
**THE “MEMORY EFFECT” OF ECONOMIC SANCTIONS
AGAINST RUSSIA: OPPOSING APPROACHES TO THE
LEGALITY OF UNILATERAL SANCTIONS CLASH AGAIN**

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ABSTRACT

The “sanctions war” between the West and Russia, the worst crisis since the end of the Cold War, again raises the issue of whether the imposition of economic sanctions without authorization of the U.N. Security Council is permissible under international law. In this Article, I analyze the legal justifications and contemporary sanctions practice of the United States, and the evolution of Russia’s arguments against the use of those economic sanctions. On the basis of a brief case study analysis of episodes related to the imposition of the tacit trade embargo upon Russia’s neighboring countries, I argue that while on political and diplomatic levels the United States and Russia demonstrate opposite views towards the legality of unilateral economic sanctions, today, at its very core, the actual activity of both states tends to make unilateral sanctions more recognizable as a part of international customary law.

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1. INTRODUCTION

The United States' economic sanctions imposed upon Russia in recent years may be considered as a reversion to the Cold-War-era campaign of sanctions against the Soviet Union.¹ In the 1990's, economic sanctions, which originally had been regarded as one of the key elements of the containment strategy, became a very popular instrument of the United States' foreign policy. Meanwhile, the current efforts toward the political and economic isolation of Russia have revived traditional debates between the "old protagonists" regarding the legality of the deployments of economic sanctions without authorization of the U.N. Security Council under international law.

Despite the fact that following the dissolution of the Soviet Union the major part of U.S. laws and policies regarding the restriction of bilateral trade were abolished, some of them continuously applied to Russia as the successor of the Soviet Union.² The most illustrative example of such "relics," is the Jackson-Vanik Amendment to the Trade Act of 1974.³ It restrained trade relations between the United States and non-market economies that restrict freedom of emigration and remained valid,⁴ though post-Cold War

¹ For instance, Michael McFaul, the former U.S. Ambassador to the Russian Federation, emphasizes that the current sanctions against Russian companies are "more comprehensive than anything was done during the Cold War including during the Reagan days." Michael McFaul, *Confronting Putin's Russia: Long-Term Economic and Foreign Policy Implications*, Lecture at the Christopher H. Browne Center for International Politics at the University of Pennsylvania (Oct. 30, 2014), available at <https://bc.sas.upenn.edu/anspach-lecture>.

² See, e.g., Vladimir Putin, President of the Russian Federation, *Address at the meeting with State Duma deputies, Federation Council members, heads of Russian regions and civil society representatives in the Kremlin* (Mar. 18, 2014), <http://eng.kremlin.ru/news/6889> ("Today, we are being threatened with sanctions, but we already experience many limitations, ones that are quite significant for us, our economy and our nation. For example, still during the times of the Cold War, the US and subsequently other nations restricted a large list of technologies and equipment from being sold to the USSR, creating the Coordinating Committee for Multilateral Export Controls list. Today, they have formally been eliminated, but only formally; and in reality, many limitations are still in effect. In short, we have every reason to assume that the infamous policy of containment, led in the 18th, 19th and 20th centuries, continues today.").

³ 19 U.S.C. § 2432 (repealed 2012).

⁴ Since 1992, the trade restrictions against Russia had been waived by U.S. Presidents on year-by-year basis; and, in 2012, the Jackson-Vanik Amendment was

economic reforms had brought Russian market and immigration rules completely in line with all its requirements almost two decades before.⁵ Consequently, in the light of the fifty-year history of almost permanent economic restrictions placed upon the Soviet Union and, later, upon post-Soviet Russia, it is hardly surprising that Russia has not only never changed its traditional position regarding illegality of “unilateral” sanctions imposed without express authorization of the U.N. Security Council,⁶ but also joined its efforts with China and other members of the U.N. Security Council to veto most U.S. sanctions initiatives against rogue countries.⁷

This Article argues that while on political and diplomatic levels the United States and Russia demonstrate opposing views toward the legality of unilateral economic sanctions, the actual activity of these powerful Security Council permanent members in the international arena tends to make unilateral sanctions more recognizable as a part of customary international law.

As it is shown later in this Article, modern Russia also uses an implicit trade embargo as an instrument of its foreign policy in relations with neighboring countries.⁸ Moreover, immediately following the announcement of the creation of the single market of the Eurasian Economic Union, Russia started to pressure Belarus and Kazakhstan to comply with its policy of trade restriction against third countries.⁹ Nevertheless, Russia’s strong opposition to U.S.

replaced by the Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012.

⁵ See, e.g., John Quigley, *Most-Favored-Nation Status and Soviet Emigration: Does the Jackson-Vanik Amendment Apply*, 11 LOY. L.A. INT'L & COMP. L.J. 543, 545-548 (1989) (“there is no factual basis for applying it to the U.S.S.R.”). For a more detailed discussion about rescinding the Jackson-Vanik application to Russia, see Robert H. Brumley, *Jackson-Vanik: Hard Facts, Bad Law*, 8 B.U. INT'L L. J. 363, 368-371 (1990); Kevin M. Cowan, *Cold War Trade Statutes: Is Jackson-Vanik Still Relevant*, 42 U. KAN. L. REV. 737, 751-757 (1993-1994).

⁶ For the purposes of this Article, the term “unilateral” refers to actions taken by states without the mandate of the UN Security Council; the “unilateral” actions of a state does not mean that other states may not take similar “unilateral” actions as well.

⁷ See Jeffrey A. Meyer, *Second Thoughts on Secondary Sanctions*, 30 U. PA. J. INT'L L. 905, 919-924 (2014) (assessing the role of Russia and China in opposing U.S. efforts in the Security Council to place aggressive sanctions against Iran, Sudan, Myanmar, Zimbabwe and Iraq).

⁸ For instance, Russia banned the imports of goods from Poland (2005), Moldova (2005), Georgia (2006), Ukraine (2006), Latvia (2006), etc.

⁹ See, e.g., *Belarus, Kazakhstan Oppose Ukraine Import Restrictions*, THE MOSCOW TIMES, June 30, 2014, <http://www.themoscowtimes.com/business/article/>

unilateral economic coercion measures is based on its desire (1) to increase the role of the U.N. Security Council and, thereby, the powers of its permanent members, (2) to maintain moral ascendancy over opponents, getting support of developing countries in debates on the legitimacy of unilateral sanctions, and (3) to keep strong legal arguments contesting potential economic sanctions against Russia and its allies. The opposing approaches of both the United States and Russia are summarized in table 1.

Table 1. Approaches toward the use of unilateral economic sanctions

| | The United States | The Russian Federation |
|---|---|----------------------------------|
| Official position: | a sovereign right of the United States to regulate its trade relations with other nations / legitimate self-help acts / an element of economic statecraft | a violation of international law |
| Practice: | | |
| • own activity | explicit unilateral sanctions | tacit unilateral sanctions |
| • alliances / international cooperation | global or regional alliances | regional alliances |

Additionally, this Article argues that Russia should change its approach to the tacit use of unilateral coercive measures against the neighboring states because – despite the variety of formal names or

[belarus-kazakhstan-nix-ukraine-imports-restriction-proposal/502719.html](http://www.belarus-kazakhstan-nix-ukraine-imports-restriction-proposal/502719.html) (on Belarus's and Kazakhstan's opposition to proposed restrictions from Ukraine to the Customs Union); Margarita Liutova & Anfisa Voronina, *Ni Kazakhstan, ni Belorussii ne otkazhutsia ot importa iz ES* [Neither Kazakhstan nor Belarus refuse export from the EU], *VEDOMOSTI*, Aug. 12, 2014 (Russ.), <http://www.vedomosti.ru/politics/news/32013971/soyuz-lomitsya-ot-edy> (on Kazakhstan's and Belarus's refusal to cease importing certain goods from the European Union).

grounds of Russia's trade bans – such a Janus-faced foreign policy may significantly weaken available arguments justifying the unlawful character of the current anti-Russia sanctions campaign proclaimed by the United States and the European Union.

Part 2 provides a historical overview of the role of U.S. unilateral sanctions in relations between the United States and the Soviet Union / Russian Federation. It pays special attention to the differences and similarities of Cold War-era sanctions against Communist countries and the current economic sanctions campaign against Russia. Part 3 discusses the major international law concerns raised by the U.S. sanctions practice and justifications of the use of unilateral economic sanctions. Part 4 addresses the evolution of Russia's legal arguments against unilateral sanctions, and the development of legislation on special economic measures in the 2000s. Part 4 presents the results of a brief case study analysis of episodes where Russia allegedly imposed tacit trade embargoes upon neighboring countries, and includes the author's recommendations for further Russian strategy. Part 5 provides a conclusion.

2. U.S.-RUSSIA TRADE RESTRICTIONS: A HISTORICAL OVERVIEW¹⁰

2.1. *The Cold War*

Following the victory over the Axis Powers in World War II, somewhat clouded relations between the former Allies caused the extension of U.S. wartime trade restrictions with respect to control goods exported to the USSR and other countries of the Communist block.¹¹ After a series of one-year extensions of the wartime controls,

¹⁰ While this Part of the Article covers the post-WWII period of history only, it is noted that the first wave of U.S. economic sanctions against Soviet Russia was imposed in 1919, within the period of U.S. participation in the Allied intervention to Russia, also known as the Polar Bear Expedition. *See, e.g.*, MICHAEL P. MALLOY, ECONOMIC SANCTIONS AND U.S. TRADE 188 (1990) (stating the period of the first sanction campaign against the USSR).

¹¹ *See, e.g.*, BRUCE E. CLUBB, UNITED STATES FOREIGN TRADE LAW 134-135 (1991); Harold J. Berman & John R. Garson, *United States Export Controls-Past, Present, and Future*, 67 COLUM. L. REV. 791, 794-795 (1967).

Congress enacted the Export Control Act of 1949,¹² the first legislative act adopting the comprehensive system of export control in order to deny supplies of strategic materials or military equipment to Communist countries.¹³ Around the same time period, the United States initiated the formation of a multilateral export control system with participation of Western European governments, which was later institutionalized as the Coordinating Committee for Multilateral Export Controls (CoCom).¹⁴ Two years later, the President was authorized under the Trade Agreement Extension Act of 1951¹⁵ to terminate most favored nation treatment for the USSR and its satellites, and the Trade Expansion Act of 1962¹⁶ almost eliminated the possibility of granting any trade concession to the Soviet Union.¹⁷

In addition to general export controls against the Communist block, "basically commodity specific in their orientation",¹⁸ at various times other unilateral economic measures were triggered by certain political developments in the Soviet Union. For example, in 1974, the Jackson-Vanik Amendment, which prevented granting most-favored nation status to the USSR because of Soviet restriction upon Jewish emigration, almost brought to naught the previous attempts of the Nixon administration to return to normality in

¹² 63 Stat. 7, 81 P.L. 11, 63 Stat. 7, 81 Cong. Ch. 11 (expired 1969) (in accordance with Sec. 3(a) of the Act the President might "prohibit or curtail the exportation from the United States . . . of any articles, materials, or supplies including technical data, except under such rules and regulations as he shall prescribe").

¹³ See generally Paul H. Silverstone, *The Export Control Act of 1949: Extraterritorial Enforcement*, 107 U. PA. L. REV. 331, 331-362 (1959).

¹⁴ See, e.g., MICHAEL MASTANDUNO, *ECONOMIC CONTAINMENT: COCOM AND THE POLITICS OF EAST-WEST TRADE* 78-82 (1992) (explaining the role of the United States in the formation of CoCom); GARY CLYDE HUFBAUER & JEFFREY J. SCHOTT, *ECONOMIC SANCTIONS RECONSIDERED: HISTORY AND CURRENT POLICY* 211-216 (1985) (providing an overview of the U.S. and CoCom sanctions against the USSR and Comecon since 1948 to 1985, and the goals of sender countries).

¹⁵ 5 Stat. 72, 82 P.L. 50, 65 Stat. 72, 82 Cong. Ch. 141.

¹⁶ 76 Stat. 872, 87 P.L. 794, 76 Stat. 872.

¹⁷ See BRUCE E. CLUBB, *supra* note 11 at 140-142. While, as a result of U.S. policy of détente with the Communist block, in 1972, the United States and the Soviet Union entered into the Trade Agreement, it had been never ratified because of continuing tensions between the countries (e.g., U.S. support of human right movement in the USSR, the Soviet invasion to Afghanistan and the imposition of martial law in Poland). See, e.g., *id.* at 142, 144; THOMAS W. HOYA, *EAST-WEST TRADE: COMECON LAW: AMERICAN-SOVIET TRADE* 40-41 (1984).

¹⁸ MALLOY, *supra* note 10, at 212.

bilateral trade.¹⁹ Further, from 1978 to 1980, the United States banned the exports of technologies to the Soviet Union in response to the arrests of well-known dissidents - Aleksander I. Ginzburg and Anatoly B. Shcharansky.²⁰

Following the Soviet invasion of Afghanistan on December 25, 1979, the Carter administration called for the immediate withdrawal of Soviet troops from Afghanistan and took several responsive measures, including a boycott of the Moscow Summer Olympics, and an imposition of grain, technology and phosphate embargoes.²¹ While the Summer Olympics boycott had a symbolic rather than practical effect,²² the economic impact of other sanctions against the USSR was assessed controversially. For instance, the grain embargo of 1980-1981 was widely criticized because of its minimal effect on Soviet economy, which successfully replaced U.S. grain with supplies from other countries, and overall negative consequences for the U.S. agriculture industry.²³ Another notorious example of economic restrictions placed against the Soviet Union was the

¹⁹ See generally Stanley D. Metzger, *Most-Favored-Nation Treatment of Imports to the U.S. from the U.S.S.R.*, 1 INT'L TRADE L.J. 79, 79-86 (1975-1976); see also HUFBAUER & SCHOTT, *supra* note 14, at 508-511 (providing a chronology of events and a list of pursued goals).

²⁰ See LISA L. MARTIN, *COERCIVE COOPERATION: EXPLAINING MULTILATERAL ECONOMIC SANCTIONS* 198-201 (1992) (arguing that the ineffectiveness of those sanctions was caused by the low level of international cooperation between the United States and its allies). See also HUFBAUER & SCHOTT, *supra* note 14, at 603-604 (providing a chronology of events and a pursued goal).

²¹ See, e.g., MARTIN, *supra* note 20, at 191-198 (1992) (overviewing the background and U.S. efforts to coordinate high-technology sanctions against the USSR with other countries); HOMER E. MOYER, JR. & LINDA A. MABRY, *EXPORT CONTROLS AS INSTRUMENTS OF FOREIGN POLICY: THE HISTORY, LEGAL ISSUES, AND POLICY LESSONS OF THREE RECENT CASES* 27-43 (1988) (describing the reasons and essence of Afghanistan related sanctions). See also HUFBAUER & SCHOTT, *supra* note 14, at 655-659 (providing a chronology of events and a list of pursued goals).

²² See Kim Richard Nossal, *Knowing When to Fold: Western Sanctions against the USSR 1980-1983*, 44 INT'L J. 698, 705 (1988-1989) ("because of the symbolic political importance of the Olympic Games in East-West relations in general, and Soviet-American relations in particular, embracing a boycott in 1980 virtually guaranteed that this measure would aggravate - and prolong - conflict between the blocs").

²³ Critics, among others, focused on the significant adverse impact of the grain embargo on U.S. farmers. The embargo caused rapid decline of export sales and the loss of Soviet grain market, which was captured by rivaling grain exporters from Argentina, Canada and other countries. See, e.g., BARRY E. CARTER, *INTERNATIONAL ECONOMIC SANCTIONS: IMPROVING THE HAPHAZARD U.S. REGIME* 29, 70-72 (1988); MOYER & MABRY, *supra* note 21 at 48-52; ROGER B. PORTER, *THE U.S.-U.S.S.R. GRAIN AGREEMENT* 134-137 (1984); Robert I. Paarlberg, *Lessons of the Grain Embargo*, 59 FOREIGN AFF. 144, 144-162 (1980-1981).

Trans-Siberian pipeline embargo of 1981-1982. Initially imposed as an additional element of a complex sanction campaign directed at Poland in response to the declaration of martial law, those measures were aimed at hampering Soviet construction of Yamal natural-gas pipeline, which would allow the Soviet Union to transport natural gas from the Urengoi gas field in Siberia to Western Europe. It provided expanded export control over oil and gas equipment and technology supplies from the United States and European countries. That large-scale project of energy cooperation with the Soviet Union raised a serious concern for the Reagan administration about dangerous potential dependency of European countries on Soviet energy sources, which could provide the Soviet Union with potential leverage over U.S. allies in Europe.²⁴ Extraterritorial applicability of that initiative was met with strong opposition by European governments and companies that continued to deliver controlled pipeline equipment to the Soviet Union in spite of enforcement actions launched by U.S. authorities.²⁵ The shoot down of Korean Airline Flight 007 by the Soviet air force in 1983 caused the imposition of short-time air transportation sanction against the Soviet Union.²⁶

In 1985, Mikhail Gorbachev, the last General Secretary of the Communist Party, launched liberalizing reforms and reconsidered Soviet foreign policy, focusing on reducing tensions, which led to the end of the Cold War. In the same year, he proposed that the two countries abolish mutual trade restrictions and expand bilateral economic cooperation as an alternative to unavailing confrontation.²⁷

²⁴ See generally Moyer & Mabry, *supra* note 21, at 67-73, 88-91; George E. Shambaugh, *State, Firms, and Power: Successful Sanctions in United States Foreign Policy* 71-103 (1999). See also Hufbauer & Schott, *supra* note 14, at 696-703 (providing a chronology of events and a list of pursued goals).

²⁵ For a discussion of the reasons and consequences of the intra-alliance conflict over the Trans-Siberian pipeline embargo; see, e.g., CLAUS HOFHANSEL, *COMMERCIAL COMPETITION AND NATIONAL SECURITY: COMPARING U.S. AND GERMAN EXPORT CONTROL POLICIES* 176-187 (1996); MARTIN, *supra* note 20, at 207-234; MASTANDUNO, *supra* note 14, at 247-264; Edward L. Rubinoff, *Export of Oil and Gas Equipment and Technology to the Soviet Union: A Case Study in The Use of Export Control as Instruments of U.S. Foreign Policy* in *LAW AND POLICY OF EXPORT CONTROLS: RECENT ESSAYS ON KEY EXPORT ISSUES* 417, 419-429 (Homer E. Moyer, Jr. et al. eds., 1993).

