

## NOTES

### A NEW ENERGY PARADIGM FOR THE TWENTY-FIRST CENTURY: CHINA, RUSSIA, AND AMERICA'S TRIANGULAR SECURITY STRATEGY

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#### I. OVERVIEW: WHAT AMERICAN LAW MUST STRIVE TO ACCOMPLISH

##### *A. Introduction: Oil as the World's Blood*

This Note briefly surveys the nature of international affairs and the importance of energy to the success of nations. It suggests a broad strategy for American law to pursue in maximizing the security and affluence of the United States during the rise of the next great power, China, throughout the twenty-first century.

A variety of factors determine the relative power and influence of nations. One of the most fundamental necessities for building a successful society is energy.<sup>1</sup> An inexpensive supply of energy fuels a nation's economy, defense, and quality of life. Several fine definitions of "energy security" have been proposed. Among the best is the meaning provided by the U.S. Energy Association:

Energy security is a multi-faceted issue. In its most fundamental sense, energy security is assured when the nation can deliver energy economically, reliably, environmentally soundly and safely, and in

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1. As the U.S. Energy Association notes,

[e]nergy is not an end in itself, but rather is a means to achieve the broader goals of sustainable development generally, and economic growth, specifically. . . . Failure to provide reliable energy services in a comprehensive and integrated manner inhibits entrepreneurs and serves as a brake on economic growth and private investment.

U.S. ENERGY ASS'N, TOWARD AN INTERNATIONAL ENERGY TRADE AND DEVELOPMENT STRATEGY 29-30 (2001), available at <http://www.usea.org/T&Dreport.pdf>.

quantities sufficient to support our growing economy and defense needs. To do so requires policies that support expansion of all elements of the energy supply and delivery infrastructure, with sufficient storage and generating reserves, diversity and redundancy, to meet the demands of economic growth.<sup>2</sup>

The reality today is that “oil” remains fundamental to “energy.” Those nations that wish to excel need oil, and those that possess it have influence. Oil, therefore, is *power*.<sup>3</sup>

Since the collapse of the Soviet Union, America’s policymakers have correctly come to identify energy with national security.<sup>4</sup> One scholar notes that “[w]hereas, in the past, national power was thought to reside in the possession of a mighty arsenal and the maintenance of extended alliance systems, it is now associated with economic dynamism and the cultivation of technological innovation.”<sup>5</sup> This shift does not mean that military force is becoming obsolete; indeed, quite the opposite is true. A sound economic system is required for a nation to afford an effective military; an effective military, in turn, is necessary to defend a nation’s interests—including the nation’s supply of the inexpensive energy that fuels its economy.<sup>6</sup> Not surprisingly, other nations today (including China) are shifting their mindsets and strategies to the critical importance of energy supplies, the so-called “*economization* of international security affairs.”<sup>7</sup> Nationalism and territoriality still persist; therefore, “energy security for all must be managed carefully lest other pathologies spread into deliberations in the energy area.”<sup>8</sup>

Given the critical importance of energy to the future of every country, the current and projected states of petroleum are troublesome. The world’s supply of recoverable oil is diminishing as demand continues to rise. Some estimates—including those based upon the well-known Hubbert’s Curve—predict that the world has already reached the midpoint of recoverable production and that half or more of all recoverable oil has already been extracted.<sup>9</sup> The U.S. government’s Energy Information Administration claims

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2. U.S. ENERGY ASS’N, NATIONAL ENERGY SECURITY POST 9/11, at 7 (2002), available at <http://www.usea.org/USEAREport.pdf>.

3. See generally DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY, AND POWER (1991). On the significance of power, see also *infra* note 24.

4. MICHAEL T. KLARE, RESOURCE WARS 5-10 (2001).

5. *Id.* at 7.

6. *Id.* at 6, 9-10.

7. *Id.* at 10.

8. Amy Jaffe, *The Growing Developing Country Appetite for Oil and Natural Gas*, 9 ECON. PERSP. (U.S. DEP’T OF STATE) 13, 13 (2004), available at [http://www.ciaonet.org/olj/ep/ep\\_may04/ep\\_may04d.pdf](http://www.ciaonet.org/olj/ep/ep_may04/ep_may04d.pdf) (subscription required).

9. See *The Hubbert Peak for World Oil, Summary*, <http://www.hubbertypeak.com/summary.htm> (last visited May 18, 2006).

that world oil production will peak around 2037.<sup>10</sup> This estimate, however, is based upon several speculative assumptions,<sup>11</sup> and even though its “analysis shows that [the global production midpoint of petroleum] will be closer to the middle of the 21st century than to its beginning,” the authors concede that “this result in no way justifies complacency about both supply-side and demand-side research and development.”<sup>12</sup> Indeed, one can manipulate estimates of the global production peak depending upon which sets of data are used, which statistical models are employed, and what kinds of assumptions are made. For example, the ecosystems model<sup>13</sup> includes one curve peaking around 2020,<sup>14</sup> but that curve “assumes a price leap when the share of world production from a few Middle East countries reaches 30%.”<sup>15</sup>

In sum, even the most optimistic estimates concede that the world’s petroleum production capacity is almost certain to peak within the next thirty years or so; less optimistic estimates predict that the curve has already peaked. In any event, the supply of petroleum is declining and will likely have surpassed more than half of the recoverable total by about 2035. In the near future, the amount of the global petroleum supply makes it highly likely that the United States and other nations will find it increasingly difficult to continue to assure their supplies of oil. Given the critical importance of oil, it is also likely that *as recoverable supplies continue to decline, nations will compete for those scarce resources with increasing intensity.*<sup>16</sup>

At the same time the global supply of recoverable oil is declining, demand for the product is rising at a furious rate and will continue to do so.<sup>17</sup> The United States is by far the world’s top demander of oil, consuming nearly four times as

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10. JOHN H. WOOD ET AL., U.S. ENERGY INFO. ADMINISTRATION, LONG-TERM WORLD OIL SUPPLY SCENARIOS: THE FUTURE IS NEITHER AS BLEAK OR AS ROSY AS SOME ASSERT 5 (2004), available at [http://www.eia.doe.gov/pub/oil\\_gas/petroleum/feature\\_articles/2004/worldoilsupply/pdf/itwas04.pdf](http://www.eia.doe.gov/pub/oil_gas/petroleum/feature_articles/2004/worldoilsupply/pdf/itwas04.pdf).

11. *Id.* Among other factors, the study assumes an average of two percent production growth until the peak and a production decline at a reserves-to-production ratio of ten. *Id.* Although it is beyond the scope of this paper to debate the scientific merits of this study’s chosen estimates, it is sufficient to note that the estimates are just those—estimates—and that many other credible scientific studies (including the Hubbert Peak, *supra* note 9) give less optimistic projections about the precise timing of the peak.

12. *Id.* at 7 (emphasis omitted).

13. *See supra* note 9 and accompanying text.

14. *See supra* note 9 (noting the “Swing Case”).

15. *Id.*

16. *See also supra* notes 4-7 and accompanying text. *See generally* KLARE, *supra* note 4.

17. The Energy Information Administration, for example, estimates that global oil consumption will increase by 1.9% per year through 2025, from 77 million barrels per day in 2001 to nearly 121 million barrels per day in 2025. U.S. ENERGY INFO. ADMIN., INTERNATIONAL ENERGY OUTLOOK 2004, at 2 (2004), available at [http://tonto.eia.doe.gov/FTP/forecasting/0484\(2004\).pdf](http://tonto.eia.doe.gov/FTP/forecasting/0484(2004).pdf).

much as the next country in 2001.<sup>18</sup> Experts expect America's petroleum demand to increase by an average of 1.5% per year through 2025, at which point the United States will consume 28.3 million barrels per day.<sup>19</sup> This large consumption of oil by Americans is particularly vexing given the importance of the Middle East to the world's oil supply and the tenuous political, economic, and social environment which that region of the world now occupies.<sup>20</sup>

Complicating the demand picture further is the rise of China. In 2003, China became the world's second-largest consumer of oil after the United States and already is "a significant factor in world oil markets."<sup>21</sup> Like the United States, China "is focused on meeting domestic demand."<sup>22</sup> As China's economy continues to grow, its demand for oil will continue to grow as well.

To summarize, the global supply of recoverable oil is shrinking. Because an increasing proportion of the world's supply is expected to come from the politically troubled Middle East, nations have an incentive to diversify their oil suppliers. Although it is impossible to pinpoint the precise moment when the world will exceed its production peak, most reliable estimates predict that the peak will be surpassed by roughly 2035, and some estimates claim that the world has already surpassed its peak production. Although the world's capacity to recover oil is irreversibly declining, global demand for oil is growing and will continue to do so. Specifically, America's demand will reach new heights, far outstripping the degree of dependence other nations have on petroleum. Simultaneously, China's thirst for oil will grow, closing the demand gap with the United States as the twenty-first century progresses. Although alternative energy technologies and domestic initiatives such as conservation are crucial, these attempts to curb the need for petroleum currently show little promise of significantly reducing dependence upon oil in the next half-century.

### *B. Implications for the United States*

#### *1. Offensive Realism: Why Nations Act as They Do.*—Several competing

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18. CIA, *The World Fact Book: Rank Order—Oil—Consumption*, <http://www.odci.gov/cia/publications/factbook/rankorder/2174rank.html> (last updated Jan. 10, 2006).

19. U.S. ENERGY INFO. ADMIN., *supra* note 17, at 30. Thus, America will demand 28 million barrels per day out of the total global consumption of 121 million barrels per day in 2025, or roughly twenty-three percent of the world's available supply.

20. Providing yet another compelling incentive for the United States to diversify its petroleum sources, the Middle East is expected to supply a still greater proportion of the world's oil as the twenty-first century progresses. Consequently, "[s]hort-term risks to energy security are expected to increase in coming decades as a greater share of oil and gas supplies come from politically sensitive areas." Kevin Morrison, *World to Become More Dependent on Mideast Oil*, *FIN. TIMES* (U.K.), Oct. 27, 2004, at 6.

21. U.S. ENERGY INFO. ADMIN., *COUNTRY ANALYSIS BRIEFS: CHINA 1* (2005), available at <http://www.eia.doe.gov/emeu/cabs/china.pdf> [hereinafter U.S. ENERGY INFO. ADMIN.: CHINA].

22. *Id.* at 4. Otherwise stated, China is focused on ensuring the continuation of its oil supplies from abroad.

theories seek to describe the incentives and actions of nations in the international context. The theory that most closely underlies the assumptions of this Note is popularly termed “offensive realism.”<sup>23</sup>

The most fundamental concept to the theory of offensive realism is that of *power*.<sup>24</sup> Nations pursue power, usually at the expense of each other, because in an anarchic system of international affairs, there is no authority to protect states from one another. Power is the best way to ensure survival, and the incentives created by international anarchy oftentimes encourage proactive behavior.<sup>25</sup> Unlike other variants of realism, offensive realism rejects the notion that nations remain stagnant or seek to embrace the status quo, because “the international system creates powerful incentives for states to look for opportunities to gain power at the expense of rivals, and to take advantage of those situations when the benefits outweigh the costs.”<sup>26</sup> Nations, then, are constantly looking for ways to better secure themselves, both by promoting their own strengths and by undermining the strengths of surrounding states. A state’s ultimate goal is to become the dominant power in its region, so strong that no other state can credibly threaten its well-being. Such a state is called a “hegemon.”<sup>27</sup> Hegemons maximize their economic opportunities and secure those opportunities to the greatest extent possible, usually through an intimidating military force. Because technology and affluence are “shrinking” the world, making it possible for still more distant states to threaten and harm each other, policymakers must bear this dynamic in mind while formulating America’s security strategy.

