



Negotiable Hostilities - Part III

“REXIT” - Doing Business With (or Leaving) Russia

CONTINUING LEGAL EDUCATION
THOMSON REUTERS

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Negotiable Hostilities - Part III

Introduction

- Introduction & Overview
- U.S. Sanctions
- Impact on Investment and Commercial Transactions
- “REXIT” - Leaving Russia & The Consequences
- Dispute Resolution, Litigation, Arbitration
- Round Table Discussion

Negotiable Hostilities - Part III

Overview

- Introduction & Overview
 - The Current Conflict
- U.S. Sanctions
 - (How Effective?)
 - The Russian Response

Negotiable Hostilities - Part III

Overview

- U.S. Sanctions (Continued)
 - U.S. Entry Barriers
 - CFIUS; “Team Telecom”
 - Export Regulations
 - New Restrictions
- Impact on Investment and Commercial Transactions

Negotiable Hostilities - Part III

Overview

- REXIT: Leaving Russia & The Consequences
 - On Cross Border Commercial Transactions
 - Term and Termination
 - Force Majeure; Commercial Impracticality
 - Stranded Investment
 - Russian Response
 - Practical Concerns (Criminal Investigations)


Negotiable Hostilities - Part III

Overview

- Dispute Resolution
 - Informal v. Formal
 - Choice of Law
 - Litigation
 - Choice of Forum / Jurisdiction
- International Arbitration

Negotiable Hostilities: Overview & Context of Sanctions on Russia

Adam N. Stulberg
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Sam Nunn School of International Affairs
Georgia Institute of Technology





Where Are We?

- ▶ Pre-2022 Targeted Sanctions on Russia
- ▶ Economic Containment & the Russian-Ukrainian War of 2022
 - ▶ Unprecedented number, breadth & intensity of sanctions
 - ▶ Cut-off major Russian banks from global financial system
 - ▶ Blocked export of high-tech components in unison with Asian allies
 - ▶ Seized overseas assets hundreds of Russian oligarchs
 - ▶ Revoked trade treaties with Moscow
 - ▶ Restricted oil sales to US & UK
 - ▶ Blocked all FDI in Russia economy from their jurisdiction
 - ▶ Frozen \$403B of \$630B foreign reserves



Cracks in Fortress Russia



Economic Pain

- ▶ Ruble lost 50% value
- ▶ Frozen currency reserves
- ▶ GDP at less 1% for '22
- ▶ Lost decade of GDP growth & financial shielding
- ▶ Relative lag in prosperity
- ▶ Small and medium business sectors
- ▶ Innovation sectors

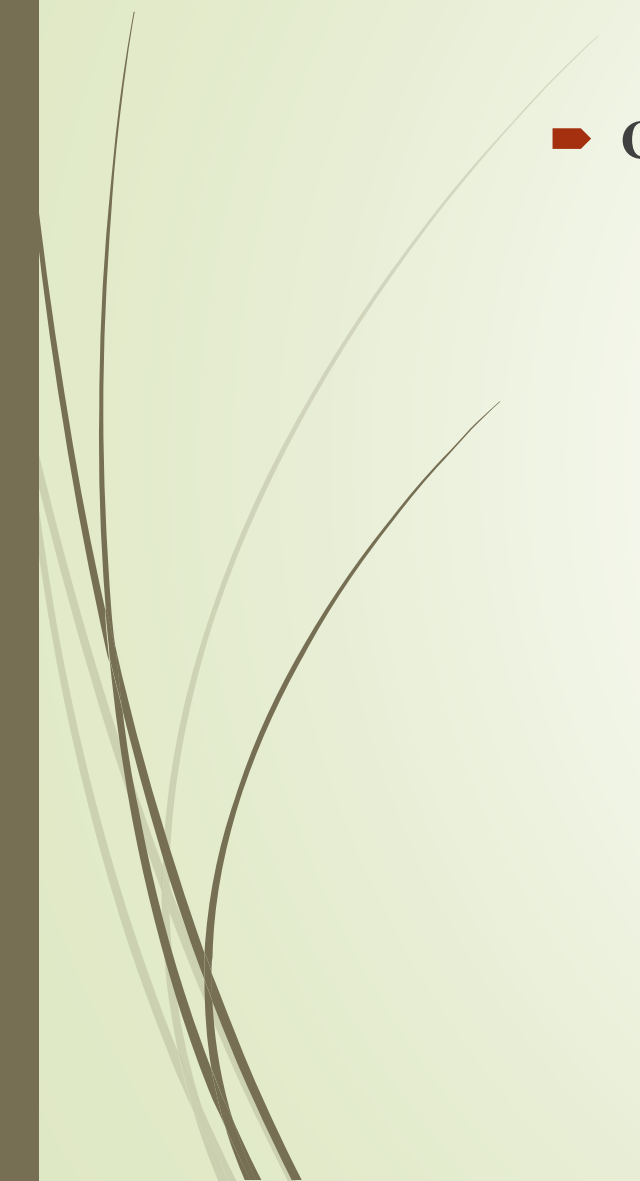


Multiplier Effects

- ▶ Corporate flight & reputational concerns
- ▶ Inflation/recession and weak economic performance
- ▶ Financial deleveraging



Cracks in Fortress Russia (*Cont.*)

- **Counter-Sanctions & Escalation**
 - Capital controls
 - Renationalization of Western capital
 - Restriction of food and commodity exports & ruble pricing
 - Energy price discounts
 - Pressure on global manufacturing & key importers in Eurasia & Africa
 - Debt repayment in rubles post-May '22 vs. default?
- 

Track Record of Success

- General economic sanctions are effective at achieving their goals only around 23-34% of the time
- New data on the United Nations' use of "targeted sanctions" revealed a coercive success rate of only 10%
- Economic costs do not affect all domestic constituencies in sender or target equally
- Threatening sanctions can sometimes be effective, which adds to the overall efficacy of the policy
- New Post-Cold War data reveals US more effective at threatening vs. EU more effective at imposing sanctions
- Impact > Success



Why Do Economic Sanctions Fail?

