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Sanctions as a Bone of Contention in the EU-Germany-US-Russia Quadrilateral

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On 2 August 2017, President Donald Trump grudgingly signed into law the Countering America's Adversaries through Sanctions Act. In a statement issued at the same time when he signed the document he called the bill 'seriously flawed'.³ Preceding the signature were votes in both houses of Congress that passed the legislation with overwhelming majorities, 98:2 in the Senate and 419:3 in the House of Representatives.

The law calls for the imposition of certain additional sanctions targeting Iran, Russia, and North Korea. The part of the voluminous law that concerns Russia is entitled, in its short version, the Countering Russian Influence in Europe and Eurasia Act.⁴ Its main provisions are designed severely to limit the President's ability to relax existing sanctions against Russia; increase financial and energy-related sanctions; expand sectoral sanctions to cover the Russian railway, shipping, metals, and mining industries; target 'persons' (i.e. individuals or institutions) who

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³ For the full text of the Act see <https://www.congress.gov/115/bills/hr3364/BILLS-115hr3364enr.pdf>.

⁴ Sections 201-212 of the Act. The full title of these sections is 'Sanctions with Respect to the Russian Federation and Combating Terrorism and Illicit Financing'. – A comprehensive overview of the Act as adopted by the US Senate in June 2017 has been provided by Inessa Owens, Eunhyung Kim Shin and Alison J. Stafford Powell, 'Significant New Russia Sanctions Legislation Advances in the US Senate Alongside Iran Ballistic Missile Sanctions', 18.6.2017, <http://www.bakermckenzie.com/en/insight/publications/2017/08/uspresident-signs-sanctions-bill/>.

evade corruption and foreign sanctions; and impose a raft of extra-territorial ‘secondary sanctions’ in the energy, defence, cyber security and other sectors. While some provisions require the President to implement the sanctions within a prescribed period of time, others do not and will require implementing action by the executive branch. The law also contains discretionary provisions as, for instance, sanctions targeting Russian energy export pipelines.

In fact, some of the most important provisions of the law concern energy. As aptly described and analyzed by the US Atlantic Council,⁵ current sanctions prohibit Western companies from providing goods or services to next-generation oil projects in Russia. Specifically, these pertain to Arctic offshore, deepwater, and shale projects. The bill now expands US *mandatory* restrictions in two important ways. First, it brings projects in which Russian companies are involved – regardless in which country they are located – under the purview of sanctions. That means Russian companies would be denied the opportunity to acquire expertise in advanced drilling techniques by learning from Western partners. Second, the bill requires the executive branch to impose sanctions on foreign firms that make significant investments in next-generation Russian oil projects. This provision – a classic case of secondary sanctions also known as backfilling – would discourage companies around the world from investing in Arctic offshore, deepwater, and shale oil projects in Russia, diminishing the risk that lost US business will be picked up by foreign competitors. Taken together, the provision could severely hamper Russia’s development of next-generation oil resources.⁶

Furthermore, while most energy-related sanctions according to the law are mandatory, the imposition of sanctions on investment in the construction of Russian energy export pipelines is *discretionary*. If the Treasury Department, that is, the branch of the executive responsible for the implementation of sanctions, opted to use this provision, it could threaten sanctions on companies that take part – as investors, suppliers or contractors – in Russian pipeline construction projects. Specifically, the law provides that the sanctions shall target parties that (1) ‘knowingly make an investment that directly and significantly contributes to the enhancement of the ability of Russia to construct energy export pipelines, or (2) sell, lease, or provide to Russia goods, services, technology, information, or support that could directly and significantly facilitate the maintenance or expansion of the construction, modernization, or repair of energy pipelines, and where the investment or transaction has a fair market value of \$1,000,000 or more, or that, during a 12-month period, has an aggregate fair market value of \$5,000,000 or more’.⁷

That includes the Nord Stream 2 gas pipeline.⁸ The Act specifically states (in essence, reminds the president) that ‘It is the policy of the United States [...] to continue to oppose the Nord

⁵ Edward Fishman, ‘The Senate Just Passed a Monumental New Russia Sanctions Bill—Here’s What’s In It’, Atlanticcouncil.org, 14.6.2017, <http://www.atlanticcouncil.org/blogs/ukrainealert/the-senate-just-passed-a-monumental-new-russia-sanctions-bill-here-s-what-s-in-it>.

