is applied to the EU sanctions in the subsequent chapter (*IV.*); and finally, the paper is closed by conclusion (*V.*).

## II. The EU sanctions on Russia

In 2014, after Russia has annexed Crimea, the EU Member States decided to impose complex economic sanctions on Russia, as EU diplomatic efforts –

[1] Here I refer only to a general definition of national interest, namely it includes the perceived needs and desires of one state in relation to other states comprising the external environment, in other words national interest always says what is best for a society in foreign affairs. See ROSENAU, J. (1968): National Interest, p. 34–40; NUECHTERLEIN, D. (1976): National Interests and Foreign Policy: A Conceptual Framework for Analysis and Decision-Making, p. 246–266.

[2] For a detailed analysis, see: ALEXANDER, K. (2009): Economic sanctions; BOSSCHE, P. v. d. / ZDOUC, W. (2013): The Law and Policy of the World Trade Organization; and ABASS, A. / WHITE, N. (2006): Countermeasures and Sanctions; SZÉP, V. (2018): Foreign policy without unilateral alternatives?

intended to compel the Russian Federation to act decisively to prevent the further escalation of the Ukrainian crisis – had been proven ineffective.[3] The early sanctions contained restrictions on Russian and Ukrainian individuals (freezing of private assets and travel bans),[4] however, as the deepening conflict between Russia and Ukraine escalated, the Council repeatedly amended the sanction legislation and expanded the scope of application of the restrictive measures. The most recent substantive amendments were effected in December 2017[5] and March 2018[6] and the sanctions have been extended until July 2018 (economic sanctions) as well as September 2018 (individual restrictive measures) and March 2019 (asset freezes against certain persons).[7]

The aim of the economic sanctions imposed by the European Union was to condemn and punish Russia for its role in the intensification of the Ukrainian crisis and the related legal measures build on two main objectives. First, as a general objective, the sanctions put pressure on Russia to abandon policies that escalate the Ukrainian crisis, i.e. any actions that undermine the territorial integrity and sovereignty of Ukraine, thereby endangering the stability and security of the region (e.g. cessation of military support for pro-Russian separatists). Second, the economic sanctions also constitute a response to the violations of human rights committed in Ukraine and to the annexation of part of Ukraine and are aimed at decision-makers, politicians, companies and other legal entities that can be held liable for the occurrence of these infringements. On the basis of these objectives, it is therefore evident that the economic sanctions imposed by the European Union serve the purpose of achieving broader foreign policy and security policy goals, and should be considered relevant not merely on the basis of their economic content. Hermann van Rompuy, former President of the European Council was therefore apt when he described the nature of the EU sanctions as belonging to the arsenal of foreign policy, and representing "not an objective in themselves, but a means of achieving an objective".[8]

Therefore, the economic sanctions are markedly easier to interpret as instruments of foreign policy rather than as legal instruments. However, it cannot be disputed that the Treaties lay down the basic legal framework and thereby limit the European Union's scope for policy action when it comes to applying economic sanctions. In line with this, since no international (UN) embargo is in force relating to the Ukrainian crisis, the economic sanctions analyzed here may be considered autonomous policy instruments of the European Union.

Three types of sanctions imposed by the European Union can be distinguished.[9] Some are general economic and trade restrictions, others are restrictive measures on the assets and movement of individuals, and there are particular provisions of economic diplomacy. The first category, namely economic and trade sanctions against the Russian Federation and the Crimean Peninsula entails the introduction by the EU of a general export and import ban on products on the Common Military List of the European Union.[10] These restrictions were subsequently extended to include the export of so-called dual-use goods and technologies, and special import restrictions were imposed on products from the Crimean region. An exception to

[3] On the historic context of the escalation of the Russia–Ukraine crisis and the imposition of EU sanctions, see: Doraev, M. (2015): The "Memory Effect" of Economic Sanctions Against Russia, p. 355–419.; Ingelevič-Citak, M. (2015): Crimean conflict – from the perspectives of Russia, Ukraine, and public international law, p. 23–45.; Horvathy, B. / Nyircsak, A. (2014): EU-Russia Sanctions War. Part I: The legal framework, HAS CSS Lendület–HPOPs Research Group, Budapest. (6 October 2014, available at: http://hpops.tk.mta.hu/en/blog/2014/10/eu-russia-sanctions-war-part-i-the-legal-framework).

