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## WHEN THE GREAT POWERS CLASH: REFORMING THE UNITED NATIONS TO BETTER SERVE A CHAOTIC WORLD

David F. Scheidel II \*

### INTRODUCTION

The current state of global affairs can best be described as an exercise in Chaos Theory; try to find the patterns in what seems like complete chaos, and even when you think you find a pattern be prepared for it to be completely wrong. This exercise is usually frustrating, even for those who have a wealth of informative resources, because being able to predict what any world government is going to do on any given day is analogous to trying to predict the weather. Occasionally on a predicted sunny day, Mother Nature simply does not cooperate and there is instead a torrential downpour.

This is a fair approximation of what occurred in March of 2014. The Russian Federation, in contravention of geopolitical norms and international law, invaded and then annexed a portion of Ukraine all the while the supposed guarantor of international peace and security, the United Nations Security Council, sat idly by while the Russian Federation went rogue.<sup>1</sup> While this characterization may not be entirely fair, it does have the ring of truth and is the main impetus for this note.

At the conclusion of this note there will be a proposal for a fairly comprehensive plan to reform the United Nations-more specifically the United Nations Security Council-to better deal with clashes between the Great Powers. Part I will explore the United Nations, the Ukraine Crisis and the breakdown of the Post-Cold War world order. Part II will briefly explore the history of United States economic actions against foreign countries. Part III will explore the economic sanctions imposed on the Russian Federation by the United States and the relevant authority of Congress, the President, and the United States Department of the Treasury to act. Part IV will explore the specifics of the United States economic sanctions themselves and their subsequent effect on both the economy of the Russian Federation and the global consequences. Part V will describe in detail the current United Nations structure and its subsequent failure to act. Part VI will propose United Nations reform having used the United States economic sanctions and the dysfunction of the United Nations as the foundation

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\* J.D. Candidate, Maurice A. Deane School of Law at Hofstra University, 2016. I would like to thank the staff of the *Journal of International Business & Law*, for giving me this opportunity and their excellent work in preparing this Note for publication. I would also like to thank my Mom and Dad for all your support and assistance during this process.

<sup>1</sup> Press Release, Security Council, *Ukraine, in Emergency Meeting, Calls on Security Council to Stop Military Intervention by Russian Federation*, U.N. Press Release SC/11302 (March 1, 2014), <http://www.un.org/News/Press/docs/2014/sc11302.doc.htm> [hereinafter *Security Council Press Release: Ukraine*]; Press Release, Security Council, *Security Council Fails to Adopt text Urging Member States Not to Recognize Planned 16 March Referendum in Ukraine's Crimea Region*, U.N. Press Release SC/11319 (March 15, 2014), <http://www.un.org/press/en/2014/sc11319.doc.htm> [hereinafter *Security Council Press Release*]; CBS/AP, *Russia Officially Annexes Crimea Away from Ukraine with Signature from Vladimir Putin*, CBS NEWS (Mar. 21, 2014, 8:13 AM), <http://www.cbsnews.com/news/russia-annexes-crimea-away-from-ukraine-with-signature-from-vladimir-putin/> [hereinafter *Russia Officially Annexes Crimea*].

for why the United Nations requires significant reform if it is to function in the capacity that its founders envisioned. Part VII will delve into the problems that arise when trying to get half the nations in the world to agree on anything. Part VIII concludes the note by summarizing the problem with the current United Nations situation and the proposal that would solve this problem.

## I. THE “UNTIED” NATIONS

The United Nations was formed in the aftermath of World War II for the purpose of “maintain[ing] international peace and security...To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character and encouraging respect for human rights...To be a center for harmonizing the actions of nations in attainment of these common goals.”<sup>2</sup> These lofty and ambitious purposes form the backbone of an international organization that has abdicated its authority to the bare-knuckles geopolitical realities of the world. This abdication is the very product of the international system itself and allays any simple solution.<sup>3</sup>

One single sentence in the UN Charter makes it abundantly clear why the United Nations was in for difficulties from the start; “The [United Nations] Organization is based on the principle of the *sovereign equality* of all its Members” (emphasis added).<sup>4</sup> Sovereign equality’s definition stems from the Peace of Westphalia that ended the Thirty Years’ War in 1648,<sup>5</sup> through which Nation-States became the fulcrum on which all international relations are based.<sup>6</sup> This inherent authority of Nation-States to act as they see fit is still very much in practice today. The ability of an organization that now has 193 members,<sup>7</sup> with organizational bodies that have diametrically opposed membership - i.e. the UN Security Council - to act in concert is a challenge at best and a total pipe-dream at worst.

The crisis that erupted in Ukraine after the ouster of President Viktor F. Yanukovich in late February 2014<sup>8</sup> and the subsequent Russian Federation annexation of Crimea<sup>9</sup> brings into stark contrast the dynamics of geopolitics and the abdication of the “Untied” Nations. A

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<sup>2</sup> U.N. Charter art. 1.

<sup>3</sup> The simplest solution one could imagine probably involves an alien invasion and/or the potential for the extinction of humanity.

<sup>4</sup> U.N. Charter art. 2, para. 1.

<sup>5</sup> Dan Philpott, *Sovereignty*, Stanford Encyclopedia of Philosophy (last updated Jun, 8, 2010), <http://plato.stanford.edu/entries/sovereignty/#2>.

<sup>6</sup> Miyoshi Masahiro, *Sovereignty and International Law* 1-10, 2 (April 1, 2009) (unpublished manuscript) (found at [https://www.dur.ac.uk/ibru/conferences/sos/programme/1\\_april/track1\\_session1/#miyoshi](https://www.dur.ac.uk/ibru/conferences/sos/programme/1_april/track1_session1/#miyoshi)). The Peace of Westphalia ushered in the beginning of the era of the modern nation-state, a political entity that would be further defined centuries later through the adoption of the Montevideo Convention on Rights and Duties of States of 1933. The definition of a Nation-State is “(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States.” Convention on the Rights and Duties of States, art. 1, Dec. 26, 1933, 3 Bevans 145, 147 (1968).

<sup>7</sup> *Growth in United Nations Membership, 1945-Present*, UNITED NATIONS, <http://www.un.org/en/members/growth.shtml> (last visited Jan. 20, 2015).

<sup>8</sup> *Ukrainian President Leaves Kyiv, Parliament Speaker Resigns*, RADIO FREE EUROPE RADIO LIBERTY (Jan. 30, 2015), <http://www.rferl.org/content/ukraine-president-yanukovych-leaves-kyiv/25273184.html>.

<sup>9</sup> *Russia Officially Annexes Crimea*, *supra* note 1.

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prime example of this abdication emerged during an attempt by the UN Security Council to pass a resolution on not recognizing the March 16 Crimea referendum, when “many speakers decried the [Security] Council’s inability to act, expressing support for Ukraine’s sovereignty, independence and territorial integrity.”<sup>10</sup>

### A. Russian Federation Adventurism in Ukraine...

There was no recalling of ambassadors. There was no movement of troops along national borders. There was no surprise attack. There was no declaration of war. What did happen was on November 21, 2013, protestors began to gather in Kiev to protest the Ukrainian government’s decision to “halt the process of preparing the Association Agreement and the Deep and Comprehensive Free Trade Area between Ukraine and the EU[.]”<sup>11</sup>

After weeks of increasingly agitated protests the President of Ukraine, Viktor F. Yanukovich, finally succumbed to the pressures of the protestors and fled Ukraine.<sup>12</sup> This was interpreted by the Ukrainian protestors as a major victory and paved the way for a new presidential election as well as for new parliamentary elections.<sup>13</sup> What the now victorious protestors did not envision was the subsequent bloody rebellion that would convulse eastern Ukraine and the subsequent Russian Federation support for the rebels.<sup>14</sup>

In addition to the renewal of democracy, the Russians launched a covert invasion of the Crimea<sup>15</sup> after the ouster of President Viktor F. Yanukovich of Ukraine.<sup>16</sup> Unidentified heavily armed men and armored vehicles appeared in large numbers, taking outright control of and surrounding other key facilities in Crimea; this included “airports, communications facilities and public buildings, including the regional parliament.”<sup>17</sup> These just happen to be all the essential structures to firmly place an occupation force in control.

In a seemingly coincidental action that corresponded with these troop deployments the Russian Duma<sup>18</sup> authorized “the use [of] force on Ukraine’s territory, and not against

<sup>10</sup> *Security Council Press Release*, *supra* note 1.

<sup>11</sup> Olesia Ogryzko, *Ukraine’s Uprising*, EUROPEANPUBLICAFFAIRS.EU (Nov. 22, 2013), <http://www.europeanpublicaffairs.eu/ukraines-uprising/>.

