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DEAR READERS,

The year of 2015 is gradually coming to its logical end. What has it been marked by? What will the Russians and other peoples remember it by?

2015 is also rich in memorable and historic events. For Russians, Number One among them is Victory Day on 9 May. This year marked the 70th anniversary of the Great Victory of the Soviet people and the Soviet Army over Nazi Germany in the Great Patriotic War of 1941-1945. However, not all countries and peoples marked this memorable day in the world history with dignity and respect. In the context of the Ukrainian events, the history of World War II was unprecedentedly falsified as to the participation of anti-Hitler coalition in the war and, primarily, of the Soviet Union.

On 2 September 1945 (70 years ago), the Act of Unconditional Capitulation of Japan was signed. However, a little earlier, in August, the US President Harry S. Truman initiated the nuclear bombing of Hiroshima and Nagasaki to speed up the Japan capitulation within the framework of Pacific Ocean World War II theatre of military operations.

2015 is marked by many historic events connected with City Days in Russia. 24 May is the City Day of Ryazan' (920th anniversary), 30 May is the City Day of Yaroslavl' (1005th anniversary), 6 September is the City Day of Vladimir (1025th anniversary), and 13 September is the City Day of Elets (869th anniversary). By the way, my father, Sergey Sergeevich Belykh was born in the village of Olshanets, Chibiskovsky district of the Orel province (at present, Elets of the Lipetsk province). He was very proud of his ancestral birthplace, and we often heard him say proudly, “We are from Elets”. Elets was the birthplace of the famous Russian composer T.N. Khrennikov. The Russian writer I.A. Bunin spent his childhood and youth there. The Russian writer M.M. Prishvin was born in the Elets county. The city has a number of monuments of historical and cultural heritage (more than 2000). On 10 October 2007, Elets was named “the City of Military Glory” by the Kremlin rescript.

The present year 2015 is the year of the Goat, according to Oriental Calendar . Though this animal is timorous, it likes those who are persistent. Energy in the activities is a guarantee of the prosperous future.

Dear readers, take care of yourselves and your relatives. Love your neighbors as yourselves. Not to lose yourself in this raging world is very important.

We are open to cooperation and ready to publish articles, information and advertisement in our “Russian Law: Theory and Practice” Journal.

Editor in Chief, Doctor of Law, Professor **V.S. Belykh**

PROSPECTS OF LEGAL DEVELOPMENT AND CONSTITUTION

Sergey F. Udartsev
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Abstract: The article considers current tendencies of the constitutional development and global ways of legal evolution. By means of comparative legal analysis and theoretical generalization of law evolution, an attempt to map out some prospects of legal development was made. The significant role of constitutional acts as a foundation and fundamentals of system-generating legal and political instruments for organizing a national system, its development and interaction with international law and international institutions is emphasized. It is accentuated that in spite of occasional crises, disputes and new conflicts, the uniting processes in law are objective. A new level of legal development is being formed– metalaw as a complex planetary system of law and law of space civilization being born on planet Earth. Constitutional acts of different levels acting as adapters of legal systems of different levels and basic elements of some segments in a hierarchical complex legal system of humanity are expected to play an essential role.
Key words: law, constitution, development, evolution, civilization, national law, international law, metalaw, forming of extraterrestrial civilization, planetary law.

Some tendencies in the evolution of modern constitutions

The phenomenon of the Constitution is closely connected with a multidimensional process of legal development.

During the last half a century, constitutions all over the world have undergone some evolution: some countries have established new constitutions, new independent countries appeared, and their constitutional development started from that moment[1]. Researchers single out several tendencies in the development of new constitutions. Thus, some established constitutions (in Italy, France, Greece, Spain, Portugal, Japan) include provisions about public or national sovereignty. In some coun-

[1] See also: S.F. Udartsev. Globalizatsiia, perspektivy pravovogo razvitiia i konstitutsiia [Globalization, Prospects of Legal Development and a Constitution]// Yuriditcheskii‘ forum [Legal Forum]. Nautchno-prakticheskii‘ gurnal [Scientific-Practical Journal]. Bishkek, Issyk-Kul, 2014, pp. 60 – 68.

tries (in Austria, Bulgaria, Germany, India, Kazakhstan, Poland) the constitutions state that the source of state power is the people[2]. The constitutions continue to strengthen the legal equality between men and women, specify correlation between religious and temporal rules of law. The decision of the US Supreme Court adopted in June, 2015, will probably effect the constitutional development of western countries. Dividing five to four, the US Supreme Court justices held that "principles of equity before the law and the court guaranteed by the Constitution means that some states cannot prohibit entering into a same-sex marriage"[3].

In some countries, the new constitutions give homage to previous historical experience. **So**, in the Constitution of Hungary adopted in 2011, the name of the country was changed from the Republic of Hungary in Hungary. Though the country remains a republic, the new state symbols have appeared such as a golden Crown and the scepter of the first king, St. Stephen, under whom in the early XXth century, Hungary was about twice bigger in area and included the territories of Austria, Rumania, Serbia, Slovakia, Slovenia, Ukraine and Croatia, that is "lands of St. Stephen's Crown"[4].

In *constitutions and constitutional practice* there are different tendencies as to strengthening of the executive power in some countries and strengthening of the legislative power in other countries. For instance, the new constitutions of the Scandinavian countries have defined that the first place in the system of the supreme organs of government belongs to the Parliament. In particular, in Sweden, the head of the state has ceased to have the right of veto regarding to draft laws of Riksdag[5]. In the development of Parliaments in some countries, lower chambers are getting stronger, but in some European countries (Denmark, Greece, Iceland, Portugal, Sweden) the Parliaments became a single chamber organs[6]. The power of Kyrgyzstan Parliament has increased too.

The constitutions more accurately define and consolidate rights and freedoms of the person, especially while countries are ratifying major international treaties in this

[2] M.A. Mogunova. Konstitutsiia zarubezhnykh stran [Constitutions of Foreign Countries]// Kostitutsionnoe pravo zarubezhnykh stran: uchebnik dlia vuzov [Constitutional Law of Foreign Countries: Textbook for Universities]// Edited by M.V. Baglay, Yu.I. Leybo and L.M. Entin. Moscow, 2006, p. 78.

[3] The US Supreme Court allowed to enter into a same sex marriage// Available at: http://www.golos-ameriki.ru/content/supreme-court-marriage-1st-update/2838532.html . (Accessed on: July 17, 2015).

[4] One Republic less// Available at: http://gazeta.zn.ua/POLITICS/odnoy_respublikoy_menshe.html . (Accessed on: October 11, 2013).

[5] M.A. Mogunova. Konstitutsii zarubezhnykh stran [Constitutions of Foreign Countries]. p. 81.

[6] Ibid.

sphere. At the same time, the authorities vested with constitutional supervision clarify the relationship between the legal force of decisions made by international courts and the fundamental law of the country, take measures to protect traditional values. Hence, on July 14, 2015, the RF Constitutional Court emphasized in its decision once again that the decisions made by the European Court of Human Rights cannot abolish the priority of the Russian Constitution having the highest legal power on its territory. In case of dispute, owing to the supremacy of the Constitution, Russia, like other countries, has the right to refuse from a literal adherence to the resolutions of the Strasbourg court[7].

In modern constitutions, much more attention is paid to issues relating to foreign policy and international law. The constitutions of the EU countries have included norms on delegating a part of powers to the EU authorities.

The evolution of human civilization and its legal system

Modern civilization is increasing its power and spreading beyond regional limits in all parts of the world. It is becoming complex but uniform to a large extent. "As P.A. Sorokin stated, mankind is a new power of the world. This power is growing: it defines the area of its existence and expands this area more and more"[8].

With modern means of communication, transport and services, the planet is becoming a more adequate space for the operation of people, their international public associations, states, intergovernmental organizations. Karl Jaspers, thinking about tendencies of world development, noticed that freedom of the person, including freedom of developing new territories, new space, has continued to evolve with the development of humanity and its expansion all over the world. When the whole planet has become available to a man, and while humans are deprived of the opportunity to expand their presence in the Universe, "the density of humanity seems to be growing on Earth"[9].

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[7] RF Constitutional Court has established the priority of RF Constitution over the decisions made European Court on Human Rights// Available at: http://www.infovoronezh.ru/News/Konstitutsionnyiy-Sud-RF-ustanovil-prioritet-Konstitutsii-RF-nad-resheniyami-Evropeyskogo-Suda-po-pravam-cheloveka-39421.html . (Accessed on: July 17, 2015).

[8] P.A. Sorokin. Chelovek. Tsivilizatsiia. Obshestvo [Man. Civilization. Society]// Generally edited by the author and preface A.Yu Sogomonov. Translated from English. Moscow, 1992, p. 521; V.E. Chirkin writes that some investigators count up to 300 certain civilizations. V.E. Chirkin. Nekotorye voprosy formatsionno-tsivilizatsionnogo podkhoda v sravnitel'nom pravovedenii [Some Issues of Formational and Civilizational Approach in Comparative Jurisprudence]// Voprosy pravovedeniia [Issues of Law]. 2013, No. 2, p. 39.

[9] K.T. Yaspers. Smysl i naznachenie istorii [Meaning and Purpose of History]. Moscow, 1991, p. 246.

As a result, a new whole is acquiring shape on the planet – the universal civilization is institutionalized. Step by step, this new whole is getting its features, a structure, and a regime of functioning. Technology, culture, economy, world market cross national boundaries and unite nations; in addition, the same processes are taking place in politics and law. Speaking to students of St. Petersburg State University (Russia) in September, 2013, the UN Secretary General, Ban Ki-moon, emphasized that "you are citizens not only of Russia, you are citizens of the world"[10]. In this case, he reproduced I. Kant's idea from his treatise "To Eternal Peace" (1795)[11]. However, if Kant formulated an abstract idea about the distant and uncertain future, Ban Ki-moon's words sound quite practical for the youth of today.

Globalization creates new grounds for sustainable development of global systems. At the same time, the evolution of former political and legal systems can cause increasing instability in some links and at certain levels during the global transformation of law, statehood and formation of new levels of political and legal systems, as N.S. Bondar noted that

"Globalization directly impacts the constitutional systems of modern states, predetermines new value-related criteria of their protection, new tendencies of development, and in many cases becomes a factor of instability of the national constitutional system"[12].

But in the course of historical development and especially in the context of globalization, international relations become more civilized and bound by universally recognized standards which are under the control of international arbitration. The relations among states are established not by power and tyranny but gradually penetrate into the sphere of law. Acts committed "in the interests of the state", "state security", due to political expediency and necessity (including force, violence, emergency) which could remain uncontrolled earlier, get more under the control of inter-

[10] Ban Ki-moon – to students of St. Petersburg University: you are citizens not only of Russia but you are citizens of the world// Available at: www.fontanka.ru/2013/09/04/126 . (Accessed on: September 6, 2013).

[11] See: E. Kant. Ideia vseobshei' istorii vo vsemirno-grazhdanskom plane. K vechnomu miru [The Idea of Universal History in the Context of in the World Civil Aspect. To Eternal Peace]. Introduction and annotation made by S.F. Udartsev. 2-d ed., Almaty, 2004.

[12] N.S. Bondar. Kostitutsionnoe pravosudie v sootnoshenii s politikoi': teoriia i practika…bez politizatsii [Constitutional Justice in Correlation with Policy: Theory and Practice…without Politicization]// Kostitutsionnoe pravo i politika. Sobranie materialov mezhdinarodnoi' nauchnoi' konferentsii. Yuridicheskii Fakultet MGU imeni M.V. Lomonosova. 28-30 marta 2012 [Constitutional Law and Politics. Collected Materials of International Scientific Conference. MSU Law Faculty, Moscow Lomonosov State University. March 26 – 30, 2012]// Editor-in-Chief S.A. Avakiyan. Moscow, 2012, p. 528.

national communities and checked for conformity with international law. This process of interaction of law and politics, the rule of force and the power of law is quite complex, contradictory, with setbacks, with new forms of former coercive actions. Nevertheless, especially judging by the tendencies in the last century, the current process of expanding the field of law, especially due to increasing and strengthening international law, in particular, is actively developing. In this process, constitutions and constitutional supervision authorities, which have spread everywhere, as well as supranational and international agencies, political and legal institutions and international courts play an important role. S.S. Alekseev paid attention to the fact, that "law is a universal institution in human life on our planet"[13]. Observing the emerging "strikingly effective system of people communication in all countries and continents", he stated that there are grounds to speak about "the existence of a *common legal status in the world*". Moreover, "the status" is not in the form of the known level of law, "standard" and "threshold" of legal awareness set by universally recognized legal values, legal culture of the most developed countries but also in the form of famous *foundations of world law and order* (the italics of the author — *S. U.*)"[14]. The emergence new elements never existing in the history of law is typical for the modern legal development. In the context of global environmental and other problems, the question of responsibility to environment as well as to the future generation is facing the modern humanity[15].

The new tendencies that are beginning to take shape in legal development as to protecting rights of the future generation, which, have already been formalized not only in international legal instruments but in the constitutions of some countries, for instance, in the 1946 Constitution of Japan (Art.11 and 97). And in the 1979 Constitution of Iran, where the future generation has "the right to life and prosperity in the environment, the preservation of which is considered to be a responsibility of the state". The protection of interests of future generations in the field of environmental protection, the responsibility to them are also mentioned in the constitutions of Georgia (Art. 37 (4), Armenia (Art. 48(10), Albania (Art. 59(1e)), Poland (preamble, p.1, Art. 74), Germany (Art. 20-a), in the preamble of the Union Constitution of

[13] S.S. Alekseev. Pravo: azbuka – teoriia – filosofiia. Opyt kompleksnogo analiza [Law: the ABC – Theory – Philosophy. Practice of Complex Analysis]. Moscow, 1999, p. 660.

[14] Ibid.

[15] See: O.V. Petrenko. Kontseptsiia prav budushchikh pokolenii' v mezhdunarodnom i natsionalnom prave: problemy, tendentsii, perspektivy [The Concept of Rights of the Future Generations in International and National Law: Problems, Tendencies, Prospects]// Pravo i politika [Law and Politics]. 2011, No. 12, p. 2079.

Swiss Conference, as well as in constitutions of post-Soviet countries, such as the Russian Federation, Ukraine, Tajikistan, Moldova, and Kazakhstan[16].

For example, the preamble of the Constitution of the Republic of Kazakhstan contains the words about the awareness by the people of Kazakhstan of "*their highest responsibility to the present and future generation"* (the italics is mine — *S.U.*)"[17].

Many researchers are observing the tendency of forming a planetary legal system, often called "universal law", which is not quite precise, but, as a whole, means the same. In addition, S.V. Chernichenko is right in distinguishing an opportunity from its implementation in this tendency, emphasizing that for some reasons, the upcoming opportunity may fail to be implemented. He writes that "…international law is developing slowly, sometimes stopping and going backwards, while transforming into universal world law which will be not international but domestic .That there is such an opportunity as one of the countless alternatives of human society development as a whole should not be excluded. The issue is whether mankind will be able to implement this opportunity, to make it real. That the social spirit "is acting" in this direction does not predetermine the outcome"[18].

The basis of these processes of global integration, consolidation of countries and nations which are still at the initial stage of their evolution is the economy developing into planetary economy, universal (planetary) market.

K.S. Maulenov and V.M. Shumilov wrote:

"…in spite of all contradictions and issues in the international community, first signs of *global legal system* and *global law* appear (the italics of the author — *S. U.*)"[19]. The complex and contradictory process of the international law development under the conditions of increasingly close economic ties between countries and peoples significantly influence the contemporary national law and statehood. T.Ya. Khabrieva writes that "…international law establishes the absolute liability of the state for observing human rights, emphasizing the worth of each person as a legal maximum.

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[16] Ibid. pp. 2079, 2081.

[17] Konstitutsiia Respubliki Kazakhstan [The Constitution of the Republic of Kazakhstan]. Priniata na respublikanskom referendum 30 avgusta 1995 goda. S izmeneniiami i dopolneniiami, vnesennymi Zakonamy Respubliki Kazakhstan ot 7 oktiabria 1998 No. 284, 21 maia 2007 No. 254-III, 2 fevral'a 2011 No. 403-IV. [Adopted at the Republican Referendum from the August 30, 1995. With Amendments and Additions Made by Law of the Republic of Kazakhstan dated: October 7, 1998 No. 284, May 21, 2007 No. 254-III, February 2, 2011 No. 403-IV]. Almaty, 2012.

[18] S.V. Chernichenko. Ocherki po filosofii i mezhdunarodnomu pravu [Sketches on Philosophy and International Law]. Moscow, 2009, p. 666.

[19] K.S. Maulenov, M.V. Shumilov. Mezhdunarodnoe kosmichesloe pravo. Uchebnoe posobie [International Economic law. Tutorial]. Almaty, 2011, pp. 410 – 411.

At the same time, it "erases" state boundaries, transforms functions of the state, changes forms and methods of public administration, ensures a new quality of legal potential of the individual's development"[20].

At present, numerous national systems of law interact much closer with one another, and, which is more important, contribute to rather close interaction of national economies, cultures, governments, individuals and their public associations. New phenomena, institutions, rules appear in the system of international law and international justice, gradually forming a new supranational global political and legal system which connects human communities scattered throughout the planet into one complex world and having their own characteristics. Nevertheless, the systems are being formed which unite heterogeneous elements into one's complex whole. The variety of human cultures, languages, traditions, ideas, and etc. turns out to be a means of the maximum comprehensive development of humanity, whose unity is not threatened by diversity of its parts.

Just as a variety of , individualities of its citizens does not impede the unity of a national state, wealth, the completeness and endless possibilities for adaptation and development of humanity as a whole are revealed by means of individual, national and race diversity of parts of humanity. This diversity of humanity constitutes its repeated multi-level security from difficult climate conditions, adaptation to their peculiarities, multifaceted and multi-variant understanding of the planet, space and human beings.

One can agree with those scientists who are skeptical about extremes in interpreting globalization— from abolition of national states as "unnatural and even impossible" in the world economy to the opposite extreme of underestimating and disregarding current global processes. Globalization does not eliminate national states, though it changes the entire organizational structure of the world significantly, or, according to V.D. Zorkin,

"…reshuffles the national economy, political structure, modifies the power, functions and authorities of national governments. Thus, the power of national governments is not necessarily reduced as the result of globalization. In contrast, the public

[20] T.Ya. Khabrieva. Gosudarstvo i lichnost' v dialektike pravovogo razvitiia i vzaimodei'stviia [State and Individual in Dialectics of Legal Development and Interaction]]// Materialy mezhdunarodnoi' nauchno-prakticheskoi' konferentsii (VIII avgustovskikh chtenii') "Gosudarstvo i lichnost': 20 let razvitiia Kazakhstana po puti progressa", posvyasheny 20-letiyu Nezavisimosti i Dnia Konstitutsii Respubliki Kazakhstan [Materials of International Scientific-practical Conference (VIII August Reading) "State and Individual: 20 Years of Development of Kazakhstan in the Way of Progress', Dedicated to the 20th Anniversary of Independence and Day of the Constitution of the Republic of Kazakhstan]. Astana, 2011, p. 51.

authority will be transformed, restructured, adapting to the essence of growing management processes in the modern world permeated with closer ties"[21].

Forming a global system of law at a new level of development

In spite of slowing down and stopping in the development from time to time, the humanity objectively moves to forming a complex system of information, scientific and technical, economic, political, legal and cultural unity. The modern world shows a new level of unification of law in the context of globalization, the rapid development of international law and the formation of constitutional acts of higher level than national ones. These tendencies are persisting, although the movement to the future is accompanied by crises and conflicts, setbacks and new contradictions. However, through all these things, new unification tendencies typical of globalization are beginning to show. The modern world is getting complicated, new levels of the global legal system are forming, and the subject of their legal regulation and influence is expanding, including human rights and freedoms. The hierarchy of the global legal system creates prerequisites for forming and formalizing, in one way or another, fundamentals of law on the new emerging supranational level.

Law is closely connected with power. As interacting historical phenomena, they constantly complement each other. Increasing the scope of an individual's activity, exploring the planet by humans during a global evolution of the humanity and spreading human activity on the space surrounding the planet lead to evolution of forms of state and law, legal and political institutions, to formation of their new levels.

During the evolution of human civilization, some new phenomena appear which correspond to the new level of historical development. At present time, during the multi-aspect global evolution some new tendencies of law evolution can be seen.

In the conditions of scientific and technical progress and expansion of the human civilization at the present stage of its development, in the situation when it is going beyond the limits of its existence on our planet, new issues are arising. In fact, humanity finds itself at the beginning of a new era in its history.

As it is critical to harmonize intensive and multifaceted old and new relations among nations, states, international organizations, etc., new elements and phenomena appear in the legal system. These innovations, in total, indicate the way of developing new mechanisms of regulation of public relations, which prove the formation

[21] V.D. Zorkin. Konstitutsionnoe razvitie Rossii [Russia's Constitutional Development]. Moscow, 2011, p. 657.

of a new level of law and gradual entry of law into a new global stage of evolution. Legal scholars refer to legal phenomena and new characteristics of law born by this phase of evolution as metalaw[22].

The *new stage of the development of law* will include both the planetary level of law and supraplanetary, cosmic level, which is being formed in international law, first of all, as international cosmic law

This branch of modern international law is a potential core of the future global cosmic system of law which, without a doubt, will expand and branch out, involving, adapting to a new level and developing different elements and institutions of law from various branches of international law and systems of national law, and if necessary, forming new levels of law and its global subsystems.

The formation of new global phenomena in law may have a considerable effect on the evolution of legal systems. During the political and legal development of humanity, new tendencies and characteristics of law can be revealed. It is obvious that the planetary level of legal development will not be limited.

Government authority is also transforming. The system of power is getting more complicated, expansion of its limits will require new legal institutions and mechanisms[23].

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[22] See in details, e.g.: V.V. Rubtsov, A.D. Ursul. Kontakt tsivilizatsii' i problemy metaprava [Contact of Civilization and Issues of Metalaw]; K.E. Tsiolkovsky. Filisofskie i sotsialno-politicheskie problemy osvoeniia kosmicheskogo prostranstva. Trudy XXI–XXIII chtenii', posviashchaetsa razrabotke nauchnogo naslediia K.E. Tsiolkovskogo [Philosophical and Socio-Political Issues of Space Exploration. Works of the XXI–XXIII Reading Dedicated to the Development of Scientific Heritage of K.E. Tsiolkovsky]. Kaluga, 1986, 1987, 1988; Sektsiia "K.E. Tsiolkovskii' i filosofskie problemy osvoeniia kosmosa" [Section "K.E. Tsiolkovsky and Philosophical Issues of Space Exploration]. Moscow, 1991, pp 181 – 190; S.F. Udartsev. Metapravo i ponimanie (o trasformatsii pravoponimaniia na novom urovne pravovogo razvitiia [Metalaw and Law Understanding (about Transformation of Law Understanding at a New Level of Legal Development)]. Scientific studies "Edilet", 2000, No. 1, pp. 22 – 41 (CV in English: pp. 172 – 173); S.F. Udartsev. Metapravo: o globalnoii' jevolutsii prava [Metalaw: about a Global Evolution of Law]. Herald of Moscow state open university, 2003, No. 2; S.F. Udartsev. Globalizatsiia politiki i prava: chelovecheskaia tsivilizatsiia na puti k planetarnoii' organizatsii [Globalization of Policy and the Rights: Human Civilization on the Way to the Planetary Organization]. Kazakhstan and modern world, 2003, No. 4 (7), pp. 87 – 100; S.F. Udartsev. O nekotorykh tendenttsiiakh globalnoi' evolutsii gosudarstva i prava [About some Tendencies of Global Evolution of a State and Law]. Karaganda, 2004; S.F. Udartsev. O nekotorykh iavleniiakh i tendentsiiakh mirovogo politicheskogo i pravovogo razvitiia [About some Phenomena and Tendencies of the World Political and Legal Development]. Scientific notes of Academy of economy and law, Almaty, 2005, No. 1, p. 1, pp. 15 – 25; S.F. Udartsev. Kosmicheskoe gosudarstvo: formirovanie i razvitie idei v istorii mysli [Cosmic State: the Forming and Development of the Idea in the History of Thought]. Sententia. European Journal of Humanities and Social Sciences, 2014, No. 1, pp. 37 – 50.

[23] See: I.A. Isaev. Gospodstvo [Supremecy]. Moscow, 2008, p. 350; S.F. Udartsev. Gosudarstvennost' v usloviiah globalizatsii: krizisnye iavleniia, adaptatsionnaia transformatsiia i razvitie [Statehood in

G*lobal go-between-systems, metalegal mechanisms of integrating law, legal conversion of its ideas, principles, regulations* from one historically determined system into another,criteria and equivalents for equating cases and legal models of one legal system to those in others are being formed historically.

Metalegal institutions, e.g. systemic elements of a higher level uniting the law in its diversity of forms, regulations and structures, gradually establishing a model of a new level of legal development – integral compound law of the integrated compound human civilization on Earth, are appearing. A flexible system of metanorms (rules of law of conflict, standard principles, basic norms in various spheres of international law) is developing. Also, a flexible system of "living" law, its "living" reasonable fundamentals operating as a system of metalegal global institutions, first and foremost, of courts (at this stage – various international courts) both international specialized courts and international courts of general jurisdiction, which create and maintain the harmony as well as resolve conflicts arising inside legal systems and between them is being formed. While forming and developing the cosmic civilization, metalaw will acquire standard legal content and appropriate institutional infrastructure of different levels and varying space jurisdiction.

Due to these global tendencies of legal development, we may see the increase of the role of constitutions as a kind of "adapters", filters, points of contact, interaction and transitions of national legal systems, international law and emerging elements of the global system of metalaw.

The existence of national constitutions as the foundation and core of national legislation which takes into account the principles and norms of law of higher level may be quite compatible with constitutional acts at the next levels of the global legal system. However, adjusting or partially redistributing functions performed by the basic acts of different levels, and specifying their hierarchy, correlation, mechanisms of resolving standard conflicts, as well as institutions which exercise control over the hierarchy of standard legal acts and harmonization of the legal system as a whole are possible.

The Constitution may also act as a kind of adapter of legal systems of one legal level to the legal systems of another legal level (for example, a means of connection, differentiation, and fusion of national and international law levels). At the same time, national constitutions may eventually become basic elements in sectors of a more hierarchically complicated legal system of humanity. Documents of a consolidated,

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the Context of Globalization: Crisis Phenomena, Adaptational Transformation and Development]// Pravo i gosudarstvo [Law and State]. 2013, No. 4, pp. 18 – 23.

synthesizing type, which is a constitutional type of a higher level, in more complex international government entities and, theoretically, on the scale of human civilization can appear.

In this case, there is specific fundamental legal connection among constitutional documents of different levels, their norms as reference points of the global legal system containing concentrated legal energy with mutual dependence and certainty, but, obviously, with a certain tendency of domination of constitutional documents of higher level.

Ensuring fulfillment of important functions of the constitution in the society requires its reliable implementation and effective mechanisms of constitutional protection. Apparently, in the future, in the conditions of globalization, one can predict the necessity of specific systemic and functional strengthening of organs of the constitutional control, their close interaction both horizontally and vertically with similar and other governmental and international authorities[24].

The Constitution may be a criterion of response and assessment, a regulator of events of a certain level of socio-political energy. Excessive strength, power of the political potential of events that are capable to process the mechanisms of constitutional and legal regulation of a certain legal system can cause them to fail. A significant excess of admissible load on the mechanism of the constitutional and legal regulation as a whole may lead to their destruction. In this regard, the mechanisms of the legal regulation require constant monitoring, careful maintenance and timely repairs, upgrades. There is a need in other systemic measures in the sphere of economics, politics and law in order to eliminate the excessive overload of the mechanisms governing the processes which take place in public life.

[24] G.G. Arutyunyan. Sotsialnoe vospriiatie aksiologicheskikh osnov Konstitutsii v sovremennom obshestve [Social Perception of Axiological Bases of the Constitution in Modern Society]// Sobranie materialov mezhdinarodnoi' nauchno-practicheckoi' konferentsii "Konstitutsiia – osnova sotsial'noi' modernizatsii obshchestva i gosudarstva (30 – 30 avgusta 2012) [Collected Materials of International Research-to-Practice Conference "Constitution – a Basis of Social Modernization of the Society and the State (August 30 – 31, 2012)]. Astana, Almaty, 2012, p. 70.

RECOGNITION OF STATE AND GOVERNMENT BY THE CZECH REPUBLIC

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Abstract: The articles deals with the principles governing recognition of foreign states by the Czech government. The author describes specific cases of states recognized by the Czech Republic – those of Palestine and South Sudan.
Key words: Recognition of a state *de jure* and *de facto*, to represent the state externally, state bodies, recognition of the state of Palestine, irrevocable recognition, to establish diplomatic relations.

Recognition of a state[1] is not expressly regulated in the Czech legal order. In such situations when there is an act towards another state, this act is regarded as a part of the presidential right to represent the state externally. Recognition of a state has two levels – *de facto* and *de jure*. By recognition of a state, the readiness is expressed to negotiate with other states as a participant in international relations. There are two ways of recognising a state – either expressly or by establishment of diplomatic relations. Similarly, there are two ways of recognising a government – *de facto* and *de jure*. This represents recognition of new power holders in a state which is however recognised by the Czech Republic but where a coup took place. It is recognition of a government in a broader sense, not only recognition of the state body called government but also of power relations (head of a state, government etc.).

De facto recognition is interim, limited and revocable. It lies in the fact that a state negotiates with another state (with its government, head of a state) – it has to be a body which is entitled to such a negotiation. It may be the president or some other state body (the government, the Ministry of Foreign Affairs). President can, for

[1] Miroslav Potočný: Mezinárodní právo veřejné. 2 edition. Prague, 1978, pp. 166 – 170; Miroslav Potočný: Mezinárodní právo veřejné. Zvláštní část. Prague, 1996, pp. 20 – 24; Vítězslav David, Pavel Sladký, František Zbořil: Mezinárodní právo veřejné. Prague, 2004, ISBN 80-7201-473-0, pp. 151 – 153. Sometimes the meaning of recognition is contested by the assertion that a state is factually created by having its territory, citizens and sovereign state power; at this moment a state automatically becomes a subject of international law. However, acceptance of a newly created state by other states is very important. Ignaz Seidl-Hohenveldern: Mezinárodní právo veřejné. Reedition of the 1st edition. Prague, 2001, ISBN 80-85963-82-5, pp. 135 – 139.

example, invite a foreign head of state which is currently not recognised *de jure* and provide honours that a foreign head of state is entitled to, or the president can negotiate an international treaty with a foreign state. *De jure* recognition is full, final and irrevocable. It is the right of head of state to represent the state externally. No other constitutional norm expressly regulates competence of some other body to recognise a state. Nevertheless, the factual situation is different in the Czech Republic.

After the dissolution of Czechoslovakia, the newly created state Czech Republic, which was originally a part of the federation of Czechoslovakia, obtained full sovereignty. Within the framework of this process, the parliament (the Czech National Council) appropriated the right to recognise other states. The Czech National Council recognised in the form of a constitutional statute all the states which former Czechoslovakia recognised till the day of its dissolution on 31. 12. 1992[2].

From this point of view, the attitude of the Czech Republic towards the state of Palestine is very interesting. The State of Palestine was declared on 15 November, 1988 by Yasser Arafat at the meeting of the Palestinian National Council in Algeria and so far this state has been recognised by over 110 states. This state is recognised by the Czech Republic as well. Czechoslovakia *de jure* recognised the state of Palestine shortly after its declaration and established diplomatic relations at the level of embassy. The Czech Republic recognised all the states which Czechoslovakia had recognised. Once given, *de jure* recognition is irrevocable. Due to this fact, the Czech Republic recognises the state of Palestine, although this is not manifested in its policy. This recognition is regulated by a constitutional statute and that is why it has to be respected by the Czech authorities. In common policy, the Czech bodies mainly support the American standpoint and see the position of the state of Palestine as a special autonomy on the occupied territories (not as an independent state). This attitude was demonstrated in September 2011 when the Czech prime minister Petr Nečas, during his visit in Israel on 15 September, 2011[3] and the Czech president Václav Klaus during his speech at the United Nations General Assembly meeting on 23 September, 2011 refused to support the Palestinian request for admission as a full member of the United Nations[4]. This attitude is also manifested in the fact that there

[2] Art 5 par 1 of the constitutional statute No. 4/1993 Coll., on measures connected to dissolution of Czechoslovakia.

[3] Uznání Palestiny v OSN nepodpoříme, ujistil Nečas Izrael// Available at: http://www.novinky.cz/zahranicni/blizky-a-stredni-vychod/244767-uznani-palestiny-v-osn-nepodporim-ujistil-necas-izrael.html?ref=boxD .

[4] MIROSLAV BENČ: Klaus odmítl jednostranné vyhlášení palestinského státu. Právo. September 24, 2011, ISSN 1211-2119, p. 1, p. 9.

is an embassy of the state of Palestine in Prague whereas there is only a liaison office of the Czech Republic in Ramallah for contacts with Palestinian bodies, which does not have the status of an embassy.

On 21 September, 2008, the Czech government recognised the Albanian Republic of Kosovo by the decision of establishing diplomatic relations[5]. The Czech government did so despite the disapproval of the president Václav Klaus. The president of the Czech Republic commented on the considered recognition of Kosovo: *"do not hurry, do not do it, it is not necessary"*. Nevertheless, he did not expressly oppose this governmental act; he stressed that "*foreign policy is the matter of the government*"[6]. It is true that both foreign policy and national policy are the matters of the government. However, the government is entitled to make decisions only provided that it has either a constitutional or a statutory competence to do that. No legal regulation entitles the government to recognise states. It can be subsumed as a unilateral legal act into the competences of the president to represent the state externally. This right underlies the countersignature and the president should exercise this right on a governmental proposal as the government is a top but not supreme body of the executive power. Kosovo was recognised by an incompetent body from the national perspective and that is why this procedure was legally invalid. However, this does not reverse the international binding effect because both prime minister and minister of foreign affairs can represent the state without special powers; the national invalidity cannot be invoked as a reason for invalidity of international activities of a state on condition that the considered invalidity is not quite obvious[7], which is not the mentioned case. President can react to such a governmental act by not appointing the Czech ambassador in a given country and by not accepting the ambassador of the other party in the Czech Republic, which happened when the Czech government established an embassy in Pristine but the position of the ambassador has remained vacant and no Kosovar ambassador was accepted by the Czech president. Head officers of diplomatic missions are only *chargé d'affaires* (administrators of embassies) who are not accredited by the head of the state but by the minister of foreign affaires[8].

