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Introduction Symposium: Russia and the Rule of Law: New Opportunities In Domestic and International Affairs

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SYMPOSIUM: RUSSIA AND THE RULE OF LAW: NEW OPPORTUNITIES IN DOMESTIC AND INTERNATIONAL AFFIARS

INTRODUCTION

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Throughout the period known as the Cold War, the globe was divided into two competing factions, led by the United States and the Soviet Union. Today, the Russian Federation continues in its role as a major player on the world stage but has not solved its identity crisis as the successor to the mighty Soviet Union. While Russia has engaged its fellow nations on a number of issues such as containing the spread of nuclear weapons and international trade, it has also

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embarked on some alarming ventures such as the invasion of Georgia in August 2008. With this dichotomy in mind, the *American University International Law Review* hosted a symposium on Russia in February 2009 entitled *Russia and the Rule of Law: New Opportunities in Domestic and International Affairs*.

This issue contains several articles by symposium participants. This brief introduction will highlight the discussions that occurred during the symposium event itself and function as a guide for the articles in this issue. All the summaries below are the interpretation of the author and are not intended to impute a position upon any panelist.

I. INTERNATIONAL TRADE AND ENERGY MARKETS

Russia is rich in natural resources and is one of the biggest producers of oil and gas in the world. Since the fall of the Soviet Union, Russia has been slowly integrating itself into the world market, including a drawn out accession process with the World Trade Organization (“WTO”). However, in light of the recent global financial crisis, progress in the Russian domestic economy and its international trade relations has been put on hold. Discussing these issues were Leonard Coburn, President of Coburn International Energy Company and Member of the Law Council; Val Kogan, President, Mid-Atlantic - Russia Business Council; William Pomeranz, Deputy Director, Kennan Institute, The Woodrow Wilson International Center for Scholars; and David G. Tarr, Consultant, Former World Bank Lead Economist 1988-2005.

The panelists all agreed that the process of accession to the WTO transforms the way a country does business because membership in the WTO generally demands domestic reform in order to meet WTO obligations. Accession to the WTO can be a unique opportunity for domestic reform, particularly for Russia. The panelists discussed the need for a series of new laws covering not only traditional trade barriers such as tariffs, but also technical standards, intellectual property, and the service industries. David Tarr noted that the Russian legislature, the Duma, seems committed to make the necessary substantial changes to Russia’s domestic system. Tarr commented that even though the Russian financial system was one of

the most controversial of its service sectors, Russia has already negotiated to allow foreign ownership of financial services and to allow foreign investment companies to own and trade securities in Russia, all as part of the WTO accession process.

The panelists agreed that the Russian economy rises when oil and gas prices are high, and declines when prices go down. Leonard Coburn discussed the use of energy as a foreign policy tool, mentioning the intermingling between the Russian executive branch and the state owned energy company Gazprom. He also described the Russian manipulation of gas supplies to Europe, via pipelines in the Ukraine, as a way to keep former Soviet States within the Russia's sphere of influence. However, Coburn noted that Russia's annual gas contract disputes with the Ukraine may backfire by convincing Europe that Russia is not a reliable energy supplier and encouraging the continent to look elsewhere for gas supplies.

That the global recession could lead to increased protectionist measures in Russia was another point of agreement. William Pomeranz stated that while Russia has enjoyed an increase in foreign direct investment, there has been some recent backsliding in the form of protectionist measures that may hinder future foreign investment. Such measures may take the traditional forms of tariffs and quotas, but may also involve the creative use of tax and health inspections against foreign companies. In his article, *Russian Protectionism and the Strategic Sectors Law*, Pomeranz describes a recent Russian law that can trigger a government review whenever a transaction involving a foreign company and a Russian "strategic" company may result in the foreign company gaining direct or indirect control of the Russian company.¹ Pomeranz notes that "strategic" sectors include not only aerospace and arms production, but can include fishing, television and publishing, and telecommunications firms. On the one hand, the passage of the law has eliminated uncertainty by providing clear standards and procedures for foreign companies to purchase interest in Russian companies. On the other hand, the time consuming and expensive process, coupled with the need to reveal confidential information to Russian authorities, may discourage more foreign companies from investing in Russia, especially if a larger

1. William E. Pomeranz, *Russian Protectionism and the Strategic Sectors Law*, 25 AM. U. INT'L L. REV. 213 (2010).

number of foreign investment transactions are denied under the new law. Such an increase in protectionism could have huge political consequence in Russia, particularly because much of the Russian economy relies on imports.