²⁶ See HUFBAUER & SCHOTT; *supra* note 14, at 738-740 (providing a chronology of events and a list of pursued goals).

²⁷ See Mikhail S. Gorbachev, *Remarks on US-USSR Trade*, HARV. BUS. REV., May-June 1986, at 55, 56-57. Gorbachev resumed the following:

2.2. From the Cold War to the Cold Peace

In the aftermath of the breakup of the Soviet Union, the move of Russia and other former Soviet republics towards democracy and market economies, and their further integration to the world economy and Western political structures triggered not only the rapid growth of bilateral trade and investment, but also development of the U.S.-Russia partnership in such areas as defense and security, nuclear nonproliferation and environmental protection.²⁸ It, consequently, resulted in the disappearance of the rationale of archaic Cold War economic restrictions on international and national levels.

In 1993, President Clinton initiated the repeal of obstacles affecting normal relations with the states of the former Soviet Union, including the so-called Friendship Act²⁹ that lifted major statutory trade restrictions on Russia.³⁰ Although some old-fashioned restrictions remained in place,³¹ their potential negative effect on bilateral economic cooperation was offset by the generally permissive practice of their enforcement with respect to Russian business.³² On March 13, 1994, the members of CoCom announced its termination and started the negotiation of the successor

Both of us will survive without each other, particularly since there is no lack of trade partners in the world today. But is it normal from a political standpoint? My answer is definitely and emphatically no. In our dangerous world we simply cannot afford to neglect . . . such stabilizing factors in relations as trade and economic, scientific and economic ties. If we are to have genuinely stable and enduring relations capable of ensuring a lasting peace, they should be based, among other things, on well-developed business relations.

Id. at 56.

²⁸ See Vancouver Declaration: Joint Statement of the Presidents of the United States and the Russian Federation, April 4, 1993, available at <http://www.gpo.gov/fdsys/pkg/WCPD-1993-04-12/pdf/WCPD-1993-04-12-Pg545.pdf>.

²⁹ Act for Reform in Emerging New Democracies and Support and Help for Improved Partnership with Russia, Ukraine and Other New Independent States, 107 Stat. 2317, 103 P.L. 199, 107 Stat. 2317.

³⁰ *Id.* Sections 201-204.

³¹ See, e.g., Cowan, *supra* note 5, at 744-748 (reviewing the modification of U.S. laws and policies regarding trade with the Soviet Union other than Jackson-Vanik).

³² See Aleksandr Mekhanik & Aleksei Khazbiev, *Tekhnologii na linii fronta* [Technologies on Front Line], EXPERT, Sept. 22, 2014 (Russ.), <http://expert.ru/expert/2014/39/tehnologii-na-linii-fronta/> (describing the loose control over U.S. technology exports to Russia in recent decades).

institution for the purposes of international coordination of dual-use export control with the participation of former East-block countries.³³ During the same time period, the Russian government continued negotiations with U.S. officials to obtain the most favored nation trade status and applied to join the most respectable international institutions, including the General Agreement on Tariffs and Trade.³⁴ The Jackson-Vanik Amendment became a principal barrier for Russia to achieve those objectives.

It is, however, quite notable that although sometimes East-West relations in 1990s-2000s were far from rosy, the mutual interest of both countries in obtaining the benefits from collaboration on the international arena always prevailed over all potentially conflicting situations – including NATO expansion (1999, 2004, and 2009), the wars in Yugoslavia (1995 and 1998), Chechnya (1994 and 1999), Afghanistan (2001), Iraq (2003), and Georgia (2008) – which hardly affected bilateral economic and political ties. For example, following the 9/11 terrorist attacks on the World Trade Center and Pentagon, President Putin was the first foreign leader who expressed support and solidarity to the American people,³⁵ and Russia even provided support to U.S. military operations in Afghanistan.³⁶

2.3. *Magnitsky Act and U.S. response to the Ukraine Crisis*

³³ See Michael Lipson, *The Wassenaar Arrangement: Transparency and Restraint through Trans-Governmental Cooperation?* in NON-PROLIFERATION EXPORT CONTROLS: ORIGINS, CHALLENGES, AND PROPOSALS FOR STRENGTHENING 49, 50-53 (Daniel Joyner ed., 2006) (overviewing the process of CoCom dissolution and its replacement by other international export control arrangements).

³⁴ For a general analysis of Russian post-Soviet foreign policy, see Robert H. Donaldson, *Boris Yeltsin's Foreign Policy Legacy*, 7 TULSA J. COMP. & INT'L L. 285 (2000) (describing the key challenges of U.S.-Russia relations and the main objectives of Russia's foreign policy between 1992 and 1999).

³⁵ On September 13, 2001, Russia held a moment of silence to honor the 9/11 victims throughout its territory. See Press Release, President Vladimir Putin signed a decree declaring a minute of silence as a gesture of mourning over the tragic consequences of the terrorist acts in the United States of America (Sept. 12, 2001, 12:50), <http://eng.kremlin.ru/news/15213>.

³⁶ See, e.g., NATO-Russia practical cooperation (Dec. 2013), http://www.nato.int/nato_static/assets/pdf/pdf_2013_12/20131127_131201-MediaBackgroundunder-NRC_en.pdf.

After nineteen years of multilateral negotiations, aimed at Russia's accession to the World Trade Organization (WTO), Russia became a member of the WTO in August 2012.³⁷ In order to obtain full free-trade advantage for U.S. business³⁸ the Obama administration requested that Congress grant extension of permanent normal trade relations (PNTR) to Russia and, consequently, end the application of the Jackson-Vanik Amendment.³⁹

The passage of the PNTR bill caused heated debates in Congress and resulted in a compromise with lawmakers who backed the pairing of the bill with a system of economic sanctions designed to penalize persons responsible for corruption and human-rights violations in Russia.⁴⁰ That legislation also named as the Magnitsky

³⁷ See Press Release, World Trade Org., WTO Membership Rises to 157 with the Entry of Russia and Vanuatu (Aug. 22, 2012), available at http://www.wto.org/english/news_e/pres12_e/pr671_e.htm (quoting a statement by WTO Director-General Pascal Lamy, welcoming Russia as the 156th WTO member).

³⁸ See generally U.S. Export Opportunities From Russia's Membership in the WTO, <http://www.ustr.gov/countries-regions/europe-middle-east/russia-and-eurasia/russia-0>. See also Andrew E. Kramer, U.S. Companies Worry About Effect of Russia Joining W.T.O., N.Y. TIMES, Aug. 21, 2012, (discussing the potential benefits of granting Russia permanent normal trade relations to U.S. companies).

³⁹ H.R. Rep. No. 112-632 (2012), reprinted in 2012 U.S.C.C.A.N. 683, 2012 WL 3139857. Russia's officials blamed William F. Browder, the CEO and co-founder of the investment fund Hermitage Capital Management, who was previously accused by Russian tax service of large-scale tax evasion, for lobbying the Magnitsky Act. See Interview with Sergey Lavrov, the Foreign Minister of the Russian Federation, in RTVI (Apr. 11, 2013, 02:03 PM), available at <http://russian.rt.com/article/7130>. See also William Browder, *Tortured to Death by Putin's Jackboot State: Inside the Rat-infested Gestapo-like Russian Prison Where Eight Guards Beat Lawyer Who Exposed Moscow's Gangster Regime*, DAILY MAIL (Nov. 3, 2012, 17:00 EST), <http://www.dailymail.co.uk/news/article-2227309/Tortured-death-Putins-jackboot-state-Last-words-Moscow-lawyer-death-screams--chilling-truth-Russias-terrifying-gangster-regime.html>.

⁴⁰ See generally Vicki Needham, *Senators, Obama Administration Aim for Compromise on Russia Trade*, THE HILL (Jun. 21, 2012, 06:02 PM), <http://thehill.com/policy/finance/234173-senators-obama-administration-aim-for-compromise-on-russia-trade> (explaining a background of the discussion and the reasons of the administration and lawmakers to link the two bills); Andrew Baskin & Bruce Zagaris, U.S. Blacklists Russian Officials Linked to Human Rights Violations, 27 No. 10 INT'L ENFORCEMENT L. REP. 918 (2012) (“[b]alancing . . . concerns [over close cooperation with Russia on Iran, Israel and Palestine, and the Arctic, as well as other substantive issues ranging from cybercrime to counter-terrorism to nuclear proliferation] while simultaneously attempting to maintain credibility on human rights and fundamental freedoms, and simultaneously handling an uncooperative and impatient Congress, will be a significant test for the Obama administration”).

Rule of Law Accountability Act or the Magnitsky Act⁴¹ was proposed by Senator Ben Cardin in 2011⁴² in response to the tragic death at Moscow's notorious Matrosskaya Tishina prison of Sergei Magnitsky, an auditor who was imprisoned after accusing a group of Russian officials of tax fraud and theft.⁴³

The Magnitsky Act also identifies other violations of human rights in Russia including

murders of Nustap Abdurakhmanov, Maksharip Aushev, Natalya Estemirova, Akhmed Hadjimagomedov, Umar Israilov, Paul Klebnikov, Anna Politkovskaya, Saihadji Saihadjiev, and Magomed Y. Yevloyev, the death in custody of Vera Trifonova, the disappearances of MokhmadSalakh Masaev and Said-Saleh Ibragimov, the torture of Ali Israilov and Islam Umarpashaev, the near-fatal beatings of Mikhail Beketov, Oleg Kashin, Arkadiy Lander, and Mikhail Vinyukov, and the harsh and ongoing imprisonment of Mikhail Khodorkovsky, Alexei Kozlov, Platon Lebedev, and Fyodor Mikheev⁴⁴

and empowers the President to determine persons responsible or otherwise related to the death of Sergei Magnitsky or other violations of internationally recognized human rights" to forbid them to enter the United States, and "freeze and prohibit all transactions in all property and interests in property of [such]

⁴¹ Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule Of Law Accountability Act of 2012 § 401-407, Pub. L. No. 112-208, 126 Stat. 1496 (2012).

⁴² S. 1039, 112th Cong. § 1 (2011).

⁴³ See generally President of Russia's Council on Civil Society and Human Rights, *Predvaritel'noe Zakluchenie Rabochei Gruppy po Izucheniiu Obstoiatel'stv Gibeli Sergeia Magnitskogo ot 04 iulia 2011* [Preliminary Conclusion of the Working Group on the Study of Circumstances of Sergey Magnitsky's Death of July 4, 2011] (Russ.), available at <http://president-sovet.ru/documents/read/59/>; The Public Oversight Commission of the City of Moscow for the Control of the Observance of Human Rights in Places of Forced Detention, *Otchet o Proverke Soderzhaniiia S.L. Magnitskogo v SIZO g. Moskoy* [Review of the Conditions of the Detention of Sergei Magnitsky in the Pre-Trial Detention Centers of the City of Moscow] (Dec. 12, 2010, 02:20 PM) (Russ.), http://onk-moskva.hrworld.ru/news_onk/otchet-obshchiestviennoi-nabliudatiel-noi-komissii-ghmoskva; Council of Europe. *Parliamentary Assembly, Allegations of Politically-motivated Abuses of the Criminal Justice System in Council of Europe Member States* (Aug. 7, 2009), available at <http://www.refworld.org/docid/4a9b8f1b2.html>.

⁴⁴ Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012 § 402(a)(15).

person[s].”⁴⁵ The unclassified part of the Magnitsky sanction list, which initially included 18 individuals implicated in the death of Sergei Magnitsky and other alleged human rights abuses,⁴⁶ was extended twice: to 30 people in May⁴⁷ and to 34 people in December 2014.⁴⁸

A second wave of contemporary sanctions against the Russian Federation was triggered by the Ukraine crisis of 2013-2014, and Russia’s subsequent actions in Crimea and the Donbass region.⁴⁹ On March 6, 2014, President Obama signed Executive Order 13660, placing targeted sanctions including a U.S. travel ban and the asset freeze against individuals and entities responsible for “undermin[ing] democratic processes and institutions in Ukraine,” and “threaten[ing] its peace, security, stability, sovereignty, and territorial integrity;”⁵⁰ further, the sanctions imposed pursuant to Executive Order 13660 on former President of Ukraine Viktor Yanukovich, Crimea-based separatist leaders, and other former Ukrainian officials⁵¹ was expanded by Executive Order 13661 of March 17, 2014 to cover certain Russian lawmakers and officials,⁵² and to made it clear that the United States’ next steps would be “based on whether Russia chooses to escalate or to de-escalate the situation.”⁵³ Three days later, in response to the continuing actions of Russian Government, “including its purported annexation of

⁴⁵ Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act of 2012 § 404-406.

⁴⁶ OFAC, Magnitsky Sanctions Listings (Dec. 4, 2013), <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20130412.aspx>.

⁴⁷ OFAC, Magnitsky Sanctions Designations (May 20, 2014), <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140520.aspx>.

⁴⁸ OFAC, Magnitsky-related Designations (Dec. 29, 2014), <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20141229.aspx>.

⁴⁹ See generally Press Release, Statement by the President on Ukraine (Feb. 28, 2014, 5:05 PM EST), <http://www.whitehouse.gov/the-press-office/2014/02/28/statement-president-ukraine>.

⁵⁰ Exec. Order No. 13660 3 C.F.R. (2014).

⁵¹ OFAC, Issuance of a new Ukraine-related Executive Order; Ukraine-related Designations (Mar. 17, 2014), <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20140317.aspx>.

⁵² Exec. Order No. 13661 3 C.F.R. (2014).

⁵³ Press Release, Statement by the President on Ukraine (Mar. 17, 2014, 10:45 AM EDT), <http://www.whitehouse.gov/the-press-office/2014/03/17/statement-president-ukraine>.

Crimea and its use of force in Ukraine," a new Executive order "Blocking Property of Additional Persons Contributing to the Situation in Ukraine" expanded the scope of the national emergency declared in previous executive orders.⁵⁴

In view of the development of the conflict in Ukraine, the provisions of Executive Orders 13660, 13661 and 13662 were included inter alia into the Support for the Sovereignty, Integrity, Democracy, and Economic Stability of Ukraine Act of 2014.⁵⁵ To increase economic pressure on Russia, the list of the persons targeted by U.S. sanctions was expanded several times to politicians and businessmen in Putin's inner circle, Crimean officials, the leaders of the separatist movement in Donbass, Donetsk and Luhansk People's Republics, and even a motorcycle club, as well as Russian largest banks, defense and energy companies.⁵⁶ In addition to targeted sanctions deployed against designated individuals, companies, and the sectors of the Russian economy, on December 19, 2014, the United States announced the placement of a

⁵⁴ Exec. Order No. 13662 3 C.F.R. (2014). The Executive Order 13662 provided ability to impose sanctions targeting certain sectors of Russian economy that may be chosen by the Secretary of the Treasury, in consultation with the Secretary of State (e.g., financial services, energy, metals and mining, engineering, and defense and related materiel). Simultaneously, the Office of Foreign Assets Control announced a significant extension of the Specially Designated Nationals List related to the Ukrainian crisis. *See* OFAC, Ukraine-related Designations (Mar. 20, 2014), http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20140320_33.aspx.

⁵⁵ Support for the Sovereignty Integrity Democracy and Economic Stability of Ukraine Act of 2014 § 8-9, Pub. L. No. 113-95, 128 Stat. 1088 (2014).

⁵⁶ OFAC, Ukraine-related Designations (Apr. 11, 2014), <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20140411.aspx>; OFAC, Ukraine-related Designations (Apr. 28, 2014), <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20140411.aspx>; OFAC, Ukraine-related Designations (June 20, 2014), http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140619_33.aspx; OFAC, Ukraine-related Sanctions; Publication of Executive Order 13662 Sectoral Sanctions Identifications List (July 16, 2014), <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140716.aspx>; OFAC, Sectoral Sanctions Identifications; Kingpin Act Designations; Iran Designations Update; Ukraine-related Designation (July, 29, 2014), <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140729.aspx>; OFAC, Ukraine-related Sanctions (Sept. 12, 2014), <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140912.aspx>; OFAC, Issuance of a new Ukraine-related Executive Order and General License; Ukraine-related Designations (Dec. 19, 2014), <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20141219.aspx>.

comprehensive economic embargo on “the Crimea region of Ukraine” which included almost all economic interactions between the United States and Crimea.⁵⁷ The U.S. President also signed into law the Ukraine Freedom Support Act of 2014⁵⁸ that gives “the Administration additional authorities that could be utilized, if circumstances warranted,”⁵⁹ to deploy further sanctions targeting financial, defense and energy sectors of Russian economy, and to place additional licensing restriction on U.S. export and re-export to Russia.⁶⁰

The situations with economic sanctions placed on the Soviet Union in the 1970s and 1980s and the two current sanction campaigns against the Russian Federation have some similarities. The most remarkable of them is obvious parallels between factual backgrounds of events triggering the U.S. reaction: human rights abuses (i.e., the arrests of dissidents in the Soviet Union, and the death of Sergei Magnitsky in Moscow’s prison following his arrest), and alleged violations of international law (i.e., the bringing of Soviet troops into Afghanistan and Russia’s actions in Ukraine, and the tragic downing of Korean Airline Flight 007 in 1983 and Malaysia Airlines Flight 17 in 2014). The major difference is that the Ukraine-related sanctions are more complex and rigorous than measures the United States had ever put in place against the Soviet Union.⁶¹ Nevertheless, unlike the Jackson-Vanik Amendment and other hardly irreversible Cold War restrictions, the contemporary

⁵⁷ Exec. Order No. 13685 79 Fed. Reg. 77357 (Dec. 19, 2014). *See also* OFAC, General License No. 4 of Dec. 19, 2014 (Authorizing the Exportation or Reexportation of Agricultural Commodities, Medicine, Medical Supplies, and Replacement Parts), *available at* http://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine_gl4.pdf; OFAC, General License No. 5 of Dec. 30, 2014 (Authorizing Certain Activities Prohibited by Executive Order 13685 of Dec. 19, 2014 Necessary to Wind Down Operations Involving the Crimea Region of Ukraine), *available at* http://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine_gl5.pdf.

⁵⁸ The Ukraine Freedom Support Act of 2014, Pub. L. No. 113-272, 128 Stat. 2952 (2014).