[5] Resolution of government from May 21, 2008, No. 635// Available at: http://racek.vlada.cz/usneseni/usneseni_webtest.nsf/0/3996AA9DDE0132FFC12574D000203539/$FILE/635%20uv080521.0635.pdf .

[6] Partie, TV Prima// Available at: http://www.novinky.cz/domaci/133389-klaus-nepodporuje-uznani-kosova.html . (Accessed on: February 17, 2008).

[7] Analogically the art. 46 of the Vienna Convention on the Law on Treaties. No. 15/1988 Coll. can be applied here.

[8] Art. 14 par. 1 letter c) of the Vienna Convention on Diplomatic Relations No. 157/1964 Coll.

Recognition of South Sudan was of a similar nature. South Sudan declared its independence on 9 September, 2011 on the basis of previous referendum. The Czech government recognised this state without the presence of the Czech president in advance with a resolution from 29 June, 2011[9]. Creation of this new state was not internationally disputable because South Sudan was created with the consent of Sudan – South Sudan was originally an autonomous part of Sudan.

Only the Czech Minister of Foreign Affaires Karel Schwarzenberg *de jure* recognised, on 29 August, 2011, the Libyan National Transitional Council as the new Libyan government after the troops of the former dictator Muammar Kaddafi were defeated[10]. Karel Schwarzenberg commented on this: "I am a supporter of the old international law which recognises a government as soon as it controls a territory." [11]

This Schwarzenbergs statement is true only on condition that the state is recognised as such and the control of the territory seems to be long-term. However, even in such a case the government does not have to be recognised, especially *de jure*.

[9] Resolution of government from June 29, 2011, No. 509// Available at: http://kormoran.vlada.cz/usneseni/usneseni_webtest.nsf/0/60D3A1A0A6AE7A6CC12578CA003CB24D/$FILE/509%20uv110629.0509.pdf .

[10] Declaration of the minister of foreign affaires Karel Schwarzenberg on the events in Libya from August 29, 2011// Available at: http://www.mzv.cz/jnp/cz/udalosti_a_media/prohlaseni_a_stanoviska/x2011_08_29_prohlaseni_ministra_schwarzenberga_k.html .

[11] ČTK report from August 29, 2011.

TAXATION OF MULTINATIONAL ENTERPRISES: OECD RECOMMENDATIONS AND RUSSIAN APPROACH

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Abstract: Multinational enterprises do tax planning, relying on generally accepted concepts enshrined in tax conventions and clarified by recommendations of the Organization for Economic Co-operation and Development. However, Russian authorities tend to develop their own, different and more flexible regulatory techniques that provide enhanced tax collection from international businesses. This article examines the current state of affairs in the field, identifying general trends in Russian taxation policies.
Key words: taxation; tax planning; multinational enterprises; double taxation treaties (DTT); Organization for Economic Co-operation and Development; OECD Model Tax Convention on Income and on Capital; OECD Commentaries on the Articles of the Model Tax Convention; OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations.

Most Russian double taxation treaties (DTT) are based on the Model Tax Convention on Income and Capital (Model Convention) presented by the Organization for Economic Co-operation and Development (OECD). The OECD not only provides a treaty pattern, but also prepares additional information on the problems that may arise in day-to-day practice. While the Russian Federation is not a member of the organization, its application of the Model Convention implies respect for OECD soft law on the subject.

For non-OECD countries, there are greater possibilities for flexible interpretations in favor of tax administrations. Commentaries on the Articles of the Model Tax Convention (Commentaries) contain non-OECD economies' reservations regarding interpretation of the convention articles. Russia's disagreement on several provisions should imply agreement with all other rules. Although Russian officials do not always feel bound by common practices, the Federal Tax Service of Russia (FTS) holds an ambivalent position on the issue of applicability of OECD documents; generally positive attitudes may change to a complete disavowal in specific situations.

General Regulations

Enforceable since 2002, the Tax Code of Russia (Tax Code) contains all legislative regulations on the taxation issues. Since its adoption, it became the subject of multiple modifications. Transfer pricing rules initially consisting of several articles became a full-scale section of the Tax Code in 2012. Although some articles of the new section were amended in 2011, several months after the adoption of the initial text, the rules were revised several times more after entering into force.

The amendments on transfer pricing regulations were due to the general novelty of terms and procedures. As the new rules carried many bottlenecks, practitioners were forced to search for suitable solutions, and the tax administration relied, first of all, on OECD documents.

The Russian Ministry of Finance (the MinFin) started to draw upon common OECD ideas both with and without references. Some official letters of explanation[1] of the MinFin explicitly underline that the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (the TP Guidelines) present "internationally-accepted approaches" [2] and should be taken into consideration if a transaction is international[3]. The FTS, as a MinFin subordinate organization, states that it shall stick to common international principles provided by the TP Guidelines[4]. At the same time, the head of the FTS Transfer Pricing Directorate V. Golishevskiy regards the TP Guidelines mostly as a framework for legislators, but not for practitioners[5]. This position matches neither the OECD conceptions nor the ones officially declared by the FTS, but may be observed as a reflection of inner discussions.

Court decisions play important roles along with governmental clarifications. While not recognized as a source of law, legal cases do have a great impact on judges and practitioners. Taxation cases are within jurisdiction of Russia's "state arbitrazh" (or commercial) court system consisting of first instance courts, courts of appeal, courts of cassation and the Supreme Court of Russia (created on the basis of the former Supreme Commercial Court and the Supreme Court as a result of the 2014 judicial reforms) as the court of final instance.

While the Supreme Commercial Court has been dissolved as an institution since 2014, its doctrines and clarifications still play a decisive role in day-to-day legal practice. Cassation court decisions may be valuable in the absence of a position of the

[1] Non-binding official document.

[2] The MinFin. Letter No. 03-01-18/33520 of August 16, 2013 (in Russian).

[3] The MinFin. Letter No. 03-01-07/5-14 of November 28, 2011 (in Russian).

[4] The FTS. Letter No. OA-4-13/85 of January 12, 2012 (in Russian).

[5] Available at: http://www.nalog.ru/rn77/news/activities_fts/4878289/ .

Supreme Court. Making decisions contrary to FTS letters and even "*contra leges*", an arbitrazh (commercial) court can contribute to a more favorable business environment. However, experts currently agree that after the reform, the court is more likely to provide more cautious and restrained decisions. Despite the recent alterations of the judicial system, court practice remains the most valuable part of non-governmental clarifications and plays the greatest role in defining the limits of lawful tax planning.

The British-American Tobacco Case

Beginning in 2012, British-American Tobacco (BAT) subsidiaries in Russia became subject to a series of the FTS field tax audits. Attention was focused on justification and reasonability of expenditures on intangibles.

The case centers around BAT Investments, Limited (a non-Russian resident) that provided services to ZAO MUMT (a BAT subsidiary and a Russian resident), which were later rendered to three other Russian BAT subsidiaries by means of service contracts.

The FTS's attention was drawn to the case due to the enormous growth of payments abroad. The total amount of expenses for the MUMT in 2008 grew 25 times the following year and reached 2.2 billion rubles. Initially, the BAT tried to provide an explanation for the new expenses based on additional services provided. Tax inspectors obtained documents that were later qualified by court as "appearance of the provision of additional services"[6] and MUMT employees' testimonies confirmed no significant increment in the amount of the services rendered. Based on the evidence, the courts recognized the service contracts as sham transactions covering up a cost contribution arrangement.

The decisions contained two highly important statements. First, the deductions in 2009 were not justified properly. The FTS and the court, based on evidence and expert evaluation, deemed the expenses justifiable only in the amount equal to the amount of the previous year. The taxpayer claimed the increase as an adjustment of the contract price in conformity with the OECD TP guidelines, but was unable to provide documentary proof in order to assert the indirect charge method. **Thus**, the taxpayer had not complied with the TP guidelines that oblige the companies — the provider as well as the client — to present reliable information on price and quantity of the services rendered. The taxpayer should be prepared to demonstrate the rea-

[6] Federal'nyi' arbitrazhnyi' sud Moskovskogo okruga [The Federal Commercial Court of Moscow District]. Case No. A40-62131/12-91-355, dated March 25, 2013. The document was not published. The text is available in Consultant Plus legal information system.

sonableness of its charges to associated enterprises in such cases[7]. The absence of justification also presented a Tax Code violation.

Apart from the subject matter of the claim, the court also made a controversial statement on the possibility of the practical application of the OECD regulations in general and the TP guidelines in particular. "The Russian Federation is not an OECD member, thus the TP Guidelines are not a source of the country's law and cannot be utilized in defining internal taxation matters," and the Tax Code section on transfer pricing "does not accept the OECD elaborations on the possibility of cost contribution arrangements between independent entities," stated the court judgment[8]. Moreover, the court directly stated that, "the implied deal (a cost contribution arrangement based on the OECD principles inside a multinational enterprise) is not provided by the Russian Federation law, and thus, does not result in legal consequences"[9].

The court's denial of the OECD recommendations in this case represents the reluctance of the state to deal with sophisticated international legal constructions and ignores freedom of contract. Claiming a cost contribution arrangement an unlawful transaction, the FTS, in fact, opposes the indirect charge method. The court by choosing the FTS side in the BAT case presumed correctness of the FTS statement without giving it a critical examination.

Alternative Court Practice

Previous court decisions, however, had generally accepted the OECD principles. In the Heineken Breweries case, a court based its decision on a letter from the Ministry of Economic Development of Russia that explained the conformity of an agent's fee with common practices enshrined in the OECD TP Guidelines[10]. *The Royal Bank of Scotland* case is also an example of a court referring to the TP Guidelines as a source of terms and concepts[11].

[7] Paragraph 7.32 of OECD TP Guidelines.

[8] 9 apelliatsionnyi' arbitrazhnyi' sud [The 9 Appellate Commercial Court]. Case No. A40-62131/12-91-355, dated December 17, 2012. The document was not published. The text is available in Consultant Plus legal information system.

[9] Federal'nyi' arbitrazhnyi' sud Moskovskogo okruga [The Federal Commercial Court of Moscow District]. Case No. A40-62131/12-91-355, dated March 25, 2013. The document was not published. The text is available in Consultant Plus legal information system.

[10] 9 apelliatsionnyi' arbitrazhnyi' sud [The 9 Appellate Commercial Court]. Case No. A40-131465/09-142- 981, dated August 09, 2010. The document was not published. The text is available in Consultant Plus legal information system.

[11] Federal'nyi' arbitrazhnyi' sud Severo-Zapadnogo okruga [The Federal Commercial Court of North-Western District]. Case No. A56-94331/2009, dated of April 19, 2011. The document was not published. The text is available in Consultant Plus legal information system.

The FTS even based some of its field audits on the OECD recommendations. In *the SGK-Sever* case[12], for example, a subsidiary of a once leading Russian construction company was advised to pay additional taxes as a tax agent of an offshore counter-party. Commentaries on the Articles of the Model Tax Convention state that "gains from the alienation of shares deriving more than 50 per cent of their value directly or indirectly from immovable property situated in a Contracting State may be taxed in that State"[13]. At the time when the Court heard the case, the Tax Code did not contain such a detailed provision, normally allowing the alienation of shares in foreign entities without checking indirect possessions of immovable property in Russia.

In *the SGK-Sever* case, the court denied the usage of the OECD commentaries as a consequence of absence of a double tax treaty (DTT) between Russia and the British Virgin Islands. The case represents a rare example of a court not willing 'to pierce the veil' or to reconstruct the actual substance of a deal underlining instability of current court practice. Also, it should be noted that the FTS prepared this OECD recommendations-based decision after finalization of the above-mentioned BAT case.

***The Freshfields Bruckhaus Deringer* Case**

To correctly apply the OECD Model Tax Convention, it is necessary to provide all parties of the treaty with uniform terms and institutions. This may be achieved by means of OECD documents and non-obligatory explanations on practical problems. In the Russian practice, these commonly accepted methods are often ignored by the tax administration.

The Russian branch of Freshfields Bruckhaus Deringer, LLP (Freshfields), a member of the Magic Circle of elite British law firms, became the subject of a FTS field audit that resulted in a notable trial which is still in progress.

The UK-Russia tax relations are regulated by an ordinary, but obsolete DTT based on the OECD Model Convention. Due to the special legal status of a Limited Liability Partnership (LLP) in the UK (an entity for corporate regulations and transparent for taxation), the tax convention excludes partnerships from its scope of application. The UK-Russia DTT definition of a person[14] specifically is declared as "a company

[12] Case No. A81-4077/2013. The document was not published. The text is available in Consultant Plus legal information system.

[13] Paragraph 28.4 of the OECD Commentaries on paragraph 4 of Article 13 of the Model Tax Convention.

[14] Article 3, paragraph 1, subparagraph (e) of UK-Russia Double Taxation Convention.

and any other body of persons, but does not include a partnership." And as the "Convention shall apply to persons who are residents of one or both of the Contracting States," the FTS contests tax deductions for a LLP, deeming them as not complying with the convention.

The OECD commentaries assume that such partnerships are to be transparent for taxation, causing taxation of each partner individually. Also, current versions of the OECD commentaries recommend that both the permanent establishment (PE) of a company and the fixed base for activities of an independent character be treated equally to eliminate uncertainty as there is no practical difference between the two concepts[15].

While the UK-Russia treaty is based on an earlier version of the model containing Article 14 on independent personal services, the Freshfields branch was registered in Russia as a permanent establishment, being subject to all corporate taxes. The field audit decision was to eliminate the benefits of the treaty such as the right of allocation of expenses to its PE. The position of the tax service was that the provisions of the treaty are not applicable to a partnership, thus it is not applicable to a partnership's PE as the Convention does not define partnership and its PE as separate "persons" or subjects of taxation[16].

The TP Guidelines recommendation to a state that "disregards a partnership for tax purposes and treats it as fiscally transparent"[17] is to base taxation on the partnership members that are liable to taxation on that income an,d thus, are the appropriate persons to claim the benefits of the conventions. Freshfields' allegations that in the case of fiscally transparent partnerships, each partner should be considered to have a permanent establishment for the purposes of the taxation of its share of the business profits derived by the partnership[18], were rejected. **Thus**, refusing to confirm a PE existence, the commercial court of appeal denied the partners' right to allocate the expenses that were calculated by the indirect charge method.

The court accepted as appropriate evidence a letter of the Ministry of Finance[19] that generally stated that the Convention is not applicable to partnerships. The court disregarded the last paragraph of the letter that stated that the Convention is appli-

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[15] Paragraph 23, Issues Related to Article 14 of the OECD Model Tax Convention, OECD 2000.

[16] 9 apelliatsionnyi' arbitrazhnyi' sud [The 9 Appellate Commercial Court]. Case No. A40-3279/14, dated of April 20, 2015. The document was not published. The text is available in Consultant Plus legal information system.

[17] Paragraph 8.8 of the OECD Commentary on Article 4 of the Model Tax Convention.

[18] Paragraph 19.1 of the OECD Commentary on paragraph 4 of the Article 5 of the Model Tax Convention.

[19] The MinFin. Letter of February 07, 2013, No. 03-08-13(in Russian).

cable to members of the partnership who are residents of UK. The same position, according to the text of the court decision, is held by the Institute of Legislation and Comparative Law under the Government of the Russian Federation.

Regarding the expense attributions for a partnership as impossible by the DTT and regarding such provisions to be absent in the Tax Code, the court came to the conclusion that a PE does not have the right to make exemptions for the expenses made by its head office.

There is still a possibility for the court's position to be changed. The Cassation Court and the Supreme Court are the next forums for the case. Their decisions will demonstrate whether common OECD principles are applicable in Russia or whether it is necessary to base tax planning solely on the provisions of the Tax Code and FTS clarifications.

***The Oriflame Cosmetics* Case**

Attempts to determine the correct scope of acceptability and allocation of profits may produce additional difficulties for an enterprise even in a country that is fully complying with OECD standards. As a non-member of the OECD, the Russian Federation is searching for a balanced solution to the problem, though the transition period may be difficult for multinational enterprises working in the country. The *Oriflame Cosmetics* case provides a perfect example of tax risks resulting both from the lack of reasonable justification of expenses on the taxpayer's side and from an extremely severe FTS position.

Oriflame is an international cosmetics company of Swedish origin, operating on the Russian market for more than twenty years. The Russian branch not only sells, but also manufactures some of its products. Highly recognizable on the market, the company attracted FTS attention.

According to a shareholders' annual report, the company profits were maximized on the market of the CIS and Baltic countries, with the Russian market presumably providing most of them. However, the official tax return states that the OOO Oriflame Cosmetics (the Russian subsidiary) suffered losses in the same period. A tax field audit discovered that the basis for the loss was a high royalty payment moving by means of sublicense agreement to a Dutch Oriflame subsidiary and then by license agreement to the holding company in the Grand Duchy of Luxembourg.

The situation was similar to Starbucks' UK problem that drew the attention of the UK Parliament and was resolved only by a unilateral company decision to give up several tax exemptions. Starbucks managed to provide the HM Revenue and Customs with information on losses for 14 out of 15 years of the UK subsidiary's existence.

The information for shareholders was more positive. One of the main expenses of the company for all these years was paying for a trademark. Being highly motivated by the bad public reaction, the company decided to change its taxation practices.

Russian consumers are not so responsive to taxation matters, so the FTS was ready to act directly, rather than rely on public reactions. Oriflame's payments to a Luxembourg-based holding company ordinarily would cause a price audit with significant chances of additional taxation. The FTS selected another mode of action claiming that the Russian subsidiary is not a company *per se*, but in fact a mere permanent establishment of a foreign company. The allegation that the Russian office is a permanent establishment meant that the subsidiary could not conclude a license contract with the head office because it would be impossible for a company to conclude a contract with its part. Both arguments demand close examination.

The cases of *"Parex Banka"* and *"Citadele Banka"*[20] formed the basis for the court decision in question. The two foreign banks operated in Russia through unofficial and unregistered branches, affirming to have no representation in the country. The offices were rented by related companies, but not by the banks themselves. To prove a connection, the Supreme Commercial Court applied the following test: the first criterion – did customers consider their contract as a contract with the bank, the second – did liability arise directly for the bank. Both criteria combined allowed to define the bank as a party to a contract, defining offices as branches. Neither the term 'permanent establishment', nor taxation matters were considered.

In Russia, the definition of "branch" (or representative office) – "представительство" - resembles the term "постоянное представительство", which means "permanent establishment," but in legal terms the concepts are not equal. Instead, the terms are civil and tax law institutions respectively. In the *Oriflame* case, the court found it reasonable not only to find a connection between the entities, which is an obvious trait for a subsidiary, but also to alter a legal form of a business entity.

Advertising booklets contained the "Oriflame" trademark predominantly, but did not sufficiently show the Russian subsidiary (OOO "Oriflame") name and the firm's details[21]; the web-site contained only the "Oriflame Sarl" sign at the bottom. In conjunction with other examples, the court found this evidence to be sufficient proof of

[20] Prezidium Vysshego Arbitrazhnogo Suda [The Presidium of the Supreme Commercial Court]. Case No. A40-21127/11-98-184, dated of April 24, 2012. The document was not published. The text is available in Consultant Plus legal information system.

[21] Arbitrazhnyi' sud goroda Moskvy [The Moscow commercial court]. Case No. A40-138879/14, dated December 04, 2014. The document was not published. The text is available in Consultant Plus legal information system.

the customers' lack of comprehension. Thus, the clients are said to think that the contract party was the Luxembourg-based holding company Oriflame Sarl.

The possibility of a contract directly between the foreign company and a Russian customer was not proven, but the court decided that the sublicensee's obligation of providing the same amount of customer service as the customer could obtain from the licensor itself was a sufficient argument. That meant that not only can worldwide service standards attract customers, but they can also submit additional tax risks.

Referring to paragraph 37 of the OECD Commentaries to paragraph 6 of Article 5 of the Model Convention, the Cassation court asserts that the Russian branch is not independent both legally and economically as it bears the features of a dependent agent and its activities constitute a PE[22]. The Court stated:

"Formally registered, the Russian legal entity OOO "Oriflame," in fact, acted on behalf and in the name of a foreign company. As such, payments to the foreign company by sublicense agreement cannot be accepted as justified in terms of reasonable business purpose".

Under the authorized OECD approach, internal dealings should have the same effect on the attribution of profits between a PE and other parts of the enterprise as a comparable provision of services or goods between independent enterprises. For a PE, these dealings are postulated solely for the purposes of attributing the appropriate amount of profit[23]. Not accepting these rights of the newly formed PE, the court stated:

"Due to the fact that the entity is practically a branch of a Luxembourg company… finally getting 98,4% of the total amount of license payments… the conclusion of the contracts between the licensee and the sublicensee constitutes evidence of unjustified tax benefits"[24].

This case provides an example of how broad an interpretation of a DTT can be. A separate entity paying taxes for a long period can be transformed into a PE, at least for tax purposes. A regular license agreement can be estimated as a means of obtaining unlawful tax exemptions without referring to the price of the contract. Aggressive tax planning can currently provide additional risks not limited by strict legal

[22] Federal'nyi' arbitrazhnyi' sud Moskovskogo okruga [The Federal Commercial Court of Moscow District]. Case No. A40-138879/14, dated June 11, 2015. The document was not published. The text is available in Consultant Plus legal information system.

[23] Paragraph 173 of Part 1 (Section D-2, Subsection (vi)) of the OECD Report on the Attribution of Profits to Permanent Establishments, 2010.

[24] 9 apelliatsionnyi' arbitrazhnyi' sud [The 9 Appellate Commercial Court]. Case No. A40-138879/14, dated of March 06, 2015. The document was not published. The text is available in Consultant Plus legal information system.

rules since the FTS is not committed to reconstructing the exact circumstances and tax schemes, preferring to deny companies' rights on deductions.

The above-mentioned examples demonstrate that the current Russian legal environment is not favorable towards complicated international structures. OECD recommendations and approaches will probably not be taken into account or will be interpreted in a manner different from that intended. International corporations' activity in Russia may become more challenging since the FTS is committed to taking tough measures and actively battling with tax base erosion.

The indirect charge method for service contracts and payments abroad for intangible goods between related enterprises can provoke a highly suspicious response towards a company. Coupled with a commercial (arbitrazh) court system that is inclined to accept government claims, the current situation will result in increases in the overall tax burden for international companies in Russia.

THE INNOVATIVE VECTOR OF THE RUSSIAN ECONOMY: BEHAVIOURAL PREPAREDNESS OF THE POPULATION*

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Abstract: The article examines the attitude of various population groups and segments (employees, business people, government representatives of various levels) to the perspectives of the RF innovative development and the formation of knowledge economy. On the basis of research results and social polls, the author makes a conclusion that the main "retaining" factor of the innovation development and formation of knowledge economy is a reducing quality of managing development at all the levels, the "conservatism" of a significant part of the Russian business elite, and indifference and "detachment" from the innovative processes shown by most Russians.
Key words: innovations, innovative development, innovative system, innovative environment, innovative behavior, innovative leadership, smart economy, knowledge economy.

Researchers, professionals and policy makers of various countries as well as international organizations are actively debating a pressing issue for the world community - the problem of developing the 5th and 6th technological techno-economic paradigms, as well as the calls to form "smart economy", which is based on the latest achievements of science and world practice. There are also notable results demonstrating that some countries are, in fact, developing technologies of the 6th techno-economic paradigm. It is generally accepted that a country started mass development of new, sixth techno-economic paradigm, if its share in total production reaches 5 percent[1]. According to the existing sources, only three countries may

* This article was written with the financial support of the Russian Federation President's Grant Program SS-1182.2014.6 "Leading School of Research".

[1] A.A. Akayev. Speech at the Moscow Economic Forum. "Mir peremen" ["The World of Changes"], 2014, No. 2, p. 15.

belong to this group: the USA – 9.5%, Germany – more than 5% and Japan – 5%. Other countries lack these indicators or have not started forming the 6th techno-economic paradigm yet. The data are not available for the Russian Federation. During the period of 2006 – 2013 (4th and 5th techno-economic paradigms), the Middle Urals, specifically Sverdlovsk region sharing high-tech production, had a little over of 14 % shipped products with 70.4% in total costs of R&D (research and development). Having 30 % of world resources, Russia accounts for only 2.9% of the world GDP, and for only 0.3% in the high-tech production.

Changing the socio-economic development vector will help Russians ensure market prosperity

The current stage of socio-economic development is characterized by instability of external and internal environment, increasing competition between market agents, reduction of the life cycle of produced goods and services. That is why the general trend of world economic development is aimed at accelerating processes of new industrialization the defining vector of which is a systemic innovative development and the formation of high-tech industries within national economies and some particular industrialized regions[2]. The Russian national high-tech status can be defined by the majority of features as "catching up", but staying in the technological mainstream[3]. Against this background, the main priority in the development of high-tech industries and spheres of activity is reconstructing the destroyed and forming new units of foreign and domestic innovative environment[4]. We can name the following priorities:

First of all, there is a task to create innovatively prepared and economically literate people who can manage social processes and develop domestic production, using industrial and management breakthroughs in the conditions of growing globalization, and competition for industrial and economic leadership. According to A. Smith,

2 V.V. Akberdina, O.A. Romanova, A.I. Tatarkin. Formirovanie vysokotechnologichnogo sektora v industrial'nom regione [Formation of High-Tech Industrial Sector in the Region]. Journal of the New Economic Association, 2014, No. 2, pp. 145 – 200.

3 M.A. Benediktov, I.E. Frolov. Vysokotehnologichnyi' sector promyshlennosti Rossii: sostoianie, tendetsii, mechanizmy innovatsionnogo razvitiia [High-Tech Industrial Sector In Russia: State, Trends, Mechanisms of Innovative Development]// Nauka [Science]. Moscow, 2007, p. 583; O.A. Romanova, V.V. Akberdina. Metodologiia i praktika formirovaniia vysokotehnologichnogo sektora ekonomiki i sozdaniia rabochikh mest v industrialnom regione [Methodology and Practice of Forming High-Tech Sectors of the Economy and Creating New Jobs in the Industrial Region]// Economika regiona [Regional Economy]. 2013, No. 3, pp. 152 – 161.

4 E. Kutsenko. Regionalnyi' Kontext. Territorii innovatsionnogo rosta [Regional Context. Territory of Innovative Growth]// Bisnes-zhurnal [Business-Journal]. 2014, No. 9, pp. 56 – 58.

efficient and sustainable development of market economy is possible only in the society of economically (and, we should add, innovatively) prepared people who want to create and support innovative environment of their industrial and public activities aimed at increasing final economic (social, ecological) result[5].

The most socially significant decision to implement this priority must be terminating meaningless, unprepared and ineffective government "games of reforming" the educational system, general and higher education, along with completely liquidating the system of secondary vocational education. The health care system is definitely divided into two unequal parts: basic health care with low quality services which is available to all people, and elite health care with a full set of paid medical services and, hence, not available to most Russians . The latter part has become a fee-based sphere of activity.

In the process of "shock privatization", most industry-specific and design centres were reoriented; research work in the system of the Russian Academy of Sciences is constantly limited because of various pretexts that cannot hold up to scrutiny. There are two real reasons: reducing the burden on the budget by limiting the funding of budget spheres; using savings to increase "allowance" for officials of various levels who do not care about the innovation economy in Russia. Their priority is to be in their employers' good books and have good service allowance. But an ordinary RF citizen has to pay excessive costs for maintaining the machinery of government and costs arising from implementing the Government's not innovative, but often detrimental regulatory decisions, uncontrolled price and tariff growth, and other costs. There are **three facts** that confirm the said:

First, in 1985 there was one official for every 115 citizens in the Soviet Union during the period of the planned economy that required additional administrative efforts. But in 2010, there was one official for every 58 citizens. The number of officials doubled during a quarter of the century. Was all this done under the liberal-market "song" that "the market will regulate everything"? Expenditures for the maintenance of the machinery of government were 0.8% from budget costs in 1985, and in 2010 they were about 14%[6]. Is this not an expressive difference? It seems like there is somebody to be held accountable. Somebody is to be held accountable more and more often nowadays. For

[5] A.I. Tatarkin. Dialektika gosudarstvennogo i rynochnogo regulirovaniia sotsialno-eckonomicheskogo razvitiia regionov i munitsipalitetov [Dialectics of State and Market Regulation of Socio-Economic Development of Regions and Municipalities]// Ekonomika regiona [Regional Economy]. 2014, No. 1, pp. 9 – 33.

[6] D.M. Denisov. Tsyfr perebor [Looking into Numbers]// Bisnes-zhurnal [Business-Journal]. 2014, No. 8, p. 1.

example: Why are the wallets of the citizens drained more rapidly? According to V.Kostikov, "during the last 12 years, gas supply tariffs have increased tenfold , water supply tariffs have increased 14 times, utility services charges – 15 times, and energy supply tariffs – 7 times. The population, particularly in regions, is not satisfied with the quality of education and health care. Russia holds one of last places among countries where international experts have measured the quality of national health care system"[7]. And there are a lot of such questions!!! Unfortunately, we have not received and are unlikely to receive reasonable answers to those questions.

Second, since 1 September 2014, according to the RF President's Decree, the "financial allowance for officials in the Russian Federation has been increased"[8]. Among those officials are federal ministers, the State Duma and the Federation Council deputies, the Security Council Secretary, the members of the Central Election Commission, and other kinds of high-level federal officials. According to some assessments, the benefit given by the President's Decree allows the highest officials to receive 170-200 thousand rubles more as a monthly allowance. The RF Finance Ministry promises to spend 380 billion rubles on additional promotion of the officials in 2015-2017. The comparison of the officials' salaries and the salaries of ordinary citizens in 2012 and 2014 is very impressive. The salaries of the former have increased from 170 000 rubles per month to 420 000 rubles per month with all benefits (almost 2.5 times); those of the former – from 27 000 rubles per month to 32 000 rubles, less than 12 percent!!! This managerial decision is close to the behavior of characters in A.S. Pushkin's drama "Feast in Time of Plague". The author reveals the dramatic nature of the situation with Mary's words:

"Long ago our land was blessed:
Peaceful, rich, and gay;
People then on days of rest
Filled the church to pray.
Children's voices full of cheer
Through the schoolyard rang;
In the fields both far and near
Scythe and sickle sang.

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[7] V. Kostikov. Pokazhite gde knopka. Nuzhen trezvyi' vzgliad na situatsiyu v strane [Sohow Where the Button is. We Need a Sober Look at the Situation in the Country]// Argumenty i Fakty [Arguments and Facts]. 2014, No. 40, p. 9.

[8] A. Kolisnichenko. Slugi naroda podorozhali. Vysokopostavlennye stali bogache [Servants of the People Raised in Price. High-ranked Ones has Become Richer]// Argumenty i Fakty [Arguments and Facts]. 2014, No. 41, p. 11.

Now the church deserted stands;
School is locked and dark.
Overgrown are all our lands;
Empty groves are stark.
Now the village, bare as bone,
Seems an empty shell;
All is still--the graves alone
Thrive and toll the bell[9].

Everything is really quiet. No parliamentary fraction has expressed its protest and refused to fulfil the adopted decision. The material factor has turned out to be more efficient than ideological and political bravado "concern for the working people", for their material and social well-being… In fact, not everything is quiet. According to the Argumenty i Fakty newspaper, the deputies indignantly claimed to "check and limit" the remuneration of state corporation managers who get 4.5 million, 2.2 and "real copecks" - 1.3 million rubles per a WORKING DAY "in recognition of significant contribution to the economic development in Russia"[10]. Can anybody say that the mentioned categories of potential participants of innovative development in Russia will change the current situation? The answer is NEVER. This fact is confirmed by the poll held at one of the International Economic Forums in Krasnoyarsk; more than 60% of the interviewed are satisfied with the "raw- material orientation of the Russian economic development".

That is why it is necessary to form the innovative mindset and to start the real movement of the public opinion and the majority of Russians towards the increase of innovation activity. This process should begin from the highest state official's readiness to assume all responsibility for the innovative renewal of the economy and social development. *All his actions* should be dedicated to this goal as well as the behavior of the entire society and each member of the society irrespective of the status and place of work.

Third, the specialists from the British weekly magazine "The Economist" made a simple arithmetic calculation about the loss of capitalization of the Russian stock market due to the official policy and negligence of the government officials. The result was $1 trillion, or $7,000 per one citizen of the country. These figures were published in the magazine with the following comment: "Bad governments cost

[9] Available at: http://alexanderpushkinslittletragedies.blogspot.ru/2010/03/feast-in-time-of-plague.html . (Translator's Note).

[10] D. Mitina. Otorvalis' ot realnosty [Detached from Reality]// Argumenty i Fakty [Arguments and Facts]. 2014, No. 41, p. 11.

investors a fortune". The arithmetic calculations were made by the British very simply within the framework of the comprehensive school program. The Russian listed shares known to be significantly undervalued (nobody knows why) in comparison with the foreign ones: their average P/E ratio is 5.2, while the average ratio for developing markets is 12.5[11]. It is not difficult to calculate the cost of the Russian market if its shares were evaluated according to the average P/E ratio of the developing countries. And again, the reason is the same: "Either personal gain is an obstacle or the education fails"!

As to the second priority, the government authorities at all levels are ready to get "in the forefront" of the innovative renovation and modernization of social production and to involve all social, economic, and political structures as well as the majority of the population in the innovation processes. It is the most important concern but not the only one. The practice shows the need for mobilization of resources, of innovative, educational and academic potential of the country for "innovative, industrial, technological and socio-economic breakthrough". It must be publicly recognized that there is a lack of prospects for constant and harmful reforms of budget spheres where innovation is a top priority – education, public health, scientific researches, etc. These reforms are not agreed upon with the society though they are of great priority for the country and the life of people. It is impossible to ensure innovative development of such a country as the Russian Federation only by opening "Skolkovo", "Rosnano", "Kurchatov Centre" that are more specializing in "embezzling and sharing" of budget funds than in real fundamental research and applications[12].