Val Kogan described Russia's financial meltdown during the late 1990s and its damage to the growth of small business. He cautioned that such a catastrophe might again be in Russia's imminent future. However, Kogan also highlighted some positive changes in Russia since the 1990s, such as a more innovation friendly business environment, the creation of special economic zones to encourage technology firms, and the rise of a venture capital industry.

Finally, Matt Edwards commented that the slowing world economy could lead to a rise in protectionism, particularly the creation of "buy domestic" provisions for certain government determined strategic sectors—all of which would complicate Russia's WTO accession process. However, Edwards also commented that when oil and gas prices were high, Russia lacked the incentive to embark on legal reforms. He described the insufficient checks and balances in the Russia system, including the lack of judicial independence, the absence of a truly independent investigate media, and the extreme deference of the Russian legislative branch to the executive agencies. Edwards posited that the global economic slump may actually galvanize Russia to embark on positive economic and legal reforms, developing clearer laws and more predictably enforcing those laws.

II. THE LAW OF THE SEA AND RUSSIA'S CLAIMS IN THE ARCTIC CIRCLE

Participating on this panel were Michael A. Becker, Patterson Belknap Webb & Tyler LLP, Co-Chair, Law of the Sea Committee of the ABA Section on International Law; Professor Betsy Baker, Vermont Law School; Professor David D. Caron, Boalt Hall Law School; and Margaret Hayes, Director of the Office of Ocean and Polar Affairs, U.S. State Department.

The panelists uniformly asserted that the media hype about a race to the Arctic—and particularly about Russian aggressiveness in Arctic claims—was overblown. The panel believed that the Arctic will more likely function as an opportunity for international

cooperation than a flashpoint for conflict. Nonetheless, the panel did highlight Russia's predominant role in any discussion on the Arctic, noting Russia's extensive coastline and the accompanying exclusive economic zone, the millions of Russian citizens living within the Arctic region, Russia's extensive history in the area, and Russia's submission for an Extended Continental Shelf ("ECS"). The panelists discussed the U.N. Convention on the Law of the Sea ("UNCLOS") as the primary legal framework for resource claims in the Arctic, remarking that even though the U.S. has not ratified the UNCLOS, all the polar states (Canada, Denmark, Norway, Russia, and the United States) have agreed that they will operate under the UNCLOS regarding the Arctic Circle. David Caron further noted that in some areas Russia's domestic laws are relevant to the Arctic, particularly since Russia has the most freshwater rivers emptying into the Arctic. Caron also discussed the history of Cold War nuclear testing and Russia's dumping of nuclear waste in the Arctic region. Even today, Russia's nuclear activities raise concerns about Russia's environmental and safety standards, its ability to adopt new regulations, and its ability to enforce existing ones.

Michael Becker argued that there is an effective international legal regime in place for addressing Russian activities in the Arctic including not only UNCLOS, but also the following: the Arctic Council, which deals with scientific cooperation; the International Maritime Organization, which has established a "polar code" for the shipping industry; and various regional fishery management organizations as outgrowths of UNCLOS provisions that address Arctic fishing. In his article, *Russia and the Arctic: An Opportunity for Engagement Within the Existing Legal Framework*, Becker asserts that rather than operating in a legal vacuum, the existing legal framework is sufficient for addressing Russia's claims in the Arctic.² Becker calls for strengthening and extending the existing legal framework where necessary, rather than embarking on a new Arctic treaty separate and apart from the agreements above.