⁵⁹ Press Release, Statement by the President on the Ukraine Freedom Support Act (Dec. 18, 2014), <http://www.whitehouse.gov/the-press-office/2014/12/18/statement-president-ukraine-freedom-support-act>.

⁶⁰ In 2014, the U.S. Department of Commerce's Bureau of Industry and Security several times tightened up U.S. export control restrictions aimed at Russia's defense, oil and gas, and energy sectors. *See, e.g.*, The Export Administration Regulations, 15 C.F.R. §744, §746.5 (2014).

⁶¹ *See supra* note 1 and accompanying text.

targeted sanction policy of the United States tends to be more flexible, and, consequently, potentially more effective,⁶² because it aims not so much to penalize an adversary country, its nationals and companies, as to use a "carrot and stick" approach to coerce a targeted state to change its behavior or to follow internationally recognized standards and rules. Accordingly, the defined goal of the of Ukraine-related sanctions is "to promote a diplomatic solution that provides a lasting resolution to the conflict and helps to promote growth and stability in Ukraine and regionally, including in Russia," which is obliged to lead somehow "to implement the Minsk agreements and to reach a lasting and comprehensive resolution to the conflict which respects Ukraine's sovereignty and territorial integrity," and the United States affirmed its readiness to "roll back sanctions should Russia take the necessary steps."⁶³

Another important difference is broader international support for contemporary U.S. economic measures against Russia provided by Europe and other U.S. allies,⁶⁴ as a direct result of U.S. political and diplomatic efforts and, perhaps, some political coercion.⁶⁵

⁶² It is, however, important to note that it would be a mistake to overestimate an efficiency of new types of economic sanctions employed against Russia that aiming at its ability to refinance an external debt, and to develop key industries. According to Eric B. Lorber, like with more traditional sanctions, it still is extremely difficult to fully understand and predict the effects of such sanctions, and utilize them for policy impact. See Eric B. Lorber, *A New and Improved Sanction? Or the Same Old Story?* CATO UNBOUND (Nov. 12, 2014), <http://www.cato-unbound.org/2014/11/12/eric-b-lorber/new-improved-sanction-or-same-old-story>.

⁶³ *Supra* note 59.

⁶⁴ See, e.g., Press Release, G-7 Leaders Statement on Ukraine (Apr. 25, 2014), <http://www.whitehouse.gov/the-press-office/2014/04/25/g-7-leaders-statement-ukraine> ("We, the leaders of Canada, France, Germany, Italy, Japan, the United Kingdom, the United States, the President of the European Council and the President of the European Commission . . . now agreed that we will move swiftly to impose additional sanctions on Russia").

⁶⁵ Vice President Joseph Biden stated that "they did not want to do that. But again, it was America's leadership and the President of the United States insisting, oft times almost having to embarrass Europe to stand up and take economic hits to impose costs." Joseph R. Biden Jr., the Vice President of the United States, Remarks at the John F. Kennedy Forum, Harvard Kennedy School, Boston, Massachusetts (Oct. 2, 2014), available at <http://forum.iop.harvard.edu/content/vice-president-biden-deliver-remarks-foreign-policy> (transcript also available at <http://www.whitehouse.gov/the-press-office/2014/10/03/remarks-vice-president-john-f-kennedy-forum>).

Furthermore, along with the EU's economic⁶⁶ and diplomatic⁶⁷ measures, similar economic restrictions were adopted by a number of non-EU countries including, amongst others, Norway,⁶⁸ Switzerland,⁶⁹ and Ukraine.⁷⁰ Although a significant number of sanctioning countries do not guarantee the success of economic sanctions,⁷¹ the coalition between the United States and the European Union, whose member states have more intensive trade relations with the targeted nation,⁷² significantly increases the cost of sanctions for Russia.

⁶⁶ The EU determined a list of individuals who would be subject to travel bans and whose assets would be subject to a freeze within EU territory, placed an economic embargo against Crimea and Sevastopol, and implemented a number of measures targeting sectoral cooperation and exchanges with Russia including limited access to EU capital markets, arms embargo, and curtail access to sensitive technologies. See EU sanctions against Russia over Ukraine crisis, http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions/index_en.htm#2 (last visited Jan. 4, 2015).

⁶⁷ The EU cancelled the 2014 EU-Russia summit, announced the decision of EU members not to hold regular bilateral summits with Russia's participation, and suspended talks with Russia on visa matters as well as on the New Agreement between the EU and Russia. See *id.*

⁶⁸ See generally Press Release, the Ministry of Foreign Affairs of Norway, Norway to implement new restrictive measures against Russia (Aug. 11, 2014), <https://www.regjeringen.no/en/aktuelt/Norway-to-implement-new-restrictive-measures-against-Russia/id765675/>.

⁶⁹ See generally Press Release, the Swiss State Secretariat for Economic Affairs, Ukraine: Measures to prevent the circumvention of international sanctions (Apr. 2, 2014), <http://www.seco.admin.ch/aktuell/00277/01164/01980/index.html?lang=en&msg-id=52530>.

⁷⁰ See generally Press Release, the Government of Ukraine, Gov't approved propositions to the NSDC regarding personal sanctions as result of Russian aggression (Sept. 12, 2014), http://www.kmu.gov.ua/control/en/publish/article?art_id=247598425&cat_id=244314975.

⁷¹ See GARY CLYDE HUFBAUER ET AL., ECONOMIC SANCTIONS RECONSIDERED 172 (3rd ed. 2009) (arguing that "the greater the number of countries needed to implement sanctions and the longer the sanctions run, the greater the difficulty of sustaining an effective coalition"). See also Daniel W. Drezner, *Bargaining, Enforcement, and Multilateral Sanctions: When Is Cooperation Counterproductive?*, 54 INT'L ORG. 73 (2000) (discussing why international cooperation and the success of economic sanctions are not correlated).

⁷² For instance, Russia was the third largest trade partner of the EU in 2013. See European Commission, Directorate General for Trade, Client and Supplier Countries of the EU28 in Merchandise Trade (value %) (2013, excluding intra-EU trade) available at http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_122530.pdf.

3. THE LEGALITY OF UNILATERAL SANCTIONS: DEBATES AND THE U.S. JUSTIFICATION

There is no clear consensus in the international community as to the existence of an international norm prohibiting the unilateral use of economic sanctions. This Part examines a variety of academic views on the legality of such economic measures and then considers both the evolution of the U.S. arguments on the legitimacy of its sanction policy and the current U.S. sanction practice.

3.1. *The Lack of International Legal Standards for Unilateral Sanctions*

The deployment of economic sanctions against a sovereign state without authorization from the Security Council raises a serious question regarding the legality of U.S. unilateral coercive measures under international law, and their compliance with the rules of the international trade system. Addressing arguments that support the existence of legal limitations on a state's right to impose economic sanctions against another state will allow us to consider the United States' legal justification of its contemporary sanction practice as further discussed below.

3.1.1. *The U.N. Charter and Customary International Law*

While Article 41 of the U.N. Charter permits the use of collective economic sanctions by the international community, it states that the Security Council is the only body authorized to determine a "threat to the peace, breach of the peace, or act of aggression,"⁷³ and to decide what responsive coercive measures should be applied to a violating member of the United Nations.⁷⁴ Since the end of the Cold

⁷³ U.N. Charter art. 35.

⁷⁴ U.N. Charter art. 41. Article 41 provides that:

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

War, the Security Council has played a proactive role on the international scene deploying mandatory U.N. sanctions to put diplomatic and economic pressure on targeted states or non-state actors for breach of fundamental principles of international law, including the prohibition of aggression, terrorism, the violations of human rights and humanitarian law.⁷⁵

The U.N. Charter does not, however, contain any explicit reference to unilateral economic measures that states may use against each other without the authorization of the Security Council. The unilateral use of coercive measures raises a question of whether unilateral economic sanctions may be interpreted as a use of force against sovereign nations prohibited under Article 2(4) of the U.N. Charter,⁷⁶ or an unlawful intervention in "matters which are essentially within the domestic jurisdiction"⁷⁷ of targeted states. Although many critics agree that such nonmilitary coercive actions should be considered illegal from an international law perspective,⁷⁸

⁷⁵ See, e.g., Vera Gowlland-Debbas, *Sanctions Regimes under Article 41 of the UN Charter*, in NATIONAL IMPLEMENTATION OF UNITED NATIONS SANCTIONS: A COMPARATIVE STUDY (Vera Gowlland-Debbas ed., 2004) 6-18 (overviewing key post-1990 sanctions regimes imposed by the Security Council under Article 41 of the UN Charter).

⁷⁶ Article 2(4) states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

⁷⁷ U.N. Charter art. 2, para. 7. While the principle of non-intervention is not specified in the UN Charter, the International Court of Justice in *Nicaragua v. United States* defined it as a principle of customary international law prohibiting states from directly or indirectly intervening in the internal or external affairs of other states. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 108 (June 27), available at <http://www.icj-cij.org/docket/files/70/6503.pdf>.

⁷⁸ See, e.g., George N. Barrie, *International Law and Economic Coercion - A Legal Assessment*, 11 S. AFR. Y.B. INT'L L. 40, 53 (1985-1986) (constituting economic coercion without authorization of the Security Council as a violation of non-intervention rule); Yehuda Z. Blum, *Economic Boycotts in International Law*, 12 TEX. INT'L L. J. 5, 15 (1977) ("[e]ven if boycotts . . . do not amount to a use of force prohibited under article 2(4) of the UN Charter, most of them certainly constitute a violation of the rule of nonintervention into the domestic matters of another sovereign state, with a view to influencing their foreign or domestic policy in an unjustifiable manner"); Derek W. Bowett, *International Law and Economic Coercion*, 16 VA. J. INT'L L. 245, 246-254 (1976) (noting that economic coercion should be regulated rather by the duty of non-intervention than by Article 2(4), and suggesting three legitimate exceptions to the prohibition of economic coercion: (1) economic measures taken in self-defense; (2) economic measures of reprisal; (3) economic sanctions authorized by a competent organ of the international community); Hartmut Brosche, *The Arab Oil*

the majority of Western commentators do not support the contention that the U.N. Charter and customary international law expressly bars states from using economic measures or the broad definition of force that includes economic coercion.⁷⁹ Even though the aforementioned question is still a subject of academic disputes, developing countries' position that unilateral economic measures violate the U.N. Charter and the customary international law principle of nonintervention is becoming broadly recognized by many states and international organizations, and can be seen in many resolutions of the General Assembly.⁸⁰ Hence, in the

Embargo and United States Pressure Against Chile: Economic and Political Coercion and the Charter of the United Nations, 7 CASE W. RES. J. INT'L L. 3, 34 (1974) (emphasizing a trend towards a broader interpretation of the prohibition of the threat or use of force as formulated in Article 2(4) that includes the measures of an economic and political character); Cassandra LaRae-Perez, *Economic Sanctions as a Use of Force: Reevaluating the Legality of Sanctions from an Effects-Based Perspective*, 20 B.U. INT'L L.J. 161, 188 (2002) ("[p]arties that impose unilateral sanctions should be as answerable or their actions as they would be if they had attacked a sovereign nation with arms"); David J. Santeusano, *Extraterritoriality and Secondary Boycotts: A Critical and Legal Analysis of United States Foreign Policy*, 21 SUFFOLK TRANSNAT'L L. REV. 367, 375-379 (1998) (arguing that economic coercion via primary boycott rarely, and via secondary boycott almost always violate international law).

⁷⁹ See, e.g., Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 50-52 (2001) (concluding that Article 2(4) is expressly limited to threat or use of military force, Article 2(7) is limited to action by the UN, and "no international consensus has emerged to support the contrary position"); J. Curtis Henderson, *Legality Of Economic Sanctions Under International Law: The Case Of Nicaragua*, 43 WASH. & LEE L. REV. 167, 180-181 (1986) (discussing the issue whether sanctions against Nicaragua violates Article 2(4), and noting that the majority view is that the scope of force does not include economic coercion); See also Richard D. Porotsky, *Economic Coercion and the General Assembly: A Post-Cold War Assessment of the Legality and Utility of the Thirty-Five-Year Old Embargo against Cuba*, 28 VAND. J. TRANSNAT'L L. 901, 920 (1995) ("the Charter's 1945 travaux preparatoires clearly demonstrate that Article 2(4) was not intended to apply to economic force"). Porotsky also argues that the International Court of Justice justified the propriety of the U.S. embargo of Nicaragua under customary international law in the 1986 notorious case *Nicaragua v. United States*. See *id.* at 919. But some authors, by contrast, challenges the Arab oil embargo against the United States on the ground that those economic measures violated Article 2(4) of the UN Charter. See generally Jordan J. Paust & Albert P. Blaustein, *The Arab Oil Weapon - A Threat to International Peace*, 68 AM. J. INT'L L. 410 (1974); Brosche *supra* note 78.

⁸⁰ See G.A. Res. 44/215, U.N. Doc. A/RES/44/215 (Dec. 22, 1989); G.A. Res. 46/210, U.N. Doc. A/RES/46/210 (Dec. 20, 1991); G.A. Res. 48/168, U.N. Doc. A/RES/48/168 (Dec. 21, 1993); G.A. Res. 50/96, U.N. Doc. A/RES/50/96 (Dec. 20, 1995); G.A. Res. 52/181, U.N. Doc. A/RES/52/181 (Dec. 18, 1997); G.A. Res. 54/200, U.N. Doc. A/RES/54/200 (Dec. 22, 1999); G.A. Res. 56/179, U.N. Doc. A/RES/56/179 (Dec. 21, 2001); G.A. Res. 58/198, U.N. Doc. A/RES/58/198 (Dec. 23, 2003); G.A. Res. 60/185, U.N. Doc. A/RES/60/185 (Dec. 22, 2005); G.A. Res.

Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, the majority of U.N. member states affirmed that “no State may use or encourage the use of unilateral economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights unilateral economic sanctions violate the sovereignty of the target.”⁸¹ A similar provision was contained in the 1974 Charter of Economic Rights and Duties of States,⁸² and in the Charter of the Organization of American States.⁸³ Even if the binding status of the General Assembly’s resolutions is a debatable issue, the 40-year history of periodic acknowledgements

62/183, U.N. Doc. A/RES/62/183 (Dec. 19, 2007); G.A. Res. 64/189, U.N. Doc. A/RES/64/189 (Dec. 21, 2009); G.A. Res. 66/186, U.N. Doc. A/RES/66/186 (Dec. 22, 2011); G.A. Res. 68/200, U.N. Doc. A/RES/68/200 (Dec. 20, 2013). The resolutions repeat the almost identical statement urging “the international community to adopt urgent and effective measures to eliminate the use of unilateral coercive economic measures against developing countries that are not authorized by relevant organs of the United Nations or are inconsistent with the principles of international law as set forth in the Charter of the United Nations and that contravene the basic principles of the multilateral trading system.” G.A. Res. 68/200.

⁸¹ Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625(XXV), U.N. Doc. A/RES/25/2625 (Oct. 24, 1970). This statement evolved from the formulation of the 1965 Declaration on the Inadmissibility of Intervention, which provides that “[n]o State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights or to secure from it advantages of any kind.” Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, G.A. Res. 2131(XX), U.N. Doc. A/RES/20/2131 (Dec. 21, 1965).

⁸² Charter of Economic Rights and Duties of States, G.A. Res. 3281(XXIX), U.N. Doc. A/RES/29/3281 (Dec. 12, 1974). Article 32 declares that “[n]o State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights.”

⁸³ O.A.S. Charter art. 19-20. The articles provide the following:

Article 19. No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.

Article 20. No State may use or encourage the use of coercive measures of an economic or political character in order to force the sovereign will of another State and obtain from it advantages of any kind.

by international community of the impermissibility of unilateral economic coercive measures deserves to be considered as a global tendency toward the gradual formation of a new international custom (*lex ferenda*).⁸⁴

3.1.2. Compliance with WTO Principles

Since the adoption of General Agreement on Tariffs and Trade (GATT)⁸⁵ in 1947, it was designed to liberalize trade by virtue of the reduction of trade barriers and the elimination of discrimination in international commerce. Articles I and III of the GATT provide the most-favored-nation and national treatments to all contracting states prohibiting the use of discriminatory measures in international trade. Article XI (1) states more specific rule that the WTO member may not place restrictions other than duties, taxes or other charges on international trade.⁸⁶ Consequently, economic measures employing trade restrictions may be considered to be in contradiction with the values and principles of a free trade system.⁸⁷

Historically, there were a number of attempts to examine U.S. economic sanctions that allegedly violated the GATT/WTO principles including, for instance, the following: in 1949, Czechoslovakia filed a complaint against the United States for its export licensing controls;⁸⁸ in 1984 and 1985, Nicaragua brought the

⁸⁴ See generally Richard B. Lillich, *Economic Coercion and the "New International Legal Order": A Second Look at Some First Impressions*, in *ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER* 105, 111-112 (Richard B. Lillich ed. 1976).

⁸⁵ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

⁸⁶ Article XI(1) of the GATT provides:

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

⁸⁷ See generally Maarten Smeets, *Conflicting Goals: Economic Sanctions and the WTO*, *GLOBAL DIALOGUE*, Vol. 3, No. 2 (Summer 2000), <http://www.worlddialogue.org/content.php?id=100>.

⁸⁸ Czechoslovakia requested a decision under Article XXIII of the GATT as to whether U.S. prevention of certain exports to Czechoslovakia violated its obligations under the GATT. See Panel Report, *Summary Record of the Twenty-Second Meeting*, CP.3/SR22 (June 8, 1949), available at http://www.wto.org/english/tratop_e/dispu_e/49expres.pdf.

actions in the GATT Council to challenge trade sanctions and later total trade embargo imposed by the United States;⁸⁹ in 1996, the European Communities requested consultations with the United States concerning Helms Burton law;⁹⁰ in 1997, the European Communities filed a complaint in respect of Massachusetts government procurement measures relating to state contracts with companies doing business with Burma (Myanmar).⁹¹ Those disputes, however, left unresolved the issue of whether or not U.S. economic sanctions might be justified as legitimate trade restrictions, but pointed out the argumentation of the disputing parties regarding permissible exceptions from the GATT restraints. For example, in the 1986 Panel Report regarding U.S. trade measures affecting Nicaragua, the GATT panel held that it had no authority to examine U.S. justification of Article XXI invocation.⁹² Article XXI provides:

Security Exceptions

Nothing in this Agreement shall be construed

⁸⁹ Nicaragua requested the panel to find that U.S. restrictions to imports of sugar and the later prohibition of imports and exports of good between the United States and Nicaragua violated the provisions of the GATT. See Report of the Panel, *United States - Imports of Sugar from Nicaragua*, L/5607 (Mar. 13, 1984), available at http://www.wto.org/english/tratop_e/dispu_e/83sugar.pdf; and Report of the Panel, *United States - Trade Measures Affecting Nicaragua*, L/6053 (Oct. 13, 1986), available at http://www.wto.org/gatt_docs/English/SULPDF/91240197.pdf.