As to the third priority, as soon as there are the above-mentioned conditions for" shifting" the public development vector from increasing extraction and export of resources to the active and systemic use of innovative factors relating to the economic growth (to solve industrial, infrastructural, and ecological problems), it is necessary to "build" and "adjust" the national innovative system. If somebody says that the Russian Federation has no innovation system and that it is necessary to build it "from scratch" then he does not understand the problem facing the society. One cannot agree with the opinion that here is the national innovative system in Russia, but… it is not efficient… for various objective and subjective reasons.

[11] D.M. Denisov. Tsyfr perebor [Searching Numbers]// Bisnes-zhurnal [Business-Journal]. 2014, No. 8, p. 1.

[12] "Golova professor Douelya" ot sovetskoi' nauki ["Professor Dowell's Head" from the Russian science]. Alexander Chuikov's interview with professor Georgy Malinetsky, Doctor of Mathematics and Physics// Argumenty nedeli [Arguments of the Week]. September 18, 2014, No. 35, p. 6.

The true state of the national innovative system of the RF can be evaluated as an intermediary condition between the two above mentioned extremes. There is a "structural frame" of the system in the form of a number of federal laws and laws of the RF constituent entities on the development of innovative processes in the Russian Federation. As a rule, they are drafted behind the doors without asking the opinion of the scientific community, so they are passed without any public discussion in the format of the "wants" of "innovatively-minded" officials. The programs of innovative development are rarely implemented in practice. As practice shows, it is impossible to form the national innovative system from the "wants", though a certain structural frame of the system is developing. The enacted legislation forms the legal basis for the national system. Organizational structures that are responsible for scientific research (fundamental and applied), research activities of higher educational institutions, venture companies and scientific innovation centers (techno parks, techno policies, etc.) can be regarded as organizational basis of the national innovative system.

Unfortunately, and structural frame and the basis are highly vulnerable and subject to disruptive impact because the national system cannot be fully functional without the " Protection" in the form of a special federal agency in charge of systemic innovative development of the economy and the society (in the form of the RF State Committee on Science and Innovative Development). This sphere, including the Russian Academy of Sciences, is under the RF Ministry of Education and Science. This fact represents a change for the worse in education (secondary and higher) and in science, allowing for a constant search for a pretext to "imitate frantic reform activities". The world practice showed and proved that innovative development must be tackled seriously, constantly, drawing on scientific society, whose research traditions should not be broken by fruitless reforms.

Summarizing all the above , we can reasonably argue that there is a national innovative system in the Russian Federation, but it needs further building and adjusting to function at its full potential. For the system to start working, it is necessary to involve all the power vertical of the Russian federation, business community in all spheres of activity, scientific and educational institutions, and the majority of the Russian population. The forms of the involvement can be and must be different, individualized as to the working conditions and job duties of every category of workers, managers, specialists, scholars and higher schools' employees[13]. But the problem

[13] V.N. Belkin, N.A. Luzin. Sovershenstvovanie upravleniia iinovatsionnym potentsialom promyshlennogo predpriiatiia [Improving the Management of Innovative Potential of an Industrial Enterprise].

here is how to involve those capable of ensuring the active functioning of the national innovation system. The failure to get them involved may lead to disruptions in the work of the system because the behavioral motivation of various participants in the process may be different.

Attitude of various population groups to the increase in their innovative activities

For most participants, it is rather difficult to become actively involved in the innovative process because they have no motivation for the accelerated development of the country (region, municipalities, companies, medium and small businesses) by means of intensive factors of socio-economic growth. Available sociological research of the attitude of those who work in private companies of metallurgical (Uralelectromed, Chelyabinsk Zinc Plant), engineering (Shadrinsk Auto Aggregate Plant, Kurgan region, Chelyabinsk Tractor Plant, Uralburmash, Sverdlovsk region), and timber industries (Novolyalinsky woodworking plant, Sverdlovsk region) showed that the problem of increasing innovative activity of employees requires a serious analysis and fundamental management decisions. What is this conclusion based upon?

First, there is no serious research and methodological (and procedural) basis for creating favourable motivation environment at the enterprises in order to increase innovation activity of all employees, irrespective of their functions and position. The surveys show that positive results are accomplished in those companies where all employees, from the top-manager to gatekeepers, are motivated to achieve the innovative result and are paid according to it. Yes, this requires serious and painstaking work of persuasion and sometimes compulsion, change of current regulations, rules, and even collective bargaining agreements. Sometimes it is necessary to conclude a special contract with the staff of their structural departments for innovative retooling or solution of a production problem that hinders the development of the department.

There are numerous scholarly publications on innovative development focusing mainly on theoretical and methodological problems. Most of these publications are devoted to defining "innovation", "innovative development", "innovative growth", "innovative result", "innovative economy"[14]. Much less space is given to external conditions

Publising House of the Institute of Economics, Ural Branch of the Russian Academy of Sciences, Yekaterinburg, 2014, pp. 80 – 100.

[14] Ot samoorganizatsii k samorazviviyu: smena paradigm menedzhmenta [From Self-organizating to Self-development: a Change of Management Paradigm]// Ch ed. professor S.V. Komarov, Doc-

that contribute to or restrain innovative development on the territory of an enterprise or among its employees[15]. Even rarer is the author's view of the condition of innovative development of individual actors in innovative processes and proposals for their renewal[16]. Only rare publications propose theoretical and methodological approaches and procedural rules and norms of their implementation at various levels of the innovation process[17]. The authors of such a publication work at the Chelyabinsk Branch of the Institute of Economics (the Ural Branch of the Russian Academy of Sciences), V.N. Belkin (Doctor of Economics, Professor) and N.A. Luzin. They presented the summarized results of their research based on their own method – "The MLEP Sys-

tor of Philosophy. Monograph, Publishing House of the Institute of Economics, Ural Branch of the Russian Academy of Sciences, 2013, p. 257; I.M. Golova. Innovatsionnyi' klimat regiona: problemy formirovaniia i otsenki [Innovative Climate of the Region: Problems of Formation and Evaluation]. Publishing House of the Institute of Economics, Ural Branch of the Russian Academy of Sciences, Yekaterinburg, 2007, p. 178; I.A. Baev, I.A. Solovyova. Empirichskii' analiz vzaimosviazi investitsionnoi' i innovatsionnoi' aktivnosti regionov Rossii [Empirical Analysis of the Relationships between the Investment and Innovative Activities in the Russian Regions]// Ekonomika regiona [Regional Economy]. 2014, No. 1, pp. 147 – 155; T.I. Volkova. Institutsionalnye riski v sisteme otnoshenii' po vovlecheniyu intellektualnykh produktov v ekonomichesky oborot [Institutional Risks in the System of Relations Iinvolving Intellectual Products into Economic Turnover]// Zhurnal Ekonomicheskoi Teorii [Journal of Economic Theory]. 2012, No. 3, pp. 7 – 17; A.F. Sukhovey. Innovatsionnaia infrastruktura kak instrument razvitiia sotsialno-ekonomicheskoi' sistemy regiona [Innovative Infrastructure as a Tool for the Development of the Socio-economic System of the Region]// Ekonomika regiona [Regional Economy]. 2013, No. 2, pp. 120 – 126.

[15] I.M. Golova. Innovatsionnii' klimat regiona: problemy formirovaniia i otsenki [Innovative Climate of the Region: Problems of Formation and Evaluation]. Publishing House of the Institute of Economics, Ural Branch of the Russian Academy of Sciences, Yekaterinburg, 2007, p. 178; T.I. Volkova. Institutsionalnye riski v sisteme otnoshenii' po vovlecheniyu intellektualnykh produktov v ekonomicheskii' oborot [Institutional Risks in the System of Relations Involving Intellectual Products into Economic Turnover]// Zhurnal Ekonomicheskoi' Teorii [Journal of Economic Theory]. 2012, No. 3, pp. 7 – 17; A.F. Sukhovey. Innovatsionnaia infrastruktura kak instrument razvitiia sotsialno-ekonomicheskoi' sistemy regiona [Innovative Infrastructure as a Tool for the Development of the Socio-economic System of the Region]. Ekonomika regiona [Regional Economy]. 2013, No. 2, pp. 120 – 126.

[16] V.N. Belkin, N.A. Luzin. Sovershenstvovanie upravleniia innovatsionnym potentsialom promyshlennogo predpriiatiya [Improving the Management of Innovative Potential of an Industrial Enterprise]. Publishing House of the Institute of Economics, Ural Branch of the Russian Academy of Sciences, Yekaterinburg, 2014, pp. 80 – 100; Ot samoorganizatsii k samorazviviyu: smena paradigm menedzhmenta [From Self-Organizating to Self-Development: a Change of Management Paradigm]// Edin-Chief professor S.V. Komarov, Doctor of Philosophy. Monograph. Publishing House of the Institute of Economics, Ural Branch of the Russian Academy of Sciences, 2013, p. 257; A.F. Sukhovey. Innovatsionnaia infrastruktura kak instrument razvitiia sotsialno-ekonomicheskoi' sistemy regiona [Innovative Infrastructure as a Tool for the Development of the Socio-economic System of the Region]// Ekonomika regiona [Regional Economy]. 2013, No. 2, pp. 120 – 126.

[17] V.N. Belkin, N.A. Luzin. Sovershenstvovanie upravleniia iinovatsionnym potentsialom promyshlennogo predpriiatiia [Improving the Management of Innovative Potential of an Industrial Enterprise]. Publising House of the Institute of Economics, Ural Branch of the Russian Academy of Sciences, Yekaterinburg, 2014, pp. 80 – 100.

tem" (market labour evaluation and payment system), which was introduced at a number of enterprises and organizations in the Urals and Russia. The assessment of the participating businesses was conducted according to this methodology.

Second, the results of the conducted research and sociological polls show there is no systemic work (vertical and horizontal) done aimed at achieving an ultimate socio-economic result (an innovation share of GDP, the share of innovation production in the total production, the share of knowledge-based export production, the growth in the productivity of labor, the share of high-technology working places, etc.). There are serious declarations and calls to form the "smart economy", a promise and a task for the regions to create 2.5 million high-tech jobs by 2020. There are serious intentions of the Government to increase the role of the Russian academic community in the innovative modernization of the economy. To our great embarrassment, we should recognize that the real actions of the government agencies have nothing in common with the identified tasks. There are no real actions to increase the funding of the RAS institutes and to revive, at least partially, the applied sciences, thereby developing a creative environment for innovative creativity. A decision on the cooperation of academic, university-based and applied sciences with venture and production companies in order to reduce the cycle "a fundamental idea – a design project – a prototype - mass production" is delayed.

In the production cycle, there is still a long period from an idea of innovation knowledge to its production, which negatively influences the speed of the process because there are many unresolved organizational limitations. For example, there is no government body that, on behalf of the Russian state, can coordinate and guide all state and private structures participating in the innovation process to accomplish the ultimate result. The Ministry of Education and Science that "keeps a foot in both worlds" is not entrusted to deal with this strategic priority. This agency should be a special State Committee on Science and Innovative Development, the Head of which at the level of the Deputy (or even the first deputy) of the RF Chairman of the Government will be in charge of the innovative development of the country. The material and technical base of RAS institutes, industry-related and design centers need serious modernization and promotion. It is necessary to review the teaching load of the faculty engaged in research work to help them combine their teaching activities with scholarly research.

Third, the research into the reasons for increasingly low innovative activity among employees show that workers, mid-level managers, and some of the top managers at the majority of Russian enterprises are not interested in increasing the inno-

vative activity of their teams when there is a possibility to work and earn money without “innovation efforts”. The MLEP System was not introduced at four out of six surveyed enterprises, and the system of encouraging innovative was not working. Incentives, as at the most Russian enterprises, are provided subsequent to work results of the entire team with the use of penalties for any violations. 58% - 64% workers of the said enterprises gave a negative answer to the question whether their company’s management encourages innovative initiative, and said that “any initiative is punishable”. Better results were shown by the primary (heads of the sections, craftsmen, heads of shifts) and mid-level managers (e.g., shop foremen), and more than 50% of those interviewed responded that the heads of the enterprises do not support and will not support initiative due to its costs.

At the enterprise of metallurgical industry “Uralelectromed” and Shadrinsk Auto Aggregate Plant, the MLEP System has been operating for several years and is constantly being improved and developed with the direct participation of its creators, employees of the Chelyabinsk Branch of the UB RAS Institute of Economics (Prof. V.N. Belkin, Head; N.A. Belkina, Doctor of Economics, O.A. Antonova, Candidate of Economics; N.A. Luzin). The employees of these enterprises at all levels are financially and morally encouraged, and, therefore, the level of innovative activity is significantly higher[18]. It should, however, be recognized that there are not many examples like that in the Russian practice. The enterprises where the innovative initiative exist need further development and improvement in two directions. **First**, it is necessary to encourage heads of the company (owners and managers) to lead the movement towards innovative development, with good understanding that their decisions and actions are beneficial. **Second**, the innovative activity of employees at enterprises and companies depends not only on material and moral incentives, but on the social and psychological environment in a team, corporate culture, and the corporate patriotism of all employees. But that is not enough. For an innovative spirit “to cross the company’s entrance gates” and enter the national level, we need to create a particular socio-political and organizational innovative environment: high quality of training, full-fledged research, the national government understanding the situation and ready for innovative development of the country, regions, municipalities.

Fourth, the excessive raw materials dependence has always been an enormous burden on the way to innovative development of the Russian Federation. The results

[18] V.N. Belkin, N.A. Luzin. Sovershenstvovanie upravleniia iinovatsionnym potentsialom promyshlennogo predpriiatiia [Improving the Management of Innovative Potential of an Industrial Enterprise]. Publishing House of the Institute of Economics, Ural Branch of the Russian Academy of Sciences, Yekaterinburg, 2014, pp. 81 – 85.

of the poll among the participants of the Krasnoyarsk World Economic Forum (2012) eloquently demonstrate that. S.A. Aleksashenko, the moderator of a session, asked a question, "What is hindering the introduction of innovations?" About 63% of the interviewed answered, "We do not need innovation. We have resources". The Forum was mainly visited by management and business elite!!! With such an attitude to the innovative development of the Russian economy, it is rather difficult to persuade and encourage the Russian people to participate in the innovative activity. Yes, persuasions and calls often look more like rituals in innovation.

Conclusions and recommendations for intense discussion

The analysis of the above mentioned problems connected with the behavioral attitude of various categories of workers, managers, specialists, representatives of science and education, and of all other groups of the population to the innovative development of the country allows us to formulate several conclusions that can serve as recommendations for impartial public discussion.

1. It is necessary to recognize that without serious, professionally elaborated theory of innovative development (Innovative theory of development, etc.), a coherent system of industrial and managerial innovative development of the country cannot exist or be launched. Attempts to work out similar theories have repeatedly been made. There are several research works that can serve as a prototype (the first version) of innovative development theory. One of them is "Innovative development: the economy, intellectual resources, knowledge management" written by a team of Russian and foreign scholars, experts in different areas of knowledge, under the general editorship of B.Z. Milner, Corresponding Member of the RAS. Among the authors, there are 28 leading experts in various fields of innovative development theory.

B.Z. Milner is a recognized expert in innovation management, the RAS academician; V.L. Makarov is an expert in knowledge economy; V.I. Maevsky is an expert in the theory of innovative knowledge evolution; A.A. Dynkin and N.I. Ivanova are experts in the problem of global challenges of innovation development and innovation policy of the Russian Federation; B. N. Kuzyk is an expert in the role of certain infrastructural systems in the innovative development; G.B. Kleiner, Corresponding Member of the RAS, is an expert in problems of micro- innovation development; B.N. Porfiriev, Corresponding Member of the RAS, is an expert in the influence of the Russian climate over innovation processes (possible risks, higher costs, downward trend of productivity). Professor David John Teece, Thomas W. Tusher Chair in

Global Business and Director of the Institute of Management, Innovation, and Organization at the Walter A. Haas School of Business at the University of California, Berkeley (USA) is one of the leading experts in the field of intellectual resources and intellectual potential, market models of their productive and effective use by companies[19].

The distinctive theoretical and methodological character of titles of works devoted to innovation is a sign of the growing search for a model (form) of the theory of innovative development patterns of the countries. They are: "Innovative paradigm XXI"[20], "Innovation policy: Russia and the World 2002-2010"[21]; "Investments in Innovation: Problems and Trends"[22], "Innovative Management in Russia: Problems of Strategic Management, Scientific and Technological Security[23], and etc.

2. The development of innovation economy in Russia implies creating a full-fledged innovative system that cannot work efficiently without both employees' and managers' interest and the interest of government officers, and top government officers of the Russian Federation, its regions and municipalities. I.P. Tsapenko and M.A. Yurevich write:

"It is significant that Russia, ranking 43rd according to the knowledge index by the World Bank rating of 2012, ranks 55th according to index of development of knowledge economy. This is due to our significant backlog in the index of economic incentives and institutional regime (117th out of 145 possible). So, there is no adequate environment (and, as a consequence, innovation-oriented behavior of the working population - *A. T.*) for the development of the knowledge economy"[24].

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[19] Innovatsionnoe razvitie: ekonomika, resursy, upravlenie znaniiami [Innovative Development: the Economy, Intellectual Resources, Knowledge Management]// Edited by B.Z. Milnera. INFRA-M Publishing House, Moscow, 2009.

[20] V.V. Ivanov. Innovatsionnaia paradygma XXI [Innovative Paradigm XXI]. Russian Academy of sciences. Nauka Publishing House, Moscow, 2011.

[21] Innovatsionnaia politika: Rossiia i mir 2002 – 2010 [Innovation Policy: Russia and the World: 2002 – 2010]// Edited by N.I. Ivanova and V. Ivanov; Russian Academy of sciences. Nauka Publishing House, Moscow, 2011.

[22] L.E. Mindeli, S.I. Chernykh, N. Ivanov. Investitsii v innovatsii: problem i tendentsii [Investments in Innovation: Problems and Prospects]// Ch. edited by L.E. Mindeli. Publishing House of RAS Institute of Science Study, Moscow, 2011.

[23] V.L. Makarov, A.E. Warshavsky. Innovatsionnyi' menedzhment v Rossii: voprosy strategicheskogo upravleniia i nauchno-tehnologicheskoi' bezopasnosti [Innovation Management in Russia: Questions of Strategic Management, and Scientific and Technological Security]. Nauka Publishing House, Moscow, 2004.

[24] I.P. Tsapenko, M.A. Yurevich. Rabotniki znanii: kakuyu rol' oni igrayut v sovremennoi' ekonomike [Knowledge Workers: Their Role in Today's Economy]. Bulletin of the Russian Academy of Sciences, 2014, vol. 84, No. 7, p. 600.

According to many national and foreign scholars, the world community sees Russia as a warped knowledge society whose scope and efficient use of knowledge and innovations are significantly limited in comparison with other countries. Many political statements and calls to form a "smart economy" and to increase the innovative activity of all segments of the population (including the call to create 25 mln high-tech jobs) remain only wishful thinking, supported neither by projects nor by real actions to create the appropriate motivational environment for all participants of the innovation process. Our task is not to put check marks but to make sure that innovators are morally and financially interested, so that they can be sure that their rationalization proposals and initiative will help fulfil "the state mission" on modernizing the domestic economy by transferring it into the "smart economy".

There in an increasing number of statements and reports of government officials and deputies about their readiness to innovatively contribute to public development by improving the quality of secondary and higher education, involving experts from abroad, and raising efficiency of the RAS. After reading them and listening to them, one can inevitably start thinking whether these statements are "political signals" to "shake-up" the systems of secondary and higher education, health care and academic science remaining from the Soviet Union and considered to be very efficient by the world community. These "reforms" distract thousands of people from their work for the benefit of the society. They are harmful for the functioning of other systems and restrict innovation and labor and inevitably lead to the distrust in authority and to the termination of "smart economy" development.

3. We strongly believe that the innovative process is a "road with oncoming traffic": from federal authorities to federal ministries, academic science, design centres and regions – to municipalities and production teams – to individual employees. From the employees and working teams, the initiative and proposals (projects and commitments) will be moving in the opposite direction, and all the institutions have to create good conditions for the execution of the program. Such a public contract may have an informal character, but it has to become a bridge between the initiative, entrepreneurial nature of the population and business and the "constitutional duty" of federal authorities to channel this "energy" of the population thorough numerous officials in the right direction by creating the necessary conditions.

This process may be entitled the National Program Design Plan of Innovative Modernization of Production and Formation of a knowledge-based economy.

The National Plan should include not more than 12-15 programs on priority areas of innovative development of the Russian society. Among them are: bringing up innovative dynamic experts through the renewed system of general and higher education; reviving academic and applied science and solving the problem of a government body supervising them. Industry-specific and regional priorities may be defined based on the results of the competition.

The draft version of the National Plan must be open for public discussion, and only after that can it be considered by the Legislative Assembly and approved by the President of the Russian Federation.

Each program should be overseen by one of the RF top government officers together with a small team from the ministries concerned who will regularly monitor its progress and make all the necessary corrections in time. Each program should have several project areas. They may be branch-specific, scientific and innovative, regional and local. Those implementing the project must be chosen based on results of a competition (sectoral, regional, municipal, or local). It is advisable to use business projects elaborated on the basis of public-private partnership (PPP) as the main mechanism for implementing the projects. **First**, this will allow combining organizational abilities of government authorities with entrepreneurial resources of business in one document. *Second*, it will significantly improve the quality of business projects, reduce the time for their implementation and significantly reduce costs. **Third**, the budget load will be reduced as 40-50% of the expenses may be paid by business under appropriate conditions. **Fourth**, this will increase public control over the implementation of the project and its social performance, as the Business Projects Implementation Council o will include representatives of public organizations and unions; moreover, constant monitoring of its performance and public discussion of the results will be held.

In this respect, quite revealing is the position of the Chinese Government, whose leader Li Keqiang, the second person in China, delivered two keynote speeches twice in 2014: the first was on 18 June at Chatham House (London, Royal Institute of International Affairs, or think tank) before experts who have been preparing decisions in the sphere of international relations for the British Empire for more than 100 years. The second speech was on 14 October at the "young" forum "Open Innovations", which is only becoming a Russian platform for the discussion of multifaceted problems of innovative development and the role of the population in its intensification[25].

[25] G. Kuznetsov. Velikoe kitaiskoe predlozhenie [Great Chinese proposal]// Izvestia [News]. October 20, 2014, No. 197, p. 5.

The head of the Chinese government has announced the country's priorities — stability, openness and innovation. At the same time, he regards the latter as a unity of technological and managerial innovative modernization like "two sides of the same coin". And this, in our opinion, is the fundamental difference in the approaches of Chinese and Russian governments towards innovative development. Russia's vision is predominantly technical and technological, with some emphasis on the renewal of organizational forms and institutions. The Chinese's idea is that of systemic innovative renewal for the entire reproduction cycle with the focus on getting systemic results. So, all restrictions for the initiative and entrepreneurial approach are removed at the low level, expanding the powers of local authorities and companies in terms of improving their motivation, financial and moral forms of collective and individual incentives for innovators and inventors, initiators of optimizing the managerial structure and other structures, etc.

One can conduct lengthy and useless debates over pros and cons of each approach (national, regional, and local) to forms and methods of increasing innovation activity of the Russian society and forming "smart economy". We should leave aside all the disputes and start to glean the details and bring the national innovation system into the working condition, restoring the systems of education, health and science on the basis of innovation. Not "for the sake of political rating", but only sincerely supporting the innovation process will we start involving the majority of the Russian population into the process of innovation. If we all do not let certain categories of our citizens "privatize" results of the public activity, we will accomplish our goals.

THE SYSTEM AND SUBJECT OF CONTRACTS FOR POWER SUPPLY THROUGH CONNECTED NETWORK

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Abstract: The author indicates that a specific feature of the contracts for supply of electric, heat power and gas through connected network (which he calls the contracts built under the power supply model) is that they formalize the underlying specific economic relations the basic feature of which is their extension to the resources consumption sphere. This circumstance is the main factor of singling out the obligations related to supply through connected network into a separate contractual type in the system of civil law obligations. For the first time in the legal literature, the author substantiates the inclusion of supply through connected network of not only electric, heat power and gas, but also of oil, petroleum products and cold water as a separate contractual type into such obligations. The author gives an unconventional interpretation of the concept of power capacity as the subject-matter (object) of the power supply contracts and introduces a new concept – the capacity of technical equipment as the subject-matter of the contracts for supply of resources through connected network built under the energy supply contract.
Key words: contracts for power supply through connected network, contracts built under the model of power supply contract, subject-matter of the contracts for supply through connected network, legal, ideological and material objects of the contracts for supply through connected network, economic relations in the sphere of resources supply through connected network, obligations to supply through connected network as a separate contractual type, power capacity as a subject-matter of power supply contract, capacity of technical equipment as a subject-matter of the contracts for resources supply through connected network.

An external form of an objective process of individualization of contracts for power supply through connected network in the system of civil law obligations is the existence of their independent legal regulation. For the first time, these relations were regulated in the 1991 Fundamentals of Civil Legislation, in which in Article 84, a corresponding contract was named “a contract for supply of power and other

resources through connected network". Before that, the relations in the sphere of power supply and use were regulated by subordinate - primarily ministerial - regulatory legal acts. Currently, the principal regulatory documents in the sphere of power supply are the Federal Law dated March 26, 2003 No. 35-FZ "On Electric Power Industry"[1], the Federal Law dated July 27, 2010 No. 190-FZ "On Heat Supply"[2], the Federal Law dated March 31, 1999 No. 69-FZ "On Gas Supply in the Russian Federation"[3]. In the Civil Code of the Russian Federation (hereinafter referred to as the CC), the rules governing the contract for power supply through connected network are found in § 6 "Power Supply" of Chapter 30 "Sale and Purchase".

In the modern legal literature, the concept prevails according to which not only the contracts for supply of electric power but also the contracts for supply of heat power, gas, oil, petroleum products, water and other commodities through connected network shall be concluded and performed according to the model of the contract for power supply provided for in §6 "Power Supply" in Chapter 30 of the CC. The rules governing the contract for power supply shall be applicable to supply of all other commodities through connected network, except electric power, unless otherwise established by law and other legal acts[4].

The basis of a model of power supply contracts is a contract for electric power supply. According to some legal scholars, the analysis of provisions in Article 539 (3) and Article 548 of the CC reveals that the rules governing the contract for power supply are primarily intended to regulate the relations in the sphere of electric power supply, whereas the rules in Article 548 are nothing more than a method of the legislative technique or a legal technicality. Subsidiary application of the rules of § 6 Chapter 30 of the CC to other contracts is aimed at optimizing legal regulation of respective economic relations and determined by a certain similarity in performance of obligations arising out of these contracts[5].

Upholding the main conclusions of the mentioned concept in terms of "legal technique", we, nevertheless, think that even if regulating relations of supply of not only electric power, but also of heat power, gas, oil, petroleum products, water and

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[1] Adopted by the State Duma on February 21, 2003.

[2] Adopted by the State Duma on July 09, 2010.

[3] Approved by the Regulation of the RF Government dated February 05, 1998, No. 162.

[4] See: M.I. Braginskiy, V.V. Vitryanskiy. Dogovornoe pravo. Kniga vtoraia: Dogovory peredachi imushchestva [Law of Contracts. Book two: Contracts of Property Transfer]. Statut Publishing House, Moscow, 2000, pp. 137 – 138.

[5] See: O.Yu. Shilokhvost. Spornye voprosy sudebnoi' praktiki v kontraktakh pitaniia [Disputable Issues of Court Practice in Power Supply Contracts]. INFRA-M Publishing House, Moscow, 2012, pp. 11 – 12.

other commodities (resources) through connected network with provisions in § 6 Chapter 30 of the CC is a legislative technique, its application is determined not only (and not so much) by a subjective discretion of the legislator, but by objective factors. The main factor is that the contracts drafted according to the model of power supply formalize the specific economic relations underlying them.

This specific character the main feature of which is extending relations of the parties to the consumption sphere was for the first time substantiated by us with respect to contracts for supply of electrical power, heat power and gas[6]. At the same time, in light of recent research conducted by the authors, there are reasons to argue, developing the ideas expressed earlier, that the parties build their relationships according to the model of power supply contract in the sphere of supply, through connected network, of not only electric, heat power and gas, but also of oil, petroleum products, water and other commodities because those contracts formalize specific economic relations which (by analogy with the abovementioned term) can be called economic relations built under the model of power supply. However, if the economic relations connected with supply of electric, heat power and gas are so specific for objective reasons by virtue of technical and technological peculiarities of transmitting the abovementioned commodities through connected network, there is no such a factor in the relations connected with supply of other commodities through connected network[7].

Most authors do not see the specificity of economic relations formalized by the mentioned contracts, considering them to be similar to the relations of delivery. Illustrative in this respect is the evolution of views of S.M. Korneev who raised, for the first time in juridical literature, the issue of close resemblance of legal features of power supply contracts through connected network, and namely the contracts for supply of electric, heat power and gas. Proceeding from the mentioned similarity, he concluded that these relations differ from the relations of delivery and can be con-

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[6] See: A.M. Shafir. Sistema khoziaystvennykh dogovorov na postavku elektricheskoi' teplovoi' energii i gaza// Dissertatsiia na soiskanie stepeni kandidata yuridicheskikh nauk [The System of Economic Contracts for Supply of Electric, Heat Power and Gas// Dissertation for the Degree of Candidate of Juridical Sciences]. Moscow, 1982, p. 208; Pitanie predpriiatii (pravovye voprosy) [Power Supply of Enterprises (Legal Issues)]. Legal literature Publishing House, Moscow, 1990, p. 144.

[7] See in detail: A.M. Shafir. Model' kontrakta na istochniki pitaniia cherez prisoedinennue seti i spetsifiki ekonomicheskikh otnoshenii' formalizovannykh im. V knige: sostoianie i dogovornoe regulirovanie predprinimatel'skoi' deiatel'nosti: kollektivnaia monografiia pod nauchnoi/ redaktsieii' professora V.S. Belykh [The Model of a Contract for Power Supply Through Connected Network and Specificity of Economic Relations Formalized by it. In the Book: State and Contractual Regulation of Entrepreneurial Activity: Multi-authored Monograph under Scientific Editorship of Professor V.S. Belykh]. Prospekt Publishing House, Moscow, 2015, pp. 205 – 236.

solidated into a single group which the author suggested calling *contracts for supply through connected network*. The author's conclusion about the resemblance of legal features of those contracts was primarily based on the analysis of their legal contents. S. M. Korneev had found no distinctions in the content of economic relations formalized by power and gas supply contracts through connected network from the relations shaped in the course of delivery of products[8]. This made the author to adjust his initial position and to assert, in his later publications, that a power supply contract falls under the category of contracts of purchase and sale because it comprises all elements of that contractual obligation[9]. This position is also shared by a number of other legal writers[10].

At the same time, it is the specificity of economic relations shaped in the process of supply of commodities through connected network different from the closest to them delivery relations, and transport relations, and other economic relations which predetermines the peculiarities of their contractual and legal regulation and a special place of the contracts built under the power supply model in the system of the law of obligations.

As was noted in the economic literature only two subsystems in the general structure of the fuel and power balance – the power and gas supply subsystems – are characterized by rigid interconnection of production, transport and consumption processes. Such systems are called physical and technical systems, since in the physical respect, their links represent hydraulic circuits[11].

Electric, heat power and gas, being the products of respective industries, predetermine to a large extent the specificity intrinsic to such industries: corporeality of main links (electric power transmission lines, pipelines); continuity, and often inseparability of the processes of production, transport and consumption; impossibility or limited possibility to store the products in any considerable amount; dependence of

[8] S.M. Korneev. Kontrakt na postavku pitaniia mezhdu sotsialisticheskikh organizatsii [Contract for Power Supply between Socialist Organizations]. Gosyurizdat Publishing House, Moscow, 1956, p. 107.

[9] See: S.M. Korneev. Pravovaia priroda dogovora energosnabzheniia [Legal Nature of a Power Supply Contract]// Zakon [Law]. 1995, No. 7, pp. 118 – 121.

[10] See: O.S. Ioffe. Zakon obiazatel'stv [Law of Obligations]. Moscow, 1975, p. 277; V.V. Vitryanskiy. Dogovor pitaniia i struktura dogovornykh otnoshenii' v sfere prodazhi elektroenergii i zakupki [Power Supply Contract and the Structure of Contractual Relations in the Sphere of Electric Power Sale and Purchase]// Zakon i economika [Law and Economy]. 2005, No. 3, pp. 34 – 49.

[11] A.A. Makarov, L.A. Melentiev. Metody issledovaniia i optimizatsii energeticheskogo khoziai'stva Novosibirska: SO Nauka [Methods of Research and Optimization of the Power Economy of Novosibirsk: SO Science]. 1973, p. 6; I.Ya. Furman. Economici magictral'nogo gazotransportov [Economics of Trunk Gas Transport]. Subsoil resources, Moscow, 1978, p. 9.

the operating mode of technical devices of power and gas supplying organizations on the power and gas consumption mode; existence of unified centralized power and gas supply systems uniting the production, transport and consumption processes which are interconnected with a continuous technological operating regime; substantial limitation of the day-to-day economic activities and the role of the centralized management due to existence in the unified power and gas supply systems of rigid technological ties between the elements, general criteria of operation and development of the whole system.

The mentioned typical features of electric power industry and gas industry are finally determined by specific physical qualities of electric, heat power and gas which make it impossible to produce, transport, store and consume them outside certain technical facilities – electric grids, pipelines, etc. By virtue of a limited possibility at the present stage of technical development, to store electric, heat power and gas in large volumes, production and technical ties between the consumer and producer are structured in such a way that does not provide for a stage of product accumulation and warehousing[12]. In this connection, in contrast to other production industries, production and consumption of power and gas are characterized by direct interconnection and interdependence between them. At the same time, electric power, heat and gas consumption is uneven for objective reasons and, therefore, the production inseparably associated thereto is structured with regard to this factor.

