

2014



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**BATUMI
INTERNATIONAL
CONFERENCE ON LAW
AND POLITICS**

CONFERENCE PROCEEDINGS

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LAW AND

POLITICS

23-24 August 2014 – Batumi, Georgia



The International Institute for
Academic Development

BICLP 2014–BATUMI, GEORGIA

BATUMI INTERNATIONAL CONFERENCE ON LAW AND POLITICS

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PEER-REVIEWED CONFERENCE PROCEEDINGS

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BICLP 2014 PROGRAMME

Saturday, 23 August 2014

10:00 – 10:30 Registration

10:30 – 11:00 Opening Ceremony

Dr. Malkhaz Nakashidze – The International Institute for Academic Development, Georgia

Prof. Aliosha Bakuridze - Rector, Batumi Shota Rustaveli State University, Georgia

Prof. Inga Zaleniene - Vice-Rector, Mykolas Romeris University, Lithuania

Prof. Adam Makharadze - Dean of Faculty of Social Sciences, Business and law, Batumi State University, Georgia

11:00 – 12:30 Session

12:30 – 13:00 Coffee Break and Networking

13:00 – 14:00 Session

14:00 – 15:00 Lunch

15:00 – 16:30 Session

16:30 – 17:00 Coffee Break and Networking

17:00 – 18:30 Session

18:30 – 19:00 Coffee Break and Networking

19:00 – 19:15 Closing Ceremony

Saturday, 23 August 2014

Time 1 hour 30 minutes

Session I

Session Title Law and Politics

Dr. Malkhaz Nakashidze

Chair Batumi Shota Rustaveli state University, Georgia

11:00 – 12:30 **Inga Zaleniene, Giedrius Viliunas**, Mykolas Romeris University, Lithuania - *Academic Ethics in Higher Education System: Using the International Instruments in Building the Integrity Culture at University*

Saeed Vosoghi and Mozghan Mousavi, University of Isfahan, Iran - *Future studies and scenario making for cultural relations of Iran and Central Asia based on the Nowruz tradition*

Paulina E. Sikorska, McGill University, Canada – *The mission (Im) possible: Towards the Comprehensive Framework Regulating Safety Issues of Point to Point Suborbital Flights*

Guliko Kazhashvili, Batumi Shota Rustaveli State University, Ivane Javakhishvili Tbilisi State University, Georgia - *The role of Preservation of Evidences and procedural Guarantee in Civil Procedure, Comparative Analyse*

Time 1 hour 30 minutes
Session Title Session II
Law and Politics
Chair **Dr. Malkhaz Nakashidze**
Batumi Shota Rustaveli state University, Georgia

13:00 – 14:00 **Thomas Innes**, Associate at Steptoe & Johnson (US Law Firm), UK - *Legal Certainty and the Legitimacy of the International Investment Treaty System*

Francesco Romano, University of Naples Federico II, Italy - *The Italian Business Network contract: a legal tool for internationalization of SMEs*

Mohamed Abdelnaby Elsayed Ghanem, Faculty of law, Tanta University, Egypt - *The Negative Consequences of the Phenomenon of the Slow Pace of Litigation in Criminal Judiciary in Egypt*

Ketevan Kukhianidze, Akaki Tsereteli State University, Georgia - *Adoption by Same-Sex Couples: Reality and Challenges*

Time 1 hour 30 minutes
Session Title Session III
Law and Politics
Chair **Dr. Malkhaz Nakashidze**
Batumi Shota Rustaveli state University, Georgia

15:00 – 16:30 **Agne Tvaronaviciene**, Mykolas Romeris University, Lithuania - *Pre-litigation dispute resolution procedures in Public procurement within European Union*

Tornike Rijvadze, Legal Counsel, Adjaristsqali Georgia LLC, Georgia – *Latest trends in Georgian Project Financing*

Iago Tsuladze, Batumi Maritime Academy, Georgia - *The Specifics of the Caucasian Geopolitics in the Process of Constructing a New World Order*

George Chiladze, Samtskhe-Javakheti State University, The University of Georgia, Georgia - *The Role and Importance of Intellectual Capital for the Purposes of Business Organization*

Time	1 hour 30 minutes
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Chair	Dr. Malkhaz Nakashidze Batumi Shota Rustaveli state University, Georgia
17:00 – 18:30	Adam Makharadze , Batumi Shota Rustaveli State University, Georgia - <i>Georgian Reality About Retroactive Effect of Criminal Law</i> Murman Gorgooshadze , Batumi Shota Rustaveli State University, Georgia – <i>Some issues of Criteriums of Inheritance and Development in Law (Theoretical aspects)</i> Rostom Guntaishvili , INT Arbitration under Chamber of Commerce and Industry of AP of Adjara, Georgia – <i>Alternative solutions of disputes of private-law character by the laws of Georgia</i> George Chiladze , Samtskhe-Javakheti State University, The University of Georgia, Georgia - <i>New Realities and Legal Analysis of the Changes in Patent Laws of Georgia</i> Levan Jakeli , Batumi Shota Rustaveli State University, Georgia - <i>The Caucasus, Georgia - The General Questions of Regional Safety</i> Badri Nakashidze , M.V. Lomonosov Moscow State University, Russian Federation - <i>Pacta Sunt Servanda</i>

Sunday, 24 August 2014

10:00 – 13:00 Post-Conference Batumi Tour

Message from the Organizing Committee Chair

Welcome to the Batumi International Conference on Law and Politics – BICLP 214! The – BICLP 2014 provides opportunities for the delegates to exchange new ideas and experiences, to establish business or research relations and to find partners for future collaboration. The mission of BICLP 2014 is to provide a platform for researchers, academicians as well as other professionals from all over the world to present their research results in Law and Political Science. The goal of our conference is to support, encourage and provide a platform for young researchers to present their research, to network within the international community of other young researchers and to seek the insight and advice of successful senior researchers during the conference. We hope the conference will be held every year and will be an ideal network for people to share experiences in several fields of Law and Political Sciences.

Many people have interested in BICLP 2014 and many of them worked very hard for the conference. Thanks the authors who have submitted papers and actively participated in the conference. Many thanks to our special guests and partners Prof. Inga Zaleniene Vice-Rector of Mykolas Romeris University, Lithuania and Prof. Aleko Bakuridze, Rector of Batumi Shota Rustaveli State University, for supporting of the event.

On behalf of the International Institute for academic Development, I would like to see you next year at the BICLP. We would be very pleased to receive your suggestions, comments regarding the conference and wishes for future event. I wish you a pleasant stay in Batumi and successful conference.

Yours sincerely,

Dr. Malkhaz Nakashidze

BICLP 2014 Organizing Committee Chair

Founder of the International Institute for Academic Development

I PLENARY SESSION – Law and Politics

Session Chair:

Dr. Malkhaz Nakashidze,

Batumi Shota Rustaveli State University, Georgia

Academic Ethics in Higher Education System: Using the International Instruments in Building the Integrity Culture at University

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Abstract

With the pace of societal change and emerging global social, technological, environmental and cultural challenges ethics gets increasingly more importance in higher education (HE). Ethical values and principles become instrumental not only in strategic orientation and profiling but also in everyday decision making of a higher education institutions (HEIs). If developed and embedded properly, they can create a powerful set of references for a more effective collaboration between students, teachers and management and link more closely HEIs

to a broader context of public values, concerns and expectations.

Academic ethics belongs to fundamental discourse of the University and higher education as such. Despite of ongoing utilization of universities in service to the industry and the labor market which has led to the perception of them as a 'knowledge and qualifications factories', in its essence, the University is an ethically-based and ethically-oriented institution.

Taking into account the new roles of university in contemporary society and the role of ethics in building a globally relevant HEI of 21st century Mykolas

Romeris University (Vilnius, Lithuania) (MRU) decided to review and rebuild its academic ethics infrastructure using the best international practice. Aiming at formulating and improving university's academic ethics policy, a special work programme for embedding the academic integrity into institutional practices was developed.

The article discusses queries MRU was facing during the transformation period, the challenges of integrating of the international instruments into the institutional environment and ends with some recommendations for HEIs following the way of rethinking and revitalizing their institutional academic ethics systems.

1. Introduction: the changing role of ethics in higher education

Nowadays, ethics is a theme highly significant for higher education globally. It becomes more and more obvious that the ethical values and principles in contemporary HE cannot be limited to inherited academic culture and / or rhetorical discourse, but must actively and effectively function in every area of everyday activity of a HEI. Forward looking contemporary universities understand that in order to smoothly perform their tasks values and ethical mechanisms should be integrated into the university strategies, managerial processes, organizational procedures, and permanent monitoring,

how university responds to the societal challenges [1].

In the global interconnected world HE systems are asked should pay more attention to the complex roles and functions of universities. It is a truism that the future of humanity depends largely on scientific and technical development which is nurtured at universities and other HEIs. Less widespread but not less important is the notion that HE is the most important means to contribute to the education of responsible and ethical citizens, highly attentive to the needs of society, capable of disseminating knowledge, and serve to the society and every individual in all aspects of life.

In pragmatically-oriented environment of today's 'entrepreneurial', 'market-oriented', 'diversified' and 'mass' HE systems one can meet the attitude that ethics is something additional and secondary to the 'core business' of a university – something that can be attributed to disciplinary debates in Faculty of the Philosophy and that may be referred to only in celebratory addresses of institutional dignitaries.

A closer and more attentive consideration quickly shows this kind of reasoning as deeply misleading. Ethics belongs to fundamentals of the University and higher education as such and should create the environment where it will be motivated to take the right decisions.

Despite of ongoing utilization of universities in service to the industry and the labor market which has led to the perception of them as a 'knowledge and qualifications factories', in its essence, the University is an ethically-based and ethically-oriented institution. Along with its aforementioned mission in the world of work it serves to the development of a person; to the socialization of new generations; to the transmission of culture; and, not to forget, to the human strive for pure and disinterested knowledge which is embedded in very nature of human kind [2]. That's why ethical consideration is constant part of definition of mission and profile of any higher education institution in any time.

Current processes of massification, diversification of higher education provision and sources for the funds, marketization, commercialization, internationalization and regionalization of higher education, continuous development of ICT have added to this consideration more urgency. HEIs are facing new dilemmas such as how to balance their scholarly obligations and load of massive education of professionals; the compatibility of 'first', 'second' and 'third' missions of the university and the need to earn money in order to proceed with primary activities; and that of confrontation of unprecedented mix of cultures on their campuses. Such questions are unresolvable without ethical reflection. Thus ethical values and principles become in-

strumental not only in strategic orientation and profiling but also in everyday decision making of a HEIs. If developed and embedded properly, they can create a powerful set of references for a more effective collaboration between students, teachers and management and link more closely HEIs to a broader context of public values, concerns and expectations.

Taking into account the new roles of university in contemporary society and the role of ethics in building a globally relevant higher education institution of 21st century Mykolas Romeris University (MRU) has accepted the proposal to become a pilot institution in application of International Association of Universities (IAU) and Magna Charta Observatory (MCO) jointly prepared *IAU-MCO Guidelines for an Institutional Code of Ethics in Higher Education* [3] (IAU-MCO Guidelines) and to re-work its institutional code of ethics.

This paper gives some background information to this exercise, discusses queries faced during the drafting period, the applicability of IAU-MCO Guidelines, and ends with some recommendations for HEIs following the way of rethinking and revitalizing their institutional codes of ethics in connection with IAU-MCO initiative.

2. Background information

During last two decades Lithuanian higher education has faced a rapid expansion both in numbers of students and of HEIs. After liberation from Soviet Union in 1990 student numbers have increased almost three times and exceeded 200.000 in 2010 which was more than 60 percent of the age cohort of 18-24 of the overall population.

Correspondingly number of HEIs has risen from 8 till current 47 which comprises 14 public and 9 private universities and 13 public and 11 private colleges of non-university higher education [4].

With exception of historical Vilnius University established in 1579 and few other HEIs dating back to the beginning of the 20th century most of new players have emerged from Soviet polytechnics, postsecondary-non-tertiary schools of professional education, or were established in the 'plain field'. Explicit ethical reflection was not widespread among these schools and most of institutional codes of ethics (ICE) have emerged only in the middle of 2000ties following the recommendations of the Ministry of Education and Science (MoES) of the Republic of Lithuania of 2005 [5]. According to these recommendations all 14 existing universities adopted institutional ICE's till the end of 2008.

This top-down pathway of developing ICE has led to some easy predictable

consequences. The ICEs were not perceived as institutional self-regulation tools, universities were not approaching themselves as subjects of ethical discourse, and ICEs were not instrumentalized as means for the advancement of management culture. Most of aforementioned university ICEs followed similar structure and shared most of basic assumptions, concepts and statements. Regrettably, some questionable attitudes of the recommendations of MoES have also been multiplied. Another consequence of this system-wide push for establishment of ICEs was its administrative and rather formal way of naissance inside of HEIs leaving broader academic community neither involved in its development nor knowledgeable about its contents. Such way of developing ICE was predicted to non-effectiveness or even slightly cynical attitude in regard to it.

New wave of redesigning of ICEs was following the adoption of new Law on Higher Education and Research in 2009, in which the duty of students and academic staff to adhere to the Code of Academic Ethics adopted by a higher education institution is imposed [6]. This law also introduced the new body responsible for academic ethics on national level – Ombudsman of Academic Ethics and Procedures, a state officer who examines complains and initiates investigation regarding the violation of academic ethics and procedures. The Ombudsman of Academic Ethics and Procedures Office

was established and the ombudsman was appointed with notable delay only from the beginning of 2013 with the main tasks to promote HEIs to adhere their activities with academic ethics and procedures; to control how HEIs follow their ICI's; to cooperate with HEIs solving the problems connected with the violation of academic ethics and procedures; effectively and confidentially investigate the complains regarding the violations of academic ethics etc. [7]. According to the data presented by the Ombudsman Office in 2014, 9 officially presented complains are under the investigation and 2 final decisions were already taken [8].

According to the previously mentioned Law on Higher Education and Research the academic community shall make use of academic freedom and act in compliance with the Code of Academic Ethics, which should be prepared and approved by higher education and research institutions in accordance with the recommendations of the ombudsman of academic ethics and procedures. The draft of such a recommendations is under the development now.

3. Mykolas Romeris University Code of Ethics of 2007

Mykolas Romeris University belongs to the new generation of Lithuanian HEIs established after 1990. Following series of former transformations it became

University of Law in 2000 and transformed to comprehensive university of Social Sciences and Humanities in 2004. With its 17.500 students currently it is the second-largest university of the country and the largest university in the region in its field.

MRU Code of Ethics was approved by the University Senate on 5 of April of 2007 [9]. In compliance with the spirit and detail of the recommendations of MoES it consists of I. General Principles; II. Common Standards of Ethical Behavior of Academic Community of the University; III. Code of Communication between the Community of the University and the Students; IV. General Norms of Ethical Behavior of Students; and the V. Rules and Procedures of the Implementation of the Code.

The most striking peculiarity of the Code is the although partial but substantial separation of ethical norms of (and for) 'University Community' and 'Students'. This was determined by the Recommendations of MoES, as it formulated the separate statements for the codes for academics and for the codes for students. The priority to the perspective of academics deviates from the primary ethical and social responsibility of the university. This artificial separation makes impossible to define and develop common values and principles, recurrence of the statements, causes structural and procedural dysfunction.

MRU Code of Ethics is mainly based on prescriptive prohibitive mode and is focused mainly on negative issues of unethical conduct to be avoided, not indicating what is positive – implying standard of ethical conduct and values. In addition to that, the positive part of the Code consists mostly of general principles of socially acceptable behavior and not so much on specific features of academic, scientific and educational behavior.

Some relevant concepts are missing: institutional and personal social responsibility of the academic community; priority of students' interests; conflict of interest; sustainable development; integrity of international and intercultural collaboration, etc. The procedure of safe reporting is missing from the Code as well. On the contrary, it is proclaimed that “anonymous reports shall not be considered (Article 19)” [10].

4. Process of institutionalization of ethics at MRU

Today more and more of progressive universities explicitly engage to be socially responsible in their activities and embed their commitment in ICEs and other connected elements of ethics infrastructure.

Ethics infrastructure contains of theory based, methodologically composed, to particular institutional environment and mentality adapted elements: ICEs or codes of conduct, ethics committees, ethics

education programs, ethics training, ethics hotlines, ethics handbooks, embedded round tables and discussion circles, ethics inquiry service, ethics advisers, ethics audit, etc.[11]. Most of these contemporary ethics infrastructure elements still are perceived as novelty in Lithuanian HEIs, are lacking of understanding of their importance in solving real institutional problems, and are not consistently methodologically implemented [11].

In the pace of its dynamic development MRU has drafted a long-term institutional strategy “2010-2020 Strategic activities Plan of MRU” aiming at becoming an internationally-recognized leading university of the region. Bearing the fact that Lithuanian HEIs are part of the global academic system and aiming at establishing itself in the international academic arena, the University's top priorities were stated, which are international joint/double degree study programmes, continuous and distance learning opportunities and interdisciplinary collaborative research [12].

In the process of broadening international collaboration and advancing participation in international HEIs associations and networks, promoting mobility of students and staff, it quickly became evident that ICE of MRU does not fully comply with international practices. Everyday academic practice in the fields of education and research has also revealed omissions and shortcomings in exist-

ting practices, such as an insufficient particularity in regard to academic integrity and plagiarism.

Further clarification of the need for new ICE was stimulated by the preparation for the International Association of Universities Annual Conference entitled “Ethics and Values in Higher Education in the Era of Globalization: What Role for the Disciplines?” which was held at MRU in November 2010 [13]. During the roundtable prominent experts have discussed the issue of the need of interdisciplinary Global Code of Ethics for HE. After the discussions on rationale, possible contents and usefulness of the document, it was agreed that IAU, together with the Magna Charta Observatory (MCO), would examine the feasibility of developing an international ICE or a set of guidelines concerned with ethical conduct of and in HE. As IAU-MCO Joint Working Group on Ethics in Higher Education was established, MRU vice--rector of research dr. Inga ŽalņienĀ was invited to join this group [14]. The Working Group has drafted a unique set of Guidelines for Institutional Codes of Ethics as a way to assist institutions in revising or developing their own ICEs. During the last working group meeting MRU appreciated the opportunity to serve as a pilot institution for redesigning the ICE of MRU. The decision was taken with a sense of deep compliance of IAU-MCO led process of global revision of ethical practice in HEIs with both the

institutional strategy and practical interest of the University.

As a result of this engagement The Academic Integrity Centre was created at MRU as a scholarly unit concurrently bearing the responsibility to elaborate foundations for new ICE. The Centre has consolidated a group of researchers from different faculties practicing research on academic ethics and worked together with the Ethics Supervision Commission, faculties, Student Representative Body and other university bodies. Aiming at formulating and improving university’s academic ethics policy, a special work programme for embedding the academic integrity into institutional practices was developed. Constant monitoring of the implementation and application of ethical infrastructure was carried out as well as a number of conferences, seminars, and trainings on the aforementioned topic.

5. Pilot Academic Integrity investigation

Aiming to prepare for the development of a new version of ICE, to learn how efficient the existing instruments are, and to identify major problems, researchers from the Academic Integrity Centre carried out a pilot research project in the faculty of Politics and Management of MRU. The research project was launched in November 2011 [15].

The group of researchers adapted the methodology prepared at the Clemson University's International Centre for Academic Integrity (USA) to the local context. Focus group discussion was used as the major data collection method. The respondents were selected on the basis of criteria sampling (knowledge, work experience, relationship with the researched phenomenon). Groups were formed following the homogeneity principle, i.e. in a way to include respondents performing similar functions at the university and to avoid subordinate relations among them which might limit their activity in the discussion and the critical reflection. The discussions took part in five focus groups: teachers (5 representatives), students (2 groups, 26 representatives studying at bachelors, masters and doctoral level), heads of the departments (5 representatives), and administrative assistants (7 representatives). The questions for discussion included conception of academic integrity; experience of academic integrity violation; policy of academic integrity; distribution of responsibilities; suggestions on preventive measures to avoid academic dishonesty and form an adequate position in the society.

Majority of respondents emphasized the importance of professionalism, competence of academic staff and academic integrity. The approach that university is, first of all, a professional community responsible to broader professional com-

munity, was highlighted. The qualitative analysis of experiences of dishonest behaviour, on other hand, has brought forward the reality of a teacher's authority being affected by the perception of a student as client and of a teacher as service provider. Here, a concept of one-way responsibility for service quality direction was stated to be emerging. Students, on their side, were tending to avoid teachers who require more efforts and responsibility. They would often ignore the remarks of teachers and thesis supervisors, would change them easily, and behave dishonestly during lectures.

In line with this discovery it was also revealed that another problem of irresponsible teacher behaviour does exist that is also often determined by the absence of academic integrity standards and procedures. This absence leaves possibilities open for divergent interpretations of integrity borders, tolerance of dishonest behaviour, application of double standards, etc.

Respondents who took part in the pilot research have also emphasized the need for strict institutional regulations regarding identification of fouls and attribution of sanctions; improvement of study result evaluation system; clarity and accessibility of information.

In respect to responsibility for dishonest behaviour the respondents emphasized honesty in performing student and teach-

her duties without paying regard to impact and conditions of the external environment. Noteworthy, that integrity was emphasized first on the individual level though institutional environment was perceived as determining the increase or decrease in work quality.

The researchers engaged in the pilot research came up to the conclusion that knowledge on local environment preconditions the development of academic ethics processes in the institution. Identification of dominating value system allows selecting measures and adequately adapting them to the existing socio-cultural context and value management systems as well as envisaging appropriate steps of their operationalization.

During the research the following conditions of functionality of the ICE were displayed:

- analytical reconstruction of internal and external environment;
- adaptation of the provisions of ICE to the existing values system;
- inclusion of all shareholders in the process of developing and implementing the ICE;
- developing the mechanism of implementing coordination and support actions;

- establishing the mechanism of responsibility distribution;
- building an active academic community.

The research results have revealed that ethics' institutionalisation processes can't be voluntarily accelerated. The programme for embedding academic ethics infrastructure has to be implemented coherently and under methodological substantiation followed by adequate preparation, evaluation of institutional capacities and mobilisation of resources.

6. Development of a new version of ICE with regard to the guidelines provided by IAU-MCO

After carrying out the pilot research on academic integrity a need to review systematically the existing ethics' infrastructure and the ICE was evident. A work group was established to prepare a new version of the ICE. After the primary discussion it was agreed to split the process into several stages. In the first stage some members of the work group were assigned to carry out the analysis of the provisions of the existing Code of Ethics and to highlight problematic areas and major shortcomings. In the second stage the guidelines of IAU-MCO and possibilities of integrating them were analyzed and the draft ICE was prepared. In the third stage the draft ICE was presented for the discussion of in the faculties, other structural bodies,

and later in the Rector's Office and the Senate.

A new structure of ICE was established on the basis of seven values of academic behavior: search for knowledge and truth, academic freedom, collegiality and trust, corporative responsibility and accountability, respect to human dignity, honesty and leadership.

Following the IAU-MCO guidelines, several provisions were identified that needed to be added and emphasized: honest and equivalent international partnership and cooperation; the principles of representing academic freedom and university in the public; decision-making on the grounds of benefits to the university and adequate standards for teacher and student capacities; employment rules and performance evaluation; avoidance of interest conflict in decision making and university policy making; separate designation of special rights and duties for new students as members of the academic community.

It was recognized that implementation of these principles can't be achieved only by the ICE. They cover organizational processes other than ethics' infrastructure, as for example, procedures of personnel hiring, promotion and firing, standards for student enrolment, rules for accepting external funding, management of intellectual property, promotion of open access to knowledge sources, etc.

Thus, implementation of the Guidelines requires not only the review of existing ICE but other university performance principles and documents as well. All the administrative core of a HEI should integrate the values and principles of the Guidelines by bringing forth new regulations, such as, for instance, on the policy on social responsibility. The ultimate global trend of the ICEs indicate not to the detailed description of all possible cases of misconduct but, instead, they function together with other institutional documents and envisage organizational processes that need to be corrected adequately.

The critical challenge in developing the new version of the ICE at MRU was involvement of academic community in the process. International research results suggest that when the ICE is implemented from top to bottom without coordinating it with the representatives of all institutional levels it is programmed to be inefficient and may even call a negative attitude towards it. Thus, it is necessary to allocate adequate time and effort for the discussion in the academic community. At MRU, the working group decided to put the version of the draft ICE on the Web for public discussion.

Furthermore, it was necessary to decide on the mechanism of anonymous (safe) information provision and involve all academic community in its collection. Although the existing ICE suggested

that anonymous messages are not accepted, the provision has been put under consideration. The draft new ICE included this amendment and required the will of university leadership, community support and implementation of necessary procedures. The results of researches carried out in several Western countries reveal that the mechanisms of anonymous information provision decrease the number cases of unethical behavior as much as twice. Thus, as it is an efficient tool of risk management and anti-corruptive measure it is highly purposeful to develop such a model and open up it to the community of a HEI. Awareness of such a possibility alone does already perform a preventive function. It is better to use the possibility of anonymous information provision and react to the dangers inside the university instead of waiting until it appears in the public [16].

7. Conclusions and recommendations

The case of MRU demonstrated the discrepancy between the understanding of the nature of academic ethics embedded in Lithuanian HE system and worldwide trends. International instruments of contemporary academic ethics apply first and foremost to the institutional practices and are not limited to interpersonal relations and personal behavior. It is commendable to start the discussion on the integrity culture at HEI from the very concept of academic ethics and its

usage in different national, regional and institutional contexts.

Term of ‘ethical infrastructure’ is widely used in current global discussion on academic integrity and ethics and it may be useful in exposing the systemic nature of institutional ethical practice.

The academic community should be involved to the ICE creation process from the very beginning. Establishment of the core group for the revision / development of ICE is highly recommended. Survey of attitudes, open and online discussion can be advised. Institutions should pay attention to include all parts of the community of a HEI, notably leadership, administrative staff and students. This can require revision of the concept of ‘academic community’.

Planning the integrity culture development process, it is highly commendable to investigate the local environment of ethics/ethical practice and to compare the findings with the Guidelines prepared by IAU-MCO. Discussions on macro-, meso- and micro levels of ethical infrastructure are vitally important: on the role of ICE in the system of institutional regulatory acts, on the relationship between the ICE and implementing mechanisms, etc.

While defining areas of application of ICE institutions should bear in mind the traditional use of ‘ethical conduct’ and new international practices and challen-

ges underlined in IAU-MCO Guidelines. The difficult task of bridging the personal academic freedom and institutional social responsibility; securing the integrity of research, teaching and leadership/administrative conduct should be considered.

If the draft of ICE is approved by the HEI governing bodies and academic community, it is essential to define the follow-up tasks for implementation of ICE within the perspective of revision of ethical infrastructure of HEI. These may comprise correcting other regulatory acts, establishing appropriate procedures and mechanisms.

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Future studies and scenario making for cultural relations of Iran and Central Asia based on the Nowruz tradition

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Abstract

A scenario is a plan for future or is about a specific aspect of the future which is important for us. Scenario planning consists of creating three to five stories related to the considered objective. Each story says that what will happen in future about a specific subject. This method is an extended version of future study and as a novel research method is being used in the science. The scenario planning does not seek a prediction. In fact, it tries to find the best future among several possible futures by using open and flexible methods. On the other hand future will be shaped mostly by them. So planning a normative scenario and what is known to be the most desirable future for us somehow can be effective in making this future. Nowruz, as a traditional custom goes far than politic border of Iran and it involves all Iranian cul-

ture region and central Asia. This future with regarding its potential like longevity, constant, its connection with religious beliefs, inspiration of rich contents, its unifying and convergent role and function among inheritors of common culture, historical background and common story can be considered a common value.

