BRICS Law Journal
Volume III (2016) Issue 1

The journal's founder is

TYUMEN STATE UNIVERSITY
1930

ISSN 2412-2343 (Online)
ISSN 2409-9058 (Print)

Key title: BRICS law journal (Print)
Abbreviated key title: BRICS law j. (Print)
Variant title: BRICS LJ

Contacts: bricslaw@gmail.com

Frequency of Publication: four issues per year

Published by
LLC V. Em Publishing House,
92 Lobachevskogo str., Moscow,
Russia, 119454

BRICS LAW JOURNAL (BRICS LJ)

An independent, professional peer-reviewed academic legal journal.

Aims and Scope

The *BRICS Law Journal* is the first peer-reviewed academic legal journal on BRICS cooperation. It is a platform for relevant comparative research and legal development not only in and between the BRICS countries themselves but also between those countries and others. The journal is an open forum for legal scholars and practitioners to reflect on issues that are relevant to the BRICS and internationally significant. Prospective authors who are involved in relevant legal research, legal writing and legal development are, therefore, the main source of potential contributions.

It is published in English and appears two times per year. All articles are subject to professional editing by native English speaking legal scholars.

Notes for Contributors

Manuscripts must be the result of original research, not published elsewhere. Articles should be prepared and submitted in English. BRICS LJ doesn't accept translations of original articles prepared not in English. The BRICS LJ welcomes qualified scholars, but also accepts serious works of Ph.D. students and practicing lawyers.

Manuscripts should be submitted electronically via the website *www.bricslawjournal.com*. Articles will be subjected to a process of peer review. Contributors will be notified of the results of the initial review process within a period of two months.

Citations must conform to the *Bluebook: A Uniform System of Citation*.

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CHIEF EDITOR'S NOTE ON INTELLECTUAL PROPERTY COURTS IN BRICS COUNTRIES

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DOI:10.21684/2412-2343-2016-3-1-4-6

Recommended citation: Dmitry Maleshin, *Chief Editor's Note on Intellectual Property Courts in BRICS Countries*, 3(1) BRICS Law Journal 4–6 (2016).

Patent or Intellectual Property Courts (IP Courts) are considered specialized courts. They are specialize in intellectual property law and have exclusive jurisdiction over patent law disputes.

Brazil has not yet introduced specialised IP Courts separated from the courts of general jurisdiction. The 1996 Industrial Property Law did refer to the creation of specialized intellectual property courts but this has not yet happened. Intellectual property cases are currently considered in the courts of general jurisdiction by a specialized intellectual property division. There are also appellate courts that have exclusive jurisdiction over intellectual property cases.

In ***Russia***, the IP Court acts as a specialised court and is part of the commercial courts system. The scope of its competence covers disputes connected to intellectual rights.

This category of disputes is notable not only for the complexity of the legal analysis but also for the complexity of technical issues connected with the specifics of intellectual rights. Handling a case not only requires serious experience of legal practice but also skills in the technical and spheres. The judge considering such a case usually needs to understand some technical issues connected with intellectual property rights. The specialized IP Court provides efficiency of judicial proceedings by means of specialization of judicial practice in this area. Narrow specialization of judges increases the quality of judicial work, and reduces consideration time of a case.

The Russian IP Court was founded in 2011. However, the idea of a specialized court was announced for the first time in the late 80s. There were some drafts on

this topic and even some laws supported this idea and contained the provisions concerning the necessity to establish a specialized IP Court. The creation of the Patent Court of the USSR was stipulated in the 1988 Law 'On Inventive Activity in the USSR' (Art. 55, 56), in the 1991 USSR Law 'On Inventions in the USSR' (Art. 14, 15, 25, 42, 43), in the 1991 USSR Law 'On Industrial Models' (Art. 26), in the 1991 USSR Law 'On Trademarks and Service Marks' (Art. 32). The USSR Law 'On the Patent Court of the USSR' did not come into force. The Concept of judicial reform in the Russian Federation (1991) designated a need for court specialization and judicial specialization. The 1992 Law 'On Trademarks' provided for the creation of the Patent Court of the Russian Federation. However, the legislator refused this idea in favor of an administrative order on dispute settlement in this area. In 2010, the project of the Federal Constitutional Law 'On Patent Courts of the Russian Federation' providing for the formation of an independent patent courts system was brought to the State Duma (the Russian parliament) but was not accepted. The initiative for creating today's Intellectual Property Court was that of the Supreme Commercial Court of the Russian Federation which even adopted a special Plenum Resolution in 2013 on this court functioning.

The IP Court is situated in Moscow. The structure of the court consists of the presiding judge, two deputies, a presidium and two judicial panels. There is also an Academic and Advisory Council. It uses the *Arbitrazh* (Commercial) Procedural Code as the procedural rules for considering cases.

The IP Court acts as both a court of the first instance and as a court of cassation. Despite the IP Court being part of the commercial courts system, the criteria of jurisdiction of commercial courts do not apply to it: its competence does not depend on the nature of the dispute (economic or personal dispute) or on the status of the subject to a dispute (citizen, legal entity or sole trader).

As a court of the first instance, the IP Court considers: cases of contest of legislative acts of the federal government in the sphere of intellectual property; and cases of disputes on intellectual property activity. As a court of cassation, it considers: cases previously considered in the IP Court as in a court of the first instance; and cases in the sphere of intellectual property decided by *Arbitrazh* (Commercial) Courts.

India has a specialized administrative tribunal that exclusively considers intellectual property cases.

In ***China***, there are specialised IP Courts. Intellectual property cases are considered by courts of general jurisdiction with specialized divisions as well as in three specialized IP Courts. There are specialized intellectual property divisions in the Supreme People's Court of China. Specialized IP Courts were established in Beijing, Shanghai and Guangzhou in November 2014. These courts have special jurisdiction over intellectual property cases.

As courts of the first instance, the IP Courts consider cases concerning patents, computer software, trade secrets of a technical nature, etc. They also hear appeals

on first-instance decisions in intellectual property cases decided by basic courts located in these three regions.

Hong Kong has no specialized IP Courts. All intellectual property claims are filed in the court of first instance. There are specialized intellectual judges in the courts of Hong Kong.

In ***South Africa***, there are are two IP Courts, one for patents and one for trademarks. The 1952 Patents Act created a specialized patent court of the first instance – the Court of the Commissioner of Patents. It has a single patent judge. There is also a Copyright Tribunal to decide licensing disputes.

Therefore, all BRICS countries have special legal regulations on intellectual property litigation. Some countries, such as Russia, China and South Africa, have created specialised IP Courts. In other countries, intellectual property cases are considered in the courts of general jurisdiction.

ARTICLES

GENERAL APPROACHES TO DOMINANT MARKET POSITION, PROHIBITION OF ABUSE OF MARKET POWER, AND MARKET STRUCTURE CONTROL WITHIN THE BRICS COUNTRIES

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DOI:10.21684/2412-2343-2016-3-1-7-33

The article presents research on the general approaches taken by BRICS countries through their legislation and legal orders to counteract anticompetitive market strategies such as abuse of dominant market power and market structure control, as a means of both global and regional governance in the legal orders of China, India, Russia, and South Africa. The author pays particular attention to current legislation of the BRICS countries in the field of competition protection with regard to provisions related to (1) the criteria for establishment of a dominant market position and (2) market structure control and restriction of anticompetitive mergers & acquisitions, and 'concentration' of enterprises' market power control fixed by Asian (China and India), Euro-Asian (Russia), and African (South Africa) legal orders and prohibition of abuse of market power. The article argues that our society is interested in the engagement of the population in trade and industrial activity. This is the general rule. Nowadays, however, this rule allows exceptions: restrictions on freedom of trade can be justified by exceptional circumstances in certain cases and under certain circumstances (e.g. an exemption necessary in the interest of security of the state or public interest). The analysis of substantial contents of the laws on competition and monopolies of the abovementioned BRICS countries and relevant case law shows the existence of a number of conventional, generally acknowledged (unified) provisions and norms. At the same time, there are specific features that make them different. These generally acknowledged provisions and peculiarities are a focus of the article.

Key words: BRICS; protection of competition; restrictive business practices; market power; dominant market position; abuse of market power; prohibition of abuse of market power; market structure control; mergers & acquisitions.

Recommended citation: Ksenia Belikova, *General Approaches to Dominant Market Position, Prohibition of Abuse of Market Power, and Market Structure Control within the BRICS Countries*, 3(1) BRICS Law Journal 7–33 (2016).

Abbreviations

AML – Anti-Monopoly Law of the People's Republic of China of 2007

BRICS – Grouping of Countries Comprising Brazil, Russia, India, China, and South Africa

M&As – Mergers & Acquisitions

MNCs – Multi-National Corporations

OECD – Organization for Economic Cooperation and Development

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1. Introduction[1]

Clubbing together is in the mainstream nowadays. Thus four major emerging national economies – Brazil, Russia, India, and China – clubbed together in 2006 and created BRIC. With South Africa joining in April 2011, the term BRICS has become a widely used acronym for the shifting of global economic power from developed economies to major developing countries.

Given their expanding economic size and increasingly active diplomacy, BRICS countries are gradually gaining greater influence over the international decision-

[1] As for Brazil, see my research: Belikova K. *La protección jurídica de la competencia en MERCOSUR,* 26 BLC 59-73 (2010), at <http://ec.europa.eu/competition/publications/blc/boletin_27.pdf> (accessed Nov. 17, 2010).

making process. It was even forecasted by Goldman Sachs that BRIC economies could become as large as the G7 economies by 2032.[2]

At the same time, there is the opinion that BRICS countries face challenges at present and in the future. Some people[3] say these challenges include the lack of global dynamism, important treaties are being negotiated but not all BRICS countries take part, changes in the process of production and commercialization of industrial products (global value chains) – this is particularly worrying, given the present competitive conditions in the international market for manufactures, taking, for instance, recent Latin American experiences. Others[4] share the critical view that includes doubts about the very nature of the group; and there is also concern that the economic agenda of BRICS countries could pose new challenges to human rights and development, particularly given the absence of domestic frameworks for accountability on international engagements.

In any event, emerging powers themselves see their future in a deepened integration into the international system and globalization.[5] We consider that the emergence of BRICS countries represents an important change in the global political economy. In this regard, one of the most significant and interesting developments in recent years has been the increasing cooperation between the BRICS countries in international competition policy.

Having started from different backgrounds, they have made remarkable progress in the creation of effective competition regimes and are attempting to develop their own local competition culture.

At present, all BRICS countries have modern competition regimes. As a common core serves the subject matter and declared goals of respective legal regulation, likewise it serves the common challenges BRICS countries face.

Thus, the general approaches taken by BRICS countries through their legislation and legal orders to counteract leading anticompetitive market strategies will be the subject matter of the present article.

The main idea of this article resides in the following. The analysis of substantial contents of the laws on competition and monopolies of the abovementioned BRICS

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[2] O'Neil J., Stupnytska A. *The Long-Term Outlook for the BRICs and N-11 Post Crisis*, 192 Goldman Sachs Global Econ. Paper 3 (2009), at <http://www2.goldmansachs.com/ideas/brics/brics-at-8/BRICS-doc.pdf> (accessed Jan. 6, 2014).

[3] Baumann R. *Seven Challenges to the BRICS* (2013). Materials presented at the International Conference 'BRICS: perspectives of cooperation and development' held on behalf of the Ministry of Economic Development of the Russian Federation, Moscow (Dec. 5, 2013).

[4] John L. *Engaging BRICS. Challenges and Opportunities for Civil Society*, 12 OIWPS (2012), <http://www.oxfamindia.org/sites/default/files/Working%20paper%2012.pdf> (accessed Jan. 10, 2014).

[5] See: Концепция участия Российской Федерации в объединении БРИКС [Kontseptsiya uchastiya Rossiyskoy Federatsii v ob'edinenii BRIKS [Concept of the participation of Russia in BRICS]] (2013), <http://президент.рф/media/events/files/41d452a8a232b2f6f8a5.pdf> (accessed Jan. 14, 2013).

countries and relevant case law shows the existence of a number of conventional, generally acknowledged (unified) provisions and norms. For example, we can name the following: *forbidden anticompetitive actions and characteristics (indications) of abuse of a dominant position* – fixing limits and price manipulations with regard to goods (services), carrying out discrimination between equal contractors, imposing on contractors additional (extra) goods and unreasonable conditions of contracts.

At the same time, economic concentrations by way of mergers & acquisitions (M&A) are a focus of the legislators of BRICS countries and meet the identical restriction of 'excessive' concentration. The existence of such a norm of an anti-monopoly orientation, being caused by the current economic conditions, is justified in the countries that already have an effective economy, for example Russia and China, and it can promote an increase in efficiency, for example in India and South Africa. But in China and India it is a rare mechanism so far.

Thus the general approaches taken by BRICS countries through their legislation and legal orders to market structure control and restriction of anticompetitive M&A will also be a focus as these forms are often used (along with others)[6] by transnational corporations (hereinafter TNCs). The steady growth in the transnationalization of the world economy reflected in increased international movement of capital, labor, technology, and information facilitates the implementation of strategies for the integration of entrepreneurial activities of the BRICS countries and the formation of TNCs through the transformation of national enterprises (legal entities, etc.), creating in the course of their activities subsidiaries abroad and acquiring shares of foreign enterprises in other ways.

On the one hand, these corporations have the nationality of the country in which they are established; on the other hand, by the nature of their interests and the scope of their activities they become international. TNCs have different ways of conducting their activities in other countries: from investments on the ground (e.g. the establishment of a completely new enterprise overseas) to delivering manufacturing plants to a host country through a system of mutual participation and joint ownership of companies, securities, etc.[7] Over the last decade TNCs have developed several standard methods of functioning in the national markets of a number of different countries, and one of them, one that creates preconditions

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[6] See in detail: Нарышкин С.Е. и соавт. *БРИКС: контуры многополярного мира* [Narishkin S.E., et al. (ed.) [*BRIKS: kontury mnogopoljarnogo mira* [*BRICS: the contours of the multipolar world*]] 243-295 (The Institute of legislation and comparative law under the Government of the Russian Federation; Jurisprudence 2015); Беликова К. и соавт. *Национальные особенности и перспективы унификации частного права стран БРИКС: учебник. В 2 т.* [Belikova Ksenia, et al. (ed.) [*Nacional'nye osobennosti i perspektivy unifikacii chastnogo prava stran BRIKS*] [*National characteristics and prospects for the unification of private law within the BRICS countries*]] 220-302 (Moscow RUDN 2015).

[7] See: Авдокушин Е.Ф., Жариков М.В. *Страны БРИКС в современной мировой экономике* [E.F. Avdokushin, M.V. Jarikov, *Strany BRIKS v sovremennoj mirovoj jekonomike* [*BRICS countries in the modern world economy*]] 27 (Moscow Magistr 2013).

for facilitation of the implementation of global and regional governance, is proposed for consideration in this article.

Firstly, concentrations between undertakings can help increase economic scale, optimize resource allocation, and enhance the competitiveness of enterprises. Secondly, they may result in the decrease in the number of competitors. Particularly, when the concentration of undertakings reaches a level where undertakings can dominate or control a market, it may eliminate or restrict competition. Therefore, while stipulating that through the mechanisms of fair competition and voluntary alliance undertakings shall concentrate according to the law, thereby expanding the scope of operations and improving market competitiveness, the laws of the countries under study provide a system to control the concentrations between undertakings so as to prevent possible negative impacts on competition.

That is why we adhere to the following ***methodology of study:***

– Acts. Scope of application and general provisions;

– Relevant case study

– with regard to:

1. Concept and general characteristics of **sources of competition law** within the legal orders of China, India, Russia, and South Africa with regard to abuse of dominance;

2. Criteria for establishment of a **dominant market position** fixed by Asian (China and India), Euro-Asian (Russia), and African (South Africa) legal orders and prohibition of abuse of market power;

3. **Anticompetitive M&As and market structure control** realized by the responsible governmental bodies. General provision on restriction (control) of 'concentration' of enterprises' market power. Measures for the prevention and control of abuses of a dominant position in the market;

4. **BRICS domestic competition authorities cross-border cooperation** and **interaction** in the field under study.

2. Discussion

2.1. General Characteristics of Sources of Competition Law Within the Legal Orders of China, India, Russia, and South Africa.

China, Anti-Monopoly Law (AML) of the People's Republic of China of 2007 No. 68, adopted at the 29th meeting of the Standing Committee of the 10th National People's Congress of the PRC.

Before 1978, the Chinese economy could be characterized as a centrally planned economy. When the economic reform began in 1978 in China, a competition mechanism began to be introduced progressively. Since 1993 China has been developing a legal system for the socialist market economy and in that same year it enacted the Anti-Unfair Competition Law, its first fundamental law on the

maintenance of the order of market competition. This law includes prohibitions against practices by undertakings having monopolistic status that restrict competition, administrative monopoly, selling goods at below-cost prices, tie-in sales, and bid rigging. Then, in August 2007, China promulgated the AML by drawing on the successful experience of foreign competition legislation and in line with the actual conditions in the country. The law prohibits monopoly agreements, abuse of dominant market position, anticompetitive concentrations between undertakings, and abuse of administrative power to eliminate or restrict competition.[8]

India, Competition Act of 2002, No. 12 of 2003, Acts of Parliament, 2002 (India).[9] While the earlier Monopolies and Restrictive Trade Practices Act, 1969 had focused on curbing monopolies, the Competition Act, 2002 focuses on promoting competition. Keeping in view the economic development of the country, the Act provides for the establishment of a commission to prevent practices having an adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers, and to ensure freedom of trade carried on by all market participants in India.[10]

Russia, Federal Law No. 135-FZ of 16 July 2006 On Protection of Competition (as amended in 2011). Under this Law, competition policy in the Russian Federation is carried out taking into account the practice of previous years, national economic priorities, and the production pattern that has been formed in the country. The proposed measures should contribute to enhancement of the efficiency of the bodies of state authority and local self-government in the conditions of the market economy, the development of competition in the Russian markets, and the increase in the competitive capacity of domestic producers.[11]

South Africa, Competition Act No. 89 of 1998, § 3(1-2) (S. Afr.) (as amended in 2009). South Africa depends on direct foreign investment and thus has an interest in demonstrating to a prospective investor that it takes a proactive stand on fair competition and the preservation of economic freedom, though the South African economy is characterized by high levels of concentration in many sectors compared to other developing countries. The Reconstruction and Development Program, which was essentially the socio-economic policy framework in South Africa's first democratic government, had as one of its elements the promotion of competition as a remedy

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[8] Yang B. *Chinese competition policy*, 22 BLC 22: 25-31 (2006), at <http://ec.europa.eu/competition/publications/blc> (accessed July. 10, 2013); Emch, Regazzini, et al. (eds.) *Competition Law in the BRICS Countries* 150 (Alphen aan den Rijn: Kluwer Law International 2012).

[9] Available at <http://www.unctad.org/sections/ditc_ccpb/docs/ditc_ccpb_ncl_India_en.pdf> (accessed Feb. 3, 2014).

[10] Мозолин В.П. Личность, право, экономика современной Индии [Mozolin V.P. *Lichnost', pravo, jekonomika sovremennoj Indii* [*Personality, law, economy of modern India*]] 167-171 (Moscow Nauka 1979). Regazzini Emch (note 9 above) at 101.

[11] Federal Antimonopoly Service of Russia Report on Competition Policy in 2006 (2006).

for excessive concentration and state control in the economy. The development of competition policy in South Africa should also be seen in the context of the shift towards trade liberalization, privatization, and deregulation that started under the apartheid government. Its key aims were to introduce effective competition into an economy that was expected to be governed by a smaller state and exposed to unprecedented levels of international competition.[12]

As we know, complicated legal terminology, uncertain and indistinct legal structures, unclear wording, and vague concepts, so-called 'rubber' (ambiguous, equivocal) structures and norms (e.g. public order), make it necessary to resort to case law (administrative and court decisions) as a means of interpretation and clarification of these concepts. Thus, case law takes on special significance as a source of ideas underlying competition policies.

Both doctrine (jurisprudence) and legislation of foreign countries provide the establishment of control of market behavior of enterprises (economic entities), forbidding anticompetitive agreements and abuses of a market dominant position, and monitoring market structure in order to prevent its distortion as a result of anticompetitive mergers & acquisitions. Such a control is an essential part of a market strategy stimulated by the governments of all the countries under consideration. Let us look at it closer. And as for the presence or absence of internal (national) competition within BRICS countries, we should bear in mind that there is no place where we could find real competition. We should remember what conditional competition is. And we should be aware of the fact that a competitive economy is an ideal we all want to reach.

2.2. Criteria for Establishment of a Dominant Market Position Fixed by Asian (China and India), Euro-Asian (Russia), and African (South Africa) Legal Orders and Prohibition of Abuse of Market Power

The history of monopolization is inseparably linked with the development of the processes that at each stage accelerated the growth of monopolization of the economy, molding it into new forms. The most important of them are: the growth of the joint-stock company, the new role of banks and the development of a system of participation, monopolistic mergers as a way of centralization of capital, the evolution of forms of monopolistic association, and the newest forms of associations such as so-called multinational corporations (MNCs).

The Organization for Economic Cooperation and Development (OECD) defines MNCs as 'companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways'.[13] The economic

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[12] Afrika S-L., Bachmann S-D. *Cartel Regulation in Three Emerging BRICS Economies: Cartel and Competition Policies in South Africa, Brazil, and India – A Comparative Overview* IL 45: 975-1003 (2011); Regazzini Emch (note 9 above) at 207.

[13] OECD Guidelines for Multinational Enterprises, 3:14 (2008), <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (accessed Jan. 1, 2014).

impact of MNCs is quite significant and increasing: they operate in the form of multinational corporate groups organized in 'incredibly complex', multi-tiered corporate structures consisting of a dominant parent corporation, sub-holding companies, and scores or hundreds of subservient subsidiaries scattered around the world.

MNCs operate in different states, including emerging economies, through subsidiaries, branches, and alliances that may get involved in cartel and market dominance activities. That is why business activities of MNCs with their headquarters registered in the developed world are often subject to strict competition or antitrust laws.[14]

Abuse of dominant market position, a typical monopolistic practice, is regulated by antitrust laws in many countries and regions.

China's Anti-Monopoly Law, 2007 regulates such abuse, including the concept, definition, and determination of a dominant market position, and the category and legal liabilities of abuses of dominant market positions.

A precondition for abuse of 'dominant market position' is that, of course, the undertaking has such a position. Therefore, it is very important to define this term, which, according to the AML, is as follows: 'dominant market position refers to a market position held by a business operator [undertaking] having the capacity to control the price, quantity or other trading conditions … in a relevant market, or to hinder or affect any other business operator to enter the relevant market' (Art. 17 AML, Ch. 3).

Abuse of dominant position according to Article 17 of AML 2007 consists in:

'(1) selling commodities at unfairly high prices or buying commodities at unfairly low prices;

(2) selling products at prices below cost without any justifiable cause;

(3) refusing to trade with a trading party without any justifiable cause;

(4) requiring a trading party to trade exclusively with itself or trade exclusively with a designated business operator(s) without any justifiable cause;

(5) tying products or imposing unreasonable trading conditions at the time of trading without any justifiable cause;

(6) applying dissimilar prices or other transaction terms to counterparties with equal standing;

(7) other … [conduct] determined as abuse of a dominant position by the Anti-monopoly Authority under the State Council.'

As we can see, the list of illegal actions a dominant position can express – is not exhaustive.

Article 18 of AML 2007 specifies the factors according to which the dominant market position shall be determined: '(1) the market share of a business operator

[14] Afrika S-L., Bachmann S-D. (note 15 above) at 975–1003.

in [the] relevant market, and the competition situation of the relevant market; (2) the capacity of a business operator to control the sales markets or the raw material procurement market [*market power*, in other words]; (3) the financial and technical conditions of the business operator; (4) the degree of dependence of other business operators … [on] the business operator in transactions; (5) the degree of difficulty for other business operators to enter the relevant market; and (6) other factors related to … [determining] a dominant market position of the said business operator.'

Also according to the AML, a 'relevant market' refers to the product or geographic dimensions of the market within which undertakings compete with each other regarding particular products or services during a certain period of time. The detailed definition of relevant markets is provided in the Guidelines on definition of Relevant Market issued by the Anti-Monopoly Commission under the State Council, May 2009.[15]

Article 19 of AML 2007 provides for the circumstances that *prima facie* prove an undertaking may be assumed to have a dominant market position. They are: '(1) the relevant market share of a business operator accounts for 1/2 or above in the relevant market; (2) the joint relevant market share of two business operators accounts for 2/3 or above; or (3) the joint relevant market share of three business operators accounts for 3/4 or above. A business operator with a market share of less than 1/10 shall not be presumed as having a dominant market position even if they fall within the scope of [the] second or third item.'

This approach agrees closely with the ideas expressed in the Annual report of the EU Commission of 1980, where it was confirmed that an enterprise can be considered dominant if it holds a 40-45% market share, for enterprises occupying 20-40% of the market the possibility is less likely, and those possessing 10% market share – never can be deemed dominant.[16]

At the same time, Article 19 provides (like the South African legal order) a refutable presumption of a dominant market position: 'Where a business operator who has been presumed to have a dominant market position can otherwise prove that they do not have a dominant market, it shall not be determined as having a dominant market position.'

Since the AML took effect in 2008, quite a number of private actions have been filed with the Chinese courts. To date, all of the reported cases have been stand-alone actions and most of them challenged alleged abuse of dominance. In those abuse of dominance cases where judgments were rendered, the claims were all dismissed because of the plaintiffs' failure to define the relevant markets or their failure to prove the existence of a dominant position or the actual abuse of dominance.

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[15] Yang B. (note 9 above).

[16] Figari H., Gomez H., Zuniga M. *Hacia una metodología para la definición del Mercado relevante y la determinación de la existencia de posición del dominio*, 2 RCPI 153–187 (2005).

For example, in the first judgment – *Sursen v. Shanda*[17] – delivered in an antitrust lawsuit in China, the Shanghai Intermediate People's Court rejected an abuse of dominance action brought by Beijing Sursen Electronic Technology Co., Ltd (Sursen), an online literature website operator, against Shanda Interactive Entertainment Ltd (Shanda). Sursen alleged that Shanda had abused its dominant position in the market for online literature by forcing two authors to stop writing for Sursen a sequel to a popular online novel published by Shanda, and thus violated the prohibition on requiring exclusive dealings under the AML. Sursen adduced Shanda's marketing documents in order to prove Shanda's dominant position, but the court held that the evidence was insufficient to prove that Shanda held a dominant position in the relevant market.

In the case *Li Fangping v. China Netcom*, Li Fangping, a customer of China Netcom, accused China Netcom of abuse of dominance by engaging in discriminatory treatment. Li alleged that when applying for installation of landline phones with China Netcom, post-pay contracts were only available for permanent Beijing residents or nonpermanent residents who own real estate in Beijing, have been pre-pay customers for one year or provide a guarantee. The court found that there was a relatively high degree of substitutability between landline and mobile telephony services and between cable and wireless Internet services. The court dismissed Li's claim because of insufficient evidence of dominance presented. In addition, the court held that China Netcom's policies for post-pay landline telephony were justified because of the need to control credit risks.[18]

As for *India*, dominance as a concept refers to the exploitation of market power or employing improper means to maintain such market power by a single firm, and the provisions of the *Competition Act, 2002* seek to promote and ensure fair competition by prohibiting activities that raise competition concerns in the relevant market to the prejudice of the consumer in such a way (Sec. 4(1)). The Act also attempts to prohibit *abuse of dominance by enterprises or groups*, and it lists conduct which is considered to cause an appreciable adverse effect on competition in India (Sec. 4(2)).

Unlike the erstwhile Monopolies and Restrictive Trade Practices Act, 1969, the 2002 Act does not seek to regulate dominant position (i.e. big is bad) and instead prohibits the *abuse* of dominant position. Therefore, the Act seeks to regulate only abuse of dominance by dominant enterprises under Section 4 and not dominant enterprises that are not abusing dominance as provided under the erstwhile legislation.

Section 4 of the Act prohibits the abuse of dominant position by any 'enterprise' or 'group', as was mentioned above. An enterprise, as defined under the Act, includes all its divisions, units, and subsidiaries. A group, for the purposes of abuse of dominance cases, means 'two or more enterprises, which directly or indirectly are in a position to:

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[17] Regazzini, Emch (note 9 above) at 189.

[18] *Id*. at 189–190.

(a) exercise 26% or more of the voting rights in the other enterprise; or

(b) appoint more than 50% of the members of the board of directors in the other enterprise; or

(c) control the management or affairs of the other enterprise.'

Therefore, only an enterprise or a group can be considered dominant. Where two or more enterprises together engage in uniform conduct raising competition concerns, this may not be considered by the Commission under the provisions of the Act. Thus, unlike the law in the European Union,[19] on which the Act is largely based, there is no concept of collective dominance under the Act. Consequently, abuse of dominance is limited to an enterprise or group thereof (i.e. related entities) and not independent entities (two or more) which may together be considered to be dominant in the relevant market. Any conduct aimed at ensuring collective dominance can be captured under the anti-cartel provisions of the Act.

India's Competition Act of 2002 prohibits in its Section 4 abuse of dominant position, which, according to the sense of the law, takes place when an enterprise or a group:

'(a) directly or indirectly, imposes unfair or discriminatory

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service.

… For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to … [above] … shall not include such discriminatory condition or price which may be adopted to meet the competition; or

(b) limits or restricts

(i) production of goods or provision of services or market therefor; or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access (in any manner); or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.'

At the same time, 'dominant position' means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour' (Sec. 4).

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[19] Whish R., Sufrin B. *Competition Law* 281 (2d ed. Butterworths, London 1993). See also: Abuse of dominance and monopolization. OCDE/GD(96) 131 (1996). <http://www.oecd.org/dataoecd/0/61/2379408.pdf> (accessed Aug. 4, 2010).

According to Section 54, '[T]he Central Government may, by notification, exempt from the application of this Act, or any provision thereof, and for such period as it may specify in such notification (a) any class of enterprises if such exemption is necessary in the interest of security of the State or public interest; (b) any enterprise which performs a sovereign function on behalf of the Central Government or a State Government.'

Also, along with Section 2, which gives the definitions of the principal words and expressions used in the Act, the Act 'does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.' Thus, these enterprises can be monopolies and are able, theoretically, to abuse their market position.

South Africa's Competition Act No. 89 of 1998 (as amended) uses the same legal techniques as the Indian Act.

Abuse of dominance is determined with terms similar to those used in the Indian legislation. Section 8 states: 'It is prohibited for a dominant firm to –

(a) charge an excessive price to the detriment of consumers;

(b) refuse to give a competitor access to an essential facility when it is economically feasible to do so …,' but the domination is predisposed by a market share.

'Thus, *a firm* is dominant in a market if –

(a) it has at least 45% of that market;

(b) it has at least 35%, but less than 45%, of that market, unless it can show that it does not have market power; or

(c) it has less than 35% of that market, but has market power' (Sec. 7, Ch. 2).

At the same time, according to Section 10 of the Act a firm may apply to the Competition Commission to exempt from the application of Chapter 2 –

(a) an agreement or practice, if that agreement or practice; or

(b) category of agreements or practices, if that category of agreements or practices, if the agreement or practice concerned, or category of agreements or practices concerned, contributes to any of the following objectives:

'(i) maintenance or promotion of exports;

(ii) promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive;

(iii) change in productive capacity necessary to stop decline in an industry; or

(iv) the economic stability of any industry designated by the Minister, after consulting the Minister responsible for that industry' (Sec. 10(3)).

As for the abuse of dominance, the Act provides for: (a) 'a threshold of annual turnover, or assets, in the Republic, either in general or in relation to specific industries, below which the provisions of the Part B' – Abuse of a Dominant Position – do 'not apply to a *firm*' (i.e. a person, a partnership, trust); and for (b) 'a method for the calculation of annual turnover or assets' to be applied in relation to that threshold –

to be determined by the Minister, in consultation with the Competition Commission (Sec. 6(1)). Before making a determination, the Minister, in consultation with the Competition Commission, must publish in the *Gazette* a notice:

(a) setting out the proposed threshold and method of calculation for purposes of this section;

(b) and inviting written submissions on that proposal (Sec. 6(3)).

The Competition Tribunal has found that abuse occurred in six cases: on the part of *Patensie* (37/CR/Jun01), *South African Airways* (twice – 80/CR/Sep06 and 18/CR/Mar01), *Sasol* (72/CR/Dec03*)*, *Mittal Steel SA* (13/CR/Feb04), and *Senwes* (110/CR/Dec06).[20] However, in the *Sasol* case the finding was overturned (49/CAC/Apr05), and in the *Mittal Steel* case (43/CAC/Nov04) the finding was set aside and remitted by the Competition Appeal Court. In the *Senwes* matter (118/2010), an appeal against the Competition Tribunal's finding was upheld by the Supreme Court of Appeal on procedural grounds. The Constitutional Court has recently set the Supreme Court of Appeal's ruling aside (CCT 61/11). The Constitutional Court found that the Supreme Court of Appeal erred when it held that the referral did not cover the complaint in which *Senwes* was found to have contravened the relevant section of the Competition Act.

The early abuse cases at the Competition Tribunal included considerations of excessive pricing in the *Harmony/Mittal* matter, in which the Competition Tribunal found Mittal to be charging excessive prices. However, the Appeal Court remitted the matter to the Competition Tribunal for reconsideration as it ruled that the Competition Tribunal had not interpreted the excessive pricing provision of the Act correctly (although the Court did find that there was a *prima facie* case for excessive pricing).

Early abuse cases also tested certain exclusionary abuse provisions of the Act, such as inducement in the *South African Airways* case, and impact of exclusionary conduct in the *BATSA* case (55/CR/Jun05).

As for *Russia*, *Law No. 135-FZ of 16 July 2006 On Protection of Competition* embraces key provisions on dominant market position of the previous Law No. 948-1.

Dominant position is recognized when the position of an economic entity (a group of persons) or several economic entities (groups of persons) in the market of a certain commodity gives the economic entity or entities an opportunity to have a decisive impact on the general conditions of commodity circulation in the relevant goods market and (or) to remove other economic entities from this goods market and (or) to impede access to this goods market for other economic entities (Art. 5(1)).

At the same time, the Law on Protection of Competition in force changed a threshold starting at which an economic entity is considered to be dominant just on

[20] Regazzini, Emch (note 9 above) at 212.

the basis of its market share – from 65% to 50%. It was also made clear that dominant position can be declared by a state authority – the Federal Antimonopoly Service (FAS) of the Russian Federation – when: (1) a case on violation of antimonopoly legislation is considered or (2) a control on economic concentration is exercised.

Similarly, establishment of the existence of circumstances under which the economic entity with market share that exceeds 50% will not be considered dominant is the exclusive competence of the Antimonopoly Authority, considering that the economic entity can provide the Antimonopoly Authority or Court with proof that such a position of the economic entity is not dominant.

The new 2006 Law also contains the provisions of the previous Law No. 948-1, according to which an enterprise with market share of 35% cannot be considered dominant. This provision has two exemptions. The first concerns cases in which an enterprise that has less than 35% of the market can be deemed dominant by *other* federal laws (e.g. in the markets with state regulation of price-forming, tariffs, outputs, power, zones of service, etc.). The second is with regard to oligopolistic markets. Thus, the law defines that dominant position can refer to the company: (1) with market share less than 35% if there is a stable kernel of the largest companies in this market (e.g. there are two to five companies with market share from 50% to 70%); (2) if the company products are unique and have no substitutes, and the consumer is not able to reduce the consumption of these products, in spite of price growth; (3) if access by new sellers (players) into the market is complicated, and the prices and other conditions of sale of goods established by the company are freely accessed (e.g. via the Internet). This approach is close to the approach, already existing for a long time, in the enforcement practices of the European Union.[21]

An economic entity with a dominant market position is prohibited from abusing its market power by way of:

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[21] Байда А.Г. *Правовые аспекты доминирующего положения предпринимателя в Европейском Союзе*. In: Материалы семинара «Преподавание права Европейского Союза в российских ВУЗах – II», состоявшегося в Москве 5-7 декабря 2000 г. [Bayda A.G. *Pravovye aspekty dominirujushhego polozhenija predprinimatelja v Evropejskom Sojuze* [*Legal aspects of dominant position of businessmen in the European Union*]]. In: Materials of the seminar 'Teaching European Union law at the Russian Universities – II' (Dec. 5-7, 2000, Moscow) 174-190 (Moscow, Statut 2001)]; Беликова К.М. *Злоупотребление доминирующим положением в законодательстве, доктрине и правоприменительной практике Европейского Союза и стран Южноамериканского общего рынка – Аргентины, Бразилии и Перу*, 7(79) Право и политика 38–52 (2006) [Belikova K.M. *Zloupotreblenie dominirujushhim polozheniem v zakonodatel'stve, doktrine i pravoprimenitel'noj praktike Evropejskogo Sojuza i stran Juzhnoamerikanskogo obshhego rynka – Argentiny, Brazilii i Peru*, 7(79) Pravo i politika 38–52 (2006) [Belikova K.M. *Abuse of a dominant position in the legislation, doctrine and practice of the European Union and the countries of the southern common market – Argentina, Brazil and Peru*, 7(79) Law and politics 38-52 (2006)]]; Сушкевич А.Г. *Правовая квалификация доминирующего положения в новом антимонопольном законодательстве*, 2 Закон 25–29 (2008) [Sushkevich A.G. *Pravovaja kvalifikacija dominirujushhego polozhenija v novom antimonopol'nom zakonodatel'stve*, 2 Zakon 25–29 [Sushkevich A.G. *Legal qualification of dominant position in new antimonopoly legislation*, 2 Zakon 25–29 (2008)]].

1) establishment and maintaining of a monopolistically high or monopolistically low price for a commodity;

2) withdrawal of goods from circulation, if the result of such withdrawal is increase of price of the commodity;

3) imposing contractual terms upon a counter-agent which are unprofitable for said agent or not connected with the subject of agreement (economically or technologically unjustified);

4) economically or technologically unjustified reduction or cutting off the production of goods if there is demand for the goods or orders for their delivery are placed and there is the possibility of their profitable production, as well as if such reduction or cutting off the production of goods is not provided for directly by the Federal Laws, etc.;

5) economically or technologically unjustified refusal or evasion from concluding a contract with individual purchasers (customers) in the case where there are possibilities for production or delivery of the relevant goods as well as if such a refusal or evasion is not provided for directly by the Federal Laws, etc.;

6) economically, technologically or otherwise unjustified establishment of different prices (tariffs) for the same goods if not established otherwise by the Law;

7) establishment of an unjustifiably high or unjustifiably low price of a financial service by a financial organization;

8) creation of discriminatory conditions;

9) creation of barriers to entry into the goods market or to exiting from the goods market for the other economic entities;

10) violation of the procedure of pricing established by statutory legal acts;

11) manipulating prices on wholesale and (or) retail markets of electric power (capacity – Art. 10 Law No. 135-FZ 2006).

As for the features of the 2006 Law, it is worth mentioning that it contains a complicated system of exceptions from prohibitions on different types of monopolistic activities (e.g. Art. 13).

Enforcement practice proves that most often markets that become an object of the relevant court proceedings are markets for oil products, coal, housing services (e.g. elevators, repair works, storage of domestic waste, maintenance of gas equipment), rail and air transportation, airport activities, the power industry, communications services. Rarer, but also rather regularly, courts intervene in the markets for the services of warehouses for temporary storage and also in the markets for the production of bakery products.[22] And the question of a definition for geographical and product boundaries of the market is still a serious problem

[22] *Тай Ю. Судебная практика по делам о злоупотреблении доминирующим положением*, 1 Корпоративный юрист 10–12 (2012) [Taj Ju. Sudebnaja praktika po delam o zloupotreblenii dominirujushhim polozheniem, 1 Korporativnyj jurist 10–12 (2012) [Taj Ju. *Case law on abuse of a dominant position*, 1 Korporativnyj jurist 10–12 (2012)]].

