

Raj Bhala, *Waves of Russian Sanctions: American and Allied Measures, Indian and Chinese Responses, and Russian Countermeasures*
14(2) TRADE L. & DEV. 352 (2022)

WAVES OF RUSSIAN SANCTIONS:
AMERICAN AND ALLIED MEASURES, INDIAN AND CHINESE
RESPONSES, AND RUSSIAN COUNTERMEASURES

RAJ BHALA*

Following its February 24, 2022 invasion of Ukraine, Russia became the target of one of the broadest and deepest sanctions regimes ever imposed by the United States and its Allies. This article is a comprehensive analysis of this extraordinary regime, the responses of India and China to it, and Russia's countermeasures. What sanctions were imposed? How were they forged? Why were they levied? What were the costs, benefits, and consequences of imposing these sanctions? These theoretical and practical questions are so important that no international trade lawyer, scholar, student, or relevant stakeholder can

* Raj Bhala is a Professor at the University of Kansas, School of Law and a Senior Advisor at Dentons U.S. LLP at Kansas City, Missouri. He is a columnist in “On Point” Bloomberg Quint / BQ Prime at Mumbai and is also a member of the Speaker Program by the U.S. Department of State. He can be found at http://en.wikipedia.org/wiki/Raj_Bhala and his column can be found at <https://www.bqprime.com/author/92714/raj-bhala>. He holds a J.D., Harvard (1989, *cum laude*). M.Sc. (Management – Industrial Relations), Oxford (1986). M.Sc. (Economics), London School of Economics (1985). A.B. (Economics, Sociology), Duke (1984, A.B. Duke Scholar, *summa cum laude*, *Phi Beta Kappa*). Marshall Scholar (1984-86). Furthermore, he has written several books — *International Trade Law: A Comprehensive Textbook* (5th ed., 4 vols., 2019, 6th ed., forthcoming), *Modern GATT Law* (2nd ed., 2 vols., 2013), *TPP Objectively* (2nd ed., 2019), *Trade, Development, and Social Justice* (2003), and *Understanding Islamic Law (Shari'a)* (2nd ed., 2016, 3rd ed., forthcoming). He is also a member of the Council on Foreign Relations (U.S.), and the Royal Society for Asian Affairs (U.K.). A modified version of this article is expected to appear in the forthcoming new (6th) edition of *International Trade Law: A Comprehensive Textbook*. The views expressed herein do not necessarily represent those of the State or University of Kansas, Dentons, BQ Prime, or U.S. State Department, nor of any of their employees, affiliates, or clientele. The author is grateful to his Research Assistants, Bridget Beran (J.D. with Certificate in International Trade and Finance, University of Kansas School of Law, expected 2023, B.A., Journalism and Mass Communications, Kansas State University, 2016), and Katherine Hahn (J.D. with Certificate in International Trade and Finance, University of Kansas School of Law, expected 2023, LL.B. Law Degree, University of Liverpool School of Law, 2018) for their careful review of an earlier draft of this article. The author is also grateful to the Editors in Chief of *TL&D*, Aastha Asthana and Swikruti Nayak, for their steadfast support of this project.

afford to avoid them. Indeed, this case study will endure long after the war in Europe ends.

TABLE OF CONTENTS

- I. INTRODUCTION: AN EXTRAORDINARY CASE STUDY
- II. WAVE ONE: SANCTIONS ON TRADE AND FDI WITH DONETSK AND LUHANSK, AND PARTS OF RUSSIA'S FINANCIAL SECTOR
- III. WAVE TWO: SANCTIONING SELECTED ENTITIES AND OLIGARCHS AND RESTRICTING DUAL-USE, HIGH-TECH EXPORTS
- IV. WAVE THREE: RESTRICTING RUSSIA'S ACCESS TO THE SWIFT SYSTEM, FREEZING RESERVES, AND POTENTIAL DEFAULT
- V. WEAPONISATION OF FINANCE
- VI. WAVE FOUR: IMPORT CONTROL OF RUSSIAN OIL AND NG AND FDI IN RUSSIA'S ENERGY SECTOR
- VII. NON-SANCTIONING COUNTRIES (INDIA AND CHINA)
- VIII. WAVE FIVE: REVOKING RUSSIA'S MFN STATUS
- IX. WAVE SIX: BANNING IMPORTS OF RUSSIAN-ORIGIN ICONIC GOODS, AND EXPORTS TO RUSSIA OF LUXURY GOODS AND BANK NOTES
- X. WAVE SEVEN: PRIVATE SECTOR WITHDRAWALS
- XI. WAVE EIGHT: MORE SDN DESIGNATIONS PLUS STATE SANCTIONS
- XII. WAVE NINE: FURTHER DEGRADING KREMLIN POWER AND IMPOSING MORE ECONOMIC PAIN
- XIII. WAVE TEN: EXCLUSION FROM INTERNATIONAL BODIES
- XIV. SHOULD AMERICA DESIGNATE RUSSIA AN FTO?
- XV. RUSSIAN COUNTERMEASURES
- XVI. WAVE ELEVEN: TARGETING SERVICES AND *GAZPROMBANK*, AND MORE SDN DESIGNATIONS AND ENTITY LISTINGS
- XVII. SHOULD AMERICA IMPOSE SECONDARY BOYCOTT?
- XVIII. WAVE TWELVE: PROHIBITION ON RUSSIAN FINANCIAL INSTRUMENTS AND GOLD
- XIX. WAVE THIRTEEN: OIL AND NATURAL GAS PRICE CAPS
- XX. NO END GAME?

I. INTRODUCTION: AN EXTRAORDINARY CASE STUDY

Not even the most farsighted policymaker in Moscow could have foreseen that Russia would go from a resource-rich, middle-income country, well-integrated into the world trading system, following its August 2012 World Trade Organization (WTO) accession, to the most heavily sanctioned nation on earth. Russia took that mantle from North Korea and Iran thanks to the decision of its President, Vladimir Vladimirovich Putin (1952, President, 2000-2008, 2012-), to invade Ukraine on February 24, 2022. His pretexts — that Ukraine had no authentic history of being a sovereign nation; that the North American Treaty Organization (NATO) and European Union's (EU) eastward expansionism toward and into Ukraine threatened Russia's security interests, and it needed de-Nazification — were offensive poppycock to the entire international community.¹

¹ See Anton Troianovski, *Why Vladimir Putin Invokes Nazis to Justify His Invasion of Ukraine*, N.Y. TIMES (Mar. 17, 2022), www.nytimes.com/2022/03/17/world/europe/ukraine-putin-nazis.html?referringSource=articleShare (This is for an explanation of why President Putin used the “de-Nazification” excuse. Reporting: “[t]he ‘Nazi’ slur’s sudden emergence shows how Mr. Putin is trying to use stereotypes, distorted reality, and his country’s lingering World War II trauma to justify his invasion of Ukraine. The Kremlin is casting the war as a continuation of Russia’s fight against evil in what is known in the country as the Great Patriotic War, apparently counting on lingering Russian pride in the victory over Nazi Germany to carry over into support for Mr. Putin’s attack. ‘This rhetoric is factually wrong, morally repugnant and deeply offensive,’ scholars of genocide and Nazism from around the world said in an open letter after Mr. Putin invaded. While Ukraine has far-right groups, they said, ‘none of this justifies the Russian aggression and the gross mischaracterization of Ukraine.’ . . . Mr. Putin, in a speech . . . , used the us-versus-them language of a dictator to proclaim that Russian society needed a ‘self-purification’ from the pro-Western ‘scum and traitors’ in its midst. Many believe that Mr. Putin’s stated determination to ‘denazify’ Ukraine is code for his aim to topple the government and repress pro-Western activists and groups. It is an echo of how he has used Russian remembrance of the nation’s suffering and victory in World War II to militarize Russian society and justify domestic crackdowns and foreign aggression. Ukrainians have closed ranks behind Mr. Zelensky, however, causing Mr. Putin to escalate the brutality of his war. Mr. Putin’s ‘denazification’ mission increasingly means that he is determined to ‘destroy all Ukrainians,’ the country’s Information Minister, Oleksandr Tkachenko, wrote . . . [i]t may seem hard to fathom that regular Russians could accept Mr. Putin’s comparison of neighbouring Ukraine – where millions of Russians have relatives and friends – to Nazi Germany, the country that invaded the Soviet Union at the cost of some 27 million Soviet lives.”); *but see* Peter Baker, *In Ukraine Conflict, Putin Relies on a Promise That Ultimately Wasn’t*, N.Y. TIMES (Jan. 9, 2022), www.nytimes.com/2022/01/09/us/politics/russia-ukraine-james-baker.html?referringSource=articleShare. (President Vladimir V. Putin and other Russian officials have asserted that Mr. Baker ruled out NATO expansion into Eastern Europe when he served as President George H.W. Bush’s top diplomat. The West’s failure to live up to

that agreement, in this argument, is the real cause of the crisis now gripping Europe as Mr. Putin demands that NATO forswear membership for Ukraine as the price of calling off a potential invasion. But the record suggests this is a selective account of what really happened, used to justify Russian aggression for years. While there was indeed discussion between Mr. Baker and the Soviet leader Mikhail S. Gorbachev in the months after the fall of the Berlin Wall about limiting NATO jurisdiction if East and West Germany were reunited, no such provision was included in the final treaty signed by the Americans, Europeans, and Russians.); *see also* Jeff Neal, *There was no promise not to enlarge NATO*, HARV. L. REC. (Mar. 16, 2022), <https://today.law.harvard.edu/there-was-no-promise-not-to-enlarge-nato/> (When President George H.W. Bush sat down with Soviet President Mikhail Gorbachev to negotiate the peaceful end of the Cold War and the reunification of Germany, former Under Secretary of State Robert Zoellick . . . was in the room where it happened. During the 1990 summit, Zoellick says President Gorbachev accepted the idea of German unification within the North Atlantic Treaty Organization, based on the principle that every country should freely choose its own alliances. “I was in those meetings, and Gorbachev has [also] said there was no promise not to enlarge NATO”, Zoellick recalls. Soviet Foreign Minister, Eduard Shevardnadze, later president of Georgia, concurred, he says. Nor does the treaty on Germany’s unification include a limit on NATO enlargement. Those facts have undermined one of Russian President Vladimir Putin’s justifications for invading Ukraine – that the United States (U.S.) had agreed that former Warsaw Pact nations would never become part of the North Atlantic security alliance. Zoellick . . . [is] a former Deputy and Undersecretary of State, Deputy White House chief of staff, U.S. Trade Representative, and World Bank President . . . Zoellick vividly recalls the White House meeting he attended nearly three decades ago in which Bush asked Gorbachev if he agreed with the Conference on Security and Cooperation in Europe principle that nations are free to ally with others as they see fit. When Gorbachev said yes, he says, the Soviet leader’s “own colleagues at the table visibly separated themselves.” Sensing the import of the possible breakthrough, he says a colleague at the meeting, Robert Blackwill, sent him a note checking what they had heard and asking if they should ask Bush to repeat the question. “Gorbachev agreed again”, Zoellick recalls, to the principle that Germany could choose to enter NATO. “The reality was that, in 1989-90, most people, and certainly the Soviets, weren’t focusing on whether the Eastern European countries would become part of NATO”, Zoellick says. Knowing Soviet and Russian diplomacy, he believes Moscow would have demanded assurances in writing if it believed the U.S. had made such a promise. And even in 1996, when President Bill Clinton welcomed former Warsaw Pact nations to join NATO, he says that, “[o]ne of the German diplomats involved told me that as they discussed the enlargement with the Russians, no Russian raised the argument that there had been a promise not to enlarge.” But if the West never gave the promise Putin has used to explain his decision to invade Ukraine, what does Zoellick think motivates the Russian president’s decision to inflict death and destruction on one of Russia’s nearest neighbours? “Putin does not see Ukraine as an independent and sovereign state”, he says. “He has a view of Russian history where the Rus [the medieval ancestors of the people who came to form Russia, Belarus, and Ukraine] began in Kyiv. He believes that they are all Russians, living in a greater Russia. And I think at age sixty-nine, Putin feels that this is a question not only of Russian history, but his place in Russian history.”

Following the November 9-10, 1989 fall of the Berlin Wall and the collapse of the Soviet Union, Ukraine voted, in 1991, (via an August Declaration of Independence; a December referendum; and Presidential election in which 92% of Ukrainians favoured independence) not to integrate with Russia.² By 1996, Ukraine transferred its entire nuclear arsenal to Russia in exchange for economic aid and security assurances; in December 1994, Ukraine joined the 1968 *Nuclear Non-Proliferation Treaty as a non-nuclear weapons state party*.³ In contrast, in 2014, President Putin ordered the invasion and annexation of Ukraine's southern territory along the Black Sea, Crimea. Ukraine's President, the lawyer-turned-comedian Volodymyr Oleksandrovych Zelenskyy (1978-, President, 2019-), was Jewish and several of his relatives perished in the Holocaust. Mr. Putin sought to rebuild the Union of Soviet Socialist Republics (USSR), particularly, by rectifying what, from his perspective, was the most painful loss of all former Soviet Republics — Ukraine. After all, save for Russia itself, Ukraine was the largest (by population) and most industrialized Soviet Republic, as well as a vital producer of wheat. The Russian President simply could not accept that the Ukrainian people, following their March 2014 'Euromaiden Protest' and consequent 'Revolution of Dignity', turned their back on pro-Russian authoritarianism and embraced a western style of democracy.

The three-front attack by Russian forces — from the East, in the ethnic-Russian-Ukrainian regions of Donetsk and Luhansk; from the North, via Belarus, which was run by an intensely pro-Russian autocrat, Alexander Grigoryevich Lukashenko (1954-, President, 1994-); and from the South, via Crimea — was supposed to conclude within 96 hours, with a clear Russian victory, thanks to three factors that did not happen. First, and most importantly, the Ukrainian people, led by President Zelenskyy, fought zealously to defend their country. Second, although NATO avoided direct engagement with Russian forces so as to avoid triggering a Third World War, it supported Ukraine in every other way possible, from lethal arms

Zoellick says that when Putin's earlier attacks in the Crimea and country's eastern regions failed to halt Ukraine's drift towards the West, the Russian leader believed he had no other choice but to invade. "That's his motivation. And I think we need to be aware that he's going to double down. The resilience and resolve of the Ukrainian people to resist has been a surprise to him and everybody else. I don't think he's going to ultimately be successful. In addition to today's brutal battles, Russia faces a difficult occupation and insurgency, even if it can seize cities and territory."

² See *Ukraine's Struggle for Independence in Russia's Shadow – 1991-2022*, COUNCIL ON FOREIGN REL., www.cfr.org/timeline/ukraines-struggle-independence-russias-shadow.

³ David Kimball, *Ukraine, Nuclear Weapons, and Security Assurances at a Glance*, ARMS CONTROL ASS'N (Feb. 2022), www.armscontrol.org/factsheets/Ukraine-Nuclear-Weapons (also noting: "[a]t the time of Ukraine's independence from the Soviet Union in 1991, Ukraine held the third largest nuclear arsenal in the world, including an estimated 1,900 strategic warheads, 176 . . . ICBMs, and 44 strategic bombers.").

shipments and intelligence sharing, to humanitarian aid and refugee assistance. Third, not only the United States of America (U.S.) but also the United Kingdom (U.K.) and the EU, were quick to impose crushing sanctions on Russia. Other than China, and to a lesser degree India, Russia had few friends as it considered itself a pariah state.

As for the American and Allied measures, they took the form of calibrated trade sanctions and export controls, applied across the first two-to-three weeks in advance of, and following, the February 24, 2022 Russian attack on Ukraine. The hope was that President Putin would behave as a rational actor and calculate that his escalation of war in Ukraine would be met with an escalation of sanctions against Russia, which would wreck the Russian economy. That hope was dashed, for such expectations of rationality and foreseeing of economic sanctions were not met.

Rather, President Putin, who had been an officer in the Soviet Union's intelligence agency, recalling he had to moonlight as a taxi driver to make ends meet after the collapse of the Soviet Empire, persisted in perpetrating violence. Those acts included committing war crimes against civilians in Ukraine and applying countermeasures against the US and Allied governments that were laughably (if that adverb is appropriate in wartime) redolent of the tit-for-tat behaviour of the Chinese Communist Party (CCP) in the Sino-American Trade War.

Though there is no single or correct way to organize and categorize the Russian sanctions, it is fair to say that they occurred in multiple waves. They sent the international legal community into a veritable frenzy, as law firms across the globe struggled to help clients decamp Russia, and to avoid being hit themselves, with sanctions for collaborating with instruments of Mr. Putin's war machine. These waves overlap and hence, are only roughly chronological. For instance, the identification and sanctioning of President Putin's inner circle was a work-in-progress, taking months.

Overall, the wave of sanctions provides a veritable clinic not only on the invocation and allocation of the U.S. 1977 International Emergency Economic Powers Act (IEEPA), and not only on nearly multilateral action (indeed, the likes of Japan and Singapore, both of which traditionally after the Second World War had been reluctant to draw hard, red lines in favour of deontological do-the-right-thing versus Utilitarian pay-attention-to-who-pays-the-bills), but also on a possible restructuring of international relations. Democracies united to fight tyranny, which had not been seen in the European Continent since the Second World War, as they appreciated that a threat to freedom anywhere can be a threat to it everywhere.

II. WAVE ONE: SANCTIONS ON TRADE AND FDI WITH DONETSK AND LUHANSK, AND PARTS OF RUSSIA'S FINANCIAL SECTOR

On February 21, 2022, three days before Russia's attack on Ukraine, President Biden issued Executive Order 14065 (EO 1), that effectively imposed a complete trade and foreign direct investment (FDI) embargo on Ukraine's South-Eastern Donetsk and Luhansk region, collectively known as "Donbas".⁴ Large portions of Donbas had been controlled by Russian-backed separatist groups since circa March 2014, and the area has known no peace since then. Then, as a counter to the Revolution of Dignity, parts of Donbas rebelled in favour of Russia and against the new western-styled democratic government in Kyiv. Donetsk and Luhansk declared themselves People's Republics, which President Putin also recognised amidst his war on Ukraine.

This EO 1 specifically barred new investment in, exportation to, and importation from Donetsk or Luhansk by any US person (natural or legal) or, to or from the US. It also barred all US persons from facilitating any such transaction with a foreign person, thus the transaction would be prohibited if done by a US person. Further, the EO 1 established criteria for the Secretary of the Treasury to classify nationals as blocked persons. The rationale of the EO 1 was to deter a Russian attack on Ukraine for multiple reasons — first, Donetsk and Luhansk bordered Russia; second, ethnic Russians formed sizeable minorities across them; and third, Russian was widely spoken in them. In other words, Donbas was the most geographically identifiable area of Ukraine linked to the Russian narrative — that Russia might have to conduct a 'special military operation' to protect Ukrainians who were ethnically and linguistically Russian.

That rationale also underpinned America's next pre-war move, namely, a February 22 decision to sanction certain parts of Russia's financial services sector. This decision took the form of a "Determination Pursuant to Section 1(a)(i) of Executive Order 14024".⁵ That *Order*, issued on April 15, 2021, was titled "Blocking Property with Respect to Specified Harmful Foreign Activities of the Government of the

⁴ Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to Continued Russian Efforts To Undermine the Sovereignty and Territorial Integrity of Ukraine, 87 Fed. Reg. 10,293 (Feb. 21, 2022).

⁵ See Janet L. Yellen, Secretary of the Treasury, Determination Pursuant to Section 1(a)(i) of Executive Order 14024, https://home.treasury.gov/system/files/126/russia_harmful_determination_20220222.pdf

Russian Federation”.⁶ The U.S. Treasury Determination said that Section 1(a)(i) applies to Russia’s financial services sector. Hence, it provided the legal basis for most of the measures (discussed below) which the U.S. imposed on Russia following the invasion. Of course, both Executive Orders – 14065 and 14024 invoked the 1977 IEEPA (50 U.S.C. Section 1701 *et seq.*) and the 1976 National Emergencies Act (50 U.S.C. Section 1601 *et seq.*). These were the key statutory foundations for all U.S. measures.

Likewise, the U.S. Office of Foreign Assets Control (OFAC) aimed at key Russian economic agents under the authority of Executive Order 14024. On February 22, 2022 the OFAC listed Vnesheconombank (VEB) and Promsvyazbank Public Joint Stock Company (PSB) plus forty-two of their subsidiaries, five vessels under PSB ownership, and three members of President Putin’s inner circle as Specially Designate Nationals (SDNs) (in effect meaning that they are subject to severe sanctions).⁷ Further, on February 22, 2022 the OFAC designated Nord Stream 2 AG and one person as SDNs.⁸ This action was pursuant to Executive Order 14039 dated August 20, 2021, which targeted the Nord Stream 2 pipeline, running under the Baltic Sea from Russia to the European continent (parallel to Nord Stream 1) with the hope of reducing the EU’s dependence on Russian energy.⁹

As was typical in respect of the scope of SDN listings, they also applied to affiliates. Specifically, under OFAC’s ‘50% Rule’, any entity that was owned, directly or indirectly, 50% or more by one or more blocked person was itself blocked.¹⁰

III. WAVE TWO: SANCTIONING SELECTED ENTITIES AND OLIGARCHS AND RESTRICTING DUAL-USE, HIGH-TECH EXPORTS

⁶ See The President, *Executive Order 14024 of April 15, 2021, Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation*, 86 Federal Register number 73, 20249–20252 (Apr. 19, 2021), <https://home.treasury.gov/system/files/126/14024.pdf>.

⁷ See Press Release, U.S. Department Dep’t of the Treasury, Off. Foreign Assets Control, Press Release, U.S. Treasury Imposes Immediate Economic Costs in Response to Actions in the Donetsk and Luhansk Regions (Feb. 22, 2022), <https://home.treasury.gov/news/press-releases/jy0602> [hereinafter *U.S. Treasury Imposition on Donbas*].

⁸ See Press Release, U.S. Department Dep’t of the Treasury, Office Foreign Assets Control, PEESA Designations; Issuance of Russia-Related General License 4, U.S. Dep’t of the Treasury, Off. Foreign Assets Control (Feb. 23, 2022), https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20220223_33.

⁹ See *Blocking Property With Respect to Certain Russian Energy Export Pipelines*, 86 Fed. Reg. 47,205 (Aug. 20, 2021).

¹⁰ See U.S. DEP’T TREASURY, REVISED GUIDANCE ON ENTITIES OWNED BY PERSONS WHOSE PROPERTY AND INTERESTS IN PROPERTY ARE BLOCKED (Aug. 13, 2014).

On the day of, and immediately following, the February 24, 2022 invasion, the US and its EU and NATO allies increased pressure on Russia by imposing a series of measures specifically against President Putin and his inner circle of senior government and business officials (collectively often referred to as ‘oligarchs’, though the term is misleading insofar as it generally refers to businesspersons in the 1990s who profited from privatization under Russia’s then President Boris Yeltsin, whereas the current crop of officials shared a government background with President Putin in Russia’s intelligence and security apparatus). Not surprisingly, other than government officials, most of the targeted persons were leaders in the agricultural, industrial, metallurgical, oil, pharmaceutical, and telecom sectors, because Russia garnered substantial revenue from these areas. The amount of money these oligarchs held was staggering, even measured five years before Russia’s invasion of Ukraine. “A 2017 study of Russian oligarchs published by the U.S.-based National Economic Bureau estimated that as much as \$800 billion. is held by wealthy Russians in the United Kingdom, Switzerland, Cyprus, and other offshore banking centres”.¹¹

¹¹ *Western Countries Considering Whether to Let Russian Oligarchs Buy Relief from Sanctions*, CBC NEWS (May 26, 2022), www.cbc.ca/news/politics/western-nations-sanctions-russia-oligarchs-money-1.6467318 (In May 2022, Canada proposed to the G-7 that sanctioning countries consider unfreezing the assets of the oligarchs for use to rebuild Ukraine – in effect, a trade-off whereby Russian SDNs would regain access to their accounts in exchange for surrendering some of their monies to assist in the reconstruction of Ukraine, and thus the U.S. and its Allies could help Ukraine while the oligarchs could distance themselves from President Putin’s war); *See id.* (The damage to Ukraine caused by Russia was astounding. As of May 28: Ukraine’s Prime Minister, Denys Shmyhal, said the Russian invasion of his country had destroyed more than 25,000 km (15,000 miles) of roads, several hundred bridges, and 12 airports. More than 100 educational institutions, over 500 medical facilities, and 200 factories have also been ruined or damaged, he said. He called for Russia to be forced to pay for “the destruction it has created”, saying frozen Russian assets should be transferred to Ukraine to fund reconstruction work.); *Ukraine War: Putin Urged to Hold “Direct, Serious Negotiations” with Zelensky*, BBC NEWS (May 28, 2022), www.bbc.com/news/world-europe-61618907 (The Canadian proposal garnered support: “[i]n a *Joint Statement . . .*, [f]inance Ministers from Estonia, Latvia, Lithuania, and Slovakia urged the European Union to create a way to fund the rebuilding of cities and towns in Ukraine with frozen Russian central bank assets, so that Russia can be “held accountable for its actions and pay for the damage caused.”); Alan Rappeport & David E. Sanger, *Seizing Russian Assets to Help Ukraine Sets Off White House Debate*, N. Y. TIMES (May 31, 2022), www.nytimes.com/2022/05/31/us/politics/russia-sanctions-central-bank-assets.html?referringSource=articleShare [hereinafter Rappeport & Sanger] (However, America hesitated, thinking that seizure of the assets of oligarchs, or indeed of the Russian government or Central Bank, would be illegal under U.S. law, specifically the *IEEPA*, and disincentivize investors from holding assets in the U.S.: the devastation in Ukraine brought on by Russia’s war has leaders around the world calling for seizing more than \$300 billion of

Russian central bank assets and handing the funds to Ukraine to help rebuild the country. But the movement, which has gained momentum in parts of Europe, has run into resistance in the U.S.. Top Biden Administration officials warned that diverting those funds could be illegal and discourage other countries from relying on the United States as a haven for investment . . . The U.S., which has led a global effort to isolate Russia with stiff sanctions, has been far more cautious in this case. Internally, the Biden Administration has been debating whether to join an effort to seize the assets, which include dollars and euros that Moscow deposited before its invasion of Ukraine. Only a fraction of the funds is kept in the U.S.; much of it was deposited in Europe, including at the Bank for International Settlements in Switzerland. Russia had hoped that keeping more than \$600 billion in central bank reserves would help bolster its economy against sanctions. But it made the mistake of sending half those funds out of the country. By all accounts, Russian officials were stunned at the speed at which they were frozen – a very different reaction from the one it faced after annexing Crimea in 2014, when it took a year for weak sanctions to be imposed . . . Treasury Secretary Janet L. Yellen appeared to close the door on the United States’ ability to participate in any effort to seize and redistribute those assets. Ms. Yellen, a former central banker who initially had reservations about immobilizing the assets, said that while the concept was being studied, she believed that seizing the funds would violate U.S. law . . . In addition to the legal obstacles, Ms. Yellen and others have argued that it could make nations reluctant to keep their reserves in dollars, for fear that in future conflicts the United States and its allies would confiscate the funds. Some national security officials in the Biden Administration say they are concerned that if negotiations between Ukraine and Russia begin, there would be no way to offer significant sanctions relief to Moscow once the reserves have been drained from its overseas accounts . . . One official said that while seizing the funds to pay for reconstruction would be satisfying and warranted, the precedent it would set – and its potential effect on the United States’ status as the world’s safest place to leave assets – was a deep concern. In explaining Ms. Yellen’s comments, a Treasury spokeswoman pointed to the International Emergency Economic Powers Act of 1977, which says that the United States can confiscate foreign property if the President determines that the country is under attack or “engaged in armed hostilities.” Legal scholars have expressed differing views about that reading of the law. Laurence H. Tribe, an emeritus Law Professor at Harvard University, argues that the International Emergency Economic Powers Act gives the President ample authority to freeze and seize Russia’s central bank assets. Even if that were in doubt, he said, an amendment to the law that passed after the September 11, 2001, terrorist attacks gives the President broader discretion to determine if a foreign threat warrants confiscation of assets. President Biden could cite Russian cyberattacks against the United States to justify liquidating the central bank reserves, Mr. Tribe said, adding that the Treasury Department was misreading the law. . . . Mr. Tribe pointed to recent cases of the United States confiscating and redistributing assets from Afghanistan, Iran, and Venezuela as precedents that showed Russia’s assets did not deserve special safeguards. But according to Paul B. Stephan, a Law Professor at the University of Virginia, the examples of Afghanistan and Venezuela are not comparable because the United States did not recognize those governments as legitimate. He also argued that Mr. Biden would be escalating the conflict with Russia if he conflated cyberattacks with an act of war to justify seizing Russian assets. “I would find that alarming”, Mr. Stephan said.

“We’ve been trying to be stable, rather than destabilizing, in this area.” He added that Congress could amend the law to clearly grant the United States the authority to confiscate Russia’s assets, but that doing so was likely to lead to complex legal battles between the two countries; Rappeport & Sanger, *supra* note 11 (Query, then, whether Russia committed an attack on, or was “engaged in armed hostilities”, with, the U.S. so as to justify seizure of its, or its citizens, assets? Notably, the country that initiated the proposal acted resolutely: “Canada . . . introduced legislation in April [2022] that would give its government new authority to seize and sell assets of sanctioned Russian oligarchs and give the proceeds to Ukraine.”); *Id.* (Likewise, at least one Canadian scholar opined that the sale and redistribution of the assets of Russian oligarchs would violate Public International Law, plus potentially redound negatively to the detriment of Canada and its Allies, and noted the EU was hesitant to take such a step: If the House of Commons passes the budget implementation bill as expected . . . , the Canadian government could have new powers to seize and sell sanctioned Russian assets to fund the reconstruction of Ukraine, setting up a potential violation of international law.); Draft articles on the responsibility of international organizations adopted by the ILC at its 63rd Sess. Arts. 1 (1), 2 (a), 3., G.A. Res. A/66/10 (Jul. 4, 2011) (this provides the rules for countermeasures member states may take to hold another member – Russia, in this instance – accountable for its illegal invasion of Ukraine. Article 49 says countermeasures “shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.” That’s where the powers Prime Minister Justin Trudeau’s government proposes in [Bill] C-19 – allowing authorities to not just freeze assets held in Canada, as they can now, but seize these assets and sell off Russian-owned property to help Ukraine’s recovery – step onto shaky legal ground. In adopting these articles, U.N. members agreed that countermeasures must “induce the wrongdoing state to comply with its international obligations”, and be reversible if a targeted state ends its unlawful conduct. “Once those proceeds, and notably Russian assets, have been handed over to, say, the Ukrainian government, they’re lost. They cannot be returned”, said David Kleimann, a Researcher and Adviser on International Law and Visiting Fellow with Bruegel, a Brussels-based think tank. “Therefore, there’s no way of inducing the resumption of performance of international obligations.” . . . “I believe that the legal question is relatively clear here, that such an action or such procedures would violate international law”, he said. “That might be a risk that, given the stakes, [the Canadian government is] willing to take.” Kleimann . . . said Europeans are also reluctant. Customary international laws like these U.N. Articles are “rather unenforceable”, he said. “Even if they remain unenforceable, we have a problem here that foreign governments in the future may see this as a precedent and say ‘we can do the same’ when, let’s say the government of Canada, finds itself in a military conflict or is supporting one side or the other”, Kleimann said. “We go back to the law of the jungle, and that makes Western assets very much vulnerable to seizure, confiscation and using those proceeds for other purposes. And that is not necessarily something that Western countries would like to see, I imagine.”; Janyce McGregor, *Proposed Powers to Sell, Redistribute Russian Assets May Violate International Law, Says Legal Expert*, CBC NEWS (Jun. 6, 2022), www.cbc.ca/news/politics/c19-russia-sanctions-un-articles-violation-1.6478115 (Despite these concerns about consistency with Public International Law, in June 2022, Canada enacted legislation to permit the government to seize Russian-owned assets and sell them to pay for the reconstruction of Ukraine: C-19, the budget implementation bill, received royal

assent . . . [on June 23]. Among its many measures are new powers to seize and sell off assets owned by individuals and entities on Canada's sanctions list. While the new powers could be used in any international conflict, the Liberal government's current priority is helping victims of the Russian invasion of Ukraine "We think it's really important to extend our legal authorities because it's going to be really, really important to find the money to rebuild Ukraine", Finance Minister Chrystia Freeland . . . [said] "I can think of no more appropriate source of that funding than confiscated Russian assets." That sentiment was shared by Ontario Senator Ratna Omidvar, who proposed her own Senate legislation to enable similar asset seizures two years ago [2020]. At the time, she was motivated to help the displaced Rohingya population by sanctioning corrupt generals in Myanmar. "Kleptocrats must pay for their crimes, not through simply being sanctioned and their assets being frozen, but by their assets being repurposed and confiscated", said Omidvar. Although C-19 will work a bit differently than her bill, Omidvar still calls it a "good start" and supports the government's move. "The question no longer is 'if we should confiscate'", the senator said. "The question is: 'How should we repurpose? [. . .] Who's involved? How do we provide accountability? How do we protect ourselves?' " . . . Although some jurisdictions, notably Switzerland, already confiscate and return certain illicit assets, this move by Canada – and potentially other G-7 countries meeting in Germany this week – is unprecedented. Allies agree on the imperative of cranking up more economic pressure on Russian President Vladimir Putin, but it's still a risky play. Other hostile governments could seize Canadian-owned assets abroad in retaliation. It also may violate customary international law, such as the U.N. Articles on states responsibility. The new powers target assets in Canada owned by an individual or entity on the Federal government's sanctions list. Previously, authorities could seize the proceeds of crime. With C-19, they can confiscate the assets of sanctioned individuals whether they're acquired legally or illegally When asked about the legality of these new powers . . . , Justice Minister David Lametti said "you don't have an absolute right to own private property in Canada", and compared it to other processes of government expropriation. Adrien Blanchard, a spokesperson for Foreign Affairs Minister Melanie Joly, . . . [said] told that "necessary checks and balances" are provided in C-19, including a formal judicial process to forfeit any asset "[p]rocedural fairness was a key consideration in the development of these measures, and forfeiture proceedings before a judge are not automatic", Joly's spokesperson said . . . [s]eparate from its powers to seize assets, the budget implementation bill also implements a publicly accessible beneficial ownership registry to make it easier to trace the ownership of anonymous shell companies. That could reveal more about Russian assets in Canada. . . . Omidvar's original bill would have required the recipient of redistributed funds to report back to a Court on its use. C-19 puts the Minister of Foreign Affairs in charge of who gets the money and what happens to it.); Janyce McGregor, *Canada Can Now Seize, Sell Off Russian Assets. What's Next?*, CBC NEWS (Jun. 27, 2022), www.cbc.ca/news/politics/c19-russia-sanctions-asset-seizures-test-case-1.6496047 (As to the cost of rebuilding Ukraine, Ukrainian President Volodymyr Zelensky, estimated this month [June 2022] that it could be \$600 billion after months of artillery, missile, and tank attacks – meaning that even if all of Russia's central bank assets abroad were seized, they would cover only half the costs." Seizing Russian Assets to Help. (emphasis added). Notwithstanding the dispute about the legality of the proposal, the U.S. (as chronicled below) continued to add oligarchs, along with

Generally, this second wave of sanctions took the form of designating these persons as SDNs, thus limiting the ability of U.S. nationals to enter into transactions with them and freezing their assets, thus barring their access to their personal and real property subject to U.S. jurisdiction. In particular, the OFAC took the following actions, all pursuant to *Executive Order 14024*:¹²

- (1) On February 24, 2022, the OFAC designated VTB Bank, Russia's second-largest financial institution, three other major financial institutions, *Otkritie Bank*, *Novikombank*, and *Sovcombank*, including thirty-four subsidiaries, several members of President Putin's inner circle and their family members, and certain high-ranking financial sector of executives and some related business interests as SDNs.¹³
- (2) On February 25, 2022, the OFAC designated Russian's President and Foreign Minister, Vladimir Putin and Sergei Lavrov, respectively, plus eleven members of the Russian Security Council as SDNs.¹⁴
- (3) On February 28, 2022 OFAC designated the Russian Direct Investment Fund (RDIF), two related companies, and RDIF's CEO, Kirill Dmitriev as SDNs.¹⁵
- (4) On March 03, 2022, the OFAC designated several individuals closely related to the inner circle of President Putin, and their property, including Alisher Usmanov and his superyacht, and several Russian-Intelligence-Directed Disinformation Outlets as SDNs.¹⁶

prominent Russian government officials, certain yachts, and aircraft and related entities, as SDNs.); *See, e.g.*, U.S. DEPT TREASURY, OFFICE FOREIGN ASSETS CONTROL, U.S. TREASURY SEVERS MORE NETWORKS PROVIDING SUPPORT FOR PUTIN AND RUSSIA'S ELITES (2022).

