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# NOTE

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## **PETRO POLITICS: Russian Conduct in the International Oil and Gas Market and the United States' Need for a Strategic Administrative Response**

Adam Curfman\*

*How should the United States respond to Russia's increasingly anti-competitive conduct in the oil and gas market, especially given the Russian military involvement in the crises in Ukraine and Syria and the Russian leadership's increasingly vitriolic anti-Western sentiment? This Article contemplates the potential role of several federal agencies, including the Department of Justice, Federal Trade Commission, and the United States Trade Representative, in the resolution of this issue. It then considers these various agencies' potential restrictions to action, including both jurisdictional limitations and comity concerns. I use the resulting framework to analyze Russia's anticompetitive conduct in the oil and gas industry to comparable issues, like anticompetitive action in the airline industry by foreign carriers and disruptive conduct in the international agriculture sector. Largely due to foreign policy concerns, previous Russian action, and the legal nuances of unilaterally navigating such a global issue, I find that the United States' best opportunity is to pursue action through invoking the procedures of the World Trade Organization's Dispute Settlement Body.*

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## INTRODUCTION

The Cold War officially ended with the collapse of the Soviet Union in 1991. This political standoff, which dominated global politics for the latter half of the 20th Century, separated most countries of the world into two ideologically distinct camps—the United States-led Western Bloc, which promoted free market economies, and the Soviet Union-led Eastern Bloc, which focused on centralized state-planned economies.<sup>1</sup> Aided by Mikhail Gorbachev's reforms,<sup>2</sup> most countries of the Eastern Bloc successfully transitioned to free market economies after renouncing their communist governments. Several of these states, such as Poland, the Czech Republic, Romania, and Hungary, have since become members of the European Union, the largest open market in the world.<sup>3</sup>

Conversely, the Soviet Union's main successor state, the Russian Federation (Russia), has struggled significantly since 1991. Russia's attempts at democratization have largely faltered, as its presidents, most notably Vladimir Putin, have dominated political discourse, and many of its governmental offices are fraught with widespread corruption.<sup>4</sup> Furthermore, Russia's attempts at economic privatization in the 1990s largely floundered. In 1992, GDP fell 15% and inflation rose over 2,000%,<sup>5</sup> and by 1997, the Russian economy had contracted by roughly 50%.<sup>6</sup>

1. See C N Trueman, *What Was the Cold War?*, HIST. LEARNING SITE (May 25, 2015), <http://www.historylearningsite.co.uk/modern-world-history-1918-to-1980/the-cold-war/what-was-the-cold-war/> [https://perma.cc/7QY9-A4JX] (noting that, in addition to economic ideological differences, the Cold War was characterized by international espionage, extreme efforts to eradicate domestic subversion, proxy wars, and proliferation of nuclear arms).

2. Mikhail Gorbachev was the General Secretary of the Communist Party of the Soviet Union from 1985 to 1991 and the President of the Soviet Union from 1990 to 1991. Gorbachev's main reforms include glasnost, which expanded freedoms of expression and the press, and perestroika, which introduced measures to liberalize the economy. *Mikhail Gorbachev*, ENCYC. BRITANNICA, <http://www.britannica.com/biography/Mikhail-Gorbachev> [https://perma.cc/8JSP-PV86].

3. *EU Position in World Trade*, EUR. COMM'N, <http://ec.europa.eu/trade/policy/eu-position-in-world-trade/> [https://perma.cc/AW2S-2C8E].

4. Alexey Timofeychev, *25 Years of Post-Soviet Russia: How Far Has the Country Come?*, RUSS. BEYOND THE HEADLINES (June 12, 2015), [http://rbth.com/society/2015/06/12/25\\_years\\_of\\_post-soviet\\_russia\\_how\\_far\\_has\\_the\\_country\\_come\\_46869.html](http://rbth.com/society/2015/06/12/25_years_of_post-soviet_russia_how_far_has_the_country_come_46869.html) [https://perma.cc/49GT-LZ89].

5. See David Pitt-Watson & Carol S. Leonard, *Privatisation in Russia and Its Continuing Controversies*, EUR. FIN. REV. (June 19, 2014), <http://www.europeanfinancialreview.com/?p=2376> [https://perma.cc/ZGY4-H4QM].

6. F. Joseph Dresen, *The Piratization of Russia: Russian Reform Goes Awry*, WILSON CTR. (July 7, 2011), <https://www.wilsoncenter.org/publication/>

With its precarious economic and political situation, Russia relied on the wealth of its resources, namely its oil and gas deposits, to buttress its economy.<sup>7</sup> Due to the high prices for oil and gas commodities that largely characterized the past fifteen years, Russia enjoyed economic growth and decreased unemployment.<sup>8</sup> Recently, however, the Russian economy has faced mounting pressure due to decreased prices for oil and gas. Russia ran a budget deficit of 2.6% in 2015, and the depreciation of its currency resulted in an inflation rate of 16.9% in early 2015.<sup>9</sup> Furthermore, Russia's concurrent foreign policy has exacerbated its economic problems. International disputes have led to heightened tensions with Western countries and have thus far culminated in Russia's increased isolation from its Western counterparts.<sup>10</sup>

Though this hazardous political situation is reminiscent of the Cold War, the global political power structure has changed drastically, and the United States no longer chooses to respond as it had prior to 1991.<sup>11</sup> The United States now faces a multitude of challenges from non-governmental actors and other governments<sup>12</sup> and no longer mobilizes its military power at any notion of aggression.<sup>13</sup> Therefore, the United States' response must be creative, and its best recourse is to use its vast economic power and natural resources. The United States is now a leading producer of natural gas<sup>14</sup> and will be able to export substantial amounts of gas to Europe within the coming years.<sup>15</sup> Decisionmakers have several possible actions to pursue recourse, such as updating laws passed by Congress, utilizing regulations executed by administrative agencies, or enforcing agreements adopted by multilateral bodies. Administrative action is the

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the-piratization-russia-russian-reform-goes-awry [https://perma.cc/9UVH-EB35].

7. *Russia's Economy*, ECONOMIST (Dec. 22, 2011, 11:53 AM), <http://www.economist.com/blogs/graphicdetail/2011/12/focus-1> [https://perma.cc/9UVH-EB35].

8. *Id.*

9. Anna Andrianova & Dina Khrennikova, *How Cheap Oil Is Squeezing Russia's Economy*, BLOOMBERG BUS. (Jan. 25, 2016, 11:00 PM), <http://www.bloomberg.com/news/articles/2016-01-26/how-cheap-oil-is-squeezing-russia-s-economy> [https://perma.cc/QT88-AUTD].

10. *Id.*

11. See David E. Sanger, *Global Crises Put Obama's Strategy of Caution to the Test*, N.Y. TIMES (Mar. 16, 2014), [http://www.nytimes.com/2014/03/17/world/obamas-policy-is-put-to-the-test-as-crises-challenge-caution.html?\\_r=0](http://www.nytimes.com/2014/03/17/world/obamas-policy-is-put-to-the-test-as-crises-challenge-caution.html?_r=0) [https://perma.cc/QT88-AUTD].

12. See Bryan Walsh, *What's Wrong with U.S. Foreign Policy?*, TIME (May 21, 2015), <http://time.com/3891164/whats-wrong-with-u-s-foreign-policy/> [https://perma.cc/4WBG-EKCK] (expressing many of the United States' foreign and domestic policy concerns).

13. See, e.g., Peter Feaver, *What Really Drives Obama's Military Strategy?*, FOREIGN POL'Y (Jan. 4, 2015, 11:17 AM), <http://foreignpolicy.com/2015/02/04/what-really-drives-obamas-military-strategy/> [https://perma.cc/DX6T-YQVD].

14. Ambrose Evans-Pritchard, *US to Launch Blitz of Gas Exports, Eyes Global Energy Dominance*, TELEGRAPH (Apr. 26, 2015, 8:08 PM), <http://www.telegraph.co.uk/finance/newsbysector/energy/11563761/US-to-launch-blitz-of-gas-exports-eyes-global-energy-dominance.html> [https://perma.cc/7RBQ-NX97].

15. *Id.*

best avenue to navigate this issue, especially since the United States must respond to Russia's increased aggression to protect its consumers, markets, and interests.

Part I of this Article discusses the turbulent past of Russia's oil and gas industries after the collapse of the Soviet Union and how Russia has used the global power of these industries to execute its foreign policy. Part II surveys the available legal options that the United States' antitrust enforcers and trade authorities can pursue in response to Russian actions. Part III analyzes how the United States has reacted to similar, albeit possibly less politically charged, situations in the past, such as deregulating the United States' airline industry and subsidizing certain agricultural producers. Part IV concludes by assessing the benefits and consequences of the possible actions and generally determines that the United States' best option is to pursue action through an international body.

## I. BACKGROUND ON RUSSIA'S OIL AND GAS INDUSTRIES

### A. *Post-Soviet Union Developments*

Russia's oil and natural gas deposits are among the greatest in the world.<sup>16</sup> By the mid-1990s, Russia sold ownership of its exceedingly lucrative oil, gas, and natural resources companies, which had been controlled by the Soviet Union's state ministries, to extremely wealthy private individuals.<sup>17</sup> Because of the lack of enforceable laws and regulation, these individuals dominated the companies' ownership and therefore, Russia's national politics.<sup>18</sup> However, the Soviet Union's emphasis on central planning of the economy has increasingly returned to Russia's governmental activities since the early 2000's.<sup>19</sup> This mindset of increased state presence has dominated Russia's oil and gas industries, as illustrated by the state control of two of Russia's largest energy companies, Gazprom<sup>20</sup> and Rosneft.<sup>21</sup> Gazprom alone owns 50% of Russia's natural gas reserves, all

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16. See *Worldwide Look at Reserves and Production*, OIL & GAS J., Jan. 2014, at 62, 62.

17. Dresen, *supra* note 6.

18. See Masha Gessen, *The Myth of the Russian Oligarchs*, N.Y. TIMES (Dec. 10, 2014), [http://www.nytimes.com/2014/12/11/opinion/masha-gessen-the-myth-of-the-russian-oligarchs.html?\\_r=0](http://www.nytimes.com/2014/12/11/opinion/masha-gessen-the-myth-of-the-russian-oligarchs.html?_r=0) [<https://perma.cc/J8RH-BQ5F>] (explaining that, in the late 1990's, these oligarchs chose Putin and essentially installed him as Russia's President).

19. Max Büge et al., *State-owned Enterprises in the Global Economy: Reason for Concern?*, VOXEU.ORG (May 2, 2013), <http://www.voxeu.org/article/state-owned-enterprises-global-economy-reason-concern> [<https://perma.cc/QLR7-HZ3B>] (finding that in Russia, 81% of top companies are state-owned enterprises, which are defined as direct or indirect state control of over 50.01% of a company's shares).

20. *Shares—Gazprom's Equity Capital*, GAZPROM, <http://www.gazprom.com/investors/stock/> [<https://perma.cc/VC2N-6VYC>] (expressing that Russia, through its Federal Agency for State Property Management and its ownership of Rosneftgaz and Rosgazifikatsiya, controls over 50% of Gazprom's shares).

21. *Shareholder Structure*, ROSNEFT, [http://www.rosneft.com/Investors/structure/share\\_capital/](http://www.rosneft.com/Investors/structure/share_capital/) [<https://perma.cc/ZX3Y-5XAB>] (noting that, while Russia directly

of the main gas processing facilities, a legal export monopoly, and nearly all of the interregional pipeline networks.<sup>22</sup> Export from the oil and gas industries equaled 68% of Russia's total export revenues in 2013.<sup>23</sup> The Russian government thus relies heavily on these industries' production and exports, which finance 50% of Russia's federal budget.<sup>24</sup> Despite the recent decrease in prices in oil and gas commodities,<sup>25</sup> economic reliance on these industries persists, and the Minister of Energy stated that oil exports will increase 7.5% and natural gas exports will increase 4.9%.<sup>26</sup>

### B. *Geopolitics: Russia's Exporting of Energy Policy Objectives*

Notwithstanding the increased production and exports, Russia's economy remains beleaguered, as it continues to contract due to the lower oil and gas prices and the weakening of its currency.<sup>27</sup> Through limiting access to its energy supplies, Russia has exerted its geopolitical power on the energy-dependent European Union, which imported 33.5% and 39% of its oil and natural gas, respectively, from Russia in 2013.<sup>28</sup> This restriction on access has had reciprocal effects on Russia, which delivered nearly 90% of its natural gas exports and more than 70% of its crude oil exports to Europe in 2014.<sup>29</sup>

owns one share, OJSC Rosneftgaz, a company Russia wholly owns, has a 69.50% equity stake in Rosneft).

22. Yuli Grigoryev, *The Russian Gas Industry, Its Legal Structure, and Its Influence on World Markets*, 28 ENERGY L.J. 125, 126 (2007).

23. *Oil and Natural Gas Sales Accounted for 68% of Russia's Total Export Revenues in 2013*, U.S. ENERGY INFO. ADMIN. (July 23, 2014), <https://www.eia.gov/todayinenergy/detail.cfm?id=17231> [<https://perma.cc/C8PJ-A8MQ>] (highlighting that 68% of Russia's total export revenues equals \$355 billion).

24. *Id.* ("According to the Ministry of Finance, 50% of Russia's federal budget revenue in 2013 came from mineral extraction taxes and export customs duties on oil and natural gas.")