⁶ *Ibid.*

⁷ Sec. 232 of the Act.

⁸ The significance and controversies surrounding Nord Stream 2 were dealt with in an earlier Brief; see Hannes Adomeit, ‘Germany, the EU, and Russia: The Conflict over Nord Stream 2’, Policy Brief, Centre for European Studies and EU Centre for Excellence, Carleton University, Ottawa, Carleton.ca, 7.4. 2016, <http://carleton.ca/ces/research-and-publications/policy-briefs/>.

Stream 2 pipeline given its detrimental impacts on the European Union's energy security, gas market development in Central and Eastern Europe, and energy reforms in Ukraine.'⁹

Both the mandatory and the discretionary energy-related sanctions have elicited determined opposition by the EU and several European countries and even outrage.¹⁰ Thus, for instance, in a joint statement German Foreign Minister Sigmar Gabriel and Austrian Chancellor Christian Kern charged that 'We cannot accept the threat of illegal [sic] extraterritorial sanctions being imposed on European companies that are participating in efforts to expand Europe's energy supply network!' They went on to say that 'Europe's energy supply network is Europe's affair, not that of the United States of America! [...] We decide who supplies us with energy.' In an obvious swipe at Trump's protectionist impulses they added that 'we do so based on transparency and on free market principles'.¹¹ Furthermore, they asserted that the (then draft) bill 'is surprisingly candid about what is actually at stake, namely selling American liquefied natural gas and ending the supply of Russian natural gas to the European market. The bill aims to protect US jobs in the natural gas and petroleum industries.'¹²

Furthermore, they demanded that

'Political [sic] sanctions should not in any way be tied to economic interests. Threatening to impose penalties on companies in Germany, Austria and other European countries with regard to their business in the United States if they participate in, or fund, natural gas projects involving Russia, such as Nord Stream 2, impacts European-American relations in a new and very negative way.'¹³

The assertion that the Russia sanctions were, in essence, a threadbare design to benefit the US oil and gas companies finds some support in the bill, in the demand that 'the United States Government should prioritize the export of United States energy resources in order to create American jobs, help United States allies and partners, and strengthen United States foreign policy'.¹⁴

In the German political context it was not surprising that it was Foreign Minister Gabriel of the Social Democratic Party (SPD) who furiously attacked the draft bill. Essentially, he shares the 'soft' line of apologia and appeasement vis-à-vis Russia as conducted by ex-chancellor Gerhard Schröder and his predecessor in the foreign ministry, Frank-Walter Steinmeier. Above all, he has

⁹ Sec. 257 (9) of the Act.

¹⁰ For an analysis and criticism of European, notably German, opposition to the 'secondary' or 'extraterritorial' sanctions see Joachim Krause, 'Kommentar – Die Rolle von Sanktionen in der Politik gegenüber Russland – ein Dank an den amerikanischen Kongress', Vol. 1, No. 3 (September 2017), pp. 284-86, <https://doi.org/10.1515/sirius-2017-0061>.

¹¹ 'Foreign Minister Gabriel and Austrian Federal Chancellor Kern on the Imposition of Russia Sanctions by the US Senate', German Foreign Office, Auswärtiges-amt-de, 15.6.2017, http://www.auswaertiges-amt.de/EN/Infoservice/Presse/Meldungen/2017/170615_Kern_Russland.html?nn=728990. – The outrage was directed at the Senate draft bill but after its adoption by the House the final version was signed into law by the president without any changes.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ Sec. 257 (a) of the Act.

been a firm advocate of Nord Stream 2. He has made a case not only for the construction of the Nord Stream 2 gas pipeline *per se* but also for using it as a lever for the possible improvement of German-Russian relations, proclaiming that ‘a different and better relationship with Russia’ should begin with the construction of the pipeline and end in the lifting of sanctions against Russia.¹⁵ Furthermore, as early as October 2015, in ‘private’ conversation with President Putin at his Novo Ogaryovo state residence, Gabriel assured his Russian hosts that he would do everything to ensure that all the legal issues connected with the project would ‘remain under the competence of the German authorities’ and that the German government would make sure that any ‘opportunities for external meddling’ and ‘political interference’ would be limited – a clear commitment to subvert both EU policies and law as set down in the organization’s Third Energy Package.¹⁶