- Difficulty of forcing foreign leaders to make costly political concessions via sanctions alone
 - Sanctions' goals are too ambitious
 - Challenges in generating sufficient costs
 - Pursued in a vacuum
- Senders have non-instrumental motivations
- Credibility problems
- Indirect effects of sanctions

Conditions for Successful Imposition

13

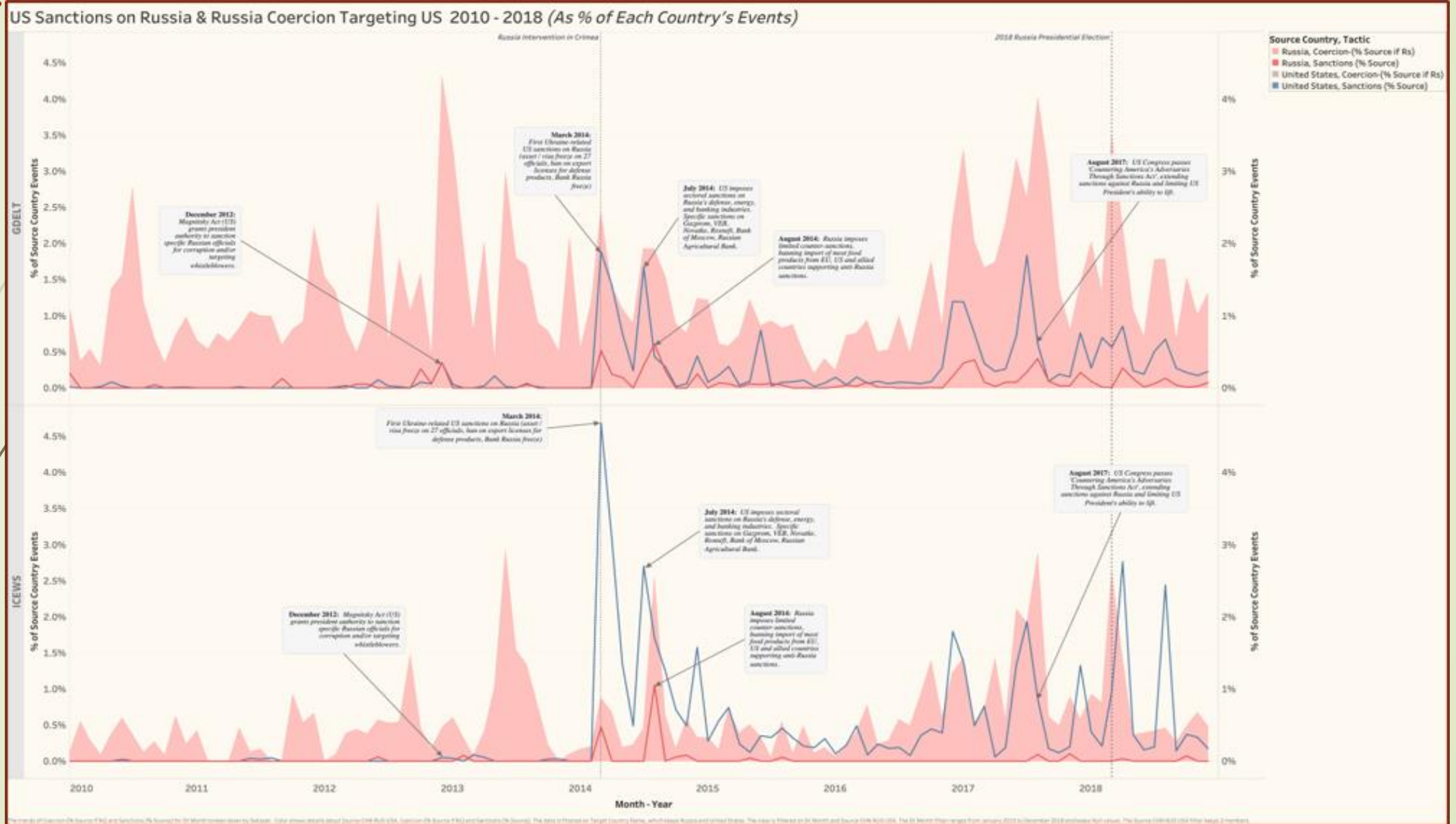
- Interdependence
- Asymmetrical Vulnerability
- Availability of Alternatives
- Proportionate to Stakes at Hand
- Sender:
 - Democratic regime; sensitive to audience costs (resolve)
- Targets:
 - Democratic regime
 - Authoritarian regime: Value exchange, satisfied with status quo, unable pass along costs to broad societal elements
 - (vs. scapegoating, rally around flag, shift costs to pol adversaries, protect loyalty)

Goldilocks Problem & Future Policy Trade-offs

- Deterrence vs. Punishment
- Relevance of Status Quo to Russia vs. West
- Escalatory Energy Embargo vs. Compensatory Domestic Intervention
- Sustainability: U.S. vs. EU vs. Third Parties
- Exacting Financial Punishment vs. post-May '22 Debt Repayment
- Credibility of Threats vs. Off-ramps for Negotiated Settlement
- Short-term Private Sector Magnification vs. Long-term De-risking?
- Targeting Russia: Coup Proofing vs. Societal Awakening
- Substitute vs. Instrument of war
- Economic Costs vs. Strategic Risks

Sanctions & War: Russia's Orthogonal Response?

