

# THE RUSSIAN CONSTITUTION OF 1993—PROVISIONS OF INTEREST TO THE ENERGY INDUSTRY

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**S**hortly after the siege of the Russian parliament during the October Revolution of 1993, the Russian government held elections, the results of which were the creation of a new national legislature and the adoption of a new constitution (herein called the "Russian Constitution").<sup>1</sup> The Russian Constitution took effect in January of 1994, replacing the former constitution of the Soviet Union that had been in effect since 1977 (herein called the "Soviet Constitution").<sup>2</sup>

This article examines the events leading up to the adoption of the Russian Constitution, broadly sets out the structure of the Russian Constitution, and examines specific provisions of the Russian Constitution that may be of particular interest to the energy industry.<sup>3</sup>

## **Constitutionalism in Russia**

### **Prior Soviet constitutions**

The following brief history of constitutionalism in Russia since 1918 may give the reader a better understanding of the political backdrop against which the Russian Constitution is set. Although, for decades, the Soviet Empire had a nominal constitution in place, the lack

of a tradition of "constitutionalism," as it is understood in Britain and the United States, makes the Russian Constitution the first modern constitution in Russia.

Following the Bolshevik Revolution, the Constitution of the Russian Soviet Federative Socialist Republics, the first Soviet constitution, was ratified in 1918.<sup>4</sup> This document was not

so much a "constitution" as a document which described the goals of the Soviet government.<sup>5</sup> This constitution was replaced by a new constitution in 1924, which paved the way for a socialist takeover of Russia's entire social, economic, and political system.<sup>6</sup>

After Joseph Stalin assumed control of the Soviet Union, a new constitution (the "Stalinist Constitution") was rati-

fied in 1936, which claimed the irreversible victory of socialism in the Soviet Union and ostensibly granted broad personal freedom to Soviet citizens.<sup>7</sup> These grants of freedom were unenforceable in practice, however, for two reasons.

First, the Stalinist Constitution made "antisocial behavior," which was broadly defined, illegal, thus taking away with one hand what it gave with the other. Second, no court had jurisdiction over constitutional questions "The Stalinist Constitution was amended 250 times between 1937 and 1974."

A relatively modern attempt at developing a constitution led to the Soviet Constitution being adopted in 1977 during Brezhnev's tenure.<sup>10</sup> The Soviet Constitution made cosmetic reforms, but did not break any new ground in then-existing Soviet law, and did not create any meaningful expectations in the minds of ordinary Soviet citizens.<sup>11</sup> It did not significantly alter the political structure of the Soviet government.<sup>12</sup> As one commentator, Alexander Yakovlev, states, the fundamental characteristics of the Soviet Constitution originated in the days of Stalin. It is a constitution of the Soviets, designed specifically to create and support the Soviet State, based upon the guiding principles of unitarianism, centralism, and subordination.<sup>13</sup>

It should be obvious to the most casual of observers that neither the Soviet Constitution nor its predecessors promoted or protected property rights, conditions for foreign investment, or free enterprise.

## Origins of the new Russian Constitution

It was not until the inception of perestroika in 1985 that steps were taken toward real reforms of Russia's constitution.<sup>14</sup> Beginning in 1985, the Russian Congress of People's Deputies<sup>15</sup> began to amend various provisions of the Soviet Constitution to reflect the changing social conditions.<sup>16</sup> By April of 1993, the Soviet Constitution had been

amended more than 200 times.<sup>17</sup> By contrast, during the past 200 years, the United States Constitution has been amended only 27 times.

The effect of these changes, however, was to create a self-contradictory document. For example, the Russian Congress of Peoples Deputies amended Article 3 of the Soviet Constitution to provide for separate legislative, executive, and judicial branches of government. But the same draft of the Soviet Constitution declared that the Russian Congress of Peoples Deputies were empowered to "make decisions on any matter assigned to the jurisdiction of the Russian Federation."<sup>18</sup> As another example, the Soviet Constitution continued to contain references to the Union of Soviet Socialist Republics long after that entity's demise.<sup>19</sup> In the end, the Soviet Constitution, which may be viewed as an amalgam of principles remnant of the Stalinist Constitution with relatively classical principles of separation of powers, became "two completely incompatible constitutions unnaturally fused into a single document."<sup>20</sup>

In 1990, the Supreme Soviet of the Russian Federation commissioned the development of an entirely new constitution which resulted in the Russian Constitution.<sup>21</sup> The Russian Constitution was approved by 52% of the votes cast by 28% of the eligible voters<sup>22</sup> and was finally adopted on December 12, 1993. The structure of this constitution will be discussed below.

