



Morgan Lewis

**US AND EU RUSSIA
SANCTIONS UPDATE –
OVERVIEW AND ENERGY SECTOR FOCUS
& EMERGING RUSSIAN COUNTERSANCTIONS**

As of 30 January 2019

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Our International Trade / Sanctions Team

UNITED STATES



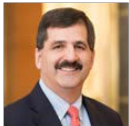
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The Russia sanctions regime is quite complex. Many of its provisions overlap with one another, and are otherwise subject to varying interpretations and application. Thus, legal advice should be sought for each specific situation. (Even official FAQs or other “guidelines” published by the relevant government agencies are subject to change or withdrawal – and are, in any event, alone neither dispositive or sufficient for pursuing a particular course of action.)

We have made reasonable efforts to assure that this presentation is current up to the day before the date appearing on the cover page. Also, the links provided from outside sources are subject to expiration or change.

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What's Newest

United States

- OFAC's SDN delisting of Deripaska-controlled companies – RUSAL, En+ and EuroSibEnergo
 - Published on 27 Jan. 2019 per OFAC [Update](#)
 - Following OFAC's 19 Dec. 2018 intent notification [letter](#) to Congress, presenting the basic details
 - Benefits these three companies and their subsidiaries, but Mr. Deripaska himself (and any company he continues to hold $\geq 50\%$ of) will remain as SDN per his April 2018 designation
 - Follows the three companies' petition to OFAC (per 31 CFR § [501.807](#)) and months-long negotiation (and several related General Licenses / extensions during this period – see slide [28](#)), and is based on the following agreed strict restructuring and governance change undertakings:
 - reduction of Deripaska's direct and indirect shareholding stakes in these companies to below 50% (and a further limitation on his voting rights in En+)
 - overhauling the composition of their boards of directors (including majority to be independent directors, and half of board of En+ to be US or UK nationals)
 - various restrictive steps re corporate governance (to further assure that Deripaska can't exercise a controlling influence)
 - and further assurances of transparency via extensive ongoing audit, certification and reporting requirements vis-à-vis OFAC
 - Also conditioned on En+ (and RUSAL and all other companies controlled by En+) not shifting to incorporation in Russia without new Board and OFAC approval
 - And these companies are subject to redesignation if any of the agreed terms are violated

What's Newest (*cont'd*)

- Note the January 2019 spate of congressional statements/resolutions etc. against these delistings
 - in House of Representatives and Senate (led by Democratic Party leaders but also supported by some Republicans), and including formal disapproval [Resolution](#) passed by the House
 - but there was insufficient congressional opposition to defeat the proposed delistings (per the relevant CAATSA sections 216, 222)
- *Further note: these Deripaska companies' delistings were based in large part on the unintended consequences of the SDN designations for the US (and world) aluminum market etc. – and thus might not be readily achieved by other Russian SDNs*
- A latest set of General License (“GL”) [extensions](#) was issued on 16 Jan. (to cover the period before effectiveness of these anticipated delistings):
 - For maintenance/wind-down of operations and existing contracts with RUSAL (GL No. 14E) – to 28 Jan. 2019
 - For maintenance/wind-down of operations and existing contracts with En+ and EuroSibEnergO (GL No. 16E) – to 28 Jan. 2019
 - For divestment/transfer of holding in En+, GAZ Group and RUSAL (GL No. 13J) – setting a new 28 Jan. 2019 deadline for En+ and RUSAL (and maintaining 7 March 2019 deadline for GAZ Group, controlled by Deripaska through Basic Element, and which hasn't been delisted)
 - And GL No. 15D of 20 Dec. 2018, for maintenance/wind-down of operations or existing contracts with GAZ Group – to a new 7 March 2019 deadline
 - *Note the requirement under these GLs for US persons to file with OFAC a “comprehensive, detailed report” re all transactions conducted with the three now-delisted companies as authorized by the GL, within 10 business days after the GL expiry (which seems to be 11 Feb., following the 28 Jan. expiry) – unless OFAC issues a further extension (see [link](#))*
- CBW Act – no second tranche (yet)
 - The expected second-tranche sanctions haven't yet been imposed by President Trump, despite expiry of the statutory 90-day period in Nov. 2018
 - This apparent flexibility stems from the lack of time limit in the law for the President's “consultation with Congress” upon expiry of the 90 days (and maybe also distractions from the long recently-ended USG shutdown)
 - See the background details (re the earlier first-tranche sanctions, and the menu of possible second-tranche sanctions from which the President is supposed to choose) at slides [51-53](#) below

What's Newest (*cont'd*)

- Various new SDN designations, including
 - 19 Dec. 2018: several individuals and entities, mostly defense/intelligence and cyber related, (and one person associated with Deripaska) in connection with 2016 US election interference among other things – see OFAC [Notice](#) and related [Press Release](#)
 - 20 Nov. 2018: various Russia (and Middle Eastern) individuals and entities in connection with petroleum shipments to Syria – see OFAC [Notice](#) and related [Advisory](#)
 - 8 Nov. 2018: several individuals and entities, mostly related to Crimea and the breakaway areas of eastern Ukraine – see OFAC [Notice](#) and related [Press Release](#)
- State Dep't parallel new 19 Dec. 2018 “LSP” listings of defense/intelligence entities per CAATSA 231(d) - [link](#)
- OFAC civil [enforcement action/fine](#) (27 Nov. 2018) against US tech company (Cobham Holdings)
 - For selling goods (silicon diode switches etc.) through Canadian and Russian distributors to like-named sub. of known Russian SDN end-user Almaz-Antey (a defense manufacturer)
 - i.e., this was *not* a case of selling through distributor to unlimited/unknown buyers in Russia (see discussion at slide [24](#))
 - Provides excellent new reconfirmation of the importance of a company's having meaningful, not just facial, screening program and due diligence in all proposed Russian-related dealings
- [Nordstream 2](#): new Dec. 2018 - Jan. 2019 rumblings against it
 - Non-binding Resolutions of US House of Representatives (11 Dec. - [link](#)) and Senate (most recent 24 Jan. - [link](#)) opposing the project and calling on the President to impose sanctions relating to it under CAATSA section 232 or for its cancellation
 - And remarkably, even a stark anti-Nordstream statement in a (non-binding) EU Parliament [Resolution](#) of 12 Dec. 2018 (Para. 79 reads: that the European Parliament “Reiterates the critical role of Ukraine in the European energy network supply; condemns the construction of the Nordstream 2 pipeline, as it is a political project that poses a threat to European energy security and the efforts to diversify energy supply; calls for the project to be cancelled”)
 - And related recent debate in Germany's political establishment on this (with some of the conservative party's candidates to succeed Ms. Merkel coming out against Nordstream 2)
 - Jan. 2019 press reports re possible US sanctions re Nordstream 2 main pipelaying contractor(s) – and 14 Jan. [letter](#) from US Ambassador in Germany to German companies warning of same (and reported European industry/gov't push-back)

What's Newest (*cont'd*)

- Commerce Dept (BIS)
 - Reported recent opposition to a US company's export to affiliates of United Aircraft Corp. (which is owned by Rostec) of high-tech composite material needed for new-generation Russian passenger liner MS-21 (and reported related US pressure on Japanese producer of same material)
 - Also note BIS Proposed Rulemaking announcement (Item [199](#), published in 16 Nov. 2018 Fed. Reg.): re intended expansion of licensing requirements on exports, reexports and in-country transfers for military end-use/end-users in Russia, China and Venezuela
- Possible new US sanctions legislation? – none yet, but ...
 - As noted above
 - continuing discontent in Congress at President's perceived failure to get tougher on Russia (including re the Deripaska-controlled companies' SDN delisting, and no CBW Act second-tranche sanctions yet)
 - and now Democrats control the House – what real effect?
 - Various earlier draft/proposed new sanctions laws, introduced in Senate or House earlier in 2018, are still pending ... without any real forward movement yet (see slides [54-55](#) below for details on a few of these)
 - Possible new sanctions designations (or even law) re US election interference?
 - see the Dec. 2018 reports on Russian disinformation operations aimed at US elections ([link](#)), received by Congress
 - these Reports and other recently-surfacing charges/evidence could lead to further Trump Admin. and/or Congress action under CAATSA (see slides [37-50](#)) and/or EO 13848 of 12 Sept. 2018 (see slide [33](#))
 - any still-emerging evidence of such interference in the recent 2018 US midterm elections seems most important
 - and the Nov. 2018 Black Sea/Kerch naval incident (and possibility of more such) is another serious irritant
 - All in all, hard to predict what more/new may come – and if so, when

What's Newest (*cont'd*)

EU

- The sectoral sanctions Reg. 833/2014 (as amended) was extended again on 21 Dec. 2018, now in effect to 31 July 2019
- If Brexit?: the EU sanctions would evidently remain in effect in the UK "as is" for now (with needed technical-jurisdictional updates)
- On 21 Jan., the EU placed four Russians (the two direct accused last year's Skripal poisoning in England, and two GRU top officials) on its new list of chemical weapons proliferation/use violators ([link](#))
- Reported discussions among some EU governments of potential invocation of long-existing blocking statute to counteract possible US application of CAATSA secondary sanctions against European companies (re Nordstream, as one example)
- And note discussion among some EU states re possible SWIFT system workaround re USD transactions (this concerns the Iran sanctions – but still worthy of note)

Russia (no newest countermeasures against US/EU, but ...)

- Russia has also enacted an SDN-like sanctions [act](#) on 1 Nov. 2018, with specific designations, against Ukraine and further expanded it on 25 Dec. 2018 ([link](#))
- Increasing reports of Russian companies (including oil producers) trying to move away from USD in favor of Euro (or other currencies) for deals having no other US link – see slides [14](#) and [64](#) below
- Gov't Decree No. 1767 of 30 Dec. 2018 ([link](#)) includes threat of withholding/removing state pension funds etc. from Russian banks that cooperate with foreign sanctions against Russia (see its art. 2)

Basic Framework – US/EU

• United States

- Treasury Dep't (*Office of Foreign Assets Control – OFAC*) "sectoral" sanction Directives, amended to date – most recently 15 Aug. 2018 (based on EO 13662 from March 2014)
 - *generally applies only to "US persons" and any persons / entities in the US: citizens / US permanent residents, US companies (including branches abroad), and US subs / branches of foreign companies*
 - but may also be applied to non-US persons anywhere, for activity that causes (i) US persons to violate or (ii) a violation to occur within the US
 - ❖ note large fines levied against several European banks for such (involving Iran, Syria, Sudan sanctions)
 - ❖ and the Zarrab case in US federal court (involving apparent Iran / Turkish bank conspiracy)
 - and all the SDN designations / sanctions also administered by OFAC (based on various EOs)
 - and Treasury's further expansive secondary sanctions authorities under CAATSA (slides [37-50](#))
- Commerce Dep't (*Bureau of Industry and Security – BIS*) export restrictions – [15 CFR §746.5](#), "Russian Industry Sector Sanctions", amended most recently Dec. 2017
 - applies to activities of any "US person" or within the US
 - and also to US-origin goods, technology, software etc. or with sufficient US-origin controlled content, wherever located
 - see also 15 CFR §744.10 (Restriction on certain entities in Russia), §744.19 (Denial of BIS licenses for sanctioned countries or entities), and §744.21 (Restrictions on military end users in Russia)
 - *note: there may well be overlapping OFAC and BIS licensing and enforcement authority – and thus thorough analysis of both sets of rules (and perhaps authorizations from both agencies) re the same proposed transaction may be required in some cases*
- CBW Act application to Russia of August 2018 (and a waiting second tranche) (see slides [6](#) above and [51-53](#))

Basic Framework – US/EU (*cont'd*)

- State Dep't
 - has primary authority for certain sections of CAATSA (see slide [38](#)); and contributing authority for most other Russia / related sanctions; see State Dep't 27 Aug., 20 Sept. and 19 Dec. releases (slides [5-7](#))
 - also has had / will continue to have important behind-the-scenes role in inter-agency consultations on Treasury / Commerce application of already-existing Russian sanctions
- CAATSA enacted 2 Aug. 2017 (and State / Treasury Guidances of Oct. 2017) – and see:
 - full summary discussion at slides [37-50](#)
 - the 29 Jan. 2018 CAATSA-based Reports/Lists for Congress (see slides [46-47](#))
 - the 15 March 2018 OFAC SDN-, FAQ- and FSB-related General License clarifications re cyber activities and to synchronize with CAATSA (see slide [35](#))
 - and the 6 April, 11 June (cyber), 20 Sept. (defense) and 19 Dec. (cyber) CAATSA-based 2018 SDN designations (see slides [5-7](#) and [25-31](#))
 - and note the recent CAATSA-implementing EO (see slide [48](#)), and proposed DASKAA further broadening of CAATSA – (see slide [54](#))
- Crimea-focused EO 13685 of 19 Dec. 2014 ... and Crimea-related SDNs
 - near-total embargo (as for Cuba), OFAC-administered, amended most recently in Jan. 2018
 - and related BIS implementing rules of 29 Jan. 2015
- Various N. Korea-related sanctions (against Russian and Chinese companies) authorized by a web of laws and executive orders (see slides [31-32](#) below)
- *Bottom line: US Russia-sanctions analysis is now like peeling a very complex onion!*