25. From 2008 to mid-2014, crude oil prices roughly averaged \$100 per barrel. By January 2016, oil was roughly \$30 per barrel. *Crude Oil Price History Chart*, MACROTRENDS, <http://www.macrotrends.net/1369/crude-oil-price-history-chart> [<https://perma.cc/F9MX-CDJG>]; see *Natural Gas Prices in Asia Mainly Linked to Crude Oil, but Use of Spot Indexes Increases*, U.S. ENERGY INFO. ADMIN. (Sept. 29, 2015), <https://www.eia.gov/todayinenergy/detail.cfm?id=23132> [<https://perma.cc/LW63-QQ8Z>] (explaining that since there is currently no globally integrated market for natural gas, internationally-traded natural gas has largely been indexed to crude oil prices).

26. *Russian Oil Exports to Increase by 7.5% in 2015—Energy Minister*, SPUTNIK NEWS (Dec. 24, 2015), <http://sputniknews.com/business/20151224/1032229920/oil-exports-russia.html> [<https://perma.cc/XZ7Q-C3WP>].

27. *Russia Economic Outlook*, FOCUS ECON. (Dec. 1, 2015), <http://www.focus-economics.com/countries/Russia> [<https://perma.cc/33CJ-S7XE>] (noting that GDP in the third quarter of 2015 decreased 4.1% from the same quarter in 2014 and contracted 4.6% in the second quarter of 2015 from the same quarter in 2014).

28. *Energy Production and Imports*, EUROSTAT (May 2015), [http://ec.europa.eu/eurostat/statistics-explained/index.php/Energy\\_production\\_and\\_imports#Imports](http://ec.europa.eu/eurostat/statistics-explained/index.php/Energy_production_and_imports#Imports) [<https://perma.cc/CMR6-MVGT>].

29. *Russia*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/beta/international/analysis.cfm?iso=RUS> [<https://perma.cc/34MX-P5B2>].

With the crises in Ukraine<sup>30</sup> and Syria,<sup>31</sup> Russia's access to the European market is further threatened. Losing this access would be a devastating setback to Russian economic and fiscal needs.<sup>32</sup> Three Russian natural gas pipelines traverse Ukraine and in early 2014, these pipelines transported upwards of 60% of Russian natural gas exports to Europe.<sup>33</sup> However, following armed conflict between the Ukrainian government and pro-Russian rebels in eastern Ukraine, Russia stopped gas supplies to Ukraine.<sup>34</sup> Although Russia relies on sales to Europe for fiscal needs, it appears that its interest in aiding pro-Russian rebels is superior to its budgetary concerns. This action continues to threaten the European Union's energy security and increases its need for diversification of energy supplies.<sup>35</sup>

Russian support of Bashar al Assad's regime<sup>36</sup> in the Syrian Civil War likewise involves the exportation of energy supplies to Europe. In 2009, Qatar, the second largest exporter of natural gas,<sup>37</sup> sought to build

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30. See *Russia's Gazprom Cuts Off Gas Supplies to Ukraine*, NBC NEWS (Nov. 25, 2015, 4:13 AM), <http://www.nbcnews.com/news/world/russias-gazprom-cuts-gas-supplies-ukraine-n469351> [https://perma.cc/4U99-XWZ7] [hereinafter *Gazprom Cuts Off Gas*].

31. See Karen Leigh & Syria Deeply, *Analyzing Russia's Support for Syria's Bashar Al-Assad*, ABC NEWS (Feb. 15, 2014), <http://abcnews.go.com/International/analyzing-russias-support-syrias-bashar-al-assad/story?id=22534530> [https://perma.cc/8U89-GJB3] (noting that Russia and the Assad regime have historically close relations and also that Russia has a general desire to showcase an ability to settle foreign crises as a strong world power).

32. See Eric Yep, *Russia to Pump Up Oil Exports to Asia*, WALL ST. J. (Dec. 4, 2014, 2:05 AM), <http://www.wsj.com/articles/russia-to-pump-up-oil-exports-to-asia-1417676709> [https://perma.cc/4DFB-S9N4] (explaining that although Russia has recently focused on increasing energy exports to Asia, the infrastructure for doing so is lacking, and when compounded with Western sanctions and the decline in energy prices, a significant reduction of Russian dependence on the European market will not occur for several years, if at all).

33. *16% of Natural Gas Consumed in Europe Flows Through Ukraine*, U.S. ENERGY INFO. ADMIN. (Mar. 14, 2014), <https://www.eia.gov/todayinenergy/detail.cfm?id=15411> [https://perma.cc/9KQL-AAD7].

34. *Gazprom Cuts Off Gas*, *supra* note 30; see generally, David Koranyi, *Transatlantic Energy Security and the Ukraine-Crisis: A Blessing in Disguise?*, NATO REV., <http://www.nato.int/docu/review/2014/NATO-Energy-security-running-on-empty/Transatlantic-energy-security-Ukraine-crisis/EN/index.htm> [https://perma.cc/YQ4X-CK6Q] (illustrating that Russia also cut off gas supplies in Ukraine in 2006 and 2009 due to disputes over gas and transit prices).

35. High Representative of the Union for Foreign Affairs and Sec. Policy, *Joint Communication to the European Parliament, the Council, and the European Economic and Social Committee and the Committee of the Regions—Review of the European Neighbourhood Policy*, at 11–12 (Nov. 18, 2015), [https://eeas.europa.eu/enp/documents/2015/151118\\_joint-communication\\_review-of-the-enp\\_en.pdf](https://eeas.europa.eu/enp/documents/2015/151118_joint-communication_review-of-the-enp_en.pdf) [https://perma.cc/8NWM-HD4A] (explaining that the European Union depends on its neighbors to provide safe and reliable production and transport of energy).

36. Leigh & Deeply, *supra* note 31.

37. *The World Factbook: Natural Gas - Exports*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2251rank.html> [https://perma.cc/953H-L8ES] (demonstrating that after Russia, which exported 201.9 billion cubic

a pipeline from the largest natural gas field in the world through Syria for delivery to Europe.<sup>38</sup> Assad, however, refused the pipeline proposal due to political strong-arming from Russia.<sup>39</sup> Through its current military intervention, Russia seeks to buttress Assad's regime and therefore, protect Russia's large share of Europe's energy market, particularly as a further decrease in price and abundant supplies from competing sources would be disastrous for the Russian economy.<sup>40</sup>

## II. ADMINISTRATIVE ACTION: OPTIONS THE UNITED STATES CAN PURSUE

President Obama has already issued several executive orders that placed successive sanctions on Russia for its actions in Ukraine.<sup>41</sup> Through implementing these orders, the United States limited international financing to four Russian energy companies.<sup>42</sup> Additionally, aiding in the development of projects that could lead to Russian oil production is prohibited, which has impacted five of Russia's major energy companies.<sup>43</sup> These sanctions, and Russia's subsequent counter sanctions,<sup>44</sup> have

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meters of natural gas in 2014, Qatar is the next largest exporter of natural gas, exporting 125.5 billion cubic meters in 2013).

38. Qatar shares the South Pars/North Dome field with Iran, though two-thirds of the reserves are in Qatari waters. In 2011, Iran also proposed a pipeline through Syria, but due to Russia's close relations with Iran, Russia did not object to this pipeline. Mitchell A. Orenstein & George Romer, *Putin's Gas Attack*, FOREIGN AFF. (Oct. 14, 2015), <https://www.foreignaffairs.com/articles/syria/2015-10-14/putins-gas-attack> [<https://perma.cc/P5AR-X7F7>].

39. Nafeez Ahmed, *Syria Intervention Plan Fueled by Oil Interests, not Chemical Weapon Concern*, GUARDIAN (Aug. 30, 2013, 12:11 PM), <http://www.theguardian.com/environment/earth-insight/2013/aug/30/syria-chemical-attack-war-intervention-oil-gas-energy-pipelines> [<https://perma.cc/6PKA-9JWS>].

40. Orenstein & Romer, *supra* note 38 (explaining that Russia's budgetary concerns would further clarify why Russia's bombing campaign has targeted Syrian rebel groups funded by Qatar and Saudi Arabia).

41. Exec. Order No. 13,685, 79 Fed. Reg. 77,357 (Dec. 19, 2014) (applying further sanctions due to Russian action in Crimea); Exec. Order No. 13,662, 79 Fed. Reg. 16,169 (Mar. 20, 2014) (stating that Russian action in Ukraine is a threat to United States' national security); Exec. Order No. 13,661, 79 Fed. Reg. 15,535 (Mar. 17, 2014) (employing additional restrictions due the belief that Russian action disrupts democratic processes in Ukraine); Exec. Order No. 13,660, 79 Fed. Reg. 13,493 (Mar. 6, 2014) (placing travel restrictions on certain Russian individuals and officials); *see also EU sanctions Russia over Ukraine crisis*, EUR. UNION NEWSROOM, [http://europa.eu/newsroom/highlights/special-coverage/eu\\_sanctions/index\\_en.htm](http://europa.eu/newsroom/highlights/special-coverage/eu_sanctions/index_en.htm) [<https://perma.cc/5L55-NKRN>] (noting that the European Union has also enacted sanctions against Russia for Russian involvement in Ukraine).

42. *Ukraine and Russia Sanctions*, U.S. DEP'T OF STATE, <http://www.state.gov/e/eb/tfs/spi/ukrainerrussia/> [<https://perma.cc/Y2DS-XTCL>].

43. *Id.*

44. *Western Sanctions Are Hitting Russia Harder than Anyone Realised*, TELEGRAPH (Aug. 3, 2015, 4:32 PM), <http://www.telegraph.co.uk/finance/economics/11780708/Western-sanctions-are-hitting-Russia-harder-than-anyone-realised.html> [<https://perma.cc/2PYZ-LW72>] (explaining that Russia has banned the import of most Western food products as a retaliatory measure).



undoubtedly had a substantial effect on the Russian economy, as the International Monetary Fund (IMF) estimated a resulting 9% decrease in Russian GDP.<sup>45</sup> However, with Russia's demonstrated aggression, more creative administrative action is necessary to protect United States' interests and allies. Especially following President Putin's executive order on December 31, 2015, which identified the United States and the expansion of the North Atlantic Treaty Organization (NATO)<sup>46</sup> as threats to Russian national security,<sup>47</sup> the United States must carefully plan its course of action. Any mobilization of military force could seriously undermine the already precarious balance of this global political situation.

#### A. *Means Available to Antitrust Enforcers*

The United States government has a robust tradition of enforcing its antitrust laws,<sup>48</sup> which are designed to protect business competition for consumers while keeping prices down and maintaining product quality.<sup>49</sup> Two federal agencies are charged with enforcing these laws: the Department of Justice Antitrust Division (DOJ) and the Federal Trade Commission (FTC).<sup>50</sup> While antitrust enforcement authority between these agencies may overlap, the FTC focuses on areas with high consumer spending, including energy, while the DOJ has sole jurisdiction in certain industries, such as airlines.<sup>51</sup>

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45. *Id.*

46. NATO is a post-World War II military alliance. Out of twenty-eight members, twenty-two also belong to the EU. *NATO-EU: A Strategic Partnership*, NATO, [http://www.nato.int/cps/en/natohq/topics\\_49217.htm](http://www.nato.int/cps/en/natohq/topics_49217.htm) [https://perma.cc/4XD5-YVNF]. Furthermore, Turkey is a member of NATO and has been negotiating accession to the European Union since 2005. *European Neighbourhood Policy and Enlargement Negotiations*, EUROPEAN COMM'N, [http://ec.europa.eu/enlargement/countries/detailed-country-information/turkey/index\\_en.htm](http://ec.europa.eu/enlargement/countries/detailed-country-information/turkey/index_en.htm) [https://perma.cc/8WLV-LEFC].

47. See Ukaz Prezidenta Rossiiskoi Federatsii: O Strategii Nacionalnoi Bezopasnostii Rossiiskoi Federatsii [Decree of the President of the Russian Federation: About the Strategy of National Security of the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 683, Items 12–17, 19.

48. The United States has three major antitrust laws: 1. The Sherman Antitrust Act; 2. The Clayton Act; and 3. The Federal Trade Commission Act. *Antitrust Laws and You*, DEP'T OF JUSTICE, <https://www.justice.gov/atr/antitrust-laws-and-you> [https://perma.cc/Y73C-Q9MC]. These laws proscribe unfair restraints of trade and business, and while most penalties are civil, individuals and businesses can also be prosecuted criminally under the Sherman Antitrust Act. *The Antitrust Laws*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [https://perma.cc/AV42-JNUY].

49. *The Antitrust Laws*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [https://perma.cc/6JVN-GS24].

50. *The Enforcers*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers> [https://perma.cc/RP5U-TTFW].