[4] Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ L 78, 17/03/2014); and Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ L 78, 17/03/2014).

[5] Council Decision (CFSP) 2017/2426 of 21 December 2017 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ L 343, 22.12.2017).

[6] Council Implementing Regulation (EU) 2018/388 of 12 March 2018 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ L 69, 13.3.2018).

[7] The economic sanctions has been extended by the Council on 21 December 2017 and are in force until 31 July 2018 (see: Russia: EU prolongs economic sanctions by six months, Press Release of the Council, 821/17; 21/12/2017) and the restrictive measures relating to asset freeze and travel bans has been prolonged on 12 March 2018 until 15 September 2018 (see: EU prolongs sanctions over actions against Ukraine's territorial integrity until 15 September 2018, Press Release of the Council, 120/18; 12/03/2018). Moreover, on 5 March 2018 the Council extended also the assets freezes of individuals responsible for the misappropriation of Ukrainian state funds until 6 March 2019 (see: Misappropriation of Ukrainian state funds: EU prolongs asset freezes against 13 persons by one year, Press Release of the Council, 104/18; 05/03/2018).

[8] EU strengthens sanctions against actions undermining Ukraine's territorial integrity (Press Release of the Council, 21/03/2014, available at: http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/141741.pdf.)

[9] See for an alternative categorization, GRUSZCZYNSKI, L./ MENKES, M. (2017): Legality of the EU Trade Sanctions Imposed on the Russian Federation under WTO Law, p. 39–41.

[10] Common Military List of the European Union (equipment covered by Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, 17 March 2014), OJ C 107/1 (09/04/2014).

these rules are cases where the "clean" origin of a product is certified by official Ukrainian documents.[11] In addition, certain investment activities are also subject to restrictions. These restrictions impact investments in Russia in the transport, telecommunications and energy sectors, including projects in oil and gas production as well as mining. The hold on investment was augmented by a ban on the export of vital products and technologies for these strategic sectors, with the provision of financial and insurance services related to such projects also being prohibited.

The second category of sanctions includes the freezing of certain assets and shares as well as travel bans for individuals (natural persons and companies). According to the latest data (15 May 2018), asset freeze and travel bans are in force against 150 persons and 38 companies, which includes a number of companies in the Crimean region whose ownership changed – in the wake of the annexation – in contravention of Ukrainian law.[12]

Measures aimed at freezing of assets include investments and economic interests of any kind of the persons designated by the EU provisions, including cash, cheques, bank deposits, stocks and shares, etc. In practice, this means that the persons concerned do not have access to, and cannot sell or transfer these assets. Travel restrictions affect individuals in that the person is denied entry into the European Union. The Council maintains the list of sanctioned persons in addendums to the legislation while also providing for legal remedy: the persons concerned have the right to comment on the list, as well as have the opportunity to challenge the Council decision at the European Court of Justice.[13]

Moreover the second category also includes specific restrictions imposing obligations on EU citizens and businesses in the context of the action against Russia, particularly restrictions on Russian state-owned banks, based on which EU citizens and businesses may not conduct financial transactions with the banks under sanctions, nor trade financial instruments (bonds, etc.). Consequently, economic sanctions in this category do not only impact foreign persons, but may also restrict the activities of EU citizens and economic entities.

The third category includes specific punitive measures of economic diplomacy against Russia, which were introduced by the European Union in order to enhance the political clout and effects of the economic sanctions. This includes the Council decision requesting that the European Commission reassess, on a case by case basis, partnership programs between the EU and Russia, and to suspend certain programs.[14] Exempt from this review are programs implementing cross-border cooperation, as well as those involving Russian civil society. Furthermore, the Union cancelled a planned EU-Russia summit[15] and decided against holding the usual bilateral negotiations, among others suspending negotiations on visa policy cooperation and on a new partnership agreement. As a joint diplomatic move, EU Member States prompted the suspension of accession negotiations between Russia and the OECD, as well as its associated International Energy Agency. In addition, the 40th G8 summit, originally planned for Sochi was cancelled in 2014, and instead, a G7 meeting without Russia was held in Brussels on 4-5 June 2014.[16] Also of significance is that the European Council on 16 July 2014 urged the European Investment Bank to postpone the signing of a new financing scheme for Russia,[17] with Member States indicating that they would be taking similar steps before the Board of Directors of the EBRD regarding approval of new funding schemes.