Nevertheless, it seems that this significant aspect of Nowruz has been neglected in foreign policies of Iran and central Asia countries. Therefore, developing this value in terms of different possible scenarios is necessary. The aim of this study is to address this issue using future research in general and scenario based planning, which has been widely noticed in the politics and social sciences, in particular. The research method is a descriptive-analytical approach and a range of librarian and internet based references have been used. The goal of this study is to

try to have regional cooperation through a cultural model and to archive the targets through a national benefits framework. The proposed questions in this research are what the possible scenarios in cultural relations between these countries are and which scenario is more probable. Hypothesis seems like that possible futures can be evaluated through a wide range of scenarios such as unity, convergence, competition, contrast and conflict, and cultural relationships between countries in spite of current problems like religiosity, interference of trans-regional countries and some ethnic affiliations lead to unity however because of common interests, common religion, and old traditions like Nowruz it move away from contrast, conflict or competition toward convergence. Therefore, it can be concluded that if cultural diplomacy of these country give the priority to the mentioned similarity, the convergence can be archived in the long term time horizon.

Keywords: *Future studies, Scenario making, Cultural relations, Central Asia, Nowruz*

1. Introduction

Nowadays cultural issues are of great significance in international relation. It is then regarded as the developed motivational engine which is the ground for improving societies and political, soci-

al, economical and behavioral patterns. Societies which culturally have great confidence in themselves are capable of having considerable confidence in their international relations. In the long term, cultural familiarity can help us to reduce pre-judgment of cultural and sensitive matters so as to facilitate matters that are approved by societies. Understanding of common cultural issues can improve the mutual appreciation of countries. Also, cooperation in this field can lead us towards cooperation in other fields as well.

The thing that bridges Central Asian countries and Caucasus is that both of them culturally have something in common with Iran. In other word, we can call Iran and Central Asian countries, in which Muslims dwell, a cultural region. In accordance with the concept of the culture region, it should be noted that these countries believe they are all deeply linked with each other from cultural aspect [1].

This area has a mirror-like and rich culture, an example of which is Nowruz Tradition with its global reflection. Using such a common symbol in addition to other commonalities like similar religion, geographical proximity, integrity of culture and history, presence of Iranians who live in those countries and similar languages in some of these countries aside from existing potential in other fields in the region can orient

all of the named countries towards one goal i.e. appreciating the understanding of each other, and boost their confidence in international relations.

Although there are barriers within the aforementioned commonalities which slow down the cooperation of the countries in the region, they can reach their goals through the existing matters that are common, an appropriate and a long term plan, and a comprehensive strategy in foreign policy. To do so, they need to have foresight about future, and assess different scenarios pertinent to their current condition. Future, into great extent, is determined via values. When it comes to the role of values in the discussion of future studies, we cannot solely rely on plausible realities and scientific theories.

Having regulative scenarios helps us not to be ignorant of our values while being materialistic [2]. Thus, our main purpose in this study is to figure out what the possible cultural scenarios between Central Asian countries and Iran are. And, what the regulative scenarios and its facilitator are? In responding to the above questions, we should say that possible scenarios in this spectral relation encompass unity, conflict, and the well-regarded scenario the cultural integration.

2. Theoretical background:

Many individuals think that having foresight about future is synonymous with being a fortune teller. But care should be exercised that fortune telling improves our self-esteem of future. Predicting future is considered significant in our everyday life, but it is useful when we can use it in exactly measurable and understandable issues like that of predicting the needed amount of fuel for an airplane. As a result, when we deal with social and humanity phenomena, prediction is not reliable[3]. We deal with multi-factors and complex issues in humanity science in general and international relation in particular.

On one hand, activists are the ones responsible for predicting futures and their decision making is considerably contingent upon changes ahead of them. Therefore, other changes, behaviors, and decisions of humans are in need of investigation too. Future of academic studies intends to create some strategies and goals.

1. Justification of regulative scenarios and manifesting an agreeable future.
2. to base future studies on humanity science, it's not being simplifiable as well as its irreducibility.
3. To move towards circumstances by which we can prevent any sort of bad

faith from happening and by which we can improve the immaturity of our minds [4].

Future of academic studies is the means by which multi-reason issues formed by factors and the means which evaluates the impossibility of certainties based on different futures. These futures are:

Possible Future: This group contains all the future deals that you imagine. They include deals which can happen, no matter how far-fetched they are. It is even possible to include breach of deals which are based on regulations or principles of physic and are regarded as acceptable.

Acceptable future:

It is the group of the future which happens in accordance with our current knowledge of things. They stem from our current understanding of principles of physic, processes, causal and non-causal relationships, system of deals among humans and other things. This future is a smaller group of the possible future.

Probable Future:

This group of future is about the things that will most likely happen and root from the current processes happening in our everyday life. Some of probable futures are more likely to happen in

comparison with the rest of them. One of them is the general occupations like a dealer, which are the simple linear symbol of our present time. Nonetheless, processes don't last long and are subject to discontinuity. The three mentioned futures, into great deal, are linked with our data and knowledge of cognition.

The fourth group is called a preferred future which is about things we prefer to happen. In other word, future, into great extent, is emotional and not cognitive. They derive from valuable judgments and are vividly mental in comparison with the other three groups of futures. They are completely different from the other three groups of future as they are categorized on the basis of values people have in their life and mind [5].

These different ways of future studies are to answer not only things pertinent to uncertainties, but they are also to make a long term and well-programmed process. Programming on the basis of scenario is one of the mostly used means in the field of future studies. Programming based on scenario is to be used as the main means of all future studies. Scenario is the only means to discover things in governmental organizations and companies. Consequently, future studies will be regarded as parallel or synonym with strategic pre-

diction or programming based on scenario [6].

Nowadays, we can claim that every situation that has undergone any sort of change in the past uses scenario [7]. The status of scenario in the world can be found in three processes. The first process is to have foresight about future in which the scenario-based approach answers the question of “what will happen?”

The second usage of scenario from 1990s has been in strategic and situation-based approaches in an attempt to answer the question of “what should be done?”

Finally, the last usage of scenario has been in learning environments and strategically developing things from the 1990s to answer the question of “what should become?” [8]

As a result, scenario uses a merely informative means for future of practical approach and impacts it has on future events programming based on scenario. We can look upon uncertainties as an opportunity. They imply that future is being formed by people and their actions. We can change these ideas, plans, and other people’s opinions into influential and more appropriate ideas. Uncertainties then encourage us to be tolerable [9].

AbdollahKhani explains the steps of producing a scenario in six steps:

1. Defining the problem: In this step, the purpose of this scenario to answer a question in a timely manner consistent with the purpose in a sophisticated way.

2. Forming a group of experts: Scenarios should be evaluated by a small group of experts in different fields, but pertinent to the matter at hand. It helps to add to the validity and to improve the status of the scenario. Also, diverse entrances and voices or ideas which both agree and disagree with them should be taken into consideration too. Usage of means such as consultation, survey, and brain storming do have the potential to motivate our imagination, decreases unadaptability and dissonance of thoughts, create a common language and act as a practice for group-thinking and participation of individuals in choosing the right techniques. This means, however, doesn’t have to be a substitution for our own thoughts or a constraint of our right to freedom of choosing the right way [10].

3. Making a model on the basis of the recognition of different elements relevant to the matter at hand. Elements are divided into three groups: A-Stable B-Pre-determined C-Unstated or Uncertain

A-The stable elements are not subject to any change. B-The pre-determined elements are predictable and have clear consequences. C-The uncertain/unstated elements are those which are categorized into agreed, opposing, and neutralized forces. These forces would be investigated on the basis of a model created from their past and present status. Historical conditions and the past relevant to the matter are assessed. Then, the extent of its impact and changing factors of these elements are examined on the basis of the current condition. Afterwards, the impact that each scenario has is of considerable importance. Here, we can use a crossed-matrix, which can be used to measure the extent of impact and certainties of occurrence of each element.

4. Designing scenarios that are substitutes: Scenarios can be designed either in the form of compound or one of the types of scenarios (It can be the best or worst status of a scenario, probable scenarios, and other things.) But, we need to pay a careful attention to the fact that the number of scenarios should be limited and don't be more than four. They should be logical, believable, descriptive, and predict various kind of futures.

5. Assessing the probability of scenarios: The probability of the occurrence of events is theoretically relevant to the timing factors into great extent. The

longer it takes time to design a scenario for predicting future, as an instance 50 years, the more it is possible to be deviated. On the other hand, we should determine the existence of outside/new scenarios from the designed ones which have less impact and are less probable to happen. These scenarios are called Joker.

6. Evaluation of Scenarios: Investigation of scenarios and their consequence ought to be done after they happen in the future. However, since we cannot wait and see what happens in future, a type of pre-assessment scenario is counted as acceptable and valid. It means that we have to investigate and analyze the suitability of events and conditions, the adaptability of scenarios with the main problem, comparison and monitoring of dependent factors from within scenarios [11].

Central Asia: The expression of Middle East which generally refers to the republic countries settled by Muslims from the east of Caspian Sea is due to the division of some parts of the former Soviet of Union of Asia. This region includes Uzbekistan, Tajikistan, Turkmenistan, Caucasus, and Kyrgyzstan. Most of other regions like Afghanistan, northern part of Pakistan are also known as part of Central Asia [12]. Central Asia is of an ongoing and increasing importance in regional and international events. It is now regarded

as one of the most significant sub-systems of our country, Iran. Central Asia is the old river called “VarRoud” and “Fararudan” of Iran which were named “Mavara al-Nahr” by Arabs, “Transoxina” by Greeks, and “Central Asia” in English [13].

1. Defining the problem:

In today’s world, the need to have intercultural relation in accordance with the current increasing development of technology has been intensified. And, it is clearly appreciated that culture sophisticatedly and deeply influences our communication. The understanding of cultural commonalities impacts our communication and comprehension of this world. It can improve the relation of countries in the political format of the region which have similar tradition and religion. We can see that Iran needs to design a plan in its cooperation with other countries. Although, Iran culturally has the most proximity with the Central of Asian countries, it has not established a comprehensive strategy in its foreign policy yet. There are a few barriers on its way slowing down the process of making the so-called policy. Not prioritizing cultural commonalities, being oriented towards minorities, a permeable culture and language of other forces, anti-Iranian promotions from other powerful countries in the region, lack of policy making, investment and allocation of sources are

examples of obstacles Iran has ahead of itself. Assessment of issues like having similar traditions like Nowruz, culture, common past history, and other things are discussed as opportunities.

A- What are the challenges in cultural relations of Iran and other Muslim populated of Central Asian countries in the geography of Nowruz?

B- What are the opportunities in cultural relations of Iran and other Muslim populated of Central Asian countries in the geography of Nowruz?

C- What are the probable scenarios in the future of cultural relations between Iran and other countries in the region?

D- What is the probable and approved/agreed future of these countries?

In stating a timing process, we need to be careful that a 5-20 year period is required for a median rang and a 20-50 year period for a long term range. Nevertheless, there are countless issues about future that are not solvable in the short term. For example, investigation and analysis of problems like burying garbage, radioactivity-related problems, global development of consistent energy, and the structure of transportation which would last more than 50 years [14].

In accordance with our on-going investigation of cultural relations over a series of common issues and on top of them, Nowruz, we can say that considering the existence of many factors in our process, we need a 20 year period or even more than that to improve relations. We need that much time because the sovereignty of Soviet Union in Central Asian countries kept them away from their culture and tradition which needs enough time to be rehabilitated.

2. Group of Experts:

In accordance with forming a group of experts, it is needed to say that experts are prime ministers of countries which have the tradition of Nowruz, cultural councilors, diplomats, and other experts in the field of culture. However, since it is time-assuming, expensive, and hard from cooperation point of view to gather these experts together, it has been agreed to use the annual celebration of Nowruz or its meeting as the expert session so as to pick up the most important points as the consequence of the session. They are then used to investigate factors so as to produce a well-designed scenario. On 7th of March in 2010, the world witnessed the first global festival of Nowruz which took place in Niavaran Palace Complex in Tehran in which Tajikistan, Turkmenistan, Afghanistan, Iraq, and other countries were participants.

Nowruz had been established in UNESCO as a spiritual tradition of human being before its first global celebration in Tehran. Consequently, 21st of March was recognized as the international day of Nowruz by UNESCO. Its second global festival was held in March of 2011 in Tehran. Its third festival took place in Tajikistan. The fourth festival occurred in Ashgh Abad in Turkmenistan when participants decided the fifth festival would take place in Afghanistan [15]. After the recognition of Nowruz by UNESCO, cultural events about Nowruz, its tradition, and other common and pertinent cultural events have taken place in Central Asia. Here, we talk about a few of them.

The national TV of Tajikistan in Dushanbe broadcasted especial reports from top officials of the region. They said “Presence of Iranian, Tajik, Afghan, and Pakistani officials in the fifth global festival of Nowruz gave them an opportunity to talk with each other about important matters in cultural and international relations.” Considering the great opportunity made by the fifth festival of Nowruz, Hasan Rouhani, Hamed Karzai, Imam Ali Rahman, and Mamnun Hossein met with each other and talked about existing potential in the region. The topics they covered in the meeting in Kabul were about strengthening business and economical relations, using the existing opportunities and potential in their eco-

nomy, market, culture, science, and cooperation in counterattacking terrorists as well as other threats posed by other ethnical minorities in the region.

Hasan Rouhani stressed that since Nowruz is a reflection of natural justice and securing global justice is one of the duties of the United Nation, justice of politics and nature must be concomitant and this is what all countries and nations in the region demand. Dr. Rouhani also said that any sort of ignorance in counterattacking terrorism, and underestimating the importance of preventing the access of financial and military support to these terrorist groups endangers the safety of the region and causes unpredictable problems.

Hamed Karzai, the prime minister of Afghanistan, as the host of the fifth global festival of Nowruz said merry Nowruz to Iranians and other countries in the region. He also noted that in addition to our cultural and lingual similarities, we have other opportunities in common that we should optimally take their advantage. He not only emphasized the importance of the cooperation of the countries in the region, but he also regarded it as useful and crucial and described extremism and terrorism as the main problems in the region.

It is said that problems of the countries in the region are equal, but with diffe-

rent intensity. The most important of these problems are naïve government, suppressive political systems, renting economy, existence of Mafia and countries which only have one product in their market, fractures which increase the racial and ethnical discrimination, great economical and social gaps and differences, domination of Islam based on Fiqh in the region, interpretation of Islam by Taliban and Safavi, confusion of the way of living in cities and villages, the enormous population of unemployed young people, mentally agitated issues of gender, being the second role of women, and deep structures of anti-women, the significantly growing political conflicts of the countries in the region, the growing number of terrorist activities, and the lack of having a political leader as well as an effective political organization.

Nowruz does have precious treasures which in the long term not only would compensate the lack of not having a leader or an appropriate organization, but they also boost the unity of people. Historical conservation and common cultural heritage and global values are examples of items which act as compensating and leading factors. A clear example is the economical status of the region a few centuries ago when the economy was the quintessential economy in the region and the rest of the world. At that time, the Silk Road linked the region with other regions in the

world. Persian played a lingual role like that of English and linked different social, cultural, and political groups. The ruling figure played political and governmental roles. The spirit of Islam has been the source of humanity values like respect, humbleness, trickery, pea-

ceful coexistence, and the residence of Jewish and other ethnical groups formed the characteristics of people dwelling in the region. Recognizable opportunities and challenges are chosen from speeches of experts and evaluated in the model making step.

3. The following chart can be drawn from what we have said so far.

Stabilized Elements	Predetermined Elements	Uncertain Elements
Commonalities in the Tradition of Nowruz	Different political ideologies	Islamic Foundation
Commonality in the Religion of Islam	Regional and Out of Regional Conflicts	Globalization
A similar historical background	Political and Economical Structures of Countries	Fear from Iran
Geographical Proximity	-----	-----
Other cultural similarities	-----	-----

Agreeable Factors	Dis-harmonious Factors	Neutral Factors
Similarities in the Tradition of Nowrouz	Religion-based Issues	Globalization
Similarities in the Religion of Islam	Islamic Foundation	Political and Economical Structures
Similar Historical Background	Regional and Out of Regional Foundation	-----

Geographical Proximity	Fear from Iran	-----
Other Cultural Similarities	-----	-----

1. Agreeable factors

1-1. Nowruz Tradition: Nowruz is an official holiday with the same name in Iran, Afghanistan, Tajikistan, Uzbekistan, Turkmenistan, Kirghizstan, and Caucasus. Some countries banned the celebration of Nowruz for a period of time like the one Soviet Union had set in Turkmenistan, Kirghizstan, and Tajikistan which continued till the presidency of Gorbechov. The ban made people to celebrate Nowruz under a different name called Laleh. The same ban occurred in Afghanistan during the sovereignty of Taliban [16]. The celebration of Nowruz in the so-called areas differs from the way it is done in other regions. As an instance, Nowruz is the beginning of the New Year in Iran and Afghanistan because of their solar-based calendar, but it is the starting point of spring in Caucasus and Middle Asia because they use a Georgian-based calendar. Nevertheless, Nowruz has been stabilized in the region due to its old similarities and the fact that people of the region are highly compassionate about its celebration.

1-2. Tradition of Islam: Majority of central Asian countries are Muslim. Even Taterlars who are Muslims of the

European part of Soviet Union and Siberia dwell in central Asia. Majority of Muslims are Uzbek, Caucasian, Tajik-, Turkmen, Kyrgyz, GhareGhalPaghs, and Dungha. Although all mosques become stables and museums during the sovereignty of communists, people did not abandon their religion, Islam, and beliefs. The existence of an inordinate number of Islamic names, respecting religious traditions, and conserving traditions like fasting and Eid al-Fetr are examples proving that people of the region have not deserted their religion [17].

1-3. Common Historical Background: A majority part of what is called Central Asian used to be part of Achaemenes territory during 4-6 century BC. The word Sogdia, which is the name of a territory in Central Asian encompassed Uzbekistan and east of Tajikistan, has been engraved on inscriptions made at the time of Dirus, the great. After the fall of Sasani dynasty, Iran and Central Asia have been under sovereignty of Amavi and AbbasiKhalifes for two years. During these two years and after the formation of Taherian dynasty, Tabaristan, Kerman, and Mavar al-Nahr fell out of the sovereignty of Amavi and Abbasikhalifes. As a result, Merv(a city in Turkmensitan), Sa-

marqand (the second largest city in Uzbekistan.), Bukhara which is located in Uzbekistan, and Sogdia which used to be the province at the time of Achaemenes Empire, gained the most significant status in science and literature of the Islamic world. After Muslims conquered this region, the government of Sasanian ruled by Persian Empire was the most important government which revived Persian language. Taherian, Sa-favian, amanian, Al-Buyeh, Ghaznavi-an, Seljuq Empire, and Kharazmshahi-an which were all Iranian dynasties placed Iranians and the people of the region in a united territory and gave them a united identity. However, the attack of Mongols to the region destroyed the civility and culture of the region [18].

Central Asia has also been a part of Iran at the time of the dynasty of Safavi, but was politically separated from Iran due to the naive government of Safavi and the formation of Khans of Shayboniylar of Bukhara. After Shiite became the official religion in Iran, Itgot isolated from other countries in the region. After Ottoman Empire and Russian reached their peak power in the region, their creepy informant entered the region in Central Asia. Consequently, the region fell under the territory of Soviet Union after the formation of communism [19]. However, after the fall of Soviet Union, the time and circumstance to revive the Iranian cul-

ture and civility reached which needs to be redefined in the following way.

1-4. Geographical Proximity: Iran borders on Turkmenistan more than 1500 km. One of the main and easy ways to enter Iran is via Republic of Central Asia. This way of travelling to Iran is an alternative benefit for Iran and clearly seen amongst cultural rivals in the region. While Turkey doesn't have such a benefit, it has emphasized on its cultural matters among other countries merely on the basis of its lingual similarities [20].

1-5. Other Cultural Similarities: In addition to the religion of Islam and Nowrouz tradition, similar language of Iran with adjacent tribes in the region, famous literature, and scientific figures of the region can be points on the basis of which cultural relations can develop into great extent. Generally, people of one country get to know people from another country through language and literature. Turkish have been in touch with Turkan through Sodgians, Arabs, and Persian all of whom have had a considerable role in the Islamic civilization, so the interference of their lexicon dates back to a long time ago.

After the opening of the Iranian embassy in Dushanbe on Jan 8th of 1992, subsequent cultural events as well as the performances of poetry nights, musical events and movies shown in theaters, a lot of ways popped up for expanding cultural relations. Persian are

proud of their culture, language and hope that superficial borders disappear sometime soon in future. The existence of enormous Persian and Turkish words in the literature of these two languages is the resemblance of nothing, but their deep relations. Familiarity of Turkish with Persian culture and civility began at the time when they lived with them and when they started to learn Persian.

Persian and Arabic languages became the language of Turkish religion. The expansion of thoughts became possible through the publication and translation of cultural and literature works of one nation into another. Through such things, they got to know more about one another's culture which brought about their friendship in international relations. Although poetry and literature is best known in Iran, Tajikistan, and Afghanistan, poetry has a remarkable status on other regions like Central Asian countries, Indian sub-continent, and particularly in Uzbekistan.

Whereas poetry and literature could grow and improve its status consistently during history and particularly at the time of sovereignty of Soviet Union, it nowadays has a better spot after the formation of poetry associations in places like Tashkand, Samarcand, Sor-khan Darya, Farghaneh, and Bukhara. Great poems lived in the aforementioned regions. While the time of contem-

porary poetry and literature of Mavara al-Nahr differs from Persian in its lexicon, grammar, and pronunciation, it still has a good status in classical poetry, there is an impressive and optimistic way ahead of the father of Persian poetry, Roudaki. Although Turkish and Russian speakers of Turkmenistan outnumber Persian speakers, there is a great sense of camaraderie between the two nations, Iran and Turkmenistan, due to the importance of Persian history in cultural aspects as well as the existence of enormous Persian lexicons [21].

In the past, Mavara al-Nahr has been known as a knowledgeable and free region which has produced lots of scholars. Mavara al-Nahr is also known as Turkmenistan in the category of genre if poetry and literature. As of now, it is part of Central Asia with great and famous cities like Bukhara, Samarcand, and Merve in which distinguished scholars have grown up. Their achievement and names will forever remain in the history of Iran. You need to refer to the history of literature and science of Iran to find out more about the works and arts of scholars in different fields like Hadith, interpretation, lexicography, history, geography, math, astronomy, mathematic, and music. Music used to be known as Sanae in the past. You can refer to the works of Farabi and Avicenna who have lived in Mavara al-Nahr and whose arts in Iran have

significantly added to the value of Music in Iran. There is also another instrument known as Shahrud or Shahrud which is a kind of 'Oud, which famous in Arabic countries. Fortunately, there is a picture of that instrument in the hand-written transcripts of Kabir in the version of Lion [22]. All of the aforementioned factors are known as structures that are stabilized. They are hardly subject to any change and form the agreeable power of the countries which are being examined in this article.

2. Opposing Factors:

After the fall of Soviet Union, fundamental changes happened in the geopolitic of the region in a way that a new regulation system formed in international relations which brought about the redefinition of all of countries involved in the matter. Independent countries were at the center of the new system. Turkey, Iran, and Russia are adjacent countries. China and the U.S. had an interferential role in the new system. But, the definition of this new sub-system is way more complicated than the simple meaning in the above. It is like that because we are only spectators of the game played among the actors, some of which are in alignment and some of which are not. The U.S. intends to deploy its own regularity in the region so as to reap the potential opportunities it may have there. On

one hand, there are conflicts between the U.S. and Iran; on the other hand, the U.S. has a remarkable relation with Turkey, one of our neighboring countries. Also, given the existence of the relationship between Iran and Russian, and the interest of Israel in dealing with regional matters and the basic problems it has with Iran, have all led the U.S. to find a way to keep Iran at bay [23]. Given all the above factors, Russia can influence the effectiveness of Iran.

Russia:

Although Russia has been oriented towards the west after the fall of Soviet Union due to the domination of Atlantic Euro aspect at the time of Yelstin's presidency, their policy switched from West to East at the time of Primakov's presidency. Consequently, Russian paid a special attention to central Asia and Caucasus and used its switch as a traditional territory of Russia, also known as the foreign means in its international relation.

On the basis of the foreign Monroe doctrine, the central Asia region became one of the top priorities of Russia in its international policy. According to this doctrine, Russia has special economical and security sources in the region with which other regional and outside regional countries should agree [24]. From the Kremlin's point of vi-

ew, the implantation of the Monroe Doctrine is considered Russian and not anything else. The behavior of Kremlin about neighboring regions (which are black sea, southern Caucasus, Caspian, and central Asia), the attempt of Russia to restrict the presence of, interference, and participation of other powerful countries like European Union, Turkey, Iran, and China all in all mean that Moscow only accepts structures and regularities that are based on policies determined by Russian [25]. It is taken for granted that international policy of Iran in the past years has directly been under consideration of Russia because if Iran had ever wanted to expand its international policy to central Asia, it should have passed through the gates of Russia.

China:

China and central Asian countries have economically and scientifically cooperated with each other for centuries through to Silk Road. As of now, the countries in the mentioned region have more than 2800 km of common borders with one another. Considering the created gap of power after the fall of Soviet Union, Beijing has paid a particular attention to the central Asian region because of its borderless economical benefits, consideration, and security as well as political concerns in fields of tribe, religion, military, particularly the presence of the U.S. in the re-

gion, and the expansion of NATO towards east. Either through bilateral or multilateral means, China has shown that the process of Iran in the region has particularly become less and less. China has made problems on the way of Iran's international policy [26].

The United States of America:

In the recent years, Washington has endeavored to put Russia, China, Iran, and the adjacent region under pressure. The occurrences of Sep 11 and attack of the U.S. to Afghanistan ought to be noted as a turning point of the attention of the U.S. to the region. It all in all exercised policies like counter attacking terrorism, Islamism, and fundamentalism so as to defeat and control Iran which have been successful at the end of the day. Recently, the U.S. has also prevented the countries in the region from having any sort of political, economical, and cultural relation and/or cooperation with Iran. In nutshell, the most important purposes of the foreign policy of the U.S. in central Asia from the starting point of its independence are elimination of Islamists, prevention of the growth of Islamism, controlling the Republic Islamic of Iran, completing the blockage of Iran from south and north, controlling and weakening Russia, controlling the west of China, gaining access to energies of Caspian sea, and boosting the presence

and interference of Israel in central Asia [27].

Turkey:

After the fall of Soviet Union, Turkey attempted to fill the gap in Central Asia and Caucasus by uniting the countries which speak Turkish in the light of Pan-Turkism ideology. On the basis of the interpretation of Huntington, "Turkey is the country which became disloyal to Mecca, did not have any entrance to Brussels, took the advantage of the fall of the Soviet Union and asked for Tashkan's help [28]. In this way, Turkey intends to create the Big Turkey through utilizing its deep historical, cultural, tribal, and lingual links with the newly formed and independent countries, which include Azerbaijan, Caucasus, Kirghizstan, Turkmenistan, and Uzbekistan, through acting as their more experienced brother on the basis of Pan-Turkism ideology. Turkey intends to obtain its goals through stimulating emotions and anti-Iranian and anti-Russian policies. It is completely vivid that the presence of Turkey in political, economical, cultural, and lingual fields creates a serious problem for the foreign policy of the Republic Islamic of Iran in central Asia.

Israel:

Israel is another out of regional power which has increased its presence in central Asia like that of a creepy entity.

The establishment of economical, military-based cooperation in the field of energies and other areas with Central Asian countries is counted as a serious threat. The Tel Aviv Politics on the basis of Ben Gurion Doctrine titled under unity so as to defeat the countries which disagree with it, help Jews resided in the region, attract cooperation and support of countries in international scenes, separate the Central Asia countries from Iran, and put pressure on national security and other environment. In the meantime, Israel has expanded its communication with the Central Asian countries by convincing them that the only way to receive support from the west is via Tel Aviv. Although these republican countries don't agree with the policy of Israel%100, they have accepted to cooperate with them so as to receive financial, economical, and technical support from the west [29].

2-1. Different political ideology:

Although simultaneous with the starting point of the activity of the Islamic Republic of Iran, it regarded promotion of Islamic Evolution as one of its most important principles. According to Brzezinski, nonetheless the revival of Islam in the 1990s in the Central Asian countries is one of the non-separable purposes of the today's Iranian government, this kind of the evolution has become a fixed clichés of Iran in its fo-

reign policy. This reality exists that the pursuance of such goals in the Central Asian countries is not practical [30], because of the existence of the other countries in central Asia. The Islamic policy of the Iranian government, secularism of other countries in Central Asia, the impact that Turkey has on the countries in Central Asia, ideological conflicts among traditionalist and Shiites with regard to the fact that majority of the population in the region believe in Hanafi are reasons why it is not possible to establish an Islamic integrity with the countries in the region. This conflict prepares the condition to separate one of the opposite groups from each other.