<sup>12</sup> Press Release, General Assembly, *General Assembly Adopts Resolution Calling upon States Not to Recognize Changes in Status of Crimea Region*, U.N. Press Release GA/11493 (March 27, 2014), <http://www.un.org/press/en/2014/ga11493.doc.htm> [hereinafter *General Assembly Press Release*] (“[T]he President [Viktor F. Yanukovich,] had been compelled to leave Ukraine.”).

<sup>13</sup> *Id.*

<sup>14</sup> *Security Council Press Release: Ukraine*, *supra* note 1.

<sup>15</sup> The Crimea is a peninsular outcropping of Ukrainian territory jutting into the Black Sea; this also happens to be where Sevastopol is located the headquarters and main base of operations of a significant portion of the Russian Navy. Vladimir Soldatkin, *Russia Will Add 80 New Warships to Black Sea Fleet: Fleet Commander*, REUTERS (Sept. 23, 2014, 9:17 AM), <http://www.reuters.com/article/2014/09/23/us-russia-navy-ships-idUSKCN0H116K20140923>.

<sup>16</sup> *Security Council Press Release: Ukraine*, *supra* note 1.

<sup>17</sup> *Security Council Press Release: Ukraine*, *supra* note 1.

<sup>18</sup> The Duma stands for:

[T]he lower house of the newly created Federal Assembly, or Russian national parliament. (The Federation Council comprised the upper house.) The revived Duma consisted of 450 members elected by universal suffrage to a four-year term. Half of the Duma’s members were elected by proportional representation, and the other half by

Ukraine.”<sup>19</sup> The language of the authorization is quite telling because it invokes a stated goal of the United Nations, self-determination.<sup>20</sup> This attempts to cloak the clear violation of international law<sup>21</sup> in a justification that would resound in the Western world. This statement by the Russian Federation Ambassador to the United Nations is actually perfectly in sync with the Russian Federation’s position; the Russian Federation is not working against the interests of Ukraine’s government, but working for Ukraine’s people. This is an absolutely ridiculous assertion and a dangerous precedent if allowed.<sup>22</sup>

The Russian Federation Ambassador to the United Nations continued the charade by justifying the invasion and subsequent annexation of Crimea on the grounds that “[the Russian government] could not refuse Crimean’s their right to self-determination. Historical justice had been vindicated, he noted, recalling that for many years, Crimea had been part of the Russian Federation, sharing a common history, culture and people.”<sup>23</sup> This justification is again grounded in the interpretation of Article 1<sup>24</sup> of the United Nations Charter, but at the same time is controverted by Article 2<sup>25</sup> of the United Nations Charter.

For a moment let us look at a hypothetical situation concerning the United States and Iraq. If the United States had taken a similar approach to Iraq that the Russians did for Ukraine, namely annexation, then Iraq really would not be the problem it is now. With Iraq annexed to the United States there would be no need for all the back-and-forth with Congress and the American people because Iraq would cease to exist and, simply put, be a part of the United States. The United States would be administering its own territory with the

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single-member constituencies. The revived Duma was the chief legislative chamber and passed legislation by majority vote. The Federal Assembly could override a presidential veto of such legislation by a two-thirds majority vote. The Duma also had the right to approve the prime minister and other high government officials nominated by the president. The Editors of Encyclopedia Britannica, *Duma*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/173419/Duma> (last updated Aug. 5, 2014).

<sup>19</sup> *Security Council Press Release: Ukraine*, *supra* note 1.

<sup>20</sup> “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples[.]” U.N. Charter art. 1, para. 2.

<sup>21</sup> The annexation of Crimea is a clear violation of international law because “[a]ll Members [of the United Nations] 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.” U.N. Charter art. 2, para. 4.

<sup>22</sup> This position is effectively akin to saying that as long as a nation works for the people of another nation and not directly against its government then any action taken is justified. This position has serious consequences for the idea of territorial integrity because if a militarily powerful nation can just act with impunity on the territory of another nation then the entire concept of the Nation-State is at risk. See generally Press Release, Security Council, *Peaceful Resolution of Ukraine Crisis Remains Possible, Under-Secretary-General Tells Security Council during Briefing*, U.N. Press Release SC/11314 (March 13, 2014), <http://www.un.org/press/en/2014/sc11314.doc.htm> [hereinafter *Press Release Security Council: Peaceful Resolution*] (“Unless the international community came together and sent a clear signal, the world would live with the consequences well beyond the current conflict. ‘We will look back and wish we had spoken with a unified voice,’ she warned.”).

<sup>23</sup> *General Assembly Press Release*, *supra* note 12..

<sup>24</sup> “To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples[.]” U.N. Charter art. 1, para. 2.

<sup>25</sup> “All Members [of the United Nations] 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.” U.N. Charter art. 2, para. 4.

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expectation of non-interference from foreign powers because of sovereign equality.<sup>26</sup> The problem being that this hypothetical could not have been accomplished because that action would have been a serious contravention of international law and the United Nations Charter.<sup>27</sup> This serious contravention of law does not account for the serious diplomatic consequences that would have followed, which is exactly the situation that the Russian Federation found itself in with the annexation of Crimea.<sup>28</sup>

### B. ...and the Unraveling of the Post-Cold War World Order

A Ukrainian domestic protest, admittedly one that quickly went from peaceful protest to full scale rebellion,<sup>29</sup> is all the justification that another Nation-State (the Russian Federation) needs to send in military forces and annex territory.<sup>30</sup> The uprising/protest movement, referenced in the preceding paragraph, would go on to spark, arguably, the most serious clash between the Western Powers (the United States foremost amongst them) and the Russian Federation. This clash would go on to shake the very foundations of the international order.

At an emergency session of the United Nations Security Council on March 1, 2014, “Ukraine’s Permanent Representative to the United Nations called on the Security Council to do everything possible to prevent military intervention by the Russian Federation.”<sup>31</sup> This would be the first of a number of fruitless meetings by the United Nations Security Council regarding the situation in Ukraine.<sup>32</sup> As meeting after meeting commenced a theme would develop, the Russian Federation would maintain its position that there were no Russian troops in Crimea, or eventually eastern Ukraine, and the United States, France and Great Britain would accuse the Russian Federation of interference and military provocations.<sup>33</sup>

In an attempt to move past the deadlock and to perform one of the United Nations Security Council’s core functions,<sup>34</sup> the United States Ambassador submitted a draft

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<sup>26</sup> Masahiro, *supra* note 6.

<sup>27</sup> The annexation of Crimea is a clear violation of international law because “[a]ll Members [of the United Nations] 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.” U.N. Charter art. 2, para. 4.

<sup>28</sup> See *infra* Part IV.

<sup>29</sup> *General Assembly Press Release*, *supra* note 12.

<sup>30</sup> Ogryzko, *supra* note 11 (“As Swedish Foreign Minister Carl Bildt tweeted yesterday straight away after the release of the decree: ‘Ukraine government suddenly bows deeply to the Kremlin. Politics of brutal pressure evidently works.’”).

<sup>31</sup> *Security Council Press Release: Ukraine*, *supra* note 1.

<sup>32</sup> See generally *id.*; See generally *Press Release Security Council: Peaceful Resolution*, *supra* note 22.

<sup>33</sup> See generally *Security Council Press Release: Ukraine*, *supra* note 1; March 6; *Press Release Security Council: Peaceful Resolution*, *supra* note 22; See generally *Security Council Press Release*, *supra* note 1.

<sup>34</sup> U.N. Charter art. 41

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.

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resolution for approval.<sup>35</sup> The resolution, if passed, would have “reaffirmed the [Security Council’s] commitment to the sovereignty, independence, unity and territorial integrity of Ukraine within its internationally recognized borders.”<sup>36</sup> The United States resolution was grounded in “Article 2 of the United Nations Charter,”<sup>37</sup> which clearly prohibits not just force but the threat of force against the territorial integrity or political independence of any state.<sup>38</sup> Even with clear support from the United Nations Charter the Russian Federation United Nations Ambassador said “it had been no secret that he had intended to vote against the [United States] draft resolution because he could not support making the 16 March referendum illegal. That would contravene the principle of equal rights and self-determination, as enshrined in the United Nations Charter and confirmed by the General Assembly decisions and the Helsinki Act of 1975.”<sup>39</sup>

The results of the vote on the United States resolution were “13 votes in favour to 1 against (Russian Federation) and 1 abstention (China).”<sup>40</sup> That would appear to be a victory except that on all non-procedural matters a United Nations Security Council resolution must have nine affirmative votes including the concurring votes of the Five Permanent Members of the Security Council.<sup>41</sup> The United Nations Ambassador from France aptly put this travesty best: he said, “the day’s headlines would read: ‘Russia has vetoed the Charter.’”<sup>42</sup>

Unfortunately as history is wont to do, history repeats itself. This painfully obvious pattern is essentially a modern replication of the dysfunction of the United Nations Security Council throughout the Cold War. The Soviet Union (now the Russian Federation) on one side and the West - the United States, France, and the United Kingdom - on the other side; with China somewhere in the middle (depending on which China occupied the seat).<sup>43</sup> Thus, the world went from a seemingly new era of lasting international peace, prosperity and cooperation during the 1990s, to once again rallying around the same geopolitical polities of the Cold War.<sup>44</sup>

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<sup>35</sup> *Security Council Press Release*, *supra* note 1.