The position of the German foreign minister has been endorsed by Chancellor Merkel. She has always maintained that Nord Stream 2 was purely a ‘commercial project’ and that the government, therefore, had no business interfering. In line with this position, regarding the new US sanctions, government spokesman Steffen Seibert stated that the chancellor shared the concerns raised by her foreign minister and the Austrian chancellor. He called the US move ‘peculiar’ and found it ‘strange’ that sanctions intended to punish Russia for meddling in the US elections could also lead to penalties against European companies.¹⁷ Brigitte Zypries (SPD), the economics minister, was even more emphatic. ‘Simply and clearly stated’, she said, we consider [the US extraterritorial sanctions] to be contrary to international law. The Americans can’t punish German enterprises when they conduct economic activities in another country.’¹⁸

Whatever the case may be concerning the application of the mandatory sanctions, it is highly unlikely that Trump will implement the discretionary sanctions. The Act states that the President, ‘*in coordination with allies* of the United States, may impose sanctions’ against parties that make an investment for the construction or modernization of energy export pipelines.¹⁹ ‘Coordination’ is stronger than consultation. Whereas the former can be interpreted to be a requirement, the latter can more easily be ignored if attempts at arriving at a common position fail.

¹⁵ ‘Gabriel schlägt Ende der Sanktionen gegen Russland vor’, *Zeit.de*, 25 September 2015, <http://www.zeit.de/politik/ausland/2015-09/sigmar-gabriel-russland-sanktionen-syrien>.

¹⁶ Gabriel in his then capacity as vice-chancellor as well as economics and energy minister. ‘Transcript of the Meeting Between Russian Federation President Vladimir Putin and Vice-Chancellor and Minister of Economic Affairs and Energy of Germany Sigmar Gabriel, Novo-Ogaryovo, Moscow Region’, *Kremlin.ru*, 28 October 2015, <http://en.kremlin.ru/events/president/news/50582>.

¹⁷ Andreas Rinke, ‘Bundesregierung macht geschlossen Front gegen US-Senat’, Reuters.com, 16.6.2017, <http://de.reuters.com/article/usa-russland-sanktionen-merkel-idDEKBN19713U>.

¹⁸ Zypries nennt US-Sanktionen gegen Russland “völkerrechtswidrig”, *Tagesspiegel.de*, 31.7.2017, <http://www.tagesspiegel.de/politik/bundeswirtschaftsministerin-zypries-nennt-us-sanktionen-gegen-russland-voelkerrechtswidrig/20126744.html>. – The question as to whether ‘indirect’ or ‘extraterritorial’ sanctions are contrary to international law is in dispute. For the argument that they *are* see Natalino Ronzitti, *Coercive Diplomacy, Sanctions and International Law* (Leiden: Brill Nijhoff, 2016), esp. p. 122.

¹⁹ Sec. 232 of the Act (italics not in the original). For details see above.

The German government's opposition to any linkage of sanctions to Nord Stream 2 does not mean that its position on the sanctions issued in response to the Russian annexation of the Crimea and its military intervention in eastern Ukraine had in any way changed.

EU Sanctions and Russian Policies toward Ukraine

Germany has consistently advocated the imposition of EU sanctions against Russia. The process of their imposition occurred in three stages. The first stage was agreed upon by the European Council on 6 March 2014 in reaction to Russia's military intervention in Crimea. It provided for measures at the diplomatic level, including the suspension of negotiations for the conclusion of a new or modified Partnership and Cooperation Agreement (PCA). Talks on visa liberalisation or visa-free travel were shelved as were EU-Russia summit meetings as well as meetings of sectoral working groups. EU member states supported the idea that instead of a G8 summit in Sochi, a G7 meeting should be held in Brussels. EU member states supported the suspension of negotiations over Russia's joining the OECD and the International Energy Agency. Stage 2 was set in motion on 17 March 2014 when the EU imposed first travel bans and asset freezes against persons and entities involved in actions against Ukraine's territorial integrity. In July 2014, following Russia's annexation of the Crimea and its military intervention in eastern Ukraine, the EU embarked on the third stage of measures, imposing more economic sanctions and reinforcing them in September 2014.