2-2. Islamic Fundamentalisms:

There are places in Central Asia and some parts of Caucasus which are the main sources of the activities of Islamists. The center of the radicalized Islamist Association in Central Asia is Farghana valley which is thickly populated with people from different races, but most of them are Uzbek. The region is located between Uzbekistan, Kirghizstan, and Tajikistan which has been for years the center of the activities of Islamist groups, but it is the very first time that fundamental Islamists have settled there [31].

While investigating the fundamental Islamists, It should be noted that the

extremist groups form the minority of the Islamic societies. Nevertheless, speeches of fundamental Islamists significantly impact Muslims so as to fill the gap created by secularist regimes; they need to redefine the borders in order to gain political power, attract the poor people towards their own beliefs, and maintain their symbolic figure in front of the have-nots via technical discussions and modern education. Fundamentalists use terror as their means to expand their beliefs. Although the convergence of the fundamentalism with religion is more powerful than the convergence of terrorism with religion, after the cold war, the terrorist groups have sought a religious status and formed the biggest part of the terrorist groups in the world. The terrorist groups that run their activities in Central Asia, Caucasus, and southern Asia utilize the label of Islam in order to receive support from anti-west groups [32].

2-4. Fear of Iran: Fear of Iran is based on some realities in the region and the falsification of some other realities in a way that is very expensive to gain power which as a result makes the transition of power impossible. Power (expansion, population, situation of geopolitical, and sources), geographical proximity (proportion of distance vs. filtering threats), and invading capabilities (development of an on-going ideological) can be looked upon as structural reasons of fear from Iran, and the ac-

ceptance if this speech from other countries as non-structural reasons of frightening others from Iran [33]. This factor is an opposing barrier in stating cultural convergence of this region with Iran.

3. Neutralizing factors:

3-1. Political-Economical Structures:

Cases like the lack of capacity in foreign policy, a certain position of government towards society, and all in all the fallibility of the process of establishing nations and governments, marginal and territorial conflicts, diversities of races and tribes as well as internal wars, the inability to access warm international water, and being isolated in an area of dry land make the republic countries in the region vulnerable. Consequently, it has become easy to seek help from outside powers to facilitate the economical growth as a neutralizing factor or to impede the process of cooperation of Iran with other countries in the region. Examples of Political-Economical Structures are the existence of the companies like Chevron Co. Axon, Conoco, and some other companies in the Middle East like Devo, which has invested more than one milliard USD in Uzbekistan, Mitsubishi Group, which has invested in the oil industry and entered into deals with political officials [34].

3-2. Globalization: One of the aspects of globalization, or in other word the cultural equalization, is the domination of a kind of cultural imperialism in the third world countries. The usage of this word is to show that the impact the western culture has on the cultural authors of the third world countries. The usage of this culturally imperialistic word is to convey an idea that although we are to put an end to the period in which direct political and economical domination of suppressive powers, a new form of the international suppression is on the way. This new domination is indirectly based on power so as to shrink the cultural resistance of developed countries. It also indirectly aims to provide investment for outside-national companies which are in the west in order to create the motivation to consume western products and style of life. Believers of cultural imperialism threaten western systems for putting their regional tradition at risk of falling into abeyance, convincing people of the region to be consumers and pluralists in a western way [35].

The countries which are being investigated are not safe against the mentioned danger and are threatened due to the presence of the outside regions countries and being unable to disagree with them. As a result, they are all inevitably forced to follow their globalization pattern which leads them to the risk of abandoning their own rich cul-

ture. Consequently, on one hand, globalization in some culture is known as an unclear factor, on the other hand it is regarded as neutral factor on the way of the cultural convergence of countries in the region. On one hand, globalization inherently grows its opposite understanding and causes to the growth of regional, tribal, and racial identities. On the other hand, the enhancement of social and political poetry of the countries in the region reduces this convergence.

1. Design Scenario: The scenario of unity: The elimination of the opposing factors, the least possible impact of neutralizing factors.

Converging Scenario: The increase of the agreement on opposing factors and the reduction of the impact of neutralizing factors.

The competing Scenario: The increase of disagreement on agreed factors and the increase if the neutralizing factors which boost the opposing factors.

The Scenario of Conflict and Contrast: The elimination of the agreed factors and neutralizing factors which boost the opposing factors.

2. The Assessment of the Probability of Scenarios: The integrity and conflict scenarios are regarded as the Joker Scenario. Since the possibility of the omission of the opposing and agreed factors does not exist, the occurrence of these two scenarios would be far-

etched. The converging and competing scenarios are considered the possible scenarios. The approved and regulative scenarios are convergent.

3. The Evaluation of Scenarios: The most important thing is to be as much as possible%100 clear about the whole matter. After the thorough understanding of the theme or the matter, all data would be collected and all forces that play an effective role in the formation of the matter are examined. After that, all possible probabilities and conditions in which these data can form in the long term would be stated.

3. Conclusion:

The fall of the Soviet Union and foundation of newly independent republic countries in Central Asia are the most significant changes in the contemporary history. As a result of the fall of Soviet Union, not only the realities pertinent to political peripheries changed, but also a new facet of cultural and economical issues was brought about among the countries in Central Asia and other regions. Iran as one of the important countries in the region and as the neighbor of southern Central Asia has encountered especial challenges and opportunities in its communication with them. Because of the geographical proximity, common cultural, historical, religious values and interests that Iran has with Central Asian countries, it tries to establish a convergence

based on cultural aspects. But, in the past years, the foreign policy of Iran has faced many convergent and divergent factors. If it appropriately and fully appreciates them, it will then be able to establish a realistic, dynamic, poly-lateral, and adjustable foreign policy in accordance with the realities of Central Asia. In turn, Iran can have a considerable share of political, economical, and cultural capacities among the enormous number of regional and out of region powers. It can use its share in a convergent manner to fully secure its national relations in a 20 year period. Accordingly, Iran needs to expand its cultural relations, stabilizes its cultural features, prevents the crepey tensions, corrects the false understanding of the culture of Iranian Islam, tries to gain loyalty, adapts cultural plans and behaviors on the basis of the capacity of the environment, increases the cooperation of and exchanges of information among students, graduates, and professors, holds similar scientific conferences like the ones that are held in the region, offers Persian courses and expands its education through the universities in Central Asian countries, establishes museums which are dedicated to the study of Iran, stresses the importance of special events like Nowruz and religious ceremonies as well as their introduction to young people in the region through performances of cultural events, represents a realistic face of Iran and Islam via media

and other similar means. All the stated purposes are accessible through cultural scenarios, which are approved by the society, and which prepare the ground for adaptability of political and economical fields.

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II PLENARY SESSION – Law and Politics

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Curing Textual Indeterminacy in International Investment Treaties

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Abstract

International investment treaty law has become of increasing significance over the past two decades. Nevertheless, uncertainty as to the interpretation of a number of key investment protections has arisen. This article considers the consequences of such uncertainty using the principled framework provided by Professor Thomas Franck's concept of legitimacy. The article provides an introduction to this framework and particularly the requirements of "determinacy" (one of Professor Franck's four indicators of legitimacy), which is especially relevant in this context. It will be shown that although international investment protections are textually vague to a degree that falls below the ne-

cessary level of determinacy, there are two cures to this. The first is the widespread use of terms of art. The second is the existence of a mechanism for clarifying treaty provisions with certain features that increase the probability of coherence. Each cure is introduced as a means to help focus future discussions.

1. Introduction

This article considers the consequences of the uncertainty that has arisen in the law and application of the protections offered in bilateral investment treaties ("BITs"). This analysis is undertaken through the principled framework provided by Professor Thomas Franck's concept of *legitimacy*.^[2] Of Professor Franck's four indicators of legitimacy,

“determinacy” and “coherence” are the most relevant. It will be shown that BIT protections (such as “fair and equitable treatment”) are textually vague to such a degree that they fall below the level of determinacy required to promote legitimacy. However, it will be argued that, two cures may pull these protections up to a satisfactory level of determinacy: first, the use of *terms of art*; and second, the existence of a mechanism for clarifying treaty provisions with certain features that increase the probability of coherence.

2. Inconsistent Decisions in the International Investment Treaty System

International investment treaty law has become of increasing significance over the past two decades. Indeed, it has been described as “the fastest growing area of international law at this time”.^[3] This body of law emanates primarily from a complex web of bilateral investment treaties, which seek to promote foreign direct investment between the contracting States by creating favourable conditions for foreign investors.^[4] Such protections can also be found in the investment chapters of a small number of regional and sector-specific multilateral treaties containing investment chapters; examples include the North American Free Trade Agreement, the Central American Free Trade Agreement, the Energy Charter Treaty,

and the Asia-Pacific Economic Cooperation.

It is said that the dramatic rise in the creation of investment treaty protections over the last quarter-century has been driven by “equally unprecedented increases in trans-border investment flows, a necessary concomitant of the increasing globalization that has taken place since the end of the Cold War”.^[5] For Professor Susan Franck, this body of law is “a vital tool for economic development and global prosperity” that “allows developing countries to develop local industries and receive funds from foreign investors to improve the country’s infrastructure” while enabling investors to “obtain financial returns and gain a foothold in the markets of the future”.^[6] To achieve these valuable aims, BITs typically guarantee that investors will be treated no less favourably than domestic companies, ensure a fair and equitable standard of treatment and protect them from unlawful expropriation. Disputes between foreign investors and their host States in relation to BIT protections are typically settled pursuant to a dispute settlement provision permitting recourse to independent international arbitration, often at the World Bank’s International Centre for the Settlement of Investment Disputes (“ICSID”).

The protections contained in the vast majority of BITs are textually vague

(for example, “fair and equitable treatment”). Arbitral tribunals thus play a central role in the interpretation and development of BIT protections. However, there is no *de jure* doctrine of precedent between such tribunals. Indeed, the complexity of the system’s nature renders the possibility of such a doctrine as a legally binding requirement incredibly difficult. An unfortunate consequence of this is the resulting uncertainty in the law and application of the BIT protections: conflicting decisions containing dramatically varying interpretations of the same (or at least substantially similar) provisions exist in a number of key areas of this body of law.[7] Some of the conflicts that have arisen thus far have been conceptually more serious than others.

Arguably the least egregious conflicting decisions have arisen where more than one arbitral tribunal has had to consider linguistically similar protections, but in relation to entirely different fact patterns and different BITs.[8] However, at the other end of the spectrum conflicting decisions have arisen in situations: (i) where two tribunals were constituted under separate treaties but had to determine the legality of exactly the same State actions in relation to substantially similar protections;[9] and (ii) where multiple tribunals have taken different approaches to a universally applicable rule of customary international

law in relation to the same facts.[10]

At least partly as a consequence of the uncertainty engendered by such conflicting decisions, numerous States have begun to lose faith in the effectiveness of this area of dispute resolution. This is demonstrated by actual and threatened exits from the ICSID (whose arbitral awards are subject to an enhanced enforcement mechanism),[11] as well as reactionary modifications to State negotiating policies for their future BITs (to explicitly implement their preferred reasoning, thereby reducing the need for complex treaty interpretation).[12]

That being said, it is important to acknowledge that absolute certainty is both impossible and undesirable given the vast amount of precise rules that would be required. Often, a degree of textual indeterminacy is often of great benefit to allowing laws to adapt and evolve over time. This is especially important in light of the fact that many BITs include sunset clauses, which ensure that their protections will continue to apply for many years after the treaty is terminated. Thus, it should be noted at the outset that while some inconsistency is tolerable, egregious inconsistencies are more problematic and threaten the legitimacy of both a specific award or BIT and the system as a whole.

3. The Concept of Legitimacy

The problem with conflicting interpretations of similar (or the same) rules is that they leave the persons or bodies that are subject to those rules (in this context, investors and States) unclear as to the precise boundaries of their rights and duties. This is particularly problematic in the investment treaty context since one of the system's *raison d'être* is the mitigation of political risk through the provision of a predictable international legal framework. Uncertainty has the capacity to greatly increase such risk: uncertain, ambiguous laws provide scope for a host State to ignore or avoid the responsibilities that foreign investors had assumed had been adopted by the State. Indeed, such investor assumptions are often grounded on legal advice resulting from earlier arbitral awards considering the protection, or on political assurances relating to the existence of the BIT and its protections.

As such, the question is: to what extent do conflicting arbitral decisions in the investment treaty context reduce the likelihood that a State will comply with its obligations under a BIT?

The factors that drive compliance with rules have been discussed extensively over the centuries. In relation to domestic laws, legal philosophers have gone to great lengths to define the na-

ture of law and why it drives compliance. Many theories have been posited, including the inherent morality of a law or the existence of a powerful sovereign capable of forcing compliance. International law is different. Unlike domestic law, where there is a government or similar supreme entity to enforce compliance, international law has no equivalent. And yet, it is clear that international laws are complied with in spite of this absence, albeit perhaps to a lesser extent than domestic laws.[13] So what drives compliance with international law? Three concepts can be posited: legality, justice, and legitimacy. The first two can be disregarded for present purposes for the reasons given below.

The main problem with the concept of legality in this context is that most scholars apply it by examining the extent to which a legal system looks like an idealised *domestic* legal order.[14] Such comparison is simply not appropriate in the international context nor is it warranted: particularly because key structural differences exist between international and domestic legal systems, including the lack of an overarching sovereign with coercive powers. Further, whereas in domestic legal systems it is generally possible to read the laws and form an accurate picture as to how that society operates, this cannot be said of the international legal order: compliance is lower, and there is far less

law.[15] As such, the concept of legality does not assist this investigation.

It seems inevitable that a law or rule's capacity to provide justice will be a key feature in its pull to compliance. It is said that such a pull "derives from the belief that [the rule or system] operates in accordance with certain principles of fairness and decency shared by all members of a moral order who hold common or overlapping fundamental moral values".[16] However, the international community of States is comprised of a vast array of actors, with a wide variety of moral beliefs. Take, for example, the varying perception of the death penalty throughout the world. There is simply no such moral order of shared fundamental values in the international legal order. As such, if the validity or compliance-pull of an international law is dependent on shared notions of justice, very few laws would be valid or exert a compliance-pull on those subject to it.[17] So the notion of justice can be left aside for the purposes of this article.

Whereas legality traditionally looks to structural similarities with domestic legal orders and justice requires a shared morality, the concept of legitimacy provides a more neutral explanation of the factors influencing international law's compliance-pull. Professor Franck has provided a comprehensive study on the concept of legitimacy in

relation to the international legal order. Professor Franck defines legitimacy as the "property of a rule or rule-making institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of *right process*" (emphasis added).[18] Moreover, in examining why legitimacy drives such compliance, Professor Franck posits that:

"The rules of the international system obligate – to the extent they do – primarily because they are like the house rules of a club. Membership in the club confers a desirable status, with socially recognized privileges and duties and *it is the desire to be a member of the club, to benefit by the status of membership, that is the ultimate motivator of conformist behaviour: that and the clarity with which the rules communicate, the integrity of the process by which the rules were made and are applied, their venerable pedigree and conceptual coherence. In short, it is the legitimacy of the rules which conduces to their being respected.*" (emphasis in original)[19]

From this explanation, we can discern the "integral factors" of which legitimacy is composed.[20] Firstly, there

must be a community within which the rules operate and there must be integrity of legal process (adherence in Professor Franck's ultimate terminology). Furthermore, the pedigree (or *symbolic validation*) of a rule or process is also an integral factor of legitimacy. The very fact that an international rule is termed a "law", that investment rules originate from treaties and that investment disputes are handled by arbitral tribunals (all of which have deep historical roots) demonstrates the strong pedigree of the rules and procedures used in the system, thereby increasing their legitimacy. In addition to *adherence* and *symbolic validation*, the legal order's rules must be sufficiently clear (or *determinate*) and there must be conceptual *coherence* in the output of any rule-clarifying (i.e. judicial) processes. It is these factors that are of most relevance to discussion of the effect of conflicting arbitral awards.

For Professor Franck, to the extent that a rule or rule-system exhibits these four factors (determinacy, adherence, symbolic validation and coherence) it will exert a strong compliance pull towards the members of that system; to the extent that the factors are not exhibited, the system itself will "be easier to ignore and the rule easier to avoid by a state tempted to pursue its short-term self-interest".[21] As this assertion suggests, legitimacy and its compo-

site factors exist as a matter of degree.[22]

4. Legitimacy from Determinacy

To have compliance there must first be understanding.[23] Thus, legitimacy through determinacy requires that "a rule must communicate what conduct is permitted and what conduct is out of bounds".[24] This enables the rule's subjects to conduct themselves accordingly and prevents easy justifications for non-compliance. The latter aspect is particularly significant: where a number of rules in a legal order are considered by its participants as being indeterminate, not only will the compliance-pull of the individual rules be low but it will erode the cohesion of the community as a whole because there is little incentive to attempt to comply with a rule when there are so many opportunities for others to avoid compliance with rules that might benefit you.[25] As such, the clarity of a rule is essential to both its own legitimacy (and therefore its compliance-pull) and also to the legitimacy and continuance of the legal order in which it exists as a whole.

All else being equal, the greater the determinacy of a system's rules, the more legitimate it will be and hence the stronger the pull toward compliance with its rules will be. However, that is not to say that the rule must be absolu-

tely clear, nor will this even be possible (or desirable) in many instances.[26] The question then is what level of determinacy is required at a minimum. Although this may vary depending on the particular circumstances of a legal order, it is submitted that *formal legality* conceptions of the Rule of Law provide a helpful basis to investigate the minimum level of determinacy. One theme that consistently recurs throughout such theories is the notion that law must be predictable. For example, Professor Raz regards the “basic idea” underpinning the Rule of Law as being that “the law should be capable of providing effective guidance”,[27] and for FA Hayek (with whom Professor Raz agrees), to provide such guidance rules must “make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances”. [28] Professor Tamanaha concurs that all advocates of formal legality agree that the Rule of Law “furthers individual autonomy and dignity by allowing people to plan their activities with the advance knowledge of its potential legal implications”, [29] thus arguing that “above all else it is about predictability”. [30]

The necessary degree of predictability is dictated by the characteristics of the legal order. In the international investment law context, three features appear to be especially important: the fact

that lawyers will often advise the investor as to the scope of investment protections, particularly given the substantial sums involved which are often invested; the commercial nature of this body of law; and the origin and purpose of the system. It is worth briefly focussing on the latter two of these features.

Arguably, the commercial nature of international investment law requires a heightened minimum level of predictability (and with it, determinacy). The origins of this proposition can be seen in a 1761 ruling of Lord Mansfield where it was asserted that “in all mercantile transactions the great object should be certainty ... because [investors and businessmen] then know what ground to go upon”. [31] Likewise, Professor Tamanaha asserts that since “predictability and certainty allow merchants to calculate likely costs and benefits of anticipated transactions”, legal certainty is an essential requirement for legal systems purporting to govern such an enterprise; he sees valuable support for this position in the “growing body of evidence [which] indicate[s] a positive correlation between economic development and formal legality that is attributable to these characteristics”. [32] It is submitted that this general commercial desire for certainty is particularly important and heightened in the investment treaty system. In light of the financial risks

inherent in investing abroad (particularly in States in which there is no stable domestic legal framework) that can have far-reaching consequences affecting the global economy, it is highly probable and desirable that investors will spend considerable effort in calculating the risks inherent in a decision to invest in a particular economy and that the rights available under a BIT will influence this calculation.[33]

As regards the system's origin and purpose, it should first be recalled that prior to the BIT protection movement (and in contemporary situations not governed by a BIT), foreign investors whose property had been interfered with by their host State had two options: they could bring a suit in the domestic legal system of the host State, or they could request that their home State use diplomatic methods to protect them (which could ultimately result in an legal action between the two States under the international laws on diplomatic protection).[34] The problem with the first solution is that investors may often fear (with or without cause) as to the "neutrality, impartiality, and independence of the host State's courts to settle disputes with the government".[35] Nor is the second solution free from difficulty: such efforts are primarily diplomatic in nature and are subject to international and internal political concerns, and can therefore be wildly unpredictable. Against this bac-

drop, treaties protecting foreign investments emerged to provide a more favourable framework of protections to investors along with an independent dispute resolution mechanism subject to reduced political difficulties. Thus, the fundamental goal of the investment protection movement was arguably the creation of conditions favourable to investors as a means to the promotion of foreign investment. Further, it should be noted that a condition of the utmost importance to investors is the existence of a stable legal framework. Thus, legal certainty lies at the core of the system's ability to achieve its goal.[36] As such, indeterminacy has a far greater impact on this system's legitimacy that it may in other contexts.

In spite of the evident importance of determinacy in this field of law, the language used in the majority of BIT protections is textually vague.[37] It is therefore fortunate that Professor Franck formulated two potential cures for a rule that lacks textual clarity as to the obligations or rights that it imposes. The first cure applies where a rule appears vague to an external observer, but is nevertheless sufficiently determinate for the members of the system in which it applies. The second cure covers processes that interpret and apply otherwise indeterminate rules, so long as those processes are accepted as legitimate themselves. Each will be ad-

dressed in turn in the following sections.

5. Terms of Art

As has already been stated, investment protections are contained in a large and complex network of (mainly) bilateral treaties. And yet the majority of these treaties contain substantively similar protections.[38] This includes clauses requiring that fair and equitable treatment be accorded to an investment, most-favoured-nation (“MFN”) clauses, and the so-called “Hull Formula” for compensation in the expropriation context. The widespread adoption of MFN clauses is particularly important, since such clauses enable an investor to import the protections that their host State has agreed in a separate BIT to the treaty which enabled the investor to bring an action against the State; the result of this is that the highest standards of protection can be seen to be universalised throughout networks of overlapping treaties.

In fact, many treaty protections (such as the examples cited above) incorporate and are based on *terms of art* that hold an “ancient pedigree”. [39] Arguably, States that choose to adopt such terms in their BITs may be regarded as indicating their preference to accord precedence to the pedigree of the terms when it comes to interpreting them.[40] Thus, for Professor Douglas,

“by agreeing upon a slender text with copious references to terms of art in international law [...] the state parties agree that the general principles of international law are *to assume a major part of the interpretative burden* when it comes to resolving disputes” (emphasis added).[41] It is submitted that a State’s adoption of a term of art operates at the very least as an acknowledgment that it accepts that an ever-developing, cumulative body of knowledge and practice exists (including prior arbitral awards, other international decisions,[42] and academic commentaries) with regard to that particular standard of protection and that this should form a significant (if not the primary) focus in an arbitral tribunal’s interpretative process. Indeed, this is arguably a key factor driving the *de facto* use of precedent by investment arbitral tribunals (see below).

From a legitimacy perspective, it has already been noted that the pedigree (or *symbolic validation*) of a rule is an integral factor of legitimacy. Thus, the widespread adoption of terms of art is in itself a practice that serves to increase the legitimacy of investment protections. However, it can also be shown to serve as a mechanism to cure textual indeterminacy.

As was stated in the preceding section, the legitimacy of a rule is increased where it is sufficiently determinate (i.e.

predictable) to the members of the legal order in which it applies, even if it appears vague on first blush to an external observer. Indeed, it has been observed that “[p]redictability can still come about if there are shared background understandings or customs – either within society or within the legal culture – that inform the application of the broad standards”.^[43] Professor Franck termed this cure for indeterminacy the “common community understanding” of the rule. ^[44] For example, a rule that all investments will be accorded fair and equitable treatment can be cured of its externally observable textual vagueness if the community in which it exists has a common conception of what “fair and equitable” actually requires.

Since a State’s adoption of a term of art connects that term with the wider body of knowledge and practice for the purposes of its interpretation, it is submitted that such adoption indicates the existence of a common understanding within the global community that their use should have interpretative consequences. This operates to reduce the *prima facie* textual indeterminacy of the terms of art. As such, where arbitrarily conflicting decisions exist within that wider body of knowledge, it hampers the legitimising effect of this common understanding – a vague rule cannot be cured by reference to an incoherent body of underlying knowledge.

6. Increasing Determinacy through a Legitimate Clarificatory Process

Determinacy can also be increased through a legitimate clarificatory process. In fact, for Dr Schill, the textually vague “core legal concepts” contained in BITs will “only assume a more concretized meaning over time because of the interpretations investment treaty tribunals give to them in their decisions”.^[45] In Professor Franck’s words: “A rule with low textual determinacy may overcome that deficit if it is open to a process of clarification by an authority recognized as legitimate by those to whom the rule is addressed”.^[46] A significant factor that affects the legitimacy of such an authority is the *coherence* of the principles it applies. As such, in the investment treaty context, it can be seen that the coherence of arbitral awards are of significant importance: the more coherent the body of awards are, the greater the legitimacy of the arbitral process, the determinacy of investment protections, and consequently the legitimacy of the investment treaty system and its rules as a whole.

Coherence “requires that distinctions in the treatment of ‘likes’ be *justifiable in principled terms*” (emphasis in original).^[47] Investment arbitral awards are therefore capable of being coherent in spite of a lack of consistency between them so long as any “inconsistenci-

es can be explained to the satisfaction of the community by a justifiable (i.e. principled) distinction”.[48] which must establish a “reasonable connection between a rule ... to 1) its own principled purpose, 2) principles previously employed to solve similar problems, and 3) a lattice of principles in use to resolve different problems”.[49]

Evaluating the actual coherence of the existing body of arbitral awards in this field is outside the scope of this paper. Instead, it can be simply be noted that key structural features in the international investment arbitration process can be identified as greatly increasing the likelihood of a coherent body of awards. These include:

- The *de facto* doctrine of precedent that has been observed to exist in the arbitral process.[50] This practice is based not on a formal requirement to follow past decisions, but instead on the persuasiveness of the reasoning of past awards.[51]
- The existence of a core group of arbitrators that frequently adjudicate disputes.[52]
- The use of expert witnesses and *amicus curiae* submissions and of conjoined proceedings, which have the capacity to promote harmony between differently constituted arbitral panels.

These features are examples of characteristics that drastically increase the probability of arbitral awards being coherent, and therefore increase the likelihood that the system’s rules will be sufficiently determinate.

7. Concluding Remarks

This article has considered the difficulties presented by the scope for (and indeed the existence of) conflicting arbitral interpretations of key protections in the international investment treaty law system. In doing so, Professor Franck’s concept of legitimacy has been adopted, on the basis that it provides the most appropriate explanation for why rules are complied with on the international level. It has been argued that although the textual determinacy of BIT protections generally falls below the requisite standard, there are two cures that should be considered in particular in this regard. First, the use of terms of art. Second, the use of a clarificatory process with features that increase the likelihood of coherence in its output. The author’s initial analysis in relation to each has been presented as a means to assist the focus for future discussions of this important topic.

8. References

- [1] Thomas J. Innes, M.Res. (University of Reading), LL.B. (King’s College London) is an associate at Steptoe & Johnson in London. The views ex-

pressed herein are those of the author alone and any errors are the author's sole responsibility.

[2] See TM Franck, *The Power of Legitimacy Among Nations* (OUP 1990).

[3] CN Brower & SW Schill, 'Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?' (2009) 9(2) *Chicago Journal of International Law* 471, 472. See also SD Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 *Fordham Law Review* 1521, 1521.

[4] See T-H Cheng, 'Precedent and Control in Investment Treaty Arbitration' (2006) 30 *Fordham International Law Journal* 1014, 1022 to 1023.

[5] CNBrower & SW Schill (n 3) 472.

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[7] See C Schreuer & M Weiniger, 'Conversations Across Cases – Is there a Doctrine of Precedent in Investment Arbitration?' in P Muchlinski, F Ortino & C Schreuer (eds), *The Oxford Handbook on International Investment Law* (Oxford University Press 2008) 1197 and A Reinisch, 'The Proliferation of International Dispute Settlement Mec-

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[9] See e.g. *Lauder v Czech Republic* (Final Award) (3 September 2001) 9 ICSID Rep 62 (UNCITRAL, Arbitrators: Briner C, Cutler, Klein) and *CME Czech Republic BV v Czech Republic* (Partial Award) (13 September 2001) 9 ICSID Rep 121 (UNCITRAL, Arbitrators: Kühn C, Schwebel, Händel).