¹² Note that as appropriate, U.S. Office of Foreign Assets Control (OFAC) also issued general licenses to allow either limited activity with Specially Designate Nationals (SDNs), or activity ordinarily incident and necessary to wind down transactions (*e.g.*, with respect to clearing and settlement of payments, debt, equity, and derivative contracts, and personal, non-commercial remittances and maintenance payments), and NGO-related humanitarian activities.

¹³ *U.S. Treasury Imposition on Donbas*, *supra* note 7.

¹⁴ *See* Press Release, U.S. Treasury Imposes Sanctions on Russian Federation President Vladimir Putin and Minister of Foreign Affairs Sergei Lavrov, U.S. Dep't Treasury, Off. Foreign Assets Control (Feb. 25, 2022).

¹⁵ *See* Press Release, Treasury Prohibits Transactions with Central Bank of Russia and Imposes Sanctions on Key Sources of Russia's Wealth, U.S. Dep't Treasury, Off. Foreign Assets Control (Feb. 28, 2022).

¹⁶ *See* Press Release, Treasury Sanctions Russians Bankrolling Putin and Russia-Backed Influence Actors, U.S. Dep't Treasury, Off. Foreign Assets Control (Mar. 3, 2022) (Similarly, on March 3, 2022, the Department of State designated as SDNs, pursuant to Executive

- (5) On March 11, 2022, the OFAC designated additional Russian oligarchs, Kremlin elites, members of their families, certain luxury assets, the management board of VTB Bank, and twelve members of the Russian State *Duma* as SDNs.¹⁷
- (6) On March 31, 2022, the OFAC issued multiple sanctions to prevent Russia's technology sector from evading Western sanctions and developing harmful technologies.¹⁸ The OFAC put full blocking sanctions on seventeen entities and ten individuals because they had tried to evade U.S. sanctions and procure restricted dual-use technology and equipment for the Russian government. Among those new SDNs were two Russian companies (OOO Serniya Engineering and Sertal, which had close ties to Russia's military and intelligence agencies) and four major Russian technology companies that made software and components for Russia's defence sector (including Mikron, Russia's largest microchip producer-exporter).

The OFAC expanded its previous sanctions to include the State Research Centre of the Russian Federation (specifically, its Central Scientific Research Institute of Chemistry and Mechanics), and its employees, for its alleged involvement in significant cyberattacks. Here, the OFAC's SDN listings were authorised under the 2017 Countering America's Adversaries Through Sanctions Act's (CAATSA) Section 224(a), which authorizes sanctions against an entity or person that undermines cybersecurity on behalf of the Russian government.¹⁹

Order 14024, several Russian elites, including Boris and Arkady Rotenberg, and some of their family members, companies, and personal property, plus 22 Russian defense-related entities and one technology company. OFAC added to its "List of Specially Designated Nationals and Blocked Persons" these designations.); see Targeting Russian Elites and Defense Enterprises of Russian Federation, U.S. Dep't of State, Office of the Spokesperson (Mar. 3, 2022), www.state.gov/targeting-russian-elites-and-defense-enterprises-of-russian-federation/.

¹⁷ See Press Release, Treasury Sanctions Kremlin Elites, Leaders, Oligarchs, and Family for Enabling Putin's War Against Ukraine, U.S. Dep't Treasury, Off. Foreign Assets Control (Mar. 11, 2022), <https://home.treasury.gov/news/press-releases/jy0612>.

¹⁸ See Press Release, Treasury Targets Sanctions Evasion Networks and Russian Technology Companies Enabling Putin's War, U.S. Dep't Treasury (Mar. 31, 2022).

¹⁹ *Biden Administration Considers Imposing Sanctions on Kaspersky Labs*, CROWELL (Apr. 6, 2022), www.crowell.com/NewsEvents/AlertsNewsletters/all/Biden-Administration-Considers-Imposing-Sanctions-on-Kaspersky-Labs; see Dep't of State, *Notice of Department of State Sanctions Actions Pursuant to the Countering America's Adversaries Through Sanctions Act (CAATSA) and the Protecting Europe's Energy Security Act (PEESA), as amended*, *Notice of Department of State Sanctions Actions Pursuant to the Protecting Europe's Energy Security Act*, and *Notice of Department of State Sanctions Actions Pursuant to the Protecting Europe's Energy Security Act*, 87 Federal Register number 86, 26385, 26386, and 26387, respectively (May 4, 2022),

Additionally, the increased American and Allied pressure took the form of export controls.

On the February 24, 2022, the U.S. Department of Commerce (specifically, its Bureau of Industry and Security (BIS)) issued a final rule amending the Export Administration Regulations (EAR) to apply such new controls against Russia.²⁰ Likewise, on March 03, 2022, the BIS issued a final rule that added ninety-one entities to the Entity List,²¹ and a final rule expanding existing sanctions targeting the oil refinery sector in Russia under Section 746:5 of the EAR.²² Likewise, the EU imposed a prohibition on the export of maritime-navigation goods and technology to Russia. Its ban covered navigation equipment and radio-communication

www.govinfo.gov/content/pkg/FR-2022-05-04/pdf/2022-09564.pdf?utm_source=federalregister.gov&utm_medium=email&utm_campaign=subscription+mailing+list. (The State Department also relied on CAATSA to impose sanctions against Russia, notably, on May 4, when it took action under it and the 2019 Protecting Europe's Energy Security Act (PEESA) against several individuals, entities, and vessels involved in Russia's Nord Stream 2 pipeline project; *see* U.S. DEPARTMENT OF STATE, BUREAU OF ENERGY RESOURCES, PROTECTING EUROPE'S ENERGY SECURITY ACT (PEESA), AS AMENDED (2022) (The gist of PEESA is it authorises the President to impose visa- and asset-blocking sanctions on any foreign person that knowingly provides pipe-laying vessels to construct a Russian-origin energy export pipeline that makes landfall in Germany or Turkey.).

²⁰ *See* Implementation of Sanctions Against Russia Under the Export Administration Regulations (EAR), 87 Fed. Reg. 12,226 (Mar. 8, 2022) (announcing the following export controls: “[t]hese new Russian measures impose new Commerce Control List (CCL)-based license requirements for Russia; add two new foreign ‘direct product’ rules (FDP rules) specific to Russia and Russian ‘military end users’; specify a license review policy of denial applicable to all of the license requirements being added in this rule, with certain limited exceptions; significantly restrict the use of EAR license exceptions; expand the existing Russia ‘military end use’ and ‘military end user’ control scope to all items ‘subject to the EAR’ other than food and medicine designated EAR 99, or ECCN 5A992.c and 5D992.c unless for Russian ‘government end users’ and Russian state-owned enterprises (SoEs); transfer forty-five Russian entities from the Military End-User (MEU) List to the Entity List with an expanded license requirement of all items subject to the EAR (including foreign-produced items subject to the Russia-MEU FDP rules); and add two new Russia entities and revise two Russia entities to the Entity List. Lastly, this rule imposes comprehensive export, reexport and transfer (in-country) restrictions for the so-called Donetsk People’s Republic (DNR) and Luhansk People’s Republic (LNR) regions of Ukraine (‘Covered Regions of Ukraine’) and makes conforming revisions to export, reexport transfer (in-country) restrictions for Crimea Region of Ukraine provisions.”).

²¹ *See* Further Imposition of Sanctions Against Russia With the Addition of Certain Entities to the Entity List, 87 Fed. Reg. 12,856 (Mar. 3, 2022).

²² *See* Expansion of Sanctions Against the Russian Industry Sector Under the Export Administration Regulations (EAR), 87 Fed. Reg. 13,141 (Mar. 3, 2022).

equipment, and the provision of technical or financing related to such goods. However, these bans on high-tech goods were not always easy to police, even by good-faith business actors:

When Silicon Valley chipmaker Marvell learned that one of its chips was found in a Russian surveillance drone recovered in 2016, it set out to investigate how that came to be.

The chip, which costs less than \$2, was shipped in 2009 to a distributor in Asia, which sold it to another broker in Asia, which later went out of business.

“We couldn’t trace it any further,” Marvell Technology Group Ltd. . . . Chief Operations Officer Chris Koopmans said . . .

Years later, it reappeared in the drone recovered in Lithuania.

Marvell’s experience is one of a myriad of examples of how chipmakers lack ability to track where many of their lower-end products end up, executives and experts said. That could stymie the enforcement of new U.S. sanctions designed to halt the export of U.S. technology into Russia.

While higher-end sophisticated chips that can build supercomputers are sold directly to companies, lower-cost commodity ones that might just control the power often go through several resellers before they end up in a gadget.

The global chip industry is expected to ship 578 billion chips this year, 64% of them “commodity” chips, said TechInsights’ chip economist Dan Hutcheson.

While Russia accounted for less than 0.1% of global chip purchases before the sanctions, according to the World Semiconductor Trade Statistics organization, new Western sanctions underscore the threat in human terms.

. . .

Military weapons such as drones, guided missiles, helicopters, fighter jets, vehicles, and electronic warfare equipment all need chips and experts say they often use older chips that are well tested out. Now, under new U.S. sanctions even some of the most basic chips cannot be shipped to prohibited Russian entities.

For the most sensitive chips, controlled under the *International Traffic in Arms Regulations* [ITAR], the U.S. company selling them can be held responsible if the chip ends up with an entity on the U.S. banned list

Figuring out where chips go is like tracking the flow of narcotics

It's like the drug business," said James Lewis, Director of the Technology Policy Program at Washington-based Center for Strategic and International Studies. "There's cut-outs [*sic*]. There's middlemen [*sic*]. There's money laundering There's a black-market distribution network."

The point of the Russian sanctions, Lewis said, isn't to track every chip, but to disrupt their supply chain, which the intelligence community has been working on.

Finding a solution could take creative technical approaches.

"Knowing where the chips go is probably a very good thing. You could for example, on every chip put in essentially a public private key pair, which authenticates it," and allows it to work, Eric Schmidt, the former Google Chairman, . . . [said], discussing high-end processors.

Marvell says it has a growing number of products supporting fingerprinting and tracing, and is working with industry partners and customers to advance this area²³

In essence, without extraordinarily detailed, and thus costly, tracing mechanisms, keeping certain high-tech goods, especially routinely used ones, is difficult. However, such mechanisms might raise the cost of such banned goods to a prohibitive degree.

By August 2022, it was apparent that American and Allied efforts to restrict exports of dual-use technology Russia were not sufficiently rigorous.²⁴

²³ Jane Lanhee Lee, *The chip challenge: Keeping Western semiconductors out of Russian weapons*, REUTERS (Apr. 1, 2022), www.reuters.com/technology/chip-challenge-keeping-western-semiconductors-out-russian-weapons-2022-04-01/.

²⁴ Frank Gardner, *Tighter Export Controls on Electronics Could Hamper Russia's War Effort – Report*, BBC NEWS (Aug. 8, 2022), www.bbc.com/news/world-europe-62464459.

Simply put, the urgent importance of tightening export controls to cut off Russia's 'silicon lifeline', before Russia establishes secure black-market channels, could not be overstated.

In this vein, America and its Allies put additional pressure on Russia and President Putin via its, and his, unequivocal international ally. The US took measures against Belarus and its President, Mr. Lukashenko. Hence, pursuant to Executive Order 14038, whereby on August 9, 2021 President Biden blocked the properties of certain Belarusian officials,²⁵ and on February 24, 2022 the OFAC designated twenty-four Belarusian individuals and entities in the defence and financial industries as SDNs.²⁶ The OFAC did so because of their support and facilitation of Russia's invasion of Ukraine. Likewise, on March 2, 2022 the BIS issued a final rule amending the EAR to render Belarus subject to the aforementioned requirements it imposed on Russia under the EAR amendment by BIS on February 24, 2022.²⁷

The OFAC's SDN and BIS export control expansions were complemented by another measure, one by the US Department of Justice. The Department of Justice created 'KleptoCapture', an Interagency Task Force dedicated to enforcing sanctions, export controls, and economic measures the US imposed in response to Russia's invasion of Ukraine.²⁸

IV. WAVE THREE: RESTRICTING RUSSIA'S ACCESS TO THE SWIFT SYSTEM, FREEZING RESERVES, AND POTENTIAL DEFAULT

Save for Iran, no country had ever been banned from the Society for Worldwide Financial Telecommunications (SWIFT).²⁹ This Brussels-based international payments messaging system is owned by a consortium of roughly 2,000 banks, and about 11,000 banks — including many Russian ones — participate in it as members representing over 200 countries and territories.³⁰ Through SWIFT, participating

²⁵ See Blocking Property of Additional Persons Contributing to the Situation in Belarus, 86 Fed. Reg. 43,905 (Aug. 11, 2022).

²⁶ See Press Release, U.S. Treasury Targets Belarusian Support for Russian Invasion of Ukraine, U.S. Dep't Treasury, Off. Foreign Assets Control (Feb. 24, 2022).

²⁷ See Imposition of Sanctions Against Belarus Under the Export Administration Regulations (EAR), 87 Fed. Reg. 13,048 (Mar. 8, 2022) (stating "this rule is adding new license requirements and review policies for Belarus to the . . . to render Belarus subject to the same sanctions that were imposed on Russia under the EAR effective February 24, 2022.").

²⁸ See Press Release, Attorney General Merrick B. Garland Announces Launch of Task Force Klepto Capture, U.S. Dep't Justice, Off. Public Affairs (Mar. 2, 2022).

²⁹ See ERNEST T. PATRIKIS ET AL., WIRE TRANSFERS (1993).

³⁰ See *What is SWIFT and How Does it Affect Russia?*, CNBC TV18 (Feb. 26, 2022), www.cnbc.tv18.com/finance/russiaukraine-warcrisisconflictwhat-is-swift-and-how-does-it-affect-russia-12634642.htm.

banks send and receive payment messages as originators, originating banks, intermediary banks, beneficiary banks, and beneficiaries of cross-border payments associated with the commercial and financial transactions in dollar and non-dollar currencies. On a daily basis, as of 2020, SWIFT facilitates trillions of dollars of cross-border transfers through over forty million payment messages, about 1.5% of which are Russian. Though not part of the popular consciousness, SWIFT is indispensable to the world economy — a key part of the plumbing, as it were, which keeps trade, investment, and financial flows flowing.

Thus, shutting Russia out of SWIFT — that is, barring the sending or receipt of payment messages via it, except for a limited number of communications related to non-sanctioned Russian oil and natural gas (NG) sales to Europe — was the single most severe sanction imposed. The U.S. and its Allies agreed to do so in late February 2022 (after initial reluctance by Germany on account of its need to make payments to Russia for oil and NG, on which it was dependent), and SWIFT naturally complied. The ban exempted certain payments (thus accommodating Germany’s interests.) It is important to note the gradualist approach of this sanction. For instance, initially, the EU announced that seven major Russian banks and majority-owned subsidiaries would be disconnected from SWIFT. The EU expanded the SWIFT ban (effective March 20, 2022) to three Belarusian banks: Belagroprombank, Bank Dabrabyt, and Development Bank of the Republic of Belarus. Subsequently, the EU cut off three more Russian banks from SWIFT, “including Russia’s largest lender, Sberbank”.³¹

Notably, the SWIFT ban meant Russia risked defaulting on its international debt obligation payments — a nearly unprecedented event. At issue was \$117 million in interest payments on two dollar-denominated bonds Russia sold in 2013.³² The face value of those bonds summed to \$38.5 billion, of which overseas investors owned a stake of \$20 billion.³³ Fortunately:

³¹ Jorge Valero et al., *EU Leaders Back Push to Ban Most Russian Oil Over Putin’s War*, BLOOMBERG (May 30, 2022), www.bloomberg.com/news/articles/2022-05-30/eu-leaders-back-push-to-ban-some-russian-oil-over-putin-s-war?sref=7sxx9Sxl [hereinafter *EU Leaders Back Push to Ban Most Russian Oil Over Putin’s War*].

³² See Marc Jones, *Sanctioned Russia Teeters on Brink of Historic Default*, REUTERS (Mar. 16, 2022), www.reuters.com/business/finance/sanctions-savaged-russia-teeters-brink-historic-default-2022-03-16/ [hereinafter *Sanctioned Russia Teeters on Brink of Historic Default*] (also reporting: “[r]ussian Finance Minister Anton Siluanov . . . said Moscow had made the payment which had reached the correspondent American bank, and it was now down to Washington to clarify whether settlement is possible.”).

³³ Tommy Stubbington & Robin Wigglesworth, *What to Expect as Russia Warns of Historic Default*, FIN. TIMES (Mar. 15, 2022), www.ft.com/content/9ed033f2-eea4-4cce-974d-78592a3075af?shareType=nongift [hereinafter *What to Expect as Russia Warns of Historic Default*].

JPMorgan . . . processed interest payments sent by the Russian government for two of the country's bonds, boosting investor expectations that Moscow will avoid defaulting on its debt for the first time since 1998.

The Wall Street bank has passed the \$117 mn [million] in coupon payments to Citigroup, the payment agent responsible for distributing the money to investors

JPMorgan sought approval from the U.S. Treasury Department before sending the funds to Citi to ensure that it was not contravening U.S. sanctions

The interest payments for the two bonds were due on Wednesday [16 March 2022], but Moscow has a 30-day grace period to make good on its obligations.

. . .

Moscow has repeatedly claimed that western sanctions are preventing it from servicing its debt, with Anton Siluanov, Finance Minister, saying . . . that Russia was being forced into an "artificial default."

Siluanov also said it would be "absolutely fair" for the Russian government to make payments on its dollar debt in roubles until western sanctions on the Russian Central Bank were lifted.

Although some of Russia's dollar bonds contain a clause allowing repayment in *roubles*, the two bonds due with coupons that came due on . . . [16 March 2022] are not among them. Fitch Ratings said . . . that payment in the Russian currency would constitute a default.

According to the U.S. Treasury Department, current U.S. sanctions on Russia do not prohibit the country from making these payments to bondholders.

The restrictions stipulate that U.S. entities and individuals are able to "receive interest, dividend, or maturity payments on debt or equity" from Russia's central bank, its Sovereign Wealth Fund or the Finance Ministry until May 25 [2022], after which a specific

licence will be required to receive related funds.³⁴

Had Russia defaulted in March 2022, it would have been the first time it would have done so since 1998, when it unilaterally devalued the rouble and restructured its debt. Before that shock, its last instance of a complete external default was in 1918, when the Bolshevik regime repudiated Tsarist-era debts.³⁵

Many investors and rating agencies forecast Russia would default on its foreign debt because of sanctions that included a freeze on a substantial portion of its nearly \$650 billion in hard currency FX and gold reserves,³⁶ coupled with comments from Mr. Siluanov that it would be ‘absolutely fair’ for Russia to pay its dollar-denominated obligations in roubles until the sanctions were removed.³⁷ In truth, “[s]ix of Russia’s fifteen dollar- or euro-denominated bonds . . . contain[ed] a “fallback” clause allowing repayment in roubles, but the [above-referenced] two bonds with coupons . . . were not among them”.³⁸ The freeze applied to about \$300 billion worth of reserves. The remainder of the reserves were in China and other jurisdictions beyond the reach of America and its Allies. Still, blocking Russian access to the use of the \$300 billion towards its payment obligations inhibited the ability of the Central Bank not only to make timely payments of principal and interest on bonds, but also to

³⁴ Tommy Stubbington et al., *Russia Edges Closer to Averting Default as JPMorgan Processes Bond Payment*, FIN. TIMES (Mar. 17, 2022), www.ft.com/content/4419e072-ae44-4791-98c5-ef840c650ace?shareType=nongift.

³⁵ *What to Expect as Russia Warns of Historic Default*, *supra* note 33.

³⁶ *See Sanctioned Russia Teeters on Brink of Historic Default*, *supra* note 32.

³⁷ *What to Expect as Russia Warns of Historic Default*, *supra* note 33.

³⁸ *Id.* (also noting: “[t]ypically, a default is followed by a period of negotiation between a government and its bondholders to reach an agreement on restructuring the debt. This is usually done by eventually exchanging the old, defaulted bonds with new, less onerous ones, either simply worth less, with lower interest payments or with longer repayment schedules – or a combination of all three. Investors are usually reluctant to head to Court and get a formal default declared, because that could make the entire bond come due and potentially trigger defaults in other bonds where payments have not been missed. But a ‘normal’ restructuring seems unlikely in Russia’s case. The sanctions are designed to lock the country out of global bond markets and the participation of western investors in any new debt sales is forbidden. Instead, investors will probably have to sit tight, writing off their Russian bonds and awaiting a de-escalation in the Ukraine conflict that might lead to an easing of sanctions. Some may actually want to quickly vote to demand immediate repayment and get Court judgments from U.S. and U.K. judges that allow them to try to seize overseas Russian assets, to ratchet up pressure on Moscow. In the meantime, some investors will be hoping that the failure to make interest payments triggers a payout on credit-default swaps — insurance-like derivatives used to protect against default. The decision will be made by a finance industry ‘Determinations Committee’, made up of representatives of big banks and asset managers active in the CDS market. The swaps may not end up helping bondholders, however, because the financial sanctions could snarl up the intricate system used to settle the contracts.”).

stabilize the *rouble*. The Central Bank could not access those reserves, sell a portion of them to buy *roubles* and thereby stem the significant depreciation of the rouble. Furthermore, the freeze, at least as applied by the EU, included a prohibition on transactions relating to the management of reserves or assets of the Central Bank of Belarus.

In May 2023, the forecast of default became more certain. The US Treasury Department, which already had barred American banks from transferring payments to Russia, announced it would close the loophole that allowed for Russia to access dollar-denominated accounts and make timely payment of principal and interest on its international debt obligations to US persons, which they could, till then, lawfully accept.³⁹ That loophole had taken the form of a temporary General License (in effect, a waiver), which the Treasury Department decided to let expire and not renew, stating that it was always intended to be temporary, to allow an ‘orderly transition’.⁴⁰ Hence, the U.S. began blocking those payments to U.S. investors.

Russia owed a \$100 million interest payment on May 27, 2022, and said it had sent the funds to Euroclear, which was supposed to distribute them to investors.⁴¹ Euroclear, however, said it would respect applicable sanctions — hence the payments seemed “stuck” with it.⁴² At around end of June, the technical, but historic, default occurred:⁴³

Russia defaulted on its external sovereign bonds for the first time

³⁹ Notice on Russian Harmful Foreign Activities Sanctions General License 9C, U.S. Dep’t Treasury (May 24, 2022); *U.S. Closes Loophole for Russian Debt Payments*, BBC NEWS (May 24, 2022), www.bbc.com/news/business-61569560 [hereinafter *U.S. Closes Loophole for Russian Debt Payments*]; See also Alan Rappeport & Eshe Nelson, *U.S. Will Start Blocking Russia’s Bond Payments to American Investors*, N. Y. TIMES (May 24, 2022), www.nytimes.com/2022/05/24/us/politics/russian-debt-treasury.html?referringSource=articleShare (reporting: “[a]n exemption to the sweeping sanctions that the United States imposed on Russia as punishment for its invasion of Ukraine has allowed Moscow to keep paying its debts since February [2022]. But that carve-out will expire on . . . [May 25], and the United States will not extend it As a result, Russia will be unable to make billions of dollars of debt and interest payments on bonds held by foreign investors.”).

⁴⁰ *U.S. Closes Loophole for Russian Debt Payments*, *supra* note 39.

⁴¹ Ben King, *Russia on Brink of Default as Debt Deadline Looms*, BBC NEWS (Jun. 26, 2022), www.bbc.com/news/business-61929926 [hereinafter *Russia on Brink of Default Deadline Looms*].

⁴² *Id.*

⁴³ See Marc Jones, *The ‘Big Package’: How Russia Was driven to default*, REUTERS (Jun. 28, 2022), www.reuters.com/markets/europe/big-package-how-russia-was-driven-default-2022-06-27/ (for a chronology of events leading up to this default).

in a century, the culmination of ever-tougher Western sanctions that shut down payment routes to overseas creditors.

For months, Russia had found paths around the penalties imposed after the Kremlin's invasion of Ukraine. But at the end of the day on Sunday, [26 June,] the [30 calendar day] grace period on about \$100 million of trapped interest payments due May 27 expired, a deadline considered an "Event of Default" if missed.

The route to this point has been far from normal, as Russia has the resources to pay its bills – and tried to do so – but was blocked by the sanctions. . . .

Moody's Investors Service said the missed payments constituted a default under its definition and warned that the government would likely also default on future bond payments. Moody's and other assessment firms no longer rate Russia due to sanctions.

. . .

Russia's last sovereign default occurred in 1998, during the nation's financial collapse and *rouble* devaluation.

At the time, Russia avoided defaulting on its foreign Eurobonds, although President Boris Yeltsin's government reneged on \$40 billion of *rouble*-denominated debt, and also missed payments on dollar notes issued by state-owned *Vnesheconombank*.

While those bonds were issued after an agreement with the so-called London Club in 1997 to restructure Soviet-era debt held by Western banks, they were technically obligations of *Vnesheconombank*, rather than the Russian Federation In May 1999, the government also defaulted on a Soviet-era dollar bond, known as the MinFin III that was domestically issued, but was widely held by foreign investors.

. . .

According to Lee Buchheit and Elena Daly, sovereign debt lawyers who provided advice to Russia during its 1990s restructuring, while the country did restructure some of its debt then, that didn't include its Eurobonds at the time. "MinFins, while denominated in dollars, were governed by Russian law and therefore could be viewed as internal debt," they said.

The last time Russia fell into direct default vis-à-vis its foreign creditors was more than a century ago, when the Bolsheviks under

Vladimir Lenin repudiated the nation's staggering Czarist-era debt load in 1918.

By some measures it approached a trillion dollars in today's money

By comparison, foreigners held the equivalent of almost \$20 billion of Russia's Eurobonds as of the start of April [2022]."⁴⁴

By December 2022, Russia was scheduled to have nearly \$2 billion on its debt obligations due.⁴⁵ Although the Treasury Department's decision affected only US persons, because of the predominant position of American banks in the international financial system (including in processing debt payments),⁴⁶ the ramifications of that decision were global, and the spectre of multiple defaults loomed.

Russia vowed it would contest any declaration of default, and contest efforts by creditors to recover their investments in its bonds:

[t]his [contestation of a default declaration] was for two reasons, he said. "The first is that foreign infrastructure - correspondent banks, settlement and clearing systems, depositories - are prohibited from conducting any operations related to Russia. The second is that foreign investors are expressly prohibited from receiving payments from us."

⁴⁴ Giulia Morpurgo & Libby Cherry, *Russia Slips Into Historic Default as Sanctions Muddy Next Steps*, BLOOMBERG (June 26, 2022), www.bloomberg.com/news/articles/2022-06-26/russia-defaults-on-foreign-debt-for-first-time-since-1918?sref=7sxw9Sxl; see Federico Sturzenegger & Jeromin Zettelmeyer, *Haircuts: Estimating Investor Losses in Sovereign Debt Restructurings, 1998-2005*, (IMF WORKING PAPER WP/05/137) (July 2005), www.imf.org/external/pubs/ft/wp/2005/wp05137.pdf (For a review of sovereign debt defaults and restructuring. Stating: "[t]his paper estimates bond-by-bond 'haircuts' - realized investor losses - in recent debt restructurings in Russia, Ukraine, Pakistan, Ecuador, Argentina, and Uruguay. We consider both external and domestic restructurings. Haircuts are computed as the percentage difference between the present values of old and new instruments, discounted at the yield prevailing immediately after the exchange. We find average haircuts ranging from 13 percent (Uruguay external exchange) to 73 percent (2005 Argentina exchange) With exceptions, domestic residents do not appear to have been treated systematically better (or worse) than foreign residents.").

⁴⁵ *U.S. Closes Loophole for Russian Debt Payments*, *supra* note 39.

⁴⁶ See Jeff Stein, *U.S. Pushes Russia Toward Default by Blocking Debt Payments*, WASHINGTON POST (May 24, 2022), www.washingtonpost.com/us-policy/2022/05/24/treasury-russia-debt-default/ (noting the expiry of the general license "means American banks will not be able to process debt payments when Russia tries to make them.").

Because Russia wants to pay and has plenty of money to do it, he denied that this amounts to a genuine default, which usually occurs when governments refuse to pay, or their economies are so weak that they cannot find the money.

“Everyone in the know understands that this is not a default at all” . . . [he said]. “This whole situation looks like a farce.”⁴⁷

However, Russia was in big trouble. In March 2022, even before the Treasury Department’s decision, major credit rating agencies had downgraded Russia’s debt to ‘junk status’.⁴⁸ That meant many investors (according to their investment parameters) could not buy Russian obligations, hence impeding Russia’s ability “to raise money on international markets”.⁴⁹

As for the SWIFT ban, it was complemented by a related measure. On March 7, 2022, the Financial Crimes Enforcement Network (FinCEN) issued an alert advising financial institutions to be vigilant against efforts to evade U.S. sanctions.⁵⁰ The FinCEN alert included examples of suspicious activity and summarised the reporting obligations of financial institutions under the 1970 *Bank Secrecy Act*.

V. WEAPONISATION OF FINANCE

The US and Allied sanctions concerning international banking, securities, and payments system represented the ‘weaponization of finance’. The *Financial Times* aptly summarised several considerations about launching a financial war against a sovereign nation.

The intention behind the sanctions was to “damage the Russian economy.” As an alternative to military warfare, this new kind of financial warfare has arisen. Some convention assumptions are proving inaccurate. For instance, globalisation, which has always been seen as a barrier to conflict, itself has become a new battleground. However, this would not have become possible without the omnipresence of the

⁴⁷ *Russia on Brink of Default Deadline Looms*, *supra* note 41.

⁴⁸ *U.S. Closes Loophole for Russian Debt Payments*, *supra* note 39.

⁴⁹ *Id.*

⁵⁰ See Press Release, FinCEN Advises Increased Vigilance for Potential Russian Sanctions Evasion Attempts, U.S. Dep’t Treasury (Mar. 7, 2022) (Likewise, on April 20, 2022, OFAC designated as SDNs Transkapitalbank (TKB), a global network of more than forty individuals and entities led by SDN designee Konstantin Malofeyev, and several companies operating in Russia’s virtual currency mining industry, for sanctions evasion activities.); see Press Release, U.S. Dep’t Treasury, Office Foreign Assets Control, U.S. Treasury Designates Facilitators of Russian Sanctions Evasion (Apr. 20, 2022).

