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Reinforcing And Strengthening The Sanctions Against Russia

CHRISTINE ABELY†

When Russia invaded Ukraine in February 2022, the United States, the European Union, the United Kingdom, Japan, South Korea, and many other jurisdictions enacted massive numbers of new sanctions measures. The initial response was followed by numerous rounds of new sanctions, many of which were historically far-reaching or enacted new legal authorities.¹ The E.U., for instance, largely banned the import of Russian oil, a significant move given the extent to which the Member States of the E.U. were reliant on Russian energy supplies.² The oil import ban was strengthened by a G7 price cap on oil, which was designed to limit the revenue that Russia could collect from sales of crude oil around the world.³ To date, thousands of people and entities have been designated as sanctions targets.⁴ These targeted sanctions were deployed on a mass scale, so much so that the various

Assistant Professor, New England Law | Boston. Thank you to the Maryland Journal of International Law for the invitation to the Economic Statecraft in a Multipolar World Symposium. Thank you as well to all the speakers and participants at that event for their insightful comments and discussion.

1. See generally Christine Abely, *The Russia Sanctions: The Economic Response to Russia's Invasion of Ukraine* (2023), https://www.google.com/books/edition/The_Russia_Sanctions/p_DiEAAQBAJ?hl=en&gbpv=1.

2. Press Release, European Council, Russia's Aggression Against Ukraine: EU Adopts Sixth Package of Sanctions (June 3, 2022).

3. European Commission Press Release IP/22/7468, G7 Agrees Oil Price Cap: Reducing Russia's Revenues, While Keeping Global Energy Markets Stable (Dec. 3, 2022).

4. See, e.g., *FACT SHEET: Biden Administration Expands U.S. Sanctions Authorities to Target Financial Facilitators of Russia's War Machine*, THE WHITE HOUSE (Dec. 22, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/12/22/fact-sheet-biden-administration-expands-u-s-sanctions-authorities-to-target-financial-facilitators-of-russias-war-machine/>.

forms of sanctions enacted are too voluminous to even sketch out with any completeness here.

That rapid rate at which sanctions have been imposed has slowed, though new sanctions continue to be imposed.⁵ The sanctioning jurisdictions are now grappling with a new phase of the sanctions response to Russia: that of enforcement.⁶ The first phase of implementing sanctions targets was perhaps much simpler than the complexities of this new challenge.

This second phase requires addressing two separate issues: that of sanctions evasion, and that of sanctions avoidance. These are two distinct phenomena. This essay uses the term “sanctions evasion” to refer to only those activities which violate or attempt to violate a sanctions prohibition of some jurisdiction. Sanctions evasion, as used here, necessarily involves illegality.⁷

“Sanctions avoidance”, on the other hand, is used within this essay to describe efforts by parties, either themselves subject to sanctions or those who are third-party non-sanctioned actors, to seek new trading partners and shift existing economic behaviors so as to avoid triggering the applicability of sanctions.⁸ As used in this sense, sanctions avoidance does not involve illegality. This is because the avoiding party intentionally avoids sanctions and takes precautions to

5. *Targeting Key Sectors, Evasion Efforts, and Military Supplies, Treasury Expands and Intensifies Sanctions Against Russia*, U.S. DEP’T OF THE TREASURY (Feb. 24, 2023), <https://home.treasury.gov/news/press-releases/jy1296>.

6. Stephanie Brown Cripps et al., *Sanctions Evasion Enforcement Takes Center Stage*, FRESHFIELDS BRUCKHAUS DERINGER: RISK AND COMPLIANCE BLOG (July 3, 2023), <https://riskandcompliance.freshfields.com/post/102iigq/sanctions-evasion-enforcement-takes-center-stage>.

7. U.S. DEP’T OF THE TREASURY, GLOBAL ADVISORY ON RUSSIAN SANCTIONS EVASION ISSUED JOINTLY BY THE MULTILATERAL REPO TASK FORCE (Mar. 9, 2023); European Commission Press Release IP/23/6535, Commission Welcomes Political Agreement on New Rules Criminalizing the Violation of EU Sanctions (Dec. 12, 2023).