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[12] Ibid, 757 to 760; SW Schill, 'System-Building in Investment Treaty Arbitration and Lawmaking' (2011) 12(5) *German Law Journal* 1083, 1107.

[13] See TM Franck (n 2) 19.

[14] See I Brownlie, *The Rule of Law in International Affairs* (Martinus Nijhoff 1998) 16.

[15] See TM Franck (n 2) 32.

[16] Ibid, 235.

[17] Ibid, 235 to 236.

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[19] Ibid, 38.

[20] Ibid, 18.

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[23] Ibid, 52.

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The Italian business network contract: a legal tool for small and medium enterprises

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Abstract

SME sector in Italy was hit hard by the global recession of 2008-09. Small enterprises, which constitute the vast majority of Italian companies, were more affected than medium and large-sized companies. To cope with this problem, Italian legislator has introduced the business network contract. This new contract enables business parties to collaborate in “exchanging industrial, technical, commercial information and services, or to jointly implement projects in their field, in order to boost individual and collective competitiveness” according to the law 33/2009. Since its creation, 1600 business networks involving 7000 enterprises have been created, covering all types of sectors, with the main objectives of internationalization, marketing, research & innovation, branding for high quality products and promoting local areas. Law amendments may further need to be introduced. From this perspective, an European legislative intervention for turning business network from a national into an European legal tool is considered appropriate.

1. Italian economic system

Italy is facing a particularly deep economic crisis. This country has not yet recovered the 2008 level of GDP, while other European countries have already overcome the recession.

One factor that led to this outcome is Italian national economic system made up of small and medium enterprises (SMEs). There are approximately 65 SMEs per 1000 inhabitants, which is above the EU-27 average. In addition, Italy's SME sector has a higher proportion of small enterprises employing fewer than ten persons, compared to EU average (Italy: 94%, EU: 92%). Therefore small firms contribute more to employment and value-added than elsewhere in the EU: nearly half of total employment and one-third of value added.

The current economic crisis is especially present in southern Europe. Small and medium-sized companies in these countries are facing the greatest difficulties in financing, innovation and internationalization. Due to the recession, many

SMEs have experienced a deterioration of their financial position and creditworthiness, although they have viable business models and solid customer bases. In order to solve these challenges for SMEs, Italian government has introduced the business network contract. Indeed, the well-being of SMEs has been set in this country as a major objective for transforming Italy in a particularly attractive location for SMEs. By introducing this contract, the government wanted to facilitate and to promote SMEs' innovation potential and their access to finance and export outside the EU. Moreover, the network contract is in accordance with EU priorities - set by the Small Business Act (COM(2008) 394 final). This model provides an answer to the increasing need for growth and policy development of small and medium-sized enterprises.

This new form of contract provides a business model of cooperation that enables companies to join forces and give them incentives to achieve a common goal, without losing their independence. As consequence, Italian economic system shows that SMEs can benefit from the implementation of this model.

Although business network contract has been appreciated by entrepreneurs and therefore, it has become common in the business world; there are still some challenges and opportunities for improvement. The most significant one is the le-

gal capacity, because not all networks are a legal entity. Issues around the liability towards third parties need to be addressed.

2. The business network contract

In April 2009, Italian legislator adopted a new regulation on business networks to promote cooperation and innovation between SMEs. One year later, the law was amended significantly by l. no. 122 of July, 30th 2010. Business network has awoken Italian entrepreneurs showing the aggregation's potential that they can achieve by establishing a collaborative entity without creating a corporation.

Therefore, to avoid problems associated to the strict regulations on corporation or on partnership, the parties can sign a more flexible contract: the business network. This contract is defined as "first step". The entrepreneurs use it for "getting to know" and then they decide whether it makes sense or not, to establish a society together. Business network contract has several advantages, compared to a *Società semplice* - Partnership (the Italian civil law partnership), which is not common in Italy. The most significant differences are that a *società semplice* does not have the legal capability nor can exercise any commercial activities, and the participants have unlimited personal liability.

On the contrary, business network can be a legal entity, with limited liability

and exercising any commercial activities. The core purpose of business network contract is to increase the own individual and collective innovation and competitiveness in the market. To promote this contract, Italian legislator has provided fiscal, administrative and financial benefits. On the whole, by signing this contract the entrepreneurs do not need to give up their respective independence. In the network they share a common goal, remaining independent. Business networks are established with a simple contract, which includes the main points of cooperation.

Business network contract, which was introduced in 2009 by law no. 33, art. 3, par. 4-ter, 4-quater and 4-quinquies, is a contract between two or more companies.

The network's goal is the strengthening of innovation and competitiveness, both individually (each company on its own) and collective (the network itself).

To realize this goal, the members set a contractually binding network program, to carry out any of the activities listed below:

- Cooperation within a predetermined framework, and in areas that belong to the object of one's own business activity (so-called *Reti leggere*);

Exchange of information or services of industrial, commercial, technical or tec-

hnological nature (so-called *Reti di scambio*);

- Joint exercise of one or more activities that focus on the subject of the network (so-called *Reti associative o pesanti*) and in which it is possible to make a profit.

This new tool enables companies to jointly develop innovation and thus to increase their overall competitiveness in the market without sacrificing their independence in whole or in part. The main purpose of this model is to exploit synergies that benefit every member.

3. The legal capacity of business network contract

In the literature, this contract model was criticized, since the fundamental question was whether business network was a legally capable entity. The answer to this question is important in the perspective of the network's civil liability. A network has the legal capacity when it is an independent legal subject with its own rights and obligations separate from the one of the individual network partners. At the beginning, the contract was not recognized as a legal entity by the legislator. Law 179/2012 ("*DL Sviluppo-bis*" - Development Act) has renewed the provision, affirming that networks can become an independent legal entity if they have both a network's fund as well as a managing committee and if they want it. In addition, business network contract has to be signed in the form of a

public document or a certified private document (*i.e.* both cases need the notary's seal).

In case of legally incapable network, the contract's publicity is ensured for the validity of the contracts towards third persons by the registration in the commercial register in the section where the individual participants are registered. Consequently there is no separate registration of the business network contract as a separate legal entity; network's participation is only noted in the registration journal of each member.

Particularly interesting and relevant is also the provision affirmed in art. 3, par. 4-*quater*, according to this article the validity of the contract begins on the date on which the last proposed registration has been carried out. From this point, the contract binds all those enterprises who originally signed the contract. The publicity has a constitutive and not only declaratory character, since without it, the contract has no legal validity not only towards third parties, but also between network's members. In case of a legally capable network, the registration has to be made where the network is headquartered.

4. The content of the contract

Business network contract must have the following mandatory contents:

a) two or more enterprises; the name of all participants who have originally signed the contract or entered in the network at a later date;

b) strategic objectives for increasing the innovativeness and competitiveness of participants and the mutually agreed terms of measuring progress in achieving these objectives;

c) a network program that contains the rights and obligations of each participant as well as the modalities for implementing the common goal;

d) duration of the contract;

e) criteria for inclusion of other entrepreneurs to the network;

f) decision-making rules of the participants, unless a joint managing committee has been tasked (the appointment of such a joint body is not mandatory).

A mandatory element of the contract to establish a business network is its program that sets the rights and obligations of each participant. The network program is the core element of this contract. The program contains the rights and obligations of all participants, the specific arrangements laid down for carrying out these duties and the ways to realize the common purpose. Not least, it should be noted that the network program must be certified in advance by the respective governing bodies (as *Confindustria*) if

the contracting parties want to benefit from the tax incentives.

Other duties may arise from the decisions of the joint committee, from coordination activities as well as from the contracts that have been concluded by the joint committee with third parties. If a company fails to fulfill the obligations arising from the membership of the corporate network, so it shall be liable for internal obligations that means also to the other participants of the network.

On the other hand, it should be noted that the network contract according to the law provisions must have an open structure and must allow new entrants.

Moreover, the contract must also include the accession criteria for new members who meet the subjective requirements listed above.

According to law, there are other features which are not compulsory. Indeed, it is up to the entrepreneurs to:

- a) set up a network's fund;
- b) appoint a joint committee that manages the performance of the contract;
- c) define optional reason for early contract exit.

Furthermore, the contact must include the rules regarding the decision-making of the participants.

The law, however, does not provide specific provisions; it can be determined that the decisions of the network can be taken with a simple majority of the participants or with qualified majorities (possibly only for some specific subject areas) or that the unanimity of participants is required for every, or only for certain decisions.

Network's management becomes more inflexible, the more a qualified majority or unanimity of participants is required for decision making.

The asset's regulation is structured as that of the consortia (sec. 2614 and 2615 of Italian civil code). The paid-up capital by network members and the purchased goods with these contributions constitute the network assets. As long as the network exists, participants cannot require division of the fund and the creditors of each member cannot hold with respect to their demands on the network assets. Within two months after the end of each financial year, it has to be drawn up the balance sheet of the network. The contract may also provide general rules for network's management, by establishing a joint body (Network joint committee). This can be represented by one or more members of the network.

The joint committee is entitled to (with or without power) manage and control contract network activities. The areas falling within the jurisdiction of the joint

body is not subject to the same rules which are generally provided by the contract for the network's decisions. Except in the case of a network contract with only internal effects, *i.e.* it must be established the authority for the execution of any contractual relationships with third parties. This needs the implementation of the network program.

For third parties it is fundamental to know if they are dealing with a single member or if they can rely on the liability of the whole business network. On this issue it is very interesting to analyze what happens when one or more firms of the network or - where appointed - the managing committee responsible for the execution of the program committee do not meet their own obligations towards third parties.

In case of a legally incapable network in the conclusion of contracts with third parties, the acting members are than the sole liable towards third persons. With the new rules, this provisions does not apply if the network is registered as a legal entity. In this case, liability is limited to the network assets.

The joint managing committee (if available) can be fitted by the contract with power of representation. In this case, it is entitled to conclude contracts with third parties in the name and on behalf of network's members. The committee can also be equipped without authority

to act with its name, and acting only on behalf of network's members.

In the first case, the consequences of acts performed by the joint committee are attributed to the members of the network directly, *i.e.* it exists only one contract. Indeed, contractual parties are the network and the third parties, while each participants does not act directly.

In case of damages which have emerged or the incomplete or irregular performance of contractual services, the full compensation has to be carried out by every single participant. Obviously, the individual company that provides full performance or compensation has a recourse's right against the other co-debtor companies and can thus require that they refund the applicable official shares; unless otherwise specified, it is assumed that these proportions are the same for all members. In the second case (order without authority), the joint committee is obliged to transfer the legal implications of performed actions on the client, which has acted on their behalf. It follows as a consequence that the joint committee shall be liable to any party for the undertaken obligations up to the date of this transfer, this definitely has a right of recourse against the client. Always with reference to liability; it should be noted that the joint committee shall be liable according to the provisions for the exercise of the duty with or without power, for its actions against

third parties as well as towards network members. The voluntary clauses of premature exit from the contract and the conditions for the exercise of this right are important, even if they are optional and not mandatory contractual elements, as it is optional for the parties to provide a right of withdrawal to the individual network members.

If this right is provided by a specific clause in the business network contract, the provided reasons for the resignation and the rules to be observed need to be clarified. In any case, due to the resignation of the resolution of the contractual relationship only for the company that takes this right and thus eliminated from the network before the normal expiry of the contract. According to the general principles, withdrawal's right exists in any case where there is a legitimate reason, such as in the case of modification of a contractual element or of the network program.

5. The internationalization of SMEs

Business network contract, as well as facilitating access to credit, improves SMEs condition by encouraging their development on foreign markets due to increased exports. This kind of agreement makes it possible to deal with the difficult economic situation with several actions ranging from marketing to product innovation, quality coverage to new markets. The positive progression of the

contract is of major importance by considering that Italy struggles to keep up with the recovery and continues to profit through exports (as shown by the latest data provided by ISTAT in April 2014 showing an increase of 9.2% of orders from foreign entities industry).

By waiting, therefore, the recovery of domestic demand, companies must focus abroad. This is especially true in the Italian southern regions where domestic consumption shrank by more than the rest of Italy. The regional statistics reflect a very different trend of the various productive sectors. Positive are fashion and agribusiness sectors; in difficulty, however, are the field of plastic, rubber and paper. Among the markets the locomotive is certainly Europe (with Germany and France in the lead), but positive values occurred overseas, especially in the United States.

Regarding networks, according to a recent survey by the Italian Ministry of Economic Development, companies belonging to a network contract for at least one year have increased exports by 21.8%, while those on the net for less than a year showed a plus 25.2%. The purpose of networks, as well as encouraging the growth of firms and their level of internationalization, is also to increase their degree of innovation that instead would be precluded if the enterprises keep their small size. Network allows companies to adopt more complex strategies

in terms of innovative products (73.4% versus 63.5% of those who do not cooperate) and process (78.6% vs. 66%).

6. Conclusion

Despite some changes in the legal framework, business network contracts are becoming more common in the Italian economic system that is largely of small and medium-sized enterprises (SMEs), as determined before. This type of contract allows company's cooperation in projects that would not have been possible without, safeguarding at the same time their independence. Italian Government considers this contract as an important tool to overcome the recession. For this reason, the legislator has introduced some improvements.

Among them, the most important amendment is the legal capability. Business networks, which have a limited liability, can operate under better conditions on the market. Being legally capable, having rights and obligations mean for the network and its members paying lower interest rates, or even to get a bank loan thanks to the "Network Ratings". Accordingly, the companies get favorable terms; however, the financial institutions benefit from SMEs that were previously not bankable for financial institutions. Other changes could still be introduced.

From this perspective, a European regulation on network contracts would be very helpful. A few years after the intro-

duction of the network contract, the focus on this topic remains both in the legislative policy and under the entrepreneurs.

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The Negative Consequences of the Phenomenon of the Slow Pace of Litigation in Criminal Judiciary in Egypt

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Abstract

No one can deny that "The Phenomenon of the Slow Pace of Litigation~ expands to include all wings of the judicial system, Civil, Administrative, and Criminal Issues. And extends deeper to affect all categories of litigants: Rich and Poor, Men and Women. To paint a dark picture of what could be called a ~Crisis of Justice in Egypt".

So, The delay of litigation procedures for feeble reasons leads to losing the right of citizens and making those whose rights have been devoured resort to violence instead of using legal ways which can last for years.

Justice in front of judicature is like a guard for those who fear and like a shelter for the wronged.

Therefore, this study will review some of the negative Consequences of the Phenomenon of Slow Pace of Litigation in Criminal Judiciary in Egypt.

Keyword: *Slow Pace of Litigation, Crisis of Justice, Phenomenon, Litigation, Criminal Judiciary, Egypt.*

1. Introduction:

The first supposition of justice necessitates and guarantees the right of citizens to resort to their usual judge to prevent the aggression on their rights [1], freedom and what can lead to getting their judicial equity [2] within a reasonable period without unreasonable delay [3]. It is not enough to mere state whether in constitution or law, the right of persons to resort to his judge in his suitable time [4]. It is a must that the litigants should feel that justice is within reach and this cannot be attained except one can get his right in the least time and in the least expenses [5]. Justice is not only conveying the right to its owner but also conveying it on two conditions: (1) in the nearest chance. (2) in the best way, namely, this must be done easily and without difficulties along with a period of time enough for preparing the means of avocation [6].

The delay of litigation procedures for feeble reasons leads to losing the right of citizens and making those whose rights have been devoured resort to violence instead of using legal ways which can last for years [7].

The Egyptian Constitutional Supreme Court has stated that: " The denial of the right in judicial reconciliation whether through prevention or putting obstacles or presenting it in a slow way without justification or enclosing it with faulty procedures. All this is nothing but wasting the prevention stated by constitution and law on the rights claimed to violate it and destructing the justice in the essence of its characters and the tiniest aspects especially when the way of judicial cassation to restore matters to its course is prevented or of no avail~ [8]. The SCC has also stated that: " The right of litigation cannot be completed unless the legislator provides the judicial antagonism, at the end, with a just solution representing the judicial reconciliation which its demander deserves~ [9]. It also stated that: "The right of litigation stated in constitution should associated with taking effect through removing the obstacles which prevent from settling the matters arising from the aggression on the rights stated in law"[10].

The delay of justice is not only a kind of aggression which can be more difficult and painful than losing the dispute or depriving the right of litigation [11] but

also denying it. So, it is said ~Justice Delayed, Justice Denied~ [12].

The need to justice is an innate feeling that all humans need when their rights are violated or devoured [13]. So, the fulfillment of justice satisfies such a need [14]. It is a human need exactly as the need for warmth or shadow [15].

Justice in front of judicature is like a guard for those who fear and like a shelter for the wronged.

A contemplation of the temporary reality concerning guaranteeing the right of the Egyptian citizen to resort to judicature shows a painful fact that reflexes a real crisis regarding this right [16]. It includes all ways of judicial system whether being Civil, Criminal or Administrative. Further, it affects all kinds of litigants being Rich or Poor, Strong or Weak and Men or Women. It draws a dim picture for what we can call "The Crisis of Justice in Egypt" [17].

2. Slow Pace of Litigation in Criminal Cases:

There is a close connection between the Slow Pace of Litigation and the considerations of justice in the Criminal Issues [18] where the accused person has bad effects resulting from the delay of justice represented in:

1. The effect of the long period of delay of the evidence for or against the accu-

sed person whether being verbal or not on his right of advocating [19].

2. The psychological and financial effects which befall the accused person. He suffers much owing to the long period of his trial. He may be affected financially as he may lose his job. He may be worried and nervous for fear of being criminally punished which affects his life [20].

3. The Criminal Prosecution violates the condition of the accused person in society specially the cases whose punishment is imprisonment. It may affect his civil rights and his liability for many tasks or jobs, Further; one may lose his social status in case he has been criminally punished [21].

4. Citizens in charge of administrative bodies, which are a party of the case, do not feel their responsibility before Allah and then the law to fulfil the interests of those dealing with them and linger over doing them with no real excuses to present the needed documents necessary for the decision in cases and making the proofs which takes a long time to prove and decide them [22].

5. The end of the interest of the plaintiff in his case as the interest of the plaintiff may be restricted to a specific period after which it will be of no value and the service of the clerk may come to an end before deciding an affair of his job affairs [23].

6. One may let the dispute aside being hopeless of jurisdiction and lose every hope of getting his right in courts and

have doubts as for resorting to jurisdiction and let aside the dispute out of despair [24] and the dispute becomes null and void at the request of the plaintiff being not heard in courts for 6 months [25].

7. The litigant may die before he hears the judgment of his case. Many cases have taken a long time before issuing a decision and expired due to prescription limitations after the death of the one who presented the case [26].

3. Negative Consequences of the Phenomenon of the Slow Pace of Litigation in Criminal Judiciary:

It has become clear, from the above mentioned, that there are a number of passive things resulting from the Slow Pace of Litigation. The most important are:

1. The increase of the various expenses needed to get their right including judicial fees [27], the expenses of copying, photocopying and photography and the like such as stamps, fees of lawyers, clerks in courts [28], brokers of judicial writs and other expenses in case litigants move to other towns where the court lies. Adding to that the stresses that can affect the litigants [29].

2. The delay of the execution of judgments represents a great loss as it turns to be compound injustice as what benefits may return to litigants if the judgments are not executed owing to the

long procedures of coercive execution which is too slow [30].

3. The dispute may include persons other than the litigants such as families and the other relations specially the cases of family affairs and criminal cases whose punishment is imprisonment.

4. Texts of law remain silent and still till the judge states the correct meanings which legislation meant [31]. In case the judgments are not executed and, having the power of decreed matter and obtain the power of legal reality, it affects the judge's morale passively [32].

5. The speed of hearing or reviewing cases in a session and postponing them owing to trivial reasons though the legislator does not allow postponing cases for more than once for the same reasons [33], [34].

7. Defacing the image of justice and its high costs in a world overwhelmed by materialism and devastating conscience [35], moreover, judges have been liable to falling prey to faulty procedures owing to its complications, having many branches, the big number of laws and the legal tricks some litigants may resort to [36].

8. The frustration and loss of determination which befall the judiciary owing to a number of reasons such as the misapplication of the principle of reward and

punishment, not applying the set legal rules for promotion and the annual subsidies properly. Moreover, the principle of equality in rights and duties has been violated and transferring judges on the basis of efficiency and considering the conditions of families [37].

9. The value of oppression has become common in society and the deepening of the idea of the absence of deterrent to oppression has led to wrongdoing among people and the absence of the spirit of justice in society. In case the flags of oppression and wrongdoing have been raised, it would be an alarm of degradation, corruption and an evil ending [38].

10. The government service body has been exposed to the complications of procedures of labours, the absence of decisive management of jurisdiction and not applying modern ways of running such an important body among the public utilities [39]. This has led to little efficiency of service performance [40].

11. The absence of the policy set for the justice to take its course and put the fixed outlines to face the probabilities of the future and its expectations and put into consideration the development and renewal of the means of work in the judicial system and applying the latest advances of science [41] to put the obstacles facing justice aside [42]. It has become usual that the growing development

in the amount of work that made justice bodies unable to bear its increasing burdens and the problem of settling disputes has arisen [43].

4. Conclusion:

It is clear from the study of the subject:~The Negative Consequences of the Phenomenon of the Slow Pace of Litigation in Criminal Judiciary in Egypt" That:

1. Prolonging the period of disputes heard in courts, with all its types and classes, has led to mistrust in the judicial system itself [44]. As a lot of those having rights among litigants feel they cannot desist the aggression on their rights in due time and try to get them personally or be obliged to conciliate and take a part of his right, even little, or leave it altogether. It has been deep-rooted in their minds that: ~conciliation through taking a quarter of their right is better than litigating the whole of it" [45].

2. There is a real crisis proved by the big numbers of disputes heard in courts, the long period needed to reach a final judgment and stated by the declared rates of the execution of decided judgments [46]. So, litigants have despaired of how slowly disputes are settled [47]. So, it has been familiar among people that:" wronged conciliation is better than a profitable case[48].

3. The mistrust in the judicial procedures and the loss of the rights of litigants owing to the long period of litigation [49], the increase in suffering and distracting them from taking care of their daily life as the litigant does not benefit from the wasted procedures as it is a plain loss including the actual expenses [50].

4. The problem of the accumulation of cases in courts to be decided leads to the instability of judges to perform their work properly [51] which is considered by some as justice denial [52].

5. The speed of hearing or reviewing cases in a session and postponing them owing to trivial reasons though the legislator does not allow postponing cases for more than once for the same reasons [53].

6. The value of oppression has become common in society and the deepening of the idea of the absence of deterrent to oppression has led to wrongdoing among people and the absence of the spirit of justice in society. In case the flags of oppression and wrongdoing have been raised, it would be an alarm of degradation, corruption and an evil ending [54].

7. Texts of law remain silent and still till the judge states the correct meanings which legislation meant . In case the judgments are not executed and, having the

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Adoption by Same-Sex Couples: Reality and Challenges

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Abstract

Adoption by same-sex couples is highly contested issue all over the world, as this is different from the global ideal of children being raised by a mother and a father.

Forty years ago adoption by same-sex couples was not legally accepted in any country. While yet some countries are allowing same-sex couples to marry and form a family. Nowadays same-sex adoption is permitted only in some European countries.

Full joint adoption by same-sex couples is legal in eleven European countries, namely Belgium, Denmark, France, Iceland, Luxembourg, Malta, the Netherlands, Norway, Spain, Sweden and the United Kingdom. An additional three Austria, Finland and Germany permit step-child adoption.

As Georgia wants to enter into the European Union, there is a misunderstanding among the Georgians. They complain about the Law of the Elimination of All Forms of Discrimination, so called the antidiscrimination law and

worry about the future of children and families. They believe that if they enter into EU, they will have to recognize same-sex relations and same-sex adoption, which is completely unacceptable for the Georgian nation.

This article aims to analyze information about the trends within the European Union in case of same-sex adoption and challenges for Georgia.

1. Introduction

In an ideal world, every child has to live into a friendly and stable family, where parents love and take care of their children. But sometimes reality is far from the ideal. Parents may leave their children, or children may be displaced from home and placed in foster care due to carelessness, abuse or other factors. In this case adoption is normally a gorgeous and marvelous human commitment of service and love. But, adoption by same-sex couples is highly disputable question all over the world.

In spite of that EU Charter of Fundamental Rights signed in 2007, there was confirmed non-

discrimination on the basis of sexual orientation, the question of same-sex marriage and adoption is still challenging for the European Union. It seems that the European Union plays a double-game and even if it often asks for equality, it also often states inequality through the absence of harmonized European family law.

There is no doubt that child adoption is a very sensitive and complicated issue and it is apparent that same-sex couples cannot conceive children on their own, that's why they use different forms of child adoption.[1]

1.1 Adoption by Same-Sex Couples in EU

Adoption is a different form of fostering a child when one's own parents are unavailable, unable or unwilling to take responsibility of his/her child. In many countries of the EU, the debate focuses on the question as to whether same-sex partners should be allowed to adopt a child or not.

European people, developing in many areas applying to gay and lesbian family law, have been slow to admit the rights of same-sex couples to adopt children. [2]

If we look through the history, we can see that once the first step toward legal recognition of same-sex relationships

was taken, by Denmark in 1989, other countries began to follow it.[3]

The Netherlands was the pioneer country which outlined marriage as a union of two persons despite of their sex and granting same-sex couples to adopt both locally and internationally. Despite this equality of treatment, it is true that same-sex couples can not apply their right to international adoptions just as heterosexual Dutch married couples do. There are still many countries that bound adoption of their national children to heterosexual couples or single individuals, reducing the group of countries from which same-sex couples can adopt.

In June 2002 Belgium became the second country to open marriage to same-sex couples and in 2003, amended its laws to permit adoption by same-sex married couples. Since surrogacy is not granted in Belgium, same-sex couples took the opportunity to become parents through adoption. [4]

In 2005 Spain became the third country to adopt its legislation and allow marriage to same-sex couples. Spanish law permits full equality to same-sex couples, including adoption without restrictions. It provides the rules on fatherhood presumptions of the Civil Code. For this reason bi-parentage within same-sex marriage can only be achieved through adoption.

In 2009 Sweden amended its regulation and permit same-sex couples to marry. Since then same-sex couples have the right to stepchild adoption with certain restrictions. Also, all women have access to assisted reproductive technologies regardless of their sexual orientation and marital status.[4]

In July 2010 Denmark passed a legal act that admits same-sex couples to adopt under the same conditions as married couples. Germany follows a model close to that of Denmark by providing an equal institution exclusive to same-sex couples with limitations in the area of adoption. Article 6 of the German Constitution protects marriage and family.[4] It is clear that same-sex adoption is banned or unaccepted in most of the EU countries, as there are still countries that criminalize sexual relations among two consenting adults of the same-sex, or others allowing same-sex couples to marry and form a family.[5]

1.1.1. Statistics

If we look through statistics we can see that only in England according to the Department for Education, the number of same-sex couples adopting children rose from 3% in 2009 to 6% in 2013. This means that the number of same-sex couples adopting children in England has doubled in the past four years.[18]

1.1.2 Types of Adoption by Same-Sex Couples

Currently some types of adoption by same-sex couples are legal in Europe. Same-sex couples can attempt to adopt jointly (~joint adoption~), or ("stepchild adoption ") or as an equitable adoption.

Joint adoption is a form of adoption that gives chance two unmarried people to simultaneously adopt a child with whom they have no legal kinship.[6] Joint adoptions potentially benefit several parties: the adopted child, the adoptive parents, and the state. The advantages to the adopted child are not only the stability and care provided by being raised in a home with two parents, but also the child's additional financial and legal security.[7]

As mentioned above, full joint adoption by same-sex couples is allowed in Belgium, Denmark, France, Iceland, Luxembourg, Malta, the Netherlands, Norway, Spain, Sweden and in the United Kingdom.

