Taking Your Russian Dispute Offshore: Procedural Tools Available Outside Russia for Use in Disputes Within Russia

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As a moth is drawn to the light, so is a litigant drawn to the United States.

Judge Lord Denning

Introduction

This article addresses certain recurring questions that I have received over the years from Russian clients with a legal problem in Russia.[1] Some clients have wanted to know what legal proceedings they could bring outside Russia to assist them in their dispute centered within Russia. Other clients wanted to know what kinds of legal proceedings they had to fear outside of Russia, *i.e.*, they wanted to know their legal exposure abroad. As a lawyer licensed to practice in New York, I have primarily provided advice about the legal framework in the United States. Accordingly, this article provides an overview of some of the options in the United States.[2]

It is to be expected that the demand for this kind of cross-border advice will grow as Russian companies expand their presence outside of Russia. At present, however, it is probably safe to say that the vast majority of Russian companies are not subject to the jurisdiction of the US courts under the traditional scope personal jurisdiction (based on being registered, doing business, listing shares, or having real estate in the United States). As a result, litigants have had to resort to what one might call more imaginative or aggressive approaches to invoking the judicial power of the US courts. For example, major Russian companies such as Tyumen Oil Company, the Alfa Group, and several others have been sued in the United States under a federal statute originally intended to provide, among other things, civil penalties for victims of organized crime in the United States. To date, these suits have not been successful, although the risks for defendants and the prospects of success for plaintiffs will depend on the particular factual circumstances.

Moreover, Russian companies face a threat of being sued under statutes that plaintiffs in recent years have invoked most notably against German and Austrian companies relating to the wrongs of the Nazi era. Although those cases too were largely unsuccessful, they have been widely understood to have contributed to a non-judicial resolution entailing the payment of about $5 billion US.[3] Russian companies would ignore the precedent of those Nazi-era suits at their peril.

In addition, the US courts are available under specific circumstances to provide a means for obtaining court-ordered discovery of evidence for use in Russian litigation. The evidence may be equally well obtained from parties to the Russian litigation or non-parties regardless of whether it would be discoverable in the Russian litigation. This article therefore discusses certain judicial and non-judicial ways of obtaining information in the United States.

Obtaining Evidence in the United States for Use in Russian Litigation

A. Application for discovery in aid of foreign litigation, 28 U.S.C. § 1782

It often happens that evidence exists that would be useful in a Russian court proceeding but Russian law does not provide a means for obtaining it,

[1] What follows is a general overview of some legal procedures that may be available in the United States. What procedures would actually be available depends, of course, on the particular facts of the case and would require appropriate legal advice. This paper does not provide such advice, nor should it be relied on in lieu of legal advice.

[2] This talk does not address the submission of disputes to US courts by way of an express choice of law clause, but focuses instead on certain non-consensual means of invoking US jurisdiction.

[3] The most complete description of these cases and the $5 billion non-judicial resolution is found in Susanne-Sophia Spiliotis, *Verantwortung und Rechtsfrieden. Die Stiftungsinitiative der deutschen Wirtschaft* (2003). An English translation of this book is expected to be published shortly.

either from the adverse party or some third-party. If some person (natural or juridical) in possession of such evidence is subject to the jurisdiction of the US courts, it may be possible to obtain the evidence in the United States from that person by means of a federal statute that empowers the US courts to compel the production of evidence for use in a "proceeding in a foreign or international tribunal." This provision is found in section 1782 of title 28 of the United States Code ("**Section 1782**"), which provides in part as follows:

> *"The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigation conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court."*

Under Section 1782 it is possible to apply to a US district court for an order directing a person or entity in the United States to produce evidence or give oral testimony. The applicant must make the following three-part showing:

- The applicant is an "interested person." This term has been interpreted broadly to encompass not only formal parties to foreign or international proceedings, but also state prosecutors, ministers of legal affairs, and agents of court-appointed trustees.[4]
- The requested evidence is for use in a proceeding before a "foreign or international tribunal." This term too has been interpreted broadly to encompass civil and criminal court cases, patent proceedings, EU anti-trust proceedings, and other forms of legal process.[5] Some US courts have suggested that an international commercial arbitration would qualify as a "foreign or international tribunal."[6] The prevailing view, however, is that Section 1782 may not be invoked on the basis of private arbitration proceedings.[7] It is important to note that the relevant foreign or international proceeding need not be pending when the Section 1782 application is made; rather, they need only be imminent or likely.[8]
- The person or entity from whom the evidence is sought "resides or is found" in the federal district. This is a fundamental jurisdictional requirement: the court must have the authority to compel a person or entity to produce evidence. This authority would, in general terms, extend also foreign nationals who happen to be served with a subpoena (court order) while temporarily in the district.[9] There is no express limit on the persons from whom evidence can be sought. They may be parties to the relevant foreign or international proceeding or non-parties to that proceeding.[10]

The lower courts have also imposed certain limits on the kind of evidence they will order to be produced. The case law has not been consistent. Some counts, for example, have required that the evidence sought be discoverable in the relevant foreign or international proceeding,[11] while other courts have not.[12] As a result of this inconsistency, the U.S. Supreme Court took up this question in a recent case where it decided, among other things, that the evidence sought in the US courts need not be discoverable in the foreign or international proceeding.[13]

Ultimately, however, the courts enjoy considerable discretion to decide whether to order the production of evidence. Merely because an applicant has made the requisite three-part showing noted above does not mean that the court must order the requested discovery. The court may still deny the appli-

[4] *See In re Application of Merck & Co., Inc.*, 197 F.R.D. 267 (M.D.N.C. 2000); *In re Letters Rogatory from the Tokyo Prosecutor's Office*, 16 F.3d 1016, 1019 (9th Cir. 1994; *In re Request for Legal Assistance from the Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1155 (11th Cir. 1988); *Lancaster Factoring Co. Ltd. v. Mangone*, 90 F.3d 38, 42 (2d Cir. 1996).

[5] *In re Application of Ishihara Chemical Co. Ltd.*, 121 F. Supp. 2d 209 (E.D.N.Y. 2000).

[6] *See, e.g., In re Application of Technostroyexport*, 853 F. Supp. 695 (S.D.N.Y. 1994).

[7] *Nat'l Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 191 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999). The Second and Fifth Circuits together encompass the following states: New York, Vermont, Connecticut, Texas, Louisiana, and Mississippi.

[8] *See In re Request for International Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil*, 936 F.2d 702, 706 (2d Cir. 1991); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1155 (11th Cir. 1988); *In re Letter of Request from Crown Prosecution Service of the U.K.*, 870 F.2d 686, 691 (D.C. Cir. 1989).

[9] *In re Edelman*, 295 F.3d 171, 177 (2d Cir. 2002) (a person physically present in a judicial district when served with a subpoena is "found" in the district for purposes of Section 1782).

[10] *See Application of Malev Hungarian Airline*, 964 F.2d 97, 101 (2d Cir. 1992); *In re Application of Ishihara Chemical Co. Ltd.*, 121 F. Supp. 2d 209 (E.D.N.Y. 2000).

[11] *See, e.g., In re Metallgesellschaft AG*, 121 F.3d 77, 79 (2d Cir. 1997); *In re Application of Gianoli Aldunate*, 3 F.3d 54, 58-59 (2d Cir.), *cert. denied*, 510 U.S. 965 (1993); *Four Pillars Enters. v. Avery Dennison Corp.*, 308 F.3d 1075, 1080 (9th Cir. 2002); *In re Bayer*, 146 F.3d 188, 193 (3d Cir 1998); *Advanced Micro Devices, Inc. v. Intel Corp.*, 292 F.3d 664, 669 (9th Cir. 2002).