## III. Economic sanctions in narrative of the international economic law

The subject of the subsequent analysis is the trade related provisions falling under the scope of WTO law, therefore the restrictions on weapons, dual-use products, goods and services related to special investments, the import ban on goods from the Crimean and rebel-controlled territories, as well as restrictions on business transactions involving certain companies on blacklists are of significance. However, we do not assess here neither the measures of

[11] Council Decision 2014/386/CFSP of 23 June 2014 concerning restrictions on goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol.

[12] See the current list of persons and entities under EU restrictive measures is available in the Annex of the consolidated version of Council Decision 2014/145/CFSP.

[13] Decision has so far been reached in the case of Andriy Portnov, former deputy leader of the Ukrainian president's administration: the Court upheld Portnov's appeal, annulled the freezing of his assets and stated that listing Portnov's name had not complied with the criteria of the EU law. See also other cases before the Tribunal: T-331/14 Mykola Yanovych Azarov v. Council (Prime Minister of Ukraine 2010 to 2014); T-339/14 Serhiy Vitaliyovych Kurchenko v. Council (Ukrainian businessman); T-347/14 Viktor Fedorovych Yanukovych v. Council (President of Ukraine 2010 to 2014); T-434/14 Sergej Arbuzov v. Council (Prime Minister of Ukraine February to January 2014); T-717/14 and T-720/14 Arkady Rotenberg v. Council (Russian businessman). The cases involving companies include the proceedings initiated by Russian oil company Rosneft: T-715/14. NK Rosneft et al v. Council.

[14] See EU sanctions against Russia over Ukraine crisis. European Union Newsroom. Available at: http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions/index_en.htm.

[15] EU restrictive measures in view of the situation in Eastern Ukraine and the illegal annexation of Crimea (Council, Background Note, Brussels, 29/07/2014). Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/press data/EN/foraff/144159.pdf.

[16] The Brussels G7 Summit Declaration (European Commission, Memo, Brussels, 5/06/2014). Available at: http://europa.eu/rapid/press-release_MEMO-14-402_en.htm.

[17] See EU restrictive measures in view of the situation in Eastern Ukraine and the illegal annexation of Crimea (Council, Background Note, 29/07/2014). Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/press data/EN/foraff/144159.pdf.

economic diplomacy limiting Russia's room to manoeuvre within international economic relations, nor the sanctions restricting movement of individuals,

These economic sanction measures, at the first glance, seem to be contrary to the principles of the WTO law. First, the unilateral sanction might be incompatible with principle of most favored nation treatment[18] that requires a WTO Member State to grant other Member States any preference immediately and without conditions in respect to its provisions on imports and exports, which the Member State in question provides to third countries. GATS incorporates the principle of most favored nation treatment,[19] therefore the principle also involves the aspects of the EU sanctions on trade in services, such as the ban on oil industry investments or the activities of the banking sector. Second, the sanctions imposed by the EU are not compatible with the principle of national treatment (equal treatment). Under this principle, WTO members may not give products of other Member States inferior treatment from a regulatory perspective, than they do their own domestic products.[20]

Therefore, the economic sanctions imposed by the European Union are in breach of the above principles, i.e. the EU's obligations based on GATT 1994 and GATS. Thus the essential question arises of whether the WTO law provides exceptions, legal basis for justifying the sanctions introduced by the EU. Not considering the exceptions that can be excluded *prima facie*,[21] the only exceptional provision whose application could reasonably be taken into account is the exception based on "essential security interest."[22] Therefore I focus on this provision.