51. *Id.*

Regardless of where the conduct occurs, anticompetitive actions impacting United States' domestic or foreign commerce may violate antitrust laws.<sup>52</sup> In the absence of a guiding statute pertaining specifically to anticompetitive conduct in the oil and gas industry, the FTC and the DOJ would need to examine the extraterritorial applicability of antitrust laws as currently written. These agencies would analyze Russia's actions through the purview of the Antitrust Enforcement Guidelines for International Operations (Guidelines), which were promulgated in 1995 to help businesses and individuals engaged in international operations understand the agencies' enforcement policies.<sup>53</sup>

Prior to determining the substantive merits of an action, the Guidelines require the following threshold requirements to be satisfied: 1. Jurisdiction; 2. Comity; and 3. Foreign governmental involvement.<sup>54</sup> Although there has been considerable debate<sup>55</sup> about the confines of the Foreign Trade Antitrust Improvement Act of 1982 (FTAIA),<sup>56</sup> the FTAIA provides the jurisdictional limitations for both the Sherman Act<sup>57</sup> and the Federal Trade Commission Act (FTC Act)<sup>58</sup> on non-import foreign commerce.<sup>59</sup> Subsection 1(A) of the FTAIA regards "import trade or import commerce with foreign nations,"<sup>60</sup> while Subsection 1(B)

52. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (1995).

53. *Id.*

54. *Id.*

55. Compare *United States v. LSL Biotechnologies*, 379 F.3d 672, 683 (9th Cir. 2004) (holding that the FTAIA provides the standard for whether jurisdiction exists in cases of non-import foreign commerce), with *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 851–53 (7th Cir. 2012) (en banc) (holding that the FTAIA establishes an element of an antitrust action, not a jurisdictional standard). The circuit split is a result of the Supreme Court's ruling in *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515–16 (2006), which although not addressing the FTAIA, stressed that Congress must clearly state its intention for a limitation to be jurisdictional, otherwise the limitation will be considered to be part of the substantive analysis of a claim.

56. 15 U.S.C. § 6(a) (2012). Congress passed the FTAIA to clarify when the federal antitrust laws apply to foreign conduct. See also Abbot B. Lipsky, Jr. & Kory Wilmot, *The Foreign Trade Antitrust Improvements Act: Did Arbaugh Erase Decades of Consensus Building?*, ANTITRUST SOURCE, Aug. 2013, at 1.

57. See Lipsky & Wilmot, *supra* note 56, at 1 ("[T]here is powerful evidence that the FTAIA is jurisdictional and was intended to be so by the Congress that enacted it.").

58. 15 U.S.C. §§ 41–58 (2012). Section 5 of the FTC Act states that "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce" are illegal. 15 U.S.C. § 45 (2012). Though FTAIA uses different language for the FTC Act, the DOJ and the FTC interpret the jurisdictional outcomes the same. See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 52.

59. The DOJ and the FTC interpret FTAIA to present the requirements for federal jurisdiction. See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 52. Additionally, *Arbaugh*, 546 U.S. at 515–16, failed to mention either FTAIA or the seminal case analyzing FTAIA's application, *F. Hoffman-La Roche, LTD. v. Empagran S.A.*, 542 U.S. 155 (2004). See also Lipsky & Wilmot, *supra* note 56 (providing evidence supporting the characterization of FTAIA as jurisdictional).

60. 15 U.S.C. § 6(a)(1)(A) (2012).

proscribes conduct that restrains United States' exports if the anticompetitive conduct has a "direct, substantial, and reasonably foreseeable effect" on United States' exports.<sup>61</sup>

Consideration of comity is the next requirement prior to examining the substance of an antitrust action. This broad concept involves determining the significance of the effect of an action or investigation on a foreign state's interests.<sup>62</sup> Most comity analysis in the antitrust context weighs the conduct's effect in the United States and the effect in a foreign state.<sup>63</sup> Furthermore, this analysis requires consideration of a potential conflict between action in the United States and enforcement by the foreign state.<sup>64</sup> Russia's antitrust enforcer is the Federal Antimonopoly Service (FAS), which acts under the authority of the 2006 law, On the Protection of Competition.<sup>65</sup> There have been four subsequent amendments to this enabling statute, with the third and fourth amendments declaring an objective of broadening FAS' enforcement scope to reflect its antitrust counterparts in the West.<sup>66</sup> Because of comity concerns, the DOJ or the FTC would likely contact FAS to determine whether FAS would be better suited to address the issue in addition to deciding the harm, if any, caused to the United States' interests.<sup>67</sup> However, if Russia's responses to the situations in Syria and Ukraine are any indication, and since any investigation would target Russia, either directly or indirectly through its ownership of energy companies, the likelihood that this discussion would be productive is doubtful. Corruption, inefficiency, and opacity in the Russian government, especially in regards to business and enforcement by the judiciary, are well known.<sup>68</sup> Efforts to communi-

61. *Id.* § 6(a)(1)(B).

62. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 52, § 3.2.

63. *See id.*

64. *See id.*

65. Rossiiskaya Federatsia, Federal'nii Zakon: O Zashchite Konkurensia [Russian Federation, Federal Law: On the Protection of Competition], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2006, No. 135-FZ.

66. *See* O Vnesenii Izmenenii v Federal'nii Zakon O Zashchite Konkurensii I Otdel'nyye Zakonodatel'nyye Akty Rossiiskoi Federatsii [On Amendments to the Federal Law on Protection of Competition and Certain Legislative Acts of the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2015, No. 275-FZ; O Vnesenii Izmenenii v Federal'nii Zakon O Zashchite Konkurensii I Otdel'nyye Zakonodatel'nyye Akty Rossiiskoi Federatsii [On Amendments to the Federal Law on Protection of Competition and Certain Legislative Acts of the Russian Federation], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2011, No. 401-FZ. *See also* Alyona N. Kucher et al., *Client Update: Fourth Antimonopoly Package Is Passed*, DEBEVOISE & PLIMPTON (Oct. 20, 2015), [http://www.debevoise.com/~media/files/insights/publications/2015/10/20151020e\\_fourth\\_antimonopoly\\_package.pdf](http://www.debevoise.com/~media/files/insights/publications/2015/10/20151020e_fourth_antimonopoly_package.pdf) [<https://perma.cc/Y9PY-NGXT>].

67. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 52, § 3.2.

68. *See* Tom Blass, *Combating Corruption and Political Influence in Russia's Court System*, in GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS 31, 31–34 (Linda Ehrichs & Diana Rodriguez eds., 2007) (describing the increased

cate through diplomatic channels would likely also be unsuccessful, due to the substantial decline in relations between Russia and the United States.<sup>69</sup> Foreign policy concerns thus play a significant role when analyzing comity. A determination to prosecute in the United States exhibits a clear decision “by the Executive Branch that the importance of antitrust enforcement outweighs any relevant foreign policy concerns.”<sup>70</sup>

While foreign policy goals factor heavily in the analysis of comity, these concerns do not delineate that every case involving foreign relations is outside of the ambit of the United States judiciary.<sup>71</sup> In *Japan Whaling Ass’n v. American Cetacean Society*, the Secretary of Commerce could certify to the President if any foreign nationals were violating an international fishing treaty.<sup>72</sup> Several groups called for Japan to be certified for violating the sperm whale quota, and the lower courts agreed.<sup>73</sup> The Supreme Court, however, reversed and held that a claim did not advance a political question when it requested judicial means to require the Secretary of Commerce to renege on a certain international agreement involving commercial whaling.<sup>74</sup> An examination of the claim’s merits concluded that treaty interpretation was within the judiciary’s purview despite the presence of political overtones in the matter.<sup>75</sup> This interpretation would allow for more flexibility if the DOJ or the FTC chose to file an action in the present matter.

The final element of pre-substantive analysis regards the involvement of the foreign government. Generally, a foreign government has sovereign immunity from lawsuits in the United States; however, the Foreign Sovereign Immunities Act (FSIA) delineates certain exceptions to this rule.<sup>76</sup> Under FSIA, a United States court may exercise jurisdiction over the foreign government, or its agencies or instrumentalities,<sup>77</sup> if the foreign state has engaged in “an act outside the territory of the United States in connection with a commercial activity of the foreign state

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power of Russia’s Executive Branch in the role of the judiciary and also the increase of bribe taking by members of the judiciary).

69. *Supra* notes 41–47 and accompanying text.

70. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, *supra* note 52, § 3.2 (noting that this precept applies even though the FTC is not part of the Executive Branch).

71. *Baker v. Carr*, 369 U.S. 186, 217 (1962) (delineating several factors, such as “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government,” for when an issue before a court is precluded by the political question doctrine).

72. *Japan Whaling Assoc. v. Am. Cetacean Soc’y*, 478 U.S. 221, 225 (1986).

73. *Id.* at 229.

74. *Id.*

75. *Id.* at 230.

76. 28 U.S.C. §§ 1602–1611 (2012). Most notably, § 1602 recites international law when stating, “states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned. . . .”

77. *Id.* § 1603(b) (defining what qualifies as an agency or instrumentality of a foreign state; U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, *supra* note 52, at n.15 (“It is not uncommon in antitrust cases to see state-owned enterprises meeting this definition.”)).

elsewhere and that act causes a direct effect in the United States . . . ”<sup>78</sup> Although FSIA does not clarify the meaning of “commercial activity” or “direct effect,” the Supreme Court subsequently defined these concepts. The Supreme Court interpreted “commercial activity” as a foreign state acting like a private entity in the market<sup>79</sup> and clarified “direct effect” as a proximate result of the foreign state’s conduct.<sup>80</sup> Therefore, foreign sovereign immunity is premised on whether the companies’ actions cause a direct effect in the United States. This determination will be substantially influenced by the extent of Russia’s reaction to the United States’ forthcoming energy exports.

Governmental involvement, however, is not premised solely on FSIA. The antitrust agencies must also consider the doctrine of foreign sovereign compulsion, which considers if the foreign sovereign compelled the actions prohibited by the United States’ antitrust laws.<sup>81</sup> The defense of foreign sovereign compulsion is only available when the following criteria occur: 1. The failure to comply would result in imprisonment or other severe recourse; 2. The conduct must be accomplished entirely within the foreign state’s territory; and 3. The compulsion must originate from the foreign government in its official capacity.<sup>82</sup>

The decision from *In re Vitamin C Antitrust Litigation* provides insight into the limits of this defense.<sup>83</sup> The plaintiffs filed a lawsuit against four Chinese companies, claiming that the firms had colluded to set the price for vitamin C supplements.<sup>84</sup> The companies asserted the defense of foreign sovereign compulsion by stating that the Chinese government had forced them to set a price or would forbid them from exporting their product.<sup>85</sup> However, the court ruled that the defense did not apply due to the absence of evidence regarding the Chinese government’s compulsion, especially in regards to penalties, such as shutdowns, for failure to comply with the output or quantity restrictions.<sup>86</sup>

Finally, analysis regarding the involvement of the foreign government must include whether the conduct is an act of state.<sup>87</sup> Under this doctrine, the DOJ or the FTC are unlikely to initiate an action if the anticompetitive conduct is the direct act of a foreign government, such as granting licenses, and the action would require the court to rule on

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78. 28 U.S.C. § 1605(a)(2) (2012).

79. *Saudi Arabia v. Nelson*, 507 U.S. 349, 360–61 (1993) (explaining further that the determination of likeness of the actions is determined by the foreign state’s behavior and not its motivation).

80. *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (noting that the effect cannot be trivial).

81. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, *supra* note 52, § 3.32.

82. *Id.*

83. *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522, 524 (E.D.N.Y. 2011).

84. *Id.* at 524.

85. *Id.*

86. *Id.* at 564–65.

87. U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, *supra* note 52, § 3.32–33.

the legality of a foreign sovereign's conduct.<sup>88</sup> Importantly, this general rule only applies when the actions are governmental in nature, not if the conduct is commercial activity.<sup>89</sup> As with FSIA, the actions of Russian companies in the energy market are not likely to be considered acts of state. Russia is not granting licenses; these state-owned companies are actively transacting with other entities for financial gain by delivering natural resources for use in external markets.<sup>90</sup>

#### B. *Means Available to Trade Entities*

An international system based on liberalized trade has the ability to intensify competition and thus drive innovation and development.<sup>91</sup> The United States has championed the preeminence of a multilateral system in international trade relations since the conclusion of World War II.<sup>92</sup> As an entity within the Executive Branch, the United States Trade Representative (USTR) is responsible for developing trade expertise, negotiating international trade policy with other countries, and resolving trade disputes that arise under trade obligations.<sup>93</sup> The USTR's seminal goal overlaps significantly with those of the antitrust agencies: opening markets across the globe for Americans to engage in commerce.<sup>94</sup> The USTR can therefore influence determinations of national trade remedies, though those remedies involve significant political will and interagency coordination.<sup>95</sup> Most notably, however, the USTR is less confined by jurisdictional restraints imposed by national courts due to the USTR's capability of pursuing recourse through international bodies.

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88. *Id.*

89. *Id.*

90. Although Russia's energy exports to the United States are relatively low, the potential political fallout, publicity, and cost arising from such litigation, especially given the United States' ties to many of Russia's importers in Europe, could be devastating. DOJ and FTC have not before initiated such an action against a Russian energy company; however, DOJ has used statutes with extraterritorial applicability, like the Foreign Corrupt Practices Act, to prosecute Russian energy companies and officials. *See, e.g., Former Russian Nuclear Energy Official Sentenced to 48 Months in Prison for Money Laundering Conspiracy Involving Foreign Corrupt Practices Act Violations*, DEP'T OF JUSTICE (Dec. 15, 2015), <https://www.justice.gov/opa/pr/former-russian-nuclear-energy-official-sentenced-48-months-prison-money-laundering-conspiracy> [<https://perma.cc/7H7R-TGZV>] (noting that DOJ prosecuted multiple individuals for crimes such as FCPA violations and money laundering).