## The structure of the Russian Constitution

### Structure of government

The Russian Constitution divides the government into three branches: the executive branch, the legislative branch (composed of an upper house, called the Council of the Federation, and a lower house, called the Duma), and the judicial branch.<sup>24</sup>

#### *The Executive Branch*

The presidency is the strongest of

the three branches. The President is the head of state, commander-in-chief, and head of the security council. He may declare war, being obligated only to "inform" congress. He may also declare martial law inside Russia, subject to confirmation by the Council of the Federation. Impeaching a president is difficult—the only grounds are treason or a serious crime.

#### *The Legislative Branch*

The upper house of the legislature is called the Council of the Federation. It has 178 members, two from each of the particular political subdivisions within Russia. The Council has jurisdiction over border changes, use of the army, and relations between the central government and the various regions. Laws passed by the lower house, or Duma, involving economic and defense policy require approval from the upper house.

The lower house, or Duma, is a body that comprises 450 deputies who are elected for four-year terms. The Duma must approve the government's fiscal policies. It may draft budgetary laws, but only with the government's consent.

#### *The Judicial Branch*

With regard to the judiciary, the Russian Constitution establishes a Constitutional Court, a Supreme Court, and the Superior Court of Arbitration. It enlarges the Constitutional Court, which is granted authority to interpret the constitution, from 13 to 19 justices.<sup>25</sup> The jurisdiction of the Constitutional Court extends to interpretation of the Russian Constitution, determination of the validity of acts of organs of government, and resolution of disputes among organs of government.<sup>26</sup> The court also has jurisdiction over treaties between components of the Russian Federation and over international treaties of the Russian Federation that have not entered into force.

The Russian Constitution also recognizes Russia's Supreme Court as "the highest judicial organ for civil, criminal, administrative, or other cases under the jurisdiction of the courts of

general jurisdiction"<sup>27</sup> and the Superior Court of Arbitration as "the highest judicial organ for the resolution of economic disputes and other cases examined by the courts of arbitration."<sup>28</sup>

Justices for the three courts described above are appointed by the Council of the Federation, upon the submission of the President.<sup>29</sup>

### **Rights granted to Russian citizens**

The Russian Constitution enumerates various personal and economic rights.<sup>30</sup> It contains sweeping, if vaguely defined, assurances of ideological freedom,<sup>31</sup> religious freedom,<sup>32</sup> and "human and civil rights."<sup>33</sup> Its drafters relied upon such documents as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights.<sup>34</sup>

Many of these rights, such as the "right" to work and leisure are inconsistent with a free society. Since these "rights" were included, however, in earlier Soviet constitutions, their inclusion in the Russian Constitution was evidently considered a political necessity to garner public support for its passage.<sup>35</sup>

Other rights enumerated in the Russian Constitution are consistent with a free society, such as the right to freedom of speech<sup>36</sup> and assembly<sup>37</sup> and the right not to have one's dwelling entered except as prescribed by law.<sup>38</sup> How and whether these rights will be interpreted and enforced, however, remains to be seen.

With regard to economic freedom, Article 8 states that "the free movement of goods, services, and financial resources, support for competition, and freedom of economic activity are guaranteed private, state, municipal, and other forms of property enjoy equal recognition and protection." If actually implemented, such assurances combined with the enormous estimated recoverable reserves could enhance the standing of Russia as relatively attractive place for foreign investment in the

energy sector of its economy. It remains to be seen, however, how the personal and economic rights enumerated in the Russian Constitution will be interpreted and enforced by the Russian courts, and what supplemental legislation will be enacted by the Russian legislature in support of the rights granted in the Russian Constitution.

### **Provisions of the Russian Constitution affecting the energy industry**

#### **Ownership of private property**

In Article 9, Section 2 of the Russian Constitution, private ownership of land is provided for: "The land and other natural resources can be in private, state, municipal, or other forms of ownership." It is not clear, however, whether this provision will result in enabling legislation to change the formerly sacrosanct ownership of virtually all land and certainly all underground natural resources by "the people."<sup>39</sup>

Other sections of the Russian Constitution relating to private property echo the themes embodied in Article 9, Section 2. In Article 35, Section 1, the Russian Constitution states that "[t]he right of private ownership is protected by law." In Article 36, Section 1, the Russian Constitution provides that "[c]itizens and their associations are entitled to hold land in private ownership." Furthermore, in Article 36, Section 2, the Russian Constitution establishes that "[o]wners [may] freely possess, utilize, and dispose of land and other natural resources provided that this does not damage the environment and does not violate the rights and legitimate interests of others."