The provision on essential security interest had been present in the original 1947 text of GATT, and was left unchanged by the 1994 revision. This same text was also used in Article XIV*bis* of GATS. On the whole, this exception provides leeway for Member States in cases where their essential security and their national security or security policy interest is at stake, and in such cases authorizes them to derogate from the obligations laid down by GATT 1994 and GATS. It identifies three types of justification. First, Member States may refuse any provisions that would oblige them to issue information the disclosure of which would be contrary to the security interests of the Member State.[23] Second, it authorizes Member States to freely take measures necessary for the protection of their national security interests, specifically referring to trade in arms, munitions and war material, as well as to times of war and to other emergencies in international relations.[24] As the third option, it reaffirms that Member States may take measures to implement their tasks serving the maintenance of international peace and security under the UN Charter.[25]

Among these options, the second might bear substantive significance in the context of legality of EU sanctions. However, past practice involving national security exceptions is restricted to a few concrete disputes, and so far no final decision has ever been issued in any dispute settlement procedure where a Member State has successfully based its justification of restrictive measures on the exception provisions of GATT Article XXI or GATS Article XIV*bis*. However some concrete cases in practice where consideration of national security interests was raised, suggest criteria that are relevant to the evaluation of the case of EU sanctions. The most important cases are as follows:

*a)* Applicability of GATT Article XXI was raised for the first time in procedures[26] brought by Czechoslovakia against the United States in 1949, the subject of which were export controls and a licensing system introduced by the USA. According to the United States, these restrictive measures were needed for national security reasons, and were applicable only to a narrow range of goods usable for military

[18] Article I of the General Agreement on Tariffs and Trade ("GATT"). If there is significance of the citing the earlier revision of the GATT text, this will be indicated by "GATT 1947"); Published in: Council Decision 94/800/EC concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994), Annex 1 (b), OJ L 336 (23/12/1994) page 1 [Marrakesh Agreement].

[19] Marrakesh Agreement, Annex 1 (b): General Agreement on Trade in Services (GATS) Article II paragraph (1). GATS defines the principle of most favored nation treatment as follows: "With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country."

[20] GATT Article III.

[21] Because of the special facts of the case, the general exceptions (GATT Article XX) do not apply and any other exemption allowing deviation from the principles is also logically excluded, such as free trade zones and customs unions (GATT Article XXIV).

[22] GATT Article XXI and GATS Article XIVbis.

[23] GATT Article XXI paragraph (a): "[Nothing in this Agreement shall be construed] to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests […]".

[24] GATT Article XXI paragraph (b): "[Nothing in this Agreement shall be construed] to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations (…)."

[25] GATT Article XXI paragraph (c): "[Nothing in this Agreement shall be construed] to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."

[26] US – Export Restrictions, GATT/CP. 3/SR.22 (8 June 1949), Third Session – Summary Record of the Twenty-Second Meeting, pp. 4–10. Available at: https://www.wto.org/gatt_docs/English/SULPDF/90060100.pdf.

purposes. The legal basis of the measures was cited to be GATT Article XXI paragraph (b) (iii), i.e. it referred to an emergency in international relations to justify the measures. The GATT contracting parties subsequently rejected Czechoslovakia's application[27] and did not set up a working group for an inquiry into the dispute.[28] In addition, no definition of the essence of the essential security interest had been formulated, which at the end of the negotiations Czechoslovakia interpreted as Member States themselves being able to determine what measures they consider necessary for the protection their security interests.[29]

*b)* While not considered formal dispute resolution, the relevance of GATT Article XXI was raised in connection with Portugal's accession in 1961. At that time, Ghana maintained a boycott of goods originating from Portugal, in response to the Portuguese Government's policy towards Africa, specifically in reference to the crisis in Angola. Similarly to the previously discussed case, Ghana also cited GATT Article XXI paragraph (b) (iii) as the basis for its restrictive measures and concluded that both concrete and potential dangers may threaten the security interests of a state.[30]

*c)* In 1975, in the case of a ban introduced by Sweden on footwear used by the military,[31] reference was also made to GATT Article XXI, however, that case also did not make it to formal dispute resolution. Sweden argued that the import ban served to maintain – in reality, protect – its crisis-hit domestic production, a measure necessary for Swedish national security policy. Member States made an important determination to the effect as stated that GATT Article XXI does not require consultation, [32] i.e. a state whose interest is served by restrictions may take the necessary measures unilaterally.[33] As elsewhere, it is apparent in this case that the applicability of the article is greatly influenced by who is able to interpret the scope of GATT Article XXI, whether the Member State itself is allowed to autonomously determine the scope of goods considered national security risks, or whether there are objective conditions for that.[34] These questions still remain unanswered.[35]