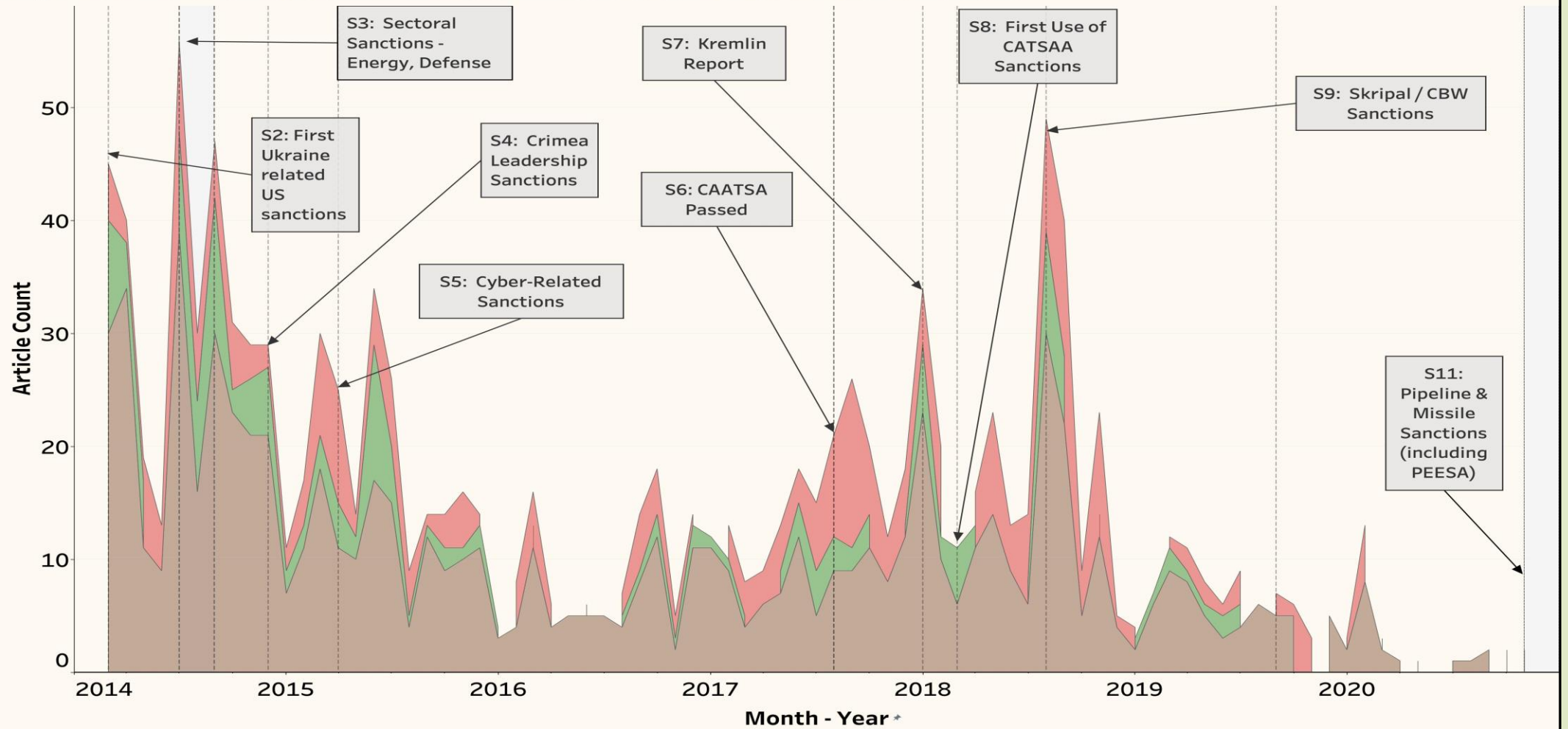
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Russia's Economic vs. Strategic Response

Russia Responds to Sanctions:

High Level Classification of Russian Elite Statements about Sanctions



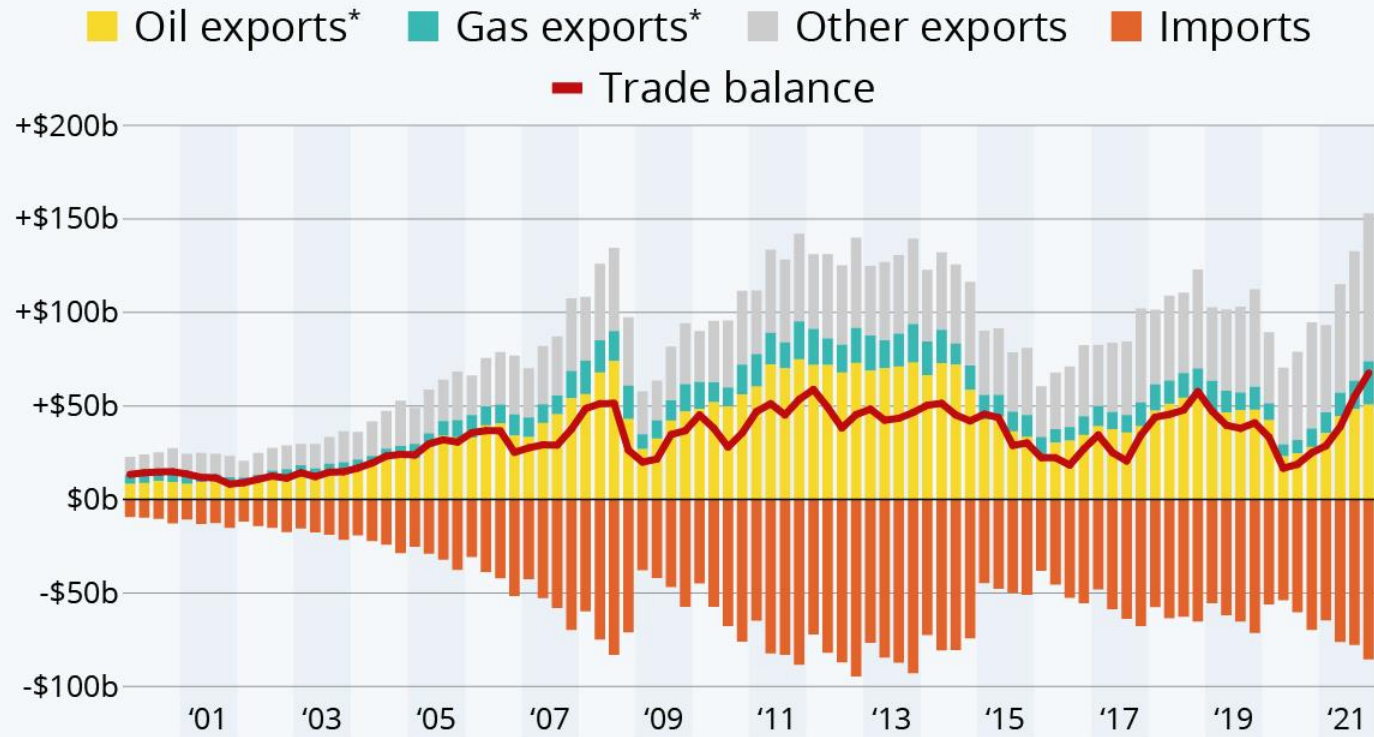
Meta-Code (group)