8. Though this Essay refers to “sanctions avoidance” to refer to activities which are not themselves prohibited, this usage is not universal. Some commentators use the term “sanctions circumvention” to refer to this phenomenon. *See, e.g.*, Anna Romandash, *Russia’s Handbook for Evading Sanctions*, INKSTICK MEDIA (July 11, 2023), <https://inkstickmedia.com/russias-handbook-for-evading-sanctions/> (“Technically, sanctions’ circumvention is not per se illegal,” said Benjamin Hilgenstock, Senior Economist at Kyiv School of Economics. “This applies to Russia buying military equipment from third countries that never sanctioned it, and that are producing their own stuff,” he explained”). The term “sanctions circumvention,” however, has also been used in various contexts to refer to some conduct which may constitute a violation of existing sanctions measures. In particular, Article 9 of Council Regulation (EU) 269-2014 now states: “[i]t shall be prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the measures referred to in Article 2.” Council Regulation 269/2014, art. 9, 2014 O.J. (L 078) 6 (EU).

avoid any actions that could lead to a violation of sanctions. While sanctions avoidance may have the effect of undercutting the sanctions regime, it does not do so through illegal activities. The use of the Chinese currency instead of the U.S. dollar, for example, may be one example of sanctions avoidance.⁹ The sanctions evader, on the other hand, acts in a manner contrary to sanctions law but takes measures to conceal the existence of his unlawful activities.

The distinction between these categories is important because the actions and priorities of the sanctioning nations may vary depending on what type of behavior the state is trying to address. Cracking down on sanctions evasion requires a dedication of resources to law enforcement in this area. The enactment of financial transparency measures such as those promoted in the sanctioning jurisdictions both pre- and post-invasion can also address sanctions evasion and other crimes.¹⁰ Namely, they may help authorities discover where funds linked to illegal activities have been secreted and reveal purchases made by sanctioned parties in violation of sanctions laws.¹¹ So too can financial transparency measures lead to the more complete freezing of assets of sanctioned parties to prevent future sanctions violations.

Addressing sanctions avoidance and legal activities which undermine the effectiveness of sanctions, however, is perhaps a more nuanced issue that requires interrogating core principles of international economic law and adjusting the existing sanctions response accordingly. One example is the case of Indian refineries ramping up purchases of Russian-origin oil discounted by the presence of sanctions elsewhere.¹² It is not illegal for these refineries to do so; India was not part of the coalition of nations which imposed sanctions on Russia following its invasion of Ukraine.¹³ Once purchased,

9. Anna Hirtenstein, *The Dominant Dollar Faces a Backlash in the Oil Market*, WALL ST. J. (Dec. 28, 2023), <https://www.wsj.com/finance/currencies/the-dominant-dollar-faces-a-backlash-in-the-oil-market-0f151e28>.

10. See, e.g., Rose Zussman, *Glimmers of Light: Two Economic Crime Bills Later, What's Next in the UK's Fight Against Dirty Money?*, TRANSPARENCY INT'L UK (Nov. 21, 2023), <https://www.transparency.org.uk/glimmers-light-two-economic-crime-bills-later-what-s-next-uk-s-fight-against-dirty-money>.

11. *Fact Sheet: U.S. Department of the Treasury Actions to Prevent and Disrupt Corruption*, U.S. DEP'T OF THE TREASURY (Dec. 11, 2023), <https://home.treasury.gov/news/press-releases/jy1974>.

12. Nidhi Verma, *Exclusive: Russian Oil Sold to India Below Price Cap in Buyers' Market*, REUTERS (Dec. 14, 2022), <https://www.reuters.com/business/energy/russian-oil-sold-india-below-price-cap-buyers-market-2022-12-14/>.

13. Christopher S. Chivvis and Beatrix Geaghan-Breiner, *India in the Emerging World Order*, CARNEGIE ENDOWMENT FOR INT'L PEACE, (Nov. 6, 2023), <https://carnegieendowment.org/2023/11/06/india-in-emerging-world-order-pub-90928>.