Previously, Germany prohibited all access to parenting for couples of the same sex, but now Austria, Finland and Germany permit step-child adoption in which the partner in a registered partnership can adopt the natural, and in some cases, the adopted child of his or her partner. Such adoptions may be limited to the biological child of one

partner or may include a partner's previously adopted legal child.[8]

Under the Swedish law registered partners can adopt both stepchildren and children who are not the child of one of the partners. In the Spanish autonomous region of Navarra as well as the Basque Region and in Aragón, Catalonia and Cantabria, same-sex partners who have registered their long-term partnership may now adopt not only stepchildren but also other children. In the Netherlands, both registered and married same-sex partners have the right to adopt.[9]

Equitable adoption (also called putative or constructive adoption) is a form of "adoption" that may be used by a child of same-sex parents as a tool to protect the child's rights to his or her parent's assets should a parent die intestate. Equitable adoption arises without a formal legal procedure, in other words, a parent can say or do certain things that result in the adoption of another person as his/her child even though there is no court order establishing the adoption.[10]

In order for a successful equitable adoption to occur, five elements must be confirmed: (1) an agreement must have existed between the natural parents and the adoptive parents; (2) the natural parents must have performed by giving up the child; (3)

the child must have performed by living in the adoptive parents' home; (4) the adoptive parents must have partially performed by raising the child as their own; and (5) the adoptive parent(s) must have died intestate. If all the elements of an equitable adoption are proven, the adopted child will be able to inherit his or her intestate share of the parents' estates; otherwise, this child will be left without a share of the inheritance.[7]

1.1.3 Cases: Fretté and E.B v France

There are some cases regarding same-sex adoption before the ECtHR, where individuals stated that they had been subject to discriminatory treatment based on their sexual orientation in infringement of their right to respect for their private and family life.

A. Fretté v France

With respect to a lesbian or gay individual's right to adopt an unrelated child, the ECtHR first considered the issue in case Fretté v France .

In order to become suitable to adopt either a foreign child or a child in the custody of the State, France asks that couples or individuals apply for authorization to adopt from the Children's Welfare Service." The process covers "conduct[ing] all the investigations required to ascertain what kind of home the applicant is likely to offer the

child[] from a psychological, child-rearing and family perspective." It is inadmissible to refuse an application solely on the basis of " the applicant's age, marital status, or whether children are already present in the home."

Mr. Philippe Fretté, a single gay man, applied for authorization to adopt in 1991." He discovered that he was homosexual in an application interview.

The written statements of the interviewing psychologists declared that Fretté had some degree of experience with children and that "[h]is ideas about bringing up children are well thought out and imbued with a spirit of tolerance." They acknowledged that "[h]is desire for a child is genuine but he has difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of a child." In their impression , "Mr. Fretté, has undoubted personal qualities and an aptitude for bringing up children. A child would probably be happy with him. The question is whether his particular circumstances as a single homosexual man allow him to be entrusted with a child."

The Paris Social Services Department opposed Fretté 's application, concluding that his 'choice of lifestyle' could not be apparent to be such as to look after adequate assurances that he would offer " a child a suitable home."

Fretté's request for re-examination was refused , and he appealed the judgment to the Paris Administrative Court."

The highest administrative court in France, the Conseil d'État, refused Fretté's appeal on the basis that his "lifestyle" could affect "substantial risks to the child's development." The domestic law contrary permitted single or unmarried males to adopt, and it was clear to the Court that the domestic authorities had denied the application on the basis of Fretté's sexual orientation. The Court explored the case under Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private and family life) .

"The Court found that the domestic authorities had pursued a legitimate aim—namely, the protection of the health and rights of children. The Court then remarked on the absence of common ground between member states of the Council of Europe concerning adoption by unmarried, homosexual persons, and concluded that there was a lack of consensus regarding the advisability or permissibility of such adoptions."

The Court concluded that a wide margin of obligation must be granted to the government in regulating the best interests of the child. Therefore ,

the Court found no violation of Articles 14 and 8 of the Convention.

By overruling *Frett v France*, the ECHR took an important step getting on for recognizing the full equality of gays and lesbians in Europe. [19]

B. Ms. E.B v France

In January of 2008, the European Court of Human Rights addressed again on the issue of lesbian and gay adoptions in the French context. The applicant in the case, Ms. E.B., had been a nursery school teacher for thirteen years when she applied for authorization to adopt. Despite the fact that she was a lesbian involved in a stable eight-year relationship, she completed her application as a single individual because she and her partner could not legally marry in France. Her application was examined by psychologists, educational specialists, pediatric nurses, and numerous representatives from the Children's Welfare Service and the Adoption Board. They characterized her as "a good listener... broad-minded and cultured," as well as "enthusiastic and warm-hearted." They commented that "[h]er ideas about child-rearing appear very positive. Many indicated that the applicant relative, a teacher, or a male friend." Despite these positive impressions, each individual reviewing her application recommended that it be opposed .

Every denial was based on two factors: first, "the lack of a paternal role model ... capable of fostering the well-adjusted development of an adopted child," and second, "the place that [the applicant's] partner would occupy in the child's life [was] not sufficiently clear." [21]

Ms.E.B. appealed to the Besancon Administrative Court. On 24 February 2000, the Administrative Court set aside the decision of the President of the *département* stating that the reasons provided were not sufficient to justify a refusal to grant authorization to adopt. The *département* appealed to the Nancy Administrative Court of Appeal. The Nancy Court altered, holding that Ms. E.B.'s application was not denied "on the basis of a position of principle regarding her choice of lifestyle," and that she is thus "not justified in alleging a breach ... of the requirements of Articles 8 and 14 of the Human Rights Convention."

The applicant opposed and brought her case to the ECHR in December of 2002." The ECHR took the E.B. case. The ECHR in *EB. v France*, the court found a violation of Articles 14 and 8 of Human Rights Convention. It did so after considering the two grounds of denial of Ms. E.B.'s application (the lack of a male referent in the child's proposed home and the attitude of Ms. E.B.'s partner) collectively.'

Under this approach, "the illegitimacy of one of the grounds has the effect of contaminating the entire decision." Therefore the ECHR found that the French authorities had relied too heavily on the applicant's "sexual orientation in reaching their decisions."

The court looked attentively at the written opinions of those reviewing Ms. E.B.'s application, finding that "the manner in which certain opinions were expressed was indeed revealing in that the applicant's homo- sexuality was a determining factor." " Not only were direct statements to this effect made, but the overwhelming belief on "her status as a single person" and the "lack of a paternal referent"-when adoption by individuals is specifically permitted by French law-further supported the conclusion that sexual-orientation discrimination was at work.

The ECHR found that "the reference to the applicant's homosexuality was... at least implicit ... [and that] [t]he applicant therefore suffered a difference in treatment."

The court found that the applicant, with her "undoubted personal qualities and an aptitude for bringing up children," would not present a problem under the best interest of the child standard."

It is clear that *EB. v France* is a important case from the perspectives of

gay and lesbian activists.[20] After such cases France in the year of 2013 legalize same-sex marriage and child adoption.

1.1.4 French Civil Law

Under the Article 143 of French Civil law (code civil) marriage was defined as a relation: "contracted by two persons of different or same sex". Such an increase of marriage to same sex couples offered 'ipso facto' the right to adoption for same sex couples. The words 'husband' and 'wife', 'father' and 'mother' replaced by the neutral 'spouse' and 'parent' in particular places in the civil law and encouraged as creating access to parenthood for same sex couples through the "mechanism" of adoption, that created a new type of parenthood. This transformation shifted the basis of filiations from the biological link between a child and his or her father and mother, to a cultural and social understanding of filiations, which set up a "right to a child". [11]

Despite this there is an absolute different attitude in the rest part of the countries in Europe with regards to same-sex persons' marriage and child adoption on their part.

1.1.5 The Different Approach Of The Particular EU Countries To The Same-Sex Adoption

Romania, Italy and Greece are among the European Union countries that provide no rights to same-sex couples. In Italy, the Constitution states that “the Republic recognizes the rights of the family as a natural society based on marriage.”[4] One can still remember with a slight embarrassment the former Prime Minister Silvio Berlusconi attesting publicly: “[It is] better to have a passion for beautiful women than being gay.” Even if this might appear as a single event, it can also be seen as a general and open aversion towards homosexuals in Italy, thus making one believe that the legal recognition of same-sex couples will not be achieved soon in this country.[12] There have been several attempts to recognize same-sex couples through registered partnership regimes, but all have failed.[4]

Hungary went even further since it legalized the non-legitimacy for same-sex couples to get married, writing in its new constitution –which took effect on the 1st January 2012 – that marriage was an institution between a man and a woman, which simultaneously meant that adoption by same-sex couples was prohibited.[12]

Slovenia, which even with having legally recognized registered partnerships for same-sex couples in 2006, has surprisingly witnessed the rejection of a gay adoption law after a referen-

dum – around 55% of the voters rejected a law which was to introduce the right for same-sex couples to adopt the biological child or children of their partners.[12]

There are no laws in Latvia, which determine any certain rights to same-sex unions – such as, for example the right to marry or to adopt children. Besides, the fact that such people exist, or that they live in lasting relationships with another person of the same sex and perhaps raise children, is not in any way recognized by the legislator. They live their lives hiding their sexual orientation and/or gender identity. The only exception is the Latvian Labour Law, in which sexual orientation is contained as the prohibited ground of discrimination as required by the EU Employment Directive 2000/78/EC. [13]

As we found out there are two different trends that seem to be arranged geographically: Western Europe seems to award more and more rights to same-sex couples – though by fits and starts – and Eastern and Southern Europe occur to be on a more dangerous ‘conservative’ slope.[12]

It is apparently clear that being a member of the European Union does not implicitly refer to the recognition of the same-sex couples’ marriage and adopting a child on their part and

suchlike principles' regulation at the legislative level.

1.1.6 Georgia

Since Georgia aspires to obtain EU membership, there is a fear among the Georgian population that one day our country will face the circumstances in which they will have to allow marriage and child adoption for same-sex couples.

The fact, that in 2014 the parliament of Georgia adopted the Law of the Elimination of All Forms of Discrimination, so called the antidiscrimination law, had a wide range of negative resonance.

According to the legislation on "Elimination of All Forms of Discrimination", the law provides protection against discrimination on the grounds of race, color, language, gender, age, citizenship, native identity, birth, and place of residence, property, social status, religion, ethnic affiliation, profession, family status, health condition, disability, expression, political or other beliefs, sexual orientation, gender identity, political or other opinions, and "other characteristics". Besides, the first paragraph of the second clause of the law mentioned determines that any kind of discrimination is prohibited in Georgia.[14]

The law mentioned above on the part of the clergymen has been assessed strictly enough. In Georgia religious beliefs have been a strong opposition against anti-discrimination law to same-sex marriage and child adoption.

On 6 May 2014, the head of the Georgian Orthodox Church, Patriarch Ilia II, said that the legalization of "illegality is a huge sin" and it will be rejected by believers, as it includes "sexual orientation" and "gender identity" on the list of prohibited grounds of discrimination. [15] Adoption of the antidiscrimination law is one of the requirements that Georgia has undertaken under its Visa Liberalization Action Plan in order to be granted short-term visa-free regime by the European Union. [16]

We suppose that the prohibition of discrimination because of the sexual orientation does not imply in the future any precondition of the legalization of the same-sex persons' marriage, to say nothing of the award of the right to child adoption for suchlike couples. The above is strengthened by the fact that Article 1106 of the Georgian civil code defines the marriage in such a way: "Marriage is the voluntary union of a woman and a man for the purpose of creating a family, which is registered with an agency of the State Register of Civil Status of Citizens". In addition, any person, who wishes to

adopt a child, should meet the following requirements. In particular, according to Article 1245 of the Civil Code, "adoptive parent or any adult person with legal capacity may be an adoptive parent, except a person who has been deprived of parental rights, or who had adopted before but the adoption was dissolved because of his or her failure to perform properly the duties of an adoptive parent. Nor may a person be an adoptive parent if he or she is unable to exercise parental rights because of illness, moral or other personal characteristics". Besides, in case spouses are willing to adopt a child, according to Article 1246 of the Civil Code:

1. Spouses may adopt a child jointly. Adoption of one child by two persons other than spouses shall not be allowed.
2. [A father may] adopt his child born out of wedlock, [and either spouse may adopt] a child of [the other] spouse.[17]

It is commonly believed that children are one of the Georgia's most valuable and dearest assets because they are critical to a successful future. Their rights are protected by parents, grandparents, relatives, and even the community.

Because of that, we assume the fear concerning the law of Georgian on the

"Elimination of All Forms of Discrimination" is groundless, as if the law were oriented towards the legalization of same-sex marriage or child adoption.

It is obvious that within the Civil Code of Georgia, the definition of marriage given underlines the voluntary union of a woman and a man that directly excludes same-sex marriage, in line with the same code, the regulating process of the parents' institution is directed towards the protection of the children's interests.

Conclusion

Based upon the mentioned above, we think that:

1. Families headed by two men or two women in same-sex relationships increasingly are a public and visible presence in the European Union, but still same-sex couples in case of child adoption have not yet reached the stage of equal rights in Europe.
2. But there are still countries in the EU which provide no rights to same-sex couples and this means that there is no obligation for EU member states or future member states to legalize same-sex persons' marriage and child adoption on their part.
3. Georgia aspiring to join the EU, in spite of the adoption of the Law of

Elimination of All Forms of Discrimination, so called antidiscrimination law, does not face this problem as our religion, beliefs and legislations prohibit same-sex marriage and adoption by same-sex couples.

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III PLENARY SESSION – Law and Politics

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Pre-Litigation Dispute Resolution Procedures in Public Procurement within the European Union

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Abstract

Public procurement is one of the oldest and most common forms of collaboration between public and private sectors. During the last decade, within EU it was rapidly developing according to the high standards of equality, transparency and non-discrimination. Mentioned novelties have also touched the area of public procurement dispute resolution. The EU Remedies Directives determined strict requirements for national public procurement review procedures. Still, a certain freedom for member states to choose the implementation measures was envisaged. It fated, that today different public procurement review systems are functioning within the EU. In most of the member states, non-judicial pre-litigation public procu-

rement review is applied. In this article, issues of the rules of the EU public procurement law in the area of dispute resolution as well as different models of the implementation thereof into national law are discussed. Also, the presumption of the need to reform judicial model, which is currently applied in the Republic of Lithuania, is raised.

1. Introduction

Public procurement is one of the oldest and most common forms of collaboration between public and private sectors. During the last decades in Lithuanian Republic, as well as in other countries, which entered EU during this time, public procurement was rapidly developing accordingly to the high

standards of equality, transparency and non-discrimination set by EU policy in this field. Government and utilities expenditure within the EU is a significant and influential factor in the economy as every year nearly 20 per cent of the EU GDP is spent by different levels of government (central and sub-central) as well as bodies governed by public law and utility service providers to procure goods, works and services [11]. Such numbers make obvious that this sphere is very important for the development of both the EU and national economies. Thus in this field a lot of disputes arises between tenderers and purchasing authorities. Very high level of protection of supplier's rights, embodied in the EU public procurement law, grants wide possibilities for them to claim the actions of contracting authorities. On the other hand, the public procurement sphere is very sensitive for corruption issues, which also leads the honest participants to displaying certain concerns. Public procurement procedures are obligatory in all projects, which are implemented by huge number of public bodies, including absorption of the EU structural funds support. With regard to it, problems concerning too long and ineffective dispute resolution procedures arise in most EU countries. Mostly they occur due to long and complex litigation procedures. In general, courts constantly are not able to deal with their overloads and additionally to grant a special attention to speedy and

qualified resolution of public procurement disputes. This leads to the emergence of financial losses, the irreversible confrontation of parties in dispute and generally negative public attitude towards public procurement.

Despite the fact that the Remedies Directive [9] has been valid for more than 8 years, this topic remains very challenging. Implementation process has been already proclaimed to be done, thus huge number of cases presented to ECJ and perpetual improvements of national systems, shows that not all objectives of EU regulation in this field are already fulfilled. According to Ch. Bovis, "underlying dangers are present: increasing speculative litigation, delaying the procurement process, making contracting authorities more reluctant in engaging with the private sector and finally, increasing the cost of procurement as a result of the potential of contractual ineffectiveness and damages to aggrieved parties." [23] These insights prove that this topic is still up to date and scientific discussions must be continued.

In this article, short overview of provisions of the EU public procurement law in the field of review procedure will be presented as well as the substantiation of pre-litigation systems of public procurement disputes expedience will be enclosed. Thereafter, the main models of public procurement dispute resolution

systems, which are applied within the EU, will be listed and analysed. In the end of the article, the presumption of the need to reform judicial model of public procurement dispute resolution system, which is currently applied in the Republic of Lithuania, will be raised.

The aim of this paper is to draw attention towards the wide range of alternatives to traditional litigation. Thus, at the same time it is essential to adjust the necessity of maintaining a balance between the dispute resolution system availability, effectiveness of its performance and compliance of the procedure and decisions with high requirements of the EU public procurement policy.

Results provided in the end of the article follow from the presented research, which was based on legal analyses of legal acts, court practice, statistical information, as well as on observation, systemic analysis, and comparative and generalization methods.

The novelty and relevance of the article lie in expedience to improve dispute resolution system in the field of national public procurement by adding pre-litigation stage, which is considered to be more effective and sustainable for the improvement of public procurement culture, as a the long-term social aim in Lithuania. This article is also essential for the states candidates to enter the EU,

because it will broaden the horizon and add additional information, which doubtlessly will be useful in the process of decision-taking, connected with choosing the model of public procurement review system for future application.

This article is based on the scientific works of Ch. Bovis, K. Engelbrekt, M.A. Bernal Blay, G. Langand and others as well as on surveys and other studies executed by the EU institutions, NGO's and Lithuanian bodies, responsible for the implementation of public procurement policy.

2. The EU requirements for public procurement procedures review systems

Regulation of public procurement often is named as one of the key areas of EU regulation. Prof. Ch. Bovis named public procurement as one of the most important drivers for both competitiveness and growth of member states. The purpose of the EU legal regulation in this field should be seen as insertion of competitiveness regime in the relevant markets and elimination of all non-tariff barriers to intra-community trade that emanate from preferential purchasing practices which favours national undertakings [1]. Also, public procurement may be treated as an instrument for testing the maturity of administration and judiciary of

countries, which have a goal to enter the EU. K. Enbelgerbt states that public procurement is namely an area where the *acquis* swiftly gained pre-eminence in accession states, but whose complex regulations depend on a well-functioning judiciary, effective administrative supervision and limited corruption [2]. It is obvious that correct application of the EU public procurement law demands high qualification and competence, which sometimes is not sufficient in contracting authorities of the Member States, especially of the new ones. The EU public procurement system is quite complex and demanding, what often leads to disputes. Dispute resolution area is a stage, where violations of the EU legal regulations have been identified and must be emended to the greatest possible extent. It should be noted that public procurement review procedures, regulated by the EU law, are unusually strictly regulated by direct orders for national law, not only setting goals that should be achieved. Analysing the possibility to use pre-litigation procedures in public procurement disputes, it is necessary to clarify, what requirements are set for such systems by the EU law. It will be done in this section of the article.

Despite the fact that the first legal documents, concerning the requirements of the EU public procurement were adopted in 1962, review issues at the EU level in the field of public procurement

have become subject to regulation only in 1989, by adopting the Directive 89/665/EEC regarding the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [3]. The Article 1 of the Directive proclaims that Member States shall take the measures necessary to ensure that, as regards public procurement contracts decisions taken by the contracting authorities may be reviewed “effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Community law in the field of public procurement or national rules transposing that law”. From the legal rules which were formulated in the Directive, it is clear that the goal of the EU public procurement policy in the field of review procedures is an effective, rapid reaction to the EU law infringements, which can be raised by any person who have or had have an interest in making a contract. The Article 2 of the Directive determined the main requirements for review procedures. It stated that member states should ensure the measures taken concerning the review procedures would power to: “(a) take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to

the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority; (b) either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure; (c) award damages to persons harmed by an infringement.” For the achievement of these goals the EU law allows the member states to choose an institutional model of review procedure the most relevant for certain legal system. The institutions responsible for review procedures may have judicial and non-judicial character. In case of preference to use judicial system, the member states are obliged to enable courts or other bodies of judicial character (this concept is widely discussed in the practice of the European Court of Justice (hereinafter the ECJ) [4; 5; 6] and is applied for institution which is established by law, have a permanent character and compulsory jurisdiction, holds inter partes procedure, applies rules of law and is independent) be responsible for the dealing with such claims. In regard to review institutions, which do not have judicial character and must be related to pre-litigation stage of dispute resolution, special requirements were set.

One of the most important things, which is set up in the 9th part of the Article 2 of the Directive is connected with requirements for the members and president of such review body of non-judicial character. It states that “the members of such an independent body shall be appointed and leave office under the same conditions as members of the judiciary as regards the authority responsible for their appointment, their period of office, and their removal. At least the President of this independent body shall have the same legal and professional qualifications as members of the judiciary”. Such strict requirements work for prevention of incompetence and also reveal the EU’s serious attitude towards pre-litigation models of public procurement dispute resolution, which may be applied. Also it is required from the non-judicial review body to provide a written motivation of decisions in all cases. In regard to the process issues, it is obligatory to guarantee that non-judicial review body takes its decisions following a procedure in which both sides are heard. It also applies in regard to the requirement to guarantee for the compulsory character of decisions of non-judicial review institution and opportunity to apply interim measures. To compare non-judicial and judicial legal models of public procurement review, it is obvious that there are very few differences mostly concerning less strict requirements for the education and

experience of members. Also the attention must be drawn to the prohibition of decisions of recommendatory status: decisions taken by a review body must be legally binding. In practice, a lot of pre-litigation bodies are taking recommendatory decisions, which are not legally binding. In the field of public procurement it is prohibited.

The Directive 89/665/EEC was inessentially amended in 1992, by the Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts [7], including the disputes in the area of public procurement services to the scope of review procedure application.

The above listed Directives were not applied in reviewing the public procurement procedures of utilities sector. The earliest attempt to determine the review system in this field was the adoption of the Directive 92/13/ECC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [8]. It should be remarked that there were no essential differences established between classical and utilities sector review procedure regulation, thus few additional provisions were provided. The first part of the second article proclaims the right of a member state to choose one of the

suggested models. The first model requires to empower to set aside or ensure the setting aside of decisions taken unlawfully by review body. The second model empowers to take, at the earliest opportunity to prevent the infringement by using interim measures, and includes opportunity to order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented. Such fine must be a level high enough to dissuade the contracting entity from committing or persisting in an infringement.

The above mentioned directives were substantially amended by the directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts [9]. This legal act made essential changes. One of the reasons why it was adopted is the new regulation of public procurement procedures (Directives 2004/18/EC and 2004/17/EC). The substantial novelties were connected with 10 days suspension period (between decision on giving an award and entering into a contract), which was new to the public procurement review system, and providing a right to the courts to proclaim as invalid contracts, which were concluded without keeping the transparency requirements and announcing the tenders. Also the possibility for review body to apply alternative penalties was realized. It was

allowed to impose fines for contracting authority or shorten the duration of the contract.

In regards to the utilities sector, main novelties were the same as for classic sector.

Latest review procedure directive in regard to non-judicial review institutions do not proclaim any new specific requirements. Thus all other novelties are without doubt applied in both models of review procedure.

It can be summed up that the Directives have set the fundamentals of review system and disclosed the additional requirements for the application of pre-litigation models as non-judicial means of review procedure. Main specific requirements, which mostly are connected with appointment and removal of specialised review body members, serve for the creation of transparent review system able to provide competent investigations. It serves as guaranty for proper implementation of Remedies Directives and Despite strictness should be evaluated as an instrument of setting high standards of professionalism and transparency in such bodies. Despite additional requirements, the member states still have enough space to design such a public procurements review mechanism, which would be appropriate to certain national legal system and

effectively contend the infringements of the EU public procurement law.

3. The EU regulation and the ECJ practice in regard to application of more amicable dispute resolution methods in public procurement disputes

Stimulation of an alternative dispute resolution may be regarded as one of the key goals of the EU legal policy. For example, in the Green Paper on Alternative Dispute Resolution in Civil and Commercial Law [14], presented by the Commission of European Communities in Brussels in 2002, it is noted that ADR is a political priority, repeatedly declared by the European Union institutions, whose task it is to promote these alternative techniques, to ensure an environment propitious to their development and to do what it can to guarantee quality. Special regulations on alternative dispute resolution or specific methods such as mediation, provokes an impression that the EU supports more amicable dispute resolution and conceive its benefits. In the area of public procurement this trend is confirmed by adding recommendations on ADR usage in Procurement Directives 2004/17/EC and 2004/18/EC as well as 2014/24/EC and 2014/25/EC, where mediation clause is recommended to include into public contracts where it is appropriate. Thus from interdisciplinary attitude to public procurement

procedure it is clear that in the field of dispute resolution, classic ADR methods are ignored and often treated as ineffective and time consuming obstacles for review system. This attitude may be validated by the distinction of the essence of public procurement review system: “the main objective of a public procurement complaints review and remedies system is to enforce the practical application of public procurement legislation by ensuring that violations of this legislation and intentional or unintentional mistakes of contracting authorities/entities can be corrected”[16]. Alternative dispute resolution methods are mostly concerned with a need to reconcile parties to a dispute and find mutually appropriate decision of consensual manner, based on compromise. The challenges set for the EU public procurement review systems, obviously differ for the main goals of alternative dispute resolution. This statement can justify the avoidance to use alternative dispute resolution methods in this field, because resuming of good relations between tenderers and contracting authorities is not a primary aim of such review procedures. The main challenge is to prevent infringements of the EU law and it can't be reached using only amicable techniques.

It should be stated that the Directive 92/13/ECC envisaged conciliation procedure, which was applied exceptionally in utilities sector and was considered to

be an advanced step in public procurement dispute resolution system. Thus, it was resigned from this regulation in the Directive 2007/66/EC (claiming it as ineffective). This unsuccessful attention to introduce more amicable dispute resolution into the public procurement review procedure may be criticized on the ground of low level of its accessibility. For tenderers as well as for contracting authorities, conciliation procedures, hold in the EU Commission, in general may not be treated as attractive. Such amicable dispute resolution methods should be held more privately (as much as possible in such cases) and more close to business place. Thus such an attempt showed the EU intentions to employ one of the alternative dispute resolution method in public procurements dispute resolution system.

In the ECJ practice amicable dispute resolution also gains an unfavourable attitude. One of the examples is the decision in case C-410/01 [10], where the ECJ evaluated Austrian practice to use mediation in public procurement disputes. In Austria, mediation was one of the stages of public procurement disputes. Contracting authority was forbidden to enter into a contract during the mediation process. Only after the unsuccessful mediation, it was allowed for tenderer to fill a claim in regard to review of decision of contracting authority. In such way additional stage of

review procedure was created on the bases of national law. The ECJ stated that implementing the directive that making access to the review procedures conditional on prior application to a conciliation commission is contrary to that Directive's objective of speed and effectiveness. This conclusion was supported by the argument that prior application to such a conciliation commission inevitably has the effect of delaying the introduction of the review procedures. Also it was noted that conciliation commission has none of the powers required to be granted for the bodies responsible for carrying out review procedures. By these arguments, the ECJ created a rule that national law cannot create obstacle for tenderers to access the review procedure and it is contrary in regard to the Directive to determine any additional conditions for using review procedure based on the EU law. In such manner, generally, national law is restricted to include any institutional measures for the review of contracting authorities' decision.

In conclusion, amicable dispute resolution and public procurement review procedure, which is envisaged by the EU law, do not have much in common. Such separation may be based on the different aims of these concepts of dispute resolution. Public procurement review system has an objective to preserve the application of the EU legal rules. Alternative dispute resolution proce-

dures mostly focus on restoration of peace between parties by reaching compromise between different interests. Additional measures, such as conciliation or mediation, according to the EU rules and ECJ practise should not be applied in case it can prolong the review procedure and create obstacles for effective and as rapid as possible implementation of the Remedies Directives.