<sup>36</sup> *Id.* The referendum referred to in the quote is one by which Crimeans could vote to become a part of the Russian Federation. *General Assembly Press Release*, *supra* note 12.

<sup>37</sup> U.N. Charter art. 2, para. 4.

<sup>38</sup> *Security Council Press Release*, *supra* note 1; U.N. Charter art. 2, para. 4.

<sup>39</sup> *Security Council Press Release*, *supra* note 1.

<sup>40</sup> *Id.*

<sup>41</sup> U.N. Charter art. 27, para. 3.

<sup>42</sup> *Security Council Press Release*, *supra* note 1.

<sup>43</sup> Perhaps the Russians should take a hint because the players on one side have changed, albeit not as drastically as once thought and the Western players remain the same. National China (Taiwan) occupied the seat from the formation of the UN until the 1970s when the People’s Republic of China (PRC) took over the seat in a deal between the United States, the PRC, and Taiwan brokered under the administration of President Nixon. *Taiwan and U.S.-China Relations*, ASIA FOR EDUCATORS, [http://afe.easia.columbia.edu/special/china\\_1950\\_taiwan.htm](http://afe.easia.columbia.edu/special/china_1950_taiwan.htm) (last visited Jan. 20, 2015).

<sup>44</sup> Those geopolitical polities are the West (specifically the United States), Russia and the Non-aligned nations.

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## II. GOING IT ALONE – A BRIEF OVERVIEW OF UNITED STATES ECONOMIC SANCTIONS ACROSS HISTORY

The United States is not the first nation, nor will it be the last, to attempt to change another nation's policies through the use of economics. The United States has been using economics as a tool of foreign policy – attempting to change other nation's foreign and domestic policies – for much of its history.

Before the United States was even a nation, members of the colony of Massachusetts staged an act of economic warfare; it has since been called the Boston Tea Party.<sup>45</sup> During the years leading up to the War of 1812, the United States enacted an embargo on British goods in response to the failure of Great Britain to abide by the treaty that ended the American Revolution.<sup>46</sup> During the Civil War, President Abraham Lincoln instituted a blockade of the Confederacy to prevent foreign war material from entering and Confederate goods, like cotton, from exiting the rebelling States.<sup>47</sup> During the 1920s and 1930s, the United States enacted a number of economic measures against Imperial Japan for its expansionist policies in the Asia-Pacific region.<sup>48</sup> During the early stages of the Cold War the United States imposed such onerous, at least to the Soviet Union, conditions on Marshall Plan aid that it effectively became an economic weapon in favor of democracy and the West.<sup>49</sup> Later, in the Cold War, the United States imposed economic costs on the Soviet Union for its persecution of Jews through the Jackson-Vanick Amendment.<sup>50</sup> More recently, the United States has imposed severe sanctions against the Islamic Republic of Iran for its nuclear program.<sup>51</sup> Just over the past year the United States has issued economic sanctions against the Russian Federation for its unwarranted intrusion into the domestic affairs of Ukraine and the annexation of Crimea.<sup>52</sup>

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<sup>45</sup> *The Destruction of Tea in Numbers and Facts*, BOSTON TEA PARTY HISTORICAL SOCIETY, <http://www.boston-tea-party.org/facts-numbers.html> (last visited Jan. 30, 2015).

<sup>46</sup> See generally U.S. Dep't of State, *War of 1812-1815*, Office of the Historian (last visited Nov. 13, 2014), <http://history.state.gov/milestones/1801-1829/war-of-1812>.

<sup>47</sup> See generally U.S. Dep't of State, *The Blockade of Confederate Ports, 1861-1865*, Office of the Historian (last visited Nov. 13, 2014), <http://history.state.gov/milestones/1861-1865/blockade>.

<sup>48</sup> See generally U.S. Dep't of State, *The Neutrality Acts, 1930s*, Office of the Historian (last visited Nov. 13, 2014), <http://history.state.gov/milestones/1921-1936/neutrality-acts>; See generally U.S. Dep't of State, *New Deal Trade Policy: The Export-Import Bank & the Reciprocal Trade Agreements Act, 1934*, Office of the Historian (last visited Nov. 13, 2014), <http://history.state.gov/milestones/1921-1936/export-import-bank>.

<sup>49</sup> See generally U.S. Dep't of State, *Marshall Plan, 1948*, Office of the Historian (last visited Nov. 13, 2014), <http://history.state.gov/milestones/1945-1952/marshall-plan>; Library of Congress, *Soviet Opposition to the Marshall Plan*, FOR EUROPEAN RECOVERY: THE FIFTIETH ANNIVERSARY OF THE MARSHALL PLAN, <http://www.loc.gov/exhibits/marshall/marsh-exhibition.html> (last visited Jan. 30, 2015).

<sup>50</sup> 19 U.S.C. § 2432 (1974); *Jackson-Vanik Amendment*, COUNCIL ON FOREIGN RELATIONS (Jan. 3, 1975), <http://www.cfr.org/trade/jackson-vanik-amendment/p18844>.

<sup>51</sup> U.S. Dep't of State, *Iran Sanctions*, DIPLOMACY IN ACTION, <http://www.state.gov/e/eb/tfs/spi/iran/index.htm> (last visited Jan. 30, 2015); U.S. Dep't of the Treasury, *Iran Sanctions*, RESOURCE CENTER <http://www.treasury.gov/resource-center/sanctions/Programs/pages/iran.aspx> (last visited Jan. 30, 2015).

<sup>52</sup> Exec. Office of the President, Exec. Order No. 13660, *Blocking Property of Certain Persons Contributing to the Situation in Ukraine*, <http://www.whitehouse.gov/the-press-office/2014/03/06/executive-order-blocking-property-certain-persons-contributing-situation> [hereinafter *Exec. Order 13660*]; Exec. Office of the President, Exec. Order No. 13661, *Blocking Property of Additional Persons Contributing to the Situation in Ukraine*, <http://www.whitehouse.gov/the-press-office/2014/03/17/executive-order-blocking-property-additional-persons>.



In each of these instances listed above the United States has used its economic might in an attempt, albeit sometimes in vain, to change both the domestic and foreign policies of various nations around the world.

### III. UNITED STATES ECONOMIC SANCTIONS AGAINST THE RUSSIAN FEDERATION – THE CONSTITUTIONAL AUTHORITY

All the powers of the United States Federal Government are derived from a single source, “We the People.”<sup>53</sup> These three simple words are the guiding principle that led the Founding Fathers to draft the Constitution, which has withstood the test of time.<sup>54</sup> The Constitution expounds upon the exclusive powers of the Federal Government, reserving those not within those enumerated powers of the Federal Government to the States and the People.<sup>55</sup>

#### A. “Congress shall have the power To...”

Article I, Section 8, Clause 3, more commonly known as the Commerce Clause states, “Congress shall have the power...To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”<sup>56</sup> This simple pronouncement is one of the most essential, core powers of the Federal Government.<sup>57</sup> The Commerce Clause, along with other provisions within Article I of the Constitution,<sup>58</sup> provides the far-reaching Constitutional authority of Congress to pass legislation that has an impact on foreign commerce.<sup>59</sup> With this Commerce Clause authority in hand Congress passed a piece of legislation, the International Emergency Economic Powers Act (“IEEPA”).<sup>60</sup> The IEEPA delegated to the President the authority to engage in the imposition of economic sanctions against foreign nations, foreign nationals and foreign business interests.<sup>61</sup>

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contributing-situat [hereinafter *Exec. Order 13661*]; Exec. Office of the President, Exec. Order No. 13662, *Blocking Property of Additional Persons Contributing to the Situation in Ukraine*, <http://www.whitehouse.gov/the-press-office/2014/03/20/executive-order-blocking-property-additional-persons-contributing-situat> [hereinafter *Exec. Order 13662*].