Although it is not the purpose of this Note to debate the merits of competing theories of international politics, it is necessary to understand the basic assumptions made here if U.S. law is to effectively serve the interests of American society. Consistent with the foregoing, this Note assumes that nations, particularly powerful ones, should, and in fact do, seek to maximize their power both in an absolute sense and, more importantly, relative to other great powers. Although scholars debate which features of power are the most important, it is sufficient here to note that among the most fundamental buttresses of that power is an *inexpensive, reliable source of energy*.

An inexpensive, reliable source of energy makes possible a flourishing economy, technological innovation, and an effective military force. Nations that do not enjoy an inexpensive, consistent energy supply—or the infrastructure to support such a supply—are doomed from the start. To date, no modern nation has pulled itself from the grips of grinding poverty and chaos—let alone maximized its security by becoming a great power—in the absence of a system of inexpensive, reliable energy. In turn, nations that possess economic affluence,

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23. For a supremely well-written discussion on the competing theories of international politics, and of realism in particular, see JOHN J. MEARSHEIMER, *THE TRAGEDY OF GREAT POWER POLITICS* 1-28 (2001).

24. *Id.* at 12. On the significance of power, see also *supra* note 3.

25. MEARSHEIMER, *supra* note 23, at 21.

26. *Id.*

27. *Id.* at 40.

technology, and military power will use some of those resources for reinforcement and expansion. Energy, the underpinning of them all, is no exception.

It is in this context, then, and with these assumptions, that the United States and other countries must consider how to best serve their economic and security interests. Even if the United States and China have no actual hostile ambitions toward the other in the year 2030, the *perception* of each will, by necessity, always be one of competition: it is impossible for a country to ever know with certainty the plans of another.<sup>28</sup> Each, then, will seek to maximize security against the other. Additionally, each nation's search for economic affluence will provide an additional incentive for the other to outpace its fellow power across the Pacific.

2. *China and the United States in the Twenty-First Century.*—China is indisputably becoming a substantial force in its own right.<sup>29</sup> As China's economy grew throughout the 1980s and 1990s, so did its demand for oil; China became a net importer of petroleum in 1993.<sup>30</sup> Now dependent upon the Middle East, China is engaging that region<sup>31</sup> and is as likely as the United States to attempt diversification of its oil suppliers. China is obsessively wary of reliance upon foreign states; this aversion is accentuated still more sharply in the realm of energy, because the government is very much aware of its stake in China's future.<sup>32</sup>

Given the foregoing, one might reasonably anticipate a conflict between China and the United States in some form, militarily or otherwise, within the next half-century; some scholars deem conflict, or at least substantial friction, to be

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28. *Id.* at 31.

29. A variety of measures are used to assess China's growth. Perhaps the most impressive is China's economic prowess: it is now the fourth largest economy in the world, and it is growing at three to four times the rate of the three largest economies. Moreover, China is soon expected to become the largest exporter of capital, acquiring ownership of commercial interests all around the globe. Fareed Zakaria, *What Bush and Kerry Missed*, NEWSWEEK, Oct. 25, 2004, at 58.

30. Daniel Yergin, *Gulf Oil—How Important is it Anyway?*, FIN. TIMES (U.K.), Mar. 22, 2003, at 1. And by 2003, China's oil consumption had doubled from a decade before.

31. As some have pointed out, China's engagement of the Middle East has not always been compatible with American interests. For example, China's "way of forming a footprint in the Middle East has been through providing technology and components for weapons of mass destruction and their delivery systems to unsavory regimes in places such as Iran, Iraq and Syria." Gal Luft, *China's Thirst for Oil Poses a Threat to U.S.*, HOUS. CHRON., Feb. 9, 2004, at A17. This is one example of how fundamentally oil is tied to a variety of different issues—in this case, to terrorism. China is a supplier of weapons to the very region in which the United States is now primarily focused on the war on terror.

32. Toshi Yoshihara & Richard Sokolsky, *The New World Disorder: The United States and China in the Persian Gulf: Challenges and Opportunities*, 26 FLETCHER F. WORLD AFF. 63, 67-68 (2002). As a result of this new awareness, China has moved to diversify its providers of oil. The only other alternative, reduction of total petroleum consumption, is manifestly incompatible with continued economic expansion.

unavoidable.<sup>33</sup> Energy could play two significant roles under such a scenario. First, the two nations would grapple over control of the raw energy supplies themselves, especially petroleum. Oil might initiate a conflict, or the two nations might expand another dispute to include energy supplies. Petroleum, then, would be the *subject* of a quarrel. The second role oil would play in any clash between the United States and China would be to serve as the *means* for waging a conflict. Energy is necessary to power a military; it is also necessary to fuel the society funding a military. The dual nature of oil—as both the catalyst and the enabler of a dispute between America and China—is crucial to appreciating its strategic value.

3. *Enter Russia.*—Barring a miraculous technological breakthrough, the United States and China will continue to demand oil at ever-higher volumes. Each nation would undoubtedly benefit by diversifying its sources of oil.<sup>34</sup> To this end, China has acquired interests in many countries already, the most spectacular recent example of which is its deal with Venezuela.<sup>35</sup> Notes the British Broadcasting Corporation, “[a] lack of sufficient domestic production and the need to lessen its dependence on imports from the Middle East has meant that China is looking to invest in other potential markets such as Latin America.”<sup>36</sup>

To further complicate a potential Sino-American oil conflict, Russia now enters the picture. Just how much oil Russia possesses is a state secret, but estimates from the private sector are frequently revised upward. Russia is the world’s second largest producer and second largest exporter of crude oil after Saudi Arabia.<sup>37</sup> Russia has managed this feat in spite of its struggling economy and the morass that is the post-Soviet legal system.<sup>38</sup>

Although a variety of legal problems continue to depress Russia’s full

33. Mearsheimer is one such scholar: “China cannot rise peacefully, and if it continues its dramatic economic growth over the next few decades, the United States and China are likely to engage in an intense security competition with considerable potential for war.” John J. Mearsheimer, *Better to Be Godzilla than Bambi*, FOREIGN POL’Y, Jan.-Feb. 2005, at 47.

34. U.S. ENERGY ASS’N, *supra* note 2, at 14. The more diversity the United States enjoys in its energy supplies, the less likely a single supply going off-line will bring the American economy and military to a halt. Of course, the same is true for China; hence, it is in America’s security interests that China has minimal diversity amongst its suppliers of oil. In the event of a conflict between the United States and China, it would be easier for the United States to deny China the oil it would require to sustain the conflict if China had few reliable sources.

35. Venezuela has offered the Chinese government access to its oil reserves, which “will allow China to operate oil fields in Venezuela and invest in new refineries.” *Venezuela and China Sign Oil Deal*, BBCNEWS (U.K.), Dec. 24, 2004, <http://news.bbc.co.uk/2/hi/business/4123465.stm>.

36. *Id.*

37. U.S. Dept. of State, *U.S. Cooperating with Russia, Central Asia on Global Energy Security*, INT’L INFO. PROGRAM, May 1, 2003, <http://usinfo.state.gov/gi/Archive/2003/May/29-238097.html>.

38. Incidentally, some commentators have questioned whether Russia will ever have enough recoverable oil to make investment there worthwhile. This Note categorically rejects such claims. *See infra* Part II.C.

potential as a supplier of oil,<sup>39</sup> global demand will soon reach a crescendo.<sup>40</sup> Russia desperately needs economic stimulus and has its own potential crisis brewing with terrorists.<sup>41</sup>

It comes as no surprise, then, that China has pursued Russian oil.<sup>42</sup> Some of China's industrial hubs, including the northeastern city of Daqing, depend *entirely* upon oil imported from Russia.<sup>43</sup> China has gone so far as to raise tensions with Asia's current economic leader, Japan, over a new Russian pipeline.<sup>44</sup> For its part, Russia has, as recently as November 2004, explicitly reassured Beijing that "it can increase rail shipments of oil disrupted in recent months . . . ."<sup>45</sup>

Although some contend that relations between Russia and China remain "ambivalent,"<sup>46</sup> this activity should command the attention and concern of American policymakers. China is doing precisely what the United States should be doing: courting Asia's energy states, particularly China's oil-producing neighbors, and most especially Russia. At least one scholar agrees that "[t]he U.S. government should also take a much more proactive stance vis-à-vis Russia and China with respect to the international energy sector[.]" as "[i]t could help . . . these two critical emerging energy powers define their own goals in manners compatible with U.S. objectives."<sup>47</sup> Some observers posit that Russia will someday join the United States in counterbalancing China's hegemonic

39. See also *infra* Parts II-III. See generally Arina Shulga, Comment, *Foreign Investment in Russia's Oil and Gas: Legal Framework and Lessons for the Future*, 22 U. PA. J. INT'L ECON. L. 1067 (2001).

40. See *supra* Part I.A.

41. See, e.g., CNN, *Timeline: Russia Terror Attacks*, CNN.COM, Sept. 1, 2004, <http://www.cnn.com/2004/world/europe/09/01/russia.timeline/index.html>.

42. "The thing to look for over the next year or two," wrote one oil expert in 2003, "is the firming up of plans by Moscow for new pipelines that will carry Russian oil to China or elsewhere in Asia . . . ." Yergin, *supra* note 30, at 1.

43. James Kynge, *Daqing's Nodding Donkeys Have Opened the Gates to Russian Oil*, FIN. TIMES (Asia), Aug. 23, 2004, at 4.

44. Paul Roberts, *The Undeclared Oil War*, WASH. POST, June 28, 2004, at A21. China and Japan have exchanged diplomatic barbs as they compete for a pipeline from—not surprisingly—Russia. *Id.*

45. Mure Dickie, *Russia Reassures China About Increased Oil Shipments*, FIN. TIMES (U.K.), Nov. 27-28, 2004, at 4. Chinese media reported that their government and Moscow "had agreed to work together to 'guarantee' Russia would be able to ship at least 10m tonnes of oil in 2005 and at least 15m tonnes in 2006." *Id.* Similarly, "Russian media have said Lukoil plans to sell 400,000 tonnes of oil to China in the first quarter of [2005]." *Id.*

46. *Courtship in Beijing*, FIN. TIMES (U.S.A.), Oct. 15, 2004, at 12. The article notes that Russia is in the more favorable position "because it has two things—energy and arms—that China badly wants. This puts Beijing in the unusual position of being *demandeur*, in contrast to its relations with the rest of the world which has been hammering on China's door for contracts." *Id.*

47. Jaffe, *supra* note 8, ¶ 25.



aspirations.<sup>48</sup> In the meantime, however, China and Russia are weaving closer ties in an effort to counter America's present geopolitical power; the two nations have even begun joint military exercises.<sup>49</sup> The U.S. government simply has not sought out allies with nearly the degree or the intensity that Beijing has.<sup>50</sup>

*C. One Possible Solution: America's Domestic and Foreign Law*<sup>51</sup>

Some scholars have advocated an American policy of slowing Chinese economic growth.<sup>52</sup> The rationale for this argument is that "[a] wealthy China would not be a status quo power but an aggressive state determined to achieve regional hegemony. . . . Although it is certainly in China's interest to be the hegemon in Northeast Asia, it is clearly not in America's interest to have that happen."<sup>53</sup> It is quite true that as a rival China would likely attempt to assert domination over Asia, and perhaps beyond, and that such an assertion would be patently contrary to America's interests. Slowing China's economy, however, is probably not a realistic option. With interests the world over seeking investment opportunities in China—including very powerful domestic interests in the United States—a voluntary withdrawal from the Chinese market by any one nation is highly unlikely. Not without physically destroying China's economic capacity through armed conflict could the United States realistically hope to slow or stop its escalation. Moreover, growth in the Chinese economy is not *necessarily* contrary to the interests of the United States. The greater the percentage of China's domestic economic power that the United States and other foreign nations own, the better position the United States occupies. In addition, American investment in China will enrich the United States at the same time it enriches China.