- Non-Reciprocal / Orthogonal Response
- Reciprocal Response
- Condemnation, Claim or Other Statement About Sanctions

Sources: Interfax News Wire; Georgia Tech Analysis; Sanctions data from RFE/RL Sanctions database

Russian Trade Surplus Surges Amid Rising Tensions

Russia's international trade in goods since Q1 2000

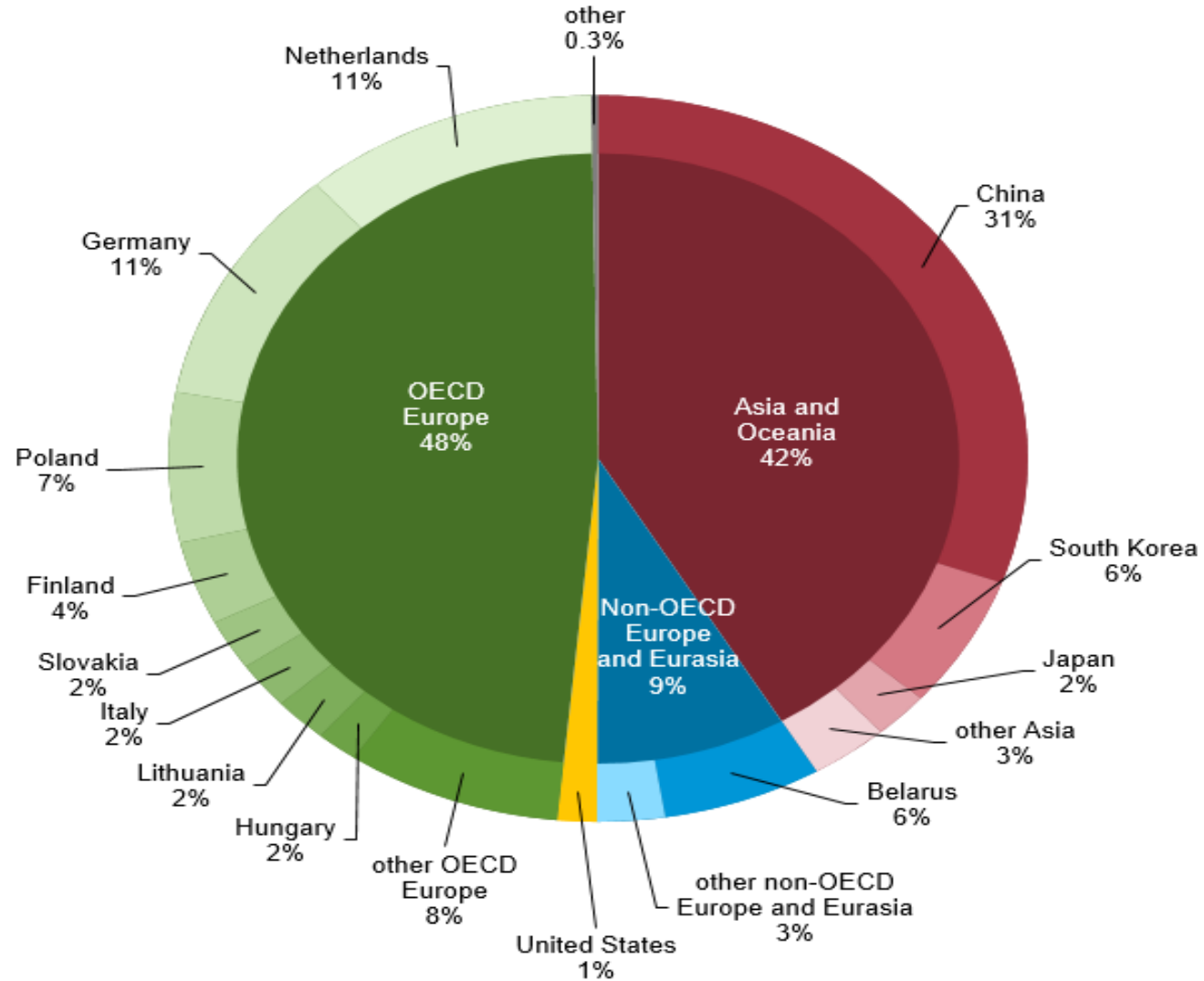


* Oil exports incl. crude oil and oil products; gas exports incl. natural gas and liquified natural gas