Basic Framework – US/EU (*cont'd*)

- **European Union**

- EU Council Reg. No. 833/2014 of 31 July 2014 – as amended by Reg. Nos. 960/2014 of 8 Sept. 2014, 1290/2014 of 4 Dec. 2014, 2015/1797 of 7 Oct. 2015, and 2017/2212 of 30 Nov. 2017
 - applies to EU nationals and companies
 - or anything happening in whole or part within EU territory
 - or involving an EU-registered aircraft / vessel
- Commission Guidance Note (16 Dec. 2014, last amended 25 Aug. 2017) on application of certain provisions (the “EU Guidance Note”)
- Currently in effect to 31 July 2019 (extended as of 21 Dec. 2018)
- And SDN-like “blacklist” Reg. No. 269/2014 of 17 March 2014
 - and updates since then (incl. re the Siemens turbines scandal and re the Kerch bridge – see slides [67-68](#))
 - currently in effect to 15 March 2019 (last extended on 13 Sept. 2018)
- And, re Crimea
 - EU Council Reg. No. 692/2014 of 23 June 2014 – as amended by Reg. No. 825/2014 of 30 July 2014, and Reg. No. 1351/2014 of 19 Dec. 2014 (now in effect to 23 June 2019)
 - hits investments in oil & gas and other mineral resources E&P, power, transport, telecoms
 - and further ban on business in various other sectors – see slide [67](#) for detail
- EU Council Reg. No. 2018/1542 of 15 Oct. 2018, Concerning Restrictive Measures Against Proliferation and Use of Chemical Weapons; and Implementing Reg. No. 2019/84 naming four Russians as violators

US Sectoral Sanctions – OFAC

Finance / Capital Markets

- The OFAC SSI sanctions *prohibit without license*:
 - Per [Directive 1](#) (as amended / effective Nov. 2017, per CAATSA): new debt financing with maturity of >14 days (*revised down from >30 days*), or new equity financing, for these designated entities or their subs (≥50%-owned), and transactions with or dealing in such debt or equity
 - *Bank of Moscow* (now merged into VTB)
 - *Gazprombank*
 - *Russian Agricultural Bank (Rosselkhozbank)*
 - *Sberbank*
 - *VEB*
 - *VTB*
 - (except depositary receipts based on pre-existing shares – per FAQ [391](#))
 - And note OFAC’s expanded bank SSIs List (by several additions to date)
 - singling out many specific VEB, VTB, Sberbank, Gazprombank and Russian Agricultural Bank subs/affiliates – in Russia, Europe, and elsewhere
 - all of these were technically covered already under the 50%+ ownership rule – so they are also named / singled out just for emphasis / clarity, to help stop circumvention, etc.
 - but note that now any of these named subs would need official OFAC delisting if/when no longer 50%+ owned by its “named SSI parent”
 - *e.g.*, RDIF – no longer a VEB sub, but still on SSI List
 - as opposed to Estonia’s Coop Bank (formerly Estonian Credit Bank) delisted in July 2018 following 2017 buyout by Coop Eesti from VTB)

US Sectoral Sanctions – OFAC (*cont'd*)

Finance / Capital Markets (*cont'd*)

- Per [Directive 2](#) (as amended / effective Nov. 2017, per CAATSA): new debt financing with maturity of >60 days (revised down from >90 days) for these designated entities or their subs (50%-or-more owned), and transactions dealing in such debt
 - *Gazpromneft*
 - *Novatek*
 - *Rosneft*
 - *Transneft*
- and here again, note the amended SSI Lists issued since 2015 to date – naming / singling out several specific Rosneft, Novatek and Transneft subs – to which the same two above-noted (re Directive 1) coverage caveats apply
- Per [Directive 3](#) (still as of 12 Sept. 2014 – not amended): new debt financing, maturity of >30 days, for Russian Technologies (Rostec) or its subs (≥50%-owned), and transactions / dealing in such debt
 - and note that Rostec is now also a CAATSA section 231 listed defense-industry entity (see slide [42](#) re the added Rostec-dealings burdens/risks this entails, for US as well as non-US persons)
 - and Rostec subsidiary Rosoboronexport is now also an SDN, per 6 April 2018 designation
- And see related OFAC FAQs
 - FAQ [395](#) as amended, re permissible / prohibited US persons' activities with regard to L/Cs involving designated companies under Directives 1, 2 and 3
 - FAQ [419](#) as amended, re permissible / prohibited payment terms for US persons' sale of goods / provision of services to, and progress payments for long-term projects with, designated companies under Directives 1, 2 and 3
 - FAQ [371](#) re correspondent banking – OK only if the underlying transaction is permissible thus appears to be stricter than under EU rules

in other words, mere use of USD, without more, could violate – which is why Russian companies, including oil exporters, are trying to move from Euro (or other currencies) as possible for transactions having no US link)
- And note OFAC [General License 1B](#) (of 28 Nov. 2017 superseding GL 1A of 28 Sept. 2014)
 - Authorizing transactions by US persons (and otherwise within the US) involving derivative products having value linked to underlying asset that is prohibited debt (or equity) under Directives 1-3
 - And see related updated FAQ [372](#)

US Sectoral Sanctions – OFAC (*cont'd*)

Energy

- [Directive 4](#) prohibits (*as amended / effective Jan. 2018, per CAATSA*) without license
 - The provision, export or re-export, directly or indirectly, of goods, services (except financial services) or technology
 - “in support of exploration or production for deepwater, Arctic offshore, or shale projects that have the potential to produce oil” in Russia
 - involving any of these designated entities or their subs (50%-or-more owned)
 - *Gazprom* • *Gazpromneft* • *Lukoil* • *Rosneft* • *Surgutneftegaz*
 - And keep in mind various SSI List amendments to date – singling out several Rosneft, Gazprom and Surgutneftegaz subs (and again with the same above-noted slide [13](#) coverage caveats applying)
 - Note also the 2015 BIS special [designation](#) of South Kirinsky field (only part of it is deep water) ... which could be expanded to other such “borderline” fields – and might well be applied by OFAC too in practice
 - *And, per CAATSA section 223 (enacted August 2017), the Directive 4 scope was expanded to cover such projects worldwide, where one or more of these five designated Russian companies has / have a (i) ≥33% ownership interest or (ii) a majority of the voting interests*
 - but this scope expansion applies only to such outside-Russia projects that are “initiated” after 29 Jan. 2018 – which means (per [FAQ 536](#)) the date when the host government (or its authorized agency etc.) “formally grants exploration, development, or production rights to any party”
 - thus, should not apply to outside-Russia projects where the Russian company(ies) obtained its/their interest at any time after the relevant gov’t grant of rights (but there could be fact/law/interpretation nuances here)
 - note also that, per related [FAQ 537](#), OFAC’s “50% rule” – regarding involvement of SSI entity(ies) in such project – will apply to determine whether either of the sanction thresholds (≥33% direct or indirect ownership interests or majority of voting interests) is passed
 - The further proposed DASKA Act, if ever passed, would further broaden sanctions coverage of oil E&P projects both inside and outside Russia (see slide [54](#) below)

US Sectoral Sanctions – OFAC (*cont'd*)

Energy (*cont'd*)

- Note OFAC FAQ [413](#) (and similar [BIS](#)) clarification that “deepwater” = over 500 ft.
- And OFAC FAQ [418](#) (and similar [BIS](#))
 - Clarification that “shale project” doesn’t include E&P *through* shale to locate or extract oil in reservoirs
 - Also, apparently, not all hard-to-extract = shale (not addressed further in later FAQ updates)
- And OFAC FAQ [421](#)
 - Re “Arctic offshore” = north of Arctic Circle
 - Including an Oct. 2017 clarification that this bar *doesn't* cover horizontal drilling operations originating onshore that extend to seabed areas above Arctic Circle
- And OFAC FAQ [420](#) – re only production (and *not* midstream / downstream) activities are covered

US Sectoral Sanctions – OFAC (*cont'd*)

Energy (*cont'd*)

- For in-Russia projects, the Directive 4 reference to "*in Russia or in other maritime area claimed by [Russia] and extending from its territory*" – is understood to mean/include
 - Any other offshore areas (inland / territorial seas, EEZ or Shelf) that aren't Arctic (this is per a BIS FAQ [answer](#), and analogous explanations under other-country sanctions rules (and is consistent with EU Reg. [clarifications](#)))
 - And the Caspian Sea zone claimed by Russia (the EU sanction might not cover this?)
 - As well as the Black Sea shelf area extending from Crimea (despite non-recognition by US as being part of Russia)
- And note the FAQ [414](#) clarification that this sanction doesn't apply if an otherwise-covered project has the potential to produce only gas
 - But *does* apply if potential for both
 - Often not clear; factual / evidentiary showing may be key here
 - *And note that BIS (and likely OFAC too) considers condensate = oil* (this seemingly helps explain the 2015 special designation of South Kirinsky field)

US Sectoral Sanctions – OFAC (*cont'd*)

Energy (*cont'd*)

- The Directive 4 export ban thus covers essentially
 - All US-origin goods, US-origin services (*except for financial services – covered in Directive 2*), tech. assistance and technology in respect of such projects
 - To the five main listed companies and their subs (and expressly including the added named Rosneft, Gazprom and Surgutneftegaz subs)
 - And likely also to / for use at the South Kirinsky field
 - and note reports of the US government's expressed opposition to a Japanese consortium's proposed joint development with Rosneft of the similarly situated Central Tatarsky field
 - might lead to eventual BIS designation of that field too (and possibly some others?)
 - The carve-out for financial services (includes clearing transactions and providing insurance re such activities – per OFAC FAQ [412](#) – but see also the further explanation in FAQ [415](#))
- There have been some license applications / favorable actions under Directive 4 (but still a much stricter approach than in the EU to date)
- Note the “support services” compliance focus / risk

US Sectoral Sanctions – OFAC (*cont'd*)

General

- All four directives (re finance / capital markets, and energy) also expressly prohibit
 - Any transaction that evades or avoids, has that purpose, or causes a violation of, or attempts to violate any of the directive prohibitions
 - Any conspiracy formed to violate any of same
 - And again, note in this respect the several SSI List supplements to date – singling out, essentially just for anti-circumvention emphasis, several subs/affiliates of
 - Rosneft, Gazprom, Novatek, Transneft and Surgutneftegaz (under Directives 2 and 4)
 - VEB, VTB, Sberbank, Gazprombank and Russian Agric. Bank (under Directive 1)
- Possible penalties
 - Civil: just over \$295,000 (per most recent inflation adjustment) *per violation*, or up to twice the value of the transaction that was the basis for the violation
 - Criminal: up to \$1 million per violation
 - And individuals could be imprisoned (for up to 20 years) for criminal violations
- *And remember: while these OFAC Directives generally apply directly only to US persons, now there is enhanced risk of application to non-US companies/individuals also – per the CAATSA secondary sanctions (slides [49-50](#) below)*

US Sectoral Sanctions – BIS

Export / Reexport Restrictions

- The basic-limited August 2014 initial BIS Russia sanctions / license requirements – applying to *any* Russian end-users / uses
 - When the exporter knows the items will be used directly or indirectly in exploration for or production of *oil or gas* in Russian deepwater, Arctic offshore, or shale formations
 - Or is unable to determine whether the item will be used in such projects
 - And *presumption of denial* when for use in such projects “that have the potential to produce oil” (here again, grey area where could produce both gas and oil)
 - And importantly, as noted above, BIS considers that condensate = oil
- This August 2014 reg. restricts (requires license for):
 - Only specifically designated ECCN items and also several listed types of drill pipe, casings, wireline, downhole equipment (per Supp. No. 2 to §746.5 of the EAR)
 - for *all* Russian entities
 - when used in Russian deepwater, Arctic offshore, or shale projects
- Expressly including, but not limited to
 - *drilling rigs*
 - *parts for horizontal drilling*
 - *drilling and completion equipment*
 - *subsea processing equipment*
 - *Arctic-capable marine equipment*
 - *wireline & down-hole equipment*
 - *drill pipe and casing*
 - *software for hydraulic fracturing*
 - *high pressure pumps*
 - *seismic acquisition equipment*
 - *remotely operated vehicles*
 - *compressors, expanders, valves, risers*