Yet it is clear that China, if it were one day capable of doing so, *would* credibly challenge American economic and security interests in Asia and elsewhere.<sup>54</sup> The ideal policy, then, would encourage Chinese participation in

48. See Mearsheimer, *supra* note 33.

49. Reuters, *Russia, China to Expand Military Cooperation*, YAHOO! NEWSINDIA, Sept. 6, 2005, <http://in.news.yahoo.com/050906/137/600rd.html>. Although the two nations will not create a formal military bloc, both have agreed to expand their military cooperation because, according to Russian Defense Minister Sergei Ivanov, "[t]he approaches of Russia and China to all problems of international security either completely coincide, or are almost identical . . . ." *Id.*

50. See Ashley J. Tellis, *A Grand Chessboard: Beijing Seeks to Reassure the World That It Is a Gentleman*, FOREIGN POL'Y, Jan.-Feb. 2005, at 52-54.

51. The phrase "foreign law" is employed here to denote U.S. laws and legal mechanisms aimed at foreign states, e.g., treaties.

52. MEARSHEIMER, *supra* note 23, at 402.

53. *Id.*

54. Indeed, the Chinese government has gleefully taken notice that "America's unchallenged global power has already shown signs of decay in the Middle East, as manifested in widespread Arab resentment toward American support for Israel, America's unpopular dual containment policy against Iraq and Iran, and the European Union's more assertive role in the region." Yoshihara &

the global community and would promote American economic interests in China *without* compromising American security by the creation of an economic giant capable of dominating the United States at some point in the future.

This Note contends that the key—or, at least, one crucial key—to pursuing such an international order is *energy*. The United States must formulate economic, cultural, and diplomatic ties with other key energy states strong enough to *aid* China when it is in our *economic* interest to do so, and strong enough to *deny* China the energy it needs to run a military-oriented economy when our *security* interests require it. This is no small task and it will likely never be absolutely feasible. Yet history has shown that this strategy is largely achievable,<sup>55</sup> and it must be adopted aggressively and without delay by U.S. law. By focusing on this century's two great states and a potentially crucial ally to one or the other, the triangular security strategy proposed here envisions a realistic way to peacefully maximize America's well-being.

For the immediate future, this key energy ally is Russia, which enjoys its distinction for several reasons. First and most importantly, Russia, along with India<sup>56</sup> and Japan, could be the anchors of an Asian counterbalance against Chinese hegemony.<sup>57</sup> Second, closer ties to Russia would greatly aid the United States in diversifying its oil supplies, a key feature of America's evolving twenty-first century energy strategy.<sup>58</sup> Third, in addition to its ever-growing oil reserves, Russia resides atop the world's largest source of natural gas,<sup>59</sup> and closer economic ties through oil would very likely lead to closer ties to the Russian gas market. Fourth, Russia could provide a bonanza of investment opportunities for American commerce in other emerging markets as well. Finally, by virtue of its culture and geographic location, Russia is an oil-producing state that is highly unlikely to ever threaten the United States by terrorist means<sup>60</sup> and could be a

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Sokolsky, *supra* note 32, at 64.

55. Such concerns have been recognized and pursued by nations in the past (including the United States), particularly during times of war. Japan, for example, was motivated largely by an uncompromising need for oil to invade Manchuria between the World Wars. YERGIN, *supra* note 3, at 305-58. Moreover, Japan sought to minimize its oil dependence upon the United States (then the world's leading oil producer) because "Japan feared," correctly so as it turned out, "that *such dependence would cripple it in a war.*" *Id.* at 309 (emphasis added).

56. For an excellent discussion of the overall power play between the United States and China, see James F. Hoge, Jr., *A Global Power Shift in the Making: Is the United States Ready?*, FOREIGN AFF., July-Aug. 2004, at 2. Hoge suggests that the United States should promote India as a counterbalance to China. Although India will undoubtedly act as a counterbalance in the future, this Note argues that Russia could play a similar role (though on a lesser scale in the long-run), and that Russia has the additional advantage of providing the United States with a strategic energy partnership.

57. MEARSHEIMER, *supra* note 23, at 47.

58. U.S. ENERGY ASS'N, *supra* note 2, at 14.

59. U.S. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: RUSSIA 1 (2005), available at <http://www.eia.doe.gov/emeu/cabs/russia.html> [hereinafter U.S. ENERGY INFO. ADMIN.: RUSSIA].

60. The oil industry is especially sensitive to the political realities of individual nations and

valuable partner in America's war on terror.<sup>61</sup>

Of course, it is inconceivable that any one nation could use force to dominate all of the world's oil reserves. The United States has demonstrated the difficulty in securing just one country (Iraq). Even with twenty percent of the world's population, it is unlikely that China could do so either. This Note's proposed strategy is more realistic than to advocate mere military force—it is a strategy of *degree*. The problem that U.S. law and policy should address is *not* how America could best intimidate the world's oil suppliers; rather, the proper question is how America could best induce other key energy states to *prefer* the United States over China in global energy markets, particularly in the event of a conflict between the United States and China. The latter question is tremendously practical and must reside upon a raw appeal to the self-interests of the energy states involved. It is thus a question upon which to ground an effective policy.

Skeptics of the real-world applicability of this “persuasive” approach should consider the fact that China is now acting in a manner calculated to diminish America's ability to form strategic alliances with other Asian nations, especially oil-rich nations. This so-called “good neighbor policy”<sup>62</sup> is China's effort to assuage the anxieties of its neighbors as it continues to grow economically and militarily and to simultaneously preclude the United States from inciting China's neighbors to act in their own interests by slowing China's meteoric ascendancy.<sup>63</sup> It is unlikely that either China or the United States could militarily occupy enough of the world's oil-producing states to cripple the other; instead, China realizes it must *persuade* potential allies—including Russia—to support it.

If recent history is any indication, some American policymakers today do not appreciate the value of an economically, culturally, and diplomatically-based foreign policy. Public relations efforts will be at least as important as the threat of military force if the United States is to secure its energy supply and if it is to build allies to balance Asia's emerging giant. Methods of persuasion must include the strongest inducement—economic ties and money—but other factors should be used as well, including strategic military agreements and a new *modus*

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to the world at-large. Political risk must be taken into account by companies, and minimized by interested governments, if the industry is to maximize its potential for investors and states alike. Thomas W. Walde, *Managing the Risk of Sanctions in the Global Oil & Gas Industry: Corporate Response Under Political, Legal and Commercial Pressures*, 36 TEX. INT'L L.J. 183, 184 (2001).

61. Indeed, Russian president Vladimir Putin has declared “all-out war” on terrorism. Mike Eckel, *Putin Promises Reforms to Quell “All-Out War,”* INDIANAPOLIS STAR, Sept. 5, 2004, at A1.

62. Tellis, *supra* note 50, at 52-54.

63. *Id.* at 54. “[China] has sought to develop friendly relations with the major states on its periphery—Russia, Japan, India, and the Central and Southeast Asian states—that are potential balancing partners in any future U.S.-led, anti-Chinese coalition.” *Id.* at 53. Tellis further acknowledges that “[t]his strategy of emphasizing peaceful ascendancy in word and deed will likely satisfy Chinese interests *until it becomes a true rival of the United States*. At that point, China will face another strategic crossroads.” *Id.* at 54 (emphasis added). This is consistent with the theory of offensive realism.

*operandi* in foreign affairs emphasizing overt displays of respect for the other culture and a general humility on America's part. Humility does not undermine the projection of strength. Sinking into an intractable military quagmire, however, does.

Of course, the threat of military force remains—and should remain—the ultimate trump card in America's hand. The principal problem in recent years is that American policy has excluded the foregoing factors altogether while overextending—and, incidentally, weakening—America's military trump card.

If the United States is able to establish sufficiently deep ties with these key states, most notably Russia, it will have taken a crucial step toward securing its health in the twenty-first century. In the event of a conflict under this persuasive policy, the United States could cut off a large portion of the oil upon which China relies without resorting to military force. Military force could, of course, destroy a large percentage of China's coal and electrical infrastructure. At that point, China would be unable to wage war. When a society is unable to fuel itself, it is almost disingenuous to say that a cogent society exists at all.

The persuasive approach ought to appeal to lawmakers of all political ideologies. Conservatives should be pleased by the fact that such a policy would place paramount emphasis upon America's security, while at the same time promoting the nation's economic interests abroad. Liberals ought to be mollified because this approach is a more "human" diplomacy, and it reduces the likelihood of war in the future: the United States would have fewer incentives to fight, and China's capability to wage war could be substantially compromised. The attractiveness of this plan to political moderates is readily apparent—at the core of the persuasive approach is an appeal to reason and balance, the end result of which would promote several of America's most crucial symbiotic interests. Moderation is where idealism meets reality. The plan proposed here resides at just that point: it is faithful to America's ideals yet realistic enough to succeed in the real world.

Timing is crucial. The United States has, throughout its history, stumbled into the future, costing the nation far more by intransigence than it would have paid with thoughtful preparation.<sup>64</sup> China's rise is not an event that America can afford to neglect, yet it appears that this is precisely what U.S. lawmakers are doing.<sup>65</sup> American law *must* prepare *now* for a changing world.

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64. See WILLIAM A. DEGREGORIO, *THE COMPLETE BOOK OF U.S. PRESIDENTS* 425 (4th ed. 1993). One commonly referenced example is the Senate's rejection of the Treaty of Versailles following World War I, an event some historians have largely credited with precipitating the Second World War.

65. As one journalist points out,

The war on terror is crucial, winning in Iraq is necessary, Middle East peace is important. But I wonder whether as we furiously debate these matters in America, we resemble Englishmen in the waning days of the British Empire. . . . They tried mightily, and at great cost, to stabilize disorderly parts of the globe. Meanwhile, across the Atlantic, the United States of America was building its vast economic, technological and cultural might, which would soon dominate the world.

In foreign affairs, the United States should immediately pursue the strongest possible relations with nearly all oil-producing states, particularly those near China, since in addition to their value as energy suppliers, these states could serve as a counterbalance to China in its own backyard. The most important of these states is Russia. In charting this route, America must employ as many facets as possible to make its relationships as deep as possible. To date, the United States has not pursued key states competitively, nor have policymakers indicated interest in altering America's approach to international relations. The United States must peacefully compete with China for the faithfulness of these crucial states so that America will have the upper-hand in any future conflict with China. This approach would also provide the Chinese government with a potent disincentive to initiate a conflict with the United States. Diplomacy must be employed to secure treaties, executive agreements, and informal arrangements to promote these goals with key energy allies. The promotion of greater access for American interests in the Russian energy market should be chief among these aspirations.