⁹⁰ In that case, the EC alleged that U.S. trade restrictions and travel ban are inconsistent with the U.S. commitments under the GATT and GATS. See Request for Consultations by the European Communities, *United States - The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/1 (May 13, 1996), available at [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_5006.aspx?Query=\(@Symbol=%20wt/ds38/1\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_5006.aspx?Query=(@Symbol=%20wt/ds38/1)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#).

⁹¹ The EC challenged legislation that prohibited the public authorities of Massachusetts to procure goods or services from any persons, who do business with Burma as contravening the U.S. obligations under the Government Procurement Agreement (GPA). See Request for Consultations by the European Communities, *United States - Measure Affecting Government Procurement*, WT/DS88/1 (June 26, 1997), available at [https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_5006.aspx?Query=\(@Symbol=%20wt/ds88/1\)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_5006.aspx?Query=(@Symbol=%20wt/ds88/1)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#).

⁹² See *supra* note 89.

(b) 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; or

(c) 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.⁹³

Although the national security exceptions contained in Article XXI are criticized as being subject to states' abuse,⁹⁴ too broad,⁹⁵ and undermining the principle objective of the WTO,⁹⁶ a country's essential security interest is one of the strongest and most frequent justifications that states utilize for the placement of trade sanctions on a WTO member state or its nationals.⁹⁷

Other legitimate objects of trade restriction are permitted by general exceptions provisions under Article XX of the GATT,⁹⁸

⁹³ The General Agreement on Trade in Services also contains a similar exception. *See* the General Agreement on Trade in Services art. XIV bis, Apr. 15, 1994, 1869 U.N.T.S. 183 [hereinafter GATS].

⁹⁴ *See generally* John H. Jackson, *World Trade and the Law of GATT (A Legal Analysis of the General Agreement on Tariffs and Trade)* 751-752 (1969).

⁹⁵ *See generally* CARTER, *supra* note 23, at 132-137.

⁹⁶ *See generally* Smeets *supra* note 87.

⁹⁷ *See* GATT, *ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE* 554-561 (6th ed. 1994) (describing the practice of interpretation and application of Article XXI).

⁹⁸ Article XX of the GATT provides:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

which may, for instance, justify the imposition of economic sanctions for human rights violations. If U.S. economic sanctions satisfy the chapeau and any of the humanitarian clarifications stated in this article (e.g., regarding measures necessary “to protect public morals”, or “to protect human . . . life or health”), they potentially might be considered as an exception to U.S. free trade obligations under the GATT/GATS.⁹⁹

Finally, the non-performance of U.S. trade obligations under the GATT/GATS may be also justifiable as self-help that is deemed as a legally permissible response to the primary violation of international obligations by another state. According to the Articles on Responsibility of States for Internationally Wrongful Acts, each countermeasure is subject to some substantive preconditions including among others: (1) prior violation of international obligations by another state;¹⁰⁰ (2) proportionality of countermeasures to the gravity of the internationally wrongful act;¹⁰¹ and (3) procedural conditions including an obligation for prior negotiation and necessity to proceed a dispute settlement.¹⁰²

-
- (a) necessary to protect public morals;
 - (b) necessary to protect human, animal or plant life or health;
 - (e) relating to the products of prison labour.

The resembling provision is contained in Article XIV of the GATS.

⁹⁹ See, e.g., Daniel C. K. Chow, *Why China Opposes Human Rights in the World Trade Organization*, 35 U. PA. J. INT'L L. 61, 89-93 (2013) (discussing the WTO practice of trade ban justification under the GATT general exceptions provision). But see also Buhm Suk Baek, *Economic Sanctions Against Human Rights Violations*, Cornell Law School Inter-University Graduate Student Conference Papers, Paper 11, at 80 (2008), available at http://scholarship.law.cornell.edu/lps_clacp/11 (“there is not much possibility of economic sanctions against human rights violations to be accepted under Article XX, General Exceptions, in the WTO system”); Sarah H. Cleveland, *Human Rights Sanctions and the World Trade Organisation* in ENVIRONMENT, HUMAN RIGHTS AND INTERNATIONAL TRADE 199, 233-250 (Francesco Francioni ed., 2001) (reasoning why Article XX is very unattractive locus for human rights measures).

¹⁰⁰ Articles on Responsibility of States for Internationally Wrongful Acts, in Rep. of the Int'l Law Comm'n, 53rd Sess., UN GAOR, 53rd Sess., Apr. 23-June 1, July 2-Aug. 10, 2001, U.N. Doc. A/56/10; GAOR 56th Sess., Supp. No. 10 [hereinafter Articles on State Responsibility] art. 49.

¹⁰¹ Articles on State Responsibility art. 51.

¹⁰² Articles on State Responsibility art. 52.

3.2. *The U.S. Unilateral Sanctions: Justification and Practice*

The practice of use of economic sanctions appeared during the American Revolution and "then became part of the tradition of the United States."¹⁰³ The U.S. government imposed economic sanctions against other countries "on more occasions than all other states [in the world] combined,"¹⁰⁴ participating as a sender, alone or with others, in three-fifths of all cases over the past century.¹⁰⁵ However, given the above discussions about the compliance of unilateral sanctions with international law, how can the use of unilateral sanctions targeting other states be legally justified by scholars and U.S. officials?

From the conventional viewpoint broadly accepted by the United States, foreign trade is a matter of national sovereignty, and there are no international law restrictions that would limit a state's sovereign right to regulate its trade relations with other nations.¹⁰⁶ Professor Alexander points out that "states are relatively free under the rules of state responsibility in customary international law to adopt unilateral economic sanctions against states, entities and individuals."¹⁰⁷ In his 1988 study, Dr. Elagab cited the following opinion advocating the use of economic coercive measures delivered by an official of the U.S. Department of State:

Traditional international law adopted a *laissez-faire* approach toward the economic right and duties of States, and it has long been considered an inherent right of an independent, sovereign state to exercise full control over its trade relations, including the withholding of export and prohibition of import with respect to any other state or states, absent treaty commitments to the contrary . . . Economic pressure may be unfriendly and even unfair, but economic coercion, *per se*,

¹⁰³ CARTER, *supra* note 23, at 8.

¹⁰⁴ KERN ALEXANDER, *ECONOMIC SANCTIONS: LAW AND PUBLIC POLICY* 89 (2009).

¹⁰⁵ See Gary Clyde Hufbauer, *Sanctions Sometimes Succeed: But No All-Purpose Cure*, CATO UNBOUND (Nov. 7, 2014), http://www.cato-unbound.org/2014/11/07/gary-clyde-hufbauer/sanctions-sometimes-succeed-no-all-purpose-cure#_ftn4 (overviewing success and failure sanctions episodes since 1917 to 2014).

¹⁰⁶ See generally J. Dapray Muir, *The Boycott in International Law*, in *ECONOMIC COERCION AND THE NEW INTERNATIONAL ECONOMIC ORDER* 19, 26-28 (Richard B. Lillich ed., 1976).

¹⁰⁷ ALEXANDER, *supra* note 104, at 57.

cannot generally be said to be prohibited by the U.N. Charter.¹⁰⁸

On the political level, today sanctions are considered a key element of U.S. economic statecraft addressing foreign and international security challenges.¹⁰⁹ As Secretary of State Hillary Clinton explained in 2011: "We are committed to raising the economic cost of unacceptable behavior [of states that threaten global security or its own people] and denying the resources that make it possible."¹¹⁰

The United States often explains economic sanctions in terms of unilateral self-help acts.¹¹¹ To justify unilateral sanctions as a permissible peacetime remedy in international law, Alexander divides sanctions into three categories: (1) retortive measures, (2) countermeasures/reprisals and (3) punitive measures.¹¹² He points out that, if a retortion that imposes economic, social or reputational costs against a target does not violate international legal obligation to the targeted state, then "for a countermeasure to be lawful under international law, it must be reciprocal and proportional in its aim and application."¹¹³ Unless prohibited by a treaty obligation, punitive sanctions which include both coercive and punitive elements and have prominent preventing character, are generally

¹⁰⁸ OMER YOUSIF ELAGAB, *THE LEGALITY OF NON-FORCIBLE COUNTER-MEASURES IN INTERNATIONAL LAW* 202-203 (1988) (citing Digest USPIL 577 (1976)).

¹⁰⁹ See Secretary of State Hillary Rodham Clinton, *Remarks on Economic Statecraft*, Speech at Economic Club of New York (Oct. 14, 2011), available at <http://iipdigital.usembassy.gov/st/english/texttrans/2011/10/20111014172924su0.9650494.html#axzz3RGF1O0QA>.

¹¹⁰ *Id.*

¹¹¹ See, e.g., ELIZABETH ZOLLER, *PEACETIME UNILATERAL REMEDIES: AN ANALYSIS OF COUNTERMEASURES* 8-9 (1984) (assessing the U.S. sanction legislation as a system of institutionalized retorsions); MALLOY, *supra* note 10, at 593-594 (considering economic sanctions as nonforcible countermeasures); Porotsky, *supra* note 79, at 932-936 (discussing the evolution of the U.S. position that the Cuban embargo was an act of retorsion).

¹¹² ALEXANDER, *supra* note 104, at 58. In his study, Alexander considers a "countermeasure" referring to both reprisals and reciprocal measures. Similarly to the Articles of State Responsibility, his definition of the countermeasure excludes a retortion as an action that is generally permissible under international law irrespective of the prior illegal action of another state. For the purposes of this Article, I adopt the same mainstream definition.

¹¹³ *Id.* at 86. See also ELAGAB, *supra* note 8 at 42-95 (defining the conditions of the legality of counter measures). For a discussion of the execution of self-help measures pursuant to international law, see, e.g., JAMES CRAWFORD, *STATE RESPONSIBILITY: THE GENERAL PART* 676-706 (2013).

permitted by international law, regardless of whether a violation of any international legal obligation by the targeted state occurred.¹¹⁴ But in many cases U.S. economic sanctions have a preventing rather than retaliatory character,¹¹⁵ and, therefore, those politically motivated advanced measures do not fall within retortions or countermeasures permitted under international law.

Responding to the criticism of the use of unilateral economic sanctions as an illegitimate instrument of U.S. foreign policy, Lowenfeld broadens the traditional interpretation of international legality suggesting that sanctions should be considered through a prism of international law, the body of which "not, for the most part, based on treaty or even customary law as traditionally defined, but on a *generally accepted principle of reasonableness*."¹¹⁶ But what reasons would be argued to justify the unilateral use of economic sanctions by the United States? For example, economic sanctions are often considered as an alternative to military sanctions.¹¹⁷ According to some studies, recent increase in the use of economic sanctions resulted directly from the conscious choice by "policy elites" of economic sanctions as an alternative to direct military intervention.¹¹⁸

¹¹⁴ *Id.* at 62-63. But see ZOLLER, *infra* note 111, at 63 (concluding that a permissible coercive measure cannot be punishment).

¹¹⁵ For example, the U.S. President's National Security Strategy in 2015 provides that:

[i]n many cases, our use of targeted sanctions and other coercive measures are meant not only to uphold international norms, but to deter severe threats to stability and order at the regional level. We are not allowing the transgressors to define our regional strategies on the basis of the immediate threats they present.

National Security Strategy, Feb. 2015, available at http://www.whitehouse.gov/sites/default/files/docs/2015_national_security_strategy_2.pdf.

¹¹⁶ Andreas F. Lowenfeld, *Sanctions and International Law: Connect or Disconnect*, 4 HIBERNIAN L.J. 1, 2 (2003) (emphasis added).

¹¹⁷ See, e.g., HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY 934 (4th ed. 2003). See also *supra* note 116, at 5-7 (discussing economic sanctions as an alternative to the use of force). But some experts warn against reliance on this assumption in foreign affairs. See Paul J. Saunders, *No War with Russia? Don't Be Too Sure*, THE NATIONAL INTEREST, Feb. 26, 2015, <http://nationalinterest.org/commentary/no-war-russia-dont-be-so-sure-10177> (discussing an erroneous opinion that economic sanctions are always an alternative to war rather than a prelude to it).

¹¹⁸ See George A. Lopez & David Cortright, *The Sanctions Era: An Alternative to Military Intervention*, 19(2) FLETCHER FORUM OF WORLD AFFAIRS 65, 67-68 (1995)

Furthermore, the supporters of unilateral sanctions repeatedly emphasize that economic sanctions allow sending states to effectively meet the objectives of their foreign policy. However, the views regarding the effectiveness of economic sanctions range from proponents' radical views that almost all significant U.S. foreign policy achievements resulted from the effective use of economic sanctions, which had been "vital weapons in America's foreign policy arsenal for more than 200 years",¹¹⁹ to opposing arguments that sanctions are rather ineffective¹²⁰, too harmful for a sender state,¹²¹ or sometimes even counter-productive.¹²² So, according to the recent study by Hufbauer, of the 75 episodes of U.S. economic sanctions between 1970 and 2014, success was achieved in only 11 unilateral U.S. cases;¹²³ but researchers should keep in mind that, in the light of the inability to separate the impact of sanctions from other factors at play, a "success" of sanctions might be an illusive concept.¹²⁴

(indicating reasons why policymakers can consider economic sanctions as a preferred option).

¹¹⁹ See Jesse Helms, *What Sanctions Epidemic? U.S. Business' Curious Crusade*, 78 FOREIGN AFF. 2, 4-5 (1999) (advocating unilateral sanctions to defend U.S. sanctions policy against charges of epidemicity by U.S. business).

¹²⁰ See, e.g., Robert A. Pape, *Why Economic Sanctions Do Not Work*, 22 INT'L SECURITY 90, 99-106 (1997) (concluding that that only five percent of sanctions episodes succeed); Peter Wallensteen, *A Century of Economic Sanctions: A Field Revisited*, Uppsala Peace Research Papers No. 1, at 6 (2000), available at http://www.uu.se/digitalAssets/18/18601_UPRP_No_1.pdf (noting that an analysis of U.N. sanctions cases during the 1990s shows a success rate close to twenty percent).

¹²¹ See, e.g., Joanmarie M. Dowling & Mark P. Popiel, *War by Sanctions: Are We Targeting Ourselves?* 11 CURRENTS INT'L TRADE L. J. 8 (2002) (describing four economic problem sanctions may create to sender states: (1) a sender state loses export business; (2) sender industries are viewed as unreliable; (3) the overuse of sanctions provides open markets to competitors; and (4) sanctions negatively affect domestic prices).

¹²² See, e.g., Zachary Selden, *Are Economic Sanctions Still a Valid Option?* 11 GEO. J. INT'L AFF. 91, 95-96 (2010) (warning that some "sanctions have the potential to make the [targeted] regime stronger and less likely to yield to international demands").

¹²³ See *supra* note 105 (listing success and failure cases and distinguishing them by their policy objectives).

¹²⁴ See, e.g., Margaret Doxey, *Reflections on the Sanctions Decade and beyond*, 64 INT'L J. 539, 541-542 (2009) (discussing whether the positive effect of sanctions can really be measured).

Some authors also argue that economic sanctions satisfy domestic policy needs to "do something."¹²⁵ Such an attractiveness of sanctions might result from the growth of media outlets and technology that led to increased public attention to foreign policy, and, hence, forced politicians to use economic sanctions as an internal policy tool to satisfy public demand for U.S. response.¹²⁶ Not surprisingly, in the 1990s-2000s, the U.S. Congress became more involved in the process of imposing economic sanctions under growing public pressure.¹²⁷ Furthermore, economic sanctions may also be considered as a way to communicate official displeasure with a foreign state's behavior.¹²⁸ Sender states may use this signaling effect of economic sanctions to message either to a domestic or an international audience.¹²⁹

In the 1990s, following the disappearance of prior Soviet opposition of U.S. sanctions that had made the United States very careful with the imposition of unilateral sanctions against some countries which could get economic and political support from the Soviet block,¹³⁰ the U.S. government became a recognized leader in sanctions regimes.¹³¹ In response to new challenges and conflicts,

¹²⁵ See generally Benjamin B. Ferencz, *Enforcing International Law - A Way to World Peace: A Documentary History and Analysis* 471 (1983).

¹²⁶ See Sarabeth Egle, *The Learning Curve of Sanctions - Have Three Decades of Sanctions Reform Taught Us Anything?* 19 CURRENTS INT'L TRADE L. J. 34, 38 (2011) (stating that an increased public knowledge of foreign policy is one of the reasons why economic sanctions are so popular in the world); Richard N. Haas, *Introduction*, in *ECONOMIC SANCTIONS AND AMERICAN DIPLOMACY* 1, 3 (Richard N. Haas ed., 1998) (describing a so-called "CNN effect" of sanctions). See also, Thomas W. Walde, *Managing the Risk of Sanctions in the Global Oil & Gas Industry: Corporate Response Under Political, Legal and Commercial Pressures*, 36 TEX. INT'L L. J. 183, 189-191 (2001) (arguing that "U.S. economic sanctions are basically the result of domestic policy pressures").

¹²⁷ See generally HUFBAUER ET AL., *supra* note 71, at 133-136; Kimberly Ann Elliott, *Trends in Economic Sanctions Policy: Challenges to Conventional Wisdom* in *INTERNATIONAL SANCTIONS: BETWEEN WORDS AND WARS IN THE GLOBAL SYSTEM* 6-7 (Peter Wallensteen & Carina Staibano ed., 2005).

¹²⁸ See Haas, *supra* note 126, at 2 (noting that, as a form of expression, sanctions "can serve to reinforce a commitment to a behavioral norm, such as respect to human rights or opposition to proliferation").

¹²⁹ See FRANCESCO GIUMELLY, *COERCING, CONSTRAINING AND SIGNALLING: EXPLAINING UN AND EU SANCTIONS AFTER THE COLD WAR* 35 (2011) (analyzing objects and a potential impact of so-called "signalling sanctions" on targets).