(e.g. law-enforcement bodies tend to narrow geographical boundaries of the market).

Thus, transformation of retail trade into large trade networks (retailers) allowed the latter, despite their seemingly small market share, to dictate the rules of the game and determine the network entry conditions for suppliers and producers. Such influence of retailers on competition is explained by growing volumes of production and imported goods coupled with the deficit of trading outlets as well as the similarity of relationship practices between retailers and suppliers.

Some of the abusive practices of retailers include: charging suppliers for access to the retailers' network of stores; imposing pricing policy on suppliers; unilateral failure to fulfill contract obligations and unilateral termination of supply contracts; and suppliers' compensation of losses caused by theft in the retailers' trading outlets.[23]

The representative case in the field of suppressing abuses of market dominance is the *sulfur market case*. The main producers of sulfur in the Russian Federation are companies that also have connections with Gazprom OJSC, with over 50% share of the market in liquid sulfur. In March 2011 the price for liquid sulfur increased 246% over the price of the previous month, and the growth continued throughout 2011. Gazprom OJSC was fixing sulfur prices in accordance with a devised formulae for calculations that depended on the world prices for sulfur and diammonium phosphate, and some coefficients.

A FAS Commission concluded that the global prices for diammonium phosphate and the application of increasing coefficients depending on the world prices for this type of phosphorus-containing fertilizers did not affect the costs of sulfur production and the conditions of its sales in the domestic market, and could not be used to calculate the price. FAS imposed an administrative fine on Gazprom OJSC for fixing monopolistically high prices – a fine amounting to RUB 17,525,592.8 (around US$ 550,000). The court supported the FAS decision.[24]

2.3. Anticompetitive M&As and Market Structure Control Realized by the Responsible Governmental Bodies. General Provision on Restriction (Control) of 'Concentration' of Enterprises' Market Power

China's *AML 2007* provides a system to control the concentrations between undertakings so as to prevent possible negative impacts on competition (Arts. 23–27, 31 and others of AML 2007). This law does not specifically define the term 'concentration between undertakings'. Instead, it lists several concentration scenarios, including:

1) merger of undertakings;

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[23] Federal Antimonopoly Service of Russia. Russia's activities on developing competition in retail (2007).

[24] Federal Antimonopoly Service of Russia Report on competition policy in 2012 (2012).

2) control over other undertakings gained by an undertaking through acquiring their shares or assets; and

3) control over other undertakings or the ability to exert a decisive influence on the same gained by an undertaking through a contract or other means (Art. 20).

Once a concentration between undertakings adverse to market competition is completed, it will cost a great deal to rectify it. Therefore, the AML provides a system of pre-closing notification. Indeed, when their intended concentration reaches the threshold level as set by the State Council, undertakings shall notify in advance the Anti-monopoly Authority (AMA) under the State Council (Art. 21); they shall not implement the concentration in the absence of such notification.

The following documents and materials should be submitted:

1) a declaration paper;

2) explanations on the effect of the concentration on the relevant market competition;

3) the agreement of concentration;

4) the financial reports and accounting reports of the proceeding accounting year of the business operator; and

5) other documents and materials as stipulated by the AMA under the State Council (Art. 23).

But in any of the following circumstances, undertakings may dispense with such a notification:

1) one of the undertakings involved in the concentration owns 50% or more of the voting shares or assets of each of the other undertakings; or

2) one and the same undertaking not involved in the concentration owns 50% or more of the voting shares or assets of each of the other undertakings involved in the concentration.

At the same time, according to the Thresholds 'Reg', concentrations between business operators are subject to mandatory notification requirements if:

– the combined aggregate worldwide turnover of all parties to the concentration in the last financial year was more than RMB (Yuán) 10 billion (approximately US$ 1.6 billion[25]) and the turnover within China of each of at least two parties to the concentration in the last financial year was over RMB 400 million (approximately US$ 63.5 million); or

– the combined aggregate Chinese turnover of all parties to the concentration in the last financial year was more than RMB two billion (approximately US $ 317.4 million) and the Chinese turnover of each of at least two parties to the concentration in the last financial year was over RMB 400 million (approximately US $ 63.5 million).[26]

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[25] Exchange rate used: US$ 1 = RMB 6.3009 (average rate on Dec. 30, 2011) from People's Bank of China.

[26] Regazzini, Emch (note 9 above) at 197.

Where the AMA under the State Council decides to conduct further review, it shall, within 90 days from the date of the decision, complete the review, make a decision on whether to prohibit the concentration, and notify the business operators concerned of the decision in written form (Art. 26).

Estimating the compatibility of the concentration with the market, the AMA takes into account:

1) the market share of the business operators involved in the relevant market and the controlling power thereof over that market,

2) the degree of market concentration in the relevant market,

3) the influence of the concentration of business operators on market access and technological progress,

4) the influence of the concentration of business operators on consumers and other business operators,

5) the influence of the concentration of business operators on national economic development, and

6) other elements that may have an effect on market competition (Art. 27).

If the business operators concerned can prove that the concentration will have more positive impact than negative impact on competition, or the concentration is pursuant to public interests, the AMA under the State Council may decide not to prohibit the concentration (Art. 28).

By March 10, 2012, 13 decisions had been published, including 12 conditional approvals and one prohibition. Out of those 12 conditional approvals, only two cases (*InBev/Anheuser-Busch* in 2008 and *General Motors/Delphi* in 2009) were decided within the first phase. The other 10 cases were decided somewhere during the second phase or the extended period of the second phase (90-day review).

Merger review in *India* is governed by the *Competition Act, 2002*. Sections 5 and 6 of the Act are the focal provisions dealing with merger review in India. Section 5 prescribes worldwide Indian assets and turnover thresholds for transactions involving the acquisition of an 'enterprise' or mergers and amalgamations of enterprises.

'The *acquisition* of one or more enterprises by one or more persons or *merger* or *amalgamation* of enterprises shall be a *combination* of such enterprises and persons or enterprises' (italics added), if the operation parties fall under the legal provisions containing certain numerical indicators specified in Article 5 of the Competition Act, 2002, addressed to the enterprises (persons).

Thus, any acquisition is considered to be monopolistic where, for instance, 'the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have,

(A) either, in India, the assets of the value of more than rupees one thousand crores or turnover more than rupees three thousand crores; or

(B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India,

or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India, etc.' (Sec. 5, Competition Act, 2002).

The substantive test used to assess combinations is set out in Section 6. Domestic and international acquisitions, mergers or amalgamations (referred to as 'combinations') are required to give notice to the Competition Commission of India (CCI). This section prohibits combinations which cause or are likely to cause 'an appreciable adverse effect on competition within the relevant market in India' and treats such combinations as void. And 'no combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission' (Sec. 6).

In addition to the aforementioned provisions of the Act, the CCI issued the CCI Regs, 2011 Combination 'Reg' (the procedure in regard to the transaction of business relating to combinations), setting out the scheme for implementing the merger control provisions under the Act. Despite the fact that the Combination 'Reg' had been in force for less than a year, the CCI introduced amendments by way of the CCI Amendment 'Reg' published on 23 February 2012, which partially addressed the concerns of industry.[27]

To date, the CCI has passed orders in 28 combinations (of which 15 relate to intra-group reorganizations) within the prescribed statutory time limit of 30 days. The CCI completed its first merger control review (C-2011/07/01) relating to an acquisition from the Bharti Group of a 74% equity interest in two joint venture companies, Bharti AXA Life Insurance Ltd and Bharti AXA General Insurance Ltd, by the Indian conglomerate Reliance Industries Ltd.

Taking into account the relatively low market shares of the parties and the fact that there was no horizontal or vertical overlap between the parties, the CCI granted its approval within a relatively short period of 18 days from the notification.

The stated purpose of the *South African* competition law encompasses orthodox concerns related to efficiency, prices, and choice. In addition, the statute also articulates the purpose of the *Competition Act, 1998* as promoting competition in order to realize goals related to employment creation and retention, equitable participation in the economy by small and medium-sized enterprises, a broader and more racially diverse spread of ownership, and international competitiveness. The 1998 Act thus envisions a role for the competitive process in rectifying the distortions and inequities wrought on the economy and society by the apartheid regime. Both these strands in the legislation ultimately relate to the government's economic, development, and social policies.

The 1998 Act makes provision for a system of compulsory merger notification.

Mergers can be of the same kind:

(a) 'a small merger' means a merger or proposed merger with a value at or below the lower threshold established in terms of 'sub-s[ection] (1)(a)';

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[27] Regazzini, Emch (note 9 above) at 134.

(b) 'an intermediate merger' means a merger or proposed merger with a value between the lower and higher thresholds established in terms of 'sub-s (1)(a)'; and

(c) 'a large merger' means a merger or proposed merger with a value at or above the higher threshold established in terms of 'sub-s (1)(a)' (Sec. 11(5)).

As for this threshold

(a) A lower and a higher threshold of combined annual turnover or assets, or a lower and a higher threshold of combinations of turnover and assets, in the Republic, in general or in relation to specific industries, for purposes of determining categories of mergers contemplated in 'sub-s (5)'; and

(b) a method for the calculation of annual turnover or assets to be applied in relation to each of those thresholds must be determined by the Minister, in consultation with the Competition Commission (Sec. 11(1)).

For large or intermediate mergers, as determined by thresholds stipulated by 'Regs' issued by the Minister of Economic Development, notice must be given to the Competition Commission (CC); while notice in respect of small mergers may be given voluntarily or as required by the CC.

The CC issues decisions in respect of small and intermediate mergers and provides recommendations to the Competition Tribunal in respect of large mergers.

A *merger* occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm. Mechanisms of acquiring control are the following: (i) purchase or lease of the shares, an interest or assets of the other firm in question; or (ii) amalgamation or other combination with the other firm in question (Sec. 12(1)).

The CC can attach conditions to mergers if it believes that they will address significant public interest or competition concerns. These conditions could include structural remedies, such as divestiture of businesses, or behavioral remedies, such as supply obligations, or conditions addressing public interest concerns. Merger proceedings may include the submissions of a broad range of stakeholders, such as government, labor, consumer groups, and small business, which need to be taken into consideration in decision-making.

If it is possible that the merger is likely to substantially prevent or lessen competition, then, based on the 'rule of reason', the Commission should assess, among others, the following factors:

'(i) whether or not the merger is likely to result in any technological, efficiency or other pro-competitive gain which will be greater than, and offset, the effects of any prevention or lessening of competition, that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and

(ii) whether the merger can or cannot be justified on substantial public interest grounds, by assessing the following factors … :

… a particular industrial sector or region;

… employment;

… the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and

… the ability of national industries to compete in international markets.'

Thus, generally speaking, public interest considerations are reflected in the merger assessment provisions, which require the authority to determine whether or not a merger can be justified on substantial public interest grounds (Sec. 12A).

As for *Russia*, procedures on control of economic concentration in the Russian Federation are turned over to coordination by (consent of) the Antimonopoly Authority of a number of transactions and market actions provided in Article 7 of the *Law On Protection of Competition, 2006* with regard to, first, certain criteria indicating the types of transactions and market actions and, second, cases subject to consent.

The following actions shall only be performed with the antimonopoly body's *prior consent*:

– the merger, acquisition or establishing of a commercial organization (the latter if its capital is paid by stocks (shares) and (or) property that are the main production-related assets and (or) intangible assets of another commercial organization – Art. 27(1)(div.1)2)4)5) Law 2006);

– the merger of a financial organization merging with a commercial organization and *vice versa* (Art. 27(1)(div.6)7) Law 2006);

– the acquisition by a person (or a group of persons) of voting stocks of a joint-stock company or shares in the authorized capital of a limited liability company (Art. 28(1)(div.1-6) Law 2006);

– obtaining by an economic entity (a group of entities) of fixed production assets (except plots of land and non-industrial buildings, structures, installations, premises and parts of premises, incomplete construction facilities) and (or) non-material assets of another economic entity registered in the Russian Federation (with the exception of a financial organization) (Art. 28(1)(div. 7) Law 2006).

At the same time, the requirement on receiving the prior consent of the Antimonopoly Authority on a number of transactions and market actions does not apply in some cases, for example:

– if the actions specified in part 1 of the present article (28) are carried out by the persons entering one group of persons on the bases provided by the provisions of division 1 of part 1 of Art. 9 of the present Federal Law (2006), or

– if their implementation is provided by acts of the President of the Russian Federation or acts of the Government of the Russian Federation, etc. (Art. 27(2) Law 2006).

The criteria of an assessment of the compatibility of economic concentration and a market thus designated above have a complex character. For example, one of such criteria, enshrined in Articles 27 and 28 of the 2006 Law, is the aggregate revenues from the sale of commodities in accordance with the accounting balance sheets as of the latest reporting date.

Additional criteria can be mentioned, for example:

– for transactions on acquisition of voting stocks of a joint-stock company (JSC), similar to Private Company or Closely Held Corporation in common law countries (UK, USA, etc.) – a certain percent of the stocks;

– for transactions on acquisition of a certain value of the volume of shares in the authorized capital of a limited liability company.

Article 30 of the 2006 Law names the types of transactions and market actions subject to prior or post (subsequent) control.

In general, it is necessary to point out that the institute of control of economic concentration practiced by the Russian Federation Antimonopoly Service is the main form of the prevention of abuses by the dominant position.

Thus, in 2012 FAS considered 2,494 pre-merger notifications and 1,943 post-merger notifications from economic entities: it granted 2,449 pre-merger notifications (of which 229 with issuing determinations) and 1,933 post-merger notifications; it refused 45 pre-merger notifications and 10 post-merger notifications.

As for typical cases, to name a few:

1. *Approval of pre-merger notifications.* FAS analyzed the wholesale market of granite macadam due to investigating a pre-merger notification of National Non-Metallic Company, OJSC (NNK; similar to Public Company or Openly Held Corporation in common law countries about acquiring 100% voting shares of Pavlovskgranit OJSC as well as a pre-merger notification of NNK on acquiring 75% voting shares of First Non-Metallic Company OJSC (PNK). (Informational note: FAS used the data from these companies and other sources; the time interval of the study was 2011–2012.)

Having researched the wholesale market for granite macadam, FAS identified signs of Pavlovskgranit OJSC having the dominant position within the boundaries of the Central Federal District. FAS granted NNK the pre-merger notifications on acquiring 100% voting shares of Pavlovskgranit OJSC and 75% voting shares of PNK. Both decisions were accompanied by determinations, the second one contained structural remedies.

2. *Granting of a pre-merger notification.* In 2012, FAS considered a petition on acquiring 70% of the statutory capital of BNP Pariba Vostok Commercial Bank Ltd by the Savings Bank of Russia OJSC.

Having made the necessary calculations, FAS concluded that despite the Savings Bank of Russia OJSC possibly having a dominant position in the regional markets of banking services, acquiring 70% of the statutory capital of BNP Pariba Vostok Commercial Bank Ltd would not restrict competition in these markets and in the market for factoring services in view of the specifics of the transaction.

3. *Dismissal of a pre-merger notification.* FAS dismissed a pre-merger notification by Gazprombank OJSC for acquiring 50.9% voting shares of Moscow Integrated Grid Company OJSC in trust management because the transaction in question would

result in combining activities for transmitting electric power with electric power generation by legal entities affiliated with Gazprom OJSC.[28]

Thus, it is established that legislation of the BRICS countries under study reacts identically on the concentration of capital by means of mergers & acquisitions. And the purpose of the practiced state control consists, naturally, not so much in forbidding operations on concentration as, on the contrary, in stimulating mergers, associations of the national enterprises for strengthening of their competitiveness in the world market.

As we know, on the national level the most fundamental step that had already been taken by policymakers worldwide (and BRICS countries are not an exception) to embrace a more market-based economy was to build a competition culture.

It is conventional wisdom that for an effective competition regime a competition agency must do more than simply enforce the competition law. It is important for competition agencies especially in developing countries to engage in competition advocacy and awareness generation. And this idea is worth special mentioning with regard to M&As in the BRICS countries under study. Let us look at several examples.

2.4. BRICS Domestic Competition Authorities Cross-Border Cooperation and Interaction

In *Russia*, for instance, under the Federal Antimonopoly Service the Public Advisory Board (Council), embracing representatives of the most influential non-commercial associations and business associations, is in full operation. The Council monitors the activities of FAS and develops recommendations on improvements to antitrust law and policies and enforcement of suppression of their violation. Councils are formed and operate in the territorial offices of FAS. Simultaneously, under FAS, Advisory Councils (AC) on the key markets (e.g. AC on advertising, AC on unfair competition, AC on energy, etc.) are in operation. Participants in the markets, representatives of non-commercial associations, and power supervisory authorities are part of these Advisory Councils. This practice allows FAS to evaluate objectively a situation that develops in the relevant markets and increases transparency of decisions made by FAS.[29]

Competition advocacy constitutes all the activities conducted by the competition authorities relating to the promotion of a competitive environment through non-enforcement mechanisms, through their relationships with other governmental entities and by increasing public awareness of the benefits of competition.[30] Hence,

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[28] Russia. Report of the Federal Antimonopoly Service on competition policy in 2012 (Jan. 2013).

[29] Общественные и консультативные советы [*Obshhestvennye i konsul'tativnye sovety* [Public and Consultative Councils]] <http://www.fas.gov.ru/community-councils/> (accessed Mar. 12, 2014).

[30] See: P.S. Mehta, *Competition Culture Key to Successful Competition Regime*. Materials of the 3rd BRICS International Competition Conference (Nov. 20-22, 2013, New Delhi).

the idea of cooperation is realized within the framework of multilateral cooperation in competition matters that takes place by international organizations aimed at promoting cooperation between competition authorities and harmonization of existing competition frameworks (e.g. the International Competition Network (ICN), the Organization for Economic Cooperation and Development, etc.), because competition authorities, likewise states, everywhere encounter similar challenges.

Thus, for instance, within the framework of the ICN Merger Working Group, competition advocacy aims at the promotion of the adoption of best practices in the design and operation of merger review regimes in order to: (i) enhance the effectiveness of each jurisdiction's merger review mechanisms; (ii) facilitate procedural and substantive convergence; and (iii) reduce the public and private time and cost of multi-jurisdictional merger reviews.[31] In general, the ICN was born out of the recognition by many jurisdictions that multilateral efforts are necessary to ensure convergence and coordination within and between the growing numbers of competition enforcement systems around the world.[32]

Then, cooperation comes down to the regional level. And here we can see both bilateral and multilateral cooperation.

For example, the head of FAS of Russia, Mr. Igor Artemyev, speaking on 21 November 2013 at the 3rd BRICS International Competition Conference in New Delhi, India, talked about the main objectives of the Antimonopoly Authority of the Russian Federation, including liberalization of control of economic concentration which will allow FAS to lower significantly the administrative load on businesses.[33]

The Competition Commission of *India*, in its turn, fully supported close cooperation between the BRICS competition authorities to forge better relationships among these agencies and help stakeholders, particularly business enterprises, gain confidence in dealings with competition authorities in member countries. The CCI participated in the two BRICS International Competition Conferences held in September 2009, in Russia, and in September 2011, in China. The CCI was a signatory to the joint communiqués signed between the heads of the competition authorities of BRICS countries during these conferences. The CCI hosted the 3rd BRICS International Competition Conference in New Delhi in 2013 and worked closely with other BRICS countries as coorganizers. The CCI's work with foreign competition agencies will continue to remain a high priority for the agency.[34]

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[31] Mission of the Merger Working Group (MWG), <http://www.internationalcompetitionnetwork.org/working-groups/current/merger.aspx> (accessed Mar. 12, 2014).

See: List of the 6th International Competition Network Conference documents (Oct. 10, 2008)

[32] F.S. Ugarte, *The Int'l Competition Network: Achievements So Far*, 22(10) Int'l Fin. L. Rev 1-5 (2003).

[33] 3rd International Conference on competition under the auspices of BRICS, New Delhi (Nov. 22, 2013), at <http://www.fas.gov.ru/fas-news/fas-news_34993.html> (accessed May 31, 2016).

[34] Regazzini Emch (note 9 above) at 108.

As an important part of the pragmatic cooperation of the BRICS Leaders Meeting, we can mention the fact that the heads of the competition authorities of Brazil, Russia, India, China and South Africa jointly held the 2nd BRICS International Competition Conference on 21-22 September 2011 in Beijing, China. These competition authority leaders reaffirmed their readiness in the spirit of openness, development, and cooperation to reach broad consensus among national and regional competition authorities and adopt effective competition policy, to maintain fair competition, protect the interests of consumers, enhance consumers' welfare, and promote the sound development of market economy.[35]

Therefore, we consider that only increased cross-border cooperation through bilateral and multilateral agreements between domestic competition authorities in the developed world can regulate anticompetitive market activities effectively.

3. Conclusions

The comparison of legislative provisions of laws on competition and monopolies of BRICS countries shows that they vary in external form and in the various legal techniques used by legislators and created as a result of *national specifics of the legal systems and methods* of both legal and paralegal regulation of social relations. BRICS countries do have several similarities in their trade practices and competition challenges in their domestic jurisdictions that make it easier to unify methods of global and regional governance.

The *analysis of substantial contents* of laws on competition and monopolies of the BRICS countries permits us to state that both legal provisions and case law of the BRICS countries under study adhere to the concept of 'market power' that allows us to qualify a number of market actions of enterprises as anticompetitive abuses of their dominant market position irrespective of the market share that they have.

At the same time that there are conventional, generally acknowledged (unified) provisions and norms (e.g. operations on the concept of 'market power' that make it possible to qualify a number of market actions of enterprises as anticompetitive abuses) there are also differences. Thus, for instance, a criterion of 'excessiveness' of concentration and a qualifying sign of its legitimacy serve in BRICS countries different economically significant values (indexes) of reorganized enterprises, for example, a market share in the relevant market (e.g. Russia, China) and the aggregate or individual balance cost of assets (India, South Africa). Likewise, the market share fixed, for example, by Russia, China, and South Africa as a reference point creating a certain framework (limits), which being overstepped attracts the special attention

[35] The Beijing Consensus of the 2nd BRICS International Competition Conference between Competition Authorities of Brazil, Russia, India, China and South Africa (Sep. 21, 2011, Beijing, China) (Apr. 19, 2012). See in detail: Regazzini Emch (note 9 above) at 315-327.

of antimonopoly authorities, differs. So there is still room for approximation and convergence of approaches.

The expediency of such an approach is of no doubt, as such is indeed the case that the existence of the market power, instead of a market share, is of a critical importance when answering the question of an opportunity for one or another enterprise to influence the competition. At the same time, the market share as a reference point cannot also be recognized as absolutely useless.

It is worth repeating that legislation of the BRICS countries under study reacts identically on the concentration of capital by means of mergers & acquisitions. And the purpose of the practiced state control consists, naturally, not so much in forbidding operations on concentration as, on the contrary, in stimulating mergers, associations of the national enterprises for strengthening of their competitiveness in the world market. The main objective of a system of such a control is to prevent 'excessive' concentrations if the negative consequences in the economic and social spheres surpass the positive effects.

Control thus extends only to those operations of enterprises, formed by means of merger, acquisition, etc., that surpass the limits set by the antitrust law – by the size or a share in the national market. And for all that, the term 'concentration' can belong to a wide range of operations in the market resulting in a concentration of control, capital, and management of economic activities, regardless of the concrete legal form that it takes. Thus, for example, the multinational corporations mentioned above can be one such mechanism.

The way in which the ideas on increased cross-border cooperation (through both bilateral and multilateral agreements between domestic competition authorities of BRICS countries) come true will be revealed only in the future. At present, we consider, and it has been shown in this article, that the ideas of domestic competition authorities determine the main content of the competition policies that are reflected and consolidated in domestic legal acts and other national documents.

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ENERGY REVOLUTION UNDER THE BRICS NATIONS

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DOI:10.21684/2412-2343-2016-3-1-34-41

The BRICS countries are of critical importance to both supply and demand fundamentals of energy markets globally. Today BRICS plays a very important role in the system of international energy security. BRICS energy diversification is driven by concerns for energy security. The potential for a BRIC energy partnership is thus enormous. The development of the BRIC countries in the next coming decades will include demographic changes with a growing middle class population which will demand more energy and resources that our world has the potential to supply.

A Green Energy Revolution is the panacea to solve major social, economic and environmental effects of their growing populations. This paper is an attempt to highlight the cooperation among the BRICS Nations for the development of Energy Sector and at the same time the concerning issue of climate change etc. It further discusses about the contribution of BRICS countries in the global economy. This paper also discusses about the role of the BRICS Nations in collaboration with the International Energy Agency.

Keywords: BRICS, energy security, demand, IEA, revolution.

Recommended citation: Manjeet Kumar Sahu, *Energy Revolution under the BRICS Nations*, 3(1) BRICS Law Journal 34–41 (2016).

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1. Introduction

The rise of developing countries like the BRICS countries (Brazil, Russia, India, China and South Africa) is constantly increasing the global energy demand. The BRICS countries are of critical importance to both supply and demand fundamentals of energy markets globally.[1] Today BRICS plays a very important role in the system of international energy security. The BRICS energy diversification is driven by concerns for energy security. The economic rise of the BRICS countries is closely tied to the global politics of energy and their increased consumption of global energy.[2] The BRICS countries together contributed about 38 percent of global carbon emissions in 2014.[3] BRICS provide a perfect division of labor in the energy sector. Russia and Brazil are key exporters while China and India are the consummate consumers. Russia occupies a key position in the global energy market. It is already involved in a mutually dependent cooperative pattern with the European Union on oil and gas. In the oil sector Russia is the largest non-OPEC oil-producing and exporting country. Russia has been endeavoring to renew its own energy structure for an integrated and R&D oriented development. In the global arena the Russian oil and gas prices and trade have an increasingly important influence. With the introduction of the New Development Bank to its feather, the Bank has also started providing loans for the development of energy sector in the BRICS Nations.[4]

The acronym was originally coined in 2001 to highlight the exceptional role of important emerging economies and only included Brazil, Russia, India and China (BRIC).[5] They started to meet as a group BRICS since 2006 and it was only in 2010 that South Africa was invited to join the group, which was then referred to as BRICS. It has been one of the most significant geopolitical events at the start of the new century.[6] The main feature and at the same time the brightest opportunity for the BRICS

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1 Akbar Valizadeh, Seyyed Mohammad Houshialsadat, *Iran and the BRICS: The Energy Factor*, 4(2) Iranian Rev. of Foreign Aff. 135–164 (2013).

2 Karl M. Rich, Elana Wilson Rowe, *BRICS: The Intertwined Politics of Energy and Climate* (Norwegian Institute of International Affairs 2012), available at <http://nkibrics.ru/system/brics/docs/data/54c7/a1df/6272/6937/f924/0000/original/NUPI_Report_BRICS_energy_and_the_new_world_order.pdf?1422369247>.

3 Greenpeace BRICS Factsheets 2015, available at <http://www.greenpeace.org/international/Global/international/briefings/climate/COP21/Greenpeace_BRICS_factsheets.pdf>.

4 Lidia Kelly, *BRICS bank okay first loans, $811 million for green energy – Russian Media*, (Reuters, April 17, 2016), available at <http://in.reuters.com/article/brics-bank-loans-idINKCN0XE07S>. The New Development Bank (NDB), formed by the BRICS group of emerging nations, has approved its first loans $811 million for renewable energy projects in Brazil, China, India and South Africa.

5 Dr. Morazan Pedro, Irene Konke, Doris Knoblauch, Thobias Schafer, *The Role of BRICS in the Developing World* (Policy Department DG External Policies, European Union 2012).

6 BRICS Joint Statistical Publication: 2015; Brazil, Russia, India, China, South Africa 235 (Moscow 2015), available at <http://www.gks.ru/free_doc/doc_2015/BRICS_ENG.pdf>.

members is their diversity. Representing almost the half of the world population, the most ancient civilizations and the richest cultures, the BRICS states naturally complement and complete one another. Therefore, the most criticized aspect of this group may be the most useful one. A collective approach is vital here and BRICS has demonstrated its adherence to it so far. It is necessary to remember that there are too many promises given by various politicians, countries, international organizations of the modern world. These promises are often left without any consequences. The task of the BRICS leaders is not to forget that there should be something more than just ordinary words. The result is needed and the success of BRICS is highly dependent on whether the declarations and vows will lead to real actions.[7]

2. BRICS: a Heterogenous Club

'The uniqueness of BRICS as an international institution is that for the first time it brings together a group of nations on the parameter of 'future potential' rather than existing prosperity or shared identities. The very idea of BRICS is thus forward-looking ... Excellencies, we have an opportunity to define the future - of not just our countries but the world at large ... I take this as a great responsibility.'

PM of India Mr. Narendra Modi on BRICS Summit

BRICS is a heterogeneous club considering that Russia and Brazil are energy exporters while the remaining three have a greater focus on demand and energy security for their continued development. Despite the lack of commonality, BRICS seem set to be the major energy players due to their size and growth.[8]

China is a big producer and consumer of energy resources and outstripped the United States in 2010 in terms of consumption. Without a sustainable China, there can be no sustainable world.[9] China and Russia agreed to start building the west route of the China-Russia natural gas pipeline which will provide 30 billion cubic meters of natural gas a year to China. Additionally, China National Petroleum Corp purchased a 10 percent share of Vankorneft, the upstream subsidiary of Russian oil giant Rosneft and operator of the lucrative Vankor oilfield.[10] China's natural gas supply and demand prospects is a major change of Eurasia and the world gas trade patterns and geopolitical factors. India is the fourth largest energy consumer after China, the US and Russia with an even greater dependence on external oil than China. On the demand side, China and India would clearly benefit from a cohesive Asian voice. The potential for a BRIC energy partnership is thus enormous. Russia and Brazil

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7 Maria Slonskaya, *The Role of BRICS in Global Security*, MGIMO-University (2015), available at <http://mgimo.ru/upload/2015/10/The_Role_of_BRICS_in_Global_Security.pdf>.

8 Karl M. Rich, Elana Wilson Rowe, *Id.*

9 Statement made by Bjorn Stigson President of World Business Council.

10 Bessie Weisman, *World Energy Headlines,* Global Energy Aff. 38 (Dec. 2014).

pump it up, India and China provide the receipts. The competition and cooperation between China and India in global energy arena are significant factors for global energy market today. Brazil has been conducting a large number of exploration and development in order to bridge its gaps in the energy sector, which has led to sizable discoveries in its offshore and deep water subsalts in particular. It is the second largest producer of ethanol in the world. Brazil has set an excellent example for developing countries by developing its bio-fuel technology and utilization. South Africa, as the biggest energy user in Africa, is relatively advanced in terms of new energy development. It also takes a leading role in the development of clean coal technology. The five countries demonstrate strong complementarities and strong potential for deeper cooperation.

3. BRICS Nation and International Energy Agency[11]

Brazil: Brazil's energy policy choices and achievements measure up well against some of the world's most urgent energy challenges.[12] A concerted policy effort has implied that access to electricity is now almost universal across the nation. Almost 45% of primary energy demand is met by renewable energy, making Brazil's energy sector one of the least carbon-intensive in the world. Total primary energy demand has doubled in Brazil since 1990, led by strong growth in electricity consumption and in demand for transport fuels on the back of robust economic growth and a burgeoning middle class. Large offshore oil and gas discoveries have confirmed Brazil's status as one of the world's foremost oil and gas provinces. The 'pre-salt' discoveries also prompted a change in upstream regulation by granting the Petrobras national oil company a strengthened role in areas deemed strategic. Production from the deepwater pre-salt fields in the Santos basin has started but not yet gained sufficient momentum to offset declining output from mature fields elsewhere. Brazil's oil output has leveled out at just above 2 mb/d since 2010 and pre-salt growth will be essential to re-attain the objective of net self-sufficiency in oil and to pave the way for Brazil to become a major oil exporter.[13]

Russia: Cooperation between the International Energy Agency (*hereinafter referred as* IEA) and the Russian Federation dates back to 1994 and has addressed the shared objectives of improving global energy security. The long-standing cooperation covers a large range of areas, such as energy security, energy efficiency, energy statistics, energy policy reviews and energy technologies. Relations involve

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[11] IEA was founded in 1974 to help countries coordinate a collective response to major disruptions in the supply of oil. It is made up of 29 member countries. It has four main areas of focus: energy security, economic development, environmental awareness and engagement worldwide.

[12] Adriana E. Abdenur, Conrad Kassier, *Nuclear Energy and the BRICS*, Georgetown J. of Int'l Aff. 55–66 (2014).

[13] *Brazil (Partner Country)*, available at <https://www.iea.org/countries/non-membercountries/brazil/>.

a broad range of public and private stakeholders in Russia. Russia maintains its position as one of the world's most important energy players continuing its essential role in global energy supply and holding among the world's largest resources of gas, oil and coal. The IEA and Russia see further cooperation perspectives notably in the fields of energy efficiency and clean coal technologies and welcome opportunities for a dialogue on energy market developments.[14]

India: The IEA and India benefit from a long, ongoing bilateral relationship built on cooperation in a broad range of areas including energy security, statistics, efficiency, market analysis, implementation agreements and technology. The cooperation was first formalised as early as 1998 with the signing of the Declaration of Cooperation covering important issues related to energy security and statistics. Since then the relationship has developed further through the endorsement of three Joint Statements, the last one in 2013. The IEA and India also have a long-standing collaboration in energy efficiency and have organized several joint workshops. In 2015, the IEA together with the Indian Petroleum Conservation Research Association (PCRA) helped to bring in an international expertise to support the development of regulations for Vehicles. The IEA and India also collaborate in renewable energy.[15]

China: TIEA has established an in-depth bilateral cooperation with China in a wide range of topics including energy security, energy statistics, energy markets (coal, oil, gas, renewables, and energy efficiency), the IEA Technology Collaboration Programs, energy technology in cleaner coal and CCS, industry, buildings and transportation.[16] China became one of the first countries to activate Association status[17] with the Agency a development that builds on relations that date back to a Memorandum of Policy Understanding in the Field of Energy in 1996. The IEA has since worked with China to assist the country in its transition to a more sustainable energy economy and to provide a greater understanding of China's energy system.

South Africa: The Republic of South Africa is a key Partner country of the IEA and a candidate for Association. The IEA and the Department of Energy (DoE) of South Africa have been building upon a long relationship of close collaboration based on common concerns such as ensuring a secure energy supply, building a cleaner energy mix and improving energy data-sharing. The IEA is also strengthening its regional engagement, given the growing regional energy interdependencies, and has been involving several countries of Southern Africa in energy training and capacity

[14] Russian Federation, available at <https://www.iea.org/countries/non-membercountries/russian-federation/>.

[15] India (Key Partner Country), available at <https://www.iea.org/countries/non-membercountries/india/>.

[16] China (Association Country), available at <https://www.iea.org/countries/non-membercountries/chinapeoplesrepublicof/>.

[17] Joint Ministerial Declaration on the occasion of the 2015 IEA Ministerial meeting expressing the Activation of Association, Paris, France (Nov.18, 2015), available at <http://www.iea.org/media/news/2015/press/IEA_ Association.pdf>.

building activities as well as in data sharing.[18] It has also signed an intergovernmental nuclear energy cooperation agreement with France, as part of its long-term plan to secure a sustainable energy mix.[19]

4. Cooperation among BRICS in the Development of Energy Sector

Beijing will have to give India more room to sign concessions (and even joint ventures) to defuse tensions in the Indian Ocean. Both countries would have to develop a broader (and more realistic) understanding of maritime security. On the supply side, the continued investment in Brazilian blocs from China would help to keep Brasil in the BRIC game. China has already sunk $10 billion into Petrobas. But the real supply side clincher would be swap agreements between China and Russia resolving the current pricing dispute.[20]

From a BRIC perspective, status quo politics and security should be the overriding Sino-Soviet interest at present not fighting each other for a strategic control over natural resources. Recently in the 1st and 2nd BRICS Industrial Expert Council,[21] The Heads of Industrial Authorities expressed their commitment to promoting the development of comprehensive industrial ties as well as to enhance the volume of mutual supplies of modern equipment and new technologies in areas such as mining, mechanical manufacturing, pharmaceuticals, metallurgy, aircraft construction, the automobile industry, railway equipment, energy-efficient technologies, low-carbon industries, oil and gas equipment, shipbuilding, information technology, chemical engineering and capital goods.[22] Recently, The Union Cabinet of India chaired by Prime Minister Narendra Modi has given its ex-post facto approval to an MoU signed between India and its BRICS (Brazil, Russia, India, China and South Africa) counterparts for strengthening and further developing of energy saving and energy efficiency cooperation based on the principles of equality and mutual benefit.[23] It is desirous to promote BRICS energy by establishing cooperation mechanisms among themselves and spearheading such cooperation at a global level, the BRICS countries would be

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18 South Africa (Partner Country), available at <https://www.iea.org/countries/non-membercountries/southafrica/>.

19 Bessie Weisman, *Id.*

20 Mathew Hulbert, Its Energy that will make or break the BRICS, Eur. Energy Rev. (Dec. 15, 2011), available at <http://europeanenergyreview.com/site/pagina.php?id=3421>.

21 The First BRICS Industrial Expert Council (26–27 August 2015), and the Second BRICS Industrial Expert Council (19 October 2015) were held in Moscow.

22 The BRICS Handover Report: 2015–2016, available at <www.en.brics2015.ru/load/885248>.

23 Memorandum of Understanding in energy saving and energy efficiency among BRICS countries, Press Information Bureau, Government of India, cabinet (Dec. 16, 2015) available at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=133403>.

at the forefront of multilateral innovation and institution building in a critical area of global governance, strengthening the demand for energy management and energy technology development and application. China and India should take the lead role to strengthen the energy demand management of the initiative.[24] Energy prices, climate framework and unconventional have been identified as the energy issues that have the greatest impact and most uncertainty for South Africa.

China/India, Energy efficiency and Energy poverty are the issues that need an action. In this regard, South Africa's membership of the BRICS Nations leads to a greater comparison with the performance of these partners. In particular, China and India are potential developing country role models. Energy leaders continue to believe that the energy efficiency represents a high impact and low uncertainty opportunity, although a delivery to date has been disappointing. On energy poverty, the issue has moved to a more prominent position, more closely aligned with the rest of Africa and reflects the increasing concern around service delivery in South Africa

An energy price was already an issue in 2014. During the last year the competitiveness of industry prices has become a more relevant topic. Firstly, because there was increasing pressure to allocate the steeply rising bills for climate action more upon the industry. Secondly, because the non-competitiveness of energy prices mostly driven by taxes and levies became evident in comparison with other regions.

From the cooperation angle point of view, the BRIC countries are an important strength of the emerging economies in the G20. The cooperation of the BRIC countries is bound to challenge the Western-led system of global governance inevitably formed to build a new global energy system.

Conclusion

For energy, the BRICS will play a major role as consumers or producers although perhaps most likely as single countries rather than a bloc. The BRIC countries have the ability to greatly augment their production of unconventional fuel sources: pre salt oil, shale gas, shale oil and biofuels, each to a varying degree depending on their resources, their regional market and their preferences. Russia, China and India share a commonality which is their key location cutting north to south through the Asian continent. In contrast, Brazil is on its own in the Western Hemisphere and its energy market has been strongly influenced by events in the Americas.[25] The development of the BRIC countries in the next coming decades will include demographic changes

[24] 2015 World Energy Issues Monitor, World Energy Council Conseil Mondial De L'energie (2015), available at <https://www.worldenergy.org/wp-content/uploads/2015/01/2015-World-Energy-Issues-Monitor.pdf>.

[25] BRIC Energy Market: Part 2, Energy Global Oilfield Technology, available at <http://www.energyglobal.com/upstream/exploration/01042014/BRIC_energy_Part_2/>.

with a growing middle class population who will demand more energy and resources that our world has the potential to supply. A Green Energy Revolution is the panacea to solve major social, economic, and environmental effects of their growing populations. Shifting to the alternative forms of energy will create a more unified global economy in a world that is cleaner and more energy efficient.[26] The BRICS countries because of their mounting power, unprecedented economic growth, and great potential to serve as a role model for green development for less developed countries have the potential to surmount all the other organizations. They have the opportunity to partake in the commencement of the greatest green movement in history. The proposal for the establishment of *BRICS Energy Association* is also another step towards the Green Energy revolution.[27] Saving the Earth, sustaining the global population, and ensuring the future livelihood of humankind are the principal goals of a Green Energy Revolution.