U.S. dollar as it is the most used currency.⁵¹

This is the first time this strategy was used by the U.S. against a major economy. At the same time, certain drawbacks have come into the picture. There could be a large risk on the U.S. dollar facing a huge backlash in terms of its global dominance.

Such financial sanctions were also exercised post 9/11 to cut the terrorists' funding, and on Iran for the 2015 nuclear deal. Notwithstanding, the irony vis-à-vis the nature of these sanctions is well illustrated from the fact that "European leaders have spent much of the past five decades criticizing the outsized influence of the U.S. currency."

To what extent does financial weaponization undermine the use of the currency that is being weaponized?

To understand the answer to this, two further lines of enquiry arise. On the one hand, is there an incentive to minimise political risk of holding dollar, or *euro*, denominated assets by converting them into assets in other currencies, thus eroding the political clout of the dollar or *euro*? On the other hand, what other convertible currencies with lower political risk are there to switch instruments to? Asked differently, is the dollar (and to a lesser extent, the *euro*), like the English language so universal that the tremendous inertia built up across centuries that will keep it as such? It is pertinent to note the U.S. Treasury used its discretion to authorize access to frozen Russian dollar-denominated accounts to allow for bond payments and thus default avoidance:

Russia appears to be on track to avoid a looming sovereign default after tapping its domestic dollar reserves to make payments on two foreign bonds that had previously been blocked by sanctions.

The U.S. is allowing the funds to be transferred The fact that Russia is using its domestic reserves has been a key aim of the U.S. restrictions. The idea is to force Russia to drain that pool and undermine its capacity to finance its invasion of Ukraine.

. . . Russia's Finance Ministry said it sent dollars to the paying agent, Citibank N.A., London branch. The amounts were \$564.8 million on a 2022 Eurobond and \$84.4 million on a 2042 bond.

Russia used a non-sanctioned bank, Bank Dom.RF JSC, to make

⁵¹ Valentina Pop et al., *Weaponization of Finance: How the West Unleashed "Shock and Awe" on Russia*, FIN. TIMES (Apr. 5, 2022), www.ft.com/content/5b397d6b-bde4-4a8c-b9a4-080485d6c64a?shareType=nongift.

coupon payments on its Eurobond using its dollar reserves Bank Dom.RF then passed along the funds to Bank of New York Mellon Corp., the correspondent bank on the bond After BNY Mellon got proper assurances from regulators, it forwarded the payment on to Citigroup Inc Citigroup is unlikely to process the payment until it has received sign-off from both U.S. and U.K. regulators

Citigroup will pass the payment onto clearing houses, who will be charged with distributing the cash to investors' accounts held with custody banks. . . .

The country had previously tried to make the payment in *rubles* after the dollar transfers were stopped in early April [2022] by its correspondent bank. That breached the terms on the debt and set the clock ticking on a 30-day grace period⁵²

The grace period ended on May 4, 2022 and no default was declared.⁵³

At this stage, it is pertinent to recall that the dollar did not supplant Britain's pound sterling as the reserve currency until after the Second World War, by when the U.K. was exhausted by two World Wars, whereas, the U.S. passed Britain as the world's largest economy at the end of the 19th century. Is the fate of the dollar tied more to the strength of the American economy? If so, then is financial weaponization less relevant to the international importance of the dollar than America running its political and economic affairs competently and efficiently?

VI. WAVE FOUR: IMPORT CONTROL OF RUSSIAN OIL AND NG AND FDI IN RUSSIA'S ENERGY SECTOR

On March 8, 2022, the U.S. took a major step in broadening the sanctions regime. President Biden issued Executive Order 14066,⁵⁴ which prohibited importation of

⁵² *Russia Uses Domestic Dollar Stash to Avoid Defaulting on Bonds*, BLOOMBERG (Apr. 29, 2022), www.bloomberg.com/news/articles/2022-04-29/russia-said-it-made-sovereign-bond-payments-in-u-s-dollars?sref=7sxw9Sxl.

⁵³ See Rodrigo Campos & Davide Barbuscia, *Explainer: Russia Serves to Avoid Default: What is Next?*, REUTERS (May 2, 2022) www.reuters.com/business/russia-swerves-avoid-default-what-is-next-2022-05-02/; Tommy Stubbington, *Russia's "Failure to Pay" Bond Interest Triggers Credit Default Swaps*, FIN. TIMES (Jun. 1 2022), www.ft.com/content/f270f38d-b0a4-4f97-9ffd-e55962955fad?shareType=nongift.

⁵⁴ See Prohibiting Certain Imports and New Investments With Respect to Continued Russian Federation Efforts To Undermine the Sovereignty and Territorial Integrity of Ukraine, 87 Fed. Reg. 13,625 (Mar. 8, 2022) (On April 8, 2022, President Biden signed into law

Russian-origin coal, crude oil, NG, petroleum, and related products, and barred new investment in Russia's energy sector by U.S. persons. Importantly, the definition of 'investment' was broad: it included any transaction involving a "contribution of funds or other assets for" new "energy sector activities" that are "located or occurring" in Russia after March 08, 2022. Simply put, the Order took aim at the heart of the Russian economy, namely, its energy sector. The Order also made the approval, financing, facilitation, or guarantee by a U.S. person of a transaction by a foreign person, where the transaction would be prohibited if done by a U.S. person or within the U.S., illegal.

Australia and Canada did likewise, declaring an embargo on purchases of Russian oil.⁵⁵ The U.K. pledged it would "phase out" the import of Russian oil by year-end 2022, but gave no specifics on how it would do so.

As for the EU, and especially Germany, it was not positioned to forswear Russian oil or NG at such short notice. The EU relied heavily on Russia for oil and NG, 27% and 41%, respectively, of its imports of the two commodities, were sourced from Russia⁵⁶ — whereas America sourced only 8% of its oil from Russia. However, the EU resolved to wean itself off that dependence by year-end 2022, and even Green Parties suggested they would relax their opposition to nuclear power to help find alternatives to Russian hydrocarbons. In particular, initially, the EU targeted a reduction of "its dependence on Russian oil and gas by two-thirds by the end of the year and to zero by the end of 2027".⁵⁷ "Germany, the EU's largest economy, . . . announced plans to end its dependence on Russian oil by the close of this year

the Ending Importation of Russian Oil Act (H.R. 6968, Public Law 117-109), which prohibited U.S. imports of all Russian-origin products classifiable in Harmonized Tariff Schedule of the United States (HTSUS) Chapter 27. The Act was to be implemented consistently with Executive Order 14066, which (as discussed above), banned importation of Russian-origin crude oil and related products.).

⁵⁵ *Fact Box: Who is Buying Russian Crude Oil and Who Has Stopped*, REUTERS (Apr. 28, 2022), www.reuters.com/business/energy/who-is-still-buying-russian-crude-oil-2022-03-21/ [hereinafter *Fact Box: Who is Buying Russian Crude Oil and Who has Stopped*].

⁵⁶ *From Where Do We Import Our Energy?*, EUROSTAT, <https://ec.europa.eu/eurostat/cache/infographs/energy/bloc-2c.html> [hereinafter *From Where Do We Import Our Energy?*] (reporting: "Russia is the main EU supplier of crude oil, natural gas and solid fossil fuels", and: "[i]n 2019, almost two thirds of the extra-EU's crude oil imports came from Russia (27%), Iraq (9%), Nigeria and Saudi Arabia (both 8%) and Kazakhstan and Norway (both 7%). A similar analysis shows that almost three quarters of the EU's imports of natural gas came from Russia (41%), Norway (16%), Algeria (8%) and Qatar (5%), while over three quarters of solid fuel (mostly coal) imports originated from Russia (47%), the United States (18%) and Australia (14%).").

⁵⁷ *Fact Box: Who is Buying Russian Crude Oil and Who has Stopped*, *supra* note 55.

[2022]”.⁵⁸ In essence, by early May the EU reached consensus on imposing a total embargo of Russian oil by November — with possible additional transition periods for the Czech Republic and Slovakia of two to three and three years, respectively, and a possible exception for Hungary⁵⁹ — and a gradual embargo of Russian NG. Further, the European Commission published its steps toward this NG embargo.”⁶⁰ Even absent an immediate and outright embargo of Russian fossil fuels, many EU companies voluntarily self-sanctioned Russian oil and NG, winding down their extant long-term energy supply contracts with Russia, and avoiding signing any new deals.

On the May 31, 2022, the EU struck a major deal to eliminate 90% of Russian crude oil and petroleum product imports by year-end 2022. The key points of the deal involved a compromise, principally with Hungary:

(1) Seaborne Oil Import Ban:

The entire EU agreed to ban (by December 5, 2022) all Russian oil “that arrives by sea – around two-thirds of oil imports – but not pipeline oil, following opposition from Hungary”.⁶¹ “This immediately covers more than two-thirds of oil imports from Russia, cutting a huge source of financing for its war efforts,’ [European Council (EC) President Charles] Michel said in a tweet: ‘Maximum pressure on Russia to end the war’”.⁶² Specifically, the EU accepted the EC’s proposal to ban seaborne crude oil within six months, and refined petroleum products within eight months.⁶³ However, some EU countries received an extension in the transition period to implement the seaborne oil ban. For example, for Bulgaria, “a period until June or December 2024 ... [was] envisioned, while Croatia” sought

⁵⁸ *Id.*

⁵⁹ See Paul Kirby, *Ukraine War: EU Plans Russian Oil Ban and War Crimes Sanctions*, BBC NEWS (May 4, 2022), www.bbc.com/news/world-europe-61318689 (also reporting: “Germany has drastically reduced its reliance on Russian oil imports, down from 35% to 12%. The U.K., which is no longer in the EU, is already phasing out Russian oil, which accounts for 8% of its imports The problem for Hungary, Slovakia and the Czech Republic is that they are all landlocked and rely on their neighbors for fuel supplies. Czech Special Envoy for Energy Security Vaclav Bartuska . . . [said] that Europe was currently trying to redraw the map of energy supplies as fast as it could: ‘[w]e want to get rid of Russian crude once and for all and we want to be absolutely sure there’ll be no need to go back and ask Russia again.’”).

⁶⁰ Jonah Fisher, *EU Reveals its Plans to Stop Using Russian Gas*, BBC NEWS (May 18, 2022), www.bbc.com/news/science-environment-61497315.

⁶¹ *Russian Oil: EU Agrees Compromise Deal on Banning Imports*, BBC NEWS (May 31, 2022), www.bbc.com/news/world-europe-61638860 [hereinafter *Russian Oil: EU Agrees Compromise Deal on Banning Imports*].

⁶² *EU Leaders Back Push to Ban Most Russian Oil Over Putin’s War*, *supra* note 31.

⁶³ *Id.*

“an exemption for imports of vacuum gas oil, which is used to make products including gasoline and butane.”⁶⁴

- (2) Temporary Pipeline Import Allowance:
Because Hungary “import[ed] 65% of its oil from Russia through pipelines,” it was the “main opponent” of an immediate, comprehensive import ban.⁶⁵ Such a ban, Hungary argued, would put its economy at risk. The Hungarian Prime Minister also took safety-net measures for obtaining Russian crude oil from other sources, should the Druzbha pipeline (crossing Ukraine) dysfunction.⁶⁶

Similarly, the Czech Republic and Slovakia also were reliant on pipeline imports. Therefore, the EU agreed to a temporary exemption to allow for such imports via pipeline.⁶⁷

Manifestly, this allowance was necessary for all twenty-seven EU states to reach a deal, as was, perhaps, the intentional ambiguity as to its precise duration.⁶⁸ However, re-exports of Russian oil delivered by pipeline were forbidden (to ensure the landlocked countries were invoking their exemption for *bona fide*, domestic consumption purposes, and not selling that oil abroad for profit).⁶⁹

⁶⁴ *Id.*

⁶⁵ *Russian Oil: EU Agrees Compromise Deal on Banning Imports*, *supra* note 61.

⁶⁶ Sam Fleming et al., *EU Leaders Agree to Ban Majority of Russian Oil Imports*, FIN. TIMES (May 30, 2022), www.ft.com/content/acc55aee-1b63-4f23-b52d-41fe661b0714?shareType=nongift [hereinafter *EU Leaders Agree to Ban Majority of Russian Oil Imports*] (also reporting: “Croatia . . . could expand the capacity of its Adria pipeline . . . to provide supplies of crude to Hungary”, and that “it was helpful to offer extra time to Hungary so the country could ‘really switch off’ [as EC President Ursula Von der Leyen said] Russian oil.”); See *EU Leaders Back Push to Ban Most Russian Oil Over Putin’s War*, *supra* note 31 (There were three major pipelines from Russia westward to Europe:

- (1) the Druzbha Pipeline, which crossed Ukraine
- (2) the Baltic Pipeline System (laid out north of the Druzbha Pipeline)
- (3) The Baltic Pipeline System 2, carrying crude oil from Unecha, Russia at the Druzbha Pipeline to Ust-Luga.

A different pipeline (laid out south and east of the Druzbha Pipeline) carried Russian crude oil from West Siberia to the Russian Black Sea ports of Novorossiysk and Tuapse.).

⁶⁷ See *Russian Oil: EU Agrees Compromise Deal on Banning Imports*, *supra* note 61.

⁶⁸ See *EU Leaders Agree to Ban Majority of Russian Oil Imports*, *supra* note 66. (reporting: “European governments have not settled on how long the carve-out of Russian oil supplied via pipeline will last, declaring only that it will be ‘temporary’ and that they will return to the matter as soon as possible.”).

⁶⁹ *EU Leaders Agree to Ban Majority of Russian Oil Imports*, *supra* note 66.

- (3) German and Polish Pledge on Pipeline Imports:
Germany and Poland pledged to cease all pipeline imports, too, thus raising the figure of embargoed imports [pipeline plus seaborne] to 90%.⁷⁰
- (4) Insurance:
The EU (as well as the U.K.) agreed to “a ban on insurance services related to shipping oil to third countries,” to take effect six months after the adoption of the above-listed measures.⁷¹

Prior to the EU deal, “about 2.3 million barrels a day of Russian crude oil head[ed] west through a network of pipelines and ports”,⁷² with the EU “pay[ing] Russia around € 400 bn (\$ 430 bn [billion]) a year in return” for oil.⁷³ Hence, Russia stood to lose as much as € 400 bn (\$387 bn) annually from its previously assured EU

⁷⁰ *Russian Oil: EU Agrees Compromise Deal on Banning Imports*, *supra* note 61.

⁷¹ *EU Leaders Back Push to Ban Most Russian Oil Over Putin’s War*, *supra* note 31; Andy Bounds et al., *U.K. and EU Hit Russian Oil Cargoes with Insurance Ban*, FIN. TIMES (May 31, 2022), www.ft.com/content/10372dd3-be3c-42b9-982b-241a38efcc88?shareType=nongift [hereinafter *U.K. and EU Hit Russian Oil Cargoes with Insurance Ban*]; see also Ian Smith & Harry Dempsey, *Insurance Ban to Tighten Squeeze on Russian Oil Shipments*, FIN. TIMES (June 1, 2022), www.ft.com/content/56379aac-674d-49ca-9574-e2feff3d4a8d?shareType=nongift [hereinafter *Insurance Ban to Tighten Squeeze on Russian Oil Shipments*] (explaining: “[o]ne key area of marine insurance is liability cover, which covers shipowners for huge accidents such as oil or bunker fuel spills that can incur multibillion-dollar claims. Without such cover, many ports decline entry. The maritime sector has its own special insurance arrangements through the International Group of P&I Clubs, thirteen protection and indemnity insurers, most of which operate from Europe. They provide mutual insurance coverage for 90 per cent of oceangoing tonnage, pooling their risk, and rely on Lloyd’s for reinsurance cover. Some P&I executives . . . said the Iran oil experience would make complying with a Russian ban easier, but others see a Russian ban as adding to an already-crushing compliance workload because of other strictures coming from the conflict.”) The utility of drawing and applying lessons from the Iranian to the Russian context (mentioned in the above-quoted articles) was noteworthy. But, so, too, was the deft (and sometimes illegal) ways in which the Iranian and Russian regimes countered sanctions. As to the extent to which they could do so with respect to marine insurance, as well as container vessels, that was unclear. See *Insurance Ban to Tighten Squeeze*. Simply put, it was difficult even for powerful target countries, and countries friendly to the targets, to create anew a services market where none, or an inchoate one, existed before a sanctions regime took effect.)

⁷² *EU Leaders Back Push to Ban Most Russian Oil Over Putin’s War*, *supra* note 31 (The figure of 2.3 million barrels consisted of pipeline and sea shipments: “Russia shipped about 720,000 barrels a day of crude to European refineries through its main pipeline to the [European] region last year [2021]”, which “compares with seaborne volumes of 1.57 million barrels a day from its Baltic, Black Sea and Arctic ports.”); *Id.*

⁷³ *Russian Oil: EU Agrees Compromise Deal on Banning Imports*, *supra* note 61.

market.⁷⁴ It seemed unlikely that China and India, though (as discussed below) eager to boost their sourcing of Russian-origin oil, especially at cheaper prices given the decline in EU demand, could make up fully for lost sales revenues from the EU.⁷⁵

To assist its EU Allies in cutting their dependence on Russian hydrocarbons, Canada pledged to step-up oil and NG production and exports (though it could not plug the entire deficit created by removal of Russian products from the world market).⁷⁶ Arguably, there was no net adverse impact on greenhouse gas (GHG) emissions because of a substitution effect, that is, Canadian hydrocarbons were being substituted for Russian ones.⁷⁷ The EU had complementary options in addition to sourcing from Canada. For example, before its move to end its dependence on Russia, *i.e.*, as of 2021, when Russia was the EU's primary source at 24.8% of its imported oil, the EU also sourced oil from Norway, 9.4%; U.S., 8.8%; Libya, 8.2%; Kazakhstan, 8.0%; Nigeria, 7.1%; Iraq, 6.6%; Saudi Arabia, 5.1%; U.K., 5.1%; and all other countries, 16.9%.⁷⁸ These figures suggest that there was no single supplier that could step in to replace Russia completely, but that, over time, the EU could

⁷⁴ *But see EU Leaders Back Push to Ban Most Russian Oil Over Putin's War*, *supra* note 31 (reporting: “[s]eaborne supplies account for about two-thirds of Russian oil imports, and once in place, the measure would cost Putin up to \$10 billion a year in lost export revenue That’s because the ban would force Russia to sell its crude at a discount to Asia, where it’s already changing hands at about \$34 a barrel cheaper than the price of Brent futures.”)

⁷⁵ *EU Leaders Agree to Ban Majority of Russian Oil Imports*, *supra* note 66 (Interestingly: [t]he partial [EU] ban [on Russian oil] risks distorting competition in the EU oil market, with refineries connected to pipelines from Russia enjoying a price advantage. The price of Russian oil has fallen sharply as European traders have shunned the country’s seaborne crude. Russian Urals crude is trading at about \$93 a barrel, compared with \$120 for Brent, the international oil benchmark. While Russian oil delivered via Druzhba may not carry such a big discount, depending on how contracts are structured, Hungarian oil group Mol has said it has enjoyed “skyrocketing” margins for its refineries since March because of the widening Brent-Ural spread.)

⁷⁶ See Jonathan Josephs, *Canada Pledges to Help Countries Stop Using Russian Oil*, BBC NEWS (Mar. 27, 2022), www.bbc.com/news/business-60879685 [hereinafter *Canada Pledges to Help Countries Stop Using Russian Oil*] (also reporting: “Canada says it can provide more oil, gas and uranium to help solve the global energy crisis. Prices have soared as a result of Russian supplies being squeezed because of its invasion of Ukraine. Canada’s Natural Resources Minister said many countries are committed ‘to help as much as we can in terms of displacing Russian oil and gas.’ The world’s fourth biggest oil producer has committed to exporting an extra 200,000 barrels of oil. Its Natural Resources Minister Jonathan Wilkinson . . . [said] it would also export an additional 100,000 barrels of natural gas ‘We expect that by the end of the year [2022] we will be fully up to the 300,000 barrels’, said Mr. Wilkinson. However, that is only a fraction of the three million barrels a day that the IEA says will be removed from global markets by next month because of sanctions against Russia.”)

⁷⁷ See *id.*

⁷⁸ See *Russian Oil: EU Agrees Compromise Deal on Banning Imports*, *supra* note 61.

shift purchasing to a variety of countries with the capacity to bolster output and ensure safe deliveries.

The EU was not alone in acting resolutely. On May 30, 2022, the entire Group of Seven (G-7) agreed to eschew Russian energy. G-7 leaders issued a bold pledge vide a Joint Statement:

“[w]e commit to phase out our dependency on Russian energy, including by phasing out or banning the import of Russian oil. We will ensure that we do so in a timely and orderly fashion We will work together and with our partners to ensure stable and sustainable global energy supplies and affordable prices for consumers”.⁷⁹

Associated with this pledge was President Biden’s Proclamation 10371 (April 21), which (in Section 1) prohibited Russia-affiliated vessels from entering U.S. ports (with certain exceptions for vessels carrying source material, special nuclear material, and nuclear by-product material, or for force majeure reasons, in Section 2). The ban, obviously, covered ships carrying Russian oil.⁸⁰

The efforts of America and its Allies to remove Russian energy from world markets triggered sanction-evasion behaviour by Russian tankers.⁸¹ So, the proverbial game of cat-and-mouse associated with any sanctions regime was on: the sanctions-

⁷⁹ *G-7 to Phase Out Russian Oil, U.S. Sanctions Gazprombank Executives*, NIKKEI ASIA (May 9, 2022), <https://asia.nikkei.com/Politics/Ukraine-war/G7-to-phase-out-Russian-oil-U.S.-sanctions-Gazprombank-executives> [hereinafter *G-7 to Phase Out Russian Oil, U.S. Sanctions Gazprombank Executives*].

⁸⁰ See THE WHITE HOUSE, A PROCLAMATION ON THE DECLARATION OF NATIONAL EMERGENCY AND INVOCATION OF EMERGENCY AUTHORITY RELATING TO THE REGULATION OF THE ANCHORAGE AND MOVEMENT OF RUSSIAN-AFFILIATED VESSELS TO UNITED STATES PORTS (2022).

⁸¹ K Oanh Ha, *Russian Tankers Going Dark Raises Flags on Sanctions Evasion*, BLOOMBERG (Mar. 27, 2022), www.bloomberg.com/news/articles/2022-03-27/russian-tankers-going-dark-raises-flags-on-sanctions-evasion?sref=7sxx9Sxl; see also Julian Lee, *Oil Tankers Make Rare Mid-Atlantic Switch of Russian Crude Cargo*, BLOOMBERG (Jun. 6, 2022), www.bloomberg.com/news/articles/2022-06-06/oil-tankers-make-rare-mid-atlantic-switch-of-russian-crude-cargo?sref=7sxx9Sxl (reporting: “[s]hippers of Russian crude are turning to unusual methods to move cargoes displaced from Europe over much longer distances to new customers. The most recent example is a ship-to-ship transfer in the middle of the Atlantic Ocean.”).

imposing country being the cat, and the targets being the mouse.⁸² That this game would be played was foreseeable, given that it had occurred (and was occurring contemporaneously) in the context of sanctions against Iran.⁸³

VII. NON-SANCTIONING COUNTRIES (INDIA AND CHINA)

Russia was the world's third-largest crude oil producer.⁸⁴ With the US, Allied, and G-7 measures against importation of its oil, Russia sought other customers. These customers included China, India, and Turkey. India's case seemed especially

⁸² The EU contemplated an expansive boycott of Russian oil, that is, a rule that would forbid any EU-owned vessel from transporting Russian-origin crude oil and petroleum products, oil to and from any location, including ship-to-ship transfers. See Nikos Chrysoloras et al., *EU Drops Plan to Stop Tankers Moving Russian Oil Anywhere*, BLOOMBERG (May 9, 2022) www.bloomberg.com/news/articles/2022-05-09/eu-drops-plan-to-stop-tankers-moving-russian-oil-to-other-buyers?sref=7sxw9Sxl (The proposal rule would have applied to exports originating from Russia, or previously exported from Russia. However, "Greece, whose economy is heavily reliant on shipping, was among the [EU] member states that pushed the provision on exporting to third countries . . . be dropped."); *Id.* (also reporting: "Greeks own more than a quarter [26%] of the world's oil tankers by capacity." Moreover, the proposal would have adversely affected Central Asian countries, which opposed Russia's war against Ukraine, but were dependent on Russian energy.); see *id.* (observing: the revised "ban will fully exempt goods that don't originate in Russia even if they transit through the country. That would free up oil from Kazakhstan or other third countries."); see *id.* (The EU did, however, entertain a ban on insuring any such cargo. Explaining: a "ban on providing insurance would span the vast majority of the global fleet of oil tankers seeking to transport Russian barrels. Tanker companies insure their vessels collectively against risks including oil spills. Through an over-arching organization called the International Group of P&I Clubs in London, vessel owners collectively purchase cover from eighty reinsurers, including from more than twenty of the twenty-five largest providers in the world. As such, an insurance ban would make it all but impossible to obtain such cover given how many reinsurers are European. . . . The International Group's members sort out cover for 95% of the tanker fleet for spills and other maritime liabilities. If they could no longer do so, then it would force Moscow or its buyers to come up with alternative arrangements at a time when Russia is already being heavily sanctioned.").

⁸³ Andre Mayer, *Oil Has Long Been Used as a Geopolitical Weapon. Could Electrified Transport Change That?*, CBC NEWS (May 2, 2022), www.cbc.ca/news/electric-vehicles-oil-transition-1.6434080 (Tellingly, "[a] 2013 policy brief by the Belfer Center for Science and International Affairs at Harvard states bluntly that oil is a leading cause of war", estimating that "between one-quarter and one-half of interstate wars since 1973 have been linked to oil."); Jeff D. Colgan, *Oil, Conflict, and U.S. National Interests*, HARV. KENNEDY SCH. BELFER CTR. SCI. & INT'L AFF.: POL. BRIEF (Oct. 2013), www.belfercenter.org/publication/oil-conflict-and-us-national-interests (This is a synopsis of the fascinating study); Jeff D. Colgan, *Fueling the Fire: Pathways from Oil to War*, 38(2) INT'L SECURITY 147 (2013), www.belfercenter.org/publication/fueling-fire-pathways-oil-war (this is the full study).

⁸⁴ U.K. and EU Hit Russian Oil Cargoes with Insurance Ban, *supra* note 71.

regrettable.

That is, India — which took only about 3% of its oil from Russia — seemed rather unprincipled in its approach to Russian oil. India saw an opportunity to purchase Russian oil at a discounted price, given that Russian suppliers could neither sell to, nor collect payments from, sanctioning countries.

“Russian oil exports to India have quadrupled this month [March 2022] in a sign of the vast reshaping of global energy flows since Russia’s invasion of Ukraine.

India, the world’s third-largest energy-consuming country, has snapped up multiple cargoes of Russian oil from traders as buyers in Europe shunned the country’s vast commodities market following western sanctions on Moscow.

Russia has exported 360,000 barrels a day of oil to India in March so far, nearly four times the 2021 average. The country is on track to hit 203,000 b/d for the whole month based on current shipment schedules, according to Kpler, a commodities data and analytics firm. Export data represent cargoes that have been loaded onto tankers and are *en route* to India.

Alex Booth, Head of Research at Kpler, said India typically buys CPC [Caspian Pipeline Consortium], a blend of predominantly Kazakh and Russian crude, but the big increase in March was for Russia’s flagship Urals crude, suggesting Indian buyers weighed up significant discounts against public opinion.

...

Historically, Russian crude oil has constituted below 5 per cent of India’s total imports, which were 4.2 mn b/d [barrels per day] last year.

“Indian companies weren’t sourcing much from Russia given high shipping costs,” said Vivekanand Subbaraman, Research Analyst at Ambit Capital. “This appears to be changing now.”

...

With 85 per cent of India’s crude needs covered by imports, higher oil prices act as a drag on its treasury.

Subbaraman said: “I think that all three state-owned refiners will purchase oil from Russia given how import dependent and politically sensitive energy is for Indians.”

...
 Russia's Deputy Prime Minister Alexander Novak and [Indian Oil Minister Hardeep] Singh Puri spoke by phone... "We are interested in further attracting Indian investment to the Russian oil and gas sector and expanding Russian companies' sales networks in India," Novak said.

Indian officials have said that the central bank and government are looking at establishing a *rupee-rouble* trading mechanism, which would facilitate trade after western restrictions on international payments to and from Russia.

The two countries have several joint energy interests. *Rosneft* owns 49 per cent of Nayara Energy, which runs India's second largest refinery."⁸⁵

India's approach was nakedly unprincipled and self-interested, as its Minister of Finance confirmed:

"Nirmala Sitharaman . . . [said] India would continue to buy discounted oil from Russia.

"I would put my country's national interests first and I would put my energy security first," she said. "Why should I not buy it? I need it for my people."⁸⁶

Had the Finance Minister forgotten how Mahatma Gandhi, the Father of the Indian Nation, defined 'national interests' and 'security'? Better to launch a Salt March than buy salt from the British. Fortunately, in the Gandhian tradition, India's Judge on

⁸⁵ Harry Dempsey & Chloe Cornish, *Russian Oil Exports to India Surge as Europe Shuns Cargoes*, FIN. TIMES (Mar. 18, 2022), www.ft.com/content/5efc6338-3f01-4015-aedf-53a4a1944ca8?shareType=nongift [hereinafter *Russian Oil Exports to India Surge as Europe Shuns Cargoes*].

See *China Is Quietly Taking Cheap Russian Crude as India Buys More*, BLOOMBERG (Mar. 24, 2022), www.bloomberg.com/news/articles/2022-03-24/china-is-quietly-taking-cheap-russian-crude-as-india-buys-more?sref=7sxw9Sxl (China, too, helped itself to Russian oil, the price of which had fallen because of sanctions-induced demand declines in countries that condemned Russia's aggression against Ukraine.); *Fact Box: Who is Buying Russian Crude Oil and Who Has Stopped*, *supra* note 55 (listing, as of end-April 2022, at least five Indian entities were importing Russian oil).

⁸⁶ Krishna N. Das, *Russia's Lavrov Hopes to Bypass Sanctions in Trade with "Friend" India*, REUTERS (Apr. 1, 2021), www.reuters.com/world/russias-lavrov-lobbies-india-after-western-emissaries-make-case-sanctions-2022-04-01/.

the International Court of Justice (ICJ) did not behave that way: he voted against Russia, calling on it to withdraw from Ukraine. Evidently, there is conflict between India's decision to prioritise its national interest (to purchase the discounted Russian oil in the context of inflation in oil prices) over international ethics, and Justice Bhandari's stance on condemning Russia's war. Completing the trifecta of confusion was India's abstention in key U.N. votes and its advocacy of dialogue and discussion. The labyrinthine Indian positions do not indicate any clear stance.⁸⁷

India's approach also wrongly assumed that Russia was monolithic in support of Mr. Putin's war. It was not, as high-level officials in the Russian government too, increasingly, "had come to believe that Putin's commitment to continue the invasion would doom Russia to years of isolation and heightened tensions, which would leave its economy crippled, security compromised, and global influence gutted".⁸⁸ Such critics "remain[ed] limited," for fear of retribution if they spoke openly and honestly,

⁸⁷ Kiran Sharma, *Indian Judge Votes Against Russia at Top United Nations Court*, NIKKEI ASIA (Mar. 17, 2022), <https://asia.nikkei.com/Politics/Ukraine-war/Indian-judge-votes-against-Russia-at-top-United-Nations-court> (In particular: [a]n Indian Judge at the International Court of Justice . . . voted with the majority against Moscow, a decision at odds with India's abstention from a United Nations General Assembly resolution on March 2[, 2022] condemning the Russian invasion of Ukraine. The United Nations Court's order was backed by thirteen of its fifteen judges and demanded that Russia "immediately suspend" military operations in Ukraine. The two judges voting against were ICJ Vice President Kirill Gevorgian from Russia and Judge Xue Hanqin from China. India's Judge Dalveer Bhandari voted with the majority, which included ICJ President Joan E. Donoghue of the U.S., Judge Ronny Abraham of France, and Judge Yuji Iwasawa of Japan. Judge Bhandari's vote differs from the Indian government's stance on the issue. Given its long-standing defense and strategic ties with Russia, India has refrained from outright condemnation of Moscow over its invasion of Ukraine. It has also abstained from key U.N. votes on the crisis, calling instead for an immediate cessation of violence and a return to dialogue. Bhandari, a former Judge with the Supreme Court of India, was first nominated to serve on the ICJ in 2012, before the ruling Bharatiya Janata Party and Prime Minister Narendra Modi came in power in 2014. He was renominated by India in 2017 to fill a vacancy for the 2018-2027 term. Modi's government had supported Bhandari through diplomatic efforts in various forums. Although ICJ Judges are nominated by their home-country governments, they do not represent them once elected. Thus, Judge Bhandari's vote is independent and based on his own understanding of the Russia-Ukraine crisis The Court order . . . said, "[t]he court is profoundly concerned about the use of force by the Russian Federation in Ukraine, which raises very serious issues of international law." The ruling came in response to a suit filed by Ukraine after the Russian invasion began on February 24, 2022. Although Court rulings are binding, it has no direct means of enforcing them.)