Source: Bank of Russia



Figure 2. Russia's crude oil and condensate exports by destination, 2020

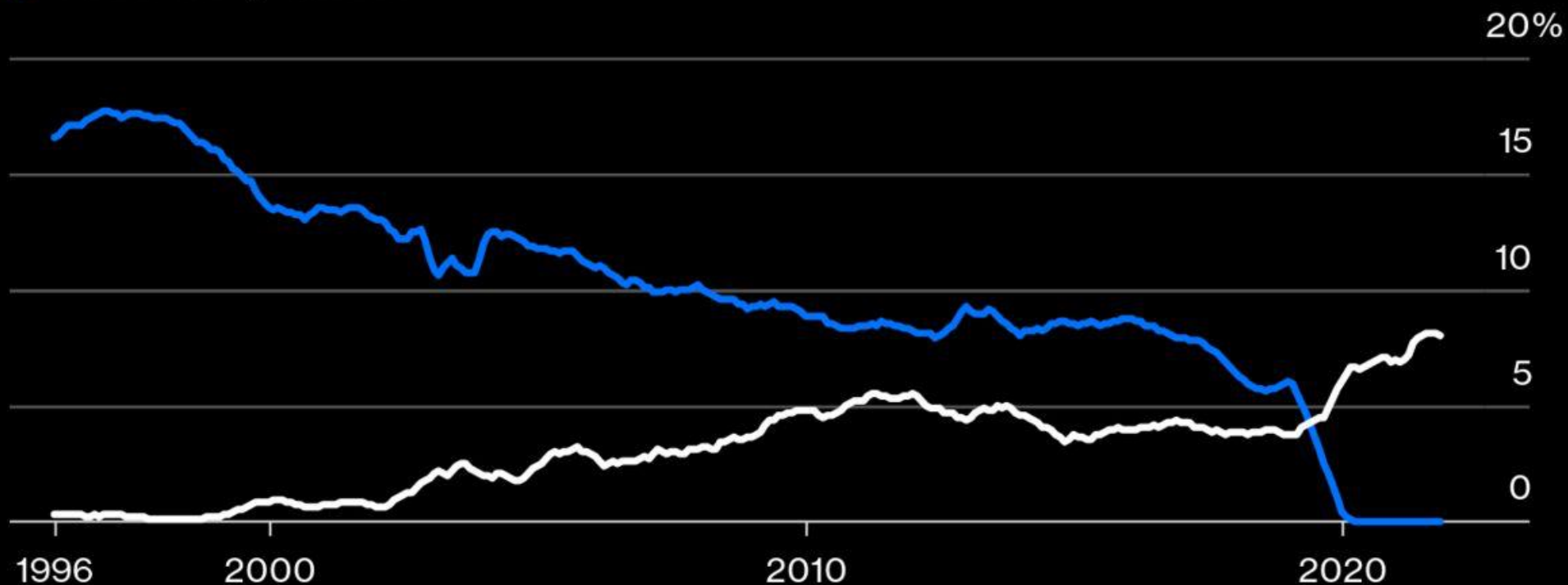


Source: Graph by the U.S. Energy Information Administration, based on Russian export statistics and partner country import statistics from Global Trade Tracker

Dueling Adversaries

As U.S. imports of Venezuelan oil declined and then were blocked altogether, Russia filled the gap

— Venezuela — Russia

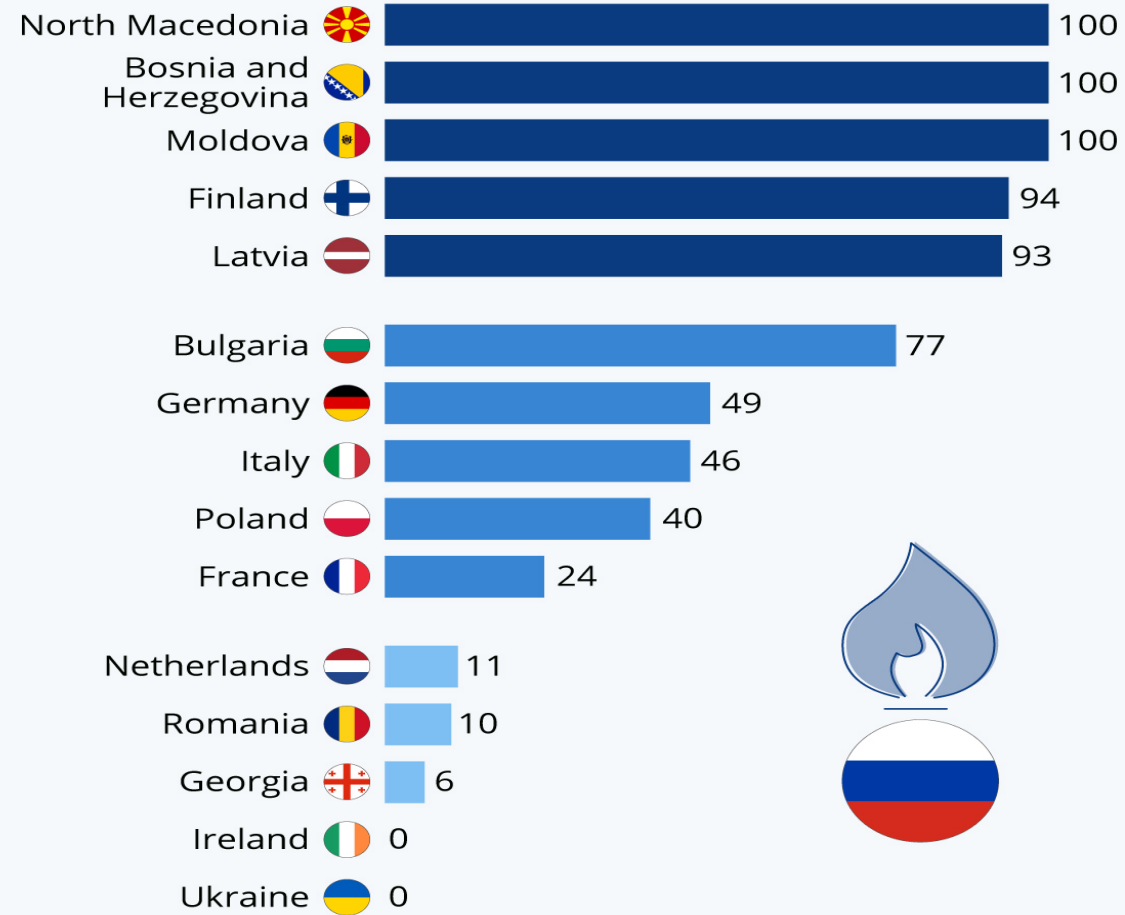


Source: Energy Information Administration

Note: Share of U.S. oil imports, trailing 12-month averages.