Russian-origin crude oil is then refined in India into various petroleum products. Having been substantially transformed from their inputs, these petroleum products are considered to be of Indian origin and may be sold into the sanctioning jurisdictions without violating the existing import bans on Russian-origin oil products.¹⁴ (It should be noted, however, that purchases are often made above the price cap and so such transactions, where they involve G7 service providers, would in fact be illegal.)¹⁵

These activities do undercut the effectiveness of the joint sanctions response. Yet this result is also a function of a core principle of the global trading system.¹⁶ There has been some progress in addressing this type of issue. The E.U., for example, enacted a measure to take effect in March 2024 that banned the import of Russian-origin diamonds even after having been processed or incorporated into jewelry in other countries, to supplement an E.U. ban on Russian-origin diamonds themselves.¹⁷ But where such measures have not been implemented, what reasonable alternative is there to deal with these gaps in the sanctions response which do not involve illegal conduct?

Here, perhaps, is where we reach a limitation on the effectiveness of primary sanctions alone. As widespread as the sanctions response was, with as many nations responding to the invasion of Ukraine as was the case, the sanctions effort was by no means universal. Entire regions of the world largely abstained from the imposition of sanctions against Russia, such as South America and Africa, as did certain major economies including China and India.¹⁸

14. *American purchases of laundered Russian oil worth at least \$180 million to the Kremlin*, GLOBAL WITNESS, (Nov. 16, 2023), <https://www.globalwitness.org/en/campaigns/stop-russian-oil/american-purchases-laundered-russian-oil-worth-least-180-million-kremlin/>; Shritama Bose, *EU will go easy on Indian resale of Russian fuel*, REUTERS, (May 22, 2023), <https://www.reuters.com/breakingviews/eu-will-go-easy-indian-resale-russian-fuel-2023-05-23/>.

15. Press Release, U.S. Dep't of the Treasury, *Treasury Sanctions Entities for Transporting Oil Sold Above the Coalition Price Cap to Restrict Russia's War Machine*, (Oct. 12, 2023), <https://home.treasury.gov/news/press-releases/jy1795>.

16. Liana Wong, Cong. Rsch. Rserv. RL34524, *International Trade: Rules of Origin*, CONG. RSCH SERV. (Mar. 3, 2020), <https://crsreports.congress.gov/product/pdf/RL/RL34524>.

17. Press Release, European Council, *Russia's war of aggression against Ukraine: EU adopts 12th package of economic and individual sanctions*, (Dec. 18, 2023), <https://www.consilium.europa.eu/en/press/press-releases/2023/12/18/russia-s-war-of-aggression-against-ukraine-eu-adopts-12th-package-of-economic-and-individual-sanctions/>.

18. Eric J. Kadel, Jr., & Jacob M. Marco, *Sanctions in Latin America*, GLOBAL INVESTIGATIONS REVIEW, (Sept. 29, 2023), <https://globalinvestigationsreview.com/guide/the-guide-sanctions/fourth-edition/article/sanctions-in-latin-america>; Jacob Sugarman, *Why Latin*

This necessitated significant limits as to how far primary sanctions could isolate Russia within the global economy.

Secondary sanctions are one tool which may supplement primary sanctions to reduce the incidence of activities which undermine the effectiveness of sanctions. Secondary sanctions were not prominent in the initial sanctions response to Russia, as that first phase was focused on the imposition of primary sanctions. Their potential importance as an enforcement tool to enhance already-existing prohibitions, however, has since become notable in actions taken by the U.S. and the E.U. While the E.U. has historically opposed the U.S.'s deployment of secondary sanctions, the E.U. adopted in its eighth sanctions package additional listing criteria which may enable the E.U. to enact secondary sanctions of its own.¹⁹ Indeed, a key element of the E.U.'s sanctions response to Russia after the initial rounds of sanctions has consisted of enacting new authority to prohibit sanctions circumvention, thus transferring activities from the category of sanctions avoidance within the meaning given to it by this essay (which is not illegal) into the category of sanctions evasion (which constitutes a violation of sanctions prohibitions). Article 9 of Council Regulation 269/2014 prohibits sanctions circumvention.²⁰ Moreover, other E.U. provisions also prohibit parties within the E.U. and all E.U. persons from knowingly and intentionally participating in conduct the object or effect of which is to circumvent E.U. sanctions.²¹

Likewise, the U.S. has designated non-Russian targets, making them subject to sanctions themselves based on their support of sanctioned Russian parties, even where their own nations had not

America Will Stay Nonaligned, FOREIGN POLICY (Mar. 24, 2023), <https://foreignpolicy.com/2023/03/24/argentina-fernandez-russia-ukraine-war-brazil-lula-nonalignment/>; Mariko Oi, *War in Ukraine: How Asian economies are divided over Russia sanctions*, BBC NEWS, (Mar. 10, 2022), <https://www.bbc.com/news/business-60672278>.