Betsy Baker explored the ECS claim process, noting that when the 200 nautical mile extended economic zones of the polar states are accompanied by claims for an extended continental shelf, there is the

2. Michael Becker, *Russia and the Arctic: An Opportunity for Engagement Within the Existing Legal Framework*, 25 AM. U. INT'L L. REV. 225 (2010).

potential for most of the Arctic Circle to be under national sovereignty. Baker addressed the interplay between science and law in mapping the extended continental shelf. In her article, *Mapping the Arctic Continental Shelf: Russia's Leading Role and the Promotion of Scientific and Circumpolar Cooperation*, she describes how the existing legal framework realizes heavily on the science of continental mapping, and emphasizes that the ECS is a juridical concept that does not necessarily reflect the geology of the region.³ While scientific investigation of the continental shelves cannot provide lawyers with a bright line rule, it can nonetheless provide the tools and context to help approximate the line in determining ECS claims. Increased scientific cooperation in the Arctic mapping process, she argues, could help further legal and diplomatic efforts to resolve state territorial claims.

Margaret Hayes discussed Russia's ECS submission and its efforts to revise its claim in accordance with Commission recommendations, noting the U.S. concerns with the original submission and acknowledging that Russia has made an effort to obtain better scientific data. All of the panelists agreed that when Russia finally submits its revised ECS claim, this exercise of sovereignty will be another example of Russia's adherence to the rule of law in the Arctic.

III. DOING BUSINESS IN RUSSIA . . . AS A LAWYER

The speakers were Mary Adele Greer, Senior Advisor, Criminal Law Reform Program, ABA Rule of Law Initiative; Eileen M. O'Connor, Orrick, Herrington & Sutcliffe LLP; and Ludmila Petrova, Attorney at Law, St. Petersburg Bar Association.

The panel addressed the similarities and contrasts between legal careers in Russia and other countries. The panelists discussed the challenges one faces when practicing law in Russia, both for Russian trained lawyers and for lawyers from other countries. A recurring theme throughout the panel was the problem of corruption in the

3. Betsy Baker, *Law, Science, and the Continental Shelf: The Russian Federation and the Promise of Arctic Cooperation*, 25 AM. U. INT'L L. REV. 251 (2010).

Russian legal system. There was a general consensus regarding the marked difference in the rule of law in the hinterlands from the major cities. Additionally, the panel highlighted the criminal law system in Russia and the differences between procedures in Russia and other states.

Ludmila Petrova, a Russian trained lawyer and alumna of the Washington College of Law, provided an overview of the Russian legal education system. Petrova noted that while there are certainly more opportunities to get a legal education than there would have been under the Soviet Union, the quality of the schools today is uneven. Petrova also remarked that it is difficult to enforce ethical rules and standards, and that bribery is a major concern. Petrova lamented the lack of a collegial atmosphere between the defense and prosecution bars, noting that prosecutors and judges seem to enjoy more advantages than defense lawyers.

Eileen M. O'Connor, who before her legal career also covered corruption and organized crime as a reporter for CNN, also addressed the corruption issue. O'Connor discussed a number of high profile cases involving Russian businesses, remarking that there remains a problem with lawyers negotiating deals outside the court system in a less than ethical fashion.

Mary Greer discussed the ABA's Rule of Law Initiative ("ROLI") in Russia to improve clinical legal education, access to justice, ethical standards of the Russian legal profession, and criminal law reform efforts. ROLI efforts involve introducing international standards for criminal law, covering items such as preventing abuse in detention procedures, ensuring the impartiality of justices of the peace, and encouraging anti-corruption efforts at the municipal level. Greer agreed with Petrova that Russian defense lawyers are at a disadvantage as compared with prosecutors and judges. Specifically, she explained that defense lawyers do not always have access to materials, whereas prosecutors receive more opportunities for training. Greer further commented that defense lawyers and prosecutors strongly disagree about criminal procedure matters.

IV. ENVIRONMENTAL ISSUES IN RUSSIA AND THE FORMER SOVIET STATES

At this panel, the speakers were Matthew R. Auer, Dean, Hutton Honors College, Indiana University, Professor of Public and Environmental Affairs; Ruth Greenspan Bell, Senior Fellow, World Resources Institute (WRI); and Alexander Golub, Senior Research Fellow, Environmental Defense Fund. The panelists discussed Russia's reliance on energy resources and the accompanying problems of pipeline disruptions to the environment, complications stemming from pollution, and Russia's international role in environmental policy.