Domestic law has a lesser, but nevertheless important, role to play in America's twenty-first century energy strategy. In particular, American lawmakers must resist the urge to sanction Russian industries and should remove other barriers to the trading of energy commodities, goods, and services. Additionally, lawmakers should consider restoring the President's trade promotion authority and should leverage international organizations such as the World Trade Organization. Although not immediately relevant here, other useful domestic programs such as energy conservation and alternative fuel research and development should be pursued aggressively in conjunction with the legal strategy proposed here.

*What* America's lawmakers must seek to accomplish is clear. The remainder of this Note addresses exactly *how* the domestic and foreign laws of the United States could work to secure the nation's interests in a rapidly-changing and potentially dangerous world. Part II briefly considers the positions of the United States, China, and Russia, particularly with respect to energy. Each country's relevant strengths and weaknesses will be identified and employed as the basis of the Note's legal proposals in Part III, which explores two dimensions of the law: actual legal changes within Russia that America should pursue, and some of the legal mechanisms available to encourage the changes. Finally, Part IV summarizes the role American law can play in fortifying our national interests pursuant to the triangular security strategy.

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Fareed Zakaria, *What Bush and Kerry Missed*, NEWSWEEK, Oct. 25, 2004, at 58. Today, China is building, and the United States is distracted. Perhaps the United States can avoid the mistake that Western Europe made in the nineteenth and twentieth centuries. At the rate China is rising, however, America will not have the luxury of a few centuries to secure the future. The time for America to prepare is *now*.

## II. OPPORTUNITIES AND HAZARDS: A BRIEF SURVEY OF EACH COUNTRY'S POLICY GOALS

### A. *The United States: Hegemon Under Fire*

In 2003, the U.S. averaged total gross oil imports<sup>66</sup> of about 12.2 million barrels per day. These imports represented approximately sixty-two percent of total U.S. oil demand, and over forty percent of this petroleum came from OPEC nations.<sup>67</sup> Additionally, oil demand in the United States is expected to grow thirty-seven percent by 2025.<sup>68</sup>

Diversification of America's energy sources is thus a crucial facet to its future: "Energy investments are costly and risky, requiring long-term commitments. Recognizing this reality, U.S. energy policy seeks to encourage expansion and diversification of energy supplies."<sup>69</sup> One of the most attractive regions for diversification is Russia and the Caspian Basin.<sup>70</sup>

Presently, the United States lacks an effective energy policy and is thus "vulnerable, in both economic and foreign policy terms," in the realm of oil.<sup>71</sup> "The United States," writes Senator Chuck Hagel (R-NE), "has an interest in assuring stable and secure supplies of oil . . . U.S. national security therefore depends on political stability in the Middle East and other potentially volatile oil- and gas-producing regions."<sup>72</sup>

In the realm of energy, then, the United States needs the greatest possible number of politically-stable, energy-producing allies overseas. At least one U.S. Senator recognizes the key role that Russia could play as America seeks to diversify its oil suppliers.<sup>73</sup> In the long term, America must consider China's rising demand for oil, how this growing demand will influence U.S. energy

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66. "Gross oil imports" include crude oil plus oil products. U.S. ENERGY INFO. ADMIN., COUNTRY ANALYSIS BRIEFS: UNITED STATES OF AMERICA 18 (2005), available at <http://www.eia.doe.gov/emeu/cabs/usa.pdf>.

67. "Overall, the top suppliers of . . . oil during January-October 2004 were Canada (1.6 million bbl/d), Mexico (1.6 million bbl/d), Saudi Arabia (1.5 million bbl/d), Venezuela (1.3 million bbl/d), and Nigeria (1.1 million bbl/d)." *Id.* at 4. The abbreviation "bbl/d" stands for "million barrels per day." *Id.* at 2.

68. Reuters, *Petroleum Demand to Grow 37% by 2025—EIA*, MSNBC, Dec. 9, 2004, <http://www.msnbc.msn.com/id/6685647>.

69. Alan Larson, *Geopolitics of Oil and Natural Gas*, 9 ECON. PERSP. (U.S. DEP'T OF STATE) 10, 10 (May 2004), available at [http://www.ciaonet.org/olj/ep/ep\\_may04/ep\\_may04c.pdf](http://www.ciaonet.org/olj/ep/ep_may04/ep_may04c.pdf) (subscription required).

70. *Id.* At least one State Department official believes that "Russia already is an energy superpower." *Id.*

71. C. Fred Bergsten, *Foreign Economic Policy for the Next President*, FOREIGN AFF., Mar.-Apr. 2004, at 88.

72. Chuck Hagel, *A Republican Foreign Policy*, FOREIGN AFF., July-Aug. 2004, at 68.

73. Senator Hagel writes, "As U.S. energy policy seeks to ensure diversified sources of energy . . . we must seek a policy that includes Russia as a strategic trading partner." *Id.* at 74.

security, and the larger geopolitical portrait of the United States and China as the globe's two most influential states.

In seeking to promote its political, economic, energy, and security interests, America can offer potential allies many attractive inducements, including foreign aid from the U.S. government, potentially billions of dollars in private American investment, technology sharing, and other strategic economic and security interests.<sup>74</sup>

### B. China: A Paranoid Giant

China is now the world's second largest demander of oil and is projected to consume 14.2 million barrels daily by 2025 with a net import of 10.9 million barrels per day.<sup>75</sup> In 1998, Beijing reorganized its state-owned petroleum assets into two vertically-integrated firms: the China National Petroleum Corporation ("CNPC") and the China Petrochemical Corporation ("Sinopec").<sup>76</sup> Other major firms include the China National Offshore Oil Corporation ("CNOOC") and China National Star Petroleum.<sup>77</sup> To date, the Chinese government still holds majority shares in CNPC, Sinopec, and CNOOC; the Chinese government "[has] not give[n] . . . foreign investors a major voice in corporate governance."<sup>78</sup>

The unwillingness of the Chinese government to give foreign investors significant influence over the state's petroleum companies suggests an acute paranoia afflicting the government as it pursues a reliable energy supply. China's increasing dependence upon foreign crude oil is, "[f]or the security-obsessed Chinese . . . scary."<sup>79</sup> As a result, the government is explicitly adopting offensive military scenarios to reinforce its petroleum supply<sup>80</sup> and is working to ensure that energy is not cut off from the mainland: "the Chinese are grabbing what they can—and fending off anyone with a rival claim in a show of muscular petrodplomacy."<sup>81</sup> Some in the Chinese media see immediate conflicts over oil as inevitable, particularly with Japan.<sup>82</sup> At least one scholar has suggested that

74. The inducements America can offer to the rest of the world are considered at length *infra* Part III.C.

75. U.S. ENERGY INFO. ADMIN.: CHINA, *supra* note 21, at 2.

76. *Id.* CNPC works primarily on China's north and west and focuses on crude oil production; Sinopec operates in China's south and specializes in refining.

77. CNOOC "handles offshore exploration and production," while National Star is relatively new. *Id.* at 3.

78. *Id.*

79. Brian Bremner & Dexter Roberts, *The Great Oil Hunt*, BUS. WEEK, Nov. 15, 2004, at 60-61.

80. *Id.* at 61. "[T]he [Chinese] military," noted the two journalists, "has published a book, called *Liberating Taiwan*, that imagines Chinese warships seizing sea routes to the Persian Gulf and imposing an oil embargo on Taipei, Tokyo, and Washington." *Id.*

81. *Id.*

82. *China and Japan's Oil Rivalry Unavoidable*, CHINA DAILY, July 13, 2004, [http://www.chinadaily.com.cn/english/doc/2004-07/13/content\\_347868.htm](http://www.chinadaily.com.cn/english/doc/2004-07/13/content_347868.htm).

this posturing is unsurprising, given that “a liberal internationalist foreign policy is incompatible with China’s illiberal domestic order.”<sup>83</sup>

These trends reinforce the theory of offensive realism as China escalates its competition with other nations for economic and security interests. American policymakers should note the immutable mindset of Chinese officials as they create U.S. energy security policy for the twenty-first century.

### C. *Russia: Land of Opportunity?*

Since the collapse of the Soviet Union, the Russian economy has continued to fair unfavorably in global markets. Russia enjoys great potential for becoming an economic force in the world, in part due to its population and in part by virtue of its considerable reserves of natural resources—including oil and natural gas.<sup>84</sup> It is noteworthy that Russia exported roughly seventy percent of its crude oil production in 2002.<sup>85</sup>

Russia appears to recognize the importance of its energy sector in “speed[ing] up the country’s economic revival and enhanc[ing] its geopolitical weight.”<sup>86</sup> In spite of this recognition, however, domestic struggles for power now appear to trump Moscow’s concerns regarding economic growth and international political prowess.<sup>87</sup> To the extent the Kremlin has concerned itself

83. Minxin Pei, *Beijing’s Closed Politics Hinders “New Diplomacy,”* FIN. TIMES (U.K.), Sept. 13, 2004, at 21.

84. Indeed, Russia’s real gross domestic product grew by 7.1% in 2004, “surpassing average growth rates in all other G8 countries, and marking the country’s sixth consecutive year of economic expansion.” U.S. ENERGY INFO. ADMIN.: RUSSIA, *supra* note 59, at 1. Of particular interest is the fact that “Russia’s economic growth over the last five years has been fueled primarily by energy exports, particularly given the boom in Russian oil production . . . .” *Id.*

85. *Id.* at 3. Of the exports, nearly two-thirds went to nations along Druzhba, Russia’s major export line. *Id.* Given the efficiency of pipeline transportation, *see id.*, one key security concern for American policymakers should be future routes for Russian petroleum and natural gas pipelines. *See* Andrew Jack, *Pipeline Politics: Common Interest in Oil is Bringing Russia and China Together,* FIN. TIMES (U.K.), May 29, 2003, at 12.

86. Vladimir Radyuhin, *Russia Plays Energy Card,* HINDU, July 6, 2004.

87. *See generally* Andrew Jack, *Foreign Investment in Limbo as Putin’s Team Backtracks,* FIN. TIMES (U.S.A.), Oct. 8, 2004, at 3. As Jack notes,

Three elements have combined to create a deadlock [to foreign investment since Putin was reelected in March 2004]: the broad path of economic reform has been thrown into question by Mr [sic] Putin and his new team; the Kremlin has further centrali[z]ed power to create overload at the top; and “administrative reform” designed to smooth government operations appears to have done the opposite.

*Id.* In recent years, the Russian government has expanded its role in the Russian economy (especially in the natural resources sector) and has dampened investor confidence through legal maneuvers such as the government’s conflict with the oil giant Yukos. *Id.* “None of these different elements,” however, “has stopped investment or economic growth in Russia, which continues to flourish. But many fear Mr [sic] Putin’s second term will fall far short of expectations.” *Id.* It is



with energy, it has moved to assert the government more forcefully into the industry.<sup>88</sup>

Many businesses<sup>89</sup> and other groups<sup>90</sup> nevertheless remain optimistic about investment opportunities in Russia, and in the Russian petroleum industry in particular.<sup>91</sup> “Foreign direct investment remains modest but is also increasing, with indications that it may reach record levels above [\$8 billion in 2004].”<sup>92</sup> But the destruction of Yukos, “at least in the short term . . . has fuelled capital flight”

in the interest of the United States, then, that the environment for U.S. investments in Russia be made more secure.