The connection of production to consumption finds its reflection in economic relations whose typical feature is the actual absence of the moment when the commodities – electric, heat power and gas - are found on the market at the stage of circulation, as a result of which the time of circulation in the economic relations connected with power and gas supply equals zero. Consequently, the activity of a supplying organization is directly connected with the activity of a consuming organization, which dictates the necessity to coordinate their operating modes.

The principal interest of a supplying organization in its economic relations with consumer is to realize, to sell its products. However, by virtue of indirect connection of the activity of a supplying organization with the activity of consumers and uneven character of consumption, power and gas supplying organizations can secure a due process of production and sale only if the recipient properly carries out operation of

[12] See: E.Kh. Kapelyan. Proizvodstvennye sily: struktura, funktsii, tipologiia (voprosy metodologii i teorii) [Production Forces: Structure, Functions, Typology (the Issues of Methodology and Theory)]// Nauki i tekhnika [Science and engineering]. Minsk, 1976, pp. 53 – 56; V.G. Marakhov. Struktura i razvitie proizvoditel'nykh sil sotsialisticheskogo obshchestva [Structure and Development of Production Forces of the Socialist Society]// Mysl' [Mysl]. Moscow, 1979, pp. 37 – 38, 124.

its technical facilities. The latter, however, is only the external expression of specific economic relations shaped between the parties which, governing the process of compensated realization (transfer) of products, extend to the sphere of their consumption as well.

These relations are not isolated – these are different stages of development of a single public and economic relation in the sphere of electric, heat power and gas supply through connected network. Objectively, the mentioned economic relation cannot be limited only to the first stage because without the second stage the existence and development of the first stage is impossible.

Economic relations connected with power and gas supply are property-related. As far as the first stage of their development – relations connected with compensated sale of products – is concerned, their property-related content raises no doubts. At the same time, the second stage – relations in the process of consumption of products – are as such not property relations, since they are directly formed not in respect of a material object but have *per se* an organizational character, as they are directed at organizing and streamlining the consumption process[13]. The process of the product use by consumer is covered by property relations in the sphere of electric, heat power and gas supply of , which constitutes their main specificity differentiating them, in particular, from the closest to them relations connected with delivery of products.

Economic relations in the sphere of supply through connected network of other commodities, in particular oil, petroleum products, cold water and other resources are often shaped according to the above mentioned economic model of power and gas supply. It should be underlined that in contrast to the power and gas supply relations, supply through connected network of other commodities does not in itself require, for objective reasons and by virtue of technical and process-related factors, the formation of specific economic relations defined by the absence of the stage of accumulating the products and the associated interconnection and interdependence of the activity on the part of a supplying organization and consumer. The matter is that there is no rigid interconnection here among the processes of production, transportation and consumption of resources. The ties between the elements of the system of supplying other resources through connected network do not present, in physical terms, hydraulic links, since oil and water supply suggests the technical pos-

[13] It is almost generally recognized in legal literature that in the cases where a property relation passes a definite stage in its organization in order to take a final shape, this last stage is the stage of development of the "organized" property relation constitutes a single relation with it.

sibility of stockpiling. And this predetermines that in the economic relations in the sphere of oil and water supply there is a rather lengthy stage of circulation which may be reduced or extended depending upon specific conditions of production and consumption. In other words, the economic relations in the sphere of supply through connected network of oil, petroleum products, water and other resources are, in principle, similar to the relations which arise in the process of product delivery.

Nevertheless, in practice, rather common are the relations in the sphere of supplying resources through connected network whereby the commodities supplied by a supplying organization are immediately used by their recipient (the oil is burnt, the water is consumed); therefore, the stage of accumulating resources is missing here either, which makes the economic relations of supply through connected network formed in this way similar to power and gas supply through connected network.

The only difference here is that in supplying electric, heat power and gas through connected network, specific technical and processing relations and the economic relations determined by them are formed by virtue of objective factors, whereas in supplying oil, water and other resources, such an objective aspect is missing in principle, and here we can talk about the formation of interconnection between the parties following the model of economic relations in the sphere of power supply in terms of subject matter and purpose.

In other words, if the relations between an organization supplying oil, petroleum products, water and other resources through connected network and its consumers do not presuppose any long technologically isolated and stage of circulation extended in time, and as a result, unevenness of consumption is covered not by a respective decrease or increase in the volume of consumer's reservoirs for storing commodities (resources) but by the activity of the supplying organization related to regulating their consumption, then there are economic relations of the parties built under the model of power supply. The principal characteristic feature of these relations is the immediate interrelation and interdependence of activity of a supplying organization and a consumer and the coverage by economic relations determined thereby of the resources consumption stage.

A key factor here is that in the economic relations of the parties, the stage of circulation equals zero, but not the factor of supply of resources through connected network as such. For example, if there arise technical possibilities allowing the consumers of electric, heat power and gas to accumulate them in significant volumes when supplying them through connected network, then, however ironically this might sound, the power and gas supply relations will not be built under the model of

power supply relations, since such interrelations will be determined by the stage of circulation of a certain length and, in this case, the immediate interdependence of the activity of supplying organizations from the consuming organizations' activity will disappear. As a result, in this case the relations in the sphere of power and gas supply will be limited to the moment of transferring resources to consumer and, thus, will be regulated by a contract of purchase and sale, just like the existing relations connected with bottled gas supply, and the energy in batteries.

In the opinion of many legal writers, among which one can find such well-known scholars as S.M. Korneev, M.I. Braginskiy, V.V. Vitrianskiy, etc., the main reason for individualization of the contracts for power supply through connected network in the system of civil law obligations is a special character of supplying electrical and heat power, gas, water, oil and petroleum products – by way of connection of consumers to the networks (pipelines) of a supplying organization[14].

In our opinion, the connected network and continuous supply of resources through it does not directly determine the legal specificity of contracts for commodities supply through connected network, but is the reason for special economic relations built under the model of power supply whose characteristics have been given above. The mentioned economic relations determine, in the long run, the specificity of contracts for supply of commodities through connected network which cover both the process of transmitting resources and their consumption, which distinguishes these contracts in the system of civil law obligations.

According to the prevailing position in the legal literature, the criterion for division of civil law contracts into types is the content of contractual obligations according to which types of contractual relations denote essential features of respective homogenous economic relations[15]. The contracts for supply of electric, heat power, gas, oil, petroleum products, water and other commodities through connected net-

[14] See: Sovetskoe grazhdanskoe pravo [Soviet Civil Law]. Volume 2// Edited by V.A. Ryasentsev. Legal literature Publishing House, Moscow, 1976, p. 73; Grazhdanskii' zakon [Civil Law]. Part 2. Zakon ob obiazatel'stvakh [Law of Obligations]// Edited by V.V. Zalesskiy. "MTK "Eastern Express" Publishing House, Moscow, 1998, pp. 96 – 97; V.V. Vitryanskiy. Dogovor kupli-prodazhi i nekotorye ego vidy [Contract of Purchase and Sale and its Certain Types]. Statut Publishing House, Moscow, 1999, p. 158.; Grazhdanskii' zakon: Uchebnoye posobiye. V dvukh tomakh. Tom II. Podtom 1 [Civil law: Textbook. In Two Volumes. Volume II. Semi-volume 1]// Editor-in-chief Professor E.A. Sukhanov. 2nd edition, revised and supplemented. "BEK" Publishing House, Moscow, 1997. p. 327.

[15] See: S.S. Alexeev. Grazhdanskoe pravo v period masshtabnogo stroitel'stva sotsializma [Civil Law in the Period of Large-scale Construction of Socialism]. Gosyurizdat Publishing House, Moscow, 1962 pp. 93 – 95; V.G. Verdnikov. A.Yu. Kabalkin. Grazhdansko pravovye formy tovarno-denezhnykh otnoshenii' [Civil Law Forms of Commodity-money Relations]. Legal literature Publishing House, Moscow, 1970, p. 67.

work are a legal form of formalizing specific economic relations which are not reduced, in terms of their content, either to relations underlying the contract of delivery or to any other relations formalized by civil law contracts. This gives us the ground to assert that as a legal form expressing essential features of specific homogenous economic relations whose main characteristic is their extension to consumption, the obligations formed according to the model of contracts for power supply through connected network have an objective ground for being singled out as a separate contractual type in the system of civil law obligations.

The concept of obligations related to the supply through connected network (CTCN)[16] as a separate contractual type which has been singled out in the system of civil law relations and which includes - as contract types - the contracts for supply of electric, heat power, gas, oil, petroleum products and cold water through connected network (CTCN contracts) allows us to answer in a novel way the question which gives rise to vigorous discussions in the legal literature concerning the concept and legal nature of capacity in the power sector, viewed here as the subject matter of power supply contracts.

In the federal laws governing power sector, the mentioning of power and capacity is generally reduced to two versions: the first one suggests synonymy of these categories, and the second distinguishes these concepts from each other as having independent meaning. Federal Law dated April 14, 1995 No 41-FZ "On State Regulation of Tariffs for Electric and Heat Power in the Russian Federation"[17], where in the version amended on 26 March , 2003 No. 38-FZ the capacity was mentioned almost for the first time, it was not considered as an independent object of circulation, since it was paid for simultaneously with electric power according to a double-rate tariff. The tariff for electric power was included into a double-rate tariff as variable costs, and the tariff for capacity as semi-fixed costs. At the same time, the Federal Law dated 04 November, 2007, No. 250-FZ[18] and the "Rules Governing the Wholesale Market of Electric Power and Capacity" (hereinafter referred to as the WMEPC Rules)[19] approved by the Regulation of the Government of the Russian Federation dated December 27, 2010 No.1172 (hereinafter referred to as the Rules) show a new

[16] [16] Supply through connected network.

[17] [17] Sobranie zakonodatel'stva Rossiiskoii Federatsii [Collection of Legislation of the Russian Federation]. April 17, 1995, No. 16, art. 1316.

[18] Sobranie zakonodatel'stva Rossiiskoii Federatsii [Collection of Legislation of the Russian Federation]. November 05, 2007, No. 45, art. 5427.

[19] Sobranie zakonodatel'stva Rossiiskoii Federatsii [Collection of Legislation of the Russian Federation]. April 04, 2011, No. 14, art. 1916.

approach according to which the capacity shall be sold in the market as an independent commodity along with power. According to para.42 of the WMEPC Rules, the capacity is "a special commodity the sale of which entails the obligation of the participant of the wholesale market to maintain the generating equipment to which it holds title or which belongs to him on any other legal ground in a state ready to generate electric power, including conducting the necessary repairs of the generating equipment, and the right of other participants of the wholesale market to demand its proper discharge in accordance with the respective obligation under the terms of concluded contracts for purchase and sale of capacity (delivery)"[20].

Two prevailing views are expressed in the legal literature on the issue of economic and legal content of the concept of capacity. According to the first one, the legal writers do not recognize the capacity as a separate commodity and consider it only to be a quantitative indicator of electric power[21]. The law scholars – proponents of the second point of view consider the capacity to be a separate commodity and recognize the capacity of the devices generating electric power, i.e. their ability to produce certain volumes of electric power determined by operating conditions, as a subject of circulation in the wholesale market[22].

The issue of the subject-matter of the contracts for power supply through connected network has not been yet unambiguously resolved by legal scholars. This is largely explained by the fact that the object of legal relation is a point of discussion here because the subject-matter of the contract is, after all, the object in respect of which a civil law relation arising out of the concluded contract is shaped. There are two principal viewpoints concerning the concept of the *object*. The first one proceeds from the idea that the object is not a constituent part of the concept of a legal relation, the object is respect of which the legal relations are established[23]. This position,

[20] Sobranie zakonodatel'stva Rossiiskoii Federatsii [Collection of Legislation of the Russian Federation]. April 04, 2011, No. 14, art. 1916.

[21] See: A. Lysenko. Vlast' kak samostoiatel'nyi' ob'yekt grazhdanskogo oborota [Power as an Independent Object of Civil Turnover]// Zakon i Economika [Law and Economy]. 2008, No. 12. pp. 43 – 47; S.Stoft. Ekonomiki sistemy pitaniia. Proektirovanie rynka electrichestva. Perevod s anglii'skogo [Power Systems Economics. Designing Markets for Electricity. Translation from English]// Mir [Mir], Moscow, 2006, p. 514; S.A. Svirkov. Osnovnye problemy grazhdansko-pravovogo regulirovaniia oborota pitaniya [Main Problems of Civil law Regulation of Power Turnover]. Statut Publishing House, Moscow, 2013, p. 31.

[22] See: V.F. Yakovlev. Pravovoe gosudarstvo: problemy stanovleniia [Legal State: Problems of Formation]. Statut Publishing House, Moscow, 2012, p. 307.

[23] See: N.G. Alexandrov. Zakonnost' i pravootnosheniia v sovetskom obshchestve [Legality and Legal Relations in the Soviet Society]. Gosyurizdat Publishing House, 1955, pp. 117, 119; D.D. Grimm. Teoriia ob'yektov prava [The Theory of the Objects of Rights]// Vestnik prava: zhurnal yuridichesk-

however, denies the opportunity to answer the main questions – for what purpose the legal relation arises. The rights that do not have their object, that are not aimed at anything particular have no sense for the bearer of such rights and are not, therefore, the rights in the true meaning of this word[24]. Another view prevailing in the legal literature appears to be justified: the object of a legal relation is what this relation is directed at and with which it interacts. According to such view, any legal relation performs a specific ancillary function of regulating social relations, phenomena, processes underlying it, therefore, there can be no legal relations without an object, i.e. relations not directed at anything[25].

However, there is no unanimity among scholars as to what is exactly the object of legal relations. In our opinion, the view of O.S. Ioffe who determined the object of a legal relation as something at which the legal relation is aimed or upon which it influences is correct. Every phenomenon influences any other phenomenon with its content. However, a civil law relation has legal, ideological and material content. Therefore, it can be aimed not only at legal but also at ideological and material objects. The willpower of a holder of rights and obligations constitutes the ideological object of a civil law relation. The legal object of a civil law relation is the conduct of the obligor to which the holder of the right is entitled. A material object of a civil law relation is the object possessed by the social relation underlying it and formalized by it[26].

As was already mentioned, the main typical feature of CTCN contracts is the coverage of consumption of resources by obligations relations, in connection with

ogo obshchestva Sankt-Peterburga [Law Bulletin: Journal of St. Petersburg's Law Society]. 1905, volume 7, pp. 161 – 162; Grazhdanskoe pravo: Uchebnik. V 2-kh tomakh [Civil Law: Textbook. In 2 Volumes]// Edited M.M. Agarkov, D.M. Genkin. Moscow, 1944, volume 1, p. 72; R.O. Khalfina. General'noe uchenie pravootnosheniiam [General Teaching of Legal Relation]. p. 214.

[24] See: O.S. Ioffe. Izbrannye proizvedeniia po grazhdanskomu pravu: iz istorii grazhdanskoi' mysli. Grazhdanskie pravootnosheniia. Kritika teorii khoziai'stvennogo prava [Selected Works in Civil Law: from the History of Civil Thought. Civil Relations. Criticism of the Theory of Economic Law]. Moscow, 2009, p. 589.

[25] See: Sovetskoe grazhdanskoye pravo [Soviet Civil Law]// Under editorship of D.M. Genkin. Yurizdat Publishing House, Moscow, 1950, pp. 110 – 111; O.S. Ioffe. Sovetskoe grazhdanskoe pravo (kurs lektsii') [Soviet Civil Law (Course of Lectures)]. Publishing house of Leningrad's University, Leningrad, 1958, p. 170; Yu.K. Tolstoy. K teorii pravootnosheniia [Concerning the Theory of Legal Relations]. Publishing house of Leningrad University, Leningrad, 1959, pp. 48-67.

[26] See: O.S. Ioffe. Sovetskoe grazhdanskoe pravo (kurs lektsii') [Soviet Civil Law (Course of Lectures)]. Publishing house of Leningrad's University, Leningrad, 1958, pp. 168 – 169; Izbrannye proizvedeniia po grazhdanskomu pravu: iz istorii grazhdanskoi' mysli. Grazhdanskie pravootnosheniia. Kritika teorii khoziaystvennogo prava [Selected Works in Civil Law: from the History of Civil Thought. Civil Relations. Criticism of the Theory of Economic Law]. Moscow, 2009, p. 589.

which the legal relations arising as a result of concluding these contracts are characterized by two stages in their development, each having its own objects.

The *first stage of development of a legal relation* under the CTCN has ideological and legal objects. The ideological object is the right of a consumer to demand from a supplying organization the maintenance of a proper level of the equipment's capacity to generate resources and a reciprocal obligation of the supplying organization to secure such a level, whereas the legal object is the activity of the supplying organization related to securing the readiness of the equipment to generate and transmit the resources in the volume and quality agreed upon in the contract with the consumer. The second stage of legal relations under the CTCN is characterized by two ideological, two legal and one material objects of a legal relation, which is determined by a specific nature of transmitting resources through connected network which actually concurs with their use. The mentioned concurrence of the processes of transfer and consumption of resources has a technical and process-related character, whereas the content of the economic activity of the parties is different here; so legal formalization of the process of transfer and consumption is different here too as well as the content of ideological and legal objects of legal relations. The ideological object in the process of transmission is the right of a consumer to obtain the resources for its economic purposes and the corresponding obligation of a supplying organization to enable a consumer to get the resources in the volume and of the quality agreed in the contract, whereas the legal object is the activity of the supplying organization related to transmission of resources. The ideological object in the process of utilization is the right of a supplying organization to demand from a consumer the efficient use of the obtained resources and the proper operation of its technical equipment in the process of resources utilization, as well as the obligations of the consumer of resources corresponding to such rights; the legal object is the activity of the supplying organization in the sphere of control over the efficient use of resources by the consumer and proper operation by the consumer of its technical equipment. The material object of the second stage of legal relations under the CTCN is the resources transmitted by the supplying organization and used by the consumer – electric and heat power, gas, oil, petroleum products, cold water.

It follows from the above that the power capacity is a subject-matter of power supply contracts, namely, the legal object of the first stage of development of legal relations arising out of concluded contracts for the supply of electric and heat power. In the process of supply through connected network of resources other than electric and heat power, there is no obligation of the supplying organization to maintain the

"capacity", as this concept is used both in the legislation and legal literature only in respect of power. However, in this case, in the framework of relations shaped under the model of power supply, there is an absolutely similar, in terms of its economic and legal nature, obligation of a supplying organization to carry out the activity agreed in the contract with the consumer for securing the readiness of the equipment to generate and transmit the resources to the consumer.

Thus, in accordance with the legislation currently in effect, the power capacity in the CTCN contracts is a characteristic of the subject-matter of only two types of such contracts – for supply of electric and heat power. At the same time, the term applied in the legislation governing electric power industry may also be extended to the relations arising in the process of supply through connected network of other resources as well – oil, petroleum products and cold water. Accordingly, in respect of legal objects of all component parts of the obligation under the CTCN contracts, the term "capacity of technical equipment" or any other similar term could be used.

LEGAL FORMS AND METHODS IN COORDINATING ACTIVITIES OF PARTIES TO THE INSOLVENCY (BANKRUPTCY) PROCEDURE

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Abstract: This article analyzes the concept, forms and specific features of coordinating activities of parties to the insolvency (bankruptcy) procedure. The author explores various methods of coordinating the activities of parties concerned within the framework of state regulation, identifying factors that pre-determine the diversity of coordination methods in the state regulation. The author identifies the content of interrelationships among forms of coordination within the state regulation and self-regulation, discloses the mechanism of their interaction, noting that the mechanism is primarily based on a combination of private law and public law devices for regulating relevant relationships.
Key words: insolvency (bankruptcy), legal forms, legal methods, coordination of activity, insolvency (bankruptcy) procedure, state regulation and self-regulation.

Relationships arising in the area of insolvency (bankruptcy) show the specific features pre-determined by the particulars of the very concept of insolvency (bankruptcy), its place, purpose, objectives in a market economy, diversity of parties, complexity of relations among various interest groups arising in the environment of competition of creditors' rights while the debtor's assets are insufficient.

Complex and diverse in its nature and structure, insolvency (bankruptcy) necessitates an adequate mechanism of legal regulation of relevant relationships, coordination of activities of parties to insolvency (bankruptcy).

The mechanism of legal regulation representing a complex of means, ways and methods of legal regulation materially affects coordination of activities of parties to an insolvency procedure, which ultimately pre-determines the exercise of their rights and legitimate interests, ensures the dynamics of the insolvency (bankruptcy) procedure itself, pre-determines the degree of efficiency of the insolvency (bankruptcy)

concept in a market economy, allows to solve the problem of choosing an acceptable bankruptcy mechanism.

Note that the issue of coordinating activities of parties to an insolvency (bankruptcy) procedure does not frequently become the subject matter of research in the Russian legal literature. Existing research mostly concerns an analysis of self-regulation issues and partly – of state regulation. However, in our view, research into coordination of activities of parties to the insolvency (bankruptcy) procedure should not be limited only to the above mentioned forms; due regard should be given to quite complex aspects of determination, correlation among various forms, ways and methods of state regulation and self-regulation.

Addressing the issue of what coordination of activities of parties to the insolvency (bankruptcy) procedure is like, what forms and types it may take, it is necessary, first and foremost, to examine the etymology of this notion. In the Russian language, *coordination* means alignment, matching, putting in order, bringing into compliance (actions, concepts, components of anything), setting a proper correlation between/among certain actions or phenomena[1].

Taking into account this definition and multifaceted interests arising in the course of bankruptcy, *coordination of activities of parties to an insolvency (bankruptcy) procedure represents a certain mechanism of creating the most adequate agreed-upon correlation of actions taken by parties and decisions made by them and intended to exercise their rights and legitimate interests, on the one hand, and to achieve the objectives envisaged by the bankruptcy concept, on the other.*

Coordination of activities of parties to an insolvency (bankruptcy) procedure is distinct in certain specific features which are pre-determined by the specifics of the bankruptcy concept itself, which is designed, on the one hand, to counter individual interests of certain persons and, on the other hand, to ensure a balance of interests and stability of the market on the whole. Both the theoretical and practical significance of such an approach lies in the recognition of the social nature of the insolvency concept, with this nature creating a mechanism to resolve disagreements between parties to the insolvency procedure inevitably arising due to the insufficiency of a debtor's assets to pay creditors' claims.

Certainly, various interests of relevant parties should be taken into account in the concept of insolvency.

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[1] S.I. Ozhegov. Slovar' russkogo iazyka [Dictionary of the Russian Language] // Editor by N.Y. Shvedova. 14th edition, Moscow, 1983, p. 261.

Furthermore, several interests may exist within one specific relationship. Existence of each of the parties' own interests does not mean that they cannot have common interests.

In other words, in coordinating activities of parties, the legislator must "give equal rights" to creditors who are not equal in their legal status, in particular, secured and unsecured creditors, preferential and ordinary creditors.

The difficulty in achieving this objective is that creditors enter into such relationships with each other in which they, exercising their rights, mutually diminish the outcome of their conduct intended to exercise such rights at the expense of the debtor's assets, striving to pursue their interests to the maximum extent while the debtor pursues its own interests by paying its creditors' claims out of its assets.

Moreover, in bankruptcy the point is not about a contradiction between rights and interests of a debtor and those of its creditors. Their rights and interests should be considered in the system of rights and interests of the other parties to insolvency proceedings, including public interests.

The interrelation between public and private interests is quite complex in its nature being determined by intrusion of the state in private matters. Furthermore, public interests are not always implemented through the accomplishing private interests of parties to insolvency (bankruptcy) as in the case when, for example, a company may be rehabilitated by restoring its solvency and saving its assets from piecemeal sell-off.

However, whatever the government intrusion in private matters is, one should proceed from the assumption that the principle of reasonable balance between public and private interests should be underlying.

The balance of interests in insolvency is ensured by the legislator through various means, including by public law impact on the process of exercising rights and legitimate interests by the parties, which pre-determines various forms and methods of state regulation of insolvency (bankruptcy).

Certainly, state regulation is one of basic forms of coordination in the area of insolvency (bankruptcy). The methods of coordinating activities of parties to an insolvency procedure as part of state regulation vary: they include direct prohibitions of certain conduct, for example, inability to pay creditors' claims in the course of insolvency (bankruptcy) individually, enshrining a certain system of restrictions (property-related, organizational, financial, informational etc.), in particular, in respect of a debtor, setting up a mechanism to compel parties involved in an insol-

vency procedure to take certain actions and make decisions, for example, in respect of an insolvency practitioner, etc.

The diversity of means in coordinating activities of parties as part of state regulation is, in our view, pre-determined by various factors: **first**, by the diversity of legal forms of state participation in insolvency, including interests of the state as a creditor; **second**, necessity to ensure the balance of interests among various groups of parties in the area of insolvency; **third**, the government having social functions, which pre-determines the necessity to incorporate in the legislation rules stipulating social rehabilitation of the debtor's employees, specifics of insolvency (bankruptcy) for certain categories of debtors (for example, backbone enterprise in a company town, strategic, agricultural enterprises, etc.) and other. **Moreover**, the concept of insolvency (bankruptcy) itself in its broadest sense represents government intrusion where it concerns payment of taxes to protect rights and interests of a debtor and its creditors. From this point of view, this concept should be regarded as an instrument of the government to ensure stability, the balance of rights and interests of parties to business transactions and ultimately of the entire market as a whole.

It should be noted that one of the legal forms of the government's participation in the insolvency (bankruptcy) procedure is proceedings in commercial courts. One of the ways of coordination where a commercial court is directly involved is a mechanism whereby the commercial court gives prior approval of the activities undertaken by parties to an insolvency (bankruptcy) procedure, for example, to identify creditors' claims, commence a particular bankruptcy proceeding, approve an insolvency practitioner's report, etc. Certain powers of a commercial court are related to reasonableness of creditors' claims and identification of such claims, supervision over an insolvency practitioner's activities, etc.

Each of the above measures taken by a commercial court results in the entry of a particular judgment. At the same time, a commercial court by virtue of its legal nature and competence may not take all but only some actions and enter relevant judgments.

However, decisions which fall outside the purview of commercial courts are to be made for the sake of functioning and dynamics of relationships arising in insolvency. These are decisions made by insolvency practitioners, a self-regulated organization of insolvency practitioners and a meeting (committee) of creditors. The above allows one to assert that a major role in the area of insolvency (bankruptcy) is played by various methods of coordination of activities of parties by way of self-regulation.

Without going into details of researching legal problems in self-regulation in the course of bankruptcy as such research requires separate in-depth analysis, I would like to note that differentiating between these forms of coordinating activities of parties is not as important as identifying the content of interrelations between them and the mechanism of their interaction.

In our opinion, the mechanism of their interaction is primarily based on a combination of private law and public law devices for legal regulation of relevant relationships.

Specifically, a special role in insolvency is played by one of the major private law devices: agreements entered into at various stages of insolvency proceedings. This is a universal remedy. The significance of this remedy is recognized by the legislator. The 2002 Insolvency Law provides for entry into various agreements, in particular, bailout agreements, agreements for enforcement of debtor's obligations as per repayment schedule to be entered into as part of financial rehabilitation, agreements with a third party (parties) and debtor's governing bodies as to provision of funds to discharge the debtor's obligations in external administration, agreements for sale of debtor's assets through an auction, etc. Please note that entry into a particular agreement is preceded making a decision by creditors' meeting which cannot be regarded as a private law device in the area of insolvency (bankruptcy).

Another example: the Insolvency Law provides for assignment of the debtor's receivables in bankruptcy proceedings but a relevant agreement may be entered into by a receiver only subject to consent of the creditors' meeting on the basis of its resolution. A similar provision is found in the rule of the Insolvency Law stipulating a possibility to enter into agreements for the sale and purchase of the debtor's receivables as part of external administration.

According to the Law, major transactions and interested party transactions are made by an external administrator only subject to consent of the creditors' meeting (committee) on the basis of its resolution.

We note that the legislation affects not only a contract or an agreement in general but their individual terms as well, in particular, the term on the contract price. For example, the initial price for assets put up for an auction as part of external administration is set in a resolution of the creditors' meeting (committee).

Therefore, public law devices in regulation of insolvency directly affect the content or procedures of application of private law devices, ensuring and, to a large extent, pre-determining the nature of coordination of activities of parties to insolvency proceedings.

In turn, private law devices facilitate application of public law remedies. In particular, provisions of Article 95 of the Insolvency Law provide for a moratorium on satisfaction of creditors' claims, which certainly represents a public law remedy. Imposition of a moratorium entails a number of legal consequences, one of which is accrual of interest on the amount of claims made by a creditor in bankruptcy and a competent authority. At the same time, an agreement between an external administrator and a creditor may provide for a smaller amount of payable interest or a shorter period for accrual of interest as compared to those contemplated by the Law.

It is noteworthy that many agreements in the process of business activities are made in compliance with the Model Agreements approved by government authorities, which results in a transformation of a private law remedy into a public law remedy.

Specifically, for the purpose of implementation of Federal Law No.83-FZ "On Financial Rehabilitation of Agricultural Producers" dated July 9, 2002, the Russian Government approved the Model Agreement on Debt Restructuring and the Model Agreement on Writing off Penalties and Fines.

In the reasonable opinion of E.P. Gubin, "many private law remedies are transformed into private-public remedies and are widely used in regulation of business activities. Classifying such remedies, for example, a contract, only as private law devices is not consistent with the realities of contemporary regulation of business relationships. This conclusion does not rule out potential application of particular remedies in private, including civil, relationships, does not downplay the significance of such remedies but only expands our understanding of the essence of these concepts"[2].

In the course of legal regulation in insolvency (bankruptcy), private law and public law remedies interact but, as a rule, public law remedies precede application of private law remedies. The above examples represent a clear confirmation of this. However, the opposite is not ruled out. For example, an agreement for the sale and purchase of a company as a single property complex entered into following a public auction is subject to state registration.

A *characteristic feature of interaction between private law and public law remedies* in the course of legal regulation of insolvency matters is that the entity applying both remedies is one and the same. The state involved in insolvency (bankruptcy)

[2] E.P. Gubin. Gosudarstvennoe regulirovanie rynochnoi' ekonomiki i predprinimatel'stva: pravovye problemy [State Regulation of Market Economy and Entrepreneurship: Legal Problems]. Moscow, 2005, p. 171.

proceedings concurrently advocates both private law and public law interests. This makes an impact on the duality of the state's legal position in bankruptcy proceedings and the nature of its functions.

First of all, the state acts as a third priority creditor. The legislator adheres to the principle of balancing rights of competent authorities and creditors in bankruptcy. Specifically, they have equal rights to file a bankruptcy petition against a debtor in a commercial court. Additionally, competent authorities and creditors in bankruptcy have equal voting rights at creditors' meetings.

At the same time, the state also acts as a party to public law relationships in insolvency proceedings. This is primarily manifested in the control over the bankruptcy procedure by the state represented by a regulatory authority or an authority in charge of supervision and oversight of self-regulating organizations of insolvency practitioners.

In the course of interaction between private law and public law remedies, they tend to converge, which is primarily manifested in the increasing role of the court in resolution of bankruptcy-related disputes when applying public law devices, for example, challenging the conduct of the debtor's CEO, insolvency practitioner, etc.

The described mechanism of attaining the most adequate balance in parties' conduct and their decisions certainly does not exhaust all of the methods of coordination of activities of parties to insolvency (bankruptcy) but it determines in a significant way the nature of their interaction intended for the exercise of their rights and legitimate interests, on the one hand, and fulfillment of the goals enshrined in the concept of bankruptcy on the other.

UNDERSTANDING ORIGINS AND ROOTS OF THE "RUSSIAN ARBITRATION"

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Abstract: The article is devoted to the history of Russian arbitration. The authors emphasize specific differences between commercial arbitration and Russian state arbitrazh courts. A special focus is made on the arbitrability of foreign arbitral awards in Russia.
Key words: commercial arbitration, arbitrazh courts, arbitrability, enforcing foreign arbitral awards, the Russian court reform, dispute resolution, commercial (economic) courts, settlement of disputes.

1. Deep roots of differences between commercial arbitration courts and "State Arbitrazh Courts"

Our generation still remembers the times of economic reforms of the 1990s, when the state courts were trying "to put on a mask of arbitration" because they were called "state arbitration courts". Up till now, they preserved this name "state arbitration (or arbitrazh) courts"[1], being in fact commercial courts designed to resolve eco-

[1] One should keep in mind that in some sources the state arbitration courts are often referred to as "Arbitrazh Courts" to avoid the confusion. See, for example, Albert Jan Van Den Berg: "Enforcement of Arbitral Awards Annulled in Russia. Case Comment on Court of Appeal of Amsterdam, April 28, 2009"// Zhurnal mezhdunarodnyi' arbitrazh [Journal of International Arbitration]. 2010, 27 (2), pp. 179 – 198. It is worth mentioning that the incorrectness of the use of the term "commercial arbitration" with respect to internal (local) dispute resolution was stressed in the Legal opinion of the the State Legal Directorate in the Presidential Executive Office , signed by its Head L. Brychova, which dealt with the drafts of the reform of the arbitration (tertiary) courts. According to this opinion, the term "arbitration" should refer to international commercial arbitration and not to the inland disputes. With respect to the purposes of the present article, we deliberately use the term "arbitration" in its initial original sense of commercial arbitration. In specific cases, we will use "state arbitration courts" to stress the difference between state courts and non-state bodies for dispute resolution represented by commercial arbitration.

nomic disputes. . As we see, the main problem with these so-called "arbitrazh" courts in Russia is their historic roots deriving from commercial arbitration. The old "arbitration roots" still influence much of the practice as well as the procedures for resolving economic disputes and the general attitude of the state arbitrazh courts to "real" commercial (non-state) arbitration, or "tertiary courts", according to the terminology used to designate commercial arbitration for resolving local (internal) disputes. To this effect, one should keep in mind the specific understanding of the term "arbitration" that continues to affect legal minds specializing in dispute resolution proceedings.