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[26] Desiree Hubby, *Rebuilding the World with Green BRICS* (Dentan, Texas), available at < http://digital.library.unt.edu/ark:/67531/metadc94271/>.

[27] BRICS Energy Association to formed in 2016 (Nov. 20, 2015), available at <http://tass.ru/en/economy/837998>.

EXPLOITATION OF THE CONTINENTAL SHELF IN DISPUTED AREAS AN EXAMPLE OF THE ARCTIC OCEAN

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DOI:10.21684/2412-2343-2016-3-1-42-65

This paper aims to examine the legal regime related to define the outer limits of the continental shelf beyond 200 NM. Firstly, special focus will be on the development of the legal concept of the continental shelf. Relevant provisions of the LOS Convention and Article 76 in particular will be scrutinized. Subsequently there is an assumption on which the principles of the Arctic outer continental margin delimitation will be conducted in relation of hypothetic application during the practice of an international adjudicative body. The delimitation within 200 NM and beyond 200 NM will be compared. The fourth chapter will be concentrated on the role of the Commission as an important participant of delimitation process. Also there will be a general overview of the state practice concerning the establishment of the outer continental margin in the Arctic, the reaction of other Arctic States and recommendations of the Commission.

It will be concluded that 'there are some difficulties in implementing the Article 76 (locating the foot of the slope and dealing with ridge issues), however it is possible to delimit the continental margin of the world based on the Article 76.' Difficulties in implementing and some discrepancies in provisions of the Article 76 do not constitute grounds for considering of a new legal approach. Discrepancies are mainly contained in the Rules of Procedure and in the Scientific and Technical Guidelines of the Commission. They can be disposed practically without considering the legal concept. In case of unresolved land or maritime dispute the cooperation among coastal states is the best way to avoid conflicts while delimiting the outer continental margin.

Keywords: Delimitation under the Law of Sea; Article 76 of LOS; Commission and function under LOS; Continental shelf and resource management; exploitation of Arctic.

Recommended citation: Mary Sabina Peters, *The Exploitation of the Continental Shelf in Disputed Areas on the Example of the Arctic Ocean*, 3(1) BRICS Law Journal 42–65 (2016).

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1. Introduction

The adoption of the Convention on the Law of the Sea (hereinafter LOS Convention) and approaching of deadlines for Arctic Coastal States signalized a new stage in struggle for the huge oil and gas reserves of the Arctic seabed. A new claim to the parts of the Arctic outer continental margin brings new challenges to the international law related to the continental shelf in general, and delimitation of the outer continental margin in particular. With the depletion of oil and gas reserves onshore and in traditional offshore provinces within 200 nautical miles the Arctic attracts much more attention of the world-wide community. Such heightened attention could be explained by the fact that the Arctic consists of 1/4 of world's undiscovered hydrocarbon resources. As it was suggested by Young that 'the world was entering the 'Age of the Arctic' during which the Arctic region would begin to play a dominant role in international affairs.'[1]

[1] Donald Rothwell, *The Polar Regions and the Development of International Law* 224 (Cambridge University Press 1996).

1.1. Premise

In legal literature dedicated to the Law of the Sea and with Arctic problems a great attention has been paid to the issues of Arctic outer continental margin delimitation and the role of the Commission on the Limits of the Continental Shelf (hereinafter Commission). Some provisions of the LOS Convention concerning the delimitation of the outer continental margin have been criticized a lot for the complexity of its rules and difficulties in its implementing. Thus, it is important to find out whether the international law corresponds to the new claims to the Arctic or a new legal approach should be considered.

1.2. Indication of its Importance and Relevance

The outer continental margin delimitation is a very long and complicated process which is based on different scientific-technical and legal aspects which are 'very much intertwined and not easily separated[2]'. It becomes more complicated when the claims of the coastal states overlap. There is a provision in the Rules of Procedure of the Commission (hereinafter the Rules of procedure)[3] which contemplates the procedure for such cases: the Commission 'shall not consider and qualify a submission made by any of the States concerned in Dispute.'[4] The Rules of Procedure also involve several options to avoid conflict such as: 'the delimitation may be made by two or more coastal States by an agreement' Despite this the expectation of litigation on Arctic disputes is high. It is essential to mention the fact that 'from a review of continental shelf areas beyond 200 NM worldwide, there are only a few of such areas which form the prolongation of only one coastal State.' Thus, Prescott in inventory, exercised in 1998, found '29 such areas, 22 of which involve more than one State and only 7 involve just one.' Until the International Court of Justice (hereinafter referred to as ICJ) pronounces a judiciary decision on Arctic disputes, it is hard to say on which principles the Arctic delimitation will be applied.

Another important feature of the delimitation process is a time limitation. According to Annex II, Article 4 of the LOS Convention a coastal State has to make a submission within 10 years of entry into force of the LOS Convention. Thus, it should be borne in mind that for the Russian Federation the deadline has been 2009, for Canada 2013, for Denmark 2014. Technological developments and climate change which results in ice caps melting should also be mentioned as the other factors which increase the tension in the Arctic disputes, making the exploitation possible. According to Peter Croker, there will be 'somewhere between 27 and 47 submissions in the next six years.'

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2 Thomas H. Heidar, *Legal Aspects of Continental Shelf Limits*, in M.H. Nordquist et al., *Legal and Scientific Aspects of Continental Shelf Limits* 19 (Leiden, Martinus Nijhoff Publishers 2004).

3 *Rules of Procedure of the Commission on the Limits of the Continental Shelf*. CLCS/3/Rev.2 (United Nations, New York 1998).

4 Rules of procedure, Annex 1 Rule 5 (1).

2. Legal Concept of the Continental Shelf

2.1. Legal and Historical Background

Until the 20th century the continental shelf did not attract much attention of coastal States. With the developments in technology, which make it feasible to exploit the continental shelf the situation changed. Speaking about the history of the claims to the continental shelf, the Proclamation made by President Truman of the United States in 1945 should be mentioned as a first significant phenomenon. The Truman Proclamation declared that 'the Government of the United States regards the natural resources of the subsoil and seabed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States subject to its jurisdiction and control.'[5] It was the first claim to the resources of the continental shelf which lay down the basis for many others. Another example was the Santiago Declaration in 1952, when Chile, Ecuador and Peru 'which have no real continental shelf in the physical sense claimed full sovereignty over the seabed and subsoil for a distance of 200 NM from their coasts.'[6]

For the first time the doctrine of the continental shelf was established at the Geneva Conference on the Law of the Sea in 1958. Article 1 of the Convention on the Continental Shelf (hereinafter the Geneva Convention)[7] in 1958 defined the continental shelf as: 'The seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas…' Thus, the Geneva Convention established two criteria to define the outer limit of the continental shelf: the depth (200 m) and the exploitability.

The next stage in development of legal concept of the continental shelf was the *North Sea Continental Shelf Cases*[8] in 1969. The relevant provisions of the Geneva Convention were confirmed to represent a customary law. The International Court of Justice stressed that 'More fundamental than the notion of proximity appears to be the principle … of the natural prolongation or continuation of the land territory …'[9] Subsequently, this conclusion had a great influence on the farther development of the continental shelf legal concept at the third United Nations Conference on the Law of the Sea in 1982.

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5 Proclamation No. 2667, Concerning the Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf. Reproduced in the Code of Federal Regulations 1943–1948 Comp. 3, at 67.

6 Thomas H. Heidar, *Id.* at 21.

7 *Convention on the Continental Shelf*, 29 April (Geneva 1958). In force June, 10 1964. 499 UNTS 311.

8 *North Sea Continental Shelf* cases (*Federal Republic of Germany v. Denmark*; *Federal republic of Germany v. Netherlands*), 3 ICJ Reports (1969).

9 *Id*.

2.2. The Third United Nations Convention on the Law of the Sea

To date, the LOS Convention is the basic source of the modern law of the sea or 'a constitution for the oceans',[10] which was finally adopted at the third United Nations Conference on the Law of the Sea in 1982. It should be mentioned that the negotiating process took a long time and 'from a very early stage became a singularly undemocratic and non-transparent.'[11] Decisions were mainly taken on the basis of consensus. Many compromises are another characteristic of the LOS Convention.

The Part VI (articles 76–85) of the LOS Convention concerned the continental shelf. One of the basic achievements of the LOS Convention was the new definition of the continental shelf with the provision that 'every coastal state has an inherent right to the continental shelf *ipso facto*. According to the Article 76 (1) of the LOS Convention a definition of the continental shelf is 'the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.'[12]

Nowadays some scholars state that the Article 76 of the LOS Convention defines 'the continental shelf in a manner which is scientifically based, legally defensible and politically acceptable.'[13] The provisions of the Article 76 have been criticized a lot for the difficulties in its implementing and for the complexity of its rules. Furthermore, according to Macnab 'it is generally agreed that the Article 76 with its simplifying assumptions and its ambiguous terminology constitutes an uncomfortable mix of law and science that makes it difficult under some circumstances to achieve clear and unequivocal conclusions.'[14] The difficult aspects were also highlighted by Gudlaugsson. In his opinion 'the main sources of interpretational difficulties and controversy associated with the definition of the continental shelf are the following:

– Disagreement, without mentioning the confusion of consciousness, over the meaning of the concept of natural prolongation. This includes leakage from the concept of natural components of a continental margin used in defining constraints on the maximum seaward extent of the continental shelf in the provisions defining and implementing its outer limit.

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[10] Hans Corell, *International Oceans Governance and the Challenge of Implementation*, in M.H. Nordquist et al. *Legal and Scientific Aspects of Continental Shelf Limits* 461 (Leiden, Martinus Nijhoff Publishers 2004).

[11] Gudmundur Eiriksson, *The Case of Disagreement Between a Coastal State and the Commission on the Limits of the Continental Shelf*, in M.H. Nordquist et al., *Legal and Scientific Aspects of Continental Shelf Limits* 252(Leiden, Martinus Nijhoff Publishers 2004).

[12] LOS Convention. Article 76 (1).

[13] R.W. Smith and G. Taft, *Legal Aspects of the Continental Shelf*, in *Continental Shelf Limits: The Scientific and Legal Interface* 17 (P.J. Cook and C.M. Carleton eds.) (New York, Oxford University Press 2000).

[14] Ron Macnab, *The Outer Limit of the Continental Shelf in the Arctic Ocean*, in M.H. Nordquist et al., *Legal and Scientific Aspects of Continental Shelf Limits* 308 (Leiden, Martinus Nijhoff Publishers 2004).

– The interplay between the natural complexity of continental margins and ambiguity in the Article 76.

– Differences of opinions regarding the role should be given to a geological evidence, especially an evidence based on deep-seated geological formations and geological origin relative to a geomorphologic evidence in determining the outer edge of the continental margin and also regarding the proper channel for presenting such evidence.

– Lack of care not to break with the principle of neutrality of the Article 76 with respect to the status of a coastal state as an island or a continent.

– A tendency to take a scientific point of view of the Article 76 rather than a juridical one.'[15]

Besides the above-mentioned interpretational difficulties, he also highlighted many strengths of the definition of the continental shelf. Thus, Gudlaugsson stated that in general 'the concepts used in its construction are fairly simple, well-understood and not likely to arouse as much controversy as many others probably would have done.'[16]

Concerning the operational difficulties, Gudlaugsson offered some solutions in order to overcome the complexity with the Article 76:

1) 'to avoid the use of natural prolongation in a way that conflicts with its geomorphologic nature;

2) to refrain from the claims on the basis of arguments that amount to jumping or leakage from the concept of natural components of the continental margin; and

3) to present a geological evidence as opposed to a geomorphologic evidence referring to all but the shallowest geological formations beneath the seafloor and relating to the determination of the outer edge of the continental margin through the evidence-to-the-contrary mechanism of paragraph 4 (b).'[17]

Finally, Gudlaugsson concluded that it is doubtful that any other approach 'based on other data and yardsticks could be any better than the present Article 76. The definition is practical in the sense that it is operational in nature.[18]' This opinion was also supported by Moore who declared that 'there are some difficulties in implementing the Article 76 (locating the foot of the slope and dealing with ridge issues); however, it is possible to delimit the continental margin of the world based on the Article 76.'[19]

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15 S.T. Gudlaugsson, *Natural Prolongation and the Concept of the Continental Margin*, in M.H. Nordquist et al., *Legal and Scientific Aspects of Continental Shelf Limits* 80 (Leiden, Martinus Nijhoff Publishers 2004).

16 *Id.* at 64.

17 *Id.*

18 *Id.*

19 Moore, *Concluding Remarks* 457.

Thus, it can be concluded that despite the fact that many provisions of the Article 76 of the LOS Convention has been criticized for the difficulties in its implementation, the current legal approach allows the demarcation of the continental margins in the world to avoid potential conflicts.

The another important provision in the current legal approach should be mentioned. Taking into account the interest of the non-coastal States as a compromise the LOS Convention assigned financial obligation on a coastal State 'to make payments or contributions in kind in respect of the exploitation of the non-living resources of the continental shelf beyond 200 nautical miles.'[20] These payments should be distributed to States Parties of the LOS Convention 'on the basis of equitable sharing criteria.'[21]

2.3. The Article 76 of the LOS Convention: Four Rules, Two Formulas and Two Constraints

As it was said, the process of negotiating of the LOS Convention was very complicated and took a long time, especially concerning the Article 76. Each group of States pursues its own purpose according their strategic interests and the continental shelf. It was described by Miles: 'For the superpowers, the oil and gas interests were competitive with security interests in terms of narrow shelves as possible and, in any case, clearly defined outer limits.'[22] It must be stressed that the LOS Convention makes it possible for Coastal states to claim for the continental shelf beyond 200 NM, whereas the Geneva Convention did not provide such a possibility. The Article 76 (4) (a) stated that 'the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.'[23] The another significant provision of the LOS Convention concerning the continental shelf is that 'the sovereign rights of the coastal State are exclusive in the sense that if it does not explore the continental shelf or exploit its natural resources, no one may undertake these activities without an agreement of the coastal State.'[24]

In respect of outer limit delimitation, the Article 76 (4) of the LOS Convention introduces 'four rules, two formulas and two constraints based on the concepts of geodesy, geology, geophysics and hydrography which govern the legal contours of the extension of the continental margin to the area beyond 200 NM.'[25] Two formulas for the

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[20] LOS Convention. Article 82 (1).

[21] *Id.* Article 82 (4).

[22] E.L. Miles, *Global Ocean Politics* 382 (The Hague, Martinus Nijhoff, 1998).

[23] LOS Convention. Article 76 (4)(a).

[24] *Id*. Article 77 (2).

[25] B. Kunoy, *A New Arctic Conquest: The Arctic Outer Continental Margin*, 76 Nordic J. of Int'l L. 468 (2007). DOI: 10.1163/090273507X257058.

establishing of the outer limits of the continental shelf are 'Irish' and 'Hedberg'. These formulas can be applied alternatively in different portions. Thus, the first one is based on the thickness of sedimentary material – 'a line delineated in accordance with the paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope.'[26] The latest is based on a line up to 60 NM from the foot of the continental slope – 'a line delineated in accordance with the paragraph 7 by reference to fixed points no more than 60 nautical miles from the foot of the continental slope.'[27] It is very important in this regard to mention that, the determination of the foot of the continental slope is primary in any delimitation because 'the foot of the continental slope is an essential feature that serves as a basis for entitlement to the extended continental shelf and the delineation of its outer limits.'[28]

Two alternative constraints are: 'the fixed points comprising the line of the outer limits of the continental shelf on the sea-bed drawn in accordance with the paragraph 4 (a) (i) and (ii) either shall not exceed 350 NM from the baselines from which the breadth of the territorial sea is measured or shall not exceed 100 NM from 2.500 meter isobaths which is a line connecting the depth of 2.500 meters.'[29]

McDorman criticized the provisions of the Article 76 in a way that: 'the criteria are not easily applicable in any given situation because of the technical and definitional difficulties of determining thickness of sediment, foot of the continental shelf, the 2,500 meter isobaths and distinguishing among submarine ridges, oceanic ridges and submarine elevations that are natural components of the continental margin.'[30] This point of view was supported by many other authors (Kunoy, Macnab, Nelson and Zinchenko). However, it must be stressed that the difficulties in implementing are mostly concerned with the complexity of the sphere of application.

Finally, it should be mentioned that according to the Article 121 of the LOS Convention the 'continental shelf of an island is determined in accordance with the provisions of this Convention applicable to other land territory.'[31] Thus, there is no special rule provided to the islands.

Each coastal State claiming to the extension of the outer continental margin must collect and submit data to the Commission to prove that the outer continental margin is a natural prolongation of the continental shelf.

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26 LOS Convention. Article 76 (4)(a).

27 *Id.*

28 Scientific and Technical Guidelines of the CLCS, point 5.1.1.

29 *Id*, point 2.1.7.

30 T.L. McDorman, *The Entry into Force of the 1982 LOS Convention and the Article 76 Outer Continental Shelf Regime*, 10 Int'l J. of Marine and Coastal L.165 (1995). DOI: 10.1163/157180895X00033.

31 LOS Convention. Article 121 (2).

3. Problems of Delimitations. Methods and Criteria to Establish an Equitable Solution

3.1. Principles of Arctic delimitation

As it can be seen, the Rules of Procedure provide many possibilities of peaceful settlement of the disputes. However the probability of the litigation is high. Until ICJ states a decision on Arctic disputes, it is hard to say on which principles the Arctic delimitation will be affected. To answer this question it is important to take into account the relevant cases in which maritime disputes on delimitation within 200 NM were resolved such as: *the North Sea Continental Shelf Cases,*[32] *Tunisia v. Libyan Arab Jamahiriya,*[33] *the Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area.*[34] It can be assumed that these cases will have a great impact on the delimitation of the outer continental margin in the Arctic.

According to the Article 83 of the LOS Convention 'the delimitation of the continental shelf between States with opposite or adjacent coasts shall be affected by agreement on the basis of international law as referred to in the Article 38 of the Statute of the International Court of Justice in order to achieve an equitable solution.' As it was stated in one of the cases, concerning the delimitation within 200 NM, finding of an equitable solution is a 'fundamental norm'[35] to each delimitation. From the above-mentioned cases it can be concluded that 'the equitable solution will be determined autonomously on the basis of other criteria than the edified case law in respect to delimitations within 200 NM.'[36] Geology, geophysics, hydrography and geomorphology will define the methods and criteria on which the equitable solution is based but not the coastal geography.[37] However, there is no provision in the LOS Convention nor in Technical Guidelines of the Commission establishing which criteria is primary and how this issue will be resolved. The same author considered that the title to the outer continental margin 'is based on something other than distance and geological and geomorphologic criteria are relevant for determining a title.'[38]

3.2. The Determination of Title to the Arctic Continental Margin

As it was reasonably stated by Weil, 'the delimitation cannot be understood without a title, which lies at its very heart.'[39] The establishment of an equitable solution

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[32] *North Sea Continental Shelf* cases (*Federal Republic of Germany v. Denmark*; *Federal republic of Germany v. Netherlands*), 3 ICJ Reports (1969).

[33] *Tunisia v. Libyan Arab Jamahiriya*, ICJ Reports (1982).

[34] *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area*, ICJ Reports (1984).

[35] *Id.*, Para 111.

[36] B. Kunoy, *A New Arctic Conquest: The Arctic Outer Continental Margin* 475.

[37] *Id*.

[38] *Id.* at 471.

[39] P. Weil, *Dissenting Opinion Canada v. France arbitration,* 31(5) ILM (1992) 1198, paras 10–12.

in any delimitation must be carried out 'according to the legal basis of the title and must further comply with principles of equity in order to be found in law. It is therefore of quintessential importance to identify the basis of legal title as this is the sole factor that determines the applicable law and methods to find an equitable solution.'[40]

Firstly, it should be borne in mind that the title to the Arctic outer continental margin is different to the title to the continental shelf within 200 NM. In case of delimitation of the continental shelf within 200 NM the preliminary equidistant line will be the basis for establishing of the methods and criteria to find an equitable solution.[41] Each coastal State has an inherent title to the 200 NM but not to the continental shelf beyond 200 NM.

In *Tunisia v. Libya* ICJ held that 'it is only the legal basis of the title to the continental shelf rights – the mere distance from the coast – which can be taken into account as possibly having consequences for the claims of the Parties.'[42] Further the ICJ held in *Libya v. Malta* that 'the choice of criterion and method which is to employ should be made in a manner consistent with the concepts underlying the attribution of the legal title.'[43] It can be seen that the coastal geography is considered as a relevant criterion for the delimitation within 200 NM. The coast forms the title to the continental shelf within 200 NM; therefore the distance criterion is determinative. However, Kunoy postulated that by the way of analogy the coastal geography cannot be used as a criterion of five Arctic coastal States with respect to the applicable methods and criteria for finding an equitable solution because 'geography is alien with respect to the title of the outer continental margin.'[44] As it was stated in the *North Sea Continental Shelf Cases* by the ICJ 'the land is the legal source of power which a State may exercise over territorial extensions to seaward.'[45] Thus, it can be concluded that the delimitation beyond 200 NM in the Arctic will be based on the other principles than delimitation within 200 NM. As D.A. Colson assumed 'whereas the *North Sea* cases were decided prior to the emergence of the Convention the natural prolongation with respect to the Arctic delimitation will be relevant for the delimitation of the outer continental margin.'[46] Therefore, the primary of the Arctic coastal States will be to prove that 'the outer continental margin is a natural prolongation of the continental shelf.'[47] Concerning the potential case law, it also

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40 *Id.* at p. 202.

41 B. Kunoy, *A New Arctic Conquest: The Arctic Outer Continental Margin* 472.

42 *Tunisia v. Libyan Arab Jamahiriya*, ICJ Reports 48 (1982), para 47.

43 *Libya v. Malta*, p. 46–47, para 61.

44 B. Kunoy, *A New Arctic Conquest: The Arctic Outer Continental Margin* 468.

45 *North Sea Continental Shelf* cases (*Federal Republic of Germany v. Denmark*; *Federal republic of Germany v. Netherlands*), 3 ICJ Reports 51 (1969), para 96.

46 D.A. Colson, *The Delimitation of the Outer Continental Shelf Between Neighboring States*, 97 AJIL 107 (2003).

47 B. Kunoy, *A New Arctic Conquest: The Arctic Outer Continental Margin* 471.

can be suggested that it will be based on a legal approach taken by ICJ in *North Sea Continental Shelf* cases 'that the submarine areas concerned may be deemed to be actually part of the territory over which the coastal State already has dominion.'[48] Further, based on the above Kunoy suggested that the outer continental margin delimitation will be similar to land delimitation.'[49] Thus, the question of a concurrency of title is rising in case of dispute. Each claimant has to prove that its title to the outer continental margin is concurrent and the primary principle is the determination of 'which of the parties has produced the more convincing proof of title to the disputed area.'[50] This was also stated in arbitral decision the *Island of Palmas* 'if a dispute arises as to the sovereignty over a portion of territory, it is customary to examine which of the States claiming sovereignty possesses a title […] superior to that which the other State might possibly bring forward against it.'[51] Finally, it can be concluded that 'the adjudicative body, prior determining the methods and criteria to establish an equitable solution will study an issue and in affirmative positive meaning to what extent the title of one coastal State could partially triumph the title of the other.'[52] In the case of the Arctic; Canada, Denmark and the Russian Federation will prove that the Lomonosov ridge is the natural prolongation of its territory, and the adjudicative body will scrutinize the title of each claimant. It should be mentioned in this regard that to date only Russia submitted data to the Commission, therefore the process is far from the end.

4. The Role of the Commission on the Limits of the Continental Shelf

4.1. Functions and Constitutive Structure of the Commission

The Commission is one out of three international bodies established under the LOS Convention (The International Seabed Authority, The International Tribunal of the Law of the Sea). The Commission is an independent institution which purpose is to 'facilitate the implementation of the United Nation Convention on the Law of the Sea in respect of the establishment of the outer limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.'[53] In its work the Commission relied upon Rules of

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48 *North Sea Continental Shelf* cases (*Federal Republic of Germany v. Denmark*; *Federal republic of Germany v. Netherlands*) 31, para 46.

49 B. Kunoy, *A New Arctic Conquest: The Arctic Outer Continental Margin* 472.

50 *Minquiers adn Ecrehos case,* ICJ Reports 52 (1953).

51 *Island of Palmas case*, 2 Reports of Int'l Arbitration Awards 838 (1928).

52 B. Kunoy, *A New Arctic Conquest: The Arctic Outer Continental Margin* 477.

53 *United Nations, Commission on the Limits of the Continental Shelf, Purpose, Functions and Sessions* <http://www.un.org/Depts/los/clcs_new/commission_purpose.htm#Purpose> (accessed July 8, 2015).

procedure and 'The Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf (hereinafter CLCS Guidelines)'[54] which are subordinate to the provisions of LOS Convention.

Functions of the Commission are set in Annex II of the LOS Convention:

'(a) to consider the data and other material submitted by coastal States concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles and to make recommendations in accordance with the Article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea;

(b) to provide scientific and technical advice if requested by the coastal State concerned during the preparation of the data referred to in subparagraph (a).'[55]

The constitutive structure of the Commission consists of 21 members – 'individuals and not States or representatives of States'[56] who are experts in the field of geology, geophysics or hydrography but not lawyers. The deficiency of lawyers in the composition of the Commission has been attacked a lot. Thus Thomas Heidar called it an omission and stated that 'this omission has been criticized by many in light of the fact that even though it is not a court, one of the cardinal functions of the Commission must necessarily be to interpret or apply the relevant provisions of the Convention which is essentially a legal task.'[57] Another scholar and former Judge of International Tribunal for the Law of the Sea Gudmundur Eiriksson supported his point of view saying that: 'The relevant provisions of the United Nations Convention on the Law of the Sea are from the legal point of view, far from clear. In fact, when reading the recent literature one is struck by the lack of accord among commentators on the legal aspects. It is thus somewhat surprising that the law is not one of those fields of expertise qualifying candidates for election to the Commission considering the Commission's central role in the application of these provisions.'[58] This omission is mostly considered to be an intentional or deliberate by different scholars.[59] Another opinion was that the omission is 'rather unfortunate'[60]. Taking into account the role

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54 *Scientific and Technical Guidelines of the Commission on the Limits of the Continental Shelf* adopted on 13 May 1999, CLCS/11 (United Nations, New York 1999).

55 LOS Convention, Annex II, Art. 3(1).

56 N.N. St. Claver Francis, *The Continental Shelf Commission* in M.H. Nordquist and J.N. Moore (eds.), *Oceans Policy: New Institutions, Challenges and Opportunities* 142 (The Hague, Martinus Nijhoff, 1999).

57 Heidar, *Legal Aspects of Continental Shelf Limits* 30.

58 Eiriksson, *The Case of Disagreement Between a Coastal State and the Commission on the Limits of the Continental Shelf* 251.

59 L.D.M. Nelson, *The Continental Shelf: Interplay of Law and Science*, in Ando N. et al., *Liber Amirocum Judge Shigeru Oda* 1238 (Kluwer Law International, 2002).

60 E.D. Brown, *Sea-Bed Energy and Minerals: The International Legal Regime,* 1 The Continental Shelf 31 (Martinus Nijhoff, 2001).

of the Commission and a large political component of the delimitation process it can be assumed that the lack of lawyers is the deliberate omission. On the other hand, the main appropriation of the Commission is to consider scientific and technical data, therefore a legal component is not the primary.

Besides the lack of lawyers in the Commission, another two puzzling aspects in the Commission practice have been recipients of criticisms. Firstly, the commitment of the State which appoints a member of Commission 'to defray the expenses' places in question the truly independence and impartiality of the Commission members. Even the members of the Commission are concerned about it, as one of them explained:

'The concept of the independence of each Commission member is a most desirable one. However, one has to ask the question as to the extent to which this Commission can be truly independent when all expenses of the Commission member are borne by the State party which proposed the member. It is my opinion that the expenses of each Commission member should be borne by the United Nations to make it a real independent Commission.[61]' Such a comment is also logical, because financial aspects always attract undesirable apprehension. This aspect considered to be easily avoidable in case of transferring the financial burden from the State party to the United Nations.

The other provision which attracts criticism is the possibility of Commission members being an advisor and consultant to states in preparing the submissions 'to a particular delineation and that they are able to participate in final decisions with respect to the delineation.'[62] This provision again puts in question the neutrality of the Commission because while advising a member become biased to the result and cannot impartially make recommendations. On the other hand, 'to provide scientific and technical advice' is one of the main functions of the Commission. Nevertheless, this provision should also be reconsidered in order to avoid criticisms, since the impartiality of the Commission should not be doubted. However, to date there is no precedent of suspecting any of the Commission members.

4.2. The Process of Submission

As it was said each coastal State claiming to the extension of the outer continental margin must collect and submit data to the Commission to prove that the outer continental margin is a natural prolongation of the continental shelf. According to Annex II, Article 4 submission to the Commission has to be made within 10 years of entry into force of the LOS Convention. However, there is no legal consequence envisaged in the LOS Convention if a State does not make a submission within a 10 year period. Furthermore, this time limitation does not correspond to the rule,

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61 N.N. St. Claver Francis, *The Continental Shelf Commission* in M.H. Nordquist and J.N. Moore (eds.), *Oceans Policy: New Institutions, Challenges and Opportunities* 142 (the Hague, Martinus Nijhoff, 1999).

62 Eiriksson, *The Case of Disagreement Between a Coastal State and the Commission on the Limits of the Continental Shelf* 254.

established in the *North Sea Continental Shelf Cases* in 1969, which was codified later in paragraph 3 of the Article 77 of the LOS Convention that 'the rights of the coastal State over the continental shelf do not depend on effective or notional occupation, or on any express proclamation. The rights of the coastal State over the shelf exist *ipso facto* and *ab initio* by virtue of its sovereignty over the land territory. In short, there is an inherent right.'[63]

The legal process between the submitting coastal State and the Commission has been criticized by some scholars and was called 'a narrowing down ping-pong procedure' (coastal State submission, Commission recommendations, coastal State disagreement with recommendations and re-submission) with no legislated endpoint.[64] The member of the Commission Alexei Zinchenko[65] considered that:

'The Article 76 does not clearly indicate what a submitting State's responsibilities are after receiving the recommendations of the Commission. If, however, the coastal State disagrees with those recommendations, the coastal State shall, within a reasonable time, make a revised or new submission to the Commission. The purpose is to eventually achieve accord. But how long can this process of 'submission-resubmission' continue? James Gardiner, the Irish inventor of the sediment thickness formula applied in the Article 76, referred to it as a 'ping-pong' process that would become progressively tighter with time. But is it possible for the coastal State to just stop the process when it wishes? Well of course it can, but unless the Commission has 'vetted' the outer limits, the establishment of those limits by the State is not final and binding.'[66] This critics can be considered as reasonable bearing in mind that to date, nine submissions have been made but only one recommendation concerning the delimitation of the outer continental margin has been adopted by the Commission.[67] On the other hand, time pressure will be inadmissible in such a complex and a highly scientific sphere of application. Furthermore, the advancement of the consideration process may lead to the irreversible consequences, inasmuch as the establishment of limits will be final and binding.

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63 3 Int'l Court of Justice Reports, 23(1969).

64 P.R.R. Gardiner, *The Limits of the Sea Beyond National Jurisdiction–Some Problems with Particular Reference to the Role of the Commission on the Limits of the Continental Shelf*, in G. Blake (ed.), *Maritime Boundaries and Ocean Resources* 69 (London & Sydney: Croom Helm, 1987). R.W. Smith and G. Taft, *Legal Aspects of the Continental Shelf* in P.J. Cook and C.M. Carleton (eds.), *Continental Shelf Limits: The Scientific and Legal Interface* (New York, Oxford University Press 2000).

65 Secretary of the Commission on the Limits of the Continental Shelf, Principal Officer, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations.

66 Alexei A. Zinchenko, *Emerging Issues in the Work of the Commission*, in M.H. Nordquist et al., *Legal and Scientific Aspects of Continental Shelf Limits* 225 (Leiden, Martinus Nijhoff Publishers 2004).

67 On 9 April 2008, the Commission adopted the 'Recommendations of the Commission on the Limits of the Continental Shelf' in regard to the submission made by Australia on 15 November 2004 on information on the proposed outer limits of its continental shelf beyond 200 nautical miles.

4.3. Submission of Coastal States to the Commission in Cases of Unresolved or Maritime Disputes

The LOS Convention established the general rule to settle any disputes in Article 279: 'State Parties shall settle any dispute between them concerning the interpretation or application of this Convention by peaceful means in accordance with Article 2, paragraph 3 of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in Article 33, paragraph 1 of the Charter.'[68] Concerning the maritime disputes the primary rule for the Commission is: 'the actions of the Commission shall not prejudice matters relating to delimitation of boundaries between States with opposite or adjacent coasts'[69], more importantly the Commission 'shall not consider and qualify a submission made by any of the States concerned in the Dispute.'[70] For the purpose of this paper it is necessary to emphasize on the provisions of Annex I to the Rules of procedure which are relating the disputes, 'which may arise in connection with the establishment of the outer limits of the continental shelf.'[71] In case of the Arctic it is more essential because three of the coastal States (Canada, Denmark and the Russian Federation) claim to the same part of the Arctic, proving that the Lomonosov ridge is the natural prolongation of their territory.

The definition of 'a dispute' can be found in the *East Timor* case, when ICJ explained that 'a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties. In order to establish the existence of a dispute, it must be shown that the claim of one party is positively opposed by the other.'[72]

There are several types of disputes specified in Annex I:

– 'disputes concerning what qualifies as a baseline under the LOS Convention;

– sovereignty disputes over the territory from which continental shelf extends;

– disputes over the interpretation or application of article 76.'[73]

Annex I of the Rules of Procedure contains several provisions to avoid conflicts in case of disputes. The primary rule is that the submitting coastal State has to inform the Commission of any disputes related to the submission.[74] A possibility of a submission for a portion of the continental shelf is envisaged in order not to prejudice questions

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68 Los Convention. Article 279.

69 Los Convention. Annex II, article 9.

70 Rules of procedure, Annex I, Rule 5(1).

71 Rules of procedure, Annex 1 (1).

72 *Case concerning East Timor* (*Portugal v. Australia*), Judgment of 30 June 1995, ICJ Reports 99–100 (1995), para 22.

73 Alex G. Oude Elferink, *Submissions of Coastal States to the CLCS in Cases of Unresolved Land or Maritime Disputes*, in M.H. Nordquist, et al., *Legal and Scientific Aspects of Continental Shelf Limits* 263 (Leiden, Martinus Nijhoff Publishers 2004).

74 Rules of Procedure (para 2(a)).

relating to the delimitation of boundaries between States.[75] The coastal State itself will choose which parts of the continental shelf to include in the submission. In this case additional submission for the areas which are not included in the original submission may be made after 10-year constraint. Another option is joint or separate submissions may be made by two or more coastal States by agreement.[76] This provision can be considered as the ideal approach for settlement of a dispute. However, coastal States reluctantly use the above mentioned opportunity, because it is very difficult to reach the agreement when there are significant discrepancies between the involved parties. Taking into account that stakes in delimitation of the continental shelf are high, the compromise is not always attainable, especially in the case of the Arctic. To date there is only one example of joint submissions out of twelve submissions in Commission practice (joint submission by France, Ireland, Spain and the United Kingdom of Great Britain and Northern Ireland in respect of the Celtic Sea and the Bay of Biscay – 2006). For the considering of the submission, a prior consent of all engaged States that are a party to the dispute is required before the examination of a submission.[77]

Thus, analyzing the relevant provisions of the LOS Convention, it can be concluded that the procedure for settlement of a dispute exist and the requirements of the law are: 'First, the coastal States in question must reach an agreement on how to divide the disputed areas between them, or, alternatively, agree on a joint exploitation area. Second, the coastal States concerned must establish the outer limits of the continental shelf *vis-a-vis* the international seabed area, after having made joint or separate submissions to the Commission and having received recommendations from the Commission.'[78]

It is of interest to understand the role of the Commission in the process of the delimitation of the outer continental margin. As it was reasonably suggested by McDorman 'the only concrete role of the Commission in the delineation of the outer limits is procedural.'[79] This postulate can be supported by the relevant provisions of the LOS Convention. The primary rule is that the Commission 'shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf.'[80] Even the Commission itself defined its role as to facilitate, which shows the procedural basis in its practice.[81] Subsequently, McDorman emphasized

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75 *Id.* Annex I (3).

76 *Id.* Annex I (4).

77 *Id.* Annex I (5).

78 Thomas H. Heidar, *Legal Aspects of Continental Shelf Limits* 33.

79 T.L. McDorman, *The Role of the Commission on the Limits of Continental Shelf: A Technical Body in a Political World*, 17(3) Int'l J. of Marine and Coastal L.319 (2002). DOI: 10.1163/157180802X00099.

80 *Id.*

81 See the Commission document 'Purpose, Functions and Sessions.' The Oxford English Dictionary provides the following definition for facilitate – 'make easy or less difficult or more easily achieved.'

informational role of the Commission, as the main task of it is to 'consider data' and 'make recommendations.'[82] Relied on the above he identified the potential risk for the Commission: 'it will be ignored, except as a procedural hurdle, and the positive involvement of the Commission in providing information for determinations of legitimating will be squandered.'[83] There are some pronouncements which support this point of view. It is of particular interest the definition of the role of the Commission made by its member Alexei Zinchenko: 'The CLCS is not a court of law, nor it was expected to become one. The role of this highly scientific organ which is called upon to provide assistance in the much politicized realm of setting legal boundaries is to help to establish the true limit of the outer boundary of the continental shelf according to the terms of the United Nations Convention on the Law of the Sea.'[84]

Finally, it can be concluded that it is a coastal State, 'which has the legal capacity to set the state's outer limit of the continental margin.'[85] The Commission makes only recommendations on scientific issues and its role should not be overestimated. While considering the role of the Commission, it should be borne in mind that 'the Commission was an integral part of the compromise reached regarding the Article 76 and its provisions on the determination of the outer limits of the continental shelf.'[86] Thus, the role and the status of the Commission cannot be reviewed individually, without reconsidering the legal approach in general.

5. State Practice Concerning the Establishment of the Outer Continental Margin in the Arctic

5.1. The Submission of the Russian Federation

In this section, consideration will be given to the submissions to the Commission made by Arctic coastal States, the reactions of neighboring States and the Commission recommendations.

The Russian Federation was the first coastal State that made a submission to the Commission with respect to the outer limits of the continental shelf beyond 200 NM, which provoked severe critics and indignation among other coastal States. It is explained by the fact that Russia claims to the part of the Arctic comparable to the size of Western Europe. To date eleven more submissions to the Commission have been made (Australia, Barbados, Brazil, Indonesia, Ireland, Mexico, New Zeeland, Norway, France, United Kingdom of Great Britain and Northern Ireland, and joint by France,

82 McDormanp, *The Role of the Commission on the Limits of Continental Shelf: A Technical Body in a Political World* 320.