The economic sanctions include the prohibition for EU nationals and companies to buy or sell new bonds, equity or similar financial instruments with a maturity exceeding 30 days, issued by major state-owned Russian banks, energy and defence companies; embargos on the import and export of arms and related material from/to Russia; exports of dual use goods and technology for military use in Russia or to Russian military end-users; exports of certain energy-related equipment and technology to Russia without prior authorisation by competent authorities of EU member states; issuance of export licenses for products destined for oil exploration and production in waters deeper than 150 meters or in the offshore area north of the Arctic Circle, and projects that have the potential to produce oil from resources located in shale formations by way of hydraulic fracturing.²⁰

In total, the EU imposed asset freezes and visa bans on 150 persons while 37 entities were subjected to a freeze of their assets in the EU. This includes persons and entities responsible for action against Ukraine's territorial integrity, persons providing support to or benefitting Russian decision-makers and 13 entities in Crimea and Sevastopol that were confiscated or that have benefitted from a transfer of ownership contrary to Ukrainian law.

On 4 August 2017, by decision of the Council three persons and three companies were added to the sanctions list over Russia's 'actions against Ukraine's territorial integrity'.²¹ The sanctions

²⁰ The 'restrictive measures' (visa bans and asset freezes) and 'economic sanctions' (as enumerated above) according to https://europa.eu/newsroom/highlights/special-coverage/eu-sanctions-against-russia-over-ukraine-crisis_en.

²¹ For the sanctions imposed as a result of the Siemens controversy see <http://www.consilium.europa.eu/en/press/press-releases/2017/08/04/sanctions-ukraine/>.

were imposed upon German initiative and are linked to the ‘Siemens affair’ (to be analyzed below), the illegal diversion of four Siemens gas turbines from southern Russia to Ukraine’s Russian-occupied Crimean Peninsula. The persons comprise deputy energy minister Andrei Cherezov; department head at the ministry Yevgeny Grabchak; and chief executive of OAO Technopromexport Sergei Topor-Gilka. The enterprises targeted are the just named Technopromexport, which is an engineering company, a subsidiary of the state enterprise Rostec and the Siemens treaty partner for the delivery of turbines to the region of Krasnodar in southern Russia; OOO Technopromexport, the enterprise that, according to the EU, is the current owner of the turbines; and ZAO Interautomatika which is responsible for the provision of products and services in power plants. According to the EU, the enterprise is co-responsible for the illegal transfer of the turbines to Crimea.²² The sanctions consist of an asset freeze and a travel ban, which will now apply to a total of 153 persons and 40 entities.

The case concerns four Siemens gas turbines with a total capacity of 940 megawatt that Russia wants to install in power stations now being built at a fast pace in Sevastopol and Simferopol.²³ The stations with their power generators are to meet Crimea’s acute energy deficit. Before Russia’s annexation of the Crimea in 2014, the peninsula received 80 percent of its required energy from mainland Ukraine. Thereafter, Ukraine cut off the power supply, as a consequence of which Crimea experienced permanent blackouts. On 13 August 2014 Putin reportedly met with Sergei Chemezov, the chief of Rostec, the Russian state-controlled corporation in charge of projects in the fields of military and industrial technologies and dual-use goods. They decided that two power plants should be built in the above-mentioned cities and that the joint stock company OAO Technopromexport, a Rostec’s subsidiary, would be in charge of the project’s execution.

On 10 March 2015 the Siemens subsidiary Siemens Gas Turbines Technology, bypassing the tender system required for all Russian state companies, signed a then secret contract to produce and deliver seven gas turbines for their use in a projected power station on the Taman peninsula in Krasnodar region, a mere 10 kilometers across the Kerch strait from Crimea. Siemens obviously knew of the possibility, if not the likelihood, that the turbines were destined for the peninsula and that this would be in violation of the EU sanctions banning companies from participating in energy projects in occupied Crimea. Thus, the contract specifically prohibited the use of the gas turbines in power stations connected to the Crimean power grid, and Technopromexport even provided specific guarantees to that effect. Testimony to the treatment of the sensitive issue at the highest- levels has been provided by the German newspaper *Wirtschaftswoche* which reported, based on its own sources, that at the end of September 2016, a

²² OAO is the Russian acronym for open joint-stock company; OOO for a joint-stock company with limited liability; and ZAO for a closed joint-stock company.