⁸⁸ *Kremlin Insiders Alarmed Over Growing Toll of Putin's War in Ukraine*, BLOOMBERG (Apr. 19, 2022), www.bloomberg.com/news/articles/2022-04-20/putin-s-war-in-ukraine-has-russian-elites-fearing-global-isolation?sref=7sxxw9Sxl. [hereinafter *Kremlin Insiders Alarmed Over Growing Toll of Putin's War in Ukraine*].

but India was foolish to ignore the truths they did speak.⁸⁹

India argued that its ties with Russia and America “stand on their own merit”,⁹⁰ essentially meaning that India would not be pushed into an ‘us-versus-them’ mentality. This response was redolent of India’s Cold War era leadership of the Third World’s Non-Aligned Movement. However, India was fooling itself: not to make a choice in such a naked breach of International Law was to ignore the demerits of Russia’s behaviour. India’s pro-Russian tilt was particularly nauseating for reasons beyond oil: “[f]rom rifles to rockets, about 60% of India’s military supplies come from Russia, which analysts say are more cost-effective than those from the United States”.⁹¹

And yet, among the justifications for India’s approach was *blaming* America and its Allies for being arrogant and indifferent:

“Indian government officials said that state-controlled Indian Oil Corp. had reached a deal to buy 3 million barrels of oil from Russia’s Rosneft Oil Co. at a 20% discount to global prices. This is a drop in the ocean of India’s oil needs, which stood at 4.5 million barrels a day in January. Still, if a payment system in *rupees* is worked out that insulates the transaction from sanctions placed on Russia [via, for example, a bank in India that has no assets exposed to U.S. authorities, and thus could clear and settle trade denominated in *rupees* and *roubles* without being ensnared in a U.S. secondary boycott], much more could follow.

The United States isn’t happy. White House spokesperson Jen Psaki said India should worry about how it will feature in the history books when the story of the Ukraine invasion is written. ...

⁸⁹ *Id.*

⁹⁰ *India Says U.S., Russia ties ‘Stand on Their Own Merit’ despite Ukraine War*, REUTERS (Mar. 24, 2022), www.reuters.com/world/india/india-says-us-russia-ties-stand-their-own-merit-despite-ukraine-war-2022-03-24/ [hereinafter *India Says U.S., Russia Ties ‘Stand on Their Own Merit’ despite Ukraine War*] (India has friendly relations with both the United States and Russia that stand on their own merit, the Foreign Ministry told Parliament . . . , in reply to a query whether the Ukraine war had affected ties . . . India is the only major country close to the U.S. that not to have condemned Russia’s invasion of Ukraine or imposed any sanctions on it. ‘India has called for immediate cessation of hostilities and return to the path of diplomacy and dialogue with respect to the conflict in Ukraine’, junior Foreign Minister Meenakshi Lekhi told Parliament. ‘India has close and friendly relations with both the U.S. and Russia’, she added. ‘They stand on their own merit’).

⁹¹ *Id.* (also reporting: “[a] U.S. diplomat said the country stood ready to help India with more supplies of military hardware and energy to reduce its reliance on Russia.”).

To India and many other developing countries, Western powers, and the institutions they dominate appear to have different standards for conflicts close to home. . . .

Meanwhile, those same Western nations are proving themselves poor stewards of the global commons. Take the cut-off of several Russian banks from the SWIFT financial messaging system. We have grown accustomed to thinking of interbank communications as a global utility; they've now been turned into a tool of Western foreign policy.

This was a unilateral decision by the countries that control SWIFT which, besides the U.S. and Japan, are all European. Little thought was given to how countries such as India, which rely on SWIFT to pay for oil and fertilizers from Russia, would manage the fallout. It should come as no surprise that India's reaction has been to look for a way around the sanctions by settling trade with Russia in [*rupees*] and [*roubles*].

Criticizing India for continuing to buy oil from Russia is especially galling, given that European nations have yet to wean themselves off Russian energy supplies either. And, unlike them, India can hardly afford such bills. If oil remains above \$70 a barrel for months, the *rupee* will collapse, the government will run out of spending money, inflation will skyrocket, and the country will have to start worrying about a balance of payments crisis.

We have lived through this sort of disruption at least twice before, in 1991 and 2012. Yet our supposed partners in the West do not seem to recognize that avoiding another one is a major national priority.

Nor do they appreciate how hypocritical their talk of sanctions can appear. The U.S. spent most of the last decade trying to convince India not to buy Iranian oil, only to try to get Iranian shipments back on the market as soon as the focus shifted to Russia. While the U.S. and Europe expect other countries to bear the costs of sanctions, they're too timid even to send Polish fighter jets to Ukraine.

Moreover, in the long-term, Indians fear that sanctions will push Russia ever closer to China and expand Beijing's control over the global economy. If some in the West worry that India is not lining

up on their side, just as many Indians worry that the West's notion of "their side" does not include India. . . .⁹²

However, Mr. Sharma's argument fell flat.

The argument omitted key facts, such as, that following Russia's invasion of Ukraine, the EU was trying to wean itself off Russian oil, on which it had been far more heavily dependent, than India, whereas India was *eager* to increase Russian oil imports. It also omitted these facts:

"India sources 10% of its crude imports from the U.S., and 1%-2% from Russia. . . .

[In an April 11, 2022 virtual meeting, President Biden] explained the impact of U.S. and European sanctions on Russia to [PM] Modi, and offered to help India diversify its oil imports."⁹³

It also omitted to acknowledge the possibility that Indian oil refineries were "laundering" Russian crude oil – a possibility the US investigated.⁹⁴

Furthermore, Indian banks are neither among the owners nor biggest participants in SWIFT. Additionally, the International Monetary Fund (IMF) and World Bank have arranged countless bailouts across Asia since their founding under the 1944 *Bretton Woods Agreement*. As for fighter jets, though India had no interest in seeing NATO start the Third World War, which is what President Biden warned could happen if NATO and Russian forces directly engaged each other, the collateral damage would extend to India and across the developing world. Notwithstanding the availability of a functioning *rupee-rouble* bilateral payment mechanism, there is doubt whether it would be widely recognised and used by Indian exporters or importers – particularly ones interested in doing business with the US. Why, for example, would Tata Steel sell steel to Russia and thus imperil all the businesses — from steel to consultancy services — Tata does in America?

⁹² Mihir Sharma, *Why India Is Losing Faith in the West*, BLOOMBERG QUINT PRIME (Mar. 17, 2022), www.bloombergquint.com/gadfly/ukraine-invasion-why-india-is-angry-about-russia-sanctions.

⁹³ Yukihiro Sakaguchi, *Biden to Modi: Importing More Russian Oil Not in India's Interest*, NIKKEI ASIA (Apr. 12, 2022), <https://asia.nikkei.com/Politics/International-relations/Biden-to-Modi-Importing-more-Russian-oil-not-in-India-s-interest> [hereinafter *Biden to Modi: Importing More Russian Oil Not in India's Interest*].

⁹⁴ See Naoyuki Toyama & Ryosuke Hanada, *India Under Spotlight for "Laundering" Russian Oil*, NIKKEI ASIA (Jul. 14, 2022), <https://asia.nikkei.com/Business/Energy/India-under-spotlight-for-laundering-Russian-oil>.

Indeed, overall, counter-arguments from the Indian side were paltry, amounting to little else than a litany of weak, outdated, and anti-American arguments that attempt to self-exonerate India from its moral hypocrisy.⁹⁵ Some were unreservedly untrue and insulting, such as the contention that the war in Ukraine was, in the words of India's External Affairs Minister, S. Jaishankar, "a wake-up call for Europe to also look at challenges faced by Asia and to rules-based order in the region"⁹⁶:

Jaishankar . . . hinted at the West being oblivious to some developments in Asia, including the return to power of the Taliban. "I remember less than a year ago what happened in Afghanistan, where an entire civil society was thrown under the bus by the world," he said.

"When the rules-based order was under challenge in Asia, the advice we got from Europe is 'do more trade.' At least we are not giving you that advice," he said. "In terms of Afghanistan, please show me which part of the rules-based order justified what the world did there."

...

Jaishankar responded that in the last two months many in the West have argued that "there are things happening in Europe and Asia [that we] should worry about . . . because these could happen in Asia."

...

"This is a part of the world where boundaries have not been settled; [and] where terrorism is still practiced, often sponsored by states," he said in an indirect reference to issues New Delhi has with neighboring China and Pakistan. "This is a part of the world where the rules-based order has been under continuous stress for more than a decade."⁹⁷

The truth was that neither the EU nor US had ever ceased to pay attention to Central, South, or East Asia, or offer to assist in resolving its problems. The West had poured blood, sweat, tears, and toil across the twenty years after the 9/11 terrorist attacks into rebuilding Afghanistan, giving aid to the Subcontinent, and

⁹⁵ See Brahma Chellaney, *Washington's Clumsy Attempts to Bully India Must Stop*, NIKKEI ASIA (Apr. 21, 2022), <https://asia.nikkei.com/Opinion/Washington-s-clumsy-attempts-to-bully-india-must-stop> (this is one example of an unconvincing reply).

⁹⁶ Kiran Sharma, *India Says Ukraine Crisis "Wake-up Call" for Europe to Look at Asia*, NIKKEI ASIA (Apr. 26, 2022), <https://asia.nikkei.com/Politics/Ukraine-war/India-says-Ukraine-crisis-wake-up-call-for-Europe-to-look-at-Asia>.

⁹⁷ *Id.*

attempting to de-nuclearize the Korean Peninsula. However, the exogenous force of the West could no more kill the ideology of Islamist extremism than India and Pakistan, and North and South Korea, could embrace each other: change had to come endogenously from Asians themselves. Mr. Jaishankar's point was nothing more than to point his government's finger at the West and thus deny accountability for Asia's role in its continued messes.

Put differently, the neutrality of Modi Administration's with respect to Russia's war on Ukraine was unbecoming of the world's largest secular democracy, free market, and religiously pluralistic country. The excuse of historic ties stemmed from a ridiculously outdated Cold War thinking.⁹⁸ If balance-of-power politics was at issue, then India's long-term concern would be China. Rightly so, America admonished India for its behaviour.⁹⁹ However, whether the U.S. would go so far as to enforce rigorously a secondary boycott on India — an emerging ally in the Indo-Pacific region against China — was uncertain. India's former colonial master seemed to try to head off that outcome, with the British Prime Minister (PM Boris Johnson (1964–, PM, 2019–2022)) visiting Delhi to “announce a raft of commercial agreements and hail a ‘new era’ in bilateral trade and investment ties.”¹⁰⁰

Nevertheless, by the end of March 2022, India extended its direct interaction with Russia beyond energy trade:

. . . [India has become] one of the biggest buyers of Russian commodities since the international community began isolating Moscow for its invasion of Ukraine.

. . .

Russia is India's main supplier of defence hardware, but overall annual trade is small, averaging about \$9 billion in the past few years, mainly fertilizer and some oil. By comparison, India's bilateral trade with China is more than \$100 billion a year.

But given sharp discounts on Russian crude oil since the attack on Ukraine, India has bought at least 13 million barrels, compared with

⁹⁸ See *Russian Oil Exports to India Surge as Europe Shuns Cargoes*, *supra* note 85 (observing: “India and Russia have a longstanding partnership, from defense to trade, and [Russian President Vladimir] Putin visited India last December [2021] – only his second overseas trip since the [COVID-19] pandemic. New Delhi has so far abstained on U.N. votes condemning Russian aggression.”).

⁹⁹ *Id.*

¹⁰⁰ U.K. *PM Boris Johnson Begins Two-Day India Visit, To Announce Slew Of Pacts*, BLOOMBERG QUINT PRIME (Apr. 21, 2022), www.bloombergquint.com/business/uk-pm-boris-johnson-begins-two-day-india-visit-to-announce-slew-of-commercial-pacts.

nearly 16 million barrels imported from the country for the whole of last year [2021]. . . .

New Delhi has called for an immediate ceasefire in Ukraine but has refused to explicitly condemn Moscow's actions. It has abstained from voting on multiple U.N. resolutions on the war.

...

"India will import more items from Russia, especially if it is at a discount," one senior Indian government official said.

The government has been looking to establish a *rupee-rouble* trade system and discussions between Indian and Russian financial officials are ongoing

Besides the *rupee-rouble* trade window, several other options are on the cards, including settling all government and quasi-government payments directly through the central banks of the two countries, said the source.

...

In a sign of sustained ties despite the Ukraine crisis, India is considering allowing Russia to use its funds lying with the Reserve Bank of India . . . to invest in Indian corporate bonds....

Russia has retained about 20 billion rupees (\$263 million) of Indian payments for Russian defence equipment with the RBI [Reserve Bank of India].¹⁰¹

Fortunately for India, America exercised patience, for President Biden stated that "India was 'somewhat shaky' in acting against Russia," and "[the U.S.] had not asked partners like India to suddenly stop energy purchases from Russia".¹⁰² Likewise:

"The United States and India are going to continue our close consultation on how to manage the destabilizing effects of this Russian war," Biden said at the beginning of the [April 11, 2022 virtual] meeting [with PM Modi].

"The President conveyed very clearly" that it is not in India's interest to increase oil imports from Russia, White House Press

¹⁰¹ Aftab Ahmed & Krishna N. Das, *India Stands by Trade with Russia as Lavrov Set to Visit*, REUTERS (Mar. 29, 2022), www.reuters.com/world/india/india-stands-by-trade-with-russia-lavrov-set-visit-2022-03-29/ [hereinafter *India Stands by Trade with Russia as Lavrov Set to Visit*].

¹⁰² *Id.*

Secretary Jen Psaki told reporters after the meeting.¹⁰³

His Secretary of Commerce, Gina Raimondo, was a bit more candid: “Now is the time to stand on the right side of history, and to stand with the United States and dozens of other countries, standing up for freedom, democracy, and sovereignty with the Ukrainian people, and not funding and fuelling and aiding President Putin’s war . . . ”.¹⁰⁴

Unfortunately for America, India in July 2022 established a mechanism to facilitate international trade transactions denominated in *rupees*, thereby enabling flexibility for the exchange of payment messages to bypass SWIFT:

Under the new mechanism:

- (1) Authorized Dealer banks in India have been permitted to open *rupee vostro* accounts. [A “nostro” account is an account in which one bank, say X, keeps funds at another bank, say Y. A “vostro” account is an account in which the other bank, Y, keeps funds at the first bank, X. “Nostro” and “vostro” are Italian terms for “ours” and “yours.” Thus, a “nostro” account is “our” account with “you,” and a “vostro” account is “your” account with “us.” They are mirror images. Under the RBI mechanism, the RBI would grant permission to an Indian bank (X, the first bank) to set up a “vostro” account for a Russian bank (Y, the other bank).]
- (2) For settlement of trade transactions with any country, Authorized Dealer banks in India may open special rupee vostro accounts of correspondent bank(s) of the partner trading country.
- (3) Indian importers undertaking imports through this mechanism shall make payment in Indian rupee which shall be credited into the special vostro account of the correspondent bank of the partner country, against the invoices for the supply of goods or services from the overseas seller/supplier.
- (4) Indian exporters undertaking exports of goods and services through this mechanism shall be paid the export proceeds in Indian rupee from the balances in the designated special *vostro* account of the correspondent

¹⁰³ *Biden to Modi: Importing More Russian Oil Not in India’s Interest*, *supra* note 93.

¹⁰⁴ Eric Martin & Sudhi Ranjan Sen, *U.S. Criticizes India on Russia Talks as Lavrov Visits Delhi*, BLOOMBERG QUINT PRIME (Mar. 30, 2022), www.bloomberquint.com/politics/u-s-criticizes-india-over-russia-talks-as-lavrov-visits-delhi.

bank of the partner country.

Any *rupee* surplus balance held in the vostro accounts can be used for:

- (1) Payments for projects and investments.
- (2) Export/Import advance flow management.
- (3) Investment in government treasury bills, and government securities.

The RBI has also given exporters flexibility to borrow against any receivables they have under this facility, and the ability to set off their import payables against receivables. The bank of a partner country may approach an Authorized Dealer bank in India for opening of special Indian rupee vostro account. The bank will seek approval from the Reserve Bank with details of the arrangement.

...

The [RBI] circular added that the method of exchange of messages in safe, secure, and efficient way may be agreed mutually between the banks of partner countries.

...

The RBI's new mechanism will likely resolve the ongoing trade settlement issues with Russia, said a banker This banker said that the arrangement to one which existed in the 1980s. The option to invest surplus amounts in Indian government securities is a great way to internationalise the *rupee* and make Indian *rupees* part of forex reserves of other countries.

...

A second banker . . . explained that the new scheme, if successful, will reduce the exchange rate risk for importers and exporters.

For example, if an Indian exporter is exporting garments to Russia, the RBI and the Russian Central Bank would have a reference rate to value the export in *rupee* terms. Once the Russian company has settled . . . payments in *rupees*, the Indian exporter could theoretically use that to pay for the import of raw materials from China under the new scheme. The Chinese company could, in turn, use those *rupees* for any other imports from India.

The structure essentially helps in lowering the exchange risk for domestic traders.

...

The RBI's move to set up an international trade settlement mechanism in Indian *rupees* would facilitate trade with countries

under sanction[s], like Iran and Russia¹⁰⁵

It is important to note the importance of setting a reference exchange rate to minimize currency risk. Considerations arise as regards the modality of doing so, and the parties involved. If the reference rate is off-market, then a black market for the currencies involved may develop.

Obviously, the fact that this new settlement system was established by the RBI meant it had the official blessing of the Government of India. Equally obviously, in the short-term, the system was primed for use for Indo-Russian trade and to stem outflows of conventional hard currencies (from both India and Russia) such as the US dollar.¹⁰⁶ In the long-term, the new system aligned with India's goals to internationalise its currency, hardening it (*i.e.*, making it increasingly acceptable as a means for invoicing, payment, and settlement) and thereby lessening India's dependence on conventional hard currencies.

Yet, there were bounds to America's pressure over India. For India, Russia had historically been an easy ally — it dealt with India, but did not ask much of it. America, on the other hand, was a hard ally — it always sought a *quid pro quo*. Hence, to consider a possibility:

A former Indian diplomat said Delhi's stand has put Washington in a Catch-22 situation.

The U.S. wants India to be part of its wider strategy of isolating Russia but at the same time, it can't afford to weaken India against China [by, for example, imposing severe sanctions on India for its support of Russia] — both diplomatically and militarily.

Experts say this has created confusion in the White House about the best way to deal with India.

[Thus,] Washington has not directly criticized India but has issued

¹⁰⁵ Vishwanath Nair & Pallavi Nahata, *RBI Puts In Place New Mechanism For Rupee Settlement of International Trade*, BLOOMBERG QUINT PRIME (Jul. 11, 2022), <https://www.bqprime.com/business/business/rbi-puts-in-place-new-mechanism-for-rupee-settlement-of-international-trade>.

¹⁰⁶ *Rupee Settlement For International Trade: What Changes? #BQDebates*, BLOOMBERG QUINT PRIME (Jul. 11, 2022), www.bqprime.com/business/rupee-settlement-for-international-trade-what-changes-bqdebates.

statements that experts call “mild warnings”.¹⁰⁷

India was surely taking advantage of this situation, and to declare its self-interested opportunism to be nauseating was to fail to see it from India’s vantage point.

To be sure, India’s view could not be rationalized by India’s hope for greater regional cooperation, though PM Modi made a rather woolly-headed attempt at doing so.¹⁰⁸ As non-sanctioning countries, both India and China signalled a possible long-term trend of decoupling from trade and direct and portfolio investment relations with the US and its Allies – not a full-scale cancellation of those ties, but a pull-back not only in energy markets, but also in agricultural, industrial, and service markets, amidst a large geo-politically driven realignment of supply chains.¹⁰⁹

Thus, as one of many examples concerning China’s *de facto* pro-Russian stance, effective May 01, 2022, China suspended tariffs on imports of Russian coal.¹¹⁰ Essentially, China appeared to adhere to the letter of U.S. and Allied sanctions, but had neither abjured transactions with Russia beyond the scope of those sanctions, nor had engaged in much self-sanctioning. Perhaps that approach was unsurprising, given that China had a wealth of experience of many years in dealing with American sanctions against Iran, North Korea, and itself. Another illustration of how far China

¹⁰⁷ Vikas Pandey, *2+2 India-U.S. Talks: Ukraine Looms Large over Modi-Biden Meeting*, BBC NEWS (Apr. 11, 2022), www.bbc.com/news/world-asia-india-61042313.

¹⁰⁸ See Kiran Sharma, *Modi Seeks Greater Regional Cooperation Amid Russia-Ukraine War*, NIKKEI ASIA (Mar. 30, 2022), <https://asia.nikkei.com/Politics/International-relations/Modi-seeks-greater-regional-cooperation-amid-Russia-Ukraine-war> (reporting: “Indian Prime Minister Narendra Modi . . . said recent developments in Europe have raised a question mark over the stability of the international order, although he did not directly refer to Russia’s invasion of Ukraine. ‘In this context, it has become important to make BIMSTEC [Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation] regional cooperation more active’, he said in a virtual address at the fifth summit of the seven-nation group called the Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation . . . [.]‘It has also become essential to give greater priority to our regional security’, he added.” How India could enhance its security by burying itself in BIMSTEC amidst the Russian war against Ukraine, while maintaining cozy ties with Russia, plus square that behavior with its Indo-Pacific and global ambitions, was entirely unclear.).

¹⁰⁹ Edward White & Tom Mitchell, *Spectre of ‘Indo-Pacific NATO’ Accelerates China’s Decoupling from the West*, FIN. TIMES (Mar. 26, 2022), www.ft.com/content/98529d12-6cd6-40dc-a242-3ca907f20a73?shareType=nongift.

¹¹⁰ See Keith Bradsher, *China Suspends Import Tariffs on Coal, Helping Russian Exports*, N.Y. TIMES (Apr. 28, 2022), www.nytimes.com/live/2022/04/28/world/ukraine-russia-war-news?referringSource=articleShare#china-russia-tariffs-coal [hereinafter *China Suspends Import Tariffs on Coal, Helping Russian Exports*] (noting this “decision . . . will likely benefit Russia at a time when its coal exports to Europe are being phased out over its invasion of Ukraine”).

tilted in favour of Russia came on August 10, when China dubbed America as the “main instigator” of the Ukraine crisis.¹¹¹

As Singapore’s thoughtful PM pointed out, the risks associated with China’s perspective on the Russian war in Ukraine:

Singapore Prime Minister Lee Hsien Loong said Russia’s invasion of Ukraine raises “awkward questions” for China because it violates Beijing’s closely held principles of territorial integrity, sovereignty and non-interference.

Lee was asked during an event organized by the Washington-based Council on Foreign Relations ... whether he thinks China has paid a political price in the region for maintaining ties with Russia.

“I think it presents them with awkward questions because on Ukraine, it violates the principles which the Chinese hold very dearly – territorial integrity, and sovereignty and non-interference,” Lee said. “And if you can do that to Ukraine, and if the Donbas can be considered to be enclaves, and maybe republics,” he added before the moderator interrupted to ask what about Taiwan.¹¹²

In essence, the American-led sanctions regime amidst the war against Ukraine gave China an additional strong incentive — along with America’s Section 301 tariffs in the Sino-American Trade War and its Indo-Pacific military policies — to steer trade

¹¹¹ *China Calls U.S. ‘Main Instigator’ of Ukraine Crisis*, REUTERS (Aug. 10, 2022), www.reuters.com/world/china-calls-us-main-instigator-ukraine-crisis-2022-08-10/ (reporting: “China, which Russia has sought as an ally since being cold-shouldered by the West over its invasion of Ukraine, has called the United States the ‘main instigator’ of the crisis China’s Ambassador to Moscow, Zhang Hanhui, accused Washington of backing Russia into a corner with repeated expansions of the NATO defense alliance and support for forces seeking to align Ukraine with the European Union rather than Moscow. ‘As the initiator and main instigator of the Ukrainian crisis, Washington, while imposing unprecedented comprehensive sanctions on Russia, continues to supply arms and military equipment to Ukraine’, Zhang was quoted as saying. ‘Their ultimate goal is to exhaust and crush Russia with a protracted war and the cudgel of sanctions.’ The Ambassador’s reasoning closely followed one of Russia’s own justifications of its invasion of Ukraine . . .”).

¹¹² Philip Heijmans, *Singapore PM Says Ukraine War Poses “Awkward Questions” for China*, BLOOMBERG (Mar. 31, 2022), www.bloomberg.com/news/articles/2022-03-31/singapore-says-ukraine-war-poses-awkward-questions-for-china?sref=7sxw9Sxl.

and investment toward Russia.¹¹³

After all, on the eve of Russia's invasion of Ukraine, President Xi Jinping intoned there were "no limits" to China's friendship with Russia, hence helping Russia by buying oil, and collaborating "to promote real democracy based on nations' own conditions," was consistent with such ties.¹¹⁴ Ironically, however, there was at least one limit: Iran. Russia not only cozied up to China, but also to Iran. In doing so, i.e., in trying to sell its oil to China, Russia was displacing Iranian oil sales to China.¹¹⁵ Like Russia, Iran was trying to generate export revenues from energy sales; unlike third-country transactions with Russia, those with Iran were forbidden under America's secondary boycott of Iran. Simply put, a Sino-Russian-Iranian axis against the US and its allies was fraught with tension between competing Russian and Iranian oil sales to China.

To be sure, America's sanctions regime was not entirely perfect, in that it did not eschew all Russian-origin merchandise. The U.S. regime included multiple self-interested omissions. Uranium was among the most notable one:

The U.S. has over ninety nuclear reactors, more than any other country, and is heavily reliant on imported uranium. Russian Uranium made up 16% of U.S. purchases in 2020, according to the Energy Information Administration, with Canada and Kazakhstan each providing 22%.

Russia also supplies a fuel called high-assay, low enriched uranium

¹¹³ By no means were India and China alone in their tacit support for Russia. The UAE joined them, not only by failing to condemn Russia's aggression against Ukraine, but also opening itself to high-net-worth Russians. See Sameer Hashmi, *Wealth Russians Flee to Dubai to Avoid Sanctions*, BBC NEWS (May 5, 2022), www.bbc.com/news/business-61257448.

¹¹⁴ Quoted in *China Says It Will Work With Russia to Promote 'Real Democracy'*, BLOOMBERG (Jun. 1, 2022), www.bloomberg.com/news/articles/2022-06-01/china-will-advance-real-democracy-with-russia-says-diplomat?sref=7sxxw9Sxl (also reporting Chinese Foreign Minister stated "that 'monopolizing' the definition of democracy and human rights to influence other nations was a tactic 'doomed to fail,' in a veiled swipe at the United States . . .").

¹¹⁵ See Guy Faulconbridge & Parisa Hafezi, *Putin Forges Ties with Iran's Supreme Leader in Tebran Talks*, REUTERS (Jul. 19, 2022), www.reuters.com/world/putin-visits-iran-first-trip-outside-former-ussr-since-ukraine-war-2022-07-18/ (reporting: ". . . Russia's increased tilt towards Beijing in recent months has significantly reduced Iranian crude exports to China – a key source of income for Tehran since then-U.S. President Donald Trump reimposed sanctions in 2018. In May [2022], . . . Iran's crude exports to China had fallen sharply as Beijing favored heavily discounted Russian barrels, leaving almost 40 million barrels of Iranian oil stored on tankers at sea in Asia and seeking buyers."); A cynic might rejoice, given that the axis involved Xi's CCP, Putin's oligarchy, and Khomeini's un-Islamic theocracy.

(HALEU), which is enriched up to 20% and could be used in advanced nuclear plants expected to be developed later this decade or in the 2030s.¹¹⁶

Therefore, one measure President Biden did not order was a ban on importation of Russian-origin Uranium. Republican Senators attempted a legislative plug, introducing a bill “to ban U.S. imports of Russian uranium to punish Moscow for its invasion of Ukraine.”¹¹⁷ Interestingly, his predecessor considered a Section 232 of U.S. the Trade Expansion Act of 1962 action against all foreign-sourced Uranium, but opted against any formal adjustment of such imports. Indubitably, an import ban would boost the fortunes of domestic Uranium mines.

Interestingly, as of August 2022, India and China were hardly alone among Group of Twenty (G-20) countries in not joining the U.S. and the rest of the G-7 in sanctioning Russia. “Comprising nations that account for some 85% of global economic output, the G-20 is supposed to be more reflective of the world. Yet only half its number has joined the international sanctions imposed on fellow member Russia over its invasion of Ukraine.”¹¹⁸ Indonesia, South Africa, and Turkey were among the G-20 countries trying to stay non-aligned. Given the considerable energy sourcing from Russia by India, China, and other non-compliant countries, the effect of American and Allied sanctions thus was underwhelming.¹¹⁹

¹¹⁶ Timothy Gardner, *U.S. Senators Introduce Bill to Ban U.S. Imports of Russian Uranium*, REUTERS (Mar. 18 2022), www.reuters.com/world/us/us-senators-introduce-bill-ban-us-imports-russian-uranium-2022-03-17/ [hereinafter *U.S. Senators Introduce Bill to Ban U.S. Imports of Russian Uranium*].

¹¹⁷ *Id.*; See Bill To Prohibit the Importation of Uranium from the Russian Federation, 117th Congress, 2d Session, S.L.C. No. ROS22275 RM6, www.barrasso.senate.gov/public/_cache/files/d7d62189-d0af-478b-a079-8a14304f77cf/barrasso-russianuranianban.pdf.

¹¹⁸ Alan Crawford et al., *The U.S.-Led Drive to Isolate Russia and China Is Falling Short*, BLOOMBERG (Aug. 5, 2022), www.bloomberg.com/news/articles/2022-08-05/the-us-led-drive-to-isolate-russia-and-china-is-falling-short?sref=7sxw9Sxl.

¹¹⁹ Tom Wilson, *Western sanctions have had ‘Limited Impact’ on Russian oil output, says IEA*, FIN. TIMES (Aug. 11, 2022), www.ft.com/content/b75d0b8e-fcd8-4722-9180-39a01279d3b4?shareType=nongift (reporting: “[w]estern sanctions have had ‘limited impact’ on Russian oil output since the start of the war in Ukraine, the International Energy Agency said . . . as it raised its forecast for Russian crude production into 2023. Moscow’s exports of crude and oil products to Europe, the U.S., Japan, and Korea had fallen by nearly 2.2 million barrels a day since its full-scale invasion of Ukraine But the rerouting of flows to countries including India, China, and Turkey had mitigated financial losses for the Kremlin. Russian oil production in July was only 310,000 b/d below prewar levels, a fall of less than 3 per cent, while total oil exports were down about 580,000 b/d As a result, Russia

Turkey, for example, announced five of its banks were adopting Russia's Mir payments system.¹²⁰ Questions arose as regards the factors which explained the positions of countries opting not to follow the sanctions regime. For example, Turkey presented an apparent, *albeit* competing, rationale. On the one hand, "Turkey voiced its opposition to Russia's invasion of Ukraine."¹²¹ On the other hand, Turkey "... continued to import energy from Russia (with partial payment in *roubles*), which provided a quarter of its crude oil imports and around 45% of its natural gas deliveries last year (2021)," and "Russia has . . . provided much needed foreign-exchange liquidity to Turkey by transferring billions of dollars to a Turkey-based subsidiary of *Rosatom* for completion of a nuclear power plant's (known as Akkuyu) construction on the Mediterranean coast."¹²² By comparing Turkey's dependence on Russian-origin oil and NG to that of the EU, and in light of the fact that the EU could cut energy imports from Russia, a noteworthy consideration is that the factors preventing Turkey from doing the same are, largely, indeterminate.

VIII. WAVE FIVE: REVOKING RUSSIA'S MFN STATUS

Another big step in expanding the sanctions regime came on March 11, 2022, when the United States Trade Representative (USTR) announced that America would revoke Russia's Most Favoured Nation (MFN) status,¹²³ and the G-7 nations did likewise. The legislative instrument in the U.S. was the H.R. Bill 7109, *Suspending Normal Trade Relations with Russia and Belarus Act* (19 U.S.C. § 2434).¹²⁴ Under the Foreign Commerce Clause, Article I, Section 8, Clause 3, the authority to change Russia's trade treatment lay with the Congress, not the President. This was passed by the House and Senate, which President Biden signed on April 08.¹²⁵ Under it,

would have generated \$19 bn in oil export revenues last month [July 2022], and \$21 bn in June, the IEA's data showed. 'Asian buyers have stepped in to take advantage of cheap crude,' the IEA said, with China having overtaken the EU as the biggest importer of Russian crude in June. Increased demand for Russian crude compared with earlier in the year also meant that the discounts being paid for Russian cargoes had narrowed . . .').

¹²⁰ Tugce Ozsoy, *Turkish Banks Are Adopting Russian Payments System, Erdogan Says*, BLOOMBERG (Aug. 6, 2022), www.bloomberg.com/news/articles/2022-08-06/turkish-banks-are-adopting-russian-payments-system-erdogan-says?sref=7sxx9Sxl [hereinafter *Turkish Banks Are Adopting Russian Payments System, Erdogan Says*].

¹²¹ *Id.*

¹²² *Id.*

¹²³ See Press Release, Off. U.S. Trade Rep. Statement from Ambassador Katherine Tai on the Announcement of Additional Economic Actions Against Russia (Mar. 11, 2022).

¹²⁴ See H.R. 7108, 117th Cong., 117–110 (2021–2022) (This legislation authorized the President to increase the duty rates above Column 2 rates via Presidential Proclamation through January 1, 2024).