83 *Id.*

84 Zinchenko, *Emerging Issues in the Work of the Commission* 225.

85 *Id.*

86 Heidar, *Legal Aspects of Continental Shelf Limits* 29.

Ireland, Spain and the United Kingdom of Great Britain and Northern Ireland). The number of states which may claim is considerably greater: Angola, Argentina, Denmark, Ecuador, Fiji, Guinea, Guyana, India, Japan, Madagascar, Mauritius, Micronesia, Myanmar, Namibia, Portugal, Seychelles, South Africa, Surinam, United States and Uruguay.[87]

On 20 December 2001, the Russian Federation was the first state which made a submission through the Secretary-General to the Commission on the limits of the Continental Shelf pursuant to the Article 76, paragraph 8 of the LOS Convention. The submission contains the information on the proposed outer limits of the continental shelf of the Russian Federation beyond 200 nautical miles from the baselines from which the breadth of territorial sea is measured.[88] The Arctic Ocean, the Sea of Okhotsk, the Barents Sea and the Bering Sea were the subject of the submission. In its submission the Russian Federation did not inform the Commission of any disputes in the delimitation of the continental shelf between opposite or adjacent states, or any other unresolved land or maritime disputes.[89]

Canada, Denmark, Japan, Norway and the United States reacted to the submission of the Russian Federation. The *Notes Verbales* of Canada and Denmark both refer to the 'lack of specific data that would allow a qualified assessment of the Russian Federation's submission and indicate that the absence of comments does not imply an agreement to or acquiescence in the submission.'[90]

The United States indicated that it believed the submission 'had major flaws as it related to the Continental Shelf in the Arctic Ocean.'[91] In its comments the United States argue 'the characteristics of two ridges (Lomonosov and Mendeleev) included in the outer limit lines as defined in the Russian submission suggesting that this do not form a natural prolongation in the sense of the Article 76 (1) of the LOS Convention.'[92] The United States concluded that the recommendations of the Commission had to be based on a high degree of confidence: 'If the Commission is

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87 *The Law of the Sea: Definition of the continental shelf,* United Nations, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs 6 (New York, 1993).

88 United Nations, Commission on the Limits of the Continental Shelf, Submission of the Russian Federation, <http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm> (accessed July 5, 2015).

89 Para 1.2 of the executive summary of the Russian submission (reproduced in the document CLCS.01.2001.LOS, n.31).

90 *Note Verbale* No.119. No. 8 of the Permanent Mission of Denmark to the United Nations to the Secretary-General of the United Nations of Feb. 4, 2002 (reproduced as an attachment to the document CLCS.01.2001.LOS/DNK of 26 February 2002); *Note Verbale* No. 0145 of the Permanent Mission of Canada to the United Nations to the Secretary-General of the United Nations of Jan. 18, 2002 (reproduced as an attachment to the document CLCS.01.2001.LOS/CAN of Feb. 26, 2002).

91 Letter of the Permanent Representative of the United States to the Under-Secretary for Legal Affairs, United Nations, Feb. 28, 2002 (reproduced in CLCS.01.2001.LOS/USA of Mar. 18, 2002).

92 Attachment to the Letter of the Permanent Representative of the United States to the Under-Secretary for Legal Affairs, United Nations, Feb. 28, 2002 (reproduced in *Id*).

unsure, it should not make a recommendation but should announce that it needs further data, analyses and debate.'[93]

The limit of the continental shelf in the Barents Sea and the Arctic Ocean was the main concern in Norway's reaction whereas both countries have a long history of negotiations since 1969.[94] The core controversy between Russia and Norway was about the methods of establishing the boundary. The Russian Federation has indicated that the boundary has to be a sector line, while Norway insisted on a median line. Norway consented to the Commission examining of the Russian submission with regard to the area under dispute.[95]

The position of the Russian Federation concerning these reactions was announced during the presentation of the Russian submission to the Commission by Ivan Gloumov, the Deputy Minister of Natural Resources of the Russian Federation. From the position of the Russian Government, there was no impediment to the consideration of the submission by the Commission.[96]

After considering the data and other submitted materials the Commission made recommendations in accordance with the Article 76. The recommendations contain the results of the examination of the data and information submitted by the Russian Federation with particular reference to the question of the entitlement of the Russian Federation to the continental shelf beyond 200 nautical miles, as well as whether the formulas and the constraints had been applied as required by the Article 76 of the Convention.[97] The Commission presented its recommendations to the Russian Federation regarding the four areas relating to the continental shelf extending beyond 200 nautical miles contained in the submission: the Barents Sea, the Bering Sea, the Sea of Okhotsk and the Central Arctic Ocean.[98] As regards the Central Arctic Ocean, the Commission recommended that 'the Russian Federation make a revised submission in respect of its extended continental shelf in that area based on the findings contained in the recommendations.'[99] It is of interest to note that there was no reference to other States in the summary of this part of the recommendation and as it was suggested by Elferink and Johnson: 'the recommendation to make a revised submission was not directly linked to the existence of a territorial or maritime dispute under Annex I to the Rules of Procedure.'[100]

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93 *Id.*

94 *Note Verbale* of Mar. 20, 2002 of the Permanent Mission of Norway to the United Nations to the Secretary-General of the United Nations (reproduced in CLCS.01.2001.LOS/NOR of April 2, 2002).

95 *Id.*

96 Oceans and Law of the Sea; Reports of the Secretary-General; Addendum, n.36, para 29.

97 *Id.* para 41

98 *Id.*

99 A.G.U. Elferink, C. Johnson, *Outer Limits of the Continental Shelf and 'Disputed Areas': State Practice concerning Article* 76(10) of the LOS Convention, 21(4) The Int'l J. of Marine and Coastal L. 473 (2006). DOI: 10.1163/157180806779441138.

100 *Id.*

5.2. The Submission of Norway

On 27 November 2006 Norway submitted data to the Commission on the limits of the continental shelf beyond 200 NM from the baselines from which the breadth of the territorial sea is measured. Norway consented, without prejudice to the bilateral delimitation of the continental shelf between Norway and the Russian Federation, to the Commission considering and making recommendations on the basis of the Russian submission with regard to the so-called 'Loop Hole' in the central Barents Sea beyond 200 NM from the baselines of Norway and the Russian federation and for two separate areas in the North East Atlantic and the Arctic: the Western Nansen Basin in the Arctic Ocean and the Banana hole in the Norwegian Sea.[101] The submission was considered during the 19th session of the Commission (5 March – 13 April 2007). It was established that there were some unresolved questions remained related to the disputes with neighboring States: Denmark, Iceland and Russian Federation. Thus, those questions ought to be considered by reference to rule 46 and annex 1 of the Rules of Procedure of the Commission.[102] Denmark, Iceland and the Russian Federation reacted to the submission of Norway. The Government of the Russian Federation in a *Note Verbale* of 21 February 2007 made it clear that it had no objection to the Commission considering and making recommendations with regard to the area under dispute without prejudice to any future delimitation.[103] Denmark in its *Note Verbale* of 24 January 2007 and Iceland in its *Note Verbale* of 29 Janury 2007 notified that they did not object to the Commission considering the documentation submitted by Norway concerning the Banana Hole.[104] Then the Commission established a sub commission to examine the submission of Norway.

5.3. Other Arctic States Position: Canada, Denmark, the United States

Canada. Canada has always been taking active position in claiming to the Arctic. It must be stressed that Canada has not submitted data to the Commission pursuant to the Article 76 of the LOS Convention. The deadline for Canada is 2013. Canada became more active after the planting of the titanium flag on the seabed of the Arctic Ocean by Russian Arctic-2007 expedition on 2 August 2007. Subsequently, the intention to build two military facilities in the Arctic was announced by Canadian minister Steven Harper.[105] Canada also claims to the Lomonosov ridge.

Denmark. Denmark has not yet submitted information to the Commission on the proposed outer limits of the continental shelf beyond 200 NM. The deadline

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101 See notification CLCS.01.2001.LOS/NOR.

102 *Id.*

103 *Supra.*

104 *Id.*

105 *Canada to strengthen Arctic claim* (2008), <http://news.bbc.co.uk/1/hi/world/americas/6941426.stm> (accessed Aug. 11, 2015).

for Denmark is 2014. However, Denmark announced its position concerning the Lomonosov ridge. It is considered by Danish government that the Lomonosov ridge is an extension of Greenland the Danish autonomous province.

The United States. The United States is the only Arctic coastal state which has not ratified the LOS Convention, thus as a non-party cannot claim to the outer continental margin and submit data to Commission. However, the United States admitted to be bound by provisions of the LOS Convention as rules of the customary international law. It is of interest to note that 'the United States is in a curious position of wanting to restrict coastal state claims while at the same time being in a position to be a major beneficiary of expansive offshore claims.'[106] The United States can be involved in a land or maritime dispute as a non-party to the LOS Convention. The Rules of Procedure provide such possibility in paragraph 5 of Annex 1.

Thus, to date only two submissions to the Commission concerning the Arctic have been made by Norway and the Russian Federation. The deadlines for Canada and Denmark are approaching. It is expected that the United States will ratify the LOS Convention in the nearest time. It is predictable that the main struggle for the part of the Arctic will be between Canada, Denmark and the Russian Federation.

6. Conclusion

New claims to the Arctic put a great pressure on a modern international law relating to the delimitation of the outer continental margin. Despite the fact that many provisions of the Article 76 the of LOS Convention has been criticized for the difficulties in its implementation, the current legal approach allows the demarcation of the continental margins in the world and avoid potential conflicts. A special attention in the current legal approach has been paid to the delimitation of the outer continental margin in cases of unresolved land and maritime disputes. Coastal States may choose a number of different approaches from the procedures developed by the Commission. The envisaged options allow coastal States to cooperate in order to make joint or separate submissions by agreement. Taking into account relevant provisions, it can be concluded that 'the LOS Convention and the procedural rules devised by the Commission may thus assist in creating a certainty about the location of the boundaries of the continental shelf to the largest extent possible, making a significant contribution to the stability and finality of ocean boundaries.'[107]

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[106] Commentary *The 1982 United Nations Convention on the Law of the Sea and the Agreement on Implementation of Part XI*, attached to the Letter of Submittal from the US Secretary of State to the US President, part of the Message of Transmittal of the LOS Convention from the US President to the US Congress, US Senate Treaty Doc. 103–39, 102d Congress, 2d Session 50–58 (1994).

[107] A.G.U. Elferink, C. Johnson, *Outer Limits of the Continental Shelf* and *Disputed Areas: State Practice concerning Article 76(10) of the LOS Convention* 487.

The Article 76 of the LOS Convention in general is considered to be a great political achievement, especially taking into account that the 1958 Geneva Convention did not envisage the possibility of delimitation of the outer continental margin at all. However, the difficulties of implementing remain. It can be explained by the fact that the LOS Convention is still young and a practice of implementing is not fully formed. As it was acknowledged by the Chairman of the Commission Peter Croker: 'Two decades had passed since the time of the Third Conference and during those two decades our knowledge about the nature of continental margin had increased enormously. As an example of this, not a million miles away from where we are at this moment, in the northeast Atlantic, we have discovered that in some areas sediment thickness actually increases away from the continent, something perhaps not previously envisaged and which in a way turns the Gardiner formula on its head.'[108] The complexity of the rules and area of application is another reason for difficulties in implementing. The experts emphasized that 'two of the principal sets of difficulties in implementing the Article 76 are locating the foot of the slope and dealing with ridge issues.'[109] Nevertheless, the practice has been developing during the last years. The first significant phenomenon occurred on 9 April 2008 when the Commission adopted the 'Recommendations of the Commission on the Limits of the Continental Shelf in regard to the submission made by Australia on 15 November 2004 on information on the proposed outer limits of its continental shelf beyond 200 nautical miles.'[110] This will have a direct impact on the delimitation of the outer continental margin in the Arctic.

The Commission as a special institutional body and as a permanent directness participant of the process of the delimitation should be mentioned separately. The Commission has been criticized a lot for several aspects in its practice. Firstly, the lack of lawyers in membership considered to be a significant omission. Secondly, the financial relationship with the State party and a possibility to advise potential claimants are also disputed and put objectionable questions about independence and impartiality. Thirdly, the legal process between the coastal State and the Commission which is called 'ping-pong' process by some scholars can be endless and there is no legislated endpoint. However, these omissions are not crucial and may be disposed practically as it was proposed by some Commission members. Another point is that the role of the Commission is considered to be procedural. At the same time, this is very important as it is clear that 'the outer limits of the continental shelf will not be finally established without recommendations by the Commission.'[111]

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[108] Croker, *The Commission on the Limits of the Continental Shelf: Progress to Date and Future Challenges* 216.

[109] J.N. Moore, *Concluding Remarks* 457.

[110] Official Documents System of the United Nations.

[111] Heidar, *Legal Aspects of Continental Shelf Limits* 33.

The Arctic by virtue of its natural and geographical features is a potential conflict region. The huge reserves of hydrocarbon resources provoked an inappropriate aggression and militarization among the Arctic coastal States. As it was assumed by Ron Macnab 'probably the best way to avoid this sort of contention is for neighbor States to agree to work together by combining and rationalizing all available data sets for their region of interest and by harmonizing their analytical procedures.'[112] The last events indicate that the Arctic States are trying to find new ways of resolving the disputes and stop the militarization of the Arctic. On a two-day summit in Greenland in May 2008 five Arctic coastal States consented to let the U.N. rule on conflicting territorial claims on the region's seabed, moreover "the five nations agreed that no special Arctic treaty was necessary, saying in the declaration there was no need to develop a new international legal regime.'[113] However, it is hard to believe in a peaceful settlement of the Arctic disputes because the stakes in the delimitation of the Arctic outer continental margin are very high.

Analyzing educed difficulties in implementing and some discrepancies in the provisions of the Article 76, it can be concluded that they do not constitute grounds for a consideration of a new legal approach. As it was found there are some solutions and proposals to avoid the complexities. Concerning the discrepancies, they are mainly contained in the Rules of Procedure and in the Scientific and Technical Guidelines of the Commission. They can be disposed practically without reviewing of the legal concept.

Finally, in the nearest future the struggle for the Arctic are likely to intensify, although it should be born in mind that any 'delimitation is a legal operation […] which must […] be based on consideration of law.' It can be expected that the Arctic coastal States will follow the requirements of the LOS Convention and 'shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in the Convention in a manner which would not constitute an abuse of right.'

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[112] Macnab, *The Outer Limit of the Continental Shelf in the Arctic Ocean* 307.

[113] Kym McLaughlin, *Arctic Claimants Say They Will Obey U.N. Rules,* May 29 (2008), available at <http://www.enn.com/top_stories/article/36647> (accessed Sep. 30, 2015).

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Acknowledgements

The author will like to thank Unnipapa who has been a constant motivation.

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TOWARDS FULFILLMENT OF FUNDAMENTAL RULES OF HUMANITARIAN LAW IN THE CONTEXT OF THE NUCLEAR NON-PROLIFERATION TREATY

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DOI:10.21684/2412-2343-2016-3-1-66-89

The Non-Proliferation Treaty (NPT) is an international treaty that should be implemented during both peace and wartime. However, the obligations included in the treaty are dependent upon states' attitudes regarding other issues. Non-use of nuclear weapons is directly related to negotiations done for the purpose of non-proliferation of nuclear weapons, non-production or accumulation by other means and disarmament. In our day, prevention of the proliferation of nuclear weapons has been one of the issues of international law.

The present study is of crucial significance due to its endeavor to clarify the general principles of Humanitarian Law in a relationship to the threat of nuclear weapons' up to now, a special norm; significantly limiting or completely prohibiting the use of nuclear weapons, has not been accepted in international law. However, customary international humanitarian law regarding the use of nuclear weapons holds great value because of its purpose in eliminating nuclear weapons as a means of war through ascertaining their non-use and also appeasing the importance of nuclear ascendancy. In this respect, the NPT regime and its relationship with international humanitarian law will be discussed. Firstly, the NPT background, formation, main objectives and principles will be analyzed. In order to evaluate the relationship between the NPT and humanitarian law, the humanitarian obligations in general, humanitarian obligations in the context of the NPT and fulfillment of these obligations under the NPT should be studied. One of the main parts of the study is nuclear disarmament obligation included in the NPT. In this section, nuclear disarmament obligation in the context of the NPT and the legal framework of possible, general and comprehensive disarmament will be examined.

Keywords: nuclear weapons; non-proliferation treaty; NPT; nuclear disarmament; international law; international humanitarian law.

Recommended citation: Saeed Bagheri, *Towards Fulfillment of Fundamental Rules of Humanitarian Law in the Context of the Nuclear Non-Proliferation Treaty*, 3(1) BRICS Law Journal 66–89 (2016).

Table of Contents

1. Introduction

A specific norm that substantially restricts the use of nuclear weapons or eliminates completely these weapons has not been accepted in international law so far. However, the principles and fundamental rules of international humanitarian law applicable to nuclear weapons are also rules of customary international law. These rules are very significant in terms of reducing the importance of nuclear superiority by removing the function of these weapons as a 'means of warfare' resulting in the non-use of nuclear weapons. Actually, the concerns about humanitarian consequences of nuclear weapons have been highlighted in the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).[1] In accordance with the NPT's preamble *'the parties to the Treaty* [considers] *the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples.'*

Taking into account, the destructive impacts of nuclear weapons on human beings after the devastation of Hiroshima and Nagasaki in 1945, the humanitarian impacts of nuclear weapons have been the subject of much discussion recently. Use of nuclear weapons at any time and under any circumstances, as well as a permanent drain on human and natural resources constituted by nuclear arsenals, will lead to humanitarian disaster.

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[1] *Treaty on the Non-Proliferation of Nuclear Weapons (NPT)*, New York, June 12, 1968.

The obligations of disarmament and the elimination of nuclear weapons have been included in Article VI of the NPT. Unfortunately, the fulfillment of these obligations has not practically been realized. The obligation of nuclear disarmament is an accepted norm by all states that has been concluded in the United Nations General Assembly's first resolution adopted on 24 January 1946.[2] The resolution has elaborated on the goal of eliminating nuclear (atomic) weapons and all other major weapons 'adaptable to mass destruction.'[3] Accordingly, it can be said that the nuclear disarmament for international peace and security has long-since become an obligation under international law. Nuclear disarmament is one of the most important three pillars – disarmament, non-proliferation and peaceful use – of the NPT which was signed on July 1, 1968, and entered eforcement in 1970.

The main objective of the study is evaluating the implementation in good faith of the disarmament obligation by the states as a key element of the non-proliferation regime and the relationship between nuclear weapons and fundamental rules of humanitarian law applicable to weapons of mass destruction, especially nuclear weapons. For this purpose, Advisory Opinion of the International Court of Justice (ICJ) on the Legality of the Threat or Use of Nuclear Weapons (1996) will form the basis of the present study. In the light of what was mentioned above, the NPT, which is the basis of the existing global non-proliferation regime, has been given particular weight in this study.

2. NPT and Humanitarian Law

2.1. Formation of NPT, Its Main Objectives and Principles

The United States, as the first country to produce nuclear weapons, first used them in Hiroshima and Nagasaki of Japan. However, when the United States came face to face with the effects of this technology, it asked for prevention of nuclear weapons' proliferation and in this accordance, it refused to share its nuclear information with other states and kept it secret. In 1949, after the Soviet Union (USSR) attained the capacity to develop nuclear weapons, the United States (the US) shared its technological developments regarding nuclear weapons, for the first time, with its ally; England. After the United States' decision to share its nuclear information, a nuclear proliferation race began. Thereafter, testing process of the nuclear weapons began. As a result, following the United States, SSCB, England and France realized their first nuclear tests. During the early 1960s, in a study done byorder of the US president, John F. Kennedy, in the coming 20 years, which would be up to the 1980s,

[2] United Nations General Assembly, Establishment of a Commission to Deal with the Problems Raised by the Discovery of Atomic Energy, A/RES/1(I), 1st Session (Seventeenth Plenary Meeting), Jan. 24, 1946, available at <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/1(I)> (accessed Dec. 10, 2015).

[3] *Id*., ¶. 5 (c).

almost 40 states were expected to be able to produce nuclear weapons.[4] This issue caused a lot of concern especially for the US and USSR. Moreover, a consensus had not been achieved between the two states concerning non-proliferation of nuclear weapons. This had been the case until 1964 when the People's Republic of China performed its first nuclear weapons' test. However, since this date the US and USSR have come to be on the same side. Having begun with Ireland's attempts under UN nuclear disarmament and because of ongoing negotiations, the *Nuclear Non-Proliferation Treaty (NPT)* was opened for signature on July 1, 1968. Proposed by Ireland, it has been signed by a majority of sovereign states. The NPT, whose main purpose is to prevent the proliferation of nuclear weapons, developed through the softening of the Cold War. Except for the United Nations Security Council's five permanent members, all the states who have signed the NPT are forbidden to accumulate nuclear weapons (Article II). By signing this Treaty, nuclear powers have accepted to give technical support to those states, which seek peaceful nuclear technology, to negotiate for nuclear disarmament, to decrease the number of nuclear weapons and finally complete disarmament.

The non-nuclear-weapon states who intend to accumulate nuclear energy are obliged to allow *The International Atomic Energy Agency (IAEA)*[5] to control nuclear plants in order to make sure of preventing the conversion of nuclear materials into weapons (Article III). States possessing nuclear weapons stipulate not to transfer nuclear weapons to non-nuclear-weapon states and non-nuclear-weapon states stipulate not to accept nuclear weapons if offered by armed states (Article II and III).

Preventing the proliferation of nuclear weapons, disarmament and the peaceful use of nuclear energy constitute the three main objectives of the NPT.

The NPT has accepted the advantages of nuclear technology used for peaceful purposes but has not clarified if the same technology can be used in making nuclear weapons. In this regard, the '*Nuclear-Weapon States*' and *'Non-Nuclear-Weapon States'* have been differentiated in the NPT. In the Treaty, nuclear-weapon states have been identified as states, which have tested one nuclear weapon before January 1st, 1967. At the time that the NPT was signed the five permanent United Nations Security Council members: the US, USSR, Britain, France and China, were the five official

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[4] President Dwight D. Eisenhower's Atoms for Peace program helped some 40 countries develop nuclear power and research programs, while receiving pledges from all that such materials and technologies would not be diverted to weaponary uses. *See* Sarah J. Diehl & James C. Moltz, *Nuclear Weapons and Non-proliferation: A Reference Handbook* 14–16, 61 (2d ed., Santa Barbara 2008).

[5] On 8 December 1953, at the United Nations General Assembly, the President of the United States of America, Dwight D. Eisenhower, proposed the creation of an organization to promote the peaceful use of nuclear energy and to seek to ensure that nuclear energy would not serve any military purpose. Eisenhower's proposals led to the creation of the IAEA and helped to shape international cooperation in the civilian use of nuclear energy up to 1978, when a far reaching change in American nuclear law signalled the end of Eisenhower's programme of 'Atoms for Peace'. For detailed information, *see* David Fischer, *History of the International Atomic Energy Agency: The First Forty Years* 29–58 (Vienna 1997).

nuclear-weapon states. India and Pakistan were known to have nuclear weapons and Israel's nuclear weapons were deemed to hold a strong suspicion. However, none of these countries have signed the NPT. Before the emergence of the Treaty, the states, which have exploded a nuclear device, would not give up this capability by developing a controlled nuclear chain reaction. In Article VI of the NPT, despite the statement that '*Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament ...*,' these states have not allowed a provision that would bind them. Some states, particularly India, have described this differentiation inherent in the NPT as discrimination and clearly announced that it would not be party to the Treaty and conducted its first nuclear weapons tests in 1974. Pakistan also announced that it would not be a party to the NPT and carried out its first nuclear test in 1998. These states are not party to the NPT thus do not have the status of *'nuclear-weapon states'* but rather are called *'de facto nuclear-weapon states'* or '*states which are going to get nuclear weapons.*'[6]

2.2. A General Overview of Humanitarian Obligations

Humanitarian law obligations have been the subject of debate in the 2010 NPT Review Conference. Therefore, in order to understand and evaluate priorities in terms of issues, we will need to look briefly at the 2010 NPT Review Conference.

In actual facet, the NPT Review Conferences are operations that have been carried out for evaluation of the successes obtained in accordance with the objectives of the NPT and in cooperation with a process for achieving these goals. This process would succeed only if state parties act in accordance with the principle of 'good faith'[7] in order to achieve common goals.

The good faith principle would be realized only by implementation of activities that states have decided together. One of the key points of good faith principle was codified at the 1969 Vienna Convention on the Law of Treaties. According to Article 26 of the Vienna Convention, *'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.'*

Discussing humanitarian obligations of states in the Final Document of the 2010 NPT Review Conference is very important in terms of nuclear weapons. The conference had serious concerns regarding the humanitarian consequences of possible uses of nuclear weapons. In this regard, the Conference has stated: *'The*

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6 See generally 'De Facto Nuclear Weapons States and the NPT Regime' (2013).

7 The principle of 'good faith' is one of the fundamental principles of international law, which governs the formation, and the fulfillment of state obligations. According to Mohammed Bedjaou, former president of the ICJ, *'It (the principle of good faith) is the guarantor of international stability, because it allows state A to foresee the behavior of its partner, state B, and thus makes it possible for the former to align its behavior with that of the latter.' See* Mohammed Bedjaoui, *Good Faith, International Law, and Elimination of Nuclear Weapons: Keynote Address*, available at ‹http://lcnp.org/disarmament/2008May01eventBedjaoui.pdf› (accessed 15 Jan. 15, 2016).

Conference expresses its deep concern at the continued risk for humanity represented by the possibility that these weapons could be used and the catastrophic humanitarian consequences that would result from the use of nuclear weapons."[8] Firstly, France requested the removal of this provision and the United Kingdom has declared that it has suspicions on this issue. Furthermore, France has remained silent about the implementation of humanitarian law on nuclear weapons with regarding evidence which was presented to the ICJ in 1995. Even so, France has stated that there is not definitive ban on this issue and finally, the use of nuclear weapons is permitted during the implementation of the right to individual or collective self-defense.[9]

However, according to the 2010 NPT Review Conference, *'The Conference expresses its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons and reaffirms the need for all states at all times to comply with applicable international law, including international humanitarian law.*"[10] Actually, in accordance with this provision, the Conference has referred to 'the applicable international law'. But, the modifyication the term 'all times', has led to some concerns. In fact, referring to the 'applicable international law' is a sad situation. In this case, the emergence of the controversies on self-defense, reprisal and 'absence of applying humanitarian law in peacetime' would undermine the theory that 'the use of nuclear weapons is contrary to humanitarian law.' However, international humanitarian law is not the basis for the legality of nuclear deterrence policies. Even so, the ICJ has emphasized that international humanitarian law is applicable to the deterrence policy.[11] Undoubtedly, prohibition of the threat or use of force in Article 2(4) of United Nations Charter is applicable during wartime and peacetime. Referring to the humanitarian disasters in the wake of the use of nuclear weapons is directly connected to 'comply[ing] with the applicable international law at all times.' More importantly, the states' obligation to comply with the applicable international law at all times is as much important as their obligations to comply with international

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[8] *2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document, Vol. I Part I Review of the Operation of the Treaty,* as provided for in its Article VIII (3), taking into account the decisions and the resolution adopted by the *1995 Review and Extension Conference and the Final Document of the 2000 Review Conference, NPT/CONF.2010/50 (Vol. I)*, May 28, 2010, 12, ¶ 80, available at <http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50%20(VOL.I)> (accessed Jan. 15, 2016).

[9] *President Bedjaoui presiding in the case in Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request for Advisory Opinion Submitted by the World Health Organization) and in Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion Submitted by the General Assembly of the United Nations),* Verbatim Record, Nov. 1, 1995, 66, available at <http://www.icj-cij.org/docket/files/95/5943.pdf> (accessed Jan. 15, 2016).

[10] *2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document, Vol. I Part I Review of the Operation of the Treaty* 19.

[11] *Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weaponsp,* ICJ Reports (1996), ¶ 67, available at <http://www.icj-cij.org/docket/files/95/7495.pdf> (accessed Jan. 16, 2016).

humanitarian law. Therefore, France's self-defense policy – the language used to describe French nuclear policy is similar in many ways to that of Britain, with the stated aim being to deter a potential aggressor who might threatens the country's 'vital interests'[12] – is contrary to Article 2(4) of the United Nations Charter.[13]

In light of the foregoing, the provision on humanitarian law that has been adopted within the framework of the 2010 NPT Review Conference enhances the prohibition of the use of nuclear weapons norm. Indeed, since the US used nuclear bombs on Hiroshima and Nagasaki, the aforementioned provision having merged with the obligation to non-use of nuclear weapons, strengthens the unconditional non-use customary international law rule. In this context, the US Nuclear Posture Review Report (2010) is remarkable. According to the Report, *'it is in the US interest and that of all other nations that the nearly 65-year record of nuclear non-use be extended forever.'*[14] After a while, President Obama and Indian Prime Minister Singh stated that they would support the strengthening of non-use of nuclear weapon rule for a period of 65 years. This statement has further strengthened the statement of the US Nuclear Posture Review Report.[15]

In this regard, the declaration that former judges of the ICJ and experts of international law and diplomacy signed in 2011 is also quite important. The Declaration referring to the 1996 ICJ Advisory Opinion has spoken of 'the nascent opinio juris' of 'a customary rule specifically prohibiting the use of nuclear weapons.'[16]

2.3. Humanitarian Obligations in the Context of the NPT

In order to evaluate the humanitarian obligations in the context of the NPT, we should examine the Final Document of the 2010 NPT Review Conference.

In the Final Document of the 2010 NPT Review Conference, which was held in New York, the Conference reaffirmed *"the catastrophic humanitarian consequences of any use of nuclear weapons and need for all states to comply with international humanitarian law.'* This provision has been considered under the 'Nuclear Disarmament/Principles and Objectives' section that has taken place in Part I of the Final Document with

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12 *Chirac Reasserts French Nuclear Weapons Policy,* 82 Disarmament Diplomacy (2006).

13 *Id*., ¶ 48.

14 *Nuclear Posture Review Report,* United States Department of Defence ix (2010), available at <http://www.defense.gov/Portals/1/features/defenseReviews/NPR/2010_Nuclear_Posture_Review_Report.pdf> (accessed 16 January 2016).

15 *Joint Statement by President Obama and Prime Minister Singh of India* (2010), available at <https://www.whitehouse.gov/the-press-office/2010/11/08/joint-statement-president-obama-and-prime-minister-singh-india> (accessed Jan. 16, 2016).

16 *Vancouver Declaration: Law's Imperative for the Urgent Achievement of A Nuclear-Weapon-Free World*, Vancouver: The Simons Foundation and the International Association of Lawyers against Nuclear Arms (IALANA), 10–11 February (2011), available at <http://www.cpdnp.jp/pdf/Vancouver_Declaration.pdf> (accessed Jan. 16, 2016).

'Conclusions and Recommendations for Follow-on Actions' headline. According to the Final Document, the following statements have been put forward as conclusions and recommendations for follow-on actions:

'In pursuit of the full, effective and urgent implementation of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons and paragraphs 3 and 4 (c) of the 1995 decision entitled 'Principles and objectives for nuclear non-proliferation and disarmament,'[17] *and building upon the practical steps agreed to in the Final Document of the 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, the Conference agrees on the following action plan on nuclear disarmament which includes concrete steps for the total elimination of nuclear weapons.'*[18]

The obligation to abide by humanitarian law ensures the realization of the initial provisions of the NPT; because the obligation to follow the fundamental rules of international humanitarian law – for example, unnecessary suffering, principle of neutrality and rule of proportionality[19] – and implementation of these rules may prevent the use of nuclear weapons. *'The states concluding this Treaty, hereinafter referred to as the Parties to the Treaty, considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples and believing that the proliferation of nuclear weapons would seriously enhance the danger of nuclear war'*[20] thus have agreed upon the provisions of the Treaty.

Acceptance of the legal requirements and obligations related to the non-use of nuclear weapons – thereby strengthening the illegitimacy of nuclear weapons – could provide for the creation of secure conditions for nuclear disarmament and disarmament negotiations. To this end, the provisions relating to nuclear disarmament have been provide in the preamble of the NPT and Article VI of the Treaty. Disarmament provision is understandable from the obligation undertaken by countries in the context of the 2000 NPT Review Conference. In accordance with this obligation, *' A diminishing role for nuclear weapons in security policies to minimize the risk that these weapons will ever be used and to facilitate the process of their total elimination.'*[21]

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17 *NPT/CONF.1995/32/DEC.2*, New York, 17 April – 12 May (1995).

18 *2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document, Vol. I Part I Review of the Operation of the Treaty* 19.

19 For more information, *see* Saeed Bagheri, *Uluslararası Insancıl Hukuk ve Nükleer Silahlar* 33–38 (Ankara 2015).

20 *Treaty on the Non-Proliferation of Nuclear Weapons (NPT)*, 'preamble', available at ‹http://www.un.org/disarmament/WMD/Nuclear/NPTtext.shtml› (accessed Jan. 22, January 2016).

21 *2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document*, Vol. I Part I Review of the Operation of the Treaty, Taking into Account the Decisions and the Resolution adopted by the 1995 Review, NPT/CONF.2000/28, Vol. 1, Part I, 2000, 15. See also Jonathan Granoff, *The Nuclear Nonproliferation Treaty and its 2005 Review Conference: A Legal and Political Analysis*, 39(4) New York U. Int'l L. and Pol., 995–1006 (2007).

The humanitarian obligation that has been mentioned above and other obligations in the context of the NPT have been confirmed in the Final Document of the 2000 NPT Review Conference.[22] The Conference has agreed on the action plan for nuclear disarmament which includes concrete steps for the total elimination of nuclear weapons. According to Action point 5, *"The nuclear-weapon states commit to accelerate concrete progress on the steps leading to nuclear disarmament, contained in the Final Document of the 2000 Review Conference, in a way that promotes international stability, peace and undiminished and increased security"*.[23] Actually, the relationship between nuclear disarmament and non-use of nuclear weapons should be sought in the context of the NPT.

The NPT was opened for signature on 1 July 1968. Meanwhile, the US and USSR stated that *'further effective measure relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament'*[24] should be taken. *'Under this heading members may wish to discuss measures dealing with the cessation of testing, the non-use of nuclear weapons, the cessation of production of fissionable materials for weapons use, the cessation of the manufacture of weapons and reduction and subsequent elimination of nuclear stockpiles, nuclear-free zones, etc.'*[25]

Nuclear disarmament and humanitarian obligations included in Action point 5 are not binding. Actually, this Action Plan is the result of a treaty which has been signed by states participating in an international conference. Nevertheless, according to the required procedure 'signing' and 'ratification' are not required. In accordance with Article 11 of the 1969 Vienna Convention on the Law of Treaties, *'The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.'*[26] However, according to 'Decision 2' which 1995 the NPT Review Conference adopted on 11 May 1995 – *Principles and Objectives for Nuclear Non-Proliferation and Disarmament*[27] – the Action Plan is an agreement that has been signed in order to extend the legitimacy of the Non-Proliferation Treaty. This is the reflection of a common understanding of parties on the appropriate tools for the implementation of Article VI

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22 *2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document, Vol. I Part I Review of the Operation of the Treaty* 19.

23 *Id*., 21.

24 *Final Verbatim Record of the Conference of the Eighteen-Nation Committee on Disarmament, Meeting 390, ENDC/PV. 390*, UN Eighteen-Nation Committee on Disarmament, Geneva, Aug. 15, 15.08.1968, ¶ 93, available at <http://quod.lib.umich.edu/e/endc/4918260.0390.001/30> (accessed Jan. 22, January 2016).

25 *Id*.

26 *Vienna Convention on the Law of Treaties*, 23 May 1969, available at <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXIII/XXIII-1.en.pdf> (accessed Jan. 22, 2016).

27 *Principles and Objectives for Nuclear Non-Proliferation and Disarmament*, NPT/CONF.1995/32/DEC.2, New York, 17 April – 12 May (1995).

of the NPT. As a result, the implementation of these obligations is evidence of the compliance of states parties to the NPT and Article VI.[28] This is directly connected with international humanitarian law. Nuclear disarmament, prevention of nuclear war and the realization of the basic purposes of the NPT are within the scope of international humanitarian law obligations. Actually, nuclear disarmament included in Article VI is an obligation that has been brought in line with humanitarian justifications. Therefore, the absence of humanitarian law in the NPT text does not mean that the Treaty is disconnected with customary rules of international humanitarian law. In accordance with Article VI, *'Each of the parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament.'* This provision is extremely significant and directly connected with customary rules of humanitarian law, because potentially disastrous humanitarian and environmental consequences of the use of nuclear weapons could last a long time and be irreversible in terms of the negative impact on the conditions of human life and health of present and future generations.

2.4. Fulfillment of Humanitarian Obligations under the NPT

Implementation of the obligations of international law and humanitarian law related to nuclear weapons in good faith will only take place by eliminating the incompatibility of existing doctrines on this issue and changing the states' policies in accordance with international humanitarian law requirements. Fulfillment of humanitarian law obligations also requires conducting negotiations in good faith in order to completely eliminate of nuclear weapons. Nuclear disarmament, in accordance with the rules of international humanitarian law, is also the effective dimension of humanitarian disarmament and the logic of possession and non-use of biological and chemical weapons according to an international convention.[29]

In his statement on 20 April 2010, Jakob Kellenberger, President of the International Committee of the Red Cross (ICRC) clarified: *'… any use of nuclear weapons could be compatible with the rules of international humanitarian law.'* He believes that *'The position of the ICRC, as a humanitarian organization, goes – and must go – beyond a purely legal analysis. Nuclear weapons are unique in their destructive power, in the unspeakable human suffering they cause, in the impossibility of controlling their effects in space and time, in the risks of escalation they create, and in the threat they pose to the environment, to future generations, and indeed to the survival of*

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[28] For more information *see* Christopher A. Ford, *Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons*, 14(3) Non-proliferation Rev. 401–428 (2007). DOI: 10.1080/10736700701611720.

[29] For more information *see* Ken Berry et al. (eds.), *Delegitimizing Nuclear Weapons Examining: The Validity of Nuclear Deterrence* 37–39 (Monterey, United States 2010), available at <https://www.eda.admin.ch/content/dam/eda/de/documents/aussenpolitik/sicherheitspolitik/Delegitimizing_Nuclear_Weapons_May_2010.pdf> (accessed Jan. 23, 2016).

humanity. The ICRC, therefore, appeals today to all states to ensure that such weapons are never used again, regardless of their views on the legality of such use.'[30] According to the ICRC, *'preventing the use of nuclear weapons requires fulfillment of existing obligations to pursue negotiations aimed at prohibiting and completely eliminating such weapons through a legally binding international treaty. It also means preventing their proliferation and controlling access to materials and technology that can be used to produce them.'*[31]

The ICJ advisory opinion on the Legality of the Threat or Use of Nuclear Weapons holds significant value in the course of this study. Actually, the ICJ Advisory Opinion is a response to the United Nations General Assembly's question concerning the Legality of the Threat or Use of Nuclear Weapons. In order to answer this question, the Court stated that 'nuclear disarmament' included in Article VI of NPT should be interpreted. In this regard, the ICJ has emphasized that *'There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.'*[32] The Court also, referring to *the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1972)* and *the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (1993),* compared nuclear weapons with chemical and biological weapons.[33]

Fulfilling the disarmament obligation in good faith requires an extensive study. However, fulfillment of the NPT obligations adopted at the 2000 and 2010 NPT Review Conferences – early entry into enforcement of the *'1996 Comprehensive Nuclear-Test-Ban Treaty (CTBT)',* continuation of negotiations in order to make the '*Treaty Banning the Production of Fissile Material for Use in Nuclear Weapons or Other Nuclear Explosive Devices'* and elimination of nuclear weapons throught performance of irreversible reactions – will demonstrate the good faith of states in this accordance. Good faith also requires avoiding activities which would undermine the goal of nuclear disarmament.[34]

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30 Jacob Kellenberger, *President of the International Committee of the Red Cross, Statement: Bringing the Era of Nuclear Weapons to an End* (2010), available at <http://www.icrc.org/eng/resources/documents/statement/nuclear-weapons-statement-200410.htm> (accessed Jan. 23, 2016).

31 *Id*.

32 *Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weaponsp*, ¶ 105/2/F.

33 *Id*., ¶ 57.

34 The good faith principle prohibits every act, behavior, declaration and/or initiative tending to deprive the NPT of its object and purpose, especially nuclear disarmament included in Article VI. *See* Bedjaoui, *Id.*, p. 21. It could be said that this prohibition also covers the modernization of the nuclear arsenals and nuclear defense systems of the nuclear-weapon states and their failures of nuclear-weapon states to making multilateral negotiations for nuclear disarmament.