Matthew Auer described the many pipelines from Russia that provide energy to Europe, as well as proposed new pipelines that would avoid transiting through the Ukraine entirely. Auer remarked that Europe would prefer to avoid depending on Russian gas, but noted that proposals to get gas elsewhere may be insufficient because Russia's ability to secure long-term contracts not only makes it difficult to renegotiate existing energy agreements, but also prevents new entrants from penetrating the market. The best solution, Auer argued, would be to invest in alternative energy sources for the long term future, such as solar power, wind power, and the use of biomass crops.

Ruth Bell discussed environmental assistance programs in the states comprising the former Soviet Union, noting that little headway has been made after twenty years of work. Bell commented that Russia's pollution is a concern not just for Russia but for all of Russia's neighboring states. She posited that Russia is solely concerned with its energy security and noted that only when energy prices drop does Russia bother to put climate change and pollution on its policy agenda. Bell further remarked that Russia is prone to ignoring its own environmental regulations when it chooses to, while simultaneously and harshly applying those same regulations against businesses that are government targets. However, Bell concluded that the best way to engage the Russian leadership on environmental issues is through the connections between energy, climate change and pollution; it is in Russia's interest to constructively engage with its neighboring states on spillover of pollution, carbon capture, and alternative energy sources.

Alexander Golub disagreed with Bell's comment that the Russian leadership is not concerned with environmental issues. Rather, Golub argued that Russia is mindful of environmental issues because it is aware of the importance that the West places on those issues; Russia understands that constructive engagement on environmental issues at an international level is a useful policy tool. Furthermore, Russia is beginning to realize it will only achieve sustainable economic growth if it reforms its environmental, energy, and climate policies. Golub discussed air pollution, stating that Russia has a very high rate of carbon emissions—the pollution in Moscow alone has contributed to increased mortality rates. Golub noted that, although Russia has joined the Kyoto Protocol (while the U.S. has not), Russia has done little to implement the Protocol because when energy prices are high, Russia lacks the incentive to pass the necessary domestic laws. Golub concluded that Russia now has the opportunity to improve energy efficiency and air quality, as well as reduce carbon emissions, so long as energy prices are low and the world suffers through a global economic slump.

V. NUCLEAR NONPROLIFERATION AND THE FUTURE OF ARMS CONTROL TREATIES

The speakers at this panel were Professor Orde F. Kittrie, Sandra Day O'Connor College of Law, Arizona State University; Dr. Edward Ifft, Adjunct Professor, Security Studies Program of the School of Foreign Service, Georgetown University; and Thomas Graham Jr., Executive Chairman, Board of Directors, Thorium Power and Special Representative of the President for Arms Control, Nonproliferation and Disarmament, 1994-99. The panelists discussed the global non-proliferation regime and the responsibility of Russia to continue disarmament of its own nuclear weapons and to prevent the spread of nuclear weapons to other states.

Edward Ifft discussed the status of arms control between the U.S. and Russia, noting that the major nuclear arms reduction treaty between the two Cold War superpowers would expire on December 5, 2009.⁴ Ifft argued that Russian and U.S. nonproliferation policies

4. At the time of this writing, START expired on December 5, 2009, and no follow on treaty has been signed.

toward Iran have been similar and mutually supportive and that, although Russia is mostly uncomfortable with the use of sanctions as tool of international policy, Russia has been supportive in other areas such as proposing fuel banks for Iran in lieu of Iranian domestic development of nuclear material.

Orde Kittrie disagreed with Ifft that Russia has been supportive of U.S. policies regarding Iran, highlighting Russian assistance with Iranian nuclear reactor designs and contracts to provide Iran with conventional weapon systems. Nevertheless, Kittrie argued that Russia and the U.S. absolutely must work together on nuclear issues of mutual interest, including further reductions in nuclear arsenals, the expansion of nuclear forensics, efforts to combat nuclear terrorism, and efforts to develop nuclear fuel assurances. Kittrie further stressed the necessity of 1) implementing the "123" Agreement between Russia and the U.S. regarding cooperation on peaceful nuclear technology, which was suspended after Russia's invasion of Georgia; 2) expanding the Cooperative Threat Reduction Program ("CTR") to dismantle old Cold War nuclear weapons, which will expire in 2013; and 3) devising an instrument to replace the START treaty when it expires in December 2009.