¹³⁰ See Egle, *supra* note 126, at 38 ("the U.S. hesitated to enlist sanctions against states aligned with the Soviet Union, fearing a reprisal of the sanctions").

¹³¹ *Id.*

the contemporary sanctions policy was changed to comply with a new role of the United States as an economic and political hegemon.¹³² The U.S. government increased a number of economic sanctions regimes launched in concert with other countries,¹³³ and gave to so-called “smart sanctions” (e.g., arms embargoes, asset freezes, targeted financial restrictions, and travel bans), which could be aimed at foreign officials or governmental functions without a significant negative effect on overall economy and state’s population, the preference over old-fashioned comprehensive economic measures.¹³⁴ Today, the United States implements many sanctions programs independently of the U.N. Security Council that relate to different countries and regions including: Balkans, Belarus, Burma (Myanmar), Côte d’Ivoire (Ivory Coast), Cuba, North Korea, Russia, Syria, and Zimbabwe.¹³⁵

Another modern trend of the U.S. sanctions policy is the growing attention to non-state actors that may threaten the United States, including foreign terrorists, narcotics traffickers, and transnational criminal organizations, as well as their members and sponsors. Following September 11, 2001, the George W. Bush administration adopted new legislation expanding U.S. counter terrorism sanctions program¹³⁶ against individuals and organizations on the list of specifically designated terrorist (SDTs), and foreign terrorist organizations (FTOs). Moreover, to induce the wide international cooperation in the war of terror, the United States announced its readiness to lift sanctions on previously targeted states.¹³⁷

¹³² See HUFBAUER ET AL., *supra* note 71, at 125-126 (overviewing the development of U.S. sanctions policy in the post-Cold War period).

¹³³ See *id.* (noting that a number of U.S. unilateral sanctions decreased dramatically in the 1990s).

¹³⁴ See *id.*, at 138-141 (analyzing the rising popularity of “smart sanctions”).

¹³⁵ See generally OFAC, Sanctions Programs and Country Information, <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx> (last visited Jan 29, 2015).

¹³⁶ For example, Executive Order of September 23, 2001 authorized the Treasury Department to designate, and block the assets of, foreign persons determined to have committed terrorist activity. Exec. Order No. 13224 66 Fed. Reg. 49079 (Sept. 23, 2001).

¹³⁷ See generally HUFBAUER ET AL., *supra* note 71, at 141-142.

On December 17, 2014, President Obama announced a new course in the 50-year U.S. sanctions policy toward Cuba.¹³⁸ The announced changes are intended to normalize diplomatic relations between the United States, to authorize travel, certain trade relations, and the flow of information to and from Cuba. Later, the U.S. Treasury Department's Office of Foreign Assets Control and the U.S. Commerce Department's Bureau of Industry and Security adopted final rules amending the Cuban Assets Control Regulations and the Export Administration Regulations to implement key policy changes announced by the President.¹³⁹ On the one hand, the President's statement that "50 years have shown that isolation has not worked," and the following steps of the Obama administration to relax the U.S. embargo of Cuba may demonstrate the failure of the Cuban sanctions policy, or even the success of longstanding international pressure on U.S. government.¹⁴⁰ On the other hand, the Cuba precedent may have positive effects on other sanction regimes, including Ukraine-related sanctions. Even if the declared goals of Ukraine-related sanctions (i.e., resolution of the conflict which respects to Ukraine's territorial integrity) look rather unrealistic, because a proposal to get the Crimean Peninsula back to Ukraine would be politically lethal for not only incumbent but also any potential Kremlin leaders,¹⁴¹ lifting Cuban sanctions may help to overcome the East-West crisis of confidence, and convince Russia's leaders of U.S. readiness to release Russia and its nationals from

¹³⁸ See Press Release, Statement by the President on Cuba Policy Changes (Dec. 17, 2014, 12:01 P.M. EST), <http://www.whitehouse.gov/the-press-office/2014/12/17/statement-president-cuba-policy-changes> (providing background information on the Cuba sanctions and expressing an intention to normalize relations between the countries).

¹³⁹ See Press Release, Fact Sheet: Treasury and Commerce Announce Regulatory Amendments to the Cuba Sanctions (Jan. 15, 2015), <http://www.treasury.gov/press-center/press-releases/Pages/jl9740.aspx> (observing revised regulations related to the Cuba sanctions, which implement the changes announced by the President on December 17, 2014).

¹⁴⁰ Since 1991, the General Assembly regularly adopted the resolutions calling the United States to lift its embargo against Cuba. See Necessity of ending the economic, commercial and financial embargo imposed by the United States of America against Cuba, <http://www.un.org/en/ga/62/plenary/cuba/bkg.shtml> (last visited Jan 30, 2015).

¹⁴¹ The most recognized Russian opposition leaders backed by the West confirmed that Crimea must remain the part of the Russian Federation. See Robert Mackey, *Navalny's Comments on Crimea Ignite Russian Twittersphere*, INT'L N.Y. TIMES, Oct. 16, 2014, <http://www.nytimes.com/2014/10/17/world/europe/navalny-comments-on-crimea-ignite-russian-twittersphere.html>.

some sanctions if it takes required steps to settle the conflict in Eastern Ukraine.

In sum, despite the criticism by some states, in the absence of the explicit prohibition of the use of unilateral economic measures under international law, the United States historically considers economic sanctions as a legitimate tool of its foreign policy that allows imposing economic and political pressure on other countries independently of U.N. Security Council. Nevertheless, although this practice might be supported by the ancient “Lotus principle” that a state is permitted to do everything, which is not affirmatively prohibited,¹⁴² the United States prefers to keep a distance from debates on the legality of its sanctions. By contrast, following a position of its predecessor state, Russia is clearly opposed to the U.S. unilateral sanction policy invoking its illegality. But why Russia had not changed its approach following the dissolution of the Soviet system? Does Russia really refrain from imposing unilateral sanctions on other countries? The next section addresses these questions.

4. RUSSIA’S APPROACH TOWARDS ECONOMIC SANCTIONS: IMPROVEMENTS AND CHALLENGES

While Russia argues the illegality of unilateral sanctions, in the past two decades, Russia not only adopted its own sanction legislation but also developed a distinctive sanction strategy. In this section, I first examine the evolution of Russia’s legal views on the permissibility of sanctions and the development of municipal laws on economic sanctions, and then discuss Russia’s sanction policy in its relations with neighboring countries. Finally, the section considers Russia’s potential responses to new challenges arose from the recent waive of Western sanctions and summarizes the implications of my findings for Russia’s foreign policy.

4.1. *The Evolution of Russia’s Legal Arguments Against Unilateral Sanctions*

¹⁴² See generally S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7).

In 1935, Soviet Professor Pashukanis stated that economic warfare was one of the distinguishing features of wars between imperialistic states of those days,¹⁴³ but he could not anticipate that ten years later those economic measurers would become the popular elements of peaceful relations between nations. Since Communist countries had been the key targets of U.S. sanctions policy at the end of World War II, it is not surprising that the Soviet Union played a leading role in opposing the unilateral use of economic coercive measures.

To legally challenge the active sanctions policy of Western states, the Soviet Union reached a consensus with developing countries on the illegality of unilateral coercive measures through broadening the definitions of "aggression" and "use of force." Further, the joint political efforts of the Communist block and developing states to include non-forcible coercive actions within the general prohibition of force were not only noted by many observers,¹⁴⁴ but, as discussed above, successfully reflected in many resolutions of the U.N. General Assembly.¹⁴⁵

Noting the aforementioned difference between the interpretations of the use of force under Article 2(4) of the U.N. Charter by socialist and capitalist states, Tunkin advocated the Soviet Union's position that the concept of force includes not only armed force including, certainly, economic force which might "represent a very considerable threat to independence of [targeted] states, and m[ight] produce a significant destabilisation of international relations."¹⁴⁶

In the same way that Communist and developing states supported the broad definition of "force," the Soviet Union recognized a legal interpretation of the principle of non-intervention stated by the Declaration on Principles of International Law¹⁴⁷ that

¹⁴³ See E. PASHUKANIS, *OCHERKI PO MEZHDUNARODNOMU PRAVU* [ESSAYS ON INTERNATIONAL LAW] 203-204 (1971) (Russ.) (criticizing capitalistic approaches to economic warfare).

¹⁴⁴ See Brosche, *supra* note 78, at 18, 20 (noting that the states of East block and developing countries collaborated to support a broad interpretation of the prohibition on force covering political and economic pressure).

¹⁴⁵ See *supra* notes 80-82 and accompanying text.

¹⁴⁶ GRIGORI TUNKIN, *LAW AND FORCE IN THE INTERNATIONAL SYSTEM* 82 (1983).

¹⁴⁷ See *supra* note 81 and accompanying text (detailing the decisions and documents of international organizations prohibiting unilateral economic coercion).

included the use of economic coercive measures against other states.¹⁴⁸ The difference between Soviet and Western views on the definition of the "intervention" allowed Soviet opponents to counter socialist ideology of peaceful relations between states, and prohibition of any kind of intervention with the "imperialist policy" of covert interventions into internal affairs of sovereign states, including different types of economic interventions.¹⁴⁹ In addition, Soviet scholars argued that U.S. unilateral economic sanctions breached the international obligations of the United States under bilateral and multilateral treaties,¹⁵⁰ and the extraterritorial application of sanctions violated the principle of sovereign equality of states.¹⁵¹

Professor Vasilenko expressed an opposing view on the permissibility of unilateral coercive measures under international law, observing that "recognizing the sanction characteristic of the coercive measures of international organizations only, and countering them with self-help or reprisals lead to the overestimation of the coercive prerogatives of international organizations, and place in question states' right to coerce."¹⁵² In his study, Vasilenko suggested distinguishing legally acceptable self-help coercive measures in response to international violations (e.g., retortions, reprisals, nonrecognition, diplomatic break, and self-defense)¹⁵³ from the unlawful use of force. He gave two examples of the latter: U.S. unilateral sanctions related to the imposition of martial law in Poland, and Soviet invasion of Afghanistan.¹⁵⁴ In the late 1980s, new approaches to the international responsibility of states made more authors reconsider the traditional position and admit that unilateral non-force coercive measures might be

¹⁴⁸ MEZHDUNARODNOE PRAVO [INTERNATIONAL LAW] 119-120 (G. I. Tunkin ed., 1982) (Russ.).

¹⁴⁹ See generally V. I. Lisovskii, *Mezhdunarodnoe pravo* [International Law] 81-85 (1970); D. B. Levin, *Mezhdunarodnoe pravo, vneshniaia politika i diplomatiia* [International Law, Foreign Policy and Diplomacy] 79-84 (1981) (Russ.). See also M. M. Avakov et al. *Narusheniia SShA norm mezhdunarodnogo prava* [U.S.A.'s Violations of the Rules of International Law] 17-18 (1984) (Russ.) (stating that U.S. economic pressure on socialistic states violates the principle of non-intervention).

¹⁵⁰ *Id.* at 55-57.

¹⁵¹ *Id.* at 165-177.

¹⁵² V. A. VASILENKO, *MEZHDUNARODNO-PRAVOVYE SANKTSII* [INTERNATIONAL LEGAL SANCTIONS] 30-31 (1982) (Russ.).

¹⁵³ See *id.* at 78-95.

¹⁵⁴ See *id.* at 33-34.

permissible under certain conditions,¹⁵⁵ but such changes did not affect their views on the illegality of the U.S. sanctions policy.¹⁵⁶

While, as discussed above, the Soviet Union was recognized as "one of the vehement defenders of a wide concept concerning Art. 2(4) [of the U.N. Charter]",¹⁵⁷ this approach was later criticized by Russian commenters;¹⁵⁸ some modern Russian scholars also emphasize that the prohibition of the use of force as a rule of customary international law does not include economic coercive measures.¹⁵⁹ Noting concerns about the U.S. use of unilateral coercive economic measures against other nations, and emphasizing Russia's official position regarding the illegal character of so-called "sanctions" imposed without the mandate of the U.N. Security Council,¹⁶⁰ Batrishin, however, admits the legality of retortions and countermeasures under international law.¹⁶¹ Some commentators went further, arguing that unilateral coercive measures have no

¹⁵⁵ See, e.g., N. A. Ushakov, *Problemy teorii mezhdunarodnogo prava* [Problems of the Theory of International Law] 181-182 (1988) (Russ.). Ushakov notes that not only international organizations but any state has a right to use coercive measures against a violator of international law, as states' international responsibility and international sanctions are outside the framework of Article 2.4 of the U.N. Charter.

¹⁵⁶ See *id.* at 185-186.

¹⁵⁷ Brosche, *supra* note 78, at 20.

¹⁵⁸ See generally S. V. CHERNICHENKO, *MEZHDUNARODNOE PRAVO: SOVREMENNYE TEORETICHESKIE PROBLEMY* [INTERNATIONAL LAW: CONTEMPORARY THEORETICAL PROBLEMS] 222-224 (1993) (Russ.). See also S. V. Marinich, *Ekonomicheskie sanktsii v mezhdunarodnom prave* [Economic Sanctions in International Law], at 12-14 (1989) (unpublished synopsis of Cand. Sc. (Law) dissertation, Lomonosov Moscow State University) (on file with the SPARK Legal Library) (arguing that the definition of "force" under Article 2(4) does not include unilateral economic sanctions, and the legality of any sanction should be examined by the principle of non-intervention rather than Article 2(4)).

¹⁵⁹ See, e.g., I.N. Zhdanov, *Prinuditel'nye mery v mezhdunarodnom prave* [Coercive Measures in International Law], at 155-157 (1999) (unpublished Dr. Sc. (Law) dissertation, Moscow State Institute of International Relations) (on file with the Russian State Library) (stating that a lack of the agreed interpretation of the term "force" does not allow to effectively use Art. 2(4) of the U.N. Charter with respect to economic coercive measures).

¹⁶⁰ See R.R. Batrishin, *Otvetstvennost' gosudarstva i primeneniye kontrmer v sovremennom mezhdunarodnom prave* [State Responsibility and the Use of Countermeasures in Contemporary International Law], at 6 (2005) (unpublished Cand. Sc. (Law) dissertation, Kazan State University) (on file with the Russian State Library) (criticizing U.S. unilateral economic sanctions against Cuba, Myanmar and Syria as unlawful).

¹⁶¹ See, e.g., *id.* at 135-149 (analyzing approaches to the legality of countermeasures in contemporary international law).

legitimacy because the principle of sovereign equality of states precludes the unilateral use of sanctions against another state or a group of states (*par in parem non habet imperium*).¹⁶² In contrast, Rachkov points to the absence of an explicit customary international rule prohibiting unilateral economic sanctions.¹⁶³ Based on his own analysis of the current sanction campaign against Russia in connection with the crisis in Ukraine, he alleges that economic sanctions imposed on Russia and its nationals by the United States and its allies may be justifiable as countermeasures.¹⁶⁴

Professor Lukashuk made very interesting observations about the uselessness of any attempts to justify U.S. unilateral sanctions policy. From his point of view, the United States uses a very distinctive conception of sanctions, which may be imposed for the sake of foreign policy or national security objectives.¹⁶⁵ Taking into account that in practice those objectives may include the overthrow of a foreign government or change of its behavior, by his analysis, such sanctions are not a matter of international law.¹⁶⁶

A diversity of academic views concerning the legality of unilateral economic sanctions in relatively recent studies has not, however, affected the official position of the Russian Federation. From Russia's perspective, the purpose of its foreign policy tradition to support the illegality of the unilateral use of coercive measures is not only to deter the United States and other proponents of economic sanctions from placing harmful economic measures on the "defenseless victims" of their aggressive foreign policy, it is also to help increase the role of the Security Council of the United Nations,

¹⁶² See M. V. Ryzhova, *Ekonomicheskie sanktsii v sovremennom mezhdunarodnom prave* [Economic Sanctions in Contemporary International Law], at 10, 43-47 (2006) (unpublished Cand. Sc. (Law) dissertation, Kazan State University) (on file with the Russian State Library); A. V. Kalinin, *Ekonomicheskie sanktsii OON i odnostoronnie eksterritorial'nye mery ekonomicheskogo prinuzhdeniia* [U.N. Economic Sanctions and Extraterritorial Unilateral Coercive Measures], *IURIST-MEZHDUNARODNIK*, No. 4, at 34-37 (2005) (Russ.) (arguing that unilateral economic sanctions are illegal because one sovereign power has no right to exercise jurisdiction over another sovereign power).

¹⁶³ I. Rachkov, *Ekonomicheskie sanktsii s tochki zreniia GATT/VTO* [Economic Sanction from GATT/WTO perspective], *MEZHDUNARODNOE PRAVOSUDIIE*, No. 3(11), at 102 (2014) (Russ.).

¹⁶⁴ *Id.* at 104-105.

¹⁶⁵ I. I. LUKASHUK, *PRAVO MEZHDUNARODNOI OTVERSTVENNOSTI* [LAW OF INTERNATIONAL RESPONSIBILITY] 312-314 (2004) (Russ.).

¹⁶⁶ *Id.*

and, consequently, the powers of its permanent members, including the Russian Federation itself.

However, that moral ascendancy over Western opponents allows Russia to strengthen its Soviet-style role as a leader of developing countries that suffer from Western economic pressure. As a result, Russia would be able to get support of other participants of the joint crusade of developing nations against unilateral sanctions. For example, in 2000, Russia's representatives submitted to the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization a working paper entitled "Basic conditions and standard criteria for the introduction of sanctions and other coercive measures and their implementation" (A/AC.182/L.100). Section I(1) of the paper states that

[t]he application of sanctions is an extreme measure and is permitted only after all other peaceful means of settling the dispute or conflict and of maintaining or restoring international peace and security, including the provisional measures provided for in Article 40 of the Charter of the United Nations, have been exhausted and *only when the Security Council has determined the existence of a threat to peace, a breach of the peace or an act of aggression.*¹⁶⁷

In the following years, Russia developed this working paper to the draft of the declaration and proposed that the Committee members recommend it to the U.N. General Assembly for adoption.¹⁶⁸

Around the same time period, President Putin, in his address to the U.N. Security Council, reiterated the maintenance of the longstanding principle of Russia's foreign policy that any

¹⁶⁷ Rep. of the Special Comm. on the Charter of the U.N. and on the Strengthening of the Role of the Org., May 22, 2000, U.N. Doc. A/55/33; GAOR, 55th Sess., Supp. No. 33 (2000), available at <http://www.un.org/documents/ga/docs/55/a5533supp.pdf> (emphasis added).