US Sectoral Sanctions – BIS (*cont'd*)

Export / Reexport Restrictions (*cont'd*)

- Further, the same five OFAC-designated Russian energy companies (per OFAC Directive 4) have been on the BIS “Entity List” since Sept. 2014
 - *Gazprom* • *Gazpromneft* • *Lukoil* • *Rosneft* • *Surgutneftegas*
- Plus 15 specifically named Rosneft subs since 2015 and 51 named Gazprom subs since 2016 (essentially the same as those named by OFAC)
- Also likely (but not automatically) applies to some owned or controlled subs – see BIS Entity List FAQ [134](#) (depends on nature of sub / its activities, control, and other factors)
- This specific Entity List designation imposes (re these companies, and at least several subs) – *see slide 15*
 - A new license requirement for export, re-export, or transfer of “*all items subject to the EAR*”
 - for the 5 initially named energy sector companies (and likely also most of their subs)
 - when used in Russian deepwater, Arctic offshore, or shale projects
 - and now also certainly for all the expressly named Rosneft and Gazprom subs
 - and for the South Kirinsky field too
 - *If... or if...* (the same previous-slide oil / gas target projects litany applies here – and the rules of (i) denial presumption for oil projects, and (ii) condensate = oil, are applied here too)

US Sectoral Sanctions – BIS (*cont'd*)

Export / Reexport Restrictions (*cont'd*)

- And, as noted above, per a 2015 amendment, BIS added Gazprom's South Kirinsky field (Sea of Okhotsk, part of Sakhalin-3 areas project, off Sakhalin Island) to Entity List
 - Regardless whether in deepwater portion or not (the field has both)
 - This special designation was likely based on some particular factors
 - More such fields might eventually be named too, as also noted above
- Also further 2015-18 Entity List additions, including [Feb. 2018](#) amendments, adding many new Russian, Crimean, European and other OFAC-named SDN companies to this List (see slide [31](#))
- And the latest Entity List additions of [21 Sept. 2018](#)
 - Including 12 Russian entities, some of which are already OFAC-designated SDNs or may be indirect SSIs (as 50% or more owned by a directly designated SSI)
 - For enabling malicious Russian cyber actors, providing equipment and support to the Russian Navy, supporting Russian military aerospace production activities, or providing material support to Iranian missile programs
 - These Russian companies will now be subject to BIS license requirement for all items that are subject to the Export Administration Regulations (EAR), with presumption of denial
- Still more new BIS tightening and broadening updates seem likely
 - Possible new BIS rules / designations per the 27 Aug. 2018 State Dep't. Declaration under the CBW Act (see slides [51-53](#)) and per the 20 Sept. State Dep't release and LSP / SDN defense industry designations under CAATSA section 231 (see slide [32](#))
 - And per various other recent OFAC SDN designations
- See the current BIS [Entity List](#)

US Sectoral Sanctions – BIS (*cont'd*)

Export / Reexport Restrictions (*cont'd*)

- What is “*subject to the EAR*” (including all EAR99 items)?
 - All items in / moving in transit through the US
 - All US-origin items, wherever located
 - And
 - *foreign-made goods that incorporate controlled US-origin goods*
 - *foreign-made software that is comingled with controlled US-origin software*
 - *foreign-made goods that are “bundled” with controlled US-origin software*
 - *foreign-made technology that is comingled with controlled US-origin technology*
 - ... in quantities exceeding the de minimis levels (see [15 CFR §734](#))
 - currently 25% for Russia
 - *but there are intricate rules re what items “count” here*, beyond encryption technology
 - Certain foreign-made direct products of US-origin technology or software
 - Certain commodities, produced by any plant or major component thereof outside the US, that are direct product of US-origin technology or software
- *Note: includes even in-country transfers between entities (e.g., within Russia)*
- And BIS also has discretion to apply these sanctions more broadly (*i.e.*, without direct deepwater, Arctic offshore or shale status) – for any Russian users – if perceived unacceptable risk of diversion etc. (per [15 CFR §746.5\(a\)\(2\)](#) etc. – see slide [15](#))

US Sectoral Sanctions – BIS (*cont'd*)

Export / Reexport Restrictions (*cont'd*)

- BIS FAQ clarifications and license applications / actions (including re offshore drilling) – quite strict to date, like OFAC
- And see BIS 22 May 2015 [Guidance](#) on Due Diligence to Prevent Unauthorized Transshipment / Reexport of Controlled Items to Russia
 - Expresses BIS concern “about efforts by front companies and other intermediaries who are not the true final end users...”
 - Special focus on third-country freight forwarders and other dubious parties listed as an export item’s final destination
- Related notes:
 - Be wary of relying on a “we only shipped to a third-country distributor / warehouse” defense (generally for Russia, and for Crimea in particular – see slide [36](#) below)
 - Note the prevailing “knowledge or reason to know” standard (developed for Iran, but applies generally)
 - Various pronouncements / cases to date (see the Epsilon Electronics case [decision](#) in particular)
 - And the most recent enforcement case: US company fined for knowingly shipping controlled hi-tech goods to Russian defense-industry SDN through Canadian and Russian distributors (see slide [7](#) above – here the purchaser *end-user was known to the seller*)
- Possible penalties
 - Essentially same as for OFAC, and now CAATSA too, sanctions violations (see slides [19](#) and [50](#))
 - Plus denial of US export privileges (including that no one can export US items to the penalized company)
- *Note again: BIS and OFAC licensing / enforcement authority often overlaps – and thus thorough analysis of both sets of rules, and perhaps authorizations from both agencies, may sometimes be needed for one and the same proposed transaction*

US Direct Sanctions – SDNs

Specially Designated Nationals (SDN) List

- These are the US “direct” sanctions (as opposed to the SSI “sectoral” sanctions)
 - All US persons’ dealings with – including payments to or receipt of goods / services from – individuals or company SDNs (and subsidiaries) are generally prohibited, and US persons must block their assets
 - Possible further penalties – essentially same as above for other OFAC (and BIS) sanctions violations
- Plus risk of application of CAATSA-based secondary sanctions – see slides [37-50](#) below
 - Against non-US companies / people that initiate or continue dealings with designated SDNs (“for knowingly facilitating significant transactions for or on behalf of” them – per OFAC April 2018 release)
 - See also new OFAC FAQs [574](#), [579](#), [580](#) and [627](#) – and see generally slides [49-50](#) below
 - *Note: there have been some CAATSA-based SDN designations to date (including Russian companies and individuals in the cyber sector)*
- Some industry executives / oligarchs have been on OFAC’s SDN list since 2014 (and expanded further in 2015-18) – most notably
 - 6 April 2018 dramatic expansion: including Messrs. Deripaska (control of RUSAL, En+, Basic Element, GAZ Group, etc.), Vekselberg (controls Renova, etc.), Miller (Gazprom CEO), Kostin (VTB CEO), Bogdanov (Surgutneftegaz CEO) and Kerimov
 - These designations follow the US Treasury Dept. CAATSA sec. 241 Report to Congress listing many of Russia’s senior political figures, oligarchs, and “parastatal entities” (see slides [46-47](#))
 - And Messrs. Sechin, Timchenko, Rotenberg, and Technopromexport’s CEO (per the Siemens turbines scandal of 2017)
 - Also many other Russian (and some European) business and political figures, and Russian gov’t officials

US Direct Sanctions – SDNs (*cont'd*)

Specially Designated Nationals (SDN) List (*cont'd*)

- Such individual-person listing
 - Bars US persons' dealings with them or their controlled companies, blocked assets etc.
 - generally measured by $\geq 50\%$ shareholding (including by two or more SDN people) – see OFAC FAQs [398-402](#)
 - *and note the dramatic expansion here per the 6 April 2018 designations of Messrs. Deripaska and Vekselberg – and given their vast controlled-company holdings, including hundreds of direct / indirect $\geq 50\%$ -owned subsidiaries*
 - Doesn't bar dealing with non-SDN company where SDN person is just officer/director, etc. (e.g. Mr. Sechin - Rosneft ... and now also Messrs. Miller, Kostin, Bogdanov, etc.)
 - except has been interpreted to bar having an SDN-individual executive signing a contract on behalf of a non-SDN company (OFAC FAQs [398](#) and [400](#) and [585](#))
 - and caution should be exercised even re "mere" negotiating with such SDN-individual executive (or his / her signing non-binding preliminary documents) acting on behalf of a non-SDN company, or transactions where the SDN-individual is otherwise directly involved
 - see the July 2017 OFAC \$2 million [penalty](#) imposed on ExxonMobil for Mr. Sechin's signing Rosneft JV documents in 2014 – now under challenge by ExxonMobil in federal court
 - but a US person serving on a Russian company board of directors together with an SDN person seems OK (e.g. Rosneft – Dudley / Sechin) – as opposed to the bar on a US person's serving on board of an SDN company (see FAQ [568](#))
 - and also need to keep in mind separate SSI sanctions / restrictions re such companies (e.g. Gazprom, Surgutneftegaz and VTB)

US Direct Sanctions – SDNs (*cont'd*)

- Dramatic SDN-designated companies of 6 April 2018 (and wind-down periods set by the General Licenses (GLs) for dealings with them), including
 - En+, RUSAL, Basic Element, GAZ Group, EuroSibEnerg, Russian Machines, others (linked to Mr. Deripaska)
 - Renova (linked to Mr. Vekselberg)
- Unclear why these particular private-sector individuals and companies were singled out in April 2018, and whether / when more will follow
 - And some other companies named in April 2018 (owned / controlled by two other newly-named SDN individuals Messrs. Rotenberg and Shamalov)
 - As well as any other companies ultimately owned $\geq 50\%$ by any of the SDN individuals (there are some real questions here – on account of murky ownership structures / arrangements ...)
 - See the OFAC 6 April 2018 [Press Release](#) which gave a reason for each designation (but many are vague)
 - These designations hit hard – for the first time in the heart of Russia's private-sector economy
 - More to come from the Jan. 2018 "Oligarchs List"? (depends on ongoing course of US-Russia events) – but nothing more yet (and on the contrary pending En+, RUSAL, EuroSibEnerg delistings)
 - Note the remarkable rapidity and number of follow-on GL and FAQ issuances (see next slide) to help deal with the serious consequences of the April 2018 SDN designations – esp. re RUSAL
 - And note recent (Sept. 2018) expert testimony before Congress in this regard – counseling some caution re any further such private-sector oligarch designations – esp. re RUSAL
 - The proposed new DASKA Act would call for more such oligarch designations (see slide [54](#))

US Direct Sanctions – SDNs (*cont'd*)

- OFAC's serial April 2018 - Jan. 2019 general license actions and related pronouncements, several times extending the maintenance / wind-down deadlines for US persons' contract dealings with and divestment from RUSAL and the other main Deripaska-controlled holdings
 - In view of commercial disruptions caused in US, Russia and worldwide by these April 2018 SDN designations
 - The most recent GLs, extending deadlines to 28 Jan. / 7 March 2019, were issued on 16 Jan. 2019 (see link at slide [6](#))
 - And two FAQs of Sept. 2018 interpreting permissible "maintenance" of operations, contracts etc. (see slide [29](#))
 - Important note: the OFAC delisting actions of 27 Jan. 2019 re RUSAL, En+ and EuroSibEnergO (see link slide [6](#))
- Then 19 Dec. 2018 delisting notice re Deripaska's En+, RUSAL and EuroSibEnergO – but resistance to this in Congress (see slides [5-6](#) above)
- Further details on the new General Licenses, for winding down relations with various of the new SDNs (seems soon no longer to include En+, RUSAL, and EuroSibEnergO), are quite intricate / complex
 - Including newer GLs superseding older ones, and a range of related commercial relations aspects covered
 - *Specific advice should be sought for each particular situation involving these April 2018 designated SDN companies (or companies held ≥50% by them)*
- And related new OFAC [6 April](#) and [23 April](#) 2018 FAQs [567-582](#) and more on [1](#), [22](#) and [25 May](#), and [14 Sept.](#) (625 and 626) – giving guidance to US persons re continued relations with any such designated SDN company (or those also covered by the 50% rule) or individual, including:
 - Employment by or board service at such a company
 - Purchase / import of goods from such a company
 - Ownership of such a company's shares or GDRs
 - Holding accounts or other property of such a company or individual