<sup>53</sup> U.S. Const. pmbl.

<sup>54</sup> See generally U.S. Const. This document is almost unique, as founding government documents go, in that it left up to later generations of Americans to decide how much power to accrue to the Federal Government, and having only been amended 27 times. U.S. Const.

<sup>55</sup> U.S. Const. amend. X.

<sup>56</sup> U.S. Const. art. I, § 8, cl.3 [hereinafter Commerce Clause].

<sup>57</sup> *Id.*

<sup>58</sup> U.S. Const. art. I, § 8, cl.18 (Necessary and Proper Clause); U.S. Const. art. I, § 8, cl.1 (Congress’ power to “lay and collect...Duties, Imposts ad Excises...”); U.S. Const. art. I, § 10, cl.2 (“No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports...”)

<sup>59</sup> Commerce Clause, *supra* note 56.

<sup>60</sup> 50 U.S.C. § 1701 (2012).

<sup>61</sup> *Id.*

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**B. The President**

“As Marshall said in his great argument of March 7, 1800, in the House of Representatives, ‘The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.’”<sup>62</sup> This concept in mind, Congress passed the IEEPA in 1977 and it was signed into law in December of that year.<sup>63</sup>

The IEEPA states in part:

Any authority granted to the President by section 1702 of this title may be exercised to deal with any *unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States*, if the President declares a national emergency with respect to such threat.<sup>64</sup> (emphasis added)

The IEEPA continues:

At the times and to the extent specified in section 1701 of this title, the President may, under such regulations as he may prescribe, by means of instructions, licenses, or otherwise – (A) *investigate, regulate, or prohibit – (i) any transactions in foreign exchange, (ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof, (iii) the importing or exporting of currency or securities, by any person or with respect to any property, subject to the jurisdiction of the United States.*<sup>65</sup> (emphasis added)

Effectively the IEEPA grants the President blanket authority to determine that there is a national emergency and then to impose economic sanctions in response to that emergency.<sup>66</sup>

This extraordinary grant of authority to the Executive from the Legislative Branch would appear to raise some concern as to the Separation of Powers Doctrine<sup>67</sup> that underpins the United States Constitution. Those concerns though have been relegated to the political debate because the Supreme Court in *U.S. v. Curtiss-Wright* made quite clear that

[i]t is important to bear in mind that [Congressional authority vested in the President plus the] very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of

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<sup>62</sup> *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

<sup>63</sup> 50 U.S.C. § 1701 (2012).

<sup>64</sup> 50 U.S.C. § 1701(a) (2012).

<sup>65</sup> 50 U.S.C. § 1702(a), (a)(1)(A) (2012).

<sup>66</sup> *Id.*

<sup>67</sup> Separation of Powers is “[t]he division of governmental authority into three branches of government – legislative, executive, and judicial – each with specified duties on which neither of the other branches can encroach; a constitutional doctrine of check and balances designed to protect the people against tyranny.” Black’s Law Dictionary 683 (4th pocket ed. 2011).

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international relations...It is quite apparent that if, in the maintenance of our international relations...[embarrassment] is to be avoided and success for our aims achieved, congressional legislation...within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.<sup>68</sup>

Thus, the Constitutionality of the delegation of authority granted to the President in the IEEPA being exclusive to the foreign relations of the United States, gives the President the requisite discretion to properly act in the field of international relations.

**C. United States Department of the Treasury and the Office of Foreign Asset Control**

The United States Department of the Treasury ("Treasury Department") was one of the first Executive Departments established by Congress in 1789.<sup>69</sup> It is the purpose of the Treasury Department to maintain the governmental accounts of the Federal Government of the United States of America "and generally to perform all such services relative to the finances, as he shall be directed to perform."<sup>70</sup> The act that officially established the Treasury Department left for future generations the ability to expand the authority of the Treasury Department as deemed necessary.<sup>71</sup>

The expanded Treasury Department authority, for the purposes of this note, is the Office of Foreign Asset Control ("OFAC"). OFAC is an office within the Treasury Department created for the purpose of:

administer[ing] and enforce[ing] economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activities related to the proliferation of weapons of mass destruction, and other threats to the national security, foreign policy or economy of the United States.<sup>72</sup> (emphasis added)

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<sup>68</sup> Curtiss-Wright Exp. Corp., 299 U.S. 304, at 319-20.

<sup>69</sup> U.S. Dep't of the Treasury, *Act of Congress Establishing the Treasury Department*, ABOUT (Oct. 26, 2010, 11:02 AM), <http://www.treasury.gov/about/history/Pages/act-congress.aspx>.

<sup>70</sup> *Id.* More specifically the Treasury Departments purpose is:

to digest and prepare plans for the improvement and management of the revenue, and for the support of public credit; to prepare and report estimates of the public revenue, and the public expenditures; to superintend the collection of revenue; to decide on the forms of keeping and stating accounts and making returns, and to grant under the limitations herein established, or to be hereafter provided, all warrants for monies to be issued from the Treasury, in pursuance of appropriations by law; to execute such services relative to the sale of the lands belonging to the United States, as may be by law required of him; to make report, and give information to either branch of the legislature, in person or in writing (as he may be required), respecting all matters referred to him by the Senate or House of Representatives, or which shall appertain to his office; and generally to perform all such services relative to the finances, as he shall be directed to perform. *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> U.S. Dep't of the Treasury, *Mission*, ABOUT TERRORISM AND FINANCIAL INTELLIGENCE OFFICE OF FOREIGN ASSET CONTROL (OFAC), (Nov. 12, 2014, 5:41 PM), <http://www.treasury.gov/about/organizational->

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OFAC “is the successor to the Office of Foreign Funds Control [], which was established at the advent of World War II following the German invasion of Norway in 1940.”<sup>73</sup>

OFAC, being the principle office within the Treasury Department that implements sanctions,<sup>74</sup> derives its authority from the IEEPA, specifically the IEEPA grant of power to the Presidency of its own necessary and proper clause so that the President and the Executive departments of the United States Federal Government may properly execute the sanctions, and other specific legislative authority.<sup>75</sup>

### IV. UNITED STATES SANCTIONS AGAINST THE RUSSIAN FEDERATION

As stated in Part III, the Constitutional authority for the imposition of economic sanctions against the Russian Federation derives from the Commerce Clause (the Constitution itself), and then is defined in the IEEPA (legislation passed by Congress and signed by the President).<sup>76</sup> This power delegated to the Executive branch provided the basis for President Barack Obama’s three Executive Orders concerning the Ukraine Crisis and the subsequent OFAC regulations promulgated.<sup>77</sup>

The first of the Executive Orders (“EO”) is, Executive Order 13660 – Blocking Property of Certain Persons Contributing to the Situation in Ukraine.<sup>78</sup> This EO provides for:

All property and interests in property that are [with]in the United States [jurisdiction]...of the following persons *are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in*: any person determined by the Secretary of the Treasury, in consultation with the Secretary of State: (i) to be responsible for or complicit in, or to have engaged in, directly or indirectly, any of the following: (A) actions or policies that undermine democratic processes or institutions in Ukraine; (B) actions or policies that threaten the peace, security, stability, sovereignty, or territorial integrity of Ukraine...(ii) to have asserted governmental authority over any part or region of Ukraine without the authorization of the Government of Ukraine; (iii) *to be a leader of an entity that has, or whose members have, engaged in any activity described in subsection (a)(i) or (a)(ii) of this section or of an entity whose property and interests in property are blocked pursuant to this order*; (iv) *to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any*

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structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx [hereinafter *Treasury: About Terrorism and Financial Intelligence Office*].

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> 50 U.S.C. § 1704 (2012) (“The President may issue such regulations, including regulations prescribing definitions, a may be necessary for the exercise of the authorities granted by this chapter.”); *Treasury: About Terrorism and Financial Intelligence Office*, *supra* note 72.

<sup>76</sup> See *supra* Part III.

<sup>77</sup> *Exec. Order 13660*, *supra* note 52; *Exec. Order 13661*, *supra* note 52; *Exec. Order 13662*, *supra* note 52.

<sup>78</sup> *Exec. Order 13660*, *supra* note 52.