[12] *See, e.g., In re Application of Asta Medica*, 981 F.2d 1, 7 (1st Cir. 1992); *Lo Ka Chun v. Lo To,* 858 F.2d 1564, 1566 (11th Cir. 1988); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988).

[13] *Intel Corporation v. Advanced Micro Devices, Inc.*, No. 02-572, was decided 21 June 2004. The United States took the position that the evidence sought need not be discoverable in the foreign proceeding *See* Brief for the United States as *Amicus Curiae* in *Intel Corporation v. Advanced Micro Devices, Inc.*, No. 02-572. The position of the United States is in no way binding on the court. It may be presumed, however, that the court believed the United States' position would be informative or helpful from the fact that the court ordered the United States to submit its position.

cation or grant only such relief as it deems appropriate under the circumstances.[14]

B. Request under the Freedom of Information Act, 5 U.S.C. § 552, as amended by Public Law 104-231

A non-judicial avenue for obtaining evidence is provided by the US Freedom of Information Act ("FOIA"), which requires US federal agencies to provide documents on demand, subject to certain enumerated limits and exceptions. FOIA Section (a)(3)(A) provides in part as follows:

> *"... each agency, upon request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person."*

Any person may make a FOIA request, including non-US nationals and non-US corporations. Records may be requested from a host of US federal entities, with the notable exception of Congress, the federal courts, and the Executive Office staff and its advisors. There are also specific types of the records that are exempt from disclosure under FOIA.

The procedure for making a FOIA request is relatively simple. The applicant should describe, as specifically as possible, the requested records and address the letter to the relevant federal agency or agencies. The agency is to respond to the FOIA letter within 10 working days whether it will comply with the request. In the case of a refusal, the applicant may lodge an administrative appeal, and the agency must respond to the administrative appeal within 20 days. If the refusal is affirmed on appeal, the applicant may then take the case to federal court.

Bringing An Action in the United States against a Russian Entity

Parties often litigate their disputes where the dispute arose. In recent years, however, a number of Russian entities and individuals have been sued in the United States for conduct that occurred exclusively or primarily in Russia. The plaintiffs in these cases have relied on a US federal law that makes civil damages available for victims of organized-crime-like activity (*see* section A below).

In addition, a number of European banks, insurance companies, and industrial groups have been sued in the United States in recent years for activity occurring entirely outside the United States under federal statutes providing civil damages for torts committed in violation of international law (*see* sections B & C below), as well as for violation of the unwritten law of nations, also known as "customary international law." (*see* section D below). The results here have been mixed. Although no Russian entity, as far as we are aware, has yet been sued in the United States under these statutes, there is no reason to believe that they may not be targeted in the future as Russian business increasingly expands abroad.

A. The Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961

In recent years, a number of Russian companies and individuals have been sued in the US courts under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961 ("RICO"), including Tyumen Oil Company ("TNK"), the Alfa Group, and others.

RICO provides, in broad outline, that plaintiffs can obtain treble damages against defendants who have, to plaintiff's detriment, engaged in what the statute defines as a "pattern of racketeering activity." A "pattern of racketeering activity" is defined as "at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity."[15] The term "racketeering activity," in turn, is broadly defined to include murder, kidnapping, and arson, as well as a host of indictable financial offenses, such as fraud, extortion, and embezzlement.[16] The plaintiffs that have brought RICO actions against Russian defendants have alleged that they had been injured by a "pattern of racketeering activity" in Russia and that the Russian courts were too corrupt or biased to provide adequate redress.

Although in theory such allegations might suffice to state a claim that a US court would hear, in practice the US courts have not been receptive to allegations of bias and corruption in the Russian courts. Most recently, the federal District Court for the Southern District of New York dismissed a case called *Norex Petroleum Ltd. v. Access Industries, Inc., et al.*[17] In this case, the plain-

[14] *See, e.g., In re Application of Estes*, 101 F.3d 873, 876 (2d Cir. 1996); *In re Euromepa S.A.*, 51 F.3d 1095, 1102 (2d Cir. 1995).