91. Robert Z. Lawrence, *The United States and the WTO Dispute Settlement System* 3, COUNCIL ON FOREIGN REL. (2007), [http://i.cfr.org/content/publications/attachments/WTO\\_CSR25.pdf](http://i.cfr.org/content/publications/attachments/WTO_CSR25.pdf) [<https://perma.cc/BXK2-QEZG>].

92. *Id.*

93. *Mission of the USTR*, OFF. U.S. TRADE REP., <https://ustr.gov/about-us/about-ustr> [<https://perma.cc/S3XF-4EUR>] [hereinafter *USTR Mission*].

94. *Id.*

95. U.S. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978-2 (codified as amended in scattered sections of 19 U.S.C.); Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (codified as amended in scattered sections of 19 U.S.C.); *see also USTR Mission, supra* note 93.

One of the USTR's most important attributes therefore is its ability to influence American action in the World Trade Organization (WTO).<sup>96</sup> The WTO and its predecessor, the General Agreement on Tariffs and Trade (GATT),<sup>97</sup> accelerated the development of global commerce after World War II.<sup>98</sup> The WTO currently has 162 Members,<sup>99</sup> including Russia,<sup>100</sup> and utilizes a centralized forum to promote the free trade concepts of most favored nation (MFN)<sup>101</sup> and non-discrimination.<sup>102</sup> Under WTO rules, countries that want to become Members must agree to be bound by all agreements and articles.<sup>103</sup> The crowning achievement of the WTO is its dispute settlement system,<sup>104</sup> and Annex 2 of the WTO Agreement contains the Dispute Settlement Understanding (DSU), which is compulsory for all Members.<sup>105</sup> The Dispute Settlement Body (DSB) administers the DSU and follows specific procedures for resolving disputes amongst Members.<sup>106</sup>

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96. See *USTR Mission*, *supra* note 93 (stating that the USTR provides trade and negotiating expertise with issues involving the WTO). The creation of the WTO occurred in 1995 and was the fruit of several rounds of negotiation under the GATT system. *The WTO in Brief: The Multilateral Trading System—Past, Present and Future*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/inbrief\\_e/inbr01\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr01_e.htm) [<https://perma.cc/S5MS-C2PM>] [hereinafter *Multilateral Trading*].

97. The WTO subsumed GATT 1994, which was the culmination of GATT 1947 and its accompanying understandings regarding tariff schedules, protocols of accession, and other understandings. General Agreement on Tariffs and Trade 1994 art. 1, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Apr. 15, 1994, 1869 U.N.T.S. 401 [hereinafter GATT 1994].

98. By 2000, total trade was twenty-two times the level of that in 1950. *Multilateral Trading*, *supra* note 96.

99. *Understanding the WTO—The Organization – Members and Observers*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) [<https://perma.cc/FM2T-5YGF>] (noting that, as of November 30, 2015, 162 countries were Members of the WTO).

100. *Id.* (noting that Russia acceded to the WTO on August 22, 2012).

101. GATT 1994 art. I (providing for general MFN treatment, which is that any advantage given to one member for one product should be unconditionally extended to like products from all members); GATT 1994 art. XX (explaining several general exceptions to this obligation).

102. *Id.* art. III (requiring national treatment on internal taxes and regulation for imported goods, meaning imported products that are “like” to domestic products must be not be treated worse than the domestic products).

103. This is a development of the Uruguay Round of negotiations. Prior to the WTO's establishment, there was “GATT a la carte,” meaning there were several side agreements that only bound the signatories to each particular agreement. See *Historic Development of the WTO Dispute Settlement System*, WTO, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_settlement\\_cbt\\_e/c2s1p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c2s1p1_e.htm) [<https://perma.cc/VP9N-A7ZT>].

104. ROBERT Z. LAWRENCE, *THE UNITED STATES AND THE WTO DISPUTE SETTLEMENT SYSTEM* 6 (2007).

105. See Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Apr. 15, 1994, 1869 U.N.T.S. 401 [hereinafter DSU].

106. Parties must first enter into consultations. *Id.* art. 4. If the issue is not resolved, a party can demand the establishment of an independent panel to adjudicate

With the ability to seek recourse through the existence of the WTO's rule-based DSU, the USTR is in a position of substantial power to protect American competition interests abroad. Specifically, the WTO's Agreement on Subsidies and Countervailing Measures (SCM) focuses on the provision of subsidies and likewise provides rules for implementing countervailing duties to compensate for injury from subsidized imports.<sup>107</sup> To seek redress under the SCM, several requirements must be satisfied. First, the SCM only applies to subsidies<sup>108</sup> that are provided to a specific<sup>109</sup> industry. After an affirmative determination of specificity, subsidies are categorized as either prohibited or actionable,<sup>110</sup> with each category having a specific set of available remedies.<sup>111</sup>

Article I of the SCM defines the three basic elements of a subsidy: 1. A financial contribution; 2. By a government or any public body within a Member's territory; and 3. Which confers a benefit.<sup>112</sup> A financial contribution is a term not easily defined; however, the WTO has stated that a financial contribution essentially equates to a charge on a public account, such as grants, loans, or equity infusions, and it can also occur when a government provides services other than general infrastructure.<sup>113</sup>

After determining that a subsidy exists, the USTR would then need to prove that the benefits conferred to these companies meet the requisite specificity. The SCM states that specificity primarily exists when access to the subsidy is explicitly limited to certain enterprises.<sup>114</sup> Conversely, when objective criteria determine the eligibility for and the amount of the subsidy, specificity is lacking.<sup>115</sup> The SCM defines objectivity as criteria that do not favor one enterprise over another,<sup>116</sup> and to be objective, the criteria must be clearly delineated in a law or a regulation.<sup>117</sup>

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the dispute. *Id.* art. 6.1; *id.* art 8.2. The DSU also created the Appellate Body, which hears appeals from the Panel's cases. *Id.* art. 17.1. Prompt implementation of the Panel or Appellate Body's ruling is required. *Id.* art. 21.1. If the rulings are not implemented, compensation and suspension of concessions or other obligations are available. *Id.* art. 22.1. The ability to seeking recourse again through another Panel proceeding is also available. *Id.* art. 21.5.

107. *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), WTO, [https://www.wto.org/english/tratop\\_e/scm\\_e/subs\\_e.htm](https://www.wto.org/english/tratop_e/scm_e/subs_e.htm) [<https://perma.cc/VMK8-CXN8>].

108. Agreement on Subsidies and Countervailing Measures art 1.1, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Apr. 15, 1994, 1869 U.N.T.S. 14 [hereinafter SCM].

109. *Id.* art. 2.1–2.4 (providing what suffices the specificity standard).

110. *Id.* art. 3 (explaining what constitutes a prohibited subsidy); *Id.* art. 5 (explaining what constitutes an actionable subsidy).

111. *Id.* art 4. (clarifying the remedies available for prohibited subsidies); *Id.* art. 7 (providing the remedies available for actionable subsidies).

112. *See id.* art 1.1

113. *See id.* art. 1.1(a)(1)(i), (iii).

114. *Id.* art. 2.1(a).

115. *Id.* art 2.1(b).

116. *Id.* art. 2.1(b) n.2.

117. *Id.* art. 2.1(b).



Upon finding of a specific subsidy, the USTR must demonstrate that the subsidy is either prohibited or actionable. The SCM recognizes two types of prohibited subsidies: those contingent upon exports and those contingent upon the promotion of domestic goods over imported goods.<sup>118</sup> Although the USTR has a strong case for stating that Russia domestic price for industrial users is below that for international users.<sup>119</sup> While the WTO allowed Russia to continue its domestic pricing scheme for natural gas, in its accession protocol, as of 2007, Russia has committed to equalizing the return on domestic sales to that of its international sales.<sup>120</sup> However, after nine years, Russia's progress on this has been slow, and such a lackluster attempt to satisfy commitments can bolster USTR's stance.<sup>121</sup>

The USTR would be required to initiate consultations with Russia, as required by the SCM, prior to engaging in DSU procedures.<sup>122</sup> Due to the noted animosity between the United States and Russia, the likelihood of success in resolving the dispute during consultations is highly unlikely. The USTR would then have to pursue recourse through DSB, and a Panel would likely be established to hear the case.

### III. LEARNING FROM EXPERIENCE

#### A. *Congressional Attempts to Respond*

No antitrust law explicitly pertains to the regulation of the oil and gas industry. As a reaction to the increased price volatility and importance of commodities derived from these fuels, congressional members have introduced legislation in both the House and Senate to amend the Sherman Act<sup>123</sup> and FSIA<sup>124</sup> to assuage antitrust concerns in petroleum energy markets.<sup>125</sup> The Sherman Act currently has the following provision:

118. *Id.* art. 3.1(a)-(b).

119. U.S. TRADE REPRESENTATIVE, REPORT ON RUSSIA'S IMPLEMENTATION OF THE WTO AGREEMENT 33 (2013).

120. *Id.* at 33.

121. *Id.*

122. SCM, *supra* note 108, at art. 7.1.

123. See 15 U.S.C. §§ 1–7 (2012), as amended by 15 U.S.C. §§ 12–27 (2012) and the Foreign Trade Antitrust Improvements Act of 1982; see generally, *Sherman Antitrust Act*, CORNELL UNIV. L. SCH. LEGAL INFO. INST., [https://www.law.cornell.edu/wex/sherman\\_antitrust\\_act](https://www.law.cornell.edu/wex/sherman_antitrust_act) [<https://perma.cc/V3J5-QMV9>] (providing a broad scope in prohibiting activities restricting interstate commerce and market competition).

124. 28 U.S.C. §§ 1602–1611 (2012).

125. No Oil Producing and Exporting Cartels Act of 2011, S. 394, 112th Cong. §§ 1–3 (2011); No Oil Producing and Exporting Cartels Act of 2011, H.R. 1899, 112th Cong. §§ 101–103 (2011); No Oil Producing and Exporting Cartels Act of 2007, H.R. 2264, 110th Cong. §§ 1–3 (2007); Oil and Gas Industry Antitrust Act of 2006, S. 2557, 109th Cong. § 6 (2006) (referring to this section as the No Oil Producing and Exporting Cartels Act of 2006); see Frank A. Verrastro et al., “NOPEC” Legislation and U.S. Energy Security, CTR. FOR STRATEGIC & INT'L STUDIES (June 14, 2011), <http://csis.org/publication/nopec-legislation-and-us-energy-security> [<https://perma.cc/GTP3-ZL69>] (explaining that, since 1999, bills attempting to proscribe anticompetitive conduct in the oil and gas industry, such as price or supply limitations, have been introduced over

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.<sup>126</sup>

The proposed bills would have allowed enforcement of the Sherman Act against any foreign state, or its agents or instrumentalities, that colludes with any other foreign state, person, or association to limit production, distribution, or any other restraint of fossil fuels or to set or maintain the prices of these commodities.<sup>127</sup> Although these legislative proposals, nicknamed NOPEC, are aimed at the Organization of the Petroleum Exporting Countries (OPEC),<sup>128</sup> an organization of which Russia is not a member,<sup>129</sup> the bills did not state that the amendment to the Sherman Act would solely apply to OPEC members. While congressional members have supported these bills, other branches of government have opposed such measures.<sup>130</sup> Most notably, the Executive Branch's concern is that OPEC member countries may cut investment in or trade with the United States.<sup>131</sup> Russia, however, is not an important player in

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fifteen times).

126. 15 U.S.C. § 6(a) (2012).

127. *See, e.g.*, No Oil Producing and Exporting Cartels Act of 2011, S. 394, 112th Cong. §§ 1–3 (2011); No Oil Producing and Exporting Cartels Act of 2011, H.R. 1899, 112th Cong. §§ 101–03 (2011).

128. *See Brief History*, OPEC, [http://www.opec.org/opec\\_web/en/about\\_us/24.htm](http://www.opec.org/opec_web/en/about_us/24.htm) [<https://perma.cc/L88C-BEEK>] (stating that the goal of OPEC since its inception in 1960 was “to co-ordinate and unify petroleum policies among Member Countries”).

129. *See Member Countries*, OPEC, [http://www.opec.org/opec\\_web/en/about\\_us/25.htm](http://www.opec.org/opec_web/en/about_us/25.htm) [<https://perma.cc/6GSW-FTBJ>] (noting further that no former countries of the Soviet Union are members of OPEC).

130. Frank A. Verrastro et al., “NOPEC” Legislation and U.S. Energy Security, CTR. FOR STRATEGIC & INT’L STUDIES (June 14, 2011), <https://www.csis.org/analysis/%E2%80%9Cnopec%E2%80%9D-legislation-and-us-energy-security> [<https://perma.cc/QFP4-X7SN>].

131. *Id.*

the United States' trade and investment relations,<sup>132</sup> and therefore, in the absence of opposition to such legislation, this updated language to the Sherman Act could be used in a situation involving Russian action in the petroleum energy market.