Which European Countries Depend on Russian Gas?

% share of gas supply from Russia in selected European countries (2020 or latest available)

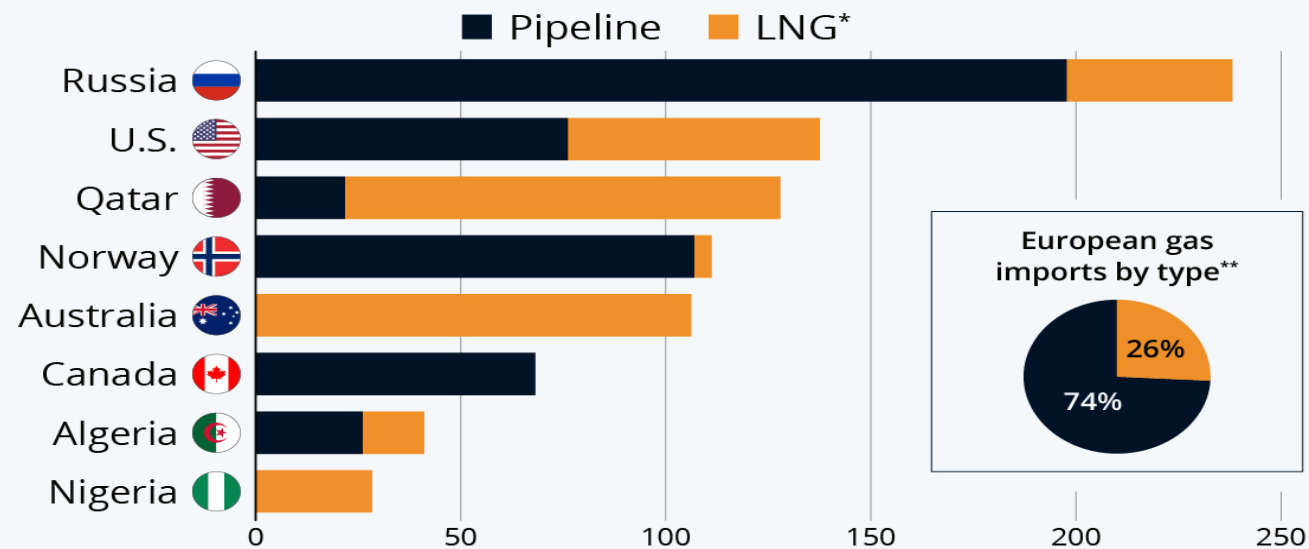


Ukraine buys its gas from the EU since 2015.

Source: European Union Agency for the Cooperation of Energy Regulators

What Alternatives Does Europe Have to Russian Gas?

Main gas exporting countries in 2020, by type of export (in billion cubic meters)



* typically exported by ship

** EU-27 + UK (2020)

Sources: BP - Statistical Review of World Energy 2021, U.S. Energy Information Administration



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Team Telecom Reviews of Foreign Investment in the U.S. Telecom Industry

Daniel Brooks

April 2022



Team Telecom Overview

- Formally known as the Committee on Foreign Participation in the United States Telecommunications Services Sector, Team Telecom is a committee of Executive Branch agencies that reviews certain applications and petitions filed with the Federal Communications Commission (FCC) for national security, law enforcement, foreign policy, and trade policy considerations.
- Recognizing the specific expertise of Executive Branch agencies in addressing these issues, the FCC has long had a general policy of referring certain FCC applications involving foreign ownership to Team Telecom and deferring action on such applications until Team Telecom has concluded its review.



Members and Advisors

- **Members**

- Attorney General (Chair)
- Secretary of Homeland Security
- Secretary of Defense
- Others as appropriate

- **Advisors**

- Secretary of State;
- Secretary of the Treasury;
- Secretary of Commerce;
- Director of the Office of Management and Budget;
- US Trade Representative;
- Director of National Intelligence;
- Administrator of General Services;
- Assistant to the President for National Security Affairs
- Assistant to the President for Economic Policy
- Director of the Office of Science and Technology Policy
- Chair of Council of Economic Advisors
- Any other Assistant to the President, as the President determines appropriate



Types of Applications Referred

- The FCC generally refers the following types of applications with “reportable foreign ownership” to Team Telecom:
 - Applications for international section 214 authorization;
 - Applications for the assignment or transfer of control of international section 214 authorizations;
 - Applications for submarine cable landing licenses;
 - Applications for the assignment or transfer of control of submarine cable landing licenses; and
 - Petitions seeking authority to exceed the Section 310(b) foreign ownership limits for broadcast, common carrier wireless, and common carrier satellite earth station licenses.

Exceptions

- The FCC generally does not refer the following types of applications to Team Telecom:
 - *Pro forma* notifications and applications;
 - International section 214 applications, submarine cable applications, and section 310(b) petitions where the only reportable foreign ownership is through wholly owned intermediate holding companies and the ultimate ownership and control is held by U.S. citizens or entities;
 - International section 214 applications where the applicant has an existing mitigation agreement, there are no new reportable foreign owners of the applicant since the date of the mitigation agreement, and the applicant agrees to continue to comply with the terms of the mitigation agreement; and
 - International section 214 applications where the applicant was cleared by the Executive Branch within the past 18 months without mitigation and there are no new reportable foreign owners of the applicant since that review.