[15] 18 U.S.C. § 1961(5)

[16] 18 U.S.C. § 1961(1).

[17] No. 02 Civ. 1499 (LTS) (KNF) (S.D.N.Y. Feb.18, 2004) ("**Norex Decision**"). *See also Base Metal Trading SA v. Russian Aluminum*, 253 F. Supp. 2d 681 (S.D.N.Y. 2003); *Pavlov v. Bank of New York Co.*, 135 F. Supp. 2d 426 (S.D.N.Y. 2001), *vacated and remanded*, 2002 WL 63576 (2d Cir. Jan. 14, 2002), *and dismissed on remand*, 2002 WL 31324097 (S.D.N.Y. Oct. 16, 2002); and *Parex v. Russian Savings Bank*, 116 F. Supp. 2d 415 (S.D.N.Y. 2000). The *Base Metals* and *Norex* cases are currently on appeal.

tiff alleged that TNK and certain of its shareholders violated RICO by orchestrating a racketeering and money laundering scheme to take control of plaintiff's business. The plaintiff sought $500 million in damages, which could be trebled under the RICO statute to $1.5 billion. The plaintiff further charged that TNK exercised a corrupt influence over the Russian courts in aid of its own economic goals. The result, according to Norex's allegations, was that Norex was deprived of its majority ownership stake in Yugraneft, a Russian oil company, when certain of the defendants allegedly arranged to divert the flow of oil from one company to TNK, thereby forcing Yugraneft into bankruptcy and stripping it of assets that were subsequently transferred to TNK or its affiliates. The plaintiff also alleged that the bankruptcy transfers of Yugraneft's shares violated the plaintiff's right of first refusal under a shareholder agreement.

Before the plaintiff sued in the US, however, it sued in Russia. Indeed, most, if not all, of the issues raised by the plaintiff's allegations, including those relating to the validity of bankruptcy proceedings and related asset transfers, the enforceability of the right of first refusal provision regarding Yugraneft shares, and the value of plaintiff's equity interests in Yugraneft, were first heard in the Russian courts in June 2001, which found in favor of TNK. Norex appealed some of its claims to the Russian appellate courts, which likewise found for the defendants. Norex then contended it was never served properly in one particular action filed by TNK, but Norex never filed an appeal in the Russian courts on that issue.

Given the abundant prehistory of the case and tenuous connection of the case with the United States, the defendants moved to dismiss the complaint in US federal court on the basis of a number of defenses:

- There is no subject matter jurisdiction over the dispute because RICO was not intended to be applied to disputes essentially unconnected to the United States;
- The plaintiff lacks standing to assert RICO claims because it was not proximally harmed by the defendants' alleged actions;
- There is a more convenient forum – Russia – because that is where the bulk of the evidence and witnesses is to be found and Russia provides an adequate alternative forum (this defense is called "*forum non conveniens*");
- The U.S. court should defer to the prior judicial proceedings in Russia on the basis of the doctrines of international comity, collateral estoppel, *res judicata*, and act of state; and
- The plaintiff has failed to plead a cause of action under the applicable U.S. federal procedural rules.

The court dismissed Norex's complaint solely on the *forum non conveniens* defense. Regarding Norex's claims that the U.S. courts had a public interest in hearing the case on the grounds that US banks received assets from TNK related to the alleged money laundering, the court found that the US connections identified by the plaintiff were merely financial channels:

> *"The central premise upon which all of the plaintiff's allegations of actionable harm... involve Russian persons and institutions... This is clearly a matter that is principally of Russian concern; the viability of the plaintiff's contention that the illegally-obtained assets have been concealed and manipulated through offshore entities' banking facilities is obviously largely dependent on demonstrating that the activities which took place in Russia were illegitimate. The public interest weighs in favor of resolution of these basic issues in the local Russian forum."*[18]