4. Why pre-litigation model should be suggested?

According to D. Pachnou, there generally seems to be a higher number of cases in member states where the review body is a specialized procurement tribunal or agency, because the procedure before such bodies is usually simpler as well as quicker, since they have to deal exclusively with procurement cases [13]. From this statement, the main advantages of pre-litigation model may be noticed: simpler procedure, quicker procedure and bigger competence in the field of public procurement. Almost the same factors are listed by SIGMA: "the procedure is usually simpler and quicker than is the case in regular courts. These characteristics ensure the conditions for better fulfilment of the "rapidity" criteria, which must be a specific feature of the remedy system; the members of the specialised review body deal exclusively with procurement cases. As a result,

they have the opportunity to very quickly gain specialised expertise and to become familiar with contract award procedures and other related issues; the cost involved when regular courts review complaints may be much higher than it would be in specialised review bodies, due to the length of the procedure and the need for legal representation.”[16]. The factor of simpler procedure on the other hand may be interpreted as bigger accessibility to the review procedure. Often it is not enough to guarantee for a person the right to fill a claim, because in reality there is a lot of obstacles for successful performance in litigation. Person, who thinks that his rights were violated, often do not have enough competence and experience to represent himself during litigation. This fact leads him to the necessity to hire an attorney, what raises costs. If it is not acceptable, a lot of risks for failure appear. Pre-litigation procedure may be and must be designed in such a manner, that every entity able to present a bid to the tender, would be also capable to be involved in the review procedure. Clear and as informal as possible rules of procedure, simple patterns of claims and other documents are only few measures, which may make this process more accessible.

Another factor of accessibility of review procedure is its cost. This question is the most difficult because in this aspect it is necessary to find a balance between

minimum of three very important factors. First of them is a level of payable sum of money for the review, which would not create an obstacle for small and middle sized business entities to claim. In regard to the costs of litigation in public procurement field, it should be noted that within the EU these sums differ a lot. For example, in Lithuania for the claim in the first instance court the tenderer is obliged to pay about 290 euro (despite the value of the contract), while pre-litigation cost of the same issue in Poland consists of 5 per cent of predictable contract value. This fee was even claimed as too high to the Constitutional Tribunal of Poland. Constitutional Tribunal, in its decision of 14th of January 2014 declared that levels relative to the value of the contract was consistent with the Constitution [15]. Cost of filing a claim to review body is not the only expense. One more thing is financial resources, which are necessary for functioning of non-judicial review body. Members of such institution, in order to retain independence must get salaries corresponding to their competence and experience; also needs of administration must be fulfilled. The third factor is concerned to the setting enough high fee for review in order to prevent groundless claims and abusing the process. Only a balance between all these factors may help to introduce reasonable price for such procedure.

Another merit of pre-litigation model is a special preparation of non-judicial body members to deal with public procurement issues. It should be noted that this field of law is especially difficult and specific. People without practical experience and competences mostly are not able to deal with such conflicts in highly professional manner. Often, in civil or administrative courts there are no special divisions which deal exceptionally with public procurement issues. It leads to the fact that judge as a person is expected to have high knowledge in all possible spheres, what obviously is impossible.

And the last, but very important factor, is duration of the procedure. In regard to the rapidness of the process it should be reminded that the Remedies Directives proclaims the need to review decisions taken by the contracting authorities “effectively and, in particular, as rapidly as possible” [9]. This objective is also steadily reaped in the ECJ practice. Procedure in non-judicial specialised bodies can be organized having shorter duration. Smaller number of claims (to compare with general flow of cases in regular courts), skills and competence of review body’s members in particular field no doubt can guarantee rapid process, which prevents big part of losses.

Main factors for choosing pre-litigation model are mostly connected with opportunities to have a more rapid process,

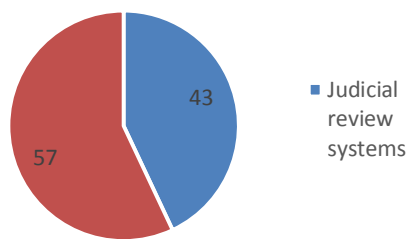
simpler procedure, lower cost and higher quality of decisions. Thus such systems also have disadvantages, which mostly are related to initial efforts to build reputation, create institutional fundamentals, and legal background. Only a deep analysis of every national systems and existing situation may show the most appropriate option, thus pre-litigation in general is more socially oriented as prevents people from litigation and do not let the conflict to disperse.

5. Main models of pre-litigation systems applied within the EU member states

Within 28 current members of the EU, the systems of public procurement review procedures are quite different. It is a result of recommendatory character of the Remedies Directive, when member states were suggested to choose the institutional model of review procedure from the two possibilities: judicial model and non-judicial model. It should be noted that big part of the EU countries are using judicial model of dispute resolution. According mostly to the information provided by the Public Procurement Network [12] the proportion between judicial and non-judicial public procurement review models consists of 43 and 47 percent. Still it should be noted that without deep analysis of the status of every review body it is very difficult to judge its

character. It may happen so, that part of non-judicial bodies may appear to be judicial in their character, if we apply criteria of the ECJ, which were discussed above. Still officially available information lets to sum up such proportion between judicial and non-judicial models of public procurement review system.

Figure 1. Proportion between judicial and non-judicial public procurement review procedures within the EU (28).

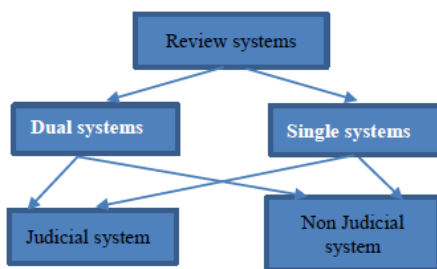


According to the SIGMA, in regard to institutions, member countries are “free to confer remedies functions to any of the following bodies: regular courts; specialised administrative bodies and a combination of the two” [16]. The third option is a result of such choice, which is allowed by the EU law: to divide review functions between judicial and administrative institutions. The main example of such division may be granting a right to award damages for a tenderer, whose rights were violated, only to regular courts, independently from the review procedure, which is up hold in specialised non-judicial body. It

means that in some countries regular courts and specialised bodies mostly of non-judicial character shares the functions delegated to them in the process of implementation of the Remedies Directives. Such practice is used in Austria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, and Luxembourg etc. It makes clear that on the basis of full or partial mandate, two models may be distinguished: full competence model (the same review body both reviews legality of contracting authority decisions and adjudicates the question of awarding damages) and part competence model (right to award damages is delegated for regular courts or other institutions of judicial character). In some other sources, the same dividing is made on the ground of competence and two models are distinguished: dual system and single system. In dual systems “certain remedies (normally damages) can only be claimed in the ordinary or civil courts. Moreover, this remedy is usually available only after the conclusion of the contract.”[17] This distinction may be applied both to judicial and to non-judicial models, because often even if review procedures are at the competence of administrative courts, the function of dealing with damages awarding issues belongs to civil courts. Also, it is notable that quite rarely the function of awarding damages is assigned to review bodies of non-judicial character. In general, Denmark

can be given as the only example. In this country, specialized review body of non-judicial character also (as regular court) can award damages [17]. Thus it is a kind of exception in European Union. Normally, awarding damages is a function exclusively of civil courts, but for example in Sweden administrative courts deal with it. In single systems, awarding damages is not separated from the other functions of review bodies. Such practice is used in Bulgaria, Latvia, Malta, Romania etc. [17]. It can be stated that within European Union member states quite different systems are working. To sum up, according to the division of the function of awarding damages, the following scheme of models, used within European Union can be presented:

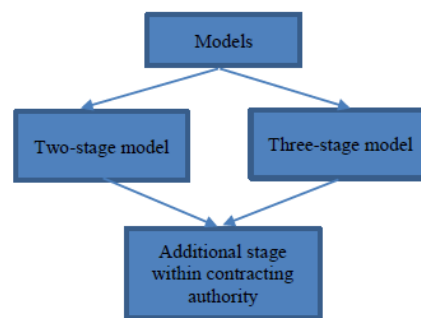
Figure 2. Models of review procedures in regard to awarding damages within the EU



On the ground of number of process stages, all models of pre-litigation character can be divided into two groups. Also it should be added that in a number of member countries the

requirement to file a claim to the contracting authority is obligatory before seeking for review procedure and represents the first stage of this procedure. The Figure 3 below presents the schematic view of possible process stages.

Figure 3. Models of review procedure processes within the EU in regard to number of stages



In two-stage model, generally the decision of specialized review body may be appealed to the administrative or civil court. According to SIGMA, two-instance system works in review systems of pre-litigation character in Austria, the Czech Republic, Estonia, Finland, Latvia and other countries [17]. Three-stage models are mostly applied in judicial public procurement review models, where it is quite usual to appeal the decision of the court of first instance to the court of appeal with additional possibility to appeal its decision to the highest court. Such system is valid in such judicial models, which are

employed in Lithuania, France, Portugal, and Sweden etc. Thus in Latvia, Hungary and Slovakia, despite the fact that these countries have specialised bodies for review, they still use the tree-stage system: procedure in specialised body, appeal to court and review in the last instance court. It should be remembered that Directives do not deal with requirements to set three-stage review systems in case of non-judicial review procedures. It is an obligation to grant an opportunity for only one stage of appeal. All appeal procedures in general take more time and do not correspond to the main objective of the Remedy directive of as rapid as possible and effective review. It should be concluded that three-stage systems are not necessary in case of public procurement disputes and should be avoided.

Despite the mandatory stages, envisaged in the Remedies Directives, national law often uses an opportunity to add an additional stage – investigation of a tenderer’s claim in contracting authority. Such stage definitely has a lot of benefits and is very useful in regard to prevention of ungrounded claims filed for review to the review body. Also “a complaint to the contracting authority may offer clear advantages, especially in cases where a genuine and obvious mistake rather than a deliberate breach of public procurement law is the reason for the dispute or when the case involves

“delicate” interpretations of the law.” [17]. For example, in Lithuania and Germany such requirement is a precondition for the judicial review. In Cyprus this requirement is also applied, despite the fact that this country has specialised review body. In group of other countries, it is enough to inform contracting authority about intentions to file a claim to review body or send a copy of a claim to contracting authority (as it is used to do in Finland and Hungary). Obligation to file a complaint to contracting authority as precondition for review procedure may also help the tenderer to avoid confrontation with the contracting authority. This dispute resolution method, which in general has a lot in common with negotiations, in a part of cases, helps to avoid using review procedure and it is not only related to preservation of good relations, but also may be connected with reduction of time and money costs as well as help to preserve reputation of both parties to a dispute. Another merit is a fact that in such stage violations of law may be corrected immediately and without using the compulsory state measures for the enforcement of review body’s decision. Thus such practise in some countries was considered to be ineffective. In 2009, Poland public procurement review systems resigned the usage of claiming to contracting authority as precondition for review procedure [24]. According to G. Lang such requirements prolonged procedure and were ineffective, since a

contracting authority was deciding on its own case. Thus this scientist states that authors of the amendments did not perceive the complaint as a measure of dialogue in the award procedure [24]. This aspect should be taken into considerations. Sometimes contracting authorities even do not know about possible violations and after internal investigations, the dispute may be closed in more amicable way to compare with active usage of review procedure.

Above mentioned advantages of such additional pre-litigation stage obviously should be used. Another suggestion is to conjoin this and classical first instance stage (review in specialised body) pre-litigation stages for the sake of economy principle. Normally before investigating the case, the review body asks the contracting authority to give an opinion or arguments for defence (the Remedies Directives proclaims that such non-judicial procedures must be based on inter partes principle). The process can be designed in such manner that by filing the claim for the contracting authority, the tenderer informs it about his plans to seek for further review procedure. The contracting authority's motivated response to such claim may be treated in review body as its official opinion, and may enable the review body to carry on the procedure more rapidly, without repetitive addressing the contracting authority for the opinion.

Another juridical interpretation of the Remedies Directives, which should be discussed, is providing a facultative character for the pre-litigation stage in a specialised body. Such system currently is used in Spain and is often criticized. According to M.A. Bernal Blay, the special review procedure in the field of public procurement has an obligatory rather than a facultative nature. In spite of it, public procurement review system was reformed to a not-obligatory stage of review in Spain. It is stated that "Facultative nature of the special review procedure in the field of procurement implies the de facto opening of a two review routes (special administrative and judicial), in order to contest decisions taken within the contracting procedure." [19] The Spanish model, which presents two different procedures, does not directly preclude the aim of the Remedies Directive, thus the question appears, whether it is effective to apply few procedures? In case of unsuccessful performance, the tenderer is free to initiate review procedure, which has an obligatory character. This may serve for further abusing the provided rights and violate the interests of the contracting authority, the decision of which was taken according to the requirements of law.

In regard to the cost of the procedure, pre-litigation systems may be divided in few groups also. In some countries review procedure in specialised public

procurement bodies is free of charge for tenderers. In other countries flat fees are required to be paid (for example, Denmark). Also there are systems, where costs are related to the percentage of the contract value (for example, Bulgaria or Estonia) [17]. It was discussed above that this financial issue must be well considered before the constituting the specialised body, thus it is clear that certain fees should be applied.

Models of public procurement review procedure applied within the EU also may be divided into two groups on the ground of application area. Big part of member states uses the same dispute regulation scheme for both above and below the EU threshold (for example Austria, Estonia, Cyprus) other member states apply this EU regulation-based review system only for international procurements above threshold value (for example Bulgaria, Latvia). Usually for other government purchases a softer system is envisaged, thus it does not protect violated rights of tenderers in such level, which is envisaged in the Directives. It should be noted that from the institutional side, it is easier to have the same system for review of all government purchases. It is more convenient for tenderers to use the same scheme for their infringed right protection. Thus in general it raises number of claims and takes more time from the contracting authorities. Still, in author's opinion, the model of review,

which is applied for all purchases, despite their value, guarantees more transparency and discrimination prevention to compare with dualistic systems, where disputes on below threshold valued purchases are treated in different way, usually less strict, that brings to certain risks, which should be avoided.

To sum up, it should be generalized that within the EU a bigger part of the member states non-judicial specialised bodies are employed in public procurement review field. Despite the particularities, which are present in every national review system, all systems may be divided into few basic models on the grounds of competence and structure of the process. Several other qualifications may also be added.

6. Public procurements dispute resolution system in the Lithuanian Republic and the argumentation of the need to improve it

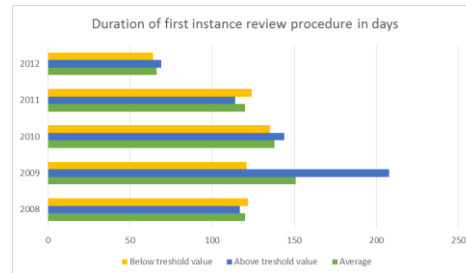
In the Republic of Lithuania as well as in 12 other EU member states the judicial model is applied. Regional courts represent the first instance for the review of both types of public procurements (above and below threshold value). Their decisions in general order may be appealed to the Court of Appeal of Lithuania. In exceptional cases, decisions of the Court of Appeal may be revised by the Supreme Court of Lithuania. The same court deals with

both pre-constructional and contractual issues. The first instance court is authorised to apply interim measures. In regard to the pre-litigation stage, there is no specialised body dealing with it, thus it is necessary for a tenderer, who seeks for the review procedure, before claiming to the court, to file a complaint to the contracting authority. Such requirement is a precondition for the review procedure in court and is compulsory.

The described system with constant improvements has been applied from 2003, after the adoption of the new edition of the Law of Public Procurement [20], where the Independent Public Procurement Dispute Commission was disestablished as consuming too much time in resolution process [21]. The mentioned institution comprised a specialised dispute resolution body, which was established under supervision of the Public Procurement office of the Republic of Lithuania. Decisions of this institution were a subject to appeal to administrative court. After this reform, the reverse effect was identified. The Law on public procurement and the Code of Civil Procedure of the Republic of Lithuania announce that all disputes should be resolved within 45 days period [20;25]. Civil courts were not ready and still are not ready to deal with public procurement issues as quickly as it is announced. According to the data of the

Public Procurement Office of the Republic of Lithuania [22], this requirement year-by-year is not fulfilled.

Figure 4. Duration of the first instance review procedure in the Republic of Lithuania.



According to the presented data, in average in 2012 cases were investigated in about 64 days. This duration to compare to results of previous years can be treated as good achievement, still it does not fulfil the requirements of law. Time limit of 45 days in general is quite long. To compare to good practices of other EU countries, it is possible to reach 15 days as it is in Estonia, 20 in Romania or 30 days in Latvia [26]. Notably, the duration differs to compare data from the countries of judicial review model and non-judicial. As rapid as possible dispute resolution in the field of public procurement is essential especially in cases related to absorption of the EU funds finance [27]. Country in general often faces the threat to lose sponsorship because of too late acquisitions of goods, services or works.

Creating of more quick system, would give a hand in this field too.

Another problem of the existing review system in Lithuania is irregular court practise. On this factor, it is clear that court decision in the field of public procurement cannot be predicted. Different judges have different attitudes and qualifications in this particular field, what leads to formation on uneven interpretation of the EU and national law. In case of non-judicial model, when a specialised body deals only with public procurement issues, naturally members of such body would be more competent to deal with such disputes and create homogeneous practise, which also will serve for prevention of ungrounded claims or support of tenderers, who do not dare to apply for review. The EU Directives set up very high criteria (the same as to judiciary) for the members of non-judicial review bodies in regard to their appointment, period of office and their removal, what obviously will serve for constituting of professional team for public procurement dispute resolution.

One more problem, which leads to the necessity for reforming the existing system, represents ungrounded claims filed by the tenderers, who abuse the mechanism of their right protection. This statement can be illustrated with an example of some statistics. According to the information of the Public Procurement

Office [28] in 2012 more than 72 per cent of claims of tenderers were not satisfied by courts at all. And only 15 per cent were fully satisfied. In 2011, only 61 per cent of claims were not satisfied at all. And only 18 per cent were fully satisfied. It may be a result of the fact, that litigation in Lithuania currently is quite cheap. As it is mentioned above, today the flat fee in first instance is about 290 euro (few years ago this fee comprised only about 29 euro and later was raised). Process in non-judicial institution may be more flexibly designed in case of payments. Having in mind that the tenderers are professional business entities, the higher costs may not be treated as obstacles for assessment to justice.

In conclusion, it should be noticed that currently in Lithuania the judicial model of public procurement review is applied. Thus litigation in regular courts takes quite long period of time and year-by-year in most cases the required time limit of 45 days (which is envisaged in national law) is not reached. Also irregular court practice in the field of public procurement dispute resolution as well as the necessity to deal with tenderers abusing the review procedure must be mentioned. In regard to these reasons the presumptions of the need to improve the existing review model in Lithuania should be stated.

7. Conclusions

The Remedies Directives have set up the fundamentals of public procurement review system and disclosed the additional requirements for the application of pre-litigation models as non-judicial means of review procedure. Mainly the specific requirements, which mostly are related to the appointment and removal of specialised review body members, serve for the creation of transparent review system able to provide competent investigations and effectively implement the Remedies Directives. Despite additional requirements, member states still have enough space to design such a pre-litigation public procurements review mechanism, which would be appropriate to specific national legal system and effectively contend the infringements of the EU public procurement law.

When designing the pre-litigation dispute resolution model in modern society, it is inevitable to analyse the possibility to employ alternative dispute resolution methods, what makes constantly a priority of the EU and national legal politics. Thus in case of public procurement, amicable dispute resolution and public procurement review procedure, which is envisaged by the EU law, do not have much in common. Public procurement review system has an objective to preserve the application of the EU legal rules. Alternative dispute resolution procedures mostly focus on

restoration of peace between parties by reaching compromise between different interests. It is not in scope of the Remedies Directives.

According to the fact that the Remedies Directives give an opportunity for the member states to choose the model of review procedure, it is essential to evaluate the possibility to employ pre-litigation systems. Main factors for choosing it mostly are connected to opportunities to have a more rapid process, simpler procedure, lower cost and higher quality of decisions. Thus such systems also have disadvantages, which mostly are related to initial efforts to build reputation, create institutional fundamentals, legal background. In case of current situation in the EU, it is clear that pre-litigation models are widely used. In bigger part of the member states non-judicial specialised bodies are employed in public procurement review field.

All currently applied within the EU public procurement pre-litigation systems, used in national review systems, may be divided into few basic models on the grounds of competence and structure of the process. Several other qualifications may also be added. In searching for the most appropriate model for the specific legal system, such variety of alternatives must be taken into considerations.

Despite the tendency to use more pre-litigation models, currently in Lithuania the judicial model of public procurement review procedure is applied. Litigation in regular courts takes quite long period of time, and frequently creates a stage for process abusing and often results in unpredicted decisions because of irregular court practise. Mentioned problems raise a presumption of the need to improve the existing review model in Lithuania and make it more rapid and effective.

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The Specifics of the Caucasian Geopolitics in the Process of Constructing a New World Order

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Abstract

The collapse of the Soviet Union has brought changes in the balance of the geopolitical system of the world order. The center of the world politics has moved from the East to Asia. First of all it is defined by the fact that the majority of a world's population resides on this continent and also in the region of Caspian and Persian Gulfs - extremely rich of hydrocarbon resources, which is in the great interest of Western World. Geopolitical and geostrategic interests of Russia, Turkey, Iran and USA have been intertwined in the Caucasus. As a whole the Caucasus represents extremely conflict region, where intractable socio-economic, national-territorial, confession, geopolitical and other interests are intertwined into the complicated knot. Therefore, it is of critical importance to understand and analyze the geopolitical processes ongoing in the Caucasus.

Introduction

The characteristic feature of the end of XX-th century and the beginning of the XXI-century is: at first - bipolar world, which is in the process of formation. Every nation can choose its own path of development in it. As analysts predicted, it will become more real with the collapse of the "evil empire". As the practice showed no country is able to control the new world order alone. The second feature is "the main difficulty" of our time, the fact that the achievements in the economic sphere are so far ahead of our successes in the political life, that the economy and politics can not develop simultaneously. Economically, the world is organized into a single system of all activities. Politically, it is not only still divided into seventy national states, but, on the contrary, the national units are increasingly shrinking, their number increases and the national consciousness become more and more keen. In this context it is necessary to mention, the Islamic factor, which plays a serious role in the world order. After the act of terrorism in the USA

on September, 11-thth, 2011, the world clearly felt that Islam is not only a religion, but powerful political doctrine existing according to the formula: "the politicization of Islam", "the Islamization of politics".

The above mentioned factors predetermine the formation of a new world order. In the book "Entering the twenty-first century" Paul Kennedy specifies that the processes taking place in our time generate tension in the world, generate local wars, revolutions, antagonism and disaster in social life of mankind.

As it is known, in August, 1971 Richard Nixon announced the beginning of the "New economic policy" to demonstrate a new economic order established after the Second World war (the Bretton Woods systems), in which the United States essentially played the role of an international banker. The doctrine of the economic order appeared on the post-Soviet space after the collapse of the Soviet Union, the United States and other leading countries of the world expanded their economic influence in the countries of the former Soviet Union, the situation in Caucasus and in the Caspian region is the most characteristic.

1. The geostrategic interests of USA and Russia, defining strategy in the Caucasus

Three Transcaucasian states appeared after the Collapse of the Soviet Union, however as well as two centuries back Transcaucasia became the "play field" again.

As compared to XIX and the beginning of XX century, the number of players on the Caucasian geopolitical field increased notably "As well as the game became complicated notably", because of the modern global world tendencies too. Many states having geopolitical and geoeconomical interests in the main, figure on Caucasus and around it currently, particularly – the so-called "Troika" (Georgia, Armenia, Azerbaijan).

Georgia and Azerbaijan conduct independent politics on this field, but it is difficult to say today if they are subjects or objects of large politics in partnership of great powers.

Historically on the extent of centuries the fight for Transcaucasia conducted mainly between three main competitors – Russia, Turkey and Iran. The role of objects, not subjects of international relations was given to others, it was not important, that was wanted by them, it was important what they wanted. Many world countries are interested in "The big game for Caucasus". These are the countries of the West, The Middle East, Russia, Turkey, Iran, Central Asia, the United States, European

countries and even Japan and China. Why is Caucasus of such a big interest? Only because of the Caspian oil deposits? From the geopolitical point of view Caucasus is the place where the European and Asian civilizations meet, their economy, culture. Caucasus is on the junction of two world religions, Christianity and Islam. Caucasus is a former Silk Road and new economic projects going to India and China, which connect them with Europe.

The current situation in Caucasus has a clear - transformation of regionalism into a world tendency, in which the regions begin to play an increasing role in the life of the region.

2. Caucasus as the conflictgenic region – experts' estimation

The specialists consider Caucasus to be a conflict region. The conflict was historically caused by relations between nations of that regions with Russian-imperial and then with the Soviet center. The characteristic feature of the conflict values of Caucasus became the situation, in which the arrangement of the international forces in the geopolitical and geostrategic plan began to influence the internal conflicts actively.

Even in ancient times from XVII-century, Russian rulers gave Caucasus

great historical and strategic importance for the empire, particularly there is such interpretation in historical materials: "Caucasus is one of the fundamental, the grandiose pillars of the state design. It is content in the south for empire forming, which provides strategic comfortable boundaries, wide buffer zone for protecting against major Islamic states (Turkey, Iran), also, if necessary, for attacking them, access to two seas and Middle Asia".

British authors considered Caucasus, in particular Circassia, as natural barrier protecting Turkey, Iran and India from Russia. E. Spencer wrote: Russia kept Circassia in blockade, inflicted irreplaceable damage to the British trade interests. Historians note: Any war in Europe didn't cost to St. Petersburg as much money as the Caucasian War. The same E. Spencer wrote: England should form an alliance with Iran and Turkey against fighting with Russia in Caucasus.

The historical aspects of the multidimensional problem "Russia – Caucasus" are often reduced to search the unambiguous answer to the question "annexion" or "conquest". Historically there was some kind of political "gravitation" between the Russian imperial core and periphery of Caucasus, overcoming which people of Caucasus did not break during the revolution of 1917

and after the collapse of the Soviet Union.

3. Regional and International interests of the countries, participating in the geopolitics of Caucasus

The main acting persons, who impose on the countries of the Caspian basin their rules of game, are certainly the USA, Iran, Russia, Turkey and the rich countries of the Middle East. Economic and some of the Arabic countries on post-soviet space USA, Turkey and some of the Arabic countries on post-soviet space are directed on weakening of political, economic and military presence of Russia in Caucasus now.

Control above Caspian oil gives Washington the levers of pressure on countries exporters of oil that adhere to anti-Western views. Caspian oil will extend the field for a maneuver in relations between the United States and the countries of the Persian Gulf. Fastened in Transcaucasia, foremost in Azerbaijan, by using oil diplomacy, the USA will be able to put pressure on Russia. Current geopolitics of Caucasus can be described as following. Military-political situation in the Caucasus region becomes more complex primarily due to the desire of the United States to join Transcaucasia with their "Greater Middle East", to remove Russia from the meaningful geopolitical players in a region, to

form geostrategic corridor for direct exit to Central Asia. The measures are carried out for involvement of countries of region in NATO and for creation in the Caspian region military bridgehead for attack on Iran. Militarization of Caucasus develops faster than the economy. The density of troops and weapons becomes one of the highest in the world here and the permanent risk of renewal of the armed phase of conflicts is saved. In opinion of western specialists the energy transportation routes from Central Asia to Europe, by number of reasons, including geopolitical, can pass only through South Caucasus, therefore Transcaucasia gets the special significance. Aggravation of the military-political situation in Caucasus can lead to involvement in conflict NATO, the United States, Turkey and Iran. The problem of international military presence in the Caspian region recently actualized in the context of the struggle for its hydrocarbon resources. First, the problem of the partition of hydrocarbon resources of the Caspian Sea appeared. Secondly, the development of energy capacities on the Caspian Sea depends not only on developing deposits of oil and gas and dividing of the sea. A special significance acquired the problems of deliveries and providing of safety of transporting of hydrocarbon resources, the main "global players" were involved to their solution. Caspian was also included in the

list of "vital interests" of the USA, the certain foreign-policy conditions can promote appearance in the region of military forces of NATO. The United States view Caucasus as "geostrategic rod" relating Europe and Near East with Central Asia and Afghanistan. This region also plays the important role in logistics to maintain the military operation of NATO in Afghanistan. The significance of Caucasus for the United States is also determined by its geographical proximity to Iran. After the planned withdrawal of NATO troops from Afghanistan, the political vacuum can appear in the Middle East, it will quickly fill Iran and Pakistan. That is why it is very important for the United States to continue its active presence in Caucasus for achievement of different geostrategic aims. Realization of project "Large Caucasus" can allow the USA to block, if necessary, Iranian export channels of energy carrier in a northward, and to provide the opportunities for large-scale construction of pipelines and transport corridors between Azerbaijan, Georgia and Turkey, passing over Russia. The important goal of Washington is creation of a powerful military infrastructure in the United States and Caucasus. Realization of project «Large Caucasus» allows the USA at once to decide a few tasks: create a zone of "political quarantine" against Russia's actions; put under their control of the Caspian oil flow; to provide itself bridgehead on

territories, contiguous with the spheres of influence of China. Special attention of the United States to the specified region associated with possible power scenario solutions of the Iranian problem.