88. For example, the Russian government has sought to increase its share in Gazprom, the giant gas monopoly in Russia, to just over fifty percent. This is part of a larger strategy “on tightening the state’s direct control over the energy sector.” Andrew Jack, *Kremlin Tightens Grip on Energy*, FIN. TIMES (U.K.), Sept. 15, 2004, at 30.

89. The U.S. oil group ConocoPhillips, for example, is going ahead with its plan to purchase 7.6% of Russian oil giant LUKoil from the Kremlin. The deal, worth \$2 billion, is being made in full view of the Yukos conflict, and ConocoPhillips already has plans to increase its ownership to twenty percent in the future. “The deal highlights the necessity of Kremlin backing for any large Russian deal particularly in natural resources,” but we now live in “a time when international oil groups are very keen to find ways to replace and increase reserves around the world.” Stefan Wagstyl, Arkady Ostrovsky & Doug Cameron, *ConocoPhillips Puts its Faith in Russia*, FIN. TIMES (U.K.), Sept. 30, 2004, at 32. This illustrates the compelling incentives for the United States to aid the Russian economy—and demonstrates how doing so will advance America’s interests.

90. “Yukos does not matter[.]” writes Charles Hecker, associate director for Russia and the former Soviet Union at the Control Risks Group. “The fate of the billions of dollars invested in Russia’s economy every year, and Russia’s future as a destination for billions more of those dollars, do not singularly depend on the outcome of *l’affaire* Yukos.” While the Kremlin is admittedly seeking more influence over the Russian economy, and although investments in the oil industry may “require a closer alignment of the investor’s goals with the state’s priorities,” Hecker insists the most radical conclusion to be drawn from the Yukos scandal [is that] international companies should not rule out investing in the Russian oil industry.

....

The Yukos conflict matters only if you are surprised by it.

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. . . [S]eeing the Yukos scandal for what it is (a reckless foray into the private sector, with an ulterior motive) and, conversely, not seeing it for what it is not (the needlework on a new iron curtain) is the only way to get a clear view of the country.

Charles Hecker, *There’s More to Russia than Yukos*, FIN. TIMES (U.S.A.), Nov. 24, 2004, at 15.

91. “International oil companies cannot keep away from Russia[.]” and “in spite of the difficulties, international oil groups will persevere because of the scale of Russia’s untapped resources.” Stefan Wagstyl, *Still Worth It in Spite of the Risk*, FIN. TIMES (U.K.), Oct. 19, 2004, at 3.

92. Andrew Jack, *Under the Cover of Law and Order*, FIN. TIMES (U.K.), Oct. 19, 2004, at 1.

because “[t]he integrity of private ownership is a massive question now.”<sup>93</sup>

It thus appears that although the Kremlin’s recent moves to exert greater influence over Russian petroleum have blunted the industry’s full potential, the prospective profits Russia could yield are still proving irresistible. Some commentators reject the idea of a close U.S.-Russian relationship.<sup>94</sup> Most, however, agree that the United States should do all that it can to encourage hospitality in the Russian investment environment, at least for American investors. Establishing stronger ties with Russia is a complex undertaking, both substantively (defining what kinds of policies would be in America’s interests) and procedurally. Because the United States cannot simply dictate Russia’s domestic policy to Moscow, American policymakers must *persuade* their Russian counterparts by *showing* how proposed policies are in the best interests of both nations. In the case of modern Russia, this effort will necessarily include an appeal to the nation’s current political leadership, which seeks to increase its own control over the country.<sup>95</sup>

Such appeals from the United States to Russia are absolutely essential and demonstrate that domestic and international *political* realities will ultimately determine America’s success in fostering a new Russian ally. The principal content of the appeals themselves, however, must concern *legal* reforms. The kinds of legal reforms within Russia that the United States should seek, as well as the legal mechanisms for securing these reforms, are the focus of Part III of

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93. *Id.*

94. See, e.g., Martin Wolf, *We Make Common Cause with Putin at Our Peril*, FIN. TIMES (U.K.), Sept. 22, 2004, at 21. Wolf writes that “[a] struggle against terrorists cannot be won by military means. . . . This struggle can ultimately be won only in the hearts and minds of Muslims. . . . A close alliance with Mr [sic] Putin’s Russia can only achieve the opposite[.]” because “Mr [sic] Putin’s road to power is paved with Chechen corpses.” *Id.* Although an analysis of the Chechen conflict is beyond the scope of this Note, and although Wolf likely raises a valid point in the importance of psychological persuasion in the war on terror, it is highly questionable whether a close alliance with Russia would preclude the United States from pursuing such a policy. First, the Chechen conflict is more complex than Wolf appears to appreciate, and although the United States by all means should encourage “humane warfare” on Russia’s part, war inherently involves a certain degree of tragic consequences. Unless the United States insists upon Russia’s surrender to acts which are undeniably terrorist in nature, it will be difficult to avoid violence altogether. This is not to say that America should turn a blind eye to violence; it is only to suggest that America must be very cautious in dictating to other nations what they may and may not do to protect themselves from terrorist activities, particularly as America engages its own “war on terror” abroad.

Second, greater U.S. ties to Russia will place America in a stronger position to pressure the Kremlin to uphold the very standards Wolf apparently feels the Russian government lacks.

Finally, as a practical matter, China is pursuing a close relationship with Russia regardless of how it conducts its conflict with Chechnya—and as seen *supra* Part I—this is a prospect which, even by itself, ought to inspire the deepest concerns in American policy circles. See also *infra* note 171 for the necessity of promoting humane policies in Russia’s foreign affairs.

95. See Tom Fenton, *Russia’s New Face Emerges*, CBSNEWS.COM, Sept. 20, 2004, <http://www.cbsnews.com/stories/2004/09/20/opinion/fenton/main644333.shtml>.

this Note.

### III. FUELING AMERICA'S FUTURE: THE TRIANGULAR SECURITY STRATEGY

#### A. *Current U.S. Energy Security Policy*

By its nature, energy security is not the sort of law subjected to frequent litigation. Although issues tangential to general energy policy may be litigated (for example, a particular environmental regulation bearing upon gasoline standards), energy *security* concerns the nation's ability as a whole to continue fueling its economy, defense, and way of life.<sup>96</sup> Hence, the judiciary is largely unconcerned with the topic, and case law is not a rich source in evaluating America's energy security. Instead, this field of law is formulated primarily by the executive branch (this is especially true in the international context when considering the role of other nations), and, to a lesser extent, by Congress.

As a result, it does not come as a surprise that relatively few statutes address energy security. Most statutes that do address the subject bear upon domestic consumption initiatives<sup>97</sup> or upon emergency supplies.<sup>98</sup> America's domestic statutory scheme only recently began to account for the rise of China's energy demands.<sup>99</sup>

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96. Recall the definition of "energy security," *supra* note 2.

97. *See, e.g.*, Biomass Energy and Alcohol Fuels Act of 1980, 42 U.S.C. §§ 8801-8871 (2000) (requiring, *inter alia*, the formulation and implementation of a national program for increased production and use of biomass energy); National Energy Policy Plan, 42 U.S.C. §§ 7321-7322 (2000) (requiring the President to submit periodic reports to the Congress outlining the nation's energy needs and specific proposals to meet those needs).

98. 42 U.S.C. §§ 6231-6246 (2000) (establishing and directing the Strategic Petroleum Reserve).

99. The Energy Policy Act of 2005, a bill of more than 1700 pages signed into law on August 8, 2005, directs the Secretary of Energy to "conduct a study of the growing energy requirements of the People's Republic of China and the implications of such growth on the political, strategic, economic, or national security interests of the United States." Energy Policy Act of 2005 § 1837(a), Pub. L. No. 109-58, 119 Stat. 594 (2005). The Secretary published this report in February 2006. U.S. DEPT. OF ENERGY, SECTION 1837: NATIONAL SECURITY REVIEW OF INTERNATIONAL ENERGY REQUIREMENTS (Feb. 2006), available at [http://www.pi.energy.gov/pdf/library/EPACT1837\\_FINAL.pdf](http://www.pi.energy.gov/pdf/library/EPACT1837_FINAL.pdf). The report provides an outstanding overview of the implications of China's rise for U.S. energy security. To its credit, the Department of Energy makes brief mention of Russia as one source of Chinese oil and natural gas. *Id.* at 5, 20, 22-23, 25, 33. The report also considers Russia with respect to the United States in the context of "a comparison of the applicable laws and regulations of an illustrative group of nations to determine whether a United States company would be permitted to purchase, acquire, merge, or otherwise establish a joint relationship with an entity whose primary place of business is in that nation." *Id.* at 41. The report provides a brief synopsis of the Russian investment environment (*Id.* at 42-43, 49) consistent with the analysis put forth in this article, *see supra* Part II.C, but does not, however, suggest any strategy on par with the one contemplated here. It the purpose of this Note to suggest that as the executive and Congress

Regrettably, presidential action in this sphere has also been limited. The executive branch published its most recent and significant proposal in the 2001 report entitled “National Energy Policy.”<sup>100</sup> Although the report acknowledges<sup>101</sup> the general global picture of increasing demand and decreasing supply,<sup>102</sup> it does not fully appreciate the emerging energy paradigm. “A primary goal of the National Energy Policy is to add supply from diverse sources . . . . This means *domestic* oil, gas, and coal. . . .”<sup>103</sup> As noted previously,<sup>104</sup> this is myopic.<sup>105</sup> Short of an unforeseen, history-altering technological breakthrough (one upon which neither the United States nor the rest of the world has any business placing its security hopes), the need for oil is a certainty in the near future, and foreign dependence is inescapable. Foreign reliance is a reality, and not a problem *per se*; rather, it is a lack of diversity amongst allied suppliers and a hegemonic Chinese competitor that pose the greater security threat to America.

The Bush Administration has engaged the Russian energy community to a limited degree. In May 2002, Presidents Bush and Putin launched a new energy dialogue; this effort has since yielded two U.S.-Russia Commercial Energy Summits.<sup>106</sup> The second summit produced a report which identifies several ways in which the two nations might increase cooperation on energy issues.<sup>107</sup> The report addresses several topics of importance, including Russia’s investing environment,<sup>108</sup> regulatory reform,<sup>109</sup> and the role of pipelines.<sup>110</sup>

construct a policy in light of the new report, policymakers should consider and plan for the significant role that Russia will play—for better or worse—in America’s twenty-first century energy security.

100. NATIONAL ENERGY POLICY DEVELOPMENT GROUP, NATIONAL ENERGY POLICY (2001), available at <http://www.whitehouse.gov/energy/National-Energy-Policy.pdf>. The report is a product of National Energy Policy Development Group, which is charged with developing the nation’s energy policy.

101. *Id.* at viii.

102. *See supra* notes 9-15 and accompanying text.

103. NATIONAL ENERGY POLICY DEVELOPMENT GROUP, *supra* note 100, at xiii (emphasis added).

104. *See supra* notes 9-20 and accompanying text.