Most importantly, the court found that an adequate alternative forum existed in Russia. First, although the court did not dispute that some judicial officials in Russia may be corrupt (as is presumably true anywhere), the plaintiff presented no evidence to demonstrate that the particular officials involved in the relevant Russian cases had been corrupt. Second, the plaintiff never brought any corruption claims in the Russian courts despite the requirement under Russian law that a criminal conviction first be obtained before a judicial act could be overturned based on allegations of corruption. Third, the plaintiff did not appeal adverse decisions on some of its claims in Russia. Finally, although the plaintiff alleged that it had not been properly served with process on one of its claims, the plaintiff appears never to have filed an appeal on that claim; indeed, it allowed the time periods for normal appeals and collateral attack to lapse before it filed action in the US. The Court thus rejected the plaintiff's sweeping allegations of corruption:

[18] Norex Decision, at 20-21.

> *"It is now axiomatic in the Second Circuit [i.e., the US federal appellate instance] that it is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation. [Citation and internal quotes omitted.] The sweeping generalizations, competing legal arguments, warnings in investment documentation, and hearsay acknowledgements of some degree of problems in a large court system cannot sufficiently support a finding that the Russian legal system as a whole lacks integrity, nor does plaintiff's body of evidence warrant rejection on that basis of the Russian legal proceedings that Norex seeks to challenge here."*[19]

Further, the Court held that

> *"the doctrine of forum* non conveniens *does not require that the plaintiff be able to prevail on its claims; there must simply be a cause of action available. The fact that some of Norex's potential Russian law claims are now-time barred does not mean that plaintiff does not have an adequate forum in Russia. Clearly plaintiff had a forum and waited for it to become unavailable."* [20]

This case, and the others like it, should be borne in mind when claims are made to the effect that the US courts are open to any dispute anywhere. In fact, the doctrine of *forum non conveniens* is often successfully employed to dismiss cases, like the Norex case, that have little or nothing to do with the United States except that one or more defendants are subject of the jurisdiction of the US courts.

B. The Alien Tort Statute, 8 U.S.C. § 1350

Enacted as part of the Judiciary Act of 1789, the Alien Tort Statute ("ATS") was seldom employed until 1980 when the US Court of Appeals for the Second Circuit held that the ATS gave rise to a cause of action in US federal courts for violations of international law as that body of law is interpreted in the present day.[21] The result of this holding was a small flood of cases against non-US companies and individuals accused of a host of violations of international law.[22]

The language of the ATS provides little guidance as to its scope and provides only (in its current version) that

> *"The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."*

Thus, by its terms, the ATS permits the US courts to hear a case if:

- It is brought by an "alien" plaintiff, *i.e.*, a non-national of the United States;
- The plaintiff has alleged some act that could be construed as a "tort," *i.e.*, delict; and
- The tort was a violation of the "law of nations" or an US treaty.

Notably absent from this definition is any jurisdictional limit. The result is that some courts have interpreted the ATS to empower the US courts to hear a case if the alleged tort took place *anywhere in the world*. For example, in the seminal 1980 case alluded to above, called *Filartiga v. Pena-Irala*,[23] two Paraguayan citizens sued another Paraguayan for torturing and killing their son in Paraguay. The trial court ultimately issued a judgment for $10 million against the defendant. In *Xuncax v. Gramajo*,[24] nine Guatemalans sued Guatemala's former Minister of Defense for alleged tortures, summary detentions and executions, and disappearances. The court issued a judgment against the defendant for $42.5 million. In *Kadic v. Karadzic*,[25] citizens of Bosnia-Herzegovina sued the Bosnian-Serbian defendant for atrocities committed by Bosnian-Serbian military forces in the former Yugoslavia. The jury awarded plaintiffs $4.5 billion.

Oil companies in particular have often been targeted by plaintiffs in ATS suits. Prominent defendants include Texaco, Royal Dutch Petroleum, Unocal, Chevron, and Exxon Mobil.