Strengthening of the United States presence in Central Asia has two important aspects - economic and political. Washington declares although, that not going to stir the military bases in a region on permanent basis. Analysts believe that current feature in the geopolitics of Caucasus is that United States can take control of energy projects in this region, but Russia will control the military-political situation. From the territory of Chechnya it can easily provoke military operations in neighboring countries under the auspices of resolution the so-called "Caucasus conflicts", also the difficult question of the international legal status of the Caspian remains. Military-political situation in Caucasus is complex, Russia, Azerbaijan, Kazakhstan, increased their military fleet several times. Uncertainty with demilitarization of the Caspian shelf, desire of the United States to pull out Russia from Caucasus complicated the conflict.

Conclusion

In general, politically-strategic interests in Caucasus countries are above the economic interests, that testifies

that Caucasus resembles "powder keg" – to not explode "politics of reason" must prevail "power politics". However, current events in Ukraine have shown, that the Russian leadership is suffering from the syndrome of "self-confidence of power", that may be dangerous for the Caucasus in the future.

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The Role and Importance of Intellectual Capital for the Purposes of Business Organization

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Abstract

The concept of IC, formulated in the Agreement Establishing the WIPO and Georgian Patent Law is very broad and it includes not only property rights but also moral rights. These rights do not necessarily generate revenue.

In the Georgian scientific literature and in practice it is necessary to expand the boundaries of the concept of "intellectual capital" and it should be used mainly in: 1) human resource management and intangible assets, 2) creating a favorable image of the company in order to attract investment, and 3) evaluation of business based on knowledge and 4) to its purchase or sale.

The above concept is broader than the more familiar concepts of "intellectual property" and "intangible assets." However, it is close in meaning to the concept of "intangible capital."

Valuation of IA – is the most difficult part of the business valuation. We used the return on assets concept approach.

The above procedure for assessment is consistent with the principles of accounting, auditing, and the fact that usually not all intangible assets at the time of sale of the company are reflected in its balance sheet. The difference between the purchase and sale of the company and the value of its net assets in the balance sheet is goodwill. It automatically takes into account the value of all intangible assets not recorded on the balance sheet.

Modern concepts of IC require even more radical change in the principles of valuation and accounting of intangible assets. Examples of Georgian practice mismatch between estimated market values and the real price of transactions in business, based on knowledge. In valuing a business based on knowledge, should be taken into account the human capital, which is part of the IC. The buyer should consider the unique qualities of management and experts in a particular company. However, it does not follow that they should be considered as part of IA and be reflected on the balance sheet. This contradicts not only

the specific rules, but also the fundamental principles of accounting and auditing.

Introduction

Intellectual property, products of intellectual creativity are of paramount importance for the innovative development of the country.

In Georgia, unfortunately, the market of intellectual capital is still slightly formed, which is detrimental to the development of all industries and the export potential of the country. Because of this, the state budget annually loses significant sums.

It is necessary to create a solid legal framework to clarify the relevant terminology, actively introduce new standards of accounting and evaluation, to more clearly define the value of intangible assets, IC and human capital in order to assess the market Unit Stake of large and small corporations.

Also is necessary to adjust the accounting approaches and standards to eliminate the fundamental contradictions between the accounting principles, laws and properties of the knowledge economy.

1. IC, IA and Market Value

Innovative development in Georgia is only possible through the intellectual

property market. In this market, we have the goods, works, services and rights - intellectual property. Its sales indicator in the world under the World Trade Organization is up to 10% of the gross domestic product of countries belonging to the WTO. In our country, this share is negligible.

In the Georgian legislation there should be widely interpreted the concept of "intellectual capital" (IC) and its use in the management of personnel and intangible assets in order to attract investment and business valuation, based on knowledge, with a view to sale or purchase. It is broader than the concept of "intellectual property" (IP) and "intangible assets" (IA). It is close in meaning to the concept of "intangible capital" used in work on econometrics.

To increase the market value of a firm is very important the intangible capital. It depends on the number of patents the firm, the volume of investments in R&D and other similar factors. Availability of the intangible capital for the firm is connected with exceeding of its market value over the replacement value of the tangible assets, taking into account the factor of an operational enterprise.

Studies have shown that for large corporations in Georgia, there exists dependence between investment in R&D, the number of patents obtained

and the increased cost of intangible capital, which is close linear dependence (relationship).

In this case the value of intangible capital is the difference between the market capitalization and the replacement value of tangible assets, considering the factor of an operational enterprise, i.e. as the market value of the firm was considered its market capitalization (producing the share price by the number of shares). For such companies is significantly increased the proportion of R&D, the results of which can not be patented.

In Georgia, large corporations are almost never sold in their entirety and for them does not make sense the standard definition of market value as the most probable price. A good example of this are the Rustavi Metallurgical Plant and Shorapani Plant «Electroelementi». At the same time, the market capitalization of the public corporation is easily calculated based on data from public sources, which is very convenient for the study. However, exactly for public corporations, existence of such dependence presents more theoretical than practical interest.

Market value of the company could be computed as the sum of the replacement cost of tangible assets, the value of the operational enterprise (defined by the table) and the cost of intangible capital.

However, in reality this is not possible. For small and medium-sized firms, there does not exist linear dependence between the amount of investment in R&D and the number of patents obtained.

According to theorem of Modigliani-Miller, value of firm depends only on the value brought by its activities and cash flow and does not depend on the structure of assets. However, we have not observed such a dependence for Georgian companies (calculations were based on the data from Rustavi Metallurgical Plant).

Market value (as opposed to price) of a firm is a calculated value. The actual price may differ from it in one way or another depending on the specific circumstances of the transaction, and significantly so.

According to current practice in Georgia, IA is usually preceded by assessment of business valuation. Based on the income approach and / or based on an analysis of comparable sales, the market value of the business as a whole is determined. This is followed by valuation of the tangible assets. Evaluation of IA as a whole is the difference between the market value of the company (business) and the value of its tangible net assets (assets minus liabilities). It should be noted that after this,

intangible assets alone are not practically measured.

This approach to the valuation of IA or IC can be called as a return on assets (ROA) concept method. Georgian companies, in assessing their business, need to specify both the value of intangible assets and the value of the business through taking into consideration these adjustments. Such evaluation procedure (ROA) is correlated with the approach taken by Professional Federation of Accountants and Auditors of Georgia (PFAAG) and is consistent with the accounting principles. It should be taken into account that, according to established practice in Georgia, at the time of sale of the company, not all intangible assets are usually reflected on its balance sheet

While IA constituted only a relatively small part of the value of companies, it did not create any problems. The difference between the purchase and sale price of the company and the value of its net assets was reflected on the balance sheet as a Goodwill. It would automatically take into account values of all intangible assets not reflected on the balance sheet. With the growth of an economy based on knowledge, such practice is no longer adequate to reality. Amounts paid for goodwill, increase every year and account for approximately 90% of the transaction amount. Accordingly have changed the accoun-

ting practices. An increasing proportion of the amount received is allocated to the identifiable assets, primarily in the IP.

When valuing a business based on knowledge, must be taken into account a human capital (management and other specialists) as part of the IC. Buyer takes into account the quality of management and experts in a particular company. However, they should not be taken into account as part of intangible assets (IA) and reflected on the balance sheet. This corresponds not only with specific rules, but also the fundamental principles of accounting. Relevant is the assessment of IC in order to attract investment. Here we can talk about both direct investments and the side, so-called "Portfolio investments." In Georgia, as a rule, the corporation budget is replenished by small shareholders. Buyers, when determining the share price, base it not on a realflow of dividends, but take into account the future perspective development of a company. Large shareholders buy shares at a bargain price and usually take advice from the experts. Because of this, the share price at purchase can sometimes several times differ from the price that is paid for the same share by small shareholders. With regard to small and little-known corporations, both large and small shareholders evaluate shares according to their real quotations on the stock-exchange.

2. Human, Market and Structural Capital

Recently, in the reports on IC of Georgian companies, as a separate item also stands human capital. The remaining part is also subdivided into a number of positions. Here is distinguished a component called market (relational, client or brand) capital. It is connected with the position of firms on the market, their relationship with customers and partners. The remaining part, which is quite heterogeneous in composition, is called a structural capital.

Human capital - is not only a gathered together and trained workforce, but also good management, contracts with eminent specialists in the sphere to which the business is related. For example, the administration of the Georgian private universities (ESM, GDAU, UG etc.), trying to emphasize the high level of the university, as the first thing indicate the number of doctors and academics working at University in their official websites, booklets and academic programs, as well as mention it during meetings with students and applicants. Off course, that academic staff, with their unique scientific potential is exactly the main value of the company, however this potential can not be considered as assets in the ordinary sense. It also includes human capital expertise (know-how), inseparable from a concrete individual. The use of such know-

how usually requires not only knowledge of how to do, but also the ability to perform the corresponding operations. This includes so-called "silent" or implicit knowledge ("tacit knowledge").

Human capital is not recognized as an asset of the company and it does not belong to the company. This issue necessarily needs to be legally regulated. Particularly, within the employment contract to tie to the company its most valuable professionals using rewards and liabilities (golden handcuffs) and reflect contracts with them as part of the intangible assets (IA). Working staff can also be tied to the company by including them as shareholders/co-owners of the firm. In my opinion, to successfully manage human capital, the management should monitor approximately the following set of parameters: 1) education; 2) professional qualifications; work-related knowledge; 3) professional inclinations; 4) psychometric properties; and 5) work-related skills.

Significant problems arise with reference to investments in human capital and measurement of results. Costs of personnel's training and qualification upgrade, according to financial accounting rules, should be attributed to costs rather than investments, although in terms of their management accounting, they should better be attributed to investments.

Structural capital – is the most diverse part of the IC. In my opinion, here should be included IPRs, informational resources, working manuals and methodologies, working procedures, systematic knowledge, company organizational systems, etc. As for market capital, it should cover: trademarks and service marks; brand names; reputation; presence of its people (insiders) in the partner institutions or customer organizations; existence of regular customers; repeated customer contracts, etc.

It is possible to quantitatively measure the individual parts of market capital, such as showing the amount of regular consumers of their products. In monetary terms, usually are estimated trademarks and service marks, and of lately - brands. Unfortunately, as in Georgian legislation and among domestic experts there is no consensus about what is the relationship between the terms "trademark» "brand" and "reputation".

In the Agreement "On Establishing the World Intellectual Property Organization" (WIPO), the Patent Law of Georgia to the IP covers not only property rights but also moral rights, including the right to the integrity of the work, the right to a name, etc. These rights do not necessarily generate revenue. Therefore, in my opinion, they can not be attributed to the IC. Of course, this is a regretful omission. Equally difficult is the relationship between the concepts of

IC and IA, if we consider IA strictly in the accounting sense.

3. Juridical Rules and Accounting Standards Assessment

Legal rules and accounting standards that apply in the country attribute to intangible assets (IA) any assets for which there was identified no place among the other "normal" assets. Therefore, the composition of intangible assets is very heterogeneous. For example, Goodwill is the difference between the company's purchase price and the cost of its net assets, i.e. essentially an accounting fiction that is not related to any specific object, except the company as whole. To IA are related many identifiable assets (identified assets), that are associated with a specific intangible object (inventions, trademarks, etc.), with the improvement of rentable real estate contract, etc. The grounds for reflecting any such asset on the balance sheet is usually the presence of the cost of its acquisition or creation. In other words, the balance sheet reflects not assets as such but accounting operations related to their purchase, which is a gap in the country's legislation.

According to Georgian legislation, IP rights constitute only a part of the identifiable intangible assets(IA). This is the most significant part of such assets, but not all. At the same time,

substantial portion of IP rights belonging to the company, are not reflected on its balance sheet, as their appearance was not associated with any accounting operations. Most often, copyrights are not reflected on the balance, as they appear as result of creating a piece of work, and the accompanying expenditures can be recognized as costs.

As part of IA, principally cannot be included such components as IC not owned by the firm, including human capital and part of the market capital. As part of firm's IA generally are not considered copyright and neighboring rights in company's ownership, although in principle they can be taken into account.

Practice shows that in Georgia, many firms do not seek to reflect such assets on their balance sheet, even though they are trying to demonstrate them to potential investors. The result is a huge gap between the book value of the company and its market capitalization.

It can be concluded that it is necessary to make adjustments to accounting approaches and standards applied in the country. There are visible fundamental contradictions between the principles of accounting, INTOSAI, legal norms and the properties of the knowledge economy.

Since accounting information is one of the most important sources of informa-

tion used in the assessment of business and capital investment decisions, it therefore should be supplemented by other forms of accounting. It is required to introduce the appropriate amendments into relevant legislative acts of the country.

Conclusions

1. In the Georgian scientific legal and economic literature as well as in practice it is necessary to expand the boundaries of the concept of "Intellectual Capital" (IC) and it is used mainly in: 1) human resource management and intangible assets, 2) creating a favorable image of the company in order to attract investment, 3) business valuation, based on knowledge, and 4) with a view to sale or purchase. The above concept is broader than the concept of "Intellectual Property" (IP) and "Intangible Assets" (IA). It is close in meaning to the concept of "Intangible Capital."

2. To assess the business and intangible assets (IA) good results can be provided by applying return on assets concept (ROA) approach. It is consistent with the principles of accounting and auditing, which operate in the country. Usually not all NMA at the time of sale of Georgian companies are reflected in their balance sheet.

3. Studies have shown that for large corporations in Georgia, there exists dependence between investment in

R&D, the number of patents obtained and the increased cost of intangible capital, which is close linear dependence (relationship). For such companies is significantly increased the proportion of R&D, the results of which cannot be patented. For small and medium-sized firms linear relationship between the amount of investment in R & D and the number of patents obtained does not exist.

4. When valuing a business based on knowledge, we must take into account human capital, which is part of the IC. Legal regulation is necessary for structural capital - the most diverse part of the IC

5. Relevant for Georgian corporations is to assess the IC in order to attract both direct and so-called "Portfolio Investment", which are essential source of income.

6. In the Agreement Establishing the World Intellectual Property Organization (WIPO), the Georgian legislation broadly defines IC as it classifies not only property rights, but also the moral law, which is unfortunate omission.

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IV PLENARY SESSION – Law and Politics

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New Realities and Legal Analysis of the Changes in Patent Laws of Georgia

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Abstract

There are many reasons to reform the patent system in the country, but the most important is the need of its adapting to the new global challenges.

The ultimate goal of the reform - to develop innovative potential of Georgia and, thereby, stimulate the national economy. It is necessary in the patent legislation of Georgia to actively implement method for determining the preemptive rights to the invention, when priority is given to the person who made it first ("first-to-invent"). However, this rule should be introduced very carefully.

Changes should cover basically the process of filing of patents in controversial situations, and they should not affect the process of challenging pa-

tents and recognition of their insolvency by the general courts of Georgia.

It is necessary to amend the Law of Georgia "On the topology of integrated circuits". It should be noted that in its essence the software can never be equated to the technical solution (for some reason there have been cases of recognizing inventions that made it possible to obtain patent for applications which completely lack even the slightest hint of a meaningful solution).

In Western countries, a clear ease with which started getting thousands and thousands of patents for all sorts of software and its variations and led to the principles of efficiency and innovation have become blurred. As a consequence, there is a parallel to the present inventive process, in which the driving element acts is not the inventor, and the lawyer, whose goal is not the

innovation process, and elementary chicanery.

To confirm the validity of the grant of a patent on software, two conditions must be fulfilled: 1) specific binding to a particular machine, and 2) the product on the output should be qualitative differences with the input product or be in any other state. That is, business processes or software that can not convert an object into something else, or do not run on highly specialized equipment, are not subject to patenting.

To encourage innovation and reduce costs it is needed to apply drastic measures.

Introduction

In 1999, the Georgian Parliament adopted a new law on intellectual property. However, more than 15 years have passed since then and the new economic challenges make us think about the significant changes and additions required to the patent laws of the state.

In order to develop the innovation potential of Georgia, it is necessary to actively introduce new approaches, consider the benefits of the patent system as the United States and the European Union.

The above applies not only to the process of registration and issuance of patents, but also challenge, the principles of efficiency and novelty of the invention, etc.

1. IA and Georgian Legislation

There are many reasons to reform the patent system in the country, but the most important is the need of its adapting to the new global challenges.

The ultimate goal of the reform is to develop innovative potential of Georgia and thereby, stimulate the national economy.

Intellectual property (IP), intellectual capital (IC) and intangible assets (IA) are the basic concepts.

Under the IA are commonly understood as any long-term assets that are not directly related to any tangible object (item). To IA are attributed any assets for which there was no place identified among the other "normal" assets. Therefore, the composition of intangible assets is very heterogeneous. The most known of them - Goodwill is the difference between the company's purchase price and the cost of its net assets, that is essentially an accounting fiction that is not related to any specific object, except the company in general. The same applies to „operational enterprise“, although this asset arises a very

different way. Such assets are called unidentifiable assets or goodwill type. In fact they are just a bookkeeping fiction. In addition, to intangible assets (IA) are related the set of identifiable assets (identified assets), associated with a specific intangible object (inventions, trademarks, etc.), with the improvement of rentable real estate contract, etc. The grounds for registering any such asset on the balance sheet is usually the presence of the cost of its acquisition or creation. In other words, the balance sheet reflects not assets as such, but as accounting transactions related to their purchase.

According to Georgian legislation, IP rights constitute only a part of the identifiable intangible assets. This is the most significant part of such assets, but not all. At the same time, substantial portion of IP rights belonging to the company are not reflected on its balance sheet as their appearance was not associated with any accounting operations. Most often, copyrights are not reflected on the balance as they arise through the creation of the piece of work, and the related expenditures can be recognized as costs.

2. Some Aspects of the Preemptive Rights

It is necessary in the "Patent Law" of Georgia and the Law of Georgia "On Design" to actively implement the

method for determining the preemptive rights to the invention, when priority is given to the person who made it the first ("first-to-invent"). However this method must be introduced very carefully.

At present, both in Georgia and in Europe a priority in the same invention belongs to a person who first applied for a patent ("first-to-file"). Representatives of academia and industry, together with the European Patent Agency, actively discuss the issue of improvement of the unitary European patent and of the European patent court. It is expected that these measures will also help Europe and Georgia to develop an innovative economy.

In the draft law on patent reform the emphasis should be placed on the fact that after this reform, there will be considered and taken into account as who did first implement the invention, although the key factor will remain as to who filed first a patent application. Also it is necessary that the "Patent Law" of Georgia and the Law of Georgia "On Design" to reflect the fact of the earlier use of the technology described in the patent (Prior art).

Changes in legislation should mainly concern the process patents registration in controversial situations, and they should not affect the process of

challenging patents and recognition of their insolvency through court.

It is required to introduce the practice when applying for a patent in Georgia also provides for specification of the date of its first practical implementation. When more than one application are submitted for one invention from different companies, in the future, priority should be given to this date of the invention, which is very difficult to challenge.

Above scheme should be applied very carefully to avoid infringing on the rights of the real inventor as well as to prevent the possibility of initiating a long and expensive trial. In this case should also be considered that especially for the purpose of fixing the earlier possible date of the invention, a potential applicant may create a simple underdeveloped prototype and record the fact of its actual usage.

3. Software and Expanding the Boundaries of Defense. EU experience

Relevant changes are required in the Law of Georgia "On Integrated Circuits". According to this law, the right to defense is given to the topology of an integrated circuit. In the Parliament of Georgia, some MPs have expressed the view to expand the boundaries of protection topology, which in my opinion is erroneous.

It should be noted that the idea of a software greatly differs from the technical solutions. However, the principles of efficiency and innovation can be blurred if patents will be granted through simplified procedures for all sorts of software and near-program variations.

At its core, the software can never be equated to a technical decision. So if it is recognized as invention, it will give possibility to obtain patents for applications which contain practically not even the slightest hint of a meaningful solution; As a consequence, this may create parallel to the real invention process, in which as a driving element acts not an inventor but a lawyer, whose goal is not the innovation process, and elementary chicanery. Have appeared companies who are involved in both buying patents and patenting inventions of all kinds with a view to afterwards bring people to court for the use of sometimes quite obvious things, as well as who patent ideas for which applies the notion of Prior Art, it has become a necessity to regulate this problem by legislation.

These facts, in our opinion, are alarming, as in Georgia, market of intellectual capital unfortunately still underdeveloped and additionally, on the current innovation field of Georgia have emerged legal entities and individuals (including foreign companies

with significant financial resources) whose selfish goals are not about the development of engineering and technology in Georgia, not a steady preparation of inventors who are capable to solve complex problems in energy, materials technology and other key sectors of the country, but mere chicanery, which diverts funds so much needed for these inventors and addresses them towards the secondary tasks that gradually destroys the real evolutionary innovation process.

In my opinion, it is necessary to work closely with the relevant profiling organizations and in the first place with the European Patent Organization (EPO), to finally solve the issue of expediency of software patents. Such a decision would provide certainty in this matter and put an end to the confusion in which domestic courts have been lately stuck in.

On July 18, 2014, Georgia signed the Agreement on association with the European Union. It should be considered that although the patent laws of the United Europe clearly establish the rule according to which the software may not be patentable, it however also contains a provision on computer-related inventions. In this regard, a lot of questions are generated which are related to interpretation of two similar concepts.

There are examples when EPO granted patents on pure software inventions. Like if a company, for example, presents a project on program implementation of tools to improve stability of cellular service - it will most likely receive a patent for his invention. On the other hand, Patent for the online auctions system will likely be rejected.

4. Judicial protection of patent Infringement: Issuance and Revocation. Accounting Standards

Relevant to our state is also judicial protection is infringed patent rights. The issue of qualifications of judges and experts in this area has become quite urgent. Therefore it is probably a time to think about creating a special court - Patent Court within the general court system of Georgia.

Georgian courts have to make decisions that impose substantial restrictions on the patentability of software and business conduct methods. In my opinion, to confirm the validity of the grant for a patent on software, 2 conditions must be fulfilled: 1) specific binding to a particular machine, and 2) the product on the output should have qualitative differences with the input product or be in any other state. That is, business process or software that does not convert an object into something else, or are not performed on a

highly specialized equipment, are not subject to patenting.

Unfortunately, the Agreement with the European Union does not provide for clear definition of a patent for software which is so important to everyday practice and new legislation introduces no clarity into this practice.

Under patent law of Georgia, publication of technical data on the invention creates a so-called prototype (prior art), reference on which may in the future justify the refusal of the granting of a patent or making it not valid.

Registration of a patent depends on factors such as the novelty of the invention. If there is information proving that the work in this direction were done by third parties and had been completed before the present application, then the invention cannot be patented. This third party may also use the right of prior art and that does not become an obstacle to register the invention.

It is necessary to legislatively simplify procedures for invalidation of the patent and granting of compulsory licenses. In the first case it is possible, if there are recorded facts of the earlier use of technology described in the patents (Prior art). In the second case - when the patent owner does not practically use his invention and does not

issue licenses for such usage to interested parties.

It is needed to simplify the procedures for revocation of the patent through court and apply the procedure for compelling evidence. There should be applied changes to Georgian legislation to prevent abuse of the patent system imperfections and protect inventors who hold patents related to genuine inventions. With this purpose, particularly, appropriate changes should be made in the Patent Law of Georgia and the Civil Procedure Code of Georgia. This would benefit the traditional patent transactions between private patent holders and society. Illegally issued patents, invalidation of which requires extensive resources, contain potential threat to innovation and dissemination of knowledge.

It should be admitted that Georgian patent law is more favorable towards corporations with powerful legal departments rather than to individual inventors and start-ups. After coming into force of the Association Agreement with the European Union, there is high probability that it will give additional grounds for opening cases on revision of patents to those who challenges them, also will slightly raise patent fees, simplify the procedure for obtaining patents for authorized third parties and restrict the possibility to

sue the manufacturer of goods for mentioning the expired patent.

In my opinion, to encourage innovation and reduce costs, drastic measures are required - for example, the complete abolition of software patents.

Accounting standards that apply in the country, include into intangible assets any assets for which there was no place identified among the other "normal" assets. Therefore, the composition of intangible assets is very heterogeneous. The most known among them – goodwill is the difference between the company's purchase price and the cost of its net assets that is essentially an accounting fiction which is not related to any specific object, except the company in general. The same applies to "going concern" (operational enterprise?), although this asset arises a very different way. Such assets are called unidentifiable assets or goodwill type. In fact it is just a bookkeeping fiction. In addition, intangible assets relate to the set of identifiable assets (identified assets), that are associated with a specific intangible object (inventions, trademarks, etc.), with the improvement of rentable real estate contract, etc. Grounds for including any such asset on the balance sheet is usually the presence of the cost of its acquisition or creation. In other words, the balance sheet not recognizes these assets as

such, but as accounting transactions related to their purchase.

According to Georgian legislation IP rights constitute only a part of the identifiable intangible assets. This is the most significant part of such assets, but not all. A substantial portion of IP rights belonging to the company, are not reflected on its balance sheet as their appearance was not associated with any accounting operations. Most often balance does not reflect the copyright, as it arises as result of creation of the piece of work and these expenditures can be recognized as costs.

Conclusions

1. It is a necessity that in patent legislation of Georgia, where the priority in the one and the same invention belongs to a person who first applied for a patent ("first-to-file") to actively implement the method for determining the preemptive rights to the invention, when priority is given to the fact who made his first ("first-to-invent"). However, this rule should be introduced very carefully.

2. In the national patent law, changes should cover mainly the registration process of patents in controversial situations and they should not affect the process of challenging patents and recognition of their insolvent through general courts of Georgia. It is impor-

tant to create a special court - Patent Court of Georgia within the general and independent legislation system of Georgia.

3. To confirm the validity of the grant of a patent on software two conditions must be fulfilled: 1) specific binding to a particular machine, and 2) the product on the output should bear qualitative differences with the input product, or be in any other state.

4. It is necessary to legislatively decide whether a significant proportion of IP rights owned by the company should be reflected on its balance sheet and therefore improve accounting standards and relevant accounting transactions. It should be noted in the balance sheet and aspects of copyright arising from the company's workforce.

5. It is necessary to put into practice that when applying for patent in the Patent Office of Georgia the date of the first practical implementation of an alleged invention is also given.

6. Changes in legislation are necessary to simplify the procedures for invalidation of the patent and the grant of compulsory licenses. It is needed to simplify the procedures for revocation of the patent in court and applying the procedure for compelling evidence.

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Caucasus Region, Georgia - General Issues of Regional Security

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Abstract

Current international and some domestic processes and factors dictate a new look at the world legal order. It is fatal to ignore the facts and especially the processes that are inherently directed to affect the settled law and order, to check their strength and prejudice the viability of the existing international legal order. However, such manifestations ceased to be the exceptions and are not limited to individual cases. Our goal is to identify exactly the processes and facts, which stimulate or in any other way may affect the current law and order and sap the balance that keeps the world peace and international security.

Introduction

The urgency and intensity of international cooperation is growing more and more, however we cannot see the trends of improving, respect, and strict adherence to the norms of international law, specific international obligations. The cases when subjective tendencies

clearly prevail over legal objective values become more often.

All the above said is confirmed by the events happening in the Caucasus region: domestic unrest, interstate armed conflict, external pressure on the domestic processes, inciting the population to resist the authorities, exaggerating and manipulation with possibility to implement the right to self-determination, the use of weapons on the territory of a foreign State, etc.

1. Geopolitical Situation in Caucasus

Caucasus has always been and remains a center of geopolitical interests not only for the region but also for the leading countries of the world. We should separately mention the interests of the Russian Federation, which originally used Georgia as a space for spreading its own geopolitical interests and its own security. Therefore it is quite natural that the peace and stability in the Caucasus region were protected from the armed conflicts and civil strife by a transparent, invisible line that disappeared after the disso-

lution of the USSR. Dissolution of the USSR not only cancelled out the system of coexistence of the States in the region, but also provided a critical impulse to the transformation of the existing world order, thereby destroying a bipolar geopolitical system of the world[.].The fail of the socialist system led to the growth and surge of liberation movements in the post-colonial world, confrontation between the population and authorities, increase of violence and uncontrolled use of the armed forces. It is enough to recall the events took place in Georgia in order that all of the above factors should get a concrete shape.