#### **Regulation of mineral resources**

With regard to the regulation of mineral resources, the Russian Constitution, consistent with the Federative Treaty<sup>40</sup> that predated the constitution, states in Article 72, Section 1(c) that "issues relating to the

ownership, use, and disposal of land, mineral resources, water, and other natural resources" fall within "the joint jurisdiction of the Russian Federation and the components of the Russian Federation." Also falling under the joint jurisdiction of the Russian Federation and the component parts of the Russian Federation are "administrative, administrative-procedural, labor, family, housing, land, water, and forestry legislation, and legislation on mineral resources and on environmental protection." The importance of such provisions to the energy industry investor are that, in conjunction with obtaining certain approvals from Moscow authorities, in many instances one also will be required to obtain similar approvals from other authorities, both local and regional, to obtain all necessary consents.

These constitutional provisions relate to the three dominant acts which govern licensing in the petroleum industry, which were enacted before the adoption of the Russian Constitution.<sup>41</sup> The first of these acts is the Law of the Russian Federation Concerning Subsurface Resources (the "Subsurface Resource Law"), adopted in February of 1992, which is the "umbrella" law. It contains general parameters concerning the development of underground minerals. Consistent with the Russian Constitution, the Subsurface Resource Law creates a system of joint jurisdiction between the Russian Federation and its component parts. While the different levels of government share jurisdiction, the investor deals with only one licensing authority, which is currently the State Committee on Underground Resources. The second law is the Statute on Licensing, adopted in July of 1992, which provides supplemental legislation connected with the Law on Underground Resources.

Finally, the Law on Mineral Payments was adopted in October of 1992, and establishes mechanisms for administering payments made by mineral licensees. Several other laws of

importance to the energy industry, such as the Federal Law on Production Sharing Agreements with Foreign Investors in Oil and Gas Development Projects and a law providing the basis for a waiver of sovereign immunity from judicial action, are being considered or to be considered by committees within the Duma. The first part of a revised Civil Code of the Russian Federation, concerning natural and juridical persons, including forms of business organizations, was passed by the Duma on October 1, 1994, signed into law on November 30, 1994, and became effective on January 1, 1995. The remaining parts of the revised civil code are being considered within committees of the Duma and are likely to include important provisions concerning ownership of land and the modification of such ownership.

Thus, with the exception of the newly adopted part one of the Russian civil code, although adopted prior to the advent of the Russian Constitution, facially, the existing laws, described above, adopted by the Russian Federation concerning the petroleum industry appear to be consistent with provisions of the Russian Constitution concerning mineral resources.

### Conclusion

While the foregoing may provide the energy industry investor with an indication as to developments in constitutional law in Russia, and other related legislative developments, the authors believe that it is too early in the history of post-coup Russia to draw any firm conclusions concerning how the investor will be affected by political developments in Russia. Only time will decide whether the Russian Constitution will become the cornerstone for preserving the liberty of Russian citizens. Hopefully, for the sake of both investors and Russian citizens, the Russian Constitution will serve as a basis to enable the judicial branch of the Russian government to protect individual rights to liberty and,

for the energy industry investor, the important rights to own, freely use, and dispose of private property.