US Direct Sanctions – SDNs (*cont'd*)

- New OFAC FAQs re “maintenance” of operations, contracts etc. with SDNs En+, RUSAL, GAZ Group, EuroSibEnergo (and their subs)
 - These are [FAQs 625 and 626](#) of 14 Sept. 2018, which refer specifically to the General Licenses of earlier this year re these specific companies (but may well also have more general application in other analogous GL-based maintenance/wind-down situations)
 - Interpretation is given (essentially formalizing existing OFAC practice) as to what may be considered “maintenance” (in context of those GLs’ phrasing “... ordinarily incident and necessary for the maintenance or wind down of operations, contracts, or other agreements ...”) re what ongoing activities are permitted until the current (and as may be further extended) wind-down deadline
 - On condition that such activities are consistent with the applicable GL, and with “transaction history” / “past practices” with the blocked entity prior to 6 April 2018
 - And “transactions and activities that are not within the framework of a pre-existing agreement may be considered ‘maintenance’ if such activity is consistent with [the parties’ pre-6 April transaction history].”
 - Also gives authorization for “contingent contracts” (again, only if consistent with the above) for transactions / activities extending beyond the current (21 Jan./7 March 2019) GLs expiration, where any performance after the expiration is contingent on such performance either not being prohibited or being authorized by OFAC (e.g., by possible GL further deadline extension or by specific license)
 - In this regard, stockpiling of inventory, even if pursuant to a pre-6 April 2018 contract, is not authorized unless consistent with past practice in scope and extent, as evidenced by transaction history

US Direct Sanctions – SDNs (*cont'd*)

- Specific licenses – needed (especially by a US person) for any activity vis-à-vis an SDN that is otherwise prohibited by law, absent coverage by any general license
 - These may be / are granted by OFAC to allow certain transactions such as purchases / sales or money transfers to or from an SDN for a longer period than an applicable general license allows (or if no general license applies)
 - For example, [see](#) the report of Swiss pump-maker Sulzer obtaining two such licenses in April 2018, allowing (i) its buyback of shares from new SDN Mr. Vekselberg to reduce his holding to below 50%, and (ii) the related unblocking of Sulzer's US bank accounts
 - And such licenses may be granted to allow US lawyers to advise / collect fees from SDNs on sanctions compliance issues (incl. possible help in trying for SDN delisting)
- And possible SDN delisting – e.g., En+, RUSAL, EuroSibEnergo applications at advanced stage (see slide [5](#) for details and link to OFAC's 19 Dec. 2018 notice to Congress of intended removals)

US Direct Sanctions – SDNs (*cont'd*)

Specially Designated Nationals (SDN) List (*cont'd*)

- The further 2015-18 SDN designations (most recent 19 Dec. 2018 – see slide [7](#)) – persons / companies under the cyber-related sanctions (see EO 13694, and CAATSA section 224)
 - Including the most recent, for the alleged IRA-led election interference operations
 - But no designations yet under related new Trump EO re election interference (see slide [33](#))
- The Jan. 2018 addition of several Russian companies (including *Power Machines*) and officials involvement in transfer of turbines made by a Siemens Russian JV co. to Crimea
- Several Crimean commercial port and transport companies (and some Russian ships that call in Crimea), banks and resort complexes are also named
- And also a number of companies involved in the Kerch Strait and other Russia / Crimea transport projects have been added
- Also a number of Russian defense industry companies (as supplemented 6 April 2018)
 - Including *Rosoboronexport* (ROE – Russia's giant arms-export enterprise, a sub of Rostec ... an existing SSI per OFAC Directive 3 and on LSP) – and ROE's sub Russian Financial Corp (RFK Bank)
 - And note 8 Nov. 2018 SDN designations per CAATSA section 228
- And June 2017 (Independent Petroleum Co. NNK) and Sept. 2018 SDN designations for alleged dealings with North Korea

US Direct Sanctions – SDNs (*cont'd*)

Specially Designated Nationals (SDN) List (*cont'd*)

- Note: the State Dep't Oct. 2017 CAATSA section 231(d) listing of Russian defense / intelligence entities (see slide [39](#)), supplemented with, most recently, 45 additional individuals and entities on 20 Sept. and 19 Dec. 2018 (see below)
 - This is the List of Specified Persons (the “LSP”): doesn't itself impose SDN (or any other sanctions) on them; but – other persons may be sanctioned under section 231 for significant transactions with them (see above-linked State Dep't announcement, and slide [42](#) below)
 - *But*
 - many were already SDNs and some were SSIs (including Rosoboronexport – now is both), and
 - there is likely chilling effect in practice on US / other companies' willingness to do business with them (see linked list of them at slide [39](#)), and
 - companies that continue to do some kinds of “significant transactions” with them risk having some SDN-like sanctions imposed on *themselves* under CAATSA section 235 (see below and slide [49](#))
 - See further discussion on this at slides [42](#), [44](#) and [49](#) below
- And new [SDN designations of 20 Sept. 2018](#) – per CAATSA section 231 (defense/intelligence-related)
 - Against
 - EDD (Equipment Development Dep't), a weapons-purchasing entity of the Chinese military – for taking delivery this year of advanced aircraft and missiles from Rosoboronexport of Russia, which is on the CAATSA section 231 List of Specified Person (LSP), and is also an SDN (see slide [42](#) below) and EDD's director
 - these were the first-ever SDN designations under CAATSA section 231 (for engaging in significant transactions with the Russian defense or intelligence sectors)
 - announced by State Dep't (see the above link – which also set out the specific sanctions chosen and being applied) – and see the corresponding OFAC SDN designations [announcement](#) of 20 Sept.
- New SDN designations under various EOs and CAATSA section 224
 - Of 19 Dec. 2018: against 18 individuals and four companies for 2016 election interference, WADA hacking, and other malign activities - [link](#)
 - Of 13 Sept. 2018: against a Chinese company, its North Korean CEO, and its Russian Vladivostok-based sister company for allowing North Korea to earn revenue from overseas IT workers – thus undermining the US's denuclearization negotiations with North Korea – [link](#)
 - Of 21 August 2018: against
 - (i) two Russian shipping companies, and six vessels, for helping North Korea evade the UN ban on its oil trade – [link](#); and
 - (ii) two Russian individuals and Russian and Slovak companies, for helping an already-sanctioned Russian company (Divetechnoservices) procure goods and services for the FSB – specifically alleged thus to be helping improve Russia's cyber systems for RF gov't agencies – [link](#)
 - Of 11 June 2018: against several Russian entities and individuals (including Divetechnoservices etc.), for providing support for / enabling FSB – [link](#)

US Direct Sanctions – SDNs (*cont'd*)

- [Executive Order 13848 of 12 Sept. 2018](#) – re election interference
 - Authorizes (by its section 2(a), which seems to have immediate effect) imposition of asset blocking and exclusion from the US etc. against any individual or entity found to have directly or indirectly engaged in, concealed or otherwise been compliant in foreign interference in a US election, to have assisted in such, or to be owned or controlled by or to have acted for such, etc.
 - Builds on existing Obama Administration EOs 13694 of 1 April 2015 (“Blocking the Property of Certain Persons Engaging in Significant Malicious Cyber-Enabled Activities”) and 13757 of 28 Dec. 2016 (“Taking Additional Steps to Address the National Emergency With Respect to Malicious Cyber-Enabled Activities”), and leaves them in effect
 - And sections 1 and 3, taken together, would authorize additional sanctions against individuals / entities found in the future to have directly or indirectly participated in any such foreign state-related US election interference activities (*no such finding yet – re the 2-18 US midterms*)
 - Attempts to specify what constitutes election interference (perhaps to clarify “red lines” for Russia)
 - Further OFAC implementing regs. are supposed to follow, but not yet
- Two general licenses issued by OFAC to respond to / correct overbroad reach of the 1 Sept. 2016 and 29 Dec. 2016 designations of GGE and FSB as SDNs (re GGE’s activities in Crimea and FSB alleged involvement in hacking / election-tampering):
 - OFAC [General License No. 11](#) of 20 Dec. 2016 (entitled “Authorizing Certain Transactions with FAU Glavgosekspertiza Rossii” - GGE)
 - gives general authorization for “all transactions and activities ... that are ordinarily incident and necessary to requesting, contracting for, paying for, receiving, or utilizing a project design review or permit from [GGE]’s office(s) in [Russia]”
 - except for carving out (i.e., still prohibiting) anything to do with GGE relating to Crimea

US Direct Sanctions – SDNs (*cont'd*)

Specially Designated Nationals (SDN) List (*cont'd*)

- OFAC [General License No. 1A](#) of (as amended 15 March 2018 to take account of / synchronize with CAATSA) under the cyber-related sanctions – entitled “Authorizing Certain Transactions with the Federal Security Service” (FSB)
 - gives authorization for “all transactions and activities ... that are necessary and ordinarily incident to ... requesting, receiving, utilizing, paying for, or dealing in licenses, permits, certifications, or notifications issued or registered by [FSB] for the importation, distribution, or use of information technology products in Russia”
 - but export, reexport, or provision of any goods or technology subject to the EAR requires BIS license, and fees payable to FSB shouldn't be \geq \$5,000 annually
 - compliance with FSB law enforcement / administrative actions or investigations as well as regulations administered by FSB is authorized
- And note OFAC FAQs [501-504](#) (as amended 15 March 2018) repeating / clarifying certain points of General License No. 1A
 - Exportation of hardware and software directly to FSB or when FSB is end-user is prohibited
 - No license needed to clear Russian border control, (which is under FSB jurisdiction)
- *At the same time, keep in mind the various cyber-related SDN designations to date for assisting / enabling certain FSB activities etc. (see slides [31-32](#) above), and likelihood of more such*
- And note the related carve-out, per Oct. 2017 State Dep't CAATSA section 231 [Guidance](#), on required regulatory dealings with the FSB – while generally section 231 warns / sets new risk re “significant transactions” with FSB (see slide [39](#) below)

US Direct Sanctions – SDNs (*cont'd*)

Specially Designated Nationals (SDN) List (*cont'd*)

- OFAC "[Guidance](#) on the Provision of Certain Services ..." of 12 Jan. 2017 (and [FAQs 495-499](#))
 - Provides some clarity as to what a US person (citizen or permanent resident) legal counsel (in-house or outside) or compliance officer can / can't do in advising a non-US company (employer, client) on the legality of proposed transactions under the US sanctions laws
 - Essential point: can advise on whether complies / violates (and approve if clearly complies ... e.g., upon OFAC authorization); but can't otherwise "facilitate" a violative transaction ... by voting at Board level, signing, etc.
 - *Indeed, as a general matter, "facilitation" (re a US person's direct or indirect participation in a non-US person's sanctions-relevant activity – involving not only SDNs but also SSIs) is a complex, case-by-case determination requiring careful factual analysis to determine whether any such US person's actions may be viewed as facilitating prohibited transactions or activities.*
- And 2016 US federal court decision (in the Zarrab case), that may be seen / used to expand extraterritorial jurisdiction to enforce US sanctions vs. foreign companies

US Crimea Sanctions

- Crimea-focused Executive Order 13685 of 19 Dec. 2014
 - Bars all new direct or indirect US investments / transactions into Crimea – including for energy sector / offshore areas
 - See also the 29 Jan. 2015 BIS rules implementing this EO
 - And many Crimea-related SDN designations (entities and individuals) from 2014 to dates (see slide [31](#) above)
- And see July 2015 OFAC [Advisory Release](#) re circumvention / evasion by omitting critical information in financial and trade transactions (further to the EO)
 - OFAC warns re
 - various patterns / practices in financial transactions that hinder correspondent banks' efforts to identify and interdict
 - (note the substantial fines suffered in recent years by various European banks for similar-type violations of OFAC sanctions – against countries other than Russia / Crimea)*
 - and similar practices in context of trade transactions – including in distributorship arrangements covering Russia
 - and advises various types of mitigation measures for these risks
- Note also these OFAC Crimea-related General License exceptions, including:
 - No. [4](#) of 19 Dec. 2014, permitting various food and agricultural products (including soft drinks, cigarettes, etc.) and medicines, medical supplies and devices
 - No. [9](#) of 22 May 2015, permitting common internet-based communications (and see related OFAC FAQ [454](#))
- And note possible sanctions-related complications re Kerch Strait maritime shipping etc.
- Possible further tightening / enforcement of following the most Nov. 2018 Russia/Ukraine Black Sea maritime incident?

