



British Institute of
International and
Comparative Law

Sanctions Policies and Procedures: a Cross-Country Comparison



Prof Yarik Kryvoi
Senior Research Fellow in
International Economic Law
y.kryvoi@biicl.org
www.kryvoi.net

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Building Climate Change Governance through Multistakeholder Cooperation: The Case of Low-Carbon Hydrogen Projects

Responsible organization: Nagoya University

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Overview

1. Sanctions from an International Legal Perspective
2. Types of Sanctions
3. How Sanctions are Imposed
4. Who Must Comply with Financial Sanctions
5. Approval Process and the Institutions Involved
6. Challenging Sanctions Listings
7. The Current Sanctions Landscape
8. Next Steps



Sanctions under PIL



- Historical development in Public International Law (PIL)
- UN Charter
- 1945-1990s: South Africa + Southern Rhodesia
- Post-Cold War: comprehensive
- Post-Iraq humanitarian crisis: sectoral and individual
- Post 9/11 attacks: not tied to state leadership

Sanctions under PIL



Article 2 of the UN Charter demands that all UN Member States settle interstate disputes “by peaceful means” and without resort to “the threat or use of force against the territorial integrity or political independence of any state.”

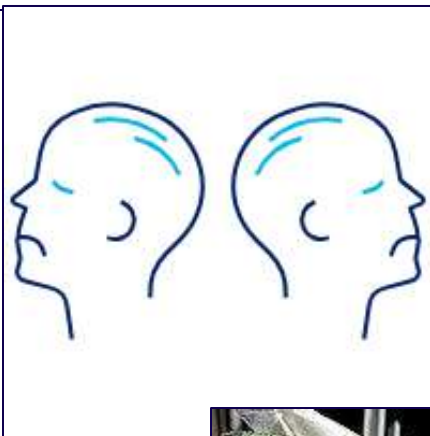
Military

- UN Security Council mandate
- Exception: self-defense (Art. 51)

Non-military

- Unilateral + collective
- Exceptions: humanitarian aid

Sanctions under PIL



- What is a sanction as a matter of PIL?
 - Retorsions?
 - Countermeasures
- Both preventative and punitive

Types of Sanctions



- Individual
- Sectoral
- Travel
- Asset freezes
- Diplomatic
- Arms embargoes
- Proscribed activities
- Commodities
- Transportation
- Financial

How Sanctions are Imposed?





UN Sanctions

- Source: Article 41 of UN Charter
- Established by UNSC Resolutions
- Various forms and various goals
- 31 sanctions regimes across time, with 15 currently active
- Must be voluntarily enforced by States and regional organizations (e.g. EU)



European Union



- Common Foreign and Security Policy (CFSP) comprised of... Treaty on the European Union and Treaty on the Functioning of the European Union
- Three main types of sanctions:
 - UN-imposed sanctions
 - EU autonomous sanctions regimes
 - Mixed sanctions regimes: UN-imposed sanctions paired with stricter additional EU measures
- Able to target non-EU Member State governments, non-state entities, non-state individuals

United States



- Key legislative sources
 - International Emergency Economic Powers Act (IEEPA)
 - Trading with the Enemy Act
 - Foreign Narcotics Kingpin Designation Act
 - Countering America's Adversaries Through Sanctions Act (CAATSA)
- "Primary sanctions" include...
 - List-based blocking sanctions (OFAC's Specially Designated Nationals (SDN) and Blocked Persons List)
 - Targeted sanctions
 - Comprehensive country/region sanctions
- Other sanctions: travel bans, arms embargoes, financial sanctions, export controls, diplomatic sanctions



Japan



- Less comprehensive sanctions regime than other legal systems
- Foreign Exchange and Foreign Trade Act 1949 (FEFTA)
 - Import/export of goods
 - Service transactions
 - International payments
 - Capital transactions
- Act on Punishment of Financing for Offences of Public Intimidation 2002
- Act on International Terrorist Assets-Freezing

United Kingdom



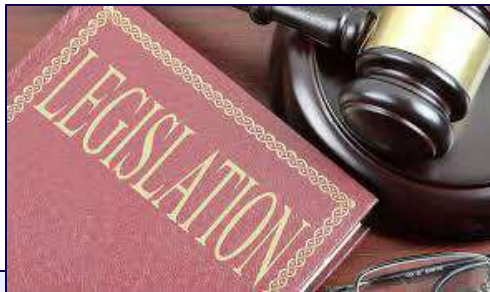
- Key legislative sources
 - Sanctions and Anti-Money Laundering Act 2018
 - Counter Terrorism Act 2008
 - Anti-Terrorism, Crime and Security Act 2001
- Types of sanctions
 - Financial: asset freezes
 - Immigration: travel bans
 - Trade: import and export prohibitions
 - Aircraft: restrictions on movement
 - Shipping: restrictions on movement
 - UN -obligated



Who Must Comply with Financial Sanctions?