¹⁶⁸ The draft resolution entitled "Declaration on the basic conditions and standard criteria for the introduction of sanctions and other coercive measures and their implementation" was proposed by the Russian Federation to the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization in 2003. See Rep. of the Special Comm. on the Charter of the U.N. and on the Strengthening of the Role of the Org., Apr. 17, 2002, U.N. Doc. A/58/33; GAOR, 58th Sess., Supp. No. 33 (2003), available at [http://www.un.org/en/ga/search/view_doc.asp?symbol=A/58/33\(Supp\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/58/33(Supp)).

imposition of economic sanctions without authorization of the Security Council would be officially treated by Russia as a violation of international law: "Only the Security Council has the right to sanction such an extreme measure as the use of force in the situation of crisis. It does so on behalf and in the interests of the whole world community as the Security Council bears special responsibility for it."¹⁶⁹

Another possible explanation why Russia holds its own is that, despite the significant progress in the U.S.-Russia collaboration in the U.N. Security Council on the use of U.N. sanctions addressing threats to international peace and security, Russia remains suspicious of the West's motives. For instance, keeping the notorious Jackson-Vanik Amendments in place, the United States hung it as a sword of Damocles over Russia to counteract a regression of its internal human rights policy.¹⁷⁰ Thus, even in the 1990s, the warmest decade of the U.S.-Russia relations, Russia had to keep strong legal arguments to contest a potential new round of economic sanctions that the United States could impose on it.

Although on a diplomatic level Russia plays a leading role in creating international consensus on the illegality of the unilateral use of economic sanctions, realpolitik's *si vis pacem, para bellum* principle dictates that Russia's government must develop its own full arsenal of economic coercive measures to address potential challenges and threats, as the next Section will discuss.

4.2. Legislation on Economic Measures

The development of Russian legislation concerning the use of economic measures in international relations was influenced by several external and internal factors. First, Russia's political and economic transformation, and greater integration into the world trading system in the 1990s caused the necessity for the Russian government to have more legal instruments of foreign trade policy. Second, in the light of the increased use of the United Nations'

¹⁶⁹ Vladimir Putin, President of the Russian Federation, *Address to the United Nations Security Council* (Sept. 7, 2000), <http://eng.kremlin.ru/transcripts/8700>.

¹⁷⁰ See Cowan, *supra* note 5, at 757 ("Keeping Jackson-Vanik in place . . . will aid in avoiding a regression of the emigration progress achieved in Russia. If such regression did begin, then Jackson-Vanik would still be in place to counteract it.").

sanctions, Russia had to take required legislative measures to implement the Security Council resolutions. Third, more aggressive foreign policy of Russia in the 2000s, including escalating tensions between Russia and its neighboring trade partners, required the adaptation of modern national legislation concerning the use of economic countermeasures. A review of that legislation helps to more precisely understand the approach of the Russian Federation towards the use of economic sanctions and a range of measures the Russian government may take in response to economic sanctions imposed by Western states.

The use of retortions and countermeasures by the Russian Federation is governed today by federal legislation.¹⁷¹ Article 1194 of the Civil Code states that the government may establish reciprocal limitations (retortions) on the property and personal non-property rights of citizens and legal entities of the states where special limitations exist on the property and personal non-property rights of Russian citizens and legal entities.¹⁷² This provision, with some minor modification, was inherited from Soviet civil legislation¹⁷³ but has not been used by the Russian government.¹⁷⁴ The Russian Federal Law On Treaties of the Russian Federation also provides that, if a party violated its obligations under a treaty with the Russian Federation, the Ministry of Foreign Affairs, alone or jointly with other authorized bodies, shall provide the president or government with proposals on required measures pursuant to the rules of international law and the provisions of the treaty.¹⁷⁵ Furthermore, there are two federal statutes that authorize the

¹⁷¹ Under the 1993 Constitution, the powers in the domain of international trade and foreign economic relations vested in federal authorities. *See* KONSTITUTSIYA ROSSIYSKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 71(zh), 71(l) (Russ.).

¹⁷² GRAZHDANSKII KODEKS ROSSIYSKOI FEDERATSII [GK RF] [Civil Code] art. 1194 (Russ.).

¹⁷³ *Osnovy Grazhdanskogo Zakonodatel'stva Soiuzna SSR i Respublik* [Fundamental Principles of Civil Legislation of the USSR and Union Republics] art. 162, *VEDOMOSTI S"EZDA NARODNYKH DEPUTATOV SSSR I VERKHOVNOGO SOVETA SSSR* [VED. SSSR] [BULLETIN OF THE CONGRESS OF PEOPLES DEPUTIES OF THE USSR AND SUPREME COUNCIL OF THE USSR] 1991, No. 26, Item 733 (Russ.).

¹⁷⁴ *See supra* note 163, at 101 (analyzing legal measures Russia can use responding to the current economic sanctions).

¹⁷⁵ *Federal'nyi Zakon RF o Mezhdunarodnykh Dogovorakh Rossiyskoi Federatsii* [Federal Law of the Russian Federation on Treaties of the Russian Federation] art. 33, *SOBRANIE ZAKONODATEL'STVA ROSSIYSKOI FEDERATSII* [SZ RF] [RUSSIAN FEDERATION COLLECTION OF LEGISLATION] 1995, No. 29, Item 2757.

Russian government to use economic measures against foreign states and their nationals: the Federal Law On Fundamental Principles of State Regulation of Foreign Trade Activity¹⁷⁶ and the Federal Law On Special Economic Measures.¹⁷⁷

Federal Law On Fundamental Principles of State Regulation of Foreign Trade Activity authorizes the President to restrict international trade by measures required in connection with Russia's participation in international sanctions placed by the U.N. Security Council.¹⁷⁸ The government is also entitled to enact responding trade-restrictive measures (countermeasures) against a foreign state, if that state: (1) violates its international obligations to Russia; (2) takes measures disserving Russia's economic or political interests including bans access to its market for Russian nationals or otherwise discriminates them; (3) does not provide appropriate and effective defense to the interests of Russian national within its territory; or (4) does not take reasonable actions to prevent the illegal activity of the individuals or legal entities of the respective state within the territory of the Russian Federation.¹⁷⁹

The enactment of the Federal Law On Special Economic Measures in 2006 expanded the legal framework for the use of economic coercive measures. According to the Committee on Security of the State Duma, this bill had been an "opportune attempt to legislatively figure out and institutionalize the tools of economic impact on states that pursue unfriendly policies toward the Russian Federation and its citizens."¹⁸⁰ It gave the President the authority to

¹⁷⁶ Federal'nyi Zakon RF ob Osnovakh Gosudarstvennogo Regulirovaniia Vneshnetorgovoi Deiatel'nosti [Federal Law of the Russian Federation on Fundamental Principles of State Regulation of Foreign Trade Activity], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [RUSSIAN FEDERATION COLLECTION OF LEGISLATION] 2003, No. 50, Item 4850.

¹⁷⁷ Federal'nyi Zakon RF o Spetsial'nykh Ekonomicheskikh Merakh [Federal Law of the Russian Federation on Special Economic Measures], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [RUSSIAN FEDERATION COLLECTION OF LEGISLATION] 2007, No. 1, Item 44.

¹⁷⁸ Federal Law of the Russian Federation on Fundamental Principles of State Regulation of Foreign Trade Activity art. 37.

¹⁷⁹ *Id.* art. 40.

¹⁸⁰ Federal'noie Sobranie Rossiiskoi Federastii [Federal Assembly of the Russian Federation], Zakluchenie Komiteta Gosudarstvennoi Dumy po Bezopasnosti [Opinion of the Committee on Security of the State Duma], No. 98/3.2, Nov. 9, 2006, available at <http://asozd2.duma.gov.ru/main.nsf/%28SpravkaNew%29?OpenAgent&RN=353522-4&02>.

employ specific economic measures "in case of appearance of set of the circumstances requiring immediate reaction to international illegal act or unfriendly action of a foreign state, or its bodies and officials, that threatens to interests and security of the Russian Federation, and (or) entrenches on rights and freedoms of its citizens, as well as pursuant to the resolutions of the Security Council of the United Nations."¹⁸¹ The list of available economic measures includes: the suspension of the implementation of economic, technical and military-technical-cooperation programs; the prohibition or limitation of financial transactions or foreign economic operations; the termination or suspension of trade or other treaties in the area of economic relations; the change of custom duties; the imposition of a ban or the restriction on calls at Russian ports for vessels and the use of Russia's airspace; the restriction of tourist activity; the prohibition on international scientific cooperation.¹⁸²

In addition to these general legal frameworks, Russia's legislation gives the government discretion to utilize certain sanctions in case of other emergencies. For example, in order to implement the U.N. Security Council resolutions or to protect Russia's national interests, the President may prohibit or impose restrictions on the export of arms and ammunition to certain countries.¹⁸³ Russia's government also reserved a right to take measures ("permissible under contemporary international law and

¹⁸¹ Federal law On Special Economic Measures art. 1(2).

¹⁸² *Id.* art. 3(2).

¹⁸³ Federal'nyi Zakon RF o Voenno-tekhicheskom Sotrudnichestve Rossiiskoi Federatsii s Inostrannymi Gosudarstvami [Federal Law of the Russian Federation on Military-technical cooperation between the Russian Federation and Foreign States] art. 6(3), SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [RUSSIAN FEDERATION COLLECTION OF LEGISLATION] 1998, No. 30, Item 3610; Ukaz Prezidenta Rossiiskoi Federatsii o Poriadke Vvedeniia Embargo na Postavku Vooruzheniia i Voennoi Tekhniki, Okazanie Uslug Voenno-tekhicheskogo Kharaktera, a Takzhe na Postavku Syria, Materialov, Oborudovaniia i Peredachu Tekhnologii Voennogo i Dvoinogo Naznachenii Zarubezhnym Gosudarstvam, v Tom Chisle Uchastnikam SNG [Executive Order of the President of the Russian Federation on Procedure for Imposing an Embargo on Arms and Military Equipment Supplies, Military-Technical Services, and Supplies of Raw Materials and Equipment, and Transfers of Military and Dual-Use Technologies to Foreign States, Including CIS Members], SOBRANIE AKTOV PRESIDENTA I PRAVITELSTVA ROSSIISKOI FEDERATSII [SAPP] [COLLECTION OF ACTS OF THE PRESIDENT AND GOVERNMENT OF THE RUSSIAN FEDERATION] 1993, No. 8, Item 658.

used in international practice") in response to the gross violations of rights of its compatriots by foreign countries.¹⁸⁴

In 2012, the placement of the Magnitsky Act sanctions on Russian officials triggered a reaction of the Russian legislature. Russia's Federal Assembly enacted the Federal Law on Coercive Measures for Individuals Violating Fundamental Human Rights and Freedoms of the Citizens of the Russian Federation¹⁸⁵ (also known as the Dima Yakovlev Law), which, according to Russia's Prime Minister, "was definitely adopted under the influence of emotions created by the relevant decision of the U.S. Congress."¹⁸⁶ It authorized the Ministry of Foreign Affairs to designate U.S. citizens, who have been involved in human rights violations or certain unfriendly actions against Russian citizens. These U.S. individuals are subject to a visa ban; any transactions with their property or investments are prohibited and their assets within Russian territory must be frozen.¹⁸⁷ Russian "tit-for-tat" list of designated persons includes a number of U.S. officials responsible for "the legalization of torture" and "unlimited detention" including tortures in Guantánamo Bay, Cuba.¹⁸⁸ In addition, the Act bans the

¹⁸⁴ Postanovlenie Pravitel'stva Rossiiskoi Federatsii o Merakh po Podderzhke Sootechestvennikov za Rubezhom [Decree of the Government of the Russian Federation on Measures Supporting Compatriots Abroad], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [RUSSIAN FEDERATION COLLECTION OF LEGISLATION] 1994, No. 21, Item 2383.

¹⁸⁵ Federal'nyi Zakon RF o Merakh Vozdeistviia na Lits, Prichastnykh k Narusheniim Osnovopolagaiushchikh Prav i Svobod Cheloveka, Prav i Svobod Grazhdan Rossiiskoi Federtsii [Federal Law of the Russian Federation on Coercive Measures for Individuals Violating Fundamental Human Rights and Freedoms of the Citizens of the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [RUSSIAN FEDERATION COLLECTION OF LEGISLATION] 2012, No. 53, Item 7597.

¹⁸⁶ Interview with Dmitry Medvedev, the Prime Minister of the Russian Federation, CNN (Jan. 27, 2013), available at <http://government.ru/en/news/160/>.

¹⁸⁷ Federal Law of the Russian Federation on Coercive Measures for Individuals Violating Fundamental Human Rights and Freedoms of the Citizens of the Russian Federation art. 1-2.

¹⁸⁸ See Ellen Barry, *Russia Bars 18 Americans After Sanctions by U.S.*, N.Y. TIMES, Apr. 13, 2013, http://www.nytimes.com/2013/04/14/world/europe/russia-bars-18-americans-in-tit-for-tat-on-rights.html?_r=0. Therefore, Russia had responded with counter allegation about the use of torture by the C.I.A., which the United States officially affirmed about a year and a half later. See generally Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency's Detention and Interrogation Program (declassified and released in Dec. 2014), available at <http://www.intelligence.senate.gov/study2014/sscistudy1.pdf>.

adoption of Russian orphans by American citizens,¹⁸⁹ and prohibits the activity of political non-profit organizations funded by the U.S. nationals and threatening to Russia's interests.¹⁹⁰

As this section shows, the Russian Federation has a broad range of regulations and legal frameworks to adopt sanctions regimes against other states and their nationals. As discussed below, with some exceptions today, Russia's government still hesitates to invoke its economic sanctions legislation to justify the trade restrictions it places on Russia's neighboring states, pointing instead to non-conformity with Russian sanitary and epidemiological or technical standards.

4.3. *Russia's Trade Wars With Neighboring Countries: Trade Embargos as a Foreign Policy Instrument*

Compared to U.S. experience with the imposition of unilateral economic sanctions in response to any kind of foreign policy or security concerns, a few episodes of Soviet economic sanctions were aimed at its neighbors and other members of Communist block to pull rebellious regimes back to Moscow's orbit. According to Hufbauer and Schott's case study, those Soviet Union's attempts were almost always unsuccessful.¹⁹¹

The collapse of the Soviet Union in 1991 did not lead to the termination of most strong economic ties amongst Soviet-successor states, even though new boundaries appeared between the producers and consumers of this former single market. Given that now, for many new post-Soviet states – especially for the members of the Commonwealth of Independent States (CIS), which use trade

However, similar to the Magnitsky case, commentators criticized U.S. reluctance to punish officials responsible for those human rights violations. See The Office of the United Nations High Commissioner for Human Rights, "If the US tortures, why can't we do it?" – UN expert says moral high ground must be recovered (Dec. 11, 2014), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15406&LangID=E>.

¹⁸⁹ Federal Law of the Russian Federation on Coercive Measures for Individuals Violating Fundamental Human Rights and Freedoms of the Citizens of the Russian Federation art. 4.

¹⁹⁰ *Id.* art. 3.

¹⁹¹ The only mentioned exception was the successful economic measures of 1958 (so-called "Nightfrost Crisis") taken by the U.S.S.R. against Finland. See HUFBAUER ET AL., *supra* note 71, at 14.

preferences within the CIS free trade area – Russia is still the most important export market for their goods, modern Russian political elite often yield to the temptation of accessing Russia’s emerging consumer market as a non-forcible instrument to achieve their foreign policy objectives. In the 1990s, Russia utilized economic coercion to protect political and economic rights of ethnic Russian minorities in the post-Soviet countries six times.¹⁹² In the 2000s-2010s Russia more aggressively imposed trade embargo on the states of its so-called “near abroad” (“blizhnee zarubezh’e”) if they had somehow challenged the role of Russia as the main political player of the region.¹⁹³

Some commentators point out that, Russia, unlike the United States, has never deployed economic sanctions against other states without the resolution of the U.N. Security Council¹⁹⁴ to achieve its relatively modest political goals. Instead, Russia confines itself to the imposition of selective import restrictions on the grounds of public-health or epidemiological concerns, or even technical problems in customs processing. Intending to maximize economic costs for targeted states, Russia’s government chooses their sensitive industries with deep dependency on Russia’s consumer market to ban imports of certain goods (mostly food and agricultural produce). As a consequence, “quiet diplomacy” almost always prevails in such trade conflicts, and, in lieu of the Russian Ministry of Foreign Affairs, the central role in Russia’s public relations is played by such non-traditional for international affairs governmental authorities as: Federal Consumer Protection Service (Rospotrebnadzor), Federal Veterinary and Phytosanitary Control Service (Rosselkhoz nadzor), and, sometimes, Federal Customs Service (FTS Rossii).

The only exception was economic sanctions related to the 2008 Russia-Georgia military conflict. In August 2008, for the first time

¹⁹² *Id.* at 131.

¹⁹³ See Will Englund & Kathy Lally, *Despite Ukraine triumph, Russia's relations with its neighbors are under strain*, THE WASHINGTON POST, Nov. 28, 2013, http://www.washingtonpost.com/world/europe/despite-ukraine-triumph-russias-relations-with-its-neighbors-are-under-strain/2013/11/28/337a834c-576e-11e3-bdbf-097ab2a3dc2b_story.html (discussing a practice of the use of trade restrictions to restore Russia’s influence in the former Soviet space).

¹⁹⁴ The Law Library of Congress, Global Legal Research Center, *Russian Federation: Legal Aspects of War in Georgia*, at 13 (Sept. 2008), available at <http://www.loc.gov/law/help/legal-aspects-of-war/russia-legal-aspects-of-war.pdf>.

ever, Russia's President mentioned Russia's right to utilize economic sanctions, as the last extreme measure in response to an aggressive act of a foreign state.¹⁹⁵ On January 16, 2009, based on the Russian Federal law on Special Economic Measures, President Medvedev issued Executive Order No. 64s, imposing an arms embargo on Georgia.¹⁹⁶ However, while officially this Executive Order prohibited all (non-existent) Russian deliveries of weapon, military and dual-use equipment, and technologies to the potential conflict zone, its main purpose was to use those sanctions as a strong signal to other countries to warn them against supplying arms to Georgian forces.¹⁹⁷

Table 2 below summarizes some of the most notorious sanction episodes between 2000 and 2014 and shows the pursued goals and results of their deployment.