### End notes

1. References to the Russian Constitution in this article are from Constitution of the Russian Federation, in *Constitutions of the Countries of the World* (Albert P. Blaustein and Gisbert H. Flanz, eds. 1994).
2. References to the Soviet Constitution in this article are from Constitution (Basic Law) Russian Federation—Russia, in *Constitutions of the Countries of the World* (Albert P. Blaustein and Gisbert H. Flanz, eds. 1993). The Soviet Constitution continued to be the law of the land in Russia after the collapse and dissolution of the Soviet Union in December of 1991.
3. Various forms of business ventures and entities available to energy industry participants in Russian projects are discussed in J. Lanier Yeates, *Strategies Outlined for Doing Business in Russia, Russian Oil & Gas Guide* (Vol. 1, No. 1) 1992. See also J. Lanier Yeates and Stephen T. Lovelady, *Russian Federation's Komi Republic Offers Oil and Gas Opportunities, Russian Oil & Gas Guide* (Vol. 2, No. 1) 1993.
4. Christopher Osakwe, *The Theories and Realities of Modern Soviet Constitutional Law: An Analysis of the 1977 USSR Constitution*, 127 *U.Penn. L. Rev.* 1350 (1979).
5. Chauvin, *Towards the Establishment of Constitutionalism in Russia*, 3 *Ind. Int'l & Comp. L. Rev.* 271, 278 (1993).
6. Osakwe, *supra* note 4, at 1350.
7. *Id.* at 1352.
8. Chauvin, *supra* note 5, at 279.
9. Osakwe, *supra* note 4, at 1352.
10. *Id.* at 1352.
11. *Id.* at 1353.
12. Osakwe, *supra* note 4, at 1355.
13. Alexander Yakovlev, *Russia: The Struggle for a Constitution*, 7 *Emory Intl. L. Rev.* 277 (1993).
14. For an excellent treatment of the final days of the Soviet Union, its system of laws, government, and institutions, see, generally, David Remnick, *Lenin's Tomb* (Random House 1993).
15. The Russian Congress of People's Deputies has exclusive jurisdiction over constitutional changes. Gennady M. Danilenko, *The New Russian Federalism*, 1 *New. Eur. L. Rev.* 367 (1992).
16. Christopher Osakwe, *Modern Russian Law of Banking and Security Transactions: ABiopsy of Post-Soviet Russian Commercial Law*, 14 *Whittier L. Rev.* 301 (1993).
17. William E. Butler, *Justice in Russia: Soviet Law and Russian History*, 42 *Emory L.J.* 433 at 442 (1993).
18. Soviet Constitution, Art. 104.
19. See, e.g., Soviet Constitution, Arts. 4, 7, 30, and 102.
20. Yakovlev, *supra* note 14, at 281.
21. Osakwe, *supra* note 16, at 301.
22. *Framework or Frame-Up? In The Economist*, p. 47 (December 18, 1993).
23. William W. Schwartz, *Civil and Human Rights and the Courts Under the New Constitution of the Russian Federation*, 28 *Intl. Law.* 3 (1994). An American example of a constitution adopted by a civil law jurisdiction is the Louisiana constitution. For an analysis of the revised constitution of the State of Louisiana in 1974, see Lee Hargrave, "Statutory" and "Hortatory" Provisions of the Louisiana Constitution of 1974, 43 *La. L. Rev.* 647 (1983).
24. Russian Constitution, Art. 10.
25. Schwartz, *supra* note 23, at 826.
26. Schwartz, *supra* note 23, at 826.
27. Russian Constitution, Art. 126.
28. Russian Constitution, Art. 127.
29. Russian Constitution, Art. 128.
30. For a few examples of libertarian justifications for the existence of objective individual rights, see Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism* (1989), esp. chapter 7; Tibor R. Machan, *Individuals and Their Rights* (1989); Murray N. Rothbard, *The Ethics of Liberty* (1982); N. Stephan Kinsella, "Estoppel: A New Justification for Individual Rights," *Reason Papers* No. 17 (Fall 1992), p. 61; and Roger A. Pilon, "Ordering Rights Consistently: Or What We Do and Do Not Have Rights To," 13 *Ga. L. Rev.* 1171 (1979).
31. Russian Constitution, Art. 13.
32. Russian Constitution, Art. 14.
33. Russian Constitution, Art. 17.
34. Schwartz, *supra* note 23, at 825.
35. Schwartz, *supra* note 23, at 829.
36. Russian Constitution, Art. 29.
37. Russian Constitution, Art. 31.
38. Russian Constitution, Art. 25.
39. For a comprehensive analysis of the ownership of private property in the Russian Federation, see Susan W. Tiefenbrum, *Land Ownership in the Russian Federation: Laws and Obstacles*, 27 *St. Louis L. J.* 235 (1993).
40. Adopted March 13, 1992 as a treaty "on the differentiation of the objects of jurisdiction and authority among federal bodies of government authority of the Russian Federation and bodies of authority of the republics contained in the Russian Federation" and signed by representatives of the Russian Federation and certain political subdivisions, including 14 of the 16 its autonomous independent republics, the Tartarstan Republic and Checheno-Ingushetia Republic abstaining.
41. Gary B. Conine and J. Lanier Yeates, *Russian Petroleum Legislation: Assessing the New Legal Framework, Russian Oil & Gas Guide* (Vol 2, No. 1) 1993.

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