105. The report mitigated its dedication to increasing domestic supplies somewhat when it stated “we recognize that a significant percentage of our resources will come from overseas[.]” and “we must build strong relationships with energy-producing nations in our own hemisphere . . . .” THE NATIONAL ENERGY POLICY DEVELOPMENT GROUP, *supra* note 100, at xv. But even this restricts executive vision to America’s (admittedly important) immediate neighbors, thereby ignoring Russia and China.

106. Rachel Halpern, *U.S.–Russia Commercial Energy Summit*, EXPORT AM., Dec. 2003, at 21. The summits included government officials and private energy interests from both nations. Both summits focused on the manner in which a closer energy relationship between the United States and Russia could be realized.

107. U.S.-RUSSIA BUSINESS COUNCIL, REPORT OF THE U.S.-RUSSIA COMMERCIAL ENERGY DIALOGUE 1 (2003), available at [http://www.usrbc.org/PFFs/ced\\_Sept2003.pdf](http://www.usrbc.org/PFFs/ced_Sept2003.pdf).

108. *Id.* at 1-2. Of particular concern are a new Subsoil Law (which should, *inter alia*, provide

These and other proposals are considered briefly below.<sup>111</sup> Most of these proposals are themselves meritorious. Three principal problems nevertheless continue to haunt U.S. energy security policy. First, the Bush Administration has not pursued proposed reforms aggressively enough. Although the evolution of closer ties to Russia will undoubtedly take time, Washington appears to be distracted by other matters, some pressing, and some less justifiable. The legal *methods* available to the Bush Administration in bringing about Russian reforms are also considered here.<sup>112</sup> The second problem U.S. policy continues to encounter is a persistent myopia—limiting the primary focus of U.S. energy concerns to North America.<sup>113</sup> Although America's ties to surrounding countries are unquestionably important, ignoring the new international energy picture is something the United States simply cannot afford to do.<sup>114</sup> Finally, U.S. policymakers continue to de-emphasize the role of persuasion in foreign affairs. A reconsideration of America's general approach to foreign relations is warranted,<sup>115</sup> and this includes particular attention to the importance of public relations efforts.<sup>116</sup>

### *B. Legal Changes for America to Pursue in Russia*

Why America must seek change in Russia is clear. It remains to be seen, however, *which* precise legal results the United States ought to advance. Below is a consideration of some of the most pressing legal issues that the U.S. government should address without delay. In addition to a number of fundamental general changes, the issues of production sharing agreements, special economic zones, and reforms to pipeline regulation present themselves as candidates worthy of attention.

1. *Changes Generally.*—Several broad reforms must be pursued before a closer strategic partnership can be cemented between the United States and Russia. If deep ties are to be established, economic ties will be chief among them. American investment in Russia (particularly in Russia's energy sector) must be promoted. U.S. interests will benefit with new investment opportunities; the Russian public will benefit with additional jobs; the Russian government will

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investors with more stability in their contracts with the Russian government and secure other legal rights with greater certainty) and reforms to the Russian tax code that make high-risk projects more attractive for investors.

109. *Id.* at 2-4. Investors here seek fewer regulations as well as transparency and stability in those regulations that are adopted.

110. *Id.* at 4-7. A clear and unmistakable definition of the rights of private investors in Russia's pipelines projects is indispensable, and the need for pipelines is unquestioned.

111. *See infra* Part III.B.

112. *See infra* Part III.C.

113. *See, e.g., supra* notes 103-05.

114. *See generally supra* Parts I-II.

115. *See supra* Part I.C. (discussing the value of persuasion in foreign relations).

116. *See supra* Part I.C. and *infra* Part III.C.4.

benefit from increased tax revenue; and the two nations will benefit by simultaneously bolstering Russia's economy (thereby providing one counterbalance to the rising Chinese hegemon) and shielding America's energy security to a greater degree in the face of Russia's rising neighbor.

As has been persuasively argued, Russia's own legal and regulatory systems are primarily to blame for the absence of foreign investment in the country.<sup>117</sup> The first and most obvious obstruction is the complete lack of legal infrastructure to define ownership and entitlement in oil and gas projects.<sup>118</sup> Without clear and definitive rules as to who gets what, investors are understandably reluctant to put money into Russia. Foreign companies need specific and explicit guarantees from the Russian government on a project-by-project basis to ensure that the terms of any deal between the company and Moscow are not unilaterally changed by the government.<sup>119</sup> Other disincentives for foreign investors include the severity and instability of the Russian tax code, jurisdictional problems still being hammered out in Russia's embryonic federalism, and the legal uncertainties that Russian environmental laws create.<sup>120</sup>

Moreover, the Russian government has recently erected yet another substantial obstacle to foreign investment: any company bidding for oil and mineral deposits in 2005 must be at least fifty-one percent Russian-owned.<sup>121</sup> "[This] ban," note two journalists, "is part of a trend by the Russian government to reassert control over strategic areas of the country's economy and keep foreigners out of the most lucrative assets."<sup>122</sup> The government subsequently defended its action by correctly pointing out that a country has the right to control the use of its own natural resources.<sup>123</sup>

This, however, misses a broader point. By placing such substantial restrictions upon the opportunities of foreign investors, the Russian government has incited otherwise eager companies to simply wait and watch.<sup>124</sup> As the rest

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117. See generally Shulga, *supra* note 39.

118. Thomas W. Waelde, *International Energy Investment*, 17 ENERGY L.J. 191, 212 (1996).

119. *Id.* at 211-12. One form for such guarantees is the production sharing agreement. See *infra* Part III.B.2.

120. Deborah K. Espinosa, Comment, *Environmental Regulation of Russia's Offshore Oil & Gas Industry and its Implications for the International Petroleum Market*, 6 PAC. RIM L. & POL'Y J. 647, 648-49 (1997).

121. Kevin Morrison & Arkady Ostrovsky, *Moscow Blow to Foreign Companies*, FIN. TIMES (U.S.A.), Feb. 11, 2005, at 1. One source close to the Russian government has stated that the ban is motivated by a desire to have raw materials processed in Russia: "foreign companies often accumulate reserves simply to increase market capitalisation, rather than developing them . . . ." *Id.*

122. *Id.*

123. Neil Buckley, *Russia Defends Rules on "Foreign" Bidders*, FIN. TIMES (U.K.), Feb. 17, 2005, at 6.

124. Doug Cameron et al., *Wary Energy Groups 'Wait and See' on Russian Cap*, FIN. TIMES (U.S.A.), Feb. 11, 2005, at 4.

of the world (including China) advances, opportunities to develop Russia are melting away; without foreign investment, the Russian petroleum industry has no hope of meeting its full potential, or even of functioning in a rudimentary manner.<sup>125</sup> Ironically, Russian policymakers who are motivated by a desire to secure their own power are making themselves *less* secure by debilitating the Russian oil industry.<sup>126</sup>

The United States should lobby the Russian government, through its normal legislative process and through the methods discussed here,<sup>127</sup> in an effort to devise a transparent and stable system of foreign investment in Russia. Contractual and property rights must be secured, and limits on foreign investments should be eliminated.

2. *Production Sharing Agreements (“PSAs”).*—The PSA “is a contract between a State and a private entity, usually a foreign investor to exploit the State’s natural resources and to divide, in a contractually agreed proportion, the resultant product between the State and the investor.”<sup>128</sup> It is attractive to foreign investors precisely because “it shields investors from unclear laws and provides better protection in case of a possible conflict.”<sup>129</sup>

Russia’s evolving PSA statute has enjoyed limited success due in part to political tensions within Russia<sup>130</sup> and fundamental legal issues.<sup>131</sup> Nevertheless, “[d]espite the lack of PSA investment projects, . . . the PSA Law has the potential to become in the near future a leading vehicle for investment in the Russian natural resource sector.”<sup>132</sup>

This vision could be realized through the combined efforts of American interests and the U.S. government. Work is currently underway “to identify aspects of the PSA Law and of the Russian legal system generally that run

125. Shulga, *supra* note 39, at 1093-94.

126. “A faltering Russian oil sector would be a disaster for the world economy as well as for Russia itself. Mr [sic] Putin must recogni[z]e that he needs a well managed and well capitalised petroleum sector.” J. Robinson West, *Putin’s Policies Threaten Global Oil Supplies*, FIN. TIMES (U.K.), Feb. 2, 2005, at 13.

127. *See infra* Part III.C.

128. Vitaly Timokhov, *Recent Developments in the Russian Production-Sharing Agreement Law: Making the Law Work*, 6 UCLA J. INT’L L. & FOREIGN AFF. 365, 366 (2002). This article provides an excellent overview of the evolution of Russia’s PSA law.

129. *Id.* at 367.

130. Giuditta Cordero Moss, *Contract or License? Regulation of Petroleum Investment in Russia and Foreign Legal Advice*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 519, 529-30 (2003). “[I]nternal power conflicts prevented a clear definition of the authorities’ competence to commit the state [to a deal].” *Id.* at 530.

131. *Id.* at 530-31. “[T]he proposed idea of an all-embracing, self-sufficient PSA Law that would supercede [sic] any past legislation and would prevail over any future legislation, conflicted with the paramount position that Russian legal tradition gives to the concept of sovereignty.” *Id.* at 530.

132. Timokhov, *supra* note 128, at 388-89.

counter to the principles of the contractual system.”<sup>133</sup> PSAs could help provide transparent terms and stability to foreign investors in Russia. But “[a]s long as essential conditions of the investment such as cost recovery, taxation, transportation, and export rights are regulated not by contractual provisions but by state regulations,” it is unlikely that investors will be inspired to play their necessary role in developing Russia’s potential.<sup>134</sup>

The United States should lobby the Russian government, through its normal legislative process and through the methods presented below,<sup>135</sup> in an effort to promote a stable and secure PSA law for American investors.

3. *Special Economic Zones (“SEZs”).*—The Russian Far East (“RFE”) has great potential in the way of natural resources; the region is also important to Russian industry and security.<sup>136</sup> As of today, however, the RFE is woefully underdeveloped.<sup>137</sup> Any measures the Russian government might take to secure the RFE would promote Russian security (thereby bolstering American security)<sup>138</sup> and, if U.S. energy interests were involved in the development of the RFE, would promote American commerce as well.

One potential method for helping to promote investment and security in the RFE would be to declare it a special economic zone. Although there is no single definition of SEZ, “[t]ypically these zones distinguish themselves from other regions by their relaxed tariff, taxation, and administrative regimes.”<sup>139</sup> In short, the legal apparatus governing the region is created to be especially simple and transparent.

A Russian declaration of the RFE as a special economic zone would help avoid the aforementioned problems plaguing investment in Russia generally. Through a new investment climate in the RFE, or through the use of PSAs, American energy interests would have the legal incentive to provide the requisite capital necessary to fully developing the RFE.<sup>140</sup> Under such a scenario, all parties would once again benefit.<sup>141</sup>

133. Moss, *supra* note 130, at 534.

134. *Id.*

135. *See infra* Part III.C.

136. Dmitri Trenin, *Putin Must Secure Russia’s Far East*, FIN. TIMES (U.S.A.), Mar. 1, 2005, at 17. The region has suffered deindustrialization since the collapse of the Soviet Union and borders China. *Id.*

137. Valentin A. Povarchuk, Comment & Translation, *Russian Draft Law on Special Economic Zones—A Step Forward, but Not Far Enough*, 13 PAC. RIM L. & POL’Y J. 351, 354 (2004).