²³ For an initial assessment of the conflict over the Siemens turbines see Hannes Adomeit, ‘Gas and Oil Interests Split Europe and US in Sanctions Policy’, 5 July 2017, <https://www.raamoprusland.nl/dossiers/geopolitiek/636-gas-and-oil-interests-split-europe-and-us-in-sanction-policy>. – The reconstruction of the controversy draws on ‘How Siemens Chose To Ignore The Obvious. An Investigation Into The Crimean Sanctions Break’, Euromaidanpress.com, 24.7.2017, <http://euromaidanpress.com/2017/07/24/how-siemens-chose-to-ignore-the-obvious-crimea-turbines/>.

meeting took place between Putin, his speaker, German vice-chancellor Gabriel, and the German ambassador to Moscow, Rüdiger von Fritsch. At that meeting, the Kremlin chief reportedly promised the German interlocutors that the *Siemens* turbines would not end up in Crimea.

Russia would have been able to create a *fait accompli* had it not been for the fact that, in late June and early July 2017, the first photos and a video of what were clearly two Siemens turbines on location in Sevastopol were published online; the photos were replicated by Reuters from an independent source. Subsequently it transpired that the remaining two Siemens turbines were delivered to Crimea through the port of Feodosiya. Immediately, on July 3, in an effort at damage control, the Russian energy ministry announced that it would limit access of foreign producers to data about the usage of their equipment in Russia. Official Russian sources denied any wrongdoing, pointing to a statement by OOO Technopromexport, explaining that it had purchased four turbines for Crimea ‘on the secondary market’ and ‘modernized the equipment’ with the resources of Russian factories and engineering companies.

The case shows that Putin takes German good will for granted and probably entertained the comforting notion that Siemens and the German government would make some fuss but then, both in a literal and a broader sense, would return to ‘business as usual’. The net result of the deceit is much the same as that of Russia’s hacking and election interference in the United States. As demonstrated by the near unanimous support for the new sanctions in both the US Senate and the House of Representatives, the Kremlin won skirmishes and battles but lost the war of changes in US policy favourable to Russia. And as a result of the breaches of contract and assurances in the Siemens case, Russia managed to erode even further the little confidence and trust it has left in Germany and elsewhere in Europe.

There is also no indication that Putin will soon be able to extricate Russia from the dead end into he maneuvered the country in its relations with both Ukraine and the West, and that there are realistic prospects for the Western sanctions regime to end.

Prospects

One of the major reasons for this rests in the fact that both the United States and the EU have linked the termination of the economic sanctions to the ‘complete implementation of the Minsk agreements’.²⁴ The fact of the matter, however, is that on close scrutiny not a single one of the thirteen provisions of the February 29/15 Minsk 2 agreements has ‘fully’ been implemented. As a result, the EU Council has successively prolonged the sanctions for six months, with the most recent extension put in effect in September 2017 for the period until March 2018. The US position is even more stringent. With its Countering Russian Influence in Europe and Eurasia Act the US Congress is not only forcing the executive to expand the sanctions but has limited the president’s room for maneuver if he wanted to weaken or rescind the sanctions. Furthermore, in February 2017 United States ambassador to the UN Nikki Haley stated unequivocally that the

²⁴ Council of the EU, ‘EU Restrictive Measures in Response to the Crisis in Ukraine’, <http://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/>. – ‘Package of Measures for the Implementation of the Minsk Agreements’, https://peacemaker.un.org/sites/peacemaker.un.org/files/UA_150212_MinskAgreement_en.pdf (in English), <http://www.osce.org/ru/cio/140221?download=true> (in Russian). – The February 2015 agreements are also referred to as Minsk 2. Its predecessor was the Minsk Protocol of September 2014.