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*activity described in subsection (a)(i) or (a)(ii) of this section or any person whose property and interests in property are blocked pursuant to this order; or (v) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.*<sup>79</sup> (emphasis added)

This EO was more general in scope by not specifically targeting the Russian Federation government.<sup>80</sup> EO 13660 gave the Secretary of the Treasury the authority and discretion to create targeted economic sanctions against those deemed to qualify under the EO's language.<sup>81</sup> This first salvo is best described as an attempt by the Obama Administration to tailor the American response. The EO makes clear that the consequences of intervention in Ukraine would be dependent on the facts on the ground because of the discretion granted to the Treasury Secretary.<sup>82</sup>

The next EO issued by President Obama was Executive Order 13661 – Blocking Property of Additional Persons Contributing to the Situation in Ukraine.<sup>83</sup> This EO states in pertinent part:

All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person (including any foreign branch) of the following persons are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in...*(A) to be an official of the Government of the Russian Federation; (B) to operate in the arms or related materiel sector in the Russian Federation; (C) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly: (1) a senior official of the Government of the Russian Federation; or (2) a person whose property and interests in property are blocked pursuant to this order; or (D) to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of: (1) a senior official of the Government of the Russian Federation; or (2) a person whose property and interests in property are blocked pursuant to this order.*<sup>84</sup> (emphasis added)

This EO, unlike EO 13660, is clearly a response to the interference by the Russian Federation in Crimea.<sup>85</sup> EO 13661 specifically targets “official[s] of the Government of the Russian Federation” for economic sanctions.<sup>86</sup>

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Exec. Order 13661, supra* note 52.

<sup>84</sup> *Id.*

<sup>85</sup> The Russian interference in Ukraine was the sending of unmarked troops, which clearly were Russian in origin and training, making threats and showing support for the ousted Ukrainian President Viktor F. Yanukovich. Willis Raburu, *Putin Admits Unmarked Soldiers in Ukraine were Russian; Optimistic about*

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The final EO issued by President Obama was Executive Order 13662 – Blocking Property of Additional Persons Contributing to the Situation in Ukraine.<sup>87</sup> This EO provides in pertinent part:

All property and interests in property that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person (including any foreign branch) of the following persons are *blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in*: any person determined by the Secretary of the Treasury, in consultation with the Secretary of State: (i) *to operate in such sectors of the Russian Federation economy as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State, such as financial services, energy, metals and mining, engineering, and defense and related materiel*; (ii) *to have materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, any person whose property and interests in property are blocked pursuant to this order*; or (iii) *to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order*.<sup>88</sup> (emphasis added)

This final EO was the last in a series of moves by the Obama Administration making use of the authority granted to the President under the IEEPA. This final EO placed even greater economic sanctions on sectors of the Russian economy, expanding on those sectors of the economy targeted in EO 13661<sup>89</sup>, in another attempt to exert influence and change on Vladimir Putin's Russia.<sup>90</sup>

These EOs followed a pattern of escalation starting with the imposition of sanctions on relatively few individuals that had a direct impact with regards to Russian interference in Ukraine and the annexation of Crimea; then to expand the sanctions to Russian officials and those people affiliated with the Russians arms manufacturing sector of the Russian economy; and finally to include all those affiliated with the financial services, energy, mining, engineering and defense sectors of the Russian economy.<sup>91</sup>

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Geneva Talks, PBS NEWSHOUR (Apr. 17, 2014, 11:45 AM), <http://www.pbs.org/newshour/rundown/putin-admits-unmarked-soldiers-ukraine-russian-optimistic-geneva-talks/>.

<sup>86</sup> Exec. Order 13661, *supra* note 52.

<sup>87</sup> Exec. Order 13662, *supra* note 52.

<sup>88</sup> *Id.*

<sup>89</sup> Exec. Order 13661, *supra* note 52.

<sup>90</sup> *Id.*

<sup>91</sup> Exec. Order 13660, *supra* note 52; Exec. Order 13661, *supra* note 52; Exec. Order 13662, *supra* note 52.

## V. FAILURE OF COLLECTIVE ACTION – INABILITY OF THE UNITED NATIONS TO ACT

Even though the United States is able to bring substantial economic pressure to bare on its own, when it comes to the sheer size of the global economy<sup>92</sup> the more participants the better. That type of concerted global action requires a body comprised both of a multitude of nations and a willingness to act. The United Nations would, on its face, appear to be the perfect body to bring about concerted global economic action, but the truth is always more complicated.

### A. Creating a Lasting Peace – The United Nations

Entire cities had been reduced to smoldering ruins. Tens of millions of people across the world are dead. Millions more afflicted by disease, famine, picking up the pieces of their shattered lives. This was the state of much of the world in the aftermath of World War II, but as the saying goes, “it is darkest before the dawn.” The United Nations was born from the ashes of World War II with the intention of never allowing this kind of destruction to afflict humanity ever again.<sup>93</sup>

San Francisco 1945-delegates from 50 nations meet to agree upon what would become the United Nations Charter.<sup>94</sup> These 50 nations would create an organization with four main avowed purposes and principles, of which the first principle is the focus of this note; to “maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threat to the peace, and for the suppression of acts of aggression or other breach of the peace.”<sup>95</sup> The most important part of this principle is the “collective measures”<sup>96</sup> that the United Nations would take, because protection from breaches of international peace would require more than one nation acting to stop the threat.

The United Nations has a near universal membership of the various republics, federations, kingdoms, etc. that make up the quilt of nations spread across the planet.<sup>97</sup> The universal character of the United Nations provides the necessary legitimacy for the collective actions taken on behalf of these disparate nations. This universal character also provides the necessary forum for which these nations can air their grievances

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<sup>92</sup> The size of the global economy in 2013 was roughly \$75.5 trillion. *Gross Domestic Product 2013*, WORLD BANK GROUP available at <http://databank.worldbank.org/data/download/GDP.pdf> [hereinafter *World Bank: GDP 2013*].

<sup>93</sup> See generally United Nations, *San Francisco Conference*, HISTORY OF THE UNITED NATIONS, [http://www.un.org/en/aboutun/history/sanfrancisco\\_conference.shtml](http://www.un.org/en/aboutun/history/sanfrancisco_conference.shtml) (last visited Jan. 30, 2015).

<sup>94</sup> United Nations, *1941-1950*, HISTORY OF THE UNITED NATIONS, <http://www.un.org/en/aboutun/history/1941-1950.shtml> (last visited Jan. 30, 2015).

<sup>95</sup> U.N. Charter art. 1, para. 3.

<sup>96</sup> *Id.*

<sup>97</sup> *Member States*, UNITED NATIONS, <http://www.un.org/en/members/> (last visited Feb. 13, 2015).

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### B. Maintaining Peace through Strength – The United Nations Security Council

The United Nations Security Council is the premier international institution when it comes to breaches of international peace and security.<sup>98</sup> The Security Council's membership consists of five permanent members and 10 non-permanent members that hold a seat for two years on a rotating schedule being duly elected by the United Nations General Assembly.<sup>99</sup> The five permanent members are the United States, Russia, China, France, and the United Kingdom.

As of 2013 the five permanent members of the Security Council account for four of the top five nations with the largest military expenditures.<sup>100</sup> The United States leads the permanent members with military expenditures of approximately \$618 billion.<sup>101</sup> Also worthy of note is the fact that the five permanent members of the Security Council are the world's five leading arms exporters, exporting billions of dollars of military hardware across the globe.<sup>102</sup> The leading military powers of today were also the leading military powers at the time of the creation of the United Nations.<sup>103</sup>

This concentration of military strength with the economic and diplomatic clout to back it up makes the Security Council the ideal institution to enforce global peace and security, well at least in theory. The problem with the five permanent members of the Security Council is so simple, yet infinitely complex; ideology.

The West - the United States, France and the United Kingdom - have a similar worldview centered on democracy and market economies.<sup>104</sup> The Russian worldview is based on security concerns.<sup>105</sup> The Chinese worldview is based on economics, security and wanting to sit at the big boys table.<sup>106</sup>

The United States, France and the United Kingdom were opposed to the Soviet Union. The United States was opposed to France and the United Kingdom. The Soviet Union was opposed to everyone. China was opposed to everyone and no one depending on the situation. All of this opposition can be boiled down to a clash of ideologies that inform the

<sup>98</sup> United Nations, *The Security Council*, UNITED NATIONS SECURITY COUNCIL, <http://www.un.org/en/sc/> (last visited Jan. 30, 2015).

<sup>99</sup> United Nations, *Membership and Election*, Frequently Asked Questions, UNITED NATIONS SECURITY COUNCIL, <http://www.un.org/en/sc/about/faq.shtml#membership> [hereinafter *U.N.: Membership and Election*] (last visited Jan. 30, 2015).

<sup>100</sup> Thomas C. Frohlich, *10 Countries Spending the Most on the Military*, 24/7 WALL ST. (July 10, 2014), <http://247wallst.com/special-report/2014/07/10/10-countries-spending-the-most-on-the-military/print/>. The United States is one, China is two, Russia is three, France is five and the United Kingdom is seven. *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See generally Charles Wolf, Jr., et al., RAND CORPORATION, *Long-Term Economic and Military Trends, 1950-2010* (Apr. 1989).