¹²⁵ See THE WHITE HOUSE, BILLS SIGNED: H.R. 6968 AND H.R. 7108 (Apr. 8, 2022).

effective April 09, Harmonized Tariff Schedule of the United States (HTSUS) Column 2 duty rates applied to all products entered therein of Russian and Belarussian origin.

This Act stated: “Notwithstanding any other provision of law, beginning the day after the date of the enactment of this Act, the rates set forth in Column 2 of the HTSUS shall apply to all products of the Russian Federation and the Republic of Belarus.”¹²⁶ The new Column 2 rate was 35%. Technically, the U.S. suspended the HTSUS Column 1 MFN rates for Russian, and Belarussian, origin merchandise on April 09. Subsequently, pursuant to this Act, President Biden (via Presidential Proclamation) announced a significant increase in ad valorem tariffs — under Column 2, non-MFN rates — on 553 8-digit categories of Russian origin products, including aluminium, ammunition, aircraft, arms, automotive-related items, chemicals, electronic parts, machinery, metal, metals, minerals, paper, steel, and wood. These tariff hikes took effect on July 29, 2022.¹²⁷ The President created a new HTSUS 8-digit Sub-Heading, 9903.90.08, with the description, “Articles the product of the Russian Federation, as provided for in U.S. Note 30(a) to this Sub-Chapter and as provided for in the Sub-Headings enumerated in U.S. Note 30(b) to this Sub-Chapter,” and likewise for Belarus.

This move was cataclysmic from four perspectives. First, it was a rare (if not unprecedented) instance in which significant WTO Members, in their own way and under their own domestic rules, quickly forged a consensus to deny MFN tariff rates to Russian-origin merchandise. Second, the announcements came with an invocation of Article XXI of the General Agreement on Tariff and Trade as an affirmative defence to the violation of the Article I:1 obligation to accord immediate and unconditional MFN treatment to all WTO Members. Third, the coupling of MFN revocation with export controls risked exacerbating the global food crisis. As WTO Director General Dr. Ngozi Okonjo-Iweala opined:

I do hope we have learned something’ from the previous global

¹²⁶ Note, then, an importer of such products needed to move quickly to avoid the new, higher rates by filing U.S. Customs and Border Protection (CBP) entry forms (or having its customs broker do so) with a date on or before April 8, 2022 – if that date was factually accurate. Left unclear by the Act was the disposition of Russian- and Belarus-origin merchandise held in inventory in foreign trade zones (FTZs) before the effective date of Act. Based on its plain language, it did not appear merchandise in privileged foreign (PF) zone status would benefit from Column 1 rates if entered on or after the Act is effective, i.e., the Column 2 rates would apply to it if entered on or after 9 April.

¹²⁷ Proclamation No. 10420, 87 Fed. Reg. 38,875 (June 30, 2022) (The HTSUS product codes of the affected Russian-origin products are listed here. Annex A lists the Column 2 rates for Russian-origin products, and Annex B for Belarussian-origin products.).

food crisis in 2007-2008, Okonjo-Iweala said, referring to a period in which problems were caused by droughts in key wheat and rice-producing countries, along with a surge in the cost of energy. ‘The signs we see now don’t show that learning very much, because we’re having the same situation of spiking food prices, spiking energy prices and an emerging spiral.’

Okonjo-Iweala, formerly Nigerian Finance Minister and World Bank Managing Director, said only around twelve WTO Member countries had so far imposed export restrictions to keep food at home, which they are permitted to do under certain evasive mechanisms [the GATT Article XI:2 exceptions] given in the WTO rules.

The Ukraine war has put intense stress on the WTO as a negotiating forum, as divisions between Russia and a coalition of mainly rich governments supporting Ukraine have spilled over into talks. Those governments have issued a statement in the WTO denouncing Moscow, blocked Belarus’s application to join the institution and withdrawn so-called “most-favoured nation” status for Russia, enabling them to impose higher tariffs on Russian goods than on other members of the Organization.¹²⁸

Fourth, the US revocation was hardly the only one. The EU, G-7 (including Japan)¹²⁹, and “other like-minded partners (Albania, Australia, Iceland, Republic of

¹²⁸ Alan Beattie, *Export Controls Risk Exacerbating Food Crisis, WTO Chief Warns*, FIN. TIMES (Mar. 26, 2022), www.ft.com/content/4bc5b9a-dc9c-4a2e-9c19-fd0552eb9975?shareType=nongift; World Trade Organization, *Joint Statement on Aggression by the Russian Federation Against Ukraine with the Support of Belarus, Communication from Albania; Australia; Canada; European Union; Iceland; Japan; Republic of Korea; Republic of Moldova; Montenegro; New Zealand; North Macedonia; Norway; United Kingdom; and United States*, WT/GC/244 (Mar. 15, 2022), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/244.pdf&Open=True>; World Trade Organization, *Joint Statement Regarding the Application from Belarus for Accession to the World Trade Organization, Communication from Albania; Australia; Canada; European Union; Iceland; Japan; Republic of Korea; Montenegro; New Zealand; North Macedonia; Norway; Ukraine; United Kingdom; and United States*, WT/GC/246 (Mar. 24, 2022), <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/GC/246.pdf&Open=True#:~:text=We%20condemn%20Belarus%20for%20its,consider%20its%20application%20for%20accession.>

¹²⁹ See Mari Yamaguchi, *Japan Formally Revokes Russia’s ‘Most Favored Nation’ Status*, ASSOCIATED PRESS (Apr. 20, 2022), <https://apnews.com/article/russia-ukraine-business->

Korea, Moldova, Montenegro, New Zealand, North Macedonia, Norway)” also withdrew MFN treatment for Russian-origin merchandise.¹³⁰ All that Russia had worked hard for during years of accession negotiations towards its August 2012 WTO entry, it had lost in a matter of weeks.

IX. WAVE SIX: BANNING IMPORTS OF RUSSIAN-ORIGIN ICONIC GOODS, AND EXPORTS TO RUSSIA OF LUXURY GOODS AND BANK NOTES

On March 11, 2022, President Biden signed an (unnumbered) *Executive Order* prohibiting importation into the U.S. of certain iconic goods of Russian origin, the exportation or supply by U.S. persons or from the U.S. to Russia of certain luxury goods and dollar-denominated bank notes, and certain new investments in Russia.¹³¹ As with the other *Orders*, this one forbade the approval, financing, facilitation, or guarantee by a U.S. person of a transaction by a foreign person, where the transaction would be prohibited if done by a U.S. person or within the U.S. The same day, the BIS issued a final rule adding a new Section 746:10 to the EAR. This addition restricted the export of luxury goods to Russia, Belarus, as well as to certain Russian and Belarusian oligarchs around the world.¹³²

America’s Allies acted similarly, widening their import and export prohibitions. For instance, on March 20, 2022, Australia announced it was banning the exportation of

tokyo-europe-moscow-e264ff718a4c998fe66c67e687864b12 (also reporting: (1) “[t]he measure, however, does not affect imports of crude oil and liquefied natural gas, as well as palladium, a type of rare metal, which had no tariffs before Russia joined the World Trade Organization in 2012 and gained the most favored nation status”, (2) “Japan has already faced reprisals from Russia. Moscow recently announced the suspension of talks on a peace treaty with Tokyo that included negotiations over Russian-held islands that the former Soviet Union seized from Japan at the end of World War II”, and (3) “Japan’s trade with Russia is relatively small but has been growing swiftly in recent years, with exports in the fiscal year that ended in March up nearly 40% and imports up almost 70%.”).

¹³⁰ European Commission, Statement, *Statement by Executive Vice-President Dombrovskis on EU Decision to Stop Treating Russia as a Most-Favored-Nation at the WTO* (Mar. 15, 2022), https://ec.europa.eu/commission/commissioners/2019-2024/dombrovskis/announcements/statement-executive-vice-president-dombrovskis-eu-decision-0_en.

¹³¹ See THE WHITE HOUSE, EXECUTIVE ORDER ON PROHIBITING CERTAIN IMPORTS, EXPORTS, AND NEW INVESTMENT WITH RESPECT TO CONTINUED RUSSIAN FEDERATION AGGRESSION (2022).

¹³² See Dep’t Commerce, *Imposition of Sanctions on “Luxury Goods” Destined for Russia and Belarus and for Russian and Belarusian Oligarchs and Malign Actors Under the Export Administration Regulations (EAR)*, 87 Fed. Reg. 14785 (Mar. 16, 2022).

alumina to Russia.¹³³ This measure was significant, as alumina is a key input into aluminium, and Russia relied for 20% of its alumina on Australia, with Russia's aluminium exports being an important source of its export revenues. Likewise, the Allies extended the measures they had taken, as need be. For example, on July 26, 2022, the EU renewed restrictions on specific sectors of Russia's economy through January 31, 2023, including measures concerning luxury goods, as well as dual-use items, and ones affecting the energy, finance, industry, and technology sectors.

Bolstering these measures against the importation of Russian merchandise, and thereby strengthening the effort to curtail its export revenues, were the actions of fuel suppliers. Per private sector self-sanctions (discussed below), by April 01, 2022, “[m]arine fuel sellers have stopped serving vessels flying the Russian flag at major European hubs including Spain and Malta in another blow to Moscow’s exports. . . .”¹³⁴ Notably, “[l]osing access to refuelling points in the Mediterranean Sea pose[d] major logistical problems for Russian oil tankers going from Baltic ports to Asia and also create[d] safety concerns over potentially being stuck at sea with flammable cargoes. . . .”¹³⁵ The reluctance to provide Russian vessels with fuel followed logically from the payments system sanctions on Russia, that is, “[p]ayment problems due to banking restrictions . . . added to complications with deals for marine fuel, which . . . [was] typically priced and paid for in U.S. dollars.”¹³⁶

X. WAVE SEVEN: PRIVATE SECTOR WITHDRAWALS

Throughout all sanctions waves, the private sector — that is, multinational corporations (MNCs) headquartered in America, Britain, and Europe — pulled out of, or scaled back their operations in, Russia. Examples ranged from McDonalds and Starbucks to an array of French luxury brands.¹³⁷ Did they act out of conviction,

¹³³ See *Australia Bans Alumina Exports to Russia, Sources Coal for Ukraine*, REUTERS (Mar. 20, 2022), www.reuters.com/world/australia-bans-alumina-exports-russia-sources-coal-ukraine-2022-03-19/.

¹³⁴ Jonathan Saul, *Exclusive: Ship Fuel Suppliers Stop Serving Russian Vessels in the Med – sources*, REUTERS (Apr. 1, 2022), www.reuters.com/world/europe/exclusive-ship-fuel-suppliers-stop-serving-russian-vessels-med-sources-2022-04-01/ [hereinafter *Exclusive: Ship Fuel Suppliers Stop Serving Russian Vessels in the Med – sources*] (also reporting: “Russia’s maritime sector is already grappling with the winding down of other services including ship certification by leading foreign providers – vital for accessing ports and securing insurance – shipping companies pulling out and ship engine makers suspending training on their equipment.”).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ Becky Morton, *McDonald’s to Leave Russia for Good After 30 Years*, BBC NEWS (May 17, 2022), www.bbc.com/news/business-61463876_; Alice Hancock, *Starbucks to Exit Russia Over Invasion of Ukraine*, FIN. TIMES (May 23, 2022),

i.e., an affirmative belief in sacrificing short-term profits for enduring principle? Or were they motivated by fear, *i.e.*, they anticipated incurring a cost of losing more business than whatever sales revenues they might preserve if they stayed in an aggressor state?

To be sure, the entire foreign-headquartered private sector did not decamp Russia immediately, triggering calls to name, shame, and boycott those firms that remained in the country:

[s]ome 400 U.S. and other multinational firms have pulled out of Russia, either permanently or temporarily, according to Yale's Jeffrey Sonnenfeld, who has kept an authoritative list of corporate actions in Russia. Oil companies (BP, Shell, ExxonMobil) and tech companies (Dell, IBM, Apple, Google, Facebook, Twitter) led the way, and many others (McDonald's, Starbucks, Coca-Cola) eventually followed.

But, according to Sonnenfeld, there are, at the other extreme, 33 companies (as of Wednesday afternoon) that form a "hall of shame," defying demands that they exit Russia or reduce their activities there.

"They are funding the Russian war machine, and they are undermining the whole idea of the sanctions," Sonnenfeld . . . [said]. "The whole idea is to freeze up civil society, to get people out on the streets and outraged. They're undermining an effective resolution" and increasing the likelihood of continued bloodshed.

Those who want to stop Russia's murderous attack against Ukraine should stop investing in or buying the products of these companies.¹³⁸

A notorious and shameful counterexample was Wichita-based, hydrocarbon-intensive Koch Industries; it was not alone.¹³⁹

www.ft.com/content/096ddd0-5f4c-4129-aa23-c7a8bb22fd68?shareType=nongiftet.

¹³⁸ Dana Milbank, *Opinion: Stop Buying from these Companies. They're Funding Putin's War.*, WASHINGTON POST (Mar. 16, 2022), www.washingtonpost.com/opinions/2022/03/16/boycott-companies-business-russia-putin-ukraine-war/ [hereinafter *Opinion: Stop Buying from these Companies. They're Funding Putin's War*].

¹³⁹ *Id.*

In all fairness, ultimately several such MNCs, including Yum Brands and Marriott, pulled out.¹⁴⁰ This initial reluctance begs the question — what motivated companies to remain in Russia?¹⁴¹

¹⁴⁰ See *Ukraine War: Marriott Hotel Chain to Leave Russia After 25 Years*, BBC NEWS (June 3, 2022), www.bbc.com/news/business-61685925 (The Yum Brands exit is noted earlier; concerning the Marriott's exit from Russia. Reporting: “[t]he company closed its Moscow office and paused investment in Russia in March [2022], following the invasion of Ukraine. However, its twenty-two hotels in the country are owned by third parties and remained open. Marriott said the process of suspending operations in Russia was ‘complex.’ But in a statement, it said: ‘[w]e have come to the view that newly announced U.S., U.K., and EU restrictions will make it impossible for Marriott to continue to operate or franchise hotels in the Russian market.’ The company said it remained ‘focused on taking care of our Russian-based associates,’ and had been supporting individuals in Ukraine and Russia to secure employment with Marriott outside countries affected by the conflict.”); See *Nike Latest Brand to Leave Russia Permanently*, BBC NEWS (June 23, 2022), www.bbc.com/news/business-61914165 (In June 2022, Nike and Cisco added themselves to the list of MNCs decamping Russia. Reporting: “[t]he U.S. sportswear giant halted online orders and closed the stores it owned in the country in March [2022]. Shops run by local partners continued to operate, but the firm is winding down those agreements. Networking giant Cisco also said it would start to fully shut down operations in Russia and Belarus . . . ‘Nike has made the decision to leave the Russian marketplace,’ the company said . . . ‘[o]ur priority is to ensure we are fully supporting our employees while we responsibly scale down our operations over the coming months.’ . . . Nike has more than 50 stores in Russia, about a third of which are closed In May, Russian media reported that the company was ending its agreement with its largest franchisee in Russia, responsible for 37 stores. Nike had previously disclosed that Russia and Ukraine together accounted for less than 1% of the company’s revenue. Cisco said . . . it had ‘made the decision to begin an orderly wind-down of our business in Russia and Belarus.’ This decision will affect a few hundred employees, the U.S. company said, adding that it wanted to ensure they are ‘treated with respect.’ . . . The networking giant had already stopped business operations, including sales and services, in the region in March . . .”).

¹⁴¹ See generally *Leaving Russia: The Key Questions Facing Multinationals*, FIN. TIMES (Mar. 20, 2022), www.ft.com/content/86144c9c-2258-4b9c-a0ad-ea8d63b7000f?shareType=nongift (summarizing: “[t] interviews with executives, advisers and academics suggest that even companies that have announced plans to pull out of Russia altogether face dilemmas about their people, their assets and liabilities, and their short- and long-term options in the country.” To be sure, as laudable as voluntary self-sanctioning by MNCs was, divestment was not always an easy option, because it raised both unpleasant ethical and economic dilemmas. For example:

[a]fter weeks of silence over the future of its Russian operations, *Société Générale* delivered a bleak blueprint for other multinationals that have pledged to exit the country.

The French bank said in early April [2022] that it would sell its *Rosbank* network to Vladimir Potanin, one of Russia's richest men and a nickel baron who has avoided EU or U.S. sanctions, taking a €3.1 bn hit in the process.

The transaction stunned some rivals and underlines the difficulties facing groups from oil majors to car companies who want to exit Russia following the invasion of Ukraine: few potential buyers, costly exit options and uncertain prospects for any future return.

“We are all trying to find a clever way to exit the country. But what *SocGen* did isn't the best way to do it,” said one senior executive at a bank with operations in the country. “There is an ethical discussion . . . there is a reputational risk to consider when selling, or basically donating, to an oligarch.”

“Essentially, they are giving a . . . gift to [Vladimir] Potanin [a “Russian billionaire and owner of OAO GMK Norilsk Nickel”]. O.K., he is not sanctioned, [but] is it the right thing to do?” the banker added.

Many Western companies have found themselves caught between the prospect of expropriation by Russia, selling to locals caught in sanctions, or trying to scout out investment from Chinese or Middle Eastern buyers that might be freer to make deals but have so far shown little appetite.

...
The costs of a fire sale could be considerable, as Renault showed this week after it emerged that it was in talks to sell its majority stake in Lada-maker *AvtoVAZ* to the state for one *rouble*.

Under a deal outlined by Denis Manturov, Russia's Trade Minister — which the French carmaker would not confirm — Renault would have the option of buying the stake back in five or six years at a price that takes into account any subsequent investments.

The divestment means Renault is giving up more than 14 years of investments, during which time it bought a 68 per cent stake in *AvtoVAZ*, overseeing a workforce of 40,000, and generating 10 per cent of its turnover and half its automotive operating margin last year [2021]. It has warned of a write-off of up to €2.2 bn.

...
A restructuring expert advising several companies on sales said: “A number of people made very grandiose statements about ‘we'll never do this, and we'll never do that’ and now they're thinking ‘oh, bugger.’ The

First, some MNCs feared nationalisation if they quit the country.¹⁴² President Putin threatened to nationalise assets of MNCs which decamped. That would amount to a government seizure the likes of which had not occurred since 1918, following the Bolshevik Revolution. Mr. Putin also authorised Russian airline companies to effectively abrogate their lease agreements. They also feared for the Russian nationals whom they employed — might they be the targets of retaliation by the Putin regime if the employers and ex-patriates left? Further, these MNCs had the long-term perspective in mind, projecting that when the war would end, they will want to make profitable operations in Russia again, which could be impeded if they left. The companies could not plausibly argue they wanted to safeguard their profits from Russian operations: aside from that being callous, they could not repatriate any such profits, because of the exclusion of Russia from SWIFT and other sanctions on banks dealing with Russia.

However, these reasons could be challenged on the ground that leaving Russia, even at the risk of hurting Russian consumers by cutting off the non-humanitarian goods and services that the MNCs supply, was preferable to the deaths of soldiers and civilians in Ukraine and Russia. That is, as the Just War Theory suggested, pursuing non-violent sanctions (with appropriate exceptions for humanitarian items such as medicines) in the hope of stopping violence was appropriate. Likewise, the argument which Koch Industries gave — that business and government should be separate; hence the latter should not foist sanctions upon the former — was laughable. The line between business and government always has been, and always will be, fuzzy. Moreover, that argument was extremist: it reflected a fanatical misreading of classical libertarian ideology.

XI. WAVE EIGHT: MORE SDN DESIGNATIONS PLUS STATE SANCTIONS

On March 24, 2022 came another tranche of sanctions, this time not only at the

reality is for most of these exits you're going to have to dance with the devil at some point.”);

Andrew Jack et al., *Companies Trying to Exit Russia Have to 'Dance with the Devil'*, FIN. TIMES (Apr. 30, 2022), www.ft.com/content/4d66f931-563a-4fdb-9032-18cffa73a7f6?shareType=nongift.

¹⁴² See, e.g., Richa Naidu & Jessica DiNapoli, *Analysis: Western Companies Wrestle with Russia 'Half-Exits'*, REUTERS (Mar. 18, 2022), www.reuters.com/business/western-companies-wrestle-with-russia-half-exits-2022-03-18/ (reporting: “[c]ompanies that left Russia may find it difficult to reclaim their property and assets once they are expropriated. Tiffany Compres, a Partner with law firm FisherBroyles, said companies may sue Russia in international venues such as the International Center for Settlement of Investment Disputes, but such cases can drag on for years and Russia cannot be forced to pay out. ‘Even if the company wins the claim, Russia has a reputation for not paying,’ Compres said.”).

Federal, but also, State level. The OFAC added the following entities to the SDN list (targeting the Russian legislature and Russian military-industrial complex):

- (1) The State *Duma* of the Federal Assembly of the Russian Federation and 328 of its members.¹⁴³
- (2) Herman Gref, the Chief Executive Officer (CEO) and Chairman of *Sberbank*, Russia's largest bank (following previous restrictions on dealings with *Sberbank* under *Executive Order* 14024 (Directive 2)).
- (3) Multiple Russian defence companies, their subsidiaries, and their leaders, including Tactical Missiles Corporation JSC . . . , JSC NPO High Precision Systems, NPK *Tekhmash* OAO, Joint Stock Company Russian Helicopters, and Joint Stock Company *Kronshtadt*.
- (4) 17 directors of Public-Joint Stock Company (PJSC) *Sovcombank* (which itself was a designated entity).¹⁴⁴

Accordingly, as with all SDNs, U.S. persons were generally prohibited from transacting with them, and all property and interests in property of SDNs was blocked. Similarly, the U.K. added sixty-five sanctions measures targeting strategic Russian industries, banks, and oligarchs.¹⁴⁵

U.S. States also started sanctioning Russia. In doing so, they delineated the scope of their sanctions by defining the types of Russian business operations they were sanctioning and identified the risks to differently situated government contractors in dealing with such businesses. Three patterns emerged.

First, most States' sanctions were narrow in scope. For example, Ohio¹⁴⁶ and

¹⁴³ See Press Release, Russia-related Designations; Publication of New Frequently Asked Question, U.S. Dep't Treasury, Off. Foreign Assets Control (Mar. 24, 2022).

¹⁴⁴ Further, OFAC redesignated OOO Volga Group, a Russian financial services firm, and its CEO, Gennady Nikolayevich Timchenko, and designated OOO Transoil, which Timchenko owned.

¹⁴⁵ As the war progressed, the UK targeted additional parties for sanctions. For example, on July 26, 2022 the UK designated forty-one more individuals (including Syrians and Palestinian involved in recruiting mercenaries to support Russia's fighters in Ukraine, regional governors in Russia, Russian officials, officials of the so-called Donetsk People's Republic and Luhansk People's Republic, and a British video blogger) and one more entity (including a Syrian entity that recruited mercenaries to fight in Ukraine).

¹⁴⁶ See MIKE DEWINE, GOVERNOR, STATE OF OHIO, EXECUTIVE ORDER 2022-02D, *State of Ohio's Response to Russia's Unjust War on the Country of Ukraine* (Mar. 3, 2022), https://content.govdelivery.com/attachments/OHIOGOVERNOR/2022/03/03/file_attachments/2093123/Signed%20EO%202022-02D.pdf.

Virginia,¹⁴⁷ limited their actions to Russian institutions and/or companies. Second, some States, such as New Jersey¹⁴⁸ and North Carolina,¹⁴⁹ targeted entities that were headquartered or had their principal place of business in Russia, as well as the subsidiaries of such entities (New Jersey also sanctioned Belarussian entities). Third, New York took the broadest approach and targeted entities that conduct business operations in Russia, which captured any entity (a) conducting any commercial activity in Russia, (b) transacting business with the Russian Government; or (c) transacting business with commercial entities headquartered or with their principal place of business in Russia.¹⁵⁰

Regarding the actual State sanctions, they took either or both of two methods: a ban on State contracting, and disinvestment. The first method aimed to sever State business with contractors operating in or with Russia or Belarus. The second method sought to sever portfolio investment links with Russia or Belarus by selling any State-government held Russian or Belarussian financial instruments (equity or debt). The divestment, as it were, also included liquor industry, as several States “adopted bans prohibiting the sale of Russian-origin vodkas in State liquor stores.”¹⁵¹ The first method, and possibly the second, entailed reporting or certification burdens on concerned State-level government contractors and portfolio investors.

Several Governors prohibited State agencies from engaging in Russia-related contracts. Via *New York Executive Order Number 14*, Governor Kathy Hochul (1958, Governor, 2021-) directed all New York State agencies to review and divest public

¹⁴⁷ See Commonwealth of Virginia, Glenn Youngkin, Governor of Virginia, *Governor Glenn Youngkin Calls for Decisive Action in Support of Ukraine* (Feb. 26, 2022), www.governor.virginia.gov/newsroom/news-releases/2022/february/name-929561-en.html.

¹⁴⁸ See NEW JERSEY LEGISLATURE, BILL S1889 SCASA (2R), SESSION 2022–2023, PROHIBITS GOVERNMENT DEALINGS WITH BUSINESSES ASSOCIATED WITH BELARUS OR RUSSIA, <https://www.njleg.state.nj.us/bill-search/2022/S1889>.

¹⁴⁹ See State of North Carolina, Roy Cooper, Governor, Exec. Order No. 251, *North Carolina Response to and Condemnation of Russian Invasion of Ukraine* (Feb. 28, 2022), <https://governor.nc.gov/media/2959/open>.

¹⁵⁰ See EXEC. ORDER NO. 16, STATE OF NY, (Mar. 17, 2022), www.governor.ny.gov/sites/default/files/2022-03/EO_16.pdf.

¹⁵¹ Lindsay B. Meyer et al., *Do You Contract with State Governments? If So, Beware of Emerging State Sanctions' Obligations Related to Russia and Belarus*, VENABLE LLP: INSIGHTS (June 3, 2022), www.venable.com/insights/publications/2022/06/do-you-contract-with-state-governments?utm_source=vuture&utm_medium=email&utm_campaign=20220603%20-%20do%20you%20contract%20with%20state%20governments%3F%20if%20so%2c%20beware%20of%20emerging%20state%20sanctions%20obligations%20related%20to%20rus-sia%20and%20belarus [hereinafter *Do You Contract with State Governments?*]

funds from Russian entities, and to terminate contracts with Russian entities.¹⁵² The Governor also “directed State agencies to refrain from contracting with entities ‘conducting business operations in Russia,’ and to request certification from bidders regarding operations in Russia as part of the procurement process.”¹⁵³

Likewise, the Governors of California, Colorado, Indiana, Massachusetts, Ohio, New Jersey, and North Carolina, issued *Executive Orders* (or otherwise took action) directing their State agencies to disassociate from Russian companies or state-owned enterprises (SOEs). For example, in California, the *Executive Order* “require[d] contractors with projects valued at over \$5 million to affirmatively report to the state their compliance with Federal economic sanctions, as well as any steps taken in response to Russia’s actions in Ukraine.”¹⁵⁴ As for New Jersey, it:

[B]anned its state agencies from doing business with companies closely linked to the governments of Russia or Belarus. Governor Phil Murphy introduced these restrictions in *Executive Order 291* (March 2, 2022), by ordering a mandatory review of New Jersey state contracts, including those with “businesses that invest directly in ... companies [owned or controlled by the government of Russia, Belarus, or their instrumentalities], directly or as subcontractors.’ While this *Executive Order* doesn’t directly place an onus on the business community, a companion New Jersey State Law, P[ublic] L[aw] 2022, c[hapter] 3, does. Under this Law, State agencies are generally prohibited from doing business with entities or persons determined by the state to be ‘engaged in prohibited activities’ in Russia or Belarus, including those with close links to the governments of Russia or Belarus or headquartered in Russia. Importantly, an entity contracting with the State of New Jersey must certify that neither it, nor any of its subsidiaries or affiliates under common ownership, is ‘engaged in prohibited activities’ in Russia or Belarus. Otherwise, it must accurately explain such activities in these countries. Moreover, if the contracting company is performing any ‘prohibited activities’, it will be obliged to terminate such activities within 90 days and certify as to the same to the state. Finally, under this New Jersey law, a false certification may result in civil penalties and suspension or termination of

¹⁵² See STATE OF NY, EXECUTIVE CHAMBER, EXEC. ORDER NO. 14: DIRECTING STATE AGENCIES AND AUTHORITIES TO DIVEST PUBLIC FUNDS SUPPORTING RUSSIA (Feb. 27, 2022), www.governor.ny.gov/sites/default/files/2022-02/Executive%20Order%20No.%2014.pdf.

¹⁵³ *Do You Contract with State Governments?*, *supra* note 151.

¹⁵⁴ *Id.*

contracting rights.¹⁵⁵

Indeed, by April 01, 2022, more than twenty States (including Alabama, Arkansas, California, Colorado, Georgia, Illinois, Indiana, Maryland, Massachusetts, Minnesota, Missouri, Mississippi, Montana, North Carolina, Nebraska, New Jersey, New York, Ohio, Texas, Virginia, Vermont, and Washington) had implemented or proposed the review and/or termination of existing State contracts and procurements with Russian entities, and prohibited State agencies from entering into new contracts with Russian entities. They did so regardless of which political party — Democrat or Republican — controlled the Governor’s Mansion and State Legislature.

Concomitant with the outright bans on dealing with Russian (and sometimes Belarusian) entities and/or divestitures of State investments in these entities, several States imposed obligations on State contractors, namely certification and disclosure requirements for them. For example, California’s regulation covered all contracts valued at \$5 million or more. Contractors had “to report on steps they have taken in response to Russia’s actions in Ukraine, including, but not limited to, desisting from making new investments in, or engaging in financial transactions with, Russian entities, not transferring technology to Russia or Russian entities, and directly providing support to the government and people of Ukraine.”¹⁵⁶ Similarly, before awarding, renewing, or amending a State procurement contract, New Jersey mandated contractors to certify that they are not dealing with any OFAC-designated SDN — and tacked on a whopping set of penalties for a false certification (namely, (1) a fine “equal to the greater of \$1,000,000 or twice the amount of the [contract] bid,” (2) “termination of an existing contract [or bid],” and (3) exclusion from public contracting with the State for 3 years (assuming the violating entity ceased its prohibited activities in Russia or Belarus).¹⁵⁷

Finally, many States followed President Biden’s import ban (discussed above) on Russian-origin vodka by sales of such vodka in State liquor stores.

XII. WAVE NINE: FURTHER DEGRADING KREMLIN POWER AND IMPOSING MORE ECONOMIC PAIN

In response to mounting, incontrovertible evidence of human rights atrocities

¹⁵⁵ *Id.*

¹⁵⁶ Gavin Newsom, Governor of California, Executive Department, State of California, Executive Order N-6-22 (Mar. 4, 2022), www.gov.ca.gov/wp-content/uploads/2022/03/3.4.22-Russia-Ukraine-Executive-Order.pdf.

¹⁵⁷ *See* SENATE, NUMBER 1889, STATE OF NEW JERSEY, 220TH LEGISLATURE (Feb. 28, 2022), www.njleg.state.nj.us/Bills/2022/S2000/1889_R2.PDF.

(including civilian murders in Bucha, a town outside Kyiv) committed by Russian forces in Ukraine, in early April, the U.S., EU, and G-7 announced another set of wide-ranging measures.¹⁵⁸ All of them were “intended to degrade key instruments of Russian state power and impose acute and immediate economic harm on Russia, . . . while holding accountable . . . a ‘kleptocracy’ that funds and supports the war.”¹⁵⁹

The American measures included:¹⁶⁰

- (1) A complete prohibition on all FDI in Russia:

President Biden issued a new *Executive Order 14071*, titled ‘Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression,’ in which the U.S. imposed a sweeping ban on FDI by any U.S. person (natural or legal).¹⁶¹ The *Executive Order*, dated April 06, 2022, extended the existing ban on FDI in Russia’s energy sector to its entire economy, so as to send Russia “further down the

¹⁵⁸ See, e.g., Nandita Bose et al., *Russia Hit with New Round of U.S. Sanctions as Biden Declares ‘Major War Crimes’*, REUTERS (Apr. 6, 2022), www.reuters.com/world/us-allies-ban-investments-russia-sanction-banks-2022-04-06/ [hereinafter Nandita Bose et al.]; Michelle Nichols et al., *Zelenskiy Accuses Russia of Worst War Crimes Since WW2*, REUTERS (Apr. 5, 2022), www.reuters.com/world/un-chief-warns-ukraine-war-one-greatest-challenges-international-order-2022-04-05/.

¹⁵⁹ Jennifer Jacobs, *U.S., EU to Hit Russian Investments With New Round of Sanctions*, BLOOMBERG (Apr. 5, 2022), www.bloomberg.com/news/articles/2022-04-05/u-s-eu-to-announce-new-sanctions-on-russia-hitting-investments?sref=7sxx9Sxl (quoting an unnamed U.S. official) [hereinafter Jennifer Jacobs].