CAATSA / Guidances / Lists

- CAATSA (Countering America's Adversaries Through Sanctions Act)
 - Signed into law by President Trump in August 2017 (after passage through both Houses of Congress by near-unanimous vote)
 - Full text is [here](#) (Public Law 115-44) – the Russia-related part is Title II, sections 201-292
 - Eastern Ukraine / Crimea situation, alleged US (and European) election meddling, and Syria were / are the three bases for it
 - Broadened / toughened the pre-existing sanctions as contained in six Executive Orders, the Ukraine Freedom Support Act of 2014 (the "UFSA") and another 2014 law in support of Ukraine (now amended by CAATSA)
 - Also has framework authorization for some new *primary sanctions* (aimed at US persons, or dealings having some other nexus to US) and *secondary sanctions* (aimed at non-US persons – and not needing any US nexus)
 - Further widened the gap between US and EU sanctions against Russia
 - despite the CAATSA Title II intro. statement that the President "should continue to uphold and seek unity with European and other key partners" on Russia sanctions
 - and note – the President's two CAATSA signing statements also emphasized the importance of coordination with allied countries and not harming US business
 - and the follow-up State and OFAC Guidances reiterated that the US authorities intend to engage / coordinate closely with allied / partners countries in interpreting / enforcing the new CAATSA secondary sanctions powers (*though experience to date casts doubt*)

CAATSA / Guidances / Lists (*cont'd*)

- By Presidential Memorandum of 29 Sept. 2017
 - CAATSA implementation functions delegated mostly to State and Treasury Dep'ts (and in consultation with Director of National Intelligence)
 - with primary responsibility given to one or the other on CAATSA article-by-article basis
- *And note EO 13849 of 20 Sept. 2018 setting out certain CAATSA sanctions implementation details for State and Treasury (see slide [48](#) below)*
- CAATSA also covers Iran and North Korea – introducing stiffened primary and secondary sanctions with regard to those two countries
 - the North Korea part is aimed primarily at foreign companies / banks (de facto focus on Chinese, Russian, etc.) doing various types of business directly or indirectly there
 - ❖ note that Independent Oil Co. (NNK) of Russia is now an SDN in this connection
 - ❖ and most recent Russian and Chinese IT companies SDN designations of 13 Sept. 2018 (and Russian shipping cos./vessels designated 21 Aug. 2018) for links with North Korea
 - and have in mind also the tightened anti-Venezuela sanctions – can affect some Russian companies – *but Venezuela, North Korea, Iran are not further covered here*
- And keep in mind the possible further broad expansion of Russia primary and secondary sanctions provisions by the proposed DASKA Act which would amend CAATSA (see slide [54](#) below)

CAATSA / Guidances / Lists (*cont'd*)

- CAATSA's basic content (as Russia-relevant)
 - Codification by statute
 - of the existing blacklist (SDN) and sectoral (SSI) sanctions enacted by the series of EOs since 2014 against Russia
 - which make it harder for President Trump (and his successors) to narrow or otherwise loosen any of these sanctions by executive action – and would require new legislation to repeal CAATSA (recall Jackson-Vanik Amendment's decades-long life)
 - (and the proposed DASKA Act, if adopted, would further harden this effect – see slide [54](#))
 - State / Treasury Dep'ts in Oct. 2017 issued first Guidances (and FAQs, Entity List, revised Directives) per various sections of the new law
 - State Dep't on 27 Oct. 2017 issued initial CAATSA section 231(d) List of entities in the Russian defense / intelligence sectors: section 231 requires President to impose sanctions on any US or non-US person, wherever located, that the President determines has knowingly engaged in a “significant transaction” with any Russian defense / intelligence sector entity on the [List of Specified Persons](#) as of now (and associated [Public Guidance](#) – and see further slide [42](#) below)
 - State Dep't also issued Oct. 31 [Public Guidance](#) on CAATSA section 225 (requiring President to impose sanctions on non-US persons that invest in certain types of oil projects in Russia) and section 232 (giving President discretion to impose sanctions on US or non-US persons that invest or are otherwise involved substantially in construction / modernization / repair of Russian energy export pipelines) – see further slides [41](#) and [43](#) below
 - OFAC (Treasury Dep't) on 31 Oct. issued its initial [Guidance](#) (including some revised and new FAQs) to implement various CAATSA provisions for which it has primary authority – including the amended / expanded Directive 4 (re Arctic offshore, deepwater and shale projects) and three other CAATSA provisions (see further slides [40-45](#) below)
 - and see FAQs [540-547](#), [579](#) and [589](#) (all from 31 Oct. 2017 or after) re “significant transaction”, “facilitation” and other related CAATSA application issues

CAATSA / Guidances / Lists (*cont'd*)

- CAATSA stiffened existing OFAC Directives 1, 2 and 4 (*this is essentially for US persons – see slides [13-15](#) above*)
 - *Directive 1*: permissible “new debt” of designated Russian banks was reduced from max. 30 to 14 days
 - *Directive 2*: permissible new debt of designated Russian energy cos. was reduced from max. 90 to 60 days
 - *Directive 4*: the prohibition on goods / services / technology involvement in deepwater, Arctic offshore or shale projects was expanded from Russia to worldwide
 - ❖ but, for outside Russia, applies only to “new” projects (see slide [15](#) above)
 - ❖ if one / more of designated Russian energy companies has ≥33% ownership or >50% voting interest
 - All now triggered by OFAC amendments of the relevant Directives – see slides [13-19](#) above
- Per CAATSA section 223(a), expansion of OFAC sanctions *potential* industry coverage (beyond financial services, energy, engineering / defense-related) – see FAQ [539](#)
 - to *state-owned* (i) railway (= RZhD, the Russian State Railway), and (ii) mining & metals companies (*e.g.*, state-owned uranium producer?)
 - but shipping industry is left off this expanded list; and nuclear power industry also doesn't appear despite earlier consideration of including it
 - and even as to railway and mining & metals sectors, the Oct. 2017 OFAC Guidance makes clear that this is only discretionary and that “maintaining unity with partners” is important
- *Requiring review / approval by Congress*
 - (per CAATSA section 216) before President can terminate or waive existing sanctions (or grant non-routine-type license that “significantly alters” foreign policy re Russia)
 - apparently including the pending delisting of En+, RUSAL and EuroSibEnergo per OFAC's 19 Dec. 2018 notice to Congress

CAATSA / Guidances / Lists (*cont'd*)

- *Requiring* the President to impose sanctions – from a few menus of possibilities, mostly involving penalties re business with/in the US – in various contexts (*upon findings, and with some carve-outs / waiver possibilities*) including against:
 - per CAATSA section 224 – US or non-US persons that knowingly engage in significant activities undermining cyber-security on behalf of the Russian gov't, materially assist, sponsors, or provides support for, or provide financial services in support of same (no general State or OFAC Guidance yet on this provision – but there has been some application ... see slides [31-32](#))
 - per CAATSA section 225 (and see 31 Oct. 2017 State Dep't Guidance), *non-US* cos. and individuals that knowingly make significant investment in deepwater, Arctic offshore or shale oil projects in Russia (as written, could be whether or not one of the Directive 4 Russian companies is involved – and the new Guidance doesn't clarify)
 - per CAATSA section 226 (and see 31 Oct. 2017 OFAC Guidance), *Russian and other foreign financial institutions ("FFIs")* that knowingly engage in / facilitate "significant" transactions involving any of the Directive 4-type oil projects in Russia, certain defense-related activities, or Gazprom's withholding of gas supplies
 - per CAATSA section 228 (and see the 31 Oct. 2017 OFAC Guidance), *non-US* companies and individuals that knowingly – *this being the broadest CAATSA provision*
 - ❖ materially violate, attempt or conspire to violate or cause a violation of any Russia sanction
 - ❖ facilitate "significant transactions" (including "deceptive or structured transactions") for or on behalf of any person that is subject to a Russia sanction – or child, spouse, parent or sibling
 - ❖ further, the related OFAC Guidance does go some way to calm fears of over-expansive application with respect to SSI sanctioned entities (see slides [44-45](#) below for details)
 - ❖ but note also the section 225 newly-stiffened requirement to impose sanctions on any FFI that knowingly facilitates a significant financial transaction for any SDN

CAATSA / Guidances / Lists (*cont'd*)

- per CAATSA section 231 (and see Oct. 2017 State Dep't List and Guidance), *US or non-US* companies and individuals that knowingly engage in a significant transaction with a Russian defense / intelligence sector entity on this List of Specified Persons
 - ❖ see the List, expanded as of 19 Dec. 2018 (see slides [31](#) and [39](#)) – and again note that a company's appearance on it doesn't itself mean any new sanction against it ... (but some are already SDNs or SSIs – *e.g.*, *Rosoboronexport*, which was on the list, has since been made an SDN)
 - ❖ these include some defense-sector companies that also have important civilian-oriented production (*e.g.* Sukhoi, Tupolev, and holding companies United Aircraft, United Shipbuilding)
 - ❖ but the State Dep't Guidance (in FAQ) stresses that:
 - ✓ for now at least, purely civilian end-use / end-user transactions, and not involving intelligence sector, are not likely to be considered “significant”
 - ✓ and that transactions with FSB (which is also on the List) are unlikely to be considered “significant” if necessary to comply with FSB rules or law enforcement / admin. actions / investigations involving FSB re import / distribution / use of IT products in Russia and payment of related processing fees to FSB (*i.e.*, this dovetails with OFAC General License No. 1 of 2 Feb. 2017 – see slide [34](#) above)
 - ❖ and from a State Dep't 20 Sept. 2018 release it appears that only the actual listed companies and not necessarily their subsidiaries are covered (at least yet)
- per CAATSA section 233 (and see 31 Oct. 2017 OFAC Guidance), *US or non-US* cos. and individuals that with actual knowledge make or facilitate investments into privatization of Russian state-owned companies (of \$10M, or combination \$1M+ bites for \$10M total in a year) where the process “unjustly benefits” RFG officials or their close associates / family (this may well be hard to assess) – *this is also one of the CAATSA sections covered in 20 Sept. 2018 EO (see slide [48](#))*

CAATSA / Guidances / Lists (*cont'd*)

- Per CAATSA section 232 (and see 31 Oct. 2017 State Dep't Guidance), creating *discretionary* power for the President, *in coordination with US allies*, to impose various possible sanctions on US or non-US companies or individuals that knowingly invest or are otherwise involved substantially in construction (or modernization, repair) of *energy export pipelines* by Russia – *namely*:
 - make an investment that directly and significantly contributes to Russia's ability to construct energy export pipelines, or
 - sell, lease or provide to Russia, for such construction purpose, goods, services, technology, information or support that could directly and significantly facilitate the maintenance or expansion of the construction, modernization or repair of Russian energy export pipelines
 - if any of the above has fair market value of >\$1 million, or an aggregate fair market value of >\$5 million during any 12-month period
 - and consider these further points and developments re CAATSA section 232:
 - ❖ the State Dep't Guidance repeats the statutory wording re this sanction being “discretionary” and the importance of coordination with allies (and also notes intent to “avoid harming the energy security of our allies”)
 - ❖ and despite the separate CAATSA statement of US policy “to continue to oppose the Nordstream 2 pipeline” (see section 257(a)(9)), there has been no enforcement action against Nordstream yet (despite its finance/construction progress)
 - ❖ further notes on the Guidance: the section 232 sanction focus is to be on investments/projects initiated on/after 2 Aug. 2017
 - ✓ and “a project is considered to have been initiated when a contract for the project is signed”
 - ✓ further Guidance statement that investments / loan agreements made before 2 Aug. 2017 wouldn't be subject to section 232 sanctions
 - ✓ and this: section 232 wouldn't target investments / other activities related to standard maintenance of pre-existing pipelines
 - ❖ the ongoing/sharpening Trump Administration negative warnings and Congressional rumbblings against Nordstream 2 including a July 2018 [draft law](#) and Dec. 2018 House and Senate reductions (see slide 7 above) –and section 232 was included as one of the four CAATSA sections covered by new EO 13849 of 20 Sept. 2018 ... which might be a signal of some possible application of sanctions – to be watched
 - ❖ and now even a Dec. 2018 European Parliament resolution (and some rising German political sentiment) against it
 - ❖ *thus* very hard to predict possible future US actions (and further European developments) on this front
 - important Guidance clarification: section 232 covers only energy export pipelines that originate in Russia, and *not* those originating outside and transiting through Russia – *thus, safe harbor for the CPC pipeline* (but not gas lines from Central Asia?)