In *Spectrum Stores, Inc. v. Citgo Petroleum Corp.*, gasoline retailers in the United States claimed that national oil companies and OPEC countries colluded to fix petroleum prices in the United States through agreeing to limit crude-oil production.<sup>133</sup> The Fifth Circuit affirmed the district court's dismissal of the appellant's claim of an antitrust violation.<sup>134</sup> The court focused on the implications of the political question and state action doctrines; however, the court also analyzed the gross inadequacy of the Sherman and Clayton Acts' language in settling matters involving the "resource-exploitation decisions of foreign sovereigns that control the global supply of oil . . ." <sup>135</sup>

The Fifth Circuit felt bound by the limitations of the antitrust acts in their current state.<sup>136</sup> Passage of a NOPEC law would reduce the jurisdictional restrictions because it would create a statutory provision that would apply to the situation described in *Spectrum Stores, Inc.* With the provisions of a NOPEC law, courts would at least have the ability to consider the merits of a claim regarding foreign nations' conduct in petroleum trade that has a direct, substantial, and reasonably foreseeable effect on individuals in the United States.

#### B. *Mayday: The Deregulation of the U.S. Airline Industry*

Agency enforcement against foreign sovereigns may not reflect the typical application of federal antitrust laws, and therefore, the decision about whether to initiate action requires an in-depth look at the situation. To understand the benefits and drawbacks of an antitrust action regarding international oil and gas markets, it is necessary to glean lessons from the government's prior involvement, policy, and strategy in analogous situations. The deregulation of the United States' airline industry, and its continuing impact on American carriers, provides substantial insight for determining whether to pursue action against Russia for its conduct in the European energy market.

The turning point for the airline industry occurred in 1978, when President Carter signed the Airline Deregulation Act.<sup>137</sup> Prior to the

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132. See David Payne & Fenwick Yu, *Foreign Direct Investment in the United States: Executive Summary*, U.S. DEP'T OF COMMERCE ECON. & STATISTICS ADMIN. (June 2011), [http://www.esa.doc.gov/sites/default/files/fdiesaisssuebriefno2061411final\\_0.pdf](http://www.esa.doc.gov/sites/default/files/fdiesaisssuebriefno2061411final_0.pdf) [<https://perma.cc/ZGS3-ZUNV>] (noting that OPEC countries had a \$96 billion trade surplus with the United States in 2010 and failing to mention anything in regards to Russia's trade figures with the United States).

133. *Spectrum Stores, Inc. v. Citgo Petrol. Corp.*, 632 F.3d 938, 942–43 (5th Cir. 2011).

134. *Id.* at 948.

135. *Id.* at 952–53.

136. See *id.*

137. 49 U.S.C. § 41708 (2012).

Act's passage and pursuant to statutory authority, the Civil Aeronautics Board (CAB) regulated fares, routes, schedules, and market entry in matters regarding interstate civilian flights.<sup>138</sup> Arguably most important, the CAB ensured that the airlines would collect a reasonable return for their services. However, in its decades of regulating the aviation market, the CAB was infamous for its opacity and acute policy shifts, which created considerable consternation amongst businessmen, governmental representatives, and passengers.<sup>139</sup> As rates continued to increase, Congress took action,<sup>140</sup> and President Carter swiftly signed the Act into law,<sup>141</sup> which removed government oversight in the airline industry except in regards to safety and security.<sup>142</sup>

As a result of the Airline Deregulation Act, the negotiations of Open Skies Agreements,<sup>143</sup> and the disappearance of a CAB-guaranteed return, many of the United States' most prominent airlines, such as Pan American Airways (Pan Am), were effectively crippled since they were unable to compete with lower-cost carriers in a free market.<sup>144</sup> Many domestic airlines have filed for bankruptcy and have been acquired by other carriers, leading to the concentration of the United States' airline industry into four carriers: Delta, United, American, and Southwest.<sup>145</sup>

While the Act decimated the domestic airline carriers, it provided a vacuum that allowed many foreign carriers to gain a substantial foothold in the United States' market. The most successful of these foreign airlines are Qatar Airways, Etihad Airways, and Emirates (collectively, the Gulf Carriers).<sup>146</sup> As their respective governments, Qatar and the United

138. See Civil Aeronautics Act of 1938, Pub. L. No. 75-706, 52 Stat. 973 (1938) (noting that the CAB ceased to exist following the enactment of the Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1793).

139. Bradley Behrman, *Civil Aeronautics Board*, in *THE POLITICS OF REGULATION* 75, 96-102 (James Q. Wilson ed., 1980).

140. See Air Transportation Regulatory Reform Act, S. 2493, 95th Cong. (1978).

141. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.) (noting that President Carter signed the Act into law on October 24, 1978, which was only six months after its introduction into the Senate).

142. *Id.*

143. Open Skies Agreements are bilateral agreements where two countries agree to open their air travel markets for competition from other carriers. The United States has negotiated a substantial number of Open Skies Agreements. *Open Skies Agreements*, U.S. DEP'T OF STATE, <http://www.state.gov/e/eb/tra/ata/> [<https://perma.cc/K28W-U5W9>].

144. Madhu Unnikrishnan, *A Law that Changed the Airline Industry Beyond Recognition (1978)*, AVIATION WEEK: FROM THE ARCHIVES (June 4, 2015), <http://aviationweek.com/blog/law-changed-airline-industry-beyond-recognition-1978> [<https://perma.cc/K34T-S5B2>].

145. *Id.*

146. The United States' Open Skies agreement with the United Arab Emirates went into effect on January 21, 2003, while the Open Skies agreement with Qatar, though concluded on October 3, 2001, is still being applied provisionally. RESTORING OPEN SKIES: THE NEED TO ADDRESS SUBSIDIZED COMPETITION FROM STATE-OWNED AIRLINES IN QATAR AND THE UAE 4 n.11 (2015) [hereinafter RESTORING OPEN SKIES].

Arab Emirates, are parties to Open Skies Agreements with the United States, all three of the Gulf Carriers agreed to eliminate government regulation of routes, passenger capacity, and fares.<sup>147</sup> American carriers, most notably American, Delta, and United Airlines (collectively, the Big Three) believe that they are unable to compete with the Gulf Carriers, who receive governmental subsidies estimated at a combined \$42 billion,<sup>148</sup> because these carriers can keep prices and costs below actual market value.<sup>149</sup> The Gulf Carriers have garnered significant retort from the Big Three because they have begun flights from their home market into the United States by stopping in a European country.<sup>150</sup> The additional stop allows the Gulf Carriers to pick up passengers traveling to the United States from Europe and vice versa. In comparison of international flights, cross-Atlantic flights are some of the most established and expensive routes in the world, and the Big Three's loss of these flight patterns to competition from the Gulf Carriers could result in the reduction of service on cross-Atlantic routes.<sup>151</sup> Not only would this reduction eliminate non-stop services, but it could also result in increased prices for American consumers.

Despite pleading from the Big Three's executives,<sup>152</sup> statements from industry coalitions,<sup>153</sup> analysis from former high-ranking government officials,<sup>154</sup> support from 268 members of the House and 22 members of

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147. *Id.*

148. *Id.* at 12–36.

149. See Benjamin Zhang, *The Middle East's 3 Best Airlines Have Infuriated Their US Competitors*, BUS. INSIDER (July 28, 2015, 5:45 PM), <http://www.businessinsider.com/middle-eastern-us-airlines-dispute-future-of-air-travel-2015-7> [https://perma.cc/Z9D3-LE7E].

150. *Id.*

151. RESTORING OPEN SKIES, *supra* note 146, at 49–50.

152. *U.S. Airline CEOs to Meet with Kerry on Gulf Carriers*, REUTERS (Sept. 17, 2015, 12:59 PM), <http://www.reuters.com/article/airlines-competition-kerry-idUSL1N11N1O720150917> [https://perma.cc/XR83-S3W4]. *But see* Terry Maxon, *Four U.S. Airlines Side with Gulf Carriers, Against American Airlines, Delta Air Lines and United Airlines in Open Skies Battle*, DALL. MORNING NEWS (Aug. 3, 2015, 6:43 PM), <http://aviationblog.dallasnews.com/2015/08/four-u-s-airlines-side-with-gulf-carriers-against-american-airlines-delta-air-lines-and-united-airlines-in-open-skies-battle.html> [https://perma.cc/X4YX-LUZV] (noting that JetBlue and Hawaiian Airlines, along with Atlas Air Worldwide and FedEx have formed a coalition against the Big Three).

153. See Maxon, *supra* note 152 (providing a statement from the Partnership for Open and Fair Skies, a coalition created by the Big Three and their workers' unions. The Bureau of Transportation Statistics estimates that these three airlines employ roughly 270,000 workers); see also Captain Tim Canoll, *Gulf Airline Subsidies Have No Parallel in U.S.*, HUFF. POST (July 6, 2015, 4:43 PM), [http://www.huffingtonpost.com/captain-tim-canoll/gulf-airline-subsidies-ha\\_b\\_7738462.html](http://www.huffingtonpost.com/captain-tim-canoll/gulf-airline-subsidies-ha_b_7738462.html) [https://perma.cc/6GA2-EQAW] (explaining that the Air Line Pilots Association, which represents more than 52,000 professional airline pilots, agrees with the Partnership's sentiments).

154. Rob Britton, *Subsidized Gulf Airlines Are Damaging Airlines Globally, Not Just in the U.S.*, HUFF. POST (Oct. 14, 2015, 5:49 PM), [http://www.huffingtonpost.com/rob-britton/subsidized-gulf-airlines-\\_1\\_b\\_8294892.html](http://www.huffingtonpost.com/rob-britton/subsidized-gulf-airlines-_1_b_8294892.html) [https://perma.cc/M9R5-C9ZY] (explaining that Charlene Barshefsky, who was the USTR under President

the Senate,<sup>155</sup> and government and private action in Europe and Asia,<sup>156</sup> the federal government has not pursued any dialogue or action with the United Arab Emirates or Qatar in regards to the Gulf Carriers' activities. The impact on the Big Three, including their partners, is clear. For instance, since Emirates launched daily non-stop service from the New York metropolitan area to Milan in October 2013, total passenger bookings increased, yet the Big Three have directly lost thirteen points of market share to Emirates.<sup>157</sup> Furthermore, in 2008, United States and European airlines accounted for 81.1% of tickets from Dallas to Mumbai and the Gulf Carriers had 2.8%; however, by 2014, the Gulf Carriers' percentage had increased to 69.6% for this route.<sup>158</sup> Although the DOJ, the antitrust enforcer with authority over airlines,<sup>159</sup> did not review the Big Three's allegations regarding the Gulf Carriers' conduct, it provided analysis to interested governmental entities.<sup>160</sup> The DOJ believes that if the Gulf Carriers' access is restricted, rates will rise and service will fall and that a decision must account for broader policy reasons outside of the airline industry.<sup>161</sup>

Application of the Guidelines to the Big Three's situation with the Gulf Carriers is insightful. Three criteria are required prior to the initiation of an international antitrust suit: 1. Jurisdiction; 2. Comity; and 3. Foreign governmental involvement.<sup>162</sup> The DOJ could likely satisfy the threshold for jurisdiction through either FTAIA § 1(A), which analyzes the impact on import trade or import commerce; however, FTAIA §

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Clinton, said that Gulf airline subsidization is fundamentally distorting the market for international flights and that Robert Hormats, who was an Under Secretary of State for Economic Growth, Energy, and the Environment under Obama, said that other nations' formation of state-owned enterprises is not the United States' concern; instead, it is the United States' concern "if the playing field is not level between them and their American competitors.")

155. *Broad Majority of Voices Call on Obama Administration to Address Unfair Gulf Airline Subsidies*, PARTNERSHIP FOR OPEN & FAIR SKIES, <http://www.openandfair-skies.com/partnership-response-filing/> [<https://perma.cc/H5FE-2KDD>].

156. Britton, *supra* note 154 (noting that government officials from the Philippines, the Netherlands, and the European Union have spoken out against the Gulf Carriers, in addition to several international airlines filing comments in the United States about this situation).

157. American, Delta, and Alitalia fly through JFK while United goes through Newark. RESTORING OPEN SKIES, *supra* note 146, at 49.

158. Michael Scaturro, *EU Carriers Battle Gulf Airlines' Expansion*, DEUTSCHE WELLE (May 28, 2015), <http://www.dw.com/en/eu-carriers-battle-gulf-airlines-expansion/a-18482670> [<https://perma.cc/3HR4-77ZD>].

159. *The Enforcers*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers> [<https://perma.cc/B3BN-6MR5>].

160. The federal agencies investigating the Big Three's allegations include the Departments of State, Treasury, and Commerce. *The DoJ Doesn't Think Much of Lobbying against Gulf Airlines*, FORTUNE (Oct. 13, 2015, 8:07 AM), <http://fortune.com/2015/10/13/airlines-justice-doj-gulf-trade-dispute/> [<https://perma.cc/H244-7DL2>].

161. *Id.*

162. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 52 (jurisdiction, comity, and foreign governmental involvement are required).