¹⁶⁰ See Sanctions Compliance Guidance for the Virtual Currency Industry, U.S. Dep’t Treasury, Off. Foreign Assets Control (Oct. 2021). (In addition to the above-listed measures, the U.S. imposed restrictions on virtual currency. For example, first, OFAC recently stressed that virtual currency transactions may not be used to evade U.S. sanctions, explaining that sanctions generally apply to transactions regardless of whether they are denominated in traditional fiat or virtual currency); *Russian Harmful Foreign Activities Sanctions – Frequently Asked Questions*, U.S. DEP’T TREASURY (Mar. 11, 2022), <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1021> (1,021. Do the prohibitions of Executive Order (E.O.) 14024 and other Russia-related sanctions extend to virtual currency? Second, OFAC imposed new blocking sanctions against Hydra, a Russian “darknet” market that relies on virtual currency, and Garantex, a virtual currency exchange operating in Russia. Previously, the U.S. targeted Hydra and Garantex for allowing sanctioned persons and other actors to exploit virtual currencies for illicit purposes, including evasion of anti-money laundering obligations); See Press Release, Treasury Sanctions Russia-Based Hydra, World’s Largest Darknet Market, and Ransomware-Enabling Virtual Currency Exchange Garantex, U.S. Dep’t Treasury (Apr. 5, 2022).

¹⁶¹ See Prohibiting New Investment in and Certain Services to the Russian Federation in Response to Continued Russian Federation Aggression, 87 Fed. Reg. 20999 (Apr. 6, 2022).

road of economic, financial, and technological isolation.”¹⁶² The ban applied only to new investments, hence it did not — for example — mandate existing American companies, such as Koch Industries, to divest.¹⁶³ However, by early April 2022, 600 American companies had voluntarily quit Russia.¹⁶⁴

The new *Executive Order* contained two additional bans, one on services and the other on facilitation thereof. First, it forbade the direct or indirect export, reexport, sale, or supply from the US or by a US person, of “any category of services as may be determined by the Secretary of the Treasury, in consultation with the Secretary of State, to any person located in the Russian Federation.” Second, it forbade any US person from facilitating, approving, financing, or guaranteeing any transaction by a foreign person, if such a transaction would be prohibited under the *Executive Order* were it to be performed by a US person or transacted within the US.

(2) Increased financial penalties on Russian banks and restrictions on SOEs:

The new measures — by OFAC SDN listings pursuant to *Executive Order 14024* — included the form of the “most severe level of sanctions” on *Sberbank*, a PJSC and Russia’s largest financial institution, forty two subsidiaries that were owned with majority stake (50% or more), directly or indirectly, by *Sberbank*, and Alfa-Bank, a JSC and the country’s biggest privately-owned bank plus six of its subsidiaries and five vessels owned by one of the subsidiaries.¹⁶⁵ (*Sberbank* held “one-third of Russia’s total banking assets, and Alfa-Bank . . . [was] the country’s fourth largest financial

¹⁶² James Politi & Hannah Murphy, *U.S. to Announce Sanctions Including Ban on New Investment in Russia*, FIN. TIMES (Apr. 5, 2022), www.ft.com/content/1eb4af84-a17a-4aae-add2-8f71a3e73b68?shareType=nongift.

¹⁶³ See Courtney Weaver et al., *U.S. Imposes ‘Severe’ Sanctions on Russian Banks after Bucha Atrocities*, FIN. TIMES (Apr. 6, 2022), www.ft.com/content/a0865d3b-1557-44d4-b23d-c9f9cf170bf9?shareType=nongift [hereinafter Courtney Weaver et al.].

¹⁶⁴ See Jennifer Jacobs & Jordan Fabian, *U.S. to Sanction Putin Children, Banks Over Bucha Atrocities*, BLOOMBERG (Apr. 6, 2022), www.bloomberg.com/news/articles/2022-04-06/u-s-to-sanction-putin-s-children-banks-after-bucha-atrocities?sref=7sxw9Sxl [hereinafter Jacobs & Fabian].

¹⁶⁵ Courtney Weaver et al., *supra* note 163 (The Sberbank SDN listings occurred under the specific authority of Directives 2 and 3 of Executive Order 14024, and the Alfa-Bank designations were under Directive 3 of that Order); See Press Release, U.S. Treasury Escalates Sanctions on Russia for Its Atrocities in Ukraine, U.S. Dep’t Treasury, Off. Foreign Assets Control (Apr. 6, 2022).

institution.”¹⁶⁶) Immediately following Russia’s February 24, 2022 invasion of Ukraine, America forbade all equity and debt transactions with Alfa-Bank and *Sberbank*. Now, the US escalated its financial measures to “much stricter curbs,” namely, so-called “full blocking sanctions.” The full blocking sanctions “prevent[ed] the lenders from transacting with any US institutions or individuals.”¹⁶⁷ That is, unless authorized by an exception (through an OFAC General License or other exception), any entity or person subject to US jurisdiction was prohibited from transacting with anyone designated as an SDN, and was obliged to block all property and interests in property of SDNs, unless authorized otherwise.

US Treasury Secretary Janet Yellen explained: “in practice, the history of sanctions is when we impose full blocking sanctions . . . the rest of the world, even in other jurisdictions that have not yet imposed a full block, they respect the regime. So there tends to be a multiplier effect.”¹⁶⁸ However, the block was not truly a “full” one. The US allowed an exception for energy sector transactions.¹⁶⁹ So, the US Treasury issued “licenses [that] exempted transactions with the targeted banks involving European allies’ purchases of Russian oil and gas.”¹⁷⁰

Separately, new measures also targeted large Russian SOEs, critical to the support of Russia’s war effort.¹⁷¹ Examples of such SOEs included United Aircraft Corporation and United Shipbuilding Corporation (another JSC), which the US believed operated in close connection with Russia’s government (in particular, it made Russian warships).¹⁷² Another example was “Alrosa, the world’s largest diamond mining company, and a top Russian state-owned enterprise.”¹⁷³ Yet, these measures also exempted

¹⁶⁶ Nandita Bose et al., *supra* note 158 (OFAC made clear the sanctions were inapplicable to Alfa Bank (Ukraine), because it was a distinct legal entity from Alfa Bank.).

¹⁶⁷ Courtney Weaver et al., *supra* note 163.

¹⁶⁸ Courtney Weaver et al., *supra* note 163; *see also* Nandita Bose et al., *supra* note 158 (reporting: “Daniel Fried, a former State Department coordinator for sanctions policy in the Obama Administration, said the latest package ‘basically makes Sberbank untouchable.’”).

¹⁶⁹ *See* Jacobs & Fabian, *supra* note 164.

¹⁷⁰ Nandita Bose et al., *supra* note 158.

¹⁷¹ *See* Courtney Weaver et al., *supra* note 163.

¹⁷² *See* Press Release, The United States Sanctions Major Russian State-Owned Enterprises, U.S. Dep’t Treasury, Office Foreign Assets Control (Apr. 7, 2022); Jacobs & Fabian, *supra* note 164.

¹⁷³ James Politi, *Russian Diamond Miner and State-Owned Shipbuilder Hit by U.S. Sanctions*, FIN. TIMES (Apr. 7, 2022), www.ft.com/content/c45cbce9-741a-4934-9918-3fc4dfb82346?shareType=nongift (also reporting the U.S. put “new sanctions on USC, the Russian shipbuilder, and individual members of its board of directors.”); the subsidiaries and Board members of both USC and Alrosa also were designated as SDNs.

energy sector transactions. And, of course, along with China, India remained an outlier: India continued to import diamonds from Russia and process them in its jewellery industry into finished merchandise, which it consumed domestically and exported.

(3) Additional SDN and Entity List listings:

The US — again via OFAC designations — targeted President Putin’s two adult daughters, Ekaterina Tikhonova and Maria Vorontsova, the wife and daughter of Foreign Minister Sergei Lavrov, members of Russia’s Security Council (including Dmitry Medvedev, Russia’s ex-President), and Russia’s ex-PM, Mikhail Mishustin,¹⁷⁴ and Russia’s Minister of Justice, Konstantin Chuychenko.¹⁷⁵ The U.S. defended its sanctions against Mr. Putin’s daughters as it “believed that they were helping shield the Russian President’s wealth.”¹⁷⁶

Further, on April 01, 2022, the BIS added 120 entities to the Entity List for supporting the Russian and Belarusian militaries. Importantly, the BIS inserted a so-called “Footnote 3” designation to ninety-five of these entities, which were ones, it decided, MEUs. “Footnote 3” designated entities referred to entities which were subject to the Foreign Direct Product (FDP) Rules, which restricted the export of most foreign manufactured goods that use US-origin software or technology as part of their manufacturing processes to Russia and Belarus.¹⁷⁷

¹⁷⁴ Courtney Weaver et al., *supra* note 163.

¹⁷⁵ Nandita Bose et al., *supra* note 158.

¹⁷⁶ Courtney Weaver et al., *supra* note 163; *see also* Jacobs & Fabian, *supra* note 164 (reporting: “[t]he U.S. believes Putin and his allies hide wealth with family members, . . . [an] official said . . . , on condition of anonymity.”); Nandita Bose et al., *supra* note 158 (reporting: “Putin’s daughter, Katerina Vladimirovna Tikhonova, is a tech executive whose work supports the Russian government and its defense industry, according to details released by the U.S. Treasury Department. His other daughter, Maria Vladimirovna Vorontsova, ‘leads state-funded programs that have received billions of dollars from the Kremlin toward genetics research and are personally overseen by Putin,’ the Treasury said.”).

¹⁷⁷ *See* Additions of Entities to Entity List, 87 Fed. Reg. 34,154 (June 6, 2022) (Additions to the Entity List continued through Spring-Summer 2022. For instance, BIS added or modified seventy-one entities located in Russia and Belarus, thus bringing the total number of parties added to the Entity List as a result of Russia’s invasion of Ukraine in February to 322, or about 15% of the entire List.); Press Release, Commerce Adds 71 Entities to Entity List in Latest Response to Russia’s Invasion of Ukraine, U.S. Dep’t Commerce, Bureau Industry & Security (June 2, 2022); Export Administration Regulations: Revisions to Russia and Belarus Sanctions and Related Provisions; Other Revisions, Corrections, and Clarifications, 87 Fed.

(4) Blocking Russian bond payments:

The US prevented “the Russian government . . . from paying holders of its sovereign debt more than \$600 million from [foreign currency] reserves held [by Russia’s Central Bank in accounts] at US banks [and frozen in those accounts],” a move that increased the risk of Russia being declared in default of its international bond payment obligations.¹⁷⁸ This measure “was meant to force Moscow to make the difficult decision of whether it would use dollars that it has access to for payments on its debt or for other purposes, including purposes of supporting its war effort.”¹⁷⁹ As a US Treasury Department official said, “Russia must choose between draining remaining valuable dollar reserves or new revenue coming in, or default.”¹⁸⁰ Such a

Reg. 34,131 (June 6, 2022) (Similarly, on June 2, 2022, BIS published a Final Rule revising Russia and Belarus MEU and end-uses controls, and clarifying the categories of licenses BIS reviews on a case-by-case basis. See U.S. Department of Commerce, Bureau of Industry and Security).

¹⁷⁸ Megan Davies & Alexandra Alper, *U.S. Stops Russian Bond Payments, Raising Risk of Default*, REUTERS (Apr. 5, 2022), www.reuters.com/business/us-cracks-down-russian-debt-payments-latest-sovereign-payments-halted-2022-04-05/ [hereinafter Davies & Alper] (also reporting: “[t]he Treasury Department had been allowing the Russian government to use those funds to make coupon payments on dollar-denominated sovereign debt on a case-by-case basis. On . . . [April 4, 2022], as the largest of the payments came due, including a \$552.4 million principal payment on a maturing bond, the U.S. government decided to cut off Moscow’s access to the frozen funds An \$84 million coupon payment was also due on Monday on a 2042 sovereign dollar bond.”).

¹⁷⁹ *Id.* (also reporting: “Russia, which has a total of 15 international bonds outstanding with a face value of around \$40 billion, has managed to avoid defaulting on its international debt despite unprecedented Western sanctions. But the task is getting harder. “What they’re [the U.S.] basically trying to do is force their [Russia’s] hand and put even more pressure on (to deplete) foreign-currency reserves back home”, said David Wolber, a sanctions lawyer at Gibson Dunn in Hong Kong. “If they have to do that, obviously that takes away from Russia’s ability to use those dollars for other activities, in essence to fund the war.” It may also put pressure on Russian demands to be paid roubles for gas by European customers Russia was last allowed to make a \$447 million coupon payment on a 2030 sovereign dollar bond, due . . . [on March 31, 2022], which was at least the fifth such payment since the war began. If Russia fails to make any of its upcoming bond payments within their pre-defined timeframes, or pays in roubles where dollars, euros, or another currency is specified, it will constitute a default. While Russia is not able to access international borrowing markets due to sanctions, a default would prohibit it from accessing those markets until creditors are fully repaid and any legal cases stemming from the default are settled.”).

¹⁸⁰ *Id.* (quoting an unnamed spokesperson, and also reporting: “Russia does have the wherewithal to pay from reserves, since sanctions have frozen roughly half of some \$640 billion in Russia’s gold and foreign currency reserves. But a drawdown would add pressure

default would be “historic.”¹⁸¹

(5) Expanded List of Merchandise Subject to Export Controls

The BIS significantly expanded the list of items subject to US export controls, explaining:

In response to . . . Russia’s ongoing aggression against Ukraine, the Department of Commerce is expanding the existing sanctions against Russian industry sectors by imposing a license requirement for exports, reexports, or transfers (in-country) to and within Russia for additional items subject to [those which the] . . . EAR identified under specific Schedule B numbers or Harmonized Tariff Schedule codes. . . . BIS is taking these actions to further restrict Russia’s ability to withstand the economic impact of the multilateral sanctions, further limit sources of revenue that could support Russia’s military capabilities, and to better align with the European Union’s controls.¹⁸²

Hence, in its final rule (dated May 11, 2022), the BIS expanded the list of items subject to the *Russian Industry Sector Sanctions* in *Supplement Number 4* to 15 C.F.R. Part 746 of the EAR. The rule added 205 HTS codes at the 6-digit level, corresponding to 478 10-digit numbers on Schedule B. All the items were designated EAR 99. The items included boilers, bulldozers, fans, industrial engines, motors, sewing machine needles, ventilation equipment, wood products, and several other items with commercial and industrial applications. Further, the BIS clarified that the scope of the controlled list was based on the HTS description.

The growing breadth and increasing depth of BIS measures created EAR compliance challenges for producer-exporters, importers, and investors. Accordingly, the BIS issued Frequently Asked Questions (FAQs) on a range of issues involving Russia, including applicable license requirements, license application review policy, and license exceptions, FDP and *de minimis* rules, identity of excluded countries, lists of sanctioned luxury goods, and country

just as the United States and Europe are planning new sanctions . . . [discussed above] to punish Moscow over civilian killings in Ukraine.”)

¹⁸¹ *Id.*

¹⁸² *See* Expansion of Sanctions Against Russian Industry Sectors Under the Export Administration Regulations (EAR), 87 Fed. Reg. 91, 28758 (May 11, 2022).

group and country chart changes.¹⁸³ The OFAC did the same with respect to its Russia-related sanctions. It amended and reissued all its *Ukraine-Russia-Related Sanctions Regulations* (31 C.F.R. Part 589) to provide more comprehensive guidance than before,¹⁸⁴ including with respect to general licenses, and revised several of its FAQs.¹⁸⁵

(6) Limited Secondary Boycott

The U.S. also expanded its Russian sanctions to “encompass not only carriers that fly U.S.-made planes, but even companies in countries such as China or India that refuel, repair or service these aircraft with the knowledge that they are violating sanctions.” In other words, it imposed secondary boycott measures on air and air transport services.¹⁸⁶

¹⁸³ See Press Release, U.S. Dep’t Commerce, Resources on Export Controls Implemented in Response to Russia’s Invasion of Ukraine (May 10, 2022).

¹⁸⁴ See Ukraine-/Russia-Related Sanctions Regulations, 87 Fed. Reg. 26094 (May 2, 2022) (“changing the heading of the Ukraine Related Sanctions Regulations to the Ukraine-/Russia-Related Sanctions Regulations, and replacing the Ukraine Related Sanctions Regulations that were published in abbreviated form on May 8, 2014” in connection with Russia’s invasion and annexation of Crimea).

¹⁸⁵ See U.S. Dep’t Treasury, *Frequently Asked Questions*, (Apr. 29, 2022) (especially FAQs 418, 541-543, 545, and 546, which OFAC revised in connection with its amended, reissued sanctions).

¹⁸⁶ See Taisei Hoyama, *U.S. Turns Up Heat on Chinese, Indian Companies Servicing Aeroflot*, NIKKEI ASIA (Apr. 20, 2022), <https://asia.nikkei.com/Business/Transportation/U.S.-turns-up-heat-on-Chinese-Indian-companies-servicing-Aeroflot>.

Interestingly, the Biden Administration was encouraged to ban British lawyers who had worked for Russian SDNs:

A member of Congress has urged the Biden Administration to place travel bans on senior British lawyers that acted for wealthy Russian clients against investigative journalists.

Steve Cohen, a Democratic Representative from Tennessee, has written to Antony Blinken, the U.S. Secretary of State, urging him to sanction the lawyers for having “enabled malign activities of Russian oligarchs.”

His letter comes as the Biden administration looks to increase its support for Ukraine in its war against Russia and tighten sanctions against those who have supported the Russian regime.

Cohen wrote: “Oligarchs who hire lawyers to engage in abusive cases against journalists to silence them cannot exert malign influence in our

On all such measures, the EU acted in tandem with the U.S.¹⁸⁷ Hence, the EU banned all Russian coal imports (as did Japan, albeit with no specific timetable).¹⁸⁸ Specifically, on April 07, 2022, it decided to phase out these imports across four months, a reasonably short period given that the EU imported 47% of its coal from Russia in 2019.¹⁸⁹ Further, the EU closed its ports to Russian ships and barred

system ... the United States must establish deterrents for foreign enablers serving individuals who are undermining democracy.”

Cohen singled out several lawyers he believed should be subject to bans on visas for travel to the US: Nigel Tait of Carter-Ruck; John Kelly of Harbottle & Lewis; barrister Hugh Tomlinson; Geraldine Proudler of CMS; Keith Schilling of Schillings; and Shlomo Rechtschaffen of SR law.

Each of the lawyers is well known in London legal circles . . .);

Kiran Stacey & Kate Beioley, *Biden Administration Urged to Ban U.K. Lawyers Who ‘Enabled’ Oligarchs*, FIN. TIMES (Apr. 19, 2022), www.ft.com/content/08744ab8-6574-4ae1-bb48-5713a31315e3?shareType=nongift (Whether the proposed ban would raise U.S. Constitutional questions (concerning, for instance, due process and the right to counsel, assuming such rights had extraterritorial application and/or applied to non-U.S. citizens) was unclear.).

¹⁸⁷ See Jessica Parker, *EU Targets Russian Coal and Ships in New Sanctions*, BBC NEWS (Apr. 5, 2022), www.bbc.co.uk/news/world-europe-60993645 (reporting European Commission President Ursula von der Leyen proposed: (1) “A ban on coal imports worth € 4 bn a year, and a full ban on four Russian banks including Russia’s second biggest bank VTB”, (2) “A ban on Russian ships entering EU ports (with some exemptions) and on Russian and Belarusian road transport operators”, (3) “Bans on EU exports in advanced semiconductors and machinery worth € 10 bn and other EU imports on wood and cement, seafood and alcohol”, and (4) “Russian companies . . . be barred from taking part in competing for contracts across the EU.”).

¹⁸⁸ See Antoni Slodkowski & Song Jung-a, *Japan Bans Russian Coal Imports After Invasion of Ukraine*, FIN. TIMES (Apr. 8, 2022), <https://www.ft.com/content/9e3662cf-540f-4748-9c2d-9d6235ad6a5b> (also noting Japan’s Russian coal import ban first targeting Russia’s energy sector, which was notable given Japan’s dependence on foreign coal: “Japan is the world’s third-largest coal importer after India and China, and Russia was the country’s second-largest supplier last year [2021], accounting for more than 10 per cent of imports.”); see *id.* (Similarly, though not an official ban, South Korean companies ceased importing Russian coal owing to doubts about making payments).

¹⁸⁹ See *From Where Do We Import Our Energy?*, *supra* note 56; Keith Bradsher, *China Suspends Import Tariffs on Coal, Helping Russian Exports*, N.Y. TIMES (Apr. 28, 2022), www.nytimes.com/live/2022/04/28/world/ukraine-russia-war-news?referringSource=articleShare#china-russia-tariffs-coal [hereinafter Keith Bradsher]; Melissa Eddy, *Here’s What the Ban on Russian Coal Could Mean for Europe*, N.Y. TIMES (Apr. 6, 2022), www.nytimes.com/2022/04/06/business/russia-coal-europe.html.

Russian (and Belarusian) road transporters from the EU.¹⁹⁰ The EU also sanctioned additional Russian political figures, propagandists, and tycoons, and the daughters of President Putin, “expanding export controls on technologies used in the Russian defence sector and other key industries,” “restrictions on sales of equipment that can be used to liquefy NG,” and placed more strictures on Russian financial institutions, such as *VTB Bank PJSC* and *Sberbank*,¹⁹¹ which had been cut off from SWIFT (as noted above), but were not, yet, “fully sanctioned.”¹⁹² Apparently, sanctioning these figures was essential to the efficacy of export controls on military technology, because of their involvement in such technology.

Likewise, the UK followed suit. For example, it banned all new FDI in Russia, and imposed a full asset freeze against *Sberbank* and Credit Bank of Moscow.¹⁹³ The U.K. also imposed “sanctions on a further eight individuals linked to key Russian industries, including Andrey Akimov, Chief Executive of *Gazprombank*, and Leonid Mikhelson, founder and Chief Executive Officer of Novatek [and associated with a petrochemical company known as “SIBUR”].”¹⁹⁴ The others were “*Gazprom Neft* CEO Alexander Dyukov,” “PhosAgro [a phosphate fertilizer company] founder Andrey Guryev,” and “Boris Rotenberg, son of the co-owner of Russia’s largest gas pipeline producer, SGM Group,”¹⁹⁵ plus Viatcheslav Kantor, the Chair of Acron, a fertilizer company. Additionally, the U.K. imposed sanctions on Mr. Putin’s adult daughters. Japan, too, imposed “new sanctions on Russia to freeze the assets of an additional 141 individuals, including Prime Minister Mikhail Mishustin” and “133 people are from the Donetsk People’s Republic and the Luhansk People’s Republic, both of which are effectively controlled by pro-Russian factions in Eastern Ukraine.”¹⁹⁶ Japan “also added 71 more organizations on its list of export ban,

¹⁹⁰ *Ukraine War: Putin’s Daughters Targeted by U.S. Sanctions*, BBC NEWS (Apr. 6, 2022), www.bbc.co.uk/news/world-us-canada-61005388 [hereinafter *Ukraine War: Putin’s Daughters Targeted by U.S. Sanctions*].

¹⁹¹ See Alberto Nardelli & Nikos Chrysoloras, *EU to Propose Phasing Out Russian Oil by the End of the Year*, BLOOMBERG (Apr. 30, 2022), www.bloomberg.com/news/articles/2022-04-30/eu-to-propose-phasing-out-russian-oil-by-the-end-of-the-year?sref=7sxxw9Sxl [hereinafter Nardelli & Chrysoloras].

¹⁹² Jennifer Jacobs, *supra* note 159.

¹⁹³ Joe Mayes, *U.K. Freezes Sberbank Assets in Fresh Round of Russia Sanctions*, BLOOMBERG (Apr. 6, 2022), www.bloomberg.com/news/articles/2022-04-06/u-k-freezes-sberbank-assets-in-fresh-round-of-russia-sanctions?sref=7sxxw9Sxl [hereinafter Joe Mayes]; Courtney Weaver et al., *supra* note 163.

¹⁹⁴ Courtney Weaver et al., *supra* note 163.

¹⁹⁵ Joe Mayes, *supra* note 193.

¹⁹⁶ *Ukraine Latest: Crucial NATO Decisions Expected in Finland, Sweden this Week*, NIKKEI ASIA (Apr. 28, 2022), <https://asia.nikkei.com/Politics/Ukraine-war/Ukraine-war-Free-to-read/Ukraine-latest-Crucial-NATO-decisions-expected-in-Finland-Sweden-this-week> [hereinafter *Crucial NATO Decisions Expected in Finland, Sweden this Week*].

bringing the total number of targeted bodies to 201.”¹⁹⁷

All these additional measures were taken in light of the evidence that the previous waves of sanctions were working, in that they were having a serious and deleterious effect on the Russian economy. Equally telling was this observation:

Edward Fishman, a former Russia and Europe sanctions lead at the State Department, called . . . [the new] measures ‘the most significant sanctions taken since the [Russian] Central Bank sanctions’ imposed in late February.

‘We’re headed towards Iran-style sanctions’, he added, referring to the decades-long measures against Tehran beginning in 1979. “This is a conveyor belt, and it only leads in one direction.”¹⁹⁸

This direction spelled potential doom for Russia’s economy, just as sanctions had wrecked Iran’s economy and forced it to the Joint Comprehensive Plan of Action (*JCPOA*) bargaining table. Already, due to the sanctions, Russia’s inflation rate rose above 15% by early April 2022 (and perhaps a whopping 200%)¹⁹⁹, and its GDP was projected to contract in 2022 by 15%.²⁰⁰ Simply put, the U.S. and its Allies had confidence that their sanctions-driven strategy was putting such economic pressure on Russia that, ultimately, Russia would be forced to change its political and military goals in Ukraine.

XIII. WAVE TEN: EXCLUSION FROM INTERNATIONAL BODIES

In late March 2022, President Biden called for Russia to be tossed out of the G-

¹⁹⁷ *Id.*

¹⁹⁸ Courtney Weaver et al., *supra* note 163.

¹⁹⁹ *Id.*

²⁰⁰ Jennifer Jacobs, *supra* note 159 (On August 12, 2022, Russia conceded its GDP had shrunk:

The economy shrank 4 percent from April through June compared with a year earlier, the Russian statistics agency said . . . It is the first quarterly Gross Domestic Product report to fully capture the change in the economy since the invasion of Ukraine in February. It was a sharp reversal from the first quarter, when the economy grew 3.5 percent.);

Eshe Nelson & Patricia Cohen, *Russian Economy Contracts Sharply as War and Sanctions Take Hold*, N.Y. TIMES (Aug. 12, 2022), www.nytimes.com/2022/08/12/business/russia-economy-gdp.html?referringSource=articleShare.

20.²⁰¹ That body had lost its original, shared purpose after the Cold War, namely, advancing the ‘Washington Consensus’ in favour of open markets and political reform. The political economies of Russia and its partners, like China, had evolved (or devolved) towards state intervention in markets and authoritarian rule, i.e., nationalism over internationalism. In mid-April, the split in the G-20 was obvious: US Treasury Secretary Janet Yellen walked out of a Group meeting to protest the presence of, and presentation by, Russia’s Minister of Finance, and she was joined by “Jerome H. Powell, the Federal Reserve Chair, Christine Lagarde, the President of the European Central Bank, Andrew Bailey, the Governor of the Bank of England, and Chrystia Freeland, Canada’s Deputy Prime Minister and Minister of Finance.”²⁰² Ms. Freeland intoned:

The G-20 can’t function effectively with Russia at the table” . . .

“Russia does not have a place at the table of countries who have come together to maintain global economic prosperity,” Freeland said, adding Russia has violated longstanding international rules with its invasion of southern Ukraine. “You can’t be a poacher and gamekeeper at the same time.”²⁰³

She was right: Russia blocked the G-20 Finance Ministers and Central Bank Governors from issuing a communiqué outlining economic policy goals, because of its opposition to any language condemning its invasion of Ukraine, and likewise, the IMF and World Bank failed to agree on statements.²⁰⁴

In early April, the UN tossed Russia out of its Human Rights Council. The vote was not close: ninety three in favour (including the U.S., U.K., and all EU countries), twenty four against (predictably including China, Belarus, Bolivia, Iran, Kazakhstan, Kyrgyzstan, Laos, North Korea, Syria, Tajikistan, Uzbekistan, and Vietnam), and fifty-eight abstentions (regrettably including Bahrain, Bangladesh, Bhutan, Brunei, Cambodia, Egypt, India, Indonesia, Malaysia, Maldives, Mongolia, Nepal, Pakistan,

²⁰¹ See *Biden Says Russia Should be Removed from G-20*, NIKKEI ASIA (Mar. 25, 2022), <https://asia.nikkei.com/Politics/Ukraine-war/Biden-says-Russia-should-be-removed-from-G-20>.

²⁰² Alan Rappoport, *Treasury Secretary Janet Yellen Walked Out of a G-20 Meeting as Russia’s Finance Minister Spoke*, N.Y. TIMES (Apr. 20, 2022), www.nytimes.com/2022/04/20/world/europe/treasury-secretary-janet-yellen-walked-out-of-a-g20-meeting-as-russias-finance-minister-spoke.html?referringSource=articleShare.

²⁰³ David Lawder & Steve Scherer, *G-20 Cannot Function with Russia at the Table, Canada Says*, REUTERS (Apr. 22, 2022), www.reuters.com/world/canada-says-g20-cannot-function-with-russia-table-2022-04-22/ [hereinafter Lawder & Scherer].

²⁰⁴ *Id.*

Singapore, South Africa, Sri Lanka, and Thailand).²⁰⁵ This vote was resounding, in that even if all the abstaining countries had voted “no,” Russia would have still be suspended from the Council.²⁰⁶

XIV. SHOULD AMERICA DESIGNATE RUSSIA AN FTO?

A vigorous debate within the Biden Administration occurred as to whether to designate Russia as a terrorist state. Doing so would isolate Russia in the category of a handful of pariah countries. But America continued to have far more engagement, and necessarily so, with Russia than those pariahs. Slapping the sobriquet ‘Foreign Terrorist Organization’ (FTO) on Russia would trigger even stiffer sanctions than those already imposed, and thus imperil yet more efforts for diplomatic solutions that America sought and needed Russian support to achieve, including, for example, resurrecting the July 2015 *JCPOA*, *i.e.*, the *Nuclear Deal*, with Iran.²⁰⁷

Interestingly, this debate implicated Constitutional separation of powers over dicey foreign policy, national security, and international trade issues. Congress wanted the Executive Branch to designate Russia a state-sponsor of terrorism. The Senate expressed its collective view via a July 2022 non-binding resolution.²⁰⁸ Furthermore, if the White House did not bend to Congress’ will, then it (Congress) threatened to mass a veto-proof mandatory directive.²⁰⁹

Note the practical effects of an FTO designation.²¹⁰ Note, too, that there seemed to

²⁰⁵ Hiona Shiraiwa & Tsukasa Hadano, *Divisions Exposed in Vote to Suspend Russia from U.N. Rights Council*, NIKKEI ASIA (Apr. 9, 2022), <https://asia.nikkei.com/Politics/International-relations/Divisions-exposed-in-vote-to-suspend-Russia-from-U.N.-rights-council>.

²⁰⁶ See Frank Gardner, *Ukraine: The Narrative the West Doesn't Want to Hear*, BBC NEWS (Apr. 29, 2022), www.bbc.co.uk/news/world-europe-61272203 (For a synopsis of the country-specific reasons why certain U.N. members abstained or sided with Russia).

²⁰⁷ Michael Crowley & Edward Wong, *Blinken Resists Push to Label Russia a Terrorist State*, NEW YORK TIMES (July 29, 2022), www.nytimes.com/2022/07/29/us/politics/russia-terrorism-blinken.html?referringSource=articleShare.

²⁰⁸ See S. R. 623, 117th Cong., 2d Session, (2021–2022), www.congress.gov/bill/117th-congress/senate-resolution/623/text.

²⁰⁹ See Press Release, Ted Lieu Congressman for California’s 33rd District, Reps. Lieu, Wilson, Golden, Kinzinger, and Malinowski Introduce Bill to Designate Russia as a State Sponsor of Terrorism (Jul. 28, 2022), <https://lieu.house.gov/media-center/press-releases/rep-lieu-wilson-golden-kinzinger-and-malinowski-introduce-bill>; 117th Congress, Second Session (2021–2022), https://lieu.house.gov/sites/lieu.house.gov/files/LIEU_227_xmll.pdf (“To provide for the designation of the Russian Federation as a state sponsor of terrorism”).

²¹⁰ Leslie Castello et al., *What Designating Russia as a State Sponsor of Terrorism Would Mean* (Apr. 20, 2022), www.crowell.com/NewsEvents/AlertsNewsletters/all/What-Designating-Russia-as-a-State-Sponsor-of-Terrorism-Would-Mean.

be an unseemly utilitarian calculation on which the Secretary of State relied. Even if the practical effects of a designation are modest, given the relatively comprehensive nature of sanctions already imposed, there was a deontological argument in favour of sanctions. That is, arguably, that it was simply morally correct to affix the right label to Russia.

XV. RUSSIAN COUNTERMEASURES

By late March 2022, there was no doubt that the rapid accretion of American and Allied trade, FDI, financial sanctions, export controls, and related measures, was taking a toll on the Russian economy. For the Russian public, the cost of living had risen to over 14% by late March.²¹¹ Moreover:

Russia is set to erase 15 years of economic gains by the end of 2023 after its invasion of Ukraine spurred a multitude of sanctions and prompted companies to pull out of the country, according to the Institute of International Finance.