CAATSA / Guidances / Lists (*cont'd*)

- Thus (in addition to the potential new sanctions against US persons for certain conduct), CAATSA has introduced a range of possible “secondary sanctions” (*i.e.*, aimed at non-US persons)
 - whether or not there is any US person / US nexus
 - but OFAC’s Oct. 2017 CAATSA Guidance reflects recognition that it would be inappropriate to penalize any / all foreigners’ activities – *i.e.*, various possible dealings with SSIs (as opposed to SDNs) that aren’t prohibited for a US person
 - for example
 - ❖ per OFAC’s section 226 Guidance, FFIs are not to be subject to sanctions solely on basis of knowingly facilitating significant financial transactions on behalf of an SSI listed under Directives 1-4
 - ❖ and per OFAC’s section 228 Guidance (appearing as FAQs [544-546](#)):
 - ✓ a transaction isn’t “significant” if US persons wouldn’t need a specific OFAC license to participate in it
 - ✓ and if involves only an SSI entity there must also be a deceptive practice (attempt to obscure, conceal, evade) to be considered “significant”
 - ✓ and even if an SSI entity is involved, and also involves deceptive practices, it is still not automatically “significant” – rather, totality of circumstances (bearing in mind the below-specified factors) are considered
 - *but, caveat re the above and below references to US gov’t agency “guidances” or FAQs:*
 - ❖ *they may be changed without notice*
 - ❖ *and in any event are not alone dispositive or otherwise sufficient to pursue a particular course of action, without specific agency authorization and/or targeted professional advice*

CAATSA / Guidances / Lists (*cont'd*)

- what is a “significant” transaction (in “totality of the facts and circumstances”)?
 - ❖ in the State Dep't and OFAC Guidances, there are slightly differing elaborations of the “totality of facts and circumstances” factors taken into account, in view of the differing focuses of the specific CAATSA provisions at issue – but basic similarity
 - ❖ the State Dep't Guidance on section 231 implementation (re transactions with LSP-listed Russian defense / intelligence entities) highlights
 - ✓ relation to / significance of US national security and foreign policy interests, and significance of defense / intelligence nature
 - ✓ versus goods / services for purely civilian end-use / end-user weighing heavily against determination of significance
 - ✓ and also notes that unity with allied countries will be taken into account as a factor ... even with regard to such countries' purchase of Russian military equipment (from entities on the CAATSA section 231 List)
 - ✓ and see elaboration on this in State Dept's release and press conf. transcript of 20 Sept. 2018 (see slide [48](#) for links)
 - ❖ the State Dep't Guidance on section 225 (re investments into certain Russian oil projects) notes, among relevant factors, “the relation and significance of the investment to the Russian energy sector”
 - ❖ the OFAC Guidances on sections 226 (re certain energy or defense-related activities etc.) and 228 (facilitating significant transactions for any sanctioned entity etc.) set out several factors
 - ✓ keying on size, number, frequency, nature, management's level of awareness / whether part of pattern of conduct / nexus with blocked person (for FFIs' financial transactions) / impact on statutory objectives / whether involves deceptive practices
 - ✓ and other factors deemed relevant on case-by-case basis

CAATSA / Guidances / Lists (*cont'd*)

- CAATSA section 241 Report and Lists:
 - US Treasury Dep't in January 2018 issued its required Report to Congress (per CAATSA sec. 241) re Russia's senior political figures, oligarchs and parastatal entities
 - Comprising an [unclassified main report](#) with list-appendices, and a classified annex
 - This Report was not a sanctions list (as stated in the Report itself, and in OFAC's accompanying FAQ [552](#) of 30 Jan. 2018, and in CAATSA sec. 241 itself)
 - inclusion of individuals or entities "does not and in no way should be interpreted to impose sanctions on those individuals or entities"
 - or to "constitute the determination by any agency that any of those individuals or entities meet the criteria for designation under any sanctions program"
 - or to "in and of itself, imply, give rise to, or create any other restrictions, prohibitions, or limitations on dealing with such persons by either US or foreign persons"
 - or to "indicate that the US Government has information about the individual's involvement in malign activities"
 - The unclassified part
 - listed 114 senior political figures – in the Presidential Administration, Cabinet of Ministers, and "other senior political leaders" (including the CEOs of many of Russia's largest majority state-owned companies such as Messrs. Miller, Sechin, Gref, Kostin and Chemezov – *some of whom were already or have since become SDNs*)
 - and 96 "oligarchs" – Russian individuals having a net worth estimated at \$1 billion (apparently just taken from the Forbes list, set out in alphabetical order ... *a few having since become SDNs – see slide [27](#) above*)

CAATSA / Guidances / Lists (*cont'd*)

- The classified annex (submitted only to Congress) apparently featured
 - a list of Russia's "parastatal entities" (companies having $\geq 25\%$ state ownership and 2016 revenues of $> \$2$ billion – see such a [list](#), in Russian, created / published by the *Kommersant* daily newspaper on 30 Jan. 2018), an assessment of their role in the Russian economy, etc.
 - the oligarchs' (apparently including some not included on the unclassified list of 96) "closeness to the Russian regime" and sources of income, location of assets, etc.
 - an overview of key US economic sectors' exposure to Russian persons and entities
 - an analysis of possible impact of additional sanctions on these persons / entities
- Mixed messages from Trump Administration upon release of those Jan. 2018 Report / Lists
- But the 6 April 2018 SDN individuals designations came from among those on the Jan. 2018 List (and there are now some threats of more to come, including per the proposed DASKA Act) – thus starkly eroding the initial Jan. 2018 words of comfort
- And second-half 2018 public news reports and further private sense
 - that leading oligarchs (such as Mr. Abramovich are restructuring holdings – e.g., his in Evraz) to reduce potential sanctions exposure
 - a number of state / "parastatal" companies are making preparations on the possibility of further sanctions imposition
- *Bottom-line note: companies considering dealing with any individuals or entities on these lists should have in mind the additional risks / due diligence concerns raised, and proceed with appropriate caution*
- And companion January 2018 report to Congress on the Effects of Expanding Sanctions to include Russian Sovereign Debt and Derivative Products (per CAATSA sec. 242)
 - Had an [unclassified main text](#); not clear if it also had a classified annex
 - Did not recommend in favor of such sanctions expansion (given the effects this would have on the US and European, as well as the Russian, financial markets)
 - *But note that proposed new DASKA Act contemplates sanctions re Russian sovereign debt (see slide [54](#)), and second-stage CBW Act sanctions might include bar on new US bank loans / credits to the Russian gov't (see slide [53](#))*

CAATSA / Guidances / Lists (*cont'd*)

- [Executive Order 13849](#) of 20 Sept. 2018 – re implementation of certain CAATSA sections
 - Its detailed provisions, in four main sections, essentially authorize / amplify / guide implementation by State Dep't and Treasury Dep't (the two agencies that share most CAATSA application/enforcement authority), for cases where the President has determined to impose sanctions under four specific CAATSA sections
 - The CAATSA sanctions sections singled out here are
 - section 224(a) – re Russian activities undermining cyber-security (see slide [41](#))
 - section 231(a) – re transactions with the Russian defense/intelligence sectors (see slide [42](#))
 - section 232(a) – re development of Russian energy export pipelines (see slide [43](#))
 - section 233(a) – re investment in or facilitation of Russian privatizations (see slide [42](#))
 - Note that the sanctions authorized under all four of these CAATSA sections are imposable against both US persons (primary sanctions) and foreign persons (secondary sanctions)
 - And see related OFAC FAQ [627](#) of 20 Sept. 2018 on this
 - Selection of these four CAATSA sections: some insights; questions remain
 - thus far, flowing from this EO the Trump Administration has imposed only new section 231 defense-related sanctions – against a Chinese state military enterprise and its director (see slide [32](#))
 - the present focus on section 231 enforcement is shown in the 20 Sept. 2018 [State Dep't release](#) and a related public release – and further emphasized in State's background briefing of same date (see the [Transcript](#))
 - not yet clear why the specific other three CAATSA sections (re cyber, export pipelines and privatization – see above) were included – but there has been no CAATSA enforcement to date re pipelines (despite mounting US threats and even European concerns re Nordstream 2 – see slide [43](#)) or re privatizations
 - note that there *have been* some CAATSA section 224 (cyber-related) SDN designations (see slide [32](#)) – against Russian and other non-US entities and individuals

CAATSA / Guidances / Lists (*cont'd*)

- Some further CAATSA interpretative / application points
 - *Important issue:* whether all these tightened and new anti-Russia secondary sanctions may be imposed against *Russian* as well as other non-US companies / individuals
 - by the technical CAATSA wording, yes – though such imposition against “target-country” persons isn’t traditional in US sanctions practice
 - and the fact of only CAATSA section 226 (amending UFGA section 5) being expressly aimed at “*Russian and other foreign financial institutions*” (emphasis added) might be taken as another sign that otherwise Russian entities/individuals are not intended to be caught – *i.e.*, that they are and can continue to be more easily targeted by existing/future primary sanctions as SDNs or SSIs
 - *but in fact in 2018 a number of Russian companies and individuals have been SDN-designated for cyber-related activities under CAATSA section 224 (and we suppose that some Russian companies / individuals already put on the section 231 LSP List, or others, might be vulnerable to same); and there can be no guarantee that this trend may not spread to targeting Russian companies / individuals under other CAATSA sections too*
 - In any event, here again the mere possibility / threat of such application against otherwise non-sanctioned or at least non-SDN Russian companies / banks may now make them (and apparently already is making them) pause before doing any possible sanctions-targeted business with sanctioned or possibly sanctioned Russian companies (especially with SDNs) under any of the CAATSA provisions – *and see OFAC’s 6 April 2018 press release specific reminder in this regard*
 - And non-Russian companies / banks are becoming more cautious about doing any such business with Russian companies (whether sanction targets or not) in general ... *all the more so with the 6 April 2018 SDN designations (core-economy oligarchs / their companies) and newer US actions*
 - Note: there is still an exemption for Russian suppliers for NASA or DoD space launches
 - *And note the Russian counter-measures enacted and pending in response to CAATSA and the 6 April 2018 SDN designations (see slides [69-72](#) below) – and more to come?*

CAATSA / Guidances / Lists (*cont'd*)

- CAATSA – Potential penalties (same as for OFAC / BIS regs. violations – based on underlying laws)
 - Civil: just over \$295,000 (per most recent inflation adjustment) *per violation*, or up to twice the value of the transaction that was the basis for violation
 - Criminal: up to \$1 million per violation, and individuals could be imprisoned (for up to 20 years) for criminal violations
 - These being in addition to the CAATSA-referenced menus of potential sanctions themselves – for non-US persons, involving various penalties re business in / with the US (and which can also include some possible penalties against CEOs / other officers of a sanctioned company)
- Possible consultation with US authorities
 - US, allied-nation and other companies have been seeking private clarifications from State and Treasury Departments re the possible CAATSA application to their Russian dealings
 - For example, note the reported approach to / blessing from State Dep't re a major non-US energy company's participation in Russia deepwater drilling in 2017 (and similar re Russian unconventional resource project participation)
 - And India might receive a specific waiver to protect it from CAATSA section 231 sanctions in connection with a major pending arms purchase from Russia, under a special new US defense law provision amending CAATSA to allow this (*contrast with treatment of China – see slide 32*)
 - But we suppose most Russian companies are hesitant to do seek such (except for already-designated SDNs applying for delisting etc. – *including En+ , RUSAL and etc. now ... see slide 5*)

The CBW Act

- CBW Act. Further US sanctions imposed against Russia in Aug. 2018, and some more were supposed to be imposed within a few months (*but none yet, as of late Dec. 2018 – see slide 6*)
 - Under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (the “CBW Act”) and related EO 12851 of 11 June 1993
 - First announced by State Dep't Determination published in [Federal Register](#) on 27 Aug. 2018
 - Triggered by finding that the Russian gov't was responsible for the Skripal poisoning by Novichok in England in March 2018 (which Russia continues to deny)
 - The first tranche of these new sanctions went into effect immediately in Aug. 2018 – with certain exceptions/waivers (per State Dep't finding that such are essential to US national security interests) – *namely*:
 - a ban on foreign assistance, arms sales and related financing (with exception granted for gov't space cooperation and commercial space launches), and denial of US gov't credit/guarantees/other financial assistance
 - and a ban on exports/re-exports of national security-sensitive goods and technology to Russia
 - ❖ these being items designated as “NS 1” or “NS 2” on the [Commerce Control List](#) (“CCL”), all of which previously have been exportable with license for Russia
 - ❖ there are many such items – spanning the whole CCL: nuclear materials, facilities and equipment; special materials, equipment, chemicals, microorganisms, toxins etc.; materials processing; electronics; computers; technology and information security; sensors and lasers; navigation and avionics; marine; and aerospace / propulsion