After dissolution of the USSR a long period of systemic crisis in Georgia started. This crisis has not finished up to now and negatively affects both public life and foreign policy of the State. However we should admit that over the last few years Georgia has made significant progress on the international scene. It has actively entered into different international processes, established important and useful contacts, obtained political support of the leading Western States. However security issues still remain uncompleted and as urgent as before.

Today the Caucasus region is partitioned as never before. Caucasian States and peoples are concerned and busy only with their own fate while

common interests have been moved to the second place. On this basis we cannot hope for soon resolution of the issues of sustainable development and security.

There is no doubt that the success of the entire Caucasus region depends on the combined efforts of both countries and peoples. In the Soviet Union the Caucasus issue was addressed in the general view, therefore achieving agreement and understanding was not complicated by subjective factors. In the face of the poly-subjectival structure of the region the positions of Caucasus States and peoples become more and more different and distant. No wonder that talks on the Caucasus unification have stopped and do not continue any more. Based on the realities of current events and the objective needs a return to the ideas of creating a “unified Caucasian Home” seems unpractical and having no prospects. Implementation of this idea could be a timely step during the beginning of the dissolution of the USSR, when unity and unanimity of the Caucasus peoples could play a key and crucial role both for these peoples and for the contemporary Russia.

From the moment of origination the idea of the Caucasus unity and to this day there is no consensus on the “Caucasian Home”. Some researchers and statesmen think that “a noble idea

of Caucasian solidarity is often added to the armoury by political speculators of various stripes, who use the pathos of these ideas to transform the entire nations into hostages of their own mercenary interests by taking steps to stir up war in the Caucasus.» Moreover, there are opinions according to which the ideas of “Caucasian Home” are operated by anti-Russian forces and they connect it with the need to preserve the integrity of Caucasian civilization. I am sorry to say that such opinion belongs to the representative of Caucasus people – Ramzan Abdulatipov, a Dagestan. It would be logical to strengthen the idea of the Caucasus unity as a determinant of self-preservation and joint opposition to any kind of external challenges.

2. Challenges for Creation of “United Caucasus”

In certain cases the attempts to approach to a cherished goal bring the opposite results. For instance on 4-5 September 1992 a round table discussion regarding the “Caucasus Home” took place in Grozny, the capital of the Chechen Republic. The participants of the discussion adopted a communiqué addressed to the peoples, States, public and religious associations, political parties and movements of the Caucasus, according to which all these are called to render full assistance and support to the “Caucasian

Home”, where each nation will be safe and have all opportunities for free development. At the initiative of Zviad Gamsakhurdia the participants of the meeting also adopted the application that subsequently had a negative impact on the future of the organization. In particular, the application called to the “condemnation of the military coup and the criminal actions of the State Council of Georgia, headed by Shevardnadze, and responsibility of Russian authorities to Georgian and Abkhazian people”, and to “immediate restoration of constitutional government in Georgia and removal of punitive troops from the territory of Abkhazia”. Participants of the meeting were not official representatives of the States of the region, but some of them occupied positions of responsibility in a number of Caucasus States. Georgian authorities were dissatisfied that Mr. Arif Hajiyev – at that time the state adviser of Azerbaijan Republic - participated in the meeting. So, such a statement of the newly established organization alerted the authorities of the Caucasus States and thus distanced them from the organization, and this led to the gradual urgency lessening of the idea of “Caucasian Home”.

It is obvious, that efforts and diligence of Caucasus peoples that for many years were aimed at foundation of the unified Caucasian home didn't bring to

the expected results, in particular to stability, security and dynamical development. The region was not ready to jointly overcome resistance either morally, or ideologically, and institutionally.

The special factor, that complicates the process of rapprochement and integration of the Caucasian countries, is that there is a State in the subject region that has unambiguous approach and ambitions of leadership in the region, and this fact originally makes the equal cooperation in any sphere impossible, the State that constantly takes all measures to resume its influence lost with the dissolution of the USSR.

3. Issues towards Integration in EU

With the purpose of this the project “Eurasian Union” is being implemented at the moment. It is a continuation of the failed attempt of integration of the former USSR countries in the form of the Commonwealth of Independent States (CIS). However, the integration processes in the CIS were found as not effective. Therefore in November 2011, with the purpose of modernization of the countries’ economics and improvement of the life quality of the population, the Russian Federation, Republic of Belarus and Kazakhstan signed a declaration on foundation the Eurasian Union. The Eurasian Union is

also remarkable because it implies, as some mass media report “integration in global sense with such countries as China, India, Iran, some European States”. In spite of the fact that no concrete projects are being developed in this respect some agreements have been already signed by the countries and joint military training exercises are run and official political visits are paid. In light of the accepted definition, the Eurasian Union is a project of confederative union of sovereign countries with united political, economical, military and customs space. It should have been founded by 2015 basing on the union of Russia, Kazakhstan and Belarus and relevant sectorial integration structures of the CIS. In fact, this project excludes establishing of any alternative unification in the conditions where the Members cannot take relevant decisions without the founders’ approval. Armenia’s refusal from European integration for the sake of Eurasian Union can serve as an example. Therefore, security matters of the Caucasus come into increased interest of the superpower of the region – Russia, which won’t allow formation of viable multinational unification without its participation and without taking into account its own geopolitical interests.

Basing on the above stated, it seems expedient to place the issue of security of Georgia from sub-regional level

onto higher - continental and even global level. The defect of the Caucasus security system is connected with lack of bilateral agreements on cooperation in military and security fields.

Some kind of confirmation of inefficiency of the regional safety system can be a setting up the Conference on Defense and Security of Georgia. The 9th Conference on Defense and Security of Georgia was held in Batumi (Adjara Autonomous Republic) on June 27, 2014. The issues of security in Black Sea region, NATO operation "Decisive Endeavor", Ukrainian crisis and some other were on the agenda. It is obvious, that Caucasian countries are doomed to care for security with their own efforts and political interests. At the present stage Georgia is in the most difficult situation. No other Caucasus State has had to confront such a powerful opponent like Russia for the last few centuries (events of August 2008). The list of the international treaties on security and defense in force can be a confirmation of vulnerability of Georgia's security. The Georgia list of the treaties in force is limited by bilateral agreements, covering such issues as prevention of proliferation of weapons of mass destruction (dated July 17, 1997 USA), Civilian Self-Defense (dated December 15, 2011 with Hashemite Kingdom of Jordan),

Double-Sided Self-Defense (with France and Poland dated February 3, 1997 and December 12, 1996) etc. There is no treaty on collective security of the region or at least any agreement providing possible military aid in case of international military conflict. However, attempts of Georgian authorities to join the approved collective security system become more and more intensive. In this respect the attention should be primarily paid to the regional security system of Europe, which totally corresponds to the global security system, determined by the UN Charter and which has proved to be viable.

Foundation of the European security system was preceded by centuries-old and tedious efforts of the States. However, its final realization became possible only in 1975 in the framework of Helsinki Conference on Security and Co-operation in Europe. The Paris Charter 1990 and its annexes provided a basis for institutionalization of European security system and owing to that the concrete structures were formed. The 1996 Lisbon Declaration on a Common and Comprehensive Security Model for Europe in the 21st century provided conceptual basis of European security. The necessity of foundation of common security space was precisely stipulated and a comprehensive and integral nature of security, respect of different values,

norms, and liabilities will be a determinative factor for this.

The significant place in the European security system takes the *Code of Conduct on Politico-Military Aspects of Security* adopted at the OSCE Forum in Budapest 1994. It is exactly this document that stated a conceptual provision that security is an integral, indivisible idea. Security of every particular State is closely connected with the security of other Member States. The most important general and inner-state measures on such important issues as disarmament, counter-terrorism, right for taking individual and collective self-defense measures, strengthening of trust, creation of favorable economic and ecological conditions were stipulated in the this document. Moreover, it is clearly stated in the Code that security means constructive, global, regional and sub-regional connections.

One more document occupies a special place in European security system - the *Charter for European Security* adopted at the 6th OSCE Summit of Heads of State or Government in Istanbul on 19 November 1999. According to the Charter, OSCE is the principal organization settling conflicts in the region and acts as an instrument for prevention of conflicts, overcoming crises, rehabilitation of societies ravaged by war and destruction. One of the

positive sides of the Charter is that it prohibits such extension of military cooperation that would create a threat for OSCE participants.

While providing the European security the special role is assigned to international agreements which determine the volume and usage regulations for some kinds of weapons. Security system of the Commonwealth of Independent States that is stated in chapter 3 of CIS Regulations can also be considered as a part of European Security. Until recent time Georgia was a participant of this Organization (CIS), however, the membership had no positive effect regarding assistance of the state development, coordinating of mutual interests, moreover it held down Georgia in many aspects and restricted her in choosing the international priorities, and that was the reason of Georgia's termination of CIS membership.

Established in 1949 NATO (North Atlantic Treaty Organization) is a part of European security. This organization provides political and military cooperation between European States, USA and Canada. According to NATO Statute the organization provides security only to Member States. Although NATO isn't merely a regional European organization, it plays a principal role in providing European security. NATO has proved

its vitality and its potential in providing inviolability to its members is indisputable.

Stability and success of European security system - though it is not perfect and should be refined - nevertheless plays a determinant role in Georgia's choice of international priorities. Events of the recent years explain Georgia's seeking for the approved international security systems and particularly for NATO. Geopolitical interests and subjective factors of the States of the Caucasus region at this stage don't allow creating favorable conditions for clear and good-neighbour existence. The existing cooperation is limited to a narrow range of mutually beneficial, economic, cultural relations, meantime the politico-military issues were moved to the background. Therefore, there is no alternative mechanism or system other than European for providing security of Georgia. Meantime, we should take into account the defect characterizing this system: it has a preventive character and in many aspects is not suitable for the facts that have already taken place.

Conclusions

In light of the above-stated the following conclusions can be made.

1) Security Georgia depends on moderate external policy, bilateral and

multilateral diplomacy, intense cooperation in the sphere of economic, social, cultural and scientific development;

2) In today's conditions providing security of Georgia by joint efforts of countries, peoples, religious confessions or other unities of the Caucasus region without participation and membership of Russia seems not possible, as the objective reality doesn't allow by only a local (sub-regional) security system to protect inviolability and stability, bearing in mind the fact, that the threat is several times higher than the potential ability to provide security;

3) It is impossible to provide security of Georgia only with the existing political and legal means; it is necessary to work out and involve new guarantees and cooperation mechanisms in the field of security and defense;

4) Georgia's intentions for European and worldwide integration associations are justified in respect of providing security in future and are least of all oriented for settling problems in the present. Thus, the existing security systems lack vitality to resist the events that have already happened

5) The system designated to provide security of Georgia should be supported in accordance with the approved

systems of Europe and NATO, the principal condition of which is interrelation of security of one State with security of the other participants of the whole treaty.

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PACTA SUNT SERVANDA

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Abstract

The given research paper deals with the issues of correlation between international and domestic law; it explores the causes of conflicts and argues in favor of the priority implementation of existing international treaty.

The principle of faithful implementation of international treaties is obligatory for all States regardless of whether they participate in the Vienna Convention on the Law of Treaties or not. Among the most important issues that are solved in this Convention, there is the problem of the correlation between an international treaty and a domestic law. According to the principle of Pacta sunt servanda, enshrined in Articles 26 and 27 of the Convention, every treaty in force is obligatory for its participants and must be faithfully implemented by them. A State-owner cannot refer to the norms of its domestic law as justification in the case of failure to implement the treaty.

Evidently, international treaties reflect the interests of the State-Participants.

But even in the case if the existing treaties due to circumstances no longer correspond to the interests of any state, they do not lose their validity. This fact helps to determine the degree of reliability of the state as a partner in international treaties.

As the modern practice analysis of the implementation of international law norms shows, States have used different ways to implement international treaty obligations in their legal systems. An automatic implementation of international treaties without their formal integration into the national legislation, which is possible as well as a reproduction of international treaty norms in the legal acts of different levels, helps to include international treaty in the national legal system.

One of the significant features of the implementation of international treaty norms is their self-executing, which does not require their implementation in national legislation for its realization, unlike non self-executing international treaties that cannot be applied directly in domestic relations and

require a publication of implementing legislation.

Introduction

One of the main principles of international law is a compliance with international treaties (*pacta sunt servanda*). According to Articles 26, 27 and 46 of the Vienna Convention on the Law of Treaties on 1969 [1], an international treaty, properly concluded and entered into force, must be abided by a State-participant faithfully and honestly. Honesty – is a key element in the concept of this principle and it implies the exact implementation of the content, obligations, terms, quality, place of fulfillment, etc. A strict implementation of the international treaty obligations by the state assumes the effectiveness of the treaty, regardless of the changes in the form of government or the state apparatus, territorial changes, strikes. The above mentioned circumstances cannot influence the implementation of international treaties.

According to the Vienna Convention on the Law of Treaties, states have no right to conclude a treaty contradictory to their obligations under existing treaties, previously concluded with the third countries. The infringement of diplomatic or consular relations between the participants of the international treaty does not affect the legal

relationships established between them by the treaty, except those cases when the presence of these relations is necessary for the implementation of the treaty.

1. Domestic (Constitutional) Guarantees

The analysis of the law and practice of various states shows that the order of interaction of treaty norms and national legislation is different. In some countries international treaty obligations are implemented automatically, without additional enactment (self-executing). Others take special laws to include acts of international law in the national legal system (incorporated). If an international treaty contains such provisions, that cannot be directly applied in a domestic sphere, then the implementation of the treaty provisions requires the adoption of an implementing legislation. In this case the rules and norms of the international treaty are included in the national regulations.

As the O.I. Tiunov has noticed, "The right to the democratic development is combined with the State obligation to take into account its international legal obligations, to reflect their specific requirements in constitutional acts, to establish the procedure for the application of international legal norms. [2]"

According to the Russian Federation Constitution paragraph 4 of Article 15,

"the universally recognized principles and norms of international law and the international treaties of the Russian Federation are the constituent parts of its legal system." "If an international treaty of the Russian Federation stipulates the rules contradictory to the law, then the rules of the international treaty are applied." [3] In other words, there should not be any contradictions between international obligations and the state law in the process of implementation of the State international obligations. If such collisions do occur, the international obligations should be fulfilled, and the provisions of national law should be brought in accordance with the standards of an international treaty of a State- participant.

S.V. Chernichenko points out, that "Domestic law should be in agreement with international law so that to ensure the implementation of the latter." [4] As these constitutional provisions are in Chapter I of the Constitution (Foundations of Constitutional Order of the State), it gives them a special legal meaning: no other provision of the Constitution cannot contradict the fundamental principles of the constitutional order (Part 2, Article 16), and any amendment in Chapter 1 means a retrial of the entire constitution and its replacement by a new one (p. 135). Thus, the RF Constitution recognizes the norms of international law, as a part of the national legal system, and

the possibility of their direct action within the state.

2. Integration into National Legislation

The Basic Law of the Russian Federation establishes an automatic integration [5] of entered into force international treaties into the national legal system. In this case there is no need to enact legislation to give effect to the provisions of an international treaty; it is enough for a state to express the will about their obligationness for the state itself in the form of signature, ratification or approval.

According to the RF Constitution paragraph 3 of Article 15 a prerequisite for the application of normative legal acts, relating to the rights, freedom and duties of a man and a citizen, is their official publication. This constitutional requirement is reflected in paragraph 3 of Article 5 of the Law of Treaties, according to which the implementation of the provisions of an international treaty is possible only after their official publication. In accordance with these requirements of the Constitution and the Law, the possibility of application of those international treaties, entered into force for the Russian Federation, that had been officially published, was established in the Resolution of the Plenum of the

Supreme Court of Justice №5 on October 10, 2003 [6].

The RF Constitution Part 4 of Article 15 recognizes the possibility of a direct action of international law norms in the domestic legal system in the case of establishing international treaty rules, different from those of national legal standards. Thereby, if public authorities or legal entities find out any contradiction between applicable national law standards and international treaty standards, they are obliged to apply the treaty norms of the Russian Federation.

Provisions of international treaties, which have to be automatically applied, as a rule, are clearly, specifically formulated and have a completed content. This fact allows to apply them directly within the state in order to regulate the appropriate legal relationships. Agreements on avoidance of double taxation [7] with established rules, different from those required by federal laws, may be attributed to the treaties of direct action in the national sphere (self-executing, i.e. which do not require the adoption of additional laws or subordinate acts). According to the Article 7 of the RF Tax Code Part I [8], if the international treaties of the Russian Federation establish the rules and norms of taxation contrary to those stipulated by the Tax Code and other laws and regulations on taxes, in this

case the rules and norms of the international treaties of the Russian Federation are applied without amendments or additions in above mentioned legal acts in accordance with the international treaty on avoidance of double taxation. As we can see, the norms of the Tax Code specifically provide for the possibility of application of international treaty norms without the need for their legislative implementation.

Certain provisions of the treaty or the treaty as a whole may need to adopt a special implementing legislation, which will reproduce treaty provisions. Since such treaties are not self-executing, the norms of current legislation have been altered and new laws are adopted in order to give these treaties a legal force in domestic law.

An example of the implementation of international obligations through the adoption of legislative acts (incorporation), which set the standards, corresponding to the treaty obligations, is the Federal Law on 28.12.2013 N 390-FL "On Amendments to Certain Legislative Acts of the Russian Federation in connection with the adoption of the Federal Law "On ratification of the Protocol on the accession of the Russian Federation to the Marrakesh agreement on Establishing the World Trade Organization on 15 April 1994" [9]. The Provisions of the Protocol

should be adapted to the relevant national legislation. According to this law the amendments and supplements have been made in the laws on mandatory health insurance in the Russian Federation, on the Legal Status of Foreign Citizens in the RF and others.

3. In the USA...

In the United States domestic legislation is considered to have precedence over the norms of international law. However, according to the Constitution of the United States Paragraph 2 of Article VI, all the treaties adopted by the United States, along with the Constitution and laws, are "the supreme right of the country" and take precedence over the domestic legislation. During proceedings courts use the Constitution and the laws of the country as well as the international treaties [10]. At the same time it is important to note that the implementation of international treaties in the United States is possible, if the treaty provisions are self-executing and are not contradictory to the subsequent laws. Non self-executing treaties require adopting an implementing legislation and the laws of the country, adopted for the implementation of the treaties, have to be applied [11].

Therefore, on the basis of the USA constitutional norms we can talk about the automatic integration of interna-

tional treaties into the national legal system. Although, the practice of their implementation shows that international treaties have the same legal force in relation to the national legislation, and in case of their contradictions - a later normative act has an advantage, regardless of whether it is a treaty or a law. As for the Constitution itself, it has a supreme legal authority both to the laws and international treaties of the United States.

Such an approach puts the states in an unequal position, because some states recognize the direct application of international treaty norms and their precedence over national legislation (Belgium, Georgia, Spain, Mexico, the Netherlands, Portugal, Russia, the Ukraine, France and others) [12], but others can justify violation of international treaties by a divergence with norms of national legislation (Australia, the UK, Canada, Ireland, Sweden and others) [13]. This legal position is contrary to the principle of *pacta sunt servanda*, according to which any active treaty is obligatory for its participants and must be fulfilled honestly, and according to which it is impossible to invoke the provisions of the domestic right and the hierarchy as justification for its default of a treaty. Besides, a current international treaty within the state cannot be altered or terminated by a domestic legal act. The current treaty may be terminated, mo-

dified or suspended only under the conditions stipulated by the treaty itself or in the order prescribed by the norms of an international law.

The opponents of this point of view argue that states are sovereign and, therefore, they are free to determine ways of domestic state implementation or termination of the international treaty. Such a perception of sovereignty seems to be not only very broad, but also contradictory, because it interferes with the fulfillment of the obligations under an international treaty to which the state has acceded. In fact the act of joining is also an expression of the sovereign will of the state. Cancellation [14] of a current and valid international treaty is possible only if the other side systematically and flagrantly violates its norms. In other cases, it may be the basis of an international legal responsibility of the state.

4. The Place in the Hierarchy of the Domestic Legal System

In terms of practical implementation of international treaty norms into domestic life, it is important to determine the status of international treaties in the hierarchy of national legislation (a legal force of an act). The fulfillment of the international obligations by a state depends on the place of international law in the hierarchy of national law,

i.e. how the contradiction between the norms of international law and the Constitution of the country, as well as between federal and local laws, will be resolved [15].

In most cases, the states equate international treaty with a national legislative act, whereby the treaty is incorporated into national law. Accordingly, if an international treaty is incorporated into domestic law by the federal law, then the subsequent national legislation cannot affect the implementation of international treaty obligations.

Therefore, the international treaties, ratified by the Federal Assembly in the form of a federal law, occupy a higher position than the ordinary laws, but concede to the RF Constitution, which has the supreme legal force, according to paragraph 1 of Article 1. If an international treaty or its part is contrary to the specific provisions of the RF Constitution, then the acceptance of obligations on such a treaty is possible only with the relevant amendments in the Constitution (or the adoption of a treaty with clauses to certain provisions, contradictory to the Constitution). This is a special procedure for the adoption of a special law on the amendments, which requires a qualified majority of the members of the Federal Assembly and the approval of not less than two thirds of the Fede-

ration members. In this connection an interesting point of view belongs to E.T. Usenko, who notes that "while concluding an international treaty the State is obliged to take into account its domestic legal norms, the presence of domestic opportunity to amend them, if necessary, in order to fulfill its international obligations [16].

Returning to the RF Constitution Part 4 of Article 15 we will find the following provision: "... if an international treaty of the Russian Federation stipulates the rules different from those stipulated by the law, then the rules of the international treaty have to be applied." In this regard, there arises a question: does any international treaty have the precedence, regardless of the level of the decision made on implementation of the treaty, or only those treaties do, which obligations are adopted in the form of a law? The Constitution cannot answer this question. Indeed, in paragraph 4 of Article 15 of the Constitution no treaties, ratified by the Russian Federation, are mentioned and it is possible to interpret the Constitution in such a way, that any international treaty would have the advantage over the law, no matter by whom it was decided to be adopted (for example, a bilateral interagency treaty, entered into action after signing by the Federal Minister).

To clarify the issue we would refer to a provision in paragraph 1 of Article 15

of the same Act, in which the subjects of ratification, i.e. adoption of a treaty by the Parliament in the form of federal law, are international treaties that establish rules different from those stipulated by law and require amendments in the current laws or the adoption of new federal laws [17]. Treaties of another character may be put into action by the decision of the President, the Government or the authorized authority. Consequently, the international treaties, that have not passed the ratification procedure by Parliament and have not been adopted in the form of a federal law, cannot claim priority in respect of laws. Another interpretation would be contrary to the principle of authority separation and would mean the substitution of the legislator.

According to the logic of law-making, in the hierarchy of sources of domestic law international treaties can have the status only of such an act, with the means of which they were incorporated into the national legal system and may have priority in respect of these acts and subordinate ones. Consequently, if the treaty is concluded by the authority, which regulations are below the law by legal force, it cannot have greater force than the law.

Such a perception is reflected in the Resolution of the Supreme Court Plenum on October 10, 2003 №5

(paragraph 8), which states: "The rules of the current international treaty of the Russian Federation, which agreement to be bound was adopted in the form of a federal law, have a priority in application in respect of the laws of the Russian Federation [18].

International treaties of the Russian Federation, adopted in the form of a federal law, should not contradict the federal constitutional laws – it is a demand of the Constitution (chapter 3 p. 76): "Federal laws cannot contradict federal constitutional laws." Therefore, at the conclusion of international treaties the provisions, contradicting the current federal constitutional laws, should not be taken, or the relevant articles of federal constitutional laws should be pre-altered. Although, there is a quite small probability of crossing regulation items, listed in the Constitution of federal constitutional laws and international treaties of Russia.

The implementation of international treaty obligations may be affected by the Constitutional Court, which is obliged to check the signed international treaties, as well as constitutionality of acts, sanctioning the conclusion of international treaties and determining the order of their application in the case of their infringement of constitutional provisions (for example, in the event of disputes about a competence of the federal public authorities to

conclude international treaties). Besides, by checking the concordance of laws and regulations of international treaties entered in force for the state, the Constitutional Court may provide the fulfillment of the state international obligations. According to A.N. Talaev, the resolution of the Constitutional Court, in which a law or a regulation is recognized not to be corresponding to the RF Constitution, entails the loss of the act force, but it is limited only by the domestic sphere and does not affect the action and the validity of the international legal treaty [19].

5. Solution of Conflict Questions

However, what happens if the discrepancy between international law norms and a domestic legal act of a higher level will be found in the practice of application of international law norms? According to L. P. Anufrieva "the court application of international treaties, concluded by Russia, may cause difficulties because of different interpretations of constitutional provisions and rules of other legal sources. For instance, from the set of articles of the Federal Law "On International Treaties of the Russian Federation" dated 15 July 1995 (Articles 5, 6, 14, 15), it follows that in the event of the divergence between domestic norms and provisions of international treaty, the norms of the latter are applied only

in the case of its ratification in the form of a federal law, while the provisions of the Constitution could be interpreted as referring to any international treaty [20].

We consider that any arguments on the legal force of an international treaty, based on the principle of the hierarchy (subordination) of national legislation, would be contrary to the *pacta sunt servanda* principle, which was enshrined in the Vienna Convention on the Law of Treaties and requires conscientious implementation of the current treaty provisions by its members regardless to its location in the system of domestic law. As noted above, a state cannot refer to domestic rules as justification for failure to perform international treaty norms. The quite reasonable observation seems to have B. I. Osminina, who supposes that different states may use various means of implementation of international treaty obligations, allot a special place for international treaties in a hierarchical system of domestic law sources, have different approach to the problem of self-execution, direct applicability of international treaties, but the result should be the same – they must fulfill international treaty obligations [21].

Such an interpretation is caused by the fact that the subjects of international law and international treaties are the states as a whole, rather than their

authorities. The right to conclude international treaties – is a quality of an entire state, an element of its international legal subjectivity. There is no norm in an international law that would require the fulfillment of a specific constitutional procedure at the conclusion of international treaties by a state. Therefore, compliance or non-compliance of the domestic laws by a state cannot affect the obligation of international treaties.

A validity of an international treaty and the treaty itself are the concepts of international law. That is the reason why the Vienna Convention, following the principle of *pacta sunt servanda*, determines that a participant cannot refer to the provisions of its domestic law as justification for its failure to perform a treaty. On the other hand, the Convention allows for two exceptions when the violation of the domestic law may cast doubt on the validity of an international treaty: the violation must be clear and relate to domestic law norm of particular importance. This means the norms, the violation of which at the conclusion of an international treaty could lead to significant defects of state will (the Constitution, the principle of authority separation and the competence of state authorities, etc.).

However, if the state does not recognize such violations, then another

State-Partner has also no right to challenge the validity of a treaty entered into force, referring only to the fact that the first state has not fulfilled the provisions of its constitution or other legal acts. In the case of doubt another state may refuse an approval or a ratification of such a treaty and not to challenge the assurances of the State-Partner on their compliance with the laws. This would be a violation of the sovereignty and dignity of the State.

A deepening cooperation between international and domestic law is inevitable during the process of globalization and growing interdependence of nations. Their harmonious development and the strict compliance of the general principle of the law supremacy can provide with the successful establishment of a system of international relations, the perfection and the security of which entirely depends on the compliance with the principles and norms of international law.

Conclusions

The legal essence of an international treaty is an agreement, in which a mutual will of the participant sides is realized. A State, pledging to comply with a standard of an international law, expects the same from the other states. The most important part of the principle of *Pacta sunt servanda* is the requirement to exclude the possibility

of the State references to its domestic law as justification for failure to comply with the terms of the treaty. The other comprehension of this issue would mean the desire of the state to unilaterally alter the obligation of a State to change reciprocally taken international commitments.

A deepening cooperation between international and domestic law is inevitable during the process of globalization and growing interdependence of nations. Their harmonious development and the strict compliance of the general principle of the law supremacy can provide with the successful establishment of a system of international relations, the perfection and the security of which entirely depends on the compliance with the principles and norms of international law.

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