*d)* The past case closest to the current EU sanctions against Russia concerns the economic sanctions imposed on Argentina by the EEC, Canada and Australia, the background to which was the armed conflict in the Falkland Islands between the United Kingdom and Argentina, as well as the implementation of the subsequent UN Security Council decision 502 of 1982.[36] As a result of the negotiations of the GATT contracting parties, a separate decision was adopted on issues concerning the application of GATT Article XXI.[37] The importance of the decision lay in that it clarified several procedural issues around the application of the national security exception. First, it stated that contracting parties subject to restrictions must be provided the broadest possible information by the sanctioning state about the measures implemented. Above all, this was meant to clarify the application of the exception referred to by GATT Article XXI paragraph (a). In other words, it sought to prevent interpretation of the above-mentioned GATT Article XXI paragraph (a) in a way that allowed the sanctioning state to fully restrict the disclosure to the affected state of information relating to the sanctions. Second, it also made it clear that states subject to sanctions retain all their rights deriving from their GATT membership. Last, the decision authorized the GATT Council to specify, on request, further criteria with reference to specific economic sanctions. The decision did not address the substantive issues, however, two additional aspects are evident from the text. Firstly, the wording of the document implied that judging the existence of national security interests is at the full discretion of Member States.[38] Secondly, the decision clearly stated that signatories introducing restrictions must take into account the interests of affected third states.[39]

[27] US – Export Restrictions, pp. 8–10.

[28] This initial case arose before the establishment of the WTO panel.

[29] US – Export Restrictions, p. 10.

[30] Summary Record of the Eleventh Meeting, SR.19/11/Corr.1 (28 December 1961), p. 196. Available at: https://www.wto.org/gatt_docs/English/SULPDF/90280183.pdf.

[31] Sweden – Import Restrictions on Certain Footwear, L/4250, 17 November 1975. Available at: https://www.wto.org/gatt_docs/English/SULPDF/90920073.pdf.

[32] Sweden – Import Restrictions on Certain Footwear, p. 3.

[33] GATT Council Meeting, Minutes of Meeting (10 November 1975), C/M/109. p. 9. Available at: https://www.wto.org/gatt_docs/English/SULPDF/90430147.pdf.

[34] Taking an example, the connection between army boots and the essential security interest is palpable, but it is questionable whether a state should be able to restrict trade e.g. in slippers used by the military.

[35] ALFORD, R. P. (2011): The Self-Judging WTO Security Exception, p. 697–759.

[36] The decision acknowledged that the UK may cite self-defense if Argentine troops did not leave the Falkland Islands. See: Resolution 502 (1982) of 3 April 1982. Available at: http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/502%281982%29.

[37] Decision concerning Article XXI of the General Agreement (30 November 1982), L/5426 (2 December 1982). Available at: https://www.wto.org/gatt_docs/english/SULPDF/91000212.pdf.

[38] Decision concerning Article XXI of the General Agreement, first paragraph of the preamble: "Considering that the exceptions envisaged in Article XXI of the General Agreement constitute an important element for safeguarding the rights of contracting parties when they consider that reasons of security are involved"

[39] Decision concerning Article XXI of the General Agreement, third paragraph of the preamble.

*e)* The dispute on the embargo imposed by the United States on Nicaragua in 1985 was also a case of significance.[40] The United States cited GATT Article XXI as justification for the economic sanctions on the grounds that the revolutionary Sandinista leadership governing Nicaragua at the time posed a real threat to US national security and foreign policy.[41] Nicaragua rejected this argument, and requested to set up a panel. However, since the panel's mandate did not allow to examine the USA's justification referencing GATT Article XXI, i.e. the existence of the national security interest cited by the USA, the panel in its conclusions could not state that the USA had complied with the requirements arising from GATT Article XXI, nor that it was in violation of its obligations under GATT.[42] The limited mandate of the panel and its self-restriction allows us to conclude that GATT Article XXI leaves to Member States the justification of the existence of the national security interest, i.e. it is up to each Member State's judgment and discretion what circumstances can be considered essential to its security.