After the October revolution of 1917 and era of nationalization of industries, the new government started the "New Economic Policy" (or "NEP") which provided, above other measures, for the support of competition between "old bourgeois enterprises" and new state-owned "socialist factories". The new factories were governed in accordance with revolutionary order and communist discipline. The civil procedure legislation was old-fashioned as well as the "old" courts, which applied the "old tsarist economic legislation". In order to provide adequate dispute resolution mechanism for the disputes arising between state-owned enterprises in an amicable way consistent with the nature of these enterprises, special arbitration commissions were created in accordance with the Regulation of the CEC (the Central Executive Committee) and the SPK (the Soviet of Peoples' Commissars) of September 21, 1922. Initially, those Arbitration Commissions were non-state by nature, more like true arbitration bodies which corresponded to the amicable way of the disputes resolution. But very soon, they turned into state regulatory bodies empowered to resolve disputes between state–owned enterprises of certain industries. Very soon, it became clear that the old rules of economic interchange could hardly meet the requirements of the centrally planned economy. The new type of economy was based on the system of state ownership over enterprises, state planning of enterprises' activities, including production, development of the enterprise through acquisition of new equipment, etc. Sometimes judgements passed by the "state arbitration courts" of the new type had to be based on the idea of revolutionary rationalism rather than on the rules of the Civil Code, which had been modernized by 1922 but mainly reflected good old traditions of the Russian pre-revolutionary law. So the rulings and by-laws of a corresponding regulatory authority (e.g. "narkomat"-Peoples' Kommissariat - or ministry)_prevailed over the rules of the Code. And oftentimes such rulings were issued in order to resolve a conflict situation as well as to prescribe how to deal with similar situations in future.

Before the perestroika had begun, the State Arbitration (the so-called Arbitrazh) Court under the USSR Council of Ministers represented a semi-judicial/semi-administrative conglomerate. The ministries had Arbitration Courts within their administrative structures. These bodies, on the one hand, resolved disputes within the corresponding industry, fulfilling the function of a state court. On the other hand, they bodies had the power to issue regulations which were obligatory for state enterprises. In the planned economic system, such a way of organizing dispute resolution proved to be effective and made it possible to correct and improve contractual ties between state enterprises[2] almost immediately.

2. The Roots and Origins of International Commercial Arbitration in Russia

Parallel to the new internal semi-arbitration/semi-administrative court system, the system of international commercial arbitration was initialized approximately at the same time - at the beginning of the 1930-s. It also represented an attempt to create a new type of economy and a new type of state. Such modernization required new technologies, equipment, expert assistance, etc., so the contacts with companies from foreign countries turned out to be necessary. In the case of intensive contacts, some conflicts or misunderstanding are inevitable. In the first years of the New Economic Policy, the Soviet entrepreneurs, when dealing with their foreign companions, often turned to commercial arbitration as an effective mechanism of the dispute resolution. The most preferred arbitration institute at that time was the Arbitration Institute of the Stockholm Chamber of Commerce. One of the most known and discussed disputes connected with the involvement of the Soviet state in the arbitration proceedings was the nationalization of the concession enterprise Lena Goldfields. The concession agreement provided for the resolution of potential disputes in the Stockholm Arbitration. The commentators of the Lena Goldfield dispute noticed that, starting in 1920, the international trade with Russia and later with the USSR had developed in political,

[2] In some way, the Russian experience of semi-judicial semi-administrative proceedings was reproduced in some US regulatory bodies, e.g., the Securities and Exchange Commission (the SEC), within which the Office of Administrative Law Judges (the ALJ) was created. By means of the Administrative law proceedings, the ALJ are empowered to impose a variety of sanctions in the name of the SEC. Still, the ALJ decisions do not possess the same power as a final court decision. The party not satisfied with the decision may appeal to the US Court of Appeals which performs a de novo review and can affirm, reverse, modify, set aside or remand the above-mentioned ALJ decision. Finally, with respect to the US experience, there is no conversion between administrative (SEC's) and judicial powers. The SEC does a part of work but the final decision is made within the US Court of Appeals. About the Office of Administrative Law Judges see: http://www.sec.gov.alj .

economic and legal conditions that were hostile to the idea of commercial arbitration but, nevertheless, the arbitration continued to develop[3]. Such an approach was the result of the interest of the Russian and later Soviet state in attracting foreign capital and economic cooperation with "Western countries". On the other hand, "one of the features of the Soviet leadership was legal nihilism and deep ignorance of commercial law and inconsistency with any independent mechanism of the resolution of the civil law disputes"[4]. *An attempt to combine the two contradictory principles* made it necessary for the government to find a solution to a variety of very important problems, such as:

1) the possibility of applying the supra-national or, to be more precise, "beyond-national" law, e.g. general principles of laws like the UNDROIT Principles of International Commercial Contracts 2010 which were worked out by a non-government international organization and are used in international commercial contracts);

2) the right of the majority of the arbitrators to continue and finalize the dispute resolution procedure in the absence of the consent of an arbitrator;

3) the right of arbitrators to decide whether they have enough competence to resolve the dispute (competence of the competence) as well as the problem of the arbitration clause autonomy[5].

The *development of commercial arbitration in Russia* before 1917 and later in the USSR is connected with the activities of the Foreign Trade Arbitration Commission (the FTAC, in Russian – Внешнеторговая Арбитражная Комиссия, ВТАК) which was created in 1932[6] at the Chambers of Commerce. It was created for settling disputes arising from foreign trade contracts concluded by Russian foreign trade organizations with foreign firms. As the economic ties of the newly created Soviet Union grew, it was necessary for the country to create a dispute resolution mechanism. During the period of 1932 till 2011, the FTAC, which later was reorganized into the International Commercial Arbitration Court (the ICAC in Russian: Международный

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[3] V.V. Veder. Arbitrazhnoe razbiratel'stvo Lenu Goldfilds: istoricheskie korni trekh idei' [The Lena Goldfields Arbitration: the Historical Roots of the Three Ideas]// ICLQ, 1998, v. 47, p. 744.

[4] Ibid.

[5] V.V. Veder. Arbitrazhnoe razbiratel'stvo Lenu Goldfilds: istoricheskie korni trekh idei' [The Lena Goldfields Arbitration: the Historical Roots of the Three Ideas]// ICLQ, 1998, v. 47, p. 748.

[6] The Commission was created by the Regulation of the CEC (the Central Executive Committee) and the SPK (the Soviet of Peoples' Commissars) of June 17, 1932, No. 281 "On the Foreign Trade Arbitration Commission at the All-Union Chamber of Commerce".

коммерческий арбитражный суд - МКАС (МКАС))[7], resolved more than 8000 disputes[8].

The *idea of creating the FTAC* was connected with the desire to bring commercial arbitration from abroad to the Soviet Union. Such a transfer would be possible only if dispute resolution proceedings were carried on in accordance with internationally recognized standards. Both the Commission and its arbitrators did their best to resolve disputes coming before them in a highly qualified manner, applying rules of foreign and international law. Generally, their awards met international standards and the proceedings were carried out in a transparent manner[9]. So the FTAC arbitration turned out to be something very special within the socialist system of dispute resolution.

In 1993, the Law on International Commercial Arbitration was adopted by the Supreme Soviet of the Russian Federation. In the preamble, the Law stipulated that it implemented the rules of bilateral treaties dealing with problems of arbitration as well as the uniform 1985 UNCITRAL Law on international commercial arbitration. So the Law of 1993 meets the best international standards of international commercial arbitration. One of the peculiarities of the 1993 Law is that it contains the Regulations on the International Commercial Arbitration Court as Supplement 1. It this case, we have an unprecedented legal solution: the document defining a legal status for an institutional arbitration court is included in the Law. Such a decision appears to be quite reasonable if we look into Section 4 of Supplement 1 to the Law of 1993, which provides that the ICAC is the legal successor of the FTAC, so the ICAC had powers to resolve disputes arising out of contracts containing the arbitration clause for the FTAC as a competent arbitration court.

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7 Available at: http://www.tpprf-mkac.ru/ .

8 Mezhdunarodnyi‘ kommercheskii‘ arbitrazh: opyt otechestvennogo regulirovaniia i samoregulirovaniia. 80 let mezhdunarodnomu kommercheskomy arbitrazhnomy sudy pri torgovo-promyshlennoi‘ palate Rossiiskoii Federatsii [International Commercial Arbitration: Experience of Domestic Regulation and Self-regulation. 80 years International Commercial Arbitration Court at the Chamber of Commerce Russian Federation]// Sbornik izbrannykh nauchnykh, normativnykh, arkhivnykh, analiticheskikh i inykh materialov [Collection of Selected Scientific, Regulatory, Archival, Analytical and other Materials]. Moscow, 2012, v. 1, p. 30.

9 See: E. Rashba. Uregulirovanie sporov v kommercheskikh otnosheniiakh s Sovetskim Soyuzom [Settlement of Disputes in Commercial Dealings with the Soviet Union]// Obzor zakonodatel'stva Kolumbii [Columbia Law Review], 1945, v. 45, issue 4, p. 551; Pisar Samuel. Kommunisticheskaia sistema vneshne torgovogo resheniia [The Communist System of Foreign Trade Adjudication]. Harvard Law Review, June, 1959, v. 72, issue 8, p. 1480; Larkin Edward. Vliianie sotsializma na mezhdunarodnyi torgovyi' arbitrazh v SSSR [The Effect of Communism on International Trade Arbitration in the Soviet Union]. The George Washington Law Review, 1965, v.33, issue 3, p. 733 – 739.

The *specific position of the FTAC* (it was created in accordance with an act of the executive power) and then of the ICAC (the legal status was determined in the Law) demonstrates the specific attitude of the Soviet and later Russian government to everything that was connected with foreign or international issues. This approach made it possible for Russian legislation to correspond to international standards of commercial arbitration in the best possible way.

Still, the *liberalization of economic and political regime and economic reforms in Russia* made it necessary to develop an appropriate dispute resolution system. The Law on tertiary (arbitration) courts was adopted in 2002. So at present time, separation between international arbitration and internal tertiary (arbitration) dispute resolution systems exists, but in Russia, this difference exists only at the level of legislation. In practice, separating internal and international arbitration is very difficult. Such separation seems absolutely impossible if we take into consideration the fact that, according to Article 1 (2), the following disputes are referred to international commercial arbitration – "disputes arising between enterprises with foreign investment, international associations and organizations established in the territory of the Russian Federation". One should keep in mind that according to Article 4 (6) of the Russian Federal Law of July 9, 1999 No.160-FZ "On Foreign Investments on the Territory of the Russian Federation", a Russian commercial organization becomes a commercial organization with foreign investments on the day when a foreign investor becomes a participant of such an organization, and it ceases to be the organization with foreign investments on the day when the last foreign investor ceases participation. So, one can see that a status of an organization with foreign investments can change very rapidly (especially if shares of a joint stock company are traded in an exchange). These changes affect numerous details of the dispute resolution: the disputes (in the case the arbitration takes place in Russia) in which a party is an organization with foreign investments, the Law on International Commercial Arbitration is applied, and if the last of the foreign participants ceases participation in the organization, there is a possibility of applying the Law on Tertiary Arbitration. In this situation, the institutional arbitrations engaged in dispute resolution prefer to combine the competence to resolve both domestic (internal) disputes and international disputes. But, in fact, there is not much difference between the awards - international or domestic.

In practice, there is no difference between an award decision made by an international commercial arbitration court and a tertiary court's decision / award. Formal requirements for an international award are found within Article 31 of the Law on

International Commercial Arbitration, which almost completely repeat Article 31 of the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments adopted in 2006) (further - UNCITRAL Model Law). The requirements with respect to the form and the contents of an award of an internal tertiary arbitration court are found in Article 33 of the Law on tertiary courts. Although these requirements seem to be more detailed, the essence is almost the same.

3. The Russian state arbitration and the international commercial arbitration at the time of "perestroika"

At the times of the Perestroika, the "state arbitration courts "formally" lost their administrative functions and ceased to represent their hybrid semi-judicial origin. But there was an idea that these semi-courts/semi-regulators, by taking a decision resolving a conflict, at the same time provided for preventive measures regulating activities of the enterprises involved in conflict situation.

With this idea, the Russian arbitration courts survived in the "perestroika" and are operative till the present moment. One of the first laws on economic reforms was the Federal Constitutional Law "On Arbitration Courts in the Russian Federation" of April 28 1995, No.1-FKZ. Article 7 of the said Law provides that acts adopted by arbitration courts, their decisions, definitions, regulations are obligatory for all federal state bodies, local government bodies, other bodies, organizations, officials, citizens and are to be executed on the entire territory of the Russian Federation. The provision of Article 7 represents a rudimentary approach which reflects the trend to fulfill the "double function" of the body resolving the disputes and at the same time carrying out a "regulatory function" over the parties.

Although the State Arbitration courts were in fact state economic courts, there were some features that had remained from arbitration proceedings. First of all, the dispute resolution proceedings were less formal than those in ordinary courts of general jurisdiction[10]. Starting from the 1990s, the reform of the State Arbitration Courts was aimed at formalizing their proceedings and pushing them towards proceedings in ordinary courts. The Russian Arbitration Procedural Code of 2002[11] is an acting document which is applied along with the Russian Civil Procedure Code.

[10] For example, the proceedings in the courts of general jurisdiction were carried on in accordance with the Civil Procedure Code (CPC) while the Arbitration Courts operated in accordance with the Regulations adopted by the USSR Council of Ministers which formally was an act of the executor (not legislative) power.

[11] In fact, there were 3 "editions" of the Arbitration Procedural Codes: the Code of 1992, the Code of 1995, and the present version of the Arbitration Procedural Code of 2002.

One of the most difficult problems was to separate the competence of the Court systems including the power to execute real arbitration (tertiary courts) awards. At the end of the XX century, Arbitration Courts in Russia competed actively with courts of general jurisdiction for the powers of execution of foreign arbitration awards[12]. Neither APC of 1992, nor APC of 1995 provided for such competence, and the powers to execute foreign arbitration awards belonged to courts of general jurisdiction. The State Arbitration Court was granted the powers to enforce foreign arbitration award under the APC of 2002.

A *brief historical analysis of the origin of the State arbitration courts* demonstrating the "arbitral past" of these "state arbitration" courts, in our opinion, helps to understand the deepest roots of the existing dichotomy of the Russian judicial system. This dichotomy leads to some problems and instability connected with the division of competence between the arbitration courts and courts of general jurisdiction. For some time, this competition for the competence concerned the enforcement of foreign awards but at the present moment the situation resulted in the "victory" of the State arbitration courts. This dichotomy in fact is the problem of "growth" - the fast development of the legal infrastructure which should correspond to the requirements of market reforms of the society.

The "arbitral roots" of the state arbitration courts may be the real cause of the "arbitrocide" tendency (the term analogous to "genocide" with respect to commercial arbitration)[13]. Unfortunately, this tendency exists in Russia in the field of dispute

[12] See: A.I. Muranov. Ispolnenie inostrannykh sudebnykh i arbitrazhnykh reshenii': kompetentsiia rossiyskikh sudov [Enforcement of Foreign Judgments and Arbitral Awards: the Competence of the Russian Courts]// Yuridicheskii' dom „Yustitsinform" [Legal House „Yustitsinform"]. Moscow, 2002; the book by Aleksander Muranov was published at the times when there was a discussion, which of the judicial bodies will be responsible for the enforcement of the foreign arbitral and judicial decision in Russia; in his book Aleksander Muranov gives legal basement of the position according to which the general (civil) courts (not the state arbitration courts) should enforce the foreign court decisions and arbitral awards but with the adoption of the new Arbitration Procedural Code in 2002 the State Arbitration courts received the powers to enforce the foreign awards.

[13] This term was used in the article devoted to the analysis of the tendencies in the development of commercial arbitration in Russia. See: Mezhdunarodnyi' kommercheskii' arbitrazh: opyt otechestvennogo regulirovaniia i samore-gulirovaniia. 80 let mezhdunarodnomu kommercheskomy arbitrazhnomy sudy pri torgovo-promyshlennoi' palate Rossiiskoii Federatsii [International Commercial Arbitration: Experience of Domestic Regulation and Self-regulation. 80 years International Commercial Arbitration Court at the Chamber of Commerce Russian Federation]// Sbornik izbrannykh nauchnykh, nor-mativnykh, arkhivnykh, analiticheskikh i inykh materialov [Collection of Selected Scientific, Re-gulatory, Archival, Analytical and other Materials]. Moscow, v. 1, 2012, p. 54. With respect to a quoted book, it should be mentioned that it is a very illustrative book devoted to the 80-th anniversary of the ICAC comprising articles or fragments of articles by modern authors as well as the authors that lived long ago who influenced the practice of international commercial ar-

resolution and enforcement of arbitration awards. Sometimes state arbitration courts seem to be "jealous" of commercial arbitration, forgetting that the commercial arbitration and the state courts (including the Russian state arbitration courts) represent different systems of protection of violated economic rights. The problem of mixture of these systems, has a historical origin, and at present leads to a contradictory position of the state jurisdiction with respect to arbitration. On the one hand, the state arbitration courts are overloaded and the judges suffer from an enormous amount of disputes to be resolved[14]. Sometimes this leads to inaccurate resolution of a dispute, including inadequate and insufficient reasons for the court decisions.

On the other hand, the state arbitration courts do everything to avoid the transfer of at least part of the tremendous amount of disputes to commercial arbitration courts preferring any other form of ADR (alternative dispute resolution) but arbitration. In his interview to "Rossiyskaya Gazeta", the ex-Head of the Supreme State Arbitration Court Anton Ivanov mentioned that the application of mediation proceedings could result in approximately 10-15% decrease in the number of disputes in the courts[15]. At the same time, the State Arbitration Courts sometimes demonstrate unwillingness to enforce arbitration awards and thoroughly look for reasons to refuse the enforcement. "Russian courts persist in seeking out civil provisions from which, as they think, the parties deviate from the arbitration arrangement or reduce contractual fines and completely or in another way somehow invalidate arbitration agreements. The courts seem insistent on endeavoring to find a weaker party in a dispute and protecting it. This should not be the case in commercial relations, since they are not similar to consumer protection, where vulnerability of one party is taken for granted"[16]. Sometimes it seems that the State Arbitration Courts have nostalgic feelings for the times when the arbitration courts not only resolved disputes but also issued regulations for future conditions of the conflicting parties' arrangements'. Sometimes, it seems that the state arbitration courts (including the Supreme Arbi-

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bitration in the USSR as well as modern Russia. The book also contains documents and statistical information.

[14] In 2012, the state arbitration courts had about 1,5 million claims that is 16% more than in 2011. In 31 regions, a judge in the court of the first instance had to resolve about 40 – 60 claims per month and in 11 regions this figure is 80 – 120 claims per month (the figures are taken from the interview of the Head of the Supreme State Arbitration Court A. Ivanov to the Russian// Rossiiskaia Gazeta [Russian Newspaper], April 26, 2013.

[15] See: V.Kulikov. Sygrayut v zashchite [Played in the Protection of]// Rossiiskaia Gazeta [Russian Newspaper]. April 26, 2013.

[16] A. Sitnikov. Obratnaia reaktsiia [Reverse reaction]. International Financial Law Review (IFLR), October 2011, pp. 75 – 76.

tration Court) tend to control everything, including commercial arbitration (internal and foreign as well).

4. The tasks of the court system reform in Russia at present time – is it the period of hopes for commercial arbitration?

According to the Russian experience, one should admit that the dichotomy of the judicial system (without exact borders for separation of competence and jurisdiction) negatively affects not only the internal judicial order but also touches upon the problem of enforcement of awards (not only those of the foreign arbitration but the internal ones as well). It is for a reason that the judicial reform nowadays is understood as a factor which may sufficiently improve the investment climate in Russia. The recent political declaration made by the Russian President[17] at the 2013 Petersburg Economic forum sounds quite inspiring. The President spoke on the necessity to unite state arbitration courts and civil courts within one system. This should put an end to the jurisdictional dichotomy existing in Russian law. The elimination of the abovementioned "jurisdictional dichotomy" could restitute the balance between the state courts jurisdiction and commercial arbitration.

Following President Putin's Declaration, several important acts were enacted, including the Federal Constitutional Laws No.2-FKZ "On the Supreme Court of the Russian Federation and the Public Attorney Service of the Russian Federation", No.3-FKZ "On the Supreme Court of the Russian Federation", "On the amendments to the Federal Constitutional Law "On the Judicial System of the Russian Federation". The acts mentioned above were enacted on February 5, 2014 and came into force on August 6, 2014. After the Supreme Courts are united under the recent reform, the lower courts remain to be separated: the arbitration courts and the courts of "general jurisdiction" continue to resolve economic disputes. The problem that still needs to be resolved before the courts of lower jurisdiction are united is to unite the respective procedural codes: the Arbitration Procedural Code and the Civil Procedural Code. The working group of leading lawyers has started working on the new "unified" civil proceedings code. We would like to mention several ideas that one should keep in mind, working on the task of reforming the arbitration laws in our country.

1. It is very important at least to preserve the correspondence of the commercial arbitration to international standards which have already been expressed in the prac-

[17] President Putin on the S-Petersburg economic forum announced on the uniting of the Supreme Court and Supreme Arbitration Court. The announced unification will require amendments to the Constitution// Available at: http://ria.ru/society/20130621/944952799.html#ixzz2c6mMkrd8 .

tice of application of the 1955 New-York Convention on admission and execution of foreign arbitral awards, in the provisions of the UNCITRAL unification rules. Most of the standards were introduced in the Soviet International Commercial Arbitration Law of 1993. It would be advisable to spread these standards over internal commercial arbitration in the so-called tertiary courts. The correspondence to global standards of commercial arbitration, including friendly and cooperative relationship between the state judicial system and non-state arbitration, is important. The exchange of professional opinions and discussions with respect to various situations, avoidance of concurrence of competence, efficient enforcement of provisional decisions and awards – these are the keys for the effective dispute resolution system as a whole.

2. It is very important to put the abovementioned international standards as a platform for the commercial arbitration dispute resolution system on the territory of the post-Soviet republics integrated within CIS. The problem is that within this territory, some of the "bad habits" were inherited. The mixture of the state arbitration concept and commercial arbitration should be included in this "heritage".

To this effect, one should keep in mind several international conventions, dealing with dispute resolution:

- the Moscow Convention on Settlement by Arbitration of Civil Law Disputes Arising from Relations of Economic, Scientific and Technical Cooperation (1972),
- the Convention on Legal Assistance and Legal Relations in the Civil, Family and Criminal Matters (Minsk Convention, 1993), and
- the Agreement on the Procedure of Settlement of Disputes Related to Economic Activities (Kyiv Convention, 1992).

The Moscow Convention "On Settlement by Arbitration of Civil Law Disputes Arising from Relations of Economic, Scientific and Technical Cooperation (1972) was designed to resolve the problems of the Council for Mutual Economic Assistance (CMEA). The Convention provides for the obligatory competence of arbitration courts in the place of the defendant at the Chambers of Commerce of the CMEA member states for disputes between economic organizations arising from relations of economic, scientific and technical cooperation. On January 13, 1992, the Ministry of Foreign Affairs of the Russian Federation directed the Note in which it declared that Russia would continue to fulfill all the obligations of the former USSR arising from the international treaties of the former USSR. Some of the States (e.g. Poland, Hungary) declared on denunciation of the Moscow Convention 1972. But some of the counties continued to participate in the Convention. According to ICAC statis-

tics, in 1996 there were still several disputes resolved in accordance with the Moscow Convention[18].

None of the CIS countries made a declaration on participation in Moscow convention 1972. At the same time, the CIS counties signed several multilateral treaties:

- Minsk Convention on legal assistance and legal relations in civil, family and criminal affairs of January 22, 1993; the Minsk Convention in Article 53 (1) provides for the enforcement of foreign decisions through a "competent court";
- Kyiv agreement on the order of resolution of disputes arising from economic activities of March 20, 1992; The Kiev Agreement concerns the dispute resolution in courts, economic courts and tertiary courts (see Article 3 (clause 2));
- Moscow Agreement of March 6, 1998, on the enforcement of the arbitration, economic courts decisions; the Moscow Agreement is based on the Kiev Agreement and provides for the enforcement of the foreign decisions through a "competent court"[19].

In the abovementioned Letter No.OM-37 of 1996, the Supreme Arbitration (or Commercial, as it is sometimes called) Court, stressed that courts mentioned in the CIS counties' treaties of 1992 and 1993, mean state courts (not commercial arbitration (or tertiary) court), which are competent, according to the law, to take decisions which are to be enforced on the territory of the state, which means the courts of the general jurisdiction and arbitration (economic) courts. In this context, the provisions of the said CIS treaties can hardly be regarded as additional or alternative means of enforcement of foreign arbitration awards. Nevertheless, these international treaties exist and should be taken into account in reforming the system of commercial arbitration in Russia.

The existing heritage should not be thrown out but be preserved and improved. It would be also advisable to mention bilateral agreements between the Chambers of Commerce and industries. These agreements provide for the admission of the finality of arbitration awards and exchange of information on commercial arbitration in corresponding countries. Although these agreements are mostly aimed at regulation of the cooperation between the Chambers of Commerce, a certain influence with respect to enforcement of the foreign awards can be taken into account.

[18] R.A. Petrosyan. Primenenie Moskovskoi' konventsii 1972 g. v sovremennykh usloviiakh [Application of the Moscow Convention 1972, in Modern Conditions]// Sbornik informatsionnykh materialov „Pravo i arbitrazhnaia praktika" [Collection of Information Materials „Law and Arbitration Practice"]. ICAC, Moscow, 1997, issue 1, pp. 15 – 30.

[19] This Convention was signed by the Russian Federation but did not ratify it, so it did not come into force in Russia.

The start of the work of the Court of the Euro-Asian Economic Union should finally correct the traditional misunderstanding with respect to the economic dispute resolution system. Such corrections would be easier to introduce if we take into consideration not only procedural but also material law aspects.

3. The link between regulating dispute resolution proceedings and the material law should be taken into consideration. One of the examples is connected with the participation in the Washington Convention on the Settlement of Investment Disputes (ICSID Convention, 1965). The said Convention is not in force in Russia as it has not been ratified"[20].

It should be admitted that one the most effective means other than the New York Convention is the mechanism provided within the Washington Convention 1965 On International Centre for Settlement of the Investment Disputes (ICSID). Russia signed the Convention in 1992 but up till now has not ratified it. The situation with the Washington Convention is contradictory. On the one hand, the Washington convention as a document which was not ratified by the Russian Federation is inoperative for Russia. On the other hand, some of the Bilateral Investment Treaties signed by Russia provide for the dispute resolution in ICSID and the Government Regulations No.456 of June 9, 2001, "On agreements between the Government of the Russian Federation and foreign governments on mutual protection of investments" which contains the model bilateral investment agreement also providing the ICSID dispute resolution clause. This Regulation adopted the Model Form of a Bilateral Investment Treaty which provides a condition (Article 8 of the Model Form) on the procedure of the dispute resolution between the contracting Party (State–recipient of the investments) and an investor from the other Contracting Party.

The *Energy Charter Treaty (ECT)* was also signed by the Russian Federation but not ratified. The ECT also provides for the settlement of investment disputes by means of the ICSID. The status of the ECT Agreement was the subject matter of the arbitration preliminary award in Hulley Enterprises Limited (Cyprus) case[21], concerning the dispute arising out of the dispute connected with the liquidation of Yukos Oil Company. The lack of understanding of the nature of investment as "vesting of the capital" reflected within the Russian law leads to the situation when Russian citizens who were controlling stakeholders of an offshore company which received

[20] P. Nacimiento, A. Barnashov. Priznanie i privedenii v ispolnenie inostrannykh arbitrazhnykh reshenii' v Rossii [Recognition and Enforcement of Arbitral Awards in Russia]// Zhurnal mezhdunarodnogo arbitrazha [Journal of International Arbitration]. 2010, v. 27 (3), pp. 295 – l306 (at p. 298).

[21] Hulley Enterprises Limited (Cyprus) v. The Russian Federation,PCA Case No. AA 226, UNCITRAL// Available at: http://italaw.com/cases/544) . (Accessed on: June 30, 20130.

investment papers as a result of privatization process were considered to be a foreign investor. The criteria was absolute formal and did not reflect the essence of investment activities and relationship between an investor and a recipient of the investment at all. Besides, this approach turned out to be leading to a confusion between investment and corporate relations. Still, the tendency to limit the scope of the disputes which can be resolved by means of commercial arbitration can be illustrated by the admission of non-arbitrability of "corporate disputes". These attempts demonstrate the lack of understanding both of the nature of the commercial arbitration and of the nature of legal relationship dealing with the so-called "corporate disputes". Such disputes have been already found non-arbitrable in Ukraine[22]. The attempts to argue the arbitrability of corporate disputes are still made in Russia. With respect to the Russian experience of recognizing or enforcing arbitral awards, it shows that sometimes the awards of the domestic institutional arbitration which were denied the enforcement "at home" by the local court seek to be enforced abroad The examples are connected with the enforcement of the Yukos awards[23] and *Maksimov v. Lisin* case.[24]

[22] See: Y. Chernych. Arbitrazh po korporativnym sporam v Ukraine [Arbitrability of Corporate Disputes in Ukraine]// Zhurnal mezhdunarodnogo arbitrazha [Journal of International Arbitration], 2009, v. 26 (5), pp. 745 – 749; in Ukraine, first Recommendations on application of the legislation in corporate relations of the High Commercial Court and the adoption of the Law No. 1076-VI of March 5, 2009 made corporate disputes non-arbitrable.

[23] See footnote 49 below.

[24] See: R.A. Khodykin. Antiiskovye obespechitel'nye mery v tsivilisticheskom protsesse v mezhdunarodnom arbitrazhe [Anticlaim Security Measures Tsivilisticheskoy Process in International Arbitration// Voprosy mezhdunarodnogo chastnogo, sravnitel'nogo i grazhdanskogo prava, mezhdunarodnogo kommercheskogo arbitrazha [Questions of Private International, Comparative and Civil Law, International Commercial Arbitration]. Liber amicorum after A.A. Kostina, O.N. Zimenkovoy, N.G. Eliseeva. Statute Publishing House, Moscow, pp. 274 – 298, on the page 287 – 288; A.I. Muranov. Projekty Minyusta pytayutsia sdelat' vazhnyy shag v storonu formirovaniia v Rossii obshchestv arbitrazhnykh professionalov [Projects of the Ministry of Justice are Trying to Make an Important Step Towards the Formation of Companies in the Russian Arbitration Professionals// Zakon [The Law]. 2014, No. 4, pp. 48 – 49; E.A. Kudelich. Arbitrabil'nost': v poiskakh balansa mezhdu chastnoi' avtonomieii' i publichnym poriadkom [Arbitrability: in Search of a Balance between Private Autonomy and Public Policy]// Zakon [The Law]. 2014, No. 4, p. 103; N.V. Konovalova, M.V. Agalydova. Arbitrabil'nost' sporov iz aktsionernykh soglashenii' [Arbitrability of Disputes of Shareholders' Agreements]// Zakon [The Law]. 2014, No. 4, pp. 112 – 113. It should be mentioned that R. Chodykin, understands an application for the enforcement of the ICAC award to a foreign state court as an example of preliminary measures securing the arbitration claim. That was not quite correct from our point of view. Besides he wrote that the foreign court satisfied the claim and referred to Yukos case decision, which, as far as we know, was rejected either. The R.Chodykin's positions need to be looked into; we hope we would be able to find out the truth and provide the final information. We analysed the mentioned Maksimov's case with respect to the problem of the corporate disputes resolution in the recent article: N.G. Semilyutina. Korporativnye spory i razvitie al'ternativnykh

But at that time, it seemed much easier to find a solution by means of forbidding arbitration dispute resolution of a corporate dispute rather than to improve material law regulation. An attempt to limit the activities of commercial arbitration was undertaken by the RF Supreme Arbitration (Commercial) Court that applied to the Constitution Court. The Constitution Court adopted Resolution No.10-P of May 26, 2011[25], in which it stated that State Arbitration Courts have no right to limit the powers of arbitration courts (both international commercial arbitration courts and domestic tertiary courts) with respect to the scope of the arbitrability of the disputes.

4. Sophistication of commercial exchange, introducing new technologies, on the one hand, internationalization of economic life, intensification of links – all these things make our life very difficult. To this effect, it is very important to find the ways to avoid conflict situations and achieve an amicable solution.. That is why the ideas of mediation and resolution of conflicts by means of mediation and negotiation are important. Along with commercial arbitration, these forms of dispute resolution depend greatly on the effectiveness of coordinating the Alternative Dispute Resolution (ADR) system with the state judiciary system[26]. This point should also be taken into account with respect to the reforming of the courts system in Russia.

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mekhanizmov razresheniia sporov [Corporate Disputes and the Development of Alternative Dispute Resolution Mechanisms]// Zhurnal rossiiskogo prava [Journal of Russian Law]. 2015, No. 2, pp. 112 – 126.

[25] The Resolution of the Constitutional Court in English as well as the comments by B.Korabelnikov and A.Muranov (both in Russian) were published in the Journal of International Commercial Arbitration. See: Vestnik mezhdunarodnogo kommercheskogo arbitrazha [Journal of International Commercial Arbitration]. 2011, No. 2, pp. 226 – 278.

[26] See: N.I. Gaydaenko Cher. Formirovanie sistemy al'ternativnykh mekhanizmov razresheniia sporov. Beskonfliktnoe obshchestvo kak osnova protivodei'stviyi'a korruptsii [Formation of System of Alternative Dispute Resolution Mechanisms. Conflict-Free Society as the Basis for Anti-Corruption]// Infra-M: Institut zakonodatel'stva i sravnitel'nogo pravovedeniia pri Pravitel'stve Rossiyskoii Federatsii [Infra-M: Institute of Legislation and Comparative Law under the Government of the Russian Federation]. Moscow, 2015.

AN OVERVIEW OF THE ICSID PRACTICE ON RESOLVING INVESTMENT DISPUTES INVOLVING POST-SOVIET STATES

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Abstract: The article examines awards of the International Centre for Settlement of Investment Disputes in the case of post-Soviet states. It also demonstrates post-Soviet states' statistics of participation as a respondent in litigations under the ICSID. The author highlights actions of the states that were considered by the Tribunal as a creeping expropriation.
Key words: foreign investments, international arbitration, international Centre for Settlement of Investment Disputes, ICSID, expropriation.