Additionally, initiation of negotiations in order to ensure the elimination of nuclear weapons in the context of a multilateral treaty is evidence of good faith of the states in this accordance.[35] Many of the states have called for the realization of this process in The United Nations General Assembly and NPT Review Conferences. However, this request has been rejected by all nuclear-weapon states party to the NPT except China.[36]

2010 NPT Review Conference has called '*on all nuclear-weapon states to undertake concrete disarmament efforts and affirms that all states need to make special efforts to establish the necessary framework to achieve and maintain the world without nuclear weapons.*'[37] In order to achieve these aims and objectives, the Conference has also noted *'the five-point proposal for nuclear disarmament of the Secretary-General of the United Nations, which proposes, inter alia, consideration of negotiations on a nuclear weapons convention or agreement on a framework of separate mutually reinforcing instruments, backed by a strong system of verification.*'[38] In continuation of these negotiations, the 2010 NPT Review Conference also recognized *'the legitimate interests of non-nuclear-weapon states in the constraining by the nuclear-weapon states of the development and qualitative improvement of nuclear weapons and ending the development of advanced new types of nuclear weapons.*'[39]

The states' meeting in good faith for nuclear disarmament, their wish for reconciliation, avoidance of delays and their intention to achieve positive results will make the realized negotiations significant.[40] According to the ICJ, nuclear disarmament obligation includes both the act and the result. In other words, 'nuclear disarmament obligation is an obligation to achieve a precise result – nuclear disarmament in all its aspects – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.'[41] It can be said that the United

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35 For more information *see* Christopher G. Weeramantry, *Good Faith Negotiations Leading to the Total Elimination of Nuclear Weapons: Request for an Advisory Opinion from the International Court of Justice* 31–32 (Harvard 2009), available at <http://lcnp.org/disarmament/2009.07.ICJbooklet.pdf> (accessed Jan. 23, 2016).

36 United Nations General Assembly, *Follow-up to the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons*, A/RES/64/55, Sixty-fourth Session, 2 December, 2010, available at <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/64/55> (accessed Jan. 23, 2016).

37 *2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons: Final Document* 20.

38 *Id.*

39 *Id.*

40 See Weeramantry, *Id.*, 30–31.

41 *Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weaponsp, ICJ Reports 1996*, ¶ 99.

Nations Secretary-General Ban Ki-moon's five-point proposal on 24 October 2008 is sufficiently definitive in this issue.[42]

3. Nuclear Disarmament

3.1. Nuclear Disarmament Obligation in the Context of the NPT

In recent years, the nuclear disarmament which developed out of concern for humanitarian suffering has failed. In other words, a genuine nuclear disarmament process has not been realized, none of the nuclear-weapon states have abandoned their nuclear weapons and after many disarmament conferences and treaties (such as START I[43] and START II[44]) coordinated so far, nuclear weapons have not been

[42] Ban Ki-moon's five-point proposal can be summarized as follows: a) Fulfilment of the obligations under the NPT to undertake negotiations on effective measures leading to nuclear disarmament by all NPT parties; pursuing this goal by agreement on a framework of separate, mutually reinforcing instruments; negotiating a nuclear-weapons convention, backed by a strong system of verification, as has long been proposed at the United Nations; engage the nuclear-weapon states with other states on this issue at the Conference on Disarmament in Geneva; resumption of bilateral negotiations between the US and Russian Federation aimed at deep and verifiable reductions of their respective arsenals; b) Commencement of the discussions of the Security Council's permanent members, perhaps within its Military Staff Committee, on security issues in the nuclear disarmament process; assuring non-nuclear-weapon states will not be the subject of the use or threat of use of nuclear weapons and convening a summit on nuclear disarmament by Security Council; freeze own nuclear-weapon capabilities and make their own disarmament commitments of Non-NPT states; c) Regarding the 'Rule of law', entering into force of the CTBT and endeavoring to make the Conference on Disarmament to begin negotiations on a fissile material treaty immediately, without preconditions; entering into force of the Central Asian and African nuclear-weapon-free zone treaties; ratifying all the protocols to the nuclear-weapon-zone treaties by nuclear-weapon states; establishing such a zone in the Middle East; concluding their safeguards agreements with the IAEA, and voluntarily adopting the strengthened safeguards under the Additional Protocol by all NPT parties; d) Accountability and transparency: The nuclear-weapon states often circulate descriptions of what they are doing to pursue these goals, yet these accounts seldom reach the public. The nuclear-weapon states' sending such material to the United Nations Secretariat, and encouraging its wider dissemination. The nuclear powers could also expand the amount of information they publish about the size of their arsenals, stocks of fissile material and specific disarmament achievements. The lack of an authoritative estimate of the total number of nuclear weapons testifies to the need for greater transparency; e) Realizing a number of complementary measures include the elimination of other types of Weapons of Mass Destruction (WMD); new efforts against WMD terrorism; limits on the production and trade in conventional arms; new weapons bans, including of missiles and space weapons; arranging the Blix Commission for a 'World Summit on disarmament, non-proliferation and terrorist use of weapons of mass destruction' by General Assembly. For more information see *Address to the East-West Institute: The United Nations and Security in a Nuclear-Weapon-Free World*, Secretary General Ban Ki-Moon, 24 October (2008), available at <http://www.un.org/apps/news/infocus/sgspeeches/search_full.asp?statID=351> (accessed Jan. 23, 2016).

[43] *Treaty between the United States of America and the Union of Soviet Socialist Republics on Strategic Offensive Reductions (START I)*, signed in 31 July 1991 and entered into force in 5 December 1994 (Parties: United States, Russian Federation, Belarus, Kazakhstan and Ukraine). The Treaty has been expired in 5 December 2009, available at <http://www.nti.org/media/pdfs/START_I_1.pdf?_=1316646898> (accessed Jan. 23, 2016).

[44] *Treaty Between the United States of America and the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms (START II)*, signed in Signed 3 January1993 and entered into force in December 1994, available at <http://www.state.gov/t/avc/trty/102887.htm#treatytext> (accessed Jan. 23, 2016).

completely eliminated. Although the aforementioned treaties can be considered an important step towards the reduction of nuclear weapons, the path to nuclear disarmament is long. This means that the nuclear disarmament, targeted by Article VI of the NPT, has not been realized. Article VI of the Treaty explicitly commits all states to *'pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament.'* In this respect, the most important problem is that the nuclear-weapon states have assimilated the nuclear deterrence politics. In this situation, the legitimacy of the treaties relating to nuclear non-proliferation could be criticized. Nuclear weapons have ascended the nuclear-weapon states to the highest level of international hierarchy. Therefore, the efforts to acquire nuclear weapons have been marked as a nobstacle, laying the ground work for intervention with seeker states and the beginnings of a war of prevention against them. In this respect, the possession of these weapons by the nuclear-weapon states and their reluctance to participate in the disarmament process could be perceived as a violation of the general rules of international law. This tension between the law and practice has been raised in the ICJ's Advisory Opinion in a striking manner. Namely, the Court has internalized the minimum interpretation – use of nuclear weapons in an extreme circumstance of self-defense in which the very survival of a state is at stake – of international law.

Distinguishing between the nuclear-weapon states and other states on the basis of international law and striving to maintain this distinction will require the use of the principle of sovereign equality of states by the non-nuclear weapon states – in line with their aims and interests – on the basis of the same standards of international law. Accordingly, the nuclear disarmament process would be completely undermined as long as the states continue to adopt a policy of deterrence.

One question is if international humanitarian law and NPT are directly bound. One of the most important goals of the NPT regime is achieving nuclear disarmament. Article VI of the NPT commits all of the states' parties to pursue negotiations in good faith on nuclear disarmament. Therefore, it seems far from inappropriate to ask if nuclear disarmament is one of the humanitarian goals of the NPT regime.

According to the Final Document agreed by the 2010 NPT Review Conference, *'The Conference expresses its deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons and reaffirms the need for all states at all times to comply with applicable international law, including international humanitarian law.'*[45] As a consequence, all of the NPT parties have obligated themselves to comply with the humanitarian law regarding the NPT obligations for nuclear weapons due to their accountability within the NPT review process.The combination of commitments in the NPT includes the fundamental NPT Article VI obligation of good faith negotiation

[45] *2010 Rev. Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document,* Volume I Part I, Review of the Operation of the Treaty 19.

of nuclear disarmament. This provision is important as it enables a critic to better read between the lines of the provision and make better sense of it; it comes in a section of the Final Document entitled 'Conclusions and recommendations for follow-on actions' and is inserted in Part I of that section, 'Nuclear Disarmament' under 'Principles and Objectives'. In accordance with the provisions of Part I, *'Effective and urgent implementation of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons and paragraphs 3 and 4(c) of the 1995 decision entitled 'Principles and objectives for nuclear non-proliferation and disarmament', and building upon the practical steps agreed to in the Final Document of the 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, the Conference agrees on the following action plan on nuclear disarmament which includes concrete steps for the total elimination of nuclear weapons.'*[46]

According to the annex of 1995 Review and Extension Conference of the Parties to the NPT, *'The Conference further agreed that Review Conferences should look forward as well as back. They should evaluate the results of the period they are reviewing, including the implementation of undertakings of the states parties under the Treaty, and identify the areas in which, and the means through which, further progress should be sought in the future.'*[47] Substantively, the humanitarian law supports non-use of nuclear weapons. This fact has been realized in the Preamble of the NPT. The First Preamble of NPT reads as follows: *'Considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples ...'*[48]

Consequently, we can see the connection between non-use of nuclear weapons and nuclear disarmament in the origins of the NPT. In this context, both USSR and the US, after opening of the NPT for signature, proposed an agenda including *'the cessation of testing, the non-use of nuclear weapons, the cessation of production of fissionable materials for weapons use, the cessation of manufacture of weapons and reduction and subsequent elimination of nuclear stockpiles …'*[49]

The action plan was adopted by a review proceeding provided by the Treaty, as part of the strengthened review process agreed on in connection with the 1995 legally binding decision to extend the treaty indefinitely. It represents state parties' collective understanding of the appropriate means for implementation of Article VI. Implementation of action plan obligations consequently would be strong evidence that state parties are in general complying with Article VI and the NPT. This point

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[46] *Id.*, 19.

[47] *1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, Part I, Organization and work of the Conference, UN Doc. NPT/CONF.1995/32,* Part I, annex, 1995, 8.

[48] *Treaty on the Non-Proliferation of Nuclear Weapons*, 'Preamble'.

[49] *Final Verbatim Record of the Conference of the Eighteen-Nation Committee on Disarmament*, ¶ 93.

certainly applies to the humanitarian law obligation, due to the close interconnection between the application of humanitarian law and the realization of the core purposes of the NPT; prevention of nuclear war, and disarmament.[50] Meanwhile, the ICJ, in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, predicated the application of humanitarian law to nuclear weapons.[51] In this context, it would not be wrong if we said that ICJ has a humanitarian approach to nuclear disarmament as an NPT obligation.

Although there is no direct discussion or naming of humanitarian law in the NPT, the Treaty owes its validity to humanitarian law. If the humanitarian law aspect is excluded from the NPT, the Treaty and its binding value would be eradicated. Therefore, skipping humanitarian law in the NPT and its additional obligations would somehow be denying those obligations. As justification, in Article VI, the obligation of disarmament actually verifies a humanitarian law obligation. Consequently, it is far from an overestimation that humanitarian law and the NPT are directly connected. As a result, it is necessary that a clear explanation of the exact requirements bring the current policies of nuclear-weapon states into compliance with fundamental rules of humanitarian law and the NPT regime be made. Reasonably enough, had the disarmament obligation in Article VI of the NPT been applied by nuclear-weapon states, the present day international community would not have had to deal with cases such as Iran or North Korea.

Generally, the NPT regime has focused on preventing of the acquisition of nuclear weapons by developing countries, especially some of the countries that have the potential to disrupt international stability, and are supported by the U.S. In fact, it should be said that the mainstay of the NPT regime is based on this cognizance that the greatest threat to mankind and to the survival of civilization does not come from the states that have hundreds of nuclear warheads and technical capabilities that can be sent to large distances; but the threat comes from the states that don't have any of the facilities mentioned above or have a small nuclear arsenal. Therefore, the approach of nuclear-weapon states towards nuclear weapons weakens the 'legitimacy' that is closely associated with world order. It is obvious that the nuclear-weapon states follow different policies in order to prevent proliferation of nuclear weapons and weapons of mass destruction. Consequently, some of the states – such as Israel – have reached for nuclear weapons capability without any dissidence from the nuclear-weapon states. While, as a result of existing doubts about developing nuclear weapons by some of the states – such as Iran and North Korea – threatening their sovereign rights is violating the principle of sovereign equality of states as

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[50] Charles J. Moxley JR., John Burroughs and Jonathan Granoff, *Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty*, 34(595) Fordham Int. L. J. 686 (2011).

[51] *Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weaponsp,* ICJ Reports (1996), ¶ 42, 86.

a fundamental rule of international law. However, this discriminatory and coercive practice model could be rendered plausible by referring to the threat of use of nuclear weapons or militancy that has been perceived in theory.

Consequently, in order to have a consistent disarmament regime some of the states have proposed that establishing a standing body or holding annual meetings may be favorable. Without a doubt, in order to realize the objectives of Article VI of the NPT, the framework for governance should be reviewed. Besides this, in order for the disarmament process to succeed, Article VI of the NPT should be strengthened. More important than anything else, the creation of a global disarmament treaty may be a considerable emprise to develop the regime and realize nuclear disarmament. For this reason, it is necessary that all of the states – nuclear-weapon states and non-nuclear-weapon states – participate in negotiations on this continuum.

3.2. The Legal Framework of Possible, General and Comprehensive Disarmament

Nuclear disarmament obligation included in Article VI of the NPT is stated as follows:

'Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.'

There is no provision regarding the illegitimacy of the use of nuclear weapons in international jurisprudence. Any other treaties related to nuclear weapons outside the NPT generally contain similar provisions included in Article VI of the NPT. According to one view, Article VI of the NPT is an express agreement by state parties to be bound by a future treaty, the object and purpose of which is nuclear disarmament and nonproliferation (pactum de contrahendo).[52] The purpose of treaty-making is reaching a successful conclusion of the nuclear disarmament negotiations. Therefore, the provision included in Article VI is very important in terms of conducting disarmament negotiations in good faith and reaching a significant conclusion (making a nuclear disarmament treaty). *'Complete nuclear disarmament under strict and efficient international control has always been seen as the ultimate goal of disarmament treaties and of many United Nations General Assembly resolutions.'*[53] Additionally, the ICJ has characterized the obligation included in Article VI as *'an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.'*[54]

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[52] See David Simon, *Article VI of the Non-Proliferation Treaty Is a Pactum De Contrahendo and Has Serious Legal Obligation by Implication* 7–16, available at <https://www.law.upenn.edu/journals/jil/jilp/articles/2-1_Simon_David.pdf> (accessed Jan. 30, 2016).

[53] See Hisakazu Fujita, *The Advisory Opinion of the International Court of Justice on Legality of Nuclear Weapons*, 316 Int'l Rev. of the Red Cross 63–64 (1997).

[54] *Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weaponsp,* ICJ Reports (1996), ¶ 105/2/F.

The United Nations General Assembly has internally expressed the same view in its 51/45 (O) Resolution, which has been adopted on 10 January 1997.[55] In addition, the European Parliament in its Resolution on the 1995 Review and Extension Conference of the Parties to the NPT[56] and Resolution on the 2005 NPT Review Conference[57] has emphasized the making of nuclear disarmament treaty and necessity of states' commitment to the disarmament obligation as a final aim of Article VI. However, nuclear-weapon states party to the NPT despite talking about nuclear disarmament, have in practice acted completely differently. The five permanent members of the United Nations Security Council that became the five licit nuclear-weapon states under the NPT have used the Security Council to prevent the development of nuclear weapons by other states.[58]

In its 1996 Advisory Opinion, the ICJ asserted that it cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very 'survival of a state' would be at stake.[59] It should be said that, if it is assumed that the use of nuclear weapons is defensive, what follows is a discussions about which states could take advantage of this right. Undoubtedly, all of the states are equally entitled to the right to use of nuclear weapons for defensive purposes that has been foreseen in the ICJ's Advisory Opinion. However, taking advantage of this right by a majority of the states is impossible, because only a few states have nuclear capability. Therefore, if the non-nuclear weapon states acquire nuclear weapons by violating their commitments arising from the NPT or withdrawing from the Treaty, it could not be guaranteed whetheror or not they would use them for defensive purposes. Additionaly, when it comes to the use of force by nuclear-weapon states in order to self-defend in extreme circumstances where the very survival of a state is at stake, these states undoubtedly have the capability to defend their survival without any use of nuclear weapons!

Even though the ICJ's Advisory Opinion has dealt with a completely distinct principle of international law – a threat or use of force by means of nuclear weapons is contrary to Article 2, paragraph 4 of the UN Charter – concerning nuclear weapons; however, it ould be said that the uncertainty in the ICJ's Advisory Opinion – inconclusive opinion

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55 United Nations General Assembly, *General and Complete Disarmament,* A/RES/51/45, Fifty-first Session, 10.01.1997, available at <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/51/45> (accessed Jan. 25, 2016).

56 *Resolution on the Conference on the Extension of the Nuclear Non-Proliferation Treaty (NPT) in New York from 17 April to 12 May A4-0054/1995* (1995), ¶ 6.

57 *European Parliament Resolution on Nuclear Disarmament: Non-proliferation Treaty Review Conference in 2005 – EU Preparation of Third NPT PrepCom* (New York, 26 April – 7 May 2004), ¶ G.

58 See Ramesh Thakur, *Nuclear Nonproliferation and Disarmament: Can the Power of Ideas Tame the Power of the State?*, 13(1) Int'l Stud. Rev. 37 (2011). DOI: 10.1111/j.1468-2486.2010.00996.x.

59 *Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weaponsp,* ICJ Reports (1996), ¶ 105/E.

on the use of nuclear weapons in some exceptional circumstances such as the survival of a state being at stake – cannot be interpreted as a reaction in compliance with international humanitarian law. Therefore, considering the devastating and destructive effects of nuclear weapons, the ICJ's Advisory Opinion could be criticized, because it does not cover any "general and complete ban" on use of nuclear weapons.

Nevertheless, the lawfulness of the use of these weapons in the event of extraordinary self-defense with the realization of nuclear disarmament will also disappear completely. The obligation of non-production, non-development and non-stockpiling of nuclear weapons is the basis of nuclear disarmament. In this respect, the elimination of existing nuclear stocks would lead to general and complete nuclear disarmament.[60]

Achieving the goal of a world free of nuclear weapons requires taking serious and practical steps. In this context, the United Nations General Assembly has emphasized that in order to completely eliminate nuclear weapons, states should decrease these weapons and launch platforms in a balanced way as soon as possible. The General Assembly has also mentioned the threat of terrorist use of weapons of mass destruction, particularly nuclear weapons and the necessity of taking international steps in order to control these weapons. According to the General Assembly, nuclear-weapon states should take effective measures in order to completely eliminate nuclear weapons. In short, the United Nations General Assembly *'urges the nuclear-weapon states to stop immediately the qualitative improvement, development, production and stockpiling of nuclear warheads and their delivery systems.'*[61]

The ICJ has evaluated the General Assembly's question concerning the Legality of the Threat or Use of Nuclear Weapons, not only from the use of force and humanitarian law perspective, but also from the 'disarmament law' perspective taking into account 'applicable law' to nuclear weapons. In addition, the Court has predicted a path for the realization of sustainable disarmament. Accordingly, treating nuclear disarmament as a legal obligation is a fairly accurate decision.

The disarmament process will terminate all activities for the acquisition of nuclear weapons. Therefore, the realization of nuclear disarmament depends on the prohibition of production, development, stockpiling and also the destruction of existing stocks completely. However, if nuclear-weapon states will not give an undertaking that they will not use these weapons under any condition, then nuclear disarmament will not be possible. Consequently, only reducing the ballistic missile does not imply the reduction of nuclear weapons. In this regard, the United Nations General Assembly has called *'…upon the nuclear-weapon states, pending the*

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60 See Fujita, *Id.*, 63.

61 United Nations General Assembly, Sixty-eighth Session, A/RES/68/47, 10 December, 2013, ¶ 6, available at <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/47> (accessed Jan. 25, 2016).

achievement of the total elimination of nuclear weapons, to agree on an internationally and legally binding instrument on a joint undertaking not to be the first to use nuclear weapons, and calls upon all States to conclude an internationally and legally binding instrument on security assurances of non-use and non-threat of use of nuclear weapons against non-nuclear-weapon states."[62]

International law moves towards the goal of completely prohibiting nuclear weapons in terms of the right to self-defense and international humanitarian law. Despite all the developments that have taken place in the international community, there are many reasons that the nuclear-weapon states have not once again used nuclear weapons since the devastation of Hiroshima and Nagasaki. From a legal perspective, the tradition of non-use of these weapons since 1945 could be based on the belief in the illegitimacy of any use of nuclear weapons. Accordingly, nuclear-weapon states acting in accordance with the fundamental rules of international humanitarian law applicable in armed conflicts have not used these weapons once again. Therefore, it can be said that a customary rule has been formed concerning the banning of nuclear weapons completely in terms of humanitarian law. One of the most important developments that strengthened the hope for banning nuclear weapons completely was the *'International Conference on Humanitarian Impact of Nuclear Weapons in Oslo."*[63]

During and after the Cold War, nuclear weapons have witnessed many vicissitudes in terms of quantity and quality. Although the Eastern Bloc Countries have reduced their nuclear arsenals through bilateral agreements, they have tested and produced new weapons. However, in both cases, these weapons were not used in wartime or peacetime. Rather than political factors, the belief in destruction of the target state and violation of the right to life of the citizens of the aggressor state a result of the use of nuclear weapons, is one of the most important reasons that states have not used these weapons. Actually, non-use of nuclear weapons by nuclear-weapon states after the disasters of Hiroshima and Nagasaki in 1945 is based upon the belief that using these weapons will constitute a violation of humanity, humanitarian law and human interests.[64] Indeed, it can be said that the international community's belief is related to non-use of nuclear weapons. This perception is in the interest of the international community and a legitimate way to eliminate the possibility of the use of nuclear

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62 *Id*., ¶ 9.

63 For more information on the clarifications of International Campaign to Abolish Nuclear Weapons (ICAN) concerning Oslo Conference, see *ICAN Final Statement to Oslo Conference on Humanitarian Impact of Nuclear Weapons* (2013), available at <http://www.regjeringen.no/globalassets/upload/ud/vedlegg/hum/hum_ican_final.pdf> (accessed Jan. 25, 2016).

64 *Further these fundamental rules – rules of humanitarian law – are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law*. See *Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weaponsp*, ICJ Reports (1996), ¶ 79.

weapons; but this is an ideal and has not taken place in the international legal order, because nuclear disarmament has not been realized in the strictest sense up to now.

Despite everything mentioned above, non-use of nuclear weapons in the last seventy years does not mean the complete banning of nuclear weapons; because nuclear-weapon states have repeatedly informed other states of their right to use nuclear weapons.[65] The nuclear-weapon states in their reports relating to negative security assurances, have abandoned – absolutely or conditionally – their right to the use of nuclear weapons against non-nuclear weapon state which are party to the NPT. Moreover, non-use of nuclear weapons is a legal obligation based on predefined conditions. However, due to the absence of any legal obligation, the capability of the USSR and the US to use these weapons during the 'Cuban Missile Crisis'[66] (1962) and 'Operation Desert Storm'[67] (1990–1991) has created serious concerns.[68]

The ICJ, in some exceptional cases, has not opposed the use of nuclear weapons in terms of humanitarian law. However, control and limitation of the content of nuclear weapons are practically impossible. From this point of view, banning the use of nuclear weapons completely is a very important and sensitive issue in terms of preventing the violation of humanitarian law applicable to armed conflict.[69]

The claim that 'modern nuclear weapon delivery systems are, indeed, capable of precisely engaging discrete military objectives'[70] does not seem acceptable, because the existence of these types of weapons has not been proven.

'[The United Nations] *General Assembly resolutions are not legally binding,* [but there is] *a consensus* [among the states] *which considers the threat of use or use of nuclear weapons as a contradiction to the fundamental humanitarian principles upon*

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65 For more information *see* Dan Caldwell & Robert E. Williams JR., *Seeking Security in an Insecure World* 60 (Lanham, Maryland 2012).

66 In October 1962, a US spy plane caught the USSR attempting to sneak nuclear-tipped missiles into Cuba, 90 miles off the United States' coast. This event drowns the parties – USSR and US – to the brink of nuclear war for the first time and became one of the first major crisis of the Cold War. *See* Graham Allison, *The Cuban Missile Crisis at 50 Lessons for U.S. Foreign Policy Today*, 91(4) Foreign Affairs 4, 11 (2012).

67 In response to Iraq's invasion and annexation of Kuwait, the US coalesced troops from 34 nations to defend Saudi Arabia in the Persian Gulf; which was called the Gulf War. This was a war, whose troop-buildup phase was codenamed as Operation Desert Shield, and whose war phased was codenamed as Operation Desert Storm. For more information, *see* Robert E. Lee, *Technology's Child: Schwarzkopf and Operation Desert Storm*, in *Command Concepts: A Theory Derived from the Practice of Command and Control* 55–71 (Carl H. Builder, Steven C. Bankes & Richard Nordin, eds.) (California 1999).

68 See Jasjit Singh, *Re-examining the 1996 ICJ Advisory Opinion: Concerning the Legality of Nuclear Weapons*, 1(5) Cadmus J. 162 (2012).

69 Richard Bilder, *Nuclear Weapons and International Law*, in *Nuclear Weapons and Law* Arthur 4 (Selvyn and Martin Feinriders, eds.,Westport 1984).

70 *ICJ Hearing for the Nuclear Weapons Advisory Opinion* 71 (Nov. 15, 1995), available at <http://www.icj-cij.org/docket/files/95/5947.pdf> (accessed Jan. 25, 2016).

which the international laws of war are founded.'[71] In addition, according to the General Assembly, the use of nuclear and thermonuclear weapons is contrary to the United Nations Charter and its aims and objectives in general.[72]

Considering the status of nuclear-weapon states, it can be said that *'the total elimination of nuclear weapons is the only absolute guarantee against the use or threat of use of nuclear weapons.'*[73] Accordingly, 'the full and effective implementation of the 13 practical steps for nuclear disarmament contained in the Final Document of the 2000 Review Conference,'[74] 'the early entry into enforcement and strict adherence of the CTBT'[75] and 'conclusion of an international legal instrument or instruments on adequate and unconditional security assurances to non-nuclear-weapon states' are required.[76]

4. Conclusion

Delegitimization of nuclear weapons will greatly aid eliminating them, which requires a new discourse about security, as well as nuclear weapons themselves. A significant outcome of the 2010 NPT Review Conference was that the final document expressed deep concern at the catastrophic humanitarian consequences of any use of nuclear weapons and was a reminder of the need for all states, at all times, to comply with applicable international law, including international humanitarian law.

Advancing the 1996 advisory opinion of the ICJ, the Review Conference statement strongly suggests that use of nuclear weapons in any circumstance is illegal. It undoubtedly develops the norm of non-use of nuclear weapons. In fact, when combined with the practice of non-use since the US atomic bombings of Nagasaki and Hiroshima, the provision strengthens the case for a customary legal obligation categorically prescribing non-use.

Actually, the 2010 NPT Review Conference considers the ICJ opinion further than the Court did itself. While the ICJ opinion stated that the threat or use of nuclear weapons is generally contrary to international law, the Review Conference links the catastrophic humanitarian consequences of any use of nuclear weapons with the

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71 Elliot L. Meyrowitz, *The Laws of War and Nuclear Weapons*, 9(2) Brooklyn J. of In'l L. 255 (1993).

72 United Nations General Assembly, *Declaration on the Prohibition of the Use of Nuclear and Thermo-Nuclear Weapons*, A/RES/1653 (XVI), 1067th Plenary Meeting, 28 November, 1961. For more information on the other resolutions that the General Assembly has condemned the use of nuclear weapons, *see also* Martin Feinrider, *International Law as Law of the Land: Another Constitutional Constraint on Use of Nuclear Weapons,* 7 Nova L. J. 103–126 (1982).

73 *See* United Nations General Assembly, Sixty-eighth Session, A/RES/68/47, 10.12.2013, ¶ 12, available at <http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/47> (accessed Jan. 25, 2016).

74 *Id*., ¶ 13.

75 *Id*., ¶ 19.

76 *Id*., ¶ 18.

call for compliance with law 'at all times', which means the use of nuclear weapons is unlawful in all circumstances. The Review Conference's statement reinforces the moral unacceptability and presumptive unlawfulness of any use of nuclear weapons.

Moving to the question of the applicability of the rules of humanitarian law to the possible threat or use of nuclear weapons, it was not possible to conclude that these principles and rules do not apply to nuclear weapons. Such a conclusion would in effect misconstrue the intrinsically humanitarian nature of the judicial principles at hand, which permeate the entire law of armed conflict and apply to all forms of war and to all weapons; those of the past and those of the present and future. The ICJ in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1996) did remark that the consequences that should be drawn from the applicability of humanitarian law to nuclear weapons are controversial. In other words, the ICJ was fully aware that "nuclear weapons" have a double nature: on the one hand, they are weapons thus justifiable under the general legal system applying to all weapons; and on the other, they are nuclear, and thus necessarily subject to a special regime because of this characteristic. According to the Court, with regard to the unique characteristics of nuclear weapons, the use of these weapons seemed scarcely reconcilable with respect to the demands of law applicable in armed conflict.[77] Actually, nuclear weapons are nonetheless weapons whose effects are clearly contrary to certain prescriptions of that corpus juris of customary rules of humanitarian law. Consequently, international law, and with it the stability of international order, which it is tasked to govern, can only suffer from that uncertainty over the legal status of such a fearsome weapon.

Emphasis on the catastrophic the humanitarian consequences of any use of nuclear weapons may be the most effective way to generate political momentum towards nuclear disarmament. In this direction, all states need to comply with applicable international law, including international humanitarian law at all times. In this regard, states can increase their security by supporting the important agreements found in current arms control treaties such as the NPT. Therefore, they should lead an international diplomatic effort to strengthen the NPT.

As a result, currently demands of the non-nuclear weapon states relating to nuclear disarmament and peaceful nuclear energy – unlimited access – cannot be ignored. From this perspective, it could be said that satisfying developing states' demands for and seeking for a common ground on, nuclear energy control systems, will be an accurate method. Consequently, reaching a new consensus regarding the rights and wrongs of nuclear energy could be one of the most important steps on global nuclear order in the 21st century. Additionally, it is necessary to initiate a process that clarifies the general illegality of nuclear weapons, just as biological and chemical weapons that have been prohibited as weapons of mass destruction. Therefore, breaking the vicious circle that has taken shape in the event of disarmament undertaken by states

[77] Bedjaoui, *Id.* at 4.

on one hand and producing a new generation of nuclear weapons on the other, is not impossible. To this end, in order to realize nuclear disarmament, ratifying an international treaty and an effective implementation mechanism could prove to be a great advantage to the disarmament process.

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COMMENTS

THE TRIPS AGREEMENT, INTERNATIONAL TECHNOLOGY TRANSFER AND DEVELOPMENT: SOME LESSONS FROM STRENGTHENING IPR PROTECTION

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DOI:10.21684/2412-2343-2016-3-1-90-125

The article focuses on the impact of the TRIPS Agreement provisions on further development of international technology transfer (ITT) mainly to developing countries. The authors review the critical specificity of ITT connected with the adoption of TRIPS. Much attention is paid to an analysis of what is most discussed among international experts in the area of the issues on the dual results of stronger intellectual property rights (IPRs) concerning various groups of developing countries. Their study also examines a number of problems with implementation of the TRIPS provisions, conducive to ITT, in the context of the TRIPS-plus era as a new stage in strengthening IPR protection. Bearing in mind the fragmentation of the international regime of IPR protection because of the adoption of numerous regional free trade agreements, the authors outline the possible position of advanced developing and least developed countries with respect to using TRIPS potentials for development of ITT under reasonable and just terms, with the aim of overall prosperity.

Keywords: intellectual property rights, patents, TRIPS Agreement, developing countries, technology transfer, proprietary technology.

Recommended citation: Mark Shugurov, T*he TRIPS Agreement, International Technology Transfer and Development: Some Lessons from Strengthening IPR Protection*, 3(1) BRICS Law Journal 90–125 (2016).

Abbreviations

ESTs – Environmentally Sound Technologies
FDI – Foreign Direct Investment
FTAs – Free Trade Agreements
GATs – General Agreement on Trade in Services
ICTs – Information and Communication Technologies
IP – Intellectual Property
IPL – Intellectual Property Law
IPRs – Intellectual Property Rights
ITT – International Technology Transfer
LDCs – Least-Developed Countries
R&D – Research and Developments
TNCs – Transnational Corporations
TRIPS – Agreement on Trade-Related Aspects of Intellectual Property Rights
UN – United Nations
UNCTAD – United Nations Conference on Trade and Development
WHO – World Health Organization
WIPO – World Intellectual Property Organization
WTO – World Trade Organization

1. Introduction

In today's conditions of the dynamic development of global processes in the research and development (R&D) sphere and of economic globalization, there is an increasing significance of international technology transfer (ITT) by which the exchange and diffusion of technologies, innovation and knowledge are occurring around the world. The attention of the contemporary world community given to ITT is caused by those circumstances that technologies, be they information and communication technologies (ICT) or environmentally sound technologies (EST), are a deciding factor of economic and social development, and, of course, of different problems in need of solutions at the regional and global levels. ITT, being a necessary tool for speeding up the pace of economic, technological and social development, is one of the instruments for arriving at the Millennium Development Goals and, especially, the goals of sustainable development, as those have been assigned in the Agenda XXI and other international documents pertaining to so-called international law on sustainable development.

As a rule, national technology transfer (NTT), occurring within countries, and ITT, occurring between countries, in this era of economic and technological globalization are in intersection, while both maintain a certain specificity. The providing of access to

technology, especially for developing and least developed countries (LDCs), is a very important item on the agenda of global policy in the area of aid to development. The catalog of more sensitive technologies for developing countries includes technologies for sustainable forest management and use of forests, ICT, technology for water treatment and waste management, clear and renewable energy technology, biotechnology, marine technology and health technology, among others.

Additionally, it is true to say that the transfer of technology to developing countries is one of the most actively discussed issues of international economic relations in the area of development aid in the last fifty years. Developing countries hold in this matter a very active position. Since 1970, they have expressed – at various international forums – their intentions to improve access to foreign technologies with the aim of enhancing their technological capabilities. Technology transfer at the international macro-level was and is a focus of negotiations between developed and developing countries in the contexts of technical cooperation, trade liberalization and protection of the environment. This has resulted in elaborating the macro-level political bargaining model of ITT.

Obviously, technology transfer due to the abovementioned significance of technologies for the economy and development has become one of the sectors of modern global economics, science and technology policy – including its development component. Interestingly, ITT, being the separate subject matter of the global agenda on world economic policy at large and world development aid policy in particular, as testified by P. Roffe very reasonably,[1] is one of the major concerns of global policy on intellectual property rights (IPRs) and their protection. It is fully clear that ITT as a critical factor of a sustainable rate of economic growth and development is very sensitive to protection of IPRs, that is to say, protection of the *exclusive rights,* and especially to increasing their protection.

It may quite rightly be said that the contemporary concept of technology transfer includes within its broad view IPRs, especially exclusive patent rights and trade secrets, and, to a certain degree, copyright addressing ICT and software in a kind of integrated perspective of technology transfer. Besides the approach to the transfer of technology as a transfer of technical information and technical knowledge that are the results of intellectual activity, a great significance has been placed on specifying the issues on what IPRs mean as to technology transfer. Hence, there is reason to say that the complex global policy in the areas of ITT and intellectual property (IP) intersects with the global policy on development aid.

With the widening of transnational trade flows, especially flows of sophisticated production, technology and exclusive rights to it, the linkage between patents and technology transfer has received overarching recognition, not only at the national

[1] Pedro Roffe, *Comment I: Technology Transfer on the International Agenda*, in International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime 257–281 (Keith E. Maskus & Jerome H. Reichman, eds.) (Cambridge University Press 2005).

level, but also at the international level. Because the consequences of the impact of IPR protection on technology transfer are contradictory, the protection of IPRs relevant for and conducive to internationally transferred technologies is one of the most controversial aspects of policy in the sphere of technology transfer and its encouragement, and is, naturally, a focus of global policy on development aid. Thus the ambiguous impact of IPRs on technology transfer at the national and international levels is one of the issues not only of global cooperation in the area of science, technology and innovation, but also of global economic cooperation and facilitation of development.

From this viewpoint, the provisions of the TRIPS Agreement[2] and the experience of their implementation is an important subject, because TRIPS is one of the key instruments regulating the transfer of proprietary technologies. This Agreement which set out the harmonized minimal standards of IPR protection across the world has given rise to strengthening IPR protection that has affected ITT inconsistently. The outcomes of the impact of strengthening IPR protection on ITT connected directly with the development agenda are the issues to be addressed specially and in detail in this study.

2. Methodological Background of Study

The contemporary conception of the systemic triad of ITT, IPRs and development is based on the conviction that technology transfer goes beyond a purely economic approach. In this connection, the approach to knowledge and technology as a public good[3] is a valid foundation of the modern concept of international technology transfer and, accordingly, of the triad as such. The idea that knowledge, information and technologies are public and individual goods are a significant focus of the Draft of the Treaty On Access to Knowledge.[4] Seeking to promote the transfer of technology and knowledge to developing countries is a core objective of this project, taking into account the need to balance the development of IPRs and their protection (Part 3, Part 4 Draft Treaty).

We would want to underscore that technologies, being global public goods of an intellectual nature, make possible the forming of appropriate conditions indispensable for the exercise of human rights. Hence, a core challenge for the

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[2] Agreement on Trade-Related Aspects of Intellectual Property Rights (1994).

[3] Keith E. Maskus & Jerome H. Reichman, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, in International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime 3–45 (Keith E. Maskus & Jerome H. Reichman, eds.) (Cambridge University Press 2005); Joseph E. Stiglitz, *Knowledge as a Global Public Good*, in Global Public Goods 308–325 (Inge Kaul, Isabelle Grunberg & Marc A. Stern, eds.) (Oxford University Press 1999).

[4] Draft of the Treaty on Access to Knowledge (2005), available at <http://www.cptech.org/a2k/a2k_treaty_may9.pdf> (accessed Dec. 12, 2015).

policy of international cooperation in the area of technological aid is to set up and maintain effective access to technological information and knowledge, and to devise the special mechanisms for deploying it effectively within the economy and other sectors of society. This is true for all countries, since the right to development in conjunction with the right to access to technology is universal. In our opinion, the right to access to technology should be understood as an element of the right to development. Therefore, the transfer of technology to developing countries is a matter of discussion in setting up the New International Economic Order (NIEO), an integral part of which is the New International Technology Order (NITO), including unconditionally the new order of ITT. The relevant content and extent of IPRs, as well as the regime of IPR protection, are part of the new order of ITT.

In light of this, the central hypothesis of this study is that global integrated policy in the area of protection of IPRs, technology transfer and development starts from the recognition of IPRs, especially patents and trade secrets, *as a necessary condition of effective transfer and diffusion of technologies, but no factor of their restriction*. We think that this paradigm – articulated in various international legal instruments concluding provisions on technology transfer – covers, *inter alia*, international instruments in the sphere of IPR protection and international scientific and technological cooperation, and instruments of international trade law as well. This is demonstrated by the TRIPS Agreement and by other instruments of the World Trade Organization (WTO). The General Agreement on Trade Services (GATS), for example, refers in its Annex on telecommunications to specific issues on ensuring the access of developing countries to information on advanced ICTs and their transfer. The objectives of appropriate international instruments have to identify not only the objectives of real processes of international technology transfer, carried out through various channels, especially licensing, but also the goals of protection of transferred technologies.