138. The greater the number of American allies in Asia, and the greater the strength of these allies, the more secure America will be against China, for the reasons discussed *supra* Parts I-II.

139. Povarchuk, *supra* note 137, at 357.

140. For an excellent discussion regarding the current proposals for creating a special economic zone in the RFE, see generally *id.*

141. This is especially true for Russia’s incumbent policymakers. “By increasing economic development in the RFE,” notes one scholar, “Russia could . . . establish a firmer economic foothold in its territories, thereby reducing the temptation for neighboring nations to do so.” *Id.*



The United States should lobby the Russian government, through its normal legislative process and through the methods presented below,<sup>142</sup> in an effort to promote a stable and secure RFE. The most attractive legal mechanism for doing so is the SEZ; the interests of both nations would be advanced.

4. *Reforms to Pipeline Regulation.*—It is decidedly “in Russia’s interest to accelerate repair and construction projects for oil export pipelines[]” because “[i]ncreased oil export capacity would bring in more hard currency, boosting Russia’s current programs for rebuilding infrastructure with oil export revenues.”<sup>143</sup> Yet, as with the investment climate generally, major pipeline work is unlikely to succeed without foreign funding,<sup>144</sup> and investors are as concerned about the integrity of their money in pipeline work as in other energy projects.

As long as there remains a pipeline monopoly in Russia, a stable environment for infrastructural investments will be difficult.<sup>145</sup> Yet at least one story of success stands out even with the dominant Transneft giant.<sup>146</sup> One scholarly examination notes that the break-up of Transneft is neither necessary nor desirable to promote still greater foreign investments in Russia’s pipeline infrastructure.<sup>147</sup> Rather, “[p]rogress in the [Russian] oil industry requires that the efficient production and circulation of oil . . . consider each party’s interests. To achieve this goal, [Russia’s] federal government should implement a pipeline expansion policy not through a heavy-handed policy but by establishing clear relationships with all interested parties.”<sup>148</sup>

In order to promote Russian pipeline reform, then, the United States should lobby for narrow changes that will account for the concerns of foreign investors. By narrowing the focus of such reforms, the United States will simultaneously provide investors with confidence<sup>149</sup> and will reassure the Russian government

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at 352 (emphasis added). This insight is consistent with Parts I and II, *supra*: it is conceivable that a burgeoning China might attempt to assert control over its neighbors’ natural resources were it desperate enough for petroleum. Russia’s Far East as it stands today would be a likely first candidate for such an occupation; the RFE is resource-rich and poorly-secured. If Putin wants to promote his own power, he will secure the RFE, and he needs foreign investors to do so.

142. See *infra* Part III.C.

143. Dylan Cors, *Breaking the Bottleneck: The Future of Russia’s Oil Pipelines*, 7 DUKE J. COMP. & INT’LL. 597, 610 (1997). This article provides an outstanding overview of contemporary Russian pipeline issues.

144. *Id.*

145. *Id.* at 612. Transneft is Russia’s state-owned pipeline monopoly. *Id.* at 604-10.

146. The Caspian Pipeline Project demonstrates that through consultation with all interested parties, Transneft can arrive at stable agreements acceptable to everyone. *Id.* at 613-14.

147. *Id.* at 626. It is further noted that since the government’s motivation in creating the monopoly in the first place was to exercise maximum control over Russia’s pipeline infrastructure, a voluntary dissolution of that monopoly is patently unrealistic as well.

148. *Id.* at 622.

149. Foreign investors need not command exclusive control over a given project; such an arrangement would be unnecessary, unprecedented, and unrealistic. Instead, so long as the most basic legal concerns of investors are guaranteed by the Russian government, foreign capital should

that its sovereignty will not be compromised.<sup>150</sup> In recent years, Russian officials have acknowledged some of these principles in the abstract,<sup>151</sup> yet no concrete reforms to this effect have been enacted. This should be a priority for the American government; without an augmented export capacity, the potential of Russia's energy reserves will go unrealized.

### C. *Legal Mechanisms Available for Pursuing Change*

What changes America might pursue are clear, as are the *reasons* for pursuing them. It remains to be seen *how* the United States can generate favorable results in Russia. Below is a consideration of some of the legal tools and strategies available to the United States in courting closer ties to Russia. American policymakers must consider the Russian culture as a legal influence and Russia's WTO accession, as well as possible congressional initiatives and the role a concerted public relations campaign might play in future Russo-American relations.

1. *Understanding the Russian Outlook.*—In order for America to effectively persuade Russian listeners to change their present positions, any U.S. proposal must be informed by the general outlook of the audience. There are two audiences in this case: the Russian public, and, more importantly, the Russian government.

The fundamental tension within the Russian government is that policymakers' top priority is to retain and extend their power over national affairs (leading to a distrust of foreign investment, which they view as encroachments upon their authority)<sup>152</sup> while at the same time realizing that without a reenergized economy, their jobs are less secure because Russia itself is less secure. The fact that only foreign investors can provide the necessary financing to fuel the Russian economy is the most antagonistic dimension of the government's dilemma.<sup>153</sup>

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flow into the region. This could likely be achieved through such mechanisms as the production sharing agreement. See *supra* Part III.B.2.

150. As already demonstrated, the most basic requirement of the Russian government is the psychological reassurance that it retains sufficient latitude over events within its own borders. See *supra* notes 121-23 and accompanying text.

151. See Catherine Belton, *Putin: Move Faster on Pipelines*, MOSCOW TIMES, May 27, 2004, at Section No. 2928.

152. See, e.g., *Russia and the Caspian: Hearing on U.S. Energy Security Issues Before the Senate Comm. on Foreign Relations Subcomm. on International Economy Policy, Export and Trade Promotion*, 108th Cong. (2003) (statement of Edward C. Chow, Visiting Scholar, Carnegie Endowment for International Peace) [hereinafter Chow Statement]. Mr. Chow notes that the Russian "[g]overnment fears loss of control . . ." *Id.* at 4.

153. In support of this claim, see *supra* Parts I and II and the foregoing sections of Part III. For the proposition that Russia must develop its oil industry to successfully develop a market economy and that foreign investment secured by stable laws is key to doing so, see generally Laura A. Wakefield, Note, *The Need for Comprehensive Legislation in the Russian Oil and Gas*

As a general, overarching strategy, then, the United States must persuade Russian policymakers that foreign investment will *augment* their power. Examples of the intuitive obviousness of this claim abound.<sup>154</sup> The same logic that moved Russian policymakers in the electrical industry<sup>155</sup> should be emphasized in the oil sector, where it has thus far been defied.<sup>156</sup>

Although there is evidence that the rule of law generally is taking hold in the minds of Russian citizens,<sup>157</sup> Russians entertain a view of the law that is fundamentally distinct from America's legal tradition.<sup>158</sup> In persuading Russian policymakers of the value of foreign investment, and in showing them the need to allay fundamental investor concerns such as property and contract rights, the United States will be promoting its own interests as well as Russia's economic well-being. A concerted public relations campaign is one useful device for communicating these messages.<sup>159</sup>

2. *Russia's WTO Accession.*—To the extent the Russian government is unmoved by rational argument and the lessons of history, it may prove more responsive to a practical concern: Russia wants to join the World Trade Organization ("WTO"). The potential membership benefits to Russia are substantial, including expanded market access for Russian exports, foreign investment, jobs, and a more stable environment for its market reform efforts.<sup>160</sup>

Two-thirds of existing WTO members must approve a non-member's application before the non-member can be admitted. Earning this majority approval, however, is the second step in the WTO accession process; in the first step, an applicant must reach bilateral agreements with any member nation that seeks special concessions from the applicant.<sup>161</sup> This process, combined with the fact that the United States is an existing WTO member and that Russia is an

*Industries*, 29 CASE W. RES. J. INT'L L. 149 (1997).

154. One such example is the fact that Russia is seeking billions of dollars to update its own deteriorated electrical power system. Realizing that the necessary money must come from outside the country, Russia's electrical power monopoly, Unified Energy Systems, obtained approval from lawmakers to create a competitive wholesale market for electricity, even going so far as to abolish limits on foreign ownership in the electrical power sector. *See Halpern, supra* note 106. Moreover, American energy interests stand enthusiastically able and willing to assist in developing the energy sectors of other nations. *See U.S. ENERGY ASS'N, supra* note 1, at 30.

155. *See supra* note 154.

156. *See supra* notes 121-23 and accompanying text (detailing the Russian government's recent moves to restrict foreign investment in natural resources).

157. *See generally* Inga Markovits, *Exporting Law Reform—but Will It Travel?*, 37 CORNELL INT'L L.J. 95 (2004).

158. Specifically, Russian jurisprudence is less dedicated to property and contract rights. Russian authorities still view the law as an instrument to direct state action, not as one to protect and promote investor confidence. Waelde, *supra* note 118, at 198-99.

159. *See infra* Part III.C.4.

160. William J. Kovatch, Jr., *Joining the Club: Assessing Russia's Application for Accession to the World Trade Organization*, 71 TEMP. L. REV. 995, 1006-11 (1998).

161. RAJ BHALA, *INTERNATIONAL TRADE LAW: THEORY AND PRACTICE* 144 (2d ed. 2000).

applicant, declares an opportunity for the United States in ringing terms: *before the United States approves of Russia's application to the WTO, it must employ its negotiations with Russia to extract concessions in the Russian energy world.*

The United States must move quickly in this endeavor (as Russia's application is advancing),<sup>162</sup> and negotiations must be conducted in a way that does not offend the dignity of Russian representatives. As noted above,<sup>163</sup> the United States cannot simply attempt to dictate western legal concepts to Russia. However, it is a legitimate negotiation to offer Russia what it seeks (membership in the WTO) in exchange for what ought to be America's highest priority (greater ties to the Russian energy market). If the United States makes a concerted effort to obtain the specific legal reforms noted above<sup>164</sup> in its WTO concession agreement with Russia, both nations will benefit immensely.

President Bush should immediately direct U.S. representatives concerned with Russia's WTO accession to focus their efforts on the foregoing legal reforms within Russia. Although Russia's application could be approved without U.S. support, such a scenario is unlikely. Even if this did occur, the United States retains the option of "non-application"<sup>165</sup>—that is, America could refuse to extend WTO member benefits (such as greater access to the American economy) to the new member whose admission it opposed. Even the *threat* of non-application<sup>166</sup> could move Russia toward the aforementioned reforms.

3. *Congressional Action.*—In seeking legal reforms in Russia (and in other potential energy partners), the United States Congress has several opportunities to aid the President. The most obvious congressional contribution to the new triangular security strategy would be an appropriation to provide foreign aid to Russia, as well as furthering programs that advance U.S. exports and investments in the region.<sup>167</sup> Active funding for executive initiatives, as well as American aid dedicated to furthering the well-being of the Russian people, would likely ease Russian perceptions of America's "foreign" investors—provided that the aid was packaged and delivered in a dignified, un-patronizing manner.

Congress should also reenact the so-called "trade promotion authority," under which "Congress agrees to consider legislation to implement . . . nontariff trade agreements under a procedure with mandatory deadlines, no amendment, and limited debate. The President is required to consult with congressional

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162. See World Trade Organization, *Russia's Membership Talks Make Good Progress*, WTO.ORG., Feb. 21, 2005, [http://www.wto.org/english/news\\_e/news05\\_e/acc\\_russia\\_21feb05\\_e.htm](http://www.wto.org/english/news_e/news05_e/acc_russia_21feb05_e.htm).