Nowadays, the post-Soviet states are rapidly developing their relations with foreign partners and resort to participation in various international institutions in order to establish additional advantages and guarantees for investments. The researchers note that the most important source of benefits for a recipient state is the reduction of barriers for foreign direct investments (FDI) in the sphere of services[1]. Meanwhile, the protection of FDI also is of great significance. One of the means ensuring rights of an investor is an opportunity to apply to the International Centre for Settlement of Investment Disputes (ICSID). According to the data from the official website of the ICSID, the Washington Convention on Settlement of Investment Disputes between states and nationals of other states of 1965 was signed by all 15 former Soviet Union republics. However, the Convention has entered into force only for Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Lithuania, Latvia, Moldova, Turkmenistan, Ukraine, Uzbekistan[2]. Kyrgyzstan, Russia and Tajikistan still have not rati-

[1] V.S. Belykh. Ekonomicheskii' i pravovoi' analiz posledstvii' vstupleniia Rossii vo Vsemirnoi' torgovoi' organizatsii [Economic and Legal Analyses of the Consequences Russian's Joining to the World Trade Organization]// Biznes, Menedzhment i Pravo// Business, Management and Law]. 2013, No. 1, p. 18.

[2] ICSID Convention, regulation and rules// Available at: https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%20Convention%20English.pdf .

fied the agreement, but at the same time, if there are special clauses to that effect in a Bilateral Investment Treaty (BIT), the disputes with their participation can be resolved by the named arbitration tribunal[3]. There is no doubt that "the most important characteristic of the ICSID Convention is that it creates a self-sufficient legal framework, independent of all other legal systems, whether national or international"[4]. Thereupon we have a need to study the practice of post-Soviet states participation in ICSID arbitration procedures.

Among the Transcaucasian states, the Republic of Azerbaijan participated in the largest number of arbitral trials. All three cases were settled by the parties. The first case against Azerbaijan was registered in 2006, and the claimant was the Dutch company Azpetrol International, but the claim was withdrawn by the investor. In 2006, the Turkish corporation Barmeк Holding A.S.[5] applied to the ICSID as well Dutch company Fondel Metal Participations B.V. in 2007[6]. Both disputes were settled by the parties' agreement.

In 2000, the Irish corporation Zhinvali Development Ltd filed a suit against the Republic of Georgia. Unfortunately, the information on the case is not available. Armenia also participated in one investment dispute resolved under the ICSID jurisdiction. The claimant in this case was the American gold-mining company Global Gold Mining, LLC. According to the data provided by the Tribunals' website, the parties agreed to discontinue the proceeding[7].

Estonia have participated in 4 cases under the ICSID as a respondent, 3 of the disputes have been concluded, one is pending. In the case of *Alex Genin et al v. Republic of Estonia*[8] the Respondent was able to refute the arguments of American investors and win. A group of American companies and individuals - shareholders of

[3] V.N. Lisitsa. Ob investicionnykh sporakh s uchastiem Rossiiskoii Federatsii i ikh podsudnosti Mezhdunarodnomu tsentru po uregulirovaniyu investitsionnykh sporov [On Investment Disputes with Participation of the Russian Federation and their Arbitrability to the ICSID]// Zakon [The Law]. 2013, No. 3, pp. 113 – 118.

[4] P. Bernardini. Investment Arbitration under the ICSID Convention and BITs Global Reflections on International Law, Commerce and Dispute Resolution. p. 90.

[5] Fondel Metal Participations B.V. v. Republic of Azerbaijan (ICSID Case No. ARB/07/1)// Available at: https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/07/1 .

[6] Barmek Holding A.S. v. Republic of Azerbaijan (ICSID Case No. ARB/06/16)// Available at: https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/06/16&tab=PRD

[7] Global Gold Mining LLC v. Republic of Armenia (ICSID Case No. ARB/07/7)// Available at: https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/07/7&tab=PRO .

[8] Participation of Estonia in investment disputes// Available at: https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?gE=s&rspndnt=Republic%20of%20Estonia. (Accessed on: May 13, 2015).

the Estonian Innovation Bank - claimed that the Estonian government expropriated their investments, annulling the Bank's license. The Estonian government argued that the claimant had violated the rules of the Estonian Banking Code, which is why the government annulled the Bank's license. The Tribunal found for the Respondent[9], and noted in par. 370 of the Award that there was no evidence of discriminatory action, and the government's decision to annul the EIB's license was made for the purpose of the Estonian banking sector regulation. Such regulatory practice was exercised solely in the public interests.

In 2004, the Finnish banks OKO Osuuspankkien Keskuspankki Oyj, OKO Pankki Oyj and the German Ost-West Handelsbank AG initiated arbitral proceedings against Estonia. What made this case special was that the dispute had arisen from the failure of the Estonian state-owned company Eesti Kalatööstuse Rendikoondis "Ookean" to fulfill their obligations to creditors. In spite of the Estonian government's objections that the state was not responsible for the company's liabilities, the Tribunal accepted the investors' claim and obligate the Respondent to pay the damages[10]. Par. 283 of the Award reads as follows:

"…the Respondent not only tolerated but indeed encouraged litigation for the benefit of RAS Ookean and to the detriment of the Banks. In the Tribunal's view, the Respondent's conduct (not being limited to impassive observation) was a violation of the legitimate expectation. Taking into account the long history of the Banks' difficulties, the Respondent's conduct was neither even-handed nor fair; and it was utterly inconsistent with the Letter. Accordingly, the Respondent violated the FET standard of the Estonia-Germany and Estonia-Finland BITs".

Since the Washington Convention entered into force for Latvia, it has participated in one dispute under the ICSID rules. This case is interesting because the Claimant is incorporated in another post-Soviet state – Lithuania. This dispute is still under consideration[11].

The Republic of Lithuania has also participated as the Respondent in one dispute within the framework of the ICSID[12]. Notwithstanding the Claimant's allegation that the Respondent had breached the Lithuanian-Norwegian BIT, the International

[9] Alex Genin and others v. Republic of Estonia (ICSID Case No. ARB/99/2)// Available at: https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/99/2&tab=DOC .

[10] ICSID Case No. ARB/06/6)// Available at: http://www.italaw.com/sites/default/files/case-documents/ita0712_0.pdf .

[11] UAB E energija (Lithuania) v. Republic of Latvia (ICSID Case No. ARB/12/33)// Available at: https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/12/33 .

[12] Parkerings-Compagniet AS v. Republic of Lithuania (ICSID Case No. ARB/05/8)//Available at: https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/05/8&tab=DOC .

Arbitration Tribunal supported the government of Lithuania, and stated that the actions of the respondent's actions were lawful and, therefore, there was no expropriation of the investor's property[13]. In Par. 443 of the Award we can find:

"...a breach of an agreement will amount to an expropriation only if the State acted not only in its capacity of party to the agreement, but also in its capacity of sovereign authority, that is to say using its sovereign power. The breach should be the result of this action. A State or its instrumentalities which simply breach an agreement, even grossly, acting as any other contracting party might have done, possibly wrongfully, is therefore not expropriating the other party".

The Republic of Moldova has participated in one investment dispute under the jurisdiction of the ICSID. In 2010, the French national Franck Charles Arif, the owner of Le Bridge Corporation Limited, initiated the arbitral proceedings against the Moldova at the ICSID. The Moldovan company Le Bridge Corporation Limited, with 100% of stock owned and controlled by the Claimant, had won the tender to build a network of duty-free stores, organized by the Government of Moldova. However, another participant initiated a legal proceedings before the Economic Circuit Court, seeking to annul the tender results and cancel already signed lease agreements. The Economic Circuit Court canceled lease agreements and annulled the tender results; this decision was affirmed by the Moldovan Supreme Court of Justice, and as a result, the Claimant had no opportunity to operate his business and even for a long time to retrieve his goods situated in Chisinau's airport. Mr. Arif declared court decision unlawful and breaching the Moldova-France BIT signed in 1997[14]. During the arbitral proceedings, the Tribunal found that the Republic of Moldova had breached abovementioned BIT and failed to ensure fair and equitable treatment to the Claimant's investment in the duty-free store at Chisinau Airport. The Tribunal held that the Respondent shall make proposals to Claimant for the restitution of the investment in the airport store, including guarantees for the legality of a new lease agreement[15]. In accordance with par. 547 "e" of the Award, the reasoning was as follows:

"Where a state creates a legitimate expectation which it cannot subsequently fulfill in breach of the fair and equitable treatment standard under the BIT, then the

[13] ICSID Arbitration Case No. ARB/05/8 AWARD// Available at: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC682_En&caseId=C252 .

[14] Franck Charles Arif v. Republic of Moldova (ICSID Case No. ARB/11/23)// Available at: https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=ARB/11/23 .

[15] ICSID Case No. ARB/11/23 AWARD// Available at: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC3223_En&caseId=C1740 .

State has a secondary legal obligation to remedy or ameliorate the consequences of its breach".

Par.547 "f" stated:

"...Respondent has breached the legitimate expectation that Claimant could operate a duty-free shop in his leased premises at Chisinau Airport, but also breached its secondary obligation to remedy or ameliorate its inability to fulfill this legitimate expectation... the Airport State Authority was quick to enforce court orders against Claimant, but slow to facilitate access to Claimant's staff or to permit the movement of goods when legal impediments were removed".

The Republic of Ukraine has an experience of participation in 13 arbitral proceedings initiated in accordance with the Washington convention[16], and some interesting cases will be examined below. In 2007, the Austrian company Alpha Projektholding GmbH filed an ICSID claim against Ukraine. The Claimant declared that the Respondent breached the Austria-Ukraine BIT, expropriated investments and violated the agreement on "joint work" for the renovation and operation of "Dnipro" Hotel in Kiev. The Tribunal found that the Respondent had expropriated Claimant's rights and interests in violation of the BIT as well as had denied fair and equitable treatment to the Claimant's investments[17]. It is interesting that in par 412 of the Award, the ICSID stated:

"...the Hotel at least nominally had authority to act independently of the government with respect to the management of the contracts. If that is correct, then this is not a case of a state breaching a contract for commercial reasons. It is, instead, a case where a state caused a commercial entity to breach that entity's contractual obligations".

Legal scholars note that in present law practice, "questions of creeping expropriation *de facto* or measures tantamount to expropriation obtains a high importance[18]. This is why the analysis of the case *Inmaris Perestroika Sailing Maritime Services GmbH v. Ukraine*[19] is especially appropriate nowadays. In 2003, German

[16] Participation of Ukraine in investment disputes// Available at: https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?gE=s&rspndnt=Ukraine .

[17] Alpha Projektholding GmbH v. Ukraine (ICSID Case No. ARB/07/16) Award// Available at: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1751_En&caseId=C108 .

[18] A.A. Danelyan. Problemy natsionalizatsii i ekspropriatsii inostrannoii' sobstvennosti v mezhdunarodnom prave [Problems of Nationalization and Expropriation of Foreign Property in International Law]// Jurist [The Lawyer]. No. 6, p. 44.

[19] Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine (ICSID Case No. ARB/08/8)// Available at: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC3296_En&caseId=C320 .

companies and a state-owned education institution of Ukraine entered into a series of contracts concerning the use of a windjammer sail training ship owned by the institution. Under the contracts, the institution used it to train cadets for Ukraine's national fishery fleet, while the Claimants renovated the windjammer and used it to market sailing tours and other onboard events, thus lowering the ship's operational expenses. In 2006, the partners' relations deteriorated, therefore, the Ukrainian Ministry of Agricultural Policy issued an instruction preventing the ship from leaving the territorial waters of Ukraine. These actions of the state were qualified by the investors as an expropriation of their investments. In accordance with par.275 of the Award in the case, the instruction from the Ministry preventing the ship from leaving the territorial waters of Ukraine, and the ban that remained in effect for the ensuing year, amounted to a denial of fair and equitable treatment. In par. 301, ICSID also concluded that the travel ban amounted to indirect expropriation in that it destroyed the value of Claimants' contractual rights, and such diminution in value (due to the lasting damage to Claimants' business) was, for all intents and purposes, permanent.

The Republic of Kyrgyzstan has not ratified the Washington Convention; however, it has participated in two arbitral proceedings in accordance with the ICSID Additional Facility Rules. In April 2006, the Turkish Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. filed a claim concerning expropriation of investments in "Pinara Bishkek" Hotel. The Tribunal supported the Claimant and obligated the hosting government to pay compensation. The second case is still under consideration. It was initiated in 2013 by a group of Kazakhstan companies.

Against the Republic of Turkmenistan, six cases have been initiated, and five of them are under consideration nowadays[20]. One of them was initiated in 2011 by the Russian corporation Mobile TeleSystems OJSC; however, it was settled by the parties in accordance with Rule 49(1) of Additional Protocol of the ICSID Additional Facility Rules. Thereby we can see how a company from a country that has not ratified the Washington Convention use opportunities of the ICSID.

Seven requests were filed at the ICSID requesting for arbitration of an "investment dispute" with the Republic of Uzbekistan. Four disputes are pending, and the other three have been settled by the parties[21].

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[20] Participation of Turkmenistan in investment disputes// Available at: https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?gE=s&rspndnt=Turkmenistan .

[21] Participation of Uzbekistan in investment disputes// Available at: https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?gE=s&rspndnt=Republic%20of%20Uzbekistan .

The Republic of Kazakhstan has participated in eleven arbitral proceedings under the auspices of the ICSID, eight of them are finished[22]. The first claim against Kazakhstan was filed in 2001 by the American companies AIG Capital Partners, Inc., CJSC Tema Real Estate Company. The claimants alleged that their land plots had been expropriated in a Real Estate Development Project in Kazakhstan.. In accordance with the position of Kazakhstan's authorities, the land plot that the investors had planned to use for construction were provided to them by mistake, so they had no right to use them. Nevertheless, the Tribunal found that the acts of the Respondent's government authorities constituted measures tantamount to expropriation of the Claimants' investment in the Republic of Kazakhstan for which Respondent was liable to pay compensation[23]. According to par. 10.5.4 (5a) of the Award, taking the property of a foreign investor and offering an "alternative solution" more favorable to the host State means that the host State decides to expropriate or to take measures tantamount to expropriation of property. The ICSID position is that imposing imposing the "duty" to examine (and if reasonable, to accept) an alternative solution on the injured party (the creditor or foreign investor)would be wrong in principle.

In August 2005, the ICSID received a Request for arbitration proceedings under the ICSID Convention on behalf of the Turkish companies Rumeli Telekom A.S., Telsim Mobil Telekomunikasyon Hizmetleri A.S. against the Republic of Kazakhstan in which the Tribunal found for the investors[24]. According to the materials of the case, the claimants had been sued by their partner Telcom Invest and expelled from the Kazakh Limited Liability Partnership KaR-Tel by the decisions of the Almaty city court and the Supreme Court of the Republic. The foreign investors alleged that the decision had been passed under the pressure from the Kazakh's Investment Committee. The ICSID stated that the Kazakh court decisions constituted the unlawful taking of property. Par.708 of its Award reads as follows:

"…this was a case of 'creeping' expropriation, instigated by the decision of the Investment Committee which was then collusively and improperly communicated to "Telecom Invest" and its shareholders before Claimants were made aware of it, and which proceeded via a series of court decisions, culminating in the final decision of

[22] Participation of Kazakhstan in investment disputes// Available at: https://icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/AdvancedSearch.aspx?gE=s&rspndnt=Republic%20of%20Kazakhstan .

[23] AIG Capital Partners, Inc. and CJSC Tema Real Estate Company v. Republic of Kazakhstan, ICSID Case No. ARB/01/6, Award// Available at: http://www.italaw.com/sites/default/files/case-documents/italaw3077.pdf .

[24] Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan (ICSID Case No.ARB/05/16)// Available at: http://www.italaw.com/sites/default/files/case-documents/ita0728.pdf .

the Presidium of the Supreme Court. The decision of the Investment Committee was moreover unfair and inequitable in itself, as the Tribunal has found".

Summarizing the practice of the post-Soviet states, we can find that out of 51 disputes registered at the ICSID, 18 are under consideration, in 6 cases the Tribunal found for host-states, 11 were settled by the parties. The diagram below shows the percentage of investment disputes with the post-Soviet states under the ICSID auspices.

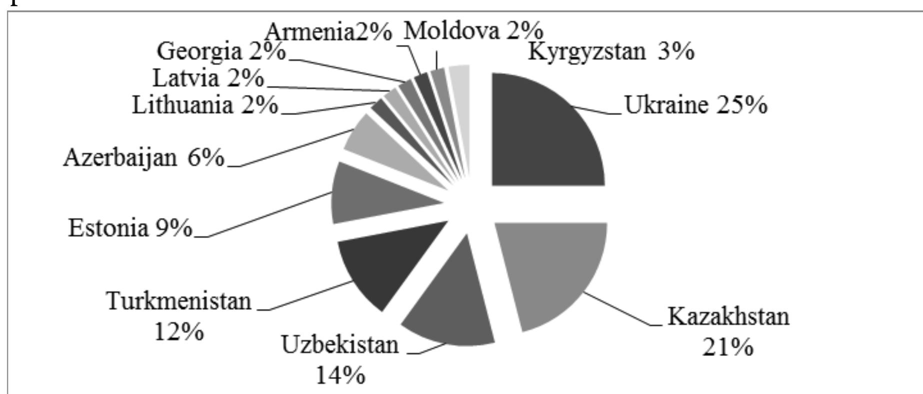

Figure 1 – Number of disputes with the post-Soviet states under the ICSID (%)

The pie chart above shows that among the post-Soviet states, Ukraine and Kazakhstan are leaders by the number of investment disputes. The Republic of Ukraine has won six, lost two and settled two disputes from the ten concluded disputes. On the one hand, this is positive statistics for the state, but frequent requests of investors to the ICSID and other Arbitral tribunals to initiate proceedings against Ukraine[25] show there are problems in the sphere of legal regulation of investor-state relationships. Kazakhstan has lost only two cases, two cases were settled, the ICSID has rejected three cases for lack of jurisdiction, and one decision is not available. However, arbitral proceedings show that Kazakhstan has some problems with its treatment of foreign investors.

Thus, except for Belarus, all post-Soviet states that have ratified 1965 Washington Convention have participated in arbitral proceedings under the ICSID auspices. Interestingly enough, investors from post-Soviet Kazakhstan, Lithuania and Russia have used the ICSID as claimants. Analyzing the cases lost by governments of post-

[25] S.A. Vojtovich. Mezhdunarodnyi' investicionnyi' arbitrazh: nekotorye tendencii i opyt Ukrainy [International Investment Arbitration: Certain Tendencies and Experience of Ukraine]// Mezhdunarodnoe publichnoe i chastnoe pravo [International Public and Private Law]. 2010, No. 3, pp. 8 – 13.

Soviet states, we can find creeping expropriation or measures tantamount to expropriation, carried out under the cover of court decisions and state bodies orders. Moreover, in a number of disputes where a state company participated in commercial relations with investors, the Tribunal concluded that a Government should pay damages because it had instigated a legal entity to breach its contractual obligations. **Therefore**, the case "Rumeli Telekom A.S., Telsim Mobil Telekomunikasyon Hizmetleri A.S. vs. Kazakhstan" is worthy of attention. The Award on this dispute contains provisions that recognize the state as a respondent because a state body took actions encouraging foreign investors' partners to terminate their partnership.

TRANSDISCIPLINARY WAYS FOR A GLOBAL JURIDICAL CONSCIENCE (PART II)

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Abstract: The article focuses on values and an innate notion of order, religions, theories, doctrines and levels of thinking, reality and levels of existence. The author also describes generic transdisciplinary procedures, provides an insight into empiric and pragmatic approaches against crimes, corruption and social ruptures.
Key words: order, juridical knowledge, levels of thinking, generic transdisciplinary procedures, methods to knowledge, fragmentary and holistic knowledge, verbal languages, global integration.

9 Transdisciplinary procedures.

Our studies about methodology began with the writings of William Pepperell Montague when he approached the paths of knowledge. It has never excited us to criticize or contest Montague's methodological content, nor that of any other thinker. Nor did we have any intention of adding anything to them. The methodology of knowledge aided us as a guide on the path through which we esteemed reaching the transcendental and sacred both emergent from the effort to integrate fragments.

Scientific knowledge results from a cognitive process emerging from a combination of *methodology*, *metaphysic*s and *axiology.*

Methodology works with *logic* and *epistemology. Metaphysics* refers to ontology and cosmology. *Axiology* is based on *theories of values,* related to Ethics and *Esthetics.*

Backed by transdisciplinary approach, the delimitation and ordering of thoughts is materialized fundamentally by four beliefs called the transdisciplinary postulates, namely - *complexity,* the *levels of reality;* the *participation of the other;* and *that the Sacred exists.*

In writings about transdisciplinary procedures, some call *the other* an indefinite *third,* which may be included or excluded, but is always in the relation.

Opening the doors to knowledge, the contours drawn by distinct and simultaneous *levels of reality* compel us not only to recognize them as distinct and essential *points of view,* but also as appropriate fields to develop *methodology* and *language.*

The forms of communication codified in signs and symbols are recognized as *language.*

Verbal language, therefore, is the oratory code through which thoughts and ways of thinking are articulated and classified.

9.1 The first postulate: complexity.

The experience, whether scientific as is each of our lives or not, teaches that it is impossible to completely isolate one phenomenon from the others. Even with the greatest precision and rigor with which laboratory procedures are performed, the observer sees himself obliged to appeal to imaginary limits in order to isolate the phenomena under observation detaching it from all other contextual instances by using hypothetical fiction,

In so far as all phenomena are dependent and interlinked, one must admit that *nothing is simple,* but quite the contrary, that *everything is complex.* There are no isolated phenomena; nothing is singular in the world in which our perceptive forms function. All the phenomena, including all living beings, are interlinked and interdependent. This leads us to believe that *complexity* is an assumption for the knowledge we intend to acquire.

In the Universe, the fragments of the all continue to be part of the all, as tiny as they may be. Deprived of any of its fragments, the Universe would no longer be *universe,* but a quasi-universe. Thoughts are always abstract thoughts of the Universe. They occur within the All; their references integrate the all, and remain connected to it.

For such observances, we adopt, as a true and justified belief, that *all phenomena of whatever nature, including thoughts, are complex, and nothing happens alone or independently from everything that exists in the Universe.* This is the first postulate of transdisciplinary methodology.

9.2 The second postulate: level of reality for knowledge and communication.

The observation of the processes and methods that lead us to knowledge and for this reason become propitious to communication, show that the varied available resources originate and, subsequently, are processed and externalized from distinct observable points. Such resources follow pre-existing language and concept parameters.

Each person, from his or her observations, reads the phenomenon differently from another resulting from personal subjective and objective reasons insofar as they come from distinct presuppositions. In view of this verification, we are led to recognize the *state of consciousness,* which is intellective by nature, and the signals with subjective and objective perceptions.

These markers, when differentiated, make it possible to read several distinct results and to consider them valid and efficient even though the forms of perception may indicate incompatibilities and incongruencies. When this happens, the solution for resolving the difficulties in this state of consciousness requires an artifice like that used for calculating, or a simple perceptive resource to identify and locate the contradiction at different *levels of reality.* With this approach, the antagonisms can be overcome through the use of the diverse forms of perception at each *level of reality.*

The chronology of the documents concerning transdisciplinarity began with the Declaration of Venice, dated March 07, 1986, to which Brazilian mathematician, Ubiratan D'Ambrósio contributed and helped to elaborate. Items 3 & 4 of the Final Communiqué originated from the colloquium on *Science and Tradition: Transdisciplinary Perspectives for the XXI Century* held in Paris on December 2-6, 1991, and organized by the UNESCO. They are part of the conclusions of seven items formulated by the editorial committee comprised of René Berger, Michel Cazenave, Roberto Juarroz, Lima de Freitas e Basarab Nicolescu, and say the following:

"3. Paradoxically, one of the conceptual revolutions of this century (XX) came from science, and particularly from quantum physics bursting the old view of reality with its classic concepts of continuity, locality and determinism still predominant in contemporary political and economic thought. It gave birth to a new logic in many aspects[1] - the old logic forgotten. A capital dialogue evermore rigorous and profound between science and tradition can now be established to construct a new scientific approach: the transdisciplinary approach.

4. Transdisciplinarity does not seek to construct any syncretism between science and tradition: modern science's methodology is radically different from traditional practices. Transdisciplinarity pursues points of views from whichever enables science and tradition to interact. It seeks to find intellectual space that will take it out of its unit while respecting the differences, especially those supported by a new concept of nature."

[1] Of the many conferences sponsored by UNESCO, the Declaration of Venice emerged from the symposium "Science before the Boundaries of Knowledge", organized with the Georgio Cino Foundation in 1986. "Science and Culture for the 21st Century" was the name given to the Vancouver symposium held in 1989.

In the Transdisciplinarity Charter, struck at the First World Transdisciplinarity Congress, held at the Arrábida Convent, Portugal, November 2 - 6, 1994, Article 2 reads:

"The recognition of the existence of different levels of reality governed by different types of logic is inherent in the transdisciplinary attitude. Any attempt to reduce reality to a single level governed by a single logic does not lie within the scope of transdisciplinarity."

And in Article 14:

"Rigor, openness and tolerance are fundamental characteristics of the transdisciplinary attitude and vision. Rigor in argument embracing all existing data is the best defense against possible distortions. Openness involves an acceptance of the unknown, the unexpected and the unforeseeable. Tolerance implies acknowledging the right to ideas and truths contrary to our own."

Each *level of realit*y needs specific forms of perception and particular rules to think and to communicate. Each level requires premonitory paradigms to enable intelligibility.

The process to think and to make choices between worth and single patterns to work with them simultaneously on *different levels of realities* constitutes the first difficulty to transpose.

Our studies lead us to believe that there are at least eight *levels of reality* in which humans simultaneously think, act and obtain positive results.

That is, what we call *conscious states* occur at the same time on different levels of reality with *a particular state of consciousness corresponding to each level.*

We call *state of consciousness* the period during which knowledge *is revealed to the observer* in his physic and mental context.

We identify as *levels of reality* those *fields of thinking* where methods for apprehending knowledge are exercised.

That's why *mysticism, authoritarianism*, *rationalism*, *empiricism*, *pragmatism, skepticism*, *amorousness* and *intuitionism* can be considered *simultaneous paths to knowledge.*

9.3 The third postulate: the *other,* as the *third* to be included or excluded.

The transdisciplinary approach suggests a third state of consciousness wherein *the other* exists, enabling it to be or not to be included or excluded in relation to the observed. We know that *other* is an indefinite pronoun: a different or an additional person or thing. It can refer to something personal as well as impersonal, human or

inhuman, great or small, colored or uncolored, opaque or transparent, a lot or a little, lasting or transitory, light or heavy, present or absent, current, past or future.

In transdisciplinary observations, the presence or absence of this *other*, because it is limitless and indefinite, and may unduly be being included or excluded – is always a sign that *humility* ought to preside in the knowledge inquiry process. Hence, transdisciplinary vision is resolutely sensitive to propitious openings of new knowledge in so far as it surpasses the dominion of the exact sciences. It intends, through its dialogue and tendency, to reconcile not only with the human and social sciences, but also with literature, poetry and spiritual experience[2].

9.4 The fourth postulate – The Sacred does exist.

Not all people working with transdisciplinary methodology used to adopt that postulate as an effective argument.

For those who feel the mystic influence of human traditions and cultures, the attribute *sacred* refers to *Logos* (λόγος) as a mystic belief. And like that, it becomes the fourth postulate of the transdisciplinary methodology.

Nobody is obliged to adopt it as a postulate, but transcending the ways of empiric and rational knowledge, it emerges like the real and efficient true based on primitive believes and traditions.

I am induced to accept *the Sacred* as a powerful argument useful during the process of thinking: from that belief, it becomes easy to understand the *origin of natural impulses* existent in the *animated* entities. The nouns *anima* and *spirit* are linked with the meaning of the adjective *sacred.*

10 Transdisciplinary methods to knowledge.

10.1 Mysticism.

Observation corroborates the affirmative that *we all have mystic and mythological roots*. When these roots are not personal, we are able to identify them by their origin in the collectivity in which we live or to which we belong.

The mystic and mythological roots are formed by mediation of *use, customs, religions* and prevailing *traditions* in the social context in which we are or were rooted.

Usually every individual accepts and incorporates the proper traditions and customs of his/her original nation.

The Global Era announces another sort of inheritance not built over tradition. We shall observe that *tradition is related to social values and expressed by beliefs and*

[2] Cf.art. 5. º da Carta de Transdisciplinaridade.

*ritual*s. In fact, tradition reports to the past. But people of the Global Era are not worried to preserve the past: they are devoted to make ruptures against the past. They are trying to build a new world over other values even when they have not elected the new ones.

People of our Global Era are demanding *new values.*

We shall see what is happening over the whole world: historic narratives referred to *moral values, mystic*, *mythological* and *religiou*s traditions are disdained when facing the possibility of a new global future.

The arguments brought by supposed *pragmatic rationalism* and *empiricism* generate irresolute doubts and pertinent query as to the origins and causes for existence, whether of individual or of universal nature.

Accordingly, in a state of consciousness we want information that exceeds the levels of empirical and rational reality.

An intellective anguish, by nature intimate and personal, leads us to perceive the existence of a *mystic level of reality* integrated by spaces of diffused images, where the movements of shadows and mist are disturbing individual and social thoughts.

It becomes usual to perceive this as much by the emphatic denial of the incredulous as by the credulous beliefs. We are just able to observe those who consciously adopt mysticism as a reason for living and others denying what is mystic.

In view of these premises, it is easy to understand the reason behind the assertion in Article 9 quoted from the same Transdisciplinarity Charter cited above:

"... Transdisciplinarity leads to an open attitude towards myths and religions, and also towards those who respect in a transdisciplinary spirit."

We observe a level of *mystic reality in which we are all ensconced* when we go to church, to religious meetings or to gatherings of mystic or mythical nature.

It is also possible to note that the efforts made by clergymen and pastors who seek to retain their followers at this *level of realit*y, not only use mystic and mythological arguments but exercise scatologic, pragmatic, authoritarian and skeptic reasons. They are claiming, with most people of the Global Era, for *futuristic values*.

10.2 Authoritarianism

This work and the efforts developed herein endeavor to provide *vital amorousness.* This text is intended to propel us to travel through the diverse fields of knowledge, transcending them while collecting compatible informs.

In that flux *of ideas, lines, methods and forms of thinkin*g we have to honor those who have transmitted to us their attention, the ones who have collected and directed their informs, ruled by ethical principles that give life its meaning.

However skeptical we may be, we always let ourselves be convinced and adopt as true the informs and beliefs originated from people to whom we attribute moral, social and scientific authority.

Accordingly, we receive and adopt as our own truths, the thoughts and *ways of thinking* that, in fact, integrate another's reality.

This supposedly true knowledge is received from others. We adopt as true reasons and narratives formulated by others to whom we give credit, attributing them intellectual, moral and mystic authority.

Furthermore, because we believe in these people, we accept their affirmations as truths.

That acceptance, therefore, stems from the subjectivity and the credibility we lend to the human source from whom the information originates.

This method of acquiring knowledge by adopting ideas of others, their informs and reasons is called *authoritarianism.*

Authoritarianism assumes the characteristic of a *level of reality imported subjectively, to which we claim the validity of their informs* and by which *we form our own judgments, reap opinions and garner values.*

There are thinkers who affirm that around ninety percent of what we suppose we know is originated from authoritarianism.

At this level of reality, we adopt as true the informs inherited from our parents, received from our teachers or gleaned from third parties in whom we trust.

The level of reality called authoritarianism is formed by alien experiences and beliefs through the translating of what others have established as truth.

Using personal conviction based on authoritarianism becomes easy and advantageous to espouse as a truth. For example, we accept as truth, neither questioning nor delving into rational or empirical verification, that the theory of relativity corresponds to a scientific truth.

After all, it has been confirmed by innumerous authorities in the field of physics, and also derived from the intellectual authority we attribute to Albert Einstein.

Furthermore, we take our children to be vaccinated against poliomyelitis based on the scientific authority we credit to our scientists. Informs published in serious newspapers and credible magazines by their publication assume the value of the recognized true.

Therefore, we have to adopt authoritarianism as a strong resource of informs to arrive to knowledge.

10.3 Rationalism.

There is a level of *rational reality*, by nature abstract, which is not only identified in algebraic and geometric expressions, but also concerns idioms, languages and linguistic formulations. It becomes perceptible by expressions, judgments and ordination of thoughts and *ways of thinking*.

The level of reality in which reason seeks to harmonize, identify or signal what appears to be real and true uses symbolism and symbolic language.

Rationalism is the most readily accessible way to collect, to construct and to project ideas.

Rationalism has its foundations in the symbolic context connected to informs produced by mathematicians, physicists and other scientists, to empiric procedures, to mystic beliefs and theoretical productions and pragmatic intentions. Rationalism uses past as an argument, present as reality and future as a projection. For rationalism, future is derived from a rational perspective resulting from present knowledge.

The essential requirement of rationalism in mental procedures demands compatibility, congruency and verifiability of conclusions in relation to the same level of reality.

10.4 Empiricism.

The codification of presuppositions where the tower of knowledge is seated, the one we call corpuscular physics, when applied in another scenario such as quantum physics, renders it necessary to establish whether or not the same scientific language used in corpuscular physics can be adjusted to the communication needs imposed by quantum physics. This occurs because the conceptual presuppositions that rule the relationships between the thought forms of these disciplines have shown themselves to be empirical and rationally incongruent. This means that saying what is observed by one empirically as the materialization of bodies, to the other is only a probability of existence.

Hence, we can observe an empirical reality that comes through our senses of taste, touch, smell, sight and hearing, conditioned by forms of perception such as the auditory, which sensitizes us by the sound uttered, or is articulated through sounds and noises. One also observes other empirical realities such as those expressed in body language, in the art forms of communication, those perceived through the intermediation in the culinary arts and in so many others that we learn to decode throughout our lifetime.

We can ascertain that the existing codes in the different scientific languages lose their value and effectiveness when they are incoherent, contradictory and controversial when they are considered at the same level of reality. Experience teaches that a sole scientific language is not always best for communication when used within different levels of reality.