<sup>104</sup> See generally John Ikenberry, *The Rise of China and the Future of the West*, FOREIGN AFFAIRS, Jan./Feb. 2008, <http://www.foreignaffairs.com/articles/63042/g-john-ikenberry/the-rise-of-china-and-the-future-of-the-west>.

<sup>105</sup> Maria Snegovaya, *How Putin's worldview may be shaping his response in Crimea*, Washington Post (Mar. 2, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/03/02/how-putins-worldview-may-be-shaping-his-response-in-crimea/>.

<sup>106</sup> Tom Doctoroff, *China's Worldview: Three Timeless Truths*, THE WORLD POST (Jan. 1, 2011, 10:15 AM), [http://www.huffingtonpost.com/tom-doctoroff/chinas-worldview-three-ti\\_b\\_804496.html](http://www.huffingtonpost.com/tom-doctoroff/chinas-worldview-three-ti_b_804496.html) (updated May 25, 2011).



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different permanent members' respective worldviews. Thus, serious threats to international peace and security were clamped down on not because the other permanent members had the strength to impose its will, but because the contest of ideologies has always kept each of the great powers in check. The balance of power was maintained through the respective strength-economically, diplomatically and militarily-of each of the permanent members.

**C. End of the Pax Americana – The Reluctant Eagle and the Resurgent Bear**

The tight lid kept on international conflicts because of the exigencies of the Cold War all collapsed with astonishing speed after the demise of the Soviet Union in 1991.<sup>107</sup>

This proliferation of hostilities, not only trans-national but increasingly of an intra-state nature, has been accompanied by, and may in part be a consequence of, serious hesitations on the part of the United States – as the world's first global superpower, and perhaps its last too – to play the role of what Secretary of Defense Richard Cheney defined during the Kuwait crisis as the world's number one gunslinger.<sup>108</sup>

For the better part of two decades after the Cold War ended, the Security Council and subsequently the entire United Nations structure behaved in a manner that the organization's founders would have been proud of; the five permanent members of the Security Council were actually working together and not in principled opposition to one another.<sup>109</sup>

**VI. UNITED NATIONS REFORM TO MEET THE NEEDS OF A CHANGING WORLD**

The essential element of this note's proposal is to create a brand new chapter within the United Nations Charter establishing a new economic and political council with teeth. To that end this proposal would remove the Security Council's current Article 41 powers<sup>110</sup> and give them to this new organ. As a consequence the Security Council and this new organ would share joint responsibility for maintaining international peace and security. The

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<sup>107</sup> U.S. Dep't of State, *Milestones: 1989-1992 The Collapse of the Soviet Union*, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1989-1992/collapse-soviet-union> (last visited Jan. 30, 2015); Alan Munro, *Humanitarianism and conflict in a post-Cold War world*, INT'L COMM. OF THE RED CROSS (Sep. 30, 1999), <https://www.icrc.org/eng/resources/documents/misc/57jq2s.htm>

<sup>108</sup> Munro, *supra* note 107.

<sup>109</sup> United Nations, *Veto List*, DAG HAMMARSKJÖLD LIBRARY RESEARCH GUIDES, <http://research.un.org/en/docs/sc/quick> (last visited Jan. 30, 2015). Since the fall of the Soviet Union in 1991 the Permanent Members of the United Nations Security Council have exercised their veto power collectively 21 times from 1991-2010. *Id.*

<sup>110</sup> U.N. Charter art. 41.

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. *Id.*

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proposal would also amend other Chapters and Articles of the United Nations Charter to reflect the creation of this new United Nations organ. Article 39,<sup>111</sup> Article 49,<sup>112</sup> Article 50,<sup>113</sup> all of Chapter X,<sup>114</sup> Article 7,<sup>115</sup> Chapter V,<sup>116</sup> and Chapter VI<sup>117</sup> would all have to be amended to this end.

### A. A New United Nations Organ for a New Day – The United Nations Economic and Political Council

The purpose of the United Nations Economic and Political Council (“the Council”) would remain within the current purview of the United Nations as set out in the United Nations Charter; “[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character.”<sup>118</sup> The purpose would also be “[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”<sup>119</sup>

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<sup>111</sup> U.N. Charter art. 39. (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”)

<sup>112</sup> U.N. Charter art. 49. (“The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.”)

<sup>113</sup> U.N. Charter art. 50.

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems. *Id.*

<sup>114</sup> U.N. Charter chapt. X. (Chapter X of the United Nations Charter refers to the power, structure and prerogatives of the United Nations Social and Economic Council.)

<sup>115</sup> U.N. Charter art. 7. (“There are established as principal organs of the United Nations: a General Assembly, a Security Council, an Economic and Social Council, a Trusteeship Council, an International Court of Justice and a Secretariat. Such subsidiary organs as may be found necessary may be established in accordance with the present Charter.”)

<sup>116</sup> U.N. Charter chapt. V. (Chapter V of the United Nations Charter refers to the powers, structure and prerogatives of the United Nations Security Council.)

<sup>117</sup> U.N. Charter chapt. VI. (Chapter VI of the United Nations Charter refers to the pacific settlement of disputes.)

<sup>118</sup> U.N. Charter art. 1, para. 3.

<sup>119</sup> U.N. Charter art. 1, para. 1.

## **B. Determination of a Threat to International Commercial and Political Stability and International Peace**

The Council shall determine any threat to the stability of international commerce in addition to

any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with [Article 41 and whether to recommend the use of Article 42 by the Security Council] to maintain or restore [international commercial and political stability and] international peace and security.<sup>120</sup>

## **C. United Nations Economic and Political Council Membership**

The Council will consist of both permanent and non-permanent members. The permanent membership would be based on the current G20. Specifically those members would be the United States, China, Japan, Germany, France, United Kingdom, Brazil, Russian Federation, Italy, India, Canada, Australia, Spain, Republic of Korea, Mexico, Indonesia, Turkey, Netherlands, Saudi Arabia, and Argentina.<sup>121</sup> These permanent members would need to be the essential core for any new United Nations organ dealing with economic issues because these countries represent the world's largest economies<sup>122</sup>, as well as some of the most active military and political powers on the planet.

In addition to the permanent members, the Council will have fifteen (15) non-permanent rotating members. These rotating members would be elected to the Council every two years, coinciding with the election of the rotating members on the United Nations Security Council.<sup>123</sup> These rotating members will be elected from the membership of the United Nations General Assembly.<sup>124</sup> Each potential non-permanent member will be put up for election on an individual ballot needing a simple majority vote within the United Nations General Assembly to gain the seat.<sup>125</sup>

One other requirement for the non-permanent members elected to the Council would be membership in the International Monetary Fund.<sup>126</sup> This additional requirement would help to ease the transition to the new Council having new responsibilities and for bringing the International Monetary Fund into a much closer relationship with the United Nations.<sup>127</sup> Also

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<sup>120</sup> U.N. Charter art. 39, para. 1.

<sup>121</sup> Univ. of Toronto, *G20 Members*, G20 INFORMATION CENTRE, <http://www.g8.utoronto.ca/g20/members.html> (last visited Jan. 30, 2015).

<sup>122</sup> *World Bank: GDP 2013*, *supra* note 92.

<sup>123</sup> *U.N.: Membership and Election*, *supra* note 99.

<sup>124</sup> Same as UN Security Council Non-permanent members. *U.N.: Membership and Election*, *supra* note 99.

<sup>125</sup> Same as UN Security Council Non-permanent members. *U.N.: Membership and Election*, *supra* note 99.

<sup>126</sup> *IMF Members' Quotas and Voting Power, and IMF Board of Governors*, International Monetary Fund, <https://www.imf.org/external/np/sec/memdir/members.aspx> (last visited Feb. 13, 2015).

<sup>127</sup> *See generally Selected Decision and Selected Documents of the IMF, Thirty-Sixth Issue – Agreement Between the United Nations and the International Monetary Fund*, INTERNATIONAL MONETARY FUND (last

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having International Monetary Fund membership would give the non-permanent members some 'skin in the game' so to speak because these nations would already participate in important global economic decisions, even if only in a nominal capacity.

While the Council membership itself will be made up of 35 nations the work of the Council involves much more than just what those nations can do collectively. International trade and economics is the cornerstone of the Council's responsibilities, making economic sanctions the primary weapon against those nations that would violate international peace. This engenders a United Nations organ that would require non-nation entities to become active participants in Council actions.