163. See *supra* note 158.

164. See *supra* Part III.B.

165. BHALA, *supra* note 161, at 144.

166. The notion here is analogous to the U.S. President influencing Congress by threatening the use of the veto. See SAMUEL KERNELL & GARY C. JACOBSON, *THE LOGIC OF AMERICAN POLITICS* 260-61 (2003).

167. Congress did precisely this in the wake of the Soviet Union's collapse. See generally Freedom for Russia and Emerging Eurasian Democracies and Open Markets Support Act of 1992, Pub. L. No. 102-511, 106 Stat. 3320 (1992).

committees during negotiation of nontariff trade agreements and notify Congress before entering into any such agreement.”<sup>168</sup> This would “give U.S. trading partners confidence in [the President’s] mandate and ability to obtain approval of [trade agreements].”<sup>169</sup> This authority would undoubtedly ease the executive branch’s efforts as it seeks to provide U.S. commercial inducements in exchange for Russian energy concessions.

Other possible areas for congressional action coordinated with executive efforts include advancing Russia’s interests in Iraq<sup>170</sup> and aiding Russia in its efforts to combat terrorism.<sup>171</sup> Most scholars agree that even if Russia frustrates American policy in some areas, the use of congressional sanctions are unwise if the goal of the United States is (as it should be) to promote the closest possible ties to Russia.<sup>172</sup>

To its credit, the House of Representatives recently passed a Resolution calling upon the President to block the China National Offshore Oil

168. Lenore Sek, *Trade Promotion Authority (Fast-Track Authority for Trade Agreements): Background and Developments in the 107th Congress*, CONGRESSIONAL RESEARCH SERVICE (Issue Brief No. 10084), Dec. 7, 2001, at “Summary,” available at <http://fpc.state.gov/documents/organization/7935.pdf>. Sek further notes that “[t]he President was granted [fast-track] authority almost continuously from 1974 to 1994, but the authority lapsed and has not been renewed.” *Id.*

169. U.S. ENERGY ASS’N, *supra* note 1, at 13.

170. Of the five permanent members of the U.N. Security Council, Russia had the closest ties to Iraq prior to the U.S.-led invasion; in 2001 alone, “Russian companies signed contracts with Iraq valued at \$2.3 billion.” Allison Ehlert, *Iraq: At the Apex of Evil*, 21 BERKELEY J. INT’L L. 731, 736 (2003). Russian interests, including LUKoil, are now in discussions with Iraq’s interim government in an effort to reverse the Iraqi government’s cancellation of contractual deals. Sandra T. Vreedenburgh, *The Saddam Oil Contracts and What Can Be Done*, 2 DEPAUL BUS. & COM. L.J. 559, 570 (2004). Although it is beyond the scope of this Note to debate the merits of Russo-U.S. relations in Iraq, it is noteworthy here that the United States might ease its progress into the Russian energy market by aiding Russia’s interests in Iraq. This is perhaps unlikely, however, since the U.S. Congress has already called for the cancellation of Iraq’s debts to Russia, among others. (Russia, incidentally, was one of Iraq’s two largest creditors prior to the invasion.) *Id.* at 589. Congress should at least rethink this declaration in light of the new energy paradigm.

171. The Bush Administration has declared that “the United States stands ‘shoulder to shoulder’ with Russia in the war on terrorism.” Associated Press, *U.S. Stands with Russia in Terror War, Bush Says*, INDIANAPOLIS STAR, Sept. 13, 2004, at A5. Russia’s terrorist problems in Chechnya may provide a common link, or a difficult wedge, in relations between the United States and Russia. There is no inherent reason why the United States could not gain a valuable ally in the war on terror while simultaneously easing ties with Russia in other fields. The United States must not be tempted, however, to ignore human rights abuses or anti-democratic impulses in the Russian government should these problems emerge. See Orde Kittrie, *U.S. Needs a Free Russia*, AZCENTRAL.COM, Feb. 24, 2005, available at <http://eurasia21.com/cgi-bin/news/print.cgi?ID=1955>. Congress should carefully weigh the merits of an intelligence alliance with Russia and the implications this could have for U.S. progress within the Russian energy market.

172. See generally Raj Bhala, *Fighting Bad Guys with International Trade Law*, 31 U.C. DAVIS L. REV. 1 (1997).

Corporation's attempt to purchase the Unocal Corporation.<sup>173</sup> It is therefore apparent that Congress is at least minimally aware of China's potential threat to U.S. energy security. It nevertheless took a discrete event (in this case, China's attempted purchase of a major American energy interest) to jumpstart congressional action. In the future, Congress must use its authority more proactively in lawmaking and oversight to anticipate challenges that China will pose, as well as opportunities that may exist in Russia. Thus far, Congress has been merely reactive and has largely yielded the initiative in this field to the executive branch.

4. *Public Relations in Russia.*—As noted above,<sup>174</sup> one of the fundamental problems with contemporary U.S. foreign policy is the de-emphasis of the role of persuasion. Some in Washington apparently feel that the United States need not bother to persuade other nations to adopt its preferred international policies. Yet the immutable fact remains that when a conflict is largely cultural, the solution must be largely cultural.

One such cultural element exists as a barrier to U.S. investment in Russia. Although "transplanted" legal reforms may take hold in another country when properly introduced,<sup>175</sup> the Russian culture embraces a jurisprudence significantly different from that of the United States<sup>176</sup> If America is to maximize the probability of success in forging a new alliance with Russia, it must be acutely aware of these cultural and legal differences.

Of the world's modern governments, "the Russian state is arguably the most bankrupt in terms of voluntary trust."<sup>177</sup> U.S. officials should note that "[f]illing the vacuum of trust left in the wake of Soviet power will require a careful rethinking of commercial communications and commitments[]" and that "[a]t the heart of these initiatives lay a government commitment, to all parties involved in a given industry, that long-term benefits will be shared."<sup>178</sup> America should also be aware that "[u]nderlying the success of [such appeals in Southeast Asia] was the perception of economic success as a shared goal[,]" because "each country's leaders were able to mobilize the population by conveying the importance of economic growth, touting it as even a national security concern."<sup>179</sup> Dignified appeals of self-interest can successfully mold public opinion, even in matters of economic strategy.

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173. H.R. 344, 109th Cong. § 721 (2005). The President is empowered by section 721 of the Defense Production Act of 1950 "to . . . prohibit any foreign acquisition, merger, or takeover of a United States corporation that threatens the national security of the United States." *Id.* Resolution 344 expressed the House's sense that President Bush should block Chinese acquisition of Unocal since China would be able to "take action that would threaten to impair the national security of the United States." *Id.*

174. *See supra* text 22-23.

175. *See generally* Markovits, *supra* note 157.

176. *See supra* notes 157-58 and accompanying text.

177. Cors, *supra* note 143, at 623.

178. *Id.* at 624.

179. *Id.* at 625.

In the case of America's potential ally in Moscow, there is a "fundamental suspicion many Russians have toward foreign investment."<sup>180</sup> The U.S. government, in appealing both to the Kremlin and to the Russian public, must combat this image if it is to forge a truly strong alliance with Russia on matters from energy to security. One scholar notes that

[b]y explicitly discussing specific projects (like individual pipelines) or laws that we [America] favor (like PSA legislation) in bilateral meetings, we give the impression that we care less about improvement in fundamental conditions—like the rule of law, transparency, more political openness—that will lead to a better investment climate . . .<sup>181</sup>

From official intergovernmental negotiations to a concerted, government-sponsored public relations campaign in Russia, America must be sensitive to the needs of the target audience. America must sell an idea—that the United States and Russia must forge a new alliance centered around the security and economic prosperity of both—before it can do business with the Russian energy market.

The details of this persuasive strategy must evolve as opportunities to sell the foregoing ideas arise. There are many potential avenues for communicating the importance of ideas such as property and contract rights for foreign investors. First, the President should direct executive branch officials to study and bear in mind Russia's cultural dimensions. Also, Congress should consider appropriating funds to be spent in a direct public relations media campaign in Russia; the informed voices of American and Russian energy interests operating in (or attempting to enter) Russia would prove useful in devising such a campaign. Congress might even go so far as to proactively expand foreign exchange programs with budding Russian attorneys.<sup>182</sup>

In any event, the United States must make an aggressive effort to treat Russian officials and the Russian public as dignified, intelligent equals, *even if* the two nations are, in fact, not political or economic equals. Neither the American public nor its elected representatives would respond well to an overbearing, arrogant, or culturally-ignorant "foreigner." America's Russian counterparts have the same perception. In smoothing the way for the acceptance of ideas necessary to a closer Russo-American relationship, U.S. policymakers cannot afford to focus exclusively upon the substantive policy changes they would like to affect in Russia. When cultural differences obstruct political and commercial intercourse, then cultural considerations must be part of the solution.

#### IV. CONCLUSION: AMERICA AS ONE POINT OF THE TRIANGLE

A new international energy paradigm is emerging. The United States will soon likely find itself engaged in an intense competition with the next great

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180. Kovatch, *supra* note 160, at 1034.

181. Chow Statement, *supra* note 152.

182. See generally Jane M. Picker & Sidney Picker, Jr., *Educating Russia's Future Lawyers—Any Role for the United States?*, 33 VAND. J. TRANSNAT'L L. 17 (2000).

power, China, in politics, economics, technology, and culture. At the base of this competition—at the base of the very security and existence of both—is the ability of each to fuel its economy and military. In this respect, a third crucial nation arises: Russia.

The United States must quickly forge a secure alliance with Russia and with other potential energy allies to fare well in this competition. The time to do so is now. America's strategy will require a variety of legal devices and legal reforms; yet the ultimate success or failure of the United States will rest with its powers of political persuasion.

In pursuing closer ties to Russia, America should seek greater economic relations. The United States should lobby Moscow for several general changes to Russian law, including a more transparent and explicit recognition of the property and contract rights of foreign investors. The United States should also seek a stable production sharing agreement law and legislation creating special economic zones. Both of these devices will promote investor confidence by clearly delineating the rights of monetary contributors. America should also seek reforms to pipeline regulation, inducing foreign investors to aid Russia in expanding its petroleum export capability.

Several legal mechanisms are available to the United States as it attempts to encourage Russia toward the aforementioned reforms. Russia's application to the WTO could provide a substantial lever for moving Moscow. Congress may act in a variety of ways. It should fund foreign aid and business development in Russia and should restore trade promotion authority to the President. Congress should also consider promoting Russia's commercial interests in Iraq and security interests against terrorism. Above all, U.S. policymakers must appreciate the differences in culture between the two nations and the effect this difference has upon Russian jurisprudence. Mindful of these differences, Washington should, in coordination with U.S. and Russian energy interests, launch a public relations campaign. A respectful effort of this sort could help sway Russian opinion to the reality that it is in the interests of both officials and the public in Russia to have increased foreign investment, and an ally in the United States as China continues its meteoric rise. In forging closer ties to the Russian energy market, the United States will better position itself to encourage democracy there as well.

The new triangular security strategy proposed here accounts for three states destined to play crucial roles in the twenty-first century. America's fate now lies in its foresight and in its dedication to achieving genuine security and prosperity for the free world.