Up to now, we have spoken of transdisciplinarity. The transdisciplinary methodology is multidimensional and does not exclude a trans-historical horizon.

Transdisciplinarity endeavors to open all the disciplines to paths of knowledge that transverse and transcend them evoking not only *mysticism, authoritarianism, rationalism, empiricism*, but also *pragmatism, skepticism, amorousness* and *intuitionism.*

10.5 Pragmatism.

Pragmatism and *practicability* do not correspond to the same concept. *Pragmatism*, also called *practicalism*, sees the usefulness of things. *Practicism* is one of the manifestations of pragmatism. Above all, it holds in view the ease and speed to which actions may be reverted.

Montague signals that:

"... The pragmatic principle is implicit in the statement that the truth of a theory depends on the practical validity of its consequences. Therefore, if in this statement the word "consequence" is highlighted, pragmatism becomes a general tendency or attitude and so widely disseminated that we end up studying it as futurism; but if we emphasize the word practical, its color and character change because it is designated as practicalism. And, being thus, more specifically applies to the problems of logical methods"[3].

A more polished approach leads us to understand that *modern pragmatism* is guided by the same *anthropocentric* beacon that has directed humanistic thinking since the XII century. In fact, *force, extension* and *intention* are attributes of *pragmatism.*

The knowledge to which we are directed is submitted to the idea of a future created resulting from our actions. Because of that, many people understand *pragmatism as futurism.*

To consider *futurism* as a goal is to invade, create, and modify present relations.

[3] Montague, William Pepperell. Los caminos del conocimiento. Buenos Aires: Sudamericana, 1944, p.113.

10.6 Skepticism.

The philosophical content paramount to skepticism is the possibility for knowledge that comes imbedded within the limitations of the human mind and results in the subject's inaccessibility to the object of knowledge. Certainty and skepticism oppose one another because of:

a) the confusion of languages;

b) diverse meanings attached to the same words;

c) different levels of reality in which the phenomena and thoughts processed are focused;

d) ambiguities in the *conceptual* field;

e) irregular practices and

f) adverse facts.

The criticism to skepticism is that by adopting the principle of systematic doubt as certain, the skeptic behaves as though the truth contained in the doubt itself were an irrefutable dogma, and for this reason, incurs in the same error as the dogmatists.

Moral skepticism sustains: a) that moral principles cannot be proved; b) that there are no moral truths; c) that morality has no rational base and d) right or wrong is a question of preference or convention.

As one can see, skepticism is a level of reality in which shocks of ideals become evident when one intends to fit them into thought forms processed at other levels of existence.

In approaching transdisciplinarity, one must consider that the empirical sciences depend on two essential approaches, namely:

a) *empirical nature*, dictated by *common sense of perception*,

b) *abstract nature*, when the *abstract conclusion* becomes the researcher's own, incorporated in the researcher´s individual subjective memory.

Skepticism serves approaches of empiric and experimental nature. These approaches can succeed through intermediation of the intellective capacity of a collective sense (*common sense*). But they can be successful also through a subjective neurophysiologic perceptions of the observer (*personal sense*).

10.7 Amorousness.

When we study *relations of love* that garbled the meaning contained in the word *amorousness*, we do not exclude sex nor confine ourselves to the understanding that sexuality is the essence of love or of amorous gesture. Sexuality is present in animal and vegetal beings, *maybe not* in micro and macrocosmic entities.

The Christians affirm that God is Love. Roman people believed human beings were linked by the actions of Cupid. As a noun, amorousness translates desire, wanting, appetite, passion. Mystically speaking, Love is the name of the Greek god Eros, a divinity.

Social relations related to mystic love unveil an answer to divine calling. Love is a greatness, a vectorial greatness, defined by point of application, intensity, direction and sense. Nature receives from Love the energy to become perpetuated. Love is also the attractive force directed to repeat the being´s existence, the preservation of Nature and the *happiness* of all entities. Love is linked to the ideas of happiness, pleasure and harmony.

Love between entities of different sexes manifests itself with the reproductive force. That reproductive force is an instinctive expression of some internal tension, proper of the living entities.

Common sense identifies amorousness as behavior related to respect, zealousness, care, attention and lovingness.

It does not seem possible to arrive at a conceptual content nor at the practices of knowledge without including the idea of amorousness in the approach.

Love is of vectorial magnitude defined by intensity, direction, meaning, application point. As a phenomenon, love is always temporary, limited to time borders and survival conditions. But it is possible to add other characteristics to that conception.

Within the methods that can propitiate knowledge, *amorousness is the most pleasurable, efficient and productive*: Love attracts people, resolves problems, dissipates doubts, is creative and skillful, seeks to induce development processes, systems and solutions that render the *human assimilative capacity* efficient and productive, harmonious and pleasing. Love seems to transfer virtues of the spirit to soul and body.

Amorousness expresses a methodology comprehended as a method, that is, a way to knowledge, *Amorousness* identifies a level of reality in which certain states of conscience are manifested by signals with transcendent powers. Decoding these signals, human mind conquers transcendent meanings. They transcend uni-, inter-, multi- and pluri-disciplinary informs.

Without love, there is no creed to connect the subject to the integrating elements of a supposed objective truth. Without a creed, no justification is possible. Hence, intellectual experience shows that without amorousness there is not the slightest possibility of practicing transdisciplinarity. Moreover, without transdisciplinarity, scientific knowledge defined as a true and justified creed becomes a mere fictional hypothesis.

Induced by the mysticism by which we are possessed, we assume the belief and accept as intuitive truth that there is a level of reality in which love is the supreme force that induces us to encounter knowledge. At that point, we become able to understand the meaning of the expression *God is love.*

10.8 Intuition.

For five thousand years the Bonist monks, followers of the Bon Po religion, the oldest in Tibet, have studied the phenomenon they call Dzoghen, which we understand as intuition.

Intuitionism is recognized as an efficient method for revealing knowledge.

Based on *common sense, we intuit what is made conscious through the intermediation of the internal forms of perception, regardless of all a priori knowledge, rational activity or personal experience.*

Respecting intuition, logical and empirical reasons lay open. It is proper of intuitionism to emerge distanced from the claws that bind us to verbalized thoughts.

What we designate intuition is imprisoned neither by discursive language, nor by other specific forms of communication such words, ideas, lines or ways of thinking, geometric or plastic forms, sensations caused by sound, noise, luminosity, taste, touch or smell.

Truly, *intuition translates existence* of non-verbalized ideas and impulses, emerged from an internal level of reality from where soul is talking to the conscious mind. There are some very developed forms of intuitive perceptions, studied in many different advanced institutions.

Aristotle recognized intuiton as the *image* of the phenomenon.

Intuitive perception seems to translate what is connatural in the writings of Thomas of Aquinas.

We are not in the condition to ignore that intuition contributes to knowledge.

11 Fragmentary and holistic knowledge.

When we refer to the object of a discipline we mean to convey the set of phenomena whose characteristics are, or can be contained or delimited by the intellective resource in this specific field of knowledge.

We know that one phenomenon, similarly to a field of empiric experience, cannot be totally isolated.

Scientific practice has proved that only theoretically is the total to isolation of the phenomena possible, helped by *imaginary* and *science fiction*, . And the hypothesis to isolate is contained and limited to the experimental field of observation.

Such procedures occur on *specific levels of reality* and according to their nature and order of magnitude. Each of them is contained within the limits of acumen of the respective forms of perception.

There is also no doubt about the reduction process occurring on the fields of observation. They confirm the necessary analytic procedure recommended by Descartes.

When we order ideas using analytical process, we become able to reduce our difficulties and incomprehension to the smallest possible dimensions. By that way, the observer focuses the object of analysis on the appropriate level of reality. Step by step, it becomes possible to clear up, to classify and to understand the results one by one.

From the smaller variables, the synthesis enables us to form a set of answered questions that allows a broader range for comprehension and understanding. From an analytical fragmentation point of view through transdisciplinary methodology founded on holistic perspectives, we endeavor to render our intellect fit to better comprehend our context.

Exploring simultaneously the diverse levels at which distinct realities coexist, transdisciplinarity, based on its postulates and method, offers an ample perspective for human wisdom. It propitiates the broad scope of holistic view. Through this vision without boundaries, transdisciplinary attitude signals with the possibility of overcoming space-time-matter-energy internal pulses and induces the approach to what is *Sacred.*

Descartes, satisfying the anxiety for the truth, propels us toward the knowledge of the whole.

The Oracle of Delphos directed to the knowledge of ourselves: *Know yourself, don´t forget you are mortal, and nothing in excess.*

When we talk about fragments, it is not possible to ignore the new conceptions of the Chaos Theory, when it refers to *fractal.*

The American Heritage Science Dictionary clears up:

“Fractal. A complex geometric pattern exhibiting self-similarity in that small details of its structure viewed at any scale repeat elements of the overall pattern...

…Fractals are often associated with recursive operations on shapes or sets of numbers, in which the result of the operation is used to input to the same operation, repeating the process indefinitely. The operation themselves are usually very simple, but the resulting shapes or sets are often dramatic and complex. For example, a fractal set called a Cantor dust can be constructed beginning with a line segment by

removing its middle third and repeating the process on the remaining line segments…"

Chaos theory refers to the idea of chaos as "the behavior of systems that fellow deterministic laws but appear random and unpredictable. Chaotic systems are very sensitive to initial conditions; small changes in those conditions can lead to quite different outcomes. One example of chaotic behavior is the flow of air in conditions of turbulence."

12 Global integration and the insufficiency of verbal languages.

When we talk about integration, it will be helpful to know what mathematics informs are: *integral calculus* is a field of knowledge that has as its object the studies about integration and its uses.

To calculate areas bounded by curves, volumes, bounded by surfaces and solutions for differential equations is useful in practical life and in the most developed studies.

The mathematical meaning of integration refers to a process that starts from fragments to arrive to something greater, limited between limits, that is, some minimum and some maximum previously defined.

Social sciences translate a human meaning to the idea of integration. *Reintegration* refers to the *reabsorption* of the individual by his/her original community.

Another meaning refers to the *inclusion of individuals, groups or communities* in a *bigger social context* from which they have been excluded because of some specific restrictions. The basic condition to integrate or reintegrate is that the participants of the process do not lose their individual and specific characteristics but have to adjust them to the whole.

To integrate and to reintegrate criminal people in their community is an essential proposal to be considered in the Global Era.

The integration or reintegration of nations under democratic global era conscience is what we are intending to do.

Integration and absorption are related to distinct concepts, but we have to understand they do not exclude one another.

Referring to *integration*, Herbert Spencer (1820-1903) published "A System of Synthetic Philosophy" (1860), based on the *principle of evolution*. Spencer said that the mission of Philosophy is *the knowledge of evolution in all aspects of reality, which is never equal to absolute reality. The phenomenon is a succession of phenomena and the universal evolution is the expression of the Supreme Unique Being, not possible to be known.*

Our previous arguments before being exposed induce us to think that a common language will not be enough to a global integration. Language should be a good instrument that should facilitate but not be sufficient to integrate global humanity.

We suppose that we have to use other instruments, related to matter, energy, time, space and internal forces of each nation, each collectivity, to integrate them by abstract and material common interests.

To search for the definition of the common interests in the context of global integration, we suggest transdisciplinary methodology.

13 Empiric and pragmatic approaches against crimes, corruption and social ruptures.

We are jurists. The main object of our lives is not only Law and Justice, but the social results of their conception and application.

Because of that, we involve ourselves with the study of many other disciplines when the facts we are studying need their informs.

Empiric and pragmatic intellectual approaches against crimes, corruption and social ruptures require the sense of reality focusing facts and their presumable effects.

Points of view, philosophical perspectives and methodology are the starting points to begin the approaches.

What is a crime?

The juridical dictionaries define a *crime* as *some act against law.*

That is to say, before the existence of a law, the act should not be defined as a crime?

The concept of crime has to be much more extensive, because the extinction and the inexistence of law are not able to extinguish or delete crimes.

A crime may be defined to be any act done in violation of those duties which an individual owes to the community, and for the breach of which the law has provided that the offender shall make satisfaction to the public.

Criminology becomes an enormous field of studies and research.

The two main aspects of criminology are defined as empiric and pragmatic approaches.

Criminal phenomena are perceptible and sensible. The first approach has to be using *empiricism* as the first step. The second one refers to pragmatic results of the studies. That is to say, we expect positive results from that field of knowledge, watching to resolve and to diminish *crimes,* such as *corruption* and *social ruptures.*

The mentioned crimes, corruption and social ruptures include some sort of corruption and some sort of social ruptures not sufficiently defined by law, but the effects of which are against customs and moral traditions, which offend social order and individual rights. .

Pragmatic solutions have to be defined by social wishes. And many times, social wishes are not translated in written laws.

The omission of a law has two main effects: either the offense is not dealt with properly because of the legal omission (*"nullum crimen nulla poena sine lege* "(Beccaria) or *the solution comes through despotic decision.*

A true concept emerges from reality. The good result of a social rupture is not considered a crime, but a bad one is.

After social ruptures, *history is written by the winners.*

We believe that on the democratic structure projected to be effective in all countries in our global era, offenses will be resolved with the help of other languages than written verbal ones.

A *global common sense* will be dominant to resolve offenses between individuals, collectivities, nations and states, not depending on international written law.

14 Searching for global solutions in the face of particular forms of processing.

Dear colleagues,

We are here, during these short days, clearing and searching juridical proposals to help our global society to find solutions for international and local problems.

Propositions, as substantive ideas, are in themselves abstractions.

Process is the adjective to give reality to the abstractions.

Juridical process is the instrument to materialize the International Law.

If we are not successful at organizing a global international system of justice, which will include a tribunal with global jurisdiction, we are capable to initiate that organization with regional or limited international tribunals.

Tribunals need procedure codes, rules and norms to become functional and to work.

That is the pragmatic direction we shall assume to give our contribution: to study and to make proposals. Particular and generic forms of processing have to be studied and brought face to face.

Forms of processing demands, international adjective law (global procedure code) and the definition of a global wish through substantive codes (Civil, Commercial and Criminal) have to become our common work.

I believe that, during this conference, participating with as many as possible, our observations will be productive and will help the global society to find its goal: peace, harmony and justice over the whole planet.

Many ways are present to be chosen. We propose transdisciplinary methodology which respects and uses the help of every disciplines and beliefs from a trans-displinary perspective. In fact, reality contains in itself that internal force expressed in the hope of a better world.

Assuming that we are *complex*, existing simultaneously on *different levels of reality*, with some *other* always present in our context and respecting the *Sacred* , I think global integration will be successful.

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- *b)* Thierry Lasserre and Danil Vignaud. *A misteriosa identidade dos neutrinos. P. 28 to 37.* (title translated: *The mistery on neutrines identity*
- Alexander Kotrschal. *"Contadores" de estresse.* P.38 to 43. (title translated: *"Accounting" stress*)
- Scientific American Brasil n.126 (in Portuguese).
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POSTGRADUATE LEGAL EDUCATION REFORM IN SPAIN AND ITS IMPACT ON THE INTERNATIONALIZATION OF THE SPANISH LAW STUDENT

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Abstract: In 2006, the Government of Spain passed legislation (Legislation 34/2006) requiring all Spanish law students to undertake a nearly two year Masters and pass a Bar exam in order to be able to practice law. Prior to this reform, law students only had to graduate with an LL.B. in order to practice. While most would agree that greater regulation of the legal industry was a necessary step, there has been minimal discussion about the impact this reform has had and will have on the ability of Spanish law students to undertake professional and educational opportunities outside of Spain. This article, using empirical data developed through surveys of postgraduate law students, argues that this reform may have a detrimental impact not only on students who wish to pursue opportunities outside of Spain but also on Spanish law firms, which have made significant gains in the international legal market over the past two decades, in part, through the internationalization of its lawyers.
Key words: Spain, Postgraduate Legal Education, Masters in Lawyering, Máster Universitario en Acceso a la Abogacia, Internationalization, Mandatory Masters, Spanish Legal Education

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1. Introduction

The purpose of this article is to explore the extent to which the *Máster Universitario en Acceso a la Abogacia* (Master's Degree in Lawyering, "MAA"), a mandatory 16 month Master's program for aspiring Spanish lawyers, impacts Spanish students' willingness to undertake LL.M.s abroad or pursue other opportunities in foreign countries. Although there is significant debate around the actual need for such a program, there has been little discussion on the impact it may be having on students' interest or ability to pursue other, and perhaps more enriching, professional and educational opportunities in foreign countries once graduated from law school.

The impact of this may go beyond only depriving students of an opportunity to pursue other studies or experiences abroad, both of which are enriching, professionally and developmentally. A legacy of this mandatory Master's program could be the inability of law firms in Spain to recruit students with diversified expertise, experiences and language abilities. Many lawyers at top firms in Spain hold LL.M.s from foreign universities or have spent time abroad before returning to Spain to enter the Spanish legal market. This decrease in the number of Spanish law students entering firms and government agencies with foreign degrees or experiences, including the attainment of a second or third language, could ultimately have a prejudicial effect on law firms' ability to recruit talent and operate internationally.

It is important to point out that the objective here is not to address the merits of this Master's program in terms of its content. Rather the purpose is to raise the question whether such a program is having an injurious impact on the internationalization of the Spanish law student by discouraging students from spending a post-LL.B. year in a foreign country. This article is intended to jumpstart academic discourse as to whether this program is doing a disservice both to Spanish students as well as the Spanish legal market.

Using the results of an empirical survey conducted amongst current Master's students, and by acknowledging the important role of students' attitudes in understanding the impact of educational policy, this article argues that this mandatory Master's program is having a negative impact on the internationalization of law students by discouraging them from pursuing other educational and professional opportunities abroad. This article also draws from interviews conducted with some of the top Spanish and international firms to gauge their opinions and experiences on the potential impact of this program.

This article concludes by discussing possible ways of remedying this deficiency in post-graduate legal education.

2. Spanish Legal Education

In a 2012 issue of the *Journal of Legal Education*, Dr. Soledad Atienza published an article titled, "The Evolution of Legal Education in Spain"[3]. In this article, she presents short testimonials from distinguished Spanish lawyers who have graduated over the past five decades from law schools in Spain to highlight the evolving dynamics of legal education in Spain. This article pointed out a number of pervasive flaws in Spanish legal education from the perspective of law graduates. In particular, the interviewees make note of the limited practice-oriented pedagogical methodology and the passive lecturing environment in which students fail to develop legal reasoning and problem-solving skills.

Although this has changed significantly during the last five decades, students and recent graduates continue to echo similar sentiments that legal education in Spain lacks the educational dynamisms of other countries, particularly in comparison with its Anglo Saxon counterparts. While some law schools, such as Universidad Pontificia Comillas, where the authors of this article teach, have made great strides in developing and implementing practice-oriented learning, many law schools, particularly public institutions, continue to provide a form of education that has not incorporated more dynamic and practical methodologies and reflects the formalistic and rigid legal culture of continental Europe. Hesselink, in his article titled "The New European Legal Culture," points out that although European legal culture is evolving and becoming more pragmatic and multi -disciplinary, the legal culture in Europe, generally, still remains rather "formal, dogmatic and positivistic," particularly in comparison with the United States[4].

This formalistic and dogmatic approach to law is, in part, a result of pedagogical methodologies that have only minimally acknowledged that the Law, as a subject and vocation, needs to go beyond just mere memorization of the civil code. A search of class listings at a U.S. law school provides a clear demonstration of this point. Classes such as *Race, Law and Gender*; *Law and Literature*; *Trial Advocacy*, all point to culture where Law is not understood in isolation but is connected to broader questions in society and, where possible, strongly imbued with a focus on reasoning and practical application, skills that in 1992 the report, colloquially known as the *McCrate*

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[3] Soledad Atienza, The Evolution of Legal Education in Spain, 61 J. Legal Educ. 468 (2012)// Available at: http://jle.aals.org/home/vol61/iss3/10/ .

[4] Hesselink, Martijn W. The New European Legal Culture - Ten Years On (December 7, 2009). Towards a European Legal Culture, G. Helleringer& K.P. Purnhagen (eds.), Baden-Baden: C.H. Beck-Hart-Nomos 2014, pp. 17 – 24// Available at SSRN: http://ssrn.com/abstract=1519939 or http://dx.doi.org/10.2139/ssrn.1519939, page 27.

Report, identified as fundamental to being a good lawyer[5]. In comparison, a search for class listings in Spanish Law Schools, where students take between 8 – 10 classes per semester, finds that nearly all classes offered focus on isolated topics such as Administrative Law, Criminal Law and Constitutional Law, and there are almost uniformly no classes that acknowledge other subject matter's interconnection to the law or which provide practical training. Although in continental Europe learning codified law is essential to the study of law, pedagogical styles have largely ignored the need to integrate and emphasise the importance of logical reasoning and critical analysis.

These sentiments relating to the limitations of Spanish education are particularly shared amongst many of the thousands of Spanish law students who each year undertake a study abroad, returning to Spain not only having experienced other teaching methods, but also having developed new lawyering and language skills. For many students, the opportunity to study abroad not only gives them the excitement of being in a foreign country, but also supplements the deficiencies in their own educational system with more varied and dynamic forms of learning.

Such experiences often inspire many students to continue their post-LL.B. studies outside of Spain or, in other cases, lead them to choose to live outside Spain for a period of time before returning and finding work as lawyers. Young, aspiring lawyers view this formative experience abroad as both a form of individual and professional enrichment. In Dr. Atienza's article, she conveys this point through an interview with Javier Villasante, a Partner at the prestigious Spanish law firm of Cuatrecasas, Gonçalves Pereira, who discusses how studying for an LL.M. abroad helped develop skills that contributed to his ability as a lawyer. She writes:

"Villasante discovered the Socratic Method when he did his LL.M. at Columbia Law School and found it helped him reason and solve problems. Villasante believes Spanish law schools are too devoted to memorization instead of teaching reasoning and problem solving…[6]"

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[5] Available at: http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2012_survey_of_law_school_curricula_2002_2010_executive_summary.authcheckdam.pdf ; http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report).authcheckdam.pdf ; http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report).authcheckdam.pdf .

[6] Atienza 476.

Villasante goes on to acknowledge the important role international legal education and foreign experiences play in the development of a lawyer. Dr. Atienza communicates this point by summarizing his comments as follows:

"Young lawyers are now more international, they have travelled more, and many of them have studied with the Erasmum program…[H]e feels continuing legal education programs for practicing attorneys in other countries is a positive development for Spain."

3. The MAA introduced by the reform of 2006

In an effort to remedy this deficiency in legal education and provide students with more skills-oriented learning, Law34/2006 of 30 October ("Law 34/2006"), created a mandatory Master's Program in Lawyering for LL.B. law graduates who wish to access the legal profession[7].

Like in other jurisdictions, the legal profession in Spain is split in two classes of lawyers, *Abogado* (~ lawyer/solicitor in the UK) and *Procurador* (~ barrister in the UK), and a legal professional will usually only hold one of the two titles. An *Abogado* is an attorney who can act in the place of his or her client for legal purposes, as in signing contracts, and may conduct litigation on his or her behalf by making applications to the court, writing letters in litigation to the client's opponent, and so on. A *Procurador* is a legal professional who specializes in courtroom advocacy, drafting legal pleadings, taking cases in tribunals and giving expert legal opinions. However, a *Procurador* is not an attorney, i.e. he or she is usually forbidden from "conducting" litigation. This means that, while the *Procurador* speaks on the client's behalf in court, he or she can do so only when instructed by an *Abogado*. In the following paragraphs, the term *lawyer* will be used, referring indistinctly to *Abogados* and/or *Procuradores* because the access requirements are the same for both, with very few exceptions.

General outline

The reform aims at improving the professional training of lawyer candidates in their capacity as future key-players in the administration of justice so that citizens are ultimately guaranteed a certain quality of counseling, legal advocacy and technical representation when exercising their fundamental right of access to justice. Prospective candidates must hold a degree in law and enroll with one of the officially

[7] It is not uncommon for countries to transplant aspects of other legal educational systems into country. See M. Erie. Pravovaia reforma obrazovaniia v Kitae cherez SSHA [Legal Education Reform in China Through U.S.]. Inspired Transplants, Journal of Legal Education, volume 59, number 1 (August 2009).

approved MAA programs. The MAA program is based on three "pillars":(i) the completion of at least 60 ECTS course credits where the candidate has to acquire a set of professional skills, (ii) a period of internship at law firms and other legal institutions representing another 30 ECTS,and (iii) the passing of the bar examination. Once the candidate has successfully completed the three stages, he or she may enroll with any Spanish bar association.

The training courses can be taught at public or private universities in the framework of programs leading to an official university Master's degree. These courses may also be arranged by combining credits from different curricula of courses taken in the same or other university, Spanish or foreign. The training courses can also be offered directly by the Spanish bar associations as approved by the General Council of Lawyers (*Consejo General de la Abogacía Española*).

According to Law 34/2006, the training courses included in the MAA must ensure the acquisition of the following skills:

– Implementation of specialized academic knowledge into the legal work.

– Techniques of research and fact-finding in different types of procedures, especially with regard to the drafting of documents, conducting interviews and providing expert evidence.

– Understanding of the defense rights of clients within national and international judicial protection.

– Techniques of negotiation, interest settlement and alternative dispute mechanisms.

– Knowledge of the professional rights and duties towards clients, other parties, colleagues, courts and public authorities.

– Functioning of free legal assistance and promotion of social responsibility of the lawyer and *pro bono* work.

– Knowledge of the scope of professional secrecy and confidentiality, and preservation the independence of judgment.

– Knowledge of data protection rules and protocols.

– Development of complex defense strategies, especially when affecting more than one practice area.

– Public speaking, especially with regard to the exposition of facts and legal arguments in different legal procedures.

The teaching staff of the MAA is to strike a balance between practitioners and university professors. Each of these groups shall not exceed 60 and not be less than 40 percent of the teaching staff. In addition, practitioners must prove that they have

been practicing at least three years and academics must provide proof of a stable contractual relationship with a university.

The internship must be completed in whole or in part at courts, state's attorney's offices, law firms, and legal or human resources departments of companies. Provided that a meaningful legal content is ensured, the internship can also be completed with police establishments, prisons, social or health services and entities that develop activities of general interest.

The yearly bar examination (*examen de acceso a la abogacía*) is the same for all candidates throughout Spain. Candidates must be of legal age, prove the completion of the training courses and internship required and not be disqualified from the exercise of the profession.

The exam aims to verify the knowledge and skills acquired in the courses and the practical training. The exam consists of a written exercise divided in two parts to be held on the same day. The first exercise includes multiple choice answers. The second exercise consists of a case study chosen by the candidate among various alternatives. The contents of the bar examination are set for each call by the Ministry of Justice. The General Council of the Judiciary, the universities, the General Council of Spanish Lawyers and the Association of Spanish Bar Associations may send proposals to the Ministry of Justice. The Ministry of Justice provides on its website updated practical information on the evaluation process and its content. The grade is either pass or fail. Surprisingly, each examination call may not contain pre-established pass rates.

For each call, the Ministries of Justice and Education appoint the members of a national evaluation committee among representatives of the two Ministries, state lawyers, representatives of the Spanish regions, lawyers with more than five years of practice, university professors and representatives of the General Council of the Judiciary. In addition, each Spanish region appoints a regional examination committee, which is responsible for the management and supervision of the exercises in that region.

Training centers

The training is entrusted by law both to universities and Spanish bar associations. Successful MAA programs ultimately depend on enhanced cooperation between universities and bar associations and/or the joint delivery of training courses.

Universities wishing to provide training courses leading to an MAA degree must conclude an agreement with at least one Spanish bar association, in order to ensure compliance with the requirements of internship placements. Similarly, Spanish bar

associations wishing to offer training courses must enter into an agreement with at least one university, in order to ensure compliance with the requirements concerning the suitability and qualification of the teaching staff.

Both universities and bar associations have a considerable leeway in shaping the training courses and internship periods. As regards the training courses, the regulation merely provides some essentials such as, for example, that the curriculum should be composed of 60 credits and the competencies required for each job. Apart from these basics, the law avoids the imposition of a closed model so that each entity can createitsMAAprogram with a large degree of autonomy.

Each MAA program must be audited and approved by the Ministries of Justice and Education both before being offered to the public and every six years after approval. The official approval process is designed to ensure that all candidates have acquired basic knowledge and skills for the practice of law. Based on this overall objective, Law 34/2006 orders the auditing processes whose priorities can change from time to time in response to specific targets.

4. The Internationalization of the Spanish Student

The Spanish Outbound Student

Modern Spain has a rich tradition of vibrant and internationally driven student population. For nearly the last decade, over 40,000 undergraduate Spanish students, including law students, have studied abroad annually in virtually all corners of the globe. No official figure exists as to the exact number of Spanish students who study abroad each year; however, an estimate based on combined sources for 2013/14 suggests that upwards of 45,000 students per year study outside of Spain, out of the 1,412,673 students (approximately 3.2% of undergraduate students) enrolled as undergraduates in the Spanish higher education system[8]. By comparison, approximately 289,000 U.S. college students studied abroad in 2012/13, out of 17.5 million undergraduate students[9]. This comes out to less than one percent of the undergraduate student population studying abroad.

Although many students choose to leave Europe to study abroad, the vast majority of Spanish study abroad students choose to stay within Europe and study through

[8] Available at: http://www.mecd.gob.es/dms/mecd/educacion-mecd/areas-educacion/universidades/estadisticas-informes/datos-cifras/Datos-y-Cifras-del-SUE-Curso-2014-2015.pdfpage 8POINT OUT HERE THAT UNDERGRADUATE INCLUDES LAW .

[9] Available at: http://nces.ed.gov/programs/coe/indicator_cha.asp; http://www.iie.org/Research-and-Publications/Open-Doors/Data/US-Study-Abroad/All-Destinations/2011-13 .

the Erasmus Study Abroad Program[10]. In both 2011/12 and 2012 /13, Spain sent over 39,000 students on the European study abroad program, more than any other country participating in the Erasmus program. In fact, four out of the top five European institutions for outbound 'study abroad' are Spanish public universities[11]. Of these 39,000 Erasmus students, approximately 13,000 are listed by the Spanish Ministry of Education as falling within the subject area of Social Sciences and Law[12]. Chart 2.1 below illustrates how many Spanish students overall studied through Erasmus in comparison with other European countries with a similar population size[13]. The difference in outbound sending is significant.

Chart 2.1

Country	2011/12 – Outbound	2012/12 – Outbound
Spain	39, 545	39,249
Germany	33, 363	34, 891
France	33,269	35, 311
Italy	23, 377	25, 805
United Kingdom	13, 662	14, 572

Spain is also one of the primary outbound countries for students coming to the United States. In 2012/13 and 2013/14, Spain, the 25th largest sender of study abroad programs to the United States, sent 5,033 and 5,350 students (both graduate and undergraduate), respectively, with approximately 10% of those students studying humanity-related subjects[14].Unlike the situation in many of other European countries, the number of students coming to the United States from Spain has risen by approximately 5.8% per year over the last eight years, demonstrating a strong interest and demand amongst Spanish students to study in the United States[15].

Spanish students also study in other parts of the globe, though in far fewer numbers. UNESCO's estimates of Spanish students studying abroad (which appear to be very low estimates), provide an idea of the wide geographic reach of Spanish study

[10] Available at: http://www.erasmusprogramme.com/, for a description of the Erasmus programme.

[11] Available at: http://europa.eu/rapid/press-release_IP-14-821_en.htm .

[12] Available at: http://www.mecd.gob.es/dms/mecd/educacion-mecd/areas-educacion/universidades/estadisticas-informes/datos-cifras/DATOS_CIFRAS_13_14.pdf .

[13] Available at: http://ec.europa.eu/education/library/statistics/ay-12-13/annex-1_en.pdf .

[14] Institute of International Education, Top 25 Places of Origin of International Students, Open Doors Data 2012/13 – 2013/14// Available at: http://www.iie.org/Research-and-Publications/Open-Doors/Data/International-Students/Leading-Places-of-Origin/2012-14 .

[15] Available at: file:///Users/adam2/Downloads/Spain-Open-Doors-2014%20(1).pdf .

abroad students[16]. In 2013, 16 Spanish students studied in South and West Asia; 367 students studied in Latin America and the Caribbean, and 19 students studied in Sub Saharan Africa[17].

The Spanish Outbound Law Student

As discussed above, there is a strong tendency amongst Spanish university students to undertake educational opportunities abroad. While less information is available as to the number of law students, specifically, who study abroad, the limited existing data suggests that in both public and private institutions, law students are highly inclined to pursue international opportunities.

Amongst public universities, for example, at the University of Seville, in the South of Spain, of the 1,333 students who studied abroad during 2013-14 academic year, approximately 6% (80 students) were law students.[18]At the University of Granada, which is also in the South of Spain, the Faculty of Law sent 115 out of 1971 students (5% of study abroad students overall) to other law schools around Europe, making it the fifth most sending Faculty within the University (out of 32 Schools)[19]. Similarly, at the University of Zaragoza, in Eastern Spain, 97 Law students (10.5%) studied abroad in 2013 – 14, out of 921 total outbound students, making the Law Faculty the second largest source of outbound sending[20].

In private universities, perhaps for obvious reasons, law students also study in large droves abroad. At Universidad Pontificia Comillas in Madrid, for example, which enrolls approximately 11,000 students, 604 students studied abroad in 2013/14[21]. Of those 604 students, 326 students studied through Erasmus, while 278 students took part in bilateral exchanges with non-Erasmus universities. The Faculty of Law sent 250 of the students abroad through Erasmus and non-Erasmus exchanges (41.3%). Similarly, in Ramon Llull University in Barcelona, 83 law students studied abroad, out of approximately 500 study abroad students overall in 2013 – 14 (16.6%)[22].

[16] It is important to point out that these figures, provided by UNESCO, seem to under represent the correct number of students studying abroad. This is because according to UNESCO, in 2014, only 28, 640 Spanish students studied abroad. As discussed further down, through Erasmus alone, over 39,000 students leave Spain each year, suggesting that reporting figures to the ILO underrepresent the correct number of Spanish students studying abroad.

[17] Available at: http://data.uis.unesco.org/Index.aspx?queryid=172 .