United Nations



- Sanctions Committee identifies potential targets, considers listing requests submitted by Member States
- UN Member States give effect to UN sanctions regimes via domestic legislation
 - Individuals and organizations not immediately bound
 - Enforcement issues

European Union



- Any individual or entity whose actions occur within the EU's jurisdiction
- EU nationals worldwide
- Companies and organizations incorporated under the law of an EU Member State
 - Including branches of EU countries in third countries
- On board aircraft or vessels under the jurisdiction of an EU Member State

United States



- Individuals who engage in activities contrary to US foreign policy or national security goals
 - Also, businesses, organizations, or institutions supporting such activities
- Countries or regions whose actions contradict US foreign policy or national security goals
- “Secondary sanctions” → non-US entities engaging in specific activities involving designated countries, industries, or persons
 - Does not require a direct US connection

Japan



- Japanese residents: persons residing or domiciled in Japan
 - Also, acts performed by Japanese residents abroad, or by their agent, employee, or other worker in relation to a resident's property or business
- Legal entities whose principal office is in Japan
 - Also, acts performed in a foreign country by a representative, agent, employee, or other worker of such an entity
- Branch offices, local offices, or other offices in Japan of non-residents
 - Irrespective of whether such an office has legal representation authority for principal office



United Kingdom



- Two classes to which financial sanctions apply:



- All individuals and legal entities within or which undertake activities within UK territory
- All UK nationals and legal entities (and their branches) established under UK law, irrespective of where their activities take place

Designation Process and the Institutions Involved



United Nations



- Security Council resolutions establish sanctions regime
 - Normal voting procedures: affirmative vote of 9/15 members, including P5
- Corresponding Sanctions Committee
 - Chair: non-permanent UNSC member
 - Several advisory and monitoring groups
- Enacted into domestic law by national and regional legislatures



European Union



- Two-step process:
 - (1) Council of the EU adopts decision based on EU High Representative's proposal
 - Unanimous
 - (2) Council of the EU adopts regulation based on joint proposal from EU High Representative and European Commission detailing on how to implement financial/economic aspects of Step 1
 - Via qualified majority
- Main institutions:
 - Adopting sanctions: Council, Commission, European External Action Service
 - Implementing sanctions: EU Member States
 - Punishing breaches: competent civil/criminal authorities of EU Member States

United Kingdom



Foreign, Commonwealth
& Development Office

- Sanctions regime design and strategy: Foreign, Commonwealth and Development Office (FCDO)
- Design of sanctions measures within regimes:
 - Trade sanctions: FCDO; Department for Business and Trade
 - Financial sanctions: FCDO; HM Treasury
 - Transport sanctions: FCDO; Department for Transportation
 - Immigration sanctions: FCDO; Home Office
- Decision to apply certain sanctions measures to specific targets:
 - General: FCDO
 - UK Domestic Counter-Terrorism Sanctions Regime: HM Treasury as lead authority

United Kingdom



Home Office

- Implementation + civil enforcement (investigations, civil penalties):
 - Trade sanctions: Department for Business and Trade (DBT), specifically DBT's Office of Trade Sanctions Implementation
 - Financial sanctions: HM Treasury's Office of Financial Sanctions Implementation
 - Transport sanctions: Department for Transport
 - Immigration sanctions: Home Office
- Criminal enforcement (investigations, prosecutions):
 - Trade sanctions: HM Revenue and Customs
 - Financial sanctions: National Crime Agency
 - Transport sanctions: Police and Serious Fraud Office
 - Immigration sanctions: Home Office

United States



- President (in consultation with State Department and other relevant agencies):
 - Executive orders
 - Sanctions applied to specific targets
 - Criteria for future designations
 - Prohibition on particular activities in certain countries/regions
 - Delegation to federal agencies (commonly, the OFAC)
- Congress: empowered to codify certain sanctions
- OFAC: issues licenses for transactions that would otherwise violate sanctions
- DOJ: investigation and prosecution of “wilful” violations
- Various federal banking agencies: civil penalties
- Financial Crimes Enforcement Network (FinCEN): enforcement of anti-money laundering laws
 - Similar in effect to sanctions

Japan



- Two key competent ministers:
 - Minister of Finance (MOF)
 - Minister of Economy, Trade and Industry (METI)
- Ministers may impose sanctions when...
 - Sanctions are necessary to fulfill Japan's international obligations
 - UN
 - Sanctions are necessary as part of Japan's contribution to international efforts to achieve global peace
 - UN, EU, US, etc.
 - Countermeasures (in the form of sanctions) are necessary to maintain peace and security in Japan
 - Unilateral
- MOF and METI may authorize other ministers/entities, in specific situations

財務省

Ministry of Finance, JAPAN



De-listing Processes



Pre-Designation Review?