19. Erik de Bie, Robert Hardy, & Nina Mantel, *EU Sanctions Russia with Eighth Package of Restrictive Measures*, Greenberg Traurig, (Oct. 10, 2022), <https://www.gtlaw.com/en/insights/2022/10/eu-sanctions-russia-with-eighth-package-of-restrictive-measures>.

20. Article 9 of Council Regulation (EU) No. 269/2014.

21. Articles 12 of Council Regulation (EU) No. 833/2014 and Art. 1m of the Council Regulation (EU) No. 765/2006; *Circumvention and Due Diligence*, at 3, https://finance.ec.europa.eu/system/files/2023-06/faqs-sanctions-russia-circumvention-due-diligence_en.pdf; *Guidance for EU operators: Implementing enhanced due diligence to shield against Russia sanctions circumvention*, European Commission (2023), https://finance.ec.europa.eu/system/files/2023-12/guidance-eu-operators-russia-sanctions-circumvention_en.pdf.

joined in the sanctions response.²² So too did the U.S. in December 2023 amend an existing executive order to allow for the imposition of sanctions on foreign financial institutions based on their roles in conducting or facilitating significant transactions involving persons having been sanctioned for operating or having operated in the Russian technology, defense and related material, construction, aerospace or manufacturing sectors, or other sectors determined to support Russia's military-industrial base, or conducting or facilitating significant transactions or providing any service involving Russia's military-industrial base.²³

Secondary sanctions, while potent, are not without negative consequences. Secondary sanctions can be an indiscriminate tool, and they can have unintended effects on human welfare.²⁴ They also risk angering allies, like India, who have chosen not to respond to Russia with sanctions and who may resent other nations making their nationals observe sanctions for fear of becoming targets of sanctions themselves.²⁵ And among so many primarily-sanctioned targets, when imposing secondary sanctions on a third party based on their dealings with a primary target, the nature of the primary target and its particular threat to Ukraine and the sanctioning nations must be examined carefully.

In summary, this new era of sanctions enforcement must confront issues of both sanctions evasion and sanctions avoidance. This essay, by focusing on the particular conceptual difficulties around sanctions avoidance, does not mean to imply that addressing the problem of sanctions evasion will be simple. Indeed, as new sanctions multiply, so too do new strategies intended to evade them. The provision of resources and the enactment of new legal authorities will be required to begin to respond to this challenge. But it is the problem of sanctions avoidance that raises the question of how far the sanctioning powers are willing to—or indeed, should—extend the reach of primary sanctions by means of secondary sanctions and other

22. See, e.g., Press Releases, U.S. Dep't of the Treasury, *Treasury Imposes Sanctions on More Than 150 Individuals and Entities Supplying Russia's Military-Industrial Base*, (Dec. 12, 2023), <https://home.treasury.gov/news/press-releases/jy1978>.

23. Exec. Order 14,114 (Dec. 22, 2023), amending Exec. Order 14,024 (Apr. 15, 2021).

24. Grégoire Mallard, Farzan Sabet, & Jin Sun, *The Humanitarian Gap in the Global Sanctions Regime*, 26 GLOBAL GOVERNANCE: A REVIEW OF MULTILATERALISM AND INT'L ORGANIZATIONS 121 (2020); AGATHE DEMARAI, BACKFIRE: HOW SANCTIONS RESHAPE THE WORLD AGAINST U.S. INTEREST 8 (2022).

25. Jeffrey A. Meyer, *Secondary Thoughts on Secondary Sanctions*, 30 U. PA. J. INT'L L. 905, 906 (2009).

measures to govern conduct beyond that of their own nationals to respond to the threats posed by sanctioned targets. The imposition of some such measures, such as those already undertaken by certain of the sanctioning jurisdictions, will be necessary to reduce the resources available to Russia to wage war in Ukraine.