The economy is expected to contract by 15% in 2022, followed by a decline of 3% in 2023, leaving the Russian GDP where it was about fifteen years ago, economists Benjamin Hilgenstock and

²¹¹ Annabelle Liang, *Russia's Cost of Living Soars by more than 14%*, BBC NEWS (Mar. 24, 2021), www.bbc.com/news/business-60856873 [hereinafter Annabelle Liang] (reporting: “[t]he cost of living in Russia is surging following the country’s invasion of Ukraine . . . Official figures show price of some household staples – such as sugar – have jumped by as much as 14% over the past week. Inflation is set to keep rising in Russia where the rouble has fallen sharply since the Ukraine war began. The value of the currency has dropped about 22% this year, and this has pushed up the cost of importing goods . . . Russia’s Economic Ministry said annual inflation had jumped 14.5% in the week ending 18 March – the highest rate since late 2015. The Federal State Statistics Service said the cost of sugar rose by as much as 37.1% in certain regions of the country and increased by an average 14%. Sugar, which is commonly used to preserve food or make liquor, was the biggest gainer in the week . . . The price of onions was the second biggest riser over the week, up 13.7% nationwide and 40.4% in some areas. Meanwhile, nappies were 4.4% more expensive. Prices for black tea rose 4% and toilet paper increased by 3%. Stephen Innes, Managing Partner at SPI Asset Management, said prices were higher because of the weaker rouble. ‘The biggest culprit is imported inflation,’ Mr Innes . . . [said]. ‘Anything Russia imports is exponentially (pricier) due to the weaker rouble.’ The U.K., the U.S. and the European Union have cut off a number Russian banks from financial markets in the West. They have also prohibited dealings with Russia’s central bank, state-owned investment funds and the Finance Ministry. The Bank of Russia more than doubled its interest rate to 20% in March, in an attempt to stop its currency from sliding further. A large number of Western businesses have pulled out of Russia because of the war in Ukraine. Others, such as the Swiss food giant Nestle, have withdrawn major brands such as KitKat and Nesquik.”).

Elina Ribakova wrote in a preliminary assessment of the impact of the war, noting that further sanctions may change their view.

“Sharply lower domestic demand is likely to play a crucial role while a collapse in imports should offset lower exports, leading to a marginally-positive contribution from net foreign demand,” the economists wrote. “However, should further sanctions in the form of trade embargos be implemented, exports might fall more than we currently forecast.”

...

Even after the immediate hit to Russia’s economy, the economy will suffer for years to come from a so-called “brain drain” — the exodus of educated, middle-class Russians with the financial means to leave the country — and from U.S. and EU export controls on technology, including microelectronics, which will hinder technological development in Russia for years.

...

At the same time, “self-sanctioning” by foreign companies which no longer want to do business with Russia will lead to a weakening of important sectors of the Russian economy.

...

“The negative effect on medium and long-term economic prospects could be even more important,” the IIF economists wrote.²¹²

Yet, the effects of the sanctions were yet to coax a change in Russian political or military strategy. Led by President Putin, Russia persisted with its war — and its alleged war crimes — in Ukraine.

At the same time, the sanctions did have a political effect. In response to them, Russia took a page from China’s playbook. Throughout the Sino-American Trade War, China engaged in tit-for-tat retaliation against America’s Section 301 measures. Similarly, Russia, imposed countermeasures against US businesses. For instance, on March 3, 2022, a Russian Court rejected a trademark claim by Hasbro Inc. for misuse of its ‘Peppa Pig’ trademark, reasoning that the sanctions imposed by the UK and other Western countries justified its decision. The same day, President Putin announced that he was looking for “legal solutions” to seize Western assets left by

²¹² *Putin’s War to Wipe Out 15 Years of Russian Economic Growth*, BLOOMBERG (Mar. 24, 2022), www.bloomberg.com/news/articles/2022-03-24/putin-s-war-seen-wiping-out-15-years-of-russian-economic-growth?sref=7sxxw9Sxl.

MNCs in Russia. Additionally, on March 5, 2022, Russia apparently issued a decree stating that Russian patents from forty-seven “unfriendly states” would be entitled to no compensation for infringement.

Yet another Russian countermeasure came on March 24, 2022, when President Putin announced that the “country would start selling natural gas to ‘unfriendly’ countries in *roubles*.”²¹³

Russian President Vladimir Putin is demanding foreign buyers to pay for Russian gas in *roubles* . . . or else have their supplies cut, a move European capitals rejected and which Germany said amounted to “blackmail”.

Putin’s decree . . . leaves Europe facing the prospect of losing more than a third of its gas supply. Germany, the most heavily reliant on Russia, has already activated an emergency plan that could lead to rationing in Europe’s biggest economy.

Energy exports are Putin’s most powerful lever as he tries to hit back against sweeping Western sanctions imposed on Russian banks, companies, businessmen and associates of the Kremlin in response to Russia’s invasion of Ukraine. Moscow calls its Ukraine action a “special military operation”.

Putin said buyers of Russian gas “must open *rouble* accounts in Russian banks. It is from these accounts that payments will be made for gas delivered, starting from tomorrow,” or April 1, 2022.

“If such payments are not made, we will consider this a default on the part of buyers, with all the ensuing consequences. Nobody sells us anything for free, and we are not going to do charity either — that is, existing contracts will be stopped,” he said. . . .

It was not immediately clear whether in practice there might be a way for foreign firms to continue payment without using *roubles*, which the European Union and G-7 have ruled out.

. . .

Under the mechanism decreed by Putin, foreign buyers would use special accounts at *Gazprombank* to pay for the gas. *Gazprombank* would buy *roubles* on behalf of the gas buyer and transfer *roubles* to another account, the order said.

²¹³ Lawder & Scherer, *supra* note 203.

Putin's decision to enforce *rouble* payments has boosted the Russian currency, which fell to historic lows after the February 24 invasion. The *rouble* has since recovered much lost ground.

Western companies and governments have rejected any move to change their gas supply contracts to another payment currency. Most European buyers use *euros*. Executives say it would take months or longer to renegotiate terms.

Payment in *roubles* would also blunt the impact of Western curbs on Moscow's access to its foreign exchange reserves.

...

Putin said that the switch to *roubles* would strengthen Russia's sovereignty. He said the West was using the financial system as a weapon, and it made no sense for Russia to trade in dollars and euros when assets in those currencies were being frozen.

"What is actually happening, what has already happened? We have supplied European consumers with our resources, in this case gas. They received it, paid us in *euros*, which they then froze themselves. In this regard, there is every reason to believe that we delivered part of the gas provided to Europe practically free of charge," he said.

"That, of course, cannot continue," Putin said. . .²¹⁴

As suggested, Mr. Putin's *diktat* aimed to support the currency, but though the EU relied on Russia for 40% of its NG, roughly 97% of those energy contracts called

²¹⁴ Joseph Nasr & Mark Trevelyan, *Putin Tells Europe: Pay in Roubles or We'll Cut Off Your Gas*, REUTERS (Mar. 31, 2022), www.reuters.com/business/energy/russia-sets-deadline-rouble-gas-payments-europe-calls-it-blackmail-2022-03-31/; see also Nastassia Astrasheuskaya & Leila Abboud, *Putin Issues Decree Requesting 'Unfriendly' Countries Pay for Gas in Roubles*, FIN. TIMES (Mar. 31, 2022), www.ft.com/content/d8ee2429-7caf-4e1f-9c85-dd1f825d36e3?shareType=nongift [hereinafter Astrasheuskaya & Abboud] (reporting: "Russia will stop supplying gas to countries it considers 'unfriendly' unless they pay in roubles, according to a Presidential decree effective immediately. Buyers in 48 countries, including the EU, will be required to open a bank account both in foreign currency and in roubles at *Gazprombank* in Russia The targets are countries that have established sanctions against Russia's economy, governing and business elite for its invasion of Ukraine. Vladimir Putin . . . said Russia was establishing 'a clear and transparent scheme' for these foreign customers. 'If such payments are not made, we will consider this a default on the part of the buyers – with all the ensuing consequences', he added during a speech at the Kremlin.").

for payments in *euros* or dollars,²¹⁵ hence it was unclear if Russia could unilaterally demand payment in *roubles*.²¹⁶ Indeed, as French Minister of Finance Bruno Le Maire said, “The contracts include provisions that stipulate the currency they must be settled in and therefore the contracts must be settled in that currency.”²¹⁷ Concomitant with this *diktat* were further countermeasures to defend the *rouble*: Russia imposed “stringent currency controls, which . . . prevented Russians from moving money to foreign bank accounts or taking significant amounts of cash out of the country,” and “temporarily banned banks and brokers from operating cash-based foreign exchanges for dollars and *euros*.”²¹⁸

On April 27, 2022, President Putin made good on his threat to cut off NG shipments to European buyers that refused to pay in *roubles*: he halted all NG supplies to Poland and Bulgaria. That is, “*Газпром* . . ., Russia’s gas export monopoly, suspended gas supplies ‘due to absence of payments in roubles,’ as stipulated in a decree from Russian President Vladimir Putin that aims to soften the impact of sanctions.”²¹⁹ President Putin did not seem bothered by the fact the EU was “the single largest consumer of crude and fuel from Russia,” perhaps figuring China and India would combine to replace it.²²⁰

The EU President, Ursula Von Der Leyen, denounced his move as “yet another attempt by Russia to use gas as an instrument of blackmail.”²²¹ This attempt, in the EU’s view, breached its sanctions, because payment in *roubles* necessitated clearing through the Russian Central Bank, but that Bank was a sanctioned entity:

The EU has warned European buyers of Russian gas that they will be in breach of sanctions against Moscow if they accept Kremlin demands for payment to be completed in *roubles*.

²¹⁵ See Valentina Pop & Andy Bounds, *Russian Gas Payment Demands in ‘Breach’ of Sanctions, EU Warns*, FIN. TIMES (Apr. 28, 2022), www.ft.com/content/aa0d294b-0982-4f94-a327-a93300444083?shareType=nongift [hereinafter Pop & Bounds].

²¹⁶ Lawder & Scherer, *supra* note 203.

²¹⁷ Astrasheuskaya & Abboud, *supra* note 214.

²¹⁸ Courtney Weaver & Kate Duguid, *US insists sanctions are working despite rouble’s rebound*, FIN. TIMES (Apr. 1, 2022), www.ft.com/content/39acf9fa-9daf-4313-b223-dfd9d434ee70?shareType=nongift.

²¹⁹ Marek Strzelecki et al., *Russia Halts Gas Supplies to Poland and Bulgaria*, REUTERS (Apr. 27, 2022), www.reuters.com/world/poland-bulgaria-face-russian-gas-cut-ukraine-crisis-escalates-2022-04-26/ [hereinafter Strzelecki et al.].

²²⁰ Alberto Nardelli & Nikos Chrysoloras, *EU to Propose Phasing Out Russian Oil by the End of the Year*, BLOOMBERG (Apr. 30, 2022), www.bloomberg.com/news/articles/2022-04-30/eu-to-propose-phasing-out-russian-oil-by-the-end-of-the-year?sref=7sxw9Sxl [hereinafter Nardelli & Chrysoloras].

²²¹ *Id.*

The warning . . . comes after several European companies indicated they would comply with the March 31 [, 2022] decree by President Vladimir Putin to introduce a *two-tiered system for gas payments*.

This involves opening *rouble* and *euro* accounts at *Gazprombank* in Russia. Under existing payment arrangements, most European companies were paying in *euros* into *Gazprombank's* Luxembourg-based accounts.

Gas distributors in Germany, Austria, Hungary, and Slovakia were planning to comply . . .

“Complying with the decree is a breach of sanctions,” European Commission Chief Spokesperson Eric Mamer . . . [said].

“If companies pay in *euros*, they are not in breach of the sanctions,” said an EU official. *“What we cannot accept is that companies are obliged to open a second account in roubles and that the payment is complete only when payment is converted into roubles.”*

Companies and national energy regulators are now in the invidious position of [either] breaching EU sanctions or defying Moscow and having gas supplies possibly cut off. The EU gets about 40% of its gas from Russia and some countries are almost completely reliant.

The EU believes that accepting completion of gas deals in roubles, as Putin has demanded, would mean involving Russia's Central Bank in the transactions, which would violate the sanctions imposed on the Russian financial system in a bid to hamper Putin's capacity to finance the war.

By having the gas payments cleared only when they are converted into roubles, Moscow is seeking to have European companies circumvent the sanctions on the Central Bank, the EU official said.

. . .

Gazprombank, as the main financial arm of Russia's monopoly gas provider, was deliberately excluded from EU sanctions — underlining how reluctant Europe is to cut off access to vital Russian gas supplies.

Gas importers in Poland and Bulgaria, which have refused to sign up to the Kremlin scheme, had gas supplies from Russia halted . . . , a decision European Commission President Ursula von der Leyen

described as “blackmail”.²²²

Accordingly, by July 2022, *Gazprom* “ha[d] cut gas supplies altogether to Bulgaria, Denmark, Finland, the Netherlands, and Poland over their refusal to comply with the Kremlin order to pay their bills in roubles, instead of *euros* or dollars.”²²³

Fortunately for Poland, Bulgaria, and the rest of the EU, the Russian countermeasure — that is, turning off the spigot of heating fuel if payments were not made in *roubles* — came “as the weather turn[ed] warmer and the need for gas heating dwindle[d].”²²⁴ And, Poland reported it had “ample gas in storage,” and Bulgaria sought replacement “supplies from Greece and Turkey.”²²⁵

Unfortunately for the entire EU, in summer 2022, Russia — specifically, *Gazprom* — made dramatic cuts in NG supplies through the Nord Stream 1 pipeline.²²⁶ (NG from Vyborg, Russia southeast to Greifswald, Germany flows through this 1,200 km pipeline). Russia said that the reductions — by about half of the normal amount — were necessary for technical reasons, to allow repairs on a turbine in that pipeline. The EU rejected that excuse.

Bracing itself for what EU President Ursula von der Leyen called the “likely scenario”, that Russia would cut off all NG supplies,²²⁷ the EU hedged its risk exposure by agreeing (with the sole exception of Hungary) that member states would

²²² Pop & Bounds, *supra* note 215.

²²³ Michael Race, *EU Allows Get-Out Clause in Russian Gas Cut Deal*, BBC NEWS (July 26, 2022), www.bbc.com/news/business-62305094 [hereinafter *EU Allows Get-Out Clause in Russian Gas Cut Deal*] (also observing: “[w]hile the U.K. would not be directly impacted by gas supply disruption, as it imports less than 5% of its gas from Russia, it would be affected by prices rising in the global markets as demand in Europe increases.”).

²²⁴ Strzelecki et al., *supra* note 219.

²²⁵ *Id.*

²²⁶ See Leo Sands, *Ukraine War: Russia Waging Gas War with Nord Stream 1 Cuts – Zelensky*, BBC NEWS (Jul. 26, 2022), www.bbc.com/news/world-europe-62300684 [hereinafter Sands] (Indeed, in August 2022, Russia shut down supplies altogether through Nord Stream 1, saying it “discovered a fault during maintenance.”); *Russia Delays Reopening of Nord Stream in Blow to Gas-Starved Europe*, REUTERS (Sept. 2, 2022), www.reuters.com/business/energy/russia-says-nord-stream-gas-supplies-still-risk-stoking-european-fears-2022-09-02/ (also reporting: “Gazprom, the state-controlled firm with a monopoly on Russian gas exports via pipeline, said . . . it could no longer provide a timeframe for restarting deliveries after finding an oil leak that meant a pipeline turbine could not run safely. Moscow has blamed sanctions, imposed by the West after Russia invaded Ukraine, for hampering routine operations and maintenance of Nord Stream 1. Brussels says this is a pretext and Russia is using gas as an economic weapon to retaliate.”).

²²⁷ *Id.*

(1) voluntarily decrease their gas consumption by 15% over the subsequent seven months (from August 2022-March 2023), and (2) empower the Commission to make consumption cuts mandatory in the event of an emergency. The plan allowed flexibility (a so called “get out clause”) for three groups of EU members:

. . . some countries not connected to the EU’s gas pipelines, such as Ireland, Malta, and Cyprus, would be exempt from any mandatory gas reduction order as they would not be able to source alternative supplies.

Elsewhere, the Baltic nations, which are not hooked up to the European electricity system and are heavily reliant on gas for electricity production, are also exempt from compulsory targets in order to avoid the risk of an electricity supply crisis.

Countries can also ask to be exempt if they exceed gas storage filling targets, if they are heavily dependent on gas for “critical” industries, or if their gas consumption has increased by at least 8% in the past year compared to the average of the past five years.

. . .

Kadri Simson, European Commissioner for Energy, said initial calculations indicated that even if all exemptions to ration were used, the EU, as a whole, would still reduce demand to a level “that would help us safely through an average winter.”

She also outlined the work needed to boost alternative gas supplies from countries including Azerbaijan, the United States, Canada, Norway, Egypt, and Israel.²²⁸

To be sure, these compromises made (in the words of one EU diplomat) made the deal look “like Emmental cheese.”²²⁹ Germany’s Economy Minister, Robert Habeck, commented: “Of course there are a lot of compromises in this text now. This is how Europe works.”²³⁰

Ukraine and its President, Mr. Zelensky, intoned Russia was engaging in “gas blackmail,” and waging a “gas war,” to inflict “terror” on people.²³¹ Indeed, Mr. Putin had weaponized Russia’s most precious commodity in a way no country had done since the Saudi-led OPEC oil embargo of 1973-1974, and the American grain

²²⁸ EU *Allows Get-Out Clause in Russian Gas Cut Deal*, *supra* note 223.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ Sands, *supra* note 226.

embargo of 1979. War catalysed both cataclysms: Arab countries protested the West's support for Israel during the October 1973 *Yom Kippur* War; and America protested the Union of Soviet Socialist Republic's December 1979 invasion of Afghanistan. The parallel did not end there: the two-front Arab attack on Israel (by Syria in the Golan Heights and Egypt in the Sinai Peninsula) was unprovoked, as was the Soviet invasion of Afghanistan. Like Israel and Afghanistan, Ukraine did not provoke the naked aggression on its soil.

In the Russian context, the alleged "terror" continued when (in September 2022), the Nord Stream 1 and 2 pipelines suffered major NG leaks caused by three ruptures in 18 hours – a rare occurrence.²³² "Powerful explosions" blew four in the two pipelines, destroying at least 50 meters of the Nord Stream 1 line.²³³ The EU said the ruptures were acts of sabotage from explosions, suspected Russia was behind them, and pledged to hit Russia with further sanctions. Russia, of course, denied the allegation, but it was evident no NG would flow from it to the EU, because repairs would take 3-6 months.²³⁴

In late May 2022, Russia announced it was considering a countermeasure to combat the exodus of MNCs from so-called "unfriendly" countries: taking control of the assets of any business that opted to leave. The *Duma* passed on first reading a new draft law which gave the Russian government "sweeping powers to intervene where there is a threat to local jobs or industry, making it more difficult for western companies to disentangle themselves quickly unless they are prepared to take a big financial hit."²³⁵ The law empowered the government to "seize the property of foreign investors," and "appoint administrators over companies owned by foreigners from 'unfriendly' countries," referring to companies in which at least 25% of the shares were in the hands of investors from countries that had imposed sanctions on Russia. In the face of those sanctions, what the Russian government sought was:

²³² See Merlyn Thomas & Elsa Maishman, *Nord Stream Leaks: Sabotage to Blame, Says EU*, BBC NEWS (Sept. 28, 2022), www.bbc.com/news/world-europe-63057966.

²³³ Merlyn Thomas, *Nord Stream Blast "Blew Away 50 Meters of Pipe"*, BBC NEWS (Oct. 18, 2022), www.bbc.com/news/world-europe-63297085 [hereinafter *Nord Stream Blast "Blew Away 50 Meters of Pipe"*] (also reporting "[g]as deliveries have been suspended since the 26 September explosions on the pipes crossing the Baltic Sea").

²³⁴ See also *id.* (reporting: "German, Danish, and Swedish authorities have all been investigating the incident," but Swedish prosecutors reportedly rejected a joint investigation out of fears of sharing sensitive information related to national security," and "Russia previously demanded to be involved in any investigations, saying the damage was in international waters, but Denmark and Sweden refused.").

²³⁵ John O' Donnell, *Analysis: Russia Prepares to Seize Western Firms Looking to Leave*, REUTERS (May 26, 2022), www.reuters.com/markets/europe/russia-prepares-seize-western-firms-looking-leave-2022-05-26/ [hereinafter Donnell].

“. . . interested in preserving jobs and tax revenues,” said Sergej Suchanow, a lawyer with risk management and compliance consultancy RSP International.

...

“First and foremost, the government will apply the rules to big companies. To avoid an administrator, companies must show that [they] are not leaving their Russian businesses in the lurch.”

...

[The draft law] la[id] down a wide range of criteria for intervention, such as when a company plays a critical role as a local employer or provides important services. It makes clear that the state can justify taking control on many grounds.

The bill cite[d] the example of companies making medical devices, but also lists a host of other sectors, such as transport and energy, as well as any firm whose closure could push up shop prices.

The state-appointed administrator would also be allowed to sell the confiscated business, while its former owners would be barred from doing business in Russia.

A court or the Ministry of Economic Development [w]ould decide to put an administrator, such as Russia’s development bank *VEB*, in charge.²³⁶

It was expected that following approval via two further readings in the *Duma*, and review by the upper house of Russia’s parliament, President Putin would sign it into law. Query whether the invocation of the law would constitute an expropriation of assets: on the one hand, an affected MNC had chosen to leave; on the other hand, it was not free to sell its assets to the highest bidder.

President Putin followed through on a similar countermeasure in August 2022. He signed a decree that immediately banned any investor from a country that supported sanctions against Russia from selling its assets in a bank, strategic entity, company producing energy equipment or engaged in coal, oil, NG, or nickel production, or in a production sharing agreement (PSA).²³⁷ The affected investors — from so-called ‘unfriendly countries’ — came from the US, UK, EU, and Japan, though Mr. Putin’s

²³⁶ *Id.*

²³⁷ *Russia Bans Western Investors from Selling Banking, Key Energy Stakes*, REUTERS (Aug. 5, 2022), www.reuters.com/markets/europe/russia-bans-western-investors-selling-stakes-banks-key-assets-including-sakhakin-2022-08-05/.

decree did not specifically list any investor. Citibank, Exxon, and Shell were among the companies at risk, but, if necessary, they could apply for a special waiver to the Russian President.

XVI. WAVE ELEVEN: TARGETING SERVICES AND *GAZPROMBANK*, AND MORE SDN DESIGNATIONS AND ENTITY LISTINGS

In late April 2022, the US and UK banned certain services exports to Russia.²³⁸ Those bans were impressive as the first ones hitting white collar professional services outside of the energy, finance, and transportation sectors. They affected accountancy, management consultancy, public relations, and trust and corporate formation services: American and British entities could not provide such services to Russia.²³⁹ For example, no U.S. person could provide them, nor could they be provided by any person from the U.S. to any person in Russia; doing so would trigger imposition of sanctions. However, these bans were not comprehensive. They did not cover, for example, all sectors and sub-sectors used under the WTO General Agreement on Trade in Services (GATS). American and British authorities had yet to define their scope and, importantly, whether it would include lawyers.²⁴⁰ Regardless of that scope, Russian litigants struggled to find legal representation in British courts —and that raised basic questions of fairness, due process, and right to counsel.²⁴¹

This wave of sanctions also included, for the first time, measures by the U.S. against *Gazprombank*, “Russia’s third-largest lender and a subsidiary of state-owned energy

²³⁸ See Felicia Schwartz et al., *US Places Sanctions on Gazprombank Executives for First Time*, FIN. TIMES (May 8, 2022), www.ft.com/content/398aa2f1-1f4c-46b2-a5f0-f5c84913b362?shareType=nongift [hereinafter Felicia Schwartz et al.].

²³⁹ See Press Release, Determination Pursuant to Section 1(a)(i) of Exec. Order 14024, U.S. Dep’t Treasury, Office Foreign Assets Control (May 8, 2022); Press Release, Determination Pursuant to Section 1(a)(ii) of Executive Order 14071, Prohibitions Related to Certain Accounting, Trust and Corporate Formation, and Management Consulting Services, U.S. Dep’t Treasury, Office Foreign Assets Control (May 8, 2022).

²⁴⁰ See Michael O’Dwyer & Daniel Thomas, *U.K. Professional Services Firms Seek Exemptions to Ban on Russia Work*, FIN. TIMES, (May 24, 2022), www.ft.com/content/3f74c9d7-d945-4a77-b0d5-81fdf5b7b23f?shareType=nongift (Predictably, potentially affected service suppliers lobbied for exceptions. Also noting: “U.K. firms, which have a long history of advising Russian companies and wealthy individuals, account for 10 per cent of Russian imports in the accountancy, management consultancy. And . . . public relations sectors.”).

²⁴¹ See Jane Croft, *Russian Litigants Left Struggling to Find Lawyers for Court Actions*, FIN. TIMES (June 4, 2022), www.ft.com/content/fd2707b4-f8bb-4b67-95ed-45872884a124?shareType=nongift.

company *Gazprom*.”²⁴² That was the first U.S. action against this bank.²⁴³ Specifically, on May 8, 2022, the OFAC “targeted twenty-seven executives [specifically, Board members] of *Gazprombank* [as SDNs],”²⁴⁴ and “imposed some 2,600 visa restrictions on Russian and Belarusian officials.”²⁴⁵ However, the US “did not freeze the company’s assets or prohibit transactions with it,” because the bank was the “main way” Russia sold NG to Europe, and Europe had yet to agree on an NG embargoes.²⁴⁶ The OFAC also designated 8 *Sberbank* board members, Moscow Industrial Bank and 10 of its subsidiaries, a private rifle manufacturer, and three Russian state-owned television stations as SDNs.²⁴⁷

Further, on June 28, following a G-7 Summit, the OFAC “added over ninety individuals and entities to the [SDN List], with a focus on Russia’s military-industrial base, including major state-owned defence-related actors.”²⁴⁸ Most notably, the new designations included:

State Corporation *Rostec* . . . and its numerous subsidiaries are a major target of the new SDN designations under . . . *Executive Order 14024*. *Rostec* is a massive Russian state-owned enterprise that consolidates Russia’s technological, space, aerospace, and military-industrial expertise, with a corporate umbrella reaching 800 entities across sectors. As the result of the latest actions, U.S. persons are now prohibited from transacting, directly or indirectly, with *Rostec* or any other *Rostec* holdings or affiliates named on the SDN list. Furthermore, pursuant to the OFAC’s 50% rule, any entity owned 50% or more, directly or indirectly, by *Rostec* is also blocked. (. . . [T]his action expands previous U.S. sanctions on certain *Rostec*-related entities, including *Rostec*’s pre-existing designation on OFAC’s Sectoral Sanctions Identifications List and on Directive 3

²⁴² Felicia Schwartz et al., *supra* note 238.

²⁴³ See *G-7 to Phase Out Russian Oil, U.S. Sanctions Gazprombank Executives*, *supra* note 79.

²⁴⁴ Felicia Schwartz et al., *supra* note 238; see also Press Release, U.S. Treasury Takes Sweeping Action Against Russia’s War Efforts, U.S. Dep’t Treasury, Off. Foreign Assets Control (May 8, 2022) (announcing the above-discussed services prohibitions and SDNs) [hereinafter U.S. Treasury Takes Sweeping Action Against Russia’s War Efforts].

²⁴⁵ *G-7 to Phase Out Russian Oil, U.S. Sanctions Gazprombank Executives*, *supra* note 79.

²⁴⁶ Felicia Schwartz et al., *supra* note 238.

²⁴⁷ See U.S. Treasury Takes Sweeping Action Against Russia’s War Efforts, *supra* note 244.

²⁴⁸ Lindsay B. Meyer et al., *Russia Update: U.S. Tightens Pressure on Russia with New, Coordinated Sanctions Package*, VENABLE LLP: INSIGHTS (June 30, 2022), www.venable.com/insights/publications/2022/06/russia-update-us-tightens-pressure-on-russia?utm_source=vuture&utm_medium=email&utm_campaign=20220630%20-%20russia%20update%3a%20u.s.%20tightens%20pressure%20on%20russia%20with%20new%2c%20coordinated%20sanctions%20package [hereinafter Meyer et al.].

under *Executive Order* 13662). Notably, General License No. 39 provides a wind-down license for transactions involving *Rostec* or its subsidiaries until August 11, 2022.²⁴⁹

The EU, U.K., and other Allies placed sanctions on *Rostec*. With a view to weaken Russia's war machine, the U.K. also targeted, with asset freezes and travel bans, two key supporters of President Putin: (1) "Anna Tsivileva, Putin's cousin and President of a major [Russian coal] mining firm [JSC Kolmar Group]," and (2) "Vladimir Potanin, Russia's second richest man. . .," who was "said to be worth \$37.1 bn (£30.5 bn) . . ., [who] continue[d] to amass wealth[,] supporting Putin's regime. . ." [who] "head[ed] the world's largest refined nickel and palladium producer, Nornickel," and "[had] acquired Russian bank *Rosbank* and shares in *Tinkoff* Bank in the period since the invasion of Ukraine."²⁵⁰

Likewise, the BIS "continue[d] to designate new entities (in Russia and elsewhere) to its Entity List, including thirty-six new entities on June 28, in order to prevent U.S.-origin technologies from being routed to Russian military end users and uses."²⁵¹ The fact that several such listings included Chinese companies²⁵² suggest

²⁴⁹ *Id.* (The subsidiaries of the Russian state-owned holding company, Rostec, indeed were "numerous." This holding company consolidated Russia's expertise in the fields of aerospace, defense, industry, and technology. Under the OFAC 50% Rule, over 800 companies under Rostec's control were subject to the same SDN prohibitions as was Rostec.); see U.S. Treasury Sanctions Nearly 100 Targets in Putin's War Machine, Prohibits Russian Gold Imports, U.S. Dep't Treasury, Office Foreign Assets Control Press Release (June 28, 2022) [hereinafter June 2022 OFAC Press Release].

²⁵⁰ Andre Rhoden-Paul, *Ukraine War: Putin's Cousin Among Inner Circle Hit by New U.K. Sanctions*, BBC NEWS (June 30, 2022), www.bbc.com/news/uk-61981765 (also reporting, as to Mr. Potanin, "he moved his \$300 mn superyacht to the safe haven of Dubai as a precaution", and "spent \$2 bn building the Rosa Khutor ski resort that hosted the 2014 Winter Olympics in Sochi . . .").

²⁵¹ Meyer et al., *supra* note 248.

²⁵² See Demetri Sevastopulo, *U.S. Blacklists Chinese Companies for Allegedly Supporting Russian Military*, FIN. TIMES (June 29, 2022), www.ft.com/content/a866bf53-ed1a-4329-aa01-2d7c1fcf305d?shareType=nongift (reporting: "[t]he Biden Administration has placed five Chinese companies on an export blacklist for violating sanctions by allegedly providing support to Russia's military and defence companies before and during the invasion of Ukraine. The Commerce Department put the Chinese firms on the "entity list", which effectively bars US companies from exporting to them. The companies, which are not globally recognized names, are Connec Electronic, King Pai Technology, Sinno Electronics, Winninc Electronic, and World Jetta (HK) Logistics . . . The blacklisting was announced as the U.S. grows increasingly worried about strengthening ties between Beijing and Moscow, particularly after Xi Jinping and Vladimir Putin in February [2022] signed a statement that described the China-Russia partnership as having "no limits." The Financial Times reported

an intersection between U.S. measures against China in the Sino-American Trade War and those against Russia amidst the war in Ukraine: the intersection point being the sanctioning of companies which aided and abetted Russia's war.

Indeed, the EU, too, took several parallel actions. As part of its compromise deal concerning a ban on Russian oil (discussed above), the EU agreed to:

- (1) "Ban the ability to provide consulting services to Russian companies and trade in a number of chemicals."²⁵³
- (2) "Sanction Alina Kabaeva, a former Olympic gymnast who ... [was] 'closely associated' with Putin...," "and Patriarch Kirill, who heads the Russian Orthodox Church and has been a vocal supporter of the Russian President and the war in Ukraine" (despite Hungary's opposition to sanctioning the Patriarch).²⁵⁴
- (3) "Sanction dozens of military personnel, including those deemed responsible for reported war crimes in Bucha, as well as companies providing equipment, supplies and services to the Russian armed forces."²⁵⁵
- (4) Ban "[t]hree more Russian state-owned broadcasters."²⁵⁶

Chronologically, all such measures (including the oil embargo) were part of the EU's sixth wave of sanctions. Regardless, they bespoke remarkably swift, dramatic, and collaborative action by twenty-seven different EU members. All told, by end-June 2022, the EU, along with the US, UK, and other Allies, had "sanctioned more than a thousand Russian individuals and businesses."²⁵⁷

XVII. SHOULD AMERICA IMPOSE SECONDARY BOYCOTT?

The most obvious next step in sanctioning Russia — the step that would put the greatest additional pressure on Russia — would be a secondary boycott. However,

in March that China had signalled a willingness to provide military assistance to Russia, which set off alarm bells in Washington. . . . The Commerce Department did not accuse the Chinese government or military . . . of supplying equipment to the Russian Army. "We have not seen China provide Russia with military equipment or systematic evasion of sanctions", said a White House official. But the decision to place the companies on the entity list emphasised the broader concern about ties between China and Russia. It also marked the first time that President Joe Biden's Administration has penalised Chinese entities for helping the Russian military since Putin launched the invasion of Ukraine in February." (Emphasis added)).

²⁵³ *EU Leaders Back Push to Ban Most Russian Oil Over Putin's War*, *supra* note 31.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Russian Oil: EU Agrees Compromise Deal on Banning Imports*, *supra* note 61.