The U.S. Supreme Court recently issued a decision defining the scope of the ATS for the first time in a case called *Sosa v. Alvarez-Machain*.[26] In *Sosa*, a Mexican doctor named Alvarez-Machain was accused of assisting a drug cartel in the torture and murder of an agent of the U.S. Drug Enforcement Agency ("DEA") in Mexico. After failing to secure his extradition, the DEA plotted with people in Mexico (including a man named Sosa) to abduct Alvarez-Machain and bring him to the U.S. for trial. Alzarez-Machin was acquitted and then sued Sosa under the ATS. The lower court

[19] Norex Decision, at 19.

[20] Norex Decision, at 16.

[21] About 20 ATS cases were brought between 1789 and 1980, an average of one case every ten years over the course of two hundred years.

[22] For a brief overview of ATS litigation, *see* Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *Awakening Monster: the Alien Tort Statute of 1789* (2003).

[23] 630 F.2d 876 (2d. Cir. 1980).

[24] 886 F. Supp. 162 (D. Mass. 1995).

[25] 70 F.3d 232 (2d Cir. 1995).

[26] The U.S. Supreme Court heard two consolidated cases: *United States of America v. Humberto Alvarez-Machain, et al.*, No. 03-485, and *José Francisco Sosa v. Humberto Alvarez-Machain, et al.,* No. 03-339, and issued its decision on 29 June 2004.

awarded Alvarez-Machain $25,000 in damages. The appellate court affirmed the lower court's decision. The U.S. Supreme Court then rejected Alvarez-Machain's claim and argument that the ATS provided authority for the creation of a new cause of action for torts in breach of international law. Instead, the court found that "[a] lthough we agree the statute is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." Thus, the federal courts may grant relief under the ATS if they can find a sufficiently well-defined norm of international law that has been breached.

Although we are not aware of any ATS case brought against Russian persons or companies, the threat remains. Victims of violence in Chechnya, or Russians imprisoned in Russia who could allege a tort in violation of the law of nations, could conceivably bring an ATS action in the United States against Russian persons and entities even where the alleged wrong had nothing to do with the United States.

C. The Torture Victim Protection Act of 1991, Public Law 102-256, Mar. 12, 1992, 106 Stat. 73 (28 U.S.C. 1350 note)

The U.S. Congress has made use of the grant of jurisdiction under the ATS to create a federal cause of action for violation of international law, namely, the Torture Victim Protection Act of 1991 ("TVPA"). The TVPA provides, in part, as follows:

"(a) An individual who, under actual or apparent authority, or color of law, of any foreign nation –

(1) *subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or*

(2) *subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death."*

The terms "torture" and "extrajudicial killing" are defined in the statute. The term "individual" is not, but the case law and legislative history to the statute suggest that the term excludes juridical entities.[27] Until that issue has been decided by the US Supreme Court, however, the possibility remains that some federal court might rule otherwise to impose liability on a corporation found guilty of the acts proscribed by the TVPA.

D. Customary International Law

Some plaintiffs have tried to sue foreign defendants for torts that took place outside the United States, not on the basis of any federal statute, but solely for violation of customary international law (the unwritten "law of nations") and, more particularly, a violation of *jus cogens* norms.[28] None has been successful.[29]

Most recently, on 31 July 2003, the federal District Court for the District of Columbia faced such a case, which was apparently of first impression in that district. In *The Herero People's Reparation Corporation v. Deutsche Bank AG, et al.*,[30] individual and representative plaintiffs of a Namibian tribe called "The Herero" alleged that the defendant German companies, as members of the "German colonial enterprise," had participated in the systematic murder of thousands of Herero between the years 1890-1915 during the German colonization of what was then called "German Southwest Africa." In their complaint, the plaintiffs did not specify any statute or precedent in support of a cause of action, but only "principles of District of Columbia law, United States law, and international law," as well as "principles of universal jurisdiction applicable to crime [sic] against humanity, genocidal practices and human rights atrocities." Defendants moved to dismiss on several grounds, including failure to state a claim, time-bar, political question doctrine, and international comity.