Table 2. Selected Russia's Sanction Episodes (2000-2014)

| Targeted State | Years | Background and Resolution |
|--------------------------------------|-------|--|
| Abkhazia (a non-recognized state) | 2004 | <u>Background and Objectives:</u> On December 2, 2004, following an announcement that the first round of the presidential election was won by opposition candidate Sergei Bagapsh, Russia stopped train service between Russia and Abkhazia, and threatened to close the border entirely. In addition, |

¹⁹⁵ Dmitry Medvedev, President of the Russian Federation, *Interview to Russian TV-channels* (Aug. 31, 2008, 19:00) (Russ.), <http://www.kremlin.ru/news/1276>.

¹⁹⁶ Ukaz Prezidenta Rossiiskoi Federatsii o Merakh po Zapreshcheniiu Postavok Gruzii Produktsii Voennogo i Dvojnogo Naznacheniiia [Executive Order of the President of the Russian Federation on Measures to Prohibit Supplies to Georgia of Military and Dual-use Production], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [RUSSIAN FEDERATION COLLECTION OF LEGISLATION] 2009, No. 3, Item 365.

¹⁹⁷ See Helena Bedwell, *Medvedev Calls for Sanctions Against Countries That Arm Georgia*, BLOOMBERG (Jan. 19, 2009 10:27 EST), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aGvmcqiv_1eQ (last visited Feb. 17, 2015) ("The order seemed to be directed primarily against Ukraine, which Russia has accused of delivering arms to Georgia before the war over the separatist region of South Ossetia.").

| | | |
|---------|------------------------------|--|
| | | <p>Russia prohibited the import of tangerines and persimmons.</p> <p><u>Resolution:</u> On December 6, 2014, Abkhazia's two key rival candidates reached an agreement, brokered by Russia, to resolve their dispute and hold a new election. Several days later, all restrictions were lifted.</p> |
| Moldova | 2005 - 2009 | <p><u>Background and Objectives:</u> In September 2005, following rising political tensions between Russia and Moldova, FTS Rossii suspended (for "technical reasons") the issue of tax labels for wine producers from Moldova. In March 2006, Rospotrebnadzor prohibited the import of Moldovan wine.</p> <p><u>Resolution:</u> In 2007, the Presidents of Russia and Moldova agreed to scrap the ban on wine. In 2009, Russia lifted the embargo and offered a \$0.5 billion credit line to Moldova.</p> |
| Poland | 2005 - 2007 | <p><u>Background and Objectives:</u> In November 2005, Russia prohibited meat and vegetable exports from Poland, citing poor standards in re-export certification. Russian experts alleged that this ban was a response to the "unfriendly" policies of the Polish government. Further, Poland blocked EU-Russia negotiations on a new wide-ranging partnership agreement, insisting that Moscow first lift the ban.</p> <p><u>Resolution:</u> In 2007, following two-year negotiations, Russia's government lifted the import ban on Polish meat.</p> |
| Georgia | 2006 - present time | <p><u>Background and Objectives:</u> In 2006, following the so-called Rose Revolution Russia imposed an import ban on Georgia's key agricultural exports (wine,</p> |

water, and fruits). Russia's objective was to secure Georgia's recognition of independence for South Ossetia and Abkhazia. In response, Georgia announced it would block Russia's WTO accession until sanctions were lifted. Russia halted all transport to and from Georgia, imposed an aviation and postal blockade, deported more than 1,000 illegal immigrants, and increased the price of oil exported to Georgia. Following the August 2008 military conflict, Russia recognized the two regions as independent and broke off diplomatic ties with Georgia.

Resolution: In 2010, Russia and Georgia reopened air traffic between the two countries for the first time since the 2008 war; Georgia withdrew its objection to Russia's membership in the WTO. In 2013, Russia lifted its embargo for wine, mineral water and some fruits and vegetables. Although the embargo against some agricultural exports remains in place, in January 2015 Russia and Georgia agreed that restrictions on Georgian agricultural products would be eliminated.

Ukraine

2006

Background and Objectives: In January 2006, Russia banned Ukrainian meat and milk imports, citing violations of veterinary standards. Ukraine's officials accused Russia of the imposition of politically motivated embargo in retaliation for Ukraine's attempt to seize lighthouses on the Crimean peninsula that were used by Russia's Black Sea Navy. Another alleged reason of the trade war was that it had been Russia's additional

- leverage in bilateral negotiations over gas prices for 2006.
- Resolution: Later that year, Rosselkhoznadzor permitted a number of Ukraine producer to import their meat and milk products.
- Latvia 2006 Background and Objectives: In October 2006, Rosselkhoznadzor announced that it
- 2007 banned canned fish imports from Latvian plants, because of a high concentration of benzopyrene in their products. "This could be a coincidence, but [almost simultaneously] Russia and Latvia settled their territorial dispute over Pskov Oblast's Pytalovskii Region (the [border] treaty was signed in March 2007)."
Resolution: In 2007, Russia lifted the restrictions on Latvian canned fish.
- Belarus 2009 Background and Objectives: In June 2006, Rospotrebnadzor prohibited the import of most categories of dairy products from Belarus, citing noncompliance with new Russia's technical standards. Alleged reasons included the 2009 Russia-Belarus gas negotiations, and Russia's intention to participate in the privatization of Belarusian large food producers. The President of Belarus also accused Moscow of blackmailing him to make Belarus recognize the independence of Abkhazia and South Ossetia.
Resolution: In August 2009, Russia and Belarus announced that they resolved a crisis, and agreed to lift a ban Belarus' milk export.

- Ukraine 2012 Background and Objectives: In February 2012, Rospontebnadzor announced that it prohibited Ukrainian cheese imports, accusing Ukrainian producers of using excessive quantities of palm oil, a cheap substitute for milk. Ukraine denied those accusations, claiming that Russia's ban was politically motivated and caused by Ukraine's refusal to join a Russia-led Customs Union.
Resolution: Following the two-month ban, Russia agreed to open its market for Ukrainian cheese.
- Ukraine 2013 - present time Background and Objectives: In July 2013, Rospontebnadzor imposed a ban on imports of Ukrainian confectionary producer Roshen, citing bad quality and the violations of labeling requirements. Further, FTS Rossii enhanced border controls for imports from Ukraine, and a certification authority suspended certificates of conformity for Ukrainian railcars. In 2014, Russia also imposed a ban on Ukrainian poultry meat, cheeses, potatoes, dairy, and alcohol products. Despite the economic and political pressure from Russia, on 21 March 2014, Ukraine signed the EU-Ukraine Association Agreement. In September 2014, Russia's government decided to permit the revocation of tariff preferences for Ukraine under the CIS Free Trade Agreement.
Resolution: The problem is still not resolved.

| | | |
|-----------|------------------------------|--|
| Lithuania | 2013 - 2014 | <p><u>Background and Objectives:</u> In October 2013, Rospotrebnadzor imposed an import ban on all dairy products from Lithuania, citing numerous violations of Russia's sanitary regulations. The alleged reason of this import ban was Lithuania's role in supporting the development of the EU Eastern Partnership Program to enter into the association agreement with Ukraine, Moldova and Georgia. In response, Lithuania threatened to block Russia's road and rail access to the Russian exclave Kaliningrad, which shares a border with Lithuania.</p> <p><u>Resolution:</u> In January 2014, Rospotrebnadzor lifted import restrictions from some dairy products.</p> |
| Moldova | 2013 - present time | <p><u>Background and Objectives:</u> In September 2013, Rospotrebnadzor prohibited wine imports from Moldova, accusing Moldavian producers of the violations of quality standards, and in April 2014 blocked the supplies of processed pork meat products. On June 27, 2014, Moldova signed the EU-Moldova Association Agreement. Following that, Russia blocked imports of canned vegetables and fruits citing non-compliance with Russia quality and sanitary requirements. In July 2014, Russia's government adopted the Decree abolishing preferred custom duties for Moldavian goods under CIS Free Trade Agreement.</p> <p><u>Resolution:</u> The problem is still not resolved.</p> |

One might argue that a highly suspicious chain of "coincidences," or obvious political benefits Russia got from the imposition of import restrictions on neighboring countries, is not

itself sufficient to allege any political motivation behind the actions of Russia's controlling authorities. Whether the highlighted cases were the uses of tacit economic coercion measures or of Russia's invocation to public health or epidemiological concerns caused only by "true" importers' violations, is not known. What is known is, from Russian government's perspective, its alleged strategy to camouflage the use of trade restrictions as a political weapon looks very reasonable. The potential advantage it expects from this strategy is multifaceted. First, tacit economic sanctions are considered a more effective "stick" to punish dissident allies or neighbors than U.S.-style official sanctions. While such hopes are sometimes disappointed, the case study shows that tacit sanctions can be speedy, informal, and confidential.

Second, by virtue of such short-term import measures, Russia can combine its foreign policy goals with plain trade protectionism to promote the development of domestic production. If a targeted state brings the WTO case, Russia can invoke the hardly contestable general exemption on measures that are "necessary to protect human, animal or plant life or health" permitted under GATT Article XX(b).

Third, Russia's officials may also hope that the import restrictions Russia imposes on its neighboring countries to keep them within its political orbit do not affect Russia's diplomatic efforts to challenge the position of Western states on the legality of unilateral economic coercion under international law. However, as explained below, this hope may be illusive.

4.4. The Ukraine-related Sanctions as a New-Old Challenge

The U.S.-E.U. cooperative efforts to increase economic pressure on Russia in response to its actions in Ukraine imposed significant costs on key sectors of Russian economy. According to the recent CRS report, economic sanctions against Russia are assessed as an important factor that contributes to the significant deterioration of Russia's economy, marked by capital flight, depreciation of the ruble, rising inflation, weaker growth prospects, and budgetary pressures.¹⁹⁸ For instance, the growth forecast for Russia's economic

¹⁹⁸ See REBECCA M. NELSON, CONG. RESEARCH SERV., R43895, U.S. SANCTIONS ON RUSSIA: ECONOMIC IMPLICATIONS 14 (2015), available at <http://www.fas.org/sgp/>

growth in 2015 of the European Bank for Reconstruction and Development is minus 4.8 percent.¹⁹⁹ The International Monetary Fund in January 2015 lowered its forecast for 2015 from growing by 0.5 percent to contracting by 3.0 percent.²⁰⁰ Nevertheless, the sanctions confrontation results in increased domestic support for Russia's foreign policy. According to a sociological survey conducted in January 2015 by the Levada Center, an independent polling agency, found that 68 percent of Russians said Russia should "continue its policies despite the sanctions."²⁰¹

However, unlike previous conflict situations between Russia and the West, to confirm its current ambitions to be a regional superpower today, Russia has to find something more than merely symbolical or symmetrical responses to the West's collective measures.²⁰² In view of the obvious ineffectiveness of equivalent, reciprocal responses to hostile U.S. moves, Russia's "responses should be [not only] asymmetrical and 'creative,' but also . . . systemic and strategic."²⁰³ Given the long history of sanctions deployed against the Soviet Union, and other notorious examples of U.S. sanctions campaigns against dissenting states, the Russian elite

crs/row/R43895.pdf. Nelson also highlighted a difficulty to assess the impact of those sanctions separate from other factors, particularly low oil prices. *Id.* Some experts also believe that although economic sanctions affected Russia's ability to raise capital, ironically, the consequences of them often hurt Western companies more than Russian exporters. See Stephen Bierman, *Strange World of Russian Sanctions Levies Uneven Penalties*, BLOOMBERG (Feb. 17, 2015, 7:01 PM EST), <http://www.bloomberg.com/news/articles/2015-02-18/the-strange-world-of-russian-sanctions-levies-uneven-penalties>.

¹⁹⁹ Anthony Williams, *Oil-driven Russia Downturn Adds to Weakness in EBRD Economies* (Jan. 19, 2015), <http://www.ebrd.com/news/2015/oil-driven-russia-downturn-adds-to-weakness-in-ebrd-economies.html>.

²⁰⁰ IMF, *World Economic Outlook (WEO) Update, Cross Currents*, Jan. 2015, available at <http://www.imf.org/external/pubs/ft/weo/2015/update/01/pdf/0115.pdf>.

²⁰¹ Press Release, Levada Center, *Sanctions* (Feb. 02, 2015), <http://www.levada.ru/eng/sanctions-0>.

²⁰² See Fyodor Lukyanov, *Russia's Asymmetrical Response: Global Aikido* in COSTS OF A NEW COLD WAR: THE U.S.-RUSSIA CONFRONTATION OVER UKRAINE 9, 10-12 (Paul J. Saunders ed., 2014), available at <http://ukrainewatch.cftni.org/wp-content/uploads/2014/10/Costs-of-a-New-Cold-War.pdf>. As Lukyanov wittily points out, key principles of oriental martial arts (i.e., "the ability to first avoid a heavier opponent's overpowering attacks and to then turn the opponent's weight advantage against him by using momentum and inertia") would prevail in this confrontation. *Id.*

²⁰³ *Id.*

believes that current sanctions regime will continue for many years, and considers them rather as retributive measures purported to change the political regime in Russia.²⁰⁴

The most predictable consequence of the sanctions regime is that Russia is seeking out alternative economic partners to squeeze out European and U.S. companies from the Russian market.²⁰⁵ Yurgens observes the following: "Russia is too big to isolate completely, however, and partial isolation is likely to have unintended consequences that contradict U.S. and European intent in imposing sanctions."²⁰⁶ For instance, in 2014, despite the broadly announced international isolation of Russia, Russia and China signed more than 40 deals including a currency swap. This swap is a large \$400-billion contract to build the pipeline to supply natural gas to China from gas fields in Eastern Siberia,²⁰⁷ and the smaller contract connecting Asian customers with Gazprom's gas deposits in Eastern Siberia.²⁰⁸ The latter, in theory, may allow Russia to divert energy supplies, currently headed to Europe, to China.²⁰⁹ In the same manner, Russia

²⁰⁴ For instance, Russian Foreign Minister observed the following:

Formerly, . . . our Western partners, when discussing the DPRK, Iran or other states, said that it was necessary to formulate the restrictions in such a way as to keep within humanitarian limits and not to cause damage to the social sphere and the economy, and to selectively target only the elite. Today everything is the other way around: Western leaders are publicly declaring that the sanctions should destroy the economy and trigger popular protests. So, as regards the conceptual approach to the use of coercive measures the West unequivocally demonstrates that it does not merely seek to change Russian policy (which in itself is illusory), but it seeks to change the regime - and practically nobody denies this.

Sergey Lavrov, the Foreign Minister of the Russian Federation, *Remarks at the XXII Assembly of the Council on Foreign and Defense Policy* (22 Nov. 22, 2014), available at http://www.mid.ru/brp_4.nsf/0/24454A08D48F695EC3257D9A004BA32E.

²⁰⁵ See NELSON, *supra* note 8, at 13 (describing Russia's attempts to find new economic partners in Latin America and Asia).

²⁰⁶ Igor Yurgens, *Targeted Sanctions with an Unclear Target* in COSTS OF A NEW COLD WAR: THE U.S.-RUSSIA CONFRONTATION OVER UKRAINE 39, 49 (Paul J. Saunders ed., 2014), available at <http://ukrainewatch.cftni.org/wp-content/uploads/2014/10/Costs-of-a-New-Cold-War.pdf>.

²⁰⁷ See Peter Baker, *As Russia Draws Closer to China, U.S. Faces a New Challenge*, N.Y. TIMES, Nov. 8, 2014, <http://www.nytimes.com/2014/11/09/world/vladimir-putin-xi-jinping-form-closer-ties.html> (discussing Russia's efforts to deepen economic cooperation with China).

²⁰⁸ Andrew E. Kramer, *Gazprom Makes a New Gas Deal With China*, N.Y. TIMES, Nov. 10, 2014, <http://www.nytimes.com/2014/11/11/business/international/gazprom-makes-a-new-gas-deal-with-china.html>.

²⁰⁹ *Id.*

expanded economic cooperation with Argentina, Brazil, Egypt, India, Turkey and some other countries. In light of these developments, it seems that Russia has good chances to minimize the negative impact of Western sanctions on its economy.

Experts remark that present conflict differs from Cold War-era tensions because of the absence of an ideological basis for the conflict. Therefore, there are two other options to impose political and strategic costs on the United States that are more preferable for Russia than merely a classical geopolitical rivalry.²¹⁰ First, Russia should terminate all existing, and avoid any further assistance to the United States.²¹¹ Pursuant to this strategy, Russia can cease to cooperate with the United States on a wide range of issues, including NATO's operation in Afghanistan, Iran's nuclear program, Syria's civil war, the conflict between North and South Korea, and a rise of the terroristic Islamic State of Iraq and the Levant (ISIS). For instance, current tensions negatively affected U.S.-Russia nuclear security collaboration.²¹² In response to NASA's announcement of the suspension of most contacts with Russian space agency,²¹³ Russia rejected the U.S. proposal to extend cooperation on the International Space Station and restricted exports of its rocket engines to the United States.²¹⁴

The second option is "to take advantage of America's setbacks in global governance and of the shortcomings in the global economic

²¹⁰ *Supra* note 2, at 16-17.

²¹¹ *Id.*

²¹² See, e.g., Michael R. Gordon, *Russia to Curtail Nuclear Security Efforts With U.S.*, INT'L N.Y. TIMES, Nov. 13, 2014, http://www.nytimes.com/2014/11/14/world/europe/russia-to-curtail-nuclear-security-efforts-with-us-officials-say.html?_r=0; Peter Baker, *Russia Plans to Boycott 2016 Nuclear Meeting Hosted by Obama*, INT'L N.Y. TIMES, Nov. 6, 2014, <http://www.nytimes.com/2014/11/06/world/europe/russia-plans-to-boycott-2016-nuclear-meeting-hosted-by-obama.html>; Matthew Bunn, *The Real Nuclear Nightmare When It Comes to U.S.-Russian Ties, The National Interest*, Jan. 24, 2015, <http://nationalinterest.org/feature/the-real-nuclear-nightmare-when-it-comes-us-russian-ties-12102>.