Like the current United Nations Economic and Social Council, the proposed Council will have Permanent Observers, non-voting members of the Council who work closely with the Council on economic and political matters.<sup>128</sup> The permanent observers would include a representative from the African Union (AU), the European Union (EU), the Association of South East Asian Nations (ASEAN), the World Trade Organization (WTO), the International Monetary Fund (IMF) and the World Bank Group. The aforementioned list of organizations is but a small sampling of potential contributors to the work of the Council. This list is by no means meant to be exclusive, but to act as an incubator for the types of organizations that would be able to contribute in a meaningful way at the creation of this new United Nations Organ.

In another holdover from the United Nations Economic and Social Council would be Non-member Participants.<sup>129</sup> As the preeminent economic and political world body the Council can enter into relationships with other public and private international organizations.<sup>130</sup> These Non-member Participants will have no voting rights, but may participate in discussions, studies, etc. conducted by the Council.<sup>131</sup> These Non-member Participants may even be chosen to oversee enforcement of economic sanctions taken by the Council. For example, SWIFT<sup>132</sup> (the international banking group that essentially governs all interbank lending over the internet) could be granted authority to monitor United Nations sanctions against North Korean financial institutions.

A diverse membership is essential for the Council to function properly. Currently the primary global economic institutions are located outside of the United Nations.<sup>133</sup> The

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updated Dec. 31, 2011), <https://www.imf.org/external/pubs/ft/sd/index.asp?decision=DN15> [hereinafter *U.N. & IMF Agreement*].

<sup>128</sup> Much in the same way the current United Nations organ ECOSOC works now. United Nations, *About ECOSOC*, UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, <http://www.un.org/en/ecosoc/about/> (last visited Jan. 30, 2015).

<sup>129</sup> See generally United Nations, *Basic Facts about ECOSOC Status*, NGO BRANCH, <http://csonet.org/index.php?menu=17> (Last visited Jan. 30, 2015).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> Society for Worldwide Interbank Financial Telecommunication, *About SWIFT*, SWIFT, [http://www.swift.com/about\\_swift/index](http://www.swift.com/about_swift/index) (last visited Jan. 30, 2015).

<sup>133</sup> While created at the same time as the United Nations the International Monetary Fund and the World Bank Group have at best a loose relationship with the United Nations. *History*, INTERNATIONAL MONETARY FUND, <http://www.imf.org/external/about/history.htm> (last visited Jan. 30, 2015); *History*, THE WORLD BANK, <http://www.worldbank.org/en/about/history> (last visited Jan. 30, 2015); *Directory of United Nations System Organizations*, U.N. SYSTEM, <http://www.unsceb.org/directory>. The World Trade Organization is completely independent of the United Nations and is responsible for the orderly conduct of international trade between the

International Monetary Fund is only nominally connected to the work done by the United Nations Economic and Social Council.<sup>134</sup> The World Bank Group is similarly situated to the International Monetary Fund in regards to its relationship to the United Nations.<sup>135</sup> The World Trade Organization has no connection to the United Nations and acts independently.<sup>136</sup> The G7/8 and the G20, both working groups for the economically developed nations and those with the largest economies and developing economies, have no actual affiliation with the United Nations except that their individual membership also happens to be part of the membership of the United Nations.<sup>137</sup> Bringing these different organizations into a formal body with the legitimacy of the United Nations will allow the Council to embark on its mission without the need to reinvent the wheel.

#### D. Functions and Decision Making – Getting Out the Vote

The concept of voting in international institutions has always been a point of contention because of a signal concept, sovereign equality.<sup>138</sup> Sovereign equality is the core principle, the cornerstone of international relations; one nation is equal to another and cannot without its consent cede its sovereignty.<sup>139</sup> As with any concept there are exceptions, war being one, but in the normal conduct of nations sovereign equality is, more or less, strictly adhered to.

The concept of sovereign equality of nations creates the problem with a voting mechanism for international institutions. How does an international institution make its decisions? Does each nation get some type of proportional vote based on a formula? Does each nation get a single vote based on the principle of sovereign equality? This proposal explores both options and envisions how each would work without giving preferential treatment to either.

The proportional approach would be similarly based on the way the International Monetary Fund and World Bank Group allocate their voting.<sup>140</sup> With this approach in mind each member of council will be allocated a voting percentage based on the percentage of national GDP within the global economy. For instance in 2013, the United States has a GDP

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vast majority of nations. *Understanding the WTO Who We Are*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/who\\_we\\_are\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm) (last visited Jan. 30, 2015).

<sup>134</sup> See generally *U.N. & IMF Agreement*, *supra* note 126.

<sup>135</sup> *History*, THE WORLD BANK, <http://www.worldbank.org/en/about/history> (last visited Jan. 30, 2015); *Directory of United Nations System*, *supra* note 132.

<sup>136</sup> *Understanding the WTO Who We Are*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/who\\_we\\_are\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm) (last visited Jan. 30, 2015).

<sup>137</sup> Univ. of Toronto, *What is the G8?*, G8 INFORMATION CENTRE, [http://www.g8.utoronto.ca/what\\_is\\_g8.html](http://www.g8.utoronto.ca/what_is_g8.html) (last visited Jan. 30, 2015); Univ. of Toronto, *The G20*, G20 INFORMATION CENTRE, <http://www.g20.utoronto.ca/g20whatisit.html> (last visited Jan. 30, 2015).

<sup>138</sup> Philpott, *supra* note 5.

<sup>139</sup> See generally Black's Law Dictionary 703 (4th pocket ed. 2011). "Sovereign...[a] person, body, or state vested with independent and supreme authority. Sovereign state...[a] state that possesses an independent existence, being complete in itself, without being merely part of a larger whole whose government it is subject. Sovereignty...[s]upreme dominion, authority, or rule." *Id.*

<sup>140</sup> *IMF Quotas*, INTERNATIONAL MONETARY FUND (Oct. 3, 2014), <http://www.imf.org/external/np/exr/facts/quotas.htm>; *Voting Powers*, THE WORLD BANK, <http://www.worldbank.org/en/about/leadership/VotingPowers> (last visited Jan. 30, 2015).

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of \$16.8 trillion, global GDP is roughly \$75.5 trillion which would mean that the United States would have a voting percentage of 22.3.<sup>141</sup> To pass a resolution of the Council a vote totaling 65 percent (subject to change) of the global economy must give an affirmative vote. To maintain a sense of legitimacy with the proportional nature of the voting, every 5 years the voting percentages will be redistributed based on current national GDP to World GDP ratio.

The sovereign equality, one vote per nation, approach would be based on exactly how the United Nations General Assembly and Security Council vote on decisions currently.<sup>142</sup> This majority approach would require that each member of the Council be allocated one vote. To pass a resolution of the Council an affirmative vote totaling 20 (subject to change) is required.

The Council shall be organized so as to function continuously.<sup>143</sup> Each member shall be represented at all times at the seat of the Organization.<sup>144</sup> The Council shall hold periodic meetings, not to exceed 8 weeks (subject to change) in between meetings.<sup>145</sup> This continual ability to function will allow for the Council to maintain a close watch on global economic events, perhaps preventing the sense of crisis and doom that was prevalent during the 2008 Financial Crisis, and acting as a constant reminder that the world was watching for those nations that would breach the peace.

### E. Who Has the Power?

Article 41 of the United Nations Charter provides “[t]he 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.”<sup>146</sup> This proposal would transfer all of the Article 41 power to the newly proposed Council as described in Part VI.<sup>147</sup> This Article 41 power would be the cornerstone of the activities to be undertaken by the Council.

In addition to the Article 41 power, the United Nations Economic and Social Council is governed under Chapter X of the United Nations Charter.<sup>148</sup> These Chapter X

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<sup>141</sup> To get this percentage the total the \$16.8 trillion was divided by \$75.7 trillion which when applying standard rounding practices gives the 22.3 percentage. *World Bank: GDP 2013*, *supra* note 92.

<sup>142</sup> United Nation, *Voting System and Records*, UNITED NATIONS SECURITY COUNCIL, <http://www.un.org/en/sc/meetings/voting.shtml> (last visited Jan. 30, 2015); United Nations, *General Assembly Voting*, DAG HAMMARSKJÖLD LIBRARY RESEARCH GUIDES, <http://research.un.org/en/docs/ga/voting> (last visited Jan. 30, 2015).

<sup>143</sup> U.N. Charter art. 28, para. 1. (“The Security Council shall be so organized as to be able to function continuously. Each member of the Security Council shall for this purpose be represented at all times at the seat of the Organization.”)