However, patent security is a subordinated aspect of technology transfer and diffusion of technologies having the aim of aiding development, including capacity building. It is important to understand that technologies are global goods, and the implicit aim of the international system of IPR protection is to facilitate technology transfer rather than to restrict it. Therefore, the protection and enforcement of IPRs should contribute to promoting technological innovation, transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge, social and economic welfare, as well as the balance between rights and obligations. This hypothesis is the horizon of our analysis of the impact of the TRIPS Agreement on the transfer and dissemination of technologies designed for aid to development.

And yet, this impact, often contradictory, demonstrates a consideration building in the thinking of scholars and experts on the interrelation between law and technology. For example, G. Pascuzzi expressly notes an active role of legal rules in providing the availability of new technology: 'The advent of new technologies may lead to the

creation of new rules. Looking at the evolution of law in a diachronic perspective it is easy to see that the most important turning points occurred whenever mankind had access to new technology.'[5] In this context, we think intellectual property law is reasonably called upon to promote access to transferred and disseminated technologies as assets of development, noting the dual-sided impact IPRs pose as has been showcased by the example of the experience of the TRIPS Agreement implementation in practice.

3. IPRs, International Technology Transfer and Development

Protection of IPRs and their enforcement within ITT aimed at aiding technological development and capacity building influence all countries, but especially developing countries, as the possible and the real beneficiaries of transferred technologies. Aligning IPRs, ITT and development in view of the interests of all involved countries is a very difficult task. However, as practice demonstrates, accomplishing the task is appropriately at the level of global policy in the triad sphere of IPRs, ITT and development. This policy is an evolving phenomenon of modern international relations. P. Sampath and P. Roffe, for example, have successively, and in concise form, demonstrated the evolution of technology transfer discourse, beginning with the 1960s, moving on to discussion of the United Nations Conference on Trade and Development's (UNCTAD) Draft International Code of Conduct on the Transfer of Technology, the impact of TRIPS, debates on a TRIPS-plus era and, finally, current initiatives of the Word Health Organization and the World Intellectual Property Organization (WIPO), as well as new approaches to technology transfer in the climate change technology mechanism. We think these stages of developing technology transfer discourse are markers of the evolution of the appropriate global policy.

The clear result of this policy is multilateral agreements signed between countries that are at different levels of development, including different levels in the development of national patent systems, and their containing provisions on protection of IPRs within technology transfer. It should be noted that provisions on protection of IPRs with regard to technology transfer have been included in various international instruments relating to different ranges of instruments of international law, for example environmental law, maritime law, trade law and economic law.[6] There are other important factors to be considered. The efforts of the international community over the last fifty years to establish an international

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[5] Giovanni Pascuzzi, *Cognitive Techniques of Legal Innovation*, in Law, Development and Innovation 18 (Giuseppe Bellantuono & Fabiano T. Lara, eds.) (Springer 2015).

[6] UNCTAD/ITE/IPC/Misc.5. Compendium of International Arrangements on Transfer of Technology. Selected Instruments. Relevant Provisions in Selected International Arrangements Pertaining to Transfer of Technology (2001), available at <http://www.unctad.org/en/docs/psiteipcm5.en.pdf> (accessed Oct. 12, 2015).

regime of technology transfer on fair and equitable terms presume that this regime is in conjunction with IPR issues. Therefore, in various documents, having different international legal essence, appropriate attention is devoted to issues on protection of transferred technologies. The certain role of this aspect arises from the legal nature of technology transfer that gives up the exclusive right to use various technical and technological innovations. This aspect has been widely given in instruments of both hard and soft international environmental law.[7]

Transferred technologies, including technology transfer for development goals, may be proprietary, for example biotechnologies, and this aspect taken into consideration in instruments, for instance in the UN Convention on Biodiversity. Additionally, international instruments referring to technology transfer can imply protected and non-protected technologies; examples of the latter include nonproprietary technology, or technological knowledge, as the public good is freely available for use and they are free of charge. That is a feature of access to them. Proprietary technologies, in essence, also are accessible; however, their accessibility demands authorization. Therefore, another array of international instruments, especially instruments of international intellectual property law, has chiefly underscored the aspect of the transfer of protected technologies. One of the key instruments regulating the transfer of proprietary technologies is precisely the TRIPS Agreement, which sets up the harmonized minimal standards of protection of IPRs around the world.

The policy under study carefully keeps its attention focused on the impact of IPRs on ITT and development, because IPRs are both an integral part of technology transfer law[8] and a major aspect of technological advancement, namely, the creation, adaptation, diffusion and use of existing and emerging technologies. The consideration of the impact of IPRs on ITT is an integral part of the continuing debates on the impact of IPRs on development in general,[9] including economic development and growth in particular.[10] Therefore, IPRs are seriously under discussion

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7 See, e.g., Irina V. Shugurova & Mark V. Shugurov, *International Technology Transfer: Controversial Global Policy Issues,* 45(3/4) Env. P. and L. 133–139 (2015). DOI: 10.3233/EPL-453403.

8 Alan S. Gutterman & Jacob N. Erlich, *Technology Development and Transfer* 17–66 (Quorum Books 1997).

9 Daniel J. Gervais, *TRIPS and Development*, in Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-plus Era (Daniel J. Gervais, ed.) 3–60 (Oxford University Press 2007); Intellectual Property and Development: Lessons from Economic Research (Carsten Fink & Keith E. Maskus, eds.) (Oxford University Press 2005), available at <http://siteresources.worldbank.org/INTRANETTRADE/Resources/Pubs/IPRs-book.pdf> (accessed Feb. 17, 2016).

10 Rod Falvey, Neil Foster & David Greenaway, *Intellectual Property Rights and Economic Growth*, 10(4) Rev. of Dev. Ec. 700–719 (2006). DOI: 10.1111/j.1467-9361.2006.00343.x; Nagesh Kumar, *Intellectual Property Rights, Technology and Economic Development: Experience of Asian Countries*, 38(3) Ec. and P. Weekly 209–226 (2003), available at <http://infojustice.org/download/gcongress/globalarchitectureandthedevelopmentagenda/Kumar%20article.pdf> (accessed Apr. 17, 2016).

in respect of international cooperation in the area of technology transfer and aid to development. As a result, empirical findings and theoretical conclusions regarding different outcomes of this impact on technology transfer to developed, developing and LDC countries are a basis for understanding the one significant tendency, namely, strengthening the protection of IPRs and how that affects the perspectives on international technology transfer, especially to countries with lower-middle income economies.

As stressed by A. Aurora, while the literature on international technology transfer has been growing over recent years, there remain numerous gaps in investigating the role of IPRs in technology transfer, particularly to developing countries and to countries with economies in transition.[11] Issues related to the outcomes of strengthening IPRs are real in this context, and there is the need to identify ways in which the gaps mentioned by Aurora could be filled through further studies, so as to be able to better understand the impact of IPRs on ITT and to elaborate appropriate suggestions. All the more, the fact of the matter is that during the last fifty years the protection and enforcement of IPRs have tended towards increased standards. That may be taken implicitly as diverging with the logic of technology transfer. This has clearly been shown by discussions at the level of international organizations and experts.

The potentials of technologies can be realized on the global scale only with the effective regulation of the transfer of the different technologies, especially high technology, and the observance of fundamental principles such as justice, equality, mutual advantage and reasonable terms. All countries are interested in compliance with these principles, but especially developing countries, most of which face the problem of overcoming the technological gap between them and developed countries. It is clear that the implementation of these fundamental principles and the realization of the positive impact of technology on development depend on strategies of protection of IPRs, because they directly affect the accessibility of technologies, their diffusion and their follow-up usage.

Therefore, regulation of IPRs in the process of technology transfer also refers to the fundamental problem of the perspectives of the interests of developed and developing countries, and whether their interests coincide. Developed countries, having an effective system of innovation and numerous innovators, tend to set up strong IPR protection for the world as a whole through the creation of appropriate standards to be implemented in national legislation. It is notable that a handful of developed countries dispose the real political and economic power necessary and

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[11] Ashish Arora, *Intellectual Property Rights and the International Transfer of Technology: Setting out an Agenda for the Empirical Research in Developing Countries*, in The Economics of Intellectual Property. Suggestions for Further Research, in Developing Countries and Countries with Economies in Transition 55 (WIPO Pub. 2009), available at <http://www.wipo.int/freepublications/en/economics/1012/wipo_pub_1012.pdf> (accessed Mar. 3, 2016).

sufficient to set up these standards. Other countries – developing and LDCs – have largely focused on imitation of technology innovations as a valid source of their domestic technological development and tend to have weak protection regimes for IPRs through the adoption of numerous flexible policies. Many developing countries perceive the increasing protection of IPRs as a threat: it shifts benefits from domestic imitation firms to foreign innovative firms, and reduces the output of the domestic economy. As underlined convincingly by A. Deardorff, increasing the protection of IPRs was not done with the aim of encouraging domestic innovative activity in developing and LDC countries.[12]

Protection of IPRs as an essential facet of cooperation between these two parties has significant public impact related to establishing a balance between the interests of the possessors of exclusive rights to technologies and public interests. This balance is provided by the regimes of limitations on and exceptions to exclusive rights in modern intellectual property law. The balance related directly to issues on world development has, therefore, public international aspects. Obtaining a balance of interests is a serious matter for the world community, one that focuses on how to harmonize the right of developing countries to access to technology in the context of the right to development, on the one hand, and IPRs as a safeguard to protect the interests of the possessors of rights, on the other. Due to the character of IPR owners, and protection of IPRs in general and patent rights in particular, access to the use of technology is possible only through authorization (beyond that which may be given by rights holders, i.e. that which is permitted by legal instrument, such as international agreements).

In principle, the asymmetrical relations between technology sellers and technology buyers derive from the IP regime which prohibits the use of protected IPRs in technology without the permission of the rights holders. Consequently, IPRs pose as a medium for access to technology. This medium may present itself in different manners, at times acting as an impediment to technology transfer. The foundation of this problem in its international aspects is the problem of the contradiction between the interests of developing and developed countries in the area of the global knowledge-based economy. This is one of the problem sectors of international cooperation in the sphere of IPRs, technology transfer and development. As far as different interests are concerned, the relation between technology transfer, protection of IPRs and effective technological assistance is under discussion at the level of global policy.

In other words, differently directed interests as to IPR protection may cause troubles for technology transfer aimed at providing developing countries with the normal help to develop their technological potential. In this case, provisions

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[12] Alan V. Deardorff, *Welfare Effects of Global Patent Protection*, 59(223) Economica 35–51 (1992), available at <http://ssc.wisc.edu/~munia/467/deardorffeconomica.pdf> (accessed May 4, 2016).

admitting the needs of developing countries (Article 4.2. of the Vienna Convention for the Protection of the Ozone Layer, Article 16 of the Convention on Biological Diversity, Article 66.2 of the TRIPS Agreement, and so on) are far from fulfilling. The impacts of such collision between different groups of countries block the realization of the creative potentials of technologies. Accordingly, nowadays this collision also impedes the transfer of environmentally sound technologies and puts off to some unknown future time the realization of the goals of sustainable development.

From the perspective of economics and development, ITT is an important sector of the contemporary world economy, the regularities of which are regularities of technology exchange. If proprietary technologies are transferred, IPRs are fundamentally involved, for in essence the transfer of proprietary technologies is a transmission of exclusive rights at the national and international levels. Thus there has arisen a global market of IPRs in the world economy. Therefore, the international system of IPR protection and the technology markets are closely connected. Indeed, due to the placement of IPR disciplines on technology transfer, technologies – understood as inventions and other protected results of intellectual activity, and purchased for goals of goods manufacturing or supporting manufacture processes – are commodities. Being commodities, technologies may be transferred through commercial transactions, i.e. they may be bought, leased or sold, and thus have utilization and diffusion facilitated through investment, licensing or other transfer arrangements. In our opinion, the commercialization of technologies and their transfer make the realization of such goals of technology transfer as the facilitation of capacity building and development very vulnerable.

Thus IPRs and technology transfer proceed in great tension. This shows that the international regime of ITT still remains a work in progress and is far from completion. Certainly, the abovementioned set of international instruments in the area of technology transfer are an attempt to decrease this implied contradiction and thus effect a balance between IPR protection and technology transfer. Generally, it may be stressed that the implementation of provisions on technology transfer means not only effective financial cooperation, but also cooperation on IPR protection, namely, the realization of a coordinated approach. This is possible if and only if all countries adhere to minimum standards of protection of transferred technologies. The readiness of states to take into account issues on IPR protection is set out in instruments of 'hard'and 'soft' international law. This is reflected also in the provisions on IPR protection under different agreements in the field of scientific and technological cooperation. These provisions consolidate the approaches harmonized at the level of global policy in the field of IP and are enshrined in appropriate IPR protection instruments that – in coordinated standards they contain – attempt to provide the balance between rights and obligations of creators, on the one hand, and rights and obligations of users of technologies, on the other. As we consider, stipulated balance is a broad basis for the balance of interests between developed and developing

countries concerning benefits from technology transfer. Unfortunately, this balance, in practice, is more wish than reality.

Nowadays, the global policy on IP and technology transfer is integrated with the global policy on encouragement of ITT. This sets the principled horizon of viewing the character of, and forming perspectives on, the impact of IPRs on international technology transfer, especially with respect to developing and LDC countries. Because of the significance of technologies for economies and development, technology transfer has become one of the sectors of modern global economics, science and technology policy, as well as development policy. Over the years, the international policy in the field of encouragement of technology transfer for developing countries has grown, and it continues to evolve today. This policy is a part of the world policy on ITT and is connected with policy in the sphere of aid to development. Acknowledgement of the technology gap and recognition of the right of developing countries to access to technologies have demanded the generation of numerous policy steps be undertaken nationally and internationally as a response to the problem. The encouragement of technology transfer to developing countries has been a recurrent issue within a variety of international economic forums, forums on aid to development and at the level of international organizations.

In addition to the foregoing, the policy of transfer encouragement is closely connected with the broad treatment of proprietary technological knowledge through intellectual property legislation. It is clear that the adopted package of international instruments not only regulates international technology transfer, but also includes provisions on promotion of technology transfer to developing countries. The promotion of technology transfer to this group of countries is the subject of provisions of international soft law, as well as of bilateral and multilateral international agreements on science and technology cooperation, on protection of the environment, and also of agreements on trade and investment.

While developing countries have the right to benefit from the generation, transfer and diffusion of the best available technologies as one of the central factors of their development, the reality is that most advanced technologies are generated privately by transnational corporations (TNCs) and pertain directly to them. Moreover, the main R&D activity in this field is located, as a rule, in developed countries. This fact creates the well-known asymmetry between technology possession and the location of technology need. As a result, there is a global technological gap that leads to a number of other gaps in all sectors of development. That is why international instruments, simultaneously, accord obligations beneficial for developing countries which have low capabilities. So, Article 66.2 of the TRIPS Agreement provides for a number of obligations imposed on developed countries that they provide incentives to enterprises and institutions within their territory with the aim of

technology transfer to LDCs.[13] The TRIPS Agreement implies transfer of technologies of any kind but, certainly, of a proprietary nature.

However, the specificity of provisions of international instruments consists in that, in most cases, they contain recommendations to 'make best efforts', 'promote', and 'encourage', rather than strong commitments. In any event, international policy on encouragement of technology transfer departs from these provisions and looks instead to their effective implementation.

We remark here that several basic theoretical approaches as regards how the protection of IPRs affects incentives for ITT can be singled out, and they reveal affects that are even contradictory. Additionally, we postulate that the global policy in the sphere of the international system of protection of IPRs essentially determines the trends in the global policy in the area of ITT and development, and that it is a sphere of collision between the different approaches to the role of IPRs for technology transfer and its perspectives. The basic theoretical approaches presented shortly reflect the different political positions of developed and developing countries with regard to viewing the role of IPRs for economic development. Developed countries insist on the positive effects of IPRs on economic development. In contrast, developing countries prefer to stress the negative effects of IPRs on economic development.[14] Like these collisions, there are different – at times opposed, colliding – approaches of these states to understanding world development and the character of promoting it.

Some experts focus attention on the possible benefits that developing countries can obtain from stronger IPR protection. As we deem, the policies of developing countries intended to satisfy their technological needs by technology imitation resting on weak IPR protection do not orient towards a long-term perspective of technology capacity building. For example, K. Maskus argues that, in spite of the dual impact of IPRs on economic development, stronger IPR protection 'can help reward creativity and risk-taking even in developing economies, with those countries that retain weak IPR protection remaining dependent on dynamically inefficient firms that rely on counterfeiting and imitation.'[15]

Unlike that position, the maximalist approach on the role of IPRs is expressed by some experts from developing countries and is motivated by economically oriented goals and the weak connection of the system of IPRs with the international system of human rights. In this light, IPRs are viewed as an erected wall against technology transfer, preventing the exercise of the right of developing countries to access to technologies. As K. Gopakumar considers, the complex web of IPRs, trade and

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[13] See more broadly, e.g., Mark V. Shugurov, *TRIPs Agreement, International Technology Transfer and Least-developed Countries*, 2(1) J. of Adv., Res. and Ed. 74–85 (2015), available at <http://kadint.net/pdf.html?n=1430116707.pdf > (accessed Mar. 19, 2016).

[14] Rami M. Olwan, *Intellectual Property and Development: Theory and Practice* (Springer-Verlag 2013).

[15] Keith E. Maskus, *Intellectual Property Rights in the Global Economy* 160 (Peterson Institute for International Economics 2000).

investment has vitiated all efforts by developing countries to develop the international regime of technology transfer on fair and equitable terms.[16] While this view reflects the interests of developing countries, it should be recognized that IPRs, in fact, are not something perfectly odious. They are indispensable aspects of the international regime of technology transfer and have certain potential for encouragement of that regime. Their potential demands appropriate coordination of international efforts to overcome the imbalance between IPRs and technology transfer, when exclusive rights prevent equitable and fair terms of technology transfer.

An exhaustive analysis of both comprehensive theory and actual practice concerning how the protection of IPRs impacts the encouragement of international technology transfer is presented in the Maskus Report. This author reviewed various forms of technology transfer, such as market-mediated ITT through trade, foreign direct investment (FDI), licensing and personnel movement. Maskus also provided an analysis of the informal means of ITT through imitation, reverse engineering and spillovers. The Report stressed that patent rights can promote increases in international technology flows to middle-income and large developing countries, but patent rights have little impact on LDCs. Maskus's study contains numerous suggestions for updating the incentives for encouragement of technology transfer to developing countries by policy changes in recipient and source countries, as well as in the global trade system.

Maskus's findings have been reproduced in a collective research paper by experts at the World Bank.[17] There they noted the capacity of IPRs to support the technology market and technology transfer. The authors of the paper further pointed out that absent IPRs firms would decrease their engagement in technology transactions. In other words, patents and trade secrets are legal bases for revealing the proprietary characteristics of technologies and entering into licensing contracts, promoting increasing technology flows to countries with appropriate technological capacity and shifting the incentives for investors between foreign direct investment and licensing agreements.

Stated briefly, there are two main approaches to encouraging technology transfer that consider relations between ITT and IPRs. The first approach is regulatory, the second is a market approach. In addition, one range of experts traditionally focuses on market-mediated ITT through trade, FDI, etc., along with informal means through, for example, imitation and reverse engineering. Others very justly point out inherent shortcomings of the technology market.

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[16] Keam M. Gopakumar, *Transfer of Technology and IPRs: A Development Perspective*, 269/270 Third World Resurgence 6–10 (Jan/Feb 2013), available at: <http://www.twn.my/title2/resurgence/2013/269-270/econ1.htm> (accessed Mar. 1, 2016).

[17] Bernard M. Hoekman, Keith E. Maskus & Kamal Saggi, *Transfer of Technology to Developing Countries: Unilateral and Multilateral Policy Options*, 33(10) W. Dev. 1587–1588 (2005). DOI: 10.1016/j.worlddev.2005.05.005.

Generally speaking, methodological relativism remains a serious problem in the scientific background of global policy in the sphere of IPRs, ITT and development. This creates various difficulties for the success of international technology transfer and for achieving the goals of development. We postulate that the stress on methodological relativism derives from the objective dual role of IPRs for international technology transfer.[18] Thus patent licensing agreements, while in many cases playing an important role, can call access to technology into question. However, the positive effects of patent protection of technologies on international technology transfer, and respectively generating innovation, demand that relevant jurisdiction as a developed system of IP law at the national and international levels must exist. It goes without saying that enforcement and use of IPRs should promote technology as global goods to be the basis for overall prosperity. In other words, the protection of IPRs relevant to transferred technologies is one of the most controversial aspects of policy in the sphere of technology transfer and its encouragement at the national and international levels. It is therefore determined that IPRs, on the one hand, have never been so economically and politically significant and, on the other hand, so controversial as now.

4. International Technology Transfer before TRIPS

For a better systemic understanding the results of increasing IPR protection connected with the TRIPS Agreement, it should be useful to review the situation before the adoption of TRIPS in 1994. There were a number of international initiatives on ITT from the 1960s to the 1980s. The international policy on technology transfer was guided by a paradigm of ITT which had been coordinated between developed and developing countries. This paradigm was reflected in numerous multilateral agreements that provided for technology transfer from developed to developing countries and predicated that ITT was one of the key mechanisms generating convergence in a global rate of economic development. This paradigm, in turn, rested on the neoclassical model of economic growth and development.

According to this model, technology is embodied within capital moving from rich countries to poor countries through a process keen to earn higher returns that might be found in poor countries, on account of diminishing returns to capital in developed economies with the highest capital stock. The convergence of growth rates is expected as a result of free technology transfer through FDI that enables developing countries to imitate and adopt the technology obtained from developed

[18] As pointed out in one of the WIPO documents, the 'relationship between patents and technology transfer is generally understood to have both positive aspects, namely where useful technology is indeed transferred to the recipient, and a negative component, namely where patent rights or an abuse of such rights, may equally hinder a transfer of technology.' WIPO, Report on the International Patent System, prepared by the Secretariat, para 101 (Geneva, 2008), available at <http://www.gtwassociates.com/alerts/WIPOTechnologyDiffusionandthePatentSystem.pdf> (accessed Nov. 18, 2015).

countries without having to duplicate the process of innovation. Nonetheless, a number of indicators of global growth in the post-World War II period did not support these expectations.

It has been acknowledged that the notion of IPRs embraces different types of IPRs, such as rights with regard to patent, copyright, trade secrets, trademarks, industrial designs and so on. All types of IPRs, in any event, affect ITT understood in a broad sense as the flow of technologies, knowledge, skills and equipment. However, some of these IPRs, namely patent rights and rights to trademarks, have the most influence on technology dissemination. In conclusion, ITT broadly depends on the state of affairs in international systems of rights of industrial property and world policy in this sphere.

Patents and their affects on technology transfer have been one of the critical issues in international debates from the beginning. In the 1960s, the United Nations undertook a study on the role of patents in respect of technology transfer.[19] As the initial starting point, General Assembly Resolution 1713 (XVI) required a study on the effects of patents, including foreign patents, on the economies of under-developed countries.[20] Reaffirming that access by developing countries to patented and unpatented technology and managerial know-how is essential to their economic development and industrialization, the General Assembly in its Resolution 2091 (XX) welcomed a series of international initiatives to facilitate the transfer of appropriate technologies to developing countries.[21] UNCTAD and WIPO further continued and extended this study in 1975.[22] The second issue of concern was anti-competitive provisions in licensing agreements on technology transfer concerning patent licenses: it had become clear that abuses of patent monopoly were impeding the free flow of technology.

There was much evidence that economic growth was not quite based upon the predictions of the neoclassical model. Before the advent of the TRIPS era, technology transfer from developed to developing countries was not costless. It required payment at monopoly rates created by IPRs in developed countries. One of the fundamental barriers to the dissemination of technologies before TRIPS was restrictive business practices, such as the abuse of patent monopoly. This was manifested in that rights

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19 United Nations, The role of patents in the transfer of technology to developing countries. Report of the Secretariat General, 65.II.B.I (New York: UN Publication, 1964).

20 United Nations General Assembly Resolution A/1713(XVI)) 'The role of patents in the transfer of technology to under-developed countries.'

21 United Nations General Assembly Resolution A/2091(XX) 'Transfer of technology to development countries' (Dec. 20, 1965), available at <http://www.worldlii.org/int/other/UNGA/1965/92.pdf> (accessed Jan. 14, 2016).

22 UNCTAD, WIPO and United Nations Department of Economic and Social Affairs. The role of the patent system in the transfer of technology to developing countries. Report of the Secretariat General (1975), available at <http://www.wipo.int/cgi-bin/koha/opac-detail.pl?bib=21106> (accessed Mar. 1, 2016).

holders could refuse technology licensing to firms from developing countries. Holders of rights in technologies strived to include in licensing agreements additional conditions that were far from delivering all the advantages of technology to its acquirers. Aside from this, patent holders could include in licensing agreements very onerous provisions that complicated the creation of innovation on the ground of already transferred technologies. The upshot was that patent monopoly existed on the wave of strong IPR protection, which had a chilling influence on R&D in the field of protected technologies, especially related to reverse engineering.

Restrictive practices were widely displayed in transfer relations between developed and developing countries. As a result, because of these practices, technology transfer did not tolerate broad technology diffusion in developing countries and was far from observant of the principles of justice and reasonable terms. Therefore, in the 1970s and 1980s many developing countries kept to a policy of control over restrictive practices and the rates of royalties. It is sufficiently clear that such a model of technology transfer built on strong and unbalanced monopoly of rights holders does not serve to promote meeting the needs of developing countries in technologies, and makes impossible consideration of technology transfer as a means for capacity building. In this situation, IPRs are turned against the right to development, including the right to access to technology in the context of the right to take part in ITT.

On the basis of what has just been said, certain conclusions can be drawn, including that developing countries are interested in the development of a system of safeguards at the national and international levels to prevent abuse of monopoly rights. A significant step in international cooperation in the area of technology transfer was negotiations on rules relating to restrictive business practices in licensing agreements. In 1980, the United Nations General Assembly adopted Resolution 35/63 in which the 'Set of Multilaterally Equitable Agreed Principles and Rules for the Control of Restrictive Business Practices' was endorsed.[23] However, it did not become the background of a binding international legal instrument in which developing countries have been interested. Despite the failure of the adoption of the International Code on Technology Transfer, its Draft[24] remains a source of best practice for international technology transfer. The Draft addresses the issue of technology transfer from various perspectives, such as legitimization of specific domestic policies on promoting the transfer and diffusion of technology, the rules governing the contractual conditions of technology transfer transactions, the special measure on differential treatment for developing countries and measures that would strengthen international cooperation.

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[23] United Nations General Assembly Resolution 'Restrictive business practices' (Dec. 5, 1980), available at <http://www.un.org/documents/ga/res/35/a35r63e.pdf> (accessed May 2, 2016).

[24] See: UNCTAD, 'Transfer of technology.' UNCTAD Series on Issues in International Investment Agreements (UNCTAD Pub. 2001), available at <http://unctad.org/en/docs/psiteiitd28.en.pdf> (accessed Nov. 17, 2015).

The approach of developing countries to the evolution of the international system of IPR protection reflects a striving for the promotion of the flexibility of IPRs that is conditioned by their needs for technological development and capacity building. Development of a system of guarantees that are regimes of limits and exceptions is a tool for the facilitation of technology transfer, and is necessary because of its complex nature. At the same time, incorporated into international instruments are the provisions that the facilitation of technology transfer cannot be implemented without appropriate development of the international system of IPR protection as such.

5. The TRIPS Agreement and New Trends in International Technology Transfer

Despite the fact that the TRIPS Agreement was inspired by pharmaceutical TNCs, it provides for the scope and extent of IPR disciplines that are unprecedented at the international level. The adoption of TRIPS became the starting point for the globalization of IPRs as the new era of development of the international IPR protection system where international standards have become the basis of the essential evolution of the national IP systems in the direction of convergence around the world.[25]

Before the TRIPS Agreement, the international IP system was grounded on conventions adopted, *inter alia*, under the auspices of WIPO, established in 1967 and administering twenty-four multilateral IP agreements at the present time.[26] It is well known that TRIPS, the first comprehensive agreement of its kind, comprises a set of minimum standards covering IPR protection in the chief areas of such rights. These standards and their enforcement must be implemented by each member of the WTO. Moreover, TRIPS requires each member to develop the appropriate mechanisms necessary to enforce protected IPRs.

Adoption of the TRIPS Agreement in 1994 was conditioned by the globalization of markets that was accompanied by the dynamic growth of investment and trade in technology and high-tech products (which doubled between 1980 and 1994). A significant difference in IPR protection – having been conferred by national law – restricted cross-border technology exchange, because of weak patent protection in many developing countries. Firms from developing countries with a weak regime of IPR protection had striven to obtain access to foreign high-tech products in order to copy them and obtain illegitimate benefit. That is why firms heavily investing in R&D put pressure on their national governments to strengthen the international IPR regime. As C. Correa has stressed: '[T]he increasing importance

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[25] Daniele Archibugi & Andrea Filippetti, *The Globalization of IPRs: Four Learned Lessons and Four Theses*, 1(2) Global Policy 137–149 (2010).

[26] WIPO-Administered Treaties, available at <http://www.wipo.int/treaties/en/> (accessed Dec. 1 2015).

of technology for international competition, the emergence of new technologies (e.g. computer programs or biotechnology) associated with high externalities and limited appropriability [sic] and the perception of developed countries that their technological lead has been diminished by countries that have caught up by imitation also contributed to this pressure.'[27]

The globalization of IPRs, connected with the adoption of TRIPS as a proper central part of the global legal system in the area of IPR protection, has resulted in various implications for global economic growth and affected ITT as one of its factors. Some analytics underscore the emergence of significant changes in and specificity of ITT after the adoption of TRIPS.[28] Indeed, the TRIPS Agreement encompasses almost all of the countries of the world, therefore there is no doubt as to its implications for the global economy and ITT. It should be remembered that before TRIPS the policy of the 'world society for development' in 1970–1980 was focused on questions of the imperfections of transfer technology mechanisms and possible conditions for increasing their effectiveness. On the whole, the issues raised concerned how to reduce the costs linked with transfer transactions and remove negative obstacles of a market character, for example defects of the international market.

It seems that the adoption of TRIPS has led directly to increasing the market, namely, the trade approach to ITT. However, TRIPS departs from the coordinated paradigm of ITT when taking into account the interests of developing countries. Before the adoption of TRIPS, there were practices whereby IPRs created artificial barriers instead of promoting innovation and made the dissemination of knowledge costly. The close connection between patents, trade and technology transfer have been confirmed by Articles 7, 8 and 66.2 of the TRIPS Agreement. Accordingly, discussions on the effects of the new era of IPR protection shifted to center stage of the global policy on technology transfer. This shift rests on the fact that IPR protection is a vehicle of economic development through trade. As a result, a change has occurred in the world debate on technology transfer.

We consider this shift does not negate the approach to technology transfer as a tool for realization of the right to access to technology in the context of the right to development. This may be expounded by understanding that trade and trade aspects of IPRs, as well as technology transfer – posing in a new way – continue to have a profound human rights foundation. Moreover, TRIPS seeks to invoke the set of basic principles of balanced relations between IPR protection and enforcement, on the one hand, and promotion of technological development, as well as transfer and dissemination of technology, on the other. For example, under the Preamble

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[27] Carlos M. Correa, *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* 3–4 (Zed Books 2000).

[28] Ahmed A. Latif, *From the UNCTAD Code of Conduct to the WTO's TRIPS Agreement: global efforts for technology transfer. WIPO Regional Consultation on Technology Transfer* (Algeria: ICTSD, 2010).

of this Agreement there is stipulated the due coordination between the goals of national systems of IPR protection and the goals of development and technological progress.

6. Basic Provisions of the TRIPS Agreement Regarding International Technology Transfer: Brief Analysis

In accordance with Article 7 of the TRIPS Agreement, IPR protection and enforcement should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge, and to the balance of rights and obligations in a manner conducive to social and economic welfare. As many know, the high standards of IPR protection are regarded by developed countries as needed conditions for scientific and technological progress. Developed countries justify this position by arguing that the proportional reward for creators and rights holders provides the incentives for further R&D. However, the high standards of IPR protection as a tool, firstly, for scientific and technological progress and, secondly, for the satisfaction of needs, is questionable for developing countries.

We think that Article 7 consolidates the principle of balance, or the principle of balanced interests, not only of rights holders and the public, but also of developed and developing countries. Developed countries are producers of technology, while developing countries are users of technology. Concurrently, Article 7 stipulates in unobvious form one of the core principles of ITT, namely, the principle of mutual advantage. More so, in the opinion of J. He, this balance as an objective that should be achieved is formulated ambiguously and, hence, cannot be actively considered by WTO panels.[29] We can agree with this suggestion in view of the complex nature of balance as objective. It appears from this that balance is the idea rather than the principle. However, in fact it is the principle rather than the idea, because of its appearance in a multitude of provisions on flexible mechanisms provided for by TRIPS.

Provisions of the Preamble and Article 7 reflect the new paradigm of economic development postulating that economic development must be assessed in terms of human development that, as shown by G. Dutfield and U. Suthersanen, supplements, in turn, economic development by incorporating social welfare considerations and considerations of sustainable development.[30] The goals of welfare and development, achieved through transfer, diffusion and application of technology, particularly

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[29] Juan He, *Developing Countries' Pursuit of an Intellectual Property Law Balance under the WTO TRIPS Agreement*, 10(4) Ch. J. of Int'l L. 827 (2011). DOI: 10.1093/chinesejil/jmr044.

[30] Graham Dutfield & Uma Suthersanen, *Global Intellectual Property Law* 272 (Edward Elgar Publishing 2008).

meaningful for developing countries, have been embodied in the flexible mechanisms of TRIPS in, for example, compulsory licensing, parallel import and transitional period.

In respect of ITT as dependent on the patent system, we may also mention Article 29.1 regarding the disclosure requirement, Articles 30 and 31 concerning exceptions to and limitations on exclusive rights, and Article 40 with regard to control over anti-competitive practices in contractual licenses. For developing countries, there is the desirable path of adopting technologies without paying monopoly rents through, for example, compulsory licensing. The TRIPS Agreement assigns legal principles in accordance with which the sovereignty and independence of developing states to adopt decisions on exploiting the flexibilities, enumerated in this Agreement, are respected. The flexibilities give developing countries the latitude to acquire technology without paying full reward to rights holders for use of the protected results of their intellectual activity. Insofar as the TRIPS Agreement is the result of compromise between two groups of states, it does not provide for single-step transition to minimum standards of IPR protection and enforcement. This is premised on the fact that development of national IP legislation has been absent in many countries. Therefore, the Agreement provides for a transitional period.

Pursuant to paragraph 1 of Article 8 'Principles', members of the Agreement may, in the process of formulating or amending their laws and regulations, adopt "measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their social-economic development, provided that such measures are consistent with the provisions of this Agreement". It is interesting that paragraph 2 of Article 8 recognizes that IPRs may be barriers to technology transfer and, accordingly, to technological development, such as, for instance, the abuse of IPRs, and connected with it restrictive practices that negatively affect trade and technology transfer at the national and international levels. Appropriate measures consistent with provisions of the Agreement may be needed to prevent the abuse of IPRs by rights holders or to prevent practices that unreasonably restrain trade or adversely affect ITT.

An effective remedy to restrictive practices in the sphere of technology transfer is antitrust mechanisms, which lead to reducing the cases of the abuse of exclusive rights. Developing countries, understanding this, have, since the 1980s, taken control over restrictive practices by seizing the opportunities afforded them by their national antitrust legislation and the provisions of the Draft International Code of Conduct with regard to technology transfer. Antitrust mechanisms contribute to the equilibrium of the system of IP law by allowing resolution of the conflict between IPRs and the right to access to technology, as well as the right to other results of the human mind. The great role for the successful process of ITT belongs not only to the flexibilities, but also to the antitrust mechanisms that are compatible with each other. Both developed and developing countries are likely to debate the flexibilities.

Article 40 of the TRIPS Agreement acts as a premise for appropriate discussions and adoption of concrete measures. In particular, Article 40.1 reads: 'Members agree that some licensing practices or conditions pertaining to IPRs which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.' Article 40.2 continues:

> Nothing in this Agreement shall prevent members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of IPRs having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.

We can fully see that the TRIPS Agreement is notable not just due to the lists of flexibilities concerning IPRs, but also due to admitting the possibility to use the antitrust mechanisms at the domestic level. As a result, as shown by T. Nguyãën, having focused on the competition flexibilities of the TRIPS Agreement in the context of technology transfer, developing countries have the right to use their domestic competition law to promote access to technology so as to protect national interests and consumer welfare.[31]

7. The Impact of the TRIPS Agreement on International Technology Transfer: Most Controversial Issues

In the light of the abovementioned reasons, the emergence of the new circumstances with regard to the functioning of ITT connected with the coming into force of TRIPS resulted in a new content to the discussions on the impact of IPRs on ITT, including debates in the WTO's Working Group on technology transfer issues.[32] It should be remembered that developed countries that had initiated negotiations on TRIPS referred to the argument that stronger IPRs would entail some positive effects, for example increasing FDI and technology flows to developing countries and stimulating domestic innovation. The explanation for this is that since the nineteenth century for developed countries there has been a historically significant regularity in the relationship between

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[31] Tan Nguyãën, *Competition Law, Technology Transfer and the TRIPS Agreement: Implications for Developing Countries* 7–8 (Edward Elgar Publishing 2010).

[32] Pedro Roffe, *Revisiting the Technology Transfer Debate: Lessons for the New WTO Working Group*, 6(2) Bridges 7–10 (2002) <http://www.iprsonline.org/ictsd/docs/RoffeTesfachewBridgesYear6N2February2002.pdf> (accessed Apr. 17, 2016).

stronger IPRs, balanced with public interest, economic growth and development.[33] This is why particular countries, especially the USA and the UK, consider IPRs to be means for promoting economic development through the creation of technological innovations and for transferring them through formal channels.

Beyond that, the noted regularity cannot manifest itself in equal positive manner in all countries. As L. Angels shows, results of the strengthening of IPR protection in developed countries (the North) and in developing countries (the South) depend on the general level of economic development of these regions.[34] However, TRIPS, when still not yet in force, brought serious fears for the practical realization of a tempting perspective to be put in place supposedly without delay. After the adoption of TRIPS the issues on the connection between stronger IPRs and technology transfer, especially to developing countries and LDCs, are largely the focus of attention of international organizations and experts. This question is similar to the question about the influence of stronger IPRs on international trade. As C. Correa explains, it emerges from the continuing technology gap between North and South that has been growing since TRIPS was adopted. He states that the fear that the enhanced protection given to IPRs will not effectively promote the development process but will, in contrast to initial expectations, limit it, instead of opening access to technology, is something that has been voiced by many developing countries.[35]

The TRIPS Agreement expressly refers to the stimulation of technology transfer, but nonetheless is mainly concerned with the scope, use and enforcement of IPRs. Therefore, mechanisms of implementing balanced relations between IPR protection and stimulation of technology development through technology transfer have not been provided for. That has led, at the level of international organizations, to discussions on mechanisms of IPR influence on technology transfer disciplines.

The prime attention of TRIPS is given to technology transfer that reflects the commercial approach, while bearing in mind some development implications. As L. Yueh remarks, this priority contradicts the adopted prediction that technology transfer will be one of the factors of convergence within the global economy and not an addition to other factors that inhibit the absorption and transfer of technologies.[36]

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[33] Mohammad T. Islam, *TRIPS Agreement and Economic Development: Implications and Challenges for Least-developed Countries Like Bangladesh*, 2(1) Nordic J. of Com. L. 5–10 (2010), available at <http://njcl.utu.fi/2_2010/islam_mohammad_towhidul.pdf> (accessed Apr. 17, 2016).

[34] Luis Angeles, *Should Developing Countries Strengthen Intellectual Property Rights?* 5(1) Berkley Elec. J. of Macroec. 1–25 (2005). DOI: 10.2202/1534-5998.1327.