²¹³ See Kenneth Chang & Peter Baker, *NASA Breaks Most Contact With Russia*, N.Y. TIMES, Apr. 2, 2014, <http://www.nytimes.com/2014/04/03/world/europe/nasa-breaks-most-contact-with-russia.html>.

²¹⁴ See Matthew Bodner, *Russia Retaliates Against U.S. Space Program in Response to Sanctions*, THE MOSCOW TIMES, May 13, 2014, <http://www.themoscowtimes.com/business/article/russia-retaliates-against-us-space-program-in-response-to-sanctions/500079.html>.

architecture.”²¹⁵ As Lukyanov stresses, the U.S. threat to use global economy leverages for political purposes (e.g., to exclude Russian banks from VISA and MasterCard payment systems, to limit Russia’s access to foreign software, to shut Russia out of the SWIFT system of international banking payments) encourages Russia to undermine the U.S.-led global economic architecture.²¹⁶ For example, Russia enhanced its coordination with China to develop their integration projects (Russia’s Eurasian Economic Union and China’s Silk Road Economic Belt) in response to recent U.S. efforts to promote new U.S.-centric economic zones (the Transatlantic Trade and Investment Partnership and the Trans-Pacific Partnership), and agreed with other the BRICS states to use national payment systems in relations between the BRICS members and to establish the BRICS development bank.²¹⁷ Furthermore, to minimize Russia’s economic dependence to the West, Sergey Glazyev, a Russian presidential advisor on economic matters, proposed the following steps aimed at the protection of the national economy from economic sanctions:

- move government assets and accounts denominated in U.S. dollars and Euros from NATO countries to neutral nations;
- sell NATO nations’ bonds;
- return state-owned property to Russia;
- stop exports of precious metals, rare earths, and other strategic metals and minerals;
- execute currency and credit swaps with China to finance critical imports;
- build a SWIFT-like domestic system for interbank information sharing within the CIS, along with a domestic payment system;
- work to introduce a capital flight tax;
- gradually transition to domestic currency settlements vis-à-vis trade partners;

²¹⁵ See *supra* note 2, at 18.

²¹⁶ *Id.*, at 18-23.

²¹⁷ *Id.*

- radically reduce the share of U.S. dollar instruments and debt of other pro-sanctions nations as a percentage of Russia's foreign currency reserves;
- replace U.S. dollar and Euro-denominated loans of state-owned corporations and state-owned banks with ruble-denominated loans; and
- transfer offshore-registered titles to strategic enterprises, and transfer mineral rights, real estate, and other property back to domestic jurisdiction.²¹⁸

In addition to political measures taken at the international level, President Putin signed the Executive Order No. 560 on August 6, 2014,²¹⁹ placing a one-year import embargo on certain agricultural products and food originating from the states that deployed sanctions against Russia's legal entities and individuals. Given that Russia was the second most important destination for European agricultural products, these countermeasures were designed to retaliate increased costs of politic and economic confrontation for the EU states,²²⁰ and, consequently, to deter them from expanding sanctions regime against Russia.

Russia has not implemented other "asymmetrical" retaliatory measures proposed by domestic politicians that Russia might use to hit sender states back including, for instance: to ban Western

²¹⁸ *Supra* note 6 at 46-47.

²¹⁹ Ukaz Prezidenta Rossiiskoi Federatsii o Primenenii Otdel'nykh Spetsial'nykh Ekonomicheskikh Mer v Tseliakh Obespecheniia Bezopasnosti Rossiiskoi Federatsii [Executive Order of the President of the Russian Federation on the Use of Certain Special Economic Measures for the Purposes of National Security Assurance of the Russian Federation] SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [RUSSIAN FEDERATION COLLECTION OF LEGISLATION] 2014, No. 32, Item 4470.

²²⁰ For an assessment of its potential impact on the European economy, see SUSANNE KRAATZ, EUROPEAN PARLIAMENT, BRIEFING, PE 536.291, THE RUSSIAN EMBARGO: IMPACT ON THE ECONOMIC AND EMPLOYMENT SITUATION IN THE EU (2014), available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/536291/IPOL_BRI\(2014\)536291_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2014/536291/IPOL_BRI(2014)536291_EN.pdf).

airlines from flying over its territory,²²¹ to ban gold exportation,²²² or to expropriate the assets of U.S. and E.U. companies.²²³ Meanwhile, at least two anti-sanctions bills are currently under consideration in Russia's State Duma. On January 20, 2015, the State Duma passed in its first reading Bill No. 662902-6²²⁴ on the recognition as "undesired" of a foreign and international organization if it poses a threat to Russia's constitutional system or national security. The Bill provides the freezing of assets of such undesired entities, and the prohibition of activity of their offices, or any distribution of their information materials within the territory of the Russian Federation.²²⁵

The second is Bill No. 607554-6²²⁶ (so-called "Rotenberg Law"), providing financial compensation to Russian companies and individuals suffering from foreign economic sanctions by virtue of the expropriation of foreign-owned assets in Russia.²²⁷ Despite wide

²²¹ See Elizabeth Piper, *Russia Hints at Flight Ban in Response to New Sanctions*, REUTERS (Sep. 8, 2014, 11:55am EDT), <http://www.reuters.com/article/2014/09/08/us-ukraine-crisis-medvedev-idUSKBN0H309G20140908> (last visited Feb. 17, 2015) (citing a statement of Russia's Prime Minister Dmitry Medvedev regarding asymmetrical responses to Western sanctions available to Russian government).

²²² See Yuliya Fedorinova & Anna Andrianova, *Russian Central Bank Sees No Need for Proposed Gold-Export Ban*, BLOOMBERG (Nov. 18, 2014, 7:54 AM EST), <http://www.bloomberg.com/news/articles/2014-11-18/russian-central-bank-sees-no-need-for-proposed-gold-export-ban> (last visited Feb. 17, 2015) (discussing a proposal of State Duma deputies to impose the Gold-Export Ban).

²²³ See *Russian Counter Sanctions: Currently No Draft Law for Expropriation of Foreign Companies Assets* (Dec. 1, 2014), <http://www.noerr.com/en/press-publications/News/russian-counter-sanctions-currently-no-draft-law-for-expropriation-of-foreign-companies-assets.aspx> (last visited Feb. 17, 2015) (analyzing three bills announced as a response to the economic sanctions imposed by the United States and the EU against Russia).

²²⁴ Bill No. 662902-6 and accompanying materials are available at <http://asozd2.duma.gov.ru/main.nsf/%28SpravkaNew%29?OpenAgent&RN=662902-6&02> (last visited Feb. 17, 2015).

²²⁵ See Pavel Koshkin, *The Kremlin Might Create a List of 'Undesired' Foreign Organizations*, RUSSIA DIRECT (Jan. 21, 2015), <http://www.russia-direct.org/analysis/kremlin-might-create-list-undesired-foreign-organizations> (last visited Feb. 17, 2015) (discussing the bill on the "undesired" organizations).

²²⁶ Bill No. 607554-6 and accompanying materials available at <http://asozd2.duma.gov.ru/main.nsf/%28Spravka%29?OpenAgent&RN=607554-6>.

²²⁷ See Andrew E. Kramer, *Russia Seeks Sanctions Tit for Tat*, N.Y. TIMES, Oct. 8, 2014, http://www.nytimes.com/2014/10/09/business/russian-parliament-moves-closer-to-adopting-law-on-compensation-for-sanctions.html?_r=0.

criticism from Russian expert society, the Rotenberg Law was preliminary adopted by the State Duma in October 2014, and now is subject to the second and third readings. It is likely that a general purpose of passing this bill is to pose a threat to the assets of U.S. transnational corporations (e.g., Chevron, General Electric, Caterpillar, Ford Motor, General Motors, PepsiCo, Mars, and Kraft Foods) in Russia, and, thereby, to draw U.S.-E.U. attention to what other leverages Russia has.

With respect to Russia's legal response on the international level, Russia stands on its traditional position that the economic sanctions campaign launched by Western states violates international law, including sender states' obligations under the WTO.²²⁸ Russia's Prime Minister Dmitry Medvedev also announced that Russia would challenge the U.S. and European economic sanctions in the WTO.²²⁹ At the same time, a number of sanctioned companies and individuals brought actions against the European Council in the European Court of Justice to contest the imposition of the Ukraine-related sanctions by the European Union.²³⁰

4.5. Implications for Russia's Foreign Policy

Although one might argue that Russia's use of economic sanctions without the authorization of the U.N. Security Council is a violation of international law -- as, indeed, it is; when one

²²⁸ See, e.g., Interview with Sergey Lavrov, the Foreign Minister of the Russian Federation, in *Kommersant* (Dec. 25, 2014) (transcript available at http://www.mid.ru/bdcomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/87b3f4554ff2b27dc3257dbd004aa8ee!OpenDocument) ("the unilateral restrictions imposed by the United States, the European Union and some other countries is in clear violation of international norms (in a number of cases the WTO norms) and the declared conceptual approaches of our Western colleagues to international economic cooperation, i.e. respect of the market principles, fair competition, etc.").

²²⁹ See *Russia challenges U.S. at WTO over sanctions - PM Medvedev*, REUTERS (June 20, 2014 12:19 pm EDT), <http://www.reuters.com/article/2014/06/20/ukraine-crisis-russia-sanctions-idUSL6N0P13YG20140620> (discussing a statement of Russia's Prime Minister Dmitry Medvedev that Russia's filed a complaint with the WTO).

²³⁰ See Kathrin Hille & Christian Oliver, *Russia takes EU to court over Ukraine sanctions*, FINANCIAL TIMES (Oct. 16, 2014, 7:18 pm), <http://www.ft.com/intl/cms/s/0/8e460fe4-5547-11e4-b750-00144feab7de.html#axzz3S7G2fRsR> (describing some proceedings launched in the European Court of Justice by Russian companies to challenge EU sanctions).

considered Russia's actions from the point of view of the formation of a new international customary rule as embodied in regular U.N. General Assembly resolutions,²³¹ this prior argument appears to lose sight of the expansion of unilateral sanctions regimes in recent decades.

Alexander points to the general trend toward the acceptance by states practice of economic sanctions as a legitimate instrument of international coercion.²³² Similarly, Egle argues that "[t]he growth of sanctions activity in the twentieth century and the new implementation of sanctions by the U.S., United Kingdom, and EU, independently of the U.N., indicate a greater acceptance of sanctions in customary international law."²³³ Interpreting modern sanctions practice, Lowenfeld concludes that unilateral sanctions have become sufficiently common and tolerated as a tool of foreign relations, and, hence, "the suggestion that economic sanctions are unlawful unless approved by the Security Council . . . is obsolete."²³⁴

In my view, however, these arguments in favor of greater recognition of unilateral sanctions might be rebutted. Customary international law is a broadly recognized authority resulting from a general and consistent practice of states (objective element) followed by them from a sense of legal obligation (subjective element).²³⁵

²³¹ See Ted Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L. L. J. 457, 463-468 (1985) (describing a law-making process of international customary principles on the basis of positions adopted in U.N. organs). See also generally NOORA ARAJÄRVI, *THE CHANGING NATURE OF CUSTOMARY INTERNATIONAL LAW: METHODS OF INTERPRETING THE CONCEPT OF CUSTOM IN INTERNATIONAL CRIMINAL TRIBUNALS* 28-29 (2014) (arguing that the resolutions of international bodies may not only illustrate *opinio juris* itself, but also provide a "normative touchstone for future direction of state practice and *opinio juris*"); BRIAN D. LEPARD, *CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS* 208-217 (2010) (discussing the role of General Assembly resolution as evidence of *opinio juris*); HUGH THIRLWAY, *THE SOURCES OF INTERNATIONAL LAW* 79-81 (2014) (pointing to General Assembly resolution as the potential sources of *opinio juris*). But Brosche considers the resolutions of General Assembly regarding the prohibition of unilateral economic coercion as a development of customary law principles, and an instrument of interpretation of the U.N. Charter "in accordance with the corresponding will of the majority of states." See Brosche, *supra* note 78, at 23.

²³² ALEXANDER, *supra* note 104, at 63.

²³³ Egle, *supra* note 126, at 34.

²³⁴ Andreas F. Lowenfeld, *Unilateral Versus Collective Sanctions: An American's Perception*, in UNITED NATIONS SANCTIONS AND INTERNATIONAL LAW 95, 96 (Vera Gowlland-Debbas ed., 2001).

²³⁵ See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1986) (identifying customary international law as a source of international law); Military

Consequently, to prove the objective element proponents of sanctions one must show that the absolute majority of states use unilateral economic sanctions (not only a number of developed countries). To establish the second element, one must provide evidence that sender states formally expressed their belief in the legal nature of their actions. Even if we assume that both elements have been already met with reference to the existing unilateral sanction practice and statements of the United States and some other nations, in any way it would be very difficult to overrule the counter-argument concerning a binding character of the prohibition of the unilateral use of economic coercion. There is a negative practice of a majority of states abstaining from the application of unilateral economic sanctions, because they believe in the unlawfulness of such a behavior considering respective declarations and resolutions of the General Assembly as enough evidence of *opinio juris*.²³⁶ Admittedly, either a principle of customary international law exists, or a process of formation of customary international law by majority of states proceeds, regardless of expanding practice of several recalcitrant actors (persistent objectors) even as politically and economically powerful as the United States or European Union.

In addition, it is noteworthy that most modern sanctions regimes are imposed by sender states invoking political or ideological rather than legal arguments. As the International Court of Justice pointed out, even if a state justified political expediency of its actions against another state, it did not mean that those actions were legally justifiable.²³⁷

and Paramilitary Activities, *supra* note 77, at 97 (defining that customary international law consists of "practice and opinion juris of states"). It is also notable that most Russian authors also support views that a customary norm consists of those two elements. See Igor I. Lukashuk, *Customary Norms in Contemporary International Law* in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY* 487, 493-495 (Jerzy Makarczyk ed., 1996). Lukashuk, however, argues that a customary rule may be created by the *opinio juris* element alone, even in the absence of preceding state practice. *Id.*, at 506-508.

²³⁶ See, e.g., ARAJÄRVI, *supra* note 23, at 20-21 (arguing that the negative practice of states may fulfill the objective element of customary international law especially with regard to prohibiting rules); LEPARD, *supra* note 23, at 219-220 ("Key is whether abstentions from acting or protesting reflect a belief by states that a particular legal rule is desirable").

²³⁷ See *Military and Paramilitary Activities*, *supra* note 77, at 120-135 (discussing U.S. argumentation regarding alleged breaches by the Government of

On the other hand, Russia's practice of the application of tacit sanctions to trade relations with neighboring states, as described in Section 4.3 above, undermines the basis of Russian argumentation. From Russia's neighboring countries perspective, there is no significant difference between Russia and the United States because both of them look like "bully' nation[s] attempting to impose and enforce its own standards on weaker states with backgrounds perceived as aberrant or anomalous to [Russian or U.S.] interests."²³⁸ Even if the contemporary government of Russia finds short-term advantages in the active use of economic coercion measures against its "near abroad" states invoking the violations of sanitary, phytosanitary or technical standards, its long terms interests are likely to be best served by its voluntary strict conformity with Russia's traditional position of the illegality of unilateral economic sanctions.

The current sanctions campaign against Russia reinforces my argument, but previous practice of tacit trade sanctions may cause Russia a bad turn. Based on the principle *ex injuria jus non oritur*, it may not only preclude Russia's potential claims (if any) against sender states as inadmissible, but also overall negatively affect long-terms efforts of Russia and developing countries to attribute legal force to the prohibition of the unilateral use of economic coercion. Therefore, from a practical perspective, in current circumstances it seems more logical for Russia to proceed with its support for views on the illegality of unilateral economic sanctions, but change its approach to the use of restrictive trade measures for political purposes and, and deescalate existing trade tensions with neighboring states.

5. CONCLUSION

The "sanctions war" between the West and Russia, the worst crisis since the end of the Cold War, again raises the issue of whether the unilateral use of economic sanctions is permissible under international law. In contrast with the U.S. position that unilateral economic sanctions should be deemed as legitimate self-help acts

Nicaragua of its international commitments, inadequate domestic and external policy, etc.).

²³⁸ Egle, *supra* note 126, at 39.

and elements of U.S. economic statecraft, Russia follows in the Soviet Union's footsteps, blaming the United States and its allies for the violation of international law. However, while on political and diplomatic levels the United States and Russia demonstrate opposite views on this issue, the analysis of the contemporary sanction activity of both states shows a lot of surprising similarities. Despite the fact that Russia avoids to use U.S.-style explicit economic sanctions, the current practice of posing tacit trade restrictions on its neighboring states might undermine Russia's traditional arguments justifying the unlawful character of any unilateral sanctions, including the current anti-Russia sanctions campaign, and even lead to more recognition of unilateral sanctions as a part of international customary law.

We recognize that recent developments of U.S. sanction practice – the increased role of smart sanctions, deepened international cooperation and flexible approaches towards the revocability of coercive measures – theoretically may result in the more effective implementation of sanction regimes. From our point of view, however, similarly to the previous waves of unilateral sanctions against the Soviet Union, the current sanction campaign against Russia is ill fated, because Russia's economic status and global political influence make complete economic isolation impossible. Rather than resolve conflict situation through international dialogue, the sanctions lead to the escalation of the West-Russia conflict and, hence, further destabilization of the international system.

Unfortunately, political elites often forget that any economic sanction is a double-edged weapon designed to inflict economic suffering on other nations rather than to sue for peace, and the use of that dangerous weapon has to be limited by international law. It seems clear that governments and the international community must cooperate to ensure the evolution of the principles of international law concerning the permissible and impermissible economic coercion provided that political tensions should not affect international trade. Discussing a bilateral effect of economic sanctions, Andrea Ovans in her recent article in *Harvard Business Review* wrote:

Ever since the spectacular success of the Marshall Plan in using mutual trade pacts to end more than two millennia of war between France and Germany, business and

governments have put their faith in international trade as a stabilizing force That of course is the ultimate irony of embargoes – they’re a tactic aimed at avoiding a fight by not doing business together. Certainly a trade war is better than a nuclear war. But in resorting to a trade war, we give up the only tool that’s ever been known to put an enduring end to actual war.²³⁹

²³⁹ Andrea Ovans, *Embargoes Work – Just Not the Way We’d Hope*, HARV. BUS. REV., Aug. 16, 2014, <https://hbr.org/2014/08/embargoes-work-just-not-the-way-wed-hope>.