*f)* After the establishment of the WTO, there has been one case under the new dispute settlement procedure where the possibility of exemption based on GATT Article XXI was raised: the dispute initiated by the EC against the United States,[43] in the wake of the sanctions introduced by the Helms Burton Act.[44] The restrictions imposed by the USA included sanctions on goods of Cuban origin, entry restrictions on Cuban nationals and other economic sanctions against Cuban companies. The EC argued that the embargo measures violated several obligations arising from GATT. According to the US, imposition of sanctions served its essential security interests, and also cited the fact that it was not considered entirely commercial in nature, so it argued that the dispute did not fall within the scope of the provisions of GATT-WTO.[45] After consultation, the Dispute Settlement Body set up a panel, but later suspended its proceedings at the request of the EC, and eventually the proceedings ended without a decision on the case's merits.

The GATT Article XXI paragraph (c), i.e. taking measures to implement tasks serving the maintenance of international peace and security under the UN Charter has not been cited in any dispute settlement case so far. Similarly, there has not been any past practice to date involving the exception provision in GATS Article XIV*bis*, however, since the text of that article is identical to GATT Article XXI, the past practice examined above might also be applicable to GATS.

**IV. The legality of economic sanctions imposed by the EU on Russia**

Considering the above criteria arising from the past case law, it is plausible that the exception in GATT Article XXI paragraph (a) does not bear significant relevance, since the economic sanctions imposed by the EU were adopted and published in a transparent way as part of the foreign and security policy decision-making process, so justification on the retention of information is likely not necessary. It is important to note, moreover, that GATT Article XXI – and also similarly GATS Article XIV*bis* – does not define additional criteria beyond the aforementioned exceptions, i.e. it does not contain requirements like the introductory provisions of GATT Article XX (the so-called *chapeau*). In addition to that, also GATT Article XXI paragraph (c) can be excluded from the scope of the analysis, since the economic sanctions imposed by the European Union on the Russian Federation were introduced unilaterally and not on the basis of a UN mandate. Therefore, the justification of the EU's restrictive provisions – hypothetically – could based on GATT Article XXI (b).

When applying the exceptions under GATT Article XXI paragraph (b), the EU must justify the existence of national security interests, the necessity of the action and the circumstances of any special cases (trade in fissionable material or weapons and war or emergency). Justification of the existence of the national security interest in the case of the European Union sanctions provides much leeway, since on the basis of the above-mentioned practice (Czechoslovakia-USA trade dispute; and decision issued on the embargo by the EEC, Canada and Australia on Argentina) the determination of the national security interest is at the discretion of the state concerned. In particular, the argument appearing in the US-Nicaragua dispute implies that the merits of such a decision on the existence of the security interest cannot be reconsidered by the panel.

As a result, it is up to the discretion of the EU to determine the extent to which the Russian-Ukrainian crisis, deepening in the wake of the annexation of Crimea, is considered a threatening concern to the national security and foreign policy of Member States. Such a concern could be the fact that the Russian

[40] For a substantial analysis, see: HENDERSON, J. C. (1986): Legality of Economic Sanctions under International Law: The Case of Nicaragua.

[41] BOSSCHE, P. V. D. / ZDOUC, W. (2013): The Law and Policy of the World Trade Organization, p. 597–598.

[42] US – Trade Measures Affecting Nicaragua (Report by the Panel, L/6053, 13 October 1986), para. 5.3. Available at: https://www.wto.org/gatt_docs/English/SULPDF/91240197.pdf.

[43] US – The Cuban Liberty and Democratic Solidarity Act (Helms Burton) (DS38).

[44] The Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms–Burton Act, Pub.L. 104–114, 110 Stat. 785, 22 U.S.C. §§ 6021–6091). The federal law was intended to further tighten the embargo on Cuba. A 1996 incident in which the Cuban air force downed two private aircraft flying under American flag played a part in the bolstering of the legislation. The aircraft were operated by an association established by Cuban refugees, and which they used to regularly fly into Cuban airspace to spread flyers.

[45] Minutes of DSB meeting of 16 October 1996 (WT/DSB/M/24), p. 7. Available at: https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/21715/Q/WT/DSB/M24.pdf.