1(B), which prohibits anticompetitive conduct that has a direct, substantial, and reasonably foreseeable effect on United States' exports, would provide a stronger argument for jurisdiction. The Gulf Carriers have been expanding their routes and fleet capacity at rates far exceeding the global market's growth because of their governments' equity infusions.<sup>163</sup> As a result, the Gulf Carriers are able to move into specific markets, such as the cross-Atlantic flights, that the Big Three substantially rely on for viability.<sup>164</sup> The effect on the United States' exports is visible as for example, in the New York metropolitan area, Emirates has already taken a huge portion of the market in barely two years.<sup>165</sup>

Furthermore, analysis of the foreign governmental involvement is crucial. Though a foreign government often receives immunity, Qatar and the United Arab Emirates would neither benefit from protection of FSIA nor the Act of State doctrine. These governments have pumped substantial equity into their respective airlines to attain global dominance in the aviation industry and substantial economic growth, which would place these governments' actions into the FSIA's commercial exception. Commercial interests in these countries dominate political action and failure to comply with governmental demands frequently result in serious consequences.<sup>166</sup> The Gulf Carriers' conduct is an international matter, as their planes take passengers worldwide. Therefore, the conduct is not accomplished solely within each government's respective territory.

### C. *Genetically Modified Prices: U.S. Agricultural Subsidies and the World Market*

A similar issue, with a much longer history, also occurs in the global agricultural industry. The United States has an extensive history of providing significant price support to its farmers. In President Franklin Roosevelt's New Deal, the Agricultural Adjustment Act artificially reduced food supplies by providing direct payments to farmers who

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163. See *Emirates and Qatar Airways Announce New US Services—for Commercial as well as Strategic Reasons*, CAPA: CENTRE FOR AVIATION (May 14, 2015), <http://centreforaviation.com/analysis/emirates-and-qatar-airways-announce-new-services---for-commercial-as-well-as-strategic-reasons-222651> [<https://perma.cc/LKM2-WBMV>].

164. See *id.*

165. RESTORING OPEN SKIES, *supra* note 146, at 49.

166. Qatar has received substantial international flack for human rights violations and bribery allegations in conjunction with the 2022 FIFA World Cup, which is currently scheduled to occur in Qatar. See *World Report 2015: Qatar*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2015/country-chapters/Qatar> [<https://perma.cc/A7U3-KV4V>]; see also Owen Gibson, *Russia and Qatar May Lose World Cups if Evidence of Bribery Is Found*, GUARDIAN (June 7, 2015, 8:45 AM), <http://www.theguardian.com/football/2015/jun/07/russia-qatar-lose-world-cups-if-bribery-found-fifa> [<https://perma.cc/FH3A-2NWE>]. The United Arab Emirates is likewise infamous for its lack of transparency and egregious violations of human rights. See *World Report 2015: United Arab Emirates*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2015/country-chapters/united-arab-emirates> [<https://perma.cc/6QJ6-GRLB>].

agreed to cut production.<sup>167</sup> Agricultural producers no longer receive direct payments;<sup>168</sup> instead, the government provides them crop insurance.<sup>169</sup> Farmers have two insurance choices, Price Loss Coverage and Agricultural Risk Coverage,<sup>170</sup> and the government, through a private insurer, provides funding whenever price or revenue, respectively, falls below a certain threshold.<sup>171</sup> With farmers' median income being higher than that of the general population<sup>172</sup> and significant payments going to wealthy individuals,<sup>173</sup> this crop insurance is forecasted to cost over \$85 billion over the next decade.<sup>174</sup>

The switch to crop insurance may be an attempt to appease other countries' concerns because, although, there is considerable domestic opposition to agricultural subsidies, WTO disputes have occurred because of these payments.<sup>175</sup> The direct payments may exceed the limits proposed in the Doha Round and have made the United States' position in trade negotiations exceedingly difficult.<sup>176</sup> For instance, the WTO's Agreement on Agriculture, which entered into effect in 1995, is designed to significantly reduce agricultural subsidies that unfairly distort trade.<sup>177</sup> The Peace Clause existed for several years after the Agreement's enactment, and this clause essentially granted immunity from SCM obligations

167. See Burton Folsom, Jr., *The Origin of American Farm Subsidies*, FREEMAN, Apr. 2006, at 35 (providing background on the history of farm subsidies in the United States).

168. 7 U.S.C. § 8713, *repealed by* Agricultural Act of 2014, Pub. L. No. 113-79, § 1101, 128 Stat. 658 (2014).

169. See Agricultural Act of 2014, Pub. L. No. 113-79, §§ 11001–11028, 128 Stat. 658 (2014).

170. See *Price Loss Coverage or Agricultural Risk Coverage?*, AGRIBANK (July 2014), <http://info.agribank.com/agrithought/Documents/AgriThoughtPLC-ARC.pdf> [<https://perma.cc/836U-MM9W>] (explaining that PLC provides coverage if a commodity's national average price is below its reference price while ARC covers when crop revenues are below either a county's or individual's guarantee).

171. See David Orden & Carl Zulauf, *U.S. Crop Insurance Since 1996*, FARMDOC DAILY (July 16, 2015), <http://farmdocdaily.illinois.edu/2015/07/us-crop-insurance-since-1996.html> [<https://perma.cc/RWS2-QJP5>].

172. According to the most recent figures, the average income of farm household was \$81,480, while the average household in the United States had an income of \$60,528. *Farm Family Income*, U.S. DEP'T OF AGRIC., [http://www.usda.gov/documents/FARM\\_FAMILY\\_INCOME.pdf](http://www.usda.gov/documents/FARM_FAMILY_INCOME.pdf) [<https://perma.cc/D7S3-M6P4>].

173. *Milking Taxpayers*, ECONOMIST (Feb. 14, 2015), <http://www.economist.com/news/united-states/21643191-crop-prices-fall-farmers-grow-subsidies-instead-milking-taxpayers> [<https://perma.cc/L7P5-QJLJ>].

174. *A Costly Farm Bill*, WASH. POST (Mar. 15, 2015), [https://www.washingtonpost.com/opinions/a-costly-farm-bill/2015/03/15/ba2d0a8e-c9bb-11e4-a199-6cb5e63819d2\\_story.html](https://www.washingtonpost.com/opinions/a-costly-farm-bill/2015/03/15/ba2d0a8e-c9bb-11e4-a199-6cb5e63819d2_story.html) [<https://perma.cc/E33Y-RDRQ>].

175. See, e.g., Request for Consultations by Brazil, *United States—Subsidies on Upland Cotton*, WTO Doc. WT/DS267/1 (Oct. 3, 2002).

176. See Orden & Zulauf, *supra* note 171.

177. Agreement on Agriculture Preamble, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Apr. 15, 1994, 1867 U.N.T.S. 410 [hereinafter *Agriculture Agreement*].



for agricultural subsidies.<sup>178</sup> These subsidies were an important focus of the Doha Round, which was effectively abandoned in December 2015, in large part due to the inability to agree on issues relating to agricultural subsidies.<sup>179</sup>

The WTO previously settled a dispute involving United States' agricultural subsidies. In 2002, Brazil initiated DSU proceedings against the United States for its export credit guarantees on upland cotton.<sup>180</sup> The Appellate Body upheld the Panel's determination that certain American export subsidies on agriculture qualified as significant price suppression and thus caused serious prejudice to Brazil's interests.<sup>181</sup> Following proceedings about the United States' failure to comply with the Appellate Body's findings,<sup>182</sup> the matter proceeded to arbitration.<sup>183</sup> The arbitrator ruled that, due to the United States' actionable subsidies, Brazil could request leave from its obligations to the United States for \$147 million.<sup>184</sup>

#### IV. TAKING ACTION

The United States must devise a precocious strategy to navigate the present status of the oil and gas market in Europe. With a booming natural gas industry that will soon export product to Europe, historical animosity between the United States and Russia, and Russia's aggressive foreign policy, there are many competing interests for the United States to contemplate. To be in a strong position, the United States should seek recourse through utilization of the SCM agreement. A law similar to the NOPEC bills would send a message to Russia that the United States is aware of the reason behind Russia's actions, but a new law alone would not be sufficient to assert the United States' interests in this issue. In addition to a NOPEC-like law, pursuing recourse through the WTO would provide the strongest position because it would reinforce the United States'

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178. *Id.* art. 13; *see also* *Agriculture: Explanation—Other Issues*, WTO, [https://www.wto.org/english/tratop\\_e/agric\\_e/ag\\_intro05\\_other\\_e.htm](https://www.wto.org/english/tratop_e/agric_e/ag_intro05_other_e.htm) [<https://perma.cc/MMW3-3MWE>] (noting that the Peace Clause expired in 2003).

179. *See* *Global Trade After the Failure of the Doha Round*, N.Y. TIMES (Jan. 1, 2016), <http://www.nytimes.com/2016/01/01/opinion/global-trade-after-the-failure-of-the-doha-round.html> [<https://perma.cc/BKN2-877M>].

180. Request for Consultations by Brazil, *United States—Subsidies on Upland Cotton*, WTO Doc. WT/DS267/1 (Oct. 3, 2002).

181. Appellate Body Report, *United States—Subsidies on Upland Cotton*, WTO Doc. WT/DS267/AB/R (Mar. 3, 2005).

182. Brazil succeeded in Article 21.5 proceedings against the United States due to the United States' failure to bring its measures into conformity with the Appellate Body's rulings. Appellate Body Report, *United States—Subsidies on Upland Cotton*, WTO Doc. WT/DS/267/AB/RW (adopted June 2, 2008).

183. Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement, *United States—Subsidies on Upland Cotton*, WTO Doc. WT/DS267/ARB/2 (Aug. 31, 2009).

184. *Id.* However, in 2014, Brazil and the United States concluded a Memorandum of Understanding, which effectively ended the dispute. Memorandum of Understanding Related to the Cotton Dispute, *United States—Subsidies on Upland Cotton*, WT/DS267 (Oct. 1, 2014).

commitment to protecting competition and consumers' rights. The federal antitrust laws, as currently interpreted by the FTC and the DOJ, do not provide the necessary coverage for an issue with such global import and are too easily evaded due to jurisdictional complications.

The United States therefore should utilize a developed, multilateral settlement body whose decisions garner the support of the vast majority of its members. The WTO and its DSU provide the perfect forum for accomplishing this task. The Appellate Body's ruling in *United States – Subsidies on Upland Cotton* explicitly demonstrates why the United States should navigate this issue through the WTO.<sup>185</sup> In that decision, the Appellate Body held that the United States' subsidies on cotton, one of America's most historically important crops, qualified as significant price suppression.<sup>186</sup> Here, oil and gas is Russia's most important commodity, as its revenues from its export funded near half of Russia's federal budget in 2013.<sup>187</sup> Furthermore, despite agriculture's historically elevated status in world trade, Brazil successfully asserted that the United States' agricultural subsidies violated the SCM in large part because the Agriculture Agreement's Peace Clause no longer applied. Although Russia may have gained certain concessions upon accession, oil and gas do not have the same historical status as agriculture in the WTO.<sup>188</sup>

The United States therefore must only prove that Russia violated its obligations under the SCM. The USTR would begin by asserting that Russia's involvement in its oil and gas companies and these companies' actions in Europe suffice the standard of "specific subsidy." The United States could likely demonstrate that Russia has subsidized Gazprom and Rosneft to the level that the SCM requires. These companies are state-owned enterprises, which are far above the simple direct transfer of funds contemplated in the SCM's definition of subsidy.<sup>189</sup> Gazprom has a legal monopoly on gas exports through Russia's sizable energy pipeline system, and the Ministry of Energy is calling for this export monopoly to remain for at least five more years.<sup>190</sup> Moreover, Russia directly funds

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185. See Appellate Body Report, *United States – Subsidies on Upland Cotton*, WTO Doc. WT/DS267/AB/R (Mar. 3, 2005).

186. *Id.*

187. *Oil and Natural Gas Sales Accounted for 68% of Russia's Total Export Revenues in 2013*, U.S. ENERGY INFO. ADMIN. (July 23, 2014), <https://www.eia.gov/todayinenergy/detail.cfm?id=17231> [<https://perma.cc/8MS9-HAEN>].

188. As compared to the Agricultural Agreement, which was negotiated during the Uruguay Round and is still hotly debated, see *supra* Section III(c), WTO only began to consider in 2013 how its framework could be used for the regulation of international energy concerns and relations. See Workshop on the Role of Intergovernmental Agreements in Energy Policy, WTO (Apr. 29, 2013), [https://www.wto.org/english/tratop\\_e/envir\\_e/wksp\\_envir\\_apr13\\_e/wksp\\_envir\\_apr13\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/wksp_envir_apr13_e/wksp_envir_apr13_e.htm) [<https://perma.cc/U8JC-PMH6>].

189. SCM, *supra* note 108, at art. 1.1.

190. Elena Mazneva & Dina Khrennikova, *Russia Holds onto Gazprom Export Monopoly to Prop up Budget*, BLOOMBERG BUS. (Oct. 21, 2015, 10:09 AM) <http://www.bloomberg.com/news/articles/2015-10-21/russia-holds-onto-gazprom-export-monopoly-to-prop-up-budget>

studies pertaining to exploration and prospecting efforts<sup>191</sup> and provides substantial tax breaks to aid in the production of oil and gas.<sup>192</sup> As Russia relies on the success and global dominance of its energy companies for its federal budget, these companies, many of which are state-owned, receive benefits that certainly qualify as subsidies. For the purposes of claim asserting violation of the SCM, detailing the existence of a subsidy is vital.