Thomas Graham provided a history of the development of nuclear weapons, and argued that the major nuclear weapons states, particularly the U.S. and Russia, were failing to live up to the obligations embodied by the Non-Proliferation Treaty (NPT). Graham referred to the central bargain of the NPT in which, in exchange for the commitment of non-nuclear states to not acquire nuclear weapons and to agree to nuclear safeguards, the nuclear weapon states would agree to allow fuel access and to embark on weapon disarmament. Graham argued that the relationship between the U.S. and Russia is the most important state-to-state relationship within the global non-proliferation regime, and only through their cooperative efforts will the international legal framework of the NPT have any real force.

VI. HUMAN RIGHTS AND HUMANITARIAN LAW IN THE AUGUST 2008 RUSSIA-GEORGIA CONFLICT

The symposium concluded with a very timely discussion of the Russian invasion of Georgia in the summer of 2008. The panel focused on analysis of human rights and humanitarian law, particularly a report of Human Rights Watch on the conflict that was released just before the symposium. The speakers were Miriam Lansky, Senior Program Officer for Central Asia and the Caucasus, National Endowment for Democracy; George Kaladze, Senior Counselor of the Embassy of Georgia to the United States; and Rachel Denber, Deputy Director, Europe and Central Asia Division, Human Rights Watch.

Miriam Lansky discussed international law issues involving the territorial integrity of the state of Georgia and critically examined Russia's claim of protecting Russian citizens in the breakaway regions of Abkhazia and South Ossetia. Lansky mentioned the problematic precedent set by Kosovo's declaration of independence, which separatist groups in Georgia argue is analogous to their situation. However, Russia's recognition of the breakaway regions sets a dangerous precedent for other groups in the Caucasus including groups that wish to break away from Russia proper. Lansky argued that it is in the international community's interest (including both Russia and Georgia) to return to the status quo ante respecting state sovereignty and the territorial integrity of state borders.

George Kaladze, from the Georgian Embassy, elaborated on the history between Russia and Georgia, arguing that Georgia views the issues of Abkhazia and South Ossetia as internal, domestic problems of the state of Georgia. Kaladze noted that Russia has sought a number of legal justifications to gather international support for its actions in the war. He argued that Russia's actions demonstrate that it is trying to impose new rules of engagement on the world system, seeking a return to the concept of "spheres of influence," where larger states dictated the affairs of smaller states. Kaladze said that Abkhazia and South Ossetia are Georgia's problem and can be effectively handled by Georgia alone without Russia's interference.

Rachel Denber discussed how international humanitarian law was applied during the conflict, emphasizing that all parties to a conflict have obligations under international law to refrain from targeting civilians and to hold violators accountable, including trying them for war crimes. Denber highlighted Human Rights Watch's research on the conflict, which concluded that the Georgian side had indiscriminately targeted villages with artillery. Yet there was no evidence that the Georgians intended to target civilians, which would be a war crime; rather they failed in their duty to minimize harm to civilians as required by international law. The Russian forces were at times effective in minimizing harm to civilians by setting up roadblocks that prevented separatist militia forces from running rampant in areas under Russian control but, as a matter of policy, the Russian military did not acknowledge that it had a duty to protect civilians, and at times aerial bombardments seemed to violate principles of proportionality and non-targeting of civilians. Denber stressed that the separatist militias were by far the worst violators in the conflict, with evidence not only that Georgian villages were systematically targeted for destruction and looting, but also that the militia forces committed acts of torture and carried out summary executions.

CONCLUSION

The symposium highlighted a wide variety of domestic and international legal challenges for the Russian Federation as it continues to develop its post Cold War identity. In the international arena, Russia has demonstrated its adherence to the rule of law in some areas, such as the Arctic Circle claims process and nuclear non-proliferation, while displaying dangerous tendencies in others, such as the violation of state sovereignty in the invasion of Georgia. Panelists provided commentary on areas of positive change in the domestic realm as well as opportunities for improvement, but cautioned that Russia often lacks the necessary impetus to embark on substantial reforms. The resolution of Russian domestic legal challenges will have repercussions in the international arena as well, particularly in areas such as the environment, international trade, foreign investment, and energy. Whether Russia continues to make progress in the rule of law in international and domestic affairs or

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falls backward is a concern both for the citizens of Russia and the international community as a whole.