<sup>144</sup> *Id.*

<sup>145</sup> This periodic meeting requirement is based on the meeting requirement for the United Nations Security Council. U.N. Charter art. 28, para. 2. (“The Security Council shall hold periodic meetings at which each of its members may, if it so desires, be represented by a member of the government or by some other specially designated representative.”)

<sup>146</sup> U.N. Charter art. 41, para. 1.

<sup>147</sup> *See supra* Part VI.

<sup>148</sup> U. N. Charter art. 61.

powers and subsequent authority would be transferred to the new Council.<sup>149</sup> In effect the United Nations Economic and Social Council would form the backbone of the new Council allowing for a readymade infrastructure already be in place and for the new Council to take the reins with minimal disruption.

#### **F. A New Twist on an Old Idea – The United Nations Economic and Political Council Appellate Body**

A unique addition to the new Council would be an Appellate Body in which the sanctioned nation(s) can appeal the sanction(s) before they goes into effect. This Appellate Body would be based loosely on the Dispute Settlement Body of the WTO.<sup>150</sup>

Membership on the Appellate Body would include five seats for the permanent members and five seats for the non-permanent members. The permanent members on the Appellate Body would be based on a rotating schedule. This schedule would be determined by the Council as a whole with the permanent members rotating onto the Appellate Body every year as per the schedule. Non-permanent member representation on the Appellate Body will also be based on a rotating schedule also to be determined by the whole Council. The non-permanent members will rotate every year as per the schedule.

The Appellate Body will function like a court, with each of the ten representatives from the Council acting like a trial judge. A trial type proceeding can be requested by a sanctioned nation with the sanctioned nation able to submit some form of evidence showing that the action taken by the Council was unjustified. There would be a 30 day discovery period for the sanctioned nation(s) to submit documents. This discovery period would be followed by a set timeframe for which to present argument to the Appellate Body, not to occur more than two weeks after end of discovery. Decisions of the Appellate Body shall be determined by a seven vote majority of the current sitting members, with the decision not to be voted on more than eight weeks after the close of the arguments period. Any decision of the Appellate Body would be final; if sanctions were considered unjustified then they would have to be lifted, if the sanctions were justified then they would be enforced. A ruling by the Appellate Body would in no way preclude another vote on sanctions for similar reasoning. The reasoning behind the Appellate Body would be to slow the process down so that the imposition of sanctions would take on a less “he said, she said” political overtone and have a more “evidentiary findings” based tone.

### **VII. EVERY SOLUTION BREEDS NEW PROBLEMS**

Nothing is ever simple, but it can be easy. Nothing is ever easy, but it can be simple. Nothing is ever simple or easy, especially when it comes to getting numerous different individual countries/groups of countries to work together period. This simple truth is the greatest weakness of the proposal set forth in Part VI.

Over seven billion people inhabit the Earth.<sup>151</sup> These seven billion people are divided into over 190 separate and distinct political units, called nations.<sup>152</sup> These nations are

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<sup>149</sup> See generally U.N. Charter chapt. X.

<sup>150</sup> See generally *Understanding the WTO: Settling Disputes*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/displ\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm) (last visited Jan. 30, 2015).

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divided into various other categories, from cultural persuasion to racial homogeneity to religious persuasion to common political structures. The most prominent of these groups are centered on four different geopolitical polities; the United States and the European Union (collectively known as the West), the Russian Federation and the People's Republic of China. In an ironic twist of specific design the main players in each of these geopolitical polities have a permanent seat on the United Nations Security Council.<sup>153</sup>

Each permanent member of the United Nations Security Council must approve any amendment to the United Nations Charter, holding the entire process hostage to five nations.<sup>154</sup> Before even submitting the proposed amendment to the United Nations Charter, the five permanent members of the United Nations Security Council would have to agree—no simple feat.

Assuming that the United States, United Kingdom, Russia, France, and China do all agree, then the amendment would be submitted to the United Nations General Assembly for passage.<sup>155</sup> This process requires a two-thirds affirmative vote of the United Nations General Assembly.<sup>156</sup> Considering how difficult it is for these five countries to agree on anything, that is a very significant obstacle to overcome.

Even within the new Council itself there would inevitably be problems. What constitutes a breach of international peace and security? What types of economic and political action should be taken? Are there enough votes to proceed with action? How should the enactments of the Council be worded? These are but a small sampling of the types of problem raising questions that would be asked at Council meetings, preventing the Council from pursuing its purpose.

The Appellate Body will also face problems of political illegitimacy. Any decision by the Appellate Body is final, effectively cutting off debate about a certain subject, thus creating a winner and a loser. That right there is the biggest problem, no one likes to lose — setting the stage for potentially acrimonious dialogue from the losing country(ies). This would only become worse depending on which countries on the Appellate Body were making the decisions. It is almost guaranteed that if any of the Western allied nations sat on the Appellate Body and passed judgment on the Russian Federation that Russia would vehemently oppose the ruling, and the vitriol that would come to follow would be intense.

While there are always going to be problems with the joining together of many disparate nations, the proposal in Part VI seeks to provide for an already defined structure and by completely leveling the playing field by eliminating the veto. This should allow for nations

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<sup>151</sup> Central Intelligence Agency, *People and Society : : World*, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html> (last visited Jan. 30, 2015).

<sup>152</sup> There are currently 193 members of the United Nations General Assembly. United Nations, *Growth in United Nations Membership*, *supra* note 7. The U.S. Department of State currently lists 194 independent countries. U.S. Dep't of State, *Independent States in the World*, DIPLOMACY IN ACTION, <http://www.worldatlas.com/nations.htm> (last visited Jan. 30, 2015).

<sup>153</sup> United Nations, *Current Members Permanent and Non-Permanent Members*, UNITED NATIONS SECURITY COUNCIL, <http://www.un.org/en/sc/members/> (last visited Jan. 30, 2015). The five permanent members of the United Nations Security Council are China, France, Russia, the United States, and the United Kingdom. *Id.*

<sup>154</sup> U.N. Charter art. 108; U.N. Charter art. 109

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*



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to come together and work out there remaining differences in an atmosphere that already has the “take” and now only requires the “give”.

## VII. CONCLUSION

The current state of global affairs can best be described as an exercise in Chaos Theory. Even within the complex chaos of international relations an overriding pattern may be discerned, self-interest. No nation-state acts for the interest of others if there is nothing to be gained by so acting. This is why the Russian Federation annexed Crimea; President Putin saw a major gain for the Russia Federation.<sup>157</sup> This is why the United States imposed economic sanctions on the Russian Federation.<sup>158</sup>

As with every dark cloud there is a silver lining. Economics have gone global. No longer can the nations of the world act in their own exclusive economic interest. Nations need to act in concert for their own economic wellbeing.

In Part I through Part V, this note explored the need for why the United Nations must be reformed.<sup>159</sup> The global economic order is best maintained through the stability of international peace and security. The only organization that has the authority and legitimacy to accomplish this is the United Nations, but this organization has failed to do so. The United Nations Security Council is not active, but reactive. It is often slow to react and frequently bogged down by the diametrically opposed views of the five Permanent Members. If the organization is not only to survive but thrive, it needs a workable form and it must change and evolve from its post-World War II beginning and embrace the new more educated and informed World.

Part VI provides the necessary medicine; the reforming of the United Nations for the 21<sup>st</sup> century.<sup>160</sup> The proposal would vastly reformat global economic governance, bringing together the disparate parts of a system that was created when there were roughly 50 independent countries and the two superpowers were at each other's' throat. The proposed United Nations Economic and Political Council combines the best parts of the current global economic governance with the legitimacy of the United Nations and will hopefully usher in a more peaceful and integrated world.

While Chaos may have a certain beauty; chaos also has an unwritten destiny. While Chaos may be difficult to order; chaos also has an unwritten structure. However, none of these things should stop the world from trying to bring about a more perfect union for the safety and security of humanity.

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<sup>157</sup> What that gain is, is uncertain, but some ideas come to mind. Maintaining Russian control over the Russia Black Sea fleet headquarters; taking back territory from Ukraine that was granted to Ukraine by Khrushchev; sticking it to the West, etc. Soldatkin, *supra* note 15.; Krishnadev Calamur, *Crimea: A Gift To Ukraine Becomes A Political Flash Point*, NPR (Feb. 27, 2014, 2:37 PM), <http://www.npr.org/blogs/parallels/2014/02/27/283481587/crimea-a-gift-to-ukraine-becomes-a-political-flash-point>.

<sup>158</sup> See generally *Exec. Order 13660*, *supra* note 52; *Exec. Order 13661*, *supra* note 52; *Exec. Order 13662*, *supra* note 52.

<sup>159</sup> See *supra* Part I-V.

<sup>160</sup> See *supra* Part VI.