Upon the likely demonstration of a subsidy, the USTR would then need to prove that the subsidies provided to the Russian oil and gas companies suffice the requisite specificity. As development, production, and sale of fuel commodities is extremely expensive, a strong determination of specificity, which requires the subsidy to be limited to particular enterprises,<sup>193</sup> is unlikely to occur because there are relatively few companies in these industries.<sup>194</sup> The inverse of the second qualification, which regards clearly delineated, objective criteria, however, is helpful to the USTR.<sup>195</sup> Russia's infamous opacity in government could aid in satisfying the requirement of specificity. In regards to the United States' agricultural subsidies, there are objective, clearly stated requirements and limitations. However, the Appellate Body still upheld the Panel's ruling that the United States' subsidies were specific.<sup>196</sup> As Putin has often placed his associates in control of these companies and found ways to defeat those who do not agree with his policy, a Panel is unlikely to hold that there are clearly objective criteria for determining which Russian oil and gas companies receive subsidies.

While favorable adjudication of a prohibited subsidy is more certain, the USTR is better positioned to demonstrate that Russia's subsidies are actionable subsidies under the SCM. There are three categories of adverse effects that constitute actionable subsidies.<sup>197</sup> Most notable is the third type of adverse effect: "serious prejudice to the

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[<https://perma.cc/X5N7-C5FX>]

191. Iuliia Ogarenko et al., *G20 Subsidies to Oil, Gas and Coal Production: Russia*, OVERSEAS DEV. INST. 2 (Nov. 2015), <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/9969.pdf> [<https://perma.cc/53Z9-2S2U>].

192. *See id.* (explaining that field-based tax privileges in 2012 equaled \$8 billion, or roughly 0.4% of Russia's GDP for the year).

193. SCM, *supra* note 108, at art. 2.1(a).

194. An argument from the USTR on this qualification is not likely a winning political move, as the United States also subsidizes specific actors in the fossil fuel industry. *Fossil Fuel Subsidies: Overview*, OIL CHANGE INT'L, <http://priceofoil.org/fossil-fuel-subsidies/> [<https://perma.cc/ZQ2T-928A>].

195. SCM, *supra* note 108, at art. 2.1(b).

196. Appellate Body Report, *United States—Subsidies on Upland Cotton*, WTO Doc. WT/DS267/AB/R (Mar. 3, 2005); *see also* Panel Report, *United States—Subsidies on Upland Cotton*, WTO Doc. WT/DS267/R (Sept. 8, 2004) (stating that "a textual analysis of 'the legislation pursuant to which the granting authority operates', to discern whether or not it 'explicitly limits access to a subsidy to certain enterprises' led to the conclusion that the United States' subsidies were specific).

197. SCM, *supra* note 108, at art. 5(a)–(c).

interests of another Member.<sup>198</sup> The addition of serious prejudice is crucial because a Member can complain about exporters from the subsidizing Member impeding or displacing exports in a third party market.<sup>199</sup> In its action against the United States, Brazil employed this third category of actionable subsidy, as interpreted by the specific article regarding serious prejudice.<sup>200</sup>

At face value, the USTR would have difficulties convincing a DSU Panel that Russia's subsidies qualify as actionable. In *Upland Cotton*, Brazil successfully argued serious prejudice through demonstrating significant price suppression under Article 6.3(c) of the SCM.<sup>201</sup> United States' companies have not yet exported gas to Europe, so price suppression of gas exports to Europe has not occurred. However, Article 6.4 of the SCM provides an important opportunity as the Article states that serious prejudice exists when the subsidized product's market share remains the same when it otherwise would decrease or when it declines at a rate slower than it otherwise would.<sup>202</sup> Russia is willing to go to great lengths to protect its market position in Europe. Absent the subsidies given for production and development, tax breaks, and governmentally supported export monopolies, Russia's energy companies would undoubtedly suffer a substantial loss of market share because the infrastructure and industry necessary to compete would be nearly unavailable. Based on the determinations above, the United States should claim that Russia's subsidization of its oil and gas industries contravene the obligations that Russia accepted upon its accession to the WTO.

Additionally, and separate from the present issue, pursuing recourse through the WTO can garner international goodwill for the United States. While countries with close relations with Russia would tend to oppose the United States' initiation of DSU procedures, other states would likely approve. The United States has promoted liberalized trade post-World War II.<sup>203</sup> While the United States can unilaterally implement measures to provide solutions to trade issues,<sup>204</sup> recourse through the DSU would insulate the United States from the erratic and potentially violent actions of an economically struggling Russia. The additional value is that utilizing the WTO's system to resolve a situation with Russia, the

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198. This third category was new to the SCM. Alan O. Sykes, *The Economics of WTO Rules on Subsidies and Countervailing Measures* 15 (Univ. of Chi. L. Sch., Working Paper No. 186, 2003).

199. SCM, *supra* note 108, at art. 6.3(b); Sykes, *supra* note 198, at 15–16.

200. Appellate Body Report, *United States—Subsidies on Upland Cotton*, WTO Doc. WT/DS267/AB/R (Mar. 3, 2005).

201. *Id.*

202. SCM, *supra* note 108, at art. 6.4.

203. Robert E. Baldwin, *The Changing Nature of U.S. Trade Policy Since World War II, in THE STRUCTURE AND EVOLUTION OF RECENT U.S. TRADE POLICY* 5, 7, 10 (Robert E. Baldwin & Anne O. Kreuger eds., 1984).

204. U.S. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978-2 (codified as amended in scattered sections of 19 U.S.C.); Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590 (codified as amended in scattered sections of 19 U.S.C.).

United States' most prominent adversary for nearly seventy years, would demonstrate that the United States has faith in the system and policies that it has championed.<sup>205</sup> The United States' leaders should consider the potential for an increase in the United States' global favorability, which has been turbulent over the past fifteen years,<sup>206</sup> a serious factor when navigating foreign and domestic policy concerns.

A law akin to the NOPEC bills could bolster the United States' position that preservation of competition and protection of consumers are of the utmost importance. The law, however, should be ancillary to any action that the United States would pursue through the WTO. The Fifth Circuit's decision in *Spectrum Stores*, which dismissed the case on political factors outside of the antitrust laws' ambit,<sup>207</sup> demonstrates why a NOPEC law, with its modifications to the Sherman Act, could strengthen the United States' stance on antitrust enforcement against foreign conduct.

Russia has already announced intentions to coordinate efforts with Venezuela to stimulate an increase in oil prices, as both countries have felt the economic repercussions of the current price decline.<sup>208</sup> The complainants in *Spectrum Stores* alleged that the companies and respective countries had colluded to fix gas prices in the United States. In the current situation, a Russian spokesperson publicly announced that Russia and Venezuela met to synchronize their tactics.<sup>209</sup> A NOPEC law would clarify that this type of overt collusion is a violation since it would constitute the conduct and harm expressly prohibited by previous NOPEC bills' proposed amendments to the Sherman Act.<sup>210</sup> Disregarding any complex foreign policy concerns, with an updated Sherman Act, federal

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205. Others also have faith in the system. Energy disputes in WTO have increased significantly in the past several years. Most notably, the EU and Russia are currently in dispute over the EU's Third Energy Package, an important provision of which "prohibits a single company from both owning and operating a gas pipeline . . ." *Russia Sues EU over 'Third Energy Package' – Report*, RT (Apr. 30, 2014, 8:11 PM), <https://www.rt.com/business/156028-russia-sues-eu-energy/> [<https://perma.cc/5EWL-QHLN>]. Russia claims that the EU has violated several of its obligations, including SCM. Request for Consultations by the Russian Federation, *European Union and its Member States—Certain Measures relating to the Energy Sector*, WTO Doc. WT/DS476/1 (May 5, 2014).

206. Richard Wike et al., *America's Global Image*, PEW RESEARCH CTR. (June 23, 2015), <http://www.pewglobal.org/2015/06/23/1-america-global-image/> [<https://perma.cc/CM8W-QBYT>].

207. *Spectrum Stores, Inc. v. Citgo Petrol. Corp.*, 632 F.3d 938, 952–53 (5th Cir. 2011).

208. Россия и Венесуэла Собрались Стимулировать Рост на цен на Нефть [*Russia and Venezuela Gathered to Stimulate the Growth of Oil Prices*], BBC RUSSIAN (Sept. 3, 2015), [http://www.bbc.com/russian/rolling\\_news/2015/09/150903\\_rn\\_oil\\_russia\\_venezuela](http://www.bbc.com/russian/rolling_news/2015/09/150903_rn_oil_russia_venezuela) [<https://perma.cc/G73Y-QLCX>].

209. *Id.*

210. See, e.g., No Oil Producing and Exporting Cartels Act of 2011, S. 394, 112th Cong. §§ 1–3 (2011); No Oil Producing and Exporting Cartels Act of 2011, H.R. 1899, 112th Cong. §§ 101–103 (2011).

antitrust authorities would have stronger statutory ability to prove that Russia's actions with Venezuela, in addition to its actions in Europe and the Middle East, disobey the law.

The DOJ and the FTC could also likely suffice the jurisdictional requirements in an antitrust action against Russia for colluding with Venezuela to stimulate prices under Subsection 1(A) of FTAIA<sup>211</sup> because the United States imports crude oil and petroleum products from Russia and Venezuela. However, petroleum imports have decreased significantly from 612,000 barrels per day in 2010 to 330,000 barrels per day in 2014, and from 1,063,000 in 2009 to 789,000 barrels per day in 2014, from Russia and Venezuela, respectively.<sup>212</sup> Thus, such a claim may not be viable in the coming years, especially with the United States' likelihood of becoming an important exporter of natural gas.

Either the DOJ or the FTC could ultimately exercise jurisdiction under Subsection 1(B) of FTAIA,<sup>213</sup> though it is heavily dependent on Russian actions. Because of the likely time limitations of exerting jurisdiction under Subsection 1(A), the antitrust enforcers should focus their efforts on utilizing Subsection 1(B). Due to fracking,<sup>214</sup> the United States has excess gas supplies and is building five large export terminals on the Atlantic coast, with the first to be operational by early 2016.<sup>215</sup> Furthermore, while demand in the European Union has declined, its gas terminals have significant capacity to stock up on supply.<sup>216</sup> Thus, as the United States is set to export petroleum in the near future, combined with the European Union's staggering capacity for storage, Russia faces a serious problem in regards to its market position in Europe's energy

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211. 15 U.S.C. § 6(a)(1)(A) (2012).

212. *Petroleum & Other Liquids: U.S. Imports by Country of Origin*, U.S. ENERGY INFO. ADMIN., [https://www.eia.gov/dnav/pet/pet\\_move\\_impcus\\_d\\_nus\\_NVE\\_mbbldpd\\_a.htm](https://www.eia.gov/dnav/pet/pet_move_impcus_d_nus_NVE_mbbldpd_a.htm) [<https://perma.cc/RF43-FNB6>]; *Petroleum & Other Liquids: U.S. Imports by Country of Origin*, U.S. ENERGY INFO. ADMIN. [https://www.eia.gov/dnav/pet/pet\\_move\\_impcus\\_d\\_nus\\_NRS\\_mbbldpd\\_a.htm](https://www.eia.gov/dnav/pet/pet_move_impcus_d_nus_NRS_mbbldpd_a.htm) [<https://perma.cc/UG4H-65H5>].

213. 15 U.S.C. § 6(a)(1)(B) (2012).

214. Much of the United States' gas deposits are located in shale formations. See *Facts about Shale Gas*, AM. PETROL. INST., [http://www.api.org/Policy-and-Issues/Policy-Items/Exploration/Facts\\_About\\_Shale\\_Gas](http://www.api.org/Policy-and-Issues/Policy-Items/Exploration/Facts_About_Shale_Gas) [<https://perma.cc/DNZ6-2C46>]. Fracking is the process of fracturing the shale formations to stimulate the flow of fossil fuels and thus, increase the amount that can be extracted. *The Process of Hydraulic Fracturing*, EPA, <http://www.epa.gov/hydraulicfracturing/process-hydraulic-fracturing> [<https://perma.cc/BC7K-3HPY>].

215. Andres Cala, *The Newest U.S. Export May Leave Russia with Excess Gas*, USA TODAY (July 2, 2015, 9:46 AM), <http://www.usatoday.com/story/news/world/2015/07/02/ozy-us-export-russia-gas/29580505/> [<https://perma.cc/68JV-TABQ>] (noting further that, while half of LNG supplies are slated for delivery to Asian markets, the rest should head to Europe, especially as several European companies have contracted for some deliveries).

216. Frank Umbach, *Russian-Ukrainian-EU Gas Conflict: Who Stands to Lose Most?*, NATO REV., <http://www.nato.int/docu/review/2014/nato-energy-security-running-on-empty/Ukrainian-conflict-Russia-annexation-of-Crimea/EN/index.htm> [<https://perma.cc/S38G-M3MJ>] (explaining that EU's gas terminals did not use 73% of their regasification capacity in 2013 and more gas terminals are being constructed).

imports.<sup>217</sup> Russia's response to the forthcoming American competition in this market will determine if jurisdiction exists under Section 1(B). However, if Russia's recent actions to protect its European market<sup>218</sup> are any indication, jurisdiction is likely to occur.