Are there mechanisms by which anticipated targets can challenge forthcoming sanctions before they are even issued?

Maybe: Japan

- Act on International Terrorist Assets-Freezing provides terrorists (as defined by the AITAF) with a pre-designation hearing before the National Public Safety Commission
- May be excused where hearing would complicate future enforcement of sanctions
- Non-sanctions legislation may provide a pathway for targets to secure opportunity (1) to be heard or (2) to provide a written explanation



No: UK, US, EU, UN

Post-Designation Review?

Are there administrative mechanisms by which targets can challenge the sanctions imposed on them?

Yes: UK, US, EU, UN

- UK challenges submitted to FCDO
- US challenges submitted to OFAC or Bureau of Industry and Security (BIS) End-User Review Committee (if on BIS Entity List)
- EU challenges submitted to the General Secretariat of the European Council
- UN challenges submitted to Focal Point for De-listing or Office of the Ombudsperson (if subject to ISIL or Al-Qaida sanctions)

Maybe: Japan

- Not firmly codified in Japanese law
- Administrative Complaint Review Act provides individuals made subject to an 'adverse disposition' by a government agency with the opportunity to request a review
- Never before applied to Japanese sanctions

Judicial Review of Designation?

Can targets challenge their sanctioned status before the courts?

Yes: US

- Appropriate where...
 - President exceeds IEEPA authority
 - Government action violates Constitution or federal law
- President and government receive “extreme deference”

Maybe: Japan

- Not firmly codified in Japanese law
- Administrative Case Litigation Act allows targets to seek revocation of ‘adverse disposition’ in court
- Never before applied to Japanese sanctions



No: UK, EU, UN

Judicial Review of Sanctions Regime?

Can targets challenge the overarching legislative acts used to impose their sanctions before the courts?

Yes: EU

- Request for 'annulment action' appropriate where...
- Target/Member State/EU institution disagrees with General Secretariat's decision
- Claimant can identify violation of European law
- If accepted, General Court invalidates EU act and sanctions imposed under it



No: UK, US, Japan, UN

Appeals?

If a target's challenge to their sanctions is unsuccessful, can they appeal the rejection of their complaint?

Yes: UK, US, EU, UN

- UK: may apply to High Court (or Court of Session) to have FCDO's decision set aside
- US: if on BIS Entity List, may appeal to End-User Review Commitment within 30 days of initial decision
- EU: may appeal denied annulment actions to Court of Justice; may not appeal decisions of General Secretariat



No: Japan

Automatic Review?

Does the sanctions regime provide for an automatic review of sanctions designations?

Yes: UK (for ships), EU

- UK: FCDO conducts review of ship designations every three years
- EU: varies depending on type of sanction:
 - UN-imposed: altered in accordance with UN Security Council resolutions
 - EU autonomous: reviewed at least once per year
 - Mixed sanctions with mixed policies: UN-imposed open-ended + EU extensions reviewed at least once per year



No: US, Japan, UN

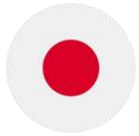
The Current Sanctions Landscape



- Russia • Belarus • Haiti (UN-imposed) • Iran • Al-Qaeda (UN-imposed) • ISIL (UN-imposed)
-



- Russia • Belarus • Iran • North Korea • counter-terrorism • Global Magnitsky Act
-



- Russia • North Korea
-



- Arms embargoes (China, Sudan, Yemen) • Export restrictions (Russia, Iran, Belarus) • Russia • North
-



Korea

- Somalia • Iraq • Mali • South Sudan • North Korea • not Russia or Belarus

Overview

	United Kingdom	United States	Japan	European Union	United Nations
<i>Pre-Designation Review</i>	No	No	Maybe	No	No
<i>Post-Designation Review</i>	Yes	Yes	Maybe	Yes	Yes
<i>Judicial Review of Designation</i>	No	Yes	Maybe	No	No
<i>Judicial Review of Act Imposing Sanctions</i>	No	No	No	Yes	No
<i>Appeals</i>	Yes	Yes	No	Yes	No
<i>Automatic Review</i>	Yes (specified ships only)	No	No	Yes	No

Next steps



- A closer examination of sanctions as a matter of public international law
- Analysis of sanctions regimes applicable to environmental concerns (nuclear programs of Iran, North Korea), illegal logging and environmental degradation (Ivory Coast), hazardous waste export (EU-imposed)
- Conclusions on the legal possibility of using sanctions in the context of climate change commitments
- Conclusions on the desirability of using sanctions in the context of climate change commitments

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