The court held that customary international law alone does not give plaintiffs a cause of action in federal court. The court first noted the absence of any federal statutory basis for a claim. The plaintiffs had disavowed reliance on the ATS, probably because they feared that a ten-year limitation period would be applied to the events they alleged, which were about a century old. Plaintiffs had also abandoned any reliance on the TVPA, after defendants argued, apparently successfully, that the TVPA does not provide a cause of action against companies, but only against "individuals," *i.e.*, natural persons.[31]

[27] *See Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362 (E.D. La. 1997), *aff'd*, 197 F.3d 161 (5th Cir. 1999), and *Friedman v. Bayer Corp.*, No. 99-CV-3675, 1999 WL 33457825 (E.D.N.Y. Dec. 15, 1999).

[28] A "*jus cogens* norm" has been defined as a "principle of international law that is accepted by the international community of States as a whole as a norm from which no derogation is permitted." *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994).

[29] The only possible exception of which the author is aware is *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000), where the court appears to have confused a cause of action for breach of customary international law alone with a claim under the ATS.

[30] Civ. No. 01-01868 (affirmed on appeal).

[31] *See supra* note 26.

The court next turned to the little authority that exists in the District of Columbia Circuit, none of which disposed of the "exact question" facing the court. The court did find, however, that the existing precedent counseled against recognizing a cause of action for violations of international law in the absence of a federal statute.

The court did not directly address the question of whether it would be possible in the absence of express federal statutory authority to *imply a right of action*, that is, "to recognize a cause of action... where Congress has not expressly provided one.[32] There are two principal impediments to implying such a right. First, the U.S. Supreme Court has severely restricted the authority of the federal courts to imply private rights of action.[33] Second, implying a private right of action for violation of customary law without express federal grant of authority would raise the serious separation of powers issue. The Constitution grants to Congress, not to the courts, the authority "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."[34] Some courts have expressly noted this danger. "To imply a cause of action from the law of nations would completely defeat the critical right of the *sovereign* to determine whether and how international rights should be enforced in that municipality."[35] That sovereign authority is granted "principally to the Legislative and Executive branches of the federal government."[36] Indeed, implying a cause of action for violation of international law arguably would run afoul of the political question doctrine to the extent that, as noted above, the U.S. Constitution presents "a textually demonstrable constitutional commitment of the issue to a coordinate political department."[37]

[32] Laurence Tribe, *American Constitutional Law* 160 (2d ed. 1988). The seminal case on implying such rights is *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[33] The US Supreme Court has "consistently refused to extend [implied rights] liability to any new context or new category of defendants" since at least 1980. *Correctional Services Corp. v. Malesko*, 122 S. Ct. 515, 520 (2001). The restraint urged in *Correctional Services* presumably should apply *a fortiori* to claims arising not out of the U.S. Constitution or federal statute, but the unwritten law of nations, *i.e.*, customary law.

[34] U.S. Const., art. I, § 8, cl. 10.

[35] *Handel v. Artukovic*, 601 F. Supp. 1421, 1428 (C.D. Cal. 1985).

[36] *White v. Paulsen*, 997 F. Supp. 1380, 1385 (E.D. Wash. 1998).

[37] *Baker v. Carr*, 369 U.S. 186, 217 (1962).

Summary

This article has focused on some specific procedural devices and substantive actions that might be available in the United States for disputes centered in Russia. It did not present an exhaustive list of such devices and actions. It also did not examine consensual means of invoking the US courts or any of the procedural options that might be available elsewhere in the world – both topics that merit their own treatment another day.

Whether any of the procedures discussed above might be applicable in a given case would require an examination of the particular facts of the case. It is hoped, however, that this general discussion of particular procedural options, at the very least, has emphasized the fact that even disputes, wrongs, and other conduct largely localized in Russia can, under appropriate circumstances, be addressed outside of Russia. There can be more than one front to certain legal battles. □