²⁵⁷ *Ukraine War: UK joins ban on imports of Russian gold*, BBC NEWS (June 26, 2022), www.bbc.com/news/business-61941589 [hereinafter *Ukraine War: U.K. Joins ban on Imports of Russian gold*].

it also would put pressure on America's Allies, and on countries, such as India, those which the U.S. had sought to wean away from Russia. Accordingly, as of June 2022, the Biden Administration was split as to whether to pursue a comprehensive secondary boycott against Russia:

Biden Administration officials are divided over how much further the U.S. can push sanctions against Russia without sparking global economic instability and fracturing transatlantic unity.

...

[F]actions have emerged over how hard to push. One group, which includes many officials at the State Department and White House, advocates even stricter measures known as secondary sanctions in response to Russian atrocities, arguing opposition from Allies can be overcome.

Another group of officials, many based at Janet Yellen's Treasury Department, worry about further strains on a global economy already suffering from supply-chain woes, inflation, volatile oil prices and a potential food crisis. Some fret about the looming midterm [November 2022] elections and Democrats' chances if prices at the pump stay high. They argue for a different, untested approach: a cap on oil prices that would allow countries to buy Russian energy while limiting Moscow's income.

...

... [W]ith [Russian President] Putin undaunted by the economic chokehold and pressing ahead with his war, there are growing calls within the [Biden] Administration to test the [Allied] unity by taking action against other countries and companies that help Russia evade sanctions or provide what the U.S. calls "material support" to sanctioned entities.²⁵⁸

Not all secondary boycotts are alike. Consider nuanced differences among them.

The secondary measures against Iran were comprehensive, "targeting almost any country or company that did business with Tehran."²⁵⁹ What less-than-thorough secondary boycotts could be imposed by the U.S., perhaps taking a lesson from the EU's concession to the Czech Republic, Hungary, and Slovakia with respect to a prohibition on Russian oil imports (discussed above), which would up the pressure

²⁵⁸ Nick Wadhams, *US Officials Are Split Over the Next Round of Russia Sanctions*, BLOOMBERG (June 1, 2022), www.bloomberg.com/news/articles/2022-06-01/us-wavers-over-next-russia-sanctions-as-fears-of-divide-grow?sref=7sxw9Sxl [hereinafter Wadhams].

²⁵⁹ *Id.*

on the target, Russia, but preserve unity among the sanctioning countries? Might a hard-line secondary boycott serve only to entrench the target regime further, as seems to have occurred with the *Ayatollah*, Islamic Revolutionary Guard Corps, and Islamic Republic?

XVIII. WAVE TWELVE: PROHIBITION ON RUSSIAN FINANCIAL INSTRUMENTS AND GOLD

In June 2022, the OFAC took an action that caught at least some portfolio investors off guard: it forbade U.S. entities from investing in Russian debt (whether corporate or sovereign), and Russian equities.²⁶⁰ That is, investors could either maintain their existing holdings of those bonds or stocks, or sell them to non-U.S. residents. However, they could not buy any new Russian financial securities, either in the IPO or secondary market. In truth, the sweeping sanction against purchases of new and existing Russian financial instruments should not have been a surprise:

“[b]anks trading Russian corporate and sovereign bonds have . . . faced criticism in [that] the US. Senator Elizabeth Warren [Democrat-Massachusetts] has blasted them for undermining sanctions, and called out market makers JPMorgan Chase & Co. and Goldman Sachs Group Inc. for purchasing and making recommendations to clients.”²⁶¹

Not on their own volition, but thanks to the OFAC’s updated guidance, on June 13, 2022, JPMorgan and Goldman Sachs announced that they have halted market-making, and thus primary and secondary market purchasing on behalf of existing or potential clients, in Russian debt.²⁶² Obviously, the OFAC’s decision was a “further blow [in addition to the default risk, discussed earlier] to funds holding Russian bonds, as it reduce[d] the number of potential buyers of the assets and undermines

²⁶⁰ See *Frequently Asked Questions, Russian Harmful Foreign Activities Sanctions*, U.S. DEP’T TREASURY, <https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1054> (Question 1054. Do the new investment prohibitions of Executive Order (E.O.) 14066, E.O. 14068, or E.O. 14071 (collectively, “the respective E.O.s”) prohibit U.S. persons from purchasing debt or equity securities issued by an entity in the Russian Federation?); Laura Benitez & Daniel Flatley, *U.S. Treasury Prohibits Investors From Buying Russian Debt*, BLOOMBERG (June 7, 2022), www.bloomberg.com/news/articles/2022-06-07/us-steps-up-sanctions-bars-investors-from-buying-russian-debt?sref=7sxx9Sxl [hereinafter *U.S. Treasury Prohibits Investors From Buying Russian Debt*].

²⁶¹ *Id.*

²⁶² See Laura Benitez & Sridhar Natarajan, *JPMorgan, Goldman Halt Russian Debt Trading After U.S. Tightens Ban*, BLOOMBERG, (June 13, 2022), www.bloomberg.com/news/articles/2022-06-13/jpmorgan-goldman-halt-russia-debt-trading-after-us-tightens-ban.

any remaining value.”²⁶³

Later in June 2022, in connection with a G-7 Summit, the U.S., along with Canada, Japan, and U.K., announced a ban on imports of Russian gold.²⁶⁴ The EU did likewise in July.²⁶⁵ The prohibition affected newly mined or refined gold, but not gold previously exported from Russia. As ex-British PM Boris Johnson put it, the measure aimed to “strike at the heart of Putin’s war machine.”²⁶⁶ In 2021, Russia exported £12.6bn (\$15.4bn) worth of gold, and the U.K. stated their importance had “increased since the [February 23, 2023] invasion [of Ukraine,] as oligarchs rush[ed] to buy bullion to avoid sanctions.”²⁶⁷ France, Germany, and Italy were persuaded by this logic, and following a G-7 meeting, joined their allies in forbidding Russian gold imports into their jurisdictions.

XIX. WAVE THIRTEEN: OIL AND NATURAL GAS PRICE CAPS

By the June 2022 G-7 Summit, the US and its Allies knew they had failed to persuade China, India, and various other countries (*e.g.*, Argentina, Indonesia, Senegal, and South Africa) to ban importation of Russian oil. Whether motivated by economic necessity or political disposition, such countries continued to provide Russia with export revenues by purchasing its oil and petrochemical products. Therefore, the U.S. and its Allies proposed a fall-back idea, namely, a price cap on Russian oil:

“They hope [was that] a cap will limit the benefits of the soaring price of crude to the Kremlin war machine, while cushioning the

²⁶³ *U.S. Treasury Prohibits Investors*, *supra* note 260.

²⁶⁴ Press Release, The White House, Fact Sheet: The United States and G-7 to Take Further Action to Support Ukraine and Hold the Russian Federation Accountable (June 27, 2022) (stating: “G-7 Leaders are determined to limit Russia’s revenues, including from gold, Russia’s second largest export after energy. The United States will take several key actions to implement these commitments. The U.S. Department of the Treasury will be issuing a determination to prohibit the import of new gold into the United States, which will prevent Russian participation in the formal gold market”) [hereinafter 2022 White House Fact Sheet]; Press Release, Determination Pursuant to Section 1(a)(ii) of Executive Order 14068, Prohibitions Related to Imports of Gold of Russian Federation Origin, U.S. Dep’t Treasury, Office Foreign Assets Control (June 24, 2022); *see also* June 2022 OFAC Press Release, *supra* note 249 (determining Section 1(a)(i) of Executive Order 14068 applies to gold of Russian origin, prohibiting the importation of Russian gold with immediate effect, but excludes Russian-origin gold located outside of Russia prior to the determination.).

²⁶⁵ *See* Francesco Guarancio, *EU Executive Proposes Import Ban on Russian Gold, Tweaks on Food Trade*, REUTERS (Jul. 15, 2022), www.reuters.com/world/europe/eu-adopt-friday-new-russia-sanctions-legal-tweaks-avert-food-shortages-sources-2022-07-15/.

²⁶⁶ *Ukraine War: U.K. Joins ban on Imports of Russian gold*, *supra* note 257.

²⁶⁷ *Id.*

impact of higher energy prices on western economies.

...

Under the price-capping scheme, Europe would limit the availability of shipping and insurance services that enable the worldwide transport of Russian oil, mandating that the services would only be available if the price ceiling was observed by the importer. A similar restriction on the availability of U.S. financial services could give the scheme added impact.

...

The U.K. would need to come on board, given it is the home of the Lloyd's of London insurance market . . ."²⁶⁸

The price cap entailed a balancing of demand and supply side considerations — respectively, not hurting American Allies, while penalising Russia. On the demand side, the basic idea of a price cap was to “let buyers continue to use Russian crude if they agreed to pay below-market rates.”²⁶⁹ On the supply side, the price cap on Russian-origin oil would be between \$40-\$60 dollars per barrel so as to limit Russia’s revenues and minimize disruptions in U.S. and Allied economies.²⁷⁰ Ideally, the price cap should be placed above the cost of production, but beneath the market price (at the time of the G-7 deliberations, Russian crude traded at approximately \$80 per barrel). Also ideally, it should be applied by December 5, 2022, which is the date the EU it to impose a ban on ocean imported Russian oil was set to take effect.

However, even that range was controversial. It “span[ned] from what is believed to be Russia’s marginal cost of production and the price of its oil before the February

²⁶⁸ Guy Chazan et al., *G-7 Aims to Hurt Russia with Price Cap on Oil Exports*, FIN. TIMES (June 26, 2022), www.ft.com/content/ee090a48-5407-496f-b0e4-1fe78f37495d?shareType=nongift. (the U.S. and G-7 were careful to assure OPEC their plan “to cap Russian oil sales at an enforced low price will not be replicated against OPEC producers,” even though OPEC announced production cuts (of 2 million bpd, effective November 2022, allegedly because of global economic uncertainty and a possible slump in demand) that “irked consumer countries.”); see Noah Browning & Dmitry Zhdannikov, *Exclusive: U.S. Says Russia Oil Price Cap Will Not Be Aimed at OPEC*, REUTERS (Oct. 19, 2022), www.reuters.com/business/energy/exclusive-us-says-russia-oil-price-cap-will-not-be-aimed-opec-2022-10-19/.

²⁶⁹ Anthony Di Paola, *U.S. Senators Call for Sanctions on Russian Oil Sales to China*, BLOOMBERG (Jul. 26, 2022), www.bloomberg.com/news/articles/2022-07-26/u-s-senators-call-for-sanctions-on-russian-oil-sales-to-china?sref=7sxw9Sxl.

²⁷⁰ See Alberto Nardelli et al., *US, Allies Discuss Capping Russian Oil at \$40-\$60 a Barrel to Cut War Financing*, BLOOMBERG (Jul. 6, 2022), www.bloomberg.com/news/articles/2022-07-06/us-and-allies-discuss-capping-russian-oil-prices-at-40-60?sref=7sxw9Sxl [hereinafter Nardelli et al.].

24 invasion of Ukraine. . .²⁷¹ Moreover, how to operationalise a price cap and strike a balance between limiting funds flowing to Russia, on the one hand, without causing world market energy prices to rise (by driving up demand for non-Russian hydrocarbons), on the other hand, was not a trivial matter. One possibility was to “ban insurance and transportation services needed to ship Russian crude and petroleum products unless the oil is purchased below an agreed price.”²⁷² Finally, imposing a price cap would cross the line between primary and secondary sanctions: “The Biden Administration has so far steered away from deploying extra-territorial secondary sanctions to enforce restrictions imposed on Russia and such moves are usually seen with concern among some European allies, [hence] [t]heir use, alongside a price cap, is likely a measure of last resort . . .”²⁷³

Nonetheless, in September 2022, the U.S. and its Allies announced agreement on three price caps: one for oil, and two for petroleum products.²⁷⁴ In effect, they had established themselves as a buyer’s cartel among many countries. The per barrel oil price seemed likely to be between \$40-\$60 per barrel. In particular, the G-7 issued a Joint Statement stating it would implement a comprehensive global prohibition on maritime services that enable the transportation of Russian crude oil (effective December 5, 2022) or petroleum products (effective February 5, 2023) that are purchased at below the relevant price cap.²⁷⁵ Likewise, the EU said that it would “press ahead with a price cap on Russian [natural] gas, and . . . a ceiling on the price paid for electricity from generators that do not run on gas.”²⁷⁶

However, the EU struggled to come up with a number of sufficient flexibilities for its enforcement. In November, they considered a cap of \$65-\$70 per barrel, mindful that the benchmark price for Russian oil (known as the “Urals blend”) was \$65-\$75.

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ See G7 Germany 2022, *G7 Finance Ministers’ Statement on the United Response to Russia’s War of Aggression Against Ukraine* (Sept. 2, 2022), www.bundesfinanzministerium.de/Content/EN/Downloads/G7-G20/2022-09-02-g7-ministers-statement.pdf?__blob=publicationFile&v=7 [hereinafter *G7 Finance Ministers’ Statement on the United Response to Russia’s War of Aggression Against Ukraine*]; David Lawder & Christian Kraemer, *G7 Ministers Forge Ahead with Russian Oil Price Cap, details thin*, REUTERS (Sept. 2, 2022), www.reuters.com/business/energy/g7-finance-chiefs-seen-advancing-russian-oil-price-cap-plan-2022-09-02/ [hereinafter *G-7 Minister Forge Ahead with Russian Oil Price Cap, details thin*].

²⁷⁵ See *id.*

²⁷⁶ *EU Plans to Cap Russian Gas Price as Putin Warns West of Winter Freeze*, REUTERS (Sept. 7, 2022), www.reuters.com/markets/europe/putin-threatens-halt-energy-supplies-czechs-get-cold-feet-price-cap-2022-09-07/. [hereinafter *EU Plans to Cap Russian Gas Price as Putin Warns West of Winter Freeze*].

They were divided: on one hand, “maritime nations said they wanted a higher price and even compensation if they lost business due to the price cap; on the other hand, Poland and other hard-line pro-Ukraine nations wanted a lower price, to deprive the Kremlin of as much revenue as possible.”²⁷⁷

Russia countered with a refusal to sell energy to any country obeying any of the caps. President Putin intoned that “contracts could be ripped up in the event of price caps and warned the West it risked being frozen like a wolf’s tail in a famous Russian fairy tale [*The Sister-Fox and the Wolf*, by Aleksandr Nikolayevich Afanasyev (1826-1871)].”²⁷⁸ In November 2022, the Kremlin drafted a Presidential Decree to “prohibit Russian companies and any traders buying the nation’s oil from selling it to anyone that participates in a price cap.”²⁷⁹ Though the draft did not define “participation”, it appeared that the Decree would “forbid dealings with both companies and countries that join the price-cap mechanism”, thereby “essentially ban[ning] any reference to a price cap in contracts for Russian crude oil or products, and prohibit[ing] loadings destined for any countries that adopt the restrictions . . .”²⁸⁰

The U.S. rightly responded by noting that Russia would not get any revenue whatsoever; this time, even China and India agreed to buy oil at the capped price. That is, Russia had an incentive to sell something, rather than nothing, and China and India had an incentive to pay a reduced price. As to how the cap would be enforced, the U.S. and its Allies necessarily “would rely heavily on denying London-brokered shipping insurance, which covers about 95% of the world’s tanker fleet, and finance to cargoes priced above the cap.”²⁸¹ At the same time, the U.S. Treasury Department issued guidelines stating “‘individuals making ‘significant purchases of oil above the price cap,’ as well as those who provide false information about those

²⁷⁷ Matina Stevis-Gridneff et al., *E.U. diplomats meet again on a plan to cap the price of russian oil but can’t strike a deal*, N.Y. TIMES (Nov. 28, 2022), www.nytimes.com/live/2022/11/28/world/russia-ukraine-war-news?smid=nytcore-ios-share&referringSource=articleShare#ukraines-allies-are-resuming-talks-about-a-plan-to-curb-russias-oil-revenue-eu-diplomats-say.

²⁷⁸ *Id.*; *Sister Fox and Brother Wolf*, RUSSIAN CRAFTS, <https://russian-crafts.com/russian-folktales/sister-fox-brother-wolf.html>.

²⁷⁹ *Russia Drafts Decree Banning Oil Sales to Price-Cap Participants*, BLOOMBERG (Nov. 26, 2022), www.bloomberg.com/news/articles/2022-11-25/russia-drafts-decree-banning-oil-sales-to-price-cap-participants?sref=7sxw9Sxl [hereinafter *Russia Drafts Decree Banning Oil Sales to Price-Cap Participants*].

²⁸⁰ *Id.*

²⁸¹ David Lawder, *G7 Ministers forge ahead with Russian oil price cap, details thin*, REUTERS (Sept. 3, 2022), <https://www.reuters.com/business/energy/g7-finance-chiefs-seen-advancing-russian-oil-price-cap-plan-2022-09-02/>.

purchases, ‘may be a target for a sanctions-enforcement action.’”²⁸² “Significant” was a deliberately ambiguous adjective that gave the Treasury Department room for discretion, while making clear its world-wide threat to buyers everywhere.

Poland, along with Estonia and Lithuania, stuck to their position that a price cap of \$65-\$70 was too high. On December 1, 2022, five days before the price cap was set to take effect, the G7 (i.e., the U.S., U.K., France, Germany, Italy, and Japan, plus the entire EU) agreed to a threshold of \$ 60 (€ 57, £ 48) per barrel: no country would be permitted to pay more than that amount for Russian seaborne crude oil.²⁸³ At the time, Urals crude traded at \$64-\$67 per barrel.²⁸⁴ The agreement contained a key guarantee — on which Poland insisted — that this limit always would be at least 5% below the market price of Urals blend. So, “[t]he initial G-7 proposal . . . for a price cap of \$65-\$70 per barrel, with no adjustment mechanism”, was rejected.²⁸⁵ Accordingly, as a G-7-Australia Joint Statement explained:

[t]he decision to impose a price cap was taken to “prevent Russia from profiting from its war of aggression against Ukraine” . . .

It [i.e., the Joint Statement] said the move aims to “support stability in global energy markets and to minimize negative economic spillovers of Russia’s war of aggression, especially on low-and middle-income countries, who have felt the impacts of Putin’s war disproportionately.”²⁸⁶

That is:

[t]he price cap - which was agreed by the G7 group of nations, Australia and the EU - came into force on 5 December [2022].

²⁸² James Politi & Derek Brower, *U.S. Warns of Sanctions for Buyers that Flout Price Cap on Russian Oil*, FIN. TIMES (Sept. 9, 2022), www.ft.com/content/e5b63797-1aad-46cd-ab30-c1b5d014b140?shareType=nongift (The Treasury Department explained “service providers that were misled would not face liability, as long as they complied with rigorous record-keeping requirements.”).

²⁸³ *Ukraine war: G7 and allies approve cap on price of Russian oil*, BBC NEWS (Dec. 1, 2022), www.bbc.com/news/world-europe-63840412 [hereinafter *Ukraine war: G7 and allies approve cap on price of Russian oil*]; Jan Strupczewski et al., *G7 coalition agrees \$60 per barrel price cap for Russian oil*, REUTERS (Dec. 2, 2022), www.reuters.com/business/energy/holdout-poland-approves-eus-60-russian-oil-price-cap-with-adjustment-mechanism-2022-12-02/ [hereinafter *G7 coalition agrees \$60 per barrel price cap for Russian oil*].

²⁸⁴ See *id.*; see also *id.*

²⁸⁵ *G7 coalition agrees \$60 per barrel price cap for Russian oil*, *supra* note 283.

²⁸⁶ *Ukraine war: G7 and allies approve cap on price of Russian oil*, *supra* note 283.

The cap prohibits countries from paying more than \$60 (€56; £50) per barrel of Russian oil.

...

The price cap aims to reduce Russian oil revenue further. It stops any Russian crude sold for more than \$60 from being shipped using G7 and EU tankers, insurance companies and credit institutions.

Many major global shipping and insurance companies are based within the G7.²⁸⁷

The achievement of consensus among the EU 27 was a significant moment in the history of the bloc: it underscored its unity in the face of Russia's aggression against Ukraine, and willingness to incur energy shortages and higher energy costs as it sought non-Russian sources. It also bespoke their extraterritorial thinking, because the price cap was intended "to affect oil exports worldwide."²⁸⁸

Equally significant was Japan's assent. Japan was dependent on imports for nearly all of its energy, and traditionally was wary of involvement in matters not pertaining to its own self-defence (per its Constitutional strictures), yet it stood with the Alliance. For instance, in December 2022, Japan forbade its insurers and reinsurers from coverage of any merchandise transported through Russian waters.²⁸⁹ That

²⁸⁷ *Russia bans oil sales to countries using price cap*, BBC NEWS (Dec. 28, 2022), www.bbc.com/news/world-europe-64102180 [hereinafter *Russia bans oil sales to countries using price cap*].

²⁸⁸ *Ukraine war: G7 and allies approve cap on price*, *supra* note 283; see Determination Pursuant to Sections 1(a)(ii), 1(b), and 5 of Executive Order 14071, *Price Cap on Crude Oil of Russian Federation Origin*, U.S. Dep't Treasury, (Dec. 5, 2022), https://home.treasury.gov/system/files/126/20221205_Price_cap_determination.pdf. (the official U.S. announcement); see *OFAC Guidance on Implementation of the Price Cap Policy for Crude Oil of Russian Federation Origin*, U.S. Dep't Treasury, Off. Foreign Assets Control (Nov. 22, 2022), https://home.treasury.gov/system/files/126/price_cap_policy_guidance_11222022.pdf (the official U.S. advice).

²⁸⁹ *Japanese insurers to halt ship insurance for all of Russia*, NIKKEI ASIA (Dec. 24, 2022), <https://asia.nikkei.com/Politics/Ukraine-war/Japanese-insurers-to-halt-ship-insurance-for-all-of-Russia> (reporting: "[t]hree Japanese insurers will stop insuring ships for war damage in all Russian waters on Jan. 1, [2023,] a decision that could affect Japan's energy imports. Tokio Marine & Nichido Fire Insurance, Sampo Japan Insurance, and Mitsui Sumitomo Insurance started to inform shipowners of their decision. . . . The move, which comes about 10 months after the start of Russia's invasion of Ukraine, was prompted by overseas reinsurance companies refusing to take on Russia-related risks. The Japanese insurers' decision means that coverage for war damage will not be provided anywhere in Russian waters — even in the Far East, far from the war in Ukraine. Nearly all vessels take

decision reflected marketplace realities, too: without the additional insurance available for such cargo because of sanctions, it was too risky — specifically, the war risk was too high — for Japanese companies to provide either primary or back-up insurance. That almost certainly meant neither Russian oil nor NG would flow to Japan, because by definition it would have to be transported through Russian waters. It definitely meant “the perceived danger has spread beyond the Black Sea and the Sea of Azov, both close to the actual fighting.”²⁹⁰

Still, whether every country would “sign up to the G7-led policy”²⁹¹ — the so-called “Price Cap Coalition”²⁹² — and thereby “only be permitted to purchase oil and petroleum products transported via sea that are sold at or below the price cap”²⁹³ was dubious even though they had obvious financial incentives to do so: no insurance or re-insurance for oil priced above the cap and doling out monies above that cap. Indeed, as U.S. Treasury Secretary Janet Yellen pointed out, the cap would especially benefit low- and medium-income countries, which had suffered from high food and energy prices.²⁹⁴ Moreover, “any non- EU-flagged tanker that was found to have breached the cap would face a ban from western maritime services for 90 days” (though that was considerably less than the “lifetime ban as originally proposed,” because of the lobbying of both Greece and the U.S., where tanker operators play a major role in shipping Russian oil — often with vessels flagged in other countries”).²⁹⁵

Predictably, Russia countered by finalizing its Presidential Decree banning oil sales to buyers that obeyed the oil price cap; it was a kind of choice of law, or better put, choice of transaction, problem — either follow the cap, and find oil elsewhere, or reject the cap, and enjoy Russian oil:

out ship insurance. A lack of additional coverage for Russian waters would make sailing there too risky for most operators. Japanese imports of liquefied natural gas from Russia’s Sakhalin-2 project and elsewhere could be affected by the inability to secure coverage. Shipowners have to sign up for extra war damage insurance before sailing through Ukrainian and Russian waters. Insurers would have to be notified in advance to follow up on terms for payouts and premiums. . . . [S]hipowners will no longer have that option from the three Japanese insurers.”] [hereinafter *Japanese insurers to halt ship insurance for all of Russia*].

²⁹⁰ *Id.*

²⁹¹ *Ukraine war: G7 and allies approve cap on price of Russian oil*, *supra* note 283.

²⁹² *G7 coalition agrees \$60 per barrel price cap*, *supra* note 283.

²⁹³ *Ukraine war: G7 and allies approve cap on price of Russian oil*, *supra* note 283.

²⁹⁴ *G7 coalition agrees \$60 per barrel price cap*, *supra* note 283.

²⁹⁵ David Sheppard et al., *Russia assembles ‘shadow fleet’ of tankers to help blunt oil sanctions*, *FIN. TIMES* (Dec. 3, 2022), www.ft.com/content/cdef936b-852e-43d8-ae55-33bcbbb82eb6?shareType=nongift [hereinafter *Russia assembles ‘shadow fleet’ of tankers to help blunt oil sanctions*].

Russia has banned oil sales to countries and companies that comply with a price cap agreed by Western nations earlier this month [December 2022].

...

Russia has now said its oil and oil products will not be sold to anyone imposing the price cap.

The Presidential Decree said the ban would take effect for five months from 1 February until 1 July [2023].

The Decree also said Russian President Vladimir Putin could give ‘special permission’ to supply to countries that fall under the ban.

...

Although Western demand for Russian oil fell after the invasion, Russian revenue remained high due to a price spike and demand elsewhere, including from India and China.²⁹⁶

Specifically, the Decree banned Russian crude oil and refined product exports to foreign buyers that adhere to a price cap, and applied “to ‘supply contracts that directly or indirectly use the mechanism of setting a price cap’, and was “‘in force at all stages up until the final buyer.’”²⁹⁷ Yet, this Decree was restrained in one sense: it “held back from the most drastic retaliatory measures that could have further disrupted global oil supplies” as it “avoid[ed] extreme measures that the market feared would further upend trade, such as designating a minimum price for its crude or bans on specific countries from buying Russian oil.”²⁹⁸

To be sure, Moscow had its allies, too. It seemed the world oil market was heading for bifurcation: with Ukraine and its U.S., EU, and other partners on one side, and Russia and its Chinese, Indian, and other customers on the other side. Moreover, not only did Russia reject the price cap, it actively planned to navigate around it — literally.²⁹⁹ Russia said it has procured a fleet of 100 oil cargo vessels to carry its oil.³⁰⁰

²⁹⁶ *Russia bans oil sales to countries using price cap*, *supra* note 287.

²⁹⁷ *Putin Responds to Oil-Price Cap With Sales Ban for Participants*, BLOOMBERG (Dec. 27, 2022), www.bloomberg.com/news/articles/2022-12-27/putin-bans-selling-russian-oil-to-price-cap-participants?sref=7sxnw9Sxl [hereinafter *Putin Responds to Oil-Price Cap With Sales Ban for Participants*].

²⁹⁸ *Id.*

²⁹⁹ See Caleb Davis & Mark Trevelyan, *Russia says it won't accept oil price cap and is preparing response*, REUTERS (Dec. 5, 2022), www.reuters.com/business/energy/russia-price-cap-is-dangerous-will-not-curb-demand-our-oil-2022-12-03/.

³⁰⁰ *Russia assembles ‘shadow fleet’ of tankers to help blunt oil sanctions*, *supra* note 295 (reporting: “Russia has quietly amassed a fleet of more than 100 ageing tankers to help circumvent

How, exactly, it did so was unclear, because the U.S. and EU made clear they would forbid the insuring or re-insuring of any vessel carrying Russian oil.³⁰¹ Even Ukraine conceded that the cap may be limited in its effects: in December 2022, “Ukraine’s President Volodymyr Zelensky, called the price cap a ‘weak’ idea that was not ‘serious’ enough to damage the Russian economy.”³⁰²

Impressively, in December 2022, the EU came together on a NG price cap, thus putting more pressure on Russia and its allies. With effect from February 15, 2023:

. . . European Union countries’ Energy Ministers agreed that the cap on gas prices would be triggered when benchmark gas prices spike to 180 euros per megawatt hour.

The EU gas price cap would kick in if prices on the front-month Dutch Title Transfer Facility [a virtual NG trading point in the Netherlands for physical and futures transactions] gas hub contract exceed 180 euro/MWh for three days . . .³⁰³

Note that the scope of application of the NG price cap did not extend to spot market contracts:

[t]he cap will initially apply to gas contracts traded on all European trading hubs for supplies between one month and a year ahead. Prices must also be €35/MWh above an average of global liquefied natural gas prices in order to be triggered. Over-the-counter deals

western restrictions on Russian oil sales following its invasion of Ukraine Shipping broker Braemar estimates Moscow, which relies heavily on foreign tankers to transport its crude, has added more than 100 ships this year [2022], through direct or indirect purchases. Energy consultancy Rystad says Russia has added 103 tankers in 2022 through purchases and the reallocation of ships servicing Iran and Venezuela, two countries under western oil embargoes.”).

³⁰¹ See *G7 coalition agrees \$60 per barrel price cap*, *supra* note 283 (reporting: “[t]he G7 price cap will allow non-EU countries to continue importing seaborne Russian crude oil, but it will prohibit shipping, insurance, and re-insurance companies from handling cargoes of Russian crude around the globe, unless it is sold for less than the price cap. Because the most important shipping and insurance firms are based in G7 countries, the price cap would make it very difficult for Moscow to sell its oil for a higher price.”).

³⁰² *Russia bans oil sales to countries using price cap*, *supra* note 287.

³⁰³ Kate Abnett, *EU countries agree gas price cap after weeks of talks*, REUTERS (Dec. 19, 2022), www.reuters.com/business/energy/eu-countries-agree-gas-price-cap-czech-republic-says-2022-12-19/.

may be included at a later stage subject to review by Brussels.³⁰⁴

That is, the cap applied (at least initially) only “to gas contracts traded on the TTF between one month and a year ahead”, and triggered only where the price specified in those contracts was at least “€35 per megawatt hour above an average of global liquefied natural gas prices.”³⁰⁵ This figure represented a significant drop from the earlier one proposed, and a climbdown by Austria, Germany, and the Netherlands, which had opposed one.³⁰⁶ To be sure, as with the oil price cap, the one on NG raised the challenge of enforcing it in third countries that potentially were disinclined to follow it.

XX. NO END GAME?

None of the American sanctions restrained agricultural or medical exports, non-governmental organization (NGO) activities, COVID-19 relief, the free flow of information, humanitarian assistance, or other support to people affected by Russia’s war against Ukraine. Indeed, the OFAC made that clear on April 19, 2022.³⁰⁷ Similarly, on April 25 and 27, respectively, the U.K. and EU eliminated all tariffs on Ukrainian-origin merchandise.³⁰⁸ However these moves, which were both logical and necessary to ensure sanctions were not over-inclusive and impacted the innocent, were nowhere close to signalling an end game to U.S. measures and Russian countermeasures, nor indeed to the war itself.

The Russian countermeasures reflected behaviour as immature as that of the CCP,

³⁰⁴ Alice Hancock, *EU energy ministers reach deal on gas price cap*, FIN. TIMES (Dec. 20, 2022), www.ft.com/content/5b2ffae4-04d1-4e09-89ce-b85f575d8422?shareType=nongift [hereinafter *EU energy ministers reach deal on gas price cap*].

³⁰⁵ *Id.*

³⁰⁶ *EU energy ministers reach deal on gas price cap*, *supra* note 304 (reporting: “[t]he ceiling is almost €100 per MWh less than the European Commission first proposed last month [November 2022], when it suggested a mechanism to limit prices when they reached €275 per MWh for 10 consecutive days. Several ministers had branded that higher level ‘a joke’ as it would not have been activated even when prices in the bloc hit record highs in August. The final deal was reached after Germany, which had been strongly opposed to the cap due to concerns it would cause valuable gas supplies to be redirected from Europe to higher paying regions, eventually agreed to the measure. The Netherlands and Austria, which had also been against the cap, abstained in the final vote and Hungary voted against.”).

³⁰⁷ See *Fact Sheet: Preserving Agricultural Trade, Access to Communication, and Other Support to Those Impacted by Russia’s War Against Ukraine*, U.S. Dep’t Treasury (Apr. 19, 2022), https://home.treasury.gov/system/files/126/russia_fact_sheet_20220419.pdf.

³⁰⁸ See Press Release, Dep’t Int’l Trade, U.K. Announces New Trade Measures to Support Ukraine (Apr. 25 2022); European Commission Press Release, EU Takes Steps to Suspend All Duties on Imports from Ukraine (Apr. 27, 2022), https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2671.

i.e., a lack of desire to resolve a conflict. However, with America's economy far less exposed to Russia than to China, their efficacy was dubious. India's lacklustre approach was self-interested and further undercut their efficacy. Less dubious was the length of time the waves of sanctions and countermeasures would remain in place. On March 27, 2022, the then British Foreign Secretary, current British PM, Liz Truss declared that the U.K. — and presumably the U.S. and all the other Allies — would retain them until Russia fully withdrew from Ukraine and agreed to a lasting ceasefire.³⁰⁹ Judging from battlefield events, Russia had no intention of accepting those terms, and presumably, had every intention of maintaining its countermeasures.

Simply, and admittedly depressingly, put, each side wanted to keep pressure on the other, hence restoration of the status quo ante to before February 24, 2022, was a long way off.

³⁰⁹ *Ukraine War: Liz Truss Says Russia Sanctions Should End Only After Withdrawal*, BBC NEWS (Mar. 27, 2022), www.bbc.com/news/uk-60890431.