[18] Available at: http://servicio.us.es/secgral/sites/default/files/A%C3%B1o%202013-2014_0.pdf .

[19] Available at: file:///Users/adam2/Downloads/42.pdf, page 280.

[20] Available at: http://www.unizar.es/sites/default/files/secregen/MEMORIA%2013-14%20final.pdf , page 141.

[21] Memoria Academica 2013/14.

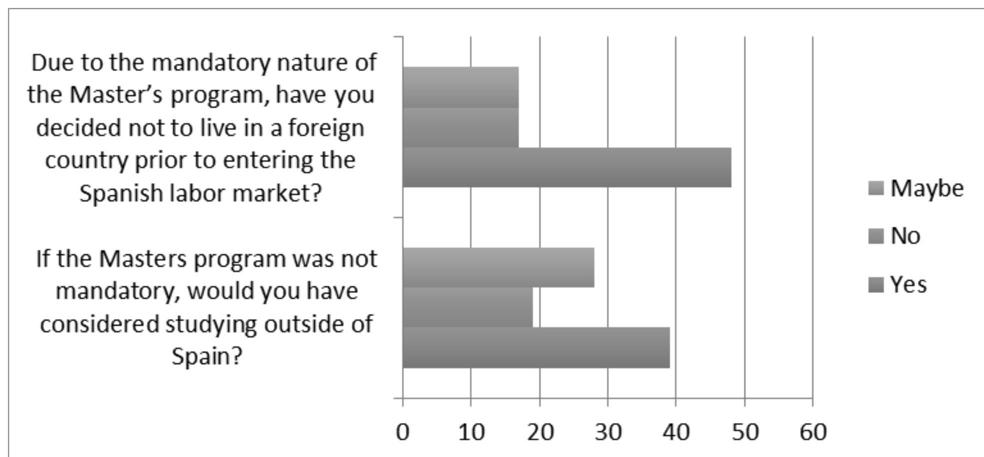
[22] Available at: http://www.esade.edu/annual-report/es/internacionalidad .

This evidence underlies the necessity to question whether, amongst a population in which there is significant interest in international educational mobility, requiring Law students to stay in Spain for two additional years after finishing undergraduate studies is leading many to forgo international experiences upon graduation, inadvertently harming, in some cases, both the individual and the professional sector. It also raises the question whether this harm could be adverted through changes to the current structure of the Master's program, while on the one hand, acknowledging that Spanish law students require a greater infusion of practical training due to dogmatic and rigid teaching methodologies; and on the other hand, recognizing that such skills and training could be achieved through more flexible post graduate or graduate policies.

5. Results

The results of the survey, which are provided in Table 1.1, suggest that the MAA has led students to forgo educational or other opportunities internationally.

Table 1.1



In the first question, the results appear to overwhelmingly support the hypothesis that the mandatory MAA has caused students to not pursue some form of opportunity outside of Spain. Approximately 57% of those surveyed stated that having to do this MAA program has led them not to live in a foreign country for some period of time, while 20% answered "maybe" and another 20% answered "no."

While the response to this first question suggests that the MAA has had an adverse impact on students' decision to live abroad prior to entering the Spanish

labor market, it is unclear from this survey what types of international opportunities may be forgone by the students. The premise behind this article, as discussed earlier, is that pursuing international opportunities, particularly in formative years, whether for professional or/and educational purposes, has a positive impact both on the individual as well as on the person's home country to which he or she returns. However, what we do not know from this first question is the type or quality of opportunity the student had hoped to pursue outside of Spain. For example, are they referring to short or long internships in another country? Are they referring to visits to other countries to develop language skills? Couchsurfing or tourism?

Through the application of a Q-Squared approach, this information could be better gathered. This would help to develop a better profile of the type of missed opportunity associated with being required to do the MAA in order to determine the extent to which this program really has a negative impact on the Spanish law school student with regard to his or her decision to internationalize.

The results in the second question also suggest that the MAA is an obstacle to students studying for a Master's program in a foreign country, though the results were less definitive. 46% of students surveyed said they would have done a Master's degree in a foreign country had it not been for the mandatory MAA. 33% surveyed stated they would "maybe" do a Master's degree in a foreign country, and 22% stated they would not have done a Master's program in a foreign country.

Without more qualitative questioning to complement this study, the results fail to provide more specification as to when they would do this Masters in a foreign country – whether it be done immediately afterwards or whether it is a long term goal – and, more importantly, how realistic they are with respect to doing a Master's degree in a foreign country

6. Recommendations

First, the authors recommend that Spanish universities and bar associations take advantage of the fact that Law 34/2006 does not preclude students from taking part of their training courses abroad. Therefore, it is highly desirable that future MAA programs integrate international programming into the mandatory Master's degree through recognition of foreign degrees or course credits (e.g. through concurrent or joint degrees).

Second, as far as the internship period is concerned, the construction of Law 34/2006 should be flexible enough so as to allow for traineeships with non-Spanish lawyers, e.g. at least 30% with Spanish qualified lawyers and 70% with non-Spanish

qualified lawyers. This combination would be in line with other European jurisdictions such as the United Kingdom or Germany, where lawyer candidates can complete a significant part of their training hours in other jurisdictions and/or with foreign law firms.

Finally, the authors question that the practical legal training for Spanish lawyer candidates is best provided through a lengthy and rather expensive Master's degree. Maybe a reform that integrated the skills of the postgraduate degree into undergraduate teaching of the Spanish law degree (*grado en Derecho*) would deliver more efficient results.

STALIN, TRUMAN AND CHURCHILL IN COLD WAR TIMES

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Joseph Vissarionovich Stalin (his real last name was Jughashvili) was born on December 6 (18), 1878 (according to the official data, he was born on December 9 (21), 1879), in Gori of Tiflis Governorate in the Russian Empire. He died on March 5, 1953, in Volynskoye of the Kuntsevo district of the Moscow region, the RSFSR, the USSR. Stalin was a Russian revolutionary, a Soviet political, state, military and party figure. Since the end of the 1920s and the beginning of the 1930s till his death in 1953, Stalin was the sole ruler of the Soviet state. He was awarded the titles of the Hero of Socialist Labour (1939), the Hero of the Soviet Union (1945), Marshal of the Soviet Union (1943), Generalissimus of the Soviet Union (1945)[1]. The short biography of Stalin was published in 1950, and it contains quite interesting facts from the life of the leader[2].

Harry S Truman (he used the letter *S* as his second initial in his name in the memory of his grandfathers: his father's father Anderson Shipp and his mother's father Solomon Young) was born on May 8, 1884, in Lamar of the state of Missouri, and died on December 26, 1972, in Kansas City, the state of Missouri. He was a famous public leader of the USA, the 33rd President of the USA from the Democratic Party from 1945 to 1953. Just a few facts: being the 33rd President of the USA, Harry Truman was granted the highest degree of Masonry (the Sovereign Grand Inspector General) in 1945 and became the Honorary Member of the Supreme Council A.A.S.R. Southern Jurisdiction Headquarters in Washington D.C. He went through the procedure of initiation into the *Belton* Masonry lodge on February 9, 1909[3].

[1] Available at: https://ru.wikipedia.org/wiki/Stalin,_Iosif_Vissarionovich .

[2] See: Iosif Vissarionovich Stalin. Kratkaia biografiia [Joseph Vissarionovich Stalin. A Short Biography]. 2nd edition, updated and supplemented// Composed by G.F. Aleksandrov, M.R. Galaktionov, V.S. Kruzhkov, M.B. Mitin, V.D. Mochalov, P.N. Pospelov// Gos.izdatelstvo politicheskoi' literatury [State Publishing House of Political Literature]. Moscow, 1950.

[3] Available at: https://ru.wikipedia.org/wiki/Truman,_Harry .

Sir Winston Leonard Spencer-Churchill (born on November 30, 1874; died on January 24, 1965 in the Blenheim Palace, London, Great Britain) was a British public and political figure, the Prime Minister of Great Britain in 1940-1945 and in 1951-1955, a military (a colonel), a journalist, a writer, the Honorary Member of the British Academy (1952), the Nobel Prize Winner in Literature (1953)[4]. According to the public opinion poll conducted by the BBC Corporation in 2002, Sir Winston Churchill was recognized as the greatest Briton in the history of the country.

The life of each of the above-mentioned public figures deserves special attention and is a subject of thorough and comprehensive investigations, which can be confirmed by a number of publications[5]. However, in this article we will focus only on their relations in the period of the so-called Cold War.

Historically speaking, March 5, 1946 is generally believed to have been the beginning of the Cold War between the West and the USSR, when Winston Churchill made a famous speech in the Westminster College at Fulton (the state of Missouri, the USA). Speaking as a private person, Churchill declared that the relations between the USSR, on the one hand, and the USA and Great Britain, on the other hand, must be based on military supremacy of the English-speaking countries. Churchill thought that, first of all, they had to strengthen their relations with the USA which had monopoly over nuclear weapons. "At present, the United States of America is on the top of the military power in the world"[6]. His declaration significantly worsened the relations between the USSR and the West.

Sir Winston Churchill is known not only as the initiator of the Cold War. Together with Harry Truman, he ardently supported the idea of creating the military block of NATO. The two world leaders insisted on that with the only purpose to stop the expansion of the USSR in Europe.

As it is well known, the USA, Canada and some European countries signed the treaty on the creation of that new military alliance on April 4, 1949. Greece and Turkey joined the alliance in 1952 (and it was the first expansion of NATO) to save them from "international communism". Western Germany became a member of NATO in 1955 (the second expansion of NATO). Spain joined the alliance in 1982 (the third expansion of NATO). After the end of the Cold War, Hungary, Poland and the Czech

[4] Available at: https://ru.wikipedia.org/wiki/Churchill,_Winston .

[5] See, for example: D. Volkogonov. Stalin. Politicheskii' portret [Stalin. Political portrait]. In 2 volumes. Moscow,1991; Y. Vlasov. Rus' bez vozhdya [Rus' without a Leader]. Voronezh, 1995; D. Brent, V. Naumov. Poslednee delo Stalina [The Last Case of Stalin]. Moscow, 2004.

[6] Available at: https://royallib.com/read/cherchill_uinston/rech_ucherchillya_v_vestminsterskom_kolledge_fulton_missuri_ssha_5_marta_1946.html#0 .

Republic joined the block in 1999 (the fourth expansion of NATO); Bulgaria, Latvia, Lithuania, Romania, Slovakia, Slovenia and Estonia did it in 2004 (the fifth expansion of NATO); and Croatia and Albania joined the block in 2009 (the sixth expansion of NATO)[7]. Georgia and Ukraine[8] are on the threshold of being accepted into NATO, though their membership is quite a difficult scenario which can hardly be implemented in the near future.

For reference: on March 13, 1946, in his interview to the Soviet newspaper "Pravda", J.V.Stalin commented on the Fulton speech made by Churchill. He said that "in fact, Mr. Churchill keeps to the position of instigating a war. And in this respect, he is not alone: he has friends not only in England but in the United States as well". The history of relations between the USSR and the USA is an obvious example to this. The world had not yet recovered from destruction and casualties of the Second World War when the United States was already a planning to destroy their ally in the anti-Hitler coalition by nuclear weapons[9].

The United States of America is the only country which has ever used nuclear weapons. In August of 1945, it was Truman who initiated the atomic bombing of Hiroshima and Nagasaki to make Japan surrender during the Pacific Ocean military activities of the Second World War. As a result, the total number of casualties amounted to 90 – 166 thousand people in Hiroshima and 60 - 80 thousand people in Nagasaki. As a result, Japan capitulated[10]. Within a year after the end of such bombings, more than 40 thousand American soldiers were stationed in Hiroshima and 27 thousand soldiers - in Nagasaki.

However, some researchers claim that the main purpose of these atomic bombings was to demonstrate the atomic power of the USA[11] and to exert influence on the USSR before it began its war against Japan in the Far East. It is well known that on July 24, 1945, during the Potsdam Conference of the three leaders, U.S. President Harry Truman told Stalin that the USA had a new type of the most destructive weap-

[7] Available at: https://ru.wikipedia.org/wiki/NATO .

[8] See: V.S. Belykh. Rossiia na poroge vstupleniia v VTO, a Gruziia i Ukraina – v NATO [Russia on the Threshold of Being Accepted in the WTO while Georgia and Ukraine in NATO]// Bizness, management i pravo [Business, management and law]. 2007. No. 2.

[9] See: N.N. Yakovlev. Ot Trumena do Reigana. Doktriny i realnosti iadernogo veka [From Truman to Reagan. Doctrines and Realities of the Nuclear Century]. Moscow, 1984; N.N. Yakovlev. TSRU protiv SSSR [The CIA Against the USSR]. Moscow, 1983.

[10] Available at: https://ru.wikipedia.org/wiki/Atomnye_bombardirovki_Khirosimy_i_Nagasaki .

[11] N.S. Indukaeva. Istoriia mezhdunarodnykh otnoshenii' 1918-1945gg: Uchebnik [History of International Relations During 1918-1945: Textbook]. Publishing House of the Tomsk University, Tomsk, 2003.

ons[12]. However, Truman did not mention that he meant nuclear weapons. Stalin did not show any interest but just said that he hoped that the USA would be able to efficiently use it against the Japanese. Churchill, who closely watched the reaction of Stalin, was of the opinion that Stalin did not fully understand the true meaning of Truman's words and, therefore, did not pay enough attention to his words[13]. It is a short fragment from the historical meeting of the three leaders.

But according to the memoirs of the legendary USSR marshal G.K.Zhukov, Stalin clearly understood everything and just did not show that. Speaking with the USSR Minister of Foreign Affairs V.M.Molotov, Stalin mentioned that "…we should speak with Kurchatov to complete the work faster"[14].

When the operation of the American special services under the code name *Venona Project* was declassified, it became known that Soviet agents knew and warned about the development of nuclear weapons. Some of their messages proved that agent Theodore Hall had informed about the planned date of the first testing of nuclear weapons just a few days before the Potsdam Conference. This fact can, to a certain extent, explain why Stalin listened to Truman's words without any excitement. Theodore Hall (Holzberg) had been working for the Soviet intelligence from 1944[15].

In 1947, the USA initiated the development of the Marshall plan, which was aimed at restoring the economy of European countries on certain conditions. The *European Recovery Program* was put forward by the U.S. Secretary of State George C. Marshall and came into effect in April 1948. Seventeen European states, including Western Germany, took part in that program. The same help was offered to the USSR and its allies; however, the USSR refused to participate. The Marshall plan was in operation for four years. Around 13 billion dollars were allocated and spent to economically and technically restore the European states united into the Organization of European Economic Cooperation. The plan contributed to the establishment of post-war

[12] See: Sovetskii' Soyuz na mezhdunarodnykh konferentsiiakh perioda Velikoi' Otechestvennoi' voi'ny, 1941-1945: sbornik dokumentov [The Soviet Union at International Conferences During the Second World War, 1941-1945: the Collection of Documents]// Ministerstvo inostrannykh del SSSR [Ministry of External Affairs of the USSR]. Politizdat Publishing House, Moscow, 1984, p. 14.

[13] Available at: https://ru.wikipedia.org/wiki/Atominye_bombardirovki_Khirosimy_i_Nagasaki .

[14] See: G.K. Zhukov. Vospominaniia i razmyshleniia [Reminiscences and Speculations]. OLMA-PRESS Publishing House, Moscow, 2002, v.1, p. 375.

[15] Theodore Hall is a prodigy physicist, a participant of the Manhattan project. He handed over secret information to the USSR, he was exposed, fired but he was not tried. Later he did research in the USA and Britain, made a significant contribution to the methods of biological object research// Available at: https://ru.wikipedia.org/wiki/Kholl_Teodor .

peace in Western Europe. The aim of the plan formulated by the USA was to restore the economy of Europe destroyed by the war, eliminate trade barriers, modernize the industry of these countries and contribute to the development of Europe as a whole[16].

Another major goal of the Marshall plan was to diminish the influence of communists and the USSR. Therefore, it was an expected move on behalf of the USA to withdraw communists from the governments of those countries which signed the Treaty. This requirement was a preliminary condition of rendering assistance. As a result, by the year of 1948, there were no communists in governments of Western Europe[17].

It is interesting to note that not all high ranking officials of the USA approved of the Marshall plan. For instance, the former vice-president of the USA Henry Wallace severely criticized the Marshall plan and called it a weapon of the Cold War against the USSR. Speaking before the State Duma on March 14, 1994, former U.S. president Richard Nixon underlined that "…if I were a Russian politician, I would realize that it is not necessary to be ahead of the American policy"[18]. Another example: in an interview to the American network channel *Salon*, the former U.S. President Jimmy Carter said: "The world considers America to be the main instigator to war"[19]. It looks like such revelations dawned only on former presidents of the USA. The current president Barak Obama does not seem to realize that. But time will show.

The personal relations between Stalin, Truman and Churchill, to put it mildly, worsened after the Second World War. Nonetheless, in February 1947, Churchill sent a private message to Stalin in answer to Stalin's message sent through Field-Marshal Montgomery who came to Moscow. Churchill wrote:

"I always look back on our comradeship together, when so much was at stake… I am also delighted to know from Montgomery of your good health. Your life is not only precious to your country, which you saved, to the friendship between Soviet Russia and the English-speaking world.

Believe me,

Yours very sincerely,

Winston Churchill"[20].

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[16] See: Jesse Russell, Ronald Cohn. Truman Harry. LENNEX Corp. Publishing House. 2012. pp. 7 – 8.

[17] Available at: https://ru.wikipedia.org/wiki/Plan_Marshalla .

[18] Nezavisimaia gazeta [Independent Newspaper]. March 15, 1994, p. 2.

[19] Available at: https://tvzvezda.ru/news/vstrane_i_mire/content/201404121733-104i.htm .

[20] See: B. Baily. Cherchil' bez lzhy. Za chto ego nenavidyat [Churchill Without Lie. What is he Hated for?]// Available at: https://libatriam.net/read/109610/# ; D. Reynolds. Iz mirovoi' voi'ny k holodnoi' voynr: Cherchil', Ruzvel't i Mezhdunarodnaia istoriia 1940-kh godov [From World War to Cold War:

Probably, at that time Churchill truly believed that it was possible to come to agreement with Stalin. The final breach of relations between the former allies of the anti-Hitler coalition took place only a year later, in 1948. As a result, Stalin, the former ally in the fight against Hitler, turned into the main threat and enemy.

It was Churchill who said that “Great Britain has no constant friends or enemies but rather constant interests”.

During the Cold War, Harry Truman made a lot of efforts to worsen the relations with Soviet Russia and with Stalin personally. Let us remember the chain of events initiated by Truman in the chronological order.

1. The Iranian crisis. The 1942 Agreement established the period of time during which the countries involved had to withdraw their troops from the territory of Iran within six months after the end of the war. By January 1, 1946, all the American troops left the territory of Iran. Great Britain declared that it would withdraw its troops by March 2. The Russian News Agency TASS announced that the USSR was ready to withdraw its troops beginning with March 2, 1946 from the “relatively calm” regions of Iran - from its northern parts. However, the USSR did not fulfill this obligation.

On March 18, 1946, the government of Iran raised a question of immediate evacuation of all the Soviet troops before the Security Council. Moscow tried to postpone the meeting of the Security Council at least till April 1. When the attempt failed, the Soviet representative A.A.Gromyko left the meeting of the Security Council[21]. The reaction of the USA was more than severe. Truman threatened to wage war against the USSR. He wrote in his memoirs

“If the Russians were to control Iran’s oil, either directly or indirectly, the raw -material balance of the world would undergo a serious change, and it would be a serious loss for the economy of the Western world”[22].

In other words, everything is still about oil.

2. China. On October 1, 1949, Great Leader Mao Zedong proclaimed the foundation of the People’s Republic of China. The overthrown Chiang Kai-shek escaped to the island of Taiwan under the cover of the U.S. troops. And it was under the control

Churchill, Roosevelt, and the International History of the 1940s]. Chapter 14. OUP Oxford Publishing House, 2006.

[21] Available at: htpps://ru.wikipedia.org/wiki/Iransky_krizis .

[22] See: O.Stone, P. Kuznik. Nerasskazanaia istorii’a SSHA [The Untold History of the USA]// Translated from Eng.by A.Orzhitsky, V.Polyakova. KoLibri, Azbuka-Atikus Publishing House, Moscow, 2014, p. 286; W.A. Boettcher. Prezidentskii’ risk povedeniia vo vneshnei’ politike: Blagorazumie ili opasnost’? [Presidential Risk Behavior in Foreign Policy: Prudence or Peril?]. Palgrave Macmillan, 2005, apr 16, p. 57.

of the U.S. troops that he organized military raids to Chinese cities till the time when the Soviet air-forces were stationed close to Shanghai[23]. Many years, even decades, have passed, however, the key issue in relations between the USA and China has always been the question of Taiwan. It concerns not only the sovereignty of China, but peace and stability in the Asian-Pacific region on the whole. The result of the American policy is two Chinas, though the government of China does not accept such a concept.

3. Vietnam. In 1945, Ho Chi Minh declared the liberated territory to be the independent Democratic Republic of Vietnam. However, France waged a colonial war against Vietnam. When in 1950 the USSR and China recognized the Democratic Republic of Vietnam, the USA began rendering military and economic assistance to France. Geneva agreements were signed after the defeat of French troops in July 1954.

4. War in Korea. On June 25, 1950, the North Korean army attacked South Korea. Almost immediately, the USA joined the military actions with the approval of the United Nations. With serious casualties within the first month, the American troops later managed to cease the advance of the North Korean army and in September they began a counter-attack. China sent significant military assistance to North Korea and thus saved it from complete defeat. Officially, the USSR did not take part in this war; however, it contributed much finance and provision to the Chinese troops[24]. After a series of defeats of the UN troops, the balance of powers stabilized and a positional war began in Korea.

The Korean War was one of the most important events in the foreign policy of the USA in the first half of the 1950s. The war was dragged out and by 1952 its obvious ineffectiveness significantly reduced Truman's political rating; therefore, he did not run for office in the next presidential election. General Dwight Eisenhower[25], a Republican candidate, became the next president, mostly due to his promises to bring an end to the Korean War. Because of the Korean War, Harry Truman has remained in the history of the USA as the president with the lowest rating during his presidency[26]. However, the war did not cease with his resignation.

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[23] See: Jesse Russell, Ronald Cohn. Truman Harry. LENNEX Corp.publishing house, 2012, p. 8.

[24] Available at: https://ru.wikipeadia.org/wiki/Koreiskaya_voina .

[25] See: R.F. Ivanov. Dwight Eisenhower// Edited by N.N. Yakovlev. Mysl Publishing House, Moscow, 1983, pp.126 – 271.

[26] See: Oliver Stone, Peter Kuznik. Neraskazannaia istoriya SSHA [The Untold History of the USA]. Translated from English by A.Orzhitsky, V.Polyakova. p. 548.

Before officially taking office (on November 4, 1952), the newly elected U.S. President Dwight Eisenhower took a trip to Korea to see what could be done to cease the war. But the turning point was Stalin's death on March 5, 1953, after which the Presidium of the Central Committee of the Communist Party of the USSR voted to end the war. Having lost the support of the USSR, China voluntarily agreed to the repatriation of the military. The exchange of the sick and wounded military began on April 20, 1953. The agreement on terminating the war was signed on July 27, 1953[27]. The representative of South Korea refused to sign the agreement.

Thus, we can draw certain conclusions and make a few recommendations: **1.** The USA represented by the U.S. President Harry Truman and Britain represented by Sir Winston Churchill were, first of all, the instigators of "the Cold War". One of the main elements of confrontation was ideological struggle and, as a result, contradictions between capitalist and communist models of state. And not only that. There was a fierce competition for influence and sales markets between the USA and its allies, on the one hand, and the USSR and its socialist camp, on the other hand. For example, the Iranian crisis, the Korean War and other events.

2. The collapse of the Soviet Union in December 1991 was the final point in the Cold War. The breakup of the USSR was caused by many reasons and circumstances. First of all, it was caused by internal political reasons. The first President of the USSR Mikhail Gorbachev and the first Russian President Boris Yeltsin destroyed the USSR by their own hands. If the latter did it because of lack of will and of common sense, the former did it because of excessive egoism. Boris Yeltsin yearned for more power, the power of the President, at any cost, even at the cost of the lost Soviet empire (the "evil empire").

3. Is there a possibility of a cold war between Russia, the USA and Europe in current conditions of global confrontation? Speaking on *Russia-24* TV channel, the RF Minister of Foreign Affairs Sergei Lavrov said that he found it irrelevant to speak about a cold war now. Nevertheless, in his opinion, there are some problems connected with the fact that "the world is changing, but our Western colleagues still have such approaches which used to exist in the epoch of their absolute dominance for many centuries"[28].

Sergei Lavrov believes that Russia does not want and will not allow any cold war despite the fact that the USA is on the way to confrontation and is making efforts to

[27] Available at: https://ru.wikipedia.org/wik/Koreiskaya_voina .

[28] Available at: http://radiomayak.ru/news/article/id/313353 .

exert influence on its partners[29]. This opinion was expressed by him on January 21, 2015 at the press-conference in Moscow. The question is what our partners think about it?

An illustrative example: *The Wall Street Journal* writes:

"Obama administration officials are considering new deterrence strategies to rein in Russian meddling in Europe.The proposed approach involves beefing up the militaries of allies and would-be partners and rooting out government corruption, which they see Moscow exploiting to gain more influence."

A wider strategy is to reduce the possibility of Moscow to use economic levers and energy with the purpose to increase its influence in Eastern and Southern Europe, the *Journal* says[30].

In my opinion, there is a possibility that Russia, the USA and Europe are on the edge of another cold war. The new cold war is likely not only because of the ideological struggle which used to exist between the USSR and Western countries in the past. Such a war can be caused by different geopolitical interests of the main international centres of power and influence - of the USA, Europe, Japan, China, and Russia. One of the recent examples is the situation with Ukraine.

Geopolitical interests of Russia are determined by its geographical position, its territory, its population, the level of economic development, and its participation in the world and European political and economic processes. And of course geopolitics objectively does not depend on who rules the country.

4. Speaking at the conference "From Fulton to Malta: How the Cold War Began and Ended", Joseph Nye, Professor of Harvard University (the USA), emphasized some of the "lessons" that we should learn from the Cold War, namely: **a)** bloodshed as a means of solving global or regional conflicts is not inevitable; **b)** a considerable deterrent in relations of warring parties was the fact that the warring parties had nuclear weapons at their disposal, and they realized what the world could be like after the nuclear war; **c)** the way the conflicts developed was determined by the character traits of certain personalities (of Stalin and Truman, of Mikhail Gorbachev and Ronald Reagan); **d)** the military power was of great importance, but did not play the decisive role (for example, the USA did not reach its purpose in Vietnam; the USSR failed in Afghanistan); **e)** it is impossible to rule the hostile population of the occupied country in the epoch of nationalism and third industrial (informational) revolution; **f)** the economic power of

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[29] Available at: http://ria.ru/politics/20150121/1043541962.html .

[30] Available at: http://www.wsj.com/articles/u-s-considers-harder-line-on-russia-1433546614, http://fair.ru/ssha-razrabotaut-novuu-strategiu-sderzhivaniya-rossii-15060703223039.htm. (Russian translation).

the state and the ability of the economic system to adjust to current conditions and innovations are gaining more importance in such conditions; **g)** soft forms of influence, or "soft power" (i.e., the ability to make others do what is desired without any force (or threat), without buying their consent, but rather attracting them to take somebody else's side), are playing a considerable role[31]. These conclusions are quite interesting, and probably the Russian establishment should take them more seriously.

The current Russia should also learn lessons from the Cold War.

5. The geographic position of our country has predetermined its historic development. Situated between the West and the East, Russia plays a linking role between them, therefore, the current and future Russia has a historic (civilized) mission to unite the East and the West.

Considering natural contradictions between the West and the USA, Russia must work towards uniting collective efforts of Western countries against the USA. The extension of American influence is dangerous not only for Russia, but for the Western countries themselves. In politics, there are no friends, only interests.

A sad example: during the Second World War, the USA dropped atomic bombs on the Japanese cities of Hiroshima and Nagasaki to make Japan immediately capitulate. However, nowadays the Japanese government closely follows the USA and its allies. Quite a strange logic.

The Deputy Chairman of the State Duma Committee on Science and High End Technologies Mikhail Degtyarev thinks that it is humiliating that Japan follows the policy of the USA, of the country that dropped atomic bombs on Japan, the *RIA News* says[32]. It is really strange and sad.

In this connection, we can remember a famous Russian poem by Fyodor
Tyutchev:

Russia cannot be understood with the mind alone,
No ordinary yardstick can span her greatness:
She stands alone, unique –
In Russia, one can only believe.

Now we see it concerns not only Russia. On the political map, there are many states the conduct of which is incomprehensible and unpredictable from the viewpoint of their geopolitical interests and the choice of partners. They are bombed but they still strengthen their military alliance with the USA and NATO.

[31] Available at: https://ru.wikipedia.org/wiki/Kholodnaya_voina .

[32] Available at: https://gorod.samara24.ru/news/society/2014/07/30/deputat_degtyarev_posovetoval_yapontsam_zabyt_o_kurilakh_i_vspomnit_ob_atomnoy_bombardirovke/ .

REVIEW

Ashavskii, B. M. (ed.). ***Sovremennoe mezhdunarodnoe pravo: teoriia i praktika.*** Liber Amicorum v chest' zasluzhennogo deiatelya nauki Rossiyskoii Federatsii, doktor yuridicheskikh nauk, professor Stanislav Valentinovich Chernichenko [***Contemporary International Law: Theory and Practice***. Liber Amicorum in Honor of Meritorious Figure of Science of the Russian Federation, Doctor of Law, Professor Stanislav Valentinovich Chernichenko]. Moscow, Original-maket, 2015, 432 p, 500 ptd.

Thirty-seven former students and colleagues honor in this volume the 80th birthday of one of the leading theoreticians of international law in the Russian Federation, S. V. Chernichenko, who for nearly half a century has worked at the Diplomatic Academy of the Ministry of Foreign Affairs of the Russian Federation and served on countless occasions as an expert on human rights for the former Soviet Union and later the Russian Federation in United Nations and European commissions and other bodies. Western jurists know him chiefly for his monumental two-volume treatise on the theory of international law and his collected essays on philosophy and international law and, more recently, on the contours of international law.

In all the collective of authors has produced thirty-two articles that address a wide range of matters in public and private international law; some broach the field of comparative law. Somewhat unusually, the articles are ordered alphabetically by author surname rather than thematically by subject-matter. Each essay is prefaced by an introductory summary in English.

Essays closest to the realm of private international law address sources of law (L. P. Anufrieva); the interface between international and municipal law (S.V. Bakhin), including with special reference to extradition legislation (B.L. Zimnenko) and as distinct legal systems (G. I. Kudriukov); the appropriate balance of interests between the State and foreign investments (I. Z. Farkhutdinov), including the expropriation of foreign investors (A. A.Danel'ian); foreign economic links of the European Union and the correlation of EU and WTO law (Iu. M. Iumashev); cooperation in internal affairs between the EU and the United States (P. N. Biriukov) or the role of these agencies in combatting crime (E. G. Liakhov, D. E. Liakhov, and A. A. Alimov); soft law in relations between Russia and the EU (P. A. Kalinichenko).

As for public international law, the contributions range widely: the nature of the profession of international law (I. N. Glebov); the identity of international law

(V.N. Likhachev); issues of power, sovereignty, and democracy (G. M. Vel'iaminov); the essence of the concept and essence of sovereign-patriotic principles of international law (E.G. Liakhov); special legal regimes for ensuring Russian national security (V. V. Aleshin); the concept of "international legal order" (B. M. Ashavskii); issues of *jus cogens* (A.S. Ispolimov); the conformity of Russian laws to treaties (V.D. Bordunov); issues of migration (A. Iu. Iastrebova); Considerable attention is given to the peaceful settlement of disputes (L. N. Galenskaia), with specific reference to issues of jurisdiction (A.R. Kaiumova), the Rwanda criminal tribunal (S. A. Egorov); the rights of the accused in international criminal law (A.B. Meziaev); decisions of international tribunals as a source of law or auxiliary means of determining legal norms (A.S. Smbatian); and the concept of humanitarian intervention (O.N. Khlestov).

Western international legal theories are addressed by A. Ia. Kapustin; the significance of religious and moral norms for developing human rights rules is evaluated by A.A. Moiseev.

The history of international law is addressed in a vigorous analysis of the Soviet-German treaty of nonaggression concluded on 23 August 1939 by G. S. Starodubtsev. A week after the treaty was concluded, the Second World War commenced. The treaty has generated a vast historical and publicist literature but, in Russia at least, says Starodubtsev, little consideration from an international legal perspective and, even then, most attention has been accorded to the secret protocols.

In fact, Starodubtsev argues, the treaty and the secret protocols are two distinct agreements that need to be analyzed individually. The treaty, he says, was consistent at the time with many similar agreements concluded during the 1920-30s: "from the standpoint of international law, it was a valid international treaty. Until 22 June 1941 it generated legal rights and duties for the participants thereof" (p. 356). The treaty was published for general information; the secret protocols, of course, were not and Starodubtsev considers the actual existence of the "secret protocols" to be not yet established. Accordingly, he concludes: "Use of the term "Molotov-Ribbentrop Pact" is inadmissible. The use of this phrase is unscholarly. It is necessary to completely eliminate the use thereof in scientific literature. One should also recommend to political leaders not to use it in public addresses and discussions. The secret protocol should become the subject-matter of further serious studies and not only historical, but also legal" (p. 361).

Of considerable interest too is the contribution by V.S. Kotliar on the Northern Sea Route. He notes recent Russian legislation affecting the administration of the Route and the imposition of authorization requirements on vessels intending to tra-

verse it. These are considered against the background of Canadian and United States opposed positions on "freedom of navigation" through the coastal waters of Arctic States. Kotliar suggests that perhaps the formula used in the 1988 Canadian-United States Agreement with regard to reserving their respective jurisdictional positions of the two parties might be equally useful with respect to Russian Arctic coastal claims.

In sum, the anniversary of Professor Chernichenko has been admirably commemorated by an excellent volume of stimulating essays.

Professor William Butler