The CBW Act (*cont'd*)

- *But at the same time these exceptions/waivers* from the new ban on national security goods/technology were also stated:
 - items eligible for several standard License Exceptions will remain so (i.e., no license application needed)
 - safety-of-flight items (for civil passenger aviation) – licensing is still permitted on case-by-case basis
 - “deemed exports/re-exports” to Russian nationals in the US – licensing permitted on case-by-case basis unless otherwise prohibited
 - to wholly-owned US subsidiaries in Russia – on same basis
 - in support of gov’t space cooperation and common space launches – on same basis
 - to commercial end-users (for civil end-uses) – on same basis
 - for state-owned/-funded enterprises – case-by-case licensing, but subject to presumption of denial
- The law provides for a rebuttable presumption against retroactive application to contracts already entered into prior to 27 Aug. 2018 (*companies have to approach this with caution*)
- These measures are to be elaborated by follow-on Commerce Dep’t (BIS) and OFAC rules/designations, per respective/overlapping jurisdictions (but none yet)
- And they are to remain in place for at least a year and until further notice

The CBW Act (*cont'd*)

- Per the CBW Act, if Russia hasn't met the following three conditions by 90 days after the initial determination (so, in Nov. 2018), as certified by the President to Congress:
 - ... that the RF gov't (i) is no longer using chemical / biological weapons etc.; (ii) has provided reliable assurances that it won't do so in future; and (iii) is willing to allow relevant on-site inspections by UN or other internationally recognized impartial observers etc. to confirm same
- As it is now clear can't be certified (indeed, the State Dep't on 6 Nov. 2018 notified Congress that Russia ignored the deadline)
- Then the President (in consultation with Congress) "shall impose" at least three of the following six possible further sanctions:
 - opposing loans/assistance from multilateral development banks (e.g., World Bank, IFC)
 - ban on US banks making almost any loan or providing any credit to the RF Gov't
 - additional restrictions on exports of goods or technologies to Russia
 - restrictions on the imports into the US of articles (which may include petroleum or any petroleum products) produced in Russia
 - downgrading or suspension of diplomatic relations
 - ban on air carriers owned or controlled (directly or indirectly) by the RF Gov't from flying to or from the US
- But, no such second-tranche sanctions have been chosen/imposed yet
 - per the CBW Act wording, no time limit is given for the Presidents' consultation with Congress etc. before he chooses/imposes the second tranche of sanctions
 - and, if/when they are eventually imposed, additional waivers and/or exceptions could be granted by the President (on national security grounds or per other express legal authority for waivers)

Proposed Further US Laws

- [Proposed DASKA Act](#) (or DASKAA – Defending American Security from Kremlin Aggression Act of 2018): This is draft additional US legislation that would further severely broaden/tighten the sanctions against Russia – amending / building on CAATSA (see slides [37-50](#))
 - Introduced in Senate in August 2018, with apparent strong bipartisan support (as CAATSA had)
 - hearings then went forward, with leading witnesses advocating need to further strengthen sanctions as punishment and/or deterrent against Russia (while also proposing some tactical narrower targeting of same)
 - *key point: per this DASKAA bill, if enacted the envisioned new/broader sanctions (see immediately below) are to be imposed by the President without any new-election-interference trigger requirement*
 - Main procedural approach: would further expand on several of the CAATSA-established sanctions of last year – with particular focus on (i) oligarchs and political figures and their families, (ii) the energy sector, (iii) the finance sector (including sovereign debt) and (iv) the cyber sector
 - Brief summary of main points (the sanctions portion of the much longer overall act)
 - new CAATSA section 235 – re “transactions with certain Russia political figures and oligarchs”
 - new CAATSA section 236 – re “transactions related to investments in energy projects supported by Russian state-owned or parastatal entities outside [Russia]”
 - new CAATSA section 237 – re “support for the development of crude oil resources in [Russia]”
 - new CAATSA section 238 – re “transactions relating to new sovereign debt of [Russia]” (and would require President to designate as SDN “one or more of” Russia’s state-owned / controlled banks)
 - new CAATSA section 239 – re “transactions with the cyber sector of [Russia]”
 - The menus of specific possible sanctions set out in CAATSA are made applicable here
 - See the [link](#) to the relevant Title VI of DASKAA for details

Proposed Further US Laws (*cont'd*)

- [Proposed DETER Act](#) (Defending Elections from Threats by Establishing Redlines Act – draft bill of Jan. 2018)
 - This is an earlier-presented Senate initiative
 - Would essentially impose SDN status on the Russian banks and energy companies (mostly state-owned) that are currently SSIs (see slides [13-18](#)), and other serious measures, as punishment in event of future election interference
 - Thus, unlike DASKAA, would require more/future election interference to be triggered
- And there were various other proposed new acts introduced into the House of Representatives in 2018 (none proceeded for consideration)
- *Again, none of the above proposed new acts has been passed by Congress yet, and their further fate is unclear (Congress in new Jan. 2019 session might choose to move this forward, or to take a different approach in light of most recent int'l events and other factors?)*

EU Sectoral Sanctions

Overview

- The EU sanctions regime (in Council Reg. No 833/2014 of 31 July 2014, most recently amended by Reg. No. 2017/2212 of 30 Nov. 2017) focuses on financial, energy, and dual-use / military sectors
 - Recently extended again; now in effect to 31 July 2019
 - Was fairly well coordinated with the US regime ... but no longer, with CAATSA / newest SDNs etc.
 - *E.g.*: no sanctions on anything re gas-focused projects (given Europe's dependence on Russian gas supplies) ... and maybe not interpreted to cover condensate (see slide [17](#) above)?
 - And no sanctions on any oil & gas projects with Russian participation outside Russia (or on Russian energy export pipelines)
 - And guidance notice exempting mere correspondent banking (payment / settlement services) from the loan / credit bans – thus seems more lenient than analogous US rule / interpretation
 - *And, unlike the US, no broad-reach blacklisting into leading commercial entities (like RUSAL, En+, Basic Element, Renova and their owners, CEOs of leading state-owned companies, etc.)*
 - And there is nothing like the US new CBW Act application to Russia (even though triggered by event in UK)
- Much easier to grasp the basic EU rules than the US ones (and all the more so now, with the newest US acts) – essentially all in one document's four corners
- *But the devil (?) is in the diversity:*
 - Each member state competent authority interprets, authorizes (where called for) or denies, enforces, and sets / imposes its own penalties
 - Unlike the US ... where this is all a uniform, federal-level matter
 - Though some coordination / consistency is called for in the Regulation
 - And see EU Commission [Guidance Note](#) of 16 Dec. 2014 (as amended most recently 25 Aug. 2017) – FAQs
- And now keep in mind Brexit – and thus possible future independent UK sanctions/rules/politics

EU Sectoral Sanctions (*cont'd*)

Energy

- Per the initial July 2014 energy-sector sanctions / authorization regime (Reg. art. 3):
 - Prior authorization is required for sale, supply, transfer or export, directly or indirectly, of the items *listed in Annex II*
 - to any person or entity in Russia or elsewhere
 - if for use in Russia (clarified to include its EEZ and Continental Shelf)
 - note that some of the Annex II item descriptions were refined / narrowed by late 2014 amendment
 - Authorization is to be considered / granted by competent authority "*of the member state where the exporter is established*", per some general EU rules

EU Sectoral Sanctions (*cont'd*)

Energy (*cont'd*)

- But authorization shall *not* be granted for supply etc. of Annex II items
 - if reasonable grounds to determine that is for Russian oil (including condensate?) E&P projects:
 - ❖ in waters deeper than 150 meters (circa 492 feet)
 - ❖ in offshore areas north of the Arctic Circle
 - ❖ in shale formations by way of hydraulic fracturing (but not including E&P activities *through* shale formations to locate/extract oil from non-shale reservoirs)
 - *except for*
 - ❖ execution of obligation arising from contract concluded before 1 Aug. 2014 – or, per Dec. 2014 liberalization, from “ancillary contracts necessary for the execution of such contracts”, or
 - ❖ items necessary in case of certain events threatening health, safety or environment
 - in fact, there have been many such license applications / approvals to date (for European and US companies, and EU subsidiaries / JVs of Russian energy companies)
 - and further note – EU has not followed US CAATSA / OFAC Directive 4 expansion of coverage to any such project worldwide having $\geq 33\%$ ownership or $> 50\%$ voting interest by designated Russian company(ies)

EU Sectoral Sanctions (*cont'd*)

Energy (*cont'd*)

- Restricted activities include (per Reg. art. 3a, as amended Dec. 2014):
 - Provision, directly or indirectly, of specified types of “associated services necessary for” deepwater, Arctic offshore, shale oil E&P projects (same litany-detail as for art. 3 – see slide [57](#) above) in Russia including in its EEZ and Continental Shelf:
 - these specified types of services:
 - *drilling*
 - *well testing*
 - *logging*
 - *completion services*
 - *supply of specialised floating vessels**

[* Note: EU Guidance Note FAQ 10 exempts “supply vessels such as platform supply vessels, anchor handling tug and supply vessels or emergency response vessels”]

- and the same exceptions apply for
 - ❖ execution of an obligation arising from a prior (pre-12 Sept. 2014) contract / agreement or follow-on ancillary contracts, or
 - ❖ services necessary in case of certain events threatening health, safety or environment
- *again, otherwise apparently no scope for authorization here – rather, a pure prohibition for / to all (if neither of the above two carve-outs applies)*

EU Sectoral Sanctions (*cont'd*)

Energy (*cont'd*)

- Also, provision of the following services related to any Annex II items *needs authorization* from national competent authority (per art. 4.3 – existing since the initial July 2014 version of the Reg., and as refined by the Dec. 2014 amendment):
 - Technical assistance (or brokering services) re Annex II items and re provision, manufacture, maintenance and use of those items directly or indirectly
 - to anyone in Russia (including its EEZ and Shelf)
 - or to anyone in any other country if concerns items for use in Russia (including EEZ / Shelf)
 - Financing or financial assistance re Annex II items – including grants, loans and export credit insurance
 - for any sale, supply, transfer or export of those items
 - or for any provision of related technical assistance
 - also (as above for technical assistance) directly or indirectly to anyone in Russia (including its EEZ / Shelf) or to anyone in another country for use in Russia (including its EEZ / Shelf)
 - Per art. 4.4, authorizations may be granted on same basis as set out in art. 3 (and possible emergency services, with prompt post-reporting – per arts. 4.3 and 3.5)

EU Sectoral Sanctions (*cont'd*)

Finance – for Energy (and Military) Sector Companies

- Prohibits (per Reg. art. 5.2) direct or indirect purchase or sale of, provision of investment services for or assistance in issuance of, or other dealings with, certain debt or equity “transferable securities” (and money-market instruments) issued after 12 Sept. 2014 by
 - *Rosneft, Transneft, Gazpromneft* (the three currently designated entities engaged in “sale or transportation of crude oil or petroleum products” (... not including *Novatek*) – per Annex VI), their non-EU subs (>50% owned), or persons or entities acting at their behalf / direction
 - Applies to debt securities, including money market instruments, with maturity >30 days (note OFAC Directive 2 now is = 60 days max.)
 - And note the relevant “transferable securities” definition – “... which are negotiable on the capital market” (some uncertainty re equity investment in LLC-type cos. is covered ... but can’t confidently rely on this)
 - And see EU Guidance Note FAQ 36 allowing modifications to transferable securities depending on materiality – *i.e.*, if would not “actually or potentially result in additional capital being made available to a targeted entity”
- Same basic prohibition re the three designated Russian entities connected with military-sector goods / services – including United Aircraft Corp. (per Annex V), with exception for space / nuclear sector entities (and a hydrazine exception)
- And note that the EU rule / interpretation re depositary receipts (GDRs etc.) appears to be stricter than that of the US (compare EU Guidance Note FAQ 37-39 with OFAC FAQ 391)

EU Sectoral Sanctions (*cont'd*)

Finance – for Russian Banks

- Prohibits (per Reg. art. 5.1) purchase or sale of, provision of investment services for or assistance in the issuance of, or other dealings with, “transferable securities” or money-market instruments
 - issued by the 5 Russian banks designated in Annex III (Sberbank, VTB, Gazprombank, VEB, Rosselkhozbank – Russian Agricultural Bank)
 - or their non-EU subs (>50% owned)
 - so, essentially the same coverage as the US OFAC sanctions
 - or persons or entities acting on their behalf or at their direction
- Applies to
 - debt securities issued (i) 2 Aug. - 12 Sept. 2014, with maturity >90 days; and (ii) after 12 Sept. 2014, with maturity ≥30 days (*note OFAC Directive 1 now is = 14 days max.*)
 - and to equity securities issued after 12 Sept. 2014
- See EU Guidance Note FAQs 32-34, addressing what EU subs of targeted Russian bank entities can / can't do (including warning re passing on funds = circumvention)