Federation had violated the sovereignty of Ukraine, had engaged armed forces, which the heads of state and government condemned in their declaration of 6 March 2014 and also called on Russia to immediately recall its forces to their permanent bases in accordance with the relevant agreements.[46] In addition, the aspects emerging from the Portugal–Ghana dispute further expand the room for manoeuvre, namely not only actual but potential security risks may also be cited as circumstances threatening the national security interest.

Another question is what requirements to apply for the justification of necessity. In contrast with GATT Article XX, which requires the express justification of necessity, it is a plausible interpretation of GATT Article XXI that proof of necessity is merely a formal requirement. This can be deduced grammatically from the wording of the text, which refers to a national security interest "*which [the contracting party] considers necessary*". It also follows logically from the above that if the definition of a national security interest is entirely at the discretion of the Member State, then the national security interest also in itself implies that the sanctions imposed are necessary for the protection of this interest. Thus if we accept broad discretion, the latter interpretation seems probable.

Finally, it should be noted that in justifying the special circumstances in the context of the application of the EU sanctions, GATT Article XXI paragraph (b) (i), which exempts restrictions on fissile materials, is irrelevant for the case in point. In contrast, either of the other two options may be considered as the legal basis for justification. In paragraph (b) (ii) the provisions on the traffic in arms, ammunition and implements of war for the purpose of supplying a military establishment are related to the parts of the EU economic sanctions dealing with the arms embargo. Due to the aspects of past practice, however, it is not determined whether this exception is applicable to dual-use goods such as war supplies serving, among others, military establishments. Fundamentally, deciding this point is not necessarily essential, since of the third basis for exception, i.e. the special circumstances in paragraph (b) (iii), namely war or other emergency in international relations, the latter appears to be justifiable in the context of the escalation of the Russian-Ukrainian conflict. This exception allows for the justification of provisions with substantially broader and general scope and without specific focus on particular goods and, could therefore, if necessary, be applied to restrictions on dual-use products. The interpretation of "other emergency" is not clear, but as before, the grammatical interpretation here also allows for a great degree of discretion. In addition to war, "other emergency" could mean a broader set of international conflicts, however, on the basis of the context, these are supposedly serious conflicts in essence comparable to war.[47]

In cases relying on this as the legal basis for justification, it is therefore assumed that the grave nature of the crisis would play a role, however we could not find examples in past practice which would provide guidance for this issue. Of the previously cited examples, the boycott imposed by Ghana on Portuguese goods is comparable to the Russia-Ukraine crisis. In this case, Ghana claimed that the crisis afoot in Angola constituted a continued threat to peace and security in whole Africa, and used this to cite GATT Article XXI paragraph (b) (iii), but as mentioned above, the proceedings did not result in a decision on the merits of the case. Consequently, in justifying the EU sanctions, the events following the annexation of the Crimean peninsula, tacit support for armed resistance in rebel-controlled areas and the consequent crisis may be argued to support the reference to "other emergency".

## V. Final remarks

I have argued in the above analysis that the justification of the economic sanctions imposed by the EU on Russia might be feasible by reference to the 'essential security interest'. GATT Article XXI grants great discretion for justifying the existence of an essential security interest and of special circumstances, but fundamentally due to the slight background of the relevant case law, the precise interpretation of the specific provisions of the exception clauses is not clear in all respects. In addition, both past practice and the current case at hand clearly demonstrate that economic sanctions are considered instruments that can be interpreted by way of external trade policy and law considerations, but in practical terms, their fundamental objectives unavoidably stretch beyond trade policy and may appear to merely serve foreign policy objectives. In other terms, the two perspectives of the 'Janus-faced' economic sanctions are bound to each other at the point of the justification. The 'legal face' is referring to the essential security interest of the states introducing sanctions, which leads us back to the pure interest of the country. Therefore, the circle is complete: the concept behind the 'essential security interest' is in fact a similarly indefinite concept of 'national interest.'

That is vital because this nature of economic sanctions inherently makes legal review difficult and therefore the WTO Member States rather opt to resolve their disputes on economic sanctions outside the WTO. As a consequence, the analysis can only conclude that hypothetically, the legality of measures comparable to the EU economic sanctions can be derived from application GATT Article XXI (b), however, due to the nature of the measure, it is not expected that the questions regarding the legality will be channeled into the dispute settlement mechanism. Accordingly the

[46] See Council decision of 2014/145/CFSP, first paragraph of the preamble (OJ L 78/16, 17/03/2014).