US government would continue ‘to condemn the Russian occupation of the Crimea and demand its immediate termination’. She reiterated Washington’s standard position that ‘the Crimea is a part of Ukraine’ and added that the sanctions would ‘remain valid until Russia has returned control over the peninsula to Ukraine’.²⁵ As, indeed, the Russian ambassador to the UN realized, at issue was more than a mere ‘change in tone’.²⁶ The US position had hardened. The lifting of sanctions was now made dependent not only on the full implementation of the Minsk 2 agreements but on the return of the Crimea. The president, according to his spokesman, had made this ‘very clear’ to Moscow.²⁷

The likelihood that Minsk 2 will ‘fully’ be implemented is exceedingly remote. This is evident when considering both Ukraine’s and Russia’s interests and commitments, and what it is that both governments have failed to implement. Kiev was to carry out ‘constitutional reform in Ukraine, with a new constitution to come into effect by the end of 2015’ with ‘decentralisation as its key element’; ‘local elections [to be held] in accordance with relevant OSCE standards and monitored by OSCE/ODIHR’ (also by the end of 2015); furthermore, ‘approval of permanent legislation on the special status of particular districts of Donetsk and Luhansk oblasts taking into account peculiarities of [these] districts’; ‘support for the socio-economic development of [these] districts’; assistance to be provided from central executive bodies for cross-border cooperation by [these] districts with regions of the Russian Federation’; and ‘freedom to create people’s militia units by decision of local councils to maintain public order in particular districts of Donetsk and Luhansk oblasts’. In essence, from Kiev’s perspective, implementation of these provisions would fail to reestablish Ukrainian sovereignty and legitimize the rule of the separatists in the areas under their control.

The Russian government, in turn, is averse to leaving the separatists to their fate, and it is not required to act. Its position is firm that implementation of Minsk 2 is up to Kiev and the authorities in Luhansk and Donetsk. The required ‘pullout of all foreign armed formations [and] military equipment’ from the conflict areas need not concern Russia since, officially, it maintains neither one nor the other there. Similarly, the restoration of ‘control of the state border to the Ukrainian government in the whole conflict zone’ officially is none of Moscow’s business. It, too, from Moscow’s perspective is something to be worked out by the separatists – and only as a result of a process that would ‘start on the first day after the local election and end after the full political regulation’.

The net result of the incompatibility of the positions of Kiev and Moscow is that the fate of the separatist republics will, in all likelihood, be the same as that of other ‘frozen conflict’ areas. Whatever the legal form of Russian control, whether annexation (Crimea), ‘international’ legal recognition as independent states (South Ossetia and Abkhazia) or *de facto* control

²⁵ U.S. Ambassador to U.N. blames Russia for new violence in eastern Ukraine. Reuters.com, 2.2.2017, www.reuters.com/article/us-russia-un-ukraine-idUSKBN15H2TS?il=0.

²⁶ ‘UN Ambassador Haley hits Russia hard on Ukraine’, CNN.com, 2.2.2017, <http://edition.cnn.com/2017/02/02/politics/haley-russia-un/>.

²⁷ White House spokesman Sean Spicer: ‘Trump expects Russia to return Crimea to Ukraine’, Reuters.com, 14.2.2017, www.reuters.com/article/us-usa-trump-russia-ukraine-idUSKBN15T2IY?il=0.

(Transnistria), the government of the countries concerned will in the foreseeable future be unable to reassert sovereignty over these areas.

Given this state of affairs and the failure of the sanctions to change the status quo in Crimea and eastern Ukraine, calls have increased for severing the linkage between Minsk 2 and the sanctions, or at least their partial lifting in exchange for some or some substantial progress in its the implementation. In hearings before the Foreign Affairs Committees of the Senate and the House of Representatives on 13-14 June 2017, US Secretary of State Rex Tillerson said that he did not want be ‘handcuffed’ to the agreement if it turned out that Russia and Ukraine decided to settle the conflict through some other structure.²⁸ Chancellor Merkel, as the chief European supporter of the sanctions, and her new coalition government could be persuaded to align themselves with that position – provided, however, as Tillerson stated, that the new structure served ‘to achieve the Minsk objectives’.²⁹ Scepticism is well in place as to whether such a structure will be put in place.

²⁸ Patricia Zengerle, ‘U.S. doesn't want to be 'handcuffed' to Ukraine agreement’, Reuters, 14.6.2017, <https://www.reuters.com/article/us-usa-diplomacy-tillerson/u-s-doesnt-want-to-be-handcuffed-to-ukraine-agreement-idUSKBN19528J>.

²⁹ *Ibid.*