[35] Carlos M. Correa, *Review of the TRIPS Agreement: Fostering the Transfer of Technology to Developing Countries* 3 (Third World Network Trade & Development Series) (2001), available at <http://www.twn.my/title2/t&d/tnd13.pdf> (accessed Apr. 30, 2016).

[36] Linda Y. Yueh, *Global IPRs and Economic Growth*, 5(3) Northwestern J. of Tech. and Int. Prop. 441–447 (2007), available at <http://scholarlycommons.law.nortwestern.edu/njtip/vol/5/iss3/3> (accessed May 8, 2016).

Based on evidence on income dispersion in the global economy and the evolution of the global system of IPR protection, this expert argues that the IPR regime under the TRIPS provisions is contributing to the divergence of growth rates among countries by making technology costly, which is closely connected with increasing the cost of developing countries' production and, thus, inhibits their ability to 'catch up'. In a kind of countervailing effect, there are the acts of the international rules-based system of facilitation of FDI for developing countries. Another expert – G. Samad – argues that increasing the level of IPR enforcement encourages licensing, reducing imitation, but enhancing royalties and license fees. That has negative impacts, not only on technology transfer to developing countries, but also on FDI.

It should also not go unmentioned that the prevailing trend in global IPR policy is, indisputably, the strengthening of IPR protection. This is a result of the approach that is being conducted and implemented by developed countries, or rather by their TNCs. Insofar as the modern world economy is an economy of IP, international technology markets are very sensitive to the broadening of the scope of IPR protection, in particular to extension of the patent duration. The significant broadening of the scope and duration covered in the TRIPs Agreement may lead to difficulties in ITT. Therefore, there is concern about the impact of stronger IPR protection on ITT.

In spite of what has been said, the potential benefits from increasing IPR protection are not always clear for developing countries.[37] As P. Janjua and G. Samad have concluded, IPRs are a factor of productivity influencing developed countries rather than middle-income developing countries.[38] While developing countries have no particular enthusiasm regarding this matter, developed countries and their firms, to say nothing of TNCs, are keen to strengthen IPRs around the world, because they believe that IP protection has a positive impact on a country's economic development, including that of developing countries, through the positive impact of IP on FDI, innovation and technology transfer.[39]

Furthermore, they even strive to enter onto the list of patentable innovations the broader variety of new technologies, for example biotechnologies. The possibility of that is laid down in Article 27.1 of the TRIPS Agreement, but under several restrictions in accordance with Articles 27.2 and 27.3. In addition, Rule 27 of the instructions on application of the European Patent Convention widens, in the light of Directive

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[37] Phillip McCalman, *Who enjoys TRIPS abroad? An Empirical Analysis of Intellectual Property Rights in the Uruguay Round,* 38(2) Can. J. of Ec. 574–603 (2005). DOI: 10.1111/j.0008-4085.2005.00293.x.

[38] Pervez Z. Janjua & Ghulam Samand, *Intellectual Property Rights and Economic Growth: the Case of Middle-income Developing Countries*, 46(4) The Pak. Dev. Rev. 720 (2007), available at <http://www.pide.org.pk/pdf/PDR/2007/Volume4/711-722.pdf> (accessed Mar. 18, 2016).

[39] Peter Magic, *International Technology Transfer & Intellectual Property Rights* (University of Texas 2003), available at <http://www.cs.utexas.edu/~fussell/courses/econtech/public-final-papers/Peter_Magic_International_IP_Rights.pdf>, (accessed Feb. 14, 2016).

98/44/EC,[40] the list of patentable inventions, including biotechnological inventions, determined by Rule 26.2 as a product or a process 'by means of which biological material is produced, processed or used.' Developing countries are not interested in widening the list of patentable inventions, because that leads to difficulties in access thereto. In effect, as C. O'Regan induces, it would be arrogant to presume that a one-size-fits-all approach to IPR protection would work for developing countries.[41]

The reforms to the patent systems undertaken in developing countries towards establishing stronger patent laws after the adoption of TRIPS has had a positive impact on technology imported into those countries. As a result, there was a reduction in the possibilities to imitate patented technologies. But, on the other hand, this has meant the strengthening of the position of foreign firms and it has not resulted in a solution to the problem of capacity building.

A study by the UN Industrial and Development Organization (UNIDO) has shown the adverse effect of patent monopoly on technology transfer. The experience of the Republic of Korea argues that stronger IPR protection will hinder rather than facilitate technology transfer and indigenous learning activities at the early stages of industrialization. Also in this reasoned study, this time with the experience of Lebanon addressed, it was stated that 'research findings indicate that the static effects of stronger IPR protection on prices, employment and output are likely to be negative for most industries' there.[42] With regard to middle-income countries, the same study recognized that the beneficial impact of stronger IPR protection on domestic innovation and technology diffusion to a certain extent are offset by the growth-enhancing benefits otherwise obtained from imitation and now precluded by the stronger IPR regime.

In addition, empirical evidence testifies that enforceable patents can increase inward flows of ITT in middle-income and large developing countries, but probably have little impact in LDCs. This conclusion is similar to B. Hall's view that stringent patent rights protection, indeed, encourages FDI and technology transfer to mid-level developing countries, but there is very little evidence that stronger patent protection can encourage indigenous innovation in developing countries.[43] Moreover,

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40 Directive 98/44/EC of the European parliament and the Council of 6 July 1998 on the legal protection of biological inventions. Official J., L 213 13–21 (July 30, 1998).

41 Cecily A. O'Regan, *Is Intellectual Property a Hurdle for Transfer Technology to Developing Countries? If so, How High of a Hurdle?* 1(1) Hasting Sc. and Tech. J. 1 (2009).

42 United Nations Industrial Development Organization (UNIDO) and World Business Council for Sustainable Development (WBCSD), Developing Countries and Technology Cooperation: an Capacity-Building Perspective (UNIDO Pub. 2002), available at <http://infohouse.p2ric.org/ref/40/39496.pdf> (accessed May 1, 2016).

43 Bronwyn N. Hall, *Does Patents Protection Help or Hinder Technology Transfer?* in Intellectual Property for Economic Development: Issues and Policy Implication 11–32 (Sanghoon Ahn, Bronwyn H. Hall & Keun Lee (eds.) (Edward Elgar Publishing 2014).

ITT should lead not only to technology inflows, but also to stimulating domestic innovation. Referring to previous quantitative research, M. Islam concludes that IPRs do not often contribute to the economic growth and development of countries with thresholds of GDP below US$3,400. Countries with a low level of development have no possibility to engage in R&D, and thus appropriate the potential to imitate, absorb or assimilate foreign inventions in order to meet consumption needs and fulfill economic goals.[44] As a result, the strengthening of IPR protection as per global standards restricts free use of knowledge and technological public goods, as well as increases the cost of technology acquisition.

The real and possible perspectives of ITT in the context of stronger IPR protection remain under discussion in the realm of experts where there is critical assessment of the claimed welfare consequences of implementing global standards of IPR protection in developing countries. The point is that some experts underscore that the minimum standards enshrined in TRIPS can bring various benefits to developing countries in respect of creating appropriate structures for encouraging the generation, diffusion and transfer of technologies, including the attraction of private investment flows at the national and international levels. Protecting IPRs in the TRIPS framework has welfare implications for developing countries (the South) by way of the impact on innovation, markets and transfer of technology. Furthermore, a stringent IPR regime is optimal for the South because it triggers technology transfer by inducing FDI in less R&D-intensive industries. According to A. Naghavi, a stringent IPR regime can also stimulate innovation by pushing the multinationals to deter entry into the high-tech sector. Additionally, G. Samad and M. Nasir in their new study conclude that IPR protection does encourage technology transfer (in this case) to Pakistan, India and Bangladesh, concurrently recognizing the positive impact on economic freedom and GDP of technology transfer.

In this regard, B. Pandey and P. Saha's approach is also quite optimistic. They recognize the skepticism surrounding TRIPS capacity to be basic for technology inflows to developing countries. Nonetheless, they argue that the Agreement contains provisions on flexibility that should be exploited by developing countries to achieve the purposes of their technological development.[45] In other words, developing countries need the optimum model of IPRs so as to further economic growth via internal and external (international) technology transfers.[46]

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[44] Mohammad T. Islam, *TRIPS Agreement of the WTO. Implications and Challenges for Bangladesh* (Cambridge Scholars Publishing 2014).

[45] Bishambhar N. Pandey & Prabhat K. Saha, *Technology Transfer in TRIPS Agreement: Implications for Developing Countries*, 3(1) Dehradun L. Rev. (2012).

[46] Yongmin Chen and Thitima Puttitanun, *Intellectual Property Rights and Innovation in Developing Countries*, 78(2) J. of Dev. Economics 477–479 (2005). DOI: 10.1016/j.jdeveco.2004.11.005.

So the positive influence of stronger IPRs on ITT continues to be a matter of discussion.[47] To draw general and unambiguous conclusions on the results of the impact of increasing IPR protection on ITT is difficult, because ITT is carried out in different forms. That is why most experts prefer to analyze the impact in regard to concrete forms of technology transfer, for example trade, FDI and licensing. In other words, most studies considering taking up one of the channels by which technologies may be transferred and diffused choose to examine the impact of IPRs on ITT activity in this concrete channel. These studies act as background for policy-making in special areas of global policy in the sphere of IP and ITT.

8. Different Results of Stronger IPR Protection Regarding Various Groups of Countries

Given the remarks just made, increasing IPR protection raises many problems concerning the difficulties of access to technologies. Stronger IPRs are, nonetheless, closely connected with possible growth in FDI, trade and licensing flows. They are real vehicles of technology transfer and can foster technology exchange. As some experts have shown, strengthening IPR protection allows shifting ITT from exports towards licensing. This positively affects inflows of technological knowledge measured as R&D expenditures undertaken on behalf of affiliates.[48] In a different way, stronger IPR protection is expected to expand the formal channels of transfer and diffusion of technology. At the same time it is necessary to avoid, to a certain extent, overstating these positive effects, insofar as these findings are applied only to recipient countries with good imitative potential. In other cases, the impact of strengthening IPR protection is zero.

Most broadly, stronger IPR protection is capable of increasing the formal channels of technology transfer via international trade, inflows of FDI and licensing, but mainly into countries imitating technologies and having certain technological potential. As premised by L. Kim, Korea is one of these countries. There seems to be certain evidence on the positive impact of IPRs on formal technology transfer, at least, at the bilateral level.

The results of stronger IPR protection are ambiguous in theory and in practice, generally, and depend on the concrete conditions of different countries. R. Rasian, having analyzed the experiences of India, NIEs (newly industrialized economies),

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[47] Lee G. Branstetter, Raymond Fisman & Fritz C. Foley, *Do Stronger Intellectual Property Rights Increase International Technology Transfer? Empirical evidence from U.S. firm-level panel data*, 121(1) The Quart. J. of Ec. 320–350 (2006). DOI: 10.1093/qje/121.1.321.

[48] Pamela J. Smith, *How Do Foreign Patent Rights Affect U.S. Exports, Affiliate Sale, and Licenses?* 55(2) J. of Int'l Ec., 411–440 (2001). DOI: 10.1016/S0022-1996(01)00086-1.

Pakistan, Sri Lanka and other countries, prefers to give conditions of technological capabilities and IPR infrastructure. He induces from his analyses that poorer economies are unlikely to enjoy compliance with the obligations under the TRIPS Agreement.[49] Similarly, R. Mashelkar states that the impact of TRIPS on developing countries will be consistent with the level of their economic and technological development. Middle-income countries, for example Brazil and Malaysia, are likely to benefit from the spur to local innovation under stronger IPRs. Other countries, for example India and China, endowed with IP infrastructure, can gain in the long term some benefits from stronger IPRs. Mashelkar summarizes further that LDCs with their minimal level of innovative development will face higher costs without the offsetting benefits.[50]

Generally speaking, the positive impact of strengthening IPR protection on technology transfer and, accordingly, on economic growth and innovation depends on the economic and technological level of the particular country. The demonstration of positive impacts as regards non-innovative developing countries or LDCs are likely to be the foremost problem of global policy in the area of IPRs, ITT and development. With regard to the poorest countries, stronger IPRs do not lead to the appearance of all the substantial benefits in view of supporting innovation growth and technology diffusion. Additionally, the high level of administrative cost for developing patent systems and the potential abuse of market power in small, closed markets along with enforcement of TRIPS will give rise to losing out by acceding to the Agreement.

Moreover, a regime of stronger IPRs may cause some difficulties for technology imitation, a significant lever designed to develop the innovative potential of various industries in LDCs with some slight technological capabilities. Besides that, TRIPS restricts free use of technologies and knowledge, but these restrictions are by no means absolute. It should be stressed that LDCs are no extreme antagonists of any protection of exclusive rights to the results of intellectual activity. But through limitations on exclusive rights, these countries can fully use their comparative advantage of reverse-engineering, thereby adding value through adaptation of existing technological goods accessed due to formal and non-formal channels. However, the TRIPS Agreement obliges its members, irrespective of their level of development, to strengthen IPR protection, including comprehensive control over technology diffusion. Indeed, as we believe, TRIPS consolidates the position of rights holders. It must not be forgotten that this consolidation is balanced with the provided flexibilities, being the outcome of the compromise between developed and developing countries. In consideration of these flexible mechanisms, TRIPS

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[49] Rajah Rasiah, *TRIPS and Industrial Technology Development in East and South Asia*, 14(1) The Eur. J. of Dev. R. 171–199 (2002).

[50] Raghunath A. Mashelkar, *Intellectual property rights and the third world*, 7(4) J. of Int. Prop. Rights 310 (2002), available at <http://nopr.niscair.res.in/handle/123456789/4927> (accessed Dec. 11, 2015).

should not be regarded as an international instrument serving only the interests of one group of countries.

Unconditionally, the logic of development of the international system of IPR protection is strengthening protection, but concurrently there is implied development of regimes of limitations and exceptions as a part of the flexibilities. That is why strengthening IPR protection may be fully consistent not only with the interests of those developing countries that have succeeded in technological and industrial development and are now transitioning to technology donors, but also with the interests of LDCs. Nonetheless, for LDCs there are many problems forthcoming. Similar conclusions have been suggested by R. Falvey, who investigated the effects of IPR protection under the TRIPS standards in the area of economic growth in seventy-nine countries.[51] In this study, he and other experts show that effects depend on the level of development, although positive and significant effects have taken place not only in high-income countries, but also in low-income countries. In the first case, economic growth is grounded on encouraging innovation by stronger IPR protection. Additionally, changes made in the relation of LDCs to IPR protection has led to enhancing technology flows. Falvey *et al.* furthermore suggest that middle-income countries may have offsetting losses in reduced scope for imitation of technologies, something which has long lain behind their economic growth.

Insofar as LDCs are more vulnerable to any strengthening of IPR protection, they are, therefore, very interested in extension of the transitional period in the process of TRIPS implementation. Article 66.1 of the Agreement clearly ascertains that the Council of TRIPS shall, upon duly motivated request by a least developed country member, accord extensions of this period. This provision is the premise of requests by LCDs to extend the transitional period. The LDCs are also very interested in comprehensive stocktaking of their technology transfer obligations that have been accepted by developed countries. In this light, the world community must envision measures on effective implementation of the obligations of developed countries under Article 66.2 of the TRIPS Agreement.

In contrast to LDCs, technologically and economically advanced developing countries are likely to experience positive effects from their exercise of the potentials of TRIPS. Stronger IPR protection seems to be a key factor in encouraging firms engaged in the imitation of technology to shift their resources towards production and commercialization of domestic innovation, since development of high-tech business is a strategy of these countries. India, for example, sets itself the task of transitioning to a high-tech export structure. This is a task of the state and business. A. Lal and R. Clement emphasize, among other things: 'India is posed to generate new business startups in the high-tech area that can help it become a major competitor in

[51] Rod Falvey, Neil Foster and David Greenaway, *Intellectual Property Rights and Economic Growth*, 10(4) Rev. of Dev. Ec. 700–719 (2006). DOI: 10.1111/j.1467-9361.2006.00343.x.

the world economy."[52] Countries that have succeeded in innovative activity in recent years, for example China, may benefit from stronger IPRs. In contrast to the poorest countries, advanced developing countries have possibilities to obtain benefits from formal channels of technology transfer and integration into the R&D activity of developed countries.

At the same time, advanced developing countries are also interested in the system of IPR protection in order to encourage technology transfer and diffusion through imitation. We consider that to be the track of the era when policy in the area of IPRs was at the national level. This admitted using various flexibilities that facilitated technology diffusion. The TRIPS Agreement shifted the bargaining on flexibilities from the national to the international level, having made these mechanisms uniform within the international system of IPRs based on minimum standards of their protection. The reality created by the TRIPS Agreement obviously drives the question, Who does benefit most from these changes? It is clear that the answer is the developed countries and their innovators and rights holders or, rather, their TNCs. Because the majority of results of intellectual activity are still produced in industrialized countries, despite essential changes, developing countries continue to depend on either spillovers or formal technology transfer from those countries and their R&D centers.

The strengthening of IPR protection pursuant to the TRIPS Agreement reduces the possibility of technology transfer free of charge from North to South, restricting obtaining the technology to channels of formal transfer that are associated with substantial costs. This means that there is a correlation between the potential increase in price and reduction in access to available technology, on the one hand, and high-tech production, on the other. There is a point to be stressed here that both advanced developing countries and LDCs need informal channels of technology transfer for use in developing or creating an innovative sector. These channels should not be underestimated as to their importance. As C. Correa suggests, the policies of LDCs in the field of technology transfer should be focused on mobilizing the informal modes of technology acquisition and should address the situation of firms at a more advanced stage of technological development.[53] Reasonably, the given policies should include mechanisms to expand the acquisition and ensure the exploitation of equipment and machinery, and they should elevate the bargaining capacity of the more advanced firms to obtain technologies through licensing agreements.

From all that has been said, it can be concretized that global policy on IPRs, ITT and development comprises the national and international policies on fostering

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[52] Anil Lal and Ronald Clement, *Economic Development in India: the Role of Individual Enterprise*, 12(2) Asia-Pacific Dev. J. 96 (2005), available at <http://www.unescap.org/sites/default/files/apdj12-2-5-lal.pdf> (accessed May 3, 2016).

[53] Carlos M. Correa, *Intellectual Property in LDCs: Strategies for Enhancing Technology Transfer and Dissemination.* Background Paper No. 4 (Geneva: UNCTAD, 2007).

formal and informal channels of technology transfer. The first are policies in the area of attracting FDI. Such policies serve all countries as means for developing their innovative technology basis. The second are policies in the area of education and R&D investment. At last, a variety of countries, including developed countries, will be interested in the diffusion of technology via patent applications and definition of "inventive step", making innovation patentable, as well as via the breadth of allowable patent claims.

9. TRIPS-plus v. TRIPS: the New Problems of International Technology Transfer

The compliance of developing countries with the provisions of the TRIPS Agreement that have increased IPR protection has been conditional on their seeking to gain access to the markets of developed countries. The higher level of IPR protection is a kind of price for this access. A key trend fully visible within the level of regional integration and bilateral trade and investment agreements is a further increasing of IPR protection. This will continue in the foreseeable future. It may reasonably be expected that economic integration achieved via bilateral and regional agreements will potentially and feasibly expand the exchange of technology. However, there are certain difficulties.

A new stage of global cooperation in the sphere of IPRs, ITT and development is the incorporation of provisions on IPR protection and technology transfer into trade and economic agreements at the bilateral and regional levels, and expansion of IPR protection beyond the level that has been set by TRIPS. Such agreements are numerous[54] and are being intently examined by experts.[55] It is possible to state that at the bilateral level there appear certain inherent standards of stronger IPR protection which are in addition to the international system of IPR protection. P. Drahos has named this appearance as a new bilateralism in intellectual property.[56] This bilateralism is, in essence, a fragmentation of the international IPR regulatory regime that may negatively affect ITT.

Provisions laid down in a myriad of bilateral and regional free trade agreements (FTAs) stipulate standards that are known as 'TRIPS-plus' provisions, which means the new wave of strengthening IPR protection. Thus, significant changes are occurring

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[54] USA Free Trade Agreements, available at <http://www.trade.gov/fta> (accessed Dec. 30, 2015); Free Trade Agreements. European Commission. Enterprise and Industry, available at <http://ec.europa.eu/trade/policy/countries-and-regions/agreements/> (accessed Nov. 23, 2015).

[55] Mark V. Shugurov, *Perspectives of International Technology Transfer in the TRIPs-plus Era: Problems and Solutions*, 5(1) Eur. J. of Soc. and Hum. Sc. 48–57 (2015), available at <http://ejshs.net/journals_n/1426244323.pdf> (accessed May 2, 2016).

[56] Peter Drahos, *BITs and BIPs: Bilateralism in Intellectual Property*, 4(6) The J. of W. Int. Prop. 793 (2001). DOI: 10.1111/j.1747-1796.2001.tb00138.x.

at the international, regional and bilateral levels that are based on strengthening minimum TRIPS standards through progressive harmonization of policies in accordance with standards of the technologically advanced countries. The world is experiencing the occurrence of the so-called TRIPS-plus era affecting IP, trade, economic development and, accordingly, international technology transfer.[57]

Testing the perspectives on the impact of these agreements on technology transfer and standards of IPR protection is left to the future. Yet, possible studies may include the logical continuation of the studies already made on the correlation between the level of IPR protection and technology transfer in general.

It is clear now that the likely influence of FTAs will be ambiguous, because the specificity of these agreements is that they comprise provisions of IPRs that go beyond multilateral agreements in the sphere of IPR protection. Additionally, they set out so-called TRIPS-plus standards aiming at reinforcement of the position of rights holders, while proclaiming the measures on prevention of the abuse of IPRs by rights holders. That may negatively influence the advancement of such chief goals of technology transfer as promotion of development and capacity building. Therefore, analysis of these provisions is a part of assessing the perspectives on ITT.[58]

The main problem accompanying the expansion of TRIPs-plus provisions is that the principle of balance assigned in the TRIPS Agreement and other agreements of the WTO is questioned. FTAs can include provisions in which the principle of balance is implemented, but this is, at least, an exception.[59] This alludes to the fact that the principle of balance between rights holders and users of technology may be considered a fad of the international IP law policymakers. The approach that stresses the principle as a fad undermines the regime of flexibilities postulated by TRIPS. Developed countries regard the balance as a superfluous detail in trade relations with developing countries, although they themselves exploit implemented flexibilities broadly, especially compulsory licensing, for providing the right of their citizens to access to medicines. We think that justification of the necessity of balance is a significant point of the current and future global policy in the sphere of IP and ITT, as the principle promotes technological advancement across the world. In turn, tensions between TRIPS and TRIPS-plus means an imbalance in the global system of IPR protection.

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[57] Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-plus Era (Daniel Gervais, ed.) (Oxford University Press 2007).

[58] Carsten Fink and Patrick Reichenmiller, *Tightening TRIPS: the Intellectual Property Provisions of recent US Free Trade Agreement*. Trade Note (February 7) 1–7 (World Bank Pub. 2005), available at <http://siteresources.worldbank.org/INTRANETTRADE/Resources/Pubs/TradeNote20.pdf> (accessed Nov. 23, 2015).

[59] Andrea Wechsler, *The Quest for Balance in Intellectual Property Law: an Emerging Paradigm or a Fad? A TRIPS Essay Competition* (2009), available at <http://www.atrip.org/Content/Essays/Andrea%20Wechsler.pdf> (accessed Sept. 19, 2015).

In other words, the TRIPS-plus era, also called the post-WTO regime, should be explicitly acknowledged as posing the problems of mutually beneficial ITT. This differs with the reasoning of this regime, rooted in the promise of mutual benefits from international trade and economic globalization. Therefore, the aim of establishing a fair international trade system firmly facilitating technology flows to interested countries is not achieved at the present time. Technologies are global public goods and they, therefore, should be transferred within the same global formal and informal channels. The international global trade system, as one of the major formal channels for technology transfer, should intend to foster prosperity around the world. This means that the international trade system should remain as a system of multilateral cooperation. Accordingly, FTAs should be compatible with the system and not lead to its fragmentation.

Additionally, FTAs should not distort the global system of IP set up on the principle of balance. This thesis is relevant to feedback relations between the bilateral and multilateral levels of technology transfer intersecting with bilateral and multilateral trade and also with investment relations. In this context, the role of multilateral international instruments and international organizations, including the WTO, remains and increases. Therefore, the TRIPS-plus era may be identified as a clear challenge to standards of technology transfer, including its IPR aspect, agreed at the global level. G. Cohen, who envisions the use of the potentials of the WTO and the TRIPS multilateral regime for international technology transfer, has remarked that the WTO plays a supportive role in setting up a just and balanced international trade system closely related with international technology transfer. As he further notes, 'this will require strengthening the provisions in WTO agreements that seek to promote developing countries' access to modern technology.'[60]

Moreover, the TRIPS Agreement continues to have significant potential. Its realization depends on the success of the adaptation of its provisions to the solution of new tasks connected with the intersection of IPR protection and enforcement with the transfer of environmentally sound technology and with new trends in the world economy and policy of aid to development, namely, stressing capacity building and facilitating national policy in the area of innovation. In this light, there arises the discussion on the framework conditions of an evolving interpretation of the TRIPS provisions that should be better situated for the new calls of the times.[61] In our opinion, indeed, there appears to be a very strong need for a multilateral framework that should secure the stable and predictable conditions of long-term FDI and for support of constructive mechanisms of technology transfer to developing countries

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[60] Goel Cohen, Technology Transfer: Strategic Management in Developing Countries 258–259 (SAGE Publications 2009).

[61] TRIPS plus 20. From Trade Rules to Market Principles 431–435 (Hanns Ullrich, Reto M. Hilty, Matthias Lamping & Josef Drexl, eds.) (Springer 2016).

with the accent on their engagement in generating innovation via the promotion of the development of their innovative policy in the areas of R&D and the economy.

10. Conclusion

The challenges ahead in forming and implementing global policy in the sphere of IPRs, ITT and development continue to be considerable. The processes taking place in the global system of IPRs and their protection reflect the conflict of a number of perspectives. We can point out, at least, the two ranges of perspectives on international technology transfer. The first views international transfer relations as instruments of world development and as means to reduce the technological gap and other gaps connected with IPR protection. The second views the stabilization of technology transfer as a powerful instrument of control over the technological development of developing countries and of its restraint. That is why the actors engaged in global policy in the area of IPRs, ITT and development should be concerned about ensuring the realization of the purported benefits from technology transfer for all countries.

The proper striving to realize these profound objectives of ITT demands that all participants of ITT (states, the private sector and international organizations) jointly elaborate systemic and innovative policy space regarding the protection of IP and technology transfer. The international policy space, undoubtedly, should aim at the implementation of a high threshold of IPR protection, simultaneously avoiding incremental patenting of innovations and extension of patent monopoly through abuse of evergreening or patent thicket strategies.

The facilitation of the transfer of technologies for purposes of their use should be provided by measures for timely, prompt disclosure of inventions after expiry of patents. That allows emulation of the technologies in a more accurate manner. Great significance adheres to facilitating the flow of technology information in order to make possible further innovation processes and to provide the possibilities for developing countries partly to catch up technologically to developed countries.

The positive perspectives of international technology transfer in particular and technology progress in general directly depend on the development of global policy in the sphere of IPRs and technology transfer. The further tendencies in the latter are issues to be especially addressed with a view to strengthening the effectiveness of technology transfer. In essence, we may soon see the appearance of the unprecedented situation in the international system of technology transfer which is closely connected not only with a new phase of international scientific and technological cooperation, but also with a new phase of development in world trade and investment. Matters of the paradigm of IPR protection gain in importance. In order to optimize the process of technology transfer, various groups of countries must undertake individual and collective actions.

Because developing countries are deeply interested in integration in technology flows, they must elaborate their strategic vision of actions for upholding the international and national regimes of IPR protection that correspond to their technological interests and development policy. That implies pushing for implementation of provisions of international instruments providing the facilitation of technology transfer and capacity building. Moreover, policy space of developing countries covers concerned realization of provisions of international instruments in the sphere of IPR protection that aim to facilitate technology transfer and technology development. These are, first of all, provisions of the TRIPS Agreement.

For developing countries it is also important to question the possibilities of TRIPS for facilitating technology transfer and for achieving their implementation. That should be accompanied by the setting up of forums in order to take stock of the possibilities in the context of a general assessment of how far the substantive provisions of TRIPS may contribute to attaining the goals claimed in its Preamble and Article 7. Developing countries should in a more coordinated manner discuss at the level of international organizations issues on the impact of IPRs on technology transfer, striving to achieve a concerted position and action, as well as pursuing the implementation of international instruments. Developing countries should deliberately take decisions on participation in FTAs and other international agreements containing any TRIPS-plus obligations. If they already are signatories to these agreements, there is need for active re-negotiations on their obligations. The forming of a favorable global order of technology transfer demands active attempts for implementation at the national level of the flexibilities of the TRIPS Agreement that facilitate technology emulation, innovation and invention.

LDCs are more vulnerable to any strengthening of IPR protection. They should engage in a comprehensive stocktaking of their technology transfer obligations that have been accepted by developed countries, when advantageous they should request extension of the transitional period under Article 66.1 of the TRIPS Agreement, and they should demand effective implementation of obligations beneficial to them under Article 66.2.

Developed countries have major responsibility for global technology development and use of technologies for development goals. The universal position of developed countries consists in that they believe that a well-designed system of IPRs is an essential tool for technology transfer and economic development. They must be made conscious concerning the negative effects that unbalanced strengthening of protection of IPRs has in respect of technology transfer and development.

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PROTECTION OF RIGHTS UNDER RUSSIAN CIVIL LAW IN A COMPARATIVE CONTEXT

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DOI:10.21684/2412-2343-2016-3-1-126-137

The article analyzes the new rules securing the protection of rights introduced in the Russian Civil Code. New enforcement provisions in the Code will contribute to the stability and sustainability of business transactions in the market economy and the observance of contractual discipline. They aim at ensuring the most complete restoration of violated civil rights and restoring the situation that existed before the violation. Positive changes appear in Article 395 of the Code, including penalties prescribing interest payments on unpaid funds for nonperformance of a monetary obligation. The changes to this article have already been tested in practice, as found in a number of interpretations announced in the decisions of higher courts of the judiciary. Yet, an analysis of the Code reveals the absence of any form of penalty in the chapters on the individual types of obligations. Furthermore, a forfeiture occurs only in certain circumstances where it is required due to the nature of the legal relations, as under, for example, transport charters and codes, and laws on the supply of goods for state requirements.

Keywords: protection of civil rights; responsibility in civil law; protection of civil relations.

Recommended citation: Denis Karkhalev, *Protection of Rights under Russian Civil Law in a Comparative Context*, 3(1) BRICS Law Journal 126–137 (2016).

1. Introduction

The remedies for the violation of civil rights are provided for in Article 12 of the Civil Code of the Russian Federation (hereinafter, the Civil Code or CC) and in other federal laws. Article 12 of the Civil Code recognises the general methods by which rights are

protected and include (among others): recognition of the right; restoration of the situation that existed before the infringement of the right; suppression of the actions infringing the right or creating the threat of its infringement; acknowledgement of the transaction as void and application of the consequences of its invalidity; recovery of damages; self-defense of the right; and compensation for moral damage. Application of the method of protection depends on two factors – the nature of the right protected and the nature of the offence. Participants in business relations may make use of these general methods, and special measures provided for in specific parts of the Civil Code and other federal laws, for violations of their rights.

The protection of rights in the substantive sense of the term is defined as a system of measures of legal influence (measures of protection) that are applied in the event of violation of rights and that are directed at their restoration. The protection of civil rights is characterized by a system of measures provided by law aimed at ensuring the inviolability of rights, restoration of violated rights and suppression of actions infringing the rights.

2. Protective Civil Relationship

The protection of civil rights is implemented within a relationship, a particular legal context, that sets down the measures of civil–legal coercion and that is characterized by the possibility of enforcement. The basis of the occurrence of this relationship is improper (i.e. illegal) action. It should be noted that for the obliged party the relationship has an adverse effect. In addition, it is a feature of the content of legal relations that they consist of only the independent subjective right to the protection and security of obligations, thus safeguarding legal relations entered into, and aimed at ensuring the protection (recovery) of subjective civil rights or interests. The relationship is retrospective in nature (it occurs after the violation or threatened violation of law) and the regulation of the corresponding legal relations is carried out on the basis of the protective rules contained in the civil law.

The relationship embodies coercion and enforcement of legal relations that serve the protection of civil rights. Their occurrence depends on the violation of a subjective right; they are based on proprietary standards. The implementation of coercive measures cannot be outside the framework of legal relations, thus the relationship may be called a legal relationship for civil rights.

The object of any enforcement obligations are the actions (behavior) that must commit the offender to the restoration of violated subjective civil rights (or interests).

The subject of the civil law in respect of legal capacity can include both regulatory law (and incur regulatory obligations) and law enforcement. It should highlight the regulatory and enforcement capacity of the injured person (the ability to have the right to protection). Legal capacity starts with the birth of the person (or creation of the legal entity). By virtue of the same legal capacity a person may exercise

regulatory law (of contract) and demand the protection of civil rights (to exercise the right of defense).

In the framework of ordinary capacity, it is necessary to distinguish two elements: (1) the ability of a person's actions to acquire and exercise regulatory, subjective civil rights and to fulfill regulatory obligations (regulatory capacity); (2) the ability of the injured person by his actions to acquire and exercise civil enforcement of a subjective right (right to protection) and to create enforcement obligations and execute them (protective capability). Full legal capacity begins at the age of eighteen.

The contents of legal relations in civil law is the right of victims to the use of civil coercion (the right to protection) and the obligation of the offender to restore the violated civil right (enforcement responsibility).

The subjective right to protection consists of the following three powers: (1) the ability (competence) to take the actual steps for the protection of the law (on the application of measures of self-defense) or to take independent legal action to restore the right (on the application of measures of operative influence); (2) the ability (competence) to require public authorities to authoritatively restore the violated right (on the application of measures of protection and measures of liability); (3) the ability (competence) to secure the protection of proprietary rights (on the application of coercive measures in a new protective civil relationship). These powers, in my opinion, indicate the independent right to defense.

The subjective enforcement responsibility consists of three elements: (1) the 'responsibility' (the need) to perform a certain action on restoration of the violated right – when implementing measures of protection or measures of responsibility; (2) the 'duty' (the need) to refrain from committing illegal actions in case of breach of contract or beginning of such actions (for the purpose of mitigation) on the part of the injured person – in measures of self-protection or operational impact; (3) the 'responsibility' (the need) to perform a certain action to restore enforcement of the law in the application of sanctions in the new legal relationship arising from the violation of a protective civil relationship.

The enforcement of obligations is reflected in the fact that the offender hands over property to the injured party. This legitimate legal action is a unilateral action (the will). The victim then takes the property from the offender. The reception of the property is also a unilateral action (the will). Performance can be expressed also in the commission of property or non-property unilateral actions (restoration of rights) unrelated to the transfer of property. Thus, the execution of enforcement of commitments represents one or more unilateral actions that result in the restoration of violated civil rights.

The case of nonperformance or improper performance of an obligation (wrongful act) is an independent protective civil relationship, which I propose to call a subprotective relationship. The principal feature of this relationship is that it arises on the basis of the (initial) protective civil relationship. The basis of the subprotective

relationship is a violation of law enforcement's initial enforcement of the liability expressed in the nonperformance (or improper performance) of an obligation.

The entitlement to protection as an independent subjective right may be violated. If the right to protection is violated, it is obvious, there must arise a new secure relationship, which should exercise a new right to protection (subprotection right) and new subprotection obligation.

Civil rights in business relations are characterized by strict liability as stipulated in Article 401 of the Civil Code. Those engaged in these relations are professional participants in commercial activity, thus they must be circumspect and responsible so as to comply scrupulously with their contractual obligations. According to Article 401, the basis for exemption from liability of persons engaged in commercial activity is where the intervention of unavoidable, extraordinary circumstances make it impossible to carry out the obligation. Thus the basis is cause, not excuse. Here, we are speaking of responsibility on an objective basis.

Hence, the principal feature of commercial activity is that its participants have a heightened responsibility in the event of violation of obligations. The liability of persons engaged in commercial activities is built on the basis of risk – they are responsible, unless they prove that proper discharge of their obligations has been impossible owing to insuperable forces (Art. 401 CC). If a person is responsible for the breach of an obligation or for injury regardless of fault, that person bears the burden of proving the circumstances which are the basis for exemption from liability.

3. Damages in Russian, European and Anglo-American Law

Remedies must be seen in the retrospective, narrow sense of the word, as measures implemented after the breach. The main method of rights protection in business relations is damages. A loss within the meaning of paragraph 2 Article 15 of the Civil Code should be understood as expenses that the person whose right is violated made or must make to restore the violated right, loss or damage to his property (actual damage), as well as lost income he would have received under normal business conditions if his right had not been violated (lost profits).

If the person who has violated a right has received income as a result, the victim has the right to demand compensation along with other losses of missed benefit in an amount not smaller than such income.

The determination of damages, in accordance with paragraph 3 Article 393 of the Civil Code, should be based on the existing prices at the place where the person should have discharged the obligation and on the date of his voluntary performance of that duty, unless the law or the contract provides otherwise.

The new resolution of the Plenum of the Supreme Court of the Russian Federation No. 25 dated June 23, 2015 'On application by courts of certain provisions of section

I of part one of the Civil Code of the Russian Federation' (hereinafter – Decree No. 25) states that the amount of recoverable damages must be established with a reasonable degree of certainty (clause 12).

The application of the analyzed method of protection has well-known difficulties of a procedural nature, since in a market economy to prove the loss may not be easy, especially when it comes to loss of profits. In paragraph 14 Decree No. 25 this feature is highlighted, that the loss of profit is lost income, the calculation of which is approximate and probabilistic in nature. But this fact in itself cannot be grounds for denial of rights.

In practice, there are a number of ways of determining the amount of loss, which include: based on the weighted average of income received in the preceding time period; based on the size of the profit obtained under normal conditions of business activity in the market for a certain product; and based on measures taken by the creditor and made with regard to arrangements in respect of anticipated profits.

Damages as a measure of contractual liability are characterized by the fact that they require four conditions: loss, fault, causation and wrongfulness. The imposition on the offender of these costs characterizes the element of punishment of the offender and shows the orientation of this measure not only to restore legal provisions, but also to influence the penalty.

Under German law, the requirement of monetary damages is a subsidiary sanction to the real requirement of execution of the obligation. The German Civil Code provides that the debtor must restore the position that would have existed but for the circumstances that created a duty to pay damages (§ 249 BGB), i.e. the debtor's first duty is to performance. If performance has become impossible, the debtor is obliged to make compensation for the damage (1 § 251 BGB).

In German law, the replacement of specific performance by monetary compensation may occur only in strictly limited circumstances, for example if compliance 'in kind' is impossible, is fraught with disproportionately large burden (para. 2 § 251 BGB), or if compliance is associated with intrusion into the sphere of the purely personal relations of the debtor, or forces him into a creative activity.[1]

In Anglo-American law, the basis for legal-political responsibility in the form of damages are the following conditions: availability of losses (harm), wrongful action (inaction), the causal connection between the wrongful conduct and damages and fault. These conditions are required in the case of the occurrence of contractual liability and in the event of tort liability.[2]

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[1] *The German Law of Torts: A Comparative Treatise* 90 (4th Ed., Hart Publishing 2002).

[2] Белых В.С. *Понятие договорной ответственности по праву Англии и России*, 19 Юрист 41–43 (2013) [Belykh V.S. *Ponyatie dogovornoy otvetstvennosti po pravy Anglii I Rossii*, 19 Yurist 41–43 (2013) [Belykh V.S. *Concept of contractual liability law of England and Russia*, 19 Lawyer 41–43 (2013)]].