EU Sectoral Sanctions (*cont'd*)

Loans – for Energy (and Military) Sector Companies and Banks

- Prohibits (per Reg. art. 5.3) directly or indirectly making or being “part of any arrangement to make” new loans / credits with maturity >30 days after 12 Sept. 2014 to any entity covered under the previous two slides – namely
 - the three Russian energy-sector companies (per Annex VI)
 - the five Russian banks (per Annex III)
 - the three Russian military-sector companies (per Annex V)
 - or their non-EU subs, or persons acting on their behalf or at their direction
- And see EU Guidance Note, FAQ 31
 - rollover of an existing debt is allowed, subject to 30-day maturity restriction
 - but succession of rollovers each with maturity of ≤ 30 days may = circumvention

EU Sectoral Sanctions (*cont'd*)

Loans – for Energy (and Military) Sector Companies and Banks (*cont'd*)

- Certain carve-outs provided (per Reg. art. 5.3, amended as of Dec. 2014)
 - *Trade finance exemption*: for “loans or credit having a specific / documented objective to provide financing for non-prohibited imports or exports of goods and non-financial services between the [EU] and any third State” (intended for use by targeted entity)
 - *But not* for purpose of *funding* any such entity (see art. 12)
 - Practical approach to the interplay here: compliant vs. circumvention? (see Reg. art. 12)
 - And see EU Guidance Note FAQ 11: this exception “should be interpreted narrowly” (but also FAQs 11-21 clarifications)
- And note these further EU Guidance Note FAQ clarifications
 - Post-Sept. 2014 cancellation of a pre-Sept. 2014 loan = prohibited new loan (FAQ 20)
 - A new term deposit at a targeted bank isn’t barred (but see FAQ 27 re circumvention)
 - Correspondent banking (or other payment / settlement services) is in itself ≠ making or being part of arrangement to make new loan or credit (FAQ 28, and see FAQs 1 and 2) – *contrast this with the US/OFAC position, see slide [14](#)*
 - Payment terms / delayed payment for goods / services ≠ prohibited loan/credit (but warning that may suggest circumvention if
 - “not in line with normal business practice”, or
 - “have been substantially extended” since 12 Sept. 2014 (FAQ 30)
- Some forms of prepayment finance are permissible

EU Sectoral Sanctions (*cont'd*)

Loans – for Energy (and Military) Sector Companies and Banks (*cont'd*)

- And note art. 5.4 (introduced by Dec. 2014 clarific.) – carving out from the general prohibition *new drawdowns / disbursements under pre-12 Sept. loan / credit contracts*
 - If
 - “all the terms and conditions” of such were agreed pre-12 Sept. 2014 and haven’t been modified since then; and
 - before 12 Sept. 2014 “a contractual maturity date has been fixed for the repayment in full of all funds made available ...”
 - Possible issues re
 - whether “all” terms and conditions really mean *all* (ref. FAQ 30 by analogy?)
 - treatment of typical carry-type loans – re the “repayment in full” aspect (in case no commercial discovery)
- Again, see the various EU Guidance Note FAQ clarifications
- Note – here again, there have been many such license applications / approvals to date (experience varying by member state)
- Also note a UK law granting power to impose fine of £1 million or 50% of transaction value, for EU financial sanctions breaches as of 1 April 2017

EU Sectoral Sanctions (*cont'd*)

Important Overarching Provisions

- The Reg. also bans knowing and intentional participation in activities having object or effect of circumventing the above prohibitions (Reg. art. 12)
- But, per art. 10, no liability without knowledge or reasonable cause to suspect that actions would violate
- Jurisdictional reach – the Reg. applies (art. 13 + see EU Guidance Note FAQ 8):
 - Within EU territory (or on board aircraft / vessels under member state jurisdiction)
 - To any person, wherever located, who is an EU member state national
 - To any entity, wherever acting, that is incorporated in an EU member state
 - To any entity “in respect of any business done in whole or in part within the Union”
- *Note the distinctions between US / EU regs. overall reach – especially now with CAATSA*
- And the “no claims ... shall be satisfied” provision but without prejudice to “judicial review of the legality of the non-performance of contractual obligations in accordance with this Regulation” (Reg. art. 11) – interesting for lawyers
- And note the 13 Sept. 2018 EU General Court decisions upholding the sectoral sanctions against challenges by Rosneft, Gazpromneft, Sberbank, VTB, VEB and others
 - Finally rejecting challenges brought some years ago by Rosneft, Gazprom Neft, Sberbank, VTB, VEB and others
 - See the Court’s [Press Release](#), which gives the various case judgment numbers for those interested in reviewing them (other than some tightening of money-laundering enforcement and visa regime for Russians, etc.)

EU Crimea Sanctions

- Reg. No. 692/2014 as amended
 - Bars sale, supply, transfer, export of goods and technology (per an Annex II) to any Crimean entity or individual or for use there
 - Covers oil & gas / other mineral resources and E&P, transport, telecoms, power sectors
 - And further general ban on financing, corporate acquisitions, JVs, investment in real estate, construction / engineering services, investment services, tourism services
- And see EU [Information Note](#) to EU Business Operating and / or Investing in Crimea / Sevastopol (Joint Working Doc. SWD/2014) of July 2014
 - As amended August 2014, June 2015 and most recently Jan. 2018
 - Gives updated summary of restrictions now in effect for EU-connected commercial activity there (though no real interpretive guidance)
- And EU's Sept. 2017 "blacklist" Reg. amendment to allow member state authorities to permit certain types of payments to Crimean Sea Ports
- Note the still-reverberating 2017 scandal re Siemens gas turbines that found their way to Crimea (evidently without the company's knowledge and despite its compliance program / efforts)
- And NL-based Booking.com's July 2018 announcement of discontinuing tourist booking services for Crimea
- Nothing further (at least yet) following the recent Russia-Ukraine Black Sea naval incident

EU Direct Sanctions (SDN-like)

- The EU's SDN-like "blacklist" Reg. No. 269/2014 of 17 March 2014, and with updates
- And more names have been added in several update regs. to date
- Individuals and entities, including those added
 - in 2017 per the Siemens turbines affair
 - and most recently in July 2018, in connection with construction of Kerch Bridge (to Crimea)
- All dealings with the blocked assets of listed persons (or their subs or certain other affiliates) etc. are generally prohibited
- Currently in effect to 15 March 2019 (extended as of 13 Sept. 2018)
- Note a published [joint article](#) of 17 June 2015 by ICC, LCIA and SCC on "The potential impact of the EU sanctions against Russian on international arbitration administered by EU-based institutions"
 - Seeks to reassure Russian parties
 - Notes availability of exemption for payment of legal fees and related expenses
 - But in fact some Russian state-owned companies have been shifting preference from LCIA or ICC to Singapore or Hong Kong arbitration (and corresponding choice of law)

Russia's Countersanctions

- Russia enacted in June 2018 a “Law on Countermeasures against Unfriendly Actions of the United States of America and/or Other Foreign Governments”, (full text is [here](#), unofficial English translation available on request), which provides essentially as follows:
 - Basic thrust is not to impose automatically – but rather to authorize the President or the Government to institute – various countermeasures (bans on import of goods / work / services, export bans, etc.)
 - upon finding of justification in anti-Russia sanctions measures (presumably including already-effective and possible future ones) of the US and other countries that commit unfriendly actions
 - “as well as against organizations located in the jurisdiction of [such countries], directly or indirectly controlled by [such countries] or affiliated with them, officials and citizens of [such countries], in the event such organizations, officials, and citizens are involved in the commission of unfriendly actions” vs. Russia
 - Thus, this Law as enacted may well not have substantial effect on international trade with Russia, unless/until the Western sanctions and/or general political relations worsen further, triggering discretionary Russian executive actions under the Law (which might start happening soon)
 - These specific types of countermeasures are authorized (in most cases seemingly stated to be applicable to unfriendly foreign governments and to organizations located in their jurisdiction that are directly or indirectly controlled by or affiliated with them)
 - in other words, as literally phrased, perhaps narrow application only to companies having state ownership / control etc.)
 - this language uncertainty (see next slide) will have to await authoritative interpretation and/or practice to clarify

Russia's Countersanctions (*cont'd*)

- Here are the countermeasures specifics:
 - termination or suspension of “int’l cooperation” of Russia and Russian legal entities with such countries and organizations, in sectors to be determined by decision of the President
 - prohibition or restriction on import into Russia of products or raw materials that originate from such countries or are produced by such organizations, with a list of such products / raw materials to be determined by the Government – and exceptions provided for (i) goods that are indispensable to life, analogues of which are not produced in Russia (e.g., certain pharmaceuticals), and (ii) goods imported for personal use
 - prohibition or restriction on export from Russia of products or raw materials by such organizations or by citizens of such countries, again with a list of such products / raw materials to be determined by the Government
 - prohibition or restriction on performance of public-procurement-type works / services in Russia for Russian state agencies and certain state-owned legal entities, by such organizations, again with a list of such works / services to be determined by the Government
 - prohibition or restriction on participation by such organizations or by citizens of such countries in Russian privatizations, as well as in performing services on behalf of Russia in connection with such privatizations of federal state property
 - and “other measures” by decision of the President (of course, this “catch-all” provision could be the basis for enactment of possible additional countermeasures, if sanctions-related tensions deteriorate further)

Russia's Countersanctions (*cont'd*)

- There are these additional closing provisions of note:
 - the countermeasures provided in the Law are to be introduced (and removed) by the Government by decision of the President – or by the President on the basis of proposal by the Security Council
 - the President may introduce a special “national regime” (or exceptions from it) with respect to goods and services originating from unfriendly countries if such countries introduce same for Russian goods and services
- And there is another proposed new set of Russian law amendments – a sort of blocking statute – that would, as seems to have evolved helpfully (but there can be no certainty here, given ongoing political tensions) per lively Russian business community opposition to an initial together draft bill, impose
 - Substantial administrative fines on any (foreign or local) person or company in Russia for compliance with US sanctions, and
 - Criminal liability on any Russian citizen who by willful action facilitates the imposition of such anti-Russian sanctions
- Further in brief summary as follows:
 - The administrative violation part would be aimed at acts or omissions, for the purpose of implementing / complying with foreign sanctions, resulting in limitation or refusal of the ability of Russian citizens, companies and state entities (and their subsidiaries anywhere) to conduct “ordinary business operations or transactions”
 - The criminal violation part would be aimed at commission by a Russian citizen of willful actions facilitating the imposition of foreign sanctions against Russian private and public persons and entities and their subsidiaries, including by providing recommendations and transfer of information that led or could have led to the imposition of foreign sanctions. The possible criminal penalties for such a violation could include substantial fine or imprisonment

Russia's Countersanctions (*cont'd*)

- There have been a series of statements from the leading Duma sponsors of this proposed legislation, upon dialogue with Russian business leaders and supported by the President's Administration, accentuating that the proposed administrative violation part (assuming this softened part remains as such if/when the bill is enacted) would be meant to cover
 - only "practically automatic"-type business dealings such as opening bank accounts, or sales that are by law open to any bidders etc.
 - as opposed to more individualized-type dealings such as opening / closing of bank branches (e.g., in Crimea), extending long-term credits, entry into "strategic-type" agreements etc.
- And per most recent press reports, it appears this proposed Russian blocking statute bill may remain altogether dormant for now
- Foreign blocking statutes (such as Russia has been considering) and US law / practice:
 - What would be OFAC's (or a US court's) reaction, if Russia's blocking legislation is enacted in some form, and a company (US, European, Russian, etc.) acts in a way that violates a US sanction (e.g., deals with an SDN individual or entity) on account of the new Russian-law mandate not to reject such dealings?
 - This is a complex subject in itself, which can't be quickly summarized. Suffice it to say here that
 - OFAC might take such claimed foreign-law mandate into account as one mitigating factor in an enforcement proceeding, but will not be controlled by it
 - the leading US court [decision](#) in the United States v. Brodie case on this subject to date – essentially rejected such a defense raised by a US company
 - and note that the US Congress has legislated a new bilateral-cooperation process (the CLOUD Act)
- Russia has also enacted an SDN-like sanctions [act](#) on 1 Nov. 2018, with specific designations, against Ukraine and further expanded it on 25 Dec. 2018 ([link](#))

QUESTIONS?

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