The United States could ultimately suffice the third element of pre-substantive analysis: foreign governmental involvement. Under FSIA's framework, if Russia's energy companies acted anticompetitively in the European oil and gas market, Russia is unlikely to qualify for sovereign immunity.<sup>219</sup> Gazprom and Rosneft, among other Russian energy companies, are state-owned enterprises for purposes Section 1603(b) of the FSIA. The companies in *In re Vitamin C*, although influenced by the Chinese government, were not state-owned enterprises and still did not qualify for the defense.<sup>220</sup> Furthermore, as the United States is set to begin exporting natural gas, continued Russian involvement in Ukraine and Syria may produce a substantial direct effect as American producers, refiners, and exporters are unlikely to engage in international business where the market's dominant supplier has already engaged in warfare to prevent competitors from entering the market.

The Russian government is notorious for its lack of transparency<sup>221</sup> and President Putin is infamous for placing his loyal associates in places of power, including as heads of Gazprom and Rosneft,<sup>222</sup> so the executives of these companies are unlikely to attempt any business strategies that conflict with Putin's interests. Furthermore, failure to comply with the Kremlin's directives has resulted in serious consequences. For instance, former Chief Executive Officer of the multinational energy corporation Yukos, Mikhail Khodorkovsky, went to prison for alleged tax crimes and had his multinational energy corporation, Yukos, dismantled.<sup>223</sup> Based

217. Although Russia largely exports gas to Europe on the basis of long-term contracts, those contracts have undergone significant renegotiations in recent years. Luca Franza, *Long-Term Gas Import Contracts in Europe*, CLINGENDAEL INT'L ENERGY PROGRAMME, 2014, at 11–20.

218. See earlier discussion of Russian intervention in Ukraine and Syria; see also Russia's naming of NATO and the United States as threats to national security.

219. See *Allen v. Russian Federation*, 522 F. Supp. 2d 167, 183 (D.D.C. 2003) (“Majority ownership by a foreign state, not control, is the benchmark of instrumentality status.”).

220. *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522, 564–65 (E.D.N.Y. 2011).

221. See Tom Blass, *Combating Corruption and Political Influence in Russia's Court System*, in GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS 31, 31–34 (Linda Ehrlich & Diana Rodriguez eds., 2007) (describing the increased power of Russia's Executive Branch in the role of the judiciary and also the increase of bribe taking by members of the judiciary).

222. William Watkinson, *Putin's Inner Circle: A Glimpse of the Powerful Men Pulling the Strings Behind Russia's President*, INT'L BUS. TIMES (July 18, 2015, 4:42 PM), <http://www.ibtimes.co.uk/putins-inner-circle-glimpse-powerful-men-pulling-strings-behind-russias-president-1511474> [<https://perma.cc/2G4Y-UXWR>].

223. See *In re Yukos Oil Co.*, 320 B.R. 130 (S.D. Tex. 2004); see also Jason M. Waltrip, *The Russian Oil and Gas Industry After Yukos: Outlook for Foreign Investment*, 17 TRANSNAT'L L. & CONTEMP. PROBS. 575, 581–83 (2008) (explaining that Khodorkovsky's

on this business environment, any anticompetitive conduct in Europe by Russian energy companies would likely suffice the first criterion of foreign sovereign compulsion. However, the burden of the second element, which requires conduct to exclusively occur in the foreign state's territory, is not likely to be satisfied.<sup>224</sup> The conduct potentially harming the United States could occur in states across Europe and also affects certain areas of the Middle East, including Syria, Qatar, and Turkey.<sup>225</sup> These states, though some may have previously been under the Soviet Union's sphere of influence or currently have close relations with Russia,<sup>226</sup> are independent states whose markets should be open to free and robust competition. Finally, the third element is also unlikely, as this element prohibits the use of the defense if the conduct would not qualify for immunity under FSIA and specifically cannot be utilized if the challenged actions fall within the commercial activity exception.<sup>227</sup>

Regardless of whether the elements are satisfied, the United States still should not pursue an antitrust action against Russia due to reasons of comity. Here, the Big Three's situation with the Gulf Carriers, and the lack of any United States administrative action is telling. Comity preventatively accounts for the political impact of an antitrust action against a foreign government and will prohibit the DOJ or the FTC from initiating a suit. In regards to Qatar and the United Arab Emirates, these countries are two of the United States' most important, and most oil-rich, allies<sup>228</sup> in a region where American presence has increasingly become unwelcomed.<sup>229</sup> The foreign policy interests and political capital, in conjunction with these countries' geostrategic location and resource-rich territories,

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significant support of political parties opposed to Putin's party, United Russia, is often attributed as the impetus for this state action).

224. See U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 52, § 3.32.

225. See *id.* at 18 (stating that the defense does not apply when the foreign sovereign requires firms to fix prices for sale or resale in a market).

226. Belarus is still largely under Russia's influence, especially as the two countries, along with Kazakhstan, Kyrgyzstan, and Armenia, are tied together through the Eurasian Economic Union. *The Eurasian Economic Union*, EURASIAN ECON. COMM'N, <http://www.eurasiancommission.org/en/Pages/ses.aspx> [https://perma.cc/7HKT-CKDX].

227. See 28 U.S.C. § 1605(a)(2) (2012); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 52, § 3.32.

228. See Simon Henderson, *Uneven Diplomacy: The U.S.-Qatar Relationship*, WASH. INST. FOR NEAR EAST POL'Y (Feb. 23, 2015), <http://www.washingtoninstitute.org/policy-analysis/view/uneven-diplomacy-the-u.s.-qatar-relationship> [https://perma.cc/ACQ5-PYSN]; Rajiv Chandrasekaran, *In the UAE, the United States Has a Quite, Potent Ally Nicknamed "Little Sparta,"* WASH. POST (Nov. 9, 2014), [https://www.washingtonpost.com/world/national-security/in-the-uae-the-united-states-has-a-quiet-potent-ally-nicknamed-little-sparta/2014/11/08/3fc6a50c-643a-11e4-836c-83bc4f26eb67\\_story.html](https://www.washingtonpost.com/world/national-security/in-the-uae-the-united-states-has-a-quiet-potent-ally-nicknamed-little-sparta/2014/11/08/3fc6a50c-643a-11e4-836c-83bc4f26eb67_story.html) [https://perma.cc/32MB-UCWV] (expanding upon the United States' precarious relationship in the region and with these countries).

229. For a history of American foreign policy in the Middle East since the late Twentieth Century, see *What Have Been the Role and Effects of U.S. Foreign Policies and Actions in the Middle East?*, PBS, <http://www.pbs.org/wgbh/globalconnections/mideast/questions/uspolicy/> [https://perma.cc/V6V2-DYBB].



are too vital to gamble in potential litigation over anticompetitive conduct in the airlines industry.

The same result is true for Russia. Either the DOJ or the FTC could satisfy the pre-substantive requirements of jurisdiction under FTAIA and foreign government involvement. Furthermore, either agency could also fulfill the requisite personal jurisdiction as required by the Clayton Act for all antitrust actions<sup>230</sup> since a subsidiary of Gazprom has an office in Houston<sup>231</sup> and Rosneft has assets in the United States.<sup>232</sup> However, a federal court's prior attempt to exercise judicial power over Russia will undoubtedly factor into a decision to file an action.

In late 2003, Mikhail Khodorkovsky, Russia's wealthiest man,<sup>233</sup> was the Chief Executive Office of Yukos, Russia's largest energy company.<sup>234</sup> Khodorkovsky, previously one of Putin's associates, was politically active in supporting opposition in the Duma to Putin's party.<sup>235</sup> Khodorkovsky and several of his associates were subsequently arrested, and Russian authorities levied embezzlement and tax evasion claims against the company,<sup>236</sup> including claims that exceeded the company's revenues for 2001 and 2002.<sup>237</sup> To collect on its alleged receivables, Russia scheduled an auction of Yukos' assets; however, prior to the auction, Yukos filed a bankruptcy petition in bankruptcy court in Houston.<sup>238</sup> Despite the issuance of a temporary restraining order that placed a worldwide automatic stay on creditors' claims,<sup>239</sup> Russia held the auction, though large international companies, such as Gazprom or Rosneft, did not participate.<sup>240</sup> A previously unknown Russian company was the highest bidder on Yukos'

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230. 15 U.S.C. § 22 (2012) ("Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business. . . .").

231. *What We Do: A Global Business*, GAZPROM MKTG. & TRADING, <http://www.gazprom-mt.com/WhatWeDo/Pages/default.aspx> [<https://perma.cc/4LEX-E2Y2>].

232. *Rosneft at a Glance*, ROSNEFT, [https://www.rosneft.com/about/Rosneft\\_today/](https://www.rosneft.com/about/Rosneft_today/) [<https://perma.cc/RA8F-7DK2>].

233. R.G. Gidadhubli, *Yukos Affair: Putin Attacks Russia's Oil Barons*, 38 *ECON. & POL. WKLY.* 4949, 4949 (2003).

234. *The Yukos Affair: A Ghost Bites Back*, *ECONOMIST* (June 27, 2015), <http://www.economist.com/news/business/21656191-shareholders-what-was-once-russias-biggest-oil-company-scent-victory-ghost-bites-back> [<https://perma.cc/F8G5-VAZY>] [hereinafter *The Yukos Affair*].

235. Waltrip, *supra* note 223, at 583.

236. *The Yukos Affair*, *supra* note 234.

237. Waltrip, *supra* note 223.

238. Brenden Marino Carbonell, *Cornering the Kremlin: Defending Yukos and TNK-BP from Strategic Expropriation by the Russian State*, 12 *U. PA. J. BUS. L.* 257, 267 (2009).

239. *In re Yukos Oil Co.*, 320 B.R. 130, 133–35 (S.D. Tex. 2004) (noting that the TRO was not effective against Russia because of insufficient service of process). The court subsequently determined in part that the petition should be dismissed because of the inability to provide a sufficient forum to resolve the matter. See *In re Yukos Oil Co.*, 321 B.R. 396, 411 (S.D. Tex. 2005).

240. Carbonell, *supra* note 238, at 267.

seminal asset, Yuganskneftegaz.<sup>241</sup> The day after its acquisition, the company merged with Rosneft, which thus effected Yukos' nationalization.

As demonstrated in this incident, Russian government officials are willing to exert power over individuals and entities that do not conform to the country's policy objectives, even if the action defies another country's courts.<sup>242</sup> American foreign policy concerns, therefore, are too important to risk in a potential action in the United States. Russia has already engaged in warfare to maintain its oil and gas market share, so Russia would certainly not have qualms about refusing a United States court's assertion of jurisdiction. There is no mechanism in federal court system that can ensure Russia would be held accountable if found liable. As the United States has been lackluster in its responses to Russian intervention in Ukraine and Syria, initiating an antitrust suit will not satisfy the image that the United States must project into global politics. Thus, "broader policy reasons" will likely be elevated above any potential antitrust enforcement.

### CONCLUSION

With the Russian government's ever escalating attempts to hold on to its dominance in Europe's vast energy market, the United States is presented with an interesting conundrum as large amounts of domestic fossil fuel products are slated for export in 2016. The unique qualities of oil and gas commodities, in addition to Russia's aggressive foreign policy and Russia and the United States' historical animosity, mean that the United States must be creative when formulating a response to protect its interests in the international oil and gas market.

Administrative action would provide the necessary creativity. Passage of specific oil and gas antitrust legislation would remove substantial confusion from the analysis of Russia's conduct. Even without a guiding statute, the antitrust enforcers, the DOJ and the FTC, could likely exert jurisdiction based on the conduct of Russia's state-owned oil and gas enterprises. While these agencies protect the foundation of our free-market economy, these agencies should give pause prior to initiating any type of action against these Russian companies. Not only is there a

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241. Yuganskneftegaz is now Rosneft's largest oil-producing enterprise and develops thirty license areas in the Khanty-Mansiysk Autonomous District of Western Siberia. *Yuganskneftegaz*, ROSNEFT, [https://llcrnyuganskneftegaz.rosneft.com/about/Rosneft\\_today/Operational\\_structure/Development\\_and\\_Production/LLCRNYuganskneftegaz/](https://llcrnyuganskneftegaz.rosneft.com/about/Rosneft_today/Operational_structure/Development_and_Production/LLCRNYuganskneftegaz/) [<https://perma.cc/788T-E4QN>].

242. Many of Yukos' shareholders whose property was expropriated by Russia in 2003 engaged in litigation to recover their losses. The shareholder's largest victory to date was a \$50 billion judgment issued by a unanimous Permanent Court of Arbitration in the Netherlands. This ruling includes the support of a judge that Russia nominated for the proceeding. *The Yukos Affair: A Ghost Bites Back*, ECONOMIST (June 27, 2015), <http://www.economist.com/news/business/21656191-shareholders-what-was-once-russias-biggest-oil-company-scent-victory-ghost-bites-back> [<https://perma.cc/LM36-7JSZ>].

high political cost in bringing such a suit, but Russia also evaded the previous attempt of a United States' court to exert any notion of jurisdiction over its affairs.

USTR, however, is in a unique place due to the existence of the WTO and Russia's recent accession to membership. Unlike an attempt by the antitrust agencies, the WTO and its DSU provide an international forum that could more successfully hold Russia accountable for its anticompetitive actions. Utilizing a multilateral arena would also aid the United States' perception globally, as compared to trying to enforce action unilaterally in its national court system. A definite drawback to pursuing recourse in the WTO is that the United States' antitrust law is more developed than the WTO's case law, which would result in a more predictable outcome. However, the ability to hold Russia accountable, in addition to garnering support from other Members, far outweigh the drawbacks of pursuing redress in the international system.