Team Telecom Process Overview

- FCC issues a public notice accepting the application for filing and refers the application to Team Telecom
- Team Telecom files a letter in the docket requesting that the FCC defer action on the application pending Team Telecom review
- Team Telecom sends “trriage questions” to applicants within 30 days of the FCC’s referral
- 120-day initial review period commences upon Team Telecom’s determination that applicants’ responses are complete
- Team Telecom may extend the initial review period and/or conduct a 90-day “secondary assessment” if warranted



Potential Outcomes

- Upon completion of its review, Team Telecom may:
 - Notify the FCC that it has no recommendation and no objection to the FCC granting the application;
 - Recommend that the FCC only grant the application contingent upon the applicant's compliance with mitigation measures; or
 - Recommend that the FCC deny the application due to the risk to national security or law enforcement interests of the United States.
- Common mitigation agreement provisions:
 - Designate a U.S. law enforcement point of contact and security officer;
 - Submit and follow network security practices and provide notice of data breaches;
 - Provide advance notice of any change in equipment, suppliers, or ownership;
 - Set out procedures for dealing with governmental subpoenas, warrants, and other orders, including with respect to electronic surveillance; and
 - Notify the U.S. government of any foreign employees with access to domestic communications or infrastructure.



Recent License Denials and Revocations

- May 2019 – FCC denies China Mobile’s application for international section 214 authorization
- Oct. 2021-Mar. 2022 – FCC revokes and terminates licenses held by China Telecom, China Unicom, Pacific Networks, and ComNet
 - Vulnerable to exploitation, influence, and control by the Chinese government and would be forced to comply with Chinese government requests
 - Ownership and control could create opportunities for the companies, their parent entities and affiliates, and the Chinese government to access, monitor, store, and disrupt or misroute U.S. communications, which could in turn allow them to engage in espionage and other harmful activities against the United States
 - Conduct and representations to the U.S. government demonstrate a lack of trustworthiness and reliability required of telecommunications carriers
 - Prior violations of Team Telecom mitigation agreements
 - Mitigation would not address Team Telecom’s national security and law enforcement concerns



Increased FCC Focus on Russia

- FCC Chairwoman Jessica Rosenworcel: FCC has “completed a top-to-bottom review . . . associated with Russian interests in communications” and has “shared that information with our national security colleagues.”
- Potential scrutiny of Russian ownership in U.S. media and telecommunications companies
- Feb. 28, 2022 Notice of Inquiry seeking comment on security vulnerabilities threatening the Border Gateway Protocol (BGP)
 - Cites the need to “reinforce our Nation’s readiness and to strengthen the cybersecurity of vital communications services and infrastructure, especially in light of Russia’s escalating actions inside of Ukraine.”
- Mar. 25, 2022 addition of AO Kaspersky Lab to list of list of communications equipment and services that “pose an unacceptable risk to the national security of the United States or the security and safety of United States persons.”

Questions?

INTER ARMA SILENT LEGES

Alla Naglis
Sapronov & Associates, P.C.

Russia's New Restrictions on Cross-Border Transactions

Statutory Framework (unchanged):

- ❑ Federal Law “On counter-measures in respect of unfriendly acts of the United States of America and other foreign states” 127-FZ, dated June 4, 2018
- ❑ Federal Law On Special Economic Measures and Enforcement Measures 281-FZ, dated December 30, 2006

Specific measures implemented by the President and the Government.

Restrictions impacting both foreign investors in Russia and Russian parties

- List of “unfriendly countries” now includes 21 individually named countries and all EU countries (Ordinance of the Government No. 430-r of March 5, 2022)

- Numerous Decrees of the President, introducing the following restrictions on:
 - Loans by residents to non-residents in foreign currency (Decree No. 79 of February 28, 2022);
 - Credits and loans in rubles to “parties connected with” or “under control” of unfriendly countries;
 - Deals with securities or real property with “parties connected with” or “under control” of unfriendly countries” (Decree No. 81 of March 1, 2022);
 - Exportation of certain raw materials and products (Decree No. 100 of March 8, 2022);
 - Limits on advance payments to non-resident;
 - Transfers of funds by parties from “unfriendly countries” from their accounts in Russian banks abroad;
 - Payments by residents for shares in foreign entities – only upon Russian Central Bank’s approval through December 31, 2022 (Decree No. 126 of March 18, 2022)

REXIT: ARE THERE PROTECTIONS TO COUNT ON?

- ❑ Assets in Russia (including those presently restricted in dealing):

Federal Law On Foreign Investments in Russia No. 160-FZ of July 9, 1999 prohibits requisition or sequestration of foreign investor's assets in Russia (NB: "except in cases set by law").

- ❑ Contract variation or termination:
 - Force majeure (NOTE: Chamber of Industry and Commerce of Russia suspended the fees for processing of certificates confirming force majeure events for Russian parties through April 20, 2022) - Orders Nos. 24 and 25 of March 9, 2022
 - Material Adverse Change

FORUM RISKS

36

- “Unfriendly” Peppa Pig?

Risks of arbitrary and biased expansion of the rules on special economic measures against parties from “unfriendly countries”

- Recommended: Arbitration v. Litigation

(NOTE: risks of broader application of the “public policy” exemption)

CRYPTOCURRENCY

- Opportunity or waltz into darkness?
- Developments to monitor



NEGOTIABLE HOSTILITIES – PART III

“REXIT”: POTENTIAL CLAIMS AND DISPUTE RESOLUTION

SAPRONOV & ASSOCIATES / THOMSON REUTERS WEBINAR | 1 APRIL 2022



AGENDA

- The disputes landscape
- Contractual non-performance / termination
- Legal and strategic considerations
- Investment protection
- International arbitration

THE DISPUTES LANDSCAPE

- Sanctions and countermeasures
- Business withdrawals, termination of M&A deals
- Suspension of infrastructure projects (e.g., Nord Stream)
- Non-performance of existing contractual arrangements (e.g., energy supply agreements), supply chain disruptions
- Breaches of foreign-owned IP and patents
- Price-review disputes
- War damage to infrastructure
- Seizures of assets and nationalizations