[47] SINGH, S. (2012): WTO Compatibility of United States' Secondary Sanctions Relating to Petroleum Transactions with Iran.

legal perspective of the 'Janus-faced' economic sanctions could not become more characteristic and the foreign policy perspective can continue to dominate the scene.

***Journal Articles***

ALFORD, R. P. (2011): The Self-Judging WTO Security Exception, Utah Law Review, p. 697–759.
DORAEV, M. (2015): The "Memory Effect" of Economic Sanctions against Russia: Opposing Approaches to the Legality of Unilateral Sanctions Clash Again, University of Pennsylvania Journal of International Law, p. 355–419.
HENDERSON, J. C. (1986): Legality of Economic Sanctions under International Law: The Case Of Nicaragua, Washington and Lee Law Review, Vol. 43, Iss. 1.
HORVATHY, B. / NYIRCSAK, A. (2014): EU-Russia Sanctions War. Part I: The legal framework, Budapest: HAS CSS Lendület–HPOPs Research Group. (6 October 2014, available at: http://hpops.tk.mta.hu/en/blog/2014/10/eu-russia-sanctions-war-part-i-the-legal-framework)
INGELEVIČ-CITAK, M. (2015): Crimean conflict – from the perspectives of Russia, Ukraine, and public international law, International and Comparative Law Review, p. 23–45.
NUECHTERLEIN, D. (1976): National Interests and Foreign Policy: A Conceptual Framework for Analysis and Decision-Making, British Journal of International Studies, p. 246–266.
SINGH, S. (2012): WTO Compatibility of United States' Secondary Sanctions Relating to Petroleum Transactions with Iran, Working Paper CWS/WP/200/1, Centre for WTO Studies – Indian Institute for Foreign Trade, Available at: http://wtocentre.iift.ac.in/workingpaper/Iran%20Sanctions.pdf

***Books***

ALEXANDER, K. (2009): Economic sanctions. Law and public policy, Palgrave Macmillan, Houndmills.
BOSSCHE, P. v. d. / ZDOUC, W. (2013): The Law and Policy of the World Trade Organization. Text, Cases and Materials, 3rd ed., Cambridge University Press, Cambridge.

***Chapters in Books***

ABASS, A. / WHITE, N. (2006): Countermeasures and Sanctions, in EVANS, M. D. (ed.): International Law, Oxford University Press, Oxford.
GRUSZCZYNSKI, L. / MENKES, M. (2017): Legality of the EU Trade Sanctions Imposed on the Russian Federation under WTO Law, in CZAPLINSKI, W. et. a. (eds.): The Case of Crimea's Annexation under International Law, Scholar, Warsaw, p. 237–257.
ROSENAU, J. (1968): National Interest, in SILLS, D./ MERTON, R. (eds.), International Encyclopaedia of the Social Sciences, vol. 11., New York, MacMillan. p. 34–40.
SZÉP, V. (2018): Foreign policy without unilateral alternatives? EU Member State interests and the imposition of economic sanctions, in Varju, M. (ed): Between Compliance and Particularism: Member State Interests and European Union Law, Heidelberg etc., Springer. (Forthcoming).

***Council, Commission and European Parliament Documents***

Council Decision 94/800/EC concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994).
Common Military List of the European Union (equipment covered by Council Common Position 2008/944/CFSP defining common rules governing the control of exports of military technology and equipment, 17 March 2014).
Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (OJ L 78/16, 17/03/2014); and Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.
Council Decision 2014/386/CFSP of 23 June 2014 concerning restrictions on goods originating in Crimea or Sevastopol, in response to the illegal annexation of Crimea and Sevastopol.
Council Decision (CFSP) 2017/2426 of 21 December 2017 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine.
Council Implementing Regulation (EU) 2018/388 of 12 March 2018 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine.




ITMS kód: 26210120047

**„Podporujeme výskumné aktivity na Slovensku / Projekt je spolufinancovaný zo zdrojov EÚ“**