American law has not embraced the concept of fault as mental relation of the debtor to his actions and grounded in a finding of guilt based on objective facts.[3] However, it is allowed and so is no-fault based liability. Causation in Anglo-American law is as follows: compensation shall be recovered only for such losses arising out of a breach of contract, which is the natural and direct consequence of the breach of contract or is within the limits of foresight of both parties at the time of the conclusion of the contract.[4]

In comparison, French legal science does not make a clear distinction between 'wrongfulness' and 'guilt'. The two concepts are merged in the notion of 'faute' ('guilt').[5]

In the Uniform Commercial Code (UCC) of the USA (V.2–715, 2–700), compensation for the related losses is considered, and under which reference is made to those costs incurred by a party with the aim of reducing the amount of loss caused by improper performance or nonperformance of the contract.

Article 2–710 of the UCC refers to the seller's incidental damages, which include any reasonable charges, commissions and costs associated with the suspension of delivery, carriage, storage of goods and care for them following a breach of contract by the buyer, in connection with the return or resale of goods or otherwise resulting from breach of contract.

American contract law acknowledges liquidated damages.[6] The parties to the agreement may provide for a certain amount, which will be paid by the party at fault to the injured party in case of a specific breach of contract. This is essentially a penalty, which is intended for restoration, that is, compensation for a loss.

A.S. Komarov found that in contrast to continental law Anglo-American law based its approach to the problem of contractual penalties on the recognition of the opportunity to provide them freer expression.

Nominal damages are usually collected in the amount of one dollar and are of an educational character. Punitive damages are carried out only as tort liability in order to censure the person in favor of the state or a charitable organization.[7]

In comparison, continental law has moratoria and compensatory damages. Compensatory damages indemnify for a loss suffered as the result of breach of an

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3 Burdick Francis M. *The Law of Torts* 543–579 (BeardBooks, Washington D.C. 2000) (1905).

4 Treitel G.H. *Remedies for Breach of Contract. A Comparative Account* 117 (Oxford University Press 1988). McCormick C.T. *Handbook on the Law of Damages* 135 (St. Paul, Minn West Publishing Co. 1935).

5 Цвайгерт К., Кётц Х. *Введение в сравнительное правоведение в сфере частного права. Том 2* [Tsvaigert K., Ketc H. *Vvedenie v sravnitelnoe pravovedenie v sfere chastnogo prava. Tom 2* [Zweigert K., Katz H. *Introduction to comparative law in the field of private law. Volume 2*]] 392 (Moscow 2000).

6 Burrows A. *Understanding the Law of Obligations* 201–240 (Oxford Hart Publishing 1998).

7 Cane P. *The Anatomy of Tort Law* (Oxford Hart Publishing 1997); Miller C.J., Lovell P.A. *Product Liability* (Butterworth, London 1977).

obligation, they replace the performance, therefore one or the other – damages or performance – may be claimed, but not both. Moratoria damages shall be recovered for delay in performance, even if, for example, the debtor, although late, still fulfills the obligation.

The nature of a causal link between the breach of the obligation and the losses suffered involves remoteness, the most apparent and immediate consequences of nonperformance of a contract being direct, and those not so being indirect.

According to the method of calculation, a loss may be measured in concrete or in abstract terms. Special damages are those actual damages (e.g. loss of profits) that one of the parties suffered as the result of a breach of contract.

French law contains a provision according to which in all cases, regardless of the compulsory execution of obligations, if the creditor suffers losses, he is given the possibility of enforcement (Arts. 1142, 1146–1155, 1611 French Civil Code).

Anglo-American law provides for the possibility of moral damages in the area of tort liability for causing loss. Contractual liability excludes the use of this protection method.

In the Russian Civil Code there are new rules for applying sanctions to be analyzed in other spheres of social relations: damage exists when illegal refusal occurs in state registration of rights to property; damage to a legal person, an individual or collegial body of an organization; damage upon termination of a contract and compensation for material losses in connection with the execution, modification or termination liability, but not involving breach by the debtor (for example, loss caused by the impossibility of performance of obligations against the creditor claims from third parties).

Deserving of support is the inclusion in the law of rules in respect of damages in case of early termination of a contract. In the case where the nonperformance or improper performance by the debtor of the contract led to its early termination and in lieu of it the creditor entered into another transaction (replacement transaction), the creditor is entitled to demand from the debtor compensation of losses in the form of the difference between the price specified in the terminated contract and the price of comparable goods, works or services under the terms of the replacement transaction.

The same can be said about sanctions such as compensation for moral harm. The size of moral harm is difficult to prove; nevertheless, this sanction is often applied in court practice where there is a violation of the moral rights of persons engaged in business activities (for example, the right to reputation).

4. Penalties in Russia, Germany and France

In judicial practice the most frequently used means of protecting the rights of participants in business relations is the recovery of damages and interest under Article 395 of the Civil Code. According to Article 333, the size of the penalty may be reduced. In the Decree of the Supreme Arbitrazh Court Plenum No. 81 of 22 December

2011 'On some issues of applying Article 333 of the Civil Code of the Russian Federation', in claim 1 of which the lower court penalty is associated only with the request of the defendant. In addition, paragraph 2 of the regulation provides that a reduction of the penalty is possible in the provision whereby the defendant offers evidence of the obvious disproportionality of the penalty with respect to the consequences of the infringement of the obligation (lower potential losses, lower penalties).

In judicial practice, questions are raised concerning the possibility of simultaneous implementation of recovery of damages and interest under Article 395 of the Civil Code. Court practice testifies to the impossibility of application of the two sanctions. It seems that the court has no right in this situation to deny the possibility (the right to defense) of recovery of interest or penalty for the following reasons: in such situations a new commitment and relationship arise in the payment of interest based on independent legal facts, and in each of these specific obligations a measure of responsibility appertains.

Both relations have in their content a subjective right to liquidated damages and the entitlement to interest, which must be implemented. Reducing the size of the penalty or interest and, especially, depriving parties of the possibility to apply one of these should be considered a restriction of legal capacity. No one has the right to deprive a creditor of a protective relationship with respect to his subjective right of defense.

If through penalty obligations the creditor is entitled to liquidated damages and is entitled to interest on the obligation to implement the sanctions of Article 395 of the Civil Code, the court shall apply both measures of coercion and is not entitled to reduce their size. Otherwise, the person loses the ability to protect his infringed rights in full and the purpose of a protective relationship will not be achieved. If the question arises as to the excessive amount of penalties, the way out of the situation is to void the transaction in part.

Penalty can be used as a method of protection. According to § 339 BGB, penalty is the amount of money that the debtor is obligated to pay in case of nonperformance or improper performance of obligations or delay of execution. If the creditor is entitled to damages, which emerged in the wake of the failure to discharge the obligation, then the minimum damages may be paid in the form of liquidated damages (§ 340 BGB).

The changes made to the Russian Federation Civil Code enshrine the rule on the reduction of the penalty only on application by the debtor. In addition, in the Civil Code special rules are proposed concerning contractual penalty, the reduction of which (if it shall be payable by the person carrying out the business activity) is allowed in exceptional cases where it is proved that the amount involved in the recovery of damages under the contract may result in the creditor receiving unjustified benefits. This proposal should be supported. The drafters of the changes to the Civil Code derive this proposal from the principle of freedom of contract, thus most appropriate only in business relations.

Contractual liability can be accepted for the payment of interest under Article 395 of the Civil Code. The offender carries an additional penalty in the amount established by this article. The basis of the application of this measure of responsibility is an offence that includes two conditions: the use of other people's money and guilt.

The basis of the application of this sanction is not the use, but the illegal possession of other people's money. A condition of illegality is necessary for the application of this measure of liability, with the fact of ownership of other people's money being sufficient grounds. For the recovery of interest it is not required of the courts to discover whether a profit has resulted through the use of other people's money.

Thus, one of the conditions for the application of these penalties is the failure to perform or improper performance of monetary obligations. The creditor may demand simultaneous payment from the debtor of interest and penalties, if such possibility is provided by law or contract. In the case where the obligation did not arise through business activities and the contract has not provided otherwise, the debtor shall be liable only if found guilty.

Therefore, the collection of interest per annum is an independent measure of responsibility, which is effected in a special protective relationship for the implementation of Article 395 of the Civil Code. The independence of measures of responsibility to a large extent determines the independence of the relations in which it is implemented.

An analysis of the Civil Code of the Russian Federation shows that the chapters on individual types of obligations do not contain any penalties. A forfeiture occurs only in certain circumstances where it is required due to the nature of the legal relations (as under, for example, transport charters and codes, and laws on the supply of goods for state requirements, relations with consumers, etc.).

Thus, the legislator has reduced the number of legitimate penalties and provided an opportunity for the parties, in the manner of individual legal regulation, to use this method of protection of civil rights, and to use it in any violation of any monetary obligations (both regulatory and protective relationships).

An analysis of judicial practice shows that the enforcement authorities admit the possibility of changing (reducing) the amount of interest. We are talking here about the joint Resolution of Plenums of the Supreme Court of the Russian Federation and the Supreme Arbitration Court of the Russian Federation No. 13/14 of 8 December 1998, 'On practice of application of provisions of the Civil Code of the Russian Federation regarding interest for using another's money resources', in which the courts allow lowering the rate of interest on the grounds provided for in Article 333 of the Civil Code.

In the case of non-fulfillment of monetary obligations for payment of interest, the (sub)protection of a new relationship arises for the payment of interest on the initial amount of interest (this is an ordinary money debt). In this case there is no application of one sanction with another sanction (interest on interest).

Positive changes appear in Article 395 of the Code, including penalties prescribing interest payments on unpaid funds for nonperformance of a monetary obligation. The changes to this article have already been tested in practice, as found in a number of interpretations announced in the decisions of higher courts of the judiciary. Statutory rules referred to above about the impossibility of the simultaneous application of the penalty and the interest, and interest on interest (compound interest) are known to some modern developed legal orders, in particular, German civil law.

However, the recovery of compound interest is not allowed in cases where such a requirement exists within a protective relationship. In the same case, when the annual interest for the breach of an obligation is exacted, and the court decision entered into legal force, the further non-payment of interest charged is a new legal fact – the failure of enforcement of the obligation to pay interest.

In this situation, as noted, there is a new subprotection obligation under which recovery of new interest on the amount unpaid of the charged interest on the first obligation is permitted. Arbitral practice on this issue shows a uniform approach.

5. Restitution, the protection of ownership and property

The changes to the Civil Code[8] allow the application of consequences with regard to invalid transactions (restitution). Thus the court is entitled to apply the consequences of invalidity of a voided transaction on its own initiative in cases where this is necessary in order to protect public interests, and in other cases provided for by law.

In addition, in respect of a voided transaction, claim invalidation is allowed, and without the use of restitution, if the person instituting such a requirement has a protected interest in the recognition of the voided transaction. This rule is currently used in practice.

The amendment to the law is acceptable. Moreover, the requirement for the application of the consequences of the invalidity of a voided transaction may be filed by the party to the transaction, and in cases stipulated by law also other persons. This proposal also deserves support, as the commission of a voided transaction may lead to infringement of interests of third parties.

In the drafting of the Civil Code much attention was paid to ownership and the protection of ownership (these standards are currently not yet taken): for example, according to Article 215, the protection of ownership effected by returning the goods to the possession of the person who lost them. The right to protection of possession applies to any owner, of both legal and illegal goods – regardless of whether the owner is entitled to possession.

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[8] Protection of property rights has also undergone some changes. Article 226 CC lists the methods of property rights protection.

The right to protection of possession of an owner of illegal goods seems a controversial provision. In this case, the right to protection of ownership will be the person who seized the property. In my view, this issue should be considered a bona fide possession, that is, protection should be given to a lawful and bona fide possession. But to protect illegal possession should be denied. This problem is especially acute in terms of the wave of hostile business takeovers that have swept through Russia in recent times.

The request by the owner for the protection of ownership is subject to the satisfaction of the court that it has been established that the property (i.e. the object or thing) at issue was out of his possession as a result of theft, arbitrariness or otherwise against the will of the owner (Art. 216 CC).

With regard to recovery following the new rules, the owner is not entitled to claim the property from the possession of a person having a limited proprietary right, including right of ownership, unless otherwise established by the Civil Code.

A person having a limited proprietary right, including right of possession, is entitled to reclaim the property from unlawful possession on the same grounds and by the same rules as the owner (for example, an agent may reclaim the property, which he is assigned on a limited proprietary right, from an illegal owner).

The right to a negatory suit is also provided to the owner or person having a limited proprietary right. What is novel is the rule that the owner of the property is also entitled to file negatory claims against persons with limited real rights in the property, if the latter, exercising his rights, goes beyond them. And, finally, a person having a limited proprietary right shall be entitled to file a negatory claim against the owner or against the person having a limited right *in rem*, if the owner or such person violates a protected property right.

In order to protect the disputed right, an action *in rem* may be brought by the requirement of recognition of property rights. The defendant in the lawsuit on the recognition of property rights is the person whose rights may be affected by the proprietary right of the plaintiff.

A separate article is planned that contains the protective rules in respect of the application of this method of protection of proprietary rights as the liberation of property from seizure. The claim for the release of property from seizure is filed against the person for whom it was seized, and the debtor or another person on demand, from whom it was seized.

6. Conclusion

New enforcement provisions in the Civil Code of the Russian Federation will contribute to the stability and sustainability of business transactions in the market economy and the observance of contractual discipline. They aim at ensuring the most complete restoration of violated civil rights and restoring the situation that existed before the violation.

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BOOK REVIEW NOTES

THE QUEST FOR CONSTITUTIONALISM IN SOUTH AFRICA[1]

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DOI:10.21684/2412-2343-2016-3-1-138-143

Recommended citation: Marianna Muravyeva, *The Quest for Constitutionalism in South Africa,* 3(1) BRICS Law Journal 138–143 (2016).

South Africa has gone a very long way from apartheid to a rule-of-law state thanks to being a frontier of transformative constitutionalism. Starting with an interim constitution of 1993, it made its way to the 1996 Constitution of the Republic of South Africa, that signified new constitutionalism whose aim was to pursue 'a better life for all'. This road to democracy, social justice, equality was not an easy one for South Africans and it is still much in progress, but they have managed to achieve some democracy in its transition. Whether the path South African society is navigating will lead the country and its people to the full accomplishment of this social project is the aim the reviewed volume seeks to achieve.

Hugh Corder, a Professor of Public Law at the University of Cape Town, Veronica Federico, a Senior Research Fellow at the Department of Public Law of the University of Florence, and Romano Orrù, a Professor of Public Comparative Law at the University of Teramo, have pulled together an impressive volume of chapters providing an in-depth analysis of the development of the legal system and of the implications of the Constitution for the social configuration of power. Five parts of the volume respectively focus on the structure of the state (part I), rights, equality and the courts

[1] Reviewed book: Corder Hugh, Veronica Federico, and Romano Orrù (eds.) *The Quest for Constitutionalism: South Africa Since 1994* (Ashgate Publishing, Ltd. 2014).

(part II), citizenship, political rights and the party system (part III), transformative constitutionalism (part IV) and South Africa in context, including BRICS (part V). The editors use the framework of transformative constitutionalism to tackle the issues of South African constitutionalism which they see as a social project. Using Habermasian interpretation, the editors see such elements as individual rights, private autonomy and citizen's capacity to exercise their equal right of political participation as its essential element. Their understanding of transformative constitutionalism is based on Klare's definition, that reads as 'a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.'[2] Therefore, the focus of the book is to analyze the impact of laws and the salience of their existence and (non)enforcement for South Africa to situate the importance of legal phenomenon in the broader context of the socio-political, economic and cultural democratization process (p. 2). In this light, South African constitutionalism is viewed as innovative; it is offering a model of transition from a heavy legacy of apartheid to a democratic state.

Each chapter in the volume contributes to unveiling deeper historical, political, social, cultural, and economic reasons for the constitutional practices and their real impact on deconstructing and reconstructing social ties in transforming society (p. 7). The majority of authors in the volume are South African scholars with a presence of international experts. Each of them contributes to one specific aspect of South African constitutional development; taken together they represent how the Constitution works. In this review, I am going to collect all pieces of the puzzle called South African transformative constitutionalism to show how the volume works to create a bigger picture of constitutional practices.

South Africa's post-apartheid transition started with its re-unification as a country and as a people. Under apartheid, it was segmented and based on two different principles: the typical division of the country along geographical lines (into provinces and municipalities with different degree of power) and based on ethno-racial principle, creating different communities of individuals with their own forms of government and differentiated rights and duties. Re-unification came with contradictory notion of decentralization that created what in her chapter Veronica Federico called quasi-federal structure of the state (chapter 1) together with the new system of government, described by Romano Orrù as the quasi-parliamentarianism in his chapter (chapter 2). Decentralization was necessary to take into account the interests of the provinces, therefore, it included the possibility for provinces to adopt provincial constitutions, that resulted in much debate around effectiveness of such governance. It matched much heated debate on the local government described by

[2] Karl E. Klare, *Legal culture and transformative constitutionalism*, 14 South African J. on Human Rights 146–188 (1998).

Francois Venter (chapter 4): while local government received a prominent placement in the new Constitutions and, what is more important, in provincial constitutions, the whole constitutional system ended to be a fairly sophisticated hybrid system, creating a complex mixture of opposite centrifugal and centripetal forces. Provincial constitutions were there to ensure that socio-economic and political inequalities were to be bridged so they acted as subsidiary-like autonomy because they thoroughly depended on national and provincial oversight and financing.

Quasi-federalism functioned alongside quasi-parliamentarianism, which was a result of an attempt to create a constitutional mechanism providing for egalitarian equality. As Romano Orrù notes, the new form of government outlined in the Constitution does not fit traditional models. Similar to the federal structure, it ended up to be a hybrid between parliamentary and presidential forms of government that put the principle of the separation of powers in somewhat difficult position. South Africa chose to have a strong president's office (elected indirectly) together with a substantial role of a prime minister, making them both responsible for executive power thus weakening the parliamentary institutions in the situation of a dominant party. Sanele Sibanda in his chapter on the separation of powers (chapter 3) suggests to focus on the institutional understanding of Parliament as a national forum that provides space to advocate for, register and record diverse views from different parliamentary and extra-parliamentary forces as they seek to influence matters before the Parliament instead of traditional inquiry into the relationships between the Parliament and the executive. Using this approach, he argues, the Parliament cease to be 'weak' or 'ineffective' but emerges as an institution for consolidation thus performing its most important function, even in the situation of the ANC's dominance as a prevailing political party.

The volume pays most of its attention to rights and their enforcement as a part of its attitude to constitutionalism as a social justice project. Emerging from the system of formal inequality and discrimination, South African judiciary have been making an enormous effort to rebalance the inequalities of the past and to recognize the intrinsic human dignity of every person. However, the current situation in terms of public mistrust in the judiciary creates a feeling of their failure. As Morne Olivier explains (chapter 5) this is due to the government looking at the judiciary as a co-partner in the pursuit of transformation, which creates interdependence between the institutions, while in order for the judiciary to perform its mandate, it requires independence from the government. Somehow, socio-economic rights due to profound impoverishment of the population and major inequalities became the locus of the rights debate in South Africa. The Grotboom case of 2000 that dealt with the right to access housing for everyone highlighted the secondary nature of socio-economic rights, but prompted the Constitutional Court to recognize that both civil and political rights and social and economic rights are inter-related and

mutually supported.[3] Linda Stewart in her chapter, however, criticizes depoliticizing socio-economic rights, which happens due to judicial deference and the progressive technicization and proceduralization of needs-talk. In her opinion, the way the adjudication goes, the judges manage to avoid talking about issues of poverty as political issues reducing them to simple matters of everyday unfortunate situations of an individual in question. The same happens with HIV-positive people living in the situation of an officially recognized HIV epidemics in Africa as Mark Heywood and Tim Fish Hodgson show in their chapter (8). At the same time, the Constitution and South African law have done a lot to proved access to medical treatment, health-care services via ensuring right to dignity and privacy and lifting a stigma from the HIV-positive people. The right to dignity is also central to the 'moral citizenship' as Justice Edwin Cameron underlines in his chapter (7) stating that it acts as a fundamental value as well. In his opinion, the role of dignity is evidenced most strikingly in the jurisprudence on the equality of gays and lesbians (p. 102). Cameron highlights that the post-1994 jurisprudence sought to affirm each individual's intrinsic worth, regardless of social station or public disapproval that allowed to recognize same-sex partnerships, adoptions and, most recently, marriages. The Constitutional Court pointed out (para 59) that it is inappropriate to entrench a particular family form as the social and legal norm, given the constantly changing nature of familial formation (p. 103). Thus dignity became central to ensure equality.

The relevance of political rights and right to vote for a democratic state is a commonplace, but all South Africans have enjoyed these rights only since 1994. The right to vote occupies a special place in the framework of the Bill of Rights and, as Francesca Romana Dau illustrates in her chapter (10), the constitutional judges have pushed towards a wide enfranchisement rather than disenfranchisement as an instrument of nation-building (p. 151). However, South Africa chose to follow 'one person, one vote' principle thus building the nation on the basis of formal equality rather than on substantive equality. It became evident in the analysis of information rights, which are crucial in the structuring of the public sphere (chapter 11). Iain Currie shows that the debate on the Protection of State Information Bill (2008–2010) underlined the conflict between freedom of information and state security. It also mobilized a wide range of civil society organizations to defend the right of access to information and to prevent the state making a broader regulation of state secrets. It also put a dominant party – the African National Congress – in a position of contradicting their own promises and values. The political outcome resulted in what Roger Southall in his chapter calls the 'contradictions of party dominance' (p. 166), explaining that the ANC became a victim of its own dominance as its electoral hegemony lies in its legacy as a liberation movement, but being a ruling party, not all of its actions have been consistent with what their voters perceive as liberal.

[3] Albie Sachs, *The judicial enforcement of socio-economic rights: The Grootboom case*, 56(1) Current Legal Problems 579–601 (2003).

The ANC has been also at the heart of the transformative constitutionalism, that is, those reform processes that made South Africa so exemplary. In Hugh Corder's review of constitutional reforms in South African history, all the political challenges of quasi-federalism and quasi-parliamentarianism become evident, especially in relation to the rule-of-law. However, it is other reforms that really transformed South African society: indigenous customary law, land reform and green economy reform. Tom Bennett explores the nature of what he calls a 'programmatic reform' (p. 203), that is supposed to bridge the gap between social classes and is marked by culture and ethnicity. It is what happened with customary law in South Africa: state law-making agencies began to acknowledge the differences between official and living laws recognizing that such principles as *ubuntu* (a complex concept denoting compassion, humanity and right-minded behaviour) could be a part of common law and jurisprudence. Thinking about the indigenous population brings a tremendous constitutional concern about land, as Nic Olivier, Nico Olivier and Clara Williams show in their chapter (15). Since 1994 the land was supposed to be redistributed but, as authors assert, it has failed due to a variety of reasons, including the status of property rights and ownership under the Constitution, betterment claims and right to food. The closely related issue of natural resources and environmental rights also highlights the difficulties of implementation good and sustainable policies in the situation of economic transformation as Tumai Murombo shows in chapter 16.

South Africa has made an impressive progress in its international standing. It is the EU's largest trading partner in Africa. South Africa's becoming the 'S' in the BRICS in 2011 makes even clearer the importance of the country in the international arena as Lucia Scaffardi discusses in chapter 19. She points out that the BRICS countries do not simply reform trade and the economics, they change the principles of law. Instead of following the strict EU example that requires new member states strongly to review their constitutional and legal systems, the BRICS group has seen using what may be described as 'soft policy transfer' (p. 248). The BRICS countries use 'legal borrowings' as a result of the decisions taken in the inter-governmental sessions, which bridges the systems and have overall positive impact on the respective legal systems. Scaffardi suggests that the BRICS creates 'global law' by not abandoning their sovereignty or homogenizing their economic systems, instead they create a new concept of a multi-center inter-state order. Following this line of reasoning, Andrea Lolloni shows the impact of South-African jurisprudence on other societies facing the same problems and vice versa, when the South African judges were allowed to use foreign law in interpreting the Bill of Rights and the Constitution. It provided a fruitful dialogue between the South-African system and other legal systems such as Canadian or Israeli. Overall, this import/export jurisprudence became a stimulating framework for further development.

This volume provides a lot of comparative reflections for Russian legal scholars. South African case offers an alternative model solution for constitutional problems,

a variety of theoretical attitudes to the separation of powers and federalism, socio-economic rights and social justice. Russia often faces the same dilemmas as South Africa: the separation of powers does not work as it is supposed according to classic models or Russian parliament is caught in the dominance of the single party and is perceived as ineffective. Furthermore, depoliticization of socio-economic rights leads to exactly the same results as in South Africa: their enforcement does not contribute to the socio-economic transformation in terms of facilitating meaningful public reasoning and dialogue in the form of political discourse and participation but rather provides for formal enforcement leaving a variety of social groups (such as, for example, HIV positive people) unprotected. At the same time, South-African analysis provides a very balanced view of legal reforms, its failures and achievements, that allows to build a progressive dialogue between scholars and experts to their mutual benefit, something that Russian scholarship often lacks.

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CONFERENCE REVIEW NOTES

THE FIRST FORUM OF THE BRICS NETWORK UNIVERSITY

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DOI:10.21684/2412-2343-2016-3-1-144-151

Recommended citation: Iana Smagina, *The First Forum of the BRICS Network University*, 3(1) BRICS Law Journal 144–151 (2016).

The first Forum of the BRICS Network University was held at the initiative of the Russian Ministry of Education at the Ural Federal University in Yekaterinburg, Russia on the 6–9 April, 2016. The Forum included representatives of the Ministries of Education and Science and 44 universities from Russia, India, China, Brazil and South Africa to form an effective collaboration within the framework of the most ambitious BRICS project in the sphere of education and research – BRICS Network University. The project aims to create a unified educational environment, the enhancement of academic mobility and training of highly-qualified professionals in the top priority areas of the member states development.

1. The Forum Background and Goals

The Memorandum of Understanding for Establishment of the BRICS Network University[1], signed on November 18, 2015 in Moscow by the Ministers of Education of Brazil, Russia, India, China and South Africa, laid the foundation for successful collaboration of BRICS countries in the sphere of higher education. The Memorandum

[1] Memorandum of Understanding on Establishment of the BRICS Network University, available at <http://center-brics.urfu.ru/fileadmin/user_upload/BRICS/br-br/MoU_SU_BRICS.pdf>.

states that the BRICS Network University is '*an educational project* aimed at developing, preferentially, bilateral/multilateral short-term joint training, master's and PhD programmes along with joint research projects in various knowledge fields according to common standards and quality criteria, given recognition of the learning outcomes by BRICS Network University (NU) participants as per national criteria.'

The key principles of the BRICS Network University are openness, focus on educational programs, equal rights of all participants, reciprocity, assurance of high quality of the BRICS Network University educational programs, and respect for national regulations. The list of the prior objectives and goals of the BRICS NU include the following: *providing opportunity of high quality life-long learning* through different forms of education, *facilitating sustainable development* of the BRICS countries, and *providing training for highly qualified professionals*.

According to D. Livanov, the minister of Education and Science of the Russian Federation, the Network University would contribute significantly to the creation of the new generation of highly qualified specialists with a capacity to work in the conditions of the emerging economies. Thus, as stated by the Vice Minister of Education and Science of the Russian Federation, A. Klimov, the main activity of the BRICS Network University is the systematic MA and PhD student exchanges within the areas of research priority, such as Energy, Computer Sciences, Information Security, BRICS Studies, Climate Changes, Water Resources, and Economics. On completion of their studies, the students will obtain a BRICS Network University certificate.

Ural State University was appointed the Russian coordinator of the BRICS Network University's activities and the host of the first Forum of the RRICS Network University. In accord with the Ural Federal University Vice-Rector for the International Relations, Prof. M. Khomyakov, it was UrFU BRICS Studies Centre that worked out all the documents for the establishment of the Network University. In addition, UrFU is planning to establish a BRICS Centre of Material Studies and is planning to coordinate the efforts of all Russian universities as far as BRICS collaboration in the field of material science is concerned.

The three main goals of the Forum were: meeting of the participating universities' administrators; the discussion sessions of the International Thematic Groups (ITG) on the anticipated future development of the joint degree and short-term programs; and the first meeting of the International Governing Board of the BRICS Network University.

The broad range of the topics discussed at the included course elaboration, titles, and degrees to be awarded, number of credits required for course completion, and credit recognition. In addition, the delegates discussed the procedural and financial issues and other related topics (e.g. adoption of the corporate style).[2]

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[2] The First Forum of the BRICS Network University to be Held at Ural Federal University, available at <http://urfu.ru/en/news/news/15320/>.

2. Forum Program

The Forum program enabled the participants to become engaged in the bilateral meetings, to present their universities during the opening plenary session, and to partake in the lively and productive debates within six International Thematic Groups (ITGs) and the International Governing Board (IGB) meeting during the first days of the event. The last day of the Forum provided the opportunities for the ITGs and IGB to summarize the results achieved and to present them on the closing plenary session. Furthermore, during the closing ceremony the special protocol was signed and the press conference took place.[3]

3. Forum Summary

The Forum was officially opened by the rector of Ural Federal University, Victor Koksharov, who underlined that academic agenda should catch up with the political one; thus, the collaboration of universities should keep pace with the trends of political and economic collaboration of the BRICS countries. According to Victor Koksharov, higher education and research are crucial for the economic development of the BRICS countries, and thus deeper and wider collaboration in this sphere is vital. At the end of his keynote speech the rector of Ural Federal University welcomed all the participants and wished them success.[4]

The opening speech of Victor Koksharov was followed by the welcoming remarks of the Secretary, Department of Higher Education, Ministry of Human Resource Development (MHRD) of India Vinay Sheel Oberoi; the deputy Minister of Education and Science of the Russian Federation (RF) Alexander Klimov; Head of International Affairs Office of Brazil Ministry of Education Aline Schleicher; Vice President of Beijing Normal University Chen Li; and Deputy Director-General of University Branch, Department of Higher Education and Training of South Africa Diane Parker.[5]

On behalf of their delegations all the reporters extended gratitude to their Russian and foreign colleagues for their engagement in a mutually beneficial multilateral collaboration, readiness to share the advancements in the sphere of higher education driven by the remarkable diversity of Education Systems in the various countries. All the speakers emphasized that the establishment of the Network University would become a significant step towards the internationalization of higher education and

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[3] The First Forum of the BRICS Network University, available at <http://urfu.ru/en/international/brics-network-university-forum/>.

[4] The video of the opening plenary session of the Forum is available at <https://www.youtube.com/watch?v=3Xt1a7-xEKM>.

[5] Top Universities of Brazil, Russia, India, China and South Africa Officially Joined the BRICS Network University, available at <https://www.newswire.com/news/top-universities-of-brazil-russia-india-china-and-south-africa-10180426>.

the intensification of the BRICS countries' successful collaboration and developing partnerships on science, technology and education, encompassing joint research projects and extended academic mobility opportunities for the faculty and the students of the involved universities. The main idea of the project, according to the deputy Minister of Education and Science of the RF, Alexander Klimov, would be to launch a large-scale collaboration in the field of Master and PhD programs, and to establish a consortium that would agree on the content of these programs and ensure the quality of education.

After the opening speeches, the session continued with the presentations of the participating universities from each country – the universities that had been selected in the course of an open competition by the Ministries of Education.[6] During the presentations, the representative of the Indian delegation gave a comprehensive talk on the system of higher education in India and the extensive international collaboration network that the country has – which involves the numerous joint projects with the USA universities, UK – India Education and Research Initiative, Indo-German Strategic Partnership (IGSP), Indo-Israel Joint Research Programme and, in addition, the collaboration with such countries as Australia, Norway and New Zealand.

Twelve Russian universities, selected to partake in the project, were presented by Maxim Khomyakov, the Chairman of the National Coordinating Committee (NCC) for BRICS Network University. He stressed the strengths and priorities of Russian universities' solid research background, which fully comply with the priority areas of BRICS Network University, along with their openness to enroll and host international students and academics.

The Brasilian delegate disclosed the selection process details, in particular, the requirements for compliance with standards of international excellence, namely, the equivalent performance to international level of excellence in the area, and a highly differentiated level of performance in relation to the national ranking in the area. Included among the nine universities in Brazil that were selected are Federal University of Minas Gerais, Federal University of Rio Grande do Sul, National Institute for Amazonian Research, Fluminense Federal University.

The Deputy Director-General of University Branch, Department of Higher Education and Training of South Africa Diane Parker stressed in her presentation that the main criterion for the South African universities to be selected to participate in BRICS Network University project was the research excellence in the particular areas of BRICS studies. While presenting the selected universities, Diane Parker focused in particular on their strengths – such as the international research projects initiated, the output of publication in peer-reviewed journals, the multidisciplinary approaches

[6] The presentations are available for downloading at <http://center-brics.urfu.ru/news/?tx_urfu_news%5Bnews%5D=571&tx_urfu_news%5Bcontroller%5D=News&cHash=bb5cb3ae2c99f609fb6ed069ef0ef221>.

exploited, the international collaboration and rankings positions in the thematic areas – that BRICS countries are particularly interested in.

The final presentation of International Thematic Groups (ITGs) of the BRICS studies by Maxim Khomyakov provided the participants with the details on possible perspectives of the ITGs Forum work. The moderators of each group were announced, and the schedule of the discussion sessions was agreed on. The list of seven key questions was suggested for the upcoming discussions, including the issues of network mobility programs implementation, practical tools to be exploited, names of people in charge, and dates and deadlines and the issue of ITG chairmanship.

The presupposed action plan for further group work, with the anticipated results, was also presented to the audience. The short-term action plan (envisaged until September 2016) encompassed the following objectives: to come up with the proposal for the programs within the BRICS Studies framework (Learning outcomes for the program); to exchange suggestions about the forthcoming summer schools and short term courses; to exchange research profiles of the researchers in three priority fields of BRICS Studies; and to set up a website forum for the virtual networking and discussion of the BRICS Studies ITG.

The work of the Forum continued in the form of meetings, where the delegates discussed the core areas of the BRICS Network University project's development. Members of the International Governing Board (IGB) focused mainly on the organizational and regulatory issues: the logo of a would be Network University; the elements of corporate style was approved; and the IGB regulations were thoroughly discussed and agreed on.

The members of six thematic groups, in turn, discussed their efforts to develop a robust action plan for implementing the joint programs. They discussed the fields for developing network of Master and PhD programs, taught in English, that would be available for students from all 5 countries; expanding academic exchange within BRICS countries; and organizing short-term programs, such as summer schools, and internships.[7]

During the closing plenary of the Forum, the results of the ITGs and IGB discussions were presented.[8] In particular, the 'Energy' ITG enumerated the general topics for cooperation in the field of energy, comprising energy economics, energy markets, energy policy and security; renewable, autonomous energetics: technology, equipment, and systems; nanomaterials and metamaterials for energy; electrical and heat power engineering; nuclear power engineering and nuclear safety; smart grids, distributed generation and global energy interconnections; energy efficiency, power

[7] Top Universities of Brazil, Russia, India, China and South Africa Officially Joined the BRICS Network University, available at <https://www.newswire.com/news/top-universities-of-brazil-russia-india-china-and-south-africa-10180426>.

[8] The video of the closing plenary session of the Forum is available at <https://www.youtube.com/watch?v=vqEVhVvRfNI>.

saving, green technologies; petroleum engineering, clean coal and gas to liquid fuel technologies; and neutron/Synchrotron infrastructure: materials characterization. Furthermore, a new joint graduate (Masters and PhD) program in the field of Energy, initiated by Brasilian university, was introduced. The comprehensive Energy group action plan for the several upcoming years covered, among the other issues, the implementation of the internet platform for information exchange among the partner universities of ITG Energy and the organization of several events, including the international young researcher conference 'Energy saving: theory and practice; the international student's conference 'Radio Electronics, Electrical and Power Engineering'; and a Movable Summer School, to name just a few.

'Computer Science and Technology' ITG identified, first, all the possible areas for joint collaboration within the BRICS Network University and, second, they sorted out five programs valuable for international students and faculty academic mobility, in compliance with the following research areas: Big Data, Machine Learning and Knowledge Fusion**;** High Performance Computing, Scientific Computing and Complex System Simulation; Software Engineering; and IT Security and Encryption and Cyber physical systems. The report also highlighted the so called 'quick wins' areas of the group, including Student exchange based on the existing Master/PhD Programs within the expertise areas and the areas for the short term exchange programs. The report also presented an action, encompassing the development of 3–4 double diploma programs, the establishment of the Double degree program committee together with the BRICS Quality assurance system, and, in addition, the implementation of various teachers and students mobility programs.

The ITG 'Water Resources and Pollution Treatment' enumerated the possible future activities of the group, including student exchange on Bachelor's, Master's and Doctoral levels; faculty exchanges; short term Specialized Courses; training programs for professionals; workshops and conferences; joint research projects; summer/winter schools; and new Education and Research programs. The action plan and the agreed scheduling of the upcoming events were also presented within the report. The group also informed the audience about some challenges they may encounter while implementing their action plan, such as human resources, financial and other infrastructural support, and bench marking and awarding of degrees in the new program.

The ITG 'Economics' shared their vision on the development of joint Master/PhD programs on Economics for NU BRICS, based on joint research areas. The group also discussed current capacities of participating universities from BRICS countries, comprising MA/PhD programs on Economics and Management, research/specialization areas, conferences and summer schools. In regard to the preliminary list of research areas in the sphere of Economics, the group named three major areas within the focus on BRICS countries' economies, namely, the general area economics, the micro-sector issues area, and the management aspects of economics, each area

consisting of a number of subtopics. The roadmap for the further development and the deadlines had also been demonstrated.

The report submitted by the ITG 'Ecology' focused on creating a joint program of the BRICS NU in the field of 'Ecology and climate change' as a new educational product. ITG on Ecology and climate change proposed the issues to be realized in a short time (2016–2017), comprising new courses; summer/winter schools for BRICS (different thematic, 10–14 days, 20–50 people); inclusive education and 'road education' (student mobility in several BRICS universities in short time); E-learning (courses available online); E-journal 'Ecology and climate change'; teachers mobility and training of teachers; series of workshops, conferences, practical trainings; student exchanges; practical field trainings; ECO&CC Newsletters; and 'Ecology and climate change' on the BRICS NU web platform**.** The report's framework also presented an action plan for the universities in charge, including the setting of deadlines.

In their closing remarks the heads of the delegations summarized the great work of the two Forum days and the results achieved, with some heads highlighting the idea that, among the numerous plans and strategies, the most robust and attainable should be chosen, thus allowing the BRICS Network University members to focus particularly on such plans and strategies. The participants expressed hope for the established BRICS NU project to become an actual and legitimate tool for the productive and effective cooperation of BRICS countries in the sphere of higher education. According to all the reporters, the Forum was a great first step towards the realization of the ambitious action plans, which had been collaboratively developed by ITGs and IGB. The participants also expressed their gratitude to the organizers and the delegates of other countries for their great enthusiasm for the future joint work.

The Forum concluded with a solemn signing ceremony during which 45 universities expressed their willingness to participate in the BRICS NU project.

4. Conclusion

The first Forum of the RRICS Network University, held upon the initiative of the Russian Ministry of Education at the Ural Federal University in Yekaterinburg, Russia on the 6–9 April, 2016, became a milestone in the development of the BRICS countries' productive collaboration in the sphere of education, science and research.

During the two-day discussions of the international thematic groups, action plans were developed for future creating the suggested joint programs within the following thematic priorities of the BRICS Network University: energy, computer science and information security, BRICS studies, ecology and climate change, water resources and pollution treatment, and economics. In accordance with the action plans developed within the Forum framework, during the next academic year the participating universities will start their first summer and winter schools and explore the opportunities for expanding academic exchange on student and faculty levels.

In a year the universities are planning to launch the first network Master and PhD programs taught in English.

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BRICS Law Journal

Volume III (2016) Issue 1

Редактор *Марина Зельдина*
Оформление и компьютерная верстка: *Виола Самойлова*

Подписано в печать 23.06.2016. Формат 70x100 $^{1}/_{16}$. Объем 9,5 п.л.
Цена свободная.
Заказ №

Наш адрес: ООО «Издательский дом В. Ема»,
119454, г. Москва, ул. Лобачевского, 92, корп. 2.
Тел.: (495) 649-18-06