CONTRACTUAL NON- PERFORMANCE / TERMINATION

Excusing non-performance (contractual or at law)

- Force majeure
- MAC clauses
- Change in law
- Frustration / impossibility / impracticability
- Hardship
- Change in circumstances

Termination rights (contractual or at law)

Alternative remedies (e.g., suspension)

LEGAL AND STRATEGIC CONSIDERATIONS

- Governing law and forum (e.g., international arbitration)
- Effect of contractual provisions
 - Scope – events covered?
 - Suspension or termination of obligations?
- Timing and notice requirements
- Enforcement
- Sanctions compliance
- Legislative relief
- Countermeasures

INVESTMENT PROTECTION

- Protection of qualifying foreign investors and their qualifying investments in contracting state
- Substantive protections, e.g.:
 - Against expropriation without due compensation
 - Fair and equitable treatment
 - Full protection and security
 - National treatment / most favoured nation treatment
 - Free transfer of funds
 - Compensation for war losses (in some cases)
- Direct right of recourse against the State through international arbitration (ICSID, UNCITRAL, other)



- BITs in force with 62 States



- BITs in force with 65 States

INTERNATIONAL ARBITRATION

- Alternative to litigation before state courts
- Private mode of dispute resolution before sole or three-person arbitral tribunal
- Procedure: flexible, institutional or ad hoc rules
- Based on consent (arbitration agreement / standing offer to arbitrate in investment treaties / foreign investment legislation)
- Supervisory jurisdiction of national courts at the seat with respect to the arbitral proceedings and resulting award (except for ICSID arbitration)



Many investment arbitrations against Russia, and later Ukraine, arising out of Russian invasion of Crimea and ensuing Russia/Ukraine tensions

INTERNATIONAL ARBITRATION

Pros

- Global enforcement of award under New York Convention
- Neutrality
- Ability to select arbitrators
- Confidentiality (not absolute)
- Award binding and final (set aside only on narrow grounds, but beware of public policy)

Cons

- Time and cost (relative to some jurisdictions)
 - Expedited procedures offered by many arbitral institutions
- Limits on arbitrators' powers
 - Scope of arbitration agreement, applicable rules and laws
 - Vis-à-vis third parties

Negotiable Hostilities - Part III

Round Table Discussion

Thank you for Attending

46

Stay Tuned for “Negotiable Hostilities – Part IV”

U.S. v. Russian Conflict of Laws

(& of Much Else)

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Walt Saprnov has represented corporate clients in telecom transactions, regulation and privacy for over thirty years. He has been named in Georgia Super Lawyers and in the International Who's Who of Telecom Lawyers. Together with his affiliates, Saprnov & Associates with offices in the U.S. and Eastern Europe, represent clients in complex commercial transactions, cross-border finance, and international dispute resolution.

For more information, please visit:

www.wstelecomlaw.com

James Kevin Wholey

48

Mr. Wholey has broad experience at the intersection of federal government, national security and international business. His specific focus is on the legislative, policy and compliance issues involved in international investment, trade and business development. Through his international business and federal government relations practice, he assists clients with transnational compliance matters (Foreign Corrupt Practices Act, EAR, ITAR, export licensing and involvement with various sanctions regimes) and works frequently with the Administration and Capitol Hill. He spent more than a decade as a senior staff member for several U.S. senators, including three years as chief of staff to then-Senate Leader Bob Dole (R-KS), for whom he also handled trade and telecommunications issues.



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Dr. Stulberg is Sam Nunn Professor and Chair in the Sam Nunn School of International Affairs. He teaches undergraduate and graduate courses on international security, Russia/Eurasian politics and security affairs, nuclear (non)proliferation, and energy and international security, as well as interdisciplinary courses on science, technology, and international security policy. His current research focuses on the geopolitics of oil and gas networks, energy security dilemmas and statecraft in Eurasia, Russia and “gray zone” conflicts, new approaches to strategic stability, internationalization of the nuclear fuel cycle, and implications of emerging technologies for strategic stability and international security.

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Daniel Brooks advises U.S. and multinational companies on a wide range of telecommunications and national security issues before the Committee on Foreign Investment in the United States (CFIUS), the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector (Team Telecom), the Federal Communications Commission (FCC), and the U.S. Treasury, State, Commerce, and Defense Departments. As part of his practice, Dan negotiates and drafts purchase agreements, fund formation documents, and mitigation agreements to address U.S. national security risks in transactions involving foreign investment and regularly represents domestic and international companies, private equity firms, and investment funds in national security reviews before CFIUS and Team Telecom.



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Alla Naglis has recently joined Sapronov & Associates as a co-founding partner of our Russian subsidiary. She has over 20 years of advising on a daily basis major U.S., European and Russian companies on virtually all aspects of media and entertainment industry, telecommunications, e-commerce and IT, technology and know-how protection; and data privacy and security issues. The scope of her expertise ranges from counselling and contractual matters to regulatory advice and representation of clients in courts and arbitration. In data privacy area, her experience includes counseling on internal compliance policies and audits for major international players, as well as compliance checks of local vendors or partners. Ms. Naglis has been consistently ranked as one of the leading Russian TMT lawyers.

Gisele Stephens-Chu

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Gisele Stephens-Chu is a dual-qualified English and French lawyer based in Paris, France, with over 17 years' experience in international arbitration and dispute resolution. She has represented corporate and State clients in ad hoc and institutional arbitrations under a wide range of arbitral rules and applicable laws, as well as appearing before the English and French courts. She also serves as arbitrator and mediator.

Gisele's experience spans many industry sectors and jurisdictions, including very significant disputes in Russia and Ukraine.

Gisèle is recognized by Who's Who Legal: Arbitration 2022 as “a meticulous, knowledgeable and very able